

CITY COUNCIL STUDY SESSION MINUTES

May 29, 2018

The City Council of the City of Norman, Cleveland County, State of Oklahoma, met in a study session at 5:30 p.m. in the Municipal Building Conference Room on the 29th day of May, 2018, and notice and agenda of the meeting were posted at the Municipal Building at 201 West Gray, and the Norman Public Library at 225 North Webster 48 hours prior to the beginning of the meeting.

PRESENT: Councilmembers Allison, Bierman, Clark, Hickman, Holman, Karjala, Wilson, Mayor Miller

ABSENT: Councilmember Castleberry

Item 1, being:

CONTINUED DISCUSSION REGARDING THE CITY COUNCIL ETHICS POLICY.

Ms. Kristina Bell, Assistant City Attorney, said in September and October 2017, the City Council Oversight Committee discussed concerns regarding the current City of Norman Conflicts of Interest Ordinance, e.g., when a person becomes a candidate for office and when a Councilmember can endorse a candidate for office. On October 19, 2017, the Oversight Committee specifically discussed removing the endorsement/opposition prohibition in Section 2-103(a)(7)(b); considered a provision to allow a majority of City Council to compel recusal when an elected official does not recuse voluntarily; and explored whether to expand the definition of an “actual conflict” in Section 2-103(c)(1) to mandate recusal of all employees as opposed to the current language which only includes one who “holds a direct benefit, detriment, or employment consequence,” but otherwise leaves the decision to the discretion of the employee/elected official as to whether an employment consequence exists.

Ms. Bell said Oversight Committee recommendations were presented to full Council in a Conference on December 19, 2017, where there appeared to be agreement to remove endorsement/opposition language, but Council wanted additional discussion on the majority override and employment as an actual conflict provisions.

Endorsement/Opposition Language

Ms. Bell said Section 2-103(a)(7)(b) states, “an elected City official shall not use his office to endorse or oppose any candidate for office” would be removed; however, some Councilmembers questioned whether striking that language would be an ethical question versus a political question while other Councilmembers felt it should be a personal decision left to each Councilmember.

Conflicts of Interest Language

Section 2-103(7)(d)(1) prohibits an elected City official from participating in the discussion of, or voting on, any item in which the official has a pecuniary interest or an actual conflict. An actual conflict is defined as, “[a] set of circumstances wherein an elected City Official would be required to take an action or make a decision regarding a cause, proceeding, application or any other matter where he or she holds a direct benefit, detriment, or employment consequence.”

If an elected City Official only has a “potential conflict” then he or she may engage both in the vote and discussion, but the potential conflict must be disclosed prior to participation. A potential conflict is defined as, “[a] set of circumstances wherein an elected City Official would be required to take an action or make a

Item 1, continued:

Conflicts of Interest Language, continued:

decision regarding a cause, proceeding, application or any other matter where he or she may have an indirect benefit, detriment, or employment consequence.”

Ms. Bell said Council discussed whether an elected City Official who may have an actual, potential, or no conflict is factually specific and if that decision should ultimately be made by the elected City Official after seeking advice and counsel from the City Attorney.

Majority Override Compelling Recusal

Ms. Bell said Council questioned whether or not a majority of Council should be empowered to override a Councilmember’s recusal decision with which they disagree. Can a majority of Council compel another member of Council to recuse when he or she refuses? She said under the City Charter, Councilmembers are elected to be the “voice” of their Ward and are answerable to Ward voters and Councilmembers felt there could be potential that a majority override could silence a minority viewpoint by “requiring” recusal. She said Section 2-103(h) of the Code of Ordinances provides that an elected City Official may consult with the City Attorney’s office if he or she believes another member has violated this policy; however, the current policy does not have a provision authorizing a majority of Council to compel recusal. She said if Council wishes, a provision could be added to Section 2-103(d)(5) that states, “Majority Override. In the event that an Elected Official believes that another Elected City Official has an actual conflict on a particular item but refuses to recuse, a motion shall be made on the record citing the basis for the belief that such actual conflict exists. Only a full majority five (5) out of nine (9) Elected City Officials may override another Elected City Official’s decision not to recuse and compel such recusal.” She said the five vote requirement mirrors Charter provisions requiring at least five (5) votes to approve or adopt an agenda item.

