After determining that a quorum was present, the City of Denton Board of Ethics of the City of Denton, Texas convened in a meeting on Monday, September 17, 2018 at 6:00 p.m. in the City Council Work Session Room, 215 E. McKinney Street, Denton, Texas at which time the following items were considered:

Present: Deborah Cosimo, Jesse Davis, Ron Johnson, Karen McDaniels, Lara Tomlin, David Zoltner,

Absent: Don Cartwright, Ben Clark, Kara Engstrom, Sandy Kristoferson,

Staff: Bryan Langley, Aaron Leal, Charlie Rosendahl, Umesh Dalal, Kelly Campbell

Meeting called to Order by Chairperson, Jesse Davis at 6:02 pm.

Regular Meeting

Jesse Davis: Call to order, I believe we do have a quorum present. Our first item for consideration is

1. PRESENTATION FROM MEMBERS OF THE PUBLIC

A. This section of the agenda permits a person to make comments regarding public business on items not listed on the agenda. This is limited to two speakers per meeting with each speaker allowed a maximum of four (4) minutes.

JDavis: This is one we have been tasked with from the beginning. Does the Staff have any presentation on this or should we just begin?

Bryan Langley: We do not. I appreciate you being here tonight. I think, Jesse you were at the meeting when we presented the recommendations to the Council. There was a work session done with Alan Bojorquez a week prior to that, we brought it back for individual consideration. It was part of the Consent Agenda, it was pulled for individual consideration. The Council had some questions about rules of procedures, asking things about a few items in there. One of the key ones was this is not a court of law. They were concerned about this looking like a judicial proceeding rather than a more administrative proceeding. There were questions about specific language that we put in the AIS for you, so we want to bring it back, get the recommendation of this Board, give you a chance to look at those items and see what your recommendations are if any difference from the first time when you saw this. Then the goal will be to take it back to the City Council for another work session to discuss it with them. Jesse will be presenting the line share of that on behalf of the Board. Get the questions that they have and then give it back to them for individual consideration. That’s the process that we’ve had and I appreciate your time going through this again.

JDavis: Thank you Bryan, a deceptively short description of the agenda item but there’s a lot of background information that we’ve received in conjunction with our agenda today. The way I’d like to proceed is what you have in your agenda packet is entitled Draft L. This is after hearing the Council’s concerns and then also Dr. Zoltner had some proposals he has brought forth, Alan Bojorquez, in your agenda packet, had a memo in response to some of those, and also in response to some of Mr. Johnson’s questions that he had, Alan responded to those. Rather than just throwing the doors open to everything, what I’d like to do is start by walking through what’s different in Draft L than previous drafts, just a brief overview of what’s different in Draft L and then go point by point through those changes and see how we feel about those changes. Then
after we go conclude that, going back and seeing if there are any other things that we need to consider in
addition to what has already been changed. Also tell the Board, two things, the Board’s doing a good job
in inventing these rules and going over them with a fine-tooth comb. Our Council is doing the same thing.
This is the way it is supposed to work, so we should not be discouraged by us needing to refine these and
spending some time on them. The second thing, I also sat down with Mayor Watts this afternoon to make
sure that the directives we got from Council is properly interpreted. They said pretty explicitly the things
they wanted us to look at and then also to make sure that there wasn’t anything new that we should be
thinking about in advance of presenting this again. I’d hate to have happen is for us to do a bunch of work
tonight and then present to the Council again, and then have another whole set of marching orders from
Council and have to come back to the drawing board. So there are a couple of places where depending on
where our conversation goes, I may have some alternative language already prepared, something else to
plug in if we go a different direction with this section, here’s another option for us. So, if you will turn to
the Rules of Procedures, Draft L in your packets. The first thing that is different from Draft K is item E.l.a.,
on page 6. This is directly in response to a request form the Mayor to reference the Subpoena section in
this section. I think this section would have been subject to that section we talked about the E. 11., anyway,
so that folks will know if subpoenas issue, they are subject to the subpoena section later on.

Next page over, under section E.5., another item of discussion from the Council, this is a real short time to
present their case. Sometimes it is exactly the right amount of time, sometimes it is too short of time. We
did, previously, build in discretion for the Board, we wouldn’t be stuck at 30 mins but 30 mins was the
starting point. What this does in section five, just makes this explicit. That the Chair on their own or by a
motion from the Board could extend those time limits by 10 mins. With a 2nd, there’d be a vote, and we’d
extend the time.

Under item seven, Dr. Zoltner suggested that we not make it permissive. People can recuse themselves for
certain things. There are certain situations where a Board member shall recuse themselves, they must recuse
themselves. That would be with in the Conflict of interest in the Code of Ethics. If someone is appearing
before the Board who clearly in the Code there would be a conflict of interest, then the member of the Board
must recuse themselves.

Next is section eight, another thing that Dr. Zoltner suggested and I went ahead and included it in this draft,
is anytime you get kicked out of the process, anytime a dismissal happens that we explain to the person why
this dismissal is happening. This is something that individual Chairs or individual makeups of the Board
might have done anyway, but it’s really good to build it into the rules of procedures because we are dealing
with citizens, non-sophisticated actors, they are not doing this professionally, don’t do this on a regular
basis. If they get their complaint dismissed, they ought to know why. Especially if the complaint has merit,
but they just don’t know how to bring it. This is the first one when someone doesn’t show up a letter of
dismissal is issued. There are a few other places in here where you’ll see there is an opportunity for the
Board to dismiss as one of our options and if we do that, you’ll see that we’re required under this draft to
issue a letter of dismissal, just explaining why you were dismissed. That would not be a requirement under
this draft, if someone was dismissed from form. If your form is insufficient, you don’t follow the rules for
filing and the City Auditor’s Office doesn’t accept your filing, that’s a different thing. That’s not getting
discharged, that’s you never got accepted [5:9:8] in the first place. The way that’s handled is under the
ordinance, it’s not something that we can change.

Then we go to section 11. What’s different here, and we have some options in how we do this. One of the
things the Council had a lot of questions about was Subpoena power. What is the best and most responsible
use of that power? How do we define that properly? The Council worked its way through that and also
came down to “what happens if you don’t comply with the subpoena?” The Board is limited in what it can
actually do to that person or what we could accomplish. My proposed language is for the Board to go as
far as they can go, which are different grades of a letter. I’m suggesting here is two kinds of sanction. One
is a letter of reprimand which would say “you should have complied with the Subpoena.” This letter
indicates that they should have at least responded, acknowledging that we had issued them a subpoena. The
other thing that we could do is to exclude related evidence from that party. The Board could say, “You could have made that evidence available when it was properly requested through a subpoena, but you chose not to, so we are not going to hear that today.” The Board could just as easily say, “We just need to sort this out, bring your box of stuff and dump it out and let’s see what’s going on.” But it leaves the Board the discretion to do that. One of the suggestions that the Mayor had today, and I have some alternative language for us if we want to do this, one of the suggestions he had was, reasonably speaking, if that is all you think that the Board can do, if those are our two available sanctions, then just make those the two available sanctions. Just say, “Here are the Board’s sanctions.”

Laura Tomlin: So we are going to discuss these later?

JDavis: Yes, we’re just running through them real quickly. 17 & 18, you’ll see a double underline part in 17? That just means that that same verbiage was moved over from 18 and just under a different heading. It didn’t get added or deleted, it just moved. In 18, Dr. Zoltner raised another interesting idea with if we are concerned with time limits and legal representation and those kinds of things, maybe we just have the Board ask the questions and not let there be direct examination or cross examination. I want us to talk about this a little bit more before we go in that direction, but it occurred to me that we hadn’t explicitly made provision for the Board to ask questions at all. If the party is questioning a witness, but not getting it right, the Board can ask questions or clarify something.

Number 19 is probably what got the Rules of Procedures pulled from the Consent Agenda in the first place. If something gets pulled from the Consent Agenda that means that at least one member of the Council wants to spend some more time talking about it and then will vote for it as it is. So the Council spent a long time talking about what exactly does it mean to have legal representation? There’s nothing in the ordinance now that prohibits what some other folks have suggested which is some other kind of advisor. It is up to us to decide a couple of things. Do we want that, some other kind of advisor showing up on someone’s behalf to sit with them, answer questions, and bend their ear, either with the accused or the complainant? If we are going to let the advisor sit with them, and only be an advisor? Or allow them to fully participate, fully represent that person? Or reserve that for a trained lawyer? I propose a middle ground. Someone could bring an advisor with them, sit with them, give them advice, but not “represent them.” Not making arguments on their behalf, presenting evidence on their behalf. If we want to go the other direction, with an advisor and not an attorney, we can do that. I would not advise anyone to take on that roll. But the Council seemed at least interested in discussing that proposition.

Section 27, I added the language about the letter of dismissal and why. And that’s it. Now let’s go back up to the top and go through those individually now that I got to say my piece. Section E1, where the Mayor requested that language there on page 6, does anyone have any thoughts about that, objections, anything either way?

Deborah Cosimo: I don’t think you can overstate it. As many places as it is necessary that it be in, reminding people. The comments that the Mayor said about limitations in section E, is limitations an important word?

