



Attorney General of New Mexico

GARY K. KING
Attorney General

October 2, 2013

ALBERT J. LAMA
Chief Deputy Attorney General

The Honorable Debbie Rodella
New Mexico State Representative
16 Private Drive 1156
Española, NM 87532

Re: Attorney General Opinion Request—Infrastructure Development Zone Board Members

Dear Representative Rodella:

You have requested our advice on whether a board member of an Infrastructure Development Zone (“IDZ”) is subject to the Governmental Conduct Act, NMSA 1978, Sections 10-16-1 to -13.3 (2011) (“GCA”) and the Finance Disclosure Act, NMSA 1978, Sections 10-16A-1 to -8 (1995). You have asked us to address four questions: (1) Is a board member of an IDZ considered a “public officer or employee” under the Governmental Conduct Act? (2) Is a “public officer” allowed to take any official action that also benefits the public officer’s financial interests? (3) Does the disclosure of conflicts of interest allow public officials to take actions they otherwise would not be able to take? (4) Does the Financial Disclosure Act apply to a board member of an IDZ?

Based on our examination of the relevant constitutional, statutory and case law authorities, and the information available to us at this time, we conclude that a board member of an IDZ is considered a public officer under the GCA, can take official action that benefits his or her financial interests only to the extent permitted by the GCA and cannot take action he or she is disqualified from taking merely by disclosing the conflict of interest. A board member of an IDZ is not subject to the requirements of the Financial Disclosure Act.

Governmental Conduct Act

The 2009 legislature enacted the Infrastructure Development Zone Act (“IDZ Act”). See NMSA 1978, §§ 5-17-1 to -36 (2009). An “infrastructure development zone” is “a political subdivision organized or acting pursuant to the provisions of the Infrastructure Development Zone Act.” *Id.* § 5-17-2(F) (emphasis added). Members of an IDZ board of directors are elected by eligible voters within the IDZ. See NMSA 1978, § 5-17-10(B) (2009). The board members “may receive compensation for the director’s service a sum not to exceed one hundred dollars (\$100) per meeting attended or one thousand six hundred dollars (\$1,600) per year.” *Id.* § 5-17-21(F).

The GCA's definition of "public officer or employee" has three subparts. It covers "any elected or appointed official or employee of a state agency or local government agency who receives compensation in the form of salary or is eligible for per diem or mileage but excludes legislators." NMSA 1978, § 10-16-2(I) (2011) (emphasis added). The GCA defines "local government agency" as "a political subdivision of the state or an agency of a political subdivision of the state." *Id.* § 10-16-2(G) (emphasis added). A board member of an IDZ fits within the first two subparts of the definition of "public officer or employee" because the board member is an "elected official" of a "local governmental agency."

Less clear is whether a board member fits within the third subpart, which refers to an official "who receives compensation in the form of a salary or is eligible for per diem." The IDZ Act authorizes compensation for board members but does not use the terms "salary" or "per diem." Instead, the IDZ Act allows board members to receive for their services up to \$100 per meeting attended or \$1,600 per year. Nevertheless, in light of the legislature's evident intent that the GCA broadly cover public officers and employees of the state and its political subdivisions, we believe the terms "salary" and "per diem" in Section 10-16-2(I) of the GCA are broad enough to include the compensation authorized for board members under the IDZ Act. Specifically, the authorization for up to \$1,600 per year can reasonably be construed as a "salary" and the authorization for up to \$100 per meeting attended can reasonably be construed as per diem. Significantly, while "per diem" is not defined in the GCA or IDZ Act, the New Mexico Per Diem and Mileage Act instructs that a per diem can be collected "for each board or committee meeting attended..." NMSA 1978, § 10-8-4(A)(1) (2009). *See* NMSA 1978, § 12-2A-20(B)(6) (rule of statutory construction authorizing consideration of "a statute ... on the same or a related subject" when determining the meaning of a statute's text); *New Mexico Bd. of Veterinary Medicine v. Riegger*, 2007 NMSC 44, ¶ 13, 142 N.M. 248, 254, 164 P.3d 947 ("all provisions of a statute, [along] with other statutes *in pari materia*, must be read together" to discern the meaning of an undefined term in a statute).

An IDZ board member is an elected official of a local government agency who is eligible for per diem in the amount of \$100 per meeting attended or a \$1,600 salary.¹ Therefore, an IDZ board member is a "public officer or employee" under the GCA.

Next, you ask whether a public officer under the GCA can take any official action that benefits his or her financial interests. For purposes of the GCA, an official action includes "an official decision, recommendation, approval, disapproval or action that involves the use of discretionary authority." NMSA 1978, § 10-16-2(H) (2011). The GCA states: "A legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests." *Id.* § 10-16-3(A) (emphasis added). This means a board member's mindset must be that every official action shall be made only to advance the public interest. If a board member allows other considerations, such as personal financial interests, to be the primary factor in the official action, the board member may

¹ Contrary to what the analysis accompanying your request suggests, we believe public officials who are otherwise covered by the GCA remain covered even if they elect not to accept compensation or per diem that they are authorized or eligible to receive.

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expose himself or herself to criminal fourth degree felony charges. See id. § 10-16-4(A). See also New Mexico Attorney General's Office's Governmental Conduct Act Compliance Guide, p. 17 (1st ed. 2013) ("GCA Compliance Guide") ("A public employee who takes an official act primarily to improve the employee's financial interest or position risks a fourth degree felony conviction.").

Although a board member's mindset should be that his or her official actions shall only advance the public interest, it is likely that, in practice, the board member will face situations where the board member's official action will necessarily or unavoidably affect his or her financial interests. According to your letter, it is possible that a board member of an IDZ could be a homeowner who lives on a busy street that is eligible to receive sewer hook-ups as part of an IDZ infrastructure project. It is also possible that a board member of an IDZ could be a developer who owns multi-acre property that will get graded and paved as part of an IDZ infrastructure project. Should the board members vote to authorize these projects?

The GCA anticipates that situations like these will arise and explains:

A public officer or employee shall be disqualified from engaging in any official act directly affecting the public officer's or employee's financial interest, except a public officer or employee shall not be disqualified from engaging in an official act if the financial benefit of the financial interest to the public officer or employee is proportionately less than the benefit to the general public.

NMSA 1978, § 10-16-4(B) (2011) (emphasis added). In other words, "the GCA generally disqualifies a public employee from taking an official act that directly affects the employee's financial interests, unless the benefit to the public clearly outweighs the financial benefit to the employee." GCA Compliance Guide, p. 17.

Applying this analysis to the examples in your letter, the benefit to the general public from the busy street infrastructure project may outweigh the individual financial benefit to the board member who lives on the street. If so, this board member could properly take official action and vote on the matter. In the latter example, the benefit to the developer's multi-acre property appears to be proportionally greater than the benefit to the general public. If so, this board member should avoid taking official action on the matter. Of course, determining whether action is appropriate in any given situation will depend upon the specific facts and must be made on a case-by-case basis.

You ask whether a board member can cure his or her disqualification by publicly disclosing a personal financial interest. Under the GCA, "[f]ull disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct." NMSA 1978, § 10-16-3(C) (2011). If a board member "has any doubt as to whether ...[he or she] should be disqualified from engaging in an official act that has an effect on [his or her] ... financial interest, the best course is full disclosure." GCA Compliance Guide, p. 17. "[F]ull disclosure of

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potential conflicts is a primary means of addressing and vetting situations that have the potential for improper self-dealing." Id.

While disclosure of real or potential conflicts of interest is important and appropriate, in situations where the GCA disqualifies a board member from acting, the board member's disclosure would not cure the disqualification. Thus, if a board member is disqualified from acting under Section 10-16-4(B), discussed above, the board member could not remove the disqualification merely by disclosing the financial interest that would be directly affected by his or her action.

Financial Disclosure Act

The Financial Disclosure Act requires certain public officials to submit written disclosure documents to the New Mexico Secretary of State. See NMSA 1978, Sections 10-16A-1 to -8 (1993, as amended through 1997). The Act defines the public officials it covers, in pertinent part, as "any person who has been elected to [or] appointed to... any state office ... but excludes legislators and judges." ~~NMSA 1978, § 10-16A-2(F) (1993) (emphasis added). As discussed~~ above, a board member for an IDZ is an elected official of a political subdivision, not a state official. Therefore, a board member for an IDZ is not subject to the Financial Disclosure Act.

Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,



MARK REYNOLDS
Assistant Attorney General