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OPINION NO. 97-01

Office of the City Attorney

TO: Ella Makula, Vice-Mayor

FROM: Steve Kemp, City Attorney

DATE: July 9, 1997

SUBJECT: Conflict of Interest

QUESTION:

You have requested a City Attorney's Opinion pertaining to the performance of your duties as a member of the City Council and as the Community Relations Director for Lawyers Title Insurance Corporation, a title insurance company that does business in the state of Arizona and in particular the City of Peoria.

OPINION:

For purposes of background, the following factual information is provided. You are currently an elected City Council member for the Willow District and serving as Vice-Mayor of the City of Peoria. As a City Council member, you are required to vote on a variety of items. Clearly under the City Charter and Code, the position of City Council member is not a full time position.

You are also employed on a full time basis by Lawyers Title Insurance Company, a title insurance company authorized to do business in the state of Arizona. Your employment at Lawyers is in the position of Director of Community Relations. In this position, you do not receive commissions for any particular title insurance policy, however, you do receive a salary based on the overall

performance of the title insurance company. If the company performs well, your salary may be increased. Conversely, if the company performs poorly, your salary may be reduced.

Prior to being employed as the Director of Community Relations, you were employed by Lawyers as a Title Officer. In that position you would receive a commission on a title insurance policy which you sold. You might also receive additional commissions from other policies sold by other title agents in your assigned office.

The conflict of interest statutes are found in Title 38 of the Arizona Revised Statutes. The applicable statute provides:

§ 38-503. Conflict of interest; exemptions; employment prohibition

A. Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any contract, sale, purchase or service to such public agency shall make known that interest in the official records of such public agency and shall refrain from voting upon or otherwise participating in any manner as an officer or employee in such contract, sale or purchase.

B. Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.

C. Notwithstanding the provisions of subsections A and B of this section, no public officer or employee of a public agency shall supply to such public agency any equipment, material, supplies or services, unless pursuant to an award or contract let after public competitive bidding, except that:

1. A school district governing board may purchase, as provided in §§ 15-213 and 15-323, supplies, materials and equipment from a school board member.

2. Political subdivisions other than school districts may purchase through their governing bodies, without using public competitive bidding procedures, supplies, materials and equipment not exceeding three hundred dollars in cost in any single transaction, not to exceed a total of one thousand dollars annually, from a member of the governing body if the policy for such purchases is approved annually.

> **D.** Notwithstanding subsections A and B of the section and as provided in §§ 15-421 and 15-1441, the governing board of a school district or a community college district may not employ a person who is a member of the governing board or who is the spouse of a member of the governing board.

The statutes envision a two part process for the determination of a conflict of interest. The first part is the determination of the public official's interest in the matter. If the matter is a remote interest, they need not proceed any further. If the matter is a substantial interest, then a determination must be made as to disqualifying the public official from further participation in the matter.

The term substantial interest is defined in A.R.S. § 38-502 as being any interest other than a remote interest. The definition of remote interest is set forth in A.R.S. § 38-502.10 as follows:

> 10. "Remote interest" means:
>
> (a) That of a nonsalaried officer of a nonprofit corporation.
>
> (b) That of a landlord or tenant of the contracting party.
>
> (c) That of an attorney of the contracting party.
>
> (d) That of a member of a nonprofit cooperative marketing association.
>
> (e) The ownership of less than three per cent of the shares of a corporation for profit, provided the total annual income from dividends , including the value of stock dividends, from the corporation does not exceed five per cent of the total annual income of such officer or employee and any other payments made to him by the corporation do not exceed five per cent of his total annual income.
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> (f) That of a public officer or employee in being reimbursed for his actual and necessary expenses incurred in the performance of official duty.
>
> (g) That of a recipient of public services generally provided by the incorporated city or town, political subdivision or state department, commission, agency, body or board of which he is a public officer or employee, on the same terms and conditions as if he were not an officer or employee.
>
> (h) That of a public school board member when the relative

involved is not a dependent, as defined in § 43-1001, or a spouse.

(i) That of a public officer or employee, or that of a relative of a public officer or employee, unless the contract of decision involved would confer a direct economic benefit or detriment upon the officer, employee or his relative, of any of the following:

(i) Another political subdivision.

