



**TOWN OF AVON, COLORADO**  
**SPECIAL MEETING FOR WEDNESDAY, OCTOBER 2, 2013**  
**MEETING BEGINS AT 6:00 PM**  
AVON TOWN HALL, ONE LAKE STREET

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**PRESIDING OFFICIALS**

<b>MAYOR</b>	<b>RICH CARROLL</b>
<b>MAYOR PRO TEM</b>	<b>TODD GOULDING</b>
<b>COUNCILORS</b>	<b>DAVE DANTAS, CHRIS EVANS, JENNIE FANCHER, ALBERT "BUZ" REYNOLDS, JR., JAKE WOLF</b>

**TOWN STAFF**

**TOWN ATTORNEY: ERIC HEIL**

**TOWN MANAGER: VIRGINIA EGGER**

**TOWN CLERK: PATTY MCKENNY**

ALL REGULAR MEETINGS ARE OPEN TO THE PUBLIC EXCEPT EXECUTIVE SESSIONS.

GENERAL COMMENTS ARE WELCOME DURING PUBLIC COMMENT, AND COMMENTS ARE ALSO WELCOME ON ANY AGENDA TOPIC.

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THE AVON TOWN COUNCIL MEETS THE 2ND AND 4TH TUESDAYS OF EACH MONTH.

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- 1. CALL TO ORDER**
- 2. ROLL CALL**
- 3. PUBLIC COMMENT**
- 4. PRESENTATION OF THE REPORT ON THE INVESTIGATION OF COUNCIL MEMBERS EVANS AND GOULDING – ATTORNEY SCOTT KROB**
- 5. PUBLIC QUESTIONS AND COMMENTS**
- 6. COUNCIL DISCUSSION**
- 7. ADJOURNMENT**



**KROB LAW OFFICE, LLC**  
Attorneys at Law

## **MEMORANDUM**

**To: Avon Mayor and Town Council**

**From: Scotty P. Krob**

**Date: September 20, 2013**

**Re: Investigation of Council Members Evans and Goulding**

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### **I. INTRODUCTION**

I have been retained by the Avon Town Council to investigate allegations of misconduct made against Council Members Chris Evans and Todd Goulding regarding their conduct in connection with the following five (5) matters:

- 1) The Walgreens project
- 2) The Wyndham project
- 3) Goulding's residency
- 4) Evan's residency
- 5) Goulding's employment by Evans' company, Evans-Chaffee Construction

This memorandum report is the result of my investigation, and it is to be used solely by the Avon Town Council for its intended purpose and for no other purpose. It is presented to you in draft form and should not be disclosed or released until it has been reviewed by the Council, excluding Council Members Evans and Goulding. Once the document is in final form, it will be up to the Council to determine whether it wishes to waive the attorney client privilege and make the report public.

In the course of the investigation I interviewed, by phone or in person, the eighteen witnesses and reviewed a large volume of documents. Based on my investigation, my findings and conclusions are as follows:

## II. CONFLICTS INVESTIGATION – WALGREENS AND WYNDHAM

The investigation of the Walgreens project and the Wyndham project are governed by the sections of the Avon Town Ethics Code that relate to conflicts of interest.

### A. Conflict of interest provisions of the Avon Town Code of Ethics, 2.30.010, *et seq.*

It should be noted at the outset, that the Avon Town Code of Ethics expressly supersedes and overrides conflicting State statutes and the common law. Sections 2.30.030 and 2.30.040. The laudatory concepts underlying the Ethics Code are set forth in its declaration of policy (Section 2.30.020) and include, among others, the statement that:

the proper operation of democratic government requires that public officers be independent, impartial and responsible to the people; . . . that public office not be used for personal gain; and that the public have confidence in the integrity of its government.

Relevant definitions are set forth in Section 2.30.050, which provides in part:

*Official act or official action* means any vote, decision, recommendation, approval, disapproval or other action, including inaction, which involves the use of discretionary authority.

*Substantial financial interest* means an interest owned or held by an officer which is:

- a. An ownership interest in a business.
- ...
- e. A directorship or officership in a business.

Rules governing conflicts of interest are set forth in Section 2.30.060, of the Town Code and provide in relevant part:

A Town Officer shall not:

- ...
- (3) Perform an official act which directly and substantially affects to its economic benefit a business or other undertaking in which such Officer has a substantial financial interest;

(4) Perform an official act which directly and substantially affects a business or other undertaking by whom the officer is employed, . . .

(5) [H]old an interest in any business or undertaking which such Officer has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by the agency over which he or she has substantive authority;

. . .

