


AGENDA	Thursday April 30, 2020 at 3:00 P.M.	 CITY OF SIOUX FALLS
Board of Ethics Meeting	Carnegie Town Hall 235 W. 10 th Street Sioux Falls, SD 57104	

1. CALL TO ORDER

2. APPROVAL OF MINUTES FROM MARCH 6, 2020 (ATTACHED)

3. ANY BUSINESS OR PENDING ISSUES TO BE BROUGHT BEFORE THE BOARD


A. RECUSAL OF CITY ATTORNEY AND APPOINTMENT OF ALAN PETERSON AS COUNSEL TO THE BOARD OF ETHICS REGARDING CONFIDENTIAL COMPLAINT 20-A

B. CONFIDENTIAL COMPLAINT (20-A) FILED 03/04/2020
(EXECUTIVE SESSION TO DISCUSS PERSONNEL MATTER PURSUANT TO SDCL 1-25-2(1) AND CONSULT WITH LEGAL COUNSEL PURSUANT TO SDCL 1-25-2(3))

4. ADJOURNMENT

BOARD OF ETHICS MEMBERS: Jack Marsh, Chair Sue Roust, Vice Chair Greg LaFollette Wanda Harris Dan Fritz	CITY STAFF: Stacy Kooistra, City Attorney Bonnie Woolam, Paralegal/Board Liaison
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If an ADA accommodation is needed, please contact the Human Relations Office at 367-8745 or humanrelations@siouxfalls.org at least 12 hours in advance of the meeting

MINUTES	Friday March 6, 2020 at 2:00 p.m.	 CITY OF SIOUX FALLS
Board of Ethics Meeting	Commission Room 1st Floor ~ City Hall 224 West Ninth Street Sioux Falls, South Dakota	

BOARD MEMBERS PRESENT: Jack Marsh, Sue Roust, Greg LaFollette, and Dan Fritz.

BOARD MEMBERS ABSENT: Wanda Harris

STAFF PRESENT: Stacy Kooistra, City Attorney, and Cari Hanzel and Bonnie Woolam, Recording Clerks

CALL TO ORDER

A quorum was present and the meeting was called to order by Board Chair Jack Marsh at 2:00 p.m.

ELECTION OF CHAIR AND VICE CHAIR

Following some preliminary discussion Greg LaFollette nominated Jack Marsh to serve as Chair of the Board of Ethics for 2020. Dan Fritz seconded the motion. With no further nominations on the floor, Jack Marsh declared the nominations closed and proceeded with a vote. Vote to approve: 4 yeases. Motion carried.

Greg LaFollette nominated Sue Roust to serve as Vice Chair of the Board of Ethics for 2020. Dan Fritz seconded the motion. With no further nominations on the floor, Jack Marsh declared the nominations closed and proceeded with a vote: Vote to Approve: 4 yeases. Motion carried.

APPROVAL OF MINUTES

A motion was made by Sue Roust and seconded by Dan Fritz to approve the minutes from the meeting on December 19, 2019. Vote to approve: 4 Yeses. Motion carried.

ANNUAL REPORT

A motion was made by Sue Roust and seconded by Greg LaFollette to approve the 2019 Board of Ethics Annual Report dated March 6, 2020. Vote to approve: 4 Yeses. Motion carried.

BUSINESS OR PENDING ISSUES BROUGHT BEFORE THE BOARD

1. REQUEST FOR ADVISORY OPINION 20-1 FILED FEBRUARY 12, 2020

Jack Marsh introduced Request for Advisory Opinion 20-1 submitted by City Council member Janet Brekke and entered it into the record.

City Attorney Stacy Kooistra advised the Board that it had jurisdiction to hear Request 20-1 as it pertained to questions 1-3 of the Request.

Attorney Kooistra advised that some questions posed by Councilor Brekke as well as attachments A, B, and C as they applied to the behavior of others was limited by § 35.057 and therefore not within the jurisdiction of the Board to determine. Only the Councilor's own conduct could be considered under her request.

Attorney Kooistra agreed that the first 7 questions were within the purview of the Board but the last 4 were not because they involved the conduct of others and were outside of the Board's purview to the extent that they referenced the conduct of other people.

Attorney Kooistra further outlined the relevant law and prior opinions that were most applicable and merited review when considering the Request.

Councilor Brekke appeared before the Board and was sworn in.

Councilor Brekke provided some background to her request and stated that the intent of her last 4 questions was a more specific restatement of her first 3 questions as it pertained to her. She explained that her reason for requesting an advisory opinion on her own conduct was because she did not want to cast aspersions on her fellow colleagues but she thought that the issues created an ethical line for her as a councilmember.

