



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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MEMORANDUM

TO: Nathan Kogon, AICP Asst. Director
MDC-RER

FROM: Martha D. Perez, Staff Attorney

SUBJECT: INQ 19-114, Conflict of Interest, Community Zoning Appeals Board, Section 20-45 Miami-Dade County Code; Conflict of Interest and Code of Ethics Ordinance (Voting/Participation Conflict by Community Council members)

DATE: November 13, 2019

CC: COE Legal Staff

Thank you for contacting the Miami-Dade Commission on Ethics and Public Trust and requesting our guidance regarding conflict of interest provisions affecting board members of Fisher Island Community Zoning Appeals Board.

Background

Miami-Dade County Community Zoning Appeals Boards (CZABs) are established pursuant to Section 33-306 of the Miami-Dade County Code.

The CZABs were created pursuant to the Home Rule Charter at Section 4.08, in order to facilitate the zoning powers granted to the Board of County Commissioners (BCC) and to hear, consider and review appeals from zoning regulations or decisions of an administrative official.

CZABs and Community Councils (CC) are one in the same when acting in their capacities to hear zoning applications. *See* Section 33-306, MDC Code and Section 20-41(A) (Community Councils shall perform the duties and responsibilities of Community Zoning Appeals Boards as set forth in Section 33-306 of the Code of Miami-Dade County).¹

¹ Area 16 - Fisher Island Community Council; Community Council / Zoning Appeals Board Members: Vacant positions. See <https://www.miamidade.gov/zoning/community-council-16.asp>

Pursuant to Section 33.307.1 (A) of the MDC Code, a CZAB member is prohibited from appearing on behalf of a third party before another CZAB or the BCC sitting in its zoning capacity. Moreover, a CZAB member shall not appear before the BCC (or any other federal, state or board) to *advocate* concerning a zoning application heard or to be heard by *any* community council. See Section 33.307.1 (B)²

In previous years, zoning applications involving Fisher Island (FI) (and the CZAB boundary) were heard by the County's Zoning Appeals Board or the BCC. In 1989, a Declaration of Restrictions between the Fisher Island Developers and the County was approved, conferring jurisdiction to the BCC over any modifications or amendments affecting Fisher Island's density, intensity, development procedures, ferry service and other public services. This means that, in the event a zoning request involves a modification or amendment to the Declaration, the matter will be heard by the BCC. The remaining application(s), *which have no effect on the Declaration*, would be heard by the CZAB.

Fisher Island encompasses approximately .24 sq. miles with a residential population of approximately 650 full-time and seasonal residents.³ Fisher Island Community Association (FICA) manages and maintains the Island's common areas and ensures compliance with Miami-Dade County and other governmental entities. While there are twenty-two condo associations and one HOA on the Island, all residents are subject to FICA rules and regulations. All property owners automatically become FICA members.

Fisher Island Holdings LLC (FIH) is the Island's developer based out of FI.

Issues

1. In the event a FI-CZAB member is an officer on a condominium board that is also represented by the developers of the island, can they hear items that are requested by the developer?
2. If a FI-CZAB member is currently or has been involved in a legal dispute with a potential applicant, can they opine on that application?

Discussion

CZABs and Community Councils (CCs) are one in the same when acting in their capacities to hear zoning applications. *See* Section 33-306 and Section 20-41(A), Miami Dade County Code (Community Councils shall perform the duties and responsibilities of Community Zoning Appeals Boards as set forth in Section 33-306 of the Code of Miami-Dade County).⁴

Consequently, a conflict of interest analysis of a CC is applicable to a CZAB, and vice versa, in matters concerning zoning application determinations.

² *See* Section 20-41, MDC Code; Section 2-11.1(m), County Ethics Code; and, INQ 18-62

³ florida.hometownlocator.com/fl/miami-dade/fisher-island.cfm#demographic

⁴ *See also*, Section 33-307: The term of office of the members of each of the Community Zoning Appeals Boards shall be the terms established as members of Community Councils.

