

**Date:** May 7, 2007  
**To:** Mt. Juliet Board of Commissioners  
**From:** Paula A. Flowers, City Attorney  
**Re:** Ethics Investigation Findings, Matter 07-02

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On April 16, 2007 the Board of Commissioners met in a properly noticed, special meeting to review a complaint filed by Public Works Director Hatton Wright against Mayor Linda C. Elam on April 13, 2007 (hereafter referred to as “Wright Complaint”). The Board of Commissioners adopted a resolution instructing me to further investigate the Wright Complaint, taking factual statements under oath, with a court reporter present. The Board of Commissioners further instructed me to submit written findings as to the factual and legal merits of the Wright Complaint on or before May 7, 2007.

#### I. Introduction – Process of Investigation

To investigate the Wright Complaint, witnesses were identified and interviewed under oath with a court reporter present. Sworn statements were taken from the following individuals:

- A. Hatton Wright, then-Director of Public Works,<sup>1</sup> accompanied by his attorney, Dean Robinson;
- B. Shannon Joyner, Assistant Director of Public Works;
- C. Marlin Keel, Consulting City Engineer;
- D. Rob Shearer, then-City Manager;<sup>2</sup>
- E. Bobby Franklin, Director of Planning;
- F. Debbie Moss, then-City Zoning Administrator;<sup>3</sup> and
- G. Mayor Linda C. Elam accompanied by her attorney, Margaret Behm. Mayor Elam also submitted a sworn affidavit to supplement her sworn statement. In this Affidavit, Mayor Elam stated that, as of April 30, 2007 she is no longer an employee of Commercial Realty Services but will continue to provide legal services to this company as an independent contractor.
- H. Louis Oliver, Consulting City Attorney for Zoning and Planning: Due to scheduling difficulties, the sworn statement of Louis Oliver did not take place. Mr. Oliver did, however, provide a sworn affidavit to me.

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<sup>1</sup> Mr. Wright resigned his position, effective April 27, 2007.

<sup>2</sup> Mr. Shearer was relieved of responsibility as City Manager, effective April 23, 2007, when the Board of Commissioners appointed Sheila Luckett to serve the function of City Manager.

<sup>3</sup> Ms. Moss’ employment with the City was terminated April 25, 2007.

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The factual circumstances of each allegation of the Wright Complaint were reviewed with these witnesses. Based upon my review of their collective statements, affidavit, and exhibits provided by these witnesses, I have identified relevant factual information and have analyzed both the factual and legal merit of the Wright Complaint.

If the allegations of the Wright Complaint were determined by me to have no underlying, plausible factual basis, I have concluded that the allegation had no factual merit. If an allegation had no factual merit, I conducted no analysis of the legal merit of the allegation, as such analysis would be purely speculative. If I determined that there was any factual basis for the allegation in the Wright Complaint, I analyzed the allegation by application of the Mt. Juliet Code of Ethics and other city ordinances referenced in the Wright Complaint.

II. Analysis of Relevant Factual Information Collected During Investigation

A. Authors of Wright Complaint: As a preliminary matter, it should be noted that the Wright Complaint was written not by Hatton Wright himself. Rob Shearer is the original author of the Wright Complaint. Mr. Wright went to Rob Shearer following the April 9, 2007 meeting of the Board of Commissioners and expressed his intent to file a complaint against Mayor Elam. Mr. Shearer had already drafted a complaint and offered that complaint, and Mr. Wright agreed. Mr. Shearer provided it to Mr. Wright for his review on or around April 12, 2007. Mr. Wright reviewed the complaint drafted by Mr. Shearer with his attorney and then submitted the Wright Complaint to the City Attorney on Friday, April 13, 2007.

B. Analysis of Paragraph 1.a. of the Wright Complaint. The Wright Complaint asserts, in Paragraph 1.a. as follows:

a. *The Mayor used her position and sought (by threats and intimidation directed towards the Zoning Administrator and the City Planner) to kill an anticipated condition or requirement on the Mt. Juliet Crossings commercial development being developed by her employer.*

Mr. Wright admitted that he had no first-hand knowledge regarding this factual allegation, and that all of his knowledge of this allegation was based on information related to him by Rob Shearer and Bobby Franklin. Mr. Wright's entire knowledge of this allegation is second- and even third-hand information, and he stated that he was not aware of any overt threats by Mayor Elam to Bobby Franklin. Mr. Wright stated that, from his conversations with Bobby Franklin and Rob Shearer, Mr. Wright perceived it was the "tone of voice" the Mayor used during a phone call with Bobby Franklin that constituted her alleged acts of "threats and intimidation" related to the Mt. Juliet Crossings development. Mr. Wright stated that he had no knowledge of any acts by Mayor Elam toward Debbie Moss.

Mr. Shearer stated that Bobby Franklin came to him on Wednesday, September 20, 2006 and stated that he might need Rob Shearer's "help" because Mayor Elam was "upset" about technical review engineering instructions that had been issued by the City regarding the Mt. Juliet Crossings development. These instructions were scheduled to be reviewed and considered for adoption by the Mt. Juliet Regional Planning Commission the following day, September 21, 2006.

The sworn statements of Rob Shearer, Bobby Franklin, and Mayor Linda Elam all reflect that Mayor Elam has been very involved in the City's development activities ever since she became chair of the Planning Commission around 2001. Mr. Shearer stated that Mayor Elam, during her tenure as a City Commissioner and as Mayor, was often involved in discussions with developers and in development of City policy regarding development. Mayor Elam sometimes provided her law office in Nashville for meetings between city officials and developers. Bobby Franklin stated that when Mayor Elam was chairperson of the Planning

Commission, he talked to her “once or twice, maybe three times a week” regarding development and planning issues, and that she was “very involved” on a communication basis, “was very interested” in the planning and development process and was “quite good at it.” Mr. Franklin stated that after she was elected Mayor, “her focus . . . was larger” than planning and development matters though she still contacted him about planning matters.

