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CITY COUNCIL WORKSHOP

Ethics Commission Ordinance

October 23, 2023 at 5:00 PM (Hybrid Meeting)

REMOTE ACCESS INFORMATION:

The City Council will conduct this meeting from Council Chambers, located on the second floor of City Hall. The public may attend the meeting in person, however space in Council Chambers is limited. The public is therefore strongly encouraged to participate remotely via Zoom pursuant to the Remote Meeting Policy adopted by the Portland City Council. Allow your computer to install the free Zoom app to get the best meeting experience. If you are not able to attend live either in person or via Zoom, a recording will be available in the Agenda Center following the meeting.

Please click the link below to join the webinar:

<https://portlandmaine-gov.zoom.us/j/87082210629?pwd=SVphTHI4bEFLQzI1UmJHc1NMVFAYUT09>

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Webinar ID: 870 8221 0629

Passcode: 755495

International numbers available: <https://portlandmaine-gov.zoom.us/j/87082210629>

AGENDA ITEMS:

Discussion: Development of an Ethics Commission Ordinance (Attorneys Jim Katsiaficas and Brandon Mazer, Perkins Thompson)

ADJOURNMENT:

Office of Corporation Counsel

Michael Goldman, *Corporation Counsel*

Amy McNally, *Associate Corporation Counsel*

Nicole Albert, *Associate Corporation Counsel*

Rachel Millette, *Associate Corporation Counsel*



MEMORANDUM

To: Mayor Snyder and Members of the City Council

From: Michael Goldman, Corporation Counsel

Date: October 20, 2023

Subject: October 23, 2023 Ethics Commission Ordinance Workshop

In the general election in November 2022, voters approved Ballot Question 8, which modified the Charter to require that the Council enact an ordinance that establishes an ethics commission. Once the commission has been established, Question 8 also requires the Council, with input from the commission, to enact a code of ethics ordinance. The language in Question 8 was added to the Charter on July 1, 2023, and the Council is now charged with enacting the ethics commission ordinance.

In anticipation of the City Council's workshop on Monday, October 23, 2023, I have attached the following:

- A September 26, 2023 memorandum from attorneys Jim Katsiaficas and Brandon Mazer at Perkins Thompson, who drafted the proposed ethics commission ordinance;
- A draft of the proposed ethics commission ordinance; and
- City Charter, Article VIII, Section 1-A - Ethics Commission and Code of Ethics

Please review the attached documents and feel free to reach out to me directly if you have any questions before Monday's workshop. Attorneys Katsiaficas and Mazer will be available at the workshop to discuss the ordinance and answer any questions that you might have. They will also be seeking your guidance on any requested revisions to the ordinance before it is presented to the Council for a public hearing and approval.

MEMORANDUM

TO: Portland City Council

CC: Michael Goldman, Corporation Counsel

FROM: Jim Katsiaficas, Brandon Mazer

DATE: September 26, 2023

RE: Ethics Commission Ordinance

In November 2022, Portland voters approved Charter Commission Ballot Question #8. This Charter modification contemplates a two-step process: 1) the establishment of an Ethics Commission, and 2) the adoption of a Code of Ethics for it to administer. Upon adoption of the Code of Ethics Ordinance, the existing Code of Ethics resolution adopted by the City Council in 2022 would stand repealed.

The first step, then, is enactment of an ordinance establishing an Ethics Commission. Consistent with the Charter modification, the attached draft Ethics Commission Ordinance establishes a 7-member appointed commission serving three year terms (after the initial board, to allow for staggered terms). However, given the difficulty of finding persons willing to serve on City boards and commissions, this draft Ordinance provide for a quorum of four members and action by a majority of those present and voting; perhaps a future Charter amendment will address the question of numbers on this and other boards and commissions. The draft Ordinance incorporates the qualifications requirements of the Charter modification (must be City resident; cannot be elected City official, candidate for City elected office, or immediate family members of either). It also incorporates the duties set out in the Charter modification:

