January 1-June 30, 2003

Board of Ethics
January 1-June 30, 2003

DIGEST OF SELECTED OPINIONS
January 1–June 30, 2003

Case 02-50

A superintendent of a Denver golf course received payment for out-of-state travel and lodging expenses for an educational course and factory tour provided by a fertilizer manufacturer. The superintendent purchases fertilizer for his golf course from the manufacturer in question, as well as from other companies. The superintendent, after participating in ethics training, requested an advisory opinion from the Board of Ethics. The Board determined that the acceptance of travel and lodging expenses under such circumstances violated Section 2-60(a) of the Code of Ethics because the superintendent was in a position to take direct official action (specifically, approving a purchase) with respect to the manufacturer and because the manufacturer was doing business with the city. The Board did not recommend any discipline, however, because the superintendent did not participate in ethics training until after the trip and he then promptly recognized that there was an ethical issue and requested an advisory opinion.

Case 03-1

An assistant chief of the Police Department requested an advisory opinion regarding whether corporals, a rank recently established in the Police Department, are "supervisors" of patrol officers within the meaning of Section 2-59(b) of the Code of Ethics. That provision prohibits city officers, officials and employees from supervising members of their immediate families unless they receive a waiver from the Board of Ethics. The Board of Ethics found that a significant number of the duties assigned to corporals were supervisory and that a corporal who was a spouse of a patrol officer in the same unit would violate 2-59(b) if the corporal did not obtain a waiver within six months.

Case 03-2

A former city employee filed an inquiry alleging that a supervisor of restaurant inspections violated the Code of Ethics in two respects: (1) by failing to obtain permission from the appointing authority for outside employment in teaching classes at a private restaurant school, in violation of Section 2-63 and (2) by having a conflict of interest in violation of Section 2-61 by influencing the inspections by his subordinate inspectors of a restaurant affiliated with the school where the supervisor taught classes. After a hearing, the Board dismissed the case, concluding that neither violation had been proven. The Board also recommended that the Public Health Inspection Division of the Department of Environmental Health should initiate internal procedures so that employees are aware of these Code provisions and that records of outside employment are maintained.

Case 03-3

A police officer requested an advisory opinion as to whether he would violate the Code of Ethics if he were a candidate for Denver City Council. The officer indicated that he would resign as a police officer if he were elected to City Council. The Board concluded that there is no provision in the Code of Ethics which would prevent a police officer from being a candidate for City Council.

Case 03-5

A citizen filed an inquiry alleging that a Denver photo-radar technician acted unethically because he operated a photo-radar van from which a photo was taken of a vehicle and which led to the issuance to the citizen of a citation for speeding. The citizen stated that she did not own the vehicle that was photographed. The Denver County Court dismissed the citation. The Board of Ethics dismissed the inquiry, determining that the Board of Ethics does not have jurisdiction over such an issue. The Board also noted that the technicians who operate photo-radar vans do not have any role in the decision about which persons own which vehicles and which individuals should receive citations.

Case 03-6

The Director of the Department of Excise and Licenses requested an advisory opinion. The Department hired a part-time on-call hearing officer, who has applied for a peddler's license from the Department to enable her to sell certain products. The Director was concerned about an actual or perceived conflict of interest. The Board concluded that the Code of Ethics would not prevent the hearing officer from having a peddler's license. However, the Board determined that Section 2-61 of the Code would prevent her from being a hearing officer for a case if her own license was the subject of a denial, suspension or revocation hearing. The Board also recommended that, in order to avoid the appearance of impropriety, she should not be a hearing officer in a case involving the peddler's license of any of her competitors selling similar products.

Case 03-7

The Director of the Office of Information Technology filed a request for an advisory opinion as to whether city employees could accept small gifts or light lunches from computer hardware or software vendors wishing to present their products at "lunch and learn" sessions. The Board of Ethics assumed that some of the city employees who would attend such vendor presentations would be in a "position to take direct official action" with respect to the vendor(s). The Board determined that city employees will not violate Section 2-60 of the Code of Ethics so long as gifts are unsolicited and are of trivial value (defined as "items or services with a value of $25.00 or less, such as inexpensive tee shirts, pens, calendars, books, flowers or similar items") or so long as meals, regardless of the value, do not total to more than four per calendar year from the same donor and attendance "must be reasonably related to the official or ceremonial duties of the employee." The Board noted that city employees are obligated to comply with the Financial Disclosure ordinance of the Revised Municipal Code relating to disclosure of gifts; therefore, if a vendor provides any gifts over the value of $25.00 or meals, the city employees should be advised of the source of those items, so that the employees can determine whether to list such items in the annual financial disclosure statement.