Section 2.30.080 of the Ethics Code spells out the obligation of a Council member to disclose any conflict of interest, the actions a conflicted Council member must take, and the ability of Council members to raise a conflict they perceive a fellow Council member may have. Section 2.30.110 indicates the protection afforded to a Council member who makes a voluntary disclosure of a conflict to the Colorado Secretary of State. The consequences for violating the Ethics Code are set forth in Section 2.30.150.

## **B. Statement of facts relevant to the conflicts investigations**

### **1. Background facts**

Evans served on Avon's Planning and Zoning Commission (PZ) between 1997 and 2009, including several years as chair of the PZ. Goulding served on PZ beginning in 2006 and succeeded Evans as its chair. Evans and Goulding were elected to the Avon Town Council in November 2010. Their terms expire in 2014.

### **2. Facts related to the Walgreens project**

On May 5, 2011, Trinity Development, represented by the Mauriello Planning Group, submitted applications for Final Design, a Special Review Use for a drive-up window, and an Alternative Equivalent Compliance for what would become known as the Walgreens project. In general, the Walgreens project involved demolition of the existing Denny's restaurant and construction of a Walgreens Pharmacy store on the site.

On June 21, 2011, at a public hearing, Avon's PZ considered Walgreens applications at a public hearing and approved the applications subject to conditions. Under Avon's Town Code, applications for Final Design, Special Review Use and Alternative Equivalent Compliance are reviewed only by the PZ and not by the Town Council, unless Council "calls the matter up." A matter may be called up by motion of the Council or by a written request from a single Council member.

On June 23, 2011, Council received a memo from Sally Vecchio, then Assistant Town Manager. In her memo, Vecchio urged Council to call the matter up to provide interpretations that would be beneficial to the applicant and staff. Vecchio's memo noted

concerns that the proposed development did not comply with several guidelines and Town plans and recommended against approval of the Final Design and Special Review Use applications.

At the June 28, 2011 Town Council meeting, the PZ's approval of the Walgreens application, Vecchio's concerns, and whether the item should be called up for Council review were discussed at substantial length. I reviewed the video of the workshop discussion, and it shows that Council heard from Vecchio, members of the PZ, and Walgreens' representative, Dominic Mauriello. Evans and Goulding participated in the discussion, as did all other Council members. At the conclusion of the discussion, a straw poll was taken. Four Council members, including Evans and Goulding, indicated they would not favor calling the matter up. The Mayor and Council Member Ferraro indicated they favored calling it up, and Council Member Phillips indicated she was on the fence. No Council member called up the Walgreens application.

After Council discussed the matter in late June, neither Evans nor Goulding had any further involvement with the Walgreens project until December 14, 2011 when Evans-Chaffee Construction was notified they were on a short list of bidders to be the general contractor on the Walgreens project. Evans-Chaffee Construction is a construction company located in Avon that is owned primarily by Evans and his wife, and it is also Goulding's employer. The short list of general contractor candidates for the Walgreens project was put together by Trinity Development and included two local firms: Evans-Chaffee Construction and R.A. Nelson Construction and two out-of-town firms that Walgreen had previously used. According to Brandt Marott of Trinity Development, the two local firms were selected because they were the only two reputable firms that were suited to do what Marott referred to as a medium size project of this type. Marott stated that Trinity Development created the short list without any solicitation or input from Evans or Goulding and Marott's first contact with them was when he reached out to them and notified Evans they were on the short list. On January 11, 2012, Evans-Chaffee Construction submitted its initial proposal to Trinity Development. On January 27, 2012, Trinity Development requested a more specific proposal from the bidders. On February 10, 2012, Evans-Chaffee Construction submitted their detailed proposal.

In March 2012, Trinity Development awarded the Walgreens job to Evans-Chaffee Construction, and the contract was signed on March 29, 2012. According to Marott, Trinity Development awarded the contract to Evans-Chaffee Construction because they were the low bidder of the four.

Prior to the Walgreens project in Avon, Marott knew who Golding was, because several years earlier, they had both worked for Vail Resort Development at the same time. However, they did not work together. Marott indicated he had no professional or social relationship with Golding or Evans before the Walgreens project. Marott said Trinity

Development worked almost exclusively with Evans on the Walgreens project and Goulding had little involvement.

According to Marott, pursuant to the parties' agreement, from late March, Evans-Chaffee Construction served as the general contractor for the Walgreens project and completed construction in October 2012. During the construction period, Evans-Chaffee Construction worked with Town staff on several occasions in acquiring necessary building and other permits, seeking inspections, and eventually obtaining a certificate of occupancy. The Town's building official, Willy Gray, said he dealt primarily with Evans on the project, and the Town staff treated Evans and the Walgreens project in the same manner as every other general contractor and project were treated.

