



Denver Board Of Ethics
Webb Municipal Building
201 West Colfax, 2nd Floor - (2.H-13)
Department 703 (for U.S. Mail)
Denver, CO 80202-5330
p: 720.865.8412
f: 720.865.8419
Email: michael.henry@denvergov.org
www.denvergov.org/ethics

October 23, 2015

Rafael Espinoza
Denver City Council
1437 Bannock Street
Denver, CO 80202

RE: Case no. 15-33 – Request for Advisory Opinion

Dear Councilman Espinoza:

This is in response to your request for an advisory opinion from the Denver Board of Ethics. Following a review of your request, dated October 12, 2015, and certain related information, as well as our discussion with you at the Board’s meeting on October 21, 2015, what follows is the Board’s response to your request for an advisory opinion.

Factual Background

The facts as the Board understands them are as follows:

You are the Denver City Council representative from District 1 in northwest Denver. You are an architect by profession. You campaigned for City Council stressing themes of protecting neighborhood scale, architecture and affordable housing. You were elected to the Denver City Council as the District a representative on May 5, 2015, and you assumed office on July 20, 2015.

The structure at 2329 Eliot Street is a single-family home located in City Council District 1, which was constructed in approximately 1886. The structure has recently been optioned to a developer, Adams Development, LLC, along with a few adjacent properties. The developer wishes to demolish the home and redevelop the aggregated properties into an 18-unit for-sale residential complex.

On April 16, 2015, the developer applied to the City to obtain a certificate of non-historic status for the structure, which triggered a review by the Denver Landmark Preservation Commission (LPC) staff. This, in turn, caused notification to be provided to certain historic preservation groups and neighborhood organizations, which is the practice required under the LPC ordinance if it appears to LPC staff that a structure might have the potential for landmark designation. The notices provided that if, on or before May 21, 2015, anyone submitted a notice of intent to file an application for landmark designation for the structure, and at least 3 persons then filed an actual application and paid an \$875 filing fee, no later than

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Executive Director
L. Michael Henry

Board Members
Brian J. Spano – Chair
Sylvia Smith – Vice Chair
Roy V. Wood
Andrew S. Armatas
Jane Feldman

May 28, 2015, the LPC would conduct a hearing to determine whether the structure merited landmark designation.

The ordinance establishing the procedure for landmark designation requires at least 3 applicants for a landmark application to which the owner does not consent. The owner of the property at 2329 Eliot opposes the landmark designation of the structure. If a structure receives landmark designation, the structure must be preserved, and it cannot be demolished or altered without review and approval by the LPC.

Historic Denver, Inc., researched the history and architecture of the structure and prepared an application for landmark designation of 2329 Eliot Street to be filed with the LPC. The home is a 2-story 2800 square-foot Queen Anne-style structure. Newspaper articles and other sources recount sensational interactions, physical altercations and court actions involving William Anderson, an attorney who resided at 2329 Eliot Street in 1900 and for many years thereafter, and Alferd Packer who was earlier convicted of cannibalism, the Denver Post, its gossip columnist, Polly Pry, and the founder-publishers of the Post, Fred Bonfils and Harry Tammen.

Nick Garcia was one of the neighborhood residents who signed the landmark application for 2329 Eliot, which was duly filed a few days before the May 28, 2015 deadline. Mr. Garcia then apparently decided to withdraw his name from the application, and on the afternoon of May 28th, the last day for submission of the application, Mr. Garcia notified LPC staff of his withdrawal as an applicant and requested a refund of the \$875 fee that he had paid in connection with the application.

In response to Mr. Garcia's withdrawal as an applicant, you reported that neighborhood residents contacted you, as their Councilman-elect, on the afternoon of May 28th and requested your assistance in reinstating the filing of the application. On the same day, you agreed to become an applicant, and then you signed the application and paid the \$875 filing fee to the LPC. The application was filed or resubmitted to the LPC on May 28, 2015 at approximately 7:00 p.m.

On October 6, 2015, the LPC conducted a hearing and voted in favor of finding that the structure at 2329 Eliot Street has historical and architectural merit. The LPC has recommended to City Council that the structure be designated as a landmark. You attended the LPC hearing, but did not speak. However, your legislative aide read a letter from you at the hearing seeking to correct the facts of certain media accounts and also supporting the landmark designation.

The City Council Neighborhoods and Planning Committee (of which you are Vice-Chair) is scheduled to meet on October 28, 2015 and will consider the application and determine whether to send the application to the full City Council, which would render the final decision on any landmark designation of the structure. If the application is sent to the full City Council, it will be the subject of a public hearing and a vote by Council. This is expect to occur a few weeks after October 28, 2015 (tentatively on November 16, 2015).

You have confirmed that you live 4 blocks away from the property at 2329 Eliot Street and that you have lived in the neighborhood for 16 years. You indicated that you were familiar with the property before the recent application. You do not have any ownership or other financial interest in the property.

You confirmed that you do not stand to receive any consideration or financial benefit in the event that the structure receives landmark designation. You have reported that your support for the landmark designation of the structure is based on your independent and professional assessment and determination that the structure warrants such designation.

Guiding Principles and Provisions of the Code of Ethics

Your request for an advisory opinion implicates certain provisions of the Denver Code of Ethics:

A. The Board is guided by the legislative intent of the Denver Code of Ethics that includes safeguarding the interests of the public and ensuring that the “public will have confidence that persons in positions of public responsibility are acting for the benefit of the public.” Further, it is the goal of the Code, in part, to help ensure that City officials and employees avoid situations that “create impropriety or the appearance of impropriety.” *See* Section 2-51.

B. Conflicts of interest are regulated by Section 2-61 of the Denver Code of Ethics:

Sec. 2-61. Conflict of interest while employed.

