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Dino Ioannides, *Executive Director*

Letter Ruling 22-02 (Conflict of Interest)

Summary: Under the facts and circumstances of this request, it would not be a violation of §§ 24-18-108.5 or 24-18-109, C.R.S., for a member of the Gilpin County Planning Commission, or her husband, to make public comments regarding a matter pending before the Gilpin Board of County Commissioners (“BOCC”). It would also not be a violation for Planning Commission or BOCC members who live in close proximity to short-term rentals to participate in consideration of short-term rental regulations.

I. Jurisdiction

Requestor is Gilpin County, by and through its legal counsel. Pursuant to § 24-18.5-101(4)(b)(III), C.R.S., any person who is not subject to the jurisdiction of the Independent Ethics Commission (“IEC”) may submit a request to the IEC for a letter ruling concerning whether potential conduct of the person making the request satisfies the requirements of Article XXIX. The IEC considers such requests pursuant to the provisions set forth in IEC Rule 5.

The IEC has subject matter jurisdiction over “other standards of conduct” in state law, including statutory standards of conduct, pursuant to § 5 of Article XXIX. *Gessler v. Smith*, 419 P.3d 964, 969 (Colo. 2018).

The IEC has jurisdiction over “local government official[s],” which is defined as elected or appointed officials of local government. Colo. Const. art. XXIX, § 2(3).

II. Background

The Planning Commission member (“Member”) at issue owns a short-term rental property. The Planning Commission recently voted on a recommendation to the BOCC regarding short-term rental regulations. The Member appropriately recused herself from that vote and discussion. The Member now wishes to publicly comment on the BOCC’s upcoming consideration of regulations governing short-term rentals. There is no overlap in membership between the Planning Commission and the BOCC.

Requestor also seeks a letter ruling addressing the application of the statutory conflict of interest

standards to the Member's spouse and to Planning Commission and BOCC members who live near short-term rentals.

III. Applicable Law

Section 24-18-109(3)(a), C.R.S., provides that a member of the governing body of a local government who has a personal or private interest in any matter proposed or pending before the governing body shall disclose such interest to the governing body, shall not vote thereon, and shall refrain from attempting to influence the decisions of the other members of the governing body in voting on the matter.

Section 24-18-108.5, C.R.S., provides that “[a] member of board, commission, council, or committee who receives no compensation other than a per diem allowance or necessary and reasonable expenses shall not perform an official act which may have a direct economic benefit on a business or other undertaking in which such member has a direct or substantial financial interest.”

IV. Discussion

We first address whether the Member may participate in the BOCC's consideration of short-term rental regulations as a member of the public, and decide that she may. Taking each statute in turn, § 24-18-109(3)(a), C.R.S., is specifically directed at members' actions related to the governing body *to which they belong*, not their actions related to other governing bodies. The Member appropriately recused herself from the discussion and vote regarding short-term rentals before the Planning Commission, and did not attempt to persuade her fellow Planning Commission members to vote in a certain manner. *See* Advisory Opinion 16-05. Because the BOCC is a separately constituted body, to which the Member does not belong, § 24-18-109(3)(a) does not apply. The Member may attend BOCC meetings and speak freely as a member of the public at those meetings, and likely has a First Amendment right to do so.¹ *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (a government employer may only restrict a government employee's speech to the extent the employee's speech affects the government entity's operations).

We note that the Member should not purport to speak on behalf of the Planning Commission at the BOCC meeting; should not purport to speak in her capacity as member of the Planning Commission; and should affirmatively identify her personal interest in the matter. The public has an interest in knowing when public officials and employees are representing the public, and when they are representing their own interests. Colo. Const. art. XXIX § 1(1)(a), (b), (d).

¹ In contrast, the U.S. Supreme Court has found that a state law requiring a legislator to recuse where he or she is conflicted did *not* violate the legislator's First Amendment rights, because “a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal... [T]he legislator has no personal right to it.” *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125-26 (2011). The same principle is true for members of local governing bodies.

Similarly, § 24-18-108.5, C.R.S., applies only to an “official act,” which is defined as “any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.” If the Member is speaking to the BOCC as a member of the public, she is not exercising the use of discretionary authority as a member of the Planning Commission.

We next address the application of the statutory standards of conduct to Planning Commission and BOCC members who own properties or live near short-term rentals. Under § 24-18-109(3)(a), C.R.S., the question becomes whether those members’ interests in short-term rental regulations are “personal and private.” The IEC has interpreted that language as asking whether a public official’s interest is different in kind from that of the general public such that it would merit recusal. *See* Complaints 20-21, 20-22. Living near or even next to short-term rentals is an experience common to that of the general public. As we noted in Complaints 20-21 and 20-22, it is expected and encouraged that local government officials are invested in the communities they serve, and living in the communities they serve is part of that investment. A Planning Commission or BOCC member does not violate § 24-18-109(3)(a) when voting on, or participating in, discussions regarding short-term rental regulations, unless the member has an interest different in kind from that of the general public such that recusal is merited.

Similarly, under § 24-18-108.5, C.R.S., general physical proximity to a short-term rental would be unlikely to confer a “direct economic benefit” on a business in which the local government official has a “direct or substantial financial interest.” Unless a Planning Commission or BOCC member has a direct or substantial financial interest in a business that directly benefits from short-term rentals, they do not have a disqualifying conflict of interest.

The Member’s spouse is not a covered individual subject to the IEC’s jurisdiction, nor does he fall within the statutory prohibitions contained in §§ 24-18-108.5 and -109, C.R.S. Accordingly, the Member’s spouse may make public comments at both Planning Commission and BOCC meetings.

V. Conclusion

Under the facts and circumstances of this request, it would not be a violation of the statutory standards of conduct for the Member to make public comments regarding short-term rental regulations at the BOCC meeting. Nor would it be a violation for Planning Commission or BOCC members who live near short-term rentals to vote on, or participate in discussions regarding, short-term rental regulations. It would not be a violation for the Member’s spouse to make public comments to either body.

The Commission cautions that this opinion is based on the specific facts presented herein, and that different facts could produce a different result. The Commission encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinions and letter rulings related to their individual circumstances.

The Independent Ethics Commission

Selina Baschiera, *Chair*

Cole Wist, *Vice-Chair*

Elizabeth Espinosa Krupa, *Commissioner* (not participating)

Annie Kao, *Commissioner*

Sarah Mercer, *Commissioner*

Dated: May 26, 2022