- (1) Prepare and recommend a Code of Ethics ordinance to the City Council for enactment;
- (2) Review the Ethics Commission and Code of Ethics ordinances at least once every three years and make recommendations for any amendments to the City Council;
- (3) Hear complaints and render written decisions with findings of fact regarding alleged violations of the City's Code of Ethics ordinance, provided that complaints regarding City employees' ongoing or prior alleged violations or misconduct shall be referred to the City for appropriate action under its personnel policies and/or collective bargaining agreements;
- (4) Hear and render advisory opinions regarding questions of prospective application of the City's Code of Ethics ordinance;
- (5) Hear and render advisory opinions regarding questions of compliance with the City Charter;

- (6) Hear and render advisory opinions regarding adherence to Council and board rules and procedures;
- (7) On receipt of requests from a majority of the City Council or of any City board or committee, procure a second legal opinion from outside legal counsel; and
- (8) Design and oversee program evaluations.

The draft Ordinance provides for the filling of vacancies, removal of members and promulgation of rules of procedure in the same manner as other City boards and committees. It permits the Ethics Commission to recommend to the City Council the appointment and funding of an Accountability Officer position to serve as an ombudsman, provide information and training for the public and City officials, and to provide other assistance as requested by the Commission and the Council, as well as to receive and follow up on public complaints about City government.

The draft Ordinance adds two procedural concepts to the Charter modification language.

One is to ensure that the complaint process is not used as an alternative to employee discipline and grievance processes under the City's personnel policies and collective bargaining agreements. Under the Charter modification, "[C]omplaints [regarding alleged violations of the Code of Ethics ordinance] may be "filed by any official, employee, or resident of the City, by the accountability officer or initiated by the ethics commission," The Charter modification already requires "that complaints regarding City employees' ongoing or prior alleged violations or misconduct and employee complaints shall be referred to the City for appropriate action under its personnel policies." The draft Ordinance adds " and/or collective bargaining agreements" to this clause, so that both non-union and union employees' rights are protected. The draft Ordinance also adds a provision so that employees cannot avoid exclusive grievance provisions under the City's personnel policies and/or collective bargaining agreements by filing a complaint with the Ethics Commission – "complaints by employees shall be referred to the City for appropriate action" under the City's personnel policies and/or collective bargaining agreements.

The other is to provide a process by which City officials on boards and committees may forward requests for advisory opinions to the Ethics Commission. This process is similar to that used by the City of Bangor for its Board of Ethics. Under this process, the Mayor, any City Councilor, and City board or committee member seeking an advisory opinion shall first submit a written statement to the board or committee upon which that person sits -- the City Council or City board or committee of which the person is a member -- describing the nature of the matter, and then the Council, or City board or committee, as appropriate, determines by majority vote of its membership whether to request an advisory opinion from the Ethics Commission. This helps ensure that the Ethics Commission focuses on real concerns and issues as determined by the board or committee. Nothing in this process is intended to prevent a board or committee from determining for and by itself whether a conflict of interest or disqualifying bias exists.

We have placed this draft Ordinance in Chapter 2, Administration, of the Portland City Code as Article IX, Ethics.

ARTICLE IX ETHICS Commission

Section 1. Chapter 2, Article III, Sec. 2-33 is amended to read:

Sec. 2-33. Applicability.

(a) The above limitation on terms shall apply to the following boards and commissions:

- (1) Board of appeals;
- (2) Board of assessment review;
- (3) Reserved;
- (4) Cable television committee (CATV);
- (5) Civil service commission employment subcommittee;
- (6) Civil service commission police citizen review subcommittee;
- (7) Community development block grant allocation committee;
- (8) Friends of the park;
- (9) Historic preservation committee;
- (10) Land bank commission;
- (11) Planning board;
- (12) Portland public art committee; and
- (13) Ethics Commission.

Section 2. Article IX is amended by the addition of Chapter 2, Sec. 2-430 to read:

Sec. 2-430. Ethics Commission.

