BEFORE THE INDEPENDENT ETHICS COMMISSION STATE OF COLORADO

Case No. 13-03

In the Matter of

JON STAVNEY, Eagle County Commissioner

RESPONSE, REQUEST FOR RECONSIDERATION OF FRIVOLOUSNESS, AND REQUEST FOR DISMISSAL BASED ON MOOTNESS

Respondent Eagle County Commissioner Jon Stavney respectfully submits this Response, Request for Reconsideration of Frivolousness, and Request for Dismissal based on Mootness ("collectively "Response") under Rule 7(K)(2) of the IEC Rules of Procedure. This Response is to the complaint filed by Mr. Chris Neuswanger on February 18, 2013.

A. Factual Background

On October 26, 2012, a land use application was made with Eagle County seeking to convert the zoning of a tract of land from commercial to multi-family residential so as to permit the development of an affordable housing project. The landowner and applicant, Remonov & Company ("Remonov"), expresses in its application an intention (if the application is approved) to donate the land to Habitat for Humanity ("HFH") for affordable housing. However, transfer of the land to HFH is not specifically proposed by Remonov as a condition of approval. In several instances throughout its application Remonov articulates the alternative that if the land is not donated to HFH, then the land will otherwise be subject to Eagle County's affordable housing regulations. Accordingly, the transfer of the Remonov land to HFH was far from a certainty at the time of application and remains so at this time.

The file is in the very beginning of the land use approval process and no formal action has been taken. The only activity on this application to date is the acceptance of the filing by the Eagle County Planning Department staff and referral of the same to various agencies for comments (i.e.

fire and EMS districts, local municipalities, metro districts, property owner associations, etc). There has been no review or discussion of the file with the Board of County Commissioners ("Commissioners"). There has been no staff report prepared identifying compliance or deficiencies in the application. There has been no housing report prepared identifying any requested changes in the application. There has been no review of the file by the Eagle County Planning Commission who must render a recommendation of approval, denial, or modification of the same. All of these items are prerequisites to scheduling the matter with the Commissioners for review. Currently, there remain drainage studies to be completed before staff reports and scheduling will even occur.

Commissioner Stavney was a Director of HFH when the Remonov application was made. This was a non-paying position. Commissioners routinely sit on non-profit boards. In Eagle County, such boards include affordable housing corporations, youth serving organizations, water boards, transportation boards, etc. The involvement directly benefits the citizens they were elected to serve through these public-private partnerships. Eagle County encourages involvement in these community-serving roles.

By letter dated January 15, 2012, the HFH Board acknowledged that the rezoning application was proposed, indicated that HFH would support the application, and encouraged those with an interest to participate in the public process. At no time was the HFH Board involved in or responsible for the Remonov application nor had the HFH Board had any formal discussion on their willingness to accept a future donation Remonov may decide to make. Such a decision would certainly be impacted by any conditions of approval that may result from the future Commissioner review. Commissioner Stavney was not privy to any conversation regarding the specifics of the application during his tenure on the HFH Board.¹

Nonetheless, Mr. Neuswanger informed Commissioner Stavney of his opinion that Commissioner Stavney's participation in the Board of County Commissioners' consideration of the Remonov application would create a conflict. Following the conflict claims made by Mr.

¹ Commissioner Stavney did not author or participate in the creation of the HFH letter. He recused himself from HFH discussion on the same. Any appearance or implication of impropriety would have been addressed through a formal disclosure at the hearing on the Remonov application.

Neuswanger to Commissioner Stavney, the Eagle County Attorney's office was asked by Commissioner Stavney to review the matter and opine on his ability to hear and decide the Remonov application when it was eventually scheduled for Commissioner review. This office reviewed the applicable statutes, interpreting case law, and discussed the substance of the application with counsel for Remonov. Based on such review and for the reasons that will be articulated later in this response, this office opined that a conflict did not exist.

Commissioner Stavney informed Mr. Neuswanger of the opinion and was told he would be turned into the Independent Ethics Commission ("IEC") if he continued to serve on both boards. Not wanting to expend taxpayer resources on such an endeavor and wanting to maintain the maximum flexibility in reviewing the Remonov application, Commissioner Stavney resigned his position on the HFH Board on February 12, 2013. See emails from Jon Stavney and John Welaj attached hereto as Exhibits "A" and "B." Such resignation occurred prior to any action relating to the file by both the HFH and Commissioner Boards, effectively mooting Mr. Neuswanger claims of conflict.