Mr. Franklin stated that when the Mayor called him on September 20, 2006 regarding the Mr. Juliet Crossings engineering instructions he “thought she was kidding” at the beginning of the phone call. Mr. Franklin stated that the Mayor questioned the appropriateness of the City’s decision to require the Mt. Juliet Crossings developer to include a 50-foot wide roadway access to the adjacent parcel located west of the Mt. Juliet Crossings development property. Mr. Franklin stated that Mayor Elam questioned whether requiring such an access would amount to an unconstitutional “Taking” of the Mt. Juliet Crossings property or amount to an act of inverse condemnation that might result in litigation for the City.

Mr. Franklin stated that he thinks he may have “laughed at her” and that he debated the access requirement with Mayor Elam and related to her examples of when such a requirement was included in other development approvals during the time that Mayor Elam served as chairperson of the Mt. Juliet Planning Commission. Mr. Franklin stated that he reviewed the subdivision regulations with Mayor Elam during the telephone conversation. Mr. Franklin stated that he felt Mayor Elam was trying to convince him not to submit the access requirement to the Planning Commission for consideration and possible adoption. Mr. Franklin stated that Mayor Elam did not threaten him during the telephone conversation.

Mr. Franklin stated that he was not aware, at the time of this telephone call, that Mayor Elam was employed by Commercial Realty Services (“CRS”), the developer of Mt. Juliet Crossings. Mr. Franklin stated that Mayor Elam “dropped the issue” after their telephone call, and the next day he was contacted by Tom White, acting as attorney for CRS. Mr. White then appeared at the Planning Commission meeting that evening, and the requirement was ultimately not adopted by the Planning Commission because CRS decided to subdivide the property in a different manner, so the access requirement was no longer applicable.

Mr. Franklin stated that he was not aware of any actions by Mayor Elam with regard to the Mr. Juliet Crossings development to pressure, threaten, or intimidate Debbie Moss. Ms. Moss stated that she did not recall any specific conversations with Mayor Elam regarding any aspect of the Mt. Juliet Crossings development, and Ms. Moss stated that she had never felt threatened or intimidated by Mayor Elam related to any aspect of the Mt. Juliet Crossings Development.

Mayor Elam stated that she became an employee of CRS on September 11, 2006. Mayor Elam stated that she had reviewed the Mt. Juliet Crossings development submittal for the September, 2006 meeting of the Planning Commission because, “as Mayor” she receives a copy of the Planning Commission packet each month and reviews those packets routinely.

Mayor Elam stated that she interpreted the engineering instruction to require that CRS actually build the 50 foot wide road to allow access to the westerly parcel.

Mayor Elam stated that her disagreement with the access road requirement was based on the fact that the adjoining parcel to the west, which would have benefited from the access road, was not within the Mt. Juliet city limits and was therefore subject only to county zoning requirements. Mayor Elam was uncomfortable because there was uncertainty as to how the adjacent property might be used, particularly if the access road was built. Mayor Elam stated that she had been concerned that a use might be implemented on the adjacent property that would be inconsistent with the nature and quality of the Mt. Juliet Crossings development.

Mayor Elam stated that her concern about the access road was also based on the 2005 United States Supreme Court opinion in Kelo v. City of New London, because Mayor Elam felt that the City's requirement of an access road to benefit a private adjoining property owner, without condemnation action by the City with resulting payment of compensation for the condemned property, could be considered an unconstitutional "Taking" of private property. Mayor Elam stated that the City had previously considered a similar factual scenario involving construction by Bob Parks Realty while she was a member of the Planning Commission. Mayor Elam stated that the Planning Commission had established policy at that time by declining to adopt a request from a neighboring property owner that Bob Parks Realty be required to provide an access road to the neighboring parcel. Mayor Elam felt that the requirement of an access road in the CRS development was, therefore, inconsistent with the Planning Commission's prior policy in a similar situation.

Mayor Elam stated that she believed she called Bobby Franklin on September 12 or 13, 2006 to express her disagreement with this departure from the Planning Commission's prior policy. Mayor Elam does not believe that she told Mr. Franklin at any point during this telephone call that she was then employed by CRS. Mayor Elam stated that she did not say that CRS might sue the City if the condition was adopted. Mayor Elam does not recall having made any mention of the possibility of litigation if CRS was required to build the access road to the adjacent property. Mayor Elam stated that she made the call in her role as Mayor, because she believed that the requirement represented a departure from the City's prior Planning Commission policy.

Mayor Elam stated that, after her conversation with Bobby Franklin, she engaged attorney Tom White to represent CRS regarding the access road condition sought by the City. Mr. White is, according to Mayor Elam and Bobby Franklin, an attorney who routinely represents developers before the Mt. Juliet Planning Commission. Mayor Elam stated that she engaged Mr. White to appear at the Planning Commission because she could not participate in the Planning Commission meeting since she had begun working for CRS as an employee.

Bobby Franklin's perception of the Mayor's call to him appears to be based now on his learning, after the fact, that Mayor Elam had begun working for CRS as an employee. Mr. Franklin now concludes that CRS might have been attempting to negotiate a purchase of the westerly adjoining parcel of property during September, 2006, and that CRS might have felt that the requirement for an access road to that property would have increased the potential sale price demanded by the adjoining property owner. Mr. Franklin stated that he thinks that CRS may now have purchased the parcel, but doesn't know whether the sale has closed.<sup>4</sup>

Mr. Franklin concludes now that the Mayor's "getting mad at me, you know offering a possibility of a lawsuit maybe" was an attempt to threaten or intimidate him. Mr. Franklin concludes now that Mayor Elam was attempting to use her position to obtain a benefit for CRS, even though Mr. Franklin acknowledged that the Mayor never indicated to him that she was calling on behalf of CRS, or as an employee of CRS. Mr. Franklin said that at the time of the telephone call in September, 2006, as far as he knew, he "was talking to the Mayor."

