

MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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May 18, 2015

Matthew Pearl, Esq.
Weiss Serota Helfman Cole Bierman & Popok, P.L.
200 East Broward Boulevard, Suite 1900
Fort Lauderdale, FL 33301

Re: RQO 15-04

- 1) The voting conflict provision in Subsection 2-11.1(d) of the Miami-Dade County Code of Ethics Ordinance applies where the board member in question is employed by a business entity that would be affected by board approval of a zoning change that would enable it to expand its floor space even though the employer is not the entity that applied to the board for the zoning change.
- 2) A member of a municipal council working as a department manager of a department store that would be permitted to expand by more than 50% upon approval of a zoning change applied for by the mall in which it is located has a voting conflict under Subsection 2-11.1(d) of the Code because he might, directly or indirectly, profit or be enhanced by the board action.

Dear Mr. Pearl:

IN A PUBLIC MEETING on May 13, 2015, the Miami-Dade County Commission on Ethics and Public Trust opined that the language in Subsection 2-11.1(d) prohibits Village of Bal Harbour Councilman Jamie Sanz from voting on the upcoming issues concerning the rezoning of the Bal Harbour Shops. The decision was based on two grounds: 1) that Councilman Sanz's employer, Neiman Marcus, is an entity that would be affected by the board action; 2) that Councilman Sanz, a department manager in Neiman Marcus, would also be prohibited from voting under the provisions of Subsection 2-11.1(d) of the Ethics Code because he might, directly or indirectly, profit or be enhanced by the votes concerning the expansion by the Bal Harbour Shops.

Background

You inquired in your capacity as an attorney at Weiss Serota Helfman Cole Bierman & Popok P.L., attorneys for the Village of Bal Harbour, in your letter of March 24, 2015 (Attachment 1) regarding whether the voting conflict prohibition in Section 2-11.1(d),¹

¹ Section 2-11.1(d) provides, *inter alia*, as follows: "Additionally, no person included in the term defined in Subsection (b)(1) shall vote on or participate in any way in any matter presented to the Board of County Commissioners if said person has any of the following relationships with any of the persons or entities which

could apply to Councilman Jamie Sanz in connection with an upcoming vote on approval of a zoning change that would permit the expansion of Bal Harbour Shops, a shopping mall in the Village of Bal Harbour. The applicant for the zoning changes is Bal Harbour Shops. Councilman Sanz is employed as manager of the Fine Dress Department at Neiman Marcus, one of the stores in Bal Harbour Shops, which holds a ground lease for its store in the Shops. There are also several corollary questions included in the request, the answers to which depend on the answers to the two issues listed above.

There are actually two votes that will be taken concerning Bal Harbour Shops and its contemplated expansion, both of which would be subject to this opinion. One vote will permit the expansion of the Shops to more than double the square footage of its existing Gross Floor Area from 401,161 to 845,551 as well as its Gross Leasable Area from 360,680 to 789,422. The second vote, inextricably connected to the first vote, would permit the sale of the Village Hall property, which would be displaced by the expansion and its rebuilding at another location, which would be paid for by the Shops. The Shops consists of approximately 100 boutiques and two anchor stores, Sax Fifth Avenue and Neiman Marcus, both of which are holders of ground leases at the Shop for the store buildings which they each own. Sax is the larger of the two anchors. The boutique stores are lessees of Bal Harbour Shops in buildings owned by the Shops.

Neiman Marcus would be affected in that the expansion would increase the square footage of the store by more than 50% from its current space of 93,017 square feet to 141,916 square feet. There are other aspects of the proposed expansion that would also affect Neiman Marcus, including parking and setback. A summary of the impact of the expansion on both the Shops and Neiman Marcus is included in an email from you dated May 6, 2015, sent to the Executive Director of the COE (Attachment 2). Approval of the Shops' zoning application would permit the expansion and the corollary changes to the property. Neiman Marcus is known to favor the zoning change enabling its expansion.