Mr. Neuswanger was informed of this resignation on February 7, 2013. *See* email from Stavney to Neuswanger dated February 7, 2013, attached to the Neuswanger complaint. His response was that he wanted Commissioner Stavney off the Commissioners Board rather than the HFH Board as it related to this file. Mr. Neuswanger indicated that he may still turn Commissioner Stavney into the IEC if he did not step down from Mr. Neuswanger's preferred Board. Mr. Neuswanger then proceeded to indicate all the reasons he was opposed to the approval of a Remonov application. Commissioner Stavney appropriately responded that he could not discuss the merits of the case ex parte with Mr. Neuswanger and that he should make his comments at a future public hearing for the benefit of the full Board of County Commissioners. *See* email from Stavney to Neuswanger dated February 8, 2013, attached to the Neuswanger complaint.

Mr. Neuswanger then filed the subject complaint.

B. Response to Complaint

1. General Denial and Summary of Argument

Commissioner Stavney denies any allegation of bias and inability to impartially review the merits of the Remonov application and apply the standards found in the Eagle County Land Use Regulations objectively to the same. Commissioner Stavney recognizes that the holding of a public office is a public trust and welcomes the IEC's role in ensuring that elected officials carry out such trust for the benefit of the people of this State.

However, Commissioner Stavney respectfully believes the IEC's role is limited by certain statutory constraints and its own adopted rules. We respectfully believe the IEC has exceeded its authority by making a non-frivolous determination in this matter as there has been no action taken by Commissioner Stavney on the land use file to date and there has been no request for an advisory opinion regarding any prospective conduct.

Accordingly, Commissioner Stavney believes a continuation of this investigation would be improper for the following reasons: 1) the IEC Rules of Procedure and statutory authority preclude consideration of potential conduct under these circumstances; 2) there has not been and cannot be a violation of an adopted standard of conduct as a matter of law; 3) the IEC is not a proper forum for a prospective due process violation complaint; and 4) the case is moot as a matter of law based on Commissioner Stavney's resignation from the HFH Board.

2. The Complaint is premature and should not be heard at this time by the IEC.

The IEC is charged with hearing complaints arising under Article XXIX and any other ethics standards of conduct. *See* C.R.S. 24-18.5-101(4). This matter does not raise Article XXIX issues. Eagle County has not adopted any other ethics standards of conduct that would be the subject of review. Accordingly, the only "other ethics standards of conduct" that may be

applicable and subject to review by the IEC are those set forth in the Colorado Code of Ethics found at C.R.S. §24-18-101 et seq. ("Code"). This is the Code that forms the subject matter of Mr. Neuswanger's complaint. He brings allegations of violating C.R.S. 24-18-105² and C.R.S. 24-18-109 of the Code. We have been asked to respond to violations of these two provisions. Accordingly, a review by the ICE and response by Commissioner Stavney must be limited to these sections. *See* C.R.S. 24-4-105(2)(a) (in order to assure all parries to an agency adjudicatory proceeding are accorded due process of law, the legal authority and jurisdiction under which any hearing is to be held must be provided); *See also* Excel Corp. V. U.S. Dep't of Agri., 397 F.3d 1285, 1297 (10th Cir. 2005) (holding that agency proceedings fail to give sufficient fair notice to justify a penalty if the alleged standards to have been violated are so ambiguous that a regulated party cannot be expected to arrive at the correct interpretation using standard tools of legal interpretation); *See also* Westmark Asset Mgmt. Corp. v. Joseph (37 p.3d 516, 518 (Colo. App. 2001) (holding that adequate notice requires sufficient information conveyed to allow a reasonable preparation for a hearing).

Any such review at this time of the provisions identified in the complaint, or any other provisions that may be under the purview of the IEC for that matter, would be premature and respectfully beyond the scope of review by the IEC for the reasons set forth below.

