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October 8, 2009

The Independent Ethics Commission
State of Colorado
c/o Jane T. Feldman
Executive Director
Via E-mail: jane.feldman@state.co.us

Re: Rex Burns Ethics Complaint

This will constitute Rex Burns' Response to the ethics complaint directed to him on August 25, 2009.

SUBMITTED EXHIBITS

- A. Intergovernmental Agreement for Stormwater Cooperation and Management.
- B. Minutes from the February 9, 2009 Boxelder Stormwater Authority Board of Directors' meeting.
- C. Affidavit of Henry K. Obermeyer.
- D. Affidavit of Rex Burns.
- E. Agreement for Professional Management Services by and between Boxelder Basin Regional Stormwater Authority and Local Government Solutions, LLC.

HISTORY

Larimer County applied for and received a Federal Grant to design and construct stormwater mitigation structures in the Boxelder Creek drainage basin in Larimer County. The grant was awarded. Mr. Burns, a professional engineer, was employed in the Larimer County Engineering Department and included among his duties were pursuing and administering this grant. The contemplated drainage improvements include areas within the corporate limits of, or are included in, the growth management areas of the City of Fort Collins and the Town of Wellington, as well as unincorporated areas of Larimer County. To carry out the purposes of the grant and to operate and maintain the contemplated drainage improvements, the three entities formed the Boxelder Basin Regional Stormwater Authority, a separate legal entity, under the provisions of C.R.S. 24-1-204.2(2). The Stormwater Authority is thus subject to all sunshine and other transparency laws applicable to government. A copy of the Intergovernmental Agreement forming the Authority is submitted as an exhibit to this Response. In the ordinary course of the Authority business, the Board of Directors decided to hire a manager to handle its day-to-day affairs. Mr. Burns expressed an interest in that position and the Authority Board of Directors decided to hire him.

Among the reasons for his hire are that Mr. Burns was very familiar with the projects in the Boxelder basin, had knowledge of these projects, would save public funds for he would not need any on-the-job training, and would avoid duplication of effort. See the Minutes of February 9, 2009 and the Obermeyer Affidavit submitted as exhibits. Most importantly, for purposes of this proceeding, Mr. Burns' compensation is market-based and he receives no extraordinary or additional compensation. Moreover, being that Larimer County is a member of the Authority, the County and Authority have a common interest, not a conflict of interest. Mr. Burns is in absolutely no position to use his influence in a manner that would give either entity unfair advantages.

NO JURISDICTION—DEFINITION OF PERSON

Mr. Burns believes the Ethics Commission has no jurisdiction over this complaint because the issue does not address conduct prohibited by the Gift Ban contained in Article XXIX of the Colorado Constitution. This has to do with whether the Stormwater Authority is to be considered a “person” for purposes of Section 3(2) of Article XXIX. The undersigned is aware of the Position Statement 09-04 taking a contrary position. The position statement should be reconsidered for a number of reasons:

First, Article XXIX contains specific definitions of “Local Government” and “local government official”. The term “local government” is very conspicuous by its absence from the definition of “person”.

Second, the Commission takes the position that “local government” is included by implication in the definition of person by a reference to “other legal entity”. The problem with that line of reasoning is that “local government” is a specifically defined term and carries specific criteria. “Other legal entity” is a general term. In construing documents and writings, the specific trumps the general. If the drafters of Article XXIX had intended to include the specific “local government” in the definition of “person”, it would have said so instead of leaving that question to an interpretation of “other legal entity”.

Third, using the section “f” reference as a means to interpret the meaning of “person” is improper unless one first determines that the definition of “person” is vague or ambiguous. The definition of “person” is clear and complete on its face and contains no ambiguity. There is no need to either create an ambiguity, or rewrite the definition of “person” with resort to section “f”. Moreover, the section “f” reference can be read another reasonable way that does not affect the definition of “person”. Section “f” contains two references to state or local government; one to other state or local government and one to the state or local government. “The” state or local government obviously applies to the employer of the individual involved. “Other” state or local government can reasonably be read as applying to those state or local governments not included in Section XXIX; namely out-of-state entities.

Fourth, policy suggests that “person” need not include state or local governments because state and local governments are subject to all open meeting laws, public records laws, individual public disclosure laws, and the public budgeting process. Private “persons” are not subject to

this transparency. This is a sound policy reason to treat “persons” as only those entities not subject to public transparency and scrutiny.

Fifth, the purpose of the gift ban, including the ban on offers of employment, is to prohibit the employee receiving the gift from providing a financial or competitive advantage to the donor of the gift. This policy makes sense when the donor is a private person. However, since governments exist to carry out public policy and public purposes, the idea of financial or other competitive advantages to a government is meaningless and inapplicable. This is another policy reason why it’s reasonable to assume “local government” is not included in the definition of “person”.

**THE COMPLAINT SHOULD BE DISMISSED BASED UPON
SECTION 24-18.5-101(5)(a)**

This statute requires the Commission to dismiss any complaint that does not “allege that a . . . governmental employee . . . has accepted any gift or other thing of value for private gain or personal financial gain”. While Mr. Fry mentions the words “personal gain” in his complaint, nowhere does he allege facts that support his conclusion. It is a simple matter to repeat the language of Article XXIX and then allege, without supporting facts, that there is a violation. 24-18.5(5)(b)(II) provides a specific definition of “private gain” or “personal financial gain” which essentially says that the employee is prohibited from accepting a thing of value in exchange for influencing or performing an official act. There is no allegation in Mr. Fry’s materials that suggests either that Mr. Burns accepted a gratuity in exchange for an official act or that his compensation is excessive. In fact, Mr. Fry only alleges that Mr. Burns is employed by the Authority, but he does not allege his pay is excessive, nor does he allege an official act taken in violation of the statutes.

**POSITION STATEMENT 09-03—CLARIFICATION OF “PROMISES OR
NEGOTIATIONS OF FUTURE EMPLOYMENT”**

The facts of this matter establish beyond doubt that Mr. Burns’ employment with the Authority is consistent with governmental ethics and is not a violation of either the letter or spirit of Article XXIX. In its position statement clarifying “promises or negotiations of future employment” the Commission focused on the real issue. The Commission noted that the compensation should be “patently excessive” for the services rendered that would suggest the intent to influence an official act. In that statement the Commission noted that it would indeed be a rare case to implicate section 3(2) in an employment setting.

Here, as noted by Mr. Obermeyer, the Authority intended to compensate Mr. Burns at market rates and it did so. According to Mr. Obermeyer’s Affidavit and the February 9, 2009 minutes, the discussions involving Mr. Burns’ working for the Authority were carried out by the Authority Board in the presence of the Authority’s attorney, who certainly would have been sensitive to issues concerning conflicts and favoritism. The remuneration provided Mr. Burns is appropriate for his position and since he is no longer employed by Larimer County he is in no position to take any action to provide unfair advantage to the Authority. The Authority decided to hire Mr. Burns for the obvious reason that given his background, experience, and training, he

was the single-best person to handle the affairs of the Authority, especially when you consider that the Authority is in a start-up local government.

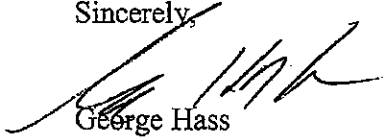
SUMMARY AND CONCLUSION

The facts of this matter clearly indicate that there is no ethics violation or even a circumstance that one could perceive a violation. At most, Mr. Fry's complaint shows only a temporal relationship between Mr. Burns leaving County employment and providing services for the start-up affairs of the Authority. Mr. Burns' employment is a straight-forward and market-based decision. The Authority is a local government with the specialized public purpose of designing, erecting, and maintaining stormwater and flood control facilities. None of this lends itself to an Article XIX issue because the Authority is not the type of entity that could be favored or receive preferential treatment based upon an offer of employment. And finally, as a matter of fact, Mr. Burns' employment with the Authority is a decision made and for legitimate efficiency purposes and there is absolutely no suggestion that his remuneration is "patently excessive" which is the standard established by the Commission in its Position Statement regarding employment or offers of employment.

The complaint against Mr. Burns should be dismissed.

Thank you for your consideration.

Sincerely,



George Hass
County Attorney