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City of Hialeah
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Re: Ethics Inquiry Request, INQ 2022-73, Voting Conflict, Section 2-11.1(d) of the County Ethics Code

Dear Ms. Bravo and Mr. Jove:

Thank you for contacting the Miami-Dade County Commission on Ethics and Public Trust (“county ethics commission” or “Ethics Commission”) and seeking guidance regarding the application of the Miami-Dade Conflict of Interest and Code of Ethics Ordinance (“County Ethics Code”) to a Hialeah Councilmember’s possible vote on a requested zoning variance relating to the expansion of a behavioral health hospital.

Facts:

The City of Hialeah Council will be considering a zoning variance application filed by an existing behavioral health hospital.

The hospital is located at 4225 West 20th Avenue, Hialeah, Florida, in a commercial area. It faces east on West 20th Avenue. West 20th Avenue runs north/south immediately parallel to and west of the Palmetto Expressway. The hospital is just south of West 41st Street, a major multilane

throughfare. The property is surrounded, to the north, south, northwest, and west, respectively, by a large educational institution with multilevel covered parking, other healthcare facilities, a church and church school, and a townhouse development.

Broadly stated, the applicant seeks to expand from its current 36,950 square feet and 72 beds by a proposed 10,840 square feet and an additional 20 beds. (approximately 30% increase in size and 28% increase in number of beds). The additional structure will be two stories in height and located on the southwest corner of the existing lot. Concerns regarding additional parking are addressed by the applicant by leasing spaces from the adjacent educational institution's multilevel parking garage.

The City's professional staff and zoning board have recommended approval of the variance with some modifications to existing windows and drainage capacities.

There is a residential townhouse development that is located on an area that from satellite maps appears to be just less than 2 square blocks in size. There appear to be between 125 and 130 units in the development. The development is walled and there is no direct ingress or egress from the development to the hospital property.

A Hialeah Councilmember lives in the townhouse development.

Issue:

Whether a Hialeah Councilmember who lives in a townhouse development that is just west of a behavioral health hospital may participate and vote on a proposed zoning variance sought by the hospital to increase its size by approximately 30% and number of beds by approximately 28%.

Discussion:

As regards future consideration and votes on matters as a Councilmember, the member's actions are governed by the County Ethics Code inasmuch Section 2-11.1(b)(1) of the County Ethics Code applies to members of County and municipal elected legislative bodies.

The county voting conflict provision is contained in Section 2-11.1(d) of Miami-Dade County Code. The provision is stricter than that which is contained State Ethics Code. The county provision provides that a voting conflict exists if the voting member "would or might, directly or indirectly, profit or be enhanced by the action..." as opposed to the state standard contained in Section 112.3134 (3) (a), Florida Statutes, that limits the county or municipal public officer from voting upon any measure "which would inure to his or her special private gain or loss." ¹

¹ RQO 15-04 (As allowed by state law, the Board of County Commissioners has established a more stringent standard of conduct as regards the local voting conflict provision than exists under state law. The county voting conflict law specifically provides that a voting conflict may exist when an official "might, directly or indirectly profit or be enhanced" by a vote. The County standard does not require a definite or measurable private gain or loss and may apply where there is a reasonable possibility or expectation of such and effect.)

The specific text of the county voting conflict provision contains three clauses that describe scenarios which may give rise to a voting conflict.

That section provides, in relevant part, that a local elected official may not:

[Vote] on or participate in any way in any matter presented...if said person 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 Board...(i) officer, director, partner, of counsel, consultant, employee, fiduciary or beneficiary; or

[if said person 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 Board] (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.

...or who would or might, directly or indirectly, profit or be enhanced by the action of the Board...

Consequently, officials may be prohibited from voting on a measure if they have a first tier enumerated relationship with a party who would or might be directly or indirectly affected by any action of the board.² If such a relationship exists, an “automatic conflict of interest” arises, and the official is barred from voting.

Also, officials may be prohibited from voting on a measure if they have a second tier enumerated relationship with a party who would or might be directly or indirectly affected by any action of the board, if the transaction or matter would affect the person...in a manner distinct from the manner in which it would affect the public generally.³ If such a relationship exists, a “contingent conflict of interest” arises, and the official is barred from voting.

