

City of San Luis

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MAYOR

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VICE MAYOR

Archibaldo Gurrola

COUNCIL MEMBERS

Dolores "Lolita" Concha

Guillermina Fuentes

Marco A. "Tony" Reyes, Jr.

Nieves Garcia Riedel

Rafael Torres

CITY MANAGER

Lee Maness

CITY ATTORNEY

Glenn Gimbut

October 11, 2006

Mayor Juan Carlos Escamilla
Members of City Council
Sonia Sanchez, City Clerk

Re: Opinion of City Attorney Regarding Possible Conflict of Interest

Dear Mayor and Members of City Council:

A question of possible conflict of interest has been presented to me for an opinion. This letter constitutes the formal legal opinion of the Office of the City Attorney. It has been reviewed by David Merkel, Esq., General Counsel of the League of Arizona Cities and Towns and Bill Sims, Esq. of Moyes Storey, and meets with their approval.

On October 4, 2006 the City Council held a special meeting and one of the items was to consider the approval of a development agreement with Wal-Mart Stores, Inc. to develop a bridge across the East Main Canal on the 22nd Street alignment. Councilwoman Delores Concha participated in the discussion and vote. The resolution approving the development agreement was passed by a vote of 5-0.

Two questions have been posed by another member of Council. First, did Mrs. Concha have a conflict of interest? Second, if there is a conflict, is there a way to correct the error in participating in the discussion and vote 'after the fact.'

As a general rule, the conflict of interest statutes would prohibit a member of Council who has a substantial interest in an item on the agenda from participating in a discussion or vote regarding that particular matter. The member of the body must declare a conflict then refrain from any participation. There are some exceptions to this rule, but those circumstances are not applicable in this particular case.

The first question that must be addressed in any analysis is whether one has a "substantial interest." A.R.S. §38-502(11) defines this term as follows:

“11. "Substantial interest" means any pecuniary or proprietary interest, either direct or indirect, other than a remote interest.

“Remote interest” is defined at ARS §38-502(10). This is a list of ten specific circumstances. None of those circumstances are present here. Arizona case law has held that if there is any pecuniary interest, direct or indirect, and it is not in the list of circumstances described in ARS §38-502(10), then it is a substantial interest and participation in either a discussion or vote would be a violation of ARS §38-503(A). As this is not a matter of being a “remote interest” as defined, one must focus on the issue of whether this is a matter involving a pecuniary or proprietary interest sufficient to be a “substantial interest.”

Here the facts constituting a possible pecuniary interest are as follows. Mrs. Concha owes a debt to Mrs. Nieves Riedel. Mrs. Riedel is the principal stockholder and chief executive officer of Riedel Construction, Inc. Riedel Construction, Inc. entered into a development agreement with the City of San Luis that provides that if a connection to the 9th Ave. alignment is made on the 22nd Street alignment from Highway 95, then Riedel Construction will pave two lanes on 22nd Street from 9th Ave. to 10th Ave. The development agreement between the City and Wal-Mart Stores, Inc. will build the last connection needed to bring 22nd Street to the 9th Ave. alignment, which, in theory, may trigger the requirement of paving by Riedel Construction, Inc.

Several facts need to also be considered in any analysis. First, the debt of Mrs. Concha to Mrs. Riedel is personal. It is not a debt with Riedel Construction, Inc., and does not affect or impact upon the financial strength or business dealings of Riedel Construction, Inc. in any manner. Second, it is unaffected in any manner by the development agreement with Wal-Mart Stores, Inc. Nothing in that agreement affects the debt in any way. Third, the agreement with Wal-Mart, Stores, Inc. is not connected with the agreement with Riedel Construction, Inc. The obligations to build the bridge and related improvements to the 9th Ave. alignment are not connected or contingent upon connecting 22nd Street to 10th Ave. Whether the paving from 9th Ave. to 10th Ave. occurs or not has no bearing on Wal-Mart’s obligations under the development agreement. As a result, whether Riedel Construction, Inc. will need to pave two lanes from 9th Ave. to 10th Ave. has no bearing on the obligations created by the Wal-Mart development agreement.

What is presented by the matter at hand is what this author would characterize as a “six degrees of separation” problem. It is possible to make anything impact anything else, all one has to do is have an active imagination and create a Rube Goldberg series of situations so that one matter eventually impacts another. Somewhere along the line common sense needs to enter into the equation.

In *Yetman v. Naumann*, 16 Ariz.App. 314, 492 P.2d 1252 (Div.2 1972) the court held at page 317:

“We do not believe however, that the legislature intended that the word ‘interest’ for purposes of disqualification was to include a mere abstract interest in the general subject or a mere possible contingent interest. Rather, the term refers to a pecuniary or proprietary interest, by which a person will gain or lose something as contrasted to general sympathy, feeling or bias. Moody v. Shuffleton, 257 P. 564 (Cal.App.1927), rev'd on grounds that an ‘interest’ was shown, 203 Cal. 100, 262 P. 1095 (1928).”

In *Hughes v. Jorgenson*, 203 Ariz. 71, 50 P.3d 821(2003) the Supreme Court upheld this interpretation by the *Yetman* court. In *Hughes* the court was faced with a circumstance where a County Sheriff directly participated in a criminal investigation of his sister. The argument was made: “...that Hughes's conduct falls within the ambit of the conflict of interest statute because both Hughes and his sister ‘had some financial interest to gain or lose by [Jane Doe's] arrest, incarceration, and prosecution for drug possession.’” The Supreme Court in rejecting the proposition that the Sheriff had a conflict of interest cited with authority the *Yetman* decision and the cases of *Shepherd v. Platt*, 177 Ariz. 63, 865 P.2d 107 (App.1993) and *Arizona Farmworkers Union v. Agric. Employment Relations Bd.*, 158 Ariz. 411, 762 P.2d 1365 (App.1988). The Supreme Court in approving the law of these cases stated at page 74:

“These cases make clear that to violate the conflict of interest statute, a public official must have a non-speculative, non-remote pecuniary or proprietary interest in the decision at issue.”

In citing the *Shepard* decision, the Supreme Court stated at page 74:

“In *Shepherd v. Platt*, 177 Ariz. 63, 865 P.2d 107 (App.1993), the court of appeals determined that Navajo tribal members who served as county supervisors had not violated the conflict of interest statute in their decisions regarding county expenditures on the Navajo Reservation. Noting that a conflict exists within the meaning of A.R.S. § 38-503 only “when a public official [or a relative] has a substantial pecuniary or proprietary interest in one of his or her decisions,” *id.* at 65, 865 P.2d at 109, the court succinctly defined the terms at issue: “[p]ecuniary means money and proprietary means ownership.” *Id.*”

Any attempt to connect the dots and create an impact between the personal obligation of Mrs. Concha to Mrs. Riedel with the development agreement with Wal-Mart Stores, Inc. is speculative at best. Nothing in the Wal-Mart development agreement creates a situation where Mrs. Concha will gain something or lose something. Nothing in

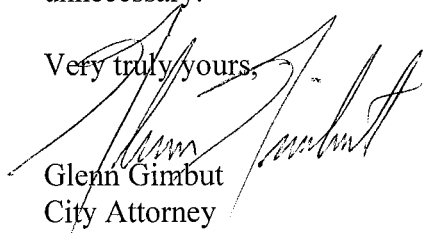
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the obligations contained in the development agreement with Wal-Mart is connected to the agreement with Riedel Construction, Inc. Nothing in the agreement with Riedel Construction, Inc. creates a situation where Mrs. Concha will gain something or lose something. And nothing in the possible trigger to pave two lanes on 22nd Street by Riedel Construction, Inc. creates a situation where Mrs. Concha will gain something or lose something. Like *Hughes, Shepard*, and the issues involving Mr. Al Lopez in *Arizona Farmworkers Union*, this situation is not statutorily defined as a "remote interest", but also like these cases, it is clearly factually a remote and speculative interest at best. Therefore, it is the opinion of this office that there is no violation of the conflict of interest statutes by the participation in the discussion and vote on the Wal-Mart development agreement by Councilwoman Concha.

With respect to the second question, there is no known method by which a public officer can cure, personally, a violation of ARS §38-503(A). This provision in the law was either violated or not. It is the opinion of this author that no violation has occurred.

Another issue is raised by ARS §38- 38-506(A) which provides: " In addition to any other remedies provided by law, any contract entered into by a public agency in violation of this article is voidable at the instance of the public agency." Again, it is the opinion of this author that no violation of the law has occurred. Even if a violation has occurred, the participation of Ms. Concha was not the deciding vote and therefore, arguably, the contract was not entered into in violation of the law for this additional reason. However, one option, in the event that someone wants to be certain that the contract was entered into in a manner free from even the appearance of impropriety is to put the matter back on the agenda and have Council vote to ratify the previous decision. This author believes, and Bill Sims concurs, that such an action is completely unnecessary.

Very truly yours,


Glenn Gimbut
City Attorney