This matter has already been the subject of preliminary votes taken by the Village Council over the past several years regarding which Councilman Sanz has received guidance from the Commission on Ethics. The previous Executive Director and the current Director have each provided an informal opinion through Village attorneys to Councilman Sanz. However, these informal opinions appear to be inconsistent with each other. The purpose of this RQO is to resolve any inconsistency in these informal opinions in order to provide

would be or might be directly or indirectly affected by any action of the Board of County Commissioners: (i) officer, director, partner, of counsel, consultant, employee, fiduciary or beneficiary; or (ii) stockholder, bondholder, debtor or creditor, if in any instance the transaction or matter would affect the person defined in Subsection (b)(1) in a manner distinct from the manner in which it would affect the public generally. Any person included in the term defined in Subsection (b)(1) who has any of the above relationships or who would or might, directly or indirectly, profit or be enhanced by the action of the Board of County Commissioners shall absent himself or herself from the Commission meeting during the discussion of the subject item and shall not vote on or participate in any way in said matter.

a definitive ruling on whether Councilman Sanz has a voting conflict in connection with any future votes on this matter.²

I. Legal Analysis

Subsection 2-11.1(d) is a subsection of the Miami-Dade County Conflict of Interest and Code of Ethics Ordinance, the primary ordinance adopted by the County Commission to insure integrity in local governments within the County. Its provisions are made applicable by Subsection 2-11.1(a) to officials and employees County government and to all municipal governments within Miami-Dade County, including the Village of Bal Harbour.

The voting conflict portion of Subsection 2-11.1(d) is made applicable to individuals falling within Subsection 2-11.1(b)(1) of the Code. Subsection 2-11.1(b)(1) includes "members of the Board of County Commissioners." Subsection 2-11.1(a) provides, *inter alia*, that, "This section shall be applicable to all County personnel as defined herein, and shall also constitute a minimum standard of ethical conduct and behavior for all municipal officials and officers..." It further provides that, "References in the section to County personnel shall therefore be applicable to municipal personnel who serve in comparable capacities to the County personnel referred to." Since members of the Village Council of the Village of Bal Harbour serve in comparable capacities to members of the Miami-Dade County Commission, the provisions of Subsection 2-11.1(d) are applicable to Councilman Sanz.

Subsection 2-11.1(d) creates three separate categories for potential voting conflicts:

- 1) An automatic prohibited conflict if the voting member has one of the following relationships with an entity "affected" by the vote before the board: officer, director, partner, of counsel, consultant, employee, fiduciary or beneficiary;
- 2) A contingent prohibited conflict if the voting member has one of the following relationships with an entity "affected" by the vote AND the matter would affect the person in a manner distinct from the manner in which it would affect the public generally: stockholder, bondholder, debtor, or creditor;
- 3) A broad prohibited conflict if the voting member "would or might, directly or indirectly, profit or be enhanced by the action" of the board in-question.

In the instant case, involving Councilman Sanz and his employer, Neiman Marcus, the first and third of the foregoing categories are relevant to the analysis. The second category is not relevant because Mr. Sanz does not fall within any of the relationships within that category. Issue #1 herein considers the application of the first category to Councilman

² The INQ provided by the current Executive Director was given in response to a telephone inquiry from an attorney other than the one who requested the earlier INQ from Mr. Meyers, although both requesting attorneys are at the same firm. Since an INQ is considered an informal opinion and no reference was made by the requesting attorney to the earlier informal opinion, the second opinion was provided under the assumption that it was the first opinion rendered in this matter, and was not provided with knowledge of or reference to the earlier opinion.

Sanz's request, which focuses on the effect of the vote on the entity employing the public official. Issue #2 considers the application of the third category to his request, which focuses on the effect of the vote on the voting official himself.

In INQ 10-175 (Attachment 3), then Executive Director Robert Meyers opined in 2010 in response to an inquiry by Attorney David Wolpin, that Councilman Sanz was permitted to participate in discussions and to vote on matters pertaining to the expansion of the Shops. The latter opinion interpreted Subsection 2-11.1(d)(i) as requiring, for the purpose of determining whether an entity which employs the Council member is "affected" by a vote, that the entity in question be the one that is requesting the action to be taken by the Council.

In considering the first of the aforesaid categories involving the specified employer/employee relationship, Mr. Meyers noted that, since Bal Harbour Shops, not Neiman Marcus, was the applicant before the board and not the party requesting the zoning change, Neiman Marcus did not meet the requirement that it be "affected" by the vote. He concluded that Mr. Sanz's employment by Neiman Marcus did not automatically exclude him from participating and voting on the application by the Shops.

Mr. Meyers further opined, in connection with the third category above, that "extensive redevelopment of the Bal Harbour Shops could potentially affect the tenants, but the benefit to Council Member Sanz is so speculative a voting conflict would not be created in this case." In effect, Mr. Meyers opined under the aforesaid subsection that he did not believe that Mr. Sanz "would or might, directly or indirectly, profit or be enhanced" by the action of the Village Council.

