

M E M O R A N D U M

To: City Council

From: James L. Banks, Jr., City Attorney
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Re: Legal Analysis of Draft Code of Ethics and Conduct/Ethics Pledge

Date: May 24, 2016

The following is an analysis of the Code of Ethics and Conduct presented to City Council by the Ad Hoc Code of Conduct Review Committee (“Review Committee”) on April 12, 2016. During the legislative meeting of April 12, 2016, City Councilmembers expressed their concern as to whether the proposed Code of Ethics and Conduct (“Code”) and Ethics Pledge (“Pledge”) clearly violated any pre-existing provisions of local or state law or created any other potential legal issues for City Council.

Analysis Regarding Specific Legal Provisions

The following is an analysis of potential conflicts between the Code and Pledge and certain identified provisions of Virginia law.

- Do the Code and Pledge present any identifiable conflicts with the open meetings and transparency requirements for local government elected officials, appointed officials and employees found in the Virginia Freedom of Information Act (FOIA) (specifically, as delineated in Va. Code § 2.2-3707)?

In general, important terms in the Code and Pledge such as “transparency” are not defined and could potentially be in conflict with the more precisely defined provisions of FOIA. The Chair of the Review Committee assured Council that the Code and Pledge were intended to be advisory or voluntary in nature. As we will discuss more fully below, a clear statement of the advisory and/or voluntary

nature of the Code and Pledge may address the potential conflicts that we have identified.

- Do the Code and Pledge present any identifiable conflicts with the requirements for local government elected officials, appointed officials and employees found in the Virginia Conflict of Interest Act (COIA)? Specifically,

- Va. Code § 2.2-3100 provides that COIA supersedes all other state and local law.

Virginia local government conflicts of interest are entirely governed by State and not by local law. The above section clearly states that “This chapter shall supersede all general and special acts and charter provisions which purport to deal with matters covered by this chapter. . .” Therefore, the Code and Pledge would be entirely void under the State’s strict application of the Dillon Rule if they were to be interpreted as mandatory local provisions governing conflicts of interest. Virginia case law clearly supports the notion that any attempt by City Council to adopt mandatory local law where the Commonwealth has reserved such authority to itself would be construed against the City. In *Lawless v. Co. of Chesterfield*, 21, Va. App. 495 (1995), the Virginia Court of Appeals stated: “We will not imply a grant of [local government] power from the legislature’s silence.” Consequently, were the Code and Pledge to be construed as mandatory they would be at odds with COIA and risk being declared a legal nullity. *Gas Mart v. Bd. of Supvs.*, 269 Va. 334 (2005).

- Va. Code § 2.2-3112 defines prohibited conduct under COIA and specifically provides that the naming of a public official in a lawsuit does not create a conflict that prohibits that official from participating in the matter at issue.

This state code provision sets out when and where a Councilmember would have a conflict because of a pending legal action that would then require recusal. If the Code and Pledge were mandatory in nature, there could arguably arise circumstances in which a conflict might exist under the Code and Pledge which would suggest recusal when the specific provisions of Va. Code § 2.2-3112(D) state that no conflict exists (and no recusal is necessary). In that case, a Councilmember would be in compliance with state law while being out of compliance with Council's own Code and Pledge.

- Va. Code § 2.2-3115(C) provides that the only duty of disclosure that a public official has is the one provided under COIA.

Pursuant to the dictates of Dillon's rule, City Council may not impose upon itself additional disclosure requirements beyond those provided for in state law. Although the Code and Pledge do not set out specific disclosures Council must make, it does imply that Councilmembers should be more "transparent" regarding their fiduciary involvement with businesses and individuals that come before Council. One could credibly argue that such a requirement imposes broader disclosure requirements than those under COIA and, therefore, is in direct conflict with Va. Code § 2.2-3115(C).

- Do the Code and Pledge create other potential conflicts if “appointed officials” is deemed to include all Council appointed Boards and Commissions? Specifically, with regards to:
 - 1) boards that have quasi-judicial duties like the BZA and the Board of Equalization and Assessment Review; 2) boards subject to their own unique confidentiality provisions like the Industrial Development Authority; and 3) those boards with rule making functions like the Traffic and Parking Board.
 - The BZA (Va. Code § 15.2-2309 *et seq.*), the Board of Equalization and Assessment (Va. Code § 15.2-716.1 *et seq.*), and the Industrial Development Authority (Va. Code § 15.2-4905 *et seq.*) have specific and detailed state statutory requirements for how they administer and decide the matters that come before them and how confidentiality must be maintained. Any attempt to modify or impose additional requirements upon those bodies by local action would be void as a strictly legal matter.
 - The Traffic and Parking Board (Alexandria City Code § 5-8-1 *et seq.*) similarly has locally mandated duties regarding analysis, recommendation, and rule making regarding taxi regulation and other traffic matters. Additional or modified disclosure or other reporting requirements would need to be carefully incorporated into the Board’s existing duties to avoid conflict with established practices and procedures.
- Does the lack of definition of the term “transparency” in the Code create any potential conflict with FOIA and/or COIA?
 - There is, of course, no single definition of transparency. In their report “Government Transparency and Secrecy”, Ginsberg, Carey, Halchin, and Keegan

define transparency in government as: “[N]ot only the disclosure of government information, but also the access, comprehension, and use of this information by the public. Transparency, as such, requires a public that can acquire, understand, and use the information that it receives from the ... government.” Black’s Law Dictionary (8th ed.) defines transparency as “Openness; clarity; lack of guile and attempts to hide damaging information. The word is used of financial disclosures, organizational policies and practices, lawmaking, and other activities where organizations interaction with the public.”

- While FOIA does not rely upon the term “transparency”, it clearly defines the circumstances under which individual Councilmembers would have to disclose specific documents and information.
- The generic understanding of the term “transparency”, however, seems to imply a duty of disclosure well beyond the specific requirements found in FOIA and COIA.
- Therefore, “transparency” under the Code would likely require broader financial disclosures than those set out in COIA and broader disclosure of documents and information than those set out in FOIA. Councilmembers could be in full compliance with FOIA and COIA but still not be “transparent” under the Code.
- Likewise, members of Boards and Commissions that derive their authority from the Va. Code could also be fully compliant with their disclosure, production, and confidentiality requirements under those specific code provisions but not be “transparent” under the Code.

Suggested Revision To Address Potential Conflicts

- An introduction or preamble should be included that clearly and unequivocally states that the Code and Pledge are advisory and voluntary in nature. If one were to misinterpret the Code and Pledge as being mandatory rather than advisory in nature, the potential conflicts identified above would likely rise to the level of actual conflicts. We believe, however, any potential issues of this nature would be fully addressed and ameliorated, if a preamble or introduction to the Code clearly stated that: the Code is aspirational in nature, is subordinate to applicable federal, state, and local law, and does not confer and/or mandate any additional duties beyond those required under existing law nor confer any right or cause of action that does not otherwise apply under existing law. With this clear statement, we believe that when Councilmembers (and any other applicable City official) abide by the specific requirements of FOIA, COIA, and all other relevant requirements of federal and state law, no actual conflict will arise between the Code and Pledge on one hand and existing law on the other hand.