### **3. Findings and Conclusions regarding the Walgreens project**

Based on the foregoing facts, none of which appear to be disputed, my findings and conclusions are as follows:

Using the definitions of "official act" and "substantial interest", set forth in Section 2.30.050 of the Ethics Code, Evans and/or Goulding violated the conflicts provisions of the Code if they participated in discussions of the Walgreens project as Council Members and then took an action or decided not to take an action involving their discretionary authority as Council Members and that action or inaction substantially benefitted Evans-Chaffee Construction economically.

The facts are neither Evans or Goulding had any involvement with the Walgreens project during the period of its consideration by the PZ. On June 28, 2011, Evans and Goulding participated in a Council discussion of whether to call the matter up. This discussion, as well as the ability of Evans or Goulding to call the matter up constituted "official actions" regarding the Walgreens project under the provisions of Section 2.30.050 of the Town Code.

Therefore, the issue is on June 28, 2011 when Evans and Goulding took their official action and decided not to call the Walgreens matter up from the PZ, was Evans-Chaffee Construction "directly and substantially" affected to its economic benefit. No evidence was discovered indicating that on June 28, 2011 Evans-Chaffee Construction had any interest in the Walgreens project or had taken any steps to obtain a contract in connection with the project. Nor was there any evidence that as of June 28, 2011, Trinity Development was considering Evans-Chaffee Construction as a candidate to perform any of the anticipated work. On the contrary, Marrott, stated that Trinity Development did not develop the list of possible general contractors and did not notify Evans-Chaffee Construction that they were on the list until December 2011, six months after Evans and Goulding had taken their official action in not calling up the Walgreens matter. The fact

that on June 28, 2011, there was a possibility Evans-Chaffee Construction might eventually be selected as the general contractor on the Walgreens project placed them in no different position than any of numerous other construction firms that might ultimately have obtained the contract. Had the developer formulated the short list and notified Evans-Chaffee Construction that they were on the short list of bidders before June 28, 2011, the outcome would almost certainly have been different. However, the mere possibility of some future direct economic benefit to an elected official for work that is not being actively sought by the elected official or contemplated by the developer is not the type of direct and substantial economic benefit barred by Avon's Ethics Code. Applying the rule in that manner would discourage innumerable individuals, be they architects, attorneys, planners, suppliers, transporters, laborers or others from serving on the PZ or Town Council out of fear that they would be precluded from doing any work on any project that was ever to come before the PZ or Town Council.

I conclude that neither Evans nor Goulding violated Avon's Ethics Code as a result of their involvement with the Walgreens project.

#### **4. Facts related to the Wyndham project**

Several months before Wyndham submitted land use applications to the Town, it spoke with members of Town staff and Council about the Town's review and approval processes and Wyndham's general concept for development of their property. One of those conversations occurred on May 31, 2012 between Goulding, as a Council Member, and Wyndham's Senior Vice President of Development Planning and Construction, Ted Hunter.

On or about September 24, 2012, Wyndham filed its land development application. The Wyndham application involved (1) amendment of the Town Code to allow timeshare/fractional ownership, (2) rezoning the property from PUD to Town Center, (3) approval of an Alternative Equivalent Compliance (AEC) request, and (4) approval of a Development Agreement. The Wyndham application was considered by the PZ during a series of public hearings beginning October 23, 2012. Throughout the proceedings, Wyndham was represented in large part by their planner, Mauriello. On January 15, 2013, the PZ approved the Wyndham application subject to certain conditions. Mauriello objected to some of the conditions recommended by the PZ.

On February 12, 2013, two ordinances relating to the Wyndham project were presented to Council for first reading. Ordinance 13-02 was an Ordinance Approving Amendments to the Avon Development Code, to allow for timeshare/fractional ownership. Ordinance 13-03 was an Ordinance Approving a Rezoning Application, Major Design and Development Plan Application, Alternative Equivalent Compliance Application and Development Agreement for Wyndham. Both ordinances passed first reading with

revisions by the Council and were set for second reading. Evans and Goulding were among the majority who voted in favor of both ordinances. On February 26, 2013, Ordinances 13-02 and 13-03 were presented to the Council for second reading. Both ordinances passed and were adopted by a vote of 5-1. Five Council Members including Goulding voted for both ordinances. Evans was absent.