#### CONCLUSION

Based on these relevant facts, I conclude that the allegations Paragraph 1.a. of the Wright Complaint have no factual merit. Although Bobby Franklin's recollection of the conversation differs slightly from Mayor Elam's recollection, I conclude from the statements of witnesses that Mayor Elam did not attempt to threaten or intimidate either Bobby Franklin or Debbie Moss to withdraw the engineering requirement for an access easement across CRS property. Mayor Elam presented a plausible explanation for her disagreement with the access easement requirement. Her actions to engage another attorney to represent CRS before the Planning Commission are consistent with her own acknowledgment that she recognized at that time that CRS would need to obtain additional legal counsel to represent CRS interests before the City's Planning Commission.

City staff's current perception of Mayor Elam's telephone call in September, 2006 appears, however, to be attributed to the fact that she did not immediately disclose her employment with CRS. Although Mayor Elam determined it would be inappropriate for her to represent CRS before the Planning Commission, she did not similarly conclude that it would be inappropriate for her to contact Bobby Franklin to discuss the engineering requirement. To avoid the appearance of any personal conflict, the Mayor could have, at a minimum, disclosed her employment to Bobby Franklin when she called him in September, 2006, or Mayor Elam could have simply not contacted Bobby Franklin at all and referred the matter to attorney Tom White.

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<sup>4</sup> Mr. Franklin's understanding was refuted by Mayor Elam, who stated that CRS now has a contract to purchase four acres from the adjoining property owner but has not purchased the one hundred acres parcel to the west of the Mt. Juliet Crossings development.

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Mt. Juliet's Code of Ethics Ordinance, Ordinance 2006-41, became effective September 25, 2006. Even if the factual allegations in Paragraph 1.a. of the Wright Complaint had factual merit, which I have concluded they do not, the requirements of the Ethics Code can not be applied to conduct prior to the effective date of the ordinance.

C. Analysis of Paragraph 1.b. of the Wright Complaint. The Wright Complaint asserts, in Paragraph 1.b. as follows:

*b. The Mayor used her position in an attempt to secure special consideration for Pulte homes to be allowed to begin construction of new homes in the DelWebb subdivision before their infrastructure was complete, contrary to the City's ordinances and policy.*

The allegations in this paragraph of the Wright Complaint relate to a meeting that was held at City Hall on Tuesday, January 23, 2007. Witnesses generally agreed as to the attendees at the meeting. Attending the meeting were Rob Shearer, Hatton Wright, Shannon Joyner, Bobby Franklin, Marlin Keel, Louis Oliver, Mayor Linda Elam, and Chris Ryan, a representative of Pulte Homes. There was uncertainty from two witnesses as to whether Gary Branham might also have attended the meeting; however, Mr. Branham confirmed to me that he did not attend the meeting.

The meeting was initiated by Mayor Elam via email on Saturday, January 20, 2007 after she had toured the Pulte construction site at the request of its representative, Chris Ryan. Mayor Elam's email was sent to Rob Shearer, Bobby Franklin, Hatton Wright, Marlin Keel, and Louis Oliver, and her email indicated the purpose of the meeting was to discuss "short-term timing issues." Mayor Elam stated that during her site tour with Mr. Ryan on January 20, 2007 he showed her some of the road construction difficulties they were having and expressed that some of those construction difficulties were due to the wet weather. Mayor Elam stated that she understood from Mr. Ryan that day that if Pulte could wait to finish some of the road work later in the year, the road bed soils would dry naturally and construction would be easier and cheaper.

Hatton Wright and Rob Shearer stated that public works staff's prior experiences with Pulte Homes had not always been positive. Difficulties in construction had occurred in a prior Pulte development, and Hatton Wright had been deposed in the course of litigation involving those prior projects.

Hatton Wright stated that prior to this meeting, in the Fall of 2006, Pulte staff had repeatedly suggested that they would like to begin construction on some of the development's homes, for purposes of showing the homes for sales and marketing, but Public Works staff had objected to construction of the homes prior to completion of infrastructure such as roads, sewer lines, and curbs.

Email records indicate that in September, 2006, Mayor Elam had received a letter from Harold Feener, representative of Homes By Design. Mr. Feener's letter of September 18, 2006 was addressed to Mayor Elam, the City Manager, and the City Commissioners and advocated the benefits of third party building inspectors for cities with booming development and limited building inspection staff. Mr. Feener's letter requested the approval and implementation of

such a program to offer developers the option of third-party engineers, pre-approved by the City of Mt. Juliet, in lieu of exclusive inspection by City personnel. Mayor Elam forwarded this letter to Rob Shearer on November 1, 2006, indicating that she had mentioned the letter to him “several weeks ago.” Mayor Elam’s email continued as follows:

“I have heard over the years that the issue this letter addresses is a real problem. Allowing the use of outside, pre-approved engineers for inspections (with the caveat that they have no connection to the project being inspected or the builder/developer doing the work) seems reasonable to me. I discussed it with Louis Oliver and Marlin Keel a year or so ago, and neither had any objection to it in theory.<sup>5</sup> Can you work on setting something like this up? I suggest that we start with road construction to see how it works and then go from there.”

Email records indicate that Rob Shearer sent a copy of the Feener letter (but not Mayor Elam’s email) on to Hatton Wright, Shannon Joyner, and Gary Branham, on November 1, 2006, the same day he received Mayor Elam’s email and suggested: “[l]et’s talk about this. There are a lot of things to think about. . . .”

Witness accounts of the topics discussed at the January 23, 2007 meeting are difficult to reconcile. Hatton Wright, Shannon Joyner, Rob Shearer, and Bobby Franklin all stated that the following discussions occurred in some manner during the meeting: (a) Mayor Elam made forceful statements indicating her opinion that Pulte should be issued building permits prior to completion of some infrastructure, and that Mayor Elam felt the City needed to figure out a way to work with the developer to allow them to move forward; and (b) Consulting City Attorney Louis Oliver advised the group that the City’s “subdivision regulations” require that infrastructure improvements be completed prior to the issuance of building permits and that only the Planning Commission can waive this requirement and instead require a bond to be pledged by the developer for the remaining infrastructure.<sup>6</sup>

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<sup>5</sup> Marlin Keel and Louis Oliver were not questioned about this email because Mr. Keel gave his sworn statement prior to my knowledge of the email’s existence, Mr. Oliver provided his Affidavit after my review of the email, and I determined that whether Mayor Elam contacted these gentlemen was not the significance of her email to Rob Shearer. The significance of the email was that Mayor Elam and Rob Shearer had communicated regarding third party building inspectors prior to the meeting with Chris Ryan and City staff in January, 2007 and in connection to development matters other than the Pulte homes development..

