

CITY OF WASILLA
ORDINANCE SERIAL NO. 04-29

AN ORDINANCE OF THE WASILLA CITY COUNCIL AMENDING WMC 2.12.010,
CONFLICT OF INTEREST, TO SPECIFY STANDARDS FOR CONFLICT OF
INTEREST OF CITY OFFICIALS AND EMPLOYEES.

* Section 1. Classification. This ordinance is of a general and permanent nature and shall become part of the city code.

* Section 2. Adoption of section. WMC 2.12.005, Definitions, is adopted to read as follows:

The following words or phrases, when used in this chapter, shall have the meanings set forth in this section:

“Financial interest” A person has a financial interest in a matter if the person’s financial situation will vary depending on the outcome of the decision on the matter. The financial interest of a person includes the financial interest of any of the following:

1. A member of the person’s immediate family.
2. The person’s employer.
3. An organization, whether for profit or nonprofit, of which the person is an owner, shareholder, partner, director, officer or member.

“Immediate family” of a person means any of the following: a spouse, parent, uncle, aunt, sibling, spouse’s parent or sibling, child (including a stepchild or adopted child), and anyone who lives in the person’s household.

Bold and underline added. [CAPS AND BRACKETS, DELETED.]

“Substantial financial interest” means any financial interest except:

1. A financial interest of such limited magnitude that it would not influence an average, reasonable person.
2. A financial interest on which the outcome of a decision would have only an insignificant or conjectural effect.
3. A financial interest that is common to a large class of persons including the person whose financial interest is at issue.

* Section 3. Amendment of section. WMC 2.12.010, Conflict of interest, is amended to read as follows:

2.12.010 Conflict of interest.

A. City council.

1. A member of the city council shall declare a substantial [ANY] financial interest the council member has in an official action and ask to be excused from a vote on the matter.

2[B]. The mayor shall rule on a request by a council member to be excused from a vote.

3[C]. The decision of the mayor on a request by a council member to be excused from a vote may be overridden by the majority vote of the council.

4. A council member who has been excused from a voting on a matter under this subsection also shall abstain from the discussion of the matter, except that the council member may speak on the matter as a member of the public.

Bold and underline added. [CAPS AND BRACKETS, DELETED.]

B[D]. Other city employees and officials. A city [MUNICIPAL] employee or official, other than a member of the city council, may not participate in an official action in which the employee or official has a substantial financial interest.

[E. A COUNCIL MEMBER WHO HAS DECLARED A CONFLICT OF INTEREST AND HAS BEEN EXCUSED BY THE MAYOR FROM A VOTE, OR A COUNCIL MEMBER WHO, BY MAJORITY VOTE OF THE COUNCIL, HAS BEEN FOUND TO HAVE A CONFLICT OF INTEREST, SHALL ALSO ABSTAIN FROM THE DISCUSSION AND VOTING ON THE ISSUE IN WHICH THERE IS A CONFLICT OF INTEREST EXCEPT THAT THE COUNCIL MEMBER MAY SPEAK ON THE ISSUE AS A MEMBER OF THE PUBLIC.]

* **Section 4. Effective date.** This ordinance shall take effect upon adoption of the Wasilla City Council.

ADOPTED by the Wasilla City Council on April 26, 2004.



DIANNE M. KELLER, Mayor

ATTEST:



KRISTIE SMITHERS, CMC
City Clerk

[SEAL]

Bold and underline added. [CAPS AND BRACKETS, DELETED.]

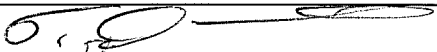
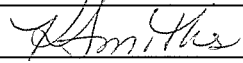


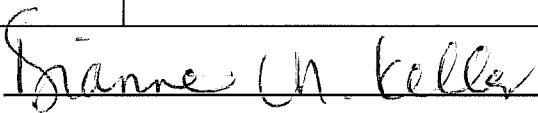
**CITY OF WASILLA
LEGISLATION STAFF REPORT**

RE: ORDINANCE SERIAL NO. 04-29: SPECIFYING STANDARDS FOR CONFLICT OF INTEREST OF CITY OFFICIALS AND EMPLOYEES.

Agenda of: April 12, 2004
Originator: Kristie Smithers, City Clerk

Date: March 30, 2004

Route to:	Department	Signature/Date
	Police	
	Recreational and Cultural Services Library, Museum	
	Public Works Planning	
X	Finance *signature required	
X	Clerk	

REVIEWED BY MAYOR DIANNE M. KELLER: 

FISCAL IMPACT: yes\$ or no Funds Available yes no

Account name/number:

Attachments: Memo from City Attorney; Re: Conflict of Interest Standards for Council Members, dated March 8, 2004

SUMMARY STATEMENT: Council Member Sande is sponsoring the attached Ordinance, which states in more detail the standards that the Council should apply in determining whether one of its members would have a conflict of interest in acting upon a matter before the Council.