JDavis: I left limitations out because section E11 has more than just limitations. So if section E11 was just a list of limitations, I think that would have been appropriate but section E11 was everything about subpoenas, so it was more than just limitations. Section 5 on the next page about timelines, what do you think about that?

Ron Johnson: Mr. Leal, correct me if I’m wrong here but, my premise is that being a home-rule municipality as Denton is, we can establish our own ordinances but those ordinances cannot deviate from State Administrative Law. Is that correct? For instance, the Administrative Law, State and Federal, calls for an open meeting. We can’t establish an ordinance that says this is an informal meeting so this is not stuff you have to do for Open Meetings Act, correct?
Aaron Leal: The answer on that, and I hate to give you this answer, but it depends. The Open Meetings Act usually applies in two situations, what is the nature of the gun I am buying and what is the nature of the decisions that they making, if any. If you are a recommended body or an actual decision making body. In general, if you look at these two factors, if those two elements are not met, then the Open Meetings Act doesn’t apply by State Statute. However, nothing prevents the City of Denton from actually imposing the Open Meetings Act requirements, specifically the procedural ones on its Boards and Commissions and that’s what the City has done. It’s not inconsistent with State Law, so we can go a little bit further and we have.

RJohnson: The point is that the ordinances cannot be inconsistent with what State Law says?

ALeal: That’s correct. We cannot be inconsistent or the term that is usually used is preemptive by a higher law, a State or Federal law.

RJohnson: I’m approaching about 300 administrative hearings so far, for U.S. Department of Justice, the City of Austin, City of Albuquerque, State of Texas and the State of New Mexico, and in every forum that I’ve conducted administrative hearings, it is a requirement that the administrative ____________ has to fulfill and that is, they have to ask the person who is the subject to the hearing if they feel they have had a full and fair hearing, number one and if they have had a chance to present all of their evidence and testimony. If they haven’t, as an administrative organizer(?), you better go back and let them have a second shot at it. If you don’t, and it goes before a Judicial Review, you could pretty much lose that if they indicate that they didn’t have a fair chance to present, so, yeah, we can establish time limits, but realistically, I don’t think that we’d be fulfilling a person’s due process rights by limiting them if they have viable and new subject matters to present.

JDavis: How do you think we should go about fixing that?

RJohnson: I don’t think there’s anything wrong with establishing time plans as a guide, but as a Board, we need to be cognitive that if at the end of whatever kind of complaint that is, if we ask the person if they have had a chance to present all their testimony and evidence and they say “no,” I think it would behoove us to let them continue for as long it takes.

JDavis: Do you think it would be worthwhile to add something there that if at the expiration of the parties time that the Chair should, whatever the inquiry is, do you feel like you’ve had a full and fair hearing today? Have you had an opportunity to present all your evidence?

RJohnson: I think that would look very good on the record.

LTomlin: I have a question about that, have you ever had a hearing and it seems frivolous, the person is just repeating themselves, and you ask that and they say they have more but you’re thinking they don’t. Have you ever come into a situation like that? And so at that point, do you let them keep going or what?

RJohnson: Yeah, no I cut them off. I also say that you’ve had a chance to present all the evidence and testimony that has been done today and don’t seem to have anything new. On that basis, I’m going to terminate your presentation. But I make sure it’s in the record that I made that consideration.

JDavis: How do you all feel about that?

LTomlin: I don’t think it is a bad idea. And based on what Mr. Johnson just said you can still cut them off if it is wasting our time.
JDavis: And if there is disagreement, say the Chair says that’s enough, we’ve been going on for a while, but a member of the Board can move to extend their time. Or if the Board says, that’s enough, and the way it is written now, the Chair can say let’s give them some more time. It’s a little bit different from a ALJ hearing that you got a whole board of people that can make decisions and move for more time and stuff, but I think it’s similar enough that we can at least ask that question at the end.

Karen McDaniels: Can’t you say something like ask the question but then if there doesn’t seem to be anything new presented, the Chair or the committee can ask that it be closed and just move on?

JDavis: We put it in there that at the end of the expiration time, the Chair will ask the question. What happens next is up to the Chair and the Board. The Chair will ask the question, have you had a full and fair hearing, do you feel like you’ve had an opportunity to present all your evidence? If they say no, then the question is what else do you have to present? They say their 17 character witnesses. Well, there are no character witnesses in here. If they say I have 15 documents that have to do with how unethical this person was last year, well that has nothing to do with your complaint. We just proceed with what is best for the situation. Does that make sense?

RJohnson: Yes, makes sense.

JDavis: Can you repeat what you said that you need to have on your record when you do your hearings?

RJohnson: Do you feel that you have had a full and fair hearing? And do you feel you have had a chance to present all the relevant evidence and testimony in your case?

JDavis: How about this, after that change section, where we say that “The Chairman can reasonably extend time, etc., another sentence that reads, “At the expiration of a parties time, the Chair shall ask the party if they have had a full and fair hearing and if they feel that they have had an opportunity to present all the relevant evidence and testimony in their case.”

LTomlin: Case or complaint?

JDavis: Proceedings maybe? In our hearing?

RJohnson: Well, hearing is what it is.

JDavis: How do we feel about inserting that?

DCosimo: Can we hear it again?

JDavis: Yeah. At the conclusion of Section 5, at the expiration of a party’s time, the Chair will ask the party if they have had a full and fair hearing and if they feel they have had an opportunity to present all of the relevant evidence and testimony in their hearing?

LTomlin: I think it is a good idea based on what Alan had said about the possibility of appealing based on due process. That could maybe clear some of that issue up on appeal.

JDavis: If there’s a record out there, then it’s hard to complain later about due process. Section 7, Recusals, clarify a little bit, and then made what section of the Code of Ethics we are talking about and then made it mandatory instead of permissive. How do we feel about that?

DCosimo: Probably better.
JDavis: I like it better too, in addition. We ought to know to do that, but it’s not just us but for future Boards too.

David Zoltner: That came directly from another ordinance, only because I felt like ours made it sounded just a little bit optional. The ordinance that came from mentioned that either by investments, family or whatever, so that takes you right back to our Code so it makes it less optional. So if you see any of those items right there, it’s time to wave the flags.

JDavis: And again, you’d hope someone who found themselves on the Board of Ethics wouldn’t have a question about that, but, here we are a Board of Ethics, so there’s no assuming about these things. How about number 8, adding Letter of Dismissal?

KMcDaniels: That seems fair, they need to show up.

JDavis: Seems fair. All right, this one is a little more meaty, the Subpoenas.

LTomlin: My first question, do we have the authority under the ordinance to do a Letter of Reprimand? I know we have the authority against a complaint, but this is not a complaint. I think that is what Alan kind of mentioned in his memo, going back to his memo, he did not see the basis for the Board of Ethics to make a failure by the subpoena a violation. It sounds like sounds like a good idea, but I do not think we have the authority to do it.

JDavis: Sure. I get that.

LTomlin: As far as the evidence, I think we would have the authority to not bring in related evidence; I can agree with that, but as far as a Letter of Reprimand, I’m not sure if we can do that.

JDavis: I’m a little iffy on it too, but what I came up with was it did not say we could not do it. It says “among the powers of the board are Letters of Reprimand, Letters of Notice,…

KMcDaniels: And then referring it back to that department, I remember that.

LTomlin: The way I read the ordinance, these are the actions we can take based on a complaint at a hearing.

JDavis: You’re right, that does appear, Section 2.2-282 of the Ordinance is Disposition, not powers of the Board or things the Board can do, but specifically disposition.

LTomlin: Under B Sanctions, “If the board turns by similar majority vote of those present and voting at the conclusion of a hearing that a violation has occurred it may…” and it goes on to do what sanctions they can do.

JDavis: Yeah, so I guess there’s a couple of questions there. Letter of Reprimand has a specific meaning under the ordinance. But what do we do if someone doesn’t comply with a subpoena? We don’t have to call it a letter of reprimand. I’m hesitant to put something in there that has no teeth or action behind it. The first time someone sends us a least endowed subpoena and it gets tossed into the can and we do not do anything, we lose credibility.

LTomlin: I don’t see that really happening.

ALEal: I agree with Commissioner Tomblin on this that you don’t have the power to actually issue a live reprimand for someone who doesn’t comply with a subpoena, however, what is listed here is what would be the logical outcome of someone who fails to comply with a subpoena? They are going want to introduce evidence and you are going to be able to exclude that to say, “We issued a subpoena, you didn’t comply to
produce information, we are not hearing it.” I think that is a very powerful tool that you have in connection to how the prehearing activity that goes on, if they don’t comply, you can just exclude that evidence. That should hand most of your subpoena noncompliance issues. If they do not, we would have to take a look at that at the Council level because in six months we will go through and try to look at what is working and what is not working, and if that isn’t working then maybe we could do something to amend the ordinance to give you more authority.

JDavis: Sure. That’s one of the things that David brought up in his memo was some sort of civil violation in the ordinance, creating civil offense for failure to comply.