<sup>6</sup> Consulting City Engineer Marlin Keel had only a general recollection of the meeting and provided no detailed information as to the discussion that might have taken place during the meeting.

Mayor Elam stated that she did not order City staff to issue the building permits to Pulte. She recalls that Louis Oliver did “read from some of the codes.” Mayor Elam does not recall the specifics of the discussion of the subdivision regulations. Mayor Elam does not recall whether Louis Oliver “said that it was allowable under the rules, but not under the policy, or whether he just said, it’s now allowable.” All witnesses indicate, however, that the matter was dropped after Mr. Oliver provided his opinion.

Mr. Oliver’s affidavit indicates that he does not recall Mayor Elam instructing or demanding issuance of building permits to Pulte.

The statements obtained from Hatton Wright, Rob Shearer, Shannon Joyner, and Bobby Franklin indicate that there was some discussion during the meeting concerning whether City codes enforcement personnel would be able to meet the daily building inspection needs of Pulte, because Pulte expected that once construction began on the homes they would need rapid inspection of those structures in order to meet Pulte’s contractual obligations to purchasers.

Hatton Wright stated that the meeting participants did discuss the possible use of private inspectors by Pulte. Rob Shearer said there was a discussion about “inspections.” Louis Oliver’s affidavit indicates that he recalls “Hatton Wright discussing the matter of Pulte hiring private building inspectors.” But Mr. Oliver’s affidavit indicates that he does not recall whether that discussion “occurred during the meeting, or immediately after the conclusion of the meeting.”

Witnesses statements were consistent that during the discussion about building inspections, Mr. Ryan made a statement that his company would not have time to wait for inspectors if the City staff could not keep up with the pace of Pulte construction. The statements of Rob Shearer and Bobby Franklin indicate that Mr. Wright then made a statement to the effect that Mr. Wright didn’t have time to sit in depositions related to poor construction by Pulte either, evidently in reference to the prior project by Pulte that had resulted in litigation. Several witnesses agree that, during this exchange, the meeting became tense, and Mayor Elam stated she was embarrassed that Mr. Wright had made this confrontational statement to Mr. Ryan. Bobby Franklin stated that when Mr. Wright had made this comment, Mr. Franklin “laughed out loud,” and he could tell that Mayor Elam was not happy about this exchange between Mr. Wright and Chris Ryan or Mr. Franklin’s reaction to Mr. Wright’s statement.

Mayor Elam does not recall discussion about the use of private inspectors by Pulte, and does not believe she advocated that private inspectors be used at the development. Mayor Elam did present the email she sent to Rob Shearer on November 1, 2006 and recalls this as her only prior discussion of the use of private inspectors to Rob Shearer and that her interest was limited only to inspection of roads.

Mayor Elam stated that Mr. Ryan contacted her the following day and felt he had been treated badly by Mr. Wright, and Mayor Elam stated she later asked Rob Shearer to speak with Mr. Wright about the incident and ask him to apologize to Mr. Ryan. Mr. Shearer stated he had not shared this request from the Mayor with Mr. Wright.

One additional exchange between Mayor Elam and Rob Shearer should be considered. Mayor Elam stated that in the Fall of 2006, Pulte representative Chris Ryan had indicated that Pulte might be willing to contribute approximately \$100,000 toward the price of a new ladder fire truck to be purchased by the City of Mt. Juliet. Mayor Elam understood from Chris Ryan during her site tour of the Pulte development that if Pulte could wait to complete some of the road construction activities that they thought would be alleviated by warmer weather drying the roadbed, Pulte might have additional money in their project budget to contribute toward the purchase of the fire truck, in addition to the money already promised by Mr. Ryan.

Rob Shearer stated that some time after the meeting held at City Hall on January 23, 2007, Mayor Elam expressed to him, "or confirmed something I had already sort of heard indirectly," that Pulte representative Chris Ryan had told Mayor Elam that if he had to spend extra project funding to complete the road construction at that time, that was less money that Pulte would have to contribute toward the purchase of a fire truck for the City. Rob Shearer stated that the Mayor related this statement in the hallway to him some weeks after the meeting, to explain why she had wanted the meeting to occur and "why she was upset that we hadn't been able to do anything at the meeting. . ."<sup>7</sup>

## **CONCLUSION**

Based on these relevant facts, I conclude that the allegations of Paragraph 1.b. of the Wright Complaint have a limited factual basis. Mayor Elam requested a meeting on behalf of Pulte, and she indicated her opinion that the City should try to find some way to allow the building permits to be issued and allow some of the road construction to wait until later in the year when the soil would be drier.

The Ethics Code, in Title 13-1-108 prohibits an official or employee from using or attempting to use "his position to secure any privilege or exemption for himself or others that is not authorized by the charter, general law, or ordinance or policy of the municipality."

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<sup>7</sup> Mr. Shearer stated that there had been a great deal of discussion in the newspaper about Mt. Juliet's need to purchase a ladder fire truck during negotiations with Wilson County concerning fire protection arrangements. Mr. Shearer also related that, due to the construction of a five story hotel structure at the CRS development, the hotel developer had made a payment to be held toward future City expenditures for public safety protections related to the unique height of the hotel, possibly including a ladder fire truck.

Mayor Elam stated that she told Chris Ryan prior to the meeting that she “didn’t know what our policies and rules and regulations were concerning the specific building process.” She stated to Mr. Ryan that her knowledge “had been in the planning and approval process, not the day-to-day implementation of it” and that she thought the best way for Mr. Ryan’s concerns to be addressed “was to bring all of the parties together to discuss it at one time, which would shorten the time period needed to arrive at a resolution.”