Employment of Actual Conflict

Ms. Bell said the current ordinance includes language regarding a direct or indirect “employment consequence” as a potential basis for creating an actual or potential conflict and “employment consequence” itself is not defined, but the elected City Official can consult with the City Attorney and based on the specific, factual analysis can make a determination on whether a conflict exists. She said a Councilmember can always make a decision to recuse if there is any pressure from the employer but does not necessarily have to recuse if he or she does not believe there is any potential impact on his or her employment status. She said if Council wanted to make employment status a *de facto* actual conflict, it could be accomplished by amending the definitions for “actual conflict” and “benefit or detriment.”

Ms. Bell said Council was concerned that a Councilmember could face pressure from an employer who could benefit from an item in front of Council; however, making employment an actual conflict could result in an overbroad exclusion requiring conflicts where none really exist. Other concerns of Council included the appearance of or public perception of a conflict and whether or not *de facto* employment as an actual conflict should apply to Councilmembers only, their employment, or encompass spouses and close family members. She said as the ordinance is currently written, employment consequence, direct or indirect, pertains to Councilmembers, their spouse, and close family members.

Ms. Bell said if Council determines to make employment an actual conflict by *de facto*, the employment consequence language would be removed and a provision could be added that states, “The elected City Official’s or any member of his or her immediate family’s employment status with a person or organization seeking City Council action shall constitute an actual conflict.”

Item 1, continued:

Recommendations

Ms. Bell said Staff recommends removing the endorsement prohibition, not adding majority override language, and leaving “employment consequence” as a fact specific inquiry, not as a *de facto* exclusion from voting on behalf of citizens in the Ward.

Comments/Questions

Councilmember Hickman said he is comfortable with the first two recommendations, but would like employment consequences to apply to the employer for any reason because no one really knows all the facts behind the scenes of the relationship between an employer and employee. He said if Council is taking action that benefits or affects a Councilmember’s employer, he would like that to be grounds for recusal. He said this provision is not about an individual Councilmember or individual employer, it is about the institution of the City Council and the perception of public trust in that institution. Councilmember Clark said that language is too broad and no one from the University of Oklahoma (OU) could run for City Council because they would not be able to vote on the budget. Why would someone who works for OU want to run for City Council knowing they could not vote on half of the important issues, e.g., the Cleveland Area Rapid Transit (CART) funding. She said every road improvement in Norman could have perceived benefit to OU in some way and she cannot support that provision.

Councilmember Hickman asked Mr. Jeff Bryant, City Attorney, if it could be interpreted that all road projects benefit OU and Mr. Bryant said current language looks directly at whether an employee has a direct benefit or employment consequence before recusing; however, the proposed language basically says that if a Councilmember works for any employer they are automatically recused regardless of whether or not there is a direct benefit or detriment to that particular employee so the language is broad. He said Councilmembers would put themselves in a position for all kinds of arguments about whether every road in Norman benefits any employer and that is the reason Staff is recommending this proposal not go forward.

Councilmember Allison said current ordinance language is challenging and the proposed language broadens that challenge even more. He said this is a fine line because many Council decisions do not have a direct benefit or detriment to an employer. He said it is hard to understand the relationships that people have within their own business or businesses they work for and it becomes even harder to understand when a large employer is involved.

Councilmember Holman said Councilmembers have a good track record of disclosing conflicts and recusing themselves when advised by Legal Staff. He does not recall any Councilmember refusing to recuse when advised to do so or purposely not disclosing any form of conflict. He said it would be pretty broad to say that any employee of any business is *de facto* excluded just because the business they happen to work for could be perceived as benefiting from an improvement project two blocks away.

Councilmember Bierman asked if there is a way to parse the two between something that does have a broad benefit, such as the budget or CART that serves a wide range of purposes, versus improving a road that benefits one business. She understands both sides of the argument, but feels current language is so broad that even if someone believes there is no potential impact to their employment status it does not necessarily mean there will not be an impact and making a decision to recuse due to pressure from an employer does not necessarily avoid employment consequences if the person does recuse. It is much more likely an employer will pressure the Councilmember to vote yes on an item than to vote no so she would like to find some middle ground. She said there are quite a few business owners sitting on Council and if that is going to be the standard, there will never be five people that can vote on the budget.