DZoltner: This was one of the confusing things for me going over this. One of the ordinances that I kind of relied on, left some of this stuff out. There is a duty to cooperate in this other city, so one of my questions is do we have the authority to issue sanctions without there being an actual violation under the Code of Ethics? That’s what I’m not sure of. This wording is here, here is the Sanctions but you still haven’t violating anything. I’m a little unclear whether or not, my known fear, if we can actually do this without saying by noncomplying or the duty to cooperate, you failed to do that? That comes back to the staff side too. I’m not really clear how we can do this without a violation of the actual code itself.

JDavis: [37:52]I’m agreeing with you, I think we do have the power to do evidentiary and procedural things. From a practical standpoint, an accused has a complaint filed against them. Somebody thought, the Panel thought that it was good enough to bring forward or we are hearing it on appeal. It met all the code requirements of getting in front of us. We’re going to have a hearing on it. We have a preliminary hearing and we all voted and said we should get all these documents, we’re going to issue a subpoena, which is a pretty extraordinary step for a city board to do. We are going to issue a subpoena and then the person doesn’t produce the documents we asked for that’s going to have real consequences on our deliberation. We may not have to be that explicit in the rules, but we are surely going to think about that.

DCosimo: Would this possibly fit under the abuse of position and interference? It’s a violation of this Article for any City official to engage in the following interference/interfere with any criminal or administrative investigation alleging the violation of any provision of this Article, City Charter, Administrative Policies or Executive Order in any manner.

LTomlin: I don’t think we can just make a complaint. There has to be an individual that makes that complaint. I would think it would have to be a separate hearing under that. That would not necessarily be put under that subpoena, it would just be if there is a violation someone could individually start a separate complaint.

JDavis: It could be one of us that started the complaint. But I agree with you there it wouldn’t be a collateral matter to deal with, it would be a whole other complaint. You violated the Code by interfering with an investigation.

DCosimo: Isn’t that the same thing? As I read it, it sounds like it’s an ethical violation?

JDavis: I still think that would have to be heard on its own merits. I think if we use that as an authority for new sanctions that aren’t already explicit in the Code, I think that is short circuiting…I think that has to be a new complaint. There is also a pretty strong argument there’s noncompliance and then there is interference. Interference is like sticking yourself in there and interfering with the process, tampering with evidence. Noncompliance is sitting back and doing nothing; noninterference.

KMcDaniels: Well, for us not having that information may also have a really profound effect on the decision that’s made, so it really is in their best interest to provide when it is asked for. Maybe some language can be put in the subpoena, to help the Ethics Board help to make a good decision.
DCosimo: If you don’t have enough information, I know I did it but I’m sitting on a subpoena, it’s going to be perfect for me, but not necessarily good for someone else.

RJohnson: A subpoena to whom, a City official or an employee?

DCosimo: That was another question I had, who would be subpoenaed?

RJohnson: More than likely a third party in the whole process would be the person that is subpoenaed because that would be the information that the court doesn’t have access to. I don’t see a City employee sitting on a subpoena or a request. So if a complaint is made about an official it is probably going to be that person’s involvement with a third party that is incidental to the City.

DCosimo: I thought the subpoena was limited by what is in direct control of the City.

JDavis: That’s what we have in there right now. A subpoena is in direct control and in possession of City Officials. It’s broader than just like a Freedom of Information Act request because it is not just what did they generate in the course of their duties as a City official, but also what is on their computer at home, etc.

RJohnson: But if the Board makes a request to the City, not a subpoena, just a request, what is the likelihood of that request not being honored?

JDavis: Like if we asked the City Secretary to produce a document or the City I.T. to give us some email?

RJohnson: Correct, but we wouldn’t be asking them, we’d be either going through the City Auditor or the City Attorney and they would be asking.

BLangley: Well it would be an Open Records Request, right? If it is a City document that is available, it would be an Open Records Request and we would provide it, right, Aaron?

ALEal: If there was a connection with an ongoing complaint that you have, I would still recommend that a subpoena be issued to the City to produce that document. I’m only thinking about the City on the City side. If it is against a Council member, and they don’t want Bryan to search for this document, it is something that they can at least hold up and say they were issued this subpoena. It’s more or less for their protection in case someone wants to interfere or avoid him getting documents that you are requesting. Not saying that would happen but it just makes sense to issue that subpoena to the City.

JDavis: Good to have that on file. Another thing too, because of the way we came at this section when we starting talking about City officials early on with Alan, we kind of had that in our minds that it would be “the City official,” let’s say the accused. It doesn’t say that. It says City officials, plural. It could be Bryan, it could be Aaron…

BLangley: I’m not a City official.

JDavis: Right, but like Aaron said, we could issue a subpoena to more than just the complainant. We could ask another City official to produce something. Right now, as it is written now, as we took it forward to the City Council in Draft K and kept it in Draft L, it is just to City officials. It does include an elected official, but does not include their banker or their personal real estate agent, google or Facebook or anyone like that. What about this, instead of, if we feel like we are limited in our sanctions, what if we just said the Board may consider a party’s failure in compliance with a subpoena in its deliberations?

LTomlin: Do we also want to be able to exclude evidence?
JDavis: We could say that. The Board may consider a parties failure in compliance with a subpoena in its deliberations and/or exclude evidence related to subject matter to the subpoena by the party which fails to comply. I know that is a little bit of legal-ese, and not to make this more like a court process than we want it too, but if someone sues you, and they request discovery, copies of documents, and you don’t produce them, well in a court of law you can’t just show up with the documents the day of and want to introduce them in front of the judge and jury, it’s just not fair. You were supposed to turn those over many months or a year ago and you didn’t do it. That’s kind of the same idea here, if you are subpoenaed, you were supposed to produce that email we asked you about, it would have helped our deliberation, and so the day of and you have that document and 15 other things related to it, we can, but we don’t have to, we could say, “No, you don’t get to go into that. We asked you about that. You had an opportunity to produce that earlier, you don’t get to go into all that right now. Make sense?

KMcDaniels: So when you subpoena documents in the request for those documents in that subpoena, is there a timeline when they must be delivered?

JDavis: That’s another thing that’s not real clear. We would have to come up with that. The City Auditor is charged by the Code with serving the subpoenas. We would have to come up with the way those are worded. There are two kinds of subpoenas. You can only really subpoena people. When you want a document you serve a subpoena that says you come and bring your documents. So a subpoena would have to have built into it some kind of timeline. You come at this hearing date and produce your documents, but it has to be issued to a person. It can be for documents, so when we say in there the control of a City official, like the Mayor, we send the Mayor a subpoena. We say, “Dear Mayor, here is our subpoena for all your emails. Mayor, you appear on such-in-such time and date and bring with you these emails or bank records or whatever it is.

KMcDaniels: That is before the hearing before the Ethics Committee?

JDavis: We would set that, I would think, at the time we issued the subpoena. If you got served with a subpoena, the date and time of either that you are supposed to show up to testify at the actual hearing or trial, or it could be at some time before. If there is some concern that you are not going to show up or if someone needs the documents before that, there is usually an option that if you produce it ahead of time, you don’t have to show up yourself, all you do is produce the documents. Those are all things we have to put into whatever subpoena we issue, and because it is a Board issuing subpoena, this is my personal opinion, I don’t know other attorneys may have a different view, I think that because the Board is voting on a subpoena, not a judge signing something and issuing a subpoena, I think the Board has to vote on the subpoena, the piece of paper. I think that we’ve got to have it drafted, and a motion to issue the subpoena, a second and then a majority vote on the record that this piece of paper, exhibit whatever, is being issued as a subpoena from the Board. I think that is the cleanest way to do it. So we would have all that, just like we are redlining all this, we’d have a piece of paper drafted, in front of the Board. The Board votes on it, amends it, whatever and then issues it. Does that seem like how we would end up doing this, Aaron?

ALeal: Yes. And there’s going to have to be some built-in times, you’re going to have independent meetings to consider subpoenas are an issue, to actually consider that and vote as a Board in a special meeting before the hearing date. You do have that ability, as written if you can interpret what’s there, to be able to postpone a hearing if you need it and so, as you start functioning as a Board, you will learn how to do these things and maybe some of them may need require ordinance amendment in the future, but overall I agree with how you’ve described it.

DZoltner: Jesse, how else would that happen other than by a majority vote? I don’t see the alternative.

JDavis: We would have to take a vote as a Board on the subpoena and on the language that goes out, not just a show of hands, “who wants to issue a subpoena?” and then we draft it later.

DCosimo: Does that mean adding to this section?
JDavis: We could, but I think we leave ourselves the most room to be flexible on how we do this because we may come to the point where that doesn’t make any common sense at all, and we’d be asking the Council for change how we do subpoenas altogether. I think right now a simple and flexible language we can use, the better. Bringing us back to that new language in Draft L, if we feel like we can’t do a Letter of Reprimand, I tend to agree with that, let me read you back what I have so far from our conversation. Replacing that language there with, “The Board may consider a party’s failure to comply with the subpoena in its deliberations or exclude evidence related to the subject matter of the subpoena offered by the party which fails to comply.”