Wyndham's Senior Vice President, Hunter stated in a letter that Wyndham began its search for a general contractor for the project in March 2012. Originally, Wyndham considered four firms, and Evans-Chaffee Construction was not one of the four. Subsequently, Wyndham reconsidered their contracting and development strategy and engaged in discussions with several companies. Again, Evans-Chaffee Construction was not one of the companies. Wyndham entered into the final bid process with Inland, Huyder Construction, and Horizon Construction and awarded Horizon Construction the general contractor job on January 21, 2013.

Wyndham's financial partner in the project was Guggenheim Capital. Guggenheim wanted to have a local owner's representative because the general contractor for the Wyndham project, Horizon Construction, was from Madison, Wisconsin and was not local to the Avon area.

On April 15, 2013, Guggenheim approached Evans for the first time via an e-mail from Tomas Christopoul, Guggenheim's Senior Managing Director of Global Real Estate & Infrastructure. Guggenheim contacted Evans based on a recommendation of other individuals as they did not know and had no previous contact with Evans or with Evans-Chaffee Construction. The following morning, April 16, 2013 Evans and Goulding met with Town Manager, Virginia Egger, and notified her of their potential involvement with the Wyndham project. Later the same day, Evans and Goulding had an initial conversation with Christopoul. After a series of discussions, on April 25, 2013 Evans-Chaffee Construction sent an initial scope of services agreement to Guggenheim that was never signed or returned. On May 16, 2013, Evans met with Egger to notify her of a meeting scheduled for the next day with the Wyndham project development team. On May 17, 2013, Evans and Goulding attended an on site meeting with Wyndham and Guggenheim representatives.

In June 2013, Evans-Chaffee Construction received confirmation that they had been selected as the project manager/owner representative for Wyndham. On June 24, 2013, Evans-Chaffee Construction began work under their contract. During the period of time in May and June 2013, Wyndham pursued an amended final plat for the Wyndham project. The amendment sought to alter the exterior boundaries along one side of the plat. On June 25, 2013, Council considered Ordinance 13-08, reflecting the proposed plat amendment. Evans and Goulding indicated their conflict because of their relationship with the project, did not participate in the discussions, and removed

themselves from the meeting. The remaining Council members unanimously approved the ordinance on first reading and set it for second reading. The second reading occurred at the July 17, 2013 meeting. Again, Evans and Goulding excluded themselves from the meeting. The remaining Council members approved and adopted the ordinance amending the Wyndham plat.

Evans and Goulding anticipate the Wyndham project will be sold and conveyed to Guggenheim within the next couple of weeks. Evans-Chaffee Construction will continue in the role of project manager/owners' representative for Guggenheim after the sale.

## **5. Findings and Conclusions regarding the Wyndham project**

Based on the foregoing facts, my findings and conclusions are as follows:

There is no evidence Evans or Goulding had any improper involvement with the Wyndham project at any time before Ordinances 13-03 and 13-04 were brought before the Council in February 2013. Evans' and Goulding's participation in the discussions regarding Ordinances 13-03 and 13-04, as well as their voting in connection with those ordinances (Evans was absent for one of the votes) constituted "official action" under Section 2.30.050. Therefore, the issue is whether Evans or Goulding had a conflict of interest under Section 2.30.060 (3),(4), or (5) at the time they took their official action of voting on the Wyndham project. If it was reasonably foreseeable in February, 2013 that Evans-Chaffee Construction would be "directly and substantially" affected to its economic benefit by approval of the Wyndham project, then Evans and Goulding would have violated Avon's Ethics Code.

There is no evidence that in February 2013 Evans-Chaffee Construction had any interest in the Wyndham project or had taken any steps to obtain work in connection with the project. Nor is there evidence that Wyndham or Guggenheim had contacted Evans-Chaffee Construction about assisting them in the Wyndham project. On the contrary, the undisputed evidence from Christopolous is that the first contact between Evans-Chaffee Construction and Wyndham occurred at the instance of Wyndham on April 15, 2013. From that date forward, Evans-Chaffee Construction clearly had a conflict of interest, but not before that date. Accordingly, neither Evans or Goulding had a conflict of interest when they voted to approve Ordinances 13-03 and 13-04 in February 2013.

The only official action taken by the Council in relation to the Wyndham project after Evans and Goulding's conflict of interest arose on April 15, 2013 (the date they were first contacted by Wyndham/Guggenheim), was to approve Ordinance 13-8, amending the final plat in June and July 2013. Neither Evans nor Goulding participated, expressly disclosing their interest and excluding themselves from the proceedings. I conclude

neither Evans or Goulding took any official action related to the Wyndham project while they had a conflicting interest in the project.