The proposed amendment adds more specific guidance on when a Council Member may have a conflict of interest, however, this guidance does not eliminate the need for the Council to exercise judgment in resolving issues of conflict of interest.

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March 8, 2004

via FACSIMILE and FIRST CLASS MAIL

Mayor and Members of the City Council
City of Wasilla
290 East Herning Avenue
Wasilla, Alaska 99654-7091

RECEIVED
MAR 09 2004
CLERK'S OFFICE
CITY OF WASILLA

Re: Conflict of Interest Standards for Council Members; Our File No. 505,780.69

Ladies and Gentlemen:

At the February 23, 2004 Council meeting, I was asked to draft an ordinance stating in more detail the standards that the Council should apply in determining whether one of its members would have a conflict of interest in acting upon a matter before the Council. A draft of such an ordinance is enclosed for your consideration. The amendment adds more specific guidance on when a Council member has a conflict of interest. However, this specific guidance does not eliminate the need for the Council to exercise judgment in resolving issues of conflict of interest.

While Council members may prefer a set of "bright line" rules for resolving questions of conflict of interest, conflict of interest determinations cannot be made in such a mechanical fashion. Cases will arise where it is clear that a conflict of interest either does or does not exist; however, determining whether there is a conflict of interest often requires the application of judgment to the circumstances of a specific situation.

To assist the council in addressing conflict of interest issues, I also offer the following discussion of the subject. Much of what follows was in a letter on the same subject that I prepared for the Council in 2000. However, a review of this discussion may be useful in the present context, particularly for Council members who have been elected since that time.

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1. *The Requirement that Each Member Present Vote on All Questions before the Body.*

By statute, each Council member present at a council meeting shall vote on every question, unless required to abstain from voting on a question by law.¹ The common law also recognized a duty on the part of Council members to vote on questions before the body. As one court stated:

A councilman is elected for the purpose of expressing an opinion. Action, and not inaction, is a duty that he assumes with the office.²

As these authorities indicate, the general rule is that Council members who are present at a meeting participate in all matters that come before the meeting. There must be sufficient legal justification for a Council member to abstain from voting on a matter. The principal justification for abstention is conflict of interest.

2. *Conflicts of Interest.*

A. *Introduction.*

Any of the following legal requirements may restrict a Council member's participation in a matter based on conflict of interest.

- Title 29 of the Alaska Statutes and the Wasilla Municipal Code require disclosure and abstention from voting on a matter in which the council member has a "substantial financial interest."
- The common law prohibits conflicts of interest in broader and more rigorous terms than the statutory disclosure and abstention requirement, particularly with respect to a Council member voting on a City contract in which the Council member has a financial interest.
- The Wasilla Municipal Code provides specific rules related to certain situations in which a Council member would have a conflict of interest.

¹ AS 29.20.160(d) provides in relevant part:

Each [Council] member present shall vote on every question, unless required to abstain from voting on a question by law. The final vote of each member on each ordinance, resolution or substantive motion shall be recorded "yes" or "no", except that if the vote is unanimous it may be recorded as "unanimous."

² *Babiyak v. Alten*, 154 N.E.2d 14, 19 (Ohio App. 1958).

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B. Disclosure and Abstention under Title 29 and the Wasilla Municipal Code.

i. The Disclosure and Abstention Requirement.

Title 29 of the Alaska Statutes requires that the City adopt the following rules for addressing a potential conflict of interest by a Council member:

- A member of the Council shall declare a substantial financial interest the member has in an official action and ask to be excused from a vote on the matter.
- The Mayor (or other presiding officer) shall rule on a request by a Council member to be excused from a vote.
- The decision of the presiding officer on a request by a Council member to be excused from a vote may be overridden by a majority of the Council.³

The City has adopted these rules governing Council member conflicts of interest.⁴

ii. Substantial Financial Interest.

Under the rules stated above, the key to determining whether a Council member is disqualified from participating in a matter due to conflict of interest is whether the Council member has a "substantial financial interest" in the matter. This issue has two components. First, does the Council member have a financial interest in the matter? Second, is that financial interest substantial?

Financial Interest. A Council member has a financial interest in a matter when a financial interest of the Council member may change depending on the action that the Council takes on the matter. Put simply, a Council member has a financial interest in a matter if the Council member may be richer or poorer depending on what action is taken.

A financial interest of another individual or organization also may be attributed to a Council member because of the individual's or organization's relationship to the Council member.

³ AS 29.20.010(a) requires that a municipality adopt a conflict of interest ordinance providing these rules, which appear in AS 29.20.010(a)(1) through (3).

