



Agenda

May 2, 2013

Governmental Center,
301 North Olive Avenue, 6th Floor
Commissioners Chambers

Meeting will begin at 1:30 pm Executive Session from 2:30pm to 4:15pm Regular Agenda will resume at 4:30pm

Palm Beach County

Commission on Ethics

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Commissioners

Manuel Farach, Chair

Robin N. Fiore, Vice Chair

Ronald E. Harbison

Daniel T. Galo

Patricia L. Archer

Executive Director

Steven P. Cullen

Intake Manager

Gina A. Levesque

Staff Counsel

Megan C. Rogers

Senior Investigator

Mark E. Bannon

Investigator

James A. Poag

- I. Call to Order
- II. Roll Call
- III. Introductory Remarks
- IV. Status Re: OPPAGA Review
- V. Approval of Minutes from April 4, 2013
- VI. Drafting Committee Update
- VII. Status Re: to C12-013
- VIII. Processed Advisory Opinions (Consent Agenda)
 - a. RQO 13-007
- IX. Items Pulled from Consent Agenda
 - a.
- X. Proposed Advisory Opinions
 - a. RQO 13-006
 - b. RQO 13-008
- XI. Executive Sessions
 - a. C13-008
 - b. C13-007
 - c. C13-001
 - d. C13-002
- XII. Executive Director Comments
- XIII. Commission Comments
- XIV. Public Comments
- XV. Adjournment

**OFFICIAL MEETING MINUTES
OF THE
PALM BEACH COUNTY COMMISSION ON ETHICS
PALM BEACH COUNTY, FLORIDA**

APRIL 4, 2013

**THURSDAY
1:30 P.M.**

**COMMISSION CHAMBERS
GOVERNMENTAL CENTER**

I. CALL TO ORDER

II. ROLL CALL

MEMBERS:

Manuel Farach, Esq., Chair
Robin N. Fiore, Ph.D., Vice Chair - Absent
Patricia L. Archer - Absent
Daniel T. Galo, Esq.
Ronald E. Harbison, CPA

STAFF:

Mark E. Bannon, Commission on Ethics (COE) Interim Staff Counsel
Gina A. Levesque, COE Intake Manager
James A. Poag, COE Investigator
Megan C. Rogers, COE Interim Executive Director

ADMINISTRATIVE STAFF:

Amanda Canete, Minutes Clerk, Clerk & Comptroller's Office

III. INTRODUCTORY REMARKS

Megan Rogers, Interim Commission on Ethics (COE) Executive Director, stated that a quorum was present.

Commissioner Manuel Farach said that electronic devices should be turned off or silenced, and that those wishing to speak should complete and submit a comment card containing the agenda item.

IV. INTRODUCTION OF NEW EXECUTIVE DIRECTOR, STEVEN CULLEN

(CLERK'S NOTE: Ms. Rogers read a letter from the COE Executive Director Cullen.)

V. APPROVAL OF MINUTES FROM MARCH 7, 2013, MEETING

MOTION to approve the March 7, 2013, minutes. Motion by Daniel Galo, seconded by Ronald Harbison, and carried 3-0. Patricia Archer and Robin Fiore absent.

VI. DRAFTING COMMITTEE UPDATE

Ms. Rogers said that:

- On February 5, 2013, the Board of County Commissioners (BCC) voted to reconvene the Palm Beach County Ethics Ordinance Drafting Committee (ODC) to discuss adding more members to the COE, and to consider term limits for existing COE members.
- The first ODC meeting would be on April 10, 2013.
- The ODC consisted of two BCC appointees, two Palm Beach County League of Cities (League of cities) appointees, a League of Cities' attorney, a County attorney, and the COE Executive Director.
- Staff's concern and position was that the appointing entities may struggle to find applicants interested in serving on the COE due to the time commitment required. Staff was seeking the COE's guidance regarding the issue.

Commissioner Ronald Harbison said that the matter regarding diversity should be directed to the entities that appoint the COE members. He said that he agreed with staff's appraisal and felt that additional members tended to make other members feel less responsible for attending meetings.

Commissioner Daniel Galo said that he did not oppose having additional COE members; however, finding qualified people was most important.

Commissioner Harbison said that term limits were acceptable; however, he was concerned about tampering with the COE's delicate structure.

VI. – CONTINUED

Commissioner Farach said that he favored term limits, and that tinkering with the COE's ordinance was dangerous.

Commissioner Harbison said that diversity existed among the five commissioners regarding how issues were studied and analyzed.

Commissioner Galo said that he would defer to the ODC to interpret diversity. He said that a perception existed that maybe the COE did not reflect a diverse personality and interest in the community, and that the ODC should evaluate the matter.

MOTION to approve staff's recommendation to the Palm Beach County Ethics Ordinance Drafting Committee. Motion by Ronald Harbison, and seconded by Manuel Farach.

Ms. Rogers said that staff has no objection to term limits.

Commissioner Galo requested separating the issues into two votes.

MOTION to approve staff's recommendation to the Palm Beach County Ethics Ordinance Drafting Committee that term limits be imposed on the Commission on Ethics. Motion by Ronald Harbison, seconded by Daniel Galo, and carried 3-0. Patricia Archer and Robin Fiore absent.

Commissioner Galo said that although he was not endorsing the increase of the COE, the ODC should evaluate the matter.

MOTION to approve staff's recommendation to the Palm Beach County Ethics Ordinance Drafting Committee on expansion of the number of members of the Ethics commission. Motion by Ronald Harbison, and seconded by Manuel Farach.

(CLERK'S NOTE: Commissioner Farach said that he seconded the motion for staff direction purposes.)

UPON CALL FOR A VOTE, the motion FAILED 2-1. Manuel Farach and Daniel Galo opposed. Patricia Archer and Robin Fiore absent.

Commissioner Farach suggested that Ms. Rogers discuss the matter with the absent commissioners and obtain their points of views.

VII. STAFF UPDATE C12-013

Ms. Rogers said that the C12-013 was initially set for final hearing on March 21, 2013. She said that the final hearing was rescheduled at the request of the advocate and Respondent's counsel for May 2, 2013.

VIII. STATUS RE: Office of Program Policy Analysis and Government Accountability (OPPAGA) REVIEW

Ms. Rogers said that:

- On March 26, 2013, staff had received a notice informing them of a review by the Office of Program Policy Analysis and Government Accountability (OPPAGA) at the direction of legislature.
- Staff, County Internal Auditor Joseph Bergeron, and Inspector General Sheryl Steckler spoke with an OPPAGA review team on April 2, 2013.
- The OPPAGA staff would review the COE's operating procedures, budget information, and the mechanisms for ensuring compliance with those existing procedures.
- The OPPAGA would prepare a high-level description of the ethics initiative and would speak with numerous community stakeholders, including the COE commissioners, respondents, and complainants that have come before the COE, the complaint process, the COE's pro bono advocate team, former COE commissioners, the former COE Executive Director, the State Attorney's Office, and the Office of the Inspector General.
- The OPPAGA staff would likely begin their initial trip to the County before the end of April.
- Once the process was complete, the OPPAGA staff would either construct a written product for publication or prepare an oral presentation for legislative leadership.
- The COE staff welcomed the review and looked forward to participating in the process.

VIII. – CONTINUED

Commissioner Farach said that:

- He did not know how the COE could be more transparent, and that anyone could request any information by contacting Ms. Rogers.
- He was concerned that the OPPAGA would not disclose who requested the review.
- The COE and its ethics initiative have been commended by the National Association of Counties. The COE has been frugal with the County's dollars and has given over 250 advisory opinions in three years.

Commissioner Galo said that the COE should be more transparent when evaluating allegations. He said that perhaps the OPPAGA was reviewing the COE's protocols.

Commissioner Farach said that the ordinance included that executive sessions had to be done in the "shade" of the Florida Sunshine Law.

Commissioner Harbison said that:

- The State COE followed the same protocol regarding executive sessions.
- Probable cause hearings were done in executive session to protect the respondent from being wrongfully excoriated.
- It was not appropriate for the public to comment during the commissioners' deliberations.

Commissioner Farach said that three final hearings were scheduled; two were settling, and the last was waiting for a resolution.

Commissioner Harbison said that final hearings were an uncommon occurrence.

Commissioner Galo said that many decisions to ultimately resolve cases were invisible to the public, and that may have raised concern.

Commissioner Harbison said that the public could listen to executive sessions on tape.

VIII. – CONTINUED

Commissioner Farach said the COE had always been transparent, and that it was his suggestion to employ pro bono advocates to prosecute cases.

Commissioner Harbison said that no precedence was there for the OPPAGA's review. He commented that an employee from Senator Abruzzo's office had applied for the COE Executive Director's position. He said that the candidate was not selected, and a week later, Senator Abruzzo requested a COE review.

Ms. Rogers said that staff had begun the process of implementing a system that would make available to the public, the COE Executive Director's e-mails that were not subject to the "shade" of the Code of Ethics.

Commissioner Farach questioned whether subpoenas were necessary to request COE information. Ms. Rogers answered that they were not, and that the public could ask any staff member for information.

IX. PROPOSED ADVISORY OPINIONS

IX.a. Request for Opinion (RQO) 13-005

Ms. Rogers said that:

- A town councilman asked whether he was prohibited from participating in a workshop to discuss the creation of a fiber network by the Town of Jupiter (Jupiter).
- Staff had submitted the following:
 - Jupiter currently had a contract with ATT for fiber services.
 - ATT was not interested in maintaining its Jupiter relationship and encouraged the town council to consider creating an independent fiber utility to connect the town's facilities to reduce ATT dependence.
 - At an coming workshop, town staff would present a plan to expand existing fiber services to local businesses.
 - The councilman was employed with Florida Power and Light (FPL), a wholly-owned subsidiary of NextEra Energy (NextEra). NextEra also owned FPL FiberNet (FiberNet).

IX.a. – CONTINUED

- The FPL and FiberNet were separate companies that did not share a board of directors, an address, or employees, or provide similar services.
- The councilman was compensated by FPL and not by FiberNet or NextEra. FiberNet would not be considered the councilman's outside employer based on the County's Code of Ethics.
- The councilmember was not prohibited from voting or participating in the workshop.

MOTION to approve proposed advisory opinion letter RQO 13-005. Motion by Ronald Harbison, and seconded by Daniel Galo.

Commissioner Farach said that the COE had previously said that if two separate entities were involved, they would be considered as the same entity.

Ms. Rogers said that:

- In previous cases, ownership was shared.
- This situation was different since the entities were completely separate.
- There was umbrella ownership; however, there was a separation of identities.

Commissioner Farach said that in this case, legal or factual basis was not sufficient to disregard the corporate entity.

Ms. Rogers said that staff did not see a conflict; she added that if he was employed by NextEra, there may be a conflict since a financial benefit between the various entities would exist.

UPON CALL FOR A VOTE, the motion carried 3-0. Patricia Archer and Robin Fiore absent.

RECESS

At 2:30 p.m., the chair declared the meeting recessed for an executive session.

RECONVENE

At 5:05 p.m., the meeting reconvened with Commissioners Farach, Galo, and Harbison present.

X. EXECUTIVE SESSIONS

X.a. C13-009

Commissioner Harbison read the public report and final order of dismissal as follows:

Complainant, Barbara Ready, filed a complaint on March 1, 2013, alleging a possible ethics violation involving Respondent, Jerry Taylor, who was a Boynton Beach City Commissioner at that time.

The Complaint alleges Respondent misused his public office or position by using his former title "Mayor" in campaign literature as a candidate for Mayor of the City of Boynton Beach.

On March 27, 2013, after reviewing the Complaint, supporting affidavit, and Memorandum of Inquiry, the Complaint was determined by staff to be legally insufficient, and presented to the Commission on Ethics on April 4, 2013, with a recommendation of dismissal as legally insufficient.

The Commission on Ethics reviewed the Complaint and Memorandum of Inquiry and determined that there is no allegation by Complainant, or information known or uncovered by staff inquiry to indicate that Respondent acted in his official position in violation of the Code of Ethics.

Therefore, the Commission has determined that the actions taken by the Respondent, Jerry Taylor, do not constitute a violation of the Code of Ethics and dismissed the Complaint on April 4, 2013, due to no legal sufficiency.

X.a. – CONTINUED

Therefore, it is:

Ordered and adjudged that the complaint against Respondent, Jerry Taylor, is hereby dismissed.

Done and ordered by the Palm Beach County Commission on Ethics in public session on April 4, 2013. Signed by Manuel Farach, Chair.

X.b. C13-005

Commissioner Harbison read the public report finding no probable cause and final order of dismissal as follows:

Complainant, J. Jerome Taylor, filed the above-referenced Complaint on February 1, 2013, alleging a possible ethics violation involving Respondent, Rodney Roberts, appointed member of the Riviera Beach Housing Authority.

The Complaint alleges that on November 13, 2012, Respondent voted on RBHA Resolution #2012-12 to provide a five hundred (\$500) dollar loan to the Comprehensive AIDS Program of Palm Beach County (CAP), Respondent's outside employer, in violation of Section 2-443(a) Misuse of public office or employment and (c) Disclosure of voting conflicts of the Palm Beach County Code of Ethics (the Code).

Pursuant to Chapter 2, Article V, Division 8, §2-258(a) of the Palm Beach County Code, the Commission on Ethics is empowered to enforce the Palm Beach County Code of Ethics.

The Memorandum of Probable Cause and Memoranda of Inquiry and Investigation, adopted by reference were presented to the Commission on Ethics on April 4, 2013. At that time, the Commission conducted a hearing. The Commission reviewed and considered the Memoranda of Inquiry, Investigation and No Probable Cause, recommendation of staff, as well as an oral statement of the Advocate. At the conclusion of the hearing, the Commission on Ethics found no probable cause exists, and the Complaint was dismissed.

X.b. – CONTINUED

Complainants must keep in mind that §2-260.4 of the Commission on Ethics ordinance authorizes the COE to award costs and fees incurred by the COE or the Respondent if the COE determines that the complaining party filed a frivolous or groundless complaint, or a complaint with malicious intent and with the knowledge that the complaint contains one or more false allegations, or with reckless disregard for whether the complaint contains material false allegations.

Therefore, it is:

Ordered and adjudged that the complaint against Respondent, Rodney Roberts, is hereby dismissed.

Done and ordered by the Palm Beach County Commission on Ethics in public session on April 4, 2013. Signed by Manuel Farach, Chair.

X.c. C13-004

Commissioner Harbison read the public report and finding of probable cause as follows:

Complainant, Bart Novak, filed the above-referenced Complaint on January 30, 2013, alleging a possible violation of the Lobbyist Registration Ordinance involving Respondent, Dean Turney. The Complaint alleges that on December 18, 2012, Respondent, Dean Turney, failed to register as a lobbyist, in violation of Section 2-353.

Pursuant to Chapter 2, Article V, Division 8, Section 2-258(a) of the Palm Beach County Code of Ethics, the Commission on Ethics is empowered to enforce the Lobbyist Registration Ordinance. The ordinance requires that prior to lobbying, all lobbyists shall register with County administration. After obtaining sworn statements from material witnesses and documentary evidence, the Complaint was determined by staff to be legally sufficient on March 22, 2013.

X.c. – CONTINUED

Information obtained during the inquiry was adopted into the investigation and presented to the Commission on Ethics on April 4, 2013, with a recommendation that probable cause exists to believe that a violation of the Lobbyist Registration Ordinance had occurred. At that time, the Commission conducted a Probable Cause hearing. The Commission reviewed and considered the inquiry and investigative reports, documentary submissions, recommendation of staff, as well as oral statements of the Respondent and Advocate. At the conclusion of the hearing, the Commission on Ethics determined that probable cause exists in this matter.

Accordingly, we find that there are reasonably trustworthy facts and circumstances for the Commission on Ethics to believe that the Respondent may have violated Section 2-353 of the Palm Beach County Lobbyist Registration Ordinance.

Therefore, it is:

Ordered and adjudged that probable cause exists and the complaint against Respondent, Dean Turney, will be set for final hearing within 120 days from this date. Said final hearing date will be coordinated between the parties.

Done and ordered by the Palm Beach County Commission on Ethics in public session on April 4, 2013. Signed by Manuel Farach, Chair.

(CLERK'S NOTE: The clerk added the language as printed in the public report and final order of dismissal, the public report finding no probable cause and final order of dismissal, and the public report and finding of probable cause.)

XI. INTERIM EXECUTIVE DIRECTOR COMMENTS

XI.a.

DISCUSSED: Ethics Awareness Month.

Ms. Rogers said that March was Ethics Awareness Month, and that the COE had held Countywide events. She said that the group organization, yourpbc.org, would be holding events throughout the rest of the week.

XI.b.

DISCUSSED: COE and Staff Appreciation.

Ms. Rogers said that she thanked the COE for the opportunity to serve as the Interim Executive Director. She thanked County staff for her training and the experience.

Commissioner Farach said that Ms. Rogers had done an extraordinary job.

XII. COMMISSION COMMENTS

XII.a.

DISCUSSED: New COE Executive Director.

Commissioner Harbison said that he looked forward to meeting and working with the new Executive Director.

XII.b.

DISCUSSED: COE Interim Executive Director Appreciation.

Commissioner Galo thanked Ms. Rogers for doing a great job in the interim position.

XIII. PUBLIC COMMENTS – None

XIV. ADJOURNMENT

MOTION to adjourn. Motion by Daniel Galo, seconded by Ronald Harbison, and carried 3-0. Robin Fiore and Patricia Archer absent.

At 5:16 p.m., the chair declared the meeting adjourned.

APPROVED:

Chair/Vice Chair

VIII Processed Advisory Opinions

RQO 13-007 Mark Burnam

A financial planner asked CFR Financial, LLC (CFR) may continue to provide the same complimentary lunch and financial action strategy plan that is available to any member of the public to county and municipal employees, officials and advisory board members.

Staff submits the following for COE review: CFR is prohibited from offering gifts valued in excess of \$100 annually, in the aggregate, to county or municipal staff, officials, or advisory board members whose governmental entity has a vendor relationship with the company. However, the gift law provides an exception for publicly advertised offers for goods and services from a vendor under the same terms and conditions as made available to the general public. Here, even if CFR is a municipal vendor, the company solicits business and provides a complimentary lunch and financial action strategy plans to any and all pre-retirement individuals working in both the private and public sectors. Accordingly, CFR is not prohibited from providing this service to county or municipal employees, officials or advisory board members so long it is offered on the same terms and conditions offered to the general public.



Palm Beach County Commission on Ethics

Commissioners
Manuel Farach, Chair
Robin N. Fiore, Vice Chair
Ronald E. Harbison
Daniel T. Galo
Patricia L. Archer

Executive Director
Steven P. Cullen

April 16, 2013

Mark Burnam, Financial Advisor
Second Half Team CFR Financial, LLC
1940 NE 55th Court
Ft. Lauderdale, FL 33308

Re: RQO 13-007
Gift Law/Publicly Advertised Offer

Dear Mr. Burnam,

Your request for an advisory opinion to the Palm Beach County Commission on Ethics (COE) has been received and reviewed. The opinion rendered is as follows:

YOU ASKED in an email dated April 12, 2013 whether CFR Financial, LLC (CFR) may continue to provide the same complimentary lunch and financial action strategy plan that is available to any member of the public to county and municipal employees, officials and advisory board members.

IN SUM, CFR is prohibited from offering gifts valued in excess of \$100 annually, in the aggregate, to county or municipal staff, officials, or advisory board members whose governmental entity has a vendor relationship with the company. However, the gift law provides an exception for publicly advertised offers for goods and services from a vendor under the same terms and conditions as made available to the general public. Here, even if CFR is a municipal vendor, you solicit business and provide a complimentary lunch and financial action strategy plans to any and all pre-retirement individuals working in both the private and public sectors. Accordingly, CFR is not prohibited from providing this service to county or municipal employees, officials or advisory board members so long it is offered on the same terms and conditions offered to the general public.

THE FACTS as we understand them are as follows:

You have recently joined CFR Financial, LLC as a financial advisor specializing in retirement planning. Prior to joining CFR, you worked in a similar position with Wells Fargo Financial Planning and sought Commission guidance on whether you could provide planning services to County or Municipal employees whose public employer contracts with Wells Fargo.¹ In an abundance of caution you are requesting an updated advisory opinion.

You work with public and private sector employees around the state. Your organization offers complimentary retirement planning to all members of the public who are "pre-retirees" and CFR subscribes to a database of potential clients who meet this description. Upon contacting the "pre-retiree" individual, you will set up a meeting, usually over coffee or lunches valued at \$20 or less, and provide the potential client with a complimentary financial action strategy plan (financial plan). All potential clients are provided with this plan and it is theirs to keep whether or not they end up working with your firm.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the revised Palm Beach County Code of Ethics:

¹ RQO 12-069

Sec. 2-444. Gift law.

(g) For the purposes of this section, "gift" shall refer to the transfer of anything of economic value, whether in the form of money, service, loan, travel, entertainment, hospitality, item or promise, or in any other form, without adequate and lawful consideration...

(1) Exceptions. The provisions of subsection (g) shall not apply to:

f. Publically advertised offers for goods or services from a vendor under the same terms and conditions as are offered or made available to the general public.

CFR offers complimentary lunch and retirement planning to all members of the public who are "pre-retirees" regardless of whether their current employer does business with the bank. The financial plans you provide to state, county and municipal employees are available to employees of private sector companies as well as any individual member of the public interested in receiving such pre-retirement investment advice. Accordingly, this service is not considered a gift as defined by §2-444(g).² Similarly, the lunch, coffee or other refreshments, valued at approximately \$20, are provided as part of the package and are available to all potential investment clients. Even if the lunch/refreshments were considered as separate and apart from the value available to the general public, the estimated value of the lunch, coffee or other refreshment is significantly less than the \$100 limit provided by the code.

Notwithstanding, county and municipal employee, officials and advisory board members are prohibited from accepting a gift of any value as a *quid pro quo* or in exchange for the past, present or future performance of an official act or a legal duty.³

IN SUMMARY, you are not prohibited from providing complimentary lunch and pre-retirement investment plans to county and municipal employees and officials. The financial plans you provide are offered to private sector employees as well as the general public under the same terms and conditions as provided to public employees, officials and advisory board members whose public entity does business with CFR.

This opinion construes the Palm Beach County Code of Ethics Ordinance, but is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at (561) 233-0724 should you have any further questions in this matter.

Sincerely,


Steven P. Cullen
Executive Director

SPC /mcr/gal

² RQO 12-010 (banking discounts provided to all government employees regardless of whether their public employer is a banking customer of BB&T are not "gifts" as provided by §2-444(g))

³ §2-444 (e). Gift Law

X. Proposed Advisory Opinions

RQO 13-006 Diana Grub Frieser

A municipal attorney asked whether an official who owns a property management company that provides services to a homeowners association (HOA) is prohibited from participating or voting on a matter that may financially benefit a developer who owns over eighty percent of the property within the HOA.

Staff submits the following for COE review: elected officials are prohibited from using their official position, participating or voting on an issue that would give a special financial benefit to themselves, their outside business or a customer or client of their outside business, not shared with similarly situated members of the general public. Based on the facts presented there is no per se prohibited conflict of interest created under the Code of Ethics. However, there is an issue of an appearance of impropriety where there is nexus between a developer whose various entities own in excess of eighty percent of a customer or client of an elected official's outside business and an issue coming before the City Council. For this reason, we recommend that the Official abstain from voting and not participate on this matter.

RQO 13-008 Patricia Wilhelm

A County employee asked whether it is a prohibited conflict of interest if a county employee bids for and is awarded a contract with Palm Beach County.

Staff submits the following for COE review: employees are prohibited from using their official position to give or influence others to give themselves or their outside business a special financial benefit.¹ In addition, this code section prohibits an employee or their outside business from contracting with their public employer.² However, there are several exceptions to the contractual relationship prohibition.³

The code provides an exception for contracts entered into under a process of sealed, competitive bidding, where a county employee's outside business is the lowest bidder, provided that the employee does not participate in the bid specifications or determination of the lowest bidder, has not used their position in any way to influence the award, and has disclosed the nature of their interest in the business submitting the bid. If a county employee fully complies with these requirements, the code does not prohibit the employee or their outside business from contracting with the County.

¹ §2-443(a)(1),(4)

² §2-443(d)

³ §2-443(e)

May 3, 2013

Diana Grub Frieser, City Attorney
City of Boca Raton
201 West Palmetto Park Road
Boca Raton, FL 33432

Re: RQO 13-006
Voting Conflicts

Dear Ms. Grub Frieser,

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion, and rendered its opinion at a public meeting held on May 2, 2013.

YOU ASKED whether an official who owns a property management company that provides services to a condominium association (COA) is prohibited from participating or voting on a matter that may financially benefit a developer whose business entities own over eighty percent of the property within the COA.

IN SUM, elected officials are prohibited from using their official position, participating or voting on an issue that would give a special financial benefit to themselves, their outside business or a customer or client of their outside business, not shared with similarly situated members of the general public. Based on the facts presented there is no per se prohibited conflict of interest created under the Code of Ethics. However, there is an issue of an appearance of impropriety where there is nexus between a developer whose various business entities own over eighty percent of the property within a COA that is a customer or client of elected official's outside business and an issue coming before the City Council. For this reason, we recommend that the Official abstain from voting and not participate on this matter.

THE FACTS as we understand them are as follows:

You are the City Attorney for the City of Boca Raton (the City). An elected official and her husband own a property management company (Management Company) that provides services to a residential community in Broward County (the Property). The overall operation of the Property is the responsibility of a master condominium association (COA), which contracts with the Management Company. The COA is managed by an independent board elected by condo owners. The Property was built in the mid-eighties. The original developer relinquished control of the Association pursuant to F.S. § 718.301(4) sometime in the past. The board of directors is responsible for administration of the Association and is elected by the unit owners of the Property. Several years ago a local Developer (Developer) purchased all but 200 of the 1600 units on the Property. The address of the Management Company is listed as the principal address, mailing address and registered agent address for the Association in its annual report (filed with the Florida Division of Corporations). The annual report provides a mailing address for both the President and Vice-President of the Association as "care of" a business entity in which the Developer has a controlling interest. The Management Company has provided in excess of \$10,000 in service to the COA over the past 24 months.

In addition to the Property, Developer has extensive real property holdings in the City. Developer has a redevelopment project coming before the City Council. The approval or denial of the Project will result in a special financial benefit or loss to Developer.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the revised Palm Beach County Commission on Ethics Ordinance and Code of Ethics, which took effect on June 1, 2011:

Sec. 2-442. Definitions.

Customer or Client means any person or entity to which an official or employee's outside employer business has supplied goods or services during the previous twenty-four (24) months, having, in the aggregate a value greater than ten thousand dollars (\$10,000).

Sec. 2-443. Prohibited conduct.

- (a) **Misuse of public office or employment.** An official or employee shall not use his or her official position or office, or take or fail to take any action, or influence others to take or fail to take any action, in a manner which he or she knows or should know with the exercise of reasonable care will result in a special financial benefit, not shared with similarly situated members of the general public, for any of the following persons or entities:
- (1) Himself or herself;
 - (5) A customer or client of the official or employee's outside employer or business

§2-443(c) Disclosure of voting conflicts. County and municipal officials as applicable shall abstain from voting and not participate in any matter that will result in a special financial benefit as set forth in subsections (a)(1) through (7) above. The official shall publicly disclose the nature of the conflict and when abstaining from the vote, shall complete and file a State of Florida Commission on Ethics Conflict Form 8B pursuant to the requirements of Florida Statutes, §112.3143. Simultaneously with filing Form 8B, the official shall submit a copy of the completed form to the county commission on ethics.

Section 2-443(a) prohibits elected officials from using their official position to take or fail to take any action if they know or should know with the exercise of reasonable care that the action would result in a special financial benefit not shared with similarly situated members of the general public, for certain entities or persons including themselves, their outside business or a customer or client of their outside business. Section 2-443(c) *Disclosure of voting conflicts*, similarly requires an elected official to abstain and not participate in any matter coming before his or her board which would result in a special financial benefit, not shared with similarly situated members of the general public, to a person or entity as described in subsection (a).

The official's outside business has supplied in excess of \$10,000 worth of goods or services to the COA during the previous 24 months. Accordingly, the COA is a customer or client of the elected official's outside business. The secondary question presented to the COE is whether an official is prohibited from voting on a matter that would benefit a developer whose various business entities own over eighty percent of the property within the COA.

The COE has opined that where entities are "effectively interchangeable in terms of identity or purpose" that an official or advisory board member is prohibited from using their official position to give a special benefit to those entities.¹ While the COA has an independent board, based on the percentage of property owned by the Developer there appears to be unity of interest between Developer and the Association. As the majority owner, he has authority to elect members to the COA board and influence policy matters at the COA level, including which property management firm the Association uses. That being said, the code provides a clear and unambiguous definition of the term "customer or client." The Management Company provides services to and contracts with the COA, not the Developer.

While the relationship may not constitute a prohibited conflict under the Code of Ethics, it does create a strong appearance of impropriety.² This is especially true if the official acts are of a discretionary nature.³ Here, there is

¹ C11-027

² 2-441 Title; statement of purpose ("...Officials...shall act and conduct themselves so as not to give occasion for distrust of their impartiality"); Art. V, Division 8, §2-260.9. Advisory opinion ("...to establish a standard of public duty, if any); Section 2.8(f), COE Rules of Procedure ("If deemed appropriate by the COE, additional comment regarding ethics, appearance of impropriety or similar advice to the requesting party based upon the factual scenario as presented.")

³ RQO 11-037 (Building official reviewing work approved by his sibling's company as private resident inspector); RQO 12-027 (Municipal official serving as small business advisor through state assistance program to municipal vendors).

nexus between the Developer and the elected official's outside business based on the percentage of the Property owned by Developer and his various business entities. Because Developer maintains a controlling interest in the COA, arguably to the extent that representatives of his interest on the COA's board of directors could elect to terminate or renew the COA's contract with the official's outside business, and because there is no question that a vote on the Boca project will result in a special financial benefit or loss to Developer, the Commission recommends that the Official abstain and not participate in this matter.

IN SUMMARY, Based on the facts you have submitted, the City Council member is not *per se* prohibited from voting to benefit a developer who has significant property holdings in a COA where the COA is a customer or client of the Council member's outside business. The Management Company provides services to and contracts with the COA, not the Developer. However, based on the ownership interest maintained by the Developer and the special financial benefit or loss to the Developer from the pending Council vote, this relationship creates a strong appearance of impropriety. For this reason, the Commission recommends that the Council member abstain and not participate in discussion of this matter.

This opinion construes the Palm Beach County Code of Ethics Ordinance and is based upon the facts and circumstances that you have submitted. It is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at 561-233-0724 if I can be of any further assistance in this matter.

Sincerely,

Steven P. Cullen
Executive Director

APC/mcr/gal



April 10, 2013

Steven Cullen, Executive Director
Palm Beach County Commission on Ethics
2633 Vista Parkway
West Palm Beach, Florida 33411

Re: Request for Advisory Opinion

Dear Mr. Cullen:

On behalf of a member of the City Council of the City of Boca Raton ("Official"), we request an advisory opinion from the Palm Beach County Commission on Ethics ("COE"). The question relates to an anticipated vote that may be impacted by Section 2-443(a)(5) and Section 2-443(c) of the Palm Beach County Code of Ethics ("Code").

I. Relevant facts and provisions of the Code of Ethics

a. Facts

The Official and her husband own a property management company ("Management Company").¹ The Management Company provides property management services to a residential community in Broward County consisting of approximately sixteen hundred condominium and apartment units ("Property"). The overall operation of the Property is the responsibility of a master condominium association, a Florida nonprofit corporation ("Association"). The Association contracts with the Management Company for property management services; the Management Company has provided a total of approximately \$24,000.00 in property management services to the Association during the past twenty-four months. All but approximately two hundred of the sixteen hundred units on the Property are owned by a developer ("Developer") or by business entities in which the Developer has a controlling interest.² In addition to the Property, the Developer has extensive real property holdings throughout the City of Boca Raton ("City"). The Developer has an anticipated redevelopment project located in the City ("Project"). In order to proceed with the Project, the Developer will require the approval of the City Council. The approval (or denial) of the Project will result in a special financial benefit (or loss) to the Developer. In the past, the Official abstained and did not participate when the Developer sought a different approval from the City Council (due to insufficient time to request an advisory opinion from the COE and in an abundance of caution). The Official now seeks clarification from the COE as to the application of Section 2-443(a)(5) and Section 2-443(c) of the Code.

¹ The Management Company is established as a Florida limited liability company; the Official and her husband are both managing members and receive compensation for services rendered by the Management Company. The Management Company provides property management services to numerous clients in Palm Beach and Broward Counties.

² The annual report of the Association (filed with the Florida Division of Corporations) provides a mailing address for both the president and vice-president of the Association as "care of" a business entity in which the Developer has a controlling interest.

b. Relevant provisions of Code of Ethics

Section 2-443(a)(5) of the Code provides in relevant part:

An official or employee shall not use his or her official position or office, or take or fail to take any action, or influence others to take or fail to take any action, in a manner which he or she knows or should know with the exercise of reasonable care will result in a special financial benefit, not shared with similarly situated members of the general public, for any of the following persons or entities:

* * *

(5) A customer or client of the official or employee's outside employer or business

Section 2-443(c) of the Code provides in relevant part:

County and municipal officials as applicable shall abstain from voting and not participate in any matter that will result in a special financial benefit as set forth in subsections (a)(1) through (7) above. The official shall publicly disclose the nature of the conflict and when abstaining from the vote, shall complete and file a State of Florida Commission on Ethics Conflict Form 8B pursuant to the requirements of Florida Statutes, § 112.3143. Simultaneously with filing Form 8B, the official shall submit a copy of the completed form to the county commission on ethics...

Section 2-442 of the Code provides in relevant part:

Customer or client means any person or entity to which an official or employee's outside employer or business has supplied goods or services during the previous twenty-four (24) months, having, in the aggregate, a value greater than ten thousand dollars (\$10,000.00).

Outside employer or business includes: (1) Any entity, other than the county, the state, or any other federal, regional, local, or municipal government entity, of which the official or employee is a member, official, director, proprietor, partner, or employee, and from which he or she receives compensation for services rendered or goods sold or produced...

Persons and entities shall be defined to include all natural persons, firms, associations, joint ventures, partnerships, estates, trusts, business entities, syndicates, fiduciaries, corporations, and all other organizations.

II. The Code does not appear to prohibit the Official from voting on the Project

a. The Developer is not a "customer or client" of the Management Company

Section 2-443(a)(5) and Section 2-443(c) of the Code do not appear to prohibit the Official from voting on the Project because the Developer is not a "customer or client" of the Official's outside business (the Management Company). The Code provides a clear and unambiguous definition of the term "customer or client."³ In this case, the Association is the entity to which the Official's

³ See *Baker v. State*, 636 So.2d 1342, 1343-44 (Fla. 1994)("[w]here the legislature has used particular words to define a term, the courts do not have the authority to redefine it."); *M.W. v. Davis*, 756 So. 2d 90 (Fla. 2000) ("[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.") The definition of "customer or client" only captures the person or entity that is supplied with goods or services and does not list an owner, officer, director, partner, principal or member within the definition of such entity.

outside business (the Management Company) supplies services, not the Developer. The Association is the entity that contracts with the Official's outside business (the Management Company), not the Developer. The Association is the entity that pays the Official's outside business (the Management Company) to supply services for the Association at the Property, not the Developer. Further, the Association and the Developer are not "effectively interchangeable in terms of identity or purpose."⁴ Accordingly, the Official does not appear to be prohibited from voting on the Project under Section 2-443(a)(5) and Section 2-443(c) of the Code because the Developer is not a "customer or client" of the Official's outside business (the Management Company).

b. The Association will not benefit from the approval of the Project.

In addition, Section 2-443(a)(5) and Section 2-443(c) of the Code do not appear to prohibit the Official from voting on the Project because the Association (the "customer or client" of the Official's outside business) will not receive any special financial benefit from the approval of the Project. The Association is not involved in any way in the Project and has no interest in the Project. The Association's only interest is in the operation and maintenance of the Property, which is located in Broward County. Accordingly, the Official does not appear to be prohibited from voting on the Project under Section 2-443(a)(5) and Section 2-443(c) of the Code because the vote will not result in a special financial benefit to the Association, which is the "customer or client" of the Official's outside business (the Management Company).

III. Summary of analysis

Section 2-443(a)(5) and Section 2-443(c) of the Code do not appear to prohibit the Official from voting on the Project because the Developer is not a "customer or client" of the Official's outside business (the Management Company). Further, Section 2-443(a)(5) and Section 2-443(c) of the Code do not appear to prohibit the Official from voting on the Project because the Association (the "customer or client" of the Official's outside business) will not receive any special financial benefit from the approval of the Project.

IV. Request for Opinion

Based on the foregoing and on behalf of the Official, we request an advisory opinion from the Palm Beach County Commission on Ethics regarding the following question:

- (1) Do Section 2-443(a)(5) and Section 2-443(c) of the Code prohibit the Official from voting on the Project?

Based on earlier discussions with COE staff, I am hereby requesting that a copy of this letter be included in the record and provided to each member of the Commission on Ethics for their

⁴ See C11-027 (finding a violation of Section 2-443(a)(5) and Section 2-443(c) of the Code where two legally separate entities had been run and publicly advertised "in such a manner as to make them effectively interchangeable in terms of identity and purpose," such that the COE considered both entities to be the official's "customer or client.") It is worth noting that in the context of voting conflicts under the state code of ethics, the Florida Commission on Ethics has demonstrated a clear reluctance to disregard the corporate form and has done so only in a limited number of circumstances.

