

FORT THOMAS BOARD OF ETHICS
ADVISORY OPINION 23-01
September 14, 2023

RE: Application of Conflict of Interest Rules to a Member of a City Commission

Mr. Gorman:

You have requested an opinion from the Fort Thomas Board of Ethics pursuant to Section § 39.69 of the Fort Thomas Code of Ordinances. The Board of Ethics may render advisory opinions concerning matters under its jurisdiction, based upon real facts and circumstances, when requested by an officer or employee of the city or a city agency who is covered by this chapter. § 39.69(A). In regards to your inquiry, it is important to note the limited scope of advisory opinions versus sworn complaints. A request for an advisory opinion shall state relevant facts and ask specific questions. § 39.69(B). Additionally, unlike a sworn complaint, an advisory opinion does not provide for a hearing and a written report of findings of fact and conclusions. Based on the nature of your request, it would be inappropriate for this Board to step beyond the narrow confines of this advisory opinion and issue any sort of findings regarding past conduct.

The Board has discerned from your request and your personal statement your inquiry is whether your real estate holdings and engagement as the owner of a real estate management company are an inherit conflict with service on the Fort Thomas Planning Commission.

As discussed in more detail below, you are advised:

- a. Fort Thomas Code of Ethics Section § 39.15(A) prohibits you from having any interest in a business or engage in any business, transaction, or activity, which is in actual and substantial conflict with the proper discharge of the officer's or employee's public duties.
- b. Fort Thomas Code of Ethics Section § 39.15(B) prohibits you from the intentional use or attempted use of his official position with the city to secure unwarranted privileges or advantages for himself or others.
- c. Fort Thomas Code of Ethics Section § 39.15(E) requires you to disclose to the Commission any financial interest you believe or have reason to believe may be affected by your participation, vote, decision, or other action taken within the scope of your public duties. Further, you shall refrain from taking any action with respect to the matter that is the subject of the disclosure.
- d. Fort Thomas Code of Ethics Section § 39.20 prohibits you from intentionally using or disclosing information acquired in the course of your official duties if the primary purpose of the use or disclosure is to further your personal financial interest or that of another person or business.

II. Jurisdiction

The Board of Ethics administers, enforces, and interprets all Fort Thomas Code provisions pertaining to ethical matters, including the conflicts of interest found in the City's Ethics Code (Fort Thomas Code of Ordinances, Chapter 39). Fort Thomas Ethics Code Section § 39.69 authorizes the Board to render advisory opinions concerning a city officer's or commission member's proposed future conduct. Advisory opinions are prospective only and are not used to adjudicate past actions or advise as to the appropriateness of prior actions.

III. Background

You are a member of the Fort Thomas Planning Commission. You are also the owner of a real estate management company whose holdings are within the jurisdiction of the Planning Commission for which you serve.

The Planning Commission is established in Fort Thomas Code of Ordinances Section § 36.040, which grants to the Commission all functions, powers, duties, and authorities found in KRS 100.133. This authorizes the Commission to review zoning ordinances, the City's current comprehensive plan, and subdivision regulations with respect to property, building, and development projects relating to the public safety, health, and general welfare of the citizens of the City of Fort Thomas. As a member of the seven-member board you review potential property developments, provide feedback, and vote on the approval of those proposals. You, as are the other members of the Commission, are unpaid for your service.

In your position as the owner of a real estate management company you have acquired and currently manage five commercial/residential properties within the City of Fort Thomas. These properties vary in nature from commercial office space to business store fronts, to residential apartment buildings. You also engage in property acquisition for large-scale developments within Fort Thomas. Any zoning change, development, or plat adjustment or consolidation with respect to any of your properties within Fort Thomas would be the jurisdiction of the Commission.

IV. Relevant Law and Discussion

a. Fort Thomas Code of Ethics Section § 39.15 (Conflicts of Interest in General)

i. Section § 39.15(A)

Fort Thomas Code of Ethics Section § 39.15(A) prohibits an officer or employee, or an immediate family member of any officer or employee, from knowingly having any interest in a business or engage in any business, transaction, or activity which is in actual and substantial conflict with the proper discharge of the officer's or employee's public duties. An officer is a member of the governing body of any city board or commission who has been appointed to the board or commission by the city. Section § 39.04. A person has a financial interest in matters when there is a potential impact on their income, compensation, value of assets, wealth, employment prospects, or business prospects.