LTomlin: I think we should do “and/or” so it’s not like we have to choose whether we can do one or the other.

JDavis: Can any of you think of anything else we could do when someone fails to comply with a subpoena?

LTomlin: I mean not under the ordinance as it’s been given to us, I think.

DZoltner: I’m only going to suggest what the City of San Antonio does, there is a $500 civil fine as part of their Code. I’m not saying for or against but that is part of their Code. There is a $500 civil fine, it is not a misdemeanor, but it is a civil fine. The Deputy City Attorney, Camila Kunau, they’ve levied it 3 times, and collected it twice without argument. So it has worked. Now I did not deliberately include that in mine but that is kind of a step beyond. But they have levied it 3 times and collected it twice, so that’s something to think about.

LTomlin: I think that would be something for the City Council to think about in six months if this doesn’t work because we don’t have the ordained to do that, I think Alan addressed that.

JDavis: Do we like the language I just read off a moment ago?

KMCDaniel: I like the idea of starting off with that approach rather than going after … like a monetary …that feels kind of…although I have a tendency to want to agree with it, it also feels a bit threatening. I don’t think we want to be that kind of board.

DZoltner: I agree

JDavis: Let me read that off one more time, The Board may consider a party’s failure to comply with a subpoena in its deliberations and/or exclude evidence related to the subject matter of the subpoena offered by the party which fails to comply. Anything else under Subpoenas? This was a big topic of discussion for the Council and not just what we talked over but the concept in general was a big topic of discussion.

LTomlin: Just like our former meetings.

JDavis: Exactly, it’s unusual that we have that available to us, we have to learn how to deal with it. Anything else on subpoenas?

KMCDaniel: Where will that language go in here then?

JDAVIS: I’m just going to stick it right where that “Should a party fail…” I’m going to take that out and just replace it with what I read off. I’m sure there’s a better way to do that, but I’m sure we’ll figure it out if this is inadequate for our task, if that makes sense. That brings us over to section 18. All I did in section 18 to kind of open us into this conversation was to not take away anyone’s ability to ask questions but to add in that the Board could ask questions of the witnesses. I’m kind of contemplating and this would be up to for future Boards and future Chairs how they do it, to have the Board ask questions toward the end. Let
someone ask their questions of their own witnesses or cross examine them and then the Board could ask follow-up. This doesn’t necessarily say either way. So what do we think about that?

RJohnson: I think that’s good, but you’ll probably run into something I run into all the time, I wait till the parties have presented their direct and cross examination on a particular issue and then I’ll ask the questions, and invariably one of the two will say, “Well, wait a minute, I have other questions.” So it has to be really understood that when we do ask questions, especially if it is at the end of the regular cross, that they probably aren’t going to have another opportunity.

JDavis: Yeah, we’re not opening it back up.

LTomlin: I like that you kept in the cross and direct for due process because I know Mayor Watts was talking about that and saying this isn’t judicial, but unfortunately the way it’s written I feel like we can say it isn’t judicial, like we can say someone is borrowing something and not stealing it, but what the facts and the ordinance shows, we need to be able to have that direct and cross.

RJohnson: That’s one of the points I was trying to make in terms of developing my questions. I thought you had to look at where it comes from and what is the higher authority and what happens at the end? The higher authority of course is the State Administrative Law and the State Administrative Law handbook prescribes the hearing process for any contested case. The rules of civil procedures are typically followed in administrative hearings, and rules of evidence are loosely applied. It is all through administrative law that this is a legal process because it is expected to produce a findings, effects and conclusions of law. It is also required to have had administrated due process throughout the process for everyone participating. It is going to produce a legal product then it has to be a legal process, because if you deviate too much from it and make it more informal, you are going to step on due process in some way.

JDavis: I agree with you on that point. If the goal is, and I know that we are on the table and then also a counselor concerned it is too much like a court like some sort of criminal proceeding so something, but, in our system, through trial and error, we’ve figured out a way to assure due process, and that’s what Courts do. They have things like direct examination and cross examination to ensure due process. So if we are concerned about due process, then I agree with you, you’ve got to go through a legal process if you want to assure due process. A bunch of citizens sitting around a table peppering you with questions and then someone off the street with no rules calls you in front of that board, that’s not due process. Back to the question of who asks the questions? Are we happy with how that’s written, or do we want to change that up some? Any further questions on that?

LTomlin: I think it’s good for us to be able to ask questions, too, esp. if its parties that aren’t represented to clear things up.

DCosimo: In a couple of sentences up, “Witnesses from each party shall also submit to questions from the members of the Board…” how is that different from what you…I like the language of what you’ve added, it just seems repetitious to have that line in there.

JDavis: We may be able to accomplish the same thing just by relying on that, I guess I was trying to be more specific of the time limits that it wasn’t just going to be open season from the Board, but that our questions wouldn’t count against their allotted time. May be there’s a better way to say that and accomplish that same goal. We are not taking from their time or cutting them off in the middle of cross examination, and spending all their time with our questions.

DCosimo: It’s kind of more editorial, [01.01.30] can we just take out that witnesses for each party shall also submit to questions?

JDavis: Which do you like better my sentence or Alan’s sentence?
LTomlin: They are pretty much the same.

DCosimo: I like your sentence because it gives more information about the parties time.

JDavis: Just mark through witnesses? That sentence? Anything else on section 18? Ok, that gets us to Section 19. If you have watched the Council proceedings, I think I’ve said my piece on how vital I think it is for someone to appear on someone’s behalf in front of what I call a quasi-judicial board. I’m going to leave that there, I don’t think it is a good idea. I’ve had my say on that, however…oh, no, go ahead.

LTomlin: I think the ordinance says you can represent yourself or legal counsel can represent you. So I think that is an issue that the Council might have with the Ordinance. We can only follow what the Ordinance says, which it says you can represent yourself or have legal counsel represent you. As far as having a non-lawyer representing you at one of the hearing. My issue is there is no ethical consequences of a non-lawyer in representing somebody. As a lawyer, they can file a grievance against you and you have certain ethical standards you have to abide by, but just a random person that bothers me. Also, if you get a person to represent you on this complaint, my worry is that person could also be a witness in the complaint. As a lawyer, you can’t be a witness in it. But if it is just someone else, I’d be worried they would have no ethical duty to abide by. Those are my opinions on that, I don’t think we can do it under the Ordinance but I also don’t think it is a good idea. That’s my say on it.

KMcDaniels: Who decides whether this advisor is qualified to be the advisor?

JDavis: I have my own opinions about that. The way I have presented this so far, I don’t think someone should represent someone and do lawyer work and not be a lawyer. I think has real consequences for everybody involved. I left the question alone of are we going to end up with a cottage industry of folks who represent people who file complaints? Like I’ve done these myself, I’ve been through a few of these, I’ve had friends go through this, why don’t you let me be your citizen advisor and sit with you at this complaint? I don’t know if that will come to pass or not. I worry about that just because I don’t know if that’s the intention of having that in the ordinance. That there is a cottage industry of ethic complaints. But to answer your question, if we allow an advisor, it would be up to the person engaging that advisor. It would be up them to say, “This is a trusted friend, and I’ve brought them along with me. This is someone who I trust to advise me in this situation.” Is completely up to them. If we open it up, we cannot second guess that person’s choice. We either say, “People who have a certain set of qualifications that we can enumerate and set forth like a law license,” or we just let them bring somebody. We can’t say the day of the hearing, “oh, that guy, he’s not qualified.”

RJohnson: Let’s go back to where this begins. It starts above us. The administrative law doesn’t speak to having an advisor, it speaks to having representation. Also most every administrative law forum that I have ever participated in allows their attorney to represent. The word represent means they can do anything that a representative does, whether it is an attorney or otherwise. Aaron, what say you on that?

ALee: I think the language of the Ordinance, under The Representation, which is 2-21C-5, it is not written in such a way to exclude an advisor from coming forward. It advises both the complainant and accused have the right to be represented by legal counsel, that does not mean that they cannot bring an advisor and that’s what you can do in putting in as far as the representation and I agree that the person is going to make the choice as to whether or not to bring a buddy or someone who has some experience, a paralegal, that’s going to be the accused or the complainant, that’s their right. I would highly encourage you if that does happen the first couple of hearings to try to explain to the person or at least ask questions of the advisor, “Have you had a chance to look at our rules of procedure? Have you had a chance to look at our Ordinance? Do you understand or have any questions? No? Then let’s proceed.” I think that would be really good for you, it is a good practice. They are not prevented from bringing an advisor under the way this ordinance is written.
RJohnson: I’m talking specifically about representation, though. Do we have the ability to distinguish between a representative and an advisor?

ALeal: I’m not so sure of what the difference would be between the two?

RJ: In one case I though I heard you say that an advisor could help the person along but could not speak for them.

JDavis: That’s kind of how I have it written right now. Again, as a point of discussion, a place to begin, I have Section 19 written now is an advisor comes along with you but cannot speak for you. A representative could speak for you, make objections, they can present evidence, function like a lawyer.

RJohnson: Administrative law does not make a distinction between a representative and an advisor. If you are appointed, you are going to be the representative. You can advise or you can present. I don’t think we can prevent them from exercising a full representational roll.

