

CONFLICT OF INTEREST

CITY COMMISSIONER SERVING AS CHARTER SCHOOL ATTORNEY WHILE CITY SELLS/TRANSFERS PROPERTY TO CHARTER SCHOOL

To: Mr. Robin Gibson (Lake Wales)

SUMMARY:

A city commissioner will have a prohibited conflict of interest pursuant to Section 112.313(7)(a), Florida Statutes, were the city to sell property to a charter school where he serves as general counsel, as that section prohibits employment or a contractual relationship with a business entity or agency doing business with one's own agency. If the property is donated, a conflict will not be found under Section 112.313(7)(a) so long as the commissioner refrains from any involvement in the transfer. Referenced are CEO [16-9](#), CEO [12-9](#), CEO [11-6](#), CEO [04-6](#), CEO [04-5](#), CEO [12-9](#), CEO [94-5](#), CEO [90-51](#), CEO [83-5](#), CEO [82-13](#), and CEO [76-2](#).

QUESTION 1:

Would you, a city commissioner, have a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, were the city commission to sell real property to a charter school where you serve as the general counsel?

Question 1 is answered in the affirmative.

In your letter of inquiry and additional information provided to our staff, you state that you currently serve as a city commissioner and, in your private capacity, serve as the general counsel for a charter school system of five schools governed by the same board of trustees (hereinafter the charter school). You relate the charter school is a tax-exempt nonprofit under Section 501(c) of the Internal Revenue Code and that it operates under a charter issued by the county's public school district.¹ You state that your position as general counsel to the charter school is paid and is as an independent contractor, rather than as an employee.

You state the charter school is hoping to build an additional middle school and would like to acquire property owned by the city to aid in the school's expansion. In particular, you relate the charter school is interested in acquiring an abandoned public school complex, located in the city's historic core, which has been vacant for 25 years. You state the terms of a conveyance from the city have not been discussed, although you indicate that neither you nor you law firm will represent the charter school before the city commission regarding the property's acquisition; instead, you will recommend that the charter school retain a transactional lawyer to handle such representation. You inquire whether you will have any conflict of interest were the city commission to transfer title of the complex to the charter school.

Section 112.313(7)(a), Florida Statutes, is relevant to your inquiry and states:

CONFLICTING EMPLOYMENT OR CONTRACTUAL
RELATIOSHIP.--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. Entities are "doing business" with one another wherever there is an exchange of consideration, such as money, property, or services. See CEO [04-5](#) and CEO [90-51](#). You will have a prohibited conflict under the first part of Section 112.313(7)(a) were the city commission to sell the property, or contract to sell the property, to the charter school for consideration, as you will have a contractual relationship with a business entity or, in argument, an agency (i.e., the charter school) doing business with your agency (i.e., the city commission).²

In your inquiry, you assert that the charter school should be considered a public "agency" as opposed to a "business entity." However, the distinction will make no difference regarding the application of the first part of Section 112.313(7)(a) if the title transference is for consideration. Even were we to consider a charter school to be an "agency," the first part of Section 112.313(7)(a) still would apply, as the statute prohibits a public officer from holding any employment or contractual relationship "with any business entity or any agency" subject to the regulation of, or doing business with, the public officer's own agency. (emphasis added). We have not overlooked that we have found in certain circumstances that agreements between government agencies ("intergovernmental agreements") do not constitute "doing business" for the purpose of Section 112.313(7)(a). See, for example, CEO [83-5](#) (agreement between county and city governments to have city run county ambulance services using city employees) and CEO [76-2](#) (agreement between city and county governments to keep city prisoners in county jail). However, these and other decisions are limited to circumstances where governmental entities are arranging for the provision of services without a component of private remuneration. To find otherwise now would undercut the language of Section 112.313(7)(a) indicating that arrangements between governmental agencies should, in general, be considered "doing business." Therefore, even were we to consider the charter school to be an "agency," a prohibited conflict would still exist under the first part of Section 112.313(7)(a) as we decline to find this type of arrangementâ€”a sale of property for considerationâ€”qualifies as the type of intergovernmental agreement that has led us to find entities were not conducting business in the past.

Question 1 is answered accordingly.

QUESTION 2:

Would you have a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, were the city commission to donate real property to the charter school?

Question 2 is answered in the negative, subject to the limitations set forth below.

In the additional information that you submitted, you indicate there is the possibility that the city may transfer title to the property to the charter school for no consideration, but with the charter school paying the closing costs. You state, again, that your law firm would not be involved in representing the charter school

regarding the transfer of title in such circumstances, but would recommend that the charter school retain a transactional attorney to handle the transfer, as discussed in Question 1.

Under this alternate scenario where the title transfer is not for consideration¹ but instead involves a donation of property² the first part of Section 112.313(7)(a) will not be triggered. In previous opinions, we have found a donation of property does not rise to the level of "doing business" because there is no exchange of consideration. See CEO [04-6](#) and CEO [82-13](#).³

Our analysis, 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. As general counsel to the charter school, you have a contractual relationship with your client, as does each member of your firm, and this contractual relationship will remain for you even if other members of your firm take over the representation of the charter school. See, among others, CEO [16-9](#). Therefore, were you, or your firm, to represent the charter school regarding the title transfer, or any other city commission matter, while you are serving on the city commission, the second part of the statute would be implicated. See, among others, CEO [11-6](#), Question 2.

However, you indicate that if the city and charter school decide to proceed with the title transfer, you will recommend that the charter school hire a transactional attorney to represent its interests and that neither you nor your firm will be involved. In this narrow circumstance, and assuming you do not use your position as a city commissioner to advocate for or advance the title transfer in any way, we find your employment relationship with the charter school will not be prohibited under the second part of the statute. This finding, though, hinges upon the title being transferred without consideration and you taking no action⁴ in either your private capacity as charter school attorney or your public capacity as city commissioner⁵ regarding the transfer. This means you must not discuss or become involved in any issue being presented to the city commission concerning the title transfer, whether before, during, or after commission meetings.

Question 2 is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 8, 2017, and **RENDERED** this 13th day of December, 2017.

Michelle Anchors, *Chair*

^[1] The charter school's bylaws, which are available online, confirm that it is incorporated under Section 501(c)(3) and that it is governed by a corporate board of trustees, not by the publicly-elected board of the chartering school district.

^[2] We note that even if you were to abstain from a vote concerning a transfer for consideration⁶ and even if you were to comply with the other requirements of the voting conflict statute (Section 112.3143(3)(a), Florida Statutes)⁷ the conflict under the first part of Section 112.313(7)(a) would not be obviated, as the provision operates independently from the voting conflict statute. See CEO [12-9](#) and CEO [94-5](#).

^[3] We also see no indication that the charter school is subject to the regulation of the city commission.