Finally, officials may also be prohibited from voting if the official would or might, directly or indirectly, profit or be enhanced by the action of board. If such, then a “broad voting conflict” exists pursuant to the third clause in the local voting conflict provision and the official is barred from voting.

In applying the state voting conflict provision to zoning or development matters, the Florida Commission on Ethics (“state ethics commission”) has utilized a series of tests to determine whether an official has a voting conflict. The County Ethics Commission has utilized some of

² The first tier enumerated relationships are officer, director, partner, of counsel, consultant, employee, fiduciary, or beneficiary.

³ The second tier enumerated relationships are stockholder, bondholder, debtor, or creditor.

these same tests to determine whether a vote on a zoning matter will create a prohibited conflict for a local official.

One test is the “unique impact” test. The unique impact test is used to determine whether a vote on a measure will impact a the official exclusively or as a member of a small class and give rise to a voting conflict as opposed to a less unique impact on the official as part of a large class when no conflict would exist.

Another test is the “remote benefits” test. The remote benefits test is used to determine whether a vote will result in an actual or immediate benefit or loss inuring to the official that creates a voting conflict as opposed to a remote or speculative benefit or loss that would not result in a conflict.

Related to the unique impact is the “1%” test. The 1% test is used to determine whether the official owns more than 1% of the properties that would be impacted. If so, then it is more likely that the official will be uniquely impacted.⁴ Of necessity, the unique impact test considers the proximity between the area that will be impacted by the measure and the voting official’s property.

In opinions concerning voting conflicts arising from traffic mitigation as well as zoning measures, the Ethics Commission has applied both the unique impact and remote benefits tests.⁵ The Ethics Commission has used the 1% analysis used by the state ethics commission in voting conflict cases involving quasi-judicial zoning measures and in local voting conflict cases involving traffic mitigation measure.⁶

Analyzing opinions issued by the state and county ethics commissions applying the state and county voting conflict provisions, respectively, to determine voting conflicts arising from zoning measures and greater traffic mitigation matters, as well as statutes and case law applying to local

⁴ No voting conflict was presented in situations where the interests of the public official involved one percent or less of the class. CEO 78-96 (38 out of 5,000 acres involved); CEO 84-80 (1 out of 500 persons whose property would be down zoned); CEO 85-5 (90% of 250 residents affected); CEO 87-18 (300 out of 29,000 acres); CEO 91-18 (385 other property owners in the area affected by varying degrees); CEO 92-52 (owner of two five-acre parcels out of 276 parcels of varying size affected by a 4.5 mile road-widening project); and CEO 96-12 (owner of four non-residential parcels out of 605 similar parcels affected by a proposed convention center project.)

⁵ INQ 18-70 (The Ethics Commission has not adopted the standards used by the state ethics commission in determining whether a voting conflict exists, but it has considered whether a loss or gain to the voting official would be too remote or speculative to create a voting conflict.)

⁶ See generally RQO 10-20 (Key Biscayne council member did not have a prohibited voting conflict voting on a zoning matter because he was one of 1500 property owners affected (.06%) and therefore his interest did not reach the threshold of 1% of the size of the class that would generally create a voting conflict.)

zoning changes ⁷, the Ethics Commission will apply the following several tests in order to determine if a voting conflict exists:

1. Whether the voting official's property abuts, adjoins or is otherwise in close proximity to the property impacted by the zoning variance or traffic mitigation plan.
2. Whether the voting official owns 1% or more of the properties that would be impacted by the zoning variance or traffic mitigation plan.
3. Whether the zoning variance or traffic mitigation plan will significantly increase or decrease traffic in the area proximate to the voting official's property.
4. Whether the zoning variance or traffic mitigation plan will significantly change the character of the official's neighborhood, including changes in densities or intensities of development.
5. Whether the zoning variance or traffic mitigation plan would create a financial benefit or detriment to the official and whether that benefit or detriment is remote and speculative.

Conclusion:

Applying the reasoning of referenced opinions and law cited above to the instant case, it is noteworthy that the Councilmember lives in a development that is immediately west of the hospital site. Indeed, the member lives in the only residential development that abuts the hospital.