Based on the information you have provided and acquired by the Ethics Board, under Section § 39.15(A) the management of a real estate business and ownership of property subject to the jurisdiction of the planning commission while serving on the planning commission would not in itself be an inherit conflict. However, there are conditions. This is permitted so long as you disclose the nature of your holdings and conflict of interest when your holdings come before the Commission. Section § 39.15(E). The disclosure must be recorded in the minutes of a formal meeting of the Commission. Though not expressly stated, the Board recommends these disclosures also be in writing. If your holdings are part of a larger discussion involving the planning commission and there is the question of a conflict of interest, to help you determine if you should abstain from action on an official decision, ask yourself these questions:

- a. Has your personal or private interest created a substantial threat to your independence of judgment?
- b. Will your participation have an effect on public confidence in the integrity of the planning commission?
- c. Is your participation likely to have any significant effect on the disposition of the matter?
- d. Will the official decision affect you in a manner differently from the public?

If you answered “yes” to any of these questions, you should disclose and abstain. When you are unsure whether you should disclose and abstain from an official action, make an inquiry to the Board of Ethics for an advisory opinion. When you do so, please include specific facts and specific questions.

ii. Section § 39.15(B)

Fort Thomas Code of Ethics Section 39.15(B) prohibits you from the intentional use or attempted use of your official position with the city to secure unwarranted privileges or advantages for yourself or others. You should not use your role on the Planning Commission to influence or negotiate with another party in a real estate transaction as buyer, seller, or in a landlord/tenant capacity. You are prohibited from the representation of yourself as a member of the Commission or the City of Fort Thomas when negotiating for a position on a parcel of real estate.

Based on the facts provided you would not be prohibited from the acquisition, sale, and leasing of property owned by your real estate company while serving on the Planning Commission. This is conditioned upon you doing so privately and not in a representative capacity of either the Commission or the City of Fort Thomas. However, you are prohibited from making contractual agreements or assurances to potential sellers, buyers, or in a landlord/tenant capacity as to any negotiated or anticipated actions that may be taken by the Commission.

iii. Section § 39.15(E)

While serving on the board, Fort Thomas Code of Ethics Section § 39.15(E) requires you to disclose to the Commission any financial interest you believe or have reason to believe may be affected by your participation, vote, decision, or other action taken within the scope of your public duties. You shall refrain from taking any action with respect to the matter that is the

subject of the disclosure. As it pertains to your interests, this would include, but not be limited to, any matter before the board that could involve you personally, or your business or holding company in the potential acquisition or sale of property, development of property, or the representation of a tenant in an application before the board.

Based on the facts provided, you would not be prohibited from engaging in the acquisition of property and potential development of the property while serving on the Planning Commission conditioned on your disclosure of your involvement and conflict to the Commission and you disqualifying yourself from any action related to it.

Official action includes not just final action, but any preliminary discussion, review, or consideration. § 39.15(E) For instance, if a tenant of one of your properties were to come before the Planning Commission for a change in the permitted use of the property, you would have a duty to notify the Commission, abstain, and recuse yourself from the hearing. You are to leave the meeting room while discussion and voting takes place on the matter and otherwise avoid influencing the decision-makers.

V. Confidential Information

Fort Thomas Ethics Code § 39.20 prohibits any officer or employee of the city from intentionally using or disclosing information acquired in the course of his official duties if the primary purpose of the use or disclosure is to further their personal financial interest or that of another person or business. Information shall be deemed confidential in nature if it is not subject to disclosure pursuant to the Kentucky Open Records Act, KRS 61.872 to 61.884, at the time of its use or disclosure. Code Section § 39.20

VI. Conclusion

As explained in more detail above, there is no inherent ethical conflict with your service on the planning commission. In regards to any potential conflicts of interest, you are advised that:

- a. You may not use or attempt to use your influence in any matter which involves a substantial conflict between your personal or private interest and your duties as a planning commission member.
- b. You may not use your position with the Planning Commission to obtain financial gain for yourself or members of your family, nor make promises or assurances during any such negotiation as to outcomes in matters before the Planning Commission.
- c. You may not take official action as a member of the Planning commission in regard to any specific property in which you have an interest and should report any such conflict to the board.
- d. You may not use confidential information for either personal gain or the gain of a third party.

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Thank you for your concern about compliance with the City of Fort Thomas Ethics Code and for seeking advice. Advisory opinions are fact specific, and this Opinion is predicated on the facts you have provided. A written advisory opinion issued by the Board shall be binding on the Board in any subsequent proceeding concerning the facts and circumstances of the particular case if no additional or intervening facts or circumstances arise which would change the opinion of the Board if they had existed at the time the opinion was rendered. However, if any fact determined by the Board to be material was omitted or misstated in the request for an opinion, the Board shall not be bound by the opinion. Section § 39.69

Since you requested a public opinion, the original opinion shall be published. If you have any questions, please contact the Fort Thomas City Attorney.

BY THE FORT THOMAS BOARD OF ETHICS

/s/ Corey P. Plybon

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