Mayor Elam stated that she had told Mr. Ryan during the meeting at City Hall that she “could not guarantee him anything other than a meeting.” Rob Shearer’s statement concerning the meeting confirms that Mayor Elam made this statement, and Rob Shearer stated that Mayor Elam also told Chris Ryan that “. . .it doesn’t appear we can do anything for you.”

If Title 13-1-108 is interpreted as the Wright Complaint suggests, this interpretation would produce an absurd result. Tennessee’s courts have repeatedly held, in determining the intent and proper application of laws, as follows:

Statutes do not exist in a vacuum, but must be read in relationship to one another to effectuate the intent of the statutory scheme as a whole. 82 C.J.S. Statutes § 351 (1999); see also Tenn. Elec. Power Co. v. City of Chattanooga, 114 S.W.2d 441, 444 (Tenn. 1937) (“A construction will be avoided, if possible, that would render one section of the act repugnant to another. Or one that would produce an absurd result.” (citations omitted)); In re Estate of Luck, No. W2004-01554-COA-R2-CV, 2005 Tenn.App. LEXIS 332, at 6-7 (Tenn. Ct. App. June 7, 2005). . .

Patterson v. Wharton, 2006 WL 1237266 (Tenn. Ct. App. 2006) at \*6. Tennessee courts construe the proper meaning and intent of laws using many long-established principles of statutory construction, including the principle that:

The language of a statute must be considered “in [the] context of the entire statute without any forced or subtle construction which would extend or limit its meaning.” Browder v. Morris, 975 S.W.2d 308, 311 (Tenn. 1998) (citing Wilson v. Johnson County, 879 S.W.2d 807, 809 (Tenn. 1994)). We are also mindful that we must construe terms reasonably and not in a fashion which will lead to an absurd result.” McClellan v. Board of Regents of State Univ., 921 S.W.2d 684, 689 (Tenn. 1996); Loftin v. Langsdon, 813 S.W. 2d 475, 480 (Tenn. Ct. App. 1991).

Interpreting Ethics Code Title § 13-1-108 as literally as the Wright Complaint asserts would mean that no official or employee of the City would be permitted to offer assistance to any citizen or private entity in their dealings with the City. No member of the Board of Commissioners would be permitted to contact City staff regarding any constituent concern, complaint, or request. Taken this literally, interpreting this ethics prohibition as the Wright Complaint does would prohibit the City Manager, Mayor, and elected Commissioners from introducing amendments to existing ordinances or passing resolutions regarding City policies or activities if their actions were initiated due to an existing concern, need, or issue presented by the City's residents or entities who operate in the City. Such efforts, under the Wright Complaint's interpretation of the Ethics Code, would be attempts to use their positions to secure privileges or exemptions that are not authorized by the charter, general law, or ordinance or policy.

As the elected representatives of their constituents, it is the responsibility of the Mayor and City Commissioners to advocate on behalf of the City's residents. In this specific instance, the Mayor's efforts were motivated not only on behalf of Pulte, but also on behalf of the City and its residents, because Mayor Elam thought that more money might be available from the development to secure a ladder fire truck if road construction costs could be minimized by delaying the road construction to drier months. If Pulte had wished, the developer could have requested approval from the Planning Commission to waive the requirement for completion of the roads and require instead that Pulte post a larger bond.

If Mayor Elam had wished, she could have initiated an ordinance to amend the subdivision regulations that Mr. Oliver indicated prohibited the issuance of building permits prior to the completion of infrastructure construction without Planning Commission approval. Interpreting Title 13-1-108 to prohibit Mayor Elam's participation in meetings or contacting City personnel to request assistance for citizens or constituents is a strained application of the Ethics Ordinance.

Although interpreting the intent of the Ethics Ordinance is within the ultimate authority of the Board of Commissioners, as the enacting body, I conclude that such a broad interpretation of this provision, as presented in the Wright Complaint, would yield an absurd result. There fore I conclude that no violation of the Ethics Ordinance occurred as alleged in Paragraph 1.b. of the Wright Complaint.

D. Analysis of Paragraph 1.c. of the Wright Complaint. The Wright Complaint asserts, in Paragraph 1.c. as follows:

*c. The Mayor used her position to seek a waiver from staff on behalf of Mt. Juliet Commons from a condition which had been imposed by a vote of the City Commission and which city staff had no authority to grant.*

The history of the Mt. Juliet Commons development, and the amendment of conditions placed on the development by both the Planning Commission and the Board of Commissioners, created confusion between Mayor Elam and city staff that surrounds this allegation of the Wright Complaint.

This multiple use development consists of single family residential homes, multifamily townhomes, and commercial construction. The relevant history of this development is as follows:<sup>8</sup>

- January 26, 2004: The Board of Commissioners annexed Mt. Juliet Commons property into the city;
- April 26, 2004: The Board of Commissioners imposed a requirement that twenty-five percent (25%) of the commercial acreage be built simultaneous to, or prior to, any residential construction, whether single family or multifamily homes;
- October 21, 2004: The Mt. Juliet Planning Commission required the development's large detention basin to be submitted for approval;
- May 30, 2006: The Board of Commissioners amended the prior conditions for the development to permit that all single family homes could be built before the commercial construction is built and required that all commercial construction must be completed before any multifamily townhomes could be built; and
- October 19, 2006: The Mt. Juliet Planning Commission approved a "variance" to remove prior restrictions regarding issuance of building permits for multifamily townhome construction.

Mr. Wright stated that the developer of Mt. Juliet Commons, Ben Forkum, had sold a portion of the commercial acreage of the development to First Freedom Bank. Mr. Wright stated that Mr. Forkum had not constructed the detention pond required for the entire development. Mr. Wright stated that the portion of the development approved for multifamily townhome construction had been sold by Mr. Forkum. Mr. Wright stated that the technical review committee, which included Mr. Wright, Bobby Franklin, and Debbie Moss along with other personnel, had delayed consideration by the Planning Commission of the First Freedom commercial site plan and plans for the multifamily townhome construction because the regional detention basin had not been built.