Steven Cullen, Executive Director
Palm Beach County Commission on Ethics
April 10, 2013
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review in connection with this inquiry. Thank you for your assistance in this matter. Please feel free to contact me if you require additional information regarding this request.

Sincerely,



Diana Grub Frieser
City Attorney, City of Boca Raton

DGF/jpk

cc: Leif J. Ahnell, C.P.A., C.G.F.O., City Manager
George S. Brown, Deputy City Manager
Joni Hamilton, Senior Assistant City Attorney
Joshua P. Koehler, Assistant City Attorney

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May 3, 2013

Patricia Wilhelm, Certification Specialist
Office of Small Business Assistance
50 South Military Trail
West Palm Beach, FL 33415

Re: RQO 13-008
Contractual Relationships-Exceptions

Dear Ms. Wilhelm,

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion, and rendered its opinion at a public meeting held on May 2, 2013.

YOU ASKED in your submission dated April 24, 2013, whether it is a prohibited conflict of interest if a Palm Beach County employee bids for and is awarded a contract with Palm Beach County.

IN SUM, employees are prohibited from using their official position to give or influence others to give themselves or their outside business a special financial benefit.¹ In addition, this code section prohibits an employee or their outside business from contracting with their public employer.² However, there are several exceptions to the contractual relationship prohibition.³

The code provides an exception for contracts entered into under a process of sealed, competitive bidding, where a county employee's outside business is the lowest bidder, provided that the employee does not participate in the bid specifications or determination of the lowest bidder, has not used their position in any way to influence the award, and has disclosed the nature of their interest in the business submitting the bid. If a county employee fully complies with these requirements, the code does not prohibit the employee or their outside business from contracting with the County.

THE FACTS as we understand them are as follows:

You are a small business certification specialist with the Palm Beach County Office of Small Business Assistance. In your position you evaluate businesses for certification. This program provides additional consideration in the PBC procurement process to approved small businesses located in Palm Beach County.

You recently received an application for certification from an ocean rescue captain who is employed by Palm Beach County Parks and Recreation. The county employee was applying with your office for his company to be certified to provide public and private life guard services and training. The business owner/employee disclosed his status as a current county employee on his application for certification.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the revised Palm Beach County Code of Ethics, which took effect on June 1, 2011:

Section 2-443(a) prohibits public employees from using their official position, or influencing others to take or fail to take any action that would result in a special financial benefit not shared with similarly situated members of the general public, for themselves or their outside employer or business. A financial benefit is defined as anything of

¹ §2-443(a)(1),(4)

² §2-443(d)

³ §2-443(e)

value. Accordingly, the employee would be prohibited from using his position as ocean rescue captain to select his outside business' training program over other available programs.⁴

Section 2-443(d) states as follows:

Contractual relationships. No official or employee shall enter into any contract or other transaction for goods or services with their respective county or municipality. This prohibition extends to all contracts or transactions between the county or municipality as applicable or any person, agency or entity acting for the county or municipality as applicable, and the official or employee, directly or indirectly, or the official or employee's outside employer or business. Any such contract, agreement, or business arrangement entered into in violation of this subsection may be rescinded or declared void by the board of county commissioners pursuant to §2-448(c) or by the local municipal governing body pursuant to local ordinance as applicable.

Section 2-443(d) explicitly prohibits contracts between an employee or their outside business and the County unless one of several exceptions applies.⁵ Based upon the facts you have submitted, as an owner of an outside business the ocean rescue captain is not eligible for a part-time employment waiver.

However, §2-442(e)(1) provides an exception for contracts awarded under a system of sealed, competitive bidding, where a county employee's company is the lowest bidder. The sealed bid exception applies so long as an employee does not 1) participate in the determination of bid specifications, 2) use their official position to influence or persuade their government entity other than by the mere submission of the bid, and 3) files a statement with the Supervisor of Elections and the Commission on Ethics disclosing the nature of the interest in the outside business prior to submitting the bid. Each individual bid submission must comply with the exception requirements listed in §2-443 (e)(1)a, b, and c.⁶ So long as the employee's bid submission comports with these requirements, the employee is not prohibited from applying and accepting bids awarded under this exception to the contractual relationship prohibition.⁷

IN SUMMARY, as a public employee may not use their official position to give a special financial benefit to themselves or their outside business. In addition, employees may not enter a contract for goods or services with their government employer, unless an exception applies. Based on the facts you have submitted, a county employee would not be prohibited from participating in the bid process, and if successful, entering into a contract with the County provided that he complies with the requirements as set forth in §2-443 (e)(1)a, b, and c.

This opinion construes the Palm Beach County Code of Ethics Ordinance and is based upon the facts and circumstances that you have submitted. It is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at 561-233-0724 if I can be of any further assistance in this matter.

Sincerely,

Steven P. Cullen
Executive Director

SPC/mcr/gal

⁴ §2-442 *Financial Benefit* includes any money, service, license, permit, contract, authorization, loan, travel, entertainment, hospitality, gratuity or any promise of any of these, or anything else of value ...

⁵ §2-442(2) *Outside employer or business* includes any entity, other than the county, the state, or any other federal, regional, local or municipal government entity, of which the official or employee is a member, official, director, proprietor, partner or employee, and from which he receives compensation for services rendered or goods sold or produced.

⁶ RQO 11-090

⁷ RQO 12-076