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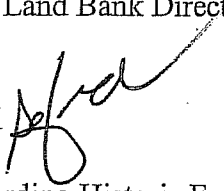
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**MEMORANDUM**

August 5, 2010

TO: County Council

C: Pete Rose, Council Administrator  
Lincoln Bormann, Land Bank Director  
Karen E. Vedder

FROM: Randall K. Gaylord 

RE: Council Vote Regarding Historic Easement with Agricultural Guild

**I. BACKGROUND AND QUESTION PRESENTED**

On August 24, 2010, it is anticipated that the County Council will be asked to approve a Historic Preservation and Conservation Easement (the "Historic Easement") regarding the Erickson building and Erickson property between the County (through the Land Bank) as the beneficial easement holder and the San Juan Islands Agricultural Guild, a Washington nonprofit corporation (the "Ag Guild") as the owner and burdened property owner. Council Member Lovel Pratt has asked for direction on her involvement in the agenda item on August 24. This memorandum is provided to all Council members because of the implications that may follow from the advice given in this memorandum.

Council Member Pratt is the former paid project director of the Ag Guild, and during the years 2008, 2009 and during the first six months of 2010 she was the person who was most responsible for carrying out the Ag Guild's plan to acquire space for a farmer's market in Friday Harbor. As part of that plan, the Erickson property was identified for lease and later for acquisition by the Ag Guild for a farmer's market.

This memorandum is intended to address the question of whether Council Member Pratt's involvement with the Erickson building transaction and, specifically, the Historic Easement should disqualify or limit her participation as a County Council member during the action of approving the Historic Easement.

The answer to this question requires an analysis of the common law and statutory rules pertaining to conflicts of interest and a detailed analysis of the role of Council Member Pratt in the development of the Historic Easement.

## II. DISCUSSION

Under RCW 42.23.030, "municipal officers" are generally prohibited from "self-dealing" where they would otherwise have the opportunity to use their public position to favor their private interests over the interests of the public. *Seattle v. State*, 100 Wn.2d 232, 246, 68 P.2d 1266 (1983).

A. Conflicts Proscribed by Code of Ethics. The conflicts of interest proscribed by RCW 42.23.030 involve:

1. A contract between the governmental entity and another party which is "made by, through or under the supervision of [the municipal] officer, in whole or in part, or which may be made for the benefit of his or her office"; and either
2. The officer is "beneficially interested, directly or indirectly," in the contract; or
3. The officer accepts, "directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein."

B. Is the Historic Easement "made" by or under the supervision of the County Council?

The contract in question (the Historic Easement) must actually be made by, through, or under the supervision of the officer in question for the statute to be triggered. It is not impermissible, for instance, for a city council member to have a beneficial financial interest in a contract executed and supervised by an independent city official according to purely objective criteria. *Seattle v. State*, 100 Wn.2d at 246. Under SJCC 2.28.010, the San Juan County Council must accept the Historic Easement. This power cannot be modified or delegated by the Council except by ordinance. It is the legal responsibility of the County Council, of which Council Member Pratt is a member, to take the action to accept the Historic Easement. This act of acceptance means that the Historic Easement is "made" by or under the supervision of the County Council. Accord, *Raymond v. Runyon*, 93 Wn. App 127, 137 (1998).

C. Does Council Member Pratt Have a Beneficial Interest in the Historic Easement?

"Beneficial interests" are financial interests and not other interests of a personal nature, such as those that follow indirectly from indemnity clauses in an agreement that mirrors an indemnity provided by state law. *Barry v. Johns*, 82 Wn. App. 865, 920 P.2d 222 (1996). We do not see how the Historic Easement provides any "beneficial interest" in favor of Council Member Pratt.

D. Does Council Member Pratt have a Remote Interest in the Historic Easement?

"Remote interests" are defined at RCW 42.23.040 to include nonsalaried officer positions in nonprofit corporations, and "an employee or *agent* of a contracting party where the compensation is fixed by wages or salary." Council Member Pratt had a paid leadership position with the Ag Guild but, since June 21, 2010, she has been and is now an unpaid volunteer. Whether paid or not, she is an agent for the Ag Guild. We believe the position that she held as "Project Director" would qualify Council Member Pratt as a "nonsalaried officer" position or as an agent.