Case 03-8

A lieutenant in the Police Department wished to know if he would violate the Code of Ethics by entering into a contract to assist a consultant to evaluate the operations of another police department during off-duty hours. The Board of Ethics determined that, since the lieutenant's appointing authority had already approved the secondary employment as required by Section 2-63 of the Code of Ethics, such employment would not violate the Code of Ethics.

Case 03-9

The Chief of Police requested an advisory opinion as to whether the Code of Ethics allows a police officer to work a secondary job that is scheduled by a subordinate in the officer's chain of command. For example, would it be ethical for a captain to work a secondary job that is scheduled by a sergeant who works for the captain? The Board advised the Chief that the Code of Ethics only requires that a city employee must report proposed secondary or outside employment to his or her appointing authority and obtain written permission from the appointing authority. However, the Code of Ethics allows any city agency to adopt "a stricter code of ethics for their own use." The Board indicated that a prohibition of police officers from outside employment scheduled by a subordinate officer in the chain of command might be wise, but would be at the discretion of the Department.

The Board indicated that in a situation where a sergeant is employed off-duty to schedule secondary employment for other officers employed off-duty by a specific employer, including the lieutenant in the sergeant's chain of command, both officers would be faced with conflicts of interest. The sergeant might be motivated to give better scheduling assignments to the lieutenant in the hope of gaining the lieutenant's favor with regard to on-duty work. The lieutenant, on the other hand, might be motivated to treat the sergeant more favorably than another sergeant in the hope of getting more or better off-duty scheduling. In either case, the private interest of the officer may affect or interfere with the officer's public responsibility.

Case 03-10

Two city supervisors requested an advisory opinion as to whether a building inspector, who was also a member of a construction trades labor union, would violate the conflict of interest section of the Code of Ethics if he picketed a construction site on behalf of the union on his off-duty time when he was assigned to inspect the same site on his on-duty time. The Board stated that the building inspector did not have a "substantial interest" as defined by the Code and, therefore, there would not be an actual conflict of interest that would be prohibited by the Code. However, the Board determined that such picketing would amount to an appearance of a conflict of interest. The Board advised the parties that any property owner or construction contractor expects to receive an impartial, fair and unbiased inspection from city inspectors and that a building inspector who pickets the same site where he inspects gives the appearance that his inspections may be biased or unfair due to his loyalty to his union or the divided loyalty this situation creates. The Board recommended that the inspector could seek relief from the union to avoid picketing duties on any site where he is the inspector or that the supervisors could reassign the inspector to help him avoid inspecting sites where he has picketed.

Case 03-11

The director of the Denver Office of Information Technology (DOIT) requested an advisory opinion or waivers on behalf of 6 other employees of DOIT and other city agencies regarding acceptance of travel and lodging expenses. One of DOIT's tasks is to oversee the installation of

a fiber-optic network that will connect many city office buildings. The city had entered into a contract with a company to assist in the implementation of the project. That company contracted with a sub-contractor in order to test some of the equipment in a "proof of concept" before the equipment would be installed in the city's network. The cost of the "proof of concept" was included in the fixed-price contract with the prime contractor. The testing would be done at the sub-contractor's laboratory facility in the Denver area. The sub-contractor, however, went out of business, as did another local company that the prime contractor later hired for the "proof of concept" testing. The prime contractor then offered to pay travel and lodging expenses for 6 Denver employees to travel to the company's facility in Memphis, Tennessee, to observe and participate in the proof of concept exercise.

The Board concluded that at least some of the city employees would violate Section 2-60 of the Code of Ethics, which prohibits city employees from accepting travel and lodging expenses, with certain exceptions, from a company which does business with the city if the employees are in a position to "take direct official action" with regard to the company which wishes to pay the expenses. Taking "direct official action" includes making recommendations for or against a renewal of a contract, which some of the employees in question are able to do concerning the contract with the prime contractor. However, the Board decided to grant waivers to the city employees, pursuant to Section 2-54(f) of the Code of Ethics, because waivers would be in the best interests of the city under the unusual circumstances of this case.

Case 03-12

The city's Director of Golf requested an advisory opinion concerning his high-school-age son's possible summer employment by Denver Golf. The actual hiring decision would be made by the Assistant Golf Professional at the golf course in question. The Board determined that, if the Assistant Golf Professional did hire the Director's son, there would not be a violation of Section 2-59 of the Code of Ethics because (1) the Director would not be the one who would hire the Director's son and (2) there would be two intermediate levels of supervisors between the Director and his son, while Section 2-59 requires that there must be one intermediate supervisor between a supervisor and a member of his or her immediate family. The Board urged the Director to avoid the appearance of impropriety by not attempting in any way to influence the employees within Denver Golf who would be making the hiring decision, who would be supervising his son, if he is hired, and who would be taking any personnel actions with respect to his son, if he is hired.