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<sup>8</sup> Many other conditions and requirements were approved and amended during the course of this development approval process; however, the conditions discussed here are those that are relevant to the allegations of the Wright Complaint.

Hatton Wright stated that his only knowledge of Mayor Elam's actions relative to this development was based upon what he was told about communications between Mayor Elam, Bobby Franklin, and Debbie Moss. Mr. Wright had no first-hand knowledge concerning Mayor Elam's actions.

Mr. Shearer's knowledge about Mayor Elam's activities were also second-hand. Mr. Shearer stated that an issue developed between planning staff and Mayor Elam as to the agenda for the March 15, 2007 Planning Commission meeting. Mr. Shearer was out of the state when this disagreement developed. He had no specific knowledge of conversations between Mayor Elam and Bobby Franklin or Debbie Moss since he was out of town. Mr. Shearer stated that he also had no personal knowledge about any actions by Mayor Elam to seek a waiver of conditions placed on the development.

Bobby Franklin stated that First Freedom Bank had a site plan submitted for approval, but the plan was not included by the technical review committee on the Planning Commission agenda for March 15, 2007 because the regional detention pond for the entire development had not been constructed since the developer sold the property where the detention pond had been intended to be located. Mr. Franklin concluded that the developer had "sold his way into stopping his whole project, because everything was waiting on someone else, and it all belonged to someone else." Mr. Franklin stated that the technical review committee had kept the First Freedom commercial plan off the March 15, 2007 Planning Commission agenda because they were concerned that the developer had attempted to avoid the requirement to build the detention pond by selling off portions of the development property.

Bobby Franklin stated that when he prepared the agenda for the March 15, 2007 Planning Commission meeting, he had included for consideration the multifamily townhome construction, but had not included the First Freedom commercial construction site plan because "we couldn't know that these site plans would drain correctly" without the construction of the detention basin. Mr. Franklin indicated that Mayor Elam "became very interested in why the multi-family was on the March agenda" when the First Freedom bank site plan was not on the agenda.

Mr. Franklin stated that the agenda item relative to the multifamily townhome construction was a preliminary plat which, if approved, would not have given approval for construction to begin because a final plat would have to be considered at a subsequent meeting before construction could begin on the multifamily townhomes. Mr. Franklin stated that the pending submittal for the First Freedom commercial construction was a final site plan approval request which would have allowed construction to begin. This was the rationale offered in his sworn statement by Mr. Franklin to explain why the townhome matter was included on the Planning Commission agenda and the commercial construction matter was not included on the agenda. Planning staff had hoped, according to Mr. Franklin, that if approval was given for the multifamily townhome construction then the developer would then construct the detention basin.

Bobby Franklin stated that the Mayor did not seek any “waiver” of a condition as alleged in Paragraph 1.c. of the Wright Complaint. Mr. Franklin stated that the Mayor’s interest was related to why the commercial construction site plan was not on the Planning Commission agenda.

Debbie Moss stated that Mayor Elam had contacted her in January, 2006 to clarify the Mayor’s understanding of the prior condition for construction of commercial construction prior to the construction of residential construction. Debbie Moss said the Mayor requested no waiver or variance related to the development. Debbie Moss had no other knowledge of Mayor Elam’s activities related to the March, 2007 Planning Commission agenda items.

Mayor Elam stated that she was contacted by Mr. Forkum in 2006 because he wished to sell the single family lots to generate cash to allow him to continue development of the property. This request resulted in the amendment approved by the Board of Commissioners in May, 2006.

Mayor Elam stated that she was contacted by John Lancaster on Monday, March 12, 2007 who related to Mayor Elam that the bank had been denied Planning Commission approval in October, 2006 for construction of the bank because the development’s detention basin had not yet been constructed. Mr. Lancaster was upset because he had heard that the multifamily townhome project was included on that week’s Planning Commission agenda. Mr. Lancaster told Mayor Elam that he knew that construction of the commercial portion of the development was required prior to construction of the townhomes, so he couldn’t understand why the townhomes were on the agenda after the bank’s commercial project was denied the previous year.

Mayor Elam contacted Bobby Franklin several times during the week of March 12, 2007 to try to determine why the agenda included the townhome plan since the commercial construction had to be completed in its entirety before the townhomes could be built. During this week, Mayor Elam learned for the first time that the Planning Commission had granted a “variance” to permit the townhomes to be constructed. Mayor Elam stated she repeatedly requested an explanation from Bobby Franklin of the current status of all conditions related to the development because she did not feel that the Planning Commission had the legal authority to grant the October, 2006 variance of the condition put on the development by the Board of Commissioners in May, 2006 to require the construction of all commercial portions of the development prior to the construction of the townhomes. Mayor Elam stated that she never received a satisfactory explanation from Bobby Franklin on this point.

Mayor Elam appeared at the Planning Commission meeting later that week, and she addressed the Planning Commission. She reviewed the prior conditions placed on the development and informed the Planning Commission that the bank had offered to provide a bond to ensure that the detention basin would be constructed if their commercial plan could be approved. The Planning Commission approved the bank’s commercial site plan.

**CONCLUSION**

Based on these relevant facts, I have concluded that the allegations of Paragraph 1.c. have no factual merit. No witness indicated that Mayor Elam had requested a waiver of any prior condition on the Mt. Juliet Commons development.

- E. Analysis of Paragraph 2 of the Wright Complaint. The Wright Complaint asserts, in Paragraph 2, that the public statements made by Mayor Elam during the April 9, 2007 meeting of the Board of Commissioners violate Ethics Code Title 13-1-106. Specifically the Wright Complaint states that Mayor Elam's April 9<sup>th</sup> public statements were a prohibited disclosure of "information obtained in [her] official capacity or position of employment that is made confidential under state or federal law." The Wright Complaint also alleges in this paragraph that Mayor Elam's statement violated the City's Personnel Ordinance.

