

City of Sioux Falls
BOARD OF ETHICS

ADVISORY OPINION NO. 20-1

Request for Opinion

Pursuant to § 35.057 of the Code of Ordinances of Sioux Falls, South Dakota, Sioux Falls City Councilor Janet Brekke requested an advisory opinion and presented the following questions at a meeting of the Board of Ethics in the Commission Room in City Hall at 2:00 p.m. on March 6, 2020.

- 1. Can I create a PAC whose funds will be utilized to support candidates in city elections?*
- 2. Can I host fundraisers for candidates in city elections using my title and position as a Sioux Falls City Council member?*
- 3. Can I use my title as a Sioux Falls City Council member to assist candidates in city elections by appearing in a postcard supporting their candidacy?*

In addition, Councilor Brekke submitted a fourth question concerning her past behavior in the following occurrences:

Did I violate the Sioux Falls Code of Ethics and/or Conflict of Interest Ordinance when as a candidate for city council member in 2018, I accepted the following:

- 1. A 300.00 donation to my campaign by another council member as an individual.*
- 2. A robo call supporting my candidacy from Theresa Stehly in her individual capacity.*
- 3. Accepted misc. independent contributions from friends of Council member Theresa Stehly*

A sub-part of Councilor Brekke's fourth question asked whether she could "*engage in activities 1, 2, 3 above as a seated Sioux Falls City Council member on behalf of declared candidates during the 2020 election.*"

All of the questions listed above were listed on page 1 of Councilor Brekke's attachment to her Request for Advisory Opinion. On pages 3 and 4 of said attachment, Councilor Brekke submitted four additional questions as follows:

1. *Whether participating in the above stated activities per attachments A, B and C creates an "appearance of impropriety" pursuant to §34.005 Canon Three (a): A City Council member should avoid impropriety and the appearance of impropriety in his or her activities.*

2. *Whether the above stated activities per attachments A, B and C are inappropriate political activities pursuant to §34.009 Canon Seven (b): A city council member should refrain from political activity inappropriate to his or her office.*

3. *Whether the above activities per attachments A, B & C grant special advantage to an individual(s) and/or use my elected position to secure special advantage to others, pursuant to Conflict of Interests §35.054 Standards of Conduct; City Council member (d) and/or (e).*

(d) Grant any special consideration, treatment or advantage to any citizen, individual, business organization or group beyond that which is normally available to every other citizen, individual, business organization or group;

(e) Use their elected position to secure special advantages, privileges or exemptions for themselves or others;

4. *As to 1, 2 and 3, past conduct, I am requesting an opinion on whether those activities were permitted because they were performed in the office holders' individual capacity or whether they are subject to Canon Three (a), Canon Seven (b) and §35.054 (d) & (e) stated above.*

Law

As provided in § 35.057 of the Code of Ordinances of Sioux Falls, South Dakota, any city official can request a Board of Ethics Advisory Opinion to review their own past behavior:

§ 35.057 of the Code of Ordinances of Sioux Falls South Dakota

Advisory opinions may be requested by any city official who seeks the board of ethics' opinion to guide that official's own conduct. Only a city official may request an advisory opinion from the board of ethics about his or her conduct or activities, provided that the request is made prior to the filing of a complaint as outlined in this chapter. Declared candidates for a municipal election can seek advisory opinions from the board of ethics about his or her conduct or activities. A request for an advisory opinion may include the request to review conduct that has already occurred that has not yet been the subject of a complaint to the board or a report to the

fraud coordination committee. The “self-reporting” on past incidents shall not act as a bar against possible sanctions for that conduct, but may be considered in mitigation of any possible penalties otherwise imposed.

Pursuant to City Ordinance § 34.005 (Canon Three), the Board of Ethics has the authority within the bounds of federal statutes, state statutes, and city ordinances to determine what constitutes an appearance of impropriety.

§ 34.005 of the Code of Ordinances of Sioux Falls, South Dakota

- (a) A city council member should avoid impropriety and the appearance of impropriety in all his or her activities.
- (b) It is essential that city government attract those citizens best qualified and willing to serve. City council members have legitimate interests (economic, professional and vocational) of a private nature. City council members should not be denied, and should not deny to other city council members or citizens, the opportunity to acquire, retain and pursue private interests, economic or otherwise, except when conflicts with their responsibility to the public cannot be avoided.
- (c) City council members should conduct themselves at all times in a manner that promotes public confidence in the integrity of their office and of city government.
- (d) City council members should not allow family, social or other relationships to unduly influence their conduct or judgment and should not lend the prestige of the office of city council member to advance the private interests of others; nor should they convey or permit others to convey the impression that they are in a special position to influence them.