INQ 10-175 advised that Councilman Sanz could vote on the expansion of the Shops.

INQ 14-162 (Attachment 4), provided by the current Executive Director during 2014 in response to an inquiry from Attorney Richard Weiss, concluded that Neiman Marcus was an "affected" entity, and that the automatic prohibition under the first enumerated category applied since Mr. Sanz was employed by an "affected" entity. No requirement that the affected entity be the applicant or requester of the board action was applied in the analysis.

INQ 14-162 went further in considering whether a conflict existed under the third category of Subsection 2-11.1(d), concluding that, because of his position as manager of the Fancy Dress Department at Neiman Marcus, Mr. Sanz "might, directly or indirectly, profit or be enhanced" by the action. This conclusion was based on the observation that "a major financial benefit to Neiman Marcus would likely also benefit its managerial staff."

INQ 14-162 concluded that Councilman Sanz should not vote or participate on the issue.

ISSUE #1

Significantly, there is no language in Subsection 2-11.1(d), or in any RQO previously issued by this Commission, that specifies that, to be considered "affected," an entity must be the applicant or requester of the contemplated board action. This is conceded in your request for this RQO. There is no bright line rule, no controlling authority, and little guidance in prior formal opinions rendered by the COE on this voting conflict provision.

You have argued that the adoption of the bright-line rule suggested by INQ 10-175 greatly simplifies the analysis, and provides elected officials with a clearer way of determining that they have a conflict. It also avoids applying the rule to a person or entity that is only remotely or tangentially “affected” by a vote.

The problem with this approach is that it exempts from the voting conflict provision a public official having significant ties to a private party that stands to reap substantial and material benefits or detriments from a vote taken by the board on which the official sits. In the instant case, the effect on Neiman Marcus of the proposed zoning change is hardly tangential. It is direct and significant. It paves the way for the store to increase its existing floor space by more than 50%.

Many voting conflict issues are inherently ambiguous. The third category under Subsection 2-11.1(d), which is analyzed below in Issue #2, has even more ambiguous language in creating a conflict where a voting official “might, directly or indirectly, profit or be enhanced by the action of the Board...” Notwithstanding that the creation of such a bright line rule would be a convenience for voting officials, it would not serve the public purpose of preventing serious ethical conflicts on important public issues.

In other contexts, this agency has utilized a standard similar to that applied by the Florida Commission on Ethics in analyzing whether a board member is uniquely or directly affected by a vote depending on the size of the affected class.³ For instance, in RQO 10-20, Key Biscayne Councilman was allowed to vote on a rezoning resolution because he was one of 1,500 property owners affected, representing only 0.06% of all residents affected.⁴ The threshold of 1-2% of the size of class, generally finding conflicts where the individual’s interest exceeds that amount, is used as a guideline in analyzing conflict issues involving individuals with property interests within an affected class and is offered here only by analogy. Nonetheless, the impact on Neiman Marcus of this zoning issue being far in excess of that threshold, merits attention in deciding whether it would be “affected” by a vote on this zoning change.

There may be room for the exercise of some discretion in determining whether a particular effect is substantial enough to invoke the prohibition or is merely a speculative effect. But there is no speculation about the huge impact that this issue would have on Neiman Marcus. A vote leading to a significant expansion on an anchor store in a mall applying for a major zoning change in a small community such as Bal Harbour should not escape scrutiny under the voting conflict provisions in Subsection 2-11.1(d) simply because the store is not the applicant. It would make no logical sense to exempt a management employee of Neiman Marcus from the voting conflict provision in this scenario, while applying the provision to a councilperson working as a clerk in a boutique which is the applicant for a sign permit.

³ In assessing whether an official has a voting conflict due to having a “special private gain” on an issue under Section 112.3143(3)(a), Florida Statutes, the Florida Commission on Ethics has used a threshold standard that considers whether the interest in question is greater than 1-2% of the class of other individuals affected by the action. *See, e.g.,* Ops. Fla. Comm’n on Ethics, CEO 93-10 (1993), CEO 04-10 (2004), CEO 92-37 (1992).

⁴ *See also*, RQO 11-28

The Commission ruled that Mr. Sanz has a voting conflict on this issue due to his employment at Neiman Marcus.

