



## **Council Policy 14 – Advisory Opinion – 2020-01 (Conflict of Interest)**

### **Summary:**

Under the facts and circumstances presented, it would not be a violation of Council Policy 14 or applicable Charter provisions for Councilmember Grimes to participate in the debate of and vote on Land Development Code amendments of general application relating to oil and gas development based on the circumstances of her employment. A conflict of interest or an appearance of impropriety may arise based additional facts or in the context of official duties directly affecting her employer, such as a land use case, annexation, City advocacy, or regulatory actions regarding a facility or property owned or operated by her employer.

### **Jurisdiction:**

This non-binding advisory opinion is issued pursuant to Council Policy 14(A)(3).<sup>1</sup> The City Council may rely on, but is not controlled by this advisory opinion, and retains authority to hear and determine violations of Council Policy 14.<sup>2</sup> In addition, violations of provisions of the City Charter may be subject to the jurisdiction of the municipal court.<sup>3</sup>

### **Background<sup>4</sup>:**

Councilmember Meghan Grimes requested an advisory opinion regarding the application of Council Policy 14's conflict of interest provisions to her role as a councilmember in debating and voting on pending amendments to the City's Land Development Code regarding oil and gas development. Councilmember Grimes, now and at the time of her election in 2019, is employed in the oil and gas industry.

The City Council, since 2019, has been considering potential amendments to the Land Development Code regarding Oil and Gas Permits and Subsurface Extraction use requirements. The City Council has conducted several study sessions and is anticipated to proceed to a vote

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<sup>1</sup> "A Commerce City official, upon full disclosure of facts to the City Manager, may request an advisory opinion of the City Manager, with the advice of the City Attorney, regarding the application of this policy to the official."

<sup>2</sup> "Upon its own motion, the City Council may hear and determine violations of this policy, and any violation shall be deemed misconduct in office and subject the City official to such penalties as are determined by the City Council, including reprimand or removal from office." CP-14(A)(2). No ordinance currently provides for removal of an elected official, as required to provide such a penalty pursuant to the City charter. Charter 19.11(d) ("The power to suspend or remove an elected official or any other officer or employee of the city shall be as provided in this Charter or by ordinance.").

<sup>3</sup> Charter 19.11(a) ("Any violation of a provision of this Charter shall be deemed a misdemeanor, and may be tried in the municipal court of Commerce City or in any other court having jurisdiction under the Statutes of Colorado.").

<sup>4</sup> This background is provided based on general knowledge and information provided by Councilmember Grimes.

before the end of 2020. The City's regulations would apply generally within the City's current boundaries, unless a property or applicant is affected by vested rights. Property not yet annexed to the City would not be subject to the City's regulations or permitting requirements until that property is annexed, if the regulations are still in effect at the time of annexation. It is not clear whether Councilmember Grimes' vote would impact the outcome of any vote.

City Councilmembers in the City are not full-time employees; they receive a monthly payment stipend and frequently hold other employment. At the time of her election in 2019 and subsequently, Councilmember Grimes voluntarily disclosed the nature of her employment in the oil and gas industry.

Councilmember Grimes is currently employed as an independent contractor to POCO Operating, LLC ("POCO"), an affiliate of Providence Energy Ltd. ("Providence"). POCO and Providence are privately-held companies in which neither Councilmember Grimes nor any member of her family has an ownership interest. Previously, Councilmember Grimes was an employee of Petroshare Corp. ("Petroshare"), and held stock in that company. Petroshare no longer exists following a now-concluded bankruptcy proceeding; Councilmember Grimes' stock has no value.

Councilmember Grimes provided a redacted copy of her current employment contract with POCO and Providence (omitting amount-specific salary and bonus information that is not relevant). Her employment contract reflects that she is contracted for work in the role of "Permitting & Regulatory Affairs Manager" through November 30, 2020, with a potential to continue on a month-to-month basis; Councilmember Grimes may be employed permanently in the future. Councilmember Grimes' is paid a monthly flat rate and received a signing bonus after 90 days of work, along with a reimbursement for her portion off health care premiums and 10 days of paid time off. Councilmember Grimes is eligible for bonuses or other compensation if duties or responsibilities are added or pending a review, but reported that no such compensation has been identified at this time. Councilmember Grimes reported that her monthly rate and bonus are consistent with industry standards and that her monthly rate reflects a reduction from her prior salary. Councilmember Grimes' compensation is not based on the development of mineral interests or approval of permits. Councilmember Grimes confirmed that neither her current or future employment nor the amount of her compensation is dependent on the outcome of the City's regulatory actions.