At least one of the complainants also questioned whether Goulding had a conflict of interest with the Walgreens and Wyndham projects because he leased his residence in Avon from Mauriello the planner for both projects. The fact that Goulding was renting from Mauriello was disclosed and discussed by Goulding and Town Attorney Heil with Council on February 28, 2012. The discussion arose in connection with an application by Northside Coffee and Kitchen regarding use of Town property for parking purposes. At the February 28, 2012 meeting, Mauriello was appearing before the Council in the same capacity as he appeared before the PZ and Council in the Walgreens and Wyndham matters – as the planner appearing on behalf of the applicant in a land use proceeding. According to the minutes of the February 28, 2012 meeting, “It was agreed by the council members that this was not a conflict of interest.” As a result, this issue has previously been resolved by the Council.

The Town’s building official, Willy Gray, confirmed that Evans-Chaffee Construction has received no special treatment or consideration in working with Town staff to acquire necessary construction permits or approvals.

### **III. RESIDENCY INVESTIGATION**

#### **A. Provisions of the Avon Charter and Avon Town Code relating to residency of Council members**

Avon is a home rule municipality and the determination of residency of Council Members is an issue of local concern. Therefore, the residency issue is governed by Avon’s Charter and Town Code. Avon’s provisions on this subject are more detailed than most municipalities.

The Avon Charter, Section 4.6(a) provides, in relevant part:

No person shall be eligible to hold office as an elected official, unless, at the time of his nomination and election he be a qualified elector as defined by the laws of the State of Colorado, a resident and qualified elector of Town as defined by ordinance.

Avon Town Code, Chapter 2.32 governs “Determining Residency Qualifications of Council Members.” Section 2.32.010 contains the following definitions:

*Home or place of abode.* A *home or place of abode* shall mean a physical location in the Town where a person can carry on usual residential

activities. This shall include the ownership of a residential accommodation or a lease of such an accommodation on a month-to-month or longer term. However with the exception of short-term rentals of thirty (30) days or less, if the affected person does not have a present right to possession of the premises, then such location shall not be considered to be a home or place of abode.

*Residency.* The residence of a person is the principal or primary home or place of abode of a person. *Principal or primary home or place of abode* is that home or place in which his or her habitation is fixed and to which a person, whenever he or she is absent, has the present intention of returning after a departure or absence therefrom. A person shall not be considered to have lost his or her residence if he or she leaves his or her home in the Town to go out of Town merely for temporary purposes with an intention of returning. If the person moves out of Town with the intention of making it his or her permanent residence, he or she shall be considered to have lost his or her residence in the Town. Residency within the Town shall be satisfied by ownership or leasehold interest of real property and contemporaneous use of the same as the affected member's primary home or place of abode.

Section 2.32.090 provides that Council may consider any relevant evidence to determine residency and sets forth a non-exclusive list of 16 relevant items:

- (1) Expressed intent of the affected member to return to a home or place of abode in Avon within six (6) months after losing same. Although this expressed intent shall be very important in making the determination of continued residency, it shall not be the sole criteria;
- (2) Activities of the affected member in acquiring a home or place of abode in Avon;
- (3) Location of current habitation of the affected member;
- (4) Length of time the affected member has resided at the out-of-Town habitation;
- (5) Ownership (including type, length of time and whether residential) of real and personal property within the Town;
- (6) Mailing address;

- (7) Business interests in the Town including involvement of the affected member in the business;
- (8) Employment in the Town;
- (9) Income sources;
- (10) Age;
- (11) Marital status;
- (12) Residence of spouse, children or parents;
- (13) Leaseholds interests both within Town and at current out-of-Town habitation;
- (14) Voter registration;
- (15) Motor vehicle and driver's license registration;
- (16) Participation of the affected member in the meetings and affairs of the Council and Town.

Section 2.32.020 addresses what may happen if a sitting Council Member loses their home or place of abode:

If a Council Member states that he or she has no intent to return to a home or place of abode in Avon, when a Council Member loses his or her home or place of abode within the Town, as defined herein, upon the expiration of thirty (30) days after the loss of such home or place of abode in the Town, such Council Member shall be considered disqualified as a Council Member for failure to maintain residency in the Town. However, the Town Council may continue such Council Member's residency qualification and membership on the Council if the Council determines, prior to the expiration of such thirty-day period, that the affected Council Member intends to regain a home or place of abode within the Town prior to the next general municipal election or within one (1) year of such determination, whichever first occurs.

Section 2.32.060 provides that if a Council Member is no longer residing in Town and has no intent to return in the foreseeable future, then he or she is no longer qualified to sit on Council.