Councilor Brekke read a letter to the Board that she previously presented to the Mayor, City Councilmembers and staff explaining her reasoning for the Request for Advisory Opinion.

Councilor Brekke further discussed her questions presented to the Board and expounded on her position on the Board's role in deciding those questions.

The Board discussed a Supreme Court ruling on free speech, applicable state statutes, city charter, and city ordinances as they related to Councilor Brekke's questions.

Councilor Brekke offered further discussion on her position and expounded on her intention to fashion her PAC after the Mayor's PAC and offered specifics on the naming and mission. Further questions were presented to Councilor Brekke by the Board.

Councilor Brekke stated that she intends to engage in the activities as enumerated in questions 1-3. Councilor Brekke further stated she did not think those types of activities were right but would participate in those activities because if she did not, then her voice would be lost.

PUBLIC INPUT

Pamela Sullivan was sworn and appeared before the Board and provided input to the Board. Tamara Baker was sworn and appeared before the Board and provided input to the Board. David Zokaites was sworn and appeared before the Board and provided input to the Board. James Sanden was sworn and appeared before the Board and provided input to the Board. Pat Starr was sworn and appeared before the Board and provided input to the Board. Joan McMillen was sworn and appeared before the Board and provided input to the Board. Sheila Wood was sworn and appeared before the Board and provided input to the Board. Christine Erickson was sworn and appeared before the Board and provided input to the Board. Richard Barnette was sworn and appeared before the Board and provided input to the Board. Bruce Danielson was sworn and appeared before the Board and provided input to the Board. Casey Murschel was sworn and appeared before the Board and provided input to the Board.

The Board addressed the questions individually with Attorney Kooistra for legal opinion. Attorney Kooistra advised the board that as a matter of law, Councilor Brekke could legally engage in the activities as stated in questions 1-3 of her Request and that the Ethics Board could not over-rule state law. Concerning the past activities of Counselor Brekke, Attorney Kooistra advised that she did not violate any laws.

Greg LaFollette made a motion that the Ethics Board determine the \$300 donation from Theresa Stehly as an individual, the robo call supporting Councilor's candidacy, or accepting miscellaneous contributions, be determined to be not ethics violations.

Dan Fritz seconded the motion. Vote to approve: 4 Yeses. Motion carried.

Greg LaFollette made a second prospective only motion that the use of Councilor or Mayor title, financial support personally or by a controlled PAC or active support such as yard signs,

campaign buttons, mailers, events, etc. be deemed to rise to the level of the appearance of impropriety and as such be considered an ethics violation.

No second. Motion dies for lack of a second.

Further discussion ensued.

Sue Roust presented a motion that the Board finds that situations as described in questions 1-3 of the Request are legal and do not give rise to the appearance of impropriety. Dan Fritz seconded the motion.

Discussion was had during which Attorney Kooistra advised removing the word "legal" from the motion.

Sue Roust re-stated her motion that the Board finds that the situations as described in questions 1-3 of the Request do not give rise to the appearance of impropriety. Motion seconded by Greg LaFollette. Vote to Approve: 3 Yeses: Roust, Fritz, Marsh. 1 No: LaFollette. Motion carried.

Discussion ensued concerning whether or not all questions were answered. Councilor Brekke confirmed that all of her questions were addressed by the discussion, motions, and vote of the Board as they apply to her.

Sue Roust presented a motion to authorize the Board's legal advisor, Stacy Kooistra, to draft an Advisory Opinion consistent with the discussions and motion of the Board and to authorize the Board Chair to both approve and sign the opinion as drafted on behalf of the Board. Motion was seconded by Greg LaFollette. No discussion. Vote to approve: 4 Yeses. Motion carried.

PUBLIC INPUT

Bruce Danielson addressed the Board and requested that all of the Board of Ethics' meeting agendas, minutes, and attachments prior to 2009 be added to the Board of Ethics website.

Councilor Brekke expressed concern regarding a lack of instruction in the Board procedures and rules. She recommended the Board raise the public's awareness by including an instruction in the Advisory Opinion section of the Rules of Procedure that all of the activities of the Board (except for complaints) and especially requests for advisory opinions, are done in open public hearing and that lobbying is not permitted. Councilor Brekke informed the Board that she found the prohibition addressing hypothetical questions confusing.

NEXT MEETING

No specific date for the next meeting was scheduled.

ADJOURNMENT

Meeting adjourned at 4:55 p.m.

Respectfully submitted,

Bonnie Woolam
Recording Clerk

DRAFT

City of Sioux Falls
BOARD OF ETHICS

ADVISORY OPINION NO. 20-1

Request for Opinion

Pursuant to § 35.057 of the Code of Ordinances of Sioux Falls, South Dakota, Sioux Falls City Councilor Janet Brekke requested an advisory opinion and presented the following questions at a meeting of the Board of Ethics in the Commission Room in City Hall at 2:00 p.m. on March 6, 2020.