Neither Councilmember Grimes nor any member of her family owns any mineral interests or interests in property that would benefit from the development of mineral interests in the City's boundaries or future growth area. Either Providence or POCO may hold mineral interests throughout the Denver-Julesburg Basin, which may include interests within the City's boundaries. As noted above, the development of those interests do not directly affect her compensation. Councilmember Grimes is not aware of any pending application by Providence or POCO to the state for any potential well sites within the City or the City's future growth boundaries.

Councilmember Grimes' former employer, Petroshare, was known to be associated with two oil and gas sites in unincorporated Adams County, but within the City's future growth boundary.

1. "AB#1" is an inactive vertical well on property generally located west of Tower Road between 96th Ave. and 104th Ave. that had been operated under a permit held by Petroshare (API #05-001-06455).<sup>5</sup> The surface property is an enclave of the City (i.e., unincorporated land surrounding by incorporated land) and is not subject to City regulations. The City has no pending or anticipated petition or plan to annex this property. To Councilmember Grimes' knowledge, the well is currently in the state Orphaned Well Program and is not operated or controlled by Providence or POCO.
2. "Ackard North" was a potential well site generally located east of E-470 north of 120th Ave. near future Himalaya St. Petroshare had submitted and withdrawn permit applications to the state to develop this site. This property is unincorporated and not subject to City regulations. The City has no pending or anticipated petition or plan to annex this property. Neither Providence nor POCO has any pending application on that site.

#### **Applicable Policies<sup>6</sup>:**

The City's Charter addresses conflicts of interest both generally and with respect to City contracts (which are not at issue here but reflect a standard regarding corporate interests). The relevant provisions are as follows:

##### **Sec. 4.19. - Conflict of interest.**

- (a) No member of the council shall be interested directly or indirectly in any contract, including purchases or sales, with the city . . . .
- (b) For purposes of this section, *ownership by a member of the council or his immediate family of securities or of any beneficial interest in securities of any corporations, shall not be deemed to create a prohibited interest under this section, unless the aggregate amount of such securities or interest in such securities, so owned by such councilman and the members of his immediate family, shall amount to ten (10) percent or more of any class of the securities of such corporation then outstanding.*

##### **Sec. 4.27. - Organization and rules of the council.**

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<sup>5</sup> <https://cogcc.state.co.us/cogis/FacilityDetail.asp?facid=00106455&TYPE=WELL>

<sup>6</sup> Commerce City, through its Charter, ordinances, and policies approved by Council resolution, has addressed the matters covered by Article XXIX of the Colorado Constitution.

- (c) *No member of the council shall vote on any question in which he has a financial interest, other than the common public interest, or on any question concerning his own conduct.*

The City Charter does not define “financial interest.”<sup>7</sup> Although Section 4.19(b) does not apply to Section 4.27, the limitation of prohibited direct or indirect interests through corporate entities to a 10% ownership indicates that a direct or substantial interest in such circumstances would be required for the prohibition to apply. As shown below, this definition was incorporated more broadly in Council Policy 14(C) related to conflicts of interest.

The City Council has chosen to establish ethics standards for Councilmembers through Council Policy 14, which was adopted and amended by resolution. The relevant provisions here are as follows:

**A. PUBLIC TRUST – BREACH OF FIDUCIARY DUTY.**

1. Commerce City officials, including elected and appointed officials, hold their positions as a public trust and Commerce City residents have a right to expect that *all City officials and staff will place loyalty to the Colorado Constitution, City Charter, laws and ethical principles above private interests; that Commerce City officials and staff shall not use public office for private gain; that officials and staff shall act impartially and not give preferential treatment to any private organization or individual; that government decisions and policy be made in the proper channels of the governmental structure; and that the public have confidence in the integrity of its government.*

**C. CONFLICT OF INTEREST.**

1. No member of the Council shall be interested, directly or indirectly, in any contract, including purchases or sales, with the City except that such contract may be made by the City if the members of the Council in office at the time the vote is taken, having no such interest, shall unanimously determine that the best interests of the City shall be served by the making of such contract, and if either such contract is made after comparative prices are obtained, or if the members of the Council having no interest shall unanimously determine that the obtaining of comparative prices is not feasible in such particular case.