Section 20-45 of the Miami-Dade County Code, *Community Councils Conflict of Interest*, provides that:

In addition to the provisions of the Miami-Dade County Conflict of Interest and Code of Ethics Ordinance, each Community Council member is prohibited from voting on or participating in any way in any matter presented to the Community Council on which the member serves **if** the member has any of the following relationships with any of the persons or entities which would be or might be directly or indirectly affected by any action of the Community Council on which the member serves: (i) officer, director, partner, of counsel, consultant, employee, fiduciary or beneficiary; or (ii) stockholder, bondholder, debtor, or creditor,⁵ if in any instance the transaction or matter would affect the Community Council member in a manner distinct from the manner in which it would affect the public generally. **Any Community Council member who has any of the above relationships or who would or might, directly or indirectly, profit or be enhanced by the action of the Community Council on which the member serves shall absent himself or herself from the Community Council meeting during the discussion of the subject item and shall not vote on or participate in any way in said matter.**⁶

Generally, the foretasted issues would trigger a conflict of interest analysis under Section 2-11.1(v) of the County Ethics Code, applicable to members of advisory and quasi-judicial boards.⁷ Notwithstanding, our analysis of voting conflicts for community council board members has primarily applied the conflict of interest provision under Section 20-45 of the MDC Code. Consequently, our guidance is based on Section 20-45 which mirrors the County Ethics Code voting conflict provisions found in Section 2-11.1(d) of the County Ethics Code.

Issue 1: Whether a FI-CZAB member can hear zoning matters requested by a Developer when he or she is sits on the condominium board which is represented by a Developer.

A CZAB board member may not participate or vote on matters if he or she falls under one of the following categories:

- 1) If he or she has any of the prohibited relationships with any person or entity appearing before the board and will be directly or indirectly affected by the board action in a manner distinct from the public generally;

⁵ Hereinafter collectively referred to as "prohibited relationships."

⁶ Ord. No. 97-196, § 1, 11-4-97

⁷ *Cf.* The conflict of interest provision in Section 20-45 mirrors Section 2-11.1(d) of the County Ethics Code, applicable to commissioners and Mayor, which prohibits a person from voting or participating in any way in any matter presented to the BCC if said person has any of the following relationships with any person or entity which would or might be directly or indirectly affected by any action of the BCC (or applicable board): (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 in a manner distinct from the manner in which it would affect the public generally. Any person who has any of the above relationships, who would or might, directly or indirectly, profit or be enhanced by the action of the BCC (applicable board) shall absent himself or herself from the meeting during the discussion of the subject item and shall not vote or participate in any way in said matter.

- 2) If he or she has a prohibited relationship with the person or entity appearing before the board; or,
- 3) If he or she would directly or indirectly profit or be enhanced by the board action.

See Section 2-11.1(d), County Ethics Code; RQO 15-04; RQO 11-28; INQ 15-58

In RQO 99-05, the COE opined that, pursuant to Section 20-45, a commercial real estate broker working for an Island developer may continue to serve on the FI-CC but may not vote on matters involving the developer since he will directly profit from development issues involving that developer (#1 above). Although the voting conflict in this instance was not found because of the board member's "consultant" or "employee" relationship *per se* (#2 above), the Commission nevertheless concluded that the board member would reasonably profit from any board action involving the business relationship with the developer and would thus be prohibited from voting or participating on the matter.

Still, other informal ethics opinions have concluded that, a board member who is also an officer of his or her condo association, is prohibited from participating or voting in any consideration by his board of a zoning matter involving the member's condo association. In those instances, the board member should absent himself or herself from the meeting and should disclose the reason for the recusal. See RQO 98-14 (an appointed CC member who is also the *director* of a condo association is prohibited from participating in any consideration by the CC of a zoning matter involving *her* condo association); INQ 05-26 (a CC member serving as an *officer* of a homeowner's association or a condo association is prohibited from participating in any discussions or voting on a matter involving the association when the association has taken an official position regarding the matter); INQ 05-77 (A FI-CC member who also serves as an *officer* of a condo association board is barred from participating or voting on a matter involving the association when the association has taken an official position and such member should resign from one of the two boards if the association is an active one which regularly appears before the CC).

Notably, in 2001, the COE reviewed a request from a FI-CC member on whether officers or board members of FI condominium associations could serve on the FI-CC. In consideration of the sixteen condo associations on the Island, the COE concluded that, in the case of the FI-CC, "[s]ince as a practical matter, most matters that come before the community council would directly or indirectly affect *any* condominium association, *due to the size and nature of the community*, any such appointee would have a frequently recurring conflict that would prevent them from being effective members of the council. Therefore, *Fisher Island condominium association board members and officers* may not be appointed to the community council." See RQO 01-46.