On April 9, 2007, following the Board of Commissioners' approval of an out-of-court settlement reached in litigation filed by a former employee of the Public Works Department, Mayor Elam disclosed publicly that new allegations had been made during the mediation of that litigation, and Mayor Elam further stated that a complaint had been recently received by a second employee of the Public Works department. Mayor Elam disclosed that allegations had been made against Mr. Wright. Mayor Elam's statement of April 9, 2007 stated that a full investigation of the allegations would be conducted. Mayor Elam further stated that, "[g]iven a lack of action on past complaints, and putting it bluntly, I have no faith in Mr. Shearer's ability or willingness to oversee such a thorough and unbiased investigation." Mayor Elam then moved the Board to appoint someone else to oversee the pending investigation concerning Mr. Wright. The motion was approved.

Mr. Wright stated that he did not know whether Mayor Elam's statement was a violation of the Ethics Ordinance, but that he thought it was, as a general matter, a "very unethical thing to do what she did to me publicly. . ." Mr. Wright stated that he felt that the Mayor's statements were intimidating to city personnel because if City personnel are going to make sexual harassment reports, then the City ". . . should have a policy that keeps you safe from everybody knowing what's going on. And then your mayor blurts that out on television and releases it to every paper and everybody else and calls names, only in this incident she only called my name." Mr. Wright stated that the Mayor's reference to "vulgar emails and cursing and physical and verbal abuse" on television was unethical because he was "just as innocent as anyone until somebody proves it different." Mr. Wright stated that he felt there were employees who would not want to come forward in support of him during the pending investigation because they were worried and scared as a result of Mayor Elam's public statement.

Rob Shearer stated that he felt that Mayor Elam's public statements violated the City's Personnel Ordinance. He stated that the Open Records law might require the City to release a document, but he felt the Personnel Ordinance imposed an obligation on "all of us. . . not to discuss it." Mr. Shearer stated that he did not think, as asserted in Paragraph 2(b) of the Wright Complaint that it would be "impossible" for a fair and unbiased investigation to be conducted into the complaint pending against Mr. Wright, but he thought it would be "more difficult."

Mayor Elam stated that the purpose of her April 9, 2007 public statement was to express her lack of confidence in City Manager Rob Shearer's willingness and ability to oversee the investigation of the recent complaint from a Public Works employee. Mayor Elam stated that she felt it was necessary for the Board of Commissioners to act publicly to appoint someone other than Rob Shearer to oversee the pending investigation, and for this reason she made the public statement. Mayor Elam stated that if she had realized how Mr. Wright would react to her statement, she could have made the statement without identifying Mr. Wright.

I have reviewed the entire text of Mayor Elam's public statement. The statements made by Mayor Elam did not disclose any information that was confidential under state or federal law, therefore I conclude that no violation of Title 13-1-106 occurred.

Mt. Juliet's Personnel Ordinance, adopted in Ordinance 2004-31, and revised by Ordinance 2004-31 specifically states as follows:

“These rules and regulations shall govern the actions of all employees in the City service, unless specifically exempted by this document. . .

All City offices and positions are divided into the regular service and the exempt service. The regular service shall include all regular full-time and regular part-time positions in the City's service unless specifically placed in the exempt service. Those offices and positions of the City that are placed in the exempt service include:

1. all elected officials . . .

Personnel Ordinance, Section 1C. Thus, elected officials are not governed by the Personnel Ordinance. The Mayor is not an employee and is specifically exempted from governance by the Personnel Ordinance so her statements could not violate the Personnel Ordinance.

Even if Mayor Elam was subject to the requirements of the Personnel Ordinance, it should be understood that Section 14 of the Personnel Ordinance does not guarantee confidentiality of sexual harassment investigations. Section 14.E.1 states that, “to the fullest extent possible,” sexual harassment investigations will be “conducted discreetly, confidentially, and with [sic] all due regard for the persons involved.” This provision also reminds that city records are subject to the Open Records Act. Any written complaints received regarding sexual harassment are, by law, subject to disclosure under the state's Open Records law. It is demonstrated, therefore, that confidentiality of sexual harassment investigations is not guaranteed, nor mandated, by the Personnel Ordinance.

- F. Analysis of Paragraph 3 of the Wright Complaint. The Wright Complaint asserts, in Paragraph 3 that Mayor Elam has violated Ethics Code Title 13-1-109 which provides that “[a]n official or employee may not accept or continue any outside employment if the work unreasonably inhibits the performance of any affirmative duty of the municipal position or conflicts with any provision of the municipality’s charter or any ordinance or policy.” The Wright Complaint asserts that Mayor Elam’s employment by CRS, a developer with an active project in Mt. Juliet, inhibits her performance as Mayor, improperly influences her duty to participate in zoning matters, and improperly influences her duty to participate in setting development standards such as architectural and signage requirements.

Based on statements from Rob Shearer, Bobby Franklin, and Hatton Wright, they all appear to perceive that all efforts taken since September, 2006 by Mayor Elam related to planning and development are colored by her employment by developer CRS.

Hatton Wright stated that he doesn’t think her duties as mayor are inhibited by her employment by CRS, but he thinks that she now oversteps her bounds. Mr. Wright stated that Mayor Elam’s initiation and participation in the January 23, 2007 meeting regarding the Pulte development is an example of how Mayor Elam has overreached her authority, and that this occurs because CRS has a “big interest in this community, has a big interest in how roads are built and how they’re put in their development. . .”

Mr. Wright pointed to the Board of Commissioners’ recent consideration of annexation and rezoning of property owned by CRS as an example of Mayor Elam’s employment influences her voting as a member of the Board of Commissioners. Mr. Wright acknowledged that Mayor Elam disclosed the interest during the public meeting and prior to the vote, but he objects to her ability to “have her way in those votes.”