Case 03-14

A police officer requested an advisory opinion as to whether the Code of Ethics would prohibit him from selling membership plans in a legal services insurance program in his off-duty hours. The Board advised the officer that, as long as he obtained written permission from his appointing authority, in compliance with Section 2-63 of the Code of Ethics, he would be permitted to engage in such outside employment. However, the Board recommended that, if he does receive his appointing authority's written permission, he should comply with these conditions in order to avoid the appearance of impropriety: (1) he should not solicit persons that he or his fellow officers have detained or arrested as potential customers; (2) he should not use any Police Department or city records or databases to find potential customers and (3) he should not conduct any outside business during on-duty hours or in his police uniform or in city workplaces.

Case 03-16

A City Councilperson requested an advisory opinion as to whether the Code of Ethics would permit her to provide food for the election judges at the polling places in her City Council district when she is a candidate. The Board determined that the Code of Ethics does not prohibit city officials, officers or employees from giving gifts. Rather, Section 2-60 only regulates the solicitation or acceptance of gifts by city officials, officers and employees, including election judges. Since election judges are not in a position to take direct official action with respect to candidates, as defined in Section 2-52(b), the Board found that election judges are not prohibited by Section 2-60 from accepting food from candidates on election day. The Board, cautioned, however, that, since Colorado Revised Statutes 1-13-714 prohibits "electioneering" within 100 feet of a polling place, the Councilperson should not provide written material with her name on it along with the food.

Case 03-17

A restaurant inspector and the Manager of the Department of Environmental Health requested an advisory opinion concerning whether the inspector could do volunteer work for a non-profit organization. The group was attempting to open an institutional kitchen to train homeless or formerly homeless young people to work in food preparation. The Board decided that the volunteer work by the city employee did not amount to a "substantial interest," which would lead to a conflict of interest that would violate Section 2-61 of the Code of Ethics. However, the Board urged the inspector, in order to avoid the appearance of a conflict of interest, to have no role whatsoever, direct or indirect in any inspection of the kitchen by the Department of Environmental Health.

Case 03-18

A City Councilperson requested an advisory opinion about whether she would violate the Code of Ethics if she would solicit donations to help her in hosting a reception to honor outgoing City Council members. She proposed to seek donations of food and the use of a ballroom from a hotel and of printed invitations from a printing company. The Board determined that solicitation or acceptance of such donations would not violate Section 2-60 of the Code of Ethics (pertaining to gifts). The Board found that the hotel in question did not have any contracts or business relationship with the city. The hotel does have a regulatory relationship with the city, regarding such things as restaurant inspections; however, the Councilperson has no ability to take direct official action with regard to any regulatory activities of the city. The printer does provide printing to one city agency; however the Councilperson has no involvement or authority with that agency. The Board did advise the Councilwoman that there might be an appearance of impropriety because of a public perception that the hotel or the printer may expect something from the City and County of Denver in return for their donations; however an appearance of impropriety is not prohibited by the Code of Ethics.

Case 03-20

During the municipal election campaign, a candidate for mayor requested an advisory opinion "to determine how to deal with any perceived conflicts " that might arise from his business interests, specifically his interests as a majority shareholder in a company that operates several restaurants within the city of Denver. After the candidate succeeded in being elected mayor, the Board of Ethics responded to his inquiry. The full text of the Board's opinion follows:

July 8, 2003

Mayor-Elect John Hickenlooper
C/O Transition Office
1700 Lincoln #2000
Denver, CO, 80203

RE: Case 03-20 – your request for an advisory opinion

Dear Mr. Hickenlooper:

On June 26, 2003, the Board of Ethics considered your request for an advisory opinion dated May 9, 2003.

You have advised the Board that you are the majority shareholder of Wynkoop Brewing Company (WBC), which owns and operates seven restaurants in the City and County of Denver, namely, Wynkoop Brewing Company, Cherry Cricket, Appaloosa Grill, Wazee Supper Club, Pearl Street Grill, Red Room and Goosetown Tavern. You sought an advisory opinion "to determine how to deal with any perceived conflicts that might arise from my business interests" if you were to be elected Mayor of Denver.

