CEO 23-5—August 3, 2023

ABUSE OF POSITION; MISUSE OF PUBLIC POSITION; CONFLICT OF INTEREST; GIFT PROHIBITIONS

STATE UNIVERSITY BOARD OF TRUSTEES MEMBER AUTHORING CONTENT FOR PUBLICATIONS REGARDING MATTERS RELATED TO HIS STATE UNIVERSITY

To: Name Withheld (New College of Florida)

SUMMARY:

A trustee of a state university is not prohibited, in his private capacity, from writing and accepting payment for publishing content on written or online media platforms concerning matters related to the university, provided the content concerns only publicly available information. Additional guidance is provided concerning whether the contractual relationships formed due to his journalism present a prohibited conflict of interest for him, and whether he is limited in soliciting personal donations through the online media platform. Referenced are CEO 23-1, CEO 22-4, CEO 22-3, CEO 19-13, CEO 16-2, CEO 16-1, CEO 08-20, CEO 08-19, CEO 08-2, CEO 06-6, CEO 95-28, CEO 92-21, CEO 90-15, CEO 89-21, and CEO 86-6.

QUESTION 1:

Would a member of the board of trustees for an institution within the State University System be in violation of the statutory and Constitutional prohibitions over which the Commission has jurisdiction were he to author and accept payment for content related to the institution?

Question 1 is answered as follows.

In your letter of inquiry and additional information provided to our staff, you indicate you are the General Counsel for New College of Florida (NCF), a public liberal arts college in the State University System of Florida. You are bringing this inquiry on behalf of a recently appointed member of the University's Board of Trustees.[1] You indicate the Trustee produces newsletters, commentaries, and videos for two different platforms —a written journal published by the Manhattan Institute for Policy Research and an online service called *Substack*. The Trustee would like to publish content related to NCF on these platforms, and promote such content through his *Twitter* account. He inquires whether this constitutes a prohibited conflict of interest with his role as a NCF Trustee. Before engaging in legal analysis, the following discussion is offered concerning the Trustee's involvement with both media platforms.

Regarding the Manhattan Institute for Policy Research, the organization is a think tank based in New York City and comprised of scholars, journalists, activists, and civic leaders.[2] The organization focuses upon offering commentary and research concerning a range of topics, such as urban affairs, policing, education, and housing. The organization's efforts include publishing the *City Journal*, which you indicate is a public policy magazine and website. The Trustee is a paid employee and director of the Manhattan Institute, and he serves as the editor for the *City Journal*. As part of his editorial duties, he writes articles, editorials, and commentaries for the *City Journal*.

Regarding *Substack*, you indicate it is an online platform for journalists and content creators where they can publish newsletters, articles, and videos, and engage in discussions with readers. The Trustee is not employed by Substack, but he has signed an agreement allowing him to have an account on its platform. On this account, he publishes articles, commentary, and videos on a variety of issues, including higher education matters. You indicate the majority of the content that the Trustee produces on *Substack* can be viewed without any monetary charge, although certain content—kept behind a paywall—requires a paid subscription. As will be explained in subsequent questions in this opinion, the money paid by subscribers is sent to a third-party payment

processor, which—in turn—takes a percentage for its services, sends a pre-set portion of the subscription fee to *Substack*, and then distributes the remaining money to the Trustee. The Trustee is not paid by *Substack*; his compensation comes from the subscriptions made to his account.

Importantly, these journalism opportunities did not arise due to his appointment to NCF's Board of Trustees. The Trustee's employment at the Manhattan Institute, his work on the *City Journal*, and his involvement with *Substack* all preceded his appointment to the Board.

You indicate that now, following his appointment, he wants to continue these journalistic endeavors, in part by publishing content in the *City Journal* and on his *Substack* account pertaining to NCF.[3] He also intends to use his *Twitter* account to draw attention to these articles. You emphasize the "strong majority of his content" for both the *City Journal* and *Substack* will not relate to NCF specifically, but will be more general in nature, concerning broader issues affecting education and schools. However, you indicate some of the content will specifically refer to and offer commentary regarding NCF, and he inquires whether this will trigger any statutory or Constitutional prohibition over which the Commission has jurisdiction.

Of note, you indicate any content generated by the Trustee concerning or referring to NCF will be non-monetized and non-paywalled, meaning this content will not generate any income for him. Because it appears he is employed by the Manhattan Institute, presumably at an established salary, this appears more relevant to content on his *Substack* account. Accordingly, from what you indicate, any content posted on his *Substack* account specifically related to or concerning NCF will be freely available, meaning it will be viewable without a paid subscription. However, you indicate even non—monetized and non—paywalled articles on *Substack* do include a link for interested readers to subscribe to the Trustee's account, as that option is built natively into the platform.

We have issued past advisory opinions regarding whether public officers may report or offer commentary for public consumption on matters affecting their public agencies. These prior opinions have analyzed this issue under two statutes, Sections 112.313(6) and 112.313(8), Florida Statutes, which state:

> MISUSE OF PUBLIC POSITION.—No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. [Section 112.313(6), Florida Statutes]

> DISCLOSURE OR USE OF CERTAIN INFORMATION.—A current or former public officer, employee of an agency, or local government attorney may not disclose or use information not available to members of the general public and gained by reason of his or her official position, except for information relating exclusively to governmental practices, for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity. [Section 112.313(8), Florida Statutes]

These provisions prohibit the Trustee from corruptly[4] using his public position or the resources thereof, or using "inside information," to benefit himself or any other person or entity. Also relevant—although it did not become effective until December 31, 2020—is the Constitutional prohibition found in Article II, Section 8(h)(2), Florida Constitution,[5] which provides:

> A public officer or public employee shall not abuse his or her public position in order to obtain a disproportionate benefit for himself or herself; his or her spouse, children, or employer; or for any business with which he or she contracts, in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest. The Florida Commission on Ethics shall, by rule in accordance with statutory procedures governing administrative rulemaking, define the term "disproportionate benefit" and prescribe the requisite intent for finding a violation of this prohibition for purposes of enforcing this paragraph. Appropriate penalties shall be prescribed by law.

In the prior opinions, which are summarized below, we concluded there was no violation of Sections 112.313(6) or 112.313(8) for two main reasons: (1) any reporting or journalism was done in a private capacity, separate and apart from the use of the public officer's official position; and (2) the reporting or journalism was confined to publicly available information.[6]

For example, CEO 90-15 addressed a city commissioner who was employed by a newspaper to write columns and articles concerning the activities of the city commission. We acknowledged that using his status as a reporter to promote his stance on a political issue or to criticize the stance of an opponent might achieve a political benefit for him. Nevertheless, we concluded that he was not using his office to generate this content, as would be needed for the prohibition in Section 112.313(6) to apply. We emphasized "his actions in writing [the columns and articles] would be taken in his private capacity rather than in his public capacity." And, regarding Section 112.313(8), we concluded the statute would not be violated so long as all the information in the columns or articles that he wrote was available to the public, and could be discussed or explained with any member of the public.

More recently, in CEO 16-2, Question 3, we found no violation of Section 112.313(6) would occur if a member of a county parks and recreation council wrote columns for a local newspaper addressing matters pertaining to county parks. We wrote:

> [A]lthough your use of the newspaper could achieve benefits for you, such an action, without more, will not violate Section 112.313(6). Because you will not be acting in a public capacity by writing a column or making comments concerning park-related issues, it cannot be said that these actions will be a use of public office under Section 112.313(6).

Similarly, in CEO 92-21, we found the statutory prohibitions would not preclude a county sheriff from owning a local newspaper that was reporting on county business. We advised the sheriff that because his ownership of the newspaper was in his private capacity, and so long as he did not use public resources to produce any of its articles or columns, Section 112.313(6) would not apply. We did caution the sheriff, though, not to use confidential criminal investigative information to give his newspaper an advantage over other publications, as such conduct would violate Section 112.313(8).

And, finally, CEO 86-6 addressed whether a public employee could be paid by a newspaper for writing a job-related article. In particular, the opinion involved a chief assistant public defender who was paid $150 by a local newspaper for writing commentary on the juvenile justice system and on a particular client whom the public defender's office had represented. We found no violations of Section 112.313(6) or 112.313(8), noting that "all information contained in the commentary about the case is a matter of court record" and "was available to members of the general public[.]"

Considering the reasoning in these prior opinions, we find the Trustee will not automatically violate Section 112.313(6) or the prohibition in Article II, Section 8(h)(2), Florida Constitution, simply by reporting or publishing content related to NCF in the *City Journal* or on *Substack*. His authoring of such content will be in his private capacity; it will not be done through his public position, as would be needed for the statutory prohibition to apply. Moreover, so long as the content deals with information fully available to the public, there will be no violation of Section 112.313(8). This means, of course, that the Trustee will have to confine his articles, commentary, and videos to information derived from public records or public meetings, and he cannot use information that is exempted or not subject to the public records law. Similarly, while he can use conversations with NCF staff consisting of information that is public record and can be discussed or explained with any member of the public, any information exempted from or not subject to the Sunshine Law or the public records law should not be referenced. The Trustee will need to keep his content within these parameters to avoid a violation of the prohibitions discussed herein.[7]

We recognize an argument could be made that public officers-such as the Trustee-should not profit in any way from the information or skills that they acquire in their public positions. However, so long as the Trustee confines his articles, videos, and commentary to publicly available information, as described above, his content will not rely upon his service on the Board of Trustees and could be written by anyone. We decline to find, without more, that such actions constitute use of one's public position.

We also acknowledge that readers may be more prone to subscribe to the *City Journal* to the Trustee's *Substack* account given his newly—appointed status as a NCF Trustee, particularly if he will be publishing content related to NCF. However, the possibility that readers may be more interested in the Trustee's content due to his public position does not provide a basis for applying the prohibitions discussed above. In CEO 90-15, which dealt with a city commissioner acting as a paid reporter, we found "[a]lthough most reading the article[s] will recognize his name and know that he is a [c]ity [c]ommissioner, this factor of name recognition alone is not sufficient to constitute a use of public office. To find otherwise would prohibit a public official from engaging in almost any private business." See also CEO 16-2 (stating "that while readers might recognize [the public officer's] name on [his] articles and realize he was a public officer, name recognition [is] not sufficient to constitute a use of public office"). In other words, the possibility that the Trustee's readership and subscriptions may increase due to his public position does not automatically equate to a misuse or abuse of his public position.[8]

However, we do offer some words of caution to the Trustee. It is critical that he not use NCF personnel to prepare the content that he privately publishes. He must author the content personally-or with others not affiliated with NCF-to avoid an application of the statutory prohibitions previously discussed. Also, to prevent any confusion, when the Trustee comments on matters related to NCF, he should emphasize he is sharing only his personal opinions and not the opinions of the university board on which he serves. This will clarify he is offering only his personal opinion and is not speaking for the university itself, which could be construed as a use of his public position.

Question 1 is answered accordingly.

QUESTION 2:

> Does the Trustee have a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, if he continues in his employment or contractual relationships with the media platforms for which he is publishing content?

Question 2 is answered in the negative.

In your inquiry, you indicate the Trustee seeks to clarify "whether his journalism or social media presence creates a conflict of interest with his role as a Trustee of NCF." This requires analysis beyond merely considering whether he can publish articles related to NCF in the *City Journal* and on *Substack*. His employment and contractual relationships with these media platforms also must be examined to ensure they do not create a prohibited conflict of interest.

The statute relevant to such an examination is Section 112.313(7)(a), Florida Statutes, which states:

> No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he is an officer or employee . . .; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

The first part of Section 112.313(7)(a) prohibits the Trustee from having employment or a contractual relationship with any agency or business entity that is subject to the regulation of, or is doing business with, his agency, which would be NCF. The second part of the statute prohibits him from having employment or a contractual relationship that will create a "continuing or frequently recurring" conflict of interest with his duties as a Trustee, or that will "impede the full and faithful discharge of [his] public duties." The following analysis will apply the statute to the Trustee's employment with the Manhattan Institute for Policy Research—which includes his service and writings for the *City Journal*—as well as his relationship with *Substack*.

Turning first to his employment with the Manhattan Institute for Policy Research, you indicate this entity is not doing business with NCF and is not subject to NCF's regulation. Assuming there is no other connection between the Institute and NCF, it does not appear this employment creates any prohibited conflicts of interest for the Trustee under Section 112.313(7)(a).

Turning next to the Trustee's relationship with *Substack*, the application of Section 112.313(7)(a) depends upon understanding how this media platform operates. As discussed in Question 1, *Substack* is an online platform on which authors can create accounts and post content, similar to having a *YouTube* channel or creating an *Instagram* account. The Trustee is not employed by *Substack* and is not paid by it. Instead, the Trustee is compensated when individuals subscribe to his account to view content kept behind a paywall. Each subscription is paid to a third-party payment processor, which separately distributes percentages of the subscription fee to *Substack* and to the Trustee.

Publicly available information indicates that authors creating an account on *Substack* have to sign a publisher's agreement. While they continue to own any original content that they post, the publisher's agreement gives *Substack* a limited license to promote that content. You indicate the Trustee entered into this publisher's agreement with *Substack* when he first established his account.

It also appears there is a contractual relationship between each *Substack* author and the third-party payment processor, inasmuch as the processor is legally obligated to remit a portion of each subscription fee to the author. To this end, the third-party payment processor must annually prepare and provide each *Substack* author with a Form 1099-K, which is a Federal form used by credit card companies and third-party payment processors to report the payment transactions that they have processed for retailers and third parties. The Form 1099-K is purely informational and does not create an employment or independent contractor relationship between the third-party payment processor and the *Substack* author. It merely summarizes the sales activity on each account, and the processor sends copies of it to both the author and the IRS.

In short, by having a *Substack* account, the Trustee has ongoing contractual relationships with both *Substack* and the third-party payment processor. The question then becomes whether either entity is conducting business with NCF or is being regulated by NCF, as would trigger the statutory prohibition in Section 112.313(7)(a). Because you indicate neither *Substack* nor the third-party payment processor have any such relationship with NCF, and assuming no other connection arises between these entities and NCF, the Trustee's contractual relationships with them do not create prohibited conflicts of interest for him under Section 112.313(7)(a).

Question 2 is answered accordingly.

QUESTION 3:

> Does the Trustee have a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, given the contractual relationship that he has with each subscriber to his online media account?

Question 3 is answered as follows.

An additional issue under Section 112.313(7)(a) concerns whether the Trustee will have a prohibited conflict of interest due to his relationship with each subscriber to his *Substack* account. From what you indicate, and as previously discussed, certain content that the Trustee posts on *Substack* can be freely accessed and viewed by any reader, regardless of whether they have subscribed to his account. This first category of readers does not create any conflicts of interest for the Trustee. However, additional content, kept behind a monetized paywall, is available only to those who have subscribed to the Trustee's account by transmitting money to the third-party payment processor. The question then becomes whether the Trustee's relationship to this second category of readers—his subscribers—could trigger the statutory prohibition in Section 112.313(7)(a).[9]

Regarding these subscribers, you indicate the Trustee has the discretion to set and modify his subscription fee without any involvement from *Substack*. Moreover, *Substack* has little to no involvement in dealing with account subscribers. You indicate that account holders, such as the Trustee, have the authority to remove subscribers from their accounts unilaterally. Moreover, *Substack's* Terms of Use indicate that it is not liable for any disagreement between its account holders and their subscribers, including disputes over the payment of subscription fees.

Considering how *Substack* operates, we find a contractual relationship exists between the Trustee and each of his subscribers. In the past, we have adopted the substantive law of contract when evaluating whether a "contractual relationship" exists for purposes of Section 112.313(7)(a), and have cited the following definition from Black's Law Dictionary (Fifth Edition, 1979) when interpreting the phrase:

> [a]ny relationship between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation.

See CEO 23-1 and CEO 95-28. We also cited a similar definition in CEO 89-21, indicating:

> The term 'contract' has been defined as a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. Another definition is that a 'contract' is an agreement upon a sufficient consideration to do or refrain from doing a particular law thing. [11 Fla. Jur. 2d Contracts, Section 1.]

Here, based on the Trustee's promise of allowing access to paywalled content, the subscribers provide consideration to him in the form of subscription fees paid to the third-party payment processor. *Substack* itself is not a party to this arrangement and the Trustee has the authority to end the relationship by removing individual subscribers on his own. Accordingly, it appears the Trustee has a contractual relationship with each paid subscriber to his *Substack* account.

Applying this finding to the statute, the Trustee is prohibited under Section 112.313(7)(a) from accepting or continuing a subscription with any "business entity" or "agency" that is doing business with NCF or is being regulated by NCF. Such a contractual relationship would create a prohibited conflict of interest for him under the first part of the statute. Importantly, the statutory prohibition applies only to contractual relationships with business entities[10] and agencies,[11] not private individuals. Accordingly, the Trustee should examine his subscription list to ascertain if any current subscribers are business entities or agencies engaged in a business or regulatory relationship with NCF. You indicate the Trustee is able to view the username and email address of each of his subscribers, and, to the best of his knowledge, none of his current subscribers are conducting business with NCF. We encourage him to be vigilant in this regard, if he chooses to continue allowing subscriptions to his *Substack* account.[12]

QUESTION 4:

> Do donations given to the Trustee through his online media account constitute prohibited "gifts" under Section 112.3148, Florida Statutes, or prohibited "expenditures" under Section 112.3215, Florida Statutes?

Question 4 is answered as follows.

Language on the Trustee's *Substack* page also asks readers to "become a patron" of his work by donating money to him. In particular, the Trustee's *Substack* page states, "If you want to support my work, you can contribute via credit card, PayPal, or Bitcoin." There are hyperlinks on the page taking readers to webpages where the donations can be made. The Trustee's *Substack* page also indicates, "[l]arger donors can make a tax-deductible contribution to my 501(c)(3) nonprofit" and provides information where such a contribution can be sent. You indicate any donations to the Trustee or his nonprofit are separate and apart from a subscription to his *Substack* account. In other words, a reader can donate money to the Trustee or his nonprofit regardless of whether they are a subscriber. The following analysis addresses whether the Trustee is prohibited or limited in engaging in such solicitations.

Initially, we note NCF is part of the State University System within the Executive Branch (see Section 1001.705(1)(d), Florida Statutes), and the Trustee, as a member of a state university board of trustees, must annually file the CE Form 1 ("Statement of Financial Interests"). See Section 112.3145(1)(c)3., Florida Statutes.

Accordingly, the Trustee is subject to Section 112.3148, Florida Statutes (the "gifts" law), and Section 112.3215(6)(a), Florida Statutes (the "expenditure ban"), as he is an Executive Branch agency "reporting individual" required to file financial disclosure. See CEO 16-1 and CEO 08-2, Question 2. The question then becomes what portions of the gift law and the expenditure ban will apply to the donations being solicited by the Trustee through his *Substack* account.