ALeal: If you are contemplating something different, an advisor and a representative as defined, that’s your call. I would allow the advisor the ability to ask questions just like a legal counsel. Again, the ultimate decision is up to you, and yes, I agree with your statement Jesse.

JDavis: So let’s start with the preliminary question. Are we comfortable and ok with someone bringing some kind of representative with them who is not a licensed attorney? What Aaron said, the Code provides the right to be represented by legal counsel but you don’t read that to mean the opposite that you are not allowed to have some other kind of representative. It just specifically says you can have legal counsel, doesn’t exclude having some other representative.

ALeal: The way it’s worded, the accused has the right to be represented, does not mean the representation would be solely through legal counsel. Those are two distinct thoughts.

JDavis: So generally speaking, how do we feel about that? How do we feel about someone have a non-lawyer representing them in these proceedings?

LTomlin: I’m against it.

JDavis: I’m in that camp too.

DZoltner: I’m in favor of the language you have here. Allowing another advisor without any description or definition of what an advisor is. Doesn’t have to be a licensed mediator, it is someone with intimate knowledge of ethics, maybe not the particular law, but nuance of our Ordinance is not that difficult to grasp, so I am very much in favor of any other advisor being given that same right either to represent the complainant or the accused. I understand your ethical arguments with the lawyer but this speaks to the bigger issue of all these civil service hearings that occur year round. There are people that represent in those situations. This is not my area, but again, I’m speaking from another city or two where the accused can be represented by anyone with specific knowledge about this case.

RJohnson: I’m one of four people in the country that when a gun store breaks the Gun Control Act, they have a right to an administrative appeal, because ATF is going to come and propose we revoke their license. When I conduct those appeals, my decision sometimes may cost those people $3 million dollars in terms of the store. They can be represented by anyone they want. If they’ve got a person who is familiar with gun rules, been in business for 30 years, they sometimes have another gun store owner. I’d say half the time they have lawyers. I don’t have any forms where it’s required that they be an attorney. I just don’t
understand the relevance of this group in terms of disallowing someone whoever they want to represent them. Administrative law provides so they can have the representation of their choice.

JDavis: So when that person comes along, just curious, when that person brings along that other gun store owner or whoever else has knowledge in that area, does that person present evidence on their behalf and ask questions of witnesses, those kinds of things?

RJohnson: No, the person who owns the store never speaks. The representative does.

JDavis: So when you say representative, they fully represent that person.

RJohnson: Right. The administrative law says a person who appeals has a right to representation. It doesn’t say you have to qualify that representation.

LTomlin: I have a question. So they just choose who they want and you go forward with it or is there any kind of vetting of whether this person knows about gun laws first?

RJohnson: You cannot vet a person’s representative. If they have confidence in their ability to represent them then that’s all that is required. Now, if they don’t know what they are doing and it becomes clear, you have to be very watchful in terms of guiding them, like you can do this but cannot do that or do it this way, but no you cannot deny someone their chosen representation.

DCosimo: There are two things that stand out to me, and one, this is not a court of law. What I took away from the City Council was that needed to be very clear, not a court. The other is their concerns that someone may not be able to afford an attorney, and therefore wouldn’t have any kind of representation because they couldn’t afford an attorney, but if they did have someone that can speak on their behalf, I think that’s very important. I have no problem with them being accompanied by another advisor. The term I was thinking was an Advocate.

RJohnson: We have to remember this is not a court of law, but it is a legal proceeding.

JDavis: I’ll say this on my part, I have misgivings about a lay person representing somebody else’s interests in front of this Board. However, I wasn’t aware until tonight that this was regularly happening in administrative hearings, that it’s something available to people appearing at administrative hearings. Frankly, that gives me misgivings, you’ve got someone representing another person who may be qualified, maybe not. At least when someone has some competency in the legal field there is some assurance there, some ethical standards there. But all that’s to say, I do have some alternative language prepared. What you have in front of you in Section 19, and I know Aaron advised us not to do this, but let me read you what I have as an alternative to what’s in front of you already. The parties may be accompanied by or represented by legal counsel or one other advisor. Legal counsel or advisor to a party may present evidence and conduct examination of witnesses. Legal counsel or any advisor may not testify on behalf of a party. Alan put that in there because of what he explained later on that’s already in your draft, that it doesn’t take the place of a complainant or an accused testifying. Legal counsel or any other advisor may not testify on behalf of a party. If a party designates legal counsel or an advisor to present evidence on a party’s behalf, then only the legal counsel or advisor may present evidence at a hearing. Then it goes into what we already have, i.e., the party cannot also present evidence, the witness offered by the complainant can be questioned by the complainant, or the complaint’s lawyer, but not both. Nothing herein relieves the complainant of the obligation to testify.

RJohnson: I would like to see one change and that is, Legal Counsel or other representative. I don’t think the word advisor belongs in there.
LTomlin: I have misgivings, Jesse, but I think 19, if we do change this it’s currently legal representation, I think it should just say representation, if that’s how we are going with it.

JDavis: I think that’s a really good point. I think the first line it ought to say “can be accompanied by or represented by Legal Counsel or other representative, but then we need to stop saying legal counsel, and just say representative. Representative is inclusive of the term Legal Counsel. Let me read through this again for you. The parties may be accompanied or represented by legal counsel or another representative. A party’s representative may present evidence and conduct examination of witnesses. A party’s representative may not testify on behalf of a party. If a party designates a representative to present evidence on the party’s behalf, then only the representative may present evidence at the hearing, i.e., the party cannot also present evidence, e.g., a witness offered by the complainant can be questioned by the complainant, or the complainant’s representative, but not both. Nothing herein relieves the complainant of the obligation to testify.

RJohnson: Can you read the first sentence again?

JDavis: Yes, the parties may be accompanied or represented by legal counsel or another representative.

RJohnson: So in that context, “accompanied by” means they might bring somebody who might not represent them?

JDavis: Right. That language came from Alan. I think what he is doing is to set up what he says later on, if you have someone sitting there, you can’t go back and forth. What my old professor use to call “one horse, one rider.” They represent some of the evidence and then switch. They are not co-counsel. Either you have a representative or you don’t. You don’t ping pong back and forth.

RJohnson: Ok. I can understand that.

LTomlin: And so that leaves open that someone can have somebody that just sits next to them during the hearing and still present?

JDavis: Yes.

KMcDaniels: You know, I really didn’t think about this till we started talking about it, but that’s frequently what happens in the spring when the property tax things come out and everyone goes down to the office to dispute their property taxes. There’s that “cottage industry” of people who say, “I can help you make your property taxes lower,” and off they go. For some reason it makes people feel more comfortable being there rather than nervous on their own.

JDavis: Whether there is a financial arrangement between those parties, I’m just going to leave that for a whole other consideration that touches on the things we’ve talked about. This needs to look less like the People’s Court and more like a Senate Ethics hearing. If you have a lawyer there and they do something like covering the microphone and say don’t answer that, whispering in your ear kind of thing, you guys don’t need to do that; or you could actually have someone who presents evidence on your behalf and makes objections and all those things.

DZoltner: Jesse, you made a comment when we started about you had talked to Chris a little bit about this and his comment about this not being a court. Did he speak to this at all?

JDavis: Not explicitly, he said it was something we needed to think about and talk about. He did not express an opinion one way or another. He did invite me to have some alternative language available in case the council went a different direction from what I had written down. I think what we are proposing here the council is going to be fine with. Based on their conversation last time we presented this, “Draft
K,” I think something like what we’ve proposed here is what they are looking for. I think a majority of the council will be on board with this, but there are also council members who didn’t speak on this point. I don’t know where they are at.

DZoltner: So you feel like its pretty good with “the Legal Counsel or another…”?

JDavis: That’s my sense, feels like I’m pushing a rock uphill with the lawyer’s only suggestion, when I was coming out hard for lawyers only, I don’t think they were with me there.

DZoltner: Well, I’m going to call the question, just as you read it, so we can move on. There’s an unfortunate uneven number here so I don’t know. I move that we adopt your final language there.

JDavis: Would you be amenable to just doing it by consensus, and then adopt the whole thing at the end?

DZoltner: Either that or that kind of brings out another process issue in my mind. Moving forward, these rules of procedure are going to need some work, Alan has mentioned that, so even looking at the Ordinance, and I don’t want to get too far off center here, but, this Board may recommend changes to the Code. Now the question is how will that happen? Is it by majority vote, is by simple majority, unanimous? So there’s nothing in the actual Code that says how we recommend, not make but recommend future changes to the Code. So, then I back up and look at our rules of procedures and there really is nothing in our own rules about how we even change our own rules here. I’m even suggesting at some point we need number 29 on our list of rules which would be entitled, “Amendments,” but not only discuss how we amend our own rules and procedures, but then what is our procedure to make that recommendation to the council? It’s just like nothing out there, so how do we actually do this? Let’s step back, I made eight recommendations or proposals in what I sent you. Now, my understanding of whether or not Robert’s Rules prevail here is that each of those things … if I make a motion or get a second, we can discuss it or just totally take no action at all. I’m not even sure how we work on our own rules here. I was expecting that if there were no second then fine, it just dies. That’s why do we get consensus on all this when we’re done or whether or not we take these items individually.