You indicated to the Board that, now that you have been elected Mayor, you will play no role in operational decisions of WBC, that you will place your WBC shares into a trust or other similar structure and that you "pledge not to discuss WBC business issues with the CEO, board members or any other officers, employees or shareholders of WBC."

As you are aware, several agencies of the City and County of Denver do or may "take direct official action" with respect to restaurants in Denver. Section 2-52 (b) of the Code of Ethics defines direct official action as:

(1) Negotiating, approving, disapproving, administering, enforcing, or recommending for or against a contract, purchase order, lease, concession, franchise, grant or other similar instrument in which the city is a party. With regard to "recommending," direct official action occurs only if the person making the recommendation is in the formal line of decision making;

(2) Enforcing laws or regulations or issuing, enforcing, or regulating permits;

(3) Selecting or recommending vendors, concessionaires, or other types of entities to do business with the city;

(4) Appointing and terminating employees, temporary workers, and independent contractors….

Examples would be the issuance of building permits by the Building Department, zoning permits by the Zoning Administration, and liquor licenses and restaurant licenses by the Department of Excise and Licenses. Other examples would be fire inspections by the Fire Department, restaurant inspections by the Department of Environmental Health, enforcement by the Police Department against possible disturbances or other lawbreaking by customers, enforcement by the Revenue Department regarding possible overdue sales tax or real estate tax collections and enforcement by Parking Management against nearby parking violators.

Section 2-61 of the Code of Ethics regulates conflicts of interest as follows:

Sec. 2-61. Conflict of interest while employed.

(a) Except when advised by the city attorney that the rule of necessity applies, an officer, official, or employee shall not take direct official action on a matter before the city if he or she or a member of the immediate family has any substantial employment, contractual, or financial interest in that matter. A substantial interest shall be deemed to exist if:

(1) He or she or a member of the immediate family is a party to the instrument;

(2) He, she, a spouse, or a domestic partner owns one (1) percent or more, or a member of the immediate family other than a spouse or domestic partner owns five (5) percent or more, of another party to the instrument;

(3) He or she or a member of the immediate family is an officer in another party to the instrument;

(4) He or she or a member of the immediate family is directly involved in obtaining the city's business for another party to the instrument;

(5) He or she or a member of the immediate family is directly involved in negotiating the contract or preparing the bid, proposal, response to a request for qualifications, or similar document for another party to the instrument, other than in a purely clerical capacity; or

(6) A member of his or her immediate family performs more than a nominal portion of the work required by the instrument, or supervises or manages more than a nominal portion of the work.

(b) An officer, official, or employee may represent himself or herself before a board in accord with such board's procedures, provided that the officer, official, or employee does not also participate in the board's decision in his or her official capacity.

(c) An officer, official, or employee may acquire an interest in bonds or other evidences of indebtedness issued by the city or the board of water commissioners so long as they are acquired on the same terms available to the general public.

(d) It shall not be a violation of this code of ethics for an officer, official, or employee to take direct official action on the following matters even if the person or a relative employed by a city agency would benefit:

(1) The city's annual budget or an amendment to the annual budget; or

(2) Establishing the pay or fringe benefit plans of city officers, officials, or employees.

Under these provisions of the Code of Ethics, there are no stringent barriers to your holding elective office and owning businesses in the City. The Board suggests that you consider taking the steps set forth below, although not strictly required, so that you may avoid even the appearance of impropriety. You should under no circumstances attempt, directly or indirectly, to influence any city officials, officers or employees with respect to actions or decisions that would specifically affect one or more of the businesses in which you hold an interest. The Board recommends that you communicate to your appointees that you expect them, as you advised the Board, to give your businesses “exactly the same treatment” as any similar businesses. The Board recognizes that, as chief executive of the City and County of Denver, you will be obligated to set general citywide policies for all city agencies and departments, including policies that will affect all restaurants in the city, and the Board recognizes that such general policymaking is neither unethical nor inappropriate.

The Board does not have the authority or desire to direct you how to structure your proposed trust; however, the Board would appreciate receiving a copy of the executed document.

Thank you for requesting this opinion and for meeting with the Board on June 26. We extend our congratulations on your election and we look forward to working with you and your administration in the future.

For the Board of Ethics:

Charles F. Savage
Chair

Case 03-21

The Deputy Manager of Safety requested an advisory opinion regarding acceptance of gifts. A software company wished to give several tickets to the Deputy Manager and several Department of Safety employees for the company's hospitality booth at Coors Field to attend a Colorado Rockies game during a national convention in Denver. The company had sold equipment to the City and County of Denver and the Deputy Manager was the chief decision-maker regarding the purchase and he will likely be the chief decision-maker regarding any continuing relationship with the company. The Deputy Manager indicated that he did not wish to accept any of the tickets for himself, but he asked if he could draw from the names of Department of Safety employees who use the software system to allocate the tickets. There would not be any business conducted during the game, so that attendance would be a purely social event.

