LOUISVILLE METRO GOVERNMENT
ETHICS COMMISSION

March 8, 2023

[redacted]
[redacted]
[redacted]
Louisville, KY 40202

RE: March 4TH Opinion Request

Dear [redacted]

You submitted a request on March 4th, 2024, for an advisory opinion, which included numerous documents, but will be summarized here:

> You are the owner of an interest in a piece of commercial property which ordinarily hosts retail restaurant or goods businesses as tenants. You are also the real estate broker on behalf of that company, in seeking new tenants. A fellow member of Metro Council, who also works in the field of commercial real estate, contacted you in that capacity representing a prospective business owner and prospective commercial tenant. You were contacted in your capacity related to the commercial property affiliation. The fellow Council Member who contacted you is currently the Respondent in an ongoing removal trial at Metro Council. In your capacity as Council Member, you will vote on guilt of the Respondent and, if found guilty, any punishment, up to and including removal from Metro Council. You are also a member of the "charging committee" of Metro Council, which originally issued the charges against this Respondent Council Member. Meanwhile, the Respondent Council Member represents that he has removed himself from involvement in the potential lease transaction, although the brokerage where he works still represents the prospective tenant, but the Respondent Council member has stated he will disclaim any personal financial benefit from the potential real estate deal. It is unknown whether the Respondent Council Member owns any beneficial interest in the brokerage where he works, or how his compensation there is derived.

The supporting documents you provided are attached hereto, including emails and a letter.

As a preliminary matter, this Opinion relates solely to the impact of the Ethics Code upon your own contemplated behavior, and not that of the Respondent Council Member, who may seek his own guidance in this regard. You will note that in order to provide an analysis to you, and you alone, this Opinion must at times necessarily infer the intent of the other party, as will be explained below. Even so, this Opinion is not intended to provide guidance to that other party, but rather only to you.

In summary, it is our opinion that the Commission as a whole would unfortunately regard the proposed transaction at issue to likely violate the Ethics Code, LMO § 21.02(C),

under the very specific circumstances of this case, as presenting an improper appearance of impropriety on the part of at least one of the parties to the transaction.

The Louisville Metro Ethics Ordinance regulates five (5) broad areas of conduct of Metro Officers, under its general standards: (1) unwarranted privileges, (2) impairment of independent judgment; (3) acceptance of things of value in exchange for influence or access; (4) use of government information to obtain financial gain; (5) representing a party or cause, in which the officer has a financial or private interest, before a county agency. LMO § 21.02. As an additional matter, the Ethics Code also prohibits misuse of government information for the private benefit of a Metro Officer, § 21.02(F). The two most likely implicated here are "impairment of independent judgment" and "acceptance of things of value," although any of the other regulated areas could be implicated as well.

First, as a threshold matter, both you and the Respondent Council Member are covered by the Louisville Metro Ethics Ordinance, as "Metro Officers" defined therein.

The prohibition against acceptance of things of value given in order to influence or access officers asks two primary questions. First, it asks what the original subjective intent of each party was in offering or forming your proposed contractual relationship, and what that intent is going forward. This test is also *objective*, however, asking if such a financial relationship "could reasonably be inferred" to be for the purpose of influence or access. Therefore, there is a two-step analysis. If this transaction was actually intended—by either party, in this case-- to provide improper influence or access -- then it constitutes a violation of the Ethics Code to engage in the transaction. At this time, based on the information provided, it can easily be inferred that engaging in the transaction is not intended as an improper purpose on your part: you have diligently requested an ethics opinion in advance; and given that you have already signed off on charges against Respondent Councilman, it appears that your decisions on the removal trial are not likely to be influenced by this transaction. The next step in reviewing the intent of the parties is to infer the actual intent of the Respondent Councilman in bringing this proposal to you. While the Respondent Councilman makes many statements disclaiming any improper purpose in this regard; and has made a general statement that he will disengage from any personal benefit flowing to him from the transaction, this does not fully answer the question. The question here is not whether *he* will obtain a personal financial benefit from the transaction, but rather whether he intended to confer such a benefit on *you* for the purpose of obtaining influence over you in your official capacity as a Metro Officer. The question of his intent is divorced from the question of your intent, except inasmuch as it is your duty to recognize transactions being offered for improper purposes by the other party and to thereby avoid them.