The statute most pertinent is Section 112.3148(3), Florida Statutes, which provides:

> A reporting individual or procurement employee is prohibited from soliciting any gift from a vendor doing business with the reporting individual's or procurement employee's agency, a political committee as defined in s. 106.011, or a lobbyist who lobbies the reporting individual's or procurement employee's agency, or the partner, firm, employer, or principal of such lobbyist, where such gift is for the personal benefit of the reporting individual or procurement employee, another reporting individual or procurement employee, or any member of the immediate family of a reporting individual or procurement employee.

Section 112.3148(3) prohibits the Trustee from soliciting for himself or his personal nonprofit a gift of any amount from a lobbyist of NCF,[13] the partner, firm, employer, or principal of such a lobbyist, a vendor of NCF,[14] or a political committee (hereinafter, throughout the remainder of this opinion, "prohibited sources"). See also Section 112.31485(2)(a), Florida Statutes (specifically prohibiting "reporting individuals" from soliciting gifts of any amount from political committees).

We acknowledge that the Trustee is not engaging in a direct or in-person solicitation through his *Substack* page, but is making a general or collective request for funding from anyone who wants to contribute. However, we recently found the term "soliciting," as used in Section 112.3148(3), does not have to be personal or direct, but encompasses general funding requests made collectively to a group or community. See In re Douglas Underhill, Complaint Nos. 20-060, 20-073, 20-103 (consolidated), Final Order No. 22-041.[15] Accordingly, we find the general request for donations on the Trustee's *Substack* page qualifies as "soliciting" for purposes of Section 112.3148(3).

Given the applicability of the statute, the Trustee has two choices. Clearly, he would not be in violation of Section 112.3148(3) if he were to remove all language on his *Substack* page requesting donations for himself or his nonprofit. His other choice is to keep the language requesting donations, but also specify that the prohibited sources identified above cannot contribute. Only by adding this limiting language will he be able to continue soliciting donations through *Substack* without violating Section 112.3148(3).

The following guidance is also provided concerning any donations that the Trustee may receive on behalf of himself or his personal nonprofit. If a prohibited source were to offer a donation unprompted—meaning the Trustee did not solicit it—three prohibitions will apply.

First, the Trustee, as a "reporting individual," will be prohibited from accepting a donation of any amount to himself or his nonprofit if it is offered by a political committee. Section 112.31485(2)(a), Florida Statutes, imposes a flat ban on such donations, stating:

> A reporting individual or procurement employee or a member of his or her immediate family is prohibited from soliciting or knowingly accepting, directly or indirectly, any gift from a political committee.

The only exception, described in Section 112.31485(1)(a), Florida Statutes, would be if the gift being offered by the political committee is "primarily related to contributions, expenditures, or other political activities authorized pursuant to chapter 106." Otherwise, donations to the Trustee or his nonprofit coming from political committees should be refused.

Second, any donation to the Trustee or his personal nonprofit by a lobbyist or principal of a lobbyist will be considered an "expenditure," subject to the restrictions in Section 112.3215(6)(a). The term "expenditure" is defined in Section 112.3215(1)(d) to mean "a payment, distribution, loan, advance, reimbursement deposit, or *anything of value* made by a lobbyist or principal for the purpose of lobbying." (emphasis added). While a donation to the Trustee or his nonprofit may not, at first blush appear, to be made "for the purpose of lobbying,"

the statute clarifies that "lobbying" can encompass any "attempt to obtain the goodwill of an agency official or employee." See Section 112.3215(1)(f), Florida Statutes and Rule 34-12.180, F.A.C. We find a donation to the Trustee or his personal nonprofit fits within this description.16

The question then becomes under what circumstance the Trustee can accept such an expenditure. Section 112.3215(6)(a) addresses this by stating:

> Notwithstanding s. 112.3148, s. 112.3149, or any other provision of law to the contrary, no lobbyist or principal shall make, directly or indirectly, and no agency official, member, or employee shall knowingly accept, directly or indirectly, any expenditure.

This provision is tailored only to Executive Branch agency reporting individuals, such as the Trustee, accepting gifts from lobbyists or principals of lobbyists of Executive Branch agencies. See Sections 112.3215(1)(a) and 112.3215(1)(f), Florida Statutes. But its meaning is clear: the Trustee as an Executive Branch agency reporting individual cannot accept a donation (i.e., a goodwill-engendering "expenditure") of any amount on behalf of himself or his personal nonprofit from any Executive Branch agency lobbyists or principal. See CEO 06-6. This applies even if the lobbyist or principal has no connection to NCF, as the prohibition is an across-the-board ban on expenditures coming from any Executive Branch agency principal or lobbyist. See CEO 08-19, Question 3.

Third, even if the donation is not coming from a political committee or an Executive Branch agency lobbyist or lobbyist principal, the Trustee as a reporting individual is subject to the prohibition in Section 112.3148(4), Florida Statutes, which states:

> A reporting individual or procurement employee or any other person on his or her behalf is prohibited from knowingly accepting, directly or indirectly, a gift from a vendor doing business with the reporting individual's or procurement employee's agency, a political committee as defined in s. 106.011, or a lobbyist who lobbies the reporting individual's or procurement employee's agency, or, directly or indirectly on behalf of the partner, firm, employer, or principal of a lobbyist, if he or she knows or reasonably believes that the gift has a value in excess of $100; however, such a gift may be accepted by such person on behalf of a governmental entity or a charitable organization. If the gift is accepted on behalf of a governmental entity or charitable organization, the person receiving the gift shall not maintain custody of the gift for any period of time beyond that reasonably necessary to arrange for the transfer of custody and ownership of the gift.

Section 112.3148(4) prohibits the Trustee, or anyone acting on his behalf, from accepting "directly or indirectly" any donation to himself or his personal nonprofit worth more than $100 from a vendor, lobbyist, or principal of a lobbyist of NCF, or from a political committee. Please note the statutory definition of a "lobbyist" for purposes of Section 112.3148(4)—which, as previously noted, is found in Section 112.3148(2)(b)1.—does not contain the exemptions for the term found in Section 112.3215(1)(h), meaning the term as it is used in Section 112.3148 is broader than in Section 112.3215.

And, finally, if the donation to the Trustee or his personal nonprofit is coming from an individual or entity who is not a prohibited source mentioned above, he may accept the donation, but he will be subject to the reporting requirements of Section 112.3148(8), Florida Statutes. These requirements would apply, for example, if a private citizen or business entity with no connection to NCF offers a donation. Section 112.3148(8) states:

> Each reporting individual or procurement employee shall file a statement with the Commission on Ethics not later than the last day of each calendar quarter, for the previous calendar quarter, containing a list of gifts which he or she believes to be in excess of $100 in value, if any, accepted by him or her, for which compensation was not provided by the done to the donor within 90 days of receipt of the gift to reduce the value to $100 or less, except the following:
>
> 1. Gifts from relatives;

2. Gifts prohibited by subsection (4) or s. 112.313(4).
3. Gifts otherwise required to be disclosed by this section.

In essence, if the Trustee receives a donation to himself or his personal nonprofit exceeding $100 from a non-prohibited source, he must disclose it. This disclosure should be made on our Form 9, "Quarterly Gift Disclosure," by the last day of the calendar quarter following the quarter in which the donation was received. For example, if a gift is received in March, it should be reported by June 30.

Because this analysis is lengthy, the following summary is offered: (1) the Trustee must remove the solicitation for donations on his *Substack* page or add limiting language to the solicitation; (2) the Trustee must decline any donations to himself or his nonprofit from a political committee, or an Executive Branch agency lobbyist or lobbyist principal, as those terms are defined in Section 112.3215; (3) the Trustee may not accept donations to himself or his nonprofit of more than $100 from a vendor or lobbyist of NCF, as those terms are defined in Section 112148; and (4) the Trustee must report any other donations not otherwise prohibited to himself or his nonprofit of more than $100 on a quarterly CE Form 9.

Question 4 is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 28, 2023, and **RENDERED** this 2nd day of August, 2023.

Glenton "Glen" Gilzean, Jr., *Chair*

[1]Section 1000.21(6)(k), Florida Statutes, lists NCF as part of the State University System, and Section 1004.32(3), Florida Statutes, authorizes the Governor to appoint all twelve members of its Board of Trustees.

[2]The information in this paragraph comes from your responses to staff inquiries, as well as from publicly available information accessed at: https://manhattan.institute/about.

[3]You indicate the Trustee authors his own content for the *City Journal* and on Substack.

[4]Section 112.312(9), Florida Statutes, defines "corruptly" as:

> . . . done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

[5]On December 31, 2022, the constitutional subsection found in Section 8(g)(2) of Article II of the Florida Constitution was redesignated as Section 8(h)(2).

[6]Typically, we are cautious in applying Section 112.313(6) in the context of an advisory opinion, given that the statute often hinges upon evidence of a corrupt intent, which is difficult to determine outside the context of an ethics complaint, where a full investigation and administrative hearing can be conducted to collect all relevant information and judge the credibility of witness testimony. See CEO 22-4, Question 2 and CEO 22-3, Question 2. However, the opinions cited herein did not need to reach the question of corrupt intent, as they determined Section 112.313(6) was inapplicable on an alternate basis, namely the lack of public capacity conduct.

[7]So long as the Trustee follows this guidance, he also will not violate these prohibitions by posting about his content on *Twitter*. While ultimately not integral to the analysis herein, we note you have indicated the Trustee is not compensated for his *Twitter* postings.

[8]We note the Trustee also intends to identify himself as a NCF Trustee in the "author biography" on his *Substack* account. While this may be, in a strict sense, a "use of position" under Section 112.313(6), we have found the mere identification of one's title, without more, does not suggest the type of wrongful intent, or the type of action inconsistent with the proper performance of public duties, necessary to constitute "corrupt" conduct under the statute. See CEO 19-13, Question 3 (finding a police chief could identify himself by title when engaging in fundraising for a nonprofit, provided he obtained permission from the city manager) and CEO 08-20 (finding a State Senator would not be in violation of Section 112.313(6) were he to allow his private equity firm to identify his public position in memoranda and publications).

[9]Because the Trustee's subscriptions are being given in exchange for a particular consideration—namely, the ability to access the paywalled content—we find the subscription fees are not "gifts" or "expenditures." See Section 112.312(12)(a), Florida Statutes (defining the term "gift" as excluding items of value for which equal or greater consideration has been provided within 90 days) and Section 112.3215(1)(d) (defining an "expenditure" to include only those items of value "made by an [executive branch agency] lobbyist or principal for the purpose of lobbying").

[10]The term "business entity" is defined in Section 112.312(5), Florida Statutes, to mean:

> any corporation, partnership, limited partnership, company, limited liability association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state.

[11]The term "agency" is defined in Section 112.312(2), Florida Statutes, to mean:

> any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state therein; any public school, community college, or state university; or any special district as defined in s. 189.012.

[12]Please be aware as well that if you accept one or more subscriptions when you know, or, with the exercise of reasonable care, should know, that they are being made to influence a vote or other action in which you are expected to participate as a Trustee, you may be in violation of Section 112.313(4), Florida Statutes (Unauthorized Compensation).

[13]The term "lobbyist" is defined in Section 112.3148(2)(b)1., Florida Statutes, to mean

> any natural person who, for compensation, seeks, or sought during the preceding 12 months, to influence the governmental decisionmaking of a reporting individual or procurement employee or his or her agency or seeks, or sought during the preceding 12 months, to encourage the passage, defeat, or modification of any proposal or recommendation by the reporting individual or procurement employee or his or her agency.

[14]The term "vendor" is defined in Section 112.3148(2)(f), Florida Statutes, to mean "a business entity doing business directly with an agency, such as renting, leasing, or selling any realty, goods or services."

[15]The First District Court of Appeal is currently reviewing Final Order No. 22-041. See Douglas Underhill v. State of Florida, Commission on Ethics, Appeal No. 1D22-3429.

[16]Florida Administrative Code Rule 34-12.180(1) further explains:

> Activities by a lobbyist which do not involve directly attempting to influence a specific decision of an agency in the area of policy or procurement may nonetheless by be considered "lobbying" pursuant to Section 112.3215, F.S., and this rule chapter, where an expenditure is made by a lobbyist or principal for the personal benefit of an agency official or employee. Such expenditures will be considered to have been for the purpose of engendering goodwill, unless the agency official or employee is a relative of the lobbyist or principal paying for the expenditure.

CONFLICT OF INTEREST

DEVELOPMENT COMPANY DONATING LAND TO FLORIDA'S TURNPIKE ENTERPRISE

To: Nicola Liquori, Executive Director (Florida's Turnpike Enterprise)

SUMMARY:

The Executive Director of Florida's Turnpike Enterprise will not have a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, if a development company that employs her husband donates land to her agency for the construction of an interchange on Florida's Turnpike, so long as she does not have employment or a contractual relationship with the development company or the investment group funding the development. Guidance is provided regarding the Executive Director's husband potentially joining the investment group. Referenced are CEO 79-16, CEO 81-47, CEO 82-13, CEO 92-43, CEO 99-13, CEO 04-17, CEO 05-14, CEO 08-12, CEO 10-9, CEO 11-5, CEO 12-2, CEO 14-4, CEO 15-11, and CEO 17-12.

QUESTION 1:

Will a prohibited conflict of interest exist for the Executive Director of Florida's Turnpike Enterprise if a property development company that employs her husband donates land to her agency for the construction of an interchange?

This question is answered in the negative.

In your letter of inquiry, you indicate that you serve as the Executive Director of Florida's Turnpike Enterprise (Enterprise). In your letter, you explain that, among your numerous responsibilities, you are tasked with the evaluation of new interchanges (access points) along the Florida's Turnpike Mainline. You also explain that your husband works for a real estate development company (Developer) that executed a purchase of land funded by an investment group that is organized as a limited liability company (the LLC). According to an article you attached to your letter, the land is known as Green Island Ranch and is approximately 6,000 acres; according to you, the land is adjacent to Florida's Turnpike Mainline in Osceola County.

You state that the construction of an interchange to Florida's Turnpike Mainline somewhere on Green Island Ranch is being contemplated and that you expect the Developer will likely discuss the matter with Osceola County and the Enterprise in the future. On the phone, you explained to Commission staff that the Osceola County Master Plan has accounted for an interchange to be built on Green Island Ranch since a time well before the Developer made the purchase. In your inquiry, you explain that, for the interchange to occur, there would not be a sale of land to the Enterprise; instead, the Developer would donate the land to the Enterprise and would not provide any remuneration or services to the Enterprise. The Enterprise would then facilitate the construction of an interchange.

With that background, you ask whether you will have a conflict of interest if the Developer donates land to the Enterprise for the construction of an interchange.

Relevant to this inquiry, Section 112.313(7)(a), Florida Statutes, states:

> No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . . ; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the

performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

The first clause of this statute prohibits a public officer or employee from having any employment or contractual relationship with a business entity or an agency that is regulated by or is doing business with his or her agency. The second clause of this statute prohibits a public officer or employee from having employment or a contractual relationship that would create a continuing or frequently recurring conflict of interest or would create an impediment to the full and faithful discharge of his or her public duties. Pursuant to Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982), the second clause is designed to prohibit a situation that creates a "temptation to dishonor" one's public responsibilities. The statute is entirely preventative and does not require an actual transgression to occur for a conflict of interest to be found. CEO 05-14.

We find that you will not have a conflict under the first clause of Section 112.313(7)(a) if the Developer donates land for the interchange to the Enterprise. Firstly, according to you, you currently do not have employment or a contractual relationship with the Developer or with the LLC. Secondly, the Commission has found that the donation of property to an agency does not constitute "doing business" for purposes of Section 112.313(7)(a). See CEO 82-13. For these two reasons, you will not have a conflict of interest under the first clause of Section 112.313(7)(a) if the Developer donates the land to the Enterprise. While your husband does have employment with the Developer, as we noted in CEO 12-2, "Section 112.313(7)(a) applies only to the official—not to his or her spouse." CEO 12-2 (citing CEO 92-43 and the opinions cited therein).

Additionally, because you do not have employment or a contractual relationship with the Developer or the LLC, the donation will not cause you to have a conflict of interest under the second clause of Section 112.313(7)(a), either.

For these reasons, if you do not hold employment or a contractual relationship with the LLC or the Developer, then you will not have a conflicting contractual relationship under Section 112.313(7)(a) should the Developer donate land to the Enterprise for the construction of an interchange.

Question 1 is answered accordingly.

QUESTION 2:

Will a prohibited conflict of interest exist for the Executive Director of Florida's Turnpike Enterprise if a property development company that employs her husband donates land to the agency for the construction of an interchange while the Executive Director is an investor in the subject property?

This question is answered in the affirmative.

Although you currently are not an investor in the LLC that is funding the development of Green Island Ranch, you contemplate in your inquiry that you might have the opportunity in the future to become an investor in the LLC. As noted above, the Developer may eventually donate land to the Enterprise for the construction of an interchange and you, as Executive Director of the Enterprise, are responsible for approving new interchanges to Florida's Turnpike Mainline.

We have found in the past that those who own stock in a business entity have a contractual relationship with that business entity. See CEO 79-16, CEO 99-13, and CEO 11-5. If you, as the Executive Director of the Enterprise, become an investor in the LLC, then you will be considered to have a contractual relationship with the LLC.

We have found prohibited conflicts of interest to exist under the second clause of Section 112.313(7)(a) when a public officer or employee has employment or a contractual relationship with a business entity and the exercise of their official judgment could affect the business entity. In CEO 04-17, Question 3, we found that a school teacher would have a prohibited conflict of interest under this provision if he privately tutored his own students for compensation outside of school. In CEO 14-4, where a former FDOT employee had a pension fund with a former employer and the pension fund was at least partially invested in the former employer's own stock, we found that the FDOT employee would have a prohibited conflict of interest under the second clause of Section 112.313(7)(a) if he participated in the selection process for an engineering consulting firm and if the

former employer was an applicant for the contract. There, we reasoned that the employee would be tempted to dishonor his public responsibilities because he stood to gain from FDOT awarding the contract to his former employer.

In your situation, you will have a contractual relationship with an entity (the LLC) and your investment in that entity could potentially benefit from the execution of your public responsibility as Executive Director to favorably evaluate a new interchange to Florida's Turnpike Mainline on the Green Island Ranch land donated by the Developer and funded by the LLC. As was the case in CEO 14-14, the potential benefit to your investment could tempt you to dishonor your public responsibilities or otherwise affect your objectivity in the evaluation of a proposed interchange on the donated land. For that reason, we find that you will have a prohibited conflict of interest under the second clause of Section 112.313(7)(a) if you invest in the LLC and the Developer donates land to the Enterprise to construct an interchange.

Question 2 is answered accordingly.

QUESTION 3:

> Will a prohibited conflict of interest exist for the Executive Director of Florida's Turnpike Enterprise if a property development company donates land to the agency for the construction of an interchange and the Executive Director's husband becomes an equity partner in the development company or an investor in the subject property?

This question is answered as follows.

You relate that, currently, your husband is an employee of the Developer and not an equity partner. Also, at present, you state that he is not an investor in the LLC. You note, however, that he may soon become an equity partner in the Developer and may be presented with an opportunity to invest in the LLC.