ISSUE #2

The third prong of the voting conflict provisions in Subsection 2-11.1(d), by far the most expansive of the three categories, creates a prohibited voting conflict where a board member “would or **might, directly or indirectly, profit or be enhanced**” by the action of the Board (emphasis added). The emphasized words, “might,” “directly or indirectly,” and “or be enhanced” serve to extend this prohibition beyond known or direct financial interests.

The word “might” indicates that, at the very least, a reasonable possibility of profit or enhancement, would trigger the prohibition. While the standard applied should require more than a remote or speculative possibility, it should cover a potential benefit that may be realistically expected to occur under known circumstances.

The word “indirectly” would include within its ambit an impact on a person or entity that should logically be extended to cover an elected official as a result of that official’s relationship or association with the person or entity primarily affected, e.g., a management employee in an store interested in expansion under a permissive zoning change.

The word “enhanced” connotes a benefit broader in concept than a measurable financial profit, including an improved professional or social position, e.g., a possible promotion or improved job prospects, or even an honorary title or position.

Councilman Sanz would stand to profit or be enhanced, at least indirectly, by the zoning change pending before the Bal Harbour Village Council. An enlarged and more profitable store would likely profit or enhance the store’s managerial employees in the form of higher pay or promotional opportunities. The store’s financial prospects would be likely to improve both by virtue of its increased selling space, as well by the increased volume of patrons generated by the overall expansion of the Shops.

However, the most direct profit or enhancement for Mr. Sanz would occur by virtue of the managerial employee toeing the company line on the expansion just to maintain his position and standing in the company. It is difficult to conceive that a managerial employee, even a middle-manager such as Mr. Sanz, would not be perceived differently by upper management were he to publicly oppose an expansion touted by the store’s owners and upper management. It requires no imagination to conclude that a Neiman Marcus employee, who exercised his power as a public official to prevent such an expansion, would likely face diminished employment prospects-within that company.

This is not to imply any lack of integrity on the part of Councilman Sanz, only a realistic appraisal of the pressure and imposed perspective that would likely affect his vote on this issue. Moreover, regardless of the merits of the zoning issue, the public perception of a Neiman Marcus managerial employee voting on an important public issue affecting the store, while serving as a member of a public board in a small municipality, would create a serious issue of public trust in the fairness of the process.

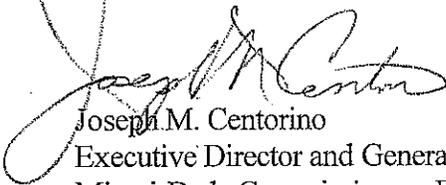
Conclusion:

Councilman Sanz would face a prohibited conflict of interest under Subsection 2-11.1(d) of the County Code of Ethics in voting on a zoning change as a public official in the Village of Bal Harbour, where the issue would permit a substantial expansion of the Bal Harbour Shops, including a substantial expansion of Neiman Marcus, the store that employs him privately as a department manager. The fact that his employer would be affected by the vote, as well as the likelihood that Mr. Sanz would or might profit or be enhanced, either directly or indirectly, in the form of maintained or improved employment prospects at Neiman Marcus, leads to the conclusion that he may not vote on this issue.

Regarding the corollary issues raised in your letter, the pertinent language in Subsection 2-11.1(d) requires, upon determination that a voting conflict exists, that the official in question "absent himself or herself from the Commission [Council] meeting during the discussion of the subject item and shall not vote on or participate in any way in said matter." Consequently, Councilman Sanz should not attend or participate in a Council-sponsored workshop regarding the expansion plan, nor any portion of a Council meeting at which the expansion plan will be discussed, regardless of whether any vote is taken at the meeting.

This restriction may not strictly apply to a nongovernmental meeting about the expansion. However, in the interests of avoiding any appearance of impropriety, including an appearance that he may be using his presence as a public official at such a meeting to influence public opinion regarding the expansion, it is recommended that Councilman Sanz avoid appearing at any nongovernmental workshops or meetings organized by interested parties in the Village to discuss the expansion plan. Whether Councilman Sanz may participate or vote on an item pertaining to the Shops, but unrelated to the expansion plans, would depend on the extent to which the item affected Neiman Marcus or Mr. Sanz personally.

Sincerely,



Joseph M. Centorino
Executive Director and General Counsel
Miami-Dade Commission on Ethics and Public Trust