The IEC has adopted its own Rules of Procedure. They state that the IEC Board may issue an advisory opinion in two limited circumstances. The first is when a public officer, member of the General Assembly, local government official, or government employee submits such a request. Rule 5(A) of the IEC Rules of Procedure. Commissioner Stavney has not asked the IEC for such advisory opinion³. The second is when a person who is not a public official submits a request and such request is limited to a ruling on whether the potential conduct of the person making the request would violate adopted rules. Rule 5(b) of the IEC Rules of Procedure (emphasis added). Mr. Neuswanger has not asked the IEC to review his own conduct. The only time the

² The complaint does not set forth particulars regarding violations of C.R.S. 24-18-105. However, it is worth noting that C.R.S. 24-18-105(1) provides "the principles set forth in this provision are intended as guides to conduct and cannot form the basis of a violation." Regardless, any claims under this section must be dismissed for the same reasons set forth herein relating to C.R.S. 24-18-109.

³ Commissioner Stavney has not asked for such an opinion as the allegations in the complaint are moot based on his stepping down from the HFH Board.

IEC is authorized by its own rules to address potential conduct is when one of these two types of requests is made. Accordingly, there is no applicable request or rule allowing the IEC board to review the potential or hypothetical conduct of Mr. Stavney at this time.

The limits on review of potential conduct found in the IEC Rules of Procedure are bolstered by the statutory limits set forth in C.R.S. 24-18.5-101 (b) (I), (II) and (III) where the powers and duties, as well as associated limits, of the IEC are set forth. Section I states that the IEC has the power to issue advisory opinion and letter rulings arising under article XXIX and other standards of conduct and reporting requirements as provided by law. Section II states that "the commission shall prepare a response to a request for an advisory opinion from a ... local government official." (emphasis added). Section III states that "(a)ny person who is not a ... local government official ... may submit a request to the commission for a letter ruling...concerning whether the potential conduct of the person making the request satisfies the requirements of article XXIX." (emphasis added). These two sections define the application of Section I to the two limited situations where a request is either made by a local government official or a private citizen regarding his/her own conduct. The IEC is not authorized by statute or its own rules to issue advisory opinions or letter rulings on its own initiative.4 Accordingly, any review of prospective conduct of Commissioner Stavney voting on a land use file that has yet to be scheduled for commissioner review is not timely and respectfully beyond the purview of the IEC.

3. The Complaint fails to identify any official action in support of a standard of conduct violation.

As stated above, the IEC cannot issue findings pertaining to prospective conduct regarding this matter and is, therefore, limited to reviewing the allegations of the complaint for *actual* violations of Article XXIX or other standards of conduct. Prospective conduct cannot form the basis of a complaint based on the IEC's adopted Rules of Procedure and the Code.

⁴ See Schlapp ex rel. Schlapp v. Colo. Dept. of Health Care Policy & Fin., 284 P.3d 177, 182 (Colo.App. 2012) (holding that administrative agencies are legally bound to comply strictly with their enabling statute. Agency rules that are inconsistent with or contrary to the statue pursuant to which they were promulgated are void).

Complaint is defined by the IEC Rules of Procedure as "a written document filed with the IEC setting forth facts asking whether a ... local government official... has violated the provisions of Article XXIX or any other standards of conduct or reporting requirements as provided by law. (emphasis added). Rule 3(A)(4) of the IEC Rules of Procedure. Further, Rule 7(A) of the IEC Rules of Procedure mandates that there be an allegation that a government official "has failed to comply with the ... standards of conduct" (emphasis added). Rule 7(A) of the ICE Rules of Procedure. There has been no such allegation of actual violations made by Mr. Neuswanger for the simple reason that there had been no action taken by Commissioner Stavney regarding the Remonov application at the time of Mr. Neuswanger's complaint and there remains no action taken by Commissioner Stavney to date. Per both the IEC Rules of Procedure and the Code, a prerequisite condition to bringing a complaint is actual conduct or action taken by an elected official that fails to comply with a stated standard of conduct. This condition precedent cannot be shown in this matter.

As with the IEC Rules of Procedure, the Code also mandates allegations of actual conduct for a claim to survive. CRS 24-18-109(1)(b) requires proof beyond a reasonable doubt that a local government official **performed an official act** directly and substantially affecting to its economic benefit a business or other undertaking in which he is engaged as counsel, consultant, representative or agent. (emphasis added). The complaint does not begin to meet the high burden of proof required to prevail and is defective on its face. This Code section requires 1) an official act 2) that affects a business or undertaking and 3) in which a local government official is currently being engaged as a counsel, consultant, representative or agent. The complaint does not allege actual violations of any of these requirements.

i. There has been no Official Act.

