

Honesty - Integrity - Character

Palm Beach County
Commission on Ethics
300 North Dixie Highway
West Palm Beach, FL 33401
561.355.1915
FAX: 561.355.1904
Hotline: 877.766.5920
E-mail: ethics@pbcgov.org

Commissioners
Sarah L. Shullman, Chair
Bryan Kummerlen, Vice Chair
Michael S. Kridel
Rodney G. Romano
Peter L. Cruise

Executive Director
Mark E. Bannon

Intake and Compliance Manager
Gina A. Levesque

General Counsel
Christie E. Kelley

Chief Investigator
Anthony C. Bennett

Investigator
Abigail Irizarry

Agenda

August 1, 2019 – 1:30 p.m.
Governmental Center,
301 North Olive Avenue, 6th Floor
Commissioners Chambers

- I. Call to Order
- II. Roll Call
- III. Introductory Remarks
- IV. Approval of Minutes from June 6, 2019
- V. Processed Advisory Opinions (Consent Agenda)
 - a. RQO 19-009
 - b. RQO 19-012
- VI. Items Pulled from Consent Agenda
 - a.
- VII. Executive Director Comments
- VIII. Commission Comments
- IX. Public Comments
- X. Adjournment

If a person decides to appeal any decision made by this Commission with respect to any matter considered at this meeting or hearing, (s)he will need a record of the proceedings, and that, for such purpose, (s)he may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

**OFFICIAL MEETING MINUTES
OF THE
PALM BEACH COUNTY COMMISSION ON ETHICS
PALM BEACH COUNTY, FLORIDA**

JUNE 6, 2019

**THURSDAY
1:30 P.M.**

**COMMISSION CHAMBERS
GOVERNMENTAL CENTER**

I. CALL TO ORDER

II. ROLL CALL

MEMBERS:

Sarah L. Shullman, Chair
Bryan Kummerlen, Vice Chair
Peter L. Cruise
Michael S. Kridel
Rodney G. Romano

STAFF:

Mark E. Bannon, Commission on Ethics (COE) Executive Director
Anthony Bennett, COE Chief Investigator
Abigail Irizarry, COE Investigator I
Christie E. Kelley, Esq., COE General Counsel
Gina A. Levesque, COE Intake and Compliance Manager

ADMINISTRATIVE STAFF:

Marisa Valentin, Deputy Clerk, Clerk & Comptroller's Office

III. INTRODUCTORY REMARKS – None

IV. APPROVAL OF MINUTES FROM APRIL 4, 2019

MOTION to approve the May 2, 2019 minutes. Motion by Rodney Romano, seconded by Peter Cruise, and carried 5-0.

V. PROCESSED ADVISORY OPINIONS (CONSENT AGENDA)

V.a. RQO 19-008

V.b. RQO 19-010

V.c. RQO 19-011

MOTION to approve the consent agenda. Motion by Rodney Romano, seconded by Michael Kridel, and carried 5-0.

VI. ITEMS PULLED FROM CONSENT AGENDA – None

VII. EXECUTIVE DIRECTOR COMMENTS

VII.a.

DISCUSSED: Update on proposed ordinance changes.

COE Executive Director Mark Bannon stated that staff had been working with the League of Cities and the County Attorney's Office on making proposed changes to certain ordinances that were agreed upon by all participants. He added that he hoped to have the completed changes available for the commissioner soon.

VII.b.

DISCUSSED: Municipal meeting attendance.

COE Executive Director Mark Bannon said that he and staff continued to attend municipal meetings to offer advice or other ethics related services.

VII.c.

DISCUSSED: Staff training

COE Executive Director Mark Bannon said that the COE staff was engaged in extensive training during the current training cycle. He added that he and General Counsel Christie Kelley were conducting live training sessions.

VIII. COMMISSION COMMENTS

VIII.a.