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<sup>7</sup> A “financial interest,” as defined in the State Ethics Code, “means a substantial interest held by an individual which is: (a) An ownership interest in a business; (b) A creditor interest in an insolvent business; (c) An employment or a prospective employment for which negotiations have begun; (d) An ownership interest in real or personal property; (e) A loan or any other debtor interest; or (f) A directorship or officership in a business.” C.R.S. 24-18-102(4).

2. For purposes of this Section, ownership by a member of the Council or his/her immediate family of securities or of any beneficial interest in securities of any corporations, shall not be deemed to create a prohibited interest under this Section, unless the aggregate amount of such securities or interest in such securities, so owned by such Councilmember and the members of his/her immediate family, shall amount to ten percent (10%) or more of any class of the securities of such corporation then outstanding.
3. *No member of the City Council, Board, Council or Commission shall perform a governmental function, participate in the discussion of, or influence or attempt to influence or give the perception of attempting to influence any other member of City Council, Board, Council, Commission or employee, or otherwise participate in any final action, or vote to render any final decision or determination on any matter in relation to which the officer has a prohibited interest.*
4. *No member of the City Council, any City Board, Council or Commission shall acquire or hold an interest in any business or undertaking which the official has reason to believe may be directly and substantially affected to the official's economic benefit by official action of the City except as provided in this Section 4 and Section 5.*
- 4[sic]. No member of the City Council shall personally solicit funds for any governmental, civic or charitable purpose from any person or entity engaged in property development or anticipated property development in the City or engage in business activities or anticipated business activities with the City unless authorized by official action of the City Council after full disclosure of the intended solicitation. *Excepted from this provision are the following: (1) campaign contributions, (2) solicitations by other members of a Board, Council, Commission or other entity or by a Board, Council, Commission or other entity as a group where the City Council is a member.*

#### **D. DISCLOSURE OF CONFLICT.**

1. *An elected or appointed official of Commerce City 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 and 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.*<sup>8</sup>

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<sup>8</sup> This provision is similar to that applicable to boards of statutory municipalities under State law, C.R.S. 31-4-404(2), and members of the General Assembly. Colo. Const. Art. 5, § 43; C.R.S. § 324-18-107(2). State law provides guidance to members of the General Assembly for determining whether a conflict exists, including

2. *All Council members and all appointed officials shall be excused from voting on any question in which such member has a financial interest, other than the common public interest, his own conduct is involved, or any other good cause is shown for his being excused from voting. The City Council, Board, Council or Commission, as applicable, by majority vote of those present, shall determine when a member shall be excused from voting. Should any member being present refuse to vote on any measure and not be excused from doing so, his vote shall be recorded in the affirmative.*

CP-14(C) and (D) refer to interests in several different ways, without specific definition other than as to ownership of a corporate interest. CP-14(C)(4) requires a direct or substantial effect on an interest to the official's economic benefit as a result of the City's action to be prohibited. CP-14(D)(1) prohibits voting where a "personal or private interest" exists while CP-14(D)(2) refers to a "financial interest," restating Charter Section 4.27. Neither the Charter nor Council Policy 14 specifically provide that employment in an industry or a benefit to an employer creates a prohibited interest, although this could be found if an action directly and substantially affected the employer in an economic way.<sup>9</sup>

As a result, where a potential conflict or interest personal or private interest relates to a financial, pecuniary, or economic benefit accruing to the official or the official's immediate family, that benefit must be the result of an official action directly and substantially affecting the basis of the interest for Council Policy 14(C-D) to be implicated.