Item 1, continued:

Comments/Questions, continued:

Mayor Miller said she does not support *de facto* exclusion for employment consequence because major employers in Norman include OU, Norman Public Schools (NPS), Moore-Norman Technology Center, Norman Regional Hospital, etc., and there have been sitting Councilmembers employed by these organizations. Since she has been on Council, Councilmembers have bent over backwards to recuse themselves when they thought there might be any appearance of a conflict. She does not want to make it more difficult for people to want to run for Council.

Mr. Bryant said it is very hard to legislate morals and ethics, but the ordinance does give Council general guidelines and one of the concerns has been whether this set of rules will be used as a sword as opposed to a shield. He said there have been concerns expressed by Council regarding situations where a majority of Councilmembers are mandating that someone who has been elected by their Ward to represent the interest of their constituents be silenced, which makes the ordinance more of a sword. He said the focus has been more about disclosure because the ultimate accountability of the actions of elected officials is to their constituents. He said unless there is a very clear conflict where there is an actual benefit, detriment, or employment consequence, Legal Staff will not recommend recusal, but will advise disclosure.

Mr. Bryant asked if Council wants to move forward with removing endorsement prohibition and Mayor Miller said she would not mind removing the endorsement prohibition for other offices, but it would be a mistake to remove it for City Council elections. She felt it best to leave that language because it helps people on Council stay more neutral. Councilmember Wilson agreed and would prefer Councilmembers not be able to endorse City Council candidates and would also like to remove any ability for Council to endorse *any* candidate from the dais. Mayor Miller agreed and said that would help separate Council's roles as a Councilmember from more personal roles. Councilmember Clark said more people follow Councilmembers on social media or the City's Facebook or Ward page than on the dais.

Councilmember Hickman said endorsement prohibition is the most problematic because some people think that a Councilmember saying something about a candidate on his or her personal Facebook page is an endorsement and some people think that private messages are a form of endorsement. If the endorsement prohibition is not going to be removed in its total, there needs to be definitions established for what an endorsement is or consequences to those who use it as a sword. He said Council has First Amendment Rights in conjunction with their duties as Councilmembers and he does not believe it is an ethics violation to endorse candidates at any level. Is donating money to a candidate going to be considered an endorsement? Where are those lines drawn? He is not a fan of removing the prohibition language; however, he has seen it used in a manipulative and inappropriate manner; therefore, there is no alternative but to remove the language or dig in and expand upon the ordinance in substantial detail with definitions.

Councilmember Holman said he would be open to working on definitions that narrow down City races where Council cannot use the dais and cannot use their "official" City Council Ward page to endorse anyone. He did not think it was appropriate to endorse City Council candidates while sitting on City Council because it could create a contentious working relationship.

Mayor Miller asked if Council could move forward with endorsement prohibition of all other candidates then review restraining language for City Council candidates and Mr. Bryant said yes. Mr. Bryant said, just to be clear, Council wants to prohibit candidate endorsement on the dais as well as on official social media platforms. Councilmember Clark said she prefers using the language "candidate or official sponsored social media" because she has an official City Twitter account so it is not just about Facebook. Mayor Miller said

Item 1, continued:

Comments/Questions, continued:

when Councilmembers become actively involved in someone's Council race, it affects a lot of other people and has lot of other consequences in terms of what happens during, before, and after Council meetings.

Councilmember Bierman asked what other cities do. Does Oklahoma City or Tulsa have a similar policy regarding endorsing other City Council candidates? If other cities do not have policies, then Council should just trust each other and other candidates to police themselves and Mr. Bryant said he can research Oklahoma City and Tulsa. He said from a legal perspective he is grateful there has not been any First Amendment challenges on the ordinance language because it would be difficult to defend political positions of Council. He said Council represents viewpoints of their constituents and it is all about representation so any restriction that has some negative consequence as an enforcement issue puts Legal Staff in a very difficult position to argue that this is a reasonable regulation of First Amendment Rights. Councilmember Wilson said she would just remove the language altogether.

Mayor Miller said Council seems to agree on removing endorsement prohibition language, not adding majority override language, and leaving employment consequence language as is.