If your husband becomes an equity partner in the Developer or if he invests in the LLC, that will not change the above analysis for Section 112.313(7)(a). The prohibitions of Section 112.313(7)(a) pertain to conflicting employment or contractual relationships that a public officer or public employee may have, but it does not apply to those relationships maintained by one's spouse. See CEO 12-2 and CEO 15-11.

However, a discussion of Section 112.313(3), Florida Statutes, is warranted by this question. Section 112.313(3) states in the relevant part:

> No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officerâ€™s or employeeâ€™s own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision.

Section 112.313(3) is a statutory provision with two separate prohibitions. The first prohibition concerns a public officer or employee who is purchasing, renting, or leasing realty, goods, or services for his or her own agency from a business entity of which he or she, or his or her spouse or child, is an officer, partner, director, proprietor, or the owner of a greater-than-five-percent interest in the business entity. The second prohibition concerns a public officer or employee who is essentially acting on behalf of a business entity to sell, rent, or lease realty, goods, or services to his or her own agency or any agency of his or her political subdivision. In CEO 17-12, Question 1, we found that a donation of land to an agency would not constitute purchasing/selling, renting, or leasing under Section 112.313(3) and, thusly, the donation would not create a prohibited conflict of interest under either of the statute's prohibitions.

We find that your husband's elevation to an equity partner of the Developer will not create a prohibited conflict for you under Section 112.313(3) because that prohibition is not applicable when the transaction between the business entity and the agency is a donation, as is the case here.

Although you will not incur a prohibited conflict of interest under either Section 112.313(3) or Section 112.313(7)(a) if your husband becomes an equity partner in the Developer or an investor in the LLC, we caution you that his status as an equity partner in the Developer or as an investor in the LLC could be rife with ethically complex scenarios for you, and may make your ethical obligations and stewardship of the public trust even more complicated to manage. The construction of an interchange on Green Island Ranch is a market maker that creates immense value in the surrounding land, and amounts to an inherent profit to all stakeholders in the development deal; in that light, we deem it prudent to highlight your other ethical obligations under the Code of Ethics.

We draw particular attention to the prohibitions in Article II, Section 8(g)(2), Florida Constitution,[1] and Section 112.313(6), Florida Statutes,[2] which essentially operate to prohibit you from misusing or abusing your public position or the resources of your position to benefit yourself or your husband, among others. If your husband becomes an equity partner in the Developer or joins the investment group of the LLC, then every official action you take to advance the construction of the interchange will have an attendant, pecuniary benefit to your husband; an official action and a benefit to your husband are two of the three elements necessary to prove prohibited conduct under these provisions. The third element is a wrongful or corrupt intent. We caution you to ensure that every official decision that you make as Executive Director related to Green Island Ranch is firmly rooted in a valid public purpose and is consistent with the proper performance of your public duties. Absent an articulable public purpose, this third element will be met and a violation of these provisions could be found. We experience discomfort that this guidance rests solely on the intent motivating your official actions, given that the presence of a public purpose often hinges on dynamic factors and can quickly dissipate. We also are aware of the great financial benefit for your husband if the interchange proceeds with his involvement. We cannot say at this point, however, that a corrupt intent can be presumed. As we have said before concerning the proper use of advisory opinions:

> [I]ntent generally is determined from an examination of all relevant circumstances. We are able to do this on the basis of evidence presented through investigation and hearing when a complaint is filed, but in rendering an advisory opinion we are [subject to] a lack of access to information concerning all circumstances of the situation as well as information concerning the credibility of the individuals involved.

CEO 81-47. For this reason, we can only caution you again that, while the situation presented in this Question does not automatically present a prohibited conflict of interest, without a valid public purpose, your actions concerning the interchange may be found to be for the sole benefit of your husband, and a violation of the prohibitions in Article II, Section 8(g)(2), Florida Constitution, and Section 112.313(6), Florida Statutes, may be found.

Additionally, we also highlight the following additional standards.

Section 112.313(8), Florida Statutes,[3] will operate to prohibit you from sharing any nonpublic information you obtain by means of your public position that relates to Green Island Ranch with your husband, the LLC, the Developer, or anyone else, if it might benefit you or any other person or business entity.

Section 112.313(2), Florida Statutes,[4] will operate to prohibit you from soliciting or accepting anything of value based on an understanding that your official action or judgment will be influenced.

Further, Section 112.313(4), Florida Statutes,[5] will operate to prohibit you or your husband from accepting anything of value where you know or should know that it is being given in an effort to influence you. See generally CEO 10-9. If, for example, the equity partnership in the Developer or the investment opportunity in the LLC were offered to your husband to influence your official decision making, or if either opportunity were offered to him at less than "arm's length," then Section 112.313(4) would operate to prohibit his acceptance. See CEO 08-12, Question 2.

Question 3 is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 3, 2022, and **RENDERED** this 8th day of June, 2022.

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John Grant, *Chair*

[1]Article II, Section 8(g)(2), Florida Constitution, states:

> A public officer or public employee shall not abuse his or her public position in order to obtain a disproportionate benefit for himself or herself; his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest.

[2]Section 112.313(6), Florida Statutes, states in the relevant part:

> No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others.

[3]Section 112.313(8), Florida Statutes, states:

> A current or former public officer, employee of an agency, or local government attorney may not disclose or use information not available to members of the general public and gained by reason of his or her official position, except for information relating exclusively to governmental practices, for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity.

[4]Section 112.313(2), Florida Statutes, states: No public officer, employee of an agency, local government attorney, or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action, or judgment of the public officer, employee, local government attorney, or candidate would be influenced thereby.

[5]Section 112.313(4), Florida Statutes, states: No public officer, employee of an agency, or local government attorney or his or her spouse or minor child shall, at any time, accept any compensation, payment, or thing of value when such public officer, employee, or local government attorney knows, or, with the exercise of reasonable care, should know, that it was given to influence a vote or other action in which the officer, employee, or local government attorney was expected to participate in his or her official capacity. (Emphasis added.)

CEO 19-23—October 30, 2019

ABUSE OF PUBLIC POSITION

ARTICLE II, SECTION 8(h)(2), FLORIDA CONSTITUTION

To: Gigi Rollini, Esq., Attorney for the Bay Laurel Center Community Development District (Ocala)

SUMMARY:

Advice is provided to members of the board of supervisors of a community development district concerning the prohibition found in Article II, Section 8(h)(2), Florida Constitution, as implemented by Rule 34-18.001, Florida Administrative Code. Referenced is CEO 82-32.

QUESTION:

Will members of the board of supervisors of a community development district acting in a manner fully compliant with the requirements of Chapters 112 and 190, Florida Statutes, as well as all other applicable statutes and ordinances, be considered to have abused their position to obtain a disproportionate benefit, as prohibited by Article II, Section 8(h)(2), Florida Constitution?[1]

Under the circumstances presented, your question is answered in the negative, provided they do not engage in coercive, intimidating, or similarly abusive conduct on behalf of themselves or others.

In your letter of inquiry and additional information provided to our staff, you state you are bringing this inquiry on behalf of the Bay Laurel Center Community Development District's Board of Supervisors. You relate the District is a local unit of special purpose government and derives its authority from Chapter 190, Florida Statutes (Community Development Districts), as well as from Marion County ordinances. You state the District, the service area of which you approximate covers over 13,000 acres, is responsible for storing, processing, delivering, and distributing water, wastewater, and reclaimed water to its residents and commercial customers.

Your specific inquiry deals with the recent amendment ("Amendment 12") to Article II, Section 8 of the Florida Constitution, specifically Article II, Section 8(h)(2), which states:

> A public officer or public employee shall not abuse his or her public position in order to obtain a disproportionate benefit for himself or herself; his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest. The Florida Commission on Ethics shall, by rule in accordance with statutory procedures governing administrative rulemaking, define the term "disproportionate benefit" and prescribe the requisite intent for finding a violation of this prohibition for purposes of enforcing this paragraph. Appropriate penalties shall be prescribed by law.

In accordance with the language contained in the Constitutional prohibition, the Commission adopted Rule 34-18.001, Florida Administrative Code, which became effective on September 30, 2019. In Rule 34-18.001(2), the term "disproportionate benefit" is defined as "a benefit, privilege, exemption or result arising from an act or omission by a public officer or public employee inconsistent with the proper performance of his or her public duties." The Rule lists several factors the Commission should consider in determining whether a benefit, privilege, exemption, or result constitutes a "disproportionate benefit."[2] It then provides—in Rule 34-18.001(4)—the requisite intent needed to find a violation of the Constitutional prohibition, stating the public officer or public employee must have "acted, or refrained from acting, with a wrongful intent for the purpose of obtaining any benefit, privilege, exemption, or result from the act or omission which is inconsistent with the proper performance of his or her public duties."

You inquire about how Article II, Section 8(h)(2) will apply to the District's Board of Supervisors, which is comprised of five members. You relate the Board primarily is responsible for managing the District and that its duties include assessing and levying taxes and special assessments, approving budgets, exercising control over District properties, controlling the use of District funds, hiring and firing District employees, and financing improvements to the District. You indicate the District Board members are subject not only to the requirements of Chapter 190—which governs the operation of special districts such as community development districts—but also to those of the Code of Ethics for Public Officers and Employees (Part III, Chapter 112, Florida Statutes).

You question whether the District Supervisors could be found in violation of the prohibition in Article II, Section 8(h)(2) of the Florida Constitution, even if their conduct is in compliance with the provisions set forth in Chapters 190 and Part III, Chapter 112, Florida Statutes. Your concern stems from the fact that one of the Supervisors currently serving on the Board is employed by the District's developer, another Supervisor has an ownership interest in the developer, and three of the Supervisors are District customers. Considering this, you state many actions or votes taken by the Board will affect a District Supervisor or a business connected to a District Supervisor, and this effect may be greater than that experienced by others residing within the District who are not affiliated with the developer or who are not District customers.

In particular, you indicate the District has a licensing agreement with the developer who is affiliated with the two Supervisors. Under this agreement, the developer disposes of the byproducts of the District's wastewater treatment, such as biosolids and effluent. You state the District Board—including these two Supervisors—must vote at meetings held every other month to approve payment to the developer to dispose of the waste. Another example you provide of an imminent matter the District Board will face is that it sets the rates for water and wastewater services and these rates personally affect the three District Supervisors who are District customers. You foresee situations similar to these commonly arising before the District Board.

You state the statutory scheme developed for community development districts in Chapter 190 contemplates and permits individuals affiliated with a district developer—or individuals with a personal interest in the operation of the district—to serve as district supervisors. In particular, you emphasize Section 190.007(1), Florida Statutes, which states "[i]t shall not be a conflict of interest under chapter 112 for a board member or the district manager or another employee of the district to be a stockholder, officer, or employee of a landowner or of an entity affiliated with a landowner." See CEO 82-32 (recognizing and applying Section 190.007(1)).[3]

However, you inquire whether the District Supervisors may still be found in violation of the prohibition found in Article II, Section 8(h)(2) of the Florida Constitution, as implemented in Rule 34-18.001, Florida Administrative Code, even if their conduct is in full compliance with the ethical standards and conflict of interest exceptions found in Chapters 112 and 190. In particular, you ask whether their mere service as voting members of the Board may be enough to trigger a violation of the new Constitutional prohibition, considering they either are affiliated with a developer interfacing with the District or are District customers themselves.

By its very language, the prohibition in Article II, Section 8(h)(2) of the Florida Constitution is triggered only if public officers and public employees are acting in a manner contrary to the proper performance of their duties (i.e., engaging in abusive conduct). The prohibition requires not just conduct resulting in an out—of—proportion benefit to the public officer, public employer, or other enumerated recipient, but also that the public officer or public employee has abused his or her public position to obtain that benefit. Therefore, so long as a District Supervisor is acting in full compliance with all statutes and ordinances governing the operation of the District and his or her conduct as a public officer, an abuse of public position will not be present.

The language in Rule 34-18.001 further emphasizes this point. Rule 34-18.001(2) states the term "disproportionate benefit" encompasses only a benefit, privilege, exemption, or result that is "inconsistent with the proper performance" of a public officer's or public employee's public duties. In other words, if the benefit, privilege, exemption, or result arising from the public officer's or public employee's conduct is contemplated by and consistent with the standards governing his or her public conduct, a "disproportionate benefit" will not be present. And Rule 34-18.001(4) states the requisite intent needed to violate the Constitutional prohibition is a "wrongful intent" to obtain a benefit, privilege, exemption, or result "inconsistent with the proper performance" of a public officer's or public employee's public duties.

Applying this reasoning to your question, so long as a District Supervisor's actions—including service on the Board or voting—are consistent with the proper performance of his or her public duties, meaning in full compliance with all applicable statutes and ordinances, including Chapters 112 and 190, Florida Statutes, the Constitutional prohibition found in Article II, Section 8(h)(2) of the Florida Constitution will not be triggered. In

such a circumstance, the District Supervisor will not have abused his or her position with the requisite intent or obtained a "disproportionate benefit" as that term is defined in Rule 34-18.001.

Regarding the District Board's upcoming votes—in particular, the approval of the licensing agreement and the setting of water rates—assuming a Board Supervisor by voting will not violate any applicable provision in Chapters 112 or 190, he or she similarly will not have abused their position to obtain a disproportionate benefit under the Constitutional prohibition. However, again, this lack of abuse to obtain a disproportionate benefit is contingent on the Board Supervisors ensuring their votes comply with all applicable statutes and ordinances. For example, Chapter 190 alone will not insulate a Supervisor from a violation of the Constitutional prohibition if the Supervisor were to take a bribe or similar under—the—table money in exchange for action that otherwise would be in conformity with the provisions of Chapter 190.

To the extent you also inquire whether existing authority interpreting and defining Section 112.313(6), Florida Statutes, may be used to interpret and define the prohibition in Article II, Section 8(h)(2), we note first there are certain differences between the statutory provision and the Constitutional amendment. Section 112.313(6), Florida Statutes, states:

> No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself or others.

The language of the statute differs from the amendment in that it is triggered not only when a "disproportionate benefit" results from misconduct by a public officer or public employee, but when a "special privilege, benefit, or exemption" of any degree results. Moreover, the language of the statute applies no matter who receives the "special privilege, benefit, or exemption," while the Constitutional amendment applies only when a "disproportionate benefit" is received by the public officer or public employee, his or her spouse, children, or employer, or a business with which he or she has an enumerated affiliation. Therefore, it cannot be said the amendment and the statute are identical.

However, the requisite intent needed to violate the amendment is highly similar, if not identical, to that of the statute. As previously described, the intent needed to violate the prohibition contained in Article II, Section 8(h)(2) is described in Rule 34-18.001(4), which states the public officer or public employee must have acted, or refrained from acting, "with a wrongful intent for the purpose of obtaining any benefit, privilege, exemption, or result from the act or omission which is inconsistent with the proper performance of his or her public duties." By comparison, the intent needed to violate the statute is found in Section 112.312(9), Florida Statutes, which states the term "corruptly," as used in Section 112.313(6), means conduct:

> . . .done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

Both the amendment and the statute require an act or omission committed with a "wrongful intent" and for the purpose of obtaining a result "inconsistent with the proper performance" of one's public duties. Therefore, the Commission's existing authority interpreting and clarifying the intent needed to violate Section 112.313(6) may be used as guidance deciding allegations or issues under the Constitutional amendment.[4]

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on October 25, 2019, and **RENDERED** this 30th day of October, 2019.

Kimberly B. Rezanka, *Chair*

[1]While your inquiry contains three numbered questions, this opinion, while addressing each question, combines them into one general query.

[2]These factors are listed in Rule 34-18.001(3), Florida Administrative Code, which states the Commission must consider:

> (a) The number of persons, besides the public officer or public employee, his or her spouse, children, employer, or business with which he or she contracts, in which he or she is an officer, a partner, a director, or a proprietor, or in which he or she owns an interest, who will experience the benefit, privilege, exemption, or result;
> (b) The nature of the interests involved;
> (c) The degree to which the interests of all those who will experience the benefit, privilege, exemption, or result are affected;
> (d) The degree to which the public officer or public employee, his or her spouse, children, employer, or business with which he or she contracts, in which he or she is an officer, a partner, a director, or a proprietor, or in which he or she owns an interest, receives a greater or more advantageous benefit, privilege, exemption, or result when compared to others who will receive a benefit, privilege, exemption, or result;
> (e) The degree to which there is uncertainty at the time of the abuse of public position as to whether there would be any benefit, privilege, exemption, or result and, if so, the nature or degree of the benefit, privilege, exemption, or result must also be considered; and
> (f) The degree to which the benefit, privilege, exemption, or result is not available to similarly situated persons. As used in this chapter, "similarly situated persons" means those with a commonality or like characteristic to the public officer or public employee that is unrelated to the holding of public office or public employment, or a commonality or like characteristic to the public officer's or public employee's spouse, children, or employer, or to any business with which the public officer or public employee contracts, serves as an officer, partner, director, or proprietor, or in which he or she owns an interest.

[3]Similar exceptions for special districts are recognized in Chapter 112, such as Section 112.3143(3)(b), Florida Statutes, which, in part, permits officers of independent special tax districts elected on a one-acre, one-vote basis to vote in that capacity. See also Section 190.006(2)(b), Florida Statutes.

[4]Indeed, records of, and commentary concerning, the Constitution Revision Commission which fashioned the amendment support its reliance on the institutional knowledge and agency expertise of the Commission on Ethics in administering the amendment.

GIFT PROHIBITIONS; MISUSE OF PUBLIC POSITION; CONFLICT OF INTEREST

CITY POLICE CHIEF AFFILIATED WITH NONPROFIT ACCEPTING DONATIONS FROM POLICE DEPARTMENT LOBBYISTS/VENDORS AND ENGAGING IN FUNDRAISING ACTIVITIES

To: Wade C. Vose, Esq., Attorney for City of Cocoa Beach

SUMMARY:

Under the circumstances presented, where a municipal police chief serves as an uncompensated director and engages in fundraising activities for a nonprofit organization, and where the nonprofit uses donations to make charitable contributions to local families, individuals, and community organizations, the donations will not constitute "indirect gifts" to the police chief under Section 112.3148, Florida Statutes. However, if the nonprofit uses the donations to purchase equipment or gear for the police department, and were the police chief to use that equipment or gear, the donations would be considered "indirect gifts" to him. If the police chief engages in fundraising on the nonprofit's behalf, no provision in the Code of Ethics prohibits him from wearing his uniform or identifying his public position, so long as he obtains permission and remains in compliance with local ordinances governing such conduct. And since the police chief does not intend to have employment or a contractual relationship with the nonprofit, his affiliation with the nonprofit will not trigger the prohibitions found in Section 112.313(7)(a), Florida Statutes. Referenced are CEO 19-1, CEO 18-13, CEO 17-15, CEO 16-1, CEO 15-6, CEO 15-1, CEO 14-12, CEO 10-2, CEO 08-20, CEO 07-24, CEO 91-69, CEO 91-52, and CEO 93-27.