Rob Shearer stated that “her employment and duties as Mayor have collided.” Mr. Shearer stated that “. . .as mayor she obviously has an influence over City policy; a vote at the City Commission level; influence over the employees whose natural inclination is to want to defer to the Mayor and a want to carry out the Mayor’s wishes, and when she begins making requests on behalf of a development. . . employees get confused.”

Mr. Shearer stated that other matters have come before the Board of Commissioners that may have presented a personal “conflict of interest” for other Mt. Juliet officials such as widening of a road in front of a Commissioner’s home and development of property adjoining the property of another Commissioner. Mr. Shearer also stated that personal conflicts of interest have arisen in the past for members of the Planning Commission, such as projects considered by the Planning Commission which were financed by a bank whose employee sits as a member of the Planning Commission or projects designed by an engineering firm whose employee engineer sits as a member of the Planning Commission.

Mr. Shearer could provide no specific examples of instances when Mayor Elam's employment by CRS has influenced her duties as Mayor in establishing City policy for architectural or signage requirements. He stated that such a conflict of interest was "theoretical." Mr. Shearer stated that he can think of no factual instances to support the allegations of Paragraphs 3.a. and 3.b. of the Wright Complaint; i.e., when it had proved impossible for Mayor Elam to separate herself, as Mayor, from the interests of CRS, her employer. He stated there was just the "potential" for such a conflict to arise.

Bobby Franklin stated that the Mayor's telephone call to him in September, 2006 is an example of how her employment by CRS has inhibited or influenced her performance as Mayor. He stated that current discussions regarding the amendment of the sign ordinance is another example of how the interests of CRS are implicated in the Mayor's role as a voting member of the Board of Commissioners. Mr. Franklin states that, in his job as Planning Director for the City, he can not also "be a real estate agent." He stated that his boss, Rob Shearer, wouldn't let him develop property inside Mt. Juliet's growth area. He stated that the same types of restrictions should apply to Mayor Elam.

Mayor Elam stated that her philosophy has not changed regarding planning and development matters since she became employed by CRS. She stated that a great deal of development took place when she was chairperson of the Planning Commission, and such positive growth could not have occurred if she had been an antigrowth, antidevelopment leader. Mayor Elam stated that she has "always required developers to build projects that benefit the city, and [her] only deciding criteria has been, is it good for the City, is it good for the citizens, is this the type of development that will enhance our community." Mayor Elam stated that she does not have involvement in any CRS matters that come to the City, other than official business as a city commissioner and mayor chair meetings."

Mayor Elam stated that she consulted with the City's prior City Attorney when she accepted employment by CRS, and that she had asked for guidance and was told by the then-City Attorney, Leslie Newman, that her employment has not prohibited and was, in Ms. Newman's experience, very common for part-time commission members and mayors to "work within the city where they were elected." Mayor Elam stated that City Attorney Leslie Newman advised her that "if any item concerning that development came before the City Commission," then Mayor Elam would need to read a disclaimer statement, and that it would be Mayor Elam's decision whether to recuse or not to recuse herself from the vote concerning CRS matters.

## CONCLUSION

Witnesses provided no specific examples of how Mayor Elam's employment with CRS has inhibited or influenced her performances as Mayor. The perceived conflict is purely "theoretical" as stated by Mr. Shearer, and therefore the allegations in Paragraph 3 of the Wright Complaint have no factual merit. Mayor Elam's employment by CRS has been implicated only in two specific factual instances:

- (a) As discussed in Section B of these Findings, Mayor Elam contacted Bobby Franklin to express her disagreement with the City's decision to require CRS to provide a 50 foot wide access road to adjoining property. This telephone call was placed by Mayor Elam after she became employed by CRS, but Mayor Elam did not disclose to Bobby Franklin that she was employed by CRS. Although the statements of Bobby Franklin and Mayor Elam differ as to the date of this telephone call and the exact nature of the access requirement, it is undisputed that this telephone call was made prior to the effective date of the Ethics Ordinance, September 25, 2006. Therefore, no violation of the Ethics Ordinance occurred.
- (b) Mayor Elam's employment by CRS would be properly classified as a "personal interest" pursuant to Ethics Code Title 13-1-102, as long as CRS has an active development in Mt. Juliet. Mayor Elam recognized this personal interest and disclosed this personal interest prior to the consideration of ordinances annexing and rezoning CRS property during meetings of the Board of Commissioners on March 26, 2007 and April 23, 2007. The Ethics Code provides, in Title 13-1-103, that Mt. Juliet officials with responsibility to vote on measure must disclose their personal interest before the vote and may recuse themselves from voting on the measure. The decision to recuse from a vote is optional.

Thus, the very language of the Ethics Ordinance explicitly recognizes and accepts the premise that Mt. Juliet City officials, with responsibility to vote on measures, are citizen-legislators; that is, it is foreseeable that they will have personal interests as individuals that might be perceived to affect their exercise of their official discretion. To ensure public knowledge of any such influences, voting officials must disclose their personal interest. Mayor Elam has complied with the requirements of the Ethics Ordinance in this regard.

III. Findings of Factual and Legal Merit of Wright Complaint

Based on the analysis above, I make the following specific findings with regard to the Wright Complaint:

- A. Paragraph 1.a. of the Wright Complaint, concerning the Mt. Juliet Crossings development, has no factual merit;
- B. Paragraph 1.b. of the Wright Complaint, concerning the Pulte Homes development, has limited factual merit. I conclude that Ethics Code Title 13-1-108 is not properly interpreted as presented in the Wright Complaint. A determination of the intent of this provision is, however, solely within the authority and knowledge of the Board of Commissioners;
- C. Paragraph 1.c. of the Wright Complaint, concerning the Mt. Juliet Commons development, has no factual merit;
- D. Paragraph 2 of the Wright Complaint, concerning Mayor Elam's public statements concerning the pending investigation of Mr. Wright, has some factual merit but no violation of the Ethics Ordinance or Personnel Ordinance occurred; and
- E. Paragraph 3 of the Wright Complaint, concerning Mayor Elam's employment by CRS, has no factual merit, and no violation of the Ethics Ordinance occurred in the two fact instances in which her employment was implicated.