"Official act" or "official action" is defined as "any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." C.R.S. 24-18-102(7). The statutes creating the IEC adopt the exact same definition

⁵ The complaint is further defective in its failure to follow Rule 7(d)(4). The complaint does not contain a signed statement that, to the best of the complainant's knowledge, information and belief, the facts and any allegations set out in the complaint are true.

of official act. See C.R.S. 24-18.5-101(5)(b)(I). The act of merely sitting on two Boards alone is never enough to satisfy this requirement absent some sort of formal action. To hold otherwise would discourage all elected officials from ever participating in outside organizations. Such participation is critical to achieve consistent responses to regional issues such as transportation, housing, water, population growth, etc. We have many town and county board members sitting on joint committees or other organizations that deal with such local, regional, and statewide issues. Multiple board representation is even more critical in small communities where those with an interest in serving may be limited. There would be a chilling effect on elected officials if the IEC were to hold that officials are automatically precluded from representing his/her constituents if a file is ever made, even if made by an unrelated third party as in this case, that may benefit one of these outside organizations without a subsequent opportunity afforded to mitigate or cure potential conflicts. It could have the unintended consequence of removing those best suited and willing to serve from these outside organizations.

It is for these reasons that both our Code and the IEC statutes mandate that there be an official act before there can be a conflict. This allows local government officials the opportunity to mitigate or moot the conflict by taking action similar to what Commissioner Stavney did in this situation. Such mitigation could include disclosure, recusal, resignation, etc. All such corrective actions are precluded if a violation can be found and a non-frivolous determination made prior to an official action. As in this situation, it would allow a citizen to utilize the IEC process to stall a file he is opposed to or try to manipulate a board more favorable to his cause. Requiring an official action provides the necessary flexibility for elected officials to continue to serve these worthy outside organizations while mitigating any potential conflicts that may arise prior to official action being taken.

ii. There has been no direct and substantial effect of an economic benefit to a business or undertaking.

You cannot have a business or other undertaking substantially effected to its economic benefit when a decision has yet to be made. The Code requires a showing that official action substantially benefited a business or undertaking. The complaint alleges that HFH will reap an

economic benefit. This required benefit showing cannot happen unless and until there is a vote to approve the file. Even upon approval, the required benefit showing cannot happen unless and until the applicant decides to transfer the property to HFH and HFH subsequently decides to accept the transfer.

Any file seeking to upzone density in Eagle County will be required to provide some aspect of affordable housing as a community benefit. This may be done in many ways such as making cash payment in lieu of providing housing, constructing a certain level of affordable units, having units constructed by a third party, or donating land to an affordable housing provider such as HFH. The Remonov application is functionally no different than any land use file coming through Eagle County except that the applicant has indicated a present intention to satisfy his affordable housing obligations through a land donation. This intention may certainly change throughout the land use process based on what requirements or conditions staff, the planning commission, or the commissioners may require. For instance, issues such as required setbacks, drainage, access, design guidelines, etc. may make the provision of HFH affordable housing financially impractical. The developer may choose to build housing that serves a higher area median income than HFH to offset any additional costs that come from conditions of approval.

There are a myriad of unknowns at this time that preclude the finding of a direct economic benefit to HFH. Rather, any land use approval would provide only a speculative and incidental benefit to HFH. Without the benefit of a hearing and ultimate action, we cannot know if this prerequisite finding can be shown.

iii. There is no relationship as counsel, consultant, representative or agent.

Further supportive of our position that a non-frivolous determination was premature is the third requisite finding in the Code that Commissioner Stavney "is engaged as counsel, consultant, representative or agent" (emphasis added). The Code does not state that Commissioner Stavney is precluded from hearing a file if he ever was engaged as counsel, consultant, representative or agent. To the contrary, it requires an ongoing relationship at the time an official action is made. The use of the present tense "is" rather than the past tense "was" demonstrates the legislative

intent to allow a government official to mitigate any perceived or actual conflicts prior to official action. Stepping down from the HFH Board prior to such action has always been contemplated as an appropriate corrective action in the Code.