⁴ WMC 2.20.100(A) through (C).

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- The interest of a person who is a member of a Council member's family or who lives in a Council member's household may be attributed to the Council member. Some statutes and ordinances on conflict of interest identify relationships that cause the interest of a family or household member *per se* to be attributed to a public official; however the statutes and ordinances vary in the relationships that they identify for this purpose. The enclosed ordinance includes a definition of "immediate family" that would establish such a *per se* rule. However, even with such a rule in place, the Council still may need to determine whether another relationship creates a conflict of interest under the circumstances of a particular case.
- The interest of a Council member's employer will be attributed to the Council member.
- The interest of a business of which a Council member is an owner, shareholder, partner, director, officer will be attributed to the Council member.
- The interest of a nonprofit organization of which a Council member is a director, officer or member will be attributed to the Council member.

Substantial Interest. Whether a financial interest is substantial, and therefore subject to disclosure and abstention, is determined under the circumstances of each case. The following are some factors that may be considered in determining whether a financial interest is substantial.

- The value of the interest that will be affected.
- The causal relationship between the action at issue and the effect on the interest. The more remote or speculative the relationship between the action and the effect on the interest, the less likely it is that the interest will be considered substantial.
- Whether the action will affect the Council member in the same manner as it will affect many other members of the public who are similarly situated.⁵ For example, a property-owning Council member would not have a substantial financial interest in setting the annual rate of City real property taxation, because this action would have a similar effect on all

⁵ *Carney v. State Board of Fisheries*, 785 P.2d 544, 548-549 (Alaska 1990).

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property owners in the City. In contrast, a Council member would have a substantial interest in a rezoning of an area including property owned by the Council member, because the rezoning would affect only a limited number of property owners.⁶

iii. Non-Financial Interests.

Financial interest is a necessary element of conflict of interest under the rules in Title 29 and WMC 2.20.100. A Council member's holding a strong opinion or preference about a matter does not disqualify the Council member from acting on the matter. However, a Council member's predisposition or bias concerning a quasi-judicial action (one involving the application of law and facts to determine the rights or obligations of a particular person or organization) may disqualify the Council member from participating in the action.

iv. Procedure for Determining Conflict of Interest.

The procedure to determine whether a Council member is required to abstain due to conflict of interest should begin with the Council member's disclosure of a substantial financial interest in a matter before the Council. Before each Council meeting, each Council member should review the agenda for the meeting carefully to determine whether the Council member has a substantial financial interest in any item on the agenda. The Council member should be prepared to disclose fully and accurately on the record at the meeting any substantial financial interest that the Council member may have in a matter to be considered by the Council.

- A conflict of interest decision is made by the presiding officer or the entire Council in response to disclosure of a financial interest. Therefore, the facts concerning the financial interest must be disclosed so that the presiding officer or the entire Council may make the required decision. It is not sufficient for a Council member to assert an intent to abstain from participation in a matter based on conflict of interest without disclosing the facts concerning the Council member's financial interest, because a Council member has no authority individually to determine whether to abstain because of conflict of interest.
- Although disclosure of a financial interest is primarily the duty of the affected Council member, this does not preclude a Council member from

⁶ *Griswold v. City of Homer*, 925 P.2d 1015, 1026-1027 (Alaska 1996).

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raising the question of another Council member's financial interest in a matter before the Council.

The presiding officer rules on whether a Council member should not participate in an action due to conflict of interest. The ruling should be made on the record, with a statement of the reasons for the presiding officer's determination.

The Council may override the ruling of the presiding officer. This occurs when the Council adopts a motion to override the ruling of the presiding officer. The motion must be approved by a majority of the Council. If fewer than a majority of the Council support the motion, the ruling of the presiding officer stands as the final determination of the matter. The action of the Council should be taken by a vote on the record, in such a manner that the vote of each participating member is recorded.

- The Council member whose interest is at issue may not vote on the motion to override the presiding officer's ruling.
 - If another member of the Council has an interest similar to that of the member whose interest is at issue, the other member also may not vote on the motion to override the presiding officer's ruling.⁷
- v. ***Disclosure and Abstention Not Sufficient.***

As will be seen in the discussion of the common law of conflict of interest below, *the fact that a Council member discloses a potential conflict of interest in a matter, and the presiding officer or Council determines that there is no conflict of interest, does not assure that the Council's action on the matter will be valid, if a court later determines that the Council member in question in fact did have a substantial financial interest in the matter.*

C. ***The Common Law Rule.***

i. ***More Stringent Standard.***

The common law establishes a more stringent standard for conflict of interest than the standard in Title 29 and the Wasilla Municipal Code. Because AS 29.20.010 and WMC 2.20.100 do not explicitly replace the common law of conflict of

⁷ Carney, 785 P.2d at 546-549.