DISCUSSED: Charity Bicycle Ride

Commissioner Romano wished Intake and Compliance Manager Gina Levesque good luck on her 165-mile charity ride.

IX. PUBLIC COMMENTS – None

X. ADJOURNMENT

At 1:33 p.m., the chair declared the meeting adjourned.

Chair/Vice Chair



Palm Beach County Commission on Ethics

Honesty - Integrity - Character

July 11, 2019
Page 4 of 10
Commissioners
Sarah L. Shullman, Chair
Bryan Kummerlen, Vice Chair
Rodney G. Romano
Michael S. Kridel
Peter L. Cruise
Executive Director
Mark E. Bannon

June 12, 2019

Ms. Christy Goddeau, Esquire
Torcivia, Donlon, Goddeau & Ansay, P.A.
701 Northpoint Parkway, Suite 209
West Palm Beach, FL 33407

Sent via email only to: christy@torcivialaw.com

Re: RQO 19-009
Misuse of Office/Voting Conflict

Dear Ms. Goddeau,

Your request for an advisory opinion to the Palm Beach County Commission on Ethics (COE) has been received and reviewed. The opinion rendered is as follows:

QUESTION:

Would a voting conflict arise for two city of Lake Worth Beach (City) appointed officials who serve on the Electric Utility Advisory Board (EUAB) if they participate in the discussion and vote on the city of Lake Worth Beach Electric Utility's Net Metering Program policy when they are both participants in the Net Metering Program and one of them owns a solar energy systems installation business? If they have a voting conflict, does the Palm Beach County Code of Ethics (Code) also prohibit these EUAB members from addressing the City Commission on the Net Metering Program issue at a public meeting?

ANSWER:

The Code prohibits officials from using their official position in any way to give a special financial benefit, not shared with similarly situated members of the general public, to specified persons or entities, including themselves or their outside business.¹ Similarly, the Code also prohibits them from voting on or participating in any matter before their advisory board which will give a special financial benefit to themselves.² Financial benefit, in the context of the Code, constitutes economic gain or loss.³ Based on the facts provided, Mr. Chalhoub and Mr. Oblander are prohibited from using their official positions as EUAB members in any way, including voting and participating in discussion, to give a special financial benefit to themselves or their outside businesses.

Whether these two advisory board members' participation in the City's Net Metering Program creates a voting conflict for them turns on whether the financial benefit involved is shared with similarly situated members of the general public. As the COE has previously opined, there is no bright line in determining the number of individuals who would need to be similarly affected to transform a personal gain or loss into a gain or loss shared with similarly situated members of the general public.⁴ Therefore, the determination of whether a measure will result in a financial benefit not shared with similarly situated members of the general public turns on the size of the class of persons who stand to benefit from the measure.⁵ Where a class is large, a prohibited financial gain would result only if there are circumstances unique to them which would enable them to benefit more than others within the class. Where

¹ §2-443(a)

² §2-443(c)

³ RQO 10-013

⁴ RQO 10-013

⁵ RQO 14-006; RQO 13-011

the class of persons benefiting is small, the likelihood of prohibited financial benefit is much greater.⁶ The general line drawn by the Florida Commission on Ethics involves situations where the interest of the public official involves 1% or less of the class. In other words, 100 or more affected persons is a sufficiently large class to transform the benefit or loss into one shared by similarly situated members of the public. While the "1% Rule" may be an arbitrary cut-off point, it provides certainty and guidance in an area of the law which otherwise lacks clarity.