It is uncontroverted that Commissioner Stavney resigned his position from the HFH Board on February 12, 2013. Mr. Neuswanger's reliance on an outdated website doesn't create factual issues as to the resignation. Mr. Neuswanger himself acknowledges that "had Commissioner Stavney stepped down (from the HFH Board) before the application was initiated with Eagle County it might be reasonable to assume he has no prejudices in this matter." Mr. Neuswanger correctly recognizes that there would be no conflict if Commissioner Stavney took the corrective action of resigning from the HFH Board. However, he incorrectly assumes such corrective action must have occurred prior to the application being filed. Such a position is in direct conflict with the plain language of the Code and nonsensical in that elected officials may not even know of a potential conflict until an application is scheduled for their review. That is particularly true when, as here, the application is made by a private developer and not the HFH Board.⁶

Applying the Code mandates rather than Mr. Neuswanger's preferences, it becomes clear that stepping down from the HFH Board prior to the file being acted upon by the Commissioners is appropriate and moots any claims of conflict as a matter of law. The Commissioners have not met or discussed this file in any manner and will not do so until such time as it has been reviewed by staff, scheduled and heard by the local planning commission, and scheduled for Commissioner review in a public, posted meeting. There is functionally no difference in stepping down from the HFH Board at this time or stepping down prior to an application being made.

⁶ As stated earlier, HFH sent a letter supporting the application as proposed, but Commissioner Stavney had no involvement with the creation of such letter and recused himself from HFH communication on the same; a fact that would have been disclosed if the Commissioner were provided the opportunity to actually conduct a hearing prior to the filing of the complaint.

4. A Due Process claim is also not properly before the IEC Board.

To the extent a reading of the complaint can be strained to include a due process issue, such complaint also must be dismissed as a matter of law. The 2013-2015 Ethics Handbook created by the IEC states that "(s)ometimes a situation arises in which contemplated behavior is legal, but may nonetheless raise concerns. The appearance of impropriety is sometimes referred to as "the smell test." 2013-2015 Ethics Handbook, Issues of Concern, Section D. This provision is applicable when an advisory opinion is sought, but it does not form the basis of the IEC's independent review of prospective conduct. Such action is precluded by the applicable statutes and adopted IEC Rules of Procedure as identified above.

A requirement that conduct actually occur prior to applying an appearance of impropriety review is bolstered by the purpose section of Article XXIX. Local government officials are required to "avoid **conduct** that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated." (emphasis added). Colorado Constitution, Article XXIX, Section 1(C). The Code and Article XXIX recognize that some conduct represents per se conflicts while other conduct may or may not create a conflict depending upon the surrounding circumstances. Under both scenarios, however, there must be some conduct to evaluate. Here there is not. More importantly, there cannot be conduct for evaluation as the issue was mooted by Commissioner Stavney's resignation from the HFH Board.

Additionally, a complaint for due process violation requires formal action to have occurred prior to review by the IEC. The IEC cannot adopt by fiat a subjective or random "smell test." See Mattox v. The Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362, 1367 (10th Crt Appeals) (holding that courts can adopt moral character standards for bar admission but that "any standard adopted should satisfy the requirements of specificity and regularity of application that give content to the due process guarantees of the constitution."). This requirement for specificity in enforceable ethical codes is bolstered by the purpose statement of Article XXIX. "To ensure propriety and to preserve public confidence, they (public officers) must have the benefit of specific standards to guide their conduct...

(emphasis added). <u>Colorado Constitution, Article XXIX, Section 1(e)</u>. Accordingly, the reference to a "smell test" in the Ethics Handbook section is simply recognition of the procedural due process requirements already required by local government officials when hearing a land use file or otherwise acting in a quasi-judicial capacity.

When a public official performs a quasi-judicial act, the due process clause of the constitution comes into play. See Hide-A-Way Massage Parlor, Inc. v. Bd. of Cnty Comm'rs, 597 564 (Colo. 1979); Elizondo v. State, 570 P.2d 518 (Colo. 1977). However, under modern standing law, a private plaintiff seeking to bring suit must demonstrate that he has suffered an "injury in fact." See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (explaining that the constitutional minimum of standing requires an injury to a legally protected interest). Such injury must be actual or imminent, not conjectural or hypothetical. Id. Additionally, a due process claim requires that the plaintiff show "conduct that deprived the plaintiff of rights, privileges, or immunities secured by the Constitution..." (emphasis added). Hillside Community Church v. Olson, 58 P.3d 1021, 1025 (Colo. 2002) (holding that neighbors to a land use application do not have a recognizable property right in a land use hearing sufficient to invoke procedural due process protections).

