



# City Council Memorandum

*City of Arts & Innovation*

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**TO: HONORABLE MAYOR AND CITY COUNCIL**      **DATE: DECEMBER 12, 2023**

**FROM: CITY CLERK'S OFFICE**      **WARDS: ALL**  
**CITY ATTORNEY'S OFFICE**

**SUBJECT: APPEAL OF THE DECISION OF BOARD OF ETHICS AT THE NOVEMBER 2, 2023, PRE-CONFERENCE FOR THE CODE OF ETHICS AND CONDUCT COMPLAINT FILED BY BEN CLYMER, JR., AGAINST COUNCILMEMBER CERVANTES**

## **ISSUE:**

To consider the appeal, filed by Ben Clymer, Jr., of the Board of Ethics decision and determine whether the Board of Ethics committed a clear procedural error at the November 2, 2023, pre-conference of the complaint filed on October 10, 2023, by Ben Clymer, Jr., against Councilmember Cervantes.

## **RECOMMENDATIONS:**

That the City Council:

1. Consider the appeal, filed by Ben Clymer, Jr., of the Board of Ethics decision at the November 2, 2023, pre-conference of the complaint filed by Ben Clymer, Jr., against Councilmember Cervantes and determine whether the Board of Ethics committed a clear procedural error based upon the pre-conference record; and
2. If there is no finding of a clear procedural error, then the City Council shall adopt the decision of the Board of Ethics as the findings of the City Council on appeal. If there is a finding of a clear procedural error, then the City Council shall state the finding of clear procedural error and shall refer the matter back to the Board of Ethics to conduct a pre-conference in light of the findings on appeal.

## **DECISION:**

On November 2, 2023, the Board of Ethics held a pre-conference to review the Code of Ethics and Conduct complaint filed on October 10, 2023, by Ben Clymer, Jr., against Councilmember Cervantes alleging violations of Riverside Municipal Code (RMC) Sections 2.78.060 (F) Violation of Government Code §87100 et seq., prohibited and 2.78.060 (M) Violations of federal, State and local law prohibited.

Following discussion, it was moved by Chair Newman and seconded by Vice Chair Vega to defer action on the alleged violation of RMC Section 2.78.060 (F) *Violation of Government Code §87100 et seq., prohibited* pending the completion of the Fair Political Practices Commission (FPPC) action. The motion carried unanimously.

The pre-conference proceeded and following further discussion, it was moved by Member Foley and seconded by Member Foreman to determine that the evidence provided by the complainant failed to show it is more likely than not that there may be a potential violation of the RMC Section 2.78.060 (M) Violations of federal, state or local law prohibited. The motion carried unanimously.

The Board of Ethics (BOE) directed the City Clerk to prepare the Statement of Findings for adoption at the regular meeting of the BOE on December 7, 2023. At the time of publication of this report, the BOE had not adopted the Statement of Findings. If the BOE makes any revisions, the final adopted Statement of Findings will be distributed to the City Council prior to the hearing on the appeal.

## **DISCUSSION:**

On November 7, 2023, complainant Ben Clymer, Jr., filed the notice of appeal of the Board of Ethics pre-conference decision and findings. See Attachment 2.

### Appeal Procedures under the RMC

RMC 2.78.090(A) provides the following:

A decision by the hearing panel of the Board of Ethics may be appealed to the City Council by either party. A decision of the Board of Ethics at a pre-conference may only be appealed if the appeal is based upon a clear procedural error. The appeal shall be taken by filing a written notice of appeal with the City Clerk within ten City business days following the date of the decision. The notice of appeal shall be in writing on a form provided by the City Clerk. The appealing party must specify on the appeal form the clear procedural error or abuse of discretion that was committed by the hearing panel. The City Clerk shall place the appeal on the agenda for a regular meeting of the City Council within 30 City business days of the filing of the notice of appeal. The City Clerk shall notify the parties in writing of the hearing date.

RMC 2.78.090(C) provides the following:

The record on appeal shall consist of a transcript of the hearing before the hearing panel, as well as all tangible evidence and testimony considered at the hearing. No new evidence will be received or considered by the City Council at the hearing on the appeal.

RMC 2.78.090(D) provides the following:

The City Council shall review the record of the hearing to determine whether the hearing panel committed a procedural error or an abuse of discretion based upon the record. The City Council may also question the complaining party, the public official or the chair or designee of the hearing panel. If no finding of clear procedural error or abuse of discretion is made by a majority of the City Council, then the City Council shall adopt the decision of the hearing panel as the findings of the City Council on appeal. If there is a finding by the City

Council of clear procedural error or abuse of discretion by the hearing panel, then that finding shall be clearly stated and the matter shall be referred to the Board of Ethics for a *de novo* (new) re-hearing of the matter in light of the findings on appeal. The *de novo* hearing shall be conducted before the same hearing panel, but no pre-conference shall be held, and the *de novo* hearing panel shall consider the clear procedural error or abuse of discretion identified by the City Council when issuing its findings. Any decision rendered by the *de novo* hearing panel may be appealed to the City Council. If the City Council finds that the *de novo* hearing panel committed clear procedural error or abuse of discretion, the City Council has the discretion to adopt the decision of the *de novo* hearing panel or issue their own decision. The City Council's decision will then be final and no longer subject to further hearing.

The Riverside Municipal Code does not define what “clear procedural error or an abuse of discretion”. Here are some examples that have been used in the past by City Council to guide discussion:

1. The term “clear error” means although there may be evidence to support the finding, the reviewing entity after reviewing the entire evidence is left with a definite and firm conviction that a mistake was committed. (*Escobar v. Flores* (2010) 183 Cal.App.4<sup>th</sup> 737, 748.) The “clear error” standard is deferential to the fact finder, which is the of the Board of Ethics. (*Ibid.*)

2. “Abuse of discretion” means the decision maker “has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” (Code Civ. Proc. § 1094.5(b).)

**FISCAL IMPACT:**

Pursuant to RMC 2.78.090 (C), the record on appeal requires a transcript of the hearing before the Board of Ethics. The cost of transcripts for appeals is included in the City Clerk’s Office budget.

Prepared by: Donesia Gause, City Clerk  
Susan Wilson, Assistant City Attorney

Approved as to form: Phaedra A. Norton, City Attorney

Attachments:

1. Statement of Findings and Decision
2. Original Complaint filed October 10, 2023
3. Appeal filed by Complainant
4. Transcript of Pre-conference Record
5. RMC Chapter 2.78 and 2.80 – Code of Ethics
6. Hearing Rules and Procedure