Hankin, Persson, McClenathen, Cohen & Darnell

Attorneys and Counselors At Law
1820 Ringling Boulevard
Sarasota, Florida 34236-5917

Lawrence M. Hankin
David P. Persson
Chad M. McClenathen*
Andrew H. Cohen
Robert W. Darnell
Michael T. Hankin
Kelly M. Fernandez**
Maggie D. Mooney-Portale***

David D. Davis (1955-2012)

Telephone (941) 365-4950
Facsimile (941) 365-3259
Email: mmooney-portale@sarasotalawfirm.com

* **Board Certified Real Estate**
** **Board Certified State and Fed. Govt. & Admin. Practice**
*** **Board Certified City, County and Local Government Law**

February 26, 2013

The Honorable James L. Brown, Mayor
and Members of Town Commission
Town of Longboat Key
501 Bay Isles Road
Longboat Key, Florida 34228

RE: Chamber of Commerce Appointments

Dear Mayor Brown and Town Commissioners:

During a recent Workshop Session, the Town Commission requested clarification on what legal issues, if any, it may encounter if it appoints an elected member of the Town Commission to fill a seat on the Board of Directors of the Longboat Key Chamber of Commerce ("Chamber"). The Town of Longboat Key ("Town") is a corporate member of the Chamber and pays annual dues for such membership. The Chamber is a non-profit, 501(c)(6) corporation "dedicated to supporting a healthy economic environment for the benefit of local businesses, residents and visitors" within the Longboat Key community. See, the Chamber's website: http://www.longboatkeychamber.com/. A Town employee has served on the Chamber's Board of Directors for the past 6 years and is term limiting off of the Board. The Town would like to continue to have a representative on the Chamber's Board of Directors and would like to explore filling the vacancy with an elected member of the Town Commission. If so, does the Town have any legal issues associated with the Sunshine, Public Records, or Ethics Law associated with such appointment?

Issue 1: Sunshine Law Ramifications.

The Sunshine law requires that a public agency conduct its public business in a manner that is open to public, noticed, and that minutes be prepared for such meetings. Fla. Stat. § 286.011. Several Florida Attorney General Opinions have considered whether private, economic development entities would be subject to the Sunshine Law. The Florida Attorney General has found that a private business entity will not fall within the definition of an "agency" and will not be subject to the requirements of the Sunshine Law unless: (a) the public agency delegates governmental responsibilities to the private entity or (b) the private entity acts in an advisory capacity to a governmental agency. Inf. Op. Att'y Gen. Fla. (Dec. 17, 2009) (open government

laws do not apply to a private economic development corporation since no delegation of a public agency's governmental function was apparent and the corporation did not play an integral part in the decision-making process of the agency); and Inf. Op. Att'y Gen. Fla. to Hatcher and Thornton (Sept. 15, 1992) (a private non-profit corporation established by local business people is not subject to the Sunshine law as the local government entity did not delegate legislative or governmental functions to the council and the council does not act in an advisory capacity)

The Town has not delegated any governmental or legislative functions to the Chamber, nor does the Town exert any control over the activities of the Chamber. The Chamber does not act in an advisory capacity to the Town. Further, the Town has not delegated any of the Town's decision making functions to the Chamber.

Accordingly, it is our opinion that as long as the Town continues its practice of not delegating government functions to the Chamber of Commerce, and the Town does not have the Chamber act in an advisory capacity to the Town, then the Sunshine Law will not apply to meetings held by the Chamber's Board of Directors irrespective of whether an elected Town representative or Town staff person sits on the Board.

Issue 2: Public Records Ramifications.

The issue of whether records of a private, economic development entity would be subject to Florida's Public Records laws is governed by a specific statutory provision. Florida Statutes § 119.01(3) states:

> (3) If public funds are expended by an agency in payment of dues or membership contributions for any person, corporation, foundation, trust, association, group, or other organization, all the financial, business, and membership records of that person, corporation, foundation, trust, association, group, or other organization which pertain to the public agency are public records and subject to the provisions of s. 119.07.

It is our understanding that the Town is a corporate member of the Chamber and that it pays the Chamber annual dues of $7,500 to sustain such membership. Based upon the above provision contained within the Public Records Act, it is our opinion that all the financial, business, and membership records of the Chamber *which pertain to the Town* are public records. Accordingly, all records maintained by the Town's representative on the Board of Directors (irrespective of whether elected official or Town staff) that pertain to the Town should also be treated as a public record. See, Op. Attn'y General (76-194). Additionally, given that the definition of a public record encompasses all materials made or received "in connection with the transaction of official business by an agency which are used to perpetuate, communicate or formalize knowledge," the most prudent approach for any Town's representative serving on the Chamber's Board of Directors to follow would be for the Town's representative to treat all records (documents, emails, etc.) made or received by him/her relating to the service on the Board of Directors as a public record.

Issue 3: Ethics issue(s).

Both the state and the Town have provisions governing conflicting appointment under its ethics laws. Generally speaking, it does not appear that there would be an ethical prohibition for a Town Commissioner to serve on the Chamber of Commerce's Board of Directors. However, any Town Commissioner who serves on both the Town Commission and the Chamber's Board of Directors, should be mindful of the potential "conflict" issue that under certain circumstances could arise for the individual Commissioner.

It is our understanding that from time to time, the Town and Chamber have planned and coordinated certain community activities (i.e., road closures, parades, etc.). If such activities involve the Town and Chamber transacting business with one another or entering into contracts with each other or relate to property transactions with one another, then such activities may create a conflict of interest for the individual Town Commissioner who also serves on the Chamber's Board of Directors. See, Fla. Stat. § 112.313(3) Stating "[n]o . . . public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer . . . is [a] director"; see also, § 39.06 LBK Code. If there are business transactions between the Commission and the Chamber, then the particular Town Commissioner serving on both bodies may need to publicly disclose the voting conflict, abstain from voting on the particular matter and/or file an appropriate disclosure form with the Town Clerk. The potential for a conflict for the individual Town Commissioner will depend on the factual circumstances relating to the transaction between the parties.

If a Town Commissioner is appointed by the Commission to serve on the Chamber's Board of Directors, he/she will need to file an appropriate disclosure form with the Town Clerk within 45 days of the appointment that sets forth the Commissioner's relationship with the Chamber (i.e., becoming a member of the Chamber's Board of Directors). See, § 39.06(H)(1), LBK Code. Lastly, any Commissioner appointed to serve on the Chamber's Board of Directors (or other for-profit or not-for-profit board doing business on Longboat Key) should be reminded of the obligation not to disclose or use information not available to the general public for the gain or benefit of the Chamber or any business entity belonging to the Chamber. Fla. Stat. § 112.313(8).

Provided the Town Commissioner observes the above outlined ethics provisions set forth in Florida Statutes and in the Longboat Key Code, it is our opinion that there is no ethics restriction on having a Town Commissioner serve on the Chamber's Board of Directors.

Should the Town Commission have any questions or concerns regarding this opinion, please do not hesitate to contact us.

Respectfully,

Maggie D. Mooney-Portale

Maggie D. Mooney-Portale

cc: David Bullock

End of Agenda Item