Based on the facts provided here, any benefit or loss obtained by changes to the Net Metering Program policy would apply to all Lake Worth Beach Utilities solar customers. There is no additional burden placed on the general population if changes are made. Therefore, only the solar customers are considered "similarly situated members of the general public" for purposes of determining whether a voting conflict exists regarding the Net Metering Program. Here, the class affected is limited to the 86 solar customers, which makes Mr. Oblander's interest in the affected class 1.16% and Mr. Chalhoub's interest in the affected class 2.32%. Because the class of the persons affected is small and both of their interests currently exceed 1%, the benefit is considered "special" and the Code prohibits them from voting on or participating in this matter at this time. In order to avoid violating the Code, Mr. Oblander and Mr. Chalhoub will need to publicly disclose the nature of their conflict, abstain from voting, not participate in discussion on the matter, complete and file a State of Florida Commission on Ethics Conflict Form (Form 8B), and submit a copy of the Form 8B to the COE.⁷

Next, in determining whether Mr. Chalhoub has an additional conflict due to his solar energy systems installation business, the COE must consider whether any gain or loss to his business would be remote and speculative. The COE has previously held that, in determining whether an action would result in a special financial benefit being given to a person or entity, any such financial benefit must be direct and immediate, rather than remote and speculative.⁸ Similarly, the Florida Commission on Ethics has also determined that where there is uncertainty at the time of a vote as to whether a measure directly affects a person or entity, any private gain or loss based on the vote is remote and speculative, and thus the official will not be precluded from casting such vote.⁹

Here, based on the facts provided, any financial gain or loss to Mr. Chalhoub's solar energy system installation business from changes to the Net Meter Policy would be remote and speculative. None of the facts provided show that any direct effect would occur from his vote on the Net Meter Program policy that would result in an increase or decrease for his business. Although changes to the Net Meter Program policy would impact the financial return to current and future solar customers, any impact that this vote would have on Mr. Chalhoub's business is remote and speculative at best. Because there is no direct causal relationship between this vote on the Net Meter Program policy and a special financial benefit being given to Mr. Chalhoub's outside business, once Mr. Chalhoub's interest in the affect class is 1% or less, he would not be prohibited from participating in or voting on the Net Meter Program policy.

Finally, with regards to whether the two EUAB members may speak at a City Commission meeting regarding the Net Metering Program policy, the Code does not regulate an advisory board member's speech at a publicly held City Commission meeting. Therefore, based upon the facts submitted, comments by the board members would not violate the Code. However, to avoid the appearance of impropriety, Mr. Chalhoub and Mr. Oblander should speak in their private capacity as participants in the Net Metering Program and not reference their membership on the EUAB.

FACTS:

Your firm serves as the City Attorney for the city of Lake Worth Beach. You are requesting an advisory opinion on behalf of two EUAB members, Ibrahim Chalhoub and Ryan Oblander.

⁶ CEO 92-37 (two percent or eight percent of the property to be affected or 5 of 60 sites and 5 of 168 sites is of sufficient size to result in a "special" gain); CEO 93-19 (measure to construct a sidewalk affecting 40 homes would not affect enough persons in order for its effect not to be considered "special" under the voting conflicts law)

⁷ §2-443(c)

⁸ RQO 12-063

⁹ CEO 05-15; CEO 91-61; CEO 12-19

In 2009, the City started a Net Metering Program for its electric utility to encourage customer-owned renewable generation (e.g. solar energy). The program provides a metering and billing methodology whereby customers with such installations could offset their electricity consumption at their property and receive a financial return on excess energy sent back to the City's system. Under the Net Metering Program, the customer would pay private installers to install a solar energy system on their property and then connect to the City's electric utility system. The customer would then be placed in the Net Metering Program to receive the benefits thereof. The program has remained in effect since 2009 with no changes. There are currently 84 out of approximately 27,000 City electric utility customers who participate in the program. This further breaks down to 79 residential and 5 commercial participants. Mr. Oblander is a residential participant, and Mr. Chalhoub is both a residential and commercial participant.

Recently, the City's electric utility staff has been reviewing the Net Metering Program to determine if changes should be made to include a reduction in the financial return to program participants and determined that the program needs modification in order to comply with state law. At the direction of the City Commission to take up the matter with the EUAB, the electric utility began gathering data related to the program and state law in order to have the EUAB review the program and make a recommendation to the City Commission on this matter.

