



October 7, 2021

MEMORANDUM

TO: City of Riverside - Board of Ethics
FROM: Lena D. Wade, Special Counsel
RE: Board of Ethics Meeting – October 7, 2021 – Agenda Item No.5: Report by outside counsel Lena Wade of Slovak Baron Empey Murphy & Pinkney LLP regarding City Council against Councilmember Conder complaint

Slovak Baron Empey Murphy & Pinkney LLP (SBEMP) and I, Lena Wade, have recently been engaged to represent the Board of Ethics regarding a Complaint filed by the City Council of the City of Riverside against Councilmember Chuck Conder. The Complaint was filed with the City of Riverside - Board of Ethics on June 22, 2021. Below are responses to the questions posed to Special Counsel by the Board of Ethics as reflected in the draft minutes of the Board of Ethics' September 2, 2021 meeting. The questions are addressed in the order in which they appear in the minutes.

Question (1) (a): Should the City Council have approved during an open session and on a published agenda the complaint against Councilmember Conder before it was accepted by the City Clerk?

Response: Included on the agenda for the City Council meeting scheduled on May 18, 2021, was agenda item 28 which stated:

Consideration of totality of facts and any information presented or submitted by Councilmember Conder regarding possible disclosure of closed session discussions (City Council) (All Wards) (15-minute presentation)

Attachments: Report

A - Ex Parte Application

B - CC Agenda 1-12-21

C - Complaint Pt. 1 (filed by Dunn Enterprises, Inc.)

C - Complaint Exhibits Pt. 2

D - Order Denying Exparte

E - CC Agenda 3-2-21

Declaration of Chuck Conder

The minutes of the City Council meeting held on May 18, 2021, regarding agenda item 28, state:

DISCUSSION CALENDAR

CONSIDERATION OF TOTALITY OF FACTS AND ANY INFORMATION PRESENTED OR SUBMITTED BY COUNCILMEMBER CONDER REGARDING POSSIBLE DISCLOSURE OF CLOSED SESSION DISCUSSIONS

Following discussion, it was moved by Councilmember Fierro and seconded by Councilmember Melendrez to forward the complaint against Councilmember Conder regarding possible disclosure of closed session discussions to the Board of Ethics to determine violations of Riverside Municipal Code (1) Section 2.78.060(B) Use or divulgence of confidential or privileged information prohibited and (2) Section 2.78.060(M) Violations of federal, State, or local law prohibited, specifically a Brown Act violation. The motion carried unanimously.

It is our opinion that whether or not the Complaint was properly approved by the City Council or whether or not there were Brown Act violations regarding the actions of the City Council are issues beyond the scope of the Board of Ethics' jurisdiction. The Board of Ethics duties are set forth in chapter 2.80 as follows:

1. **Annually review, hold public meetings, and make recommendations to the City Council regarding the overall effectiveness of RMC Chapter 2.78, including any adopted or proposed City policies, in accordance with the procedures established therein;**
2. **Receive and review complaints of violations of RMC Chapter 2.78;**
3. **Convene a hearing panel of the Board of Ethics to conduct hearings on complaints of violations of RMC Chapter 2.78 pursuant to the provisions of this chapter;**
4. **Conduct hearings on complaints of violations of RMC Chapter 2.78 in accordance with the procedures set forth therein;**
5. **Issue subpoenas compelling the attendance of witnesses or the production of books, papers or documents on any complaint before the Board of Ethics where a super majority (four affirmative votes) of the hearing panel determines it necessary for a meaningful hearing or decision on complaints of violations of RMC Chapter 2.78;**
6. **Issue a decision with findings to the City Council for all complaints determined by the hearing panel of the Board to be a violation of RMC Chapter 2.78;**
7. **Establish meeting rules and procedures and hearing rules and procedures not in conflict with the Charter of the City of Riverside,**

Riverside Municipal Code, adopted rules and procedures of the City Council, or any local, state or federal law. (Riverside Municipal Code section 2.80.B.)

Although it is our opinion that the actions of City Council regarding the lodging of the Complaint are not before the Board of Ethics or the Hearing Panel, the following is information regarding the filing of the subject Complaint gathered for your information:

Background Information.

- That City Council meeting at which it is reported that the full Council voted in the affirmative **“to forward the complaint against Councilmember Conder regarding possible disclosure of closed session discussions to the Board of Ethics”** was held on **May 18, 2021**. The Complaint forwarded to the Board of Ethics was stamped “received” by the City of Riverside’s City Clerk’s Office on **July 22, 2021**.
- I had a telephone discussion with City Clerk Donesia Gause on September 21, 2021, regarding how she received the Complaint. The City Clerk stated that following the action taken by the City Council at the May 18, 2021 meeting, the City Clerk’s office prepared the Complaint form using information from the City Council meeting, attached the Complaint form to the May 18, 2021 meeting minutes, along with attachments that had been included with the staff report for agenda item 28. The packet was forwarded to Mayor Pro Tem Plascencia for signature. In my opinion, there is nothing in the Riverside Municipal Code or the Board of Ethics Rules and Procedures that prohibit this process.
- All of the Councilmembers in office on May 18, 2021, were identified in the Complaint as Complainants.
- The “concept” of the Complaint was approved by City Council on May 18, 2021 and received by the City Clerk on June 22, 2021.