- 1. Can I create a PAC whose funds will be utilized to support candidates in city elections?*
- 2. Can I host fundraisers for candidates in city elections using my title and position as a Sioux Falls City Council member?*
- 3. Can I use my title as a Sioux Falls City Council member to assist candidates in city elections by appearing in a postcard supporting their candidacy?*

In addition, Councilor Brekke submitted a fourth question concerning her past behavior in the following occurrences:

Did I violate the Sioux Falls Code of Ethics and/or Conflict of Interest Ordinance when as a candidate for city council member in 2018, I accepted the following:

- 1. A 300.00 donation to my campaign by another council member as an individual.*
- 2. A robo call supporting my candidacy from Theresa Stehly in her individual capacity.*
- 3. Accepted misc. independent contributions from friends of Council member Theresa Stehly*

A sub-part of Councilor Brekke's fourth question asked whether she could "engage in activities 1, 2, 3 above as a seated Sioux Falls City Council member on behalf of declared candidates during the 2020 election."

All of the questions listed above were listed on page 1 of Councilor Brekke's attachment to her Request for Advisory Opinion. On pages 3 and 4 of said attachment, Councilor Brekke submitted four additional questions as follows:

1. *Whether participating in the above stated activities per attachments A, B and C creates an "appearance of impropriety" pursuant to §34.005 Canon Three (a): A City Council member should avoid impropriety and the appearance of impropriety in his or her activities.*

2. *Whether the above stated activities per attachments A, B and C are inappropriate political activities pursuant to §34.009 Canon Seven (b): A city council member should refrain from political activity inappropriate to his or her office.*

3. *Whether the above activities per attachments A, B & C grant special advantage to an individual(s) and/or use my elected position to secure special advantage to others, pursuant to Conflict of Interests §35.054 Standards of Conduct; City Council member (d) and/or (e).*

(d) Grant any special consideration, treatment or advantage to any citizen, individual, business organization or group beyond that which is normally available to every other citizen, individual, business organization or group;

(e) Use their elected position to secure special advantages, privileges or exemptions for themselves or others;

4. *As to 1, 2 and 3, past conduct, I am requesting an opinion on whether those activities were permitted because they were performed in the office holders' individual capacity or whether they are subject to Canon Three (a), Canon Seven (b) and §35.054 (d) & (e) stated above.*

Law

As provided in § 35.057 of the Code of Ordinances of Sioux Falls, South Dakota, any city official can request a Board of Ethics Advisory Opinion to review their own past behavior:

§ 35.057 of the Code of Ordinances of Sioux Falls South Dakota

Advisory opinions may be requested by any city official who seeks the board of ethics' opinion to guide that official's own conduct. Only a city official may request an advisory opinion from the board of ethics about his or her conduct or activities, provided that the request is made prior to the filing of a complaint as outlined in this chapter. Declared candidates for a municipal election can seek advisory opinions from the board of ethics about his or her conduct or activities. A request for an advisory opinion may include the request to review conduct that has already occurred that has not yet been the subject of a complaint to the board or a report to the

fraud coordination committee. The “self-reporting” on past incidents shall not act as a bar against possible sanctions for that conduct, but may be considered in mitigation of any possible penalties otherwise imposed.

Pursuant to City Ordinance § 34.005 (Canon Three), the Board of Ethics has the authority within the bounds of federal statutes, state statutes, and city ordinances to determine what constitutes an appearance of impropriety.

§ 34.005 of the Code of Ordinances of Sioux Falls, South Dakota

- (a) A city council member should avoid impropriety and the appearance of impropriety in all his or her activities.
- (b) It is essential that city government attract those citizens best qualified and willing to serve. City council members have legitimate interests (economic, professional and vocational) of a private nature. City council members should not be denied, and should not deny to other city council members or citizens, the opportunity to acquire, retain and pursue private interests, economic or otherwise, except when conflicts with their responsibility to the public cannot be avoided.
- (c) City council members should conduct themselves at all times in a manner that promotes public confidence in the integrity of their office and of city government.
- (d) City council members should not allow family, social or other relationships to unduly influence their conduct or judgment and should not lend the prestige of the office of city council member to advance the private interests of others; nor should they convey or permit others to convey the impression that they are in a special position to influence them.

The City of Sioux Falls, at City Ordinance § 38.001, has adopted South Dakota state statutes as they relate to elections and campaign finance laws:

§ 38.001 of the Code of Ordinances of Sioux Falls, South Dakota

The provisions of the general election laws and administrative rules promulgated thereto of the State of South Dakota shall apply to all municipal elections unless specifically provided by city charter or city ordinance. The provisions of state law on campaign finance applicable to state legislative office shall also apply to all elected municipal positions.