Although residency in this instance is governed by Avon Charter and Town Code provisions, it is worth noting that those provisions are largely consistent with Colorado statutes governing this issue, as well as Colorado case law as discussed in the memos provided to Council by Town Attorney Eric Heil.

## **B. Residency of Goulding**

### **1. Statement of facts**

From 1999 through August 2011, Goulding lived in a home he purchased at 600 Nottingham Road in Avon. That was Goulding's residence when he was elected to Town Council in November 2010. In August 2011, he and his wife moved out of the Nottingham Road house and rented a duplex in Wildridge, which is also in Avon. On February 1, 2013, the duplex Goulding was renting sold, subject to Goulding's lease, which expired May 31, 2013. On April 12, 2013, Goulding and his wife purchased a home in Edwards.

In May 2013, Goulding discussed his move to Edwards with the Mayor and Town Manager. On May 20, 2013, Goulding sent an e-mail letter to Council Members asking that the matter be placed on the agenda and that the Council consider granting him permission under Section 2.32.020 to remain on Council for a period of up to one year. On May 22, 2013, Town Attorney Heil provided the Council with a memo addressing issues surrounding Goulding's residency. The issue of Goulding's residency was placed on the Council's May 28, 2013 agenda, before the expiration of his lease on the duplex in Wildridge.

At the May 28, 2013 meeting, Council discussed Goulding's residency. At the conclusion of the discussion, Council passed a motion to allow Goulding to remain on the Council until June 1, 2014, but if he was unable to re-establish a residence in Avon by then, he would be required to step down. Although the context of the May 28, 2013 minutes indicate the motion was made and passed, the minutes do not specifically state who seconded the motion or that the motion passed.

### **2. Findings and conclusions regarding Goulding's residency**

Based on the foregoing facts my findings and conclusions are as follows:

The Avon Town Code specifically contemplates that a Council member who is no longer a resident may remain on Council, provided he complies with the procedural requirements of Section 2.32.020 and the Council votes to allow him to remain. In Goulding's case, both of these requirements were satisfied. Goulding's lease at the

Wildridge duplex in Avon expired May 31, 2013. Accordingly, Goulding had until June 30, 2013 to take the matter up with Council and gain Council's approval. This was accomplished on May 28, 2013, well in advance of the deadline. Regardless of whether Goulding is currently a resident of Avon, he has been granted permission by Council through a method authorized by Avon's Town Code to remain a member of Council at least until June 1, 2014. Goulding has agreed to obtain a residence in Avon by that date or resign.

### **C. Residency of Evans**

#### **1. Statement of facts**

Evan's August 6, 2010 petition to run for council, identified his residence as 2365 Fox Lane, Avon, Colorado. On January 17, 2013, Evans sent an e-mail to Council advising them that his three children were attending school in Vail, that he had purchased duplex in Vail, that his family would be moving to Vail, that he continued to own a home in Avon. He indicated he considers Avon his primary residence.

On May 1, 2013, Evans entered into a Room Rental Agreement with the O'Briens to rent a room in their Avon home from May 2013 to May 2014. In my interview of Evans, he stated he spends approximately 60% of his time at the room in the O'Briens' house. Evans acknowledged that his family never stays at the O'Briens' house and there is not space for them to do so in the room he rented. Evans' family resides full time at the duplex in Vail, where Evans indicated he spends approximately 40% of his time.

During his interview, Evans stated that he is registered to vote in Avon, his business where he is employed is located in Avon, he continues to own the house on Fox Lane in Avon, though it is rented out, and he owns the building in Avon where his business is located.

The following items provided by Evans indicate his address is in Avon:

- Driver's license
- Mailing address
- Utility bills
- Income tax return for 2012

#### **2. Findings and conclusions regarding Evan's residency**

Based on the foregoing fact my findings and conclusions are as follows:

According to Section 2.32.010 of the Town Code, the expressed intent of the Council Member is not conclusive, but it is “very important”. Evans’ family is residing in Vail. It is unlikely any Evans family time is spent in the rental room at the O’Briens’ house in Avon. Accordingly, when Evans is absent (on vacation, out of town on business, etc.), it is likely that his present intention is to return from that absence to his family in Vail. It is not clear that Evans’ move out of Avon is “merely for temporary purposes.” Evans’ January 17, 2013 e-mail suggests that his return to Avon is far from certain. Evans states that, he and his family “would like to try living closer to school in this East Vail property prior to deciding what to do with it from an investment standpoint.” The inference from this statement is that if Evans and his family conclude that it is better for them to live close to the school in East Vail, they are likely to remain there. These factors suggest Evans’ principal or primary home or place of abode is Vail.