Bringing a complaint under an appearance of impropriety or "smell test" is bringing a complaint based on due process. The IEC is subject to the same guiding principles and the requirements that there be an actual violation or injury in fact of a protected interest rather than a hypothetical, conjectural violation as set forth in Mr. Neuswanger's complaint. Article XXIX does not grant the IEC authority to hear due process complaints of neighbors where courts themselves are without authority to do so. Accordingly, a review of the complaint is also premature under this analysis.

Even assuming a due process claim was ripe for IEC review, the complaint is defective in the necessary allegations to support such a claim. In quantifying the appearance of impropriety, the 10th Circuit has recognized that "(i)mpartiality of the tribunal is an essential element of due process." *See* Riggins v. Goodman, 572 F.3d 1101, 112 (10th Cir. 20090) (citing Withrow v. Larking, 421 U.S. 35, 46-47 (1975). However, there is a presumption of honesty, integrity and

impartiality on the part of decision makers, and a substantial showing of personal bias is required to disqualify a hearing officer or tribunal. (emphasis added) <u>Id.</u> Any due process analysis that might be applied by the IEC is subject to these presumptions and the facts of this case do not begin to reach this high standard for disqualification.

There has been no review or discussion of the Remonov application with the Commissioners; there have been no planning or housing staff reports; there has been no review or recommendation by the planning commission; there has been no decision by the developer to transfer the property to HFH; there has been no decision by HFH to accept the property; and there has been no detailed discussion by the HFH Board regarding the application or property acquisition. The only statements Commissioner Stavney has made to date regarding the particulars of this file are his statements to Mr. Neuswanger that it would be inappropriate to discuss Mr. Neuswanger's opposition to the file outside of a noticed public hearing and encouraging Mr. Neuswanger to participate in the public process. *See* email from Stavney to Neuswanger dated 2/8/13 attached to the Neuswanger complaint.

There simply has been no allegation that Commissioner Stavney is in any way incapable of hearing this file objectively. The only allegation is that he was a sitting member on the HFH Board at the time of the Remonov application, a position he has since resigned. The mere sitting on two boards at the time a file is made is not dispositive of a conflict. As a matter of law, much more is required to support such a claim. The complaint falls far short of the substantial showing of personal bias required for disqualification. *See* Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976) (holding that mere familiarity with the fact of a case gained by an agency in the performance of its statutory role does not disqualify a decision maker.); Johnson v. City Council of the City of Glendale, 595 P.2d 701 (Colo.App. 1979) (holding that it was not impermissible for board members during a personnel appeal to receive evidence at a prior "informal hearing" and then make a final decision after a subsequent formal hearing); Mountain States Tel. Co. v. Pub. Utils. Comm'n, 763 P.2d 1020, 1028 (Colo. 1988) (holding that a decision maker is not disqualified on due process grounds simply for having taken a position, even in public, on a policy issue related to the dispute, if there is not a showing that the decision maker is incapable of judging the particular controversy fairly on the basis of its

own circumstances.); <u>Applebaugh v. Bd. of Cty. Comm'rs</u>, 837 P.2d 304 (Colo. App. 1992) (holding there was not a denial of due process in a rezoning hearing in which the Board was both the applicant and the decision maker).

The cases that have found a due process violation in a quasi-judicial hearing context emphasize the exceptional circumstances required for disqualification of the local decision maker based on the appearance of impropriety. *See* Hillside Community Church v. Olson, 58 P.3d 1021 (Colo. 2002) (holding that neighbors to a land use application do not have a recognizable property right in a land use hearing sufficient to invoke procedural due process); Caperton v. A.T. Massey Coal Co. Inc., 556 U.S. 868, 883 (holding that a West Virginia Supreme Court of Appeals Justice should have recused himself when a litigant contributed over \$3,000,000.00 to his election campaign. The Court said "(o)n these extreme facts the probability of actual bias rises to an unconstitutional level."); Staton v. Mayes, 552 F.2d 908 (10th Cir. 1977) (holding that actual bias was shown with respect to a hearing on the termination of a school superintendent because three of the school board members promised to terminate the superintended during their elections campaigns).