JDavis: The only reason why I ask that is my hope is that we can move forward. We are making relatively few changes to the draft if you look at it in total and we are starting with a document that we are all pretty familiar with and has passed once before. So the reason I’m doing it this way, if we can develop a consensus around the few changes that we’ve talked about, then at the end of that process, we can have a motion to recommend the draft as a whole, I’ll call it “Draft M” as a whole. My intention was after we hit all of these, and I think we’re probably on the next to the last one, I don’t think the next one is going to have any contention to it at all about a letter of dismissal. Then we’ll go through your document that you sent because the council will also have that and the last thing we want is that we didn’t adopt something because we skipped over David’s memo and the council will go, “what about Dr. Zoltner’s idea,” and we didn’t even talk about it and we are back to another meeting. I was going to all the way through then go through your points then entertain a motion on “M” as a whole just because we’ve already recommended a draft forward because we are not starting totally over, if that makes sense. Whether your motion carries or not, I’m fine with putting it in the way that we’ve talked about, I’ve noted my objections, I think the council’s going to do something like this anyway, so I’m fine with moving forward.

DZoltner: This is not about my suggestions that I sent, this is actually something that has developed in my mind ever sense we received these packets, what is the process here? On down the road, when we’re not here, this could get messy. I’d like to leave a process where our rules can be amended or entered in a more formal manner, instead of these consensus things like the work sessions that the council is having. I’d like to see it a little more formal.

JDavis: I agree, that makes a lot of sense to me. A Section 29 that says the Board may amend these rules by a 3/4 vote or a simple majority or whatever we come up with. In the future, they will start with rules
which are already in existence. This process is unique to us, starting us off, we’re getting this let’s call it input from council, kicking it back to us, we’re going to kick it back to them, trying to keep us from ping ponging back and forth with council, over and over again. In the future, I would think that amendments would come bit by bit. A motion, a second and a vote. The only reason why I’m doing this kind of consensus thing as you say, is to get us through this part of the process.

DZoltner: That makes some sense and I’m good with this consensus, I guess. When we are done with this, if we are leaving something a little more formal in place then…

JDavis: I agree, there’s got to be form.

KMcdaniels: There should be some templates for things like dismissal letters and anything that’s written that we’ve talked about.

JDavis: So Alan has produced a good number of those documents. We can certainly put something in there or we could, and I suggest at a later date, adding an appendix or something with drafts or something. That might be too much to do tonight. Back to my original question, would you like to continue to urge your Motion and seek a second or are you good to go with a consensus at the end? Are you ok with that, Section 19?

DZoltner: I’m fine with that.

JDavis: Section 20, there is an edit there, I added the word “present” documentary evidence. [1.30.06] I think that was just left out. Section 27? It adds that letter of dismissal requirement. There’s not just one time that we can pull one section that deals with kicking someone out of the process. It appears in multiple places so I tried to add that letter of dismissal language in lots of places. And that brings us to the end and then I think that David’s point in Section 29 amendment, how do we want that to read, a simple majority, you think or a three quarters?

LTomlin: Well, three quarters might be hard if we end up having this amount of people here.

JDavis: I was going to suggest a simple majority just because…

DZoltner: The Board of Ethics may make recommend changes to the rules by simple majority to the Council.

JDavis: Anyone know off the top of their head, what section is in the ordinance that deals with these rules, says we are going to adopt these rules?

ALEal: Section 2-278

DZoltner: Section 2-277i is what your…Yes, 2-277i.

LTomlin: Well that’s to amend the Ordinance right? I think we are talking about two different things. Recommendations within the Ordinance and then amendments to our rules of procedure.

DZoltner: I mentioned both. Both under amendments, yes.

LTomlin: Rules of Procedure are under K.

DZoltner: The Council could have done us a favor there by saying that the Board of Ethics may recommend amendments to this article “by,” you know, a little qualification there or some, but it is just left hanging how that happens.
JDavis: So how do we want to refer to the Code of Ethics? We know how to refer to our own Rules of Procedures. To this article as a whole, not just Code of Ethics, could be to other procedural things that are not part of the Code of Ethics. So the Board of Ethics may recommend amendments to the City of Denton’s Code of Ethics, Chapter 2, Article 11? At the end of the day, what we’re doing is making recommendation for either one of these things, which, you know, strictly speaking any citizen can make a recommendation, it just has some strength coming from the Board, at least gets us a spot on the Agenda, probably. So here’s what I’ve got so far, for Section 29, Amendments, the Board of Ethics may recommend amendments to the City of Denton’s Code of Ordinances, Chapter 2, Article 11 or to its own Rules of Procedure to the City Council by a simple majority vote.

KMcDaniels: Clean

JDavis: You like it?

KMcDaniels: Yes.

DZoltner: Similarly, the Board may amend its own Rules of Procedure by…” you can add that second part to that.

JDavis: I just have it all in one sentence. The Board of Ethics may recommend amendments to the City of Denton’s Code of Ordinances, Chapter 2, Article 11 or to its own Rules of Procedure…” I started the second section and then realized I was copying and pasting the first section, so I decided to make it all one section.

DZoltner: Ok, ok. Same sentence or two. That’s fine.

KMcDaniels: At some point I think we talked about his that we really wouldn’t know what we need to amend until we actually start doing this work and then when we find things we hadn’t thought of.

JDavis: We have built in the flexibility when we hit those, we have the ability of the Board to flex time limits and presentation of evidence, all that kind of stuff.

RJohnson: I don’t think we’re finished. We need a new number 28, and make this 29. I think the new number 28 should be Reconsideration. The Ordinance, Section 2-283 that handles reconsideration, I believe this is seriously in error. This conflicts with State Administrative Law as well as Federal Administrative Law in that reconsideration of a Board’s determination for any municipality decision has to be appealed based upon an error in the application of law or a procedural error which affects the outcome. It is not predicated on new evidence, new evidence always produces a new appeal. That’s in error, but even if that is fixed, reconsideration gives the Board an additional requirement to perform, so I think we need to have that requirement in the Rules of Procedure.

JDavis: How do you think that ought to look?

RJohnson: Well, first of all, do you agree with the fact that new evidence is not a reconsideration element but errors in the application of law or procedure is?

JDavis: Generally speaking, yes, I agree with you.

RJohnson: So if that’s made, we need to determine exactly what the Board does with that in terms of do we reconvene, have our own meeting? That is what we should do. And then make a ruling on the appeal for reconsideration and issue it.
JDavis: So I’m looking at Section 2-283, I’m not disagreeing with anything you’ve just said. I think it also lines it out pretty clearly what we are supposed to do. It puts a lot on the Chair to decide. Even says “sole discretion.” There is nothing in here that bars a second complaint or third complaint or a fourth complaint except that eventually we will say you’re being frivolous. I think it outlines it out pretty clearly what we are supposed to do. It puts a lot on the Chair to decide. Even says “sole discretion.” There is nothing in here that bars a second complaint or third complaint or a fourth complaint except that eventually we will say you’re being frivolous. I think it outlines it out pretty clearly what we are supposed to do.

JDavis: I agree with everything you said, I’m just not sure that we need to do anything new in the Rules of Procedure but I agree with your general premise, it’s really not grounds for reconsideration but maybe that is something we look at for changing in the Code of Ordinance in the future. Take that power away from ourselves.

RJohnson: Well, is this a procedure that has to be followed subsequent to the issuance of a final determination, don’t you think it should at least have honorable mention in the Rules of Procedure?

JDavis: Yes, maybe something like the Chairperson, we’ve added letters of dismissal in every other situation, has to write a letter of dismissal.

RJohnson: So at this point are you saying if somebody filed a motion for reconsideration and it’s based upon a misapplication of a law or regulation, that you would just unilaterally dismiss it?

JDavis: I don’t think there’s any provision so far. The reconsideration, the way that I’m reading it, is just about new evidence.

RJohnson: My point is I think it conflicts with State Administrative Law, because State Administrative Law handbook prescribes for the standards that you’re used to. So this is in conflict, and I don’t think an Ordinance can be in conflict with State Law. Correct me if I’m wrong.

ALAel: Getting back to the preemption. I noticed many of you are getting the Constitution version that our laws or ordinances shall not be inconsistent with State Laws. When we go into preemption, we have to look at if it is express preemption or preemption by implication? Express preemption it says, “This shall be followed by all state agencies, cities, homeless cities.” The law really doesn’t say it that way, as if by implication. Well, once you hear state agency, the administrative hearings are different matters than what we have as an ordinance. I don’t think that our ordinances have to comply with the State Administrative Procedures Act, which is out there. I’ve looked at those in a prior city, and I don’t recall seeing something that says these also apply to the city. And if they don’t say that, then I think we can reconcile what we do with what the State does for their own agency hearings. Looking at this Reconsideration, to me this looks more like, and I’m not going to speak for Alan, and I don’t remember this part of the discussion when the Council was drafting this ordinance, but this sounds more like a Robert’s Rule of Parliamentary Procedure reconsideration motion as opposed to something you would find in a court or administrative hearing. That’s what it looks like to me and I think that is what Alan was trying to get at. I’m not going to say with any certainty. I don’t need this to be anything to be covered under administrative proceeding or a court proceeding. That list looks something different from that. We can actually write it this way. Is it the best ordinance provision? Time will tell. I certainly do believe you can operate under what is written here and it does not conflict with the State Administrative Hearings Procedures Act.