QUESTION 1:

Do donations given to a nonprofit organization where a municipal police chief serves as an uncompensated director—including donations from police department lobbyists, the partners, firms, employers, or principals of such lobbyists, and police department vendors—constitute "indirect gifts" to the police chief under Section 112.3148(4), Florida Statutes, when they are used to make charitable contributions to local families, individuals, and community organizations?[1]

Under the circumstances presented, Question 1 is answered in the negative.

In your letter of inquiry and additional information provided to our staff, you indicate you are inquiring on behalf of a city police chief who is organizing—along with other city police officers and, potentially, members of the public—a charitable nonprofit organization. You indicate the nonprofit intends to solicit donations and use them, at least in part, to make charitable contributions to needy or deserving local families, individuals, and community organizations.

You relate the police chief intends to serve on the nonprofit's board of directors, although you emphasize neither the chief—nor any city personnel—will be compensated for their service to or work on behalf of the nonprofit.[2] You also indicate it is anticipated that the nonprofit's constitution and bylaws, which have yet to be written, will not provide for persons to have membership in the nonprofit.

Your inquiry stems partially from the nonprofit's intent to engage in fundraising.[3] You relate that the nonprofit may consider soliciting and accepting donations from lobbyists of his public agency (the police department), the partners, firms, employers, or principals of such lobbyists, or vendors of his public agency.[4] You also indicate the police chief—acting on behalf of the nonprofit—may himself engage in such fundraising,

either in person, by telephone, or in writing. You inquire whether the Code of Ethics prohibits the police chief from engaging in the fundraising.

The police chief is subject to the restrictions and disclosure requirements of Section 112.3148, Florida Statutes (the "gifts" law), as he is a "reporting individual" required to file financial disclosure. See CEO 16-1. Section 112.3148(4), Florida Statutes, the provision of the "gifts" law most pertinent to this situation, states:

> A reporting individual or procurement employee or any other person on his or her behalf is prohibited from knowingly accepting, directly or indirectly, a gift from a vendor doing business with the reporting individual's or procurement employee's agency, a political committee as defined in s. 106.011, or a lobbyist who lobbies the reporting individual's or procurement employee's agency, or, directly or indirectly on behalf of the partner, firm, employer, or principal of a lobbyist, if he or she knows or reasonably believes that the gift has a value in excess of $100; however, such a gift may be accepted by such person on behalf of a governmental entity or a charitable organization. If the gift is accepted on behalf of a governmental entity or charitable organization, the person receiving the gift shall not maintain custody of the gift for any period of time beyond that reasonably necessary to arrange for the transfer of custody and ownership of the gift.

In short, Section 112.3148(4) prohibits the police chief, or anyone acting on his behalf, from accepting "directly or indirectly" any gift worth more than $100 from a lobbyist of his public agency,[5] the partner, firm, employer, or principal of such a lobbyist, or a vendor[6] of his public agency (hereinafter, throughout the remainder of this opinion, "prohibited sources").

The situation you present does not involve a direct gift to the police chief because the donations will be made to the nonprofit, not to him personally. The question remains, though, whether the donations can be viewed as indirect gifts to him. This analysis hinges upon whether the police chief will experience any personal benefit of a tangible or concrete nature—thereby constituting a "gift" (see Section 112.312(12), Florida Statutes)—from the donations.

The term "indirect gift" is addressed in Commission on Ethics Rule 34-13.310(8)(a), Florida Administrative Code, as follows:

> Where a gift is provided to a person other than the reporting individual or procurement employee by a . . . vendor, by a lobbyist who lobbies the agency of the reporting individual or procurement employee, or by the partner, firm, employer, or principal of a lobbyist, where the gift or the benefit of the gift ultimately is received by the reporting individual or procurement employee, and where the gift is provided with the intent to benefit the reporting individual or procurement employee, such gift will be considered an indirect gift to the reporting individual or procurement employee.

The Rule proceeds to list various factors the Commission can consider when determining if an indirect gift has been made, although the Rule indicates the list is not exclusive.[7]

Here, from what you indicate, the nonprofit intends to use donations, at least in part, to make charitable contributions to local families, individuals, and community organizations. Thus, we find the donations, when used by the nonprofit for this purpose, will not constitute an indirect gift to the police chief. There are two reasons why.

First, the police chief receives no compensation from the nonprofit. Although you indicate he is affiliated with the nonprofit and hopes to serve on its board of directors, he does not intend to accept any compensation for his services. Accordingly, the police chief will not experience any tangible or concrete benefit, and, therefore, no indirect "gift," simply because a donation is made to the nonprofit.

We encountered a similar situation in CEO 19-1, in which a school board member founded a nonprofit corporation for which she served as an uncompensated officer. The nonprofit engaged in extensive fundraising and the board member inquired whether donations could be accepted from school district vendors. We advised

that because the board member was not being compensated for her work on behalf of the nonprofit, any donations that the nonprofit received could not be considered indirect gifts to her as they were benefitting the nonprofit alone. See also CEO 91-5291-52 (finding the donations solicited by a city commissioner on behalf of a nonprofit seeking to establish a bird sanctuary and nature center could not be considered gifts to her as they were benefiting only the nonprofit).

Second, if the donations are used by the nonprofit to make charitable contributions to local families, individuals, and community organizations, no tangible or concrete benefit will flow to the police chief, provided he has no familial, business, or similar private capacity connection to the individuals and entities receiving the funds. We are aware that, in certain circumstances, donors may contribute to the nonprofit intending that the funds be used to benefit the police chief. Such a circumstance could present an indirect gift scenario, even if the police chief is not accepting compensation from the nonprofit, as the nonprofit would essentially be used as a conduit to transfer a gift that the donors could not directly give the chief. However, when the donations are being used to provide charitable contributions to the needy in the community, the police chief will not be experiencing the commensurate tangible or concrete benefit required to trigger indirect gift concerns.[8]

The police chief should be aware, though, that two other provisions in the Code of Ethics could be triggered, in certain circumstances, by contributions that he solicits or receives on the nonprofit's behalf, regardless of how the contributions are ultimately used. Section 112.313(2), Florida Statutes, prohibits him from soliciting or accepting any donation based on an understanding that the contribution will influence some vote, official action, or judgment that he might make in his capacity as the police chief. In addition, Section 112.313(4),[9] Florida Statutes, prohibits him from accepting any donation when he knows, or with the exercise of reasonable care should know, that it is being given to influence some action he might take as the police chief. The chief and other city personnel should carefully screen the circumstances of particular solicitations and donations, in light of these statutes.[10]

Question 1 is answered accordingly.

QUESTION 2:

> Do donations given to a nonprofit organization where a municipal police chief serves as an uncompensated director—including donations from prohibited sources—constitute "indirect gifts" to the police chief under Section 112.3148(4) when they are used to purchase equipment and gear for the police department?

Under the circumstances presented, Question 2 is answered below.

You also indicate the nonprofit may use donated funds to purchase gear or equipment that it, in turn, intends to donate to the police department. This scenario raises concerns not present when the nonprofit simply intends to make charitable contributions to private families, individuals, and community organizations, as there is the potential here that the police chief could use—and, therefore, personally benefit from—the donated equipment or gear.

In CEO 93-27, we opined that sheriffs attending a Florida Sheriffs' Association (FSA) conference were prohibited from accepting door prizes when they were donated to the FSA by lobbyists of sheriffs. We attributed the door prizes to the lobbyists and concluded they were indirect gifts, as they had been given by the lobbyists with the intent to benefit the sheriffs. See also CEO 91-69 (opining that county commission employees attending a seminar sponsored by a local chamber of commerce were prohibited from accepting a $500 cash door prize that had been donated to the chamber by organizations who lobbied the county commission).

Similarly, here, if a donor to the nonprofit—including a prohibited source—were to contribute with the understanding that the nonprofit will use the funds to purchase equipment or gear for the police department, the police chief should consider the donations to be indirect gifts under Section 112.3148(4). It is possible in that scenario, and perhaps likely, that the donor was attempting to benefit the police chief by providing funding for items that he would have the potential to use. Accordingly, if the donations are given for the purpose of purchasing equipment and gear for the police department, the police chief should consider the donations to be indirect gifts and should respond in the manner described below.

In the event that the police chief wants to use the equipment or gear, he must consider whether a prohibited source contributed more than $100 for their purchase. If a prohibited source contributed more than $100 towards the purchase of an item of equipment or gear, we find that the chief will be prohibited by Section 112.3148(4) from personally using the item, as such use would constitute acceptance of a prohibited indirect gift.[11]

However, in the event that the funding for the equipment or gear came from donors other than a prohibited source, the police chief can use the item so long as he properly discloses it. In that circumstance, he should report as an indirect gift on a CE Form 9 any donation of over $100 made to purchase the equipment or item in question, listing the individual(s) or entity(s) contributing the funds as the source of the gift. See Section 112.3148(8), Florida Statutes, and CE Form 9.

Importantly, this does not prohibit the police chief from accepting equipment or gear on behalf of the police department, even when the nonprofit purchases the items using donations from prohibited sources. Section 112.3148(4) permits the chief to accept gifts on behalf of the department so long as he does "not maintain custody of [them] for any period of time beyond that reasonably necessary to arrange for" their transfer to the department. Therefore, the statute will not be triggered so long as the police chief simply accepts the equipment or gear on behalf of the department and does not personally use it.

And, finally, this opinion pertains only to equipment and gear donated by the nonprofit to the police department. If the City provides a piece of equipment or gear to the police chief to be used in the proper performance of his duties, it will not be considered a gift.

Question 2 is answered accordingly.

QUESTION 3:

> Would the police chief misuse his public position contrary to Section 112.313(6), Florida Statutes, were he to wear his police uniform or identify his title with the police department while fundraising for the nonprofit?

Under the circumstances presented, Question 3 is answered in the negative.

You also inquire on behalf of the police chief whether he will be in violation of Section 112.313(6) if he wears his police uniform or identifies himself by title, either verbally or in writing, while fundraising for the nonprofit. You indicate the police chief will obtain the permission of the city manager prior to wearing his uniform or using his title during fundraising.

Section 112.313(6), Florida Statutes, provides:

> MISUSE OF PUBLIC POSITION.--No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others.

The statute will prohibit the police chief from "corruptly" using or attempting to use his official position—or any property or resources placed within his public trust—in order to specially benefit himself or another. The wearing of his uniform or the mention of his title during fundraising would qualify as use of his public position and/or property or resources placed within his public trust. The question then becomes whether such use would be "corrupt."

For purposes of the prohibition, the term "corruptly" is defined in Section 112.312(9), Florida Statutes, as follows:

> "Corruptly" means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

In CEO 07-24, the Commission found it would not be "corrupt" under Section 112.313(6) for sheriff's office employees to wear their uniforms and associated equipment while privately campaigning for public office, so long as such use was with the permission of the sheriff and was in accord with the directive, policies, and orders of the sheriff's office. Similarly, in CEO 08-2008-20, the Commission found that a State Senator would not be engaging in "corrupt" conduct under Section 112.313(6) were he to allow his private equity firm to identify his public position in memoranda and publications. We noted that while the self-identification of the Senator's public title might be, in a strict sense, a "use of position," it did not suggest the type of wrongful intent, or the type of action inconsistent with the proper performance of public duties, necessary to constitute "corrupt" conduct.

Here, you indicate the police chief will obtain permission from the city manager prior to using his uniform or mentioning his title during fundraising. Assuming the city manager is in a position to approve these uses of the police chief's public position and/or the property or resources placed within the chief's public trust, and assuming this conduct does not violate the city's, or the police department's, policies or regulations, then we do not find that the use of title or wearing of the uniform would rise to the level of "corrupt" conduct needed to trigger Section 112.313(6). However, we caution the chief that the weight of his uniform or title may intimidate or coerce constituents into donating, despite a lack of any wrongful intent on his part.

Question 3 is answered accordingly.

QUESTION 4:

Would the police chief have a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, if the nonprofit donates equipment and gear to the city's police department?

Under the circumstances presented, Question 4 is answered in the negative.

You further inquire whether the police chief's intended service as an uncompensated director of the nonprofit will create a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, which concerns conflicting employment or contractual relationships. The statute states:

> No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he is an officer or employee . . .; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

The statute is only triggered, however, if a public officer or employee holds employment or a contractual relationship in addition to his public office or public employment. See CEO 15-6. For this reason, the threshold question is whether the police chief will have either employment or a contractual relationship with the nonprofit.

From what you indicate, the police chief does not intend to have either type of relationship. A necessary element of "employment" is compensation or some form of remuneration. See CEO 19-1 and CEO 18-13. You state that while the police chief intends to serve as a director for the nonprofit, he does not plan to accept compensation or any form of consideration for his services. You also state you do not anticipate the nonprofit's constitution or bylaws providing for mere membership in the nonprofit. In the past, the Commission has found an uncompensated director of a nonprofit corporation does not have a "contractual relationship" with the corporation unless he or she also is a member. See CEO 14-12 and CEO 10-2. Accordingly, assuming the facts you describe remain unchanged, Section 112.313(7)(a) will not apply as the police chief will not have employment or a contractual relationship with the nonprofit.[12]

Question 4 is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on September 13, 2019, and **RENDERED** this 18th day of September, 2019.

Kimberly B. Rezanka, *Chair*

[1]While your inquiry contains four numbered questions, this opinion, while addressing each question, reorganizes them and does not respond to them in the order presented in the inquiry. Questions 1 and 2 of this opinion, in particular, address the fourth question of your inquiry, which asks whether the police chief's involvement with the nonprofit triggers any provisions in the Code of Ethics besides Section 112.313(6) and 112.313(7), Florida Statutes.

[2]You state that, at most, the nonprofit might reimburse the police chief and affiliated city employees for any out-of-pocket expenses incurred in the course of serving as a director or engaging in fundraising.

[3]In particular, you state the nonprofit anticipates: (1) applying for charitable grants from large corporations; (2) requesting donations from local businesses; (3) holding fundraising events, such as charity dinners and silent auctions; and (4) selling merchandise to the public.

[4]Importantly, you relate the nonprofit does not intend to solicit or accept donations from political committees.

[5]The term "lobbyist" is defined in Section 112.3148(2)(b)1., Florida Statutes, to mean

> any natural person who, for compensation, seeks, or sought during the preceding 12 months, to influence the governmental decisionmaking of a reporting individual or procurement employee or his or her agency or seeks, or sought during the preceding 12 months, to encourage the passage, defeat, or modification of any proposal or recommendation by the reporting individual or procurement employee or his or her agency.

[6]The term "vendor" is defined in Section 112.3148(2)(f), Florida Statutes, to mean "a business entity doing business directly with an agency, such as renting, leasing, or selling any realty, goods or services."

[7]The considerations are listed in Rule 34-13.310(8)(c), Florida Administrative Code, which states:

> Factors which the Commission will consider in determining whether an indirect gift has been made include but are not limited to:
> 1. The existence or nonexistence of communications by the donor indicating the donor's intent to make or convey the gift to the reporting individual or procurement employee rather than to the intervening third person;
> 2. The existence or nonexistence of any relationship between the donor and the third person, independent of the relationship between the donor and the reporting individual or procurement employee, that would motivate a gift to the third person;
> 3. The existence or nonexistence of any relationship between the third person and the reporting individual or procurement employee that would motivate the gift;
> 4. Whether the same or similar gifts have been or are being provided to other persons having the same relationship to the donor as the third person;
> 5. Whether, under the circumstances, the third person had full and independent decision-making authority to determine whether the reporting individual or procurement employee, or another, would receive the gift;
> 6. Whether the third person was acting with the knowledge or consent of, or under the direction of, the donor;
> 7. Whether there were or were intended any payments or bookkeeping transactions between the third person and the donor, reimbursing the third person for the gift; and
> 8. The degree of ownership or control the donor has over the third person.

[8]We are aware that the police chief's reputation may be bolstered were a nonprofit with which he is associated to make generous contributions to those in need. However, philanthropic or altruistic satisfaction or recognition to the chief from successes of the nonprofit

do not fit the applicable definition of "gift." Section 112.312(12)(a)14., Florida Statutes, emphasizes that, for the purposes of Section 112.3148, a "gift" is a "thing" having an attributable value.

[9]See Commission on Ethics v. Barker, 677 So. 2d 254 (Fla. 1996).

[10]An additional statutory provision—Section 112.3148(3), Florida Statutes—prohibits the police chief from soliciting a gift of any amount from a vendor, lobbyist, or principal of a lobbyist of his agency, or from a political committee. However, because Section 112.3148(3) is limited to solicitations for the personal benefit of the police chief, another "reporting individual," or a member of their immediate family, it is not applicable where the police chief is soliciting the donations for the benefit of local persons (not the immediate family member of the chief or of another reporting individual) and entities in need.

[11]We remind the police chief that he should not be soliciting donations of any amount from a prohibited source if the donations will fund the purchase of equipment and gear that he intends to use personally. The solicitation of an indirect gift for his personal benefit from a prohibited source would transgress Section 112.3148(3).

[12]In addition, as long as the equipment and gear is donated (not sold) by the nonprofit to the police department, it will not constitute "doing business" under Section 112.313(7)(a). See CEO 17-15 and CEO 15-1. Similarly, Section 112.313(3), Florida Statutes, is not implicated due to the donation not being a sale.

CEO 16-2 — March 9, 2016

CONFLICT OF INTEREST; VOTING CONFLICT; MISUSE OF POSITION

COUNTY ADVISORY BOARD MEMBER CONTRACTING WITH AND OBTAINING PERMITS FROM COUNTY

To: Name withheld at person's request (Sarasota)

SUMMARY:

A prohibited conflict of interest will be created under Sections 112.313(3) and 112.313(7)(a), Florida Statutes, if a company owned by a member of an advisory board to a county commission contracts with the county to provide summer programs. The conflict could be negated were the company to secure the contracts through sealed, competitive bidding; if the company is the sole provider within the county for the services involved; or if a waiver is obtained pursuant to Section 112.313(12), Florida Statutes. A prohibited conflict of interest will also be created under Section 112.313(7)(a) should the board member's company obtain permits issued by the county's parks and recreation department, as the member's board has the ability to influence the guidelines governing the permit program. This conflict, too, can be negated by a properly obtained waiver under Section 112.313(12). The board member is not prohibited from discussing matters concerning the permit program with other members of city and county government, so long as such discussions do not violate the Sunshine Law, and may identify herself and her public positions when commenting on such issues in a newspaper, provided she clarifies that her opinions do not necessarily reflect the positions of the public bodies on which she serves. She will also have a voting conflict regarding measures concerning the permit program guidelines. Referenced are CEO 15-2, CEO 13-16, CEO 06-24, CEO 05-10, CEO 99-11, CEO 94-36, and CEO 90-15.

QUESTION 1:

Would you, a member of an advisory board to a County Commission, have a prohibited conflict of interest if your company contracts with the County?

Under the circumstances presented, your question is answered as set forth below.

