

August 31, 2011

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

Mr. Steven J. Levitas
Kilpatrick Townsend & Stockton, LLP
4208 Six Forks Road, Suite 1400
Raleigh, North Carolina 27609

Re: City of Greensboro Solid Waste Contract

Dear Steve:

Thank you for your letter of August 24, 2011. I appreciate the opportunity to review any new information or law that I may have overlooked relating to Councilmember Vaughan's qualification to vote on the award of a contract to Gate City Waste Services, LLC ("Gate City"). My interest as city attorney is to protect the action of the City Council and to protect the city and council members from liability. Likewise, it is important to recognize that duly elected council members have a right and duty to vote on matters under consideration by the City Council. N.C. Gen Stat. Section 160A-75. The voting exceptions in this statute should not be used to permit council members to avoid voting on difficult issues. City of Albemarle v. Security Bank, 106 N.C. App. 75, 415 S.E. 2d 96 (1992).

Because G.S. 160A-75 does not define financial interest, I considered the common law standard for conflicts as stated in Kendall in preparing my memorandum of August 22, 2011. I have not been able to find any cases, however, that review facts similar to the alleged disqualifying interests of Ms. Vaughan as stated in your letter. There is nothing to indicate that Ms. Vaughan will not be diligent in meeting her duty of absolute loyalty to the City if she participates in the consideration of a contract award to Gate City. Snipes v. City of Winston, 35 S.E. 610 (1900). The determination of whether a conflict exists is necessarily dependent on the particular facts as they relate to the action being taken by the City Council.

While the City Council is scheduled to consider the award of a contract to Gate City, I do not have any information to indicate that Ms. Vaughan's husband would derive any income or commission directly from a potential contract with Waste Industries, USA, Inc. ("Waste Industries"). If this was the case, I would advise the City Council that they could not consider a contract with Waste Industries because a council member cannot avoid liability under G.S. 14-234 by being excused from voting. Under G.S. 14-234(a1)(3), "[a] public officer is also involved in the making of a contract if the . . . body of which he or she is a member takes action on the contract, whether or not the public officer actually participates in that action . . ." See also, State v. Williams, 68 S.E. 900 (1910); Gibbs v. Mayo, 162 N.C. App. 549, 591 S.E. 2d 905 (2004). A council member involved in the making of a contract in which he or she has a direct financial interest is guilty of a misdemeanor. N.C. Gen. Stat. Section 14-234(e).

In applying the common law, the North Carolina Supreme Court has been very diligent in ensuring that members of local boards do not benefit from contracts approved by a board as evidenced by Snipes and Kendall, See also, Davidson v. Guilford County, 152 N.C. 436, 67 S.E. 918 (1910). At the same time, the Courts have found that more remote interests do not violate common law conflict principles. Venable v. School Committee, 149 N.C. 120, 62 S.E. 902 (1908) (brother of school committee member was part owner of lot to be purchased for school); Kistler v. Board of Education of Randolph County, 233 N.C. 400, 64 S.E. 2d 403 (1951) (member of school board owned land near selected school site and value of land would be enhanced by school). While in dicta, the Supreme Court has stated that with regard to legislative decisions, "[w]here there is a specific, substantial and readily identifiable financial impact on a member, nonparticipation is required [emphasis added]." County of Lancaster v. Mecklenburg County, 334 N.C. 496, 511, 434 S.E. 2d 604, 614 (1993). This standard has been adopted by the General Assembly as the basis for recusal in the consideration of legislative zoning decisions. N.C. Gen. Stat. Section 160A-381.

As I stated in my memorandum of August 22, the City's Conflict of Interest Policy, G.S. 14-234 and Section 4-131 of the City Charter define prohibited financial interests by reference to a particular contract. The City's conflict policy provides that no officer shall participate in the award of a contract when one of the listed persons has a financial interest in the firm selected for award. G.S. 14-234 provides that no officer involved in the making of a contract shall derive a direct benefit from the contract. Finally, the City Charter Section 4-131 prohibits a financial interest direct or indirect in any proposed contract.

At its meeting on August 19, 2011, the Greensboro City Council made a valid selection of your client, Gate City, to perform the push and pack operation at the White Street Landfill pursuant to

the provisions of G.S. 143-129.2. The City Council determined that Gate City's proposal was "more responsive to the request for proposals", and this determination is deemed to be conclusive under the statute. N.C. Gen. Stat. Section 143-129.2(e). This selection of Gate City was preliminary because the statute contemplates the negotiation of a contract with the selected proposer. In addition, the City has elected to follow the procedures for the granting of a franchise in the approval of a contract with Gate City. I am sure that your client considers the City Council selection to be conclusive subject to compliance with the procedural steps for final approval. The action scheduled for September 20 is first reading on the award of a contract to Gate City; no other contracts are under consideration. Gate City is the only contractor for which the City Council has made the required determinations under G.S. 143-129.2.

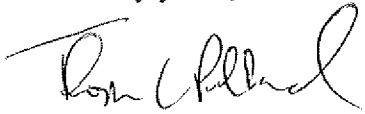
You contend that Waste Industries potentially will be affected financially by the outcome of the City Council's consideration of the award of a contract to Gate City, and Ms. Vaughan still should be barred from voting because her husband represents Waste Industries. It is undisputed that Ms. Vaughan has no financial interest in Gate City or a potential contract between the City and Gate City. The failure to approve a contract with Gate City does not dictate a particular option for the City's solid waste management services or ensure that Waste Industries will benefit from any future options chosen by the City Council. The connection of such decisions to the financial interest of Waste Industries and Ms. Vaughan is tenuous. The possibility that Waste Industries might retain some competitive advantage if the Council does not approve the contract with Gate City is just too remote an interest to overcome the strong public policy underlying the requirement to vote as set forth in G.S. 160A-75. Similarly, the possibility that Waste Industries might be at a competitive disadvantage with Republic Services, Inc. if the City chooses to close its transfer station is even more remote. These potential financial impacts on Waste Industries do not rise to the level of a specific, substantial and readily identifiable financial impact on Ms. Vaughan. Based on the matter now being considered by the City Council, applicable statutory provisions and common law conflict principles do not prohibit Ms. Vaughan from voting.

You have expressed concern about the integrity of the City's decision-making process if a council member who has not participated in the process for selection of the most responsive proposer is now permitted to vote on the final award of the contract. I am concerned about the City complying with all statutory requirements in awarding the contract now that a firm has been selected for the push and pack operation, including respecting the right and duty of all council members to vote on matters before the City Council unless limited by common law or statute. Some concerns have been expressed about the consistency of opinions on conflicts rendered by the City Attorney's office. The opinions on the potential conflicts of various council members about the White Street Landfill were based on the facts of the particular action of the City

Council. A conflict determination is necessarily dependent on the facts relating to the matter under consideration, and I am not aware of any case law that limits a council member's obligation to vote because there may have been a conflict at another stage in the consideration of a matter.

After reviewing the issues that you raised, it is still my opinion that there is no basis under G.S. 160A-75 to excuse Ms. Vaughan from voting on the award of a contract to Gate City.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Tom Pollard", written in a cursive style.

Thomas C. Pollard
Interim City Attorney

cc: Mayor and City Council Members
Rashad Young, City Manager
George W. House, Esq.