The EUAB is a seven-member advisory board of the City. All members of the EUAB are required to be customers of the city's electric utilities. The EUAB's purpose is stated in section 2-235 of the City's code of ordinances as:

The board's purpose is to advise the city commission, on behalf of and for the benefit of the citizens and residents of the city, on electric utilities policies, plans and programs. The board will advise the city commission on the establishment of fair and equitable policies, plans and programs that are consistent with customer needs, legal mandates, public policy, operational requirements and the long-term financial stability and viability of the electric utilities.

On April 9, 2019, you received an email from a City employee asking if there will be a prohibited conflict of interest for Mr. Chalhoub and Mr. Oblander at the April 10 meeting because they are both participants in the Net Metering Program. The email also asked whether Mr. Ibrahim has an additional prohibited conflict of interest since he owns a company that installs solar energy systems in the City and other areas covered by the City's electric utility service area. At the April 10, 2019 EUAB meeting, you advised the EUAB of your preliminary opinion that a potential conflict of interest may exist for the two board members. The EUAB then voted to not move forward with a discussion or vote on the Net Metering Program and directed you to request this advisory opinion from the COE. On April 30, 2019, the City also passed a four-month moratorium on new participants entering the City's Net Metering Program in order to bring the program into compliance with state law.

It is anticipated that if the EUAB makes a recommendation on the Net Metering Program, the EUAB's recommendation will be reviewed by the City Commission at a public meeting. It is highly likely that one or more EUAB members will attend the City Commission meeting and may make public comment on the same.

Mr. Oblander provided additional information to the COE. According to Mr. Oblander, City staff is attempting to initiate changes to the current Net Metering Program policy in the following areas: true up credit rate, true up time period, interconnection agreements required, application fees, tier structures, insurance requirements, system size allowable, minimum bill changes, moratorium until commission approval, and grandfathering existing customers. The EUAB was provided a worksheet on these areas that the board will discuss and vote on.

Mr. Oblander stated that the current Net Metering Program policy says that customers who have installed renewable energy systems and create more energy than they use shall receive a credit for the excess energy delivered back onto the grid. The City currently pays a retail credit for that excess energy monthly (called a true up credit), in addition to waiving the minimum bill requirements. There is still a mandatory "customer charge" for all customers, residential or commercial, to cover customer service and billing expenses. City staff wants to change the Net Metering Program policy to make it more profitable for the utility, and less attractive for the customer.

Mr. Oblander provided the following example: Sally Customer was inspired by the City's green initiatives and installed solar panels on her roof. During the month of June, she created more energy than she used by 100 kilowatt-hours, so the City's electric utility gave her a retail credit of \$9.75 for that excess (\$0.09746/kwh). In July, she used more energy than she created by 100 kilowatt-hours. Since she had a credit for the last month, she broke even. Her bill for each month would just be a \$10 customer charge. According to the proposed changes to the credit rate (let's assume FPL's rate of \$0.02/kwh), if you use the same example from before with Sally Customer who created an excess of 100 kilowatt-hours in June, she would now only receive a credit for \$2 instead of \$9.75. Then in July, when she was short 100 kilowatt-hours, she would have to now pay the difference out of pocket. Meanwhile, the City's electric utility can turn around and resell that excess to Sally's neighbor for a profit. Not including a calculation for a change in the minimum bill requirements, Sally's June bill would still be \$10, but her July bill would be \$10 minus the \$2 credit from June plus \$9.75 for 100kwh + energy taxes/fees, so possibly \$17.75-\$25.00 (depending on the taxes/fees calculations).

Mr. Oblander stated that he understands that any changes to the Net Metering Program policy could affect his calculated return on investment.

LEGAL BASIS:

The legal basis for this opinion is found in the §2-443(a) and §2-443(c) of the Code:

Sec. 2-443. Prohibited conduct.