RJohnson: ok

DZoltner: Is the words “new evidence,” is that the problem as you see it then?

RJohnson: I thought it was wrong, Aaron says it may not be wrong. So if we are going to keep it here, the way I read this is if a person presents a reconsideration motion with new evidence, then we have to conduct another hearing, not just you. It says you are responsible for unilaterally dismissing it if that provision… if there is new evidence that is truly new evidence, then what would conducting a new hearing mean?
JDavis: Right, so the way I read it is, first the motion is filed, then the Chair decides is that new evidence, then the Chair decides is that new evidence that bears directly on our decision we already made. If it’s not, the Chair dismisses unilaterally. If it is, either new evidence or new evidence that bears directly on the previous determination, then the Chair reconvenes the whole board for a hearing on whether or not we are going to reconsider. There’s nothing on what does reconsideration look like. Is it a whole new hearing, we have this new piece of evidence, let’s consider just the new piece of evidence and then kind of consider the previous record is also submitted? Do we rehash the whole thing and ask new questions? Do we ask the parties back in and pepper them with questions about the new evidence? To the first thing you brought up, what should grounds for reconsideration entail? I agree with you, I don’t like the new evidence motion for new hearing, but at same time, I don’t know that we are empowered to add another ground for reconsideration, if that makes sense.

RJohnson: Which would be what?

JDavis: If we were to add the ground of reconsideration if there were an error in our interpretation, error in law, …

RJohnson: It’s either based on a misapplication of law or a procedural error.

JDavis: Right, so I don’t think we can add that in as another ground for reconsideration because this is already there as to what reconsideration is.

RJohnson: The question in my mind, we determine this new evidence, you call a meeting of the Board, the Board says, “Oh, well, if we had had this, it would have made a difference.” Then what do you do? It seems to me, what is required, you get the parties back and we do the whole thing over again.

KMcdaniels: They have to resubmit according to this. It says the request must be filed with the City Auditor within five business days of receiving the final opinion of the Board of Ethics.

RJohnson: That’s the motion for reconsideration.

JDavis: This is what happens when it gets here, and what happens when we all think it’s important and would it change our decision.

KMcdaniels: That’s where you get sole discretion.

JDavis: I think once the Board convenes to consider, because the very first thing the Chair does after determining that the new evidence directly bears on previous determination, is to get the Board together which is going to be a noticed hearing and we consider…”shall schedule a hearing on the request for reconsideration.” So then we would have a hearing to determine what we do with the request for reconsideration. We could line out now what our options are or we could leave it open and say, “in this situation it means we have another hearing;” “in this situation, yes, that’s an email they produced that bears on what we decided, but it’s not going to make a difference;” or “it bears and makes a difference and we can go the other way without rehearing all the other.” I think we can make decisions at that time. David?

DZoltner: If I can quote directly from Reconsideration from Alan’s home town, San Antonio. Reconsideration: Within five business days of receiving the final opinion of the Ethics Review Board, the complainant or respondent may request the Ethics Review Board to reconsider its decision. The request must be filed with the City Clerk. Within ten days after filing with the City Clerk, the originally assigned preliminary reviewing panel shall review the request for reconsideration. If the panel concludes reconsideration is warranted, it shall bring the request within another ten days to the full Board for decision on whether to grant the reconsideration. If the full Board grants reconsideration the Board may then order further preceding in accordance with the provisions of this Code. If no panel was assigned to conduct a
preliminary review, the Chair shall review the request and make in his/her discretion decline the reconsideration or refer the matter to the full Board for reconsideration. So there’s nothing about eminence, it’s just pretty much left open.

RJohnson: The point was we need a 28.

JDavis: My concern is what 28 looks like at this time. I don’t want to box us in.

LTomlin: You don’t want to say just start over a hearing anew, because maybe it’s not necessary. Something about the discretion of the unilateral Chairperson as to the scope of the hearing? Along those lines?

JDavis: What if we did honorable mention? What if we said request for reconsideration shall be handled under what is provided under 2-283, something like that.

RJohnson: Develop as we go.

JDavis: Right. So we’d put that under determinations, so a new 28, that makes alternate members 29, and Amendments 30. And how do we want that to read, the title is Reconsideration. Suggestions? Reconsideration shall follow the procedure established in Section 2-283. Like that? New section 28?

KMcDaniels: So then what happens if we want to make any changes to Reconsideration, that comes under procedure, you’d change it there?

JDavis: So the way the code is written, we adopt our rules and then send them to the Council. I like what we did with Amendments. Even though we adopt something, it’s not adopted till Council confirms it. So what we did with the Amendments is say by simple majority vote, we are going to send a recommendation to the Council, recognizing that it doesn’t particularly matter what we vote on down here, they are the ones who will make the change. So if we want to flush out reconsideration more, frankly I think it is a combination of the Code and our procedures at the same time. Making a joint recommendation to let’s amend the ordinance, to come and tighten up reconsideration and then based on what that will be, lining out some procedural rules for that. That section of the Code is heavy on procedure. What else? David do you want to go over some of the things that you suggested? We did some but not all of them. Anything that you sent in your email that you want to talk about before we make a recommendation to the Council?[1.54.13]

DZoltner: Only thinking about the comments that came from City Council during that work session, these are just some things that I have lifted from San Marcos, San Antonio and some others, I’ve talked with Deputy City Attorneys, these work. Now I’m really not in a position to either justify or defend any of these, these are options of things that work elsewhere. That’s the only reason why I said this. So whether or not, we’ve already gone through the witness deal, so that may have already been resolved, I’m ok with that. The Advisory Opinions are one I’m still kind of confused about. The other Cities, for example, the Advisory Opinions from some City Officials, will go straight to either the City Auditor or the City Attorney. Advisory Opinions that will come from others, either vendors, candidates, etc., or “I am an official with a concrete company who is going to be selling concrete to your next Parks project, can I sit on your Park’s Board?” “I’m not a City Official, I’m a private citizen, but I would like an advisory opinion, if it were submitted by name, for consideration on the Park’s Board. That is one I would consider would go to the Board of Ethics, this Board, rather than the City Attorney, because I’m a private citizen, not asking for City Attorney time. The City of San Marcos and San Antonio, annually in their reports, list a number of complaints that were filed, not forwarded to the Board, they list a number of Advisory Opinions that went directly to the City Attorney. They also list a number of Advisory Opinions that went to the Board of Ethics. So there is a distinction there on the origin of the request. Ours is just kind of “Advisory opinions are all ours.” So I don’t know from an administrative or from a staff standpoint, if for example the City Managers are
comfortable forwarding their ethics issues to us, for example, rather than to anyone else. I think that’s something we need to discuss a little bit.

JDavis: I can tell you what the City Attorney doesn’t want to do and that’s issue Ethics Opinions.

DZoltner: Well, again, he’s dealing with City Officials.

ALeal: The Council-wide, I mean, just reading these, and what I heard there, is because I am also subject to this. They also did not want me to be writing your Advisory Opinions which is why I have been given the authority to hire an outside counsel, to keep that independence and integrity of this Board. You’ll see my role minimized in this Ordinance, which is the Council’s discretion, and I accept that. Same with the City Auditor. He also has a very limited role. He is the “gatekeeper.” That’s his role, he accepts the complaints, administratively checks it and gives it to you all. That’s how that operates. Now, the way I read the request for an Advisory Opinion, the way I read the request for advisory opinion is “any City Official,” that to me tells me somebody who is already in the position that they are in, as defined as a City Official, which is going to be yourselves, the four appointees, all the Council members and some of the Boards that are listed here. If they have a question as to whether or not if they are going to engage in a conflict, possibly, or whether the gift is allowable, those advisory opinion questions should be coming to this Board. That’s how the Council wanted it to be. If it’s somebody who is on the Park’s Board and are not covered by this, and they are vendor, those questions will probably still be referred to me because they are outside of the purview of this ordinance and so I don’t see an issue with those kinds of examples are being handled the way we have in the past, as opposed to the ones which have been captured by this Ordinance. That now has been transferred to this Board or a special Council to assist you in making that determination.

DZoltner: That makes sense. Do we need to clarify the language here, because our rules say and I think even the Code says it limits advisory opinions to City officials. Is that too restrictive?

LTomlin: Yeah, from the Board.

DZoltner: Either way, from independent counsel or from the Board, all I’m asking is, is that too restrictive to say that advisory opinions can only be submitted by City Officials?