However, there are several countervailing factors. Evans’ express intent during his interview was to remain a resident of Avon. He retains a house in Avon, though it is currently rented out. He is employed in Avon, has his business in Avon, has a leasehold in Avon, and owns the building in which his business is located in Avon. His driver’s license, voter registration, mailing address, utility billing address, and address for federal income tax purposes are all in Avon.

Under these circumstances and giving substantial weight to Evans’ expressed intent to remain an Avon resident, I conclude Evans is a resident of Avon under the Town Code’s provisions.

It should be noted that my conclusion regarding Evans’ residency may be revisited by the Council at any time. Section 2.32.060 of the Town Code authorizes any Council Member to ask the Council to hold a hearing on the issue of a Council Member’s residency at any time. Such a hearing would be in order if any of the facts set forth above change subsequent to the date of this report.

#### **IV. EMPLOYMENT RELATIONSHIP ISSUE**

##### **A. Provisions of the Town Code related to the employment issue**

The concerned citizens who raised the present issues assert that because Goulding is employed by Evans’ company and Evans’ is Goulding’s supervisor, Evans and Goulding are violating the following sections of the Code of Ethics:

Portions of the policy statement contained in Section 2.30.020, which states in part:

the proper operation of democratic government requires that public officers be independent, impartial . . .

Subpart (7) of the conflict of interest provisions in Section 2.30.060:

2.30.060: A Town officer shall not:

...

(7) Solicit or accept a present or future...thing of value from a person under circumstances which would lead a reasonably prudent person to believe that such...thing of value was made or given primarily for the purpose of influencing or attempting to influence such officer in connection with an official act . . .

More Specifically, the complaining parties assert (1) that by offering Goulding employment in 2011, Evans was offering and Goulding was accepting a thing of value, in violation of 2.30.060(7), and (2) as Goulding's boss, Evans has asserted control over Goulding's vote as a Council member resulting in Goulding's loss of independence and impartiality in violation of 2.30.020.

## **B. Statement of Facts**

The relationship between Evans and Goulding began in 1999, when Goulding was the owner's representative for Vail Resort Development in connection with the construction of much of the Blue Sky Basin, which was done by Evans-Chaffee Construction. After 1999, Goulding was the owner's representative for Vail on several more projects constructed by Evans-Chaffee Construction, including the Red Sky development. Before 2010, Goulding left Vail Resorts and started his own company. He was in the process of developing construction contracts for Eagle County School District and contracted with Evans-Chaffee Construction to assist him in that effort. Evans concluded that employing Goulding would benefit Evans-Chaffee Construction and allow the company to offer additional services in the project management/owner's representative area. On January 17, 2011, Evans-Chaffee Construction hired Goulding as a project manager, which is the position he has occupied with the company through the present. At the time he was hired, Goulding and Evans were both Town Council members.

According to Evans, he disclosed Goulding's hiring to the Town Council around the time it happened and no one expressed any objections. A review of the minutes shortly before and after January 17, 2011 did not indicate any discussion of the matter. However, the February 8, 2011 workshop agenda identifies item 3.b. as "Letter to Secretary of State's Office for Disclosure of Conflict of Interest for W. Todd Goulding/Informational Only." The disclosure to the Colorado Secretary of State was part of the Council packet for the workshop. Among other disclosures the document states:

I have also recently accepted a position with Evans Chaffee Construction Company, to oversee business development, project management, and consulting services as an owners representative. I believe the relationships and expertise gained in this position is an asset to my service as a...Council Member of the Town.

Others, however, may view any or all of these relationships to constitute a potential conflict of interest. Thus, this is the reason for this disclosure.

According to Goulding, no Council member raised any objection and all Council members seemed unconcerned about his employment relationship with Evans' company. Some of the citizens who have now raised the issue were on Council when Goulding disclosed his employment. They expressed no objection at that time, but now seek to raise the issue two years later.

At my request the Town Manager has provided a summary of the voting history of Evans and Goulding as well as other Council members.

### **C. Findings and Conclusions regarding Employment Issue**

Based on the forgoing facts my findings and conclusions are as follows:

To constitute a violation of Section 2.30.060 of the Town Code, the evidence would have to show not only that Evans hired Goulding in order to influence Goulding's vote, but that was the primary purpose of his hiring. The evidence reviewed demonstrates that Evans hired Goulding for business reasons. There is no evidence Evans hired Goulding in an effort to influence Goulding's vote and certainly no evidence that was Evans primary purpose for the hire.