This opinion imposed an automatic blanket prohibition on all Fisher Island CC members holding a position in their condominium association boards. It reasoned that any condo association board member or officer would automatically be affected by any matter coming before the board regardless of the person or entity seeking action from the board.

Consequently, in accordance with RQO 01-46, a FI-CZAB member who also holds a position in his or her FI condominium association board may not vote or participate on any action

before his or her CZAB, including matters involving the Developer representing his or her condo association.⁸

Issue 2: Whether a FI-CZAB member has a voting conflict when he or she is currently or has been involved in a legal dispute with a potential applicant appearing before the board.

Assuming that the CZAB board member is not an officer or member of a FI- CA or HOA and does not have any of the aforementioned “prohibited relationships” with the potential applicant, pursuant to Section 20-45, a conflict of interest in this case would depend on whether the proposed board action, i.e., the approval or denial of the zoning application, would present any likelihood that the CZAB board member would be affected in any way by the action in a manner distinct from the public generally *or* would profit or be enhanced, directly or indirectly, by the action. *See* INQ 11-116 (a council member may not vote if he would be affected by the vote differently than others in the community generally, e.g. would profit or be enhanced by the vote, or, if he has a particular relationship with the person or entity appearing before him); INQ 12-07 (a zoning matter presented by a homeowner who belongs to the board member’s HOA will not present a voting conflict as long as the board member will not be directly affected by the vote or has a prohibited relationship with the owner/applicant); INQ 19-27 (Put another way, the voting conflict analysis should focus on whether the proposed commission action will present any likelihood that the official would, personally or professionally, be affected in any way by the item in a manner distinct from the public generally).

This office is unable to address Issue #2, i.e., whether there are any potential voting conflicts under Section 20-45 or the County Ethics Code, without more detailed information such as:

- The action pending before the board;
- The nature of the current or past litigation;
- The parties involved and the relationship between the board member and the applicant in the specified legal dispute

Notwithstanding, if a board member feels that his or her knowledge of the applicant’s activities gained through the present legal dispute would prevent him or her from fairly and objectively exercising independent judgment in a quasi-judicial decision, the board member should consider voluntarily recusing himself or herself from the matter. *See* Section 286.012, Florida Statutes

Board members are also reminded of the following provisions contained in the County Ethics Code:

- Section 2-11.1(g) prohibits the use of one’s official position to secure special privileges or exemptions for himself, herself or others

⁸ Note, a board member who does not otherwise hold a prohibited relationship with the person or entity coming before the board, is not prohibited from voting on zoning matters involving the association as long as he or she would not be affected differently from the public generally by the rezoning or as long as he or she would not receive a benefit or be enhanced by the board action. *See* RQO 98-04; INQ 05-26; INQ 11-41

- Section 2-11.1(j) prohibits a board member, from board service if his or her private employment would impair his or her independence of judgment in the performance of his or her public duties as a board member.
- Section 2-11.1(m)(2) prohibits a board member from appearing before his or her board, either directly or through an associate, and make a presentation on any license, contract, ruling, decision, opinion, or other benefit sought by the third person; receive compensation, directly or indirectly for any services rendered to a third party who is seeking the benefit from the board; or, appear as counsel to the third party seeking relief from the board.

Lastly, this opinion is based on a voting conflict analysis under Section 20-45 of the Miami-Dade County Code and sections of the County Ethics Code as they may be applicable to members sitting in a quasi-judicial or advisory board under the jurisdiction of the Conflict of Interest and Code of Ethics ordinance. This opinion in no way implicates the facts regarding the present lawsuit filed by board members of Fisher Island Community Association against five other Association board members who are also officers of Fisher Island Holdings, the Island's Developer.⁹

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.

⁹ The lawsuit concerns Association board members who are also officers of the Developer and who allegedly voted on matters involving the Developer resulting in a financial benefit to the Developer and a detriment to the Association's membership. <https://therealdeal.com/miami/2019/10/15/power-struggle-between-fisher-island-associations-directors-ignites-lawsuit/>