



# STATE OF CONNECTICUT

## OFFICE OF STATE ETHICS

### Draft Advisory Opinion No. 2021-1

April 15, 2021

**Question Presented:**

The petitioner, a member of the Connecticut Port Authority's board of directors, asks how the Code's conflict provisions apply to his official activities as a board member relating to two properties, Saybrook Junction (in which he has no ownership interest) and the commercial property located at 75 Crystal Avenue, New London (which he owns).

**Brief Answer:**

Mr. Johnson may take official action in his capacity as a member of the Connecticut Port Authority's board of directors only to the extent that he does not have a "substantial" conflict under General Statutes § 1-85, and that, if he has a "potential" conflict under General Statutes § 1-86 (a), he follows the procedure set forth in that provision for "member[s] of a state regulatory agency."

At its March 18, 2021 regular meeting, the Citizen's Ethics Advisory Board ("Board") granted the petition for an advisory opinion submitted by John S. Johnson, a member of the board of directors of the Connecticut Port Authority ("CPA").<sup>1</sup> The Board now issues this advisory opinion in accordance with General Statutes § 1-81 (a) (3) of the Code of Ethics for

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<sup>1</sup>The petition was granted to address Mr. Johnson's *prospective* conduct only, for the Board generally will not respond to a request for an advisory opinion addressing the propriety of a public official's or state employee's past conduct.

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Public Officials (“Code”).

### **Background**

In his petition, Mr. Johnson provides the following facts for our consideration:

There is a question by some that I as a member of the CPA have a conflict of interest because I own commercial property in the vicinity of State Pier and therefore should not be involved in any of the discussions re the operation of the State Pier.

Additionally I have been accused by one member of the public that I own Saybrook Junction in Old Saybrook and “steered” CPA to that facility to rent space thereby benefitting me financially.

With regard to the ownership of commercial property located at 75 Crystal Ave, NL, I bought the property in 1999 and have owned it for now 22 years. It is separated from State Pier by the AMTRAK tracks and State Pier Road. The facility is fully rented to three entities, none of who is doing any business with Port of New London or State Pier. One company is a defense contractor Curtis Wright out of North Carolina. The second tenant is North East Electrical, a wholesale electrical supply house based out of Florida. And the other tenant is ASPLUNDH Construction who use their space as a yard and indoor facility to store and repair their equipment. They are tree surgeons with no affiliation with State Pier.

It is a stretch in my opinion to accuse me of a conflict of interest having owned the building for as long as I have. I was selected by the Governor several years ago to serve on the Board when the CPA was just being stood up as an Authority because of my Maritime experience and my depth of local knowledge about the waterfront etc. I don’t feel that any of my votes has ever been slanted to make my property more valuable. My vote on any issues related to State Pier was one vote only and never a deciding vote as to what the future of State Pier was to be. In discussion with the Ethics Commission several months ago, it was my understanding

that as a Board member, if we felt there was a conflict of interest, it was our duty and responsibility to recuse. I would certainly do that should I ever perceive such a conflict.

With regard to my ownership of Saybrook Junction where CPA maintains their office, I have never owned and do not own nor do I have any plans to ever own Saybrook Junction. I will admit that prior to CPA renting space, I had an agreement to buy the property, but shortly before I was to take title, the owner was taken to jail for tax fraud and the whole deal fell apart. That agreement to purchase the Saybrook property, occurred at least a year before CPA started their lease with the new owners.

To be accused of owning Saybrook Junction and steering CPA to Old Saybrook is outrageous and uncalled for. I take such accusations personally and do request that this matter also be looked into.

### Analysis

On the threshold issue of jurisdiction, persons generally subject to the Code are described in it as either “Public officials” or “State employees.” The Code defines “Public official” to include (among others) “any member or director of a quasi-public agency”; General Statutes § 1-79 (11); and it defines “Quasi-public agency” to include (among other entities) “the Connecticut Port Authority . . . .” General Statutes § 1-79 (12). As a member of the CPA board of directors, then, Mr. Johnson is a “Public official,” meaning that he is subject to the Code.

The Code provisions most pertinent here are General Statutes §§ 1-85 and 1-86 (a)—which define and proscribe “substantial” and “potential” conflicts of interests—and our task here is to apply those provisions to Mr. Johnson’s *prospective* conduct as a CPA board member concerning two properties: Saybrook Junction and the commercial property located at 75 Crystal Avenue, New London.