- (a) **Misuse of public office or employment.** An official or employee shall not use his or her official position or office, or take or fail to take any action, or influence others to take or fail to take any action, in a manner which he or she knows or should know with the exercise of reasonable care will result in a special financial benefit, not shared with similarly situated members of the general public, for any of the following persons or entities:
- (1) Himself or herself;
- (c) **Disclosure of voting conflicts.** County and municipal officials as applicable shall abstain from voting and not participate in any matter that will result in a special financial benefit as set forth in subsections (a)(1) through (7) above. The official shall publicly disclose the nature of the conflict and when abstaining from the vote, shall complete and file a State of Florida Commission on Ethics Conflict Form 8B pursuant to the requirements of Florida Statutes, §112.3143. Simultaneously with filing Form 8B, the official shall submit a copy of the completed form to the county commission on ethics. Officials who abstain and disclose a voting conflict as set forth herein, shall not be in violation of subsection (a), provided the official does not otherwise use his or her office to take or fail to take any action, or influence others to take or fail to take any action, in any other manner which he or she knows or should know with the exercise of reasonable care will result in a special financial benefit, not shared with similarly situated members of the general public, as set forth in subsections (a)(1) through (7).

This opinion construes the Palm Beach County Code of Ethics Ordinance and is based upon the facts and circumstances that you have submitted. The COE does not investigate the facts and circumstances submitted but assumes they are true for purposes of this advisory opinion. It is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

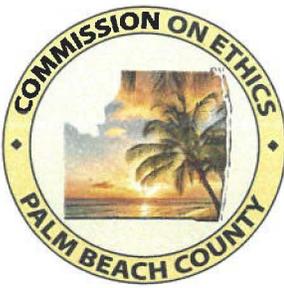
Please feel free to contact me at 561-355-1915 if I can be of any further assistance in this matter.

Sincerely,



Mark E. Bannon,
Executive Director

CEK/gal



Palm Beach County Commission on Ethics

Honesty - Integrity - Character

Commissioners

Sarah L. Shullman, Chair
Bryan Kummerlen, Vice Chair
Rodney G. Romano
Michael S. Kridel
Peter L. Cruise

Executive Director

Mark E. Bannon

July 26, 2019

Ms. Laurie Cohen, Village Attorney
Village of Wellington
12300 Forest Hill Blvd.
Wellington, FL 33414

Re: RQO 19-012
Conflict of Interest

Dear Ms. Cohen,

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion, and rendered its opinion at a public meeting held on August 1, 2019.

QUESTION:

Does the Palm Beach County Code of Ethics (Code) prohibit Anne Gerwig, Mayor of the Village of Wellington (Village), from participating in discussions and voting on a land development application that may come before the Village Council when the applicant is a customer or client of Alan Gerwig and Associate, Inc.?

ANSWER:

The Code prohibits an elected official from using his or her official position to give a special financial benefit, not shared with similarly situated members of the general public, to a customer or client of his or her outside business or employer or to corruptly secure a special benefit for any person.¹ Similarly, an official must abstain from participating in and voting on a matter that would give a special financial benefit to a customer or client of his or her outside business or employer.² Under the Code, a customer or client is any person or entity to which the official's outside employer or business has supplied services in excess of \$10,000 during the previous 24 months.³

Based on the facts provided, Alan Gerwig and Associates, Inc. (the Firm) is Mayor Gerwig's outside business. The Code defines an outside business as any entity in which the official has an ownership interest.⁴ Under the Code, ownership interest means "at least five (5) percent of the total assets or common stock is owned by the official... or any combination of the official's household members, spouse, child..."⁵ Although Mayor Gerwig only has a 1% ownership interest in the Firm, the Firm is considered her outside business because her spouse has the remaining 99% ownership interest. Further, because the Firm has supplied services in excess of \$10,000 over the previous 24 months to Dr. Swerdlin's businesses, Dr. Swerdlin is a customer or client of Mayor Gