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MEMORANDUM

TO: Village of Estero Planning, Zoning and Design Board

FROM: Nancy Stroud
Village Land Use Counsel

RE: Conflict of Interest

DATE: February 25, 2022

The PZDB had a recent discussion about the state conflict of interest rules relating to Board members who practice professionally in the Estero area and the challenges that presents to their ethical responsibilities as Board members. As requested, I have reduced my research to a memo, and also some options for the Board to consider in recommending any changes to the Village Council.

The Florida Ethics Code and Commission on Ethics Opinions

Introduction. The Florida Ethics Code is a state statute that applies to all public officials, appointed or elected. It can be a bit vague and confusing, and that is why the legislature created the Florida Commission on Ethics. The Commission issues opinions regarding the application of the Code and those opinions have the effect of law – unless overturned by a state court of appeal. The Commission’s opinions are not simply advisory.

There are numerous opinions from the Commission that very clearly state that Board members cannot represent their business clients before the Board, as that would be a prohibited conflict of interest under Florida Statute 112.313(7)(a). Neither can a member of that Board member’s firm participate in representing the client.

Florida Statute 112.313(7)(a) 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.

There is an exception found in Commission on Ethics opinions that was applied to the DRB in at least one instance before the Village's new land development code created the PZDB. Where a local ordinance creates a board which has certain designated professional members, and persons are specifically appointed to those designated seats, then the Commission has opined that those particular board members can represent clients before their board. In that case, however, the Board member cannot vote on the matter and must file a conflict-of-interest form. The Village council under the DRB process also made clear that they expected that the Board member would leave the dais and the room while the matter was being presented and discussed.

1. The Conflict-of-Interest Commission on Ethics Opinions

Florida Commission on Ethics Opinion 20-18 explains the basis for the conflict-of-interest law as follows:

The phrase "conflict of interest," as used in the statute, is defined in Section 112.312(8), Florida Statutes, to mean "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest." A "conflict of interest" maybe found if a public officer's duties and his private employment or contractual relationships "coincide to create a situation which 'tempts dishonor.'" See *Zerweck v. State Commission on Ethics*, 409 So. 2d 57 (Fla. 4th DCA 1982).

... (E)ssential to applicability of the prohibition is that the public officer hold a conflicting employment or contractual relationship. In the past, we have found that the second part of Section 112.313(7)(a) prohibits a public officer from representing a client in matters that are before a board where he is a member because it may interfere with the full and faithful discharge of his public duties.... And the conflict cannot be mitigated simply because another member of the public officer's professional firm engages in the representation. This is because the concern is the potential loss of objectivity a public officer may have if his firm is attempting to influence the decisions of his board.

... And compliance with the voting conflict statute--Section 112.3143(3)(a), Florida Statutes--has been found not to negate the prohibited conflict under the second part of Section 112.313(7)(a). Because we have found that the two statutes operate independently, we have found that following the requirements for responding to a voting conflict under Section 112.3143(3)(a) does not create a defense against the application of Section 112.313(7)(a).

Florida Commission on Ethics Opinion 79-7 further explains:

In our view, the representation of a client before one's board jeopardizes one's independence and impartiality, gives one an undeniable advantage over other members of one's profession or occupation in such matters, and strongly presents the appearance of public office being used for private gain.

Also see Florida Commission on Ethics Opinion 78-86:

When that (representation of a party before the member's board) occurs, the board member has the advantage of knowing intimately board procedures as well as the particular interests, views, and voting records of its members, and he can tailor his representation accordingly. In addition, the public officer's independence and impartiality are jeopardized. Finally, the appearance of public office being used for private gain undermines the confidence of people in their government.

. . . We do not feel that this conflict of interest could be mitigated or avoided by having another member or an employee of the public officer's professional firm represent the client before his board. The same conflict of interest and appearance of conflict of interest would be involved in this type of representation, as well as the same direct private gain to the public officer.

2. The Exception for Boards that have Designated Professional Members.

The Commission on Ethics has carved out an exception or "waiver", based on the Ethics Code, related to Boards that have designated professional members as required by ordinance. For example, Florida Commission on Ethics Opinion 04-1 explains:

Were we to apply Section 112.313(7)(a) in isolation, we would find that a prohibited conflict of interest would be created for all of the architect members of the Board were they to have clients with matters before the Board, inasmuch as they would hold employment or a contractual relationship with the clients (business entities) subject to the regulation of the Board (the members' public agency). However, inquiries such as yours necessarily involve consideration of Section 112.313(7)(b), Florida Statutes, which modifies the prohibitions of Section 112.313(7)(a), and which provides:

This subsection shall not prohibit a public officer or employee from practicing in a particular profession or occupation when such practice by persons holding such public office or employment is required or permitted by law or ordinance.

Consequently, we have found Section 112.313(7)(b) to operate to negate conflicts grounded in Section 112.313(7)(a) when, essentially, a law or **ordinance has worked a "waiver" of conflict by recognizing that certain credentials are so vital to the expertise and operation of a public board that the otherwise conflicting business/client connections of certain members must yield to the public purpose of a portion of the board's membership possessing such professional training and practice.**

. . . Thus, regarding the two architect members of the Board who occupy the two positions designated for registered architects, we find Section 112.313(7)(b) to be applicable, and thus find that no prohibited conflict of interest exists under Section 112.313(7)(a) regarding these two members.

Options for Board Membership

Based on the conflict-of-interest law described above, there are a variety of options for the Village of Estero to consider to address the current situation which would not allow a Board member or the member's firm to present an application for a Board decision. Some of the options are:

1. *Retain the current composition of the Board as provided in the Land Development Code.* The current Board is a composite of the original Design Review Board and the Planning and Zoning Advisory Board. The two boards were combined to bring a more efficient process to the review of development applications, that could allow more unified reviews of development projects and recommendations to the Village Council. The Board retains a mix of member qualifications as to background and expertise but does not designate any particular professional to a Board seat. It was also expected that a larger board would diminish the problems that had been experienced with the DRB in maintaining a quorum for meetings. There was some concern under the old code that the ability for some professionals to represent clients, while others could not, was disruptive to the Board's cohesion. On the negative side, there is a challenge to find volunteer professional members who are willing to forgo business opportunities in the Village in order to serve on the Board.

2. Amend the Land Development Code to designate certain Board "seats" to certified professionals, such as one or more of the following-- an architect, a landscape architect, and civil engineer -- whose expertise is particularly relevant to the work of the Board. This would allow those members and their firms to represent clients before the Board. A potential negative result from this option is that the public may perceive that members have conflicts of interest that reflect poorly on the Village. Variations of this option could include:

- a. Designated professional members can represent clients in all meetings of the Board, but of course could not participate in the vote.
- b. Designated professional members could only represent clients at public information meetings, with a member of the firm allowed to represent the client

in public hearings. The member would not participate in the public hearing but instead would leave the meeting.

- c. Designated professional members cannot represent clients in any meeting of the Board, but their firms can, and the members cannot participate in the vote but would leave the meeting.
- d. Limit the number of times that a member can represent a business client before the Board.
- e. Other options?

As the Local Planning Agency, the Board would be responsible for making a recommendation to the Village Council on changes to the Land Development Code.