The “concept” of the Complaint and the contents thereof were approved by City Council on May 18, 2021 and received by the City Clerk on June 22, 2021.

Question (1) (b): Should the City Council have approved during an open session and on a published agenda the...filling out [of] the complaint by the City Council before it was submitted?

Response: In our opinion, the process for filling out the Complaint was a matter for discussion between the City Council, or a representative thereof, and the City Attorney. Again, the “concept” of the Complaint was approved by City Council on May 18, 2021 as reflected in the minutes and received by the City Clerk of June 22, 2021.

As stated above, the City Clerk’s office prepared the Complaint form using information from the meeting, attached the Complaint form to the May 18, 2021 meeting minutes, along with attachments that had been included with the staff report for agenda item 28. The packet was

forwarded to Mayor Pro Tem Plascencia for signature. In our opinion, there is nothing in the Riverside Municipal Code or the Board of Ethics Rules and Procedures that prohibit this process. There is no requirement set forth in the Riverside Municipal Code or the Board of Ethics Rules and Procedures requiring a subsequent approval by City Council.

Question (1) (c): Should the City Council have approved during an open session and on a published agenda the...subsequent actions including the drawing of names for the hearing panels?

Response: Pursuant to Riverside Municipal Code section 2.80.040.B.3.c., the drawing of names is conducted by the City Clerk. The Riverside Municipal Code states:

No later than 30 calendar days prior to the date set for the hearing, a hearing panel shall be selected by the City Clerk by randomly drawing names of Board members until all names have been drawn. The first five names drawn shall constitute the hearing panel, with the sixth name drawn as an alternate...

I spoke with the City Clerk on September 21, 2021, regarding the drawing of names for the Hearing Panel. According to the City Clerk's records, on July 23, 2021, she provided written notice to the Councilmembers (who were all of the named Complainants) and Attorney Rod Pacheco, counsel to Councilmember Conder, that she would be drawing names for the Hearing Panel on July 30, 2021 at 9:00 a.m., in the City Hall lobby. No Councilmember or any of their representatives attended the drawing of names. Only the City Clerk and two (2) employees of the City Clerk's office were present for the drawing of names. The names drawn for the hearing panel were as follows:

Chair Tiffani Graham (Ward 6)
Champagne Ford (Ward 1)
Jessica Newman (Ward 7)
Gil Vega (Ward 5)
Freya Foley (Ward 2)
Alternate: Keith Nelson (Ward 3)

It is our opinion that the drawing of names by the City Clerk was appropriate. There is no requirement set forth in the Riverside Municipal Code or the Board of Ethics Rules and Procedures that the City Council authorize the City Clerk to draw names for the selection of the members of the Board of Ethics who would serve as members of the Hearing Panel. The City Clerk's authority comes from Riverside Municipal Code section 2.80.040.B.3.c.

Question (2): Should the pre-hearing have been published as a joint meeting?

Response: The pre-hearing conference for the subject Complaint was not required to be published as a joint meeting of the Board of Ethics and the Hearing Panel. According to Riverside Municipal Code section 2.78.040.D.,

All bodies whose members are covered by this chapter shall adopt rules of procedure which include the provisions of this chapter.

The Board of Ethics adopted the Board of Ethics Hearing Rules and Procedures on May 3, 2018. Rule 7.B of the Rules and Procedures states:

The pre-hearing conference shall be noticed as a special meeting of the Hearing Panel to occur on the same date and at the same time as a regular meeting of the Board of Ethics. The meeting will be convened by the Chair of the Hearing Panel immediately upon the conclusion of the regular meeting of the Board of Ethics

Reviewing the agenda for the Hearing Panel's September 2, 2021 meeting, by virtue of the fact that the Hearing Panel is not a standing committee of the Board of Ethics with regular meetings, this meeting qualifies as a "special meeting" of the Hearing Panel. The pre-hearing conference appears on the agenda for the Hearing Panel's September 2, 2021 meeting. At the September 2, 2021 meeting, the pre-hearing conference was continued by the Hearing Panel. The draft minutes state:

Following discussion, it was moved by Member Huerta and seconded by Member Newman to continue the pre-hearing proceedings on the Code of Ethics and Conduct complaint ... to a future date pending appointment of outside legal counsel. The motion carried unanimously.

We noted that the Board of Ethics meeting was set to begin at 5:00 p.m. and the Hearing Panel meeting was set to begin after at 6:00 p.m. In our opinion, this was not prejudicial to Councilmember Conder.

Question (3): Further clarification of Riverside Municipal Code Section 2.80.040 (B)(3)(h) as to whether or not the complaint language refers only to the subject of the complaint or does it refer to any councilmember or members that might be a part of the complaint process to be disqualified from participating on the hearing panel?