ALeal: They are the ones who are going to be…The Council and Alan during his presentation, they wanted to give any City Official that’s covered by this Ordinance the ability to come forward and to identify a potential conflict of interest or gift issue or abuse of position. They wanted to encourage that and that is the way it is done, giving them the freedom to come and ask for an advisory opinion from this board, before the act occurs. I’ll give you an example. Maybe one of the members of the Historic Landmark Commission is offered tickets to an event that has to do with historic preservation, for free. The cost of those tickets are $100. That person is trying to decide if he can accept that or no. How would he know? For him, if he wants to know if he can accept it, he now has the freedom under the Ordinance to come to this Board and say, “these are the facts. I’m asking this Board for an advisory opinion on whether or not accepting this ticket would constitute a gift that violates the act or not.” That’s the way I remember the discussion is supposed to work. To bring it out, to alert you before a violation occurs. To see if this is ok or not ok. If you say, “no, this is a gift and will violate this,” then the person knows, ok, I’m not going to accept the tickets, you all have spoken.

DZoltner: And that’s how I remember the discussion going as well, but my question is what does the private citizen do that is a little bit nervous about taking on a City Board, does that advisory opinion have to be sent through a City Official, or can then make that request directly of this Board?

ALeal: Under this ordinance, a nominee or let’s say one of the Boards that is covered, they are not a City Official and so there is no mechanism for that person to come to you to ask for an advisory opinion, because
they are not a City Official, meaning they have not been appointed and sworn into office in one of these
Boards who are appointed positions, and so they don’t have a mechanism right now and you’ve identified
that but they just don’t…

DZoltner: Well, I think there should be. That’s just my opinion, but there should be some mechanism to
…preventative. This is kind of what this is about, too. Rather than take that seat on the Board, and find
out six months in, and “uh, oh! I shouldn’t have…” I’m just suggesting that there should be some
mechanism, whether it’s a cabinet or some potential…

ALEal: That’s a great point. I think that should be raised in the next Amendment process for that specific
issue. It will only apply, so I note it down. That’s what I’ve been doing, anytime I see a possible
amendment, I note it in the margin of my copy.

RJohnson: In his example, the person appointing him/her, couldn’t that person pose the questions for them
and seek an advisory opinion on their behalf, before they appoint the person?

JDavis: I think so.

ALEal: I think the way it’s worded, they could.

JDavis: So a City Councilman has nominated you for an office, you say, “Hold on, I do a lot of business
with the Parks Department, what do you thing?” The City Councilman could ask for an advisory opinion
on the person’s behalf.

ALEal: Yes, the first sentence can be read in that manner.

JDavis: David, any of your other proposals do you think we should take up as Rules of Procedure changes?

DZoltner: Well the forth one there, it just came from a discussion that I had with another Deputy City
Attorney where our Code kind of makes it sound like we are limited in our decisions or determinations only
based on the Complaint that we receive. During the course of questioning or any investigation, if a larger
Ethical violation should surface, are we allowed at that point to act on that or does that require a new
complaint initiated from the Board? In other words, I don’t want to be a member of a Board that says, “This
is not a violation, but I’m not going to do anything about that bigger one that came up.”

JDavis: The way I read the current Ordinance and Rules of Procedure, it would have to be a new complaint.
However, that new complaint could come from any one of us. It could come from the questioning, “Wait,
wait, wait! Did you just say…?” and the Complainant picks up on it. So it would have to be a new complaint,
but we could move on it pretty quickly. Especially if it’s a big, obvious air-gets-sucked-out-of-the-room,
we just realized they admitted to some big Ethics violation. But I read it to be currently I think it requires
a new complaint.[2.04.51]

DZoltner: That’s most of my concerns or suggestions. I do have just one or two other come to mind recently.
I’m pleading ignorance here, is there any difference between the Chair of this Board administering an oath
to a witness versus a notary or someone like Jennifer who has been recognized by the State? Is there any
difference in purge your testimony that was given to your oath versus Jennifer’s, or someone who has been
recognized by the State? Is an oath an oath?

JDavis: No, there’s a difference between perjury and aggravated perjury. Right off the top of my head,
without looking at the Code, not in front of me, I don’t think there would be criminal offense of perjury for
lying to this Board under that oath. I could be wrong.

LTomlin: Wasn’t there something about if you lie on the complaint, it might be perjury?
JDavis: Or a new Ethics violation. The Complaint you file with a governmental entity, so that could be perjury.

ALEal: Lying on a governmental document.

LTomlin: I actually had that same thought, but I think that testimony that’s given, I don’t know if that’s perjury.

JDavis: Your asking does that oath matter? Is it the same as swearing before a notary, or something powered to take an oath? I don’t think it is the same oath? I think there’s a difference. It may have the same effect on a witness, you know the formalities attached to sworn testimony. Whether someone could be prosecuted for perjury for that later on, I don’t know that they could be. When I say Code, I mean the Penal Code.

DZoltner: So I guess what I’m asking, there’s no difference between fabricated testimony given to you or the Board versus an oath administered by someone else, like Jennifer. It’s all the same?

JDavis: If someone lies in front of a Notary or some other person authorized to take an oath, they could be charged with perjury. Whether or not that happens is another conversation. Whether a police report had been generated, etc. As far as consequences in front of this Board, I don’t know that there will be any. Consequences outside this Board that would be up to other jurisdictions let’s say. The only other thing I’ve got is seeking a motion for approval of the Rules of Procedures “Draft L” as amended by our conversation. I don’t know if you have more on that or if we are ready for that motion?

DZoltner: I’ll make that motion then.

JDavis: There’s been a motion by Dr. Zoltner to adopt the Rules of Procedure, for conducting meetings and hearings, Draft L as amended. Is there a second?

RJohnson: I’ll second.

JDavis: All those in favor say aye? All opposed same sign? Motion carries. Let me consult our Agenda. Dr. Zoltner, are there any other items that you’ve got that you might think would fall under the purview of 1.A., so we are sticking with that origin item there, which is specifically Rules of Procedure, which I think by reference requires a discussion about Ordinance, so if you had something on future amendments, would you care to mention those?

DZoltner: Not at this point, this is a work in progress.

2. ITEMS FOR INDIVIDUAL CONSIDERATION

A. Receive a report, hold a discussion, and give staff direction regarding the Board of Ethics rules of procedures required by Ethics Ordinance No. 18-757 and subject to confirmation by City Council.

JDavis: Yes, Sir. Moving on to item two of the agenda, concluding items. He had a birthday, Laura had a baby. Congratulations.

3. CONCLUDING ITEMS

Under Section 551.042 of the Texas Open Meetings Act, respond to inquiries from the Board of Ethics or the public with specific factual information or recitation of policy, or accept a proposal to place the matter on the agenda for an upcoming meeting and under Section 551.0415 of the Texas Open Meetings Act,
provide reports about items of community interest regarding which no action will be taken, to include:
expressions of thanks, congratulations, or condolence; information regarding holiday schedules; an
honorary or salutary recognition of a public official, public employee, or other citizen; a reminder about an
upcoming event organized or sponsored by the governing body; information regarding a social, ceremonial,
or community event organized or sponsored by an entity other than the governing body that was attended
or is scheduled to be attended by a member of the governing body or an official or employee of the
municipality; or an announcement involving an imminent threat to the public health and safety of people in
the municipality that has arisen after the posting of the agenda.

JDavis: Anything else for concluding items?

DZoltner: Question, you mentioned a work session. Do you have a tentative date?

BLangley: October 16th is what we are scheduled for right now. That’s dependent upon the Council looking
at some priorities for work session topics tomorrow that we’ll be talking about, but right now that is the
tentative date.

LTomlin: Can we get an email on that?

BLangley: Absolutely, as soon as I finalize that, I’ll get that out to you. We have 57 work session topic
requests that are on the agenda list, so we are having a session tomorrow to talk about prioritizing those and
get some clarification of what Council want to hear and what they don’t, but tentatively it is October 16,
but as soon as I have a confirmed date, I’ll get it to you.

JDavis: Any others? That’s it, we are adjourned.

RJohnson: The question that I had submitted, for the most part I think I’ve spoken to a lot of it. What I
was interested in obtaining is the legal authority for a lot of the legal provisions contained in the rules of
procedures. Reason why I was formulating the answer to the Council and the Mayor’s main question, “is
this a legal proceeding?” If not, we’ll make it informal. I was hoping to get more than just, “well, ten other
cities did it this way so this is where I got the legal authority to do it.” I was hoping for a State authority
which exists, but he did not provide it. My main point or thrust, especially in the judicial review portion of
this material is that what comes out of this process is going to be subject to some types of legal review. So
what comes out has to confirm at least to, as I indicated before, some form of cohesive findings of fact, and
conclusion of law as well as making sure due process was followed all along the line. If that’s what comes
out the back end, then what creates that has to be a legal process. That is my answer to the Mayor and
Council.

JDavis: Thank you, and I appreciate the questions you pose, too, because you bring a lot of experience to
the table. Anything else?

RJohnson: I just might add, in all of my forums that I’ve described, if the appellant brings an attorney, you
better believe the other side is going to have an attorney as well, that’s an exception.

JDavis: Anything else? Ok, we’re adjourned.

Minutes taken by Kelly Campbell