



Legal Department
Civic Center
P.O. Box 5021
Great Falls, MT 59403
Tel: 406-455-8578
Fax: 406-727-0005

Sara R. Sexe,
City Attorney
Joseph Cik,
Assistant City Attorney
Neil A. Anthon,
Chief Prosecutor
Cassidy R. Blomgren,
Deputy Prosecutor
Mark Dunn,
Staff Attorney

To: Gregory T. Doyon, City Manager
From: Sara R. Sexe, City Attorney
Date: May 3, 2019
Re: *Board, Council, Commission Conflicts*

QUESTION PRESENTED

You requested a legal opinion as to whether, during their periods of appointment, board, council, committee, or commission members (board members), would be precluded from applying for, or receiving benefits or other privileges from the board upon which that member sits.

OPINION

The City Code does not absolutely prohibit board members from applying for City benefits. However, board members must publicly disclose potential or actual conflicts between their public duty and private interests, and those of related parties, and abstain from all discussion and vote on an award of financial benefits or funds, including any discussion or vote on any other applications for the same subject funds or benefits.

Under Montana and Federal law, there are opportunities for disclosure and voting in certain circumstances, but the Official Code of the City of Great Falls (OCCGF) does not mirror those provisions. I advise that the OCCGF be updated to similarly allow such for clarification.

BASES FOR OPINION

Montana Law

The Montana Constitution mandates that codes of ethics be implemented to prevent conflicts between a public officer's duty and that officer's private interests. Mont. Const., Art. XIII § 4.

Mont. Code Ann. § 2-2-101 states:

The purpose of this part is to set forth a code of ethics prohibiting conflict between public duty and private interest as required by the constitution of Montana. This code recognizes distinctions between legislators, other officers and employees of state government, and officers and employees of local government and prescribes some standards of conduct common to all categories and some standards of conduct adapted to each category. The provisions of this part recognize that some actions are conflicts per se between public duty and private interest while other actions may or may not pose such conflicts depending upon the surrounding circumstances.

Mont. Code Ann. §2-2-121, provides in part:

(2) A public officer or a public employee may not:

...

(b) engage in a substantial financial transaction for the officer's or employee's private business purposes with a person whom the officer or employee inspects or supervises in the course of official duties;

...

(e) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which the officer or employee either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent;

However, it also provides:

(10) Subsections (2)(b) and (2)(e) do not prevent a member of the governing body of a local government from performing an official act when the member's participation is necessary to obtain a quorum or to otherwise enable the body to act. The member shall disclose the interest creating the appearance of impropriety prior to performing the official act.

Id.

Additionally, the Montana Supreme Court has held, using a reasonable person's standard, that a public officer using his or her official position for personal gain is a violation of the Montana Code of Ethics. *Molnar v. Fox*, 2013 MT 132, ¶30, 370 Mont. 238, 248, 301 P.3d 824, 832.

Mont. Code Ann. §2-2-105 allows for public officials to fulfill their public duties and act on items where an appearance of a conflict exists because of their private interests, but that appearance does not rise to an actual conflict. This statute states in part:

(1) The requirements in this section are intended as rules of conduct, and violations constitute a breach of the public trust and public duty of office or employment in state or local government.

...

(4) When a public employee who is a member of a quasi-judicial board or commission or of a board, commission, or committee with rulemaking authority is required to take official action on a matter as to which the public employee has a conflict created by a personal or private interest that would **directly give rise to an appearance of impropriety** as to the public employee's influence, benefit, or detriment in regard to the matter, the public employee shall disclose the interest creating the conflict prior to participating in the official action.

Id. (emphasis supplied.)

When there is an actual financial conflict, rather than simply an appearance of one, this statute does not allow the public official to act:

(2) Except as provided in subsection (4), a public officer or public employee may not acquire an interest in any business or undertaking that the officer or employee has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by the officer's or employee's agency.

...

(5) A public officer or public employee may not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when the officer or employee has a substantial personal interest in a competing firm or undertaking.

Mont. Code Ann. §2-2-105, *see also* §2-2-121.

Notwithstanding these prohibitions, public officials are permitted to participate in decisions when conflicted if they make disclosures to the Montana Commissioner of Political Practices prior to acting on a conflicted matter:

A public officer or public employee shall, prior to acting in a manner that may impinge on public duty, including the award of a permit, contract, or license, disclose the nature of the private interest that creates the conflict. The public officer or public employee shall make the disclosure in writing to the commissioner of political practices, listing the amount of private interest, if any, the purpose and duration of the person's services rendered, if any, and the compensation received for the services or other information that is necessary to describe the interest. **If the public officer or public employee then performs the official act involved, the officer or employee shall state for the record the fact and summary nature of the interest disclosed at the time of performing the act.**

Mont. Code Ann. §2-2-131 (emphasis added.)

Federal Law

Analysis must be made as well when there are Federal funds being awarded or recommended for award by City boards, councils, committees, etc. For example, pursuant to Federal conflict of interest regulations with respect to a CDBG-assisted activity, no person who exercises any function or responsibility, or who is in a position to participate in a decision-making process or gain inside information with regard to such activities, may obtain a financial interest or benefit from a CDBG assisted activity. 24 C.F.R. 570.611(b). The conflict of interest prohibition is broad in nature and extends to any employee, agent, consultant, officer, or elected or appointed official of the recipient, or of any designated public agencies or of sub recipients that receive CDBG funds. Board member's business or immediate family ties are similarly prohibited from obtaining a financial interest or benefit.