It has been mentioned that Council Member Pratt's discontinuation of pay means that she now has the status of a "former remote interest" and that her current status as a volunteer has reduced her status to something less than a "remote interest" – *i.e.*, a position without any consequence. But, there is no Washington case law addressing this specific issue. We note that cases defining direct or indirect compensation, award, or gratuity, and the few cases from other jurisdictions vary in their severity. Receiving gifts, trips, lodging, meals, alcoholic beverages and refreshments (including everything down to coffee during the course of a negotiation over a prospective contract) might all be said to fall within the language of the statute, but no reported case has condemned less than the acceptance of meals and drinks. *See, e.g., State v. Prybil*, 211 N.W.2d 308 (Iowa 1973) (Iowa statute similar to Washington's violated by county official's acceptance of dinner and drinks in connection with contract with company).

In a Washington State Attorney General Opinion, the Attorney General declined to apply "a rule of *de minimis*" when examining the amount of financial interest that is triggered by the conflict of interest rules and recognized California rules that create a disqualification where a person is prejudiced, though not financially interested. *See* Wash AGO 1953-1955 No. 317.

We do not believe that Council Member Pratt can now separate herself from any financial interests and, thereby, reduce her involvement to a point that it is no longer even a remote interest. An older case from the state of California is instructive. There the court found that a contract void existed when a council member negotiated a contract for plumbing services and then resigned his position with the city before the contract was executed. *Stigall v. City of Taft*,

58 Cal.2d 565, 570-571, 375 P.2d 289, 29, 25 Cal.Rptr. 441, 444 (CAL. 1962). If a person cannot avoid the statute by resigning the position with the government agency, they should not be able to avoid the statute by resigning the position with the contracting agency.

Even if there is no financial award to Council Member Pratt that flows from the Historic Easement, she was the paid agent for the Ag Guild and, as such, she has been actively involved in negotiating the acquisition of the Erickson property of which the Historic Easement is an integral part. Her status as an agent has been ongoing since 2008 and, of necessity, involved some strategic decision points for the Ag Guild involving the Historic Easement, including planning for the Historic Easement, the price expectations for the Historic Easement, the identification of the historic and conservation values to be protected, and other matters. These early negotiations identified the price term (\$400,000) and identified some of the historic preservation restrictions and conservation values which would be granted as necessary to arrive at that price. We recognize that these matters are being finalized under the direction of Mr. Mark Madsen, President of the Ag Guild. But, given the past involvement of Council Member Pratt *as agent for the Ag Guild*, the "remote interest" rules are appropriate to apply.

We note that care must be taken to observe the procedural requirements for taking advantage of the remote interest exception. The fact and extent of the interest in a particular contract must be disclosed to the governing body prior to contract approval, and recorded in official minutes or comparable records. Also, a remote interest holder may not influence or attempt to influence any other "officer" to enter the contract in question. *See* RCW 42.23.040.

E. Is Treating Council Member Pratt as a Remote Interest Holder Consistent With the Legislative Purpose? The prohibition against an officer having a beneficial interest in a contract is strictly construed and is based upon fundamental principles of the law of agency. *Northport v. Northport Townsite Co.*, 27 Wash. 543, 68 Pac. 204 (1902) is a widely cited case that explained the public policy as follows:

The general public policy upon which the statute . . . is founded is of ancient origin, and has been inexorably enforced by the courts throughout the history of the common law. It is that principle which requires the trustee to always occupy a position that shall be free from the dictates of any interest that may conflict with the obligations of his trust . . .

Long experience has taught lawmakers and courts the innumerable and insidious evasions of this statutory principle [prohibiting self-interest in contracts] that can be made, and therefore the statute denounces such a contract if a city officer shall be interested not only directly but indirectly. However devious and winding the

chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void.

*Id.* at 548-549 (emphasis supplied).

#### IV. CONSEQUENCES OF VIOLATION OF THE CONFLICT OF INTEREST RULES

The consequences of a violation of the conflict of interest rules is severe. The contract is void, not voidable, which means that a court would have no discretion but to declare the contract void and undue the transaction once all of the elements of a conflict of interest were found to exist. *See* RCW 42.23.050.

Moreover, the action in participating on behalf of the public entity means that they could subject the government officer to civil penalties and operate as a forfeiture of office either by recall or direct action in court. *See* RCW 42.23.050

#### V. CONCLUSION AND RECOMMENDATION

Based on the foregoing, we conclude that Council Member Pratt cannot participate in the approval of the Historical Easement because to do so would be seen as contrary to her loyalties as an agent and project director of the Ag Guild. Although Council Member Pratt has recently eliminated her pay and reduced her involvement to that of an unpaid volunteer for the Agricultural Guild, that action came at a point that was too late to participate on behalf of the County Council.

We acknowledge that under *Barry v. Johns, supra* and the facts here, that Council Member Pratt may not have a financial interest under the terms of the Historic Easement on August 24, the date set for approval by the County Council. The Historic Easement runs in favor of a nonprofit corporation, and Council Member Pratt has recently reduced her involvement in the Ag Guild.

But, what is undeniable, is that since 2008, all during the year 2009 and during most of this year so far, Council Member Pratt was the lead negotiator *on behalf of the Ag Guild* on a complicated transaction involving the County, the Ag Guild, the Ericksons, the Town, and the State. Even though Council Member Pratt will not receive financial gain from the transaction, the common law principles against having two masters is directly applicable. Council Member Pratt had to choose which side of this transaction she was going to be agent for, and she chose

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the Ag Guild. She cannot renounce her direct or indirect financial benefits and step in and now vote on behalf of the County Council.

We believe that under these circumstances the “remote interest” provisions of RCW 42.43.040 are instructive either directly or by analogy, and they should provide a “safe harbor” for the Historic Easement. Council Member Pratt’s status as agent for the Ag Guild is covered by the remote interest rules. While it is possible that a court would identify her status during key contract negotiation periods to be more important and, therefore, not apply the “safe harbor” of statutorily defined remote interests and, therefore, void the Historical Easement. We consider a court declaring the Historical Easement void to be unlikely. But, we also think if a court were to look at all of the facts it would not describe Council Member Pratt’s status and involvement as agent for the Ag Guild as insignificant or negligible.

We believe that the best approach is for Council Member Pratt to follow the three-step procedure called out for with respect to remote interest in RCW 42.43.040. First, Council Member Pratt should assure that the minutes of the Council include a disclosure of her involvement on behalf of the Ag Guild and the financial interests that she has had or does have with the Ag Guild, including any financial interests of any relatives, if any. The second step of this procedure requires Council Member Pratt to not communicate directly (by letter, e-mail or in person) with any other Council Member in an effort to influence their vote on the acceptance of the Historical Easement. Third, Council Member Pratt should not participate on the vote of approval of the Historical Easement.

RKG/tb

Attachment: Appendix

## APPENDIX

### RCW 42.23.030

#### Interest in contracts prohibited -- Exceptions.

No municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein. This section shall not apply in the following cases:

.....

A municipal officer may not vote in the authorization, approval, or ratification of a contract in which he or she is beneficially interested even though one of the exemptions allowing the awarding of such a contract applies. The interest of the municipal officer must be disclosed to the governing body of the municipality and noted in the official minutes or similar records of the municipality before the formation of the contract.

### RCW 42.23.040

#### Remote interests.

A municipal officer is not interested in a contract, within the meaning of RCW 42.23.030, if the officer has only a remote interest in the contract and the extent of the interest is disclosed to the governing body of the municipality of which the officer is an officer and noted in the official minutes or similar records of the municipality prior to the formation of the contract, and thereafter the governing body authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer having the remote interest. As used in this section "remote interest" means:

- (1) That of a nonsalaried officer of a nonprofit corporation;
- (2) That of an employee or agent of a contracting party where the compensation of such employee or agent consists entirely of fixed wages or salary;
- (3) That of a landlord or tenant of a contracting party;

(4) That of a holder of less than one percent of the shares of a corporation or cooperative which is a contracting party.

None of the provisions of this section are applicable to any officer interested in a contract, even if the officer's interest is only remote, if the officer influences or attempts to influence any other officer of the municipality of which he or she is an officer to enter into the contract.

**RCW 42.23.050**

**Prohibited contracts void -- Penalties for violation of chapter.**

Any contract made in violation of the provisions of this chapter is void and the performance thereof, in full or in part, by a contracting party shall not be the basis of any claim against the municipality. Any officer violating the provisions of this chapter is liable to the municipality of which he or she is an officer for a penalty in the amount of five hundred dollars, in addition to such other civil or criminal liability or penalty as may otherwise be imposed upon the officer by law.

In addition to all other penalties, civil or criminal, the violation by any officer of the provisions of this chapter may be grounds for forfeiture of his or her office.