#### **1. “Substantial” Conflicts of Interests**

Section 1-85 contains a general rule and an exception, the general rule being this: A public official has a “substantial conflict” and “may not take official action on [a] matter” if “he has *reason to believe or expect* that he, his

spouse, a dependent child, or a *business with which he is associated* will derive a *direct* monetary gain or suffer a *direct* monetary loss . . . by reason of his official activity . . .” (Emphasis added.) And the exception is this: A substantial conflict does not exist if such benefit or detriment accrues to any of the listed persons (i.e., self, spouse, etc.) as a member of a profession, occupation, or group to no greater extent than to any other member of the profession, occupation, or group.<sup>2</sup> (For example, a public official whose spouse is a teacher would not have a substantial conflict concerning a matter that would result in a uniform financial benefit to all teachers.)

Before getting to some examples of substantial conflicts under § 1-85, a few definitions (of the italicized terms) are in order:

- “Reason to believe or expect”: “A public official . . . has reason to believe or expect the derivation of a direct monetary gain or loss by reason of his or her official activity . . . when there is . . . specific information available to the individual which would clearly indicate to a reasonable person that such a direct benefit or detriment would accrue or when the language of the legislation, regulation or matter in question would so indicate.” Regs., Conn. State Agencies § 1-81-28 (c).
- “Business with which he is associated”: “any . . . entity through which business for profit or not for profit is conducted in which the public official . . . or member of his or her immediate family is a director, officer, owner, limited or general partner, beneficiary of a trust or holder of stock constituting five per cent or more of the total outstanding stock of any class . . . ‘Officer’ refers only to the president, executive or senior vice president or treasurer of such business.”<sup>3</sup> General Statutes § 1-79 (2).
- “Direct”: “absolute, immediate, or without intervening circumstances.” Declaratory Ruling 92-C.

With those definitions in mind, we turn to some examples of substantial conflicts under § 1-85. According to the regulations, (1) “a state employee required, in the course of his or her official duties, to determine whether a consulting contract should be awarded to his or her spouse has a substantial conflict, and may not take official action on the matter”; and (2) “if a legislator is on the board of directors of a for-profit corporation” (making it a “business

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<sup>2</sup>The term “group” “must be equivalent in size and interests to a ‘profession’ or ‘occupation.’” Advisory Opinion No. 99-5.

<sup>3</sup>The term “Business with which he is associated” does not include the relationship of unpaid director or officer of a non-profit entity. See General Statutes § 1-79 (2).

with which the legislator is associated”), and “if the corporation applied to the General Assembly for bonding, the legislator/director would have a substantial conflict, and may not take official action on the specific bonding request.” Regs., Conn. State Agencies § 1-81-28. Similarly, “an official could not: award a state contract to his business; hire an immediate family member for a state job; or issue a permit or license to [his] company . . . . All these official actions would result in an impermissible ‘direct monetary gain’ . . . .” Informal Request for Advisory Opinion No. 2501 (1999).

Another example stems from Informal Request for Advisory Opinion No. 0897 (1992), which is relevant here because it involved a board member of a (then) quasi-public agency, the Connecticut Convention Center Authority (“CCCA”), who wanted to become a member of a partnership that owned property near one of two sites for the planned convention center. The CCCA board member asked whether, “as a limited partner in the proposed development of a hotel to be built near the planned convention center,” he must “abstain from voting on the choice between the two sites which the Site Selection Committee is expected to recommend to the full [CCCA].” Apparently, “the partnership . . . own[ed] a parcel of commercial property near one of the two sites,” and if the other site was selected, “the partnership would [have] ma[de] an additional purchase of land, near such other site, upon which to build a hotel.” The response—which is worth quoting in full, particularly given that it discusses and contrasts two previous advisory opinions involving another CCCA board member—was as follows:

The Commission is cognizant of two recent advisory opinions issued to the [CCCA] chairperson, E. Clayton Gengras, Jr., in which the Commission stated that Mr. Gengras was not prohibited from taking official action to select a site for the convention center, despite being the income beneficiary of a trust which owns commercial property close to one of the proposed sites. In that case, any financial gain or loss would result from changes in property value attributable to the location of the convention center. Given the fact that the property in question is subject to a 31-year lease to a bank, the consequences of any such changes in the property’s value were considered, by the Commission, to be too speculative and remote to constitute a substantial conflict of interest within the meaning of §1-85. (See . . . Advisory Opinions Nos. 92-8 . . . and 92-16 . . . ).