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interest, the common law still applies to actions by Council members.⁸ The broader application of the common law also is consistent with the rule that AS 29.20.010 does not preclude a municipality from enacting its own, more stringent, conflict of interest standards.⁹

ii. Common Law Conflict of Interest Prohibitions.

The common law imposes prohibitions on both actions by the Council, and actions by an interested Council member, in addition to the disclosure and abstention requirements in AS 29.20.010 and WMC 2.20.100.

- The common law invalidates any action of the Council approving a contract between the City and a Council member, even if the interested Council member discloses his interest and abstains from the Council's debate and action on the matter.¹⁰
- The common law invalidates the vote of a Council member who a reviewing court determines to have a substantial financial interest in the matter, *even if the Council member disclosed the interest and the presiding officer or the Council as a whole permitted the Council member to participate.*¹¹ Thus, even though the Council followed the conflict of interest procedure in Title 29 and the Wasilla Municipal Code, the vote of an interested Council member later may be held invalid.

iii. Action May Be Invalid Even if Supported by a Majority Without Conflict.

If the Council approves an action, and a Council member who has a substantial financial interest votes in favor of the action, the common law may invalidate the action even though the vote of the interested Council member was not necessary to

⁸ *Carney*, 785 P.2d at 547-548 (holding that AS 39.50, concerning conflict of interest of public officials, does not displace the common law). Note that the Executive Branch Ethics Act, AS 39.52, which does explicitly displace the common law, does not apply to municipal officials. *Gates v. City of Tenakee Springs*, 822 P.2d 455, 462 (Alaska 1991).

⁹ *Acevedo v. City of North Pole*, 672 P.2d 130, 133 (Alaska 1983).

¹⁰ December 3, 1982 Op. Ak. Att'y. Gen., citing *Beebe v. Supervisors of Sullivan County*, 19 N.Y.S. 629 (App. Div. 1892), aff'd 37 N.E. 566 (N.Y. 1894).

¹¹ *Carney*, 785 P.2d at 548-549.

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approve the action.¹² In reaching this conclusion, the Alaska Supreme Court reasoned as follows:

A council member's role in the adoption or rejection of an ordinance cannot necessarily be measured solely by that member's vote. A conflicted member's participation may influence the votes of the member's colleagues. Moreover, the integrity required of public officeholders demands that the appearance of impropriety be avoided; [invalidating action only where an interested council member cast the deciding vote] will not always do so.¹³

Council action supported by a Council member with a conflict of interest whose vote was not necessary to approve the action still can be invalidated if a reviewing court finds that invalidation is an appropriate remedy after considering the following factors: (i) whether the Council member disclosed the interest or the other Council members were fully aware of it; (ii) the extent of the Council member's participation in the decision; and (iii) the magnitude of the Council member's interest.¹⁴ The court indicated that these factors should be weighed as follows: (i) if the interest is undisclosed, the action generally will be invalidated, unless the extent of the Council member's participation and the magnitude of the member's interest are minimal; (ii) if the interest is disclosed, the action generally will be valid, unless the Council member's participation and interest "are so great as to create an intolerable appearance of impropriety."¹⁵

D. Specific Wasilla Municipal Code Requirements.

In addition to the general principles governing conflict of interest discussed above, the Wasilla Municipal Code contains the following provisions that address specific conflicts of interest.

i. City Employment.

During the term for which elected, and for one year thereafter, no Council member may be nominated or appointed to any paid City position which has been

¹² *Griswold v. City of Homer*, 925 P.2d 1015, 1027-1028 (Alaska 1996).

¹³ *Griswold*, 925 P.2d at 1028.

¹⁴ *Griswold*, 925 P.2d at 1029.

¹⁵ *Id.*

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created, or the salary of which has been increased, while he was a member of the Council.¹⁶

ii. City Contracts.

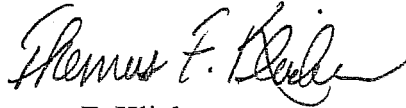
A Council member shall disclose any financial interest in any contract with the City, and shall not vote on the awarding of such a contract. Willful concealment of such an interest results in forfeiture of office. Violation of this prohibition with the knowledge of the other contracting party makes the contract voidable by the Council.¹⁷

However, the fact that a Council member's employment or Council action on a contract complies with these specific Wasilla Municipal Code rules does not exempt those matters from the application of the general conflict of interest rules discussed above.

Please let me know if I may be of further assistance in this matter.

Yours truly,

BIRCH, HORTON, BITTNER and CHEROT



Thomas F. Klinkner

TFK:cm
Enclosure

¹⁶ WMC 2.04.070.

¹⁷ WMC 6.24.230.