We will simply not answer, for purposes of this analysis, whether the Respondent Councilman proposed this transaction with an actual improper intent, because the transaction is most fraught when it comes to the "objective" test of the Code anyway. In this regard, the Code asks whether the transaction is proposed "under circumstances from which it could reasonably be inferred that the [thing of value] was given or offered" for the improper purpose of gaining influence over the officer in his or her official capacity. The Commission has in the past regarded this "objective test" to inquire what a reasonable member of the public may conclude about the appearance of the transaction. This prohibition is intended to prevent, not only actual intentional impropriety, but transactions which bear the *appearance of impropriety*. The Commission has previously noted in other Opinions that the law has long recognized that such provisions, preventing even the "appearance of impropriety," are proper and promote a legitimate government interest. Nixon v. Shrink Mo. Govt. PAC, 528 U.S. 377

(2000)(calling the danger of "the appearance of improper influence" as "of almost equal concern as the danger of actual *quid pro quo* arrangements")[1].

Therefore, this standard asks if the reasonable observer would infer that the relationship—at inception, or at some point during the course of the relationship—was entered for the purpose of influencing the officer, directly or indirectly, on official actions. Here, the official action at issue is your votes and actions with regard to the removal trial of the Respondent Council Member. Weighing positively in this regard (that is, against the appearance of an improper purpose) is that the facts represented at this time appear to support no improper intent on your part (see above). The fact that the Respondent Council Member has now purported to disclaim any benefit from the transaction weighs slightly favorably, but for the reasons stated above, this has little weight (because the issue is the appearance of a benefit offered to *you*, not whether *he* will receive a direct financial benefit).

On the other hand, weighing negatively in this regard is the fact that the Respondent has not steered or presented such transactions to you in the past, despite his having been engaged in commercial real estate for several years; the proposal was offered in the middle of Respondent's trial for discipline or removal for violations of the Ethics Code, rather than at some other point; and, perhaps most significantly, the Respondent has already recently been adjudicated as having engaged in transactions in violation of the Ethics Code with an *actual* corrupt intent in the very recent past—indeed, these transactions form part of the most significant basis of the current Council Trial. Additional pending charges against this Respondent Council Member include allegations that he lied under oath during the very ethics trial which resulted in his adjudication.

Therefore, we believe the Commission will most likely conclude[2] that this proposed transaction bears the appearance of impropriety in the highly specific individual circumstances of this case. A reasonable observer may easily infer that this Respondent Council Member has steered this business opportunity to you for the purpose of gaining influence over you, or access to you, in your official capacity, even if there is insufficient evidence that this was his actual intent.

Because we conclude that the transaction is improper under the standards of LMO 21.02(C) ("acceptance of things of value"), there is no need to also analyze the matter further under LMO 21.02(B) ("independence of judgment").

Thank you for your proactive attention to the requirements of the Ethics Code, and we hope this preliminary advisory has been helpful. You are reminded that you may seek review and change of this preliminary Opinion by requesting in writing to be heard before the full Commission at its next regularly scheduled meeting. Please send such requests to our clerk erca.burton@louisvillemetro.gov; with cc to todd.lewis@toddlewislaw.com . The Commission will otherwise docket this matter on its own, and take a full vote on whether to adopt, amend, or reject this Opinion.

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[1] This provision also serves to significantly distinguish the Ethics Code from various criminal statutes which require proof of actual illicit intent or "quid pro quo" arrangements, such as bribery of a public servant, Crace v. Commonwealth, 1998 WL 306791, 97-CA-0114 (Ky. App. 1998) (affirming conviction for bribery of a public servant, noting a payment to the prosecutor in exchange for dismissal of an indictment was intended as a "quid pro quo exchange."); or vote buying, Hardin v. Montgomery, 495 S.W.3d 686 (Ky. 2016); or similar federal criminal statutes. See 18 U.S.C. 201; McDonnell v. United States, 579 U.S. 550 (2016) ("honest services" fraud prohibits "quid pro quo" corruption.

[2] Please recall that this preliminary advisory Opinion can be appealed to the Commission as a whole by simply providing a written request that it be placed upon the agenda of their next full meeting, set for March 21st, at 3:00 PM EST.

Sincerely,



Delores “Dee” Pregliasco

Chair, Louisville Metro Ethics Commission



F. Todd Lewis

Legal Counsel, Louisville Metro Ethics Commission