(ii) A public agency of another political subdivision.

(iii) A public agency except if it is the same governmental agency.

(j) That of a member of a trade, business, occupation, profession or class of persons consisting of at least ten members which is no greater than the interest of the other members of that trade, business, occupation, profession or class of persons.

Applying these statutes to your particular facts leads to the initial conclusion that simply being an employee of a title insurance company, in your current capacity or in your former capacity, does not automatically create a conflict of interest. Instead, individual situations must be evaluated.

In regards to your former employment as a Title Officer, if you were to receive commissions from a title insurance policy issued by your office and requiring action by the City Council to allow the title insurance matter to close, then in those situations you would have a conflict of interest prohibited by the statute and you would be required to disqualify yourself and not participate in the matter further.[1] In a case as outlined in the footnote, the closing of the escrow is directly contingent on the City Council action. As a result, your receipt of a commission is directly tied to an action that you would need to take as a City Council member. In such a case, you would have a substantial conflict of interest and

[1]An example of such a situation would be a real estate transaction that is escrowed with Lawyers Title and as part of the real estate escrow is contingent on a zoning change. If the zoning change does not occur, then the escrow would not close.

would be precluded under state law from participating in the matter.

A second situation could involve City property.[2] In this case, the receipt of a commission in your capacity as Title Officer is directly contingent on the closing of a transaction involving the sale of property by the City. Because your vote in approving the sale would result in your receipt of a commission, you have a direct substantial interest in the matter and may not participate.

In a situation where you simply work for a company, the risk of a substantial conflict of interest is considerably reduced. In each of the cases outlined in footnotes one and two, you would receive no financial renumeration in your position as Director of Community Relations. Nor is there any guarantee that your votes in either of these two matters could result in additional compensation due to the financial performance of the company. These two transactions would be two out of many, many transactions of which if the other transactions were unsuccessful, the company would likely adjust your compensation downward even though the two transactions that came before the City Council of Peoria were completed.

The concern in the position of Director of Community Relations would be if you were to attempt to use your position as a City Council member to force or encourage business to be taken to Lawyers Title Insurance Company instead of other title insurance companies. Since it is an administrative decision by staff as to which title insurance company the City will use, it is extremely unlikely that you would be able to do so. However, I would caution that you should avoid any conduct which would appear to indicate an intent to force or compel the City or a private party dealing with the City to use your employer versus any other title insurance company.

Based on the foregoing, I will outline a series of questions and their answers based on the Arizona conflict of interest law.

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[2]In a situation involving City property, the question would arise in a transaction where City property is being sold. Again, the title insurance transaction is ran through the branch of Lawyers which is headed by the Council member and their capacity as a title officer. Again, the receipt of a commission is contingent on the closing of the transaction.

1. May a council member, in their capacity as Director of Community Relations for a title insurance company, vote on a transaction involving City property being acquired or sold and using the title insurance company by which the Council member is employed? Based on the compensation plan outlined above, there would be no conflict of interest.

2. May a council member, working as a title insurance officer in a title insurance company and being compensated solely on the basis of commissions, vote on a transaction resulting in their receipt of a commission? The answer is no. Such a vote would constitute a conflict of interest in violation of state statute.

3. May a council member who is a title insurance officer paid by commissions receive commissions on the closing of a parcel of property in the City of Peoria where they also serve as a City Council member? Yes, provided that there is no official action that they must take as a City Council member to allow the sale to be completed.

4. May a council member who is a Director of Community Relations for a title insurance company and who does not receive commission salary but receives a performance based salary based on the overall performance of the company vote on title insurance transactions which are handled by his or her company in the City of Peoria? Yes.

Finally, it should be recognized that there is no penalty in the law in the event a public official determines that even a remote conflict of interest constitutes an appearance of impropriety. Under the law, you may certainly in remote situations elect to disqualify yourself even though you do not have a technical legal conflict of interest. It should be noted however, in such situations under Article 2 Section 18 of the Peoria City Charter a failure to vote will be counted as a vote with the majority on any item. In the event of a tie, the vote will be counted as a "No" vote.

Should you have any further questions regarding this matter, please feel free to contact me.

cc: Honorable Mayor and Council

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