(14) *Purpose.* The Ethics Commission shall provide impartial oversight and render decisions and advisory opinions to ensure that standards of ethical conduct are observed by elected and appointed City and School Board and School Department officials and City and School Department employees. The Ethics Commission shall be an independent body, free from interference from any City elected and appointed officials and employees. The Ethics Commission may request funding from the city council for independent investigations, legal services, staffing, or other demands pertinent to its mission.

(15) *Composition.* There shall be an Ethics Commission composed of seven (7) members. All members shall be appointed to fill at-large seats, and may reside in any part of the City.

(16) *Appointment; Terms.* For the initial members of the Ethics Commission, two members shall be appointed by the City Council for a term of one (1) year, two members shall be appointed for a term of two (2) years, and three members shall be appointed for a term of three (3) years. Thereafter, the City Council shall appoint members for terms of three (3) years. Such members shall serve until their successors are duly appointed and qualified.

(17) *Qualifications.* Members of the Ethics Commission shall be residents of the City. Elected City officials, elected school department officials, candidates for any City elected office, City employees, school department employees, and their immediate family members are not eligible to be appointed as members of the Ethics Commission.

(18) *Vacancies.* Permanent vacancies on the Ethics Commission shall be filled by the City Council in the same manner as other appointments hereunder for the unexpired term of the former member.

(19) *Removal of Members.* Any member of the Ethics Commission may be removed for cause by the City Council at any time; provided, however, that before any such removal, such member shall be given an opportunity to be heard in his or her own defense at a public hearing.

(20) *Compensation.* Members of the Ethics Commission shall serve without compensation.

(21) *Meeting frequency; chair; secretary; minutes, public records.* The Ethics Commission shall meet as needed, but no less than annually. The members of the Ethics Commission shall annually elect one (1) of their members as chair to preside at all meeting and hearings and to fulfill the customary functions of that office. The members of the Ethics Commission also shall annually elect one (1) of their members as secretary to keep the minutes of the proceedings of the Ethics Commission, showing the vote of each member on every question, or his or her absence or failure to vote, and to file the same with the City Clerk, who shall maintain the permanent records and decisions of all board meetings, hearings and proceedings, and all correspondence of the Ethics Commission, as required by statute, and to fulfill the customary functions of that office. Except as otherwise provided by State law, such records shall be public records open to inspection during working hours upon reasonable notice.

(22) *Quorum and Necessary Vote.* No business shall be transacted by the Ethics Commission without a quorum, consisting of four (4) members being present. The Ethics Commission shall act by a majority of members present and voting.

(23) *Conflicts.* No member of the Ethics Commission shall participate in the hearing or disposition of any matter in which he or she has an interest. Any question of whether a member has a conflict of interest sufficient for a member to be recused shall be decided by a majority vote of the members present, except the member whose possible conflict is being examined. Where such vote results in a tie, the subject member shall be recused from the matter.

(24) *Duties.* In addition to the jurisdiction conferred on it by other sections of this Article and in accordance therewith, the Ethics Commission shall undertake the following duties:

(1) Prepare and recommend a Code of Ethics ordinance to the City Council for enactment. The City Council shall, with the recommendation of the Ethics Commission, enact and maintain a Code of Ethics ordinance defining the code of ethical conduct for elected and appointed City and School Board and School Department officials and City employees. At a minimum, such Code of Ethics ordinance shall include and address:

- (i) Standards of Conduct;
 - (ii) Conflicts of Interest;
 - (iii) Confidential Information; and
 - (iv) Disclosure Forms for City elected and appointed officials to complete and file with the city clerk and update as appropriate.
- (2) Review the Ethics Commission and Code of Ethics ordinances not less than once every three (3) years and make recommendations for any amendments to the City Council;
- (3) Hear complaints and render written decisions with findings of fact regarding alleged violations of the City's code of ethics ordinance, except that complaints regarding City employees' ongoing or prior alleged violations or misconduct and complaints by employees shall be referred without Commission investigation or action to the City Manager for appropriate action under the City's personnel policies and/or collective bargaining agreements;
- (4) Hear and render advisory opinions regarding questions of prospective application of the City's Code of Ethics ordinance;
- (5) Hear and render advisory opinions regarding questions of compliance with the City Charter;
- (6) Hear and render advisory opinions regarding adherence to City Council and City board and commission rules and procedures;
- (7) On receipt of requests from a majority of the City Council or of any City board or committee, procure a second legal opinion from outside legal counsel; and
- (8) Design and oversee program evaluations.

