



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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MEMORANDUM

TO: Daniel A. Milian, Esq.
Shareholder
Fowler White Burnett

FROM: Jose J. Arrojo, Executive Director 
Commission on Ethics

SUBJECT: INQ 19-54, Daniel Milian, Quasi-Judicial Board Member Transacting with City of Miami, Sections 2-11.1 (c) (3), (m) (2) of County Ethics Code and Section 2-612, of the Miami Conflict of Interest Ordinance

DATE: May 28, 2019

CC: All COE Legal Staff

Thank you for contacting the Miami-Dade Commission on Ethics and Public Trust and requesting our guidance regarding the following proposed transaction.

Facts:

Article III, Section Sec. 62-14, of the Code of the City of Miami, establishes a Planning, Zoning and Appeals Board (“PZAB”) of the City of Miami. The PZAB is generally described by ordinance as an instrument of advice and recommendation in all phases and aspects of the comprehensive planning program authorized by the City Charter. It is specifically allowed by ordinance to grant or deny special permits, exceptions, or variances and to serve as a quasi-judicial zoning body whose decisions are final unless appealed to the City Commission.

On or about April 1, 2019 the City Attorney for the City of Miami issued a Request for Letters of Interest (“RLI”) seeking the assistance of specialized real estate outside counsel in negotiating certain real estate terms and conducting the legal review of contract documents regarding the development, construction, and long-term leasing of City-owned property known as the Melreese Country Club.

The Fowler White Burnett law firm (“Fowler”) responded to the RLI and seeks retainer by the City of Miami to assist on the Melreese County Club matter.

Daniel Milian is engaged as a partner with Fowler. Mr. Milian does not have a “controlling financial interest” in Fowler, defined as having an interest of ten percent (10%) or more in a firm. Mr. Milian is also the Vice Chair of the City of Miami PZAB.

Mr. Milian has appeared in support of Fowler’s response to the RLI before the City of Miami Commission. He may do so again at future meetings.

At a public meeting of the City of Miami Commission, a member of the Commission inquired whether Mr. Milian’s dual role as the Vice Chair of the PZAB and as a partner in the Fowler firm that seeks to represent the City of Miami as outside counsel, created a prohibited scenario in violation of the County Ethics Code.

Mr. Milian affirmatively contacted the Ethics Commission to seek ethics opinion guidance on the matter. Additionally, he has advised that in abundance of caution and to avoid the appearance of any impropriety, if Fowler is retained by the City pursuant to the RLI, he would not be personally engaged in representing the City as outside counsel.

Issues:

Does Section 2-11.1 (c) (3) of the County Ethics Code prohibit a member of the City of Miami PZAB, a quasi-judicial zoning board, from entering into a contract, individually or through his firm, with the City of Miami?

Does Section 2-11.1 (m) (2) of the County Ethics Code prohibit a member of the City of Miami PZAB, a quasi-judicial zoning board, from making a presentation before the City of Miami Commission on behalf of his law firm?

Does Section 2-612, of the City of Miami Conflict of Interest Ordinance prohibit a member of the City of Miami PZAB, a quasi-judicial zoning board, from entering into a contract, individually or through his firm, with the City of Miami? ¹

Does Section 2-612, of the City of Miami Conflict of Interest Ordinance prohibit a member of the City of Miami PZAB, a quasi-judicial zoning board, from serving as an assigned firm attorney pursuant to contract entered into between an affiliated law firm and the City of Miami?

¹ The City of Miami’s Conflict of Interest Ordinance is found in Chapter 2, Article V of the City of Miami Code. Section 2-1072, of the Code of Miami-Dade County, provides that the Miami-Dade County Commission on Ethics and Public Trust is empowered to interpret municipal conflict of interest ordinances.

Discussion:

Section 2-11.1 (c) (3), *Prohibition on transacting business with the County [City]*, imposes a limited prohibition on members of quasi-judicial boards from transacting business with the city. However, the prohibition is qualified such that the board member is only limited from entering into a contract, individually or through a firm in which the member has a controlling financial interest, if the engagement is with a city agency or department subject to the regulation, oversight, management, policy setting, or quasi-judicial authority of the board.

In this case, it does not appear that Section 2-11.1 (c) of the Ethics Code would prohibit Mr. Milian or Fowler from contracting with the City Attorney inasmuch as the PZAB does not have regulation, oversight, management, policy setting or quasi-judicial authority over the municipal attorney's office. (*See generally*, INQ 15-61, INQ 15-148, INQ 15-229)

Section 2-11.1 (m), *Certain appearances and payment prohibited*, prohibits a member of a quasi-judicial board from appearing before the board on which he or she serves, either directly or through an associate, and making a presentation on behalf of a third party that seeks relief from the board. Subsection (m) further prohibits the quasi-judicial board member from accepting compensation directly or indirectly, from a third party, for services rendered to the party seeking relief from the board on which he sits. Finally, the subsection prohibits a board member from representing as counsel any party before an administrative forum or court, in any matter where the party seeks relief from the board.

