

CEO 20-3—March 11, 2020

## CONFLICT OF INTEREST; VOTING CONFLICT

### TOWN COMMISSIONER MEMBER OF A COUNTRY CLUB THAT IS SEEKING TO LEASE PROPERTY FROM THE TOWN

*To: Mr. David J. Ottinger, Esq. (Attorney for Town of Belleair)*

#### SUMMARY:

No prohibited conflict of interest is created under Section 112.313(7)(a) or Section 112.313(3), Florida Statutes, where a town commissioner has a non-equity membership in a country club that is seeking to lease property from the town. Because the membership conveys no proprietary interest, and does not concern the Commissioner's business or financial interests, it is not the type of contractual relationship that creates a prohibited conflict under the statutes. Were the town commission to vote on the lease agreement, the commissioner would not have a voting conflict under Section 112.3143, Florida Statutes, although it is recommended that he abstain from the vote pursuant to Section 286.012, Florida Statutes, to avoid any appearance of impropriety. Referenced are CEO [12-15](#), CEO [11-1](#), CEO [10-2](#), CEO [08-7](#), CEO [07-11](#), CEO [06-12](#), CEO [04-5](#), CEO [01-17](#), CEO [90-51](#), CEO [90-30](#), CEO [89-40](#), and CEO [78-18](#).

#### QUESTION 1:

Would a town commissioner have a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, were the town commission to lease real property to a country club of which he is a non-equity member?

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

In your letter of inquiry and additional information provided to our staff, you state you are bringing this inquiry on behalf of a Town Commissioner for the Town of Belleair who is a member of a local country club. In particular, you indicate the Commissioner is a member of the Belleview Biltmore Country Club Corporation (the Club), which is a nonprofit corporation that owns and operates a golf and country club within the Town. You relate the Club has approximately 750 golf members and approximately 450 social members,<sup>1</sup> and that the Commissioner's membership is as a golf member. Importantly, you state the Commissioner is not an employee, officer, or board member of the Club, and that he has no financial or equitable interest in the Club itself. You indicate the Commissioner uses his membership for purely recreational and social purposes, in that it allows him to access the Club's golf course and facilities.

As a golf member, the Commissioner is entitled to cast a vote on certain types of issues affecting the Club, as detailed in the Club's Amended Articles of Incorporation and Bylaws.<sup>2</sup> However, you state that being a member does not grant the Commissioner an equitable interest in the Club or the right to share in the Club's profits or losses. This claim is supported by Article 2.5 of the Bylaws, which stipulates that members have no property rights or other interests in the Club, and Article 3.3 of the Bylaws, which states that Club membership is not transferable. Moreover, Article 7 of the Amended Articles of Incorporation clarifies that, in the event the Club dissolves, its property and assets will pass to the local homeowners' association, following payment of debts and expenses.<sup>3</sup>

Your inquiry concerns a potential lease arrangement between the Club and the Town. The Town is considering a proposal by the Club's management to allow the Club to lease an approximately 60-by-300-foot parcel of Town land (less than half-an-acre of property) to build a new waterfront golf hole. You state the parcel is vacant and lies adjacent to the Club's current golf course. You relate the Town has complied with all requirements set out in the Town Charter concerning the disposition or leasing of real property. It has hired an independent appraiser to assess the parcel's fair market value and has held public workshops concerning the potential lease. You state the lease is advantageous not only for the Club, but also for the Town, as it will provide additional revenue and relieve the Town—for the duration of the lease—from having to maintain the parcel or its seawall.

You have included the lease proposal in the provided materials. In the current proposal, the Club offers an initial twenty-year term, along with the chance to renew at the conclusion of the lease term, and requires an initial payment to the Town of \$100,000, with subsequent monetary payments to be made annually. You anticipate the Town Commission will vote on this lease proposal at an upcoming meeting, and inquire whether the lease arrangement, if approved, will place the Commissioner in violation of Section 112.313(7)(a), considering his pre-existing membership with the Club.

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, any 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 part of Section 112.313(7)(a) prohibits a public officer from having a contractual relationship or employment with any agency or business entity that is either subject to the regulation of, or is doing business with, the officer's own agency. The definition of a "business entity" includes "any corporation" (see Section 112.312(5), Florida Statutes) and, therefore, applies to nonprofit organizations. See CEO [10-2](#), n.6, and CEO [78-18z](#). Accordingly, if a particular nonprofit corporation is being regulated by or is conducting business with the Town Commission, Section 112.313(7)(a), standing in isolation, will prohibit the Commissioner from having an employment or contractual relationship with it.

While there is no indication the Town is regulating the Club, the two entities will be "doing business" if they enter into the lease arrangement. Entities are "doing business" with each other when there is an exchange of consideration, such as money, property, or services. See CEO [04-5](#) and CEO [90-51](#). Lease arrangements qualify as "doing business" because of the exchange of money for property, as well as the fact that one party to a lease will have a cause of action against the other in the event of a breach or default. See CEO [12-15](#). Thus, the question here becomes whether the Commissioner's membership in the Club, which he holds solely for social and recreational purposes, should be considered a contractual relationship prohibited by Section 112.313(7)(a).

This Commission has found that membership in a social or recreational club is contractual in nature, mainly because such membership usually is accompanied by the payment of dues or fees, as well as an agreement to adhere to certain club regulations. See CEO [90-30/a](#) and CEO [89-40/a](#). However, we have not found in the past that mere membership in a social or recreational club, by itself, is sufficient to violate this portion of the statute.

In CEO 90-30/a>, we addressed an officer of the Department of Environmental Protection who oversaw all the licensing and regulatory functions being conducted in one of the Department's regional offices. A yacht club where the officer was a member had various regulatory matters coming before that regional office. Although the officer had removed himself from any regulatory issues affecting the yacht club, his membership in the yacht club—and the club's interface with the Department—did, in a technical sense, trigger the prohibition in Section 112.313(7)(a). However, we noted that the intent of the Code of Ethics is to address situations where a public officer or employee is engaged in private business transactions or professional activities, or has private obligations, that would impede or conflict with his or her public duties. We noted that mere membership in a social or recreational club was unlikely to involve a public officer's personal business interests or obligations, and also was unlikely to tempt the officer to place personal interests above those of the public. Accordingly, we applied Section 112.316, Florida Statutes,<sup>4</sup> to negate the application of the statute towards the officer's membership in the yacht club.

Similarly, here, we do not find the Commissioner's membership in the Club to be the type of contractual relationship that the statute was intended to prohibit. As in CEO 90-30/a>, the membership merely is for social and recreational purposes. It does not give the Commissioner a financial or equitable interest in the Club, it does not entitle him to share in the Club's profits, and it does not allow for any financial remuneration. Even beyond that, it is nontransferable and does not grant the Commissioner the ability to receive any property or assets if the Club is dissolved. In short, the membership creates no financial incentive or obligation for the Commissioner to place the Club's interests over his public responsibilities. Considering these factors, and the similarities to CEO 90-30/a>, we find Section 112.316 should be applied—under these unique circumstances—to negate the strict application of the first part of Section 112.313(7)(a), in the event that the Town leases the property to the Club while the Commissioner is still a Club member.

This conclusion is based on the particular set of facts presented here. However, we note that to find otherwise could lead to unreasonable results. For example, were the Town to contract with the Club to hold a holiday event in the Club's facilities, the Commissioner then would be in violation of Section 112.313(7)(a) due to his Club membership. Or were the Town to contract to use Club property for a charitable golf tournament, the Commissioner would be in violation of Section 112.313(7)(a). We find that the prohibition in the first part of Section 112.313(7)(a) is not directed at this recreational membership.

Our analysis concerning the lease arrangement, then, turns to the second part of Section 112.313(7)(a), which prohibits a public officer from having a contractual relationship or employment that will create a "continuing or frequently recurring" conflict of interest or that will "impede the full and faithful discharge" of his public duties. Under the unique circumstances here, we find that the Commissioner's membership in the Club does not constitute the type of contractual relationship that will trigger the statute. In support of this, we have found in the past that while service as an officer in a voluntary association can constitute a prohibited conflict under the second part of Section 112.313(7)(a), mere membership will not. See CEO 08-7, Question 2 and CEO 06-12. Here, the Commissioner is only a member of the Club, not an officer or director.

Accordingly, were the Town to enter into the proposed lease arrangement with the Club, we find no prohibited conflict of interest will exist under Section 112.313(7)(a) for the Commissioner.<sup>5</sup>

Question 1 is answered accordingly.

## QUESTION 2:

In the event that the town commission leases property to the country club, will the town commissioner have a prohibited conflict of interest under Section 112.313(3), Florida Statutes? Under the circumstances presented, Question 2 is answered in the negative.

You also inquire whether the Town Commissioner will have a prohibited conflict of interest under Section 112.313(3), Florida Statutes, were the Town to lease the property to the Club, considering his membership in the Club. Section 112.313(3) provides:

**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 . . . 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.

Importantly, Section 112.313(3) does not apply when the sale, rental, or lease, such as the proposed lease here, is being made from an agency to an outside entity, rather than the reverse. See CEO [07-11](#), n.8, and CEO [04-5](#). In addition, the provision only applies in situations where a public officer is an officer, partner, director, or proprietor of, or holds a material interest in,<sup>6</sup> the business entity renting, leasing, or selling to his or her agency. Because the Commissioner only has a non-equitable interest in the Club, and is not an officer or director, Section 112.313(3) will not apply.<sup>7</sup>

Question 2 is answered accordingly.

### QUESTION 3:

In the event that the town commission votes on the proposed lease agreement with the Club, will the town commissioner be presented with a voting conflict under Section 112.3143(3)(a), Florida Statutes?

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

You also inquire whether Section 112.3143, Florida Statutes, the voting conflicts law, will prohibit the Town Commissioner from voting on the measure concerning the lease agreement when it comes before the Town Commission. Section 112.3143(3)(a), which is the portion of the voting conflict statute applicable to local, elective officers, provides:

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 corporate principal 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 inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, 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.

And Section 112.3143(1)(d), Florida Statutes, defines "special private gain or loss" as "an economic benefit or harm . . ."

Because the Club may decide to increase its membership dues if it acquires the lease, inasmuch as its members will be able to enjoy a new waterfront golf hole, voting on the lease may have an economic effect on the Commissioner. However, Section 112.3143(1)(d)1., Florida Statutes, requires the Commission to consider the size of the class that will be affected by a vote when considering whether the vote presents a conflict. Given that there are 750 golf members at the Club, we find that any effect on the Commissioner's dues would not be "special," as would be required to find a voting conflict. See CEO [11-1](#) (finding no voting conflict for a city councilmember regarding a vote affecting a collective bargaining unit comprised of 150 members, including her husband). And while the statute may be triggered if a vote brings "special private gain or loss" to a public officer's principal, relative, or business associate, these considerations are not relevant here. The Club cannot be considered the Commissioner's "principal" as he has no equitable interest in it, no employment relationship with it, and accepts no compensation from it. Nor does the Commissioner's scenario involve a "business associate." We have found individuals are "business associates" when they are engaged in a common, commercial pursuit; it is not enough that they merely occupy a label or nominal status in relation to each other. See CEO [01-17](#). Here, the Commissioner's membership simply allows him access to the Club's facilities and amenities. Therefore, the Commissioner is not a "business associate" of the Club owners or other Club members, and, thus, he will not have a voting conflict concerning the approval of the lease arrangement.

Nevertheless, while the Commissioner may not have a voting conflict under Section 112.3143(3) (a), we recognize it may not foster public confidence in government for him to vote on the lease. Were he to vote, his membership in the Club may create an appearance of impropriety concerning his objectivity on the measure. To avoid such an appearance, we suggest the Commissioner remove himself from involvement in decisions concerning the lease and abstain from the vote pursuant to Section 286.012, Florida Statutes.<sup>8</sup> This provision allows a public officer to abstain when there is, or appears to be, a possible voting conflict, in the interest of fostering transparency in government. Should the Commissioner abstain under Section 286.012, as recommended herein, he should comply with the steps for responding to a voting conflict as described in Section 112.3143(3)(a). See CE Form 8B.

Question 3 is answered accordingly.

**ORDERED** by the State of Florida Commission on Ethics meeting in public session on March 6, 2020, and **RENDERED** this 11th day of March, 2020.

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Kimberly B. Rezanka, *Chair*

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[1] You indicate that, for the purpose of numbers, a member and their spouse/significant other are counted as one member, meaning the number of individuals actually using the Club and its amenities may be greater than the membership figures reflect.

[2] In the provided materials, you have included the Club's Amended Articles of Incorporation, as well as its Bylaws. Article 10 of the Amended Articles of Incorporation and Article 3.4 of the Bylaws grant to the Club's golf members voting rights on certain issues, and Article 13 of the Amended Articles of Incorporation specifies the types of actions that are subject to a vote.

[3] You state the Commissioner is not a member of that homeowners' association and does not own a home within the boundaries governed by that homeowners' association.

[4] Section 112.316 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.

[5] This discussion, though, only concerns the application of Section 112.313(7)(a). The Commissioner also should take note of Section 112.313(6), which 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 public 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. Were the Commissioner to act with a wrongful intent and in a manner inconsistent with the proper performance of his duties in an attempt to obtain a benefit for the Club—whether regarding the lease arrangement or another matter—his conduct could violate Section 112.313(6).

[6] A "material interest" is defined in Section 112.312(15), Florida Statutes, to mean direct or indirect ownership of more than 5 percent of the total assets or capital stock of a business entity.

[7] In the provided materials, you also indicate the Town and the Club have a separate agreement under which the Town supplies reclaimed water for the Club to irrigate its golf course. The prohibitions in Sections 112.313(3) and 112.313(7)(a) will not apply to the agreement because Section 112.313(12)(c), Florida Statutes, exempts the application of these provisions to utilities services.

[8] Section 286.012, Florida Statutes, provides, in pertinent part:

A member of a state, county, or municipal governmental board, commission, or agency who is present at a meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may not abstain from voting in regard to any such decision, ruling, or act; and a vote shall be recorded or counted for each such member present, unless, with respect to any such member, there is, or appears to be, a possible conflict of interest under s. 112.311, s. 112.313, s.112.3143, or additional or more stringent standards of conduct, if any, adopted pursuant to s. 112.326. If there is, or appears to be, a possible conflict under s. 112.311, s. 112.313, or s.112.3143, the member shall comply with the disclosure requirements of s. 112.3143.