Response: Riverside Municipal Code section 2.80.040.B.3.h. states:

In order to carry out its duties, the Board of Ethics is authorized to:

3. Convene a hearing panel of the Board of Ethics to conduct hearings on complaints of violations of RMC Chapter 2.78 as follows:

h. If a complaint concerns a City Councilmember, any member of the Board residing in that Councilmember's Ward shall be disqualified from participating on the hearing panel...

Municipal ordinances have the same rules of construction as statutes. *Carson Harbor Village, Ltd. V. City of Caron Mobilehome Park Rental Review Bd.* (1999) 70 Cal.App.4th 281, 290. The starting point in construing a statute is the language of the statute itself. The Supreme Court often recites the "plain meaning rule," that, if the language of the statute is plain and unambiguous, it must be applied according to its terms. *Sebelius v. Cloer* (2013) 569 U.S. 369, 376.

According to the plain meaning of Riverside Municipal Code section 2.80.040.B.3.h., if a Complaint before the Board of Ethics concerns a City Councilmember **in any capacity** (there is no qualification included in the ordinance), the Board of Ethics member from the interested Councilmember's Ward is disqualified from participating as a member of the Hearing Panel.

In this case,

- All City Councilmembers representing all 7 Wards of the City are identified on the Complaint as "Complainants." Undoubtedly, Complainants are significant parties to the action. The Complaint, therefore, concerns all City Councilmembers.
- Councilmember Conder not only is identified in the Complaint as a Complainant but also the Councilmember who "committed the alleged violation." Councilmember Conder represents Ward 4.
- All Members of the Board of Ethics who have been selected as members of the Hearing Panel (listed above) each represent one of the 7 Wards in the City.
- Since all City Councilmembers, representing all 7 Wards of the City, are identified in the Complaint as "Complainants, all members of the Board of Ethics are **"disqualified from participating on the hearing panel."**

According to Riverside Municipal Code section 2.80.040.A.3., only members of the Hearing Panel may hear Complaints before the Board of Ethics. In addition, only members of the Board of Ethics may serve on the Hearing Panel (section 2.80.040.B.3). By virtue of the conflict that exists as a result of Riverside Municipal Code section 2.80.040.B.3.h, there is no one qualified to hear the Complaint against Councilmember Conder (1) as the Complaint has been presented, and (2) as the Riverside Municipal Code and Board of Ethics Hearing Rules and Procedures currently provide. Perhaps if only one (1) Councilmember or a member of the public had filed the Complaint, the result would be different. But that is not what occurred in this case. In this case, all Councilmembers are Complainants, resulting in the disqualification of all members of the Board

of Ethics from participating on the Hearing Panel. Furthermore, there is no provision in chapters 2.78 or 2.80 of the Riverside Municipal Code or the Board of Ethics Hearing Rules and Procedures that allow for an amendment to the Complaint or for these issues to be addressed through an alternate procedure.

A timely Complaint before the Board of Ethics in this case is required to be filed within 180 days from discovery of the alleged violation. The alleged violation occurred on January 29, 2021 according to the City Clerk's records. Accordingly, the deadline for timely filing a Complaint was July 28, 2021. A new Complaint at this time for the same violation(s) would now be time barred by this rule.

Due process is enshrined in the Fifth Amendment to the Constitution which provides that no person shall "be deprived of life, liberty, or property, without due process of law." (The Fourteenth Amendment provides the same protection as to actions by the states). As is clear, members of the Ethics Board and Hearing Panel are public officials subject to the Code of Ethics and Conduct. Riverside Municipal Code chapter 2.78. Section 2.78.050 of the Riverside Municipal Code states:

The people of the City of Riverside share a set of core values that constitute the guiding principles for the establishment of this chapter. These core values are expressed in the following aspirations:

B. To strive to make decisions that are unbiased, fair, and honest. The public officials of the City of Riverside shall aspire to ensure that their decisions are unbiased, fair, and honest. They shall strive to avoid participation in all decisions which create a real or perceived conflict of interest and to disclose any personal interest that could be perceived to be in conflict with the fair and impartial exercise of their responsibilities.

C. To strive to ensure that everyone is treated with respect and in a just and fair manner. The public officials of the City of Riverside have a responsibility to make extraordinary attempts to treat all people in a manner which would be considered just and fair. They shall strive to value and encourage input from members of the community and encourage open and free discussion of public issues. They shall strive to have all persons treated with respect as they come before the body on which they serve. They shall aspire to create an atmosphere of genuine interest in the point of view expressed by members of the community even if it differs from their own.

This section of the Riverside Municipal Code is consistent with the principals of due process. A continuing theme in Chapters 2.78 and 2.80 is due process.

Based on the foregoing, it is the opinion of Special Counsel that: Since all City Councilmembers, representing all 7 Wards of the City, are identified in the Complaint as "Complainants," all members of the Board of Ethics are "disqualified from participating on the hearing panel." Due to conflicts that exist under Riverside Municipal Code section 2.80.040.B.3.h., the Complaint currently before the Hearing Panel should be dismissed because there is no one qualified to serve on the Hearing Panel.