The Board concluded that it would be a violation of Section 2-60 of the Code of Ethics if the Deputy Manager accepted any of the tickets for himself, since he was in a position to take direct official action with regard to the software company and since the city has an "existing, ongoing or pending contract, business or regulatory relationship" with the company. The exception in Section 2-60(b)4 does not apply, because, since attendance at the game was a purely social affair, it was not related to the Deputy Manager's official or ceremonial duties. The Board further concluded that the Code of Ethics prohibits him from passing along to others any gifts which he is prohibited from accepting for himself.

Case 03-22

A lieutenant in the Police Department requested a waiver from Section 2-59(b) of the Code of Ethics, which prohibits a Denver employee, official or officer from supervising a member of his or her immediate family. The lieutenant and his wife, a technician in the Police Department, are assigned to the same Police District; however, until recently, the lieutenant and his wife have been on different shifts. Due to budget cuts and staff reassignments, the lieutenant and his wife are now assigned to the same shift, however they overlap on only one day per week. Normally, the lieutenant would be second in his wife's chain of command. The commander of the district has issued an order that a captain should be the second in the chain of command and that, under no circumstances should the lieutenant be included in any action or decision involving the supervision of his wife. The Board granted the requested waiver, finding that, under all of the circumstances of the case, it was in the best interests of the city. The Board, however, stated that the waiver was conditioned upon compliance with the commander's order.

Case 03-23

A constituent of a City Councilperson filed an inquiry against him alleging that he violated Section 2-60 of the Code of Ethics regarding gifts by accepting campaign contributions from two separate groups of contributors in return for what she believed was his agreement to vote to favor those groups in two separate issues before City Council. The Board dismissed the inquiry for two reasons. First, the Board applied Section 2-56(e) of the Code of Ethics, which allows the Board to dismiss an inquiry if "the person who is the subject of the inquiry is no longer an officer, official or employee" of the City and County of Denver. Following the municipal election in June, 2003, the Councilperson would no longer be a Denver officer as of July 21, 2003 and the Board believed that it would be unable to hold a fair hearing, taking into account the procedural safeguards of the Code of Ethics, and to reach a decision before that date. Second, the Board determined that there is a serious question as to whether Section 2-60 of the Code of Ethics is applicable to this allegation, in light of the exemption in Section 2-60(b)2 for "campaign contributions as permitted by law."

Case 03-24

A professional engineer in the Community Planning and Development Agency requested an advisory opinion or a waiver. His responsibility is to supervise several engineers who review plans from applicants for building permits. The supervisor has been a member for a few years of a committee of a national non-profit organization of the masonry industry. He represents building code officers on the committee, which also consists of industry representatives and academic representatives. The committee meets twice per year to develop and maintain safe design provisions for masonry. Until recently, the City and County of Denver paid the supervisor's travel expenses and lodging for these trips; however, due to budget constraints, the city is no longer able to pay those expenses. A non-profit trade association for the Colorado masonry industry has offered to pay the travel expenses and lodging.

The Board concluded that acceptance by the supervisor of the travel expenses and lodging would violate Section 2-60 of the Code of Ethics because (1) he and his subordinates are in a position to take direct official action over those who submit applications for building permits and some of the members of the non-profit Colorado trade association are likely to benefit by approval of permits by the supervisor or his subordinates and (2) some of the members of the association have a regulatory relationship with the city. The Board, however, found that the supervisor's participation in the committee benefited the public through the development of standards that govern the masonry industry and that such participation served the best interests of the city. Accordingly, the Board granted a waiver to allow acceptance of the travel and lodging expenses.

Case 03-25

A lieutenant in the Fire Department requested an advisory opinion regarding acceptance of gifts from citizens. The fire rig to which the lieutenant is assigned has responded several times to calls from a citizen who had an incapacitating health problem. On one occasion the citizen telephoned the firehouse and asked the lieutenant to bring the rig's firefighters to her home. When the crew arrived, she presented the lieutenant and the other crew members with several handcrafted gifts, such as figurines and gift boxes. The Board of Ethics determined that firefighters generally (except when conducting fire inspections) are not in a position to take direct official action and, therefore, acceptance of gifts presented to the crew by a grateful

citizen does not violate Section 2-60 of the Code of Ethics, especially when the gifts were unsolicited and were modest in size.