In this case, it does not appear that Section 2-11.1 (m) of the Ethics Code would prohibit Mr. Milian or Fowler from appearing before the City of Miami Commission in support of its response to the RLI seeking the assistance of specialized real estate outside counsel in connection with the development of the Melreese Country Club. Mr. Milian is not appearing before the PZAB that he serves, but rather the city's elected body, the City Commission.

Section 2-612 (a), of the City of Miami Conflict of Interest Ordinance, *Transacting business with city; appearances before city boards; post-employment restrictions; participation in the award of certain contracts under the procurement ordinance; penalties, etc.*, prohibits a member of a city board from entering into any contract or transacting any business with the city or any person or agency acting for the city. ²

² This section is similar to Section 2-11.1 (m) of the County Ethics Code. The section also prohibits a board member from appearing in representation of any third party, in this case Fowler, before any board, commission or agency *of which such person is a member*. It is reported that Mr. Milian did advocate for the selection of Fowler as the RLI responding firm before the Miami City Commission and that he may do so again. This is not prohibited because he serves on the PZAB and is not member of the City Commission.

Accordingly, Section 2-162 of the City of Miami Conflict of Interest Ordinance would prohibit Mr. Milian from entering into a contract with the City of Miami and thus he would be prohibited from being the contracting party selected pursuant to the RLI seeking the assistance of outside counsel in connection with the development of the Melreese Country Club.

However, while the City of Miami Conflict of Interest Ordinance is applicable to any *person* that serves on a city board, the city's conflict of interest ordinance does not prohibit an affiliated firm or a business from entering any contract or transacting with the city. Simply stated, unlike the County Ethics Code that extends its prohibitions on some categories of covered persons to their affiliated businesses, the City Conflict of Interest Ordinance does not.

Thus, it does not appear that Section 2-162 would prohibit Fowler, a board member affiliated firm, from contracting with the City of Miami. Its selection as the outside counsel on the Melreese Country Club matter would be permissible pursuant to the plain reading of the city's conflict of interest ordinance.

The more difficult question is whether Mr. Milian may *himself* advise and represent the City of Miami Attorney if Fowler is contracted to serve as outside counsel on the Melreese Country Club matter given the prohibition on a board member "transacting any business" with the City of Miami. Put another way, is an attorney that is acting within the stated scope of services of a contract between his firm and the City by providing legal opinions to municipal counsel after reviewing contracts and other papers, and representing the City in its negotiations with third parties, "transacting business" with the city?

A broad interpretation of the term "transacting any business" would likely capture the described legal activities and prohibit a board member from acting as described within the stated scope of services of the proposed contract contemplated by the RLI. We do not need to reach this issue because in abundance of caution and to avoid any appearance of impropriety, Mr. Milian has advised that if Fowler is retained by the City, he will not be engaged in providing legal services pursuant to the retainer.^{3 4}

³ Sec. 2-614, of the City's Conflict of Interest Ordinance does provide for a waiver of the requirements of the section upon a super majority vote of the members of the City Commission in after making specific findings.

⁴ If Mr. Milian resigned his position as Vice Chair of the PZAB, then Section 2-612 (c), the "two-year rule" that limits activities of former board members after separation from service would be implicated. That prohibition applies to certain transactions with the City for a period of two years after the officer, official, or employee has left city service or terminated city employment. However, no opinion guidance has been requested regarding this rule.

Opinion:

Section 2-11.1 (c) (3), *Prohibition on transacting business with the County [City]*, does not prohibit Mr. Milian or Fowler from contracting with the City Attorney as outside counsel on the Melreese County Club development matter inasmuch as the City of Miami Planning, Zoning and Appeals Board does not have regulation, oversight, management, policy setting or quasi-judicial authority over the municipal attorney's office.

Section 2-11.1 (m), *Certain appearances and payment prohibited*, does not prohibit Mr. Milian or Fowler from appearing before the City of Miami Commission in support of its response to the RLI seeking the assistance of specialized real estate outside counsel in connection with the development of the Melreese Country Club. Mr. Milian is not appearing before the PZAB that he serves, but rather the city's elected body, the City Commission.

Section 2-612 (a), of the City of Miami Conflict of Interest Ordinance, *Transacting business with city; appearances before city boards; post-employment restrictions; participation in the award of certain contracts under the procurement ordinance; penalties, etc.*, would prohibit Mr. Milian from entering into a contract with the City of Miami and thus he would be prohibited from being the contracting party selected pursuant to the RLI seeking the assistance of outside counsel in connection with the development of the Melreese Country Club. However, Fowler would not be subject to this limitation.

This opinion is limited to the facts as presented them to the Commission on Ethics and is limited to an interpretation of the County Ethics Code only and is not intended to interpret state laws. Questions regarding state ethics laws should be addressed to the Florida Commission on Ethics.

INQs are informal ethics opinions provided by the legal staff after being reviewed and approved by the Executive Director. INQs deal with opinions previously addressed in public session by the Ethics Commission or within the plain meaning of the County Ethics Code. RQOs are opinions provided by the Miami-Dade Commission on Ethics and Public Trust when the subject matter is of great public importance or where there is insufficient precedent. While these are informal opinions, covered parties that act contrary to the opinion may be referred to the Advocate for preliminary review or investigation and may be subject to a formal Complaint filed with the Commission on Ethics and Public Trust.