### **Discussion:**

On the facts presented, Councilmember Grimes participation in the debate and vote regarding the City's pending oil and gas regulations does not violate the City Charter or Council Policy

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whether independent judgment is impeded, whether public confidence in the integrity of the General Assembly would be affected, whether participation would have significant effect on the disposition of the matter. No prohibited interest arises where legislation affects membership of an entire class. C.R.S. § 324-18-107(3).

<sup>9</sup> These provisions largely mirror similar state law provisions in the State Code of Ethics, although the State provisions directly address acts that have a direct and substantial effect to the economic benefit of a local official's employer. The State Ethics Code also does not define "personal or private interest." C.R.S. § 24-18-109(2) provides, in part, that a "local government official or local government employee shall not: \* \* \* (b) Perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a *substantial financial interest* or *is engaged as counsel, consultant, representative, or agent*["] \* \* \* (3) (a) 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 and 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." A "financial interest," as defined in the State Ethics Code, includes "employment or prospective employment for which negotiations have begun." C.R.S. 24-18-102(4)(d). The State Code of Ethics also confirms that is neither a breach of fiduciary duty or the public trust for a local government official to accept or receive benefits as an indirect consequence of transacting local government business. C.R.S. § 24-18-109(4)(B).

14. Further, these acts should not be perceived as acts that would undermine confidence in the City Council.

The proposed regulations are extensive and address procedural and substantive matters as well as other land use matters on properties adjacent to oil and gas developments. The impact of the regulations could result in increased costs to oil and gas development and possibly other property owners and mineral interest owners within the City. The regulations could further restrict oil and gas development in the City.

Regardless of this potential impact of the regulations, the facts of Councilmember Grimes' employment and the interests of her employer show that these interests would not likely be directly and substantially affected by her participation.

- There is no indication that a financial benefit would accrue to Councilmember Grimes or her employer as a result of the City's regulations, or that Councilmember Grimes' continued or future employment or compensation is contingent in any way on the outcome of the City Council's actions.
- Neither Councilmember Grimes nor any member of her immediate family owns any property interests or any ownership interest in an entity that would be affected.
- The two locations identified with Councilmember Grimes' former employer, Petroshare, are not within the City's boundaries and would not be subject to the City's regulations. There is no expectation that either property will be annexed into the City in the foreseeable future.

Any potential effect on Councilmember Grimes or her employer is speculative, overly attenuated, and not reasonably foreseeable, and, therefore, is not direct or substantial. A prohibited conflict of interest requires more to disqualify a duly-elected Councilmember from participating in a legislative action.

Therefore, it is my opinion that Councilmember Grimes has no prohibited conflict of interest, financial interest, or personal or private interest in the outcome of Council's regulatory actions as described. In the absence of a direct and substantial connection, employment in an industry and the potential incidental effect of local regulations on that industry does not give rise to a prohibited interest. A conflict of interest could arise in the future if property interests or permits of Councilmember Grimes or her employer become subject to City regulations, but that conflict is not currently presented.

Further, the connection between Councilmember Grimes' employment, as described here, and the City's land use regulations of general application is simply too attenuated and speculative, without more, to presume that Councilmember Grimes will not abide by her fiduciary duty to City and the public interest or that she will use her office for private gain. In fact, relying on a speculative and unsubstantiated connection to prohibit Councilmember Grimes' from voting in these matters would unfairly inhibit Councilmember Grimes rights and responsibilities to vote and could undermine the public trust that their elected representatives will be entitled to vote.

It is generally presumed that public officials properly discharge their duties and act in good faith and in the public interest. The facts presented here identify no sufficient, concrete basis on which to challenge that presumption. The City's ethics standards should not be used to undermine confidence in the City Council's action and should not be extended to prohibit democratic representation on the basis of speculation or unsupported assumptions.

**Conclusion:**

It would not be a violation of Council Policy 14 or applicable Charter provisions for Councilmember Grimes to participate in the debate of and vote on Land Development Code amendments of general application relating to oil and gas development under the facts and circumstances presented in the request. This advisory opinion is based on the specific facts presented herein, and that different facts could produce a different result.

All Councilmembers are encouraged to use caution in evaluating potential conflicts of interests, including if an action of the City Council directly and substantially affects them or their employers or persons with whom they do business to their economic benefit.