To establish a violation of Section 2.30.020, there would need to be evidence that Goulding had lost his independence and succumbed to the control of his employer in making decisions as a Council Member. The mere fact that Goulding often votes in the same manner as Evans does not resolve the issue. The summary of voting provided by the Town Manager, demonstrates that by the time a matter is brought to Council by staff and fully discussed and debated amongst Council at the meeting, most votes are unanimous with all Council Members, including Evans and Goulding, voting alike. There are some instances where Evans and Goulding vote differently from the other Council Members, but there are more instances where Evans and Goulding are joined by two or more other Council Members voting with them. More importantly, there are some instances where Evans and Goulding vote differently from each other. See for example the votes taken on February 12, 2013, June 26, 2012, January 10, 2012, and November 8, 2011. The evidence does not support the conclusion that Evans controls or has attempted to control Goulding's vote.

Review of the relevant case law revealed no cases where one member of an elected board was prohibited from being related to another member, whether as employer/employee, trustee/beneficiary, family member/family member, or other similar relationship. There is no prohibition against individuals with some type of close relationship serving on the same elected body.

I conclude there was no ethical violation stemming from Goulding's employment by Evans-Chaffee Construction.

## V. A NOTE ABOUT THE APPEARANCE OF IMPROPRIETY

Among the other bases for finding a conflict of interest, Section 2.30.060(8) provides:

A Town officer shall not:

...

(8) Perform any official act under circumstances which give rise to an appearance of impropriety on the part of the officer.

Taken individually, the Walgreens project, the Wyndham project, and the employment relationship between Goulding and Evans, do not involve a conflict of interest. However, the concerned citizens have asserted that an appearance of impropriety has been created by the cumulative impact of Goulding going to work for Evans-Chaffee Construction, the award of the general contractor bid to Evans-Chaffee Construction for the Walgreens project, and the selection of Evans-Chaffee Construction as the project manager/owner's representative on the Wyndham project.

The perception of impropriety standard is usually discussed in the context of the attorney client relationship.<sup>1</sup> The Colorado Appellate Courts have addressed the perception of impropriety in several cases. For example, in *People v. County Court, City & County of Denver*, 854 P.2d 1341 (Colo. 1992), the Colorado Court of Appeals held that the appearance of impropriety turns on the circumstances of each case and involves "issues of public confidence in the integrity and efficiency of the legal system and of impartiality and assurance that matters will be decided solely on the merits." However, in *People v. Garcia*, 698 P.2d 801 (Colo. 1985), the Colorado Supreme Court cautioned against reading the appearance of impropriety standard too broadly. "[W]hen we deal with what the public thinks, we must be careful not to accept the view of the most cynical as the

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<sup>1</sup> It is worth noting that the American Bar Association eliminated the perception of impropriety as a standard for evaluating misconduct of attorneys when it adopted the Model Rules of Professional Conduct in 1973, due in large part to the difficulty of enforcing this standard.

true voice of the public, lest we accept a lack of faith in our institutions as a categorical basis for restricting otherwise quite ethical conduct.” Evans and Goulding need to be mindful to maintain a clear, distinct, and fully disclosed line between what they do as Council members and what they do in their professional lives, and to make certain that while a matter is pending before them as the electors’ chosen officials, they do no act that will benefit them or their company in a manner different from the benefits that result to others similarly situated.

If the facts are made known regarding each of the subject incidents, and those facts demonstrate that there were not conflicts in any of the separate incidents, there should not be a perception or an appearance of impropriety when the incidents are viewed collectively. Those who perceive there to be an impropriety when in fact there is none may be operating from an incomplete understanding of the relevant circumstances. Accordingly, elected officials are well advised to (1) fully disclose those influences in their lives that could create the perception of a conflict and (2) make sure all of the necessary information is available to the public so that those who choose to do so, can make an informed determination of whether a conflict exists.

Based on the evidence presented, including the cumulative impact of the series of incidents involved, the evidence when fully known and disclosed does not establish that Evans or Goulding violated the appearance of impropriety standard.

## **VI. CONCLUSION**

The conflict of interest concerns raised by various citizens are understandable in light of the number and size of Town-approved projects Evans-Chaffee Construction has been involved in constructing or managing to their substantial economic benefit. Based on my investigation of the specific facts relating to each of those transactions and the sequence of events, I conclude neither Evans or Goulding violated the conflict of interest provisions of the Ethics Code when acting as Council Members. In addition, based on the Council’s motion regarding Goulding’s residency and the factors listed in the Town Code for determining residency, I conclude neither Evans or Goulding violated the residency requirements for Avon Town Council Members.