In contrast, under the circumstances described by the

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petitioner, any action he might take to choose one site over the other could be expected to result in a direct and unique monetary gain or loss for the partnership in question. The partnership does not merely own property near one of the sites, it has also expressed its intention to build a hotel close to the convention center site, wherever that may be. The financial impact of the Authority's decision on the partnership will be direct, immediate and distinct from the impact on persons who may own property near one or both of the proposed sites, but who have not planned a development project specifically linked to the convention center. Therefore, should the petitioner become a limited partner in the hotel development project he has described, he will be required, pursuant to . . . §1-85, to refrain from voting on the site selection.

Applying all of that here, Mr. Johnson must ask the following question whenever confronted with taking official action on a matter in his capacity as a CPA board member: Is there specific information available to him that would clearly indicate to a reasonable person, or does the language of the matter in question so indicate, that there would be a direct (i.e., immediate) and unique financial impact on him, his spouse, a dependent child, or a "business with which he is associated"? If the answer is yes, he has a substantial conflict under § 1-85 and is barred from taking official action on the matter.

With respect to the two properties at issue, given that, according to Mr. Johnson, he has no financial interest in Saybrook Junction, he is free to take official action as a CPA board member concerning that property, such as voting on whether to renew the CPA's existing lease at that location. This assumes, of course, that none of the other persons listed in § 1-85—i.e., Mr. Johnson's spouse, a dependent child, or a "business with which [Mr. Johnson] is associated"—have a financial interest in Saybrook Junction that would be directly and uniquely impacted by the action.

As for the other property, i.e., 75 Crystal Avenue, New London, given that Mr. Johnson owns it, he may not take official action as a CPA board member that would have a direct and unique financial impact on his financial interests by virtue of his ownership of this property.<sup>4</sup> For example, if the

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<sup>4</sup>Obviously, if the property is owned by a "business with which [Mr. Johnson] is associated" (e.g., a limited liability company of which he is an owner), he may not take

CPA board were to vote on whether to lease space at that property, Mr. Johnson would have a substantial conflict and be barred by § 1-85 from taking official action. He would likewise have a substantial conflict and be barred from taking official action with respect to any CPA matter that would have a direct (rather than speculative and remote) and unique (as compared to all other properties in the area) impact on the value of that property.

## 2. “Potential” Conflicts of Interests

Where there is no “substantial” conflict because the financial impact on the listed person either would be indirect or would be direct but would fit within § 1-85’s exception,<sup>5</sup> there may still be a “potential” conflict under § 1-86 (a). A potential conflict exists when a public official, in the discharge of his official duties, “would be required to take an action that would affect a financial interest of such official . . . such official’s . . . spouse, parent, brother, sister, child or the spouse of a child or a business with which such official . . . is associated . . . .” General Statutes § 1-86 (a). No potential conflict exists if the financial impact is de minimis (i.e., less than \$100 per person per year) or indistinct from that of a substantial segment of the general public (e.g., all licensed drivers). General Statutes § 1-86 (a); Regs. Conn. State Agencies § 1-81-30. Potential conflicts, unlike substantial conflicts, do not require “that the financial impact . . . be direct,” but “there . . . must be a reasonable expectation on the part of the individual that there will be some financial impact based on his actions.” Advisory Opinion No. 93-11.

Advisory Opinion No. 1999-18 represents an apt example of a “potential” conflict under § 1-86, for it involved a public official/property owner whose financial interests were indirectly impacted by his official action. In that opinion, the Commission was asked if the Secretary of the Office of Policy and Management (“OPM”) could rule on a property-revaluation waiver submitted by the city of Waterbury, where he was a homeowner. Absent a waiver, the city would lose almost \$10 million in state aid, which “almost certainly” would trigger an increase in the city’s mill rate, followed by an increase in property taxes to the city, followed by an estimated \$300 annual increase in the Secretary’s property tax. Said the Commission, “[c]learly, the Secretary of OPM will be required to take an action which would affect his

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official action as a CPA board member that would have a direct and unique financial impact on the business’s financial interests by virtue of its ownership of the property.