5. The Complaint is now moot and must be dismissed.

This IEC has indicated a willingness to address "potential violations" in its rulings in the matter of Colorado Ethics Watch v. Scott Gessler. See Order Denying Motion To Dismiss and Request For Reconsideration of Frivolous Determination in Complaint No. 12-07. In that case, the IEC found the complaint alleged "sufficient facts warranting a Commission investigation into a potential violation of the Constitution or other standards of conduct..." (emphasis added). Id. Such case is easily distinguishable from the facts at hand. The Gessler complaint was for attending the Republican National Lawyers Association and Republican National Convention. The complaint was for conduct and action that had already occurred. It did not seek to address conduct that may occur in the future. It was those past actions that the IEC determined could lead to "potential violations." Here, there has 1) been no conduct and 2) there can be no potential violations for future conduct as the matter is now moot. Even if the IEC Board wished to investigate potential conduct in violation of statute and its own Rules of Procedure,

Commissioner Stavney has resigned from the HFH Board thereby mooting any conduct that could possibly violate the Constitution or other standards of conduct involving the Remonov application.

As a matter of law, Commissioner Stavney can no longer have a personal or private interest in a matter proposed or pending before the Eagle County Commissioners and he should be free to vote on the Remonov application. This complaint should be dismissed as moot. Continuing to investigate this matter for conduct that has yet to occur is equivalent to a police officer continuing to investigate Commissioner Stavney for speeding violations he may potentially commit next week. Continuing to investigate this matter after Commissioner Stavney has resigned from the HFH Board is equivalent to the same police officer investigating Commissioner Stavney for future speeding violations even though he has since sold his car.

E. Requested Relief

IEC Rule 7(G)(1) states that "(a) complaint shall be dismissed by the IEC" if "(t)he complaint is frivolous." The IEC Rules of Procedure define "frivolous" as "a complaint filed without a rational argument for the IEC's involvement based on the facts or law." The complaint fails to meet the statutory requisites as stated above. Accordingly, Commissioner Stavney respectfully requests that the IEC:

- A) Reconsider its non-frivolous determination and make a frivolous determination based on the premature nature of the complaint, lack of standing or injury, and failure to meet the necessary prerequisites for IEC review;
- B) Dismiss the complaint as now being moot; and
- C) In the event the IEC wishes to pursue this matter further, set an expedited hearing in order to avoid unnecessary delay to the applicant in the Remonov matter.

EAGLE COUNTY ATTORNEY'S OFFICE

By:

Bryan Treu, Eagle County Attorney

AFFIRMATION OF JON STAVNEY

I affirm that I have read the above submission and that, to the best of my knowledge, information and belief, the facts set forth in the same are true and accurate.

By:

Jon Stavney, Commissioner

STATE OF COLORADO)

SS.

COUNTY OF EAGLE)

The foregoing affirmation was acknowledged before me this and day of April, 2013 by Jon Stavney, Chairman of the Eagle County Board of County Commissioners.

Witness my hand and official seal.

Notary Public

mudell

My commission expires: 3 24 16

DEBORAH LYNN CHURCHILL NOTARY PUBLIC STATE OF COLORADO MY COMMISSION EXPIRES 3/24/2015

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2013, I submitted via first class mail and email the foregoing RESPONSE, REQUEST FOR RECONSIDERATION OF FRIVOLOUSNESS, AND REQUEST FOR DISMISSAL BASED ON MOOTNESS to the following recipients:

Colorado Independent Ethics Commission c/o Jane Feldman, Executive Director 101 West Colfax Avenue, Suite 500 Denver, Colorado 80202

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February 12, 2013

Mr. John Welaj, Executive Director Habitat for Humanity of Eagle and Lake Counties PO Box 4149 Avon, CO 81620

Dear John:

Please accept this letter confirming my resignation from the Habitat Board of Directors. While not legally a conflict of interest with my position as county commissioner, my service on this board may give the appearance of a conflict for future land use files.

It has been a pleasure working with the Habitat team over the last three years, and I would love to continue to be involved in any way possible.

Thank you for the opportunity to work with this great program.





From: "John Welaj" <john@habitatvailvalley.org>

Date: April 1, 2013, 1:25:44 PM MDT

To: "Jon Stavney" < Jon. Stavney@eaglecounty.us>

Subject: HFH Board Member Resignation

Hi Jon -

I received your voice message on Friday but I was out of town (and out of cell range).

Just to confirm our understanding, Habitat received your notification of Board resignation on Feb 12, 2013.

This resignation was accepted immediately and we subsequently removed your name from letterhead, Board correspondence, web-site, etc.

As a donor and supporter, you may still receive general Habitat correspondence regarding current events and non-Board related information.

Please feel free to contact me if you need of any additional clarifications.

Thank you for your service,

John Welaj

Executive Director