There are approximately 125 to 130 units in the townhouse development, the member owns and lives in one unit. Using 125 as the number of units for this analysis, the member is one of 125 property owners affected (.08%) and therefore, while close, the member's interest did not reach the threshold of 1% of the size of the class that would generally create a voting conflict.

There may be more traffic in the area due to the increase in patient beds and possible concurrent increase in staff or visitation, however, this is not addressed in the City's professional staff planner's recommendation for variance.

The hospital already exists, and it is located in area where there are other health care providers, schools, churches, and multilevel parking structure. There is no new use proposed use by the

⁷ See generally Renard v. Dade County, 261 So.2d 832 (Fla. 1972); and Section 163.3215(2), Florida Statutes ("As used in this section, the term "aggrieved or adversely affected party" means any person or local government that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons.")

hospital, rather a proposed increase in size of structure and potential volume of use. It does not appear that the variance will significantly change the character of the official's neighborhood.

Finally, while having a larger mental health facility, one that will have a new two-story addition, next to a single-family townhouse development might create a financial detriment to residential property owners, there are no facts provided by the City staff that support this proposition. As such, for purposes of this opinion, any financial impact to the member would be remote or speculative.

Consequently, based on the facts provided, while a close call given the proximity between the property owner seeking the zoning variance and the member's residence, it does not appear that the official would or might, directly or indirectly, profit or be enhanced by the action of board. Again, on the facts provided, any impact would be negligible, speculative, or would impact a relatively large class of persons. There does not appear to be a "broad voting conflict" pursuant to the third clause in the local voting conflict provision and the official is not barred from voting.

The County's Conflict of Interest and Code of Ethics provides a minimum standard of conduct for public officials. It does not directly address "appearance of impropriety" issues that should guide the actions of all public servants, nor does it address the subjective mindset of a public official who, for reasons outside of the Code, does not feel capable of being fair or objective in a particular matter, due to personal considerations or recent financial arrangements. Any public official under such circumstances must use his or her own judgment in determining the proper course of action when conducting public business.

While the County Ethics Commission does not have jurisdiction to interpret state statutes, the voting conflict provision contained in the Code of Ethics for Public Officers and Employee's ("state voting conflict provision") provides that officials are required to vote on measures coming before their board unless there exists a possible conflict of interest under the state ethics code or a local ethics code that imposes more stringent standards.⁸ The state voting requirement provision provides in relevant part as follows:

A member of a state, county, or municipal governmental board, commission, or agency who is present at a meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may not abstain from voting in regard to any such decision, ruling, or act; and a vote shall be recorded or counted for each such member present, unless, with respect to any such member, there is, or appears to be, a possible conflict of interest under s. 112.311, s. 112.313, s. 112.3143, or additional or more stringent standards of conduct, if any, adopted pursuant to s. 112.326. *If the official decision, ruling,*

⁸ "Additional requirements by political subdivisions and agencies not prohibited. Nothing in this act shall prohibit the governing body of any political subdivision, by ordinance, or agency, by rule, from imposing upon its own officers and employees additional or more stringent standards of conduct and disclosure requirements than those specified in this part, provided that those standards of conduct and disclosure requirements do not otherwise conflict with the provisions of this part." (Section 112.236, Florida Statutes)

or act occurs in the context of a quasi-judicial proceeding, a member may abstain from voting on such matter if the abstention is to assure a fair proceeding free from potential bias or prejudice. (Section 286.012, Florida Statutes) (Emphasis added)

The state voting requirement provision allows local officials more discretion in abstaining from a vote if the measure under consideration arises from a quasi-judicial as opposed to a legislative matter. Consequently, when considering a zoning matter in a quasi-judicial setting, a local official may abstain from a vote even if voting on the measure would not inure to his or her special private gain or loss or otherwise not constitute a conflict under a local ethics code.

If the voting member in this case believes that he or she would avoid an appearance of impropriety by declining to vote on the zoning variance request made a property owner that is next door to his residential complex, and that abstention is appropriate to assure a fair proceeding free from potential bias or prejudice, then perhaps it is advisable that he or she should decline to vote or participate on the matter.

We hope that this opinion is of assistance, and we remain available to discuss any matters addressed in this letter, if necessary

Sincerely,



Jose J. Arrojo
Executive Director

cc: All Commission on Ethics Attorneys

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.