(25) *Appointment of Accountability Officer.* The Ethics Commission may recommend that the City Council appoint an Accountability Officer and fund that position. The Accountability

Officer shall: serve as an ombudsperson to members of the public; provide City information to the public and officials to educate them about government accountability, integrity, and transparency; provide training for public officials on ethical matters; and undertake such other duties as may be requested by the Ethics Commission and authorized by the City Council. The Accountability Officer may provide administrative support for the civilian police review board. The Accountability Officer also shall receive complaints from the public about alleged government waste, favoritism, mismanagement, and violations of the public trust; the Accountability Officer will refer matters that are within the scope of the Ethics Commission's duties to the Ethics Commission, and vice versa.

(26) Meetings, Hearings, and Procedures.

- (1) Regular meetings of the Ethics Commission shall be held at the call of the chair or as provided by the rules of the Ethics Commission. Special meetings of the Ethics Commission shall be called by the chair, at the request of any three members of the Commission, or at the request of the City Council. Except as otherwise provided by State and federal law, all meetings and hearings of the Board shall be open to the public.
- (2) The Ethics Commission shall adopt its own rules of procedure for the conduct of its business not inconsistent with the statutes of the State of Maine and this Section. Such rules shall be subject to City Council approval and then filed with the secretary and with the City Clerk. Any rule so adopted which relates to the conduct of hearings, and which is not required by federal or state law or by this Section may be waived by the Board upon good cause being shown.
- (3) Conflicts. No member of the Ethics Commission shall participate in the hearing or disposition of any matter in which they have an interest, as defined by 30-A M.R.S. §2605, as amended, common law, and the Charter.

(27) Complaints; Requests; Filing with City Clerk; Public Hearings; Decision.

- (1) Complaints. Complaints under (k)(3) above alleging violation of the City's Code of Ethics Ordinance may be filed by any official, employee, or resident of the city, by the Accountability Officer, or may be initiated by a majority of the membership of the Ethics Commission, in accordance with the process set out herein, provided that complaints regarding City employees' ongoing or prior alleged violations or misconduct and complaints by employees shall be referred without Commission investigation or action to the City for appropriate action under its personnel policies and/or collective bargaining agreements.
- (2) Requests. Requests for advisory opinions under (k)(4), (5), or (6) above may be filed by any official or employee of the City, in accordance with the process set out herein. The Mayor, any City Councilor, City board or committee member seeking an advisory opinion under (k)(4), (5), or (6) shall first submit a written statement to the City Council or City board or committee of which the person is a member describing the nature of the matter, and the Council, or City board or committee, as appropriate, shall determine by majority vote of its membership whether to request an advisory opinion from the Ethics Commission.
- (3) Filing with City Clerk. Complaints alleging violations of the Code of Ethics ordinance and requests for advisory opinions, permitted by this Section, shall be filed with the City Clerk, who shall alert the chair of the Ethics Commission of their filing and shall acknowledge in writing to the complainant or requester the Ethics Commission's receipt of a complaint or request for advisory opinion.
- (4) Public Hearings. Within 14 days after the City Clerk's receipt of a complaint, the Chair shall set the date, time, and place of a public hearing on complaints and on requests for advisory opinions, advertised and conducted by the Ethics Commission as required by various State and federal laws pursuant to which matters are brought before the Ethics Commission and that public hearing shall be conducted in accordance

with relevant State and federal law, the City Code, and the rules of the Ethics Commission.

- (5) Dismissal of certain complaints. If the Ethics Commission finds any complaint filed with it to have been based upon allegations it determines to be frivolous, scurrilous, libelous, unsubstantiated, unfounded, of nuisance, or with malice, it may so determine and may dismiss the complaint without deciding the merits of the complaint.
- (6) This Section and the Ethics Commission complaint process shall protect the identity and rights of complainants, whistleblowers, and persons complained against in accordance with and as required by all State and federal laws, regulations, codes, municipal ordinances, and policies, including but not limited to the Maine Freedom of Access Act, the Maine Whistleblowers' Act, and the City of Portland's personnel policies.
- (7) The Ethics Commission shall refer any complaint alleging corruption, fraud, or abuse of a criminal nature to the appropriate law enforcement agency.
- (28) *Decisions and Record.*
 - (1) The Ethics Commission shall decide the complaint or request for an advisory opinion within 30 days after the closing of the public hearing unless the complainant or requester agrees in writing to extension of that time period.
 - (2) Every Ethics Commission decision on a complaint or request for advisory opinion shall be in writing and every decision on a complaint shall include findings of fact and conclusions of law.
 - (3) The City Clerk shall mail notice of any decision of the Ethics Commission to the complainant and any designated interested parties within seven (7) days of such decision.

- (4) The minutes of the Ethics Commission meetings and hearings; the meeting and hearing transcripts, if these are made; all exhibits, papers, complaints, applications, and requests filed in any proceeding before the Ethics Commission; and the written decision of the Commission shall constitute the record.

(29) *Appeals to Superior Court.* An appeal from any final decision of the Ethics Commission on complaints under (k)(3) above may be taken by any aggrieved party or by any authorized officer or agent of the City to the Superior Court in accordance with Rule 80B of the Maine Rules of Civil Procedure.

(30) *Violations of the Code of Ethics.* Violations of the Code of Ethics ordinance shall be addressed as set out in that ordinance, provided, however, that any City Councilor or Mayor found by the Ethics Commission to be in violation of or to have violated the Code of Ethics ordinance may be reprimanded or censured by the City Council.

(31) *Severability.* The provisions of this Section and each of its sections, subsections, paragraphs, subparagraphs, sentences and clauses are severable. In the event that any such provision is held to be invalid or unenforceable by any judicial or administrative tribunal, it is the intent of the governing body that all other provisions thereof shall remain in full force and effect.

(32) *Effective date.* This Section shall go into effect on _____, 2023 (30 days after passage).

of the city treasury on account of any such transaction.

- (b) Purchase or accept anything from the city or school department, other than those items or services which are offered to the public generally, and then only upon the same terms and under the same procedures offered to and used for the general public. This shall not include those items or services which are received as compensation, or as a part of such person's employment contract, or which are necessary for the performance of such person's duties.
- (c) Accept or receive from any person, firm, or corporation acting under a franchise, contract, or license from the city or school department, any frank, free pass, free ticket, or free service, or accept, directly or indirectly, from any such person, firm, or corporation any service upon terms more favorable than those granted to the public generally. (Referenda 11/4/86; 11/2/10)

Section 1-A. Ethics Commission and Code of Ethics.

The city council shall enact and maintain an ordinance that establishes an ethics commission and, with input from the ethics commission, shall enact a code of ethics ordinance to be administered by the ethics commission. Upon the effective date of the code of ethics ordinance, the existing code of ethics resolution adopted by the city council shall be repealed. The ethics commission shall provide impartial oversight and render decisions and advisory opinions to ensure that standards of ethical conduct are observed by elected and appointed city officials and city employees.

(a) Ethics Commission Ordinance. The city council shall enact an ordinance directing it to create an ethics commission, appointed by the city council and consisting of seven (7) members who are residents of the City, serving for three (3) year terms, to undertake the following duties:

1. Prepare and recommend a code of ethics ordinance to the city council for enactment as provided in subsection (b) below;

2. Review the ethics commission and code of ethics ordinances not less than once every three (3) years and make recommendations for any amendments to the city council;
3. Hear complaints and render written decisions with findings of fact regarding alleged violations of the city's code of ethics ordinance, provided that complaints regarding city employees' ongoing or prior alleged violations or misconduct shall be referred to the city for appropriate action under its personnel policies;
4. Hear and render advisory opinions regarding questions of prospective application of the city's code of ethics ordinance;
5. Hear and render advisory opinions regarding questions of compliance with the city charter;
6. Hear and render advisory opinions regarding adherence to council and board rules and procedures;
7. On receipt of requests from a majority of the city council or of any board or committee, procure a second legal opinion from outside legal counsel; and
8. Design and oversee program evaluations.

Elected City officials, candidates for any City elected office, and their immediate family members are not eligible to be appointed as members of the ethics commission.

The ethics commission shall meet as needed, but no less than annually.

The ethics commission ordinance shall establish the process for filing, hearing and deciding complaints and for soliciting advisory opinions. Complaints may be filed by any official, employee, or resident of the city, by the accountability officer, or may be initiated by the ethics commission, in accordance with that process. Requests for advisory opinions

may be filed by any official or employee of the city, in accordance with that process. Receipt of a complaint or request shall be acknowledged by the ethics commission. If the ethics commission finds any complaint filed with it to have been based upon allegations it determines to be frivolous, scurrilous, libelous, unsubstantiated, unfounded, of nuisance, or with malice, it may so determine and may dismiss the complaint without deciding the merits of the complaint.

The ethics commission ordinance and complaint process shall protect the identity and rights of complainants, whistleblowers, and persons complained against in accordance with and as required by all State and federal laws, regulations, codes, municipal ordinances, and policies, including but not limited to the Maine Freedom of Access Act, the Maine Whistleblowers' Act, and the City of Portland's personnel policies. The ethics commission shall refer any complaint alleging corruption, fraud, or abuse of a criminal nature to the appropriate law enforcement agency.

The ethics commission shall be an independent body, free from interference from any city elected and appointed officials and employees. The ethics commission may request funding from the city council for independent investigations, legal services, staffing, or other demands pertinent to its mission.

(b) Code of Ethics. The city council shall, with the recommendation of the ethics commission, enact and maintain a code of ethics ordinance defining the code of ethical conduct for elected and appointed city officials and city employees. At a minimum, such code of ethics ordinance shall include and address:

1. Standards of Conduct;
2. Conflicts of Interest;
3. Confidential Information; and
4. Disclosure Forms for city elected and appointed officials to complete and file with the city clerk and update as appropriate.

(c) Appointment of Accountability Officer. The ethics commission may recommend that the city council appoint an accountability officer and fund that position. The accountability officer shall: serve as an ombudsperson to members of the public; provide city information to the public and officials to educate them about government accountability, integrity, and transparency; provide training for public officials on ethical matters; and undertake such other duties as may be requested by the ethics commission and authorized by the city council. The accountability officer may provide administrative support for the civilian police review board. The accountability officer also shall receive complaints from the public about alleged government waste, favoritism, mismanagement, and violations of the public trust; the accountability officer will refer matters that are within the scope of the ethics commission's duties to the ethics commission, and vice versa.

(d) Violations of the Code of Ethics. Violations of the code of ethics ordinance shall be addressed as set out in that ordinance, provided, however, that any city councilor or mayor found by the ethics commission to be in violation of or to have violated the ethics code may be reprimanded or censured by the city council.

(Referendum 11/8/2022)

Section 1-B. Peaks Island Council.

The city council shall maintain an ordinance establishing the "Peaks Island Council," including powers, duties, membership requirements and other necessary provisions deemed appropriate by the city council. The Peaks Island Council shall act as an elected advisory body to the city council.

(Referendum 11/8/2022)

Section 2. Ordinances, rules and regulations continued.

All ordinances in force at the time that this charter takes effect, not inconsistent with this charter, shall continue in force until amended or repealed. All rules and regulations of the municipal officers or of any office of the City of Portland