The purpose of this section is to avoid influence on the official actions of city officers, employees or officials by their private or family interests,

(a) Except when advised by the city attorney that the rule of necessity applies, **an officer, official, or employee shall not take direct official action on a matter before the city if he or she or a member of the immediate family, a business associate or an employer other than the city of the officer, official or employee has any substantial employment, contractual, or financial interest in that matter.** A substantial interest shall be deemed to exist if:

- (1) **He or she or a member of the immediate family, a business associate or an employer other than the city is the other party in the matter;**
- (2) He, she, a spouse, a domestic partner or minor children solely or aggregated together, a business associate or an employer owns or own one (1) percent or more, or a member of the immediate family other than a spouse, domestic partner or minor children own or owns five (5) percent or more, of another party in the matter;
- (3) He or she, a member of the immediate family, a business associate or an employer is an officer in another party in the matter;
- (4) He or she, a member of the immediate family, a business associate or an employer is directly involved in obtaining the city's business for another party in the matter;

- (5) He or she, a member of the immediate family, a business associate or an employer is directly involved in negotiating the contract or preparing the bid, proposal, response to a request for qualifications, or similar document for another party in the matter, other than in a purely clerical capacity; or
- (6) A member of his or her immediate family performs more than a nominal portion of the work in the matter, or supervises or manages more than a nominal portion of the work.
- (7) He or she or a member of his or her immediate family participated personally in providing legal representation or lobbying for another party in the matter or owns five (5) percent or more of a law firm or lobbying firm representing another party in the matter. ...

(f) Officers, employees or officials who are prohibited from taking direct official action due to a substantial conflict of interest shall disclose such interest to his or her colleagues on a board or commission or to his or her supervisor or appointing authority, shall not act or vote thereon, shall refrain from attempting to influence the decisions of others in acting or voting on the matter and shall work with his or her supervisor or appointing authority to ensure that the matter is assigned to someone without conflicting interests.

(g) No officer, employee or official may have any other employment or position which is incompatible with his or her duties or that adversely affect the interests of the city. (emphasis added)

C. Section 2-67 of the Code of Ethics prohibits the use of public office for private gain:

Sec. 2-67. Use of public office for private gain.

No officer, official or employee shall use his or her public office or position or disclose or use confidential information in order to obtain private gain for himself or herself, for his or her immediate family, for any business entity with which he or she is affiliated or for any person or entity with whom the officer, official or employee is negotiating or has any arrangement concerning prospective employment.

Discussion

The Board has considered the facts and circumstances surrounding your request for an advisory opinion and based on its understanding of the facts surrounding your request, the Board advises you as follows:

1. Section 2-61 of the Code of Ethics prohibits you from exercising any “direct official action” in connection with any matter in which you hold a “substantial employment, contractual or financial interest” *See* Section 2-61(a). An impermissible conflict of interest would exist if you held a

“substantial employment, contractual, or financial interest” in the proposed landmark designation of the structure at 2329 Eliot Street. Based on the information provided, it does not appear that you or any member of your immediate family holds any “substantial employment, contractual, or financial interest” in the outcome of the landmark application for the structure. Accordingly, it does not appear that there exists a prohibited conflict of interest within the meaning of the Denver Code of Ethics.

2. The legislative intent embodied in Section 2-51 of the Code of Ethics provides that officials and employees of Denver should “comply with both the letter and the spirit” of the Code, and “strive to avoid situations, which create impropriety or the appearance of impropriety.” In the event that you were to vote at Council for the landmark designation, you would appear to be exercising “direct official action.” *See* Section 2-52(b)(A person who abstains from a vote is not exercising direct official action).

3. In an effort to honor the spirit of the Code and avoid any appearance of impropriety, the Board recommends that you provide a full and complete disclosure of your role in the landmark application and designation efforts to your fellow Council members and the public. You are encouraged to do so at the upcoming meeting of the Neighborhoods and Planning Committee and at any subsequent meeting of City Council at which there is consideration of the proposed landmark designation. The Board believes that complete transparency in this regard is vital to upholding the public trust and the spirit of the Code.

4. In addition, the Board encourages you to give careful consideration to recusing yourself from any Council vote on the landmark designation of the structure at 2329 Eliot Street. While not mandated by the Denver Code of Ethics, you must carefully weigh the interests of the constituents and public you represent, as well as your vested interest in maintaining personal and professional integrity under the present circumstances. The Board recognizes that members of the legislative branch routinely campaign for, draft and sponsor legislation, and often commit to represent the interests of their constituents with respect to particular matters. On the other hand, the role of Council at a meeting with respect to a landmark designation appears to function much like a quasi-judicial proceeding, at which one would reasonably expect fair and impartial arbiters. Although you have no apparent personal or financial interest in the subject property and may be reflecting the desires of your constituents, the unique circumstances of this matter and your personal involvement in the landmark application suggest that the ultimate interests of your constituents and the public-at-large may best be served by your abstention from any ultimate vote on landmark designation. In the final analysis, this is a matter of personal conscience and ethos upon which you must ultimately rest your decision.

Please understand that this advisory opinion from the Board of Ethics is based on the specific facts presented in connection with your request, and to the extent that different facts and circumstances exist or arise, the Board's conclusions and opinion are subject to change. Accordingly, to the extent that the facts underlying your request for an advisory opinion differ from those set forth here, the Board encourages you to return to the Board for additional advice and guidance.

Rafael Espinoza
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The Board thanks you for submitting this request for an advisory opinion and for attending the Board meeting on October 21, 2015.

For the Board of Ethics:

A handwritten signature in blue ink, appearing to read "B. Spano", written over a faint circular stamp.

Brian J. Spano
Chair