The city clerk shall conduct all municipal elections provided by this chapter and by city charter. Any statement, form, or filing required

by the general election laws of the state of South Dakota applicable to municipal elections shall be submitted to the city clerk's office.

The city council by ordinance may adopt specific filing and campaign finance reporting requirements for any municipal election in addition to those provided by state law.

By ordinance, the city may call for an advisory election on any issue to be presented to the voters at any regularly scheduled or special municipal election as otherwise allowed by law.

SDCL § 12-27-8

Limits on contributions to legislative or county candidate or candidate's campaign committee--Violation as misdemeanor. A legislative or county candidate or the candidate's campaign committee may accept contributions during any calendar year as follows:

- (1) Not to exceed one thousand dollars from a person, unless the person is the candidate or a member of the candidate's immediate family, in which case contributions may be made without limit;
- (2) Not to exceed one thousand dollars from an entity;
- (3) Without limit from a political action committee;
- (4) Without limit from a political party; and
- (5) Without limit from a candidate campaign committee.

Any contribution from a ballot question committee is prohibited. Any contribution from a person who is an unemancipated minor shall be deducted from the total contribution permitted under this section by the unemancipated minor's custodial parent or parents. A violation of this section is a Class 2 misdemeanor. A subsequent offense within a calendar year is a Class 1 misdemeanor.

Opinion

In regard to Question 1, the Board has determined that creation of a PAC is not a breach of the ethics rules and does not rise to the appearance of impropriety.

In regard to Question 2, the Board has determined that hosting fundraisers for candidates in city elections using the Council member's title and position as a Sioux Falls City Council member is not a breach of ethics rules and does not rise to the appearance of impropriety.

In regard to Question 3, the Board has determined that the act of a Council member using his or her title as a Sioux Falls City Council member to assist candidates in city elections by appearing in a postcard supporting their candidacy is not a breach of the ethics rules and does not rise to the appearance of impropriety.

In keeping with Board of Ethics Rule of Procedure 2.03 and Ethics Board precedent (see Advisory Opinions 2007-1, 18-2 and 19-5), the Board declined to apply hypothetical activities to the questions presented above and, consequently, the Board's decision is limited to the facts presented in said questions.

In regard to Question 4(a)¹ referenced above, the Board has determined that Councilor Brekke's acceptance of a donation from another elected official, which was within the limits of campaign finance laws, was not a breach of the ethics rules and therefore did not rise to the appearance of impropriety.

In regard to Question 4(b)² referenced above, the Board has determined that Councilor Brekke's acceptance of a robo-call supporting her candidacy from Theresa Stehly in her individual capacity was not a breach of ethics rules and therefore did not rise to the appearance of impropriety.

In regard to Question 4(c)³, the Board has determined that Councilor Brekke's acceptance of miscellaneous independent contributions from friends of Council member Theresa Stehly was not a breach of ethics rules and therefore did not rise to the appearance of impropriety.

In regard to Councilor Brekke's sub-part question to Questions 4(a-c), as the activities referenced therein were not a breach of ethics rules and therefore did not rise to the appearance of impropriety, it is the opinion of the Board of Ethics that Councilor Brekke can engage in such activities in 2020.

With respect to the fifth, sixth, seventh and eighth questions posed by Councilor Brekke⁴, the Board declines to advise on such questions pursuant to City Ordinance 35.057, which states as follows:

¹ Councilor Brekke identified this as question 1.

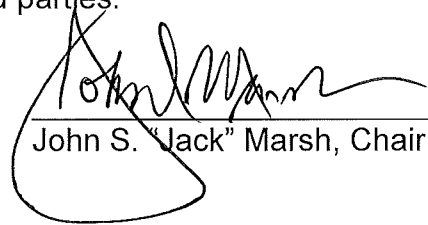
² Councilor Brekke identified this as question 2.

³ Councilor Brekke identified this as question 3.

⁴ Councilor Brekke identified these questions as questions 1, 2, 3, and 4 respectively on pages 3 and 4 of Request for Advisory Opinion.

Advisory opinions may be requested by any city official who seeks the board of ethics' opinion to guide that official's own conduct. Only a city official may request an advisory opinion from the board of ethics about his or her conduct or activities, provided that the request is made prior to the filing of a complaint as outlined in this chapter. ... A request for an advisory opinion may include the request to review conduct that has already occurred that has not yet been the subject of a complaint to the board or a report to the fraud coordination committee... (emphasis added).

The Board declines to opine on Councilor Brekke's final four questions as each references and incorporates alleged past conduct of third parties.



John S. "Jack" Marsh, Chair

Opinion decided: March 6, 2020.