Councilmember Karjala said Councilmembers should stay out of City races because it can cause hard feelings and has potential for infighting so she would like to see language stating that. She said Councilmembers always talk about restoring public trust and she believes Council staying out of City races would show citizens that Council cares about its institution being respected and endorsing a candidate for Council should be left to the voting public.

Councilmember Hickman said private comments to friends have been interpreted as being an ethical violation under the current ordinance language, which is problematic. He said if the language is not going to be removed, it needs to be defined to the point where it cannot be used as a sword and will protect First Amendment Rights to create a balanced playing field. Council needs to know what they can and cannot do, can they give money or not give money, can they use their personal Facebook page or other personal social media page, etc. He would prefer to remove the language.

Mayor Miller asked if there is a way to modulate the language for endorsement prohibition of City Council races only, not any other endorsement for any other candidate for any other races. Mr. Bryant said Staff will research Oklahoma City and Tulsa and forward that information to Council.

Items submitted for the record

1. Memorandum dated May 24, 2018, from Kristina Bell, Assistant City Attorney, through Jeff Harley Bryant, City Attorney, to Mayor and Councilmembers
2. PowerPoint presentation entitled, "City Council Ethics and Conflicts of Interest Ordinance," dated May 29, 2018
3. Copy of Norman Code of Ordinances Section 2-103. Council ethics.
4. City Council Conference minutes of December 19, 2017
5. City Council Oversight Committee minutes of October 19, 2017

Item 1, continued:

Items submitted for the record, continued

6. City Council Oversight Committee meeting agenda for October 19, 2017, including Memorandum dated October 12, 2017, from Leah Messner, Assistant City Attorney, to City Council Oversight Committee regarding Conflicts of Interest Ordinance; Memorandum dated October 10, 2017, from Kristina L. Bell, Assistant City Attorney, to Jeff Harley Bryant, City Attorney, dated October 10, 2017, regarding Definition of "Candidate" under Council Ethics Ordinance; City Charter Section 10, Candidates; Options for Candidate Endorsement Provision; City Council Planning Committee minutes of September 12, 2008; City Council Planning Committee minutes of October 24, 2008; City Council Planning Committee minute of November 14, 2008; pertinent excerpts from City Council Planning and Community Development Committee minutes of December 12, 2008; pertinent excerpts from City Council Study Session minutes of January 6, 2009; pertinent excerpts from Planning and Community Development Committee minutes of February 13, 2009; Joint City Council and Oversight Committee Study Session minutes of July 19, 2011; Ethics Code ordinances from Tulsa, Oklahoma, and Oklahoma City, Oklahoma; and City Council Oversight Committee minutes of September 21, 2017.

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Item 2, being:

DISCUSSION REGARDING POTENTIAL AMENDMENTS TO THE PROJECT PLAN OF THE UNIVERSITY NORTH PARK TAX INCREMENT FINANCE DISTRICT.

Mayor Miller said this item will not be discussed until additional information can be obtained.

Councilmember Hickman asked if the City is planning to move forward with an independent study and Mayor Miller said definitely. Councilmember Hickman asked what the study would look at and Mr. Bryant said the Center for Economic Development Law (CEDL) reached out to people in Oklahoma City with economic development expertise to ask them to review the City of Norman University North Park Tax Increment Finance (UNPTIF) District project plan amendments to garner an independent perspective on whether or not all the right questions are being asked and all the right holes are being filled to give Council some level of comfort. Mayor Miller asked if these experienced people will be given all of Norman's information currently available and Mr. Bryant said yes. He said Oklahoma City recommended the City speak to Mr. Tom Hazinski, HVS Consulting (HVS), a national firm with experience in market and feasibility economic development studies focusing on sports, leisure, and entertainment venues, which is what Norman is looking at for their entertainment district.

Councilmember Bierman wants to make sure that whatever consultant is chosen has a track record in predictions because part of Council's concern is making sure Council is confident with the predictions going forward and that the City is not going to face another recession in the next couple of years impacting the outcome of the proposed amendments.

Councilmember Holman wants to make sure that whoever is chosen has no ties to Norman and have not lived in Norman or graduated from the University of Oklahoma (OU) or Norman Public Schools (NPS). He would prefer to hire someone with no connection to Norman whatsoever so they are not swayed by personal feelings or relationships and that has no stake in the outcome of Council's decision.