August 9, 2017

To: Mayor Forrester, Councilors' Mark Benton, John Corbett, Peter Larkin & Carol Scott
From: Councilman, Rich Cerrato.
Subject: Conflict of Issue Policy

It is obvious to me by recent events, that as elected officials along with the Town Attorney and the North Carolina School of Government, we all appear to have our own interpretations defining a conflict of interest.

During my own experiences in the corporate world and being responsible for interpreting nepotism, conflict of interest and contract issues our policies and practices were simple compared to the many apparent complicated and conflicting NC Statutes left for many different interpretations. Also considered in order to maintain a healthy employee relations environment was perceptions, appearances and corporate moral values in order to avoid even the slightness thought of any violations.

It is my understanding there is not a North Carolina Stature that prohibits Towns from exceeding the basic NC Statute requirements unless of course if they are discriminatory or bias in anyway.

To eliminate this continuing confusion and to a start this conversation, I would like to see the Town adopt The North Carolina Ethic's Commissions: "Avoiding Conflict of Interest - Recusal Guidelines for Public Servants," which I have attached. To me, this simple policy interpretation should be the responsibility of the Council. I would also include that any vote by those being recused should not to be considered a "Yes" vote, which has been customary practice when a council member abstains, which only adds to more confusion.

Recusal should include the planning, discussion and vote when a violation is questioned and verified by the council and should not be rationalized for any exceptions.

It is our morale and public obligation to clearly demonstrate, that our practices not only meet the law, but to also exceed the basic requirements.

CC: S. Parker
L. Anglin
G. Richardson
L. Lewis

AVOIDING CONFLICTS OF INTEREST
RECUSAL GUIDELINES FOR PUBLIC SERVANTS

I. Introduction

Members of State boards and State employees ("public servants") who are subject to the State Government Ethics Act ("Ethics Act") are obligated to constantly monitor situations in which their personal or business interests may conflict with their official duty to represent the interests of the general public ("conflict of interest"). Ensuring that those public servants' official decisions are not influenced by their personal or business interests is central to representational democracy and to their obligation to the citizens of North Carolina.

Because public servants are often active members of their community, it is not uncommon for them to be asked to vote or otherwise participate in matters that may impact their financial interests or those of their family members. Although such conflicts of interest will usually not prevent the public servant's continued service, they may restrict the public servant's official participation in a particular matter.

What follows is a brief overview of the conflict of interest standards established in the Ethics Act and a discussion of what public servants should do when they have a conflict between their official activities and their or their family's personal financial interests.

II. Conflicts of Interest According to the Ethics Act

Although we each may have our own concept of what a conflict of interest is, the Ethics Act has established specific standards that a public servant must follow. Those standards list those particular interests that may interfere with the public servant's ability to represent the public's interests.

A. Official Actions That May Result in a Reasonably Foreseeable Financial Benefit to the Public Servant, the Public Servant's Family, or a Business/Non-Profit With Which the Public Servant Has a Relationship

The Ethics Act[1] restricts a public servant from taking *official action*[2] if that action may result in a reasonably foreseeable *financial benefit*[3] to the following individuals and entities:

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[1] G.S. 138A-36(a).

[2] Defined in G.S. 138A-3(25). Generally, "any decision" to be made in the public servant's official capacity.

[3] Defined as a "direct pecuniary gain or loss" or a "direct pecuniary loss to a business competitor." G.S. 138A-3(14c).

1. The public servant or a member of the public servant's extended family;[4]

2. The public servant's client;

3. The public servant or immediate family member's[5] employer;

4. A business or non-profit company of which the public servant or immediate family member is a lobbyist, governing board member, partner, or officer;

5. A business in which the public servant or immediate family member owns an interest of $10,000 or more, or 5% of the business, whichever is less.

It is important to understand that this conflict of interest standard is triggered only if the financial benefit resulting from a public servant's official action would result in a reasonably foreseeable financial benefit to the interest listed above. It does not apply where any financial benefit resulting from the official action is remote, tenuous, or speculative.

Once it is determined that a public servant's proposed action could result in a reasonably foreseeable financial benefit, a conflict of interest exists if:

1. That financial benefit would impair the public servant's judgment or

2. It could be reasonably inferred that the public servant's judgment would be impaired.

B. Declining to Take Official Actions in Formal Proceedings Where the Public Servant has a Personal, Financial, or Familial Relationship with a Participant

Public servants are also restricted from taking certain official actions in "proceedings" where the public servant's impartiality could be questioned due to his/her familial, personal, or financial relationship with a participant.[6] This restriction specifically applies to quasi-legislative (rulemaking) and quasi-judicial (hearings and investigations) proceedings. This conflict of interest standard is much broader that the "financial benefit" standard established by G.S. 138A-36(a) as it can apply to any actions, not just those may result in a financial benefit, and extends to individuals and entities with whom the public servant has a "personal" relationship.

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[4] Extended family includes the public servant's and his/her spouse's children, grandchildren, parents, grandparents, and siblings, and the spouses of each of those persons. G.S. 138A-3(13).
[5] A public servant's spouse and minor children, along with those extended family members that reside in the public servant's household. G.S. 138A-3(17).
[6] G.S. 138A-36(c).

C. Particular Situations Where a Public Servant May Take Official Action Even Where a Conflict Exists (Conflicts Exceptions)

In the following circumstances a public servant with a conflict of interest may still take official action:[7]

1. Where the public servant's action would affect the public servant's interests in the same manner as it would impact a large group of similarly-situated individuals or entities (the so-called "class exception").

2. Where the public servant's action is "ministerial," generally an action that is required without exercise of personal judgment or discretion.

3. Where the public servant provides written notice to the Ethics Commission that the public servant is the only person with legal authority to take the particular action and describes the nature of the conflict of interest.

III. Help with Identifying Conflicts of Interest

Because the conflict of interest standards of the Ethics Act are fairly technical, public servants should seek clarification if they are unsure if they have a conflict of interest or it is unclear whether an exception applies. The Ethics Act offers the following options to obtaining that guidance.

A. Seeking a Formal or Informal Advisory Opinion from the State Ethics Commission or Commission Staff

The Ethics Act provides that a public servant may participate in an official action if, prior to the action, the public servant received a written advisory opinion from the State Ethics Commission authorizing the public servant to take the action in question. A public servant may also request an advisory opinion from the Commission's staff prior to taking the action in question.[8]

B. Seeking a Determination by the Public Servant's Board or Employing Entity

In the event the public servant was unable to obtain an opinion from the Commission or Commission staff in advance of taking the official action, the public servant may request that the agency or board issue a written determination that the interest in question would not influence the public servant's participation in the official action. A copy of that written determination must be filed with the Commission.[9]

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[7] G.S. 138A-38.

[8] G.S. 138A-38(a)(3). Although only opinions from the Commission provide immunity to the public servant against complaints and investigations by the Commission, staff opinions will be given deference by the Commission.

[9] G.S. 138A-38(a)(4).

Even in those cases in which the public servant is disqualified from taking official action because of a conflict of interest, the covered person may be counted for the purposes of a quorum. This circumstance should be recorded in the minutes of the board meeting.[10]

IV. What To Do Once a Conflict of Interest is Identified--Recusal

Once a public servant decides that he/she has a conflict of interest and none of the exceptions outlined above would allow the public servant to participate, the Ethics Act requires that the public servant "abstain from taking any verbal or written action in furtherance of the official action."[11] This is often referred to "recusal," where a public official does not participate in a particular matter due to a conflict of interest.

The Ethics Act requires that a public servant who decides not to participate in a matter submit written reasons for the "abstention" to the agency or board. In addition, if the public servant serves on a State board, the "abstention" must be recorded in the board's minutes. Although the particular actions that the public servant should avoid will vary according to the circumstances, the public servant should also do the following:

A. Decline to Vote or Make a Decision on the Matter

The public servant serving on a board shall not vote on the matter. A public servant who is a State employee shall not make a determination on the matter and shall identify another official to make that determination in his or her place.

B. Decline to Participate in Discussions of the Matter

Whether the public servant is acting as a member of the State board or as a State agency employee, the public servant should avoid participating in verbal or written discussions about the matter with staff, fellow board members, interested parties, and members of the media or the public. This includes both formal discussions of the full board or a board committee or informal conversations concerning the matter.

C. Not Seek or Accept Information Concerning the Matter

Whether the public servant is acting as a member of the State board or as an agency employee, the public servant should not be provided with or accept non-public information related to the matter or request such information. This would include information accepted or requested from fellow board members, interested parties, or the staff of the board or agency.

Because the Ethics Act restricts a public servant with a conflict of interest from taking "verbal or written action in furtherance of" an official action, it does not require that the public servant leave

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[10] G.S. 138A-38(a)(6).
[11] G.S. 138A-36(b).

the room or a meeting where the matter is being discussed. However, the Ethics Commission recommends that public servants consider leaving the room in order to ensure that those present at the meeting are not influenced by the public servant's presence or interest in the matter.

V. Penalties for Violating Conflict of Interest Standards

A public servant's willful failure to ignore the Ethics Act's conflict of interest standards may result in the public servant's removal from his/her board or position at a State agency. The Ethics Commission has authority to investigate alleged violations of those standards.

Constitutional due process principles may also require that the action of a board or a State agency be set aside where an official with a conflict of interest participated in the board or agency's consideration of the matter.

VI. Additional Conflict of Interest Standards

Each State board and agency may have additional conflict of interest provisions established by agency-specific laws, rules, or guidelines. In addition, State law[12] places particular restrictions on State and local officials involved in public contracting with private companies in which the official has a particular financial interest. Those restrictions may prohibit an entire board from taking action on a contract even where the interested board member does not participate in the decision. Therefore, public servants are advised to consult with agency legal counsel for guidance on these additional restrictions.

[12] G.S. 14-234.