The City of Sioux Falls, at City Ordinance § 38.001, has adopted South Dakota state statutes as they relate to elections and campaign finance laws:

§ 38.001 of the Code of Ordinances of Sioux Falls, South Dakota

The provisions of the general election laws and administrative rules promulgated thereto of the State of South Dakota shall apply to all municipal elections unless specifically provided by city charter or city ordinance. The provisions of state law on campaign finance applicable to state legislative office shall also apply to all elected municipal positions.

The city clerk shall conduct all municipal elections provided by this chapter and by city charter. Any statement, form, or filing required

by the general election laws of the state of South Dakota applicable to municipal elections shall be submitted to the city clerk's office.

The city council by ordinance may adopt specific filing and campaign finance reporting requirements for any municipal election in addition to those provided by state law.

By ordinance, the city may call for an advisory election on any issue to be presented to the voters at any regularly scheduled or special municipal election as otherwise allowed by law.

SDCL § 12-27-8

Limits on contributions to legislative or county candidate or candidate's campaign committee--Violation as misdemeanor. A legislative or county candidate or the candidate's campaign committee may accept contributions during any calendar year as follows:

- (1) Not to exceed one thousand dollars from a person, unless the person is the candidate or a member of the candidate's immediate family, in which case contributions may be made without limit;
- (2) Not to exceed one thousand dollars from an entity;
- (3) Without limit from a political action committee;
- (4) Without limit from a political party; and
- (5) Without limit from a candidate campaign committee.

Any contribution from a ballot question committee is prohibited. Any contribution from a person who is an unemancipated minor shall be deducted from the total contribution permitted under this section by the unemancipated minor's custodial parent or parents. A violation of this section is a Class 2 misdemeanor. A subsequent offense within a calendar year is a Class 1 misdemeanor.

Opinion

In regard to Question 1, the Board has determined that creation of a PAC is not a breach of the ethics rules and does not rise to the appearance of impropriety.

In regard to Question 2, the Board has determined that hosting fundraisers for candidates in city elections using the Council member's title and position as a Sioux Falls City Council member is not a breach of ethics rules and does not rise to the appearance of impropriety.

In regard to Question 3, the Board has determined that the act of a Council member using his or her title as a Sioux Falls City Council member to assist candidates in city elections by appearing in a postcard supporting their candidacy is not a breach of the ethics rules and does not rise to the appearance of impropriety.

In keeping with Board of Ethics Rule of Procedure 2.03 and Ethics Board precedent (see Advisory Opinions 2007-1, 18-2 and 19-5), the Board declined to apply hypothetical activities to the questions presented above and, consequently, the Board's decision is limited to the facts presented in said questions.

In regard to Question 4(a)¹ referenced above, the Board has determined that Councilor Brekke's acceptance of a donation from another elected official, which was within the limits of campaign finance laws, was not a breach of the ethics rules and therefore did not rise to the appearance of impropriety.

In regard to Question 4(b)² referenced above, the Board has determined that Councilor Brekke's acceptance of a robo-call supporting her candidacy from Theresa Stehly in her individual capacity was not a breach of ethics rules and therefore did not rise to the appearance of impropriety.

In regard to Question 4(c)³, the Board has determined that Councilor Brekke's acceptance of miscellaneous independent contributions from friends of Council member Theresa Stehly was not a breach of ethics rules and therefore did not rise to the appearance of impropriety.

In regard to Councilor Brekke's sub-part question to Questions 4(a-c), as the activities referenced therein were not a breach of ethics rules and therefore did not rise to the appearance of impropriety, it is the opinion of the Board of Ethics that Councilor Brekke can engage in such activities in 2020.

With respect to the fifth, sixth, seventh and eighth questions posed by Councilor Brekke⁴, the Board declines to advise on such questions pursuant to City Ordinance 35.057, which states as follows:

¹ Councilor Brekke identified this as question 1.

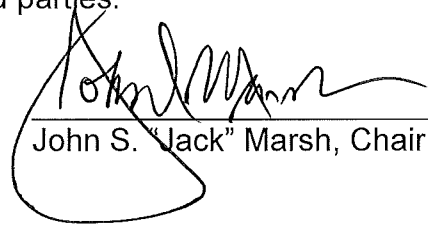
² Councilor Brekke identified this as question 2.

³ Councilor Brekke identified this as question 3.

⁴ Councilor Brekke identified these questions as questions 1, 2, 3, and 4 respectively on pages 3 and 4 of Request for Advisory Opinion.

Advisory opinions may be requested by any city official who seeks the board of ethics' opinion to guide that official's own conduct. Only a city official may request an advisory opinion from the board of ethics about his or her conduct or activities, provided that the request is made prior to the filing of a complaint as outlined in this chapter. ... A request for an advisory opinion may include the request to review conduct that has already occurred that has not yet been the subject of a complaint to the board or a report to the fraud coordination committee... (emphasis added).

The Board declines to opine on Councilor Brekke's final four questions as each references and incorporates alleged past conduct of third parties.



John S. "Jack" Marsh, Chair

Opinion decided: March 6, 2020.