Exceptions to these conflict of interest prohibitions in these situations may be granted by the Department of Housing and Urban Development (HUD). The process for requesting an exception can be found at 24 C.F.R. 570.611(d). In order to request an exception, the recipient must first meet certain requirements. The conflict must be publicly disclosed, and the recipient must obtain a legal opinion explaining that the conflict would not violate state or local law. Assuming these threshold requirements are met, HUD will consider the factors listed at 24 C.F.R. 570.611(d)(2) and may issue an exception if it concludes that the exception will serve to further the purposes of the Housing and Community Development Act and the effective and efficient administration of the recipient's program or project.

Also, application of 2 CFR 200.318(c)(1) (general procurement) maintains that, no employee, officer, elected official or agent of the City of Great Falls may participate in the selection, award, or administration of a contract supported by a Federal award, if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, elected official, agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. Such real or apparent conflicts of interest include employment at the organization, service on the Board of Directors, or other similar roles. Notwithstanding this prohibition, providing volunteer service and/or financial contributions to an organization would not be considered conflicts of interest.

City Code

The OCCGF does not allow for a “disclosure and vote” on actions where conflict is present as allowed in Mont. Code Ann. §2-2-105(4), or an opportunity to request an exception such as under 24 C.F.R. 570.611(d). The prohibitions of the OCCGF are broader than those in the Montana Code, as the requirement of “substantial personal interest” or “substantially affected” are not present in all subsections of the OCCGF. Like Federal law, the prohibitions also have broader application to “others” rather than only related business organizations.

OCCGF §2.21.050 provides:

Officers and employees of the City of Great Falls shall comply with the following provisions:

- A. No officer or employee of the City of Great Falls shall have an interest in a business organization or engage in any business, transaction, or professional activity which is in substantial conflict with the proper discharge of his or her governmental duties;
- B. **No officer or employee shall use, or attempt to use, his or her official position to secure unwarranted privileges or advantages for himself, herself or others;**
- C. No officer or employee shall act in his or her official capacity in any matter where he or she, a member of his or her immediate family, or any business organization **in which he or she has an interest, has a direct or indirect financial or personal involvement** that might reasonably be expected to:
 - 1. impair his or her objectivity or independence or judgment, or
 - 2. substantially conflict with the proper discharge of officer or employee's governmental duties;
- D. No officer or employee shall undertake any private employment or service which might prejudice his or her independent judgment in the exercise of his or her official duties;
- ...
- F. No officer or employee shall use, or allow to be used, his or her public office or employment or any information, not generally available to the members of the public, which he or she receives or acquires in the course of employment, **for the purpose of securing financial gain for himself or herself, any member of his or her immediate family, or any business organization with which he or she is associated;**

...

(Emphasis supplied.)

However, there is an exclusion for non-monetary conflicts:

- H. No officer shall be in conflict with these provisions if, by reason of his or her participation in the enactment of any ordinance, resolution or other matter required to be voted upon, no particular material or monetary

gain accrues to him or her, or his or her immediate family. . . .

Pursuant to the reasoning in *Molnar v. Fox, supra*, a reasonable person could perceive that a public board member would use his or her public position for personal gain by discussing or voting on applications for funds or benefits for which the member or the member's organization is also an applicant. A simple disclosure of the potential conflict may not sufficiently divest the board member of the conflict or appearance of conflict. The member must disclose the issue publicly, and refrain from any discussion or vote on the entire issue. The member should also recognize the potential for the perception that the member could be using his or her board membership to receive a personal or business benefit. This is because the board member's participation in discussing and voting on other applications for the subject funds may have the effect that the member is diverting funds or benefits from other worthy organizations for the member's benefit.

A very conservative reading of the OCCGF could result in a recommendation that, to avoid conflict, during their term of office, public officials, whether appointed or elected, should not apply for any funds, benefits or privileges for him or herself, family members, associated business organizations, or others from the body to which that official is appointed or elected. However, such a reading could result in worthy candidates or current members to refrain from boards. It also is not required for non-monetary conflicts under OCCGF §2.21.050.

In light of the current OCCGF language, I recommend that the language be amended to more consistently resemble state law, and require for disclosure to the Commissioner of Political Practices, as required under Mont. Code Ann. §2-2-131, or to the Ethics Committee, for ordinance related disclosures.

After the City board service or appointment is completed, board members must meet the provisions of Mont. Code Ann. §2-2-105 (similar to Federal law):

(3) A public officer or public employee may not, within 12 months following the voluntary termination of office or employment, obtain employment in which the officer or employee will take direct advantage, unavailable to others, of matters with which the officer or employee was directly involved during a term of office or during employment. These matters are rules, other than rules of general application, that the officer or employee actively helped to formulate and applications, claims, or contested cases in the consideration of which the officer or employee was an active participant.

Please let me know if you require further analysis on this issue.