Through your letter of inquiry and additional correspondence with our staff, you state you are a member (serving in an appointive position) of a City Parks and Recreation Environmental Protection Board (PREP Board).[1] You relate that the PREP Board has selected you to serve as the City's representative on the County's Parks and Recreation Council (PARC). The County resolution creating the PARC states that its purpose is to make recommendations to the Board of County Commissioners concerning issues "related to parks, beaches, recreation and the acquisition and use of [n]eighborhood [p]arkland." The resolution provides that the PARC operates in a purely advisory capacity and makes recommendations solely to the Board of County Commissioners, although it states the PARC shall be staffed by personnel from the County's Parks and Recreation Department.

You relate that you own a company which—among other things—conducts summer programs concerning water-related activities. In particular, you state your company would like to contract with the County to provide two programs this upcoming summer: a windsurfing program and a camp which will include training on stand-up paddle-boarding and snorkeling. You state your company is "the only windsurfing business located or operating in [the county]."

You advise there is a bidding process for the contracts, and that you anticipate submitting a bid for each contract to a website that serves as an online resource to facilitate competitive bidding. You relate the County's

Parks and Recreation Department will review the bids and make the final selection, and that neither the Board of County Commissioners nor the PARC will be involved in the review or selection of bids.

You inquire whether you will have a prohibited conflict of interest if your company contracts with the County to provide the summer programs while you are serving on the PARC. Your scenario implicates Section 112.313(3), Florida Statutes, and Section 112.313(7)(a), Florida Statutes. Section 112.313(3), Florida Statutes, provides:

> DOING BUSINESS WITH AN AGENCY.—No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the office or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public office or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
>
> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment.

Absent an exemption or waiver, the second part[2] of Section 112.313(3) prohibits public officers (a term which, pursuant to Section 112.313(1), Florida Statutes, includes members of advisory bodies) from acting in a private capacity to rent, lease, or sell any realty, goods, or services to their own public agency, or to any other agency of their political subdivision.

We have long held that the "agency" of a member of an advisory board to a governing body is the governing body. See CEO 06-24, CEO 05-10, citing CEO 99-11 and the opinions cited therein, and CEO 94-36 ("agency" of the Broward County Advisory Board for Persons with Disabilities was the county). As your board advises the County Commission, your "agency" is the County Commission, and absent the applicability of an exemption or a waiver—as explained below—of the requirements of Section 112.313(3), a prohibited conflict would exist were your company to provide programs to the County.[3]

Also applicable to your situation is Section 112.313(7)(a), which states:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.--No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . .; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interest and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

We find that were your company to provide the programs to the County, you would be employed by, or hold a contractual relationship with, a business entity (your company) which would be doing business with your public agency (the County Commission). Therefore, absent the applicability of an exemption, or waiver, we find

that a prohibited conflict would be created under the first part of Section 112.313(7)(a) were your company to enter into the proposed contracts or provide the programs.

Two statutory exemptions exist which could work to obviate the conflict. The first is Section 112.313(12)(b), Florida Statutes. This exemption applies when the business between a public officer's company and his or her agency or political subdivision is conducted under a system of sealed, competitive bidding to the lowest or best bidder, and neither the public officer nor his or her spouse or child participate in determining the bid specifications or in awarding the bid, and the officer files the appropriate disclosure.[4] You indicate here that the summer program contracts will be awarded through a closed bidding process. Assuming the requirements of Section 112.313(12)(b) are met, this exemption could apply to negate the conflicts of interest detailed herein.[5]

Another exemption is found in Section 112.313(12)(e), Florida Statutes. This exemption applies when a public officer's company is the sole source of supply within the political subdivision, and the officer fully discloses his or her interest prior to the transaction. CE Form 4A (Part B) has been promulgated for this purpose. You indicate your company is the only entity in the County qualified to provide the windsurfing program. Therefore, at least for that program, this exemption apparently is available to negate the conflicts presented.

Finally, waiver may be possible as to your conflicts. Section 112.313(12), Florida Statutes, provides:

> The requirements of subsections (3) and (7) as they pertain to persons serving on advisory boards may be waived in a particular instance by the body which appointed the person to the advisory board, upon a full disclosure of the transaction or relationship to the appointing body prior to the waiver and an affirmative vote in favor of waiver by two-thirds of that body. In instances in which appointment to the advisory board is made by an individual, waiver may be effected, after public hearing, by a determination by the appointing person and full disclosure of the transaction or relationship by the appointee to the appointing person.[6]

Absent the applicability of one of the cited exemptions, or a waiver, prohibited conflicts of interest under Sections 112.313(3) and 112.313(7)(a) would exist were your company to contract with the County to provide summer programs.

QUESTION 2:

> Would you have a prohibited conflict of interest if your company receives a permit from the County's Parks and Recreation Department, when your advisory board can make recommendations concerning the permitting program?

Under the circumstances presented, your question is answered in the affirmative.

You next inquire whether you will have a conflict of interest if your company applies for and obtains a permit issued by the County's Parks and Recreation Department. You state that your company has provided kayak rentals and tours within County parks since 1994. You relate that to address concerns about the overcrowding of vendors within the parks, the Parks and Recreation Department initiated a Commercial Recreation Tour Operators (CRTO) program in 2013. You state this program established a permitting process requiring kayak vendors to apply to the Department annually for a permit. You advise that so long as the vendor is properly insured and pays a fee of $500 per vessel, the Department must issue the permit; in other words, the issuance of the permit is non-discretionary and automatic upon payment.[7]

You ask whether you will run afoul of any conflict of interest provision if your company applies for and obtains a permit from the Department. You state that neither the PARC nor the County Commission are involved in reviewing or issuing the permits. However, you state that the PARC may make recommendations to the County Commission about updating or changing the CRTO guidelines, and that issues concerning the CRTO program and kayak vending permitting may be raised at PARC meetings in the near future. Indeed, you indicate an interest in personally raising issues at meetings concerning the CRTO guidelines.

Again, the statute relevant to your inquiry is Section 112.313(7)(a). The first part of the statute does not apply because your company is neither doing business with nor being regulated by the County Commission.[8] However, a prohibited conflict will be created under the second part of Section 112.313(7)(a) if your company secures a permit. The second part of the statute prohibits any employment or contractual relationship which could impede a public officer's ability to fully and faithfully discharge his or her public duties. This provision creates an objective standard which requires an examination of the nature and extent of the public officer's duties together with a review of his or her private interests to determine whether the two are compatible, separate, and distinct, or whether they coincide to create a situation which "tempts dishonor." Zerweck v. State Commission on Ethics, 409 So. 2d 57, 61 (Fla. 4th DCA 1982). In this respect, the statute is preventative in nature, and it does not require any intentionally wrongful conduct by a public officer.

Your board—the PARC—advises the County Commission on parks-related issues. In that capacity, the PARC can recommend changes to the CRTO program which will directly affect kayak vendors such as your company. There is an inherent conflict in this situation for you, as you could be tempted to use your position on the PARC to suggest and advocate for recommendations favorable to your company. Such recommendations could include requiring permitted vessels to comply with specifications already met by your company, limiting the number of permits that can be issued, or capping the number of program participants. Recommendations such as these would promote your company's interests while limiting its competition, thereby creating a conflict with your objective public duties. In arriving at this determination, we do not imply that you would intentionally misuse your position for your own private gain. We are simply finding that—by serving on an advisory board which can make recommendations affecting your private livelihood—you will be placed in a position which "tempts dishonor," which is all that is required under the statute. As we said in CEO 13-16, Section 112.313(7)(a) is prophylactic in nature and is designed to prevent situations where a public officer's private economic considerations could influence his or her ability to faithfully discharge his or her public duties.

Again, a waiver granted by the appointing individual or authority pursuant to Section 112.313(12) would negate the conflict. Absent such a waiver, however, a prohibited conflict would exist under the second part of Section 112.313(7)(a) if your company applies for and/or receives a permit through the CRTO program.

QUESTION 3:

Would Section 112.313(6), Florida Statutes, be violated were you to engage in the several actions discussed below?

Your question is answered as set forth below.

Assuming that you successfully obtain a waiver pursuant to Section 112.313(12), your company may participate in the CRTO program while you continue serving on the PARC. However, such a scenario creates further questions—which you raise in your inquiry—concerning the extent to which you may become involved as a PARC member in matters involving the CRTO program.

First, you inquire whether you may place issues concerning the CRTO program on the agenda for PARC meetings. Section 112.313(6), Florida Statutes, states:

> MISUSE OF PUBLIC POSITION.—No public officer, employee of an agency, or local government attorney shall corruptly use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others.

Section 112.313(6) prohibits a public officer from "corruptly" using or attempting to use his or her official position in order to secure a special privilege, benefit, or exemption for himself, herself, or another. The term "corruptly" is defined in Section 112.312(9), Florida Statutes, as an action

> done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a

public servant which is inconsistent with the proper performance of his or her public duties.

While there may be a personal benefit for you in placing items concerning the CRTO program on a PARC meeting agenda—namely, the chance to advocate for changes favorable to your company—there is a public purpose as well, given that the PARC is specifically tasked to make recommendations concerning issues related to county parks. The District Court of Appeal has recognized that Section 112.313(6) will not be violated in situations where there is a valid public purpose for a public officer's action, notwithstanding that the action provides an incidental private benefit to the officer. See Blackburn v. State Commission on Ethics, 589 So. 2d 431, 435-436 (Fla. 1st DCA 1991). Accordingly, we find that your placing of items concerning the CRTO program on the agenda for PARC meetings would not, by itself, violate Section 112.313(6).

Second, you inquire whether there are any limitations on your discussing matters concerning the CRTO program with members of the Board of County Commissioners, the Board of City Commissioners, or City/County administrative staff. It is difficult to answer your question without knowing the exact content of the discussions or the circumstances in which they will take place. There is no absolute prohibition against speaking to public officials and employees about public policy, even if the issues may affect your company. However, were such conversations to violate the Sunshine Law (Section 286.011, Florida Statutes), Section 112.313(6) could be implicated, as you then would have acted in a manner inconsistent with your public duties. Because we have no authority to interpret the Sunshine Law, we advise you to contact the Attorney General for further advice on situations where it would apply.

Third, you ask whether you may identify yourself as a member of the PREP Board or the PARC when writing columns for or making comments to a local newspaper addressing matters pertaining to the County parks. As previously discussed, Section 112.313(6) will prohibit you from corruptly using or attempting to use your public position to secure a special privilege, benefit, or exemption for yourself or another. In CEO 90-15, we considered whether a city commissioner would violate Section 112.313(6) if he accepted a job with a local newspaper which would require him to write a column on activities related to city government. We found that although the commissioner could use the column to promote his positions on political issues or to criticize the stances of opponents, his actions in writing the column would be taken in his private capacity rather than in his public capacity. Moreover, we stated that while readers might recognize the commissioner's name on the articles and realize he was a public officer, name recognition also was not sufficient to constitute a use of public office. Therefore, we concluded that so long as the commissioner did not use any public resources to produce the newspaper column, Section 112.313(6) would not apply.

Similarly, here, we find that although your use of the newspaper could achieve benefits for you, such an action, without more, will not violate Section 112.313(6). Because you will not be acting in a public capacity by writing a column or making comments concerning park-related issues, it cannot be said that these actions will be a use of public office under Section 112.313(6). However, if you choose to identify yourself as a PREP Board or PARC member when making such comments, you should emphasize that you are sharing only your personal opinions and not the opinions of the public bodies you serve.

QUESTION 4:

Would you be presented with a voting conflict under Section 112.3143(3)(a), Florida Statutes, concerning measures regarding the guidelines for the CRTO program?

Under the circumstances presented, your question is answered in the affirmative.

You also inquire whether—in the event you receive a waiver—you may engage in discussions at PARC meetings or vote on measures at PARC meetings concerning changing the CRTO program's guidelines. These questions concern Section 112.3143(3)(a) and Section 112.3143(4), Florida Statutes, which provide:

> No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any

> principal by whom he or she is retained or to the parent organization or subsidiary of a corporation parent by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would insure to the special private gain or loss of a relative or business associate of the public officer. [Section 112.3143(3)(a)]
>
> No appointed public officer shall participate in any matter which would inure to the officer's special private gain or loss; which the officer knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which or she is retained; or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer, without first disclosing the nature of his or her interest in the matter. [Section 112.3143(4)]

And Section 112.3143(1)(d), Florida Statutes, defines "special private gain or loss" as "an economic benefit or harm that would inure to the officer[.]"

Here, recommendations which the PARC makes concerning the CRTO guidelines will likely have an economic effect on you, as you indicate your company's livelihood depends in part on obtaining kayak permits. For this reason, measures concerning the CRTO guidelines will present a voting conflict and you should respond in accordance with the requirements described in Section 112.3143(3)(a) (i.e., declare your conflict, abstain from the vote, and timely file a CE Form 8B memorandum of voting conflict). Regarding your ability to participate in the discussion of such measures, Section 112.3143(4) prohibits such participation, unless you first have complied with the disclosures and actions required therein (see the instructions on Form 8B for for appointed officers).

Your questions are answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 4, 2016 and **RENDERED** this 9th day of March, 2016.

Stanley M. Weston, *Chair*

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[1] You state that your appointment to the PREP Board is not based in any requirement of law or ordinance that you be involved in a particular profession or occupation.

[2] The first part of the statute does not appear to be implicated under the situation presented.

[3] Even were we to consider your "agency" to be limited to the PARC, a conflict would still exist, as Section 112.313(3) prohibits the sale of goods or services not just to the "agency," but to the entire political subdivision.

[4] CE Form 3A has been promulgated for this purpose. All forms referenced are available at www.ethics.state.fl.us.

[5] Importantly, this exemption only applies in the context of sealed, competitive bidding, as opposed to an RFP (Request for Proposals), RFQ (Request for Qualifications), or other method of procurement that might be referred to as "bidding." See CEO 15-2.

[6] CE Form 4A (Part A) should be used for this disclosure. The waiver discussed in Section 112.313(12) will have to be obtained from the authority or individual who appointed you to the PARC.

[7] Your comments are supported by the CRTO rules and regulations, which indicate that a vendor must obtain an annual permit from the Department in order to launch non-motorized water vessels or provide water vessel rentals. The rules and regulations indicate that the annual fee for obtaining a permit is $500 per vessel.

[8]To the extent that the permitting process constitutes "regulation," it is performed through the Parks and Recreation Department.

CEO 13-25 - December 18, 2013

MISUSE OF POSITION

LETTERS OF SUPPORT WRITTEN ON OFFICIAL STATIONERY

To: The Honorable Wilton Simpson, Member, Florida Senate, 18th District

SUMMARY:

A Senator's providing a letter of support for grant funding or for a hospice's certificate of need application would not violate Section 112.313(6), Florida Statutes. CEO 99-8 is referenced.

QUESTION:

Would letters of support for a grant application or for a hospice's certificate of need violate Section 112.313(6), Florida Statutes, were they to be written on official stationery?

Your question is answered in the negative.

You write that you are a member of the Florida Senate, and you inquire whether two letters that you would like to send, on your official Senate letterhead, to State agencies, would violate any provision of the Code of Ethics. The first is a letter you were asked by a constituent to write to the Agency for Health Care Administration. In it, you express your support for a Certificate of Need (CON) for Hospice of Citrus County, Inc. In telephone conversations between our staff and your office, you indicated that you have no business or employment relationship with Hospice, do not sit on its board, and are not being compensated for writing this letter or in any other capacity. Rather, you advise, you simply believe in the entity's mission.

The second letter is to the Florida Highway Beautification Council, a seven-member body within the Department of Transportation. In this letter, you express support for the Beautification Grant application submitted by the City of Dade City. As with the previous case, you indicate you have no business relationship or other interest in the applicant, other than your belief in the project, and are not compensated by Dade City.

The only provision of the Code implicated here is Section 112.313(6), Florida Statutes, which provides as follows:

> MISUSE OF PUBLIC POSITION.--No public officer or employee of an agency shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31.

For purposes of this provision, the term "corruptly" is defined as follows:

> 'Corruptly' means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties. [Section 112.312(9), Florida Statutes.]

This provision prohibits you from using or attempting to use your official position as a member of the Senate, or any resources which may be within your trust, to secure a special privilege or benefit for yourself or another, where your actions are taken with wrongful intent and for the purpose of obtaining a benefit for yourself or another and are inconsistent with the proper performance of your public duties. Your Senate General Counsel

has very prudently advised members to be cautious in lending the prestige of their office in support of the endeavors of others, out of a concern that such could constitute a misuse of position.

We addressed a very similar question in CEO 99-8. There, a Clerk of Court inquired whether it would violate the Code of Ethics were she to write letters of reference, either on plain stationery, on stationery she purchased herself but which identified her as Clerk, or on official stationery. We noted, as we have in the past, that the act of identifying oneself as an officeholder is a "use" of that office, and that as such, a reference to one's titleâ€"either by using letterhead or otherwise-is a use of position. We advised "[w]e are of the opinion that whether a corrupt misuse of official position has occurred in a given situation depends on how and for what purpose the stationery will be used, rather than upon the fact of its use." The issue, we found, lay with the context in which the official's public position is referenced,

> Either way, the recipient of the letter is informed of the Council member's public position. This may be appropriate, as in the political contexts noted above, or it may be inappropriate, for example, if the letter were being sent to settle a strictly private dispute with a debtor or creditor.

In CEO 99-8 the context involved letters of recommendation having nothing to do with the business of the Clerk's office, and we found that such letters have long been considered a part of an official's public duties. Under these circumstances, we found that the Clerk's use of official stationery to write such letters would not be inconsistent with the proper performance of her public duties, absent a showing that the action was undertaken to improperly benefit the official or another. As was true in that opinion, in this case there is no suggestion of any quid pro quo in exchange for the letters of support, there is no indication of any benefit to you other than the incidental political benefit of the goodwill of the constituent, and there appears to be no law, rule, or policy which prohibits such use of resources.

Accordingly, we find that under these circumstances, the letters you propose would not violate any provision of the Code of Ethics for Public Officers and Employees.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 13, 2013, and **RENDERED** this 18th day of December, 2013.

Morgan R. Bentley, Chairman

CEO 11-23 – December 7, 2011

CONFLICT OF INTEREST; VOTING CONFLICT

SCHOOL DISTRICT BOARD MEMBER, SUPERINTENDENT, ADMINISTRATOR OR OTHER EMPLOYEE SERVING ON GOVERNING BOARD OF CHARTER SCHOOL SPONSORED BY SCHOOL DISTRICT

To: *Benjamin J. Williams, School Board Chair, and Robert W. Runcie, Superintendent (District School Board of Broward County)*

SUMMARY:

A prohibited conflict of interest would not be created under either Section 112.313(3) or Section 112.313(7)(a), Florida Statutes, were district school board officers or employees also to serve as uncompensated members of the board of directors of a charter school applying to and sponsored by the district school board, where the school board submits the application to itself for the charter school. Such a situation presents a unity of interest justifying the application of Section 112.316, Florida Statutes, to negate a rote application of the statutes. And, no voting conflict would be created under Section 112.3143(3)(a), Florida Statutes, for the district board members regarding measures/votes of the district board concerning the charter schools. Also, neither a prohibited conflict nor a voting conflict would be created for the officers or employees, in their capacity as governing board members of the charter school, pursuant to Section 1002.33(26)(a), Florida Statutes. CEOs 81-5, 81-40, 90-24, 06-26, 07-11, and 10-2 are referenced, and CEO 97-7 is distinguished.[1]

QUESTION 1:

Would a prohibited conflict of interest be created were a member of a district school board also to serve as an uncompensated member of the governing board of a charter school sponsored by the district school board, where the school board is the applicant to itself for the charter school?

This question is answered in the negative.

By your letter of inquiry, you relate that the District School Board of Broward County receives charter school applications by August 1 of each year from parties seeking to operate a charter school in the Broward School District for the following year, and beyond. Further, you state that District administrators and employees from various departments review each application to determine its sufficiency and assist the District Superintendent of Schools in developing a recommendation as to whether to approve or deny the application. Additionally, you relate that the Superintendent's recommendation then is placed on the School Board's agenda for a vote and, if the vote is favorable, a proposed charter school agreement between the applicant and the District is negotiated by District administrators and representatives of the approved charter school. Also, you state that the proposed agreement then is recommended to the School Board by the Superintendent, with the Board voting upon approval of the agreement, and that a similar process occurs for any amendment to such an agreement. Further, you relate that each approved charter school is funded under Section 1002.33(17), Florida Statutes, and that a charter school's funds are distributed to it through the District School Board.

Additionally, you state that the responsibilities of the District School Board, under Section 1002.33, Florida Statutes, as the sponsor of a charter school, include:

- Determining whether to approve or deny each charter school application.
- Approving a charter school agreement with each charter school.

- Monitoring and reviewing each charter school in its progress toward the goals established in the charter.
- Monitoring the revenues and expenditures of the charter school and performing the duties provided in Section 1002.345, Florida Statutes.
- Ensuring that the charter school is innovative and consistent with the State education goals established by Section 1000.03(5), Florida Statutes.
- Ensuring that the charter school participates in the State's education accountability system and reporting any performance shortcomings to the Florida Department of Education.
- Determining whether to share with charter schools any capital outlay funds derived through Section 1011.71(2), Florida Statutes.
- Determining whether to renew or terminate the charter school agreement of each approved charter school.

You relate that the Superintendent's responsibilities include:

- Determining whether to recommend approval or denial of each charter school application.
- Determining whether to recommend approval of a charter school agreement with each charter school.
- Determining whether to recommend the renewal or termination of the charter school agreement of each approved charter school.
- Monitoring and reviewing each charter school in its progress toward the goals established in the charter.
- Monitoring the revenues and expenditures of the charter school and performing the duties provided in Section 1002.345.
- Ensuring that the charter school is innovative and consistent with the State education goals established by Section 1000.03(5).
- Ensuring that the charter school participates in the State's education accountability system and recommending whether to report any performance shortcomings to the Florida Department of Education.
- Determining whether to recommend sharing with charter schools any capital outlay funds derived through Section 1011.71(2).

You state that the rights and responsibilities of the governing board of a charter school include:

- The ability to appeal the denial of its charter school application (where applicable) to the State Board of Education.
- Negotiation and approval of a charter school agreement with the District School Board.
- Initiation of mediation services through the Florida Department of Education for any dispute with the District School Board, other than denial of a charter school application.
- The ability to appeal to the Florida Division of Administrative Hearings any dispute with the District School Board not settled by mediation (with the prevailing party to receive reasonable attorney fees and costs).
- Providing continuing oversight over charter school operations.
- Negotiating terms and costs for goods, services, and transportation to be provided to the charter school by the District School Board.

Further, you state that at this time, the District School Board is considering whether to submit one or more applications to itself, for the operation of a new charter school or a conversion charter school,[2] to be located in Broward County. You relate that in this scenario, the District School Board would be both the applicant and the sponsor of the charter school(s).[3] Additionally, you state that the District School Board is contemplating, regarding such applications, that the governing board for the charter school would include one or more of the District School Board members, and/or the Superintendent, and/or one or more of the District's administrators or employees. However, you emphasize that no compensation would be paid for service on the governing board of such a charter school, regardless of whether the governing board member is or is not an

officer or employee of the School District. And, you relate that once a charter application is approved for such a school, the District School Board would enter into a charter school agreement with the governing board of the charter school.[4]

Prohibitions within the Code of Ethics for Public Officers and Employees (Part III, Chapter 112, Florida Statutes) relevant to your inquiry are Sections 112.313(3) and 112.313(7)(a), Florida Statutes, which provide, respectively:

> DOING BUSINESS WITH ONE'S AGENCY.—No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
>
> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment.
>
> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.—No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . .; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

In CEO 97-7, we found that a prohibited conflict of interest would be created under Section 112.313(3), were a district school board employee to serve without compensation on the board of directors of a proposed charter school seeking approval of its application from the district school board. Therein, we reasoned that, although the district employee would not be acting in a public capacity as a purchasing agent to purchase services from the charter school for the district in violation of the first part of Section 112.313(3), the employee would be acting in a private capacity under the second part of the statute to sell the services to the district.[5] Also, in CEO 97-7, we declined to find a "unity of interest" which would have negated the conflict under Section 112.316, Florida Statutes, which provides:

> CONSTRUCTION.—It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

In the instant situation, too, we find that the District School Board member, as a director of the charter school, would be acting in a private capacity to sell the services of the charter school to the School District.[6] However, unlike CEO 97-7, in the instant situation we find that a "unity of interest" would exist, which would negate a literal or mechanical application of the prohibition, via application of Section 112.316, Florida Statutes.

In previous opinions, we have found such a unity when: (1)the individual public officer or employee who also is serving in an additional capacity does not stand to benefit privately from his or her additional service, (2)the individual is appointed to the organization's board because of his or her public position, and (3)the organization was created for the benefit of the individual's public agency. See, for example, CEO 81-40 (school board member serving as trustee of Florida school boards association insurance trust), CEO 06-26 (county tax collectors serving as uncompensated directors of tax collectors association's service corporation), and CEO 07-11 (school board member, tax-exempt education foundation).[7] In CEO 97-7, we found that "elements" (2) and (3) were not met. However, the instant situation appears to mirror these requirements. Here the District School Board will have created the charter school corporation for its benefit and the benefit of its students to serve in educating students within the District ("element 3"), and the Board member would have been appointed to the charter school governing board because of his District position ("element 2"). Thus, we distinguish CEO 97-7 from the instant situation. Further, we find it important, regarding such a unity, that it is the mission of a public school district to educate students within the district, via traditional public schools and via the various modifications or alternatives available under Section 1002.33, Florida Statutes.

Concerning Section 112.313(7)(a), in CEO 97-7 we found that a district school board regulates charter schools and does business with them. Regarding the instant situation, we make the same finding; such dynamics are obvious from the responsibilities and rights of the District School Board and charter schools, as listed above. In CEO 97-7 we did not find a prohibited conflict of interest, based on the school board employee's charter school position being uncompensated, coupled with our view that service as an uncompensated director does not by itself constitute employment or a contractual relationship, another required element for a prohibited conflict under Section 112.313(7)(a). Similarly, we find here that the uncompensated service does not create a prohibited employment or contractual relationship. Rather, we emphasize that the proposed situation would involve a unity of interest. See, for example, CEO 81-5 (school board member employed as supervisor of regional diagnostic and learning resource center), in which we found such a unity "arising from a common goal of better education for exceptional students."

Question 1 is answered accordingly.

QUESTION 2:

Would a prohibited conflict of interest be created were a district school superintendent also to serve as a member of the governing board of a charter school sponsored by the district school board, where the school board is the applicant to itself for the charter school?

This question is answered in the negative.

As with the District School Board member in Question 1, we find that the Superintendent's dual service would present a unity of interest rather than a conflict of interest.

Question 2 is answered accordingly.

QUESTION 3:

Would a prohibited conflict of interest be created were an administrator or other employee of a district school board also to serve as a member of the governing board of a charter school sponsored by the district school board, where the school board is the applicant to itself for the charter school?

Under our reasoning of Questions 1 and 2, Question 3 is answered in the negative.

Your questions are answered accordingly.[8]

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 2, 2011 and **RENDERED** this 7th day of December, 2011.

Robert J. Sniffen, *Chairman*

[1]Prior opinions of the Commission on Ethics may be obtained from its website (www.ethics.state.fl.us).

[2]Section 1002.33(1), Florida Statutes, provides that ". . . [a] charter school may be formed by creating a new school or converting an existing public school to charter status . . . ."

[3]You represent that "[t]his scenario appears to be permissible under current law . . . ." It is not within our jurisdiction to opine as to whether, as a matter of substantive law, Section 1002.33 contemplates that a district school board can be both the applicant/operator and the sponsor regarding a charter school. Our role is limited to determining whether such a situation would create a prohibited conflict of interest for public officers or employees serving both the District School Board and the charter schools(s) which would be created by the District School Board.

[4]Structurally, your inquiry contemplates that the charter school would be organized and operated as a nonprofit corporation.

[5]Our finding in CEO 97-7 that the charter school would be selling services to the school district was based on the district providing the funding for the charter school, and the charter school then, in turn, educating a segment of the district's student population. We can discern no difference in this regard between the situation of CEO 97-7 and that of the instant inquiry.

[6]We also find that the District Board member would meet the elements under the first part of Section 112.313(3). Unlike public employees (e.g., the school district employee in CEO 97-7), who must act as a "purchasing agent" as defined in Section 112.312(20), Florida Statutes, in order to meet the elements of the first part, a public officer (e.g., a District School Board member) "acts in his or her official capacity" under the first part when the public agency board of which he or she is a member acts. CEO 90-24.

[7]Regarding the voting conflicts law portion of the Code of Ethics applicable to local, elective public officers, such as District School Board members, we find that the members would not be presented with a voting conflict regarding measures/votes of the Board concerning a proposed charter school or an approved charter school. As uncompensated position holders with the charter school, they would not be "retained," and retention is an essential element of the voting conflicts law. CEO 10-2.

[8]We also find that the District School Board officers or personnel who would serve on the board of a charter school, where the Board is both the applicant and the sponsor, would not have a prohibited conflict pursuant to Section 1002.33(26)(a), Florida Statutes, which provides that "[a] member of a governing board of a charter school, including a charter school operated by a private entity, is subject to ss. 112.313(2), (3), (7), and (12) and 112.3143(3)." We find that such a situation necessarily embodies the same overriding unity of interest found above, even if it does not meet the "numbered element" for such a unity which would have required that the District School Board have been created to serve the interests of the charter school. Further, we find no voting/participation conflict for the charter school governing board members under Section 112.3143, regarding measures/votes of the charter school board which affect their public employer or agency (the School Board/District) and which also do not affect them in a private capacity or others connected to them, as listed in Section 112.3143, in a private capacity; Section 112.3143 does not encompass gain or loss to a public entity (e.g., a public school board/district) and Section 112.3143(3)(a) specifically exempts measures/votes affecting one's employer when the employer is a public "agency" as defined in Section 112.312(2), Florida Statutes.

CEO 08-20 - September 10, 2008

CONFLICT OF INTEREST

STATE SENATOR OFFERED PARTNERSHIP IN PRIVATE EQUITY FIRM

To: Name withheld at person's request (Ft. Lauderdale)

SUMMARY:

The Code of Ethics for Public Officers and Employees would not prohibit a State Senator from becoming a partner in a private equity firm. There is no indication that the firm or any of its partners are doing business with the Legislature, and to the extent they are regulated by that body through the enactment of laws, the exemption of Section 112.313(7)(a)2, Florida Statutes applies. Any voting conflicts of interest that may develop require disclosure, not abstention, and the Senator is prepared to comply with the requirements imposed by the voting conflict law, Section 112.3143(2), Florida Statutes. Identification of the Senator's public position as part of descriptive information regarding the firm's members would not violate Section 112.313(6), Florida Statutes.

QUESTION:

Does the Code of Ethics for Public Officers and Employees prohibit a State Senator from becoming a partner in a private equity firm?

Your question is answered in the negative, under the circumstances presented.

You write on behalf of a member of the Florida Senate, and you advise, through correspondence and telephone conversations with our staff, that the Senator has been invited to join, as a limited partner, an international private equity firm with offices in the state of Florida. The firm creates investment funds[1] made up of individual, corporate, and institutional investors, and these individual funds are structured as limited partnerships, with the firm serving as the general partner.[2] The Senator's responsibilities with the firm will include analyzing proposed investment opportunities, many of which may be in the state, and making recommendations to the firm on whether to invest in these businesses. The Senator will also be tasked with contacting potential investors, both in and out-of-state, to determine whether they are interested in investing in a particular fund.

The Senator understands that he is precluded from representing the firm or any other entity for compensation before any State agency, and he would have no involvement in any activity which would seek to influence any agency or State pension fund. His compensation will come through a percentage of the money he raises, management fees, a bonus after a certain amount has been raised (the calculation for which will exclude any amount raised from any State agency), and a performance based fee to be paid at the close of the firm's activities. You relate that it is anticipated that the firm's website will make reference to the Senator's public position, "in the context of a resume which would mention that, among other experiences and qualifications, he is an elected official in the State of Florida," and that his position will also be referred to in "private placement memoranda" which describe the security offered for sale, terms and fees, and the background of the business and the management team.

You also advise that matters of interest to the firm may come before the Legislature, and firm members may lobby the Legislature or employ a lobbyist to do so. The Senator understands that he is precluded from having any involvement in any lobbying activities, including involvement in the firm's strategies concerning lobbying activities.

Section 112.313(7), Florida Statutes, provides:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.- No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . . ; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

The Senator's agency is the Florida Legislature (CEO 95-21) and as a member of a limited partnership, he would have a contractual relationship with the partnership itself as well as with each of the individual partners. See, CEO 98-3. Absent the applicability of an exception, the first part of Section 112.313(7) prohibits him from having a contractual or employment relationship with the partnership if it is regulated by or doing business with the Legislature.

Nothing in the materials you have provided suggests that the firm is "doing business" with the Legislature, and to the extent that it or its members may be regulated by the Legislature, Section 112.313(7)(a)2, Florida Statutes, would apply. It provides:

> When the agency referred to is a legislative body and the regulatory power over the business entity resides in another agency, or when the regulatory power which the legislative body exercises over the business entity or agency is strictly through the enactment of laws or ordinances, then employment or a contractual relationship with such business entity by a public officer or employee of a legislative body shall not be prohibited by this subsection or be deemed a conflict.

We have often found this provision applicable to exempt situations in which the potentially conflicting relationship was based on the possible "regulation" of a business entity by the Legislature (a situation applicable to many "citizen-legislators") from the prohibition of Section 112.313(7)(a). See, CEO 03-3, footnote 5. Insofar as the Senator's firm can be said to be "regulated" by the Legislature through its enacting laws, the application of Section 112.313(7)(a)2 negates any conflict.

Although we have not applied this exemption to lobbying activities, "[w]e have concluded that Section 112.313(7)(a) does not prohibit a legislator from having any employment whatsoever with an organization that engages in lobbying the Legislature." CEO 91-1. In this regard, our previous opinions have indicated that "a legislator's employment should be completely separated from the lobbying activities of his employer." Id. In CEO 90-8, an opinion instructive here, we found that a State Representative was not prohibited from serving as president and CEO of a nonprofit corporation formed to promote private higher education, but that he would be prohibited "from engaging in lobbying activities personally and also in any activities related to lobbying." We stated:

> This would include not only actual contact with legislators through physical attendance at legislative meetings, submission of written materials, and personal contact with legislators in an effort to encourage the passage, defeat, or modification of any measure before the Legislature, as part of your employment responsibilities, but also directing the activities of those who will contact the Legislature, participating in setting the strategies of whom to contact and what to say, and assisting in preparing amendments to documents in support of the corporation's position. In other words, it is our view that your employment with

> the corporation should be completely separated from the lobbying activities of your employer.

As you have already recognized, the Senator would be similarly prohibited from engaging in lobbying activities. Under such circumstances, his proposed employment would not be prohibited by Section 112.313(7), Florida Statutes.

The second part of Section 112.313(7) prohibits a public officer from having any contractual relationship which would create a continuing or frequently recurring conflict between his private interests and the performance of his public duties, or which would impede the full and faithful discharge of his public duties. In Zerweck v. State Commission on Ethics, 409 So. 2d 57, 61 (Fla. 4th DCA 1982), the District Court of Appeals said that this provision establishes an objective standard which requires an examination of the nature and extent of the public officer's duties together with a review of his private interests to determine whether the two are compatible, separate and distinct, or whether they coincide to create a situation which "tempts dishonor."

You have not provided specific details regarding the entities the firm's funds will invest in, or who the investors are or will be, and to the extent that the firm's activities are prospective, you are unable to do so. Accordingly, general guidance is all we can afford you. In that regard, there is nothing inherent in the proposed employment which would create a prohibited conflict. It is conceivable that a particular set of circumstances could cause the Senator to be tempted to dishonor his public responsibilities. However, that possibility exists in any number of employment and professional opportunities, and given that Florida's constitution and laws presently preserve the notion of a "citizen" legislature, it is insufficient by itself to violate Section 112.313(7). In CEO 96-4, we advised a State Senator that his employment by a corporation focusing on market research and business development of various health care clients would not create a prohibited conflict under Section 112.313(7), but cautioned that he exercise care to "ensure that he keeps separate his private business endeavors from his public responsibilities" in order to protect against the appearance of impropriety. That counsel is also appropriate here.

With respect to voting, Section 112.3143(2), Florida Statutes applies here. It states, in relevant part:

> No state public officer is prohibited from voting in an official capacity on any matter. However, any state public officer voting in an official capacity upon any measure which would inure to the officer's special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the public officer shall, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

As a State officer, the Senator is never required to abstain from voting. Rather, he is required to make disclosure when voting on measures which would inure to his own "special private gain or loss" or which he knows would inure to the "special private gain or loss" of a relative, business associate, or principal. You have indicated that the Senator understands that he would be required to disclose a voting conflict in the event a measure would inure to the special private gain or loss of the firm.

He would also be required to make disclosure when voting on a measure that would inure to the special private gain or loss of his partners in the firm, as they would constitute "business associates" under the statute.[3] It is important to note that not every vote which may affect the firm or its members in some way will inure to their "special private gain or loss." If the size of the class of persons affected by the measure is sufficiently large, and there is no disproportionate impact on the Senator, the firm, or its members, the gain or loss will not be

"special." See, CEO 93-28 ("assuming that a matter or measure affects you, your company, or its subsidiary, the gain from it would not be 'special' within the meaning of the voting conflicts law if the class affected by it were large.") and see, generally, CEO 90-10, and CEO 89-18.

Finally, as to references to the Senator's public position in firm memoranda and publications, Section 112.313(6), Florida Statutes, states in relevant part:

> MISUSE OF PUBLIC POSITION.--No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31. This section shall not be construed to conflict with s. 104.31.

For purposes of this provision, the term "corruptly" is defined as follows:

> Corruptly means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties. [Section 112.312(9), Florida Statutes.

These provisions prohibit public officials from corruptly using or attempting to use their official positions or property or resources placed within their trust due to their status as public officials, and it prohibits them from corruptly performing their official duties, in order to secure a special privilege, benefit, or exemption for themselves or another.

In CEO 99-8, we spoke to the propriety of a Circuit Court Clerk identifying herself as such on letters of recommendation written on personal stationery. We referenced In re George Keller, Complaint No. 97-169, where we found that there was no probable cause to believe that Mr. Keller, a city council member, had violated Section 112.313(6) by identifying himself as a member of the City Council while testifying as a character witness on behalf of a constituent whom he knew only because she had contacted him to complain about her treatment by a particular police officer, In re Ilene Liebermann, Complaint No. 90-71, in which we found no probable cause to believe that Ms. Liebermann had corruptly misused her official position by using privately purchased stationery bearing, among other things, the seal of the city, her title, and her name, for writing city electors and recommending to them particular candidates, and In re John Curlee, Complaint No. 89-45, in which we found that a highway patrolman's wearing his uniform while appearing in a television commercial for a Florida Senate candidate did not violate Section 112.313(6). In view of these prior actions we stated:

> Where personal stationery is used and no public resources are expended in making the recommendation, your providing a letter of recommendation for an appointment, job, or grant for a person who has nothing to do with the business of the Clerk's Office or of any agencies that it deals with is no different from agreeing to be listed as a character reference. The person reviewing the application will learn, or already know, of your public position and will be given a favorable recommendation of the applicant. Such an action, although it involves the use of public position, would not be "inconsistent with the proper performance of public duties" or made with "wrongful intent."

Similarly, while in this case the Senator's identifying himself as an officeholder may be, in a strict sense, a "use of position," nothing in the context you have described suggests wrongful intent in such self-

identification, or that it would be inconsistent with the proper performance of his public duties.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on September 5, 2008 and **RENDERED** this 10th day of September, 2008.

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Cheryl Forchilli, *Chair*

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[1] Private equity funds are pooled investment vehicles managed by investment professionals that solicit investors directly, rather than through general advertising, a registered broker-dealer, or a public offering. The funds are generally organized as limited partnerships ("LP") or limited liability companies ("LLC"). A management company, which acts as an investment adviser, usually holds the general partnership interest of a LP or acts as a managing member of a LLC. Investors usually consist of high net-worth individuals and families, pension funds, endowments, banks, and insurance companies. See, Bevilacqua, Convergence and Divergence: Blurring the Lines Between Hedge Funds and Private Equity Funds, 54 Buffalo L. Rev. 251, 257 (May, 2006).

[2] The Senator will not be a partner in any of the individual funds.

[3] Section 112.312(4), Florida Statutes, defines "business associate" as:

> Any person or entity engaged in or carrying on a business enterprise with a public officer, public employee, or candidate as a partner, joint venturer, corporate shareholder where the shares of such corporation are not listed on any national or regional stock exchange, or coowner of property.

CEO 02-13 -- June 11, 2002

CONFLICT OF INTEREST

CITY OFFICIALS USING CITY BUSINESS CARDS IN PRIVATE AFFAIRS

To: Name withheld at person's request

SUMMARY:

Although no definitive answer can be provided via an advisory opinion, a city official's use of a city business card to promote the official's personal profit, gain, or business would create a prohibited conflict of interest under Section 112.313(6), Florida Statutes. However, if the card is used for a public purpose and the official incidentally receives a private or business benefit, a prohibited conflict likely is not created. CEO's 75-45, 77-175, 91-38, and 99-8 are referenced.

QUESTION:

Would a prohibited conflict of interest be created were a City Commissioner or Mayor to distribute (by mail, in person, or otherwise) a City business card with the intent of promoting himself or herself for personal profit or gain?[1]

Your question is answered in the affirmative, subject to the qualifications noted below.[2]

By your letter of inquiry we are advised that as City Attorney for the City of Winter Springs you are making inquiry in behalf of the City's Mayor and Commissioners[3] regarding various uses of their City business cards. Further, we are advised that at nominal expense the City provides each Commissioner and the Mayor with City business cards; that the cards are ordinary, simple, and similar to typical business cards carried by millions of people; that the cards contain general information regarding the City, including a copy of the City seal and the City's name, address, and telephone/fax numbers; and that the cards are "personalized" for each Commissioner and the Mayor by including their respective names, City titles, and e-mail addresses. Also, we are advised that the Commissioners and the Mayor regularly carry the cards on their persons and distribute the cards in many situations, to identify themselves and to provide contact information. Further, you write that the City cards, as is true in every setting where business cards are used, serve to identify the name and status of the person presenting the card; that the card has the desired effect of being a convenient means of introduction and elimination of confusion in identifying and communicating with individuals; that, for the most part, the use of business cards is a matter of personal taste and local custom, but that one could reasonably argue there is an "implied notion" in our society that a business card is part of an individual's persona and thus there is an expectation that business cards will be used in a variety of personal and business situations; and that there is an expectation that elected officials will use their public status business cards as an efficient and cost-effective means of introducing themselves to constituents, community leaders, developers, and others in a variety

of situations in order to promote the community that elected them. Additionally, you write that the Commissioners and the Mayor predominantly use City business cards for identification purposes while performing official duties and attending government-related functions, but that on occasion they would like to use the cards as a means of introducing and identifying themselves when engaged in other affairs, including personal affairs. For example, you write further, in the course of conducting private business affairs a Commissioner and/or the Mayor also may identify an opportunity to promote the City, and during the course of this "dual private/public situation" a City business card may be presented, in person or in correspondence, to an individual for identification and information purposes and as a gesture of goodwill.

The Code of Ethics for Public Officers and Employees provides in relevant part:

> MISUSE OF PUBLIC POSITION.--No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31. [Section 112.313(6), Florida Statutes.]
>
> 'Corruptly' means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties. [Section 112.312(9), Florida Statutes.]

Section 112.313(6) prohibits public officials from corruptly using or attempting to use their official positions or property or resources placed within their trust due to their status as public officials, and it prohibits them from corruptly performing their official duties, in order to secure a special privilege, benefit, or exemption for themselves or another.

While we have not rendered an advisory opinion directly on point concerning the use of governmental business cards you describe, we have made several findings or dispositions relevant to your inquiry. In CEO 75-45, we opined that the Code of Ethics contained no provision which would prohibit a State Representative from enclosing a business card (printed at his own expense and containing a picture of himself, his name, reference to his public office and political party, district designation, telephone number, and consumer assistance telephone numbers) in correspondence to his constituents.[4] In CEO 77-175, we opined that Section 112.313(6) would not be violated were a State Senator to send copies of a brochure[5] (titled "The Florida Senate" and stamped inside the back cover with the message "Compliments of Senator . . . , District . . . , . . . , Florida") to persons or groups requesting copies, reasoning that "the stamped message would serve a function similar to that of a cover letter or a business card," citing favorably to CEO 75-45, but stating that we perceived a possible violation of Section 112.313(6) would exist were copies of the brochure to be sent unsolicited as, for example, part of an election campaign effort. In Commission Complaint No. 90-249, In re John Reed Buckley, we dismissed as legally insufficient (via our Public Report And Order Dismissing Complaint rendered July 24, 1991) an allegation that a member of an airport authority used his official business cards (paid for with public funds) to promote the candidacy of persons seeking seats on the authority by writing the names of preferred candidates on the cards and handing the cards out at gatherings.[6] In CEO 91-38, we opined that a prohibited conflict under Section 112.313(6) is not automatically created by a city council member's use of stationery similar to the city's official stationery for campaign, fund-raising, and personal purposes when the stationery was not paid for with city funds, citing favorably to the Lieberman and Curlew complaint matters, supra, but leaving open the possibility that a corrupt use could occur in a specific situation. More particularly, in CEO 91-38, we stated:

> We are of the opinion that whether a corrupt misuse of official position has occurred in a given situation depends on how and for what purpose the stationery will be used, rather than upon the fact of its use. In terms of whether the Council member's letter would be a corrupt misuse of position, we see no difference between her using the proposed stationery and her using plain stationery for a letter in which she refers to herself as a Council member. Either way, the recipient of the letter is informed of the Council member's public position. This may be appropriate, as in the political contexts noted above, or it may be inappropriate, for example, if the letter were being sent to settle a strictly private dispute with a debtor or creditor.

In Commission Complaint Nos. 88-112 and 89-09 (Consolidated), In re James K. Gordon, we entered a Final Order And Public Report Upon Mandate Of The District Court Of Appeal, finding as we had in our initial consideration of the matter that a city commissioner violated Section 112.313(6) by using city stationery and envelopes on behalf of a private university for which he was doing consulting work (promoting a symposium).[7] In Commission Complaint No. 96-241, In re Robert D. Moore, we found that a county tax collector violated the statute by using letterhead stationery of the tax collector's office to endorse a candidate for the office of tax collector and by using the State seal on a private document (via reproduction on a paid political advertisement letter to voters signed by the respondent identifying himself as tax collector). Thereafter, in 1998, we found that there was no probable cause to believe a city commissioner violated Section 112.313(6) by using resources of his office for his own benefit in the mailing of 467 letters to elected officials around the State for the alleged purpose of soliciting business for his law firm, apparently relying on our Advocate's recommendation that corrupt intent could not be proven in the matter because, in view of the commissioner's departure from office via his not seeking reelection, it could have been argued that the letters created a public benefit via informing the recipients (who were various members of the Florida League of Cities, some of whom had known the commissioner through his public office) of his departure. See our Public Report and the Advocate's Recommendation in Commission Complaint No. 98-31, In re Ron Weaver. Most recently, in CEO 99-8, we opined that a circuit court clerk's providing a letter of recommendation for an appointment, job, or grant for a person who has nothing to do with the business of the clerk's office, using stationery purchased with her own personal funds that identifies the writer as the clerk or using official stationery and public resources, would not violate any provision of the Code of Ethics, provided there was no quid pro quo of value to the clerk in exchange for the recommendation (such as a campaign contribution), provided there was no benefit to the clerk other than the incidental political benefit of gaining the goodwill of the constituent, and provided (as to official stationery) there existed no rule, regulation, or policy prohibiting use of the resources of the public office for such purposes.[8]

In view of these advisory opinions and complaints bearing on the use of official business cards, official stationery, private stationery (plain and "official/look alike"), use of public resources, and use of public position, we are persuaded that regarding your inquiry the controlling factor is (and should be) not whether the official business cards are publicly purchased or whether they contain information that identifies the named person as a public official, but, rather, whether they are used in a manner or in a context supportive of the wrongfulness or corruption required by the statute. Regarding use of public resources or position under Section 112.313(6), the District Court of Appeal has recognized that the statute is not violated in situations where there is a valid public purpose for the use, notwithstanding that the use provides an incidental private benefit to the official. See Blackburn v. State Commission on Ethics, 589 So. 2d 431 (Fla. 1st DCA 1991).

Therefore, under Blackburn, we find that use of the cards by the Mayor or a Commissioner for private purposes (such as promoting themselves for personal profit or gain) would create a prohibited conflict, inasmuch as there would be no primary, valid public purpose for the use. However, we note that incidental private benefit flowing to the Mayor or a Commissioner from use of the cards to identify himself or herself while performing official duties or attending City-related functions (as mentioned in your correspondence) likely would not be violative of the statute.[9] As the Blackburn Court stated:

> We find nothing in the language of these sections that suggests the incidental benefit appellant may have received or enjoyed in respect to her campaign for reelection by having a county employee draft the subject article was intended to be covered by this code of ethics. Both the hearing officer and the Ethics Commission agreed that it would have been appropriate for appellant to have obtained the information and written article in this case to use in her official capacity as County Commissioner *apart from being used in the reelection campaign*. Appellant insisted that the employee's work product was intended to be used and was in fact used for dual purposes: to inform the public as a county commissioner of an issue of vital importance to the county citizens, and to assist appellant in her reelection campaign. The first purpose is obviously a valid one, and the pertinent statutory language provides no basis for converting that valid purpose into an illegal or unethical act simply because the information was also to be used in a political campaign. There is no evidence in the record, apart for appellant's having freely admitted use of the article in her campaign, that disputes or contradicts her testimony regarding her intent to use the material for both purposes. The record does not contain competent substantial evidence to support a finding of fact that appellant's only purpose in obtaining the article was to corruptly use her office to obtain a prohibited benefit for use in her campaign.

Blackburn, at 435 and 436. [Emphasis original.]

Further, this opinion, as is the case with most if not all of our advisory opinions construing Section 112.313(6), is not conclusive as to the questions presented, due to the factual or evidential nuances or issues not susceptible to presentment or determination in the context of an advisory opinion; therefore, all should be mindful that this opinion is not controlling in the context of ethics complaints, if any, which might be brought regarding actual use of official business cards.

Accordingly, subject to the conditions, caveats, and/or evidential/factual cautions identified above, we find that use of City business cards by the Commissioners and the Mayor for private promotion or gain would create a prohibited conflict of interest under Section 112.313(6), Florida Statutes,[10] but that a valid public use of the cards (which merely provides an incidental private benefit to the official) likely would not.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 6, 2002 and **RENDERED** this 11th day of June, 2002.

Ronald S. Spencer, Jr.
Chair

[1] You structured the inquiry as four numbered questions. We view the inquiry substantively as one question. Thus, we have consolidated and restated the inquiry as one question.

[2] As with most, if not all, of our advisory opinions regarding Section 112.313(6), Florida Statutes, the instant opinion is not conclusive, inasmuch as questions of intent and evidential nuances regarding the statute cannot be definitively addressed absent a particular factual record.

[3] We are advised that Paul P. Partyka serves as Mayor and that Robert S. Miller, Michael S. Blake, Edward Martinez, Jr., Cindy Gennell, and David W. McLeod serve as members of the City Commission.

[4] At the time CEO 75-45 was rendered, the relevant provision of law was codified at Section 112.313(4), Florida Statutes (Supp. 1974), and read as follows:

> No public officer or employee of an agency shall corruptly use, or attempt to use, his official position, or perform his official duties, to secure special privileges, benefits, or exemptions for himself or others.

See also Chapter 74-177, Laws of Florida.

[5] Presumably generated using public (Legislative) funds.

[6] Our dismissal of the Buckley matter was based on the complaint's not containing sufficient factual allegations to indicate corruption or wrongful intent (was based on inadequate pleading). The Buckley matter cited with apparent approval our decisions in Complaint No. 89-45, In re John Curlee (State trooper appearing in uniform in a campaign advertisement for a State Senate candidate) and Complaint No. 90-71, In re Ilene Lieberman (mayor endorsing several candidates for the town council on letterhead that appeared to be similar to that of the town's but was not paid for with public funds), in which we determined that Section 112.313(6) was not violated.

[7] See Gordon v. State Com'n on Ethics, 609 So. 2d 125 (Fla. 4th DCA 1992).

[8] CEO 99-8 cites two Commission complaint matters which are factually similar to and which support the conclusion and reasoning of CEO 99-8, via findings of no probable cause. The matters are In re George Keller, Commission Complaint No. 97-169, and In re Thomas R. Mariani, Commission Complaint No. 96-238.

[9] Provided that use of the cards is not (expressly or impliedly) coupled with any intimidation, threat, coercion, quid-pro-quo solicitation, or similar communication relevant to the official's public position as discussed in CEO 91-38, and provided that use of the cards is not in contravention of any applicable rule, regulation, policy, or other standard prohibiting such use (see CEO 99-8). However, if the City's or the State's seal is on the cards (as is represented to be the situation regarding the City's seal), Sections 165.043 and 15.03, Florida Statutes, respectively, may constitute such a rule, regulation, policy, or standard. The statutes provide:

> The governing body of a county or municipality may, by ordinance, designate an official county or municipal seal. The manufacture, use, display, or other employment of any facsimile or reproduction of the county or municipal seal, except by county or municipal officials or employees in the performance of their official duties, without the express approval of the governing body is a second degree misdemeanor, punishable as provided in s.775.082 or s.775.083. [Section 165.043, Florida Statutes.]

> (1) The great seal of the state shall be the size of the American silver dollar, having in the center thereof a view of the sun's rays over a highland in the distance, a sabal palmetto palm tree, a steamboat on water, and an Indian female scattering flowers in the foreground, encircled by the words 'Great Seal of the State of Florida: In God We Trust.'
>
> (2)(a) The Department of State shall be the custodian of the great seal of the state.
>
> (b) The great seal of this state shall also be the seal of the Department of State . . . .
>
> (3) . . . . Any facsimile or reproduction of the great seal shall be manufactured, used, displayed, or otherwise employed by anyone only upon the approval of the Department of State. The Department of State may grant a certificate of approval upon application to it by any

person showing good cause for the use of the seal for a proper purpose. The Department of State may adopt reasonable rules for the manufacture or use of the great seal or any facsimile or reproduction thereof. Any person violating the provisions of this subsection is guilty of a misdemeanor of the second degree, punishable as provided in s.775.082 or s.775.083. [Section 15.03, Florida Statutes.]

[10] After transmittal of our staff's draft of this opinion, you submitted three additional questions (unnumbered and written by one of the officials who is the subject of this opinion) which essentially inquire as to whether the statute would prohibit a City official's providing (either by hand or through private mail) City business cards in conjunction with the official's private business endeavors or not in conjunction with City purposes. Consistent with our answer to your initial inquiry, we find that an official's provision of City business cards as described in the most recent questions would create a prohibited conflict under Section 112.313(6). The additional questions follow verbatim:

> If during or after a business discussion a request is made by a person from the elected official for a city business card for informational/assistance purposes, is there a conflict using the elected official's personal business mail?
>
> If the person asks to have a city business card sent with the personal business card and other business material using the elected official's personal business mail, is there a conflict?
>
> If there is no cold call, but is sent out so that the receiving person, who is known by the elected official and the receiving person knows the elected official, can have the information on the card for the receiving person's file and using the elected official's personal business mail, is that a conflict?

CEO 91-38 -- July 19, 1991

CONFLICT OF INTEREST

CITY COUNCIL MEMBER USING STATIONERY SIMILAR TO OFFICIAL CITY STATIONERY AND NOT PURCHASED WITH PUBLIC FUNDS FOR PURPOSES NOT DIRECTLY RELATED TO CITY BUSINESS

To: (Name withheld at the person's request.)

SUMMARY:

No prohibited conflict of interest is created automatically by a city council member's use of stationery similar to the city's official stationery for campaign, fund-raising, and personal purposes, when the stationery is not paid for with city funds. However, the use of such stationery in a particular context may constitute a corrupt misuse of official position in violation of Section 112.313(6), Florida Statutes, to the same extent as the use of plain stationery in a letter that refers to the council member's public position.

QUESTION:

Does the Code of Ethics for Public Officers and Employees prohibit a city council member from using privately purchased stationery bearing a reproduction of the image of the city's seal, the title of the Council member, the name of the city, the city hall address and telephone number, and a statement that the stationery was not paid for with city funds, for purposes not directly related to city business?

Your question is answered in the negative.

In your letter of inquiry, telephone conversation with our staff, and further written materials transmitted to our staff, you advise that . . . . , a member of the City Council of the City of Lauderhill, inquires whether the Code of Ethics prohibits her from using stationery bearing a reproduction of the seal of the City, her title, her name, the name of the City, the address and telephone number of City hall, and a statement that the stationery was not paid for with City funds, for campaign purposes, fund-raising purposes, and personal letters. You further advise that the stationery would not be paid for with public funds.

Section 7.03 of the City's charter provides:

> The city clerk shall act as the clerk of the council and shall perform such other duties as may be prescribed by the mayor. As clerk, s/he shall have custody of the public records of the city, shall be official custodian of the seal of the city and shall affix the said seal to all instruments requiring same.

It is the position of your office that this provision of the City Charter prohibits the use of the actual impression seal of the City by anyone except the City Clerk, but that the Charter does not in any way prohibit the use of the seal by elected officials for other purposes, such as the reproduction of the image of the seal on stationery utilized by the elected officials. The stationery in question would have the image of the seal reproduced on it and would not bear the impression seal.

Section 112.313(6), Florida Statutes, is the provision of the Code of Ethics applicable to your inquiry. It provides:

> MISUSE OF PUBLIC POSITION.--No public officer or employee of an agency shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit, or exemption for himself or others. This section shall not be construed to conflict with s. 104.31.

For purposes of this provision, the term "corruptly" is defined as follows:

> 'Corruptly' means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his public duties. [Section 112.312(7), Florida Statutes.]

This provision prohibits the Council member from corruptly using property or resources within her trust to secure for herself or others a special privilege, benefit, or exemption.

Arguably, use of the City seal, one's official title, and the name of the City even on stationery not paid for by City funds constitutes a use of public position that may be violative of Section 112.313(6), when such use has no public purpose. However, a situation virtually identical to the facts you present recently came before this body in the context of a complaint, In re ILENE LEIBERMAN, Complaint No. 90-71. In that matter, the Mayor of the City of Lauderhill used stationery the same as that proposed for use by the Council member, with the title and personal name being the only differences, for writing City electors and recommending to them particular candidates in a City Council election. There, we found that probable cause did not exist to believe that the Mayor had corruptly misused her official position. Previously, we found in In re John Curlee, Complaint No. 89-45, that a highway patrolman's wearing of his uniform while appearing in a television commercial for a Florida Senate candidate did not violate Section 112.313(6). The argument put forth by the highway patrolman was that his uniform was part of his persona and that its use was protected as constitutional free expression. It therefore seems equally true, under the facts before us, that the Council member's use of such stationery, provided it is not paid for with City funds, is not automatically prohibited by the Code of Ethics.

We are of the opinion that whether a corrupt misuse of official position has occurred in a given situation depends on how and for what purpose the stationery will be used, rather than upon the fact of its use. In terms of whether the Council member's letter would be a corrupt misuse of position, we see no difference between her using the proposed stationery and her using plain stationery for a letter in which she refers to herself as a Council member. Either

way, the recipient of the letter is informed of the Council member's public position. This may be appropriate, as in the political contexts noted above, or it may be inappropriate, for example, if the letter were being sent to settle a strictly private dispute with a debtor or creditor.

While we do not possess the authority to make a final interpretation or adjudication of the meaning of the provision of the City Charter quoted above, there does seem to us to be a distinction between use of the City's official impression seal on stationery or documents when such use is not for a public purpose and use of the image of the seal in printed form on stationery not paid for by public funds. Use of the impression seal for other than public purposes would inhibit its availability for use for public purposes and could constitute or lead to fraudulent authentication of documents as official records or true and correct copies of public records.

Further, the Legislature has recently enacted Chapter 91-59, Laws of Florida, which provides:

> Section 1. The governing body of a county or municipality may, by ordinance, designate an official county or municipal seal. The manufacture, use, display, or other employment of any facsimile or reproduction of the county or municipal seal, except by county or municipal officials or employees in the performance of their official duties, without the express approval of the governing body is a second-degree misdemeanor, punishable as provided in section 775.082 or section 775.083, Florida Statutes.
>
> Section 2. This act shall take effect upon becoming a law.

If the City Council of Lauderhill designates an official municipal seal pursuant to this law, you should request another opinion from us, as this law would appear to limit your use of a reproduction of the City seal on stationery not used for official business.

Accordingly, we find that use of stationery not purchased with public funds and bearing a reproduction of the city's seal, the title of the council member, the name of the city, the city hall address and telephone number, and a statement that the stationery was not paid for with city funds, for purposes not directly related to city business, is not prohibited by the Code of Ethics for Public Officers and Employees.

CEO 90-15 -- March 8, 1990

CONFLICT OF INTEREST

CITY COMMISSIONER EMPLOYED AS NEWSPAPER REPORTER

To: Mr. Richard J. Taylor, City Attorney, City of Sarasota

SUMMARY:

A city commissioner is not prohibited from being employed by a newspaper to write newspaper articles which concern the activities and business of the city commission. In doing so, he must avoid using information not available to the general public gained because of his public position. He would be prohibited by Section 112.3143(3), Florida Statutes, from voting on matters which would inure to the special private gain of his employer, the newspaper.

QUESTION 1:

Would a prohibited conflict of interest be created were a city commissioner to be employed as a newspaper reporter to write articles which concern the business and activities of the city commission?

Your question is answered in the negative.

In your letter of inquiry you advise that John G. "Jack" Gurney serves as a member of the Sarasota City Commission and has been offered a position as a reporter with a local newspaper, having previously been employed as a reporter and in other positions with local newspapers. Should he accept this offer, he would write a column on activities which relate to City government. The articles would be of an informative rather than investigative nature and would not be written by him in his official capacity.

In regard to your question Section 112.313(7)(a), Florida Statutes, states:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.--No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he is an officer or employee . . . ; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his private interests and the performance of his public duties or that would impede the full and faithful discharge of his public duties.

You have not provided us with any information which would indicate that the local newspaper is doing business with the City. We note that the purchase or sale for legal

advertising would be exempted from the prohibition of Section 112.313(7)(a). See Section 112.313(12)(c), Florida Statutes, and CEO 82-68. Nor are we aware of any circumstances which would indicate that the newspaper is subject to the regulation of the City.

In regard to the prohibition of a continuing conflict, presumably from time to time the newspaper which would employ the Commissioner may take and express editorial positions on City government issues. It perhaps could be argued that the Commissioner could feel compelled to use his public office to support a position endorsed by the paper. In CEO 89-29, however, we found that the fact that a chamber of commerce would regularly express opinions about what city government should do did not prohibit a city commissioner from being employed by the chamber. Similarly, in this instance, we do not believe that the likelihood of the newspaper's publishing positions on City government issues is sufficient to create a frequently recurring conflict with the Commissioner's ability to remain impartial in forming positions on City issues.

There also may be the perception that the Commissioner was offered the position because of his public position. In regard to this perception, Section 112.313(2) and Section 112.313(4), Florida Statutes, state:

> SOLICITATION OR ACCEPTANCE OF GIFTS.--No public officer, employee of an agency, or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action, or judgment of the public officer, employee, or candidate would be influenced thereby.
>
> UNAUTHORIZED COMPENSATION.--No public officer or employee of an agency or his spouse or minor child shall, at any time, accept any compensation, payment, or thing of value when such public officer or employee knows, or, with the exercise of reasonable care, should know, that it was given to influence a vote or other action in which the officer or employee was expected to participate in his official capacity.

These provisions would prohibit a public official from accepting something of value when there is an understanding, or the public officer knows, that it was given to influence his official action. Here, however, you have not given us any indication that such an understanding or such knowledge exists. In addition, it does not appear that a newspaper is a type of business activity which regularly would be affected by the decisions of city government. Therefore, you have not provided us with information which would indicate that Section 112.313(2) or Section 112.313(4), Florida Statutes, would be violated if the Commissioner were to accept the position with the newspaper.

Section 112.313(6), Florida Statutes, states:

> MISUSE OF PUBLIC POSITION.--No public officer or employee of an agency shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special

> privilege, benefit, or exemption for himself or others. This section shall not be construed to conflict with s. 104.31.

As few people would be in a better position to know the business of the Commission than a Commissioner, it may be that the Commissioner is being offered this job with the newspaper because of his public position. It could be argued that the Commissioner is using his public position to obtain a job. In our view, however, there would be no "corrupt" intent on the part of the Commissioner, absent some understanding that his objectivity as a Commissioner would be compromised to benefit the newspaper. Here, the circumstances do not indicate that any such understanding exists. Therefore, the fact that he may have been offered employment as a newspaper writer because he is a City Commissioner, without more, does not appear to violate Section 112.313(6), Florida Statutes.

Use of the newspaper column to promote the Commissioner's stand on a political issue, to criticize the stance of a political opponent, or to promote his record of service in public office could achieve political benefits for him. Nevertheless, it does not appear that such a practice would violate Section 112.313(6), Florida Statutes. In our view, his actions in writing the column would be taken in his private capacity rather than in his public capacity. Although most reading the article will recognize his name and know that he is a City Commissioner, this factor of name recognition alone is not sufficient to constitute a use of public office. To find otherwise would prohibit a public official from engaging in almost any private business. Therefore, as long as the column does not involve any use of public resources, it does not appear that Section 112.313(6), Florida Statutes, would apply. He may wish, however, to avoid using this as a vehicle to promote himself politically in order to avoid even the appearance of impropriety.

In addition, Section 112.313(8), Florida Statutes, provides:

> DISCLOSURE OR USE OF CERTAIN INFORMATION.--No public officer or employee of an agency shall disclose or use information not available to members of the general public and gained by reason of his official position for his personal gain or benefit or for the personal gain or benefit of any other person or business entity.

Use by the Commissioner of his official position to gain information unavailable to the general public in order to benefit himself or the newspaper could violate this Section, in addition to possibly violating Section 112.313(6). In CEO 88-38, we opined that a city mayor did not violate these sections in writing articles for a community newsletter on a voluntary basis when all information contained in the articles was from public records. See also CEO 88-21 and CEO 83-13. Similarly, here, all information in any article the Commissioner writes should be available to the general public in order to avoid violating either of these provisions.

Generally, information derived from public records or public meetings is available to the public, and therefore, the Commissioner would be free to use this information in his column. Presumably, most of the information with which he deals would be of this type. Obviously, he could not use information which is exempted or not subject to the public records law in an article. Similarly, conversations with City staff consisting of information which is public record and which would be discussed or explained with any member of the public could be used as the basis of a column. When the conversations concern information which is

exempted from or not subject to the Sunshine Law or public records law, then the content of such conversations cannot be used in a column.

In addition, we would caution the Commissioner to avoid use of City personnel or supplies in connection with his newspaper work.

Accordingly, under the described circumstances we find that no prohibited conflict of interest would be created were the subject Commissioner to be employed to write a column in a local newspaper in his private capacity.

QUESTION 2:

If the City Commissioner were an employee of a local newspaper, under what circumstances would Section 112.3143(3), Florida Statutes, require him to abstain from voting on a measure?

Section 112.3143(3), Florida Statutes, states:

> No county, municipal, or other local public officer shall vote in his official capacity upon any measure which inures to his special private gain or shall knowingly vote in his official capacity upon any measure which inures to the special gain of any principal, other than an agency as defined in s. 112.312(2), by whom he is retained. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of his interest in the matter from which he is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. However, a commissioner of a community redevelopment agency created or designated pursuant to s. 163.356 or s. 163.357 or an officer of an independent special tax district elected on a one-acre, one-vote basis is not prohibited from voting.

This section would require the Commissioner to abstain from voting and to file a memorandum of voting conflict in matters which inure to his special private gain or the special gain of his employer, the newspaper. In regard to a measure on which the newspaper has expressed a public position, the Commissioner would not be prohibited from voting on the measure unless the newspaper would somehow benefit from the vote. See CEO 83-14 and 78-72. Examples of "special private gain" to the newspaper would include such measures as the rezoning of property owned by the newspaper and sales by the newspaper to the City. As it is preferable to address such measures specifically rather than generally, we suggest that if such a measure is brought before the City Commission, the Commissioner should seek a further opinion or contact our staff for guidance.

Accordingly, we find that the subject City Commissioner would be required to abstain and file a memorandum of voting conflict in regard to matters which inure either to his special private gain or to the special gain of his employer, the newspaper.

CEO 81-47 -- July 16, 1981

CONFLICT OF INTEREST

DIRECTOR OF MUNICIPAL POWER PLANT OWNER OF CORPORATION OWNING MOTEL AT WHICH POWER PLANT MECHANIC RESIDES

To: Mr. Thomas H. Barry, City Attorney, City of Homestead

SUMMARY:

Section 112.313(7)(a), Florida Statutes, would prohibit a director of a municipal power plant from having a contractual relationship with a mechanic who has been hired by the director to perform repair work at the power plant. However, under the circumstances presented, the director owns one half of a corporation which owns a motel at which the mechanic resided while working at the power plant. Therefore, although the corporation had a contractual relationship with the mechanic, the director, personally, did not. Similarly, in CEO 79-1, it was found that Section 112.313(7)(a) would not prohibit a county commissioner from being a principal in a corporation which sold tires to businesses granted a franchise by the county commission. Section 112.313(6), Florida Statutes, prohibiting the solicitation or acceptance of certain gifts, would not have been violated if the director did not solicit the business of the mechanic for the motel, make his occupancy a condition of his employment, or use or attempt to use his official position in any other manner.

QUESTION:

Did a prohibited conflict of interest exist where the director of a municipal power plant hired three mechanics as independent contractors to perform repair work at the power plant and where two of the mechanics resided at a motel owned by a corporation of which the director was a fifty-percent owner?

Through your letter of inquiry we are advised that Mr. H. C. Peters, the Director of the City of Homestead Power Plant, hired three mechanics as independent contractors to perform repair work on generators at the power plant. These individuals were paid at an hourly rate; in addition they received payment for their travel expenses and a per diem amount for room and board. During the time these individuals worked for the City, two of them resided at a motel owned by a corporation of which the subject Director was a fifty- percent owner.

The Code of Ethics for Public Officers and Employees provides in part:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP. -- No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he is an officer or employee . . . ; nor shall

> an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his private interests and the performance of his public duties or that would impede the full and faithful discharge of his public duties. [Section 112.313(7)(a), Florida Statutes (1979).]

This provision prohibits a public employee from having a contractual relationship with a business entity which is doing business with his agency. Thus, the subject Director would be prohibited from having a contractual relationship with any of the mechanics who were performing repair work at the power plant.

However, under the circumstances you have presented, it was the Director's corporation and not the Director, personally, which had a contractual relationship with the mechanics. Similarly, in CEO 79-1, a copy of which is enclosed, we advised that Section 112.313(7)(a), Florida Statutes, did not prohibit a county commissioner from being a principal in a corporation which sold tires to businesses granted a franchise by the county commission. As in CEO 79-1, we feel obligated to point out that Section 112.313(7)(a) would prohibit the subject Director from personally contracting with the mechanics to provide lodging. Since this lodging was provided by the corporation, no prohibited conflict of interest was created, although the situation clearly resulted in the appearance of such a conflict of interest.

Section 112.313(7) also prohibits a public employee from having any contractual relationship that will create a continuing or frequently recurring conflict between his private interests and the performance of his public duties or that would impede the full and faithful discharge of his public duties. However, you have presented no facts from which we could conclude that the subject Director's ownership interest in the corporation which owns the motel would present a frequently recurring conflict of interest or would impede the full and faithful discharge of his duties.

The Code of Ethics also provides:

> MISUSE OF PUBLIC POSITION. -- No public officer or employee of an agency shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit, or exemption for himself or others. This section shall not be construed to conflict with s. 104.31. [Section 112.313(6), Florida Statutes (1979).]

The term "corruptly" is defined to mean

> done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his public duties. [Section 112.312(7), Florida Statutes (1979).]

As we have observed in previous opinions CEO 77-129 and CEO 81-44, this statute requires a determination of intent which is extremely difficult to make while rendering an advisory opinion, since intent generally is determined from an examination of all relevant

circumstances. We are able to do this on the basis of evidence presented through investigation and hearing when a complaint has been filed, but in rendering an advisory opinion we are handicapped by a lack of access to information concerning all the circumstances of the situation as well as information concerning the credibility of the individuals involved. Therefore, we prefer not to make a final determination as to whether the subject Director has or has not violated this prohibition.

However, we note that your letter of inquiry indicates that there is absolutely no proof that the subject Director solicited the business of the mechanics for the motel or made their occupancy a condition of their employment. If this is true, and if the subject Director did not use or attempt to use his official position in any other manner, Section 112.313(6) would not apply.

Similarly, if your representation accurately characterizes the situation, the subject Director apparently would not have violated Section 112.313(2)(b), Florida Statutes, which provides:

> SOLICITATION OR ACCEPTANCE OF GIFTS. -- No public officer or employee of an agency or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service:
>
> That is based upon any understanding that the vote, official action, or judgment of the public officer, employee, or candidate would be influenced thereby.

Accordingly, although we have been unable to provide a final answer to the question you have posed, we hope that our observations have been of some assistance to you.

CEO 79-72 -- November 16, 1979

CONFLICT OF INTEREST

CITY COMMISSIONER CAMPAIGNING FOR CANDIDATE FOR CITY COMMISSION OR MAYOR

To: Jerry L. Bowen, City Commissioner, Callaway

Prepared by: Phil Claypool

SUMMARY:

The Code of Ethics for Public Officers and Employees contains no provision which would prohibit a public officer from campaigning for another person who is seeking a seat on his board or commission. However, an officer's conduct in this respect, as in all respects, should be governed by s. 112.313(6), F. S., prohibiting the misuse of public position for private gain.

QUESTION:

Would a prohibited conflict of interest be created were I, a city commissioner, to campaign for an individual seeking a seat on the city commission or the office of mayor?

Your question is answered in the negative.

In your letter of inquiry you advise that you are a member of the City Commission of the City of Callaway. You also advise that you wish to actively campaign for an individual who may be seeking a seat on the city commission or who may be seeking the mayor/commissioner seat.

The Code of Ethics for Public Officers and Employees contains no provision which would prohibit a public officer from campaigning for another person who is seeking a seat on his board or commission. However, just as in all of your actions as a city commissioner, your conduct in this respect should be governed by the following provision of the Code of Ethics:

> MISUSE OF PUBLIC POSITION. -- No public officer or employee of an agency shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit, or exemption for himself or others. This section shall not be construed to conflict with s. 104.31. [Section 112.313(6), F. S.]

Accordingly, so long as you do not use or attempt to use your official position, or any property or resource within your trust, or perform your official duties in order to assist a candidate for the city commission, the Code of Ethics would not prohibit your active

campaigning for an individual seeking a seat on the city commission or the office of mayor/commissioner.