<sup>5</sup>The exception—which is mentioned above on page 4—states: A substantial conflict does not exist if such benefit or detriment accrues to any of the listed persons (i.e., self, spouse, etc.) as a member of a profession, occupation, or group to no greater extent than to any other member of the profession, occupation, or group. General Statutes § 1-85.

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financial interest,” and “the interest is neither de minimis (defined . . . as less than \$100 per year) nor is it shared by a ‘substantial segment’ of the general public (defined . . . as equivalent to ‘all licensed drivers, all homeowners, all parents, etc.’).” The Commission concluded, therefore, that the OPM Secretary had a potential conflict under § 1-86 (a).

Applying § 1-86 (a) here, Mr. Johnson has a potential conflict if the following holds true: Under existing facts, a reasonable person would “expect”—i.e., consider it likely, rather than merely conceivable—that action taken by the CPA board would affect his financial interest or the financial interest of the listed family members or a “business with which he is associated,” and the financial interest is neither de minimis (< \$100) nor shared by a substantial segment of the general public.

With respect to the two properties, Mr. Johnson cannot, based on the facts presented, have a potential conflict concerning Saybrook Junction, considering he has no financial interest in it, and assuming none of the listed family members or any “business with which he is associated” do so. As for the property located at 75 Crystal Avenue, New London, if, by virtue of his ownership of it, a reasonable person would expect that action taken by the CPA board would affect his financial interests in an amount exceeding \$100, he has a potential conflict. For example, a potential conflict would exist for Mr. Johnson under § 1-86 (a) if a reasonable person would consider it likely that action taken by the CPA board would increase the property’s value by \$100 or more.

In the event that Mr. Johnson is faced with a potential conflict under § 1-86 (a)—as opposed to a substantial conflict under § 1-85, which always demands recusal—how he is to proceed depends on whether he is what § 1-86 (a) calls a “member of a state regulatory agency.” That term is defined via regulation as follows: “a member of any commission, board, council, *authority* or other similar body which is authorized by law to regulate, i.e., control, administer, or *oversee*, any profession, occupation, industry, activity, fund, *endeavor* or area of conduct.” (Emphasis added.) Regs., Conn. State Agencies § 1-81-30 (c). The CPA (i.e., the Connecticut Port *Authority*) is certainly an “authority” and, under its enabling provisions, is charged with “oversee[ing]” an “endeavor,” namely, “the development of Connecticut’s ports and harbors . . . .” General Statutes § 15-31b. Accordingly, as one of its board members, Mr. Johnson is, in fact, a “member of a state regulatory agency,”<sup>6</sup> meaning

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<sup>6</sup>CPA employees (as opposed to CPA board members) are not “members of a state regulatory agency,” for that term applies only to members of regulatory *panels*. Such employees must, in the case of a potential or substantial conflict, “prepare a written

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that, in the case of a potential conflict, § 1-86 (a) gives him two options:

either [1] excuse himself . . . from the matter or [2] prepare a written statement signed under penalty of false statement describing the matter requiring action and the nature of the potential conflict and explaining why despite the potential conflict, [he] . . . is able to vote and otherwise participate fairly, objectively and in the public interest. [He] . . . shall deliver a copy of the statement to the Office of State Ethics and enter a copy of the statement in the journal or minutes of the [CPA].

### **Conclusion**

This advisory opinion represents a general overview of how § 1-85 and 1-86 (a) could apply to Mr. Johnson, in his capacity as a CPA board member, in relation to the properties at issue. If, going forward, he has any hesitation as to whether, with respect to any particular CPA matter, he has a substantial or potential conflict under those provisions, the Board urges him to either seek an informal opinion from the Legal Division of the Office of State Ethics or, if necessary, petition this Board for further advice.

By order of the Board,

Dated \_\_\_\_\_

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Chairperson

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statement signed under penalty of false statement describing the matter requiring action and the nature of the conflict and deliver a copy of the statement to such . . . employee's immediate superior . . . who shall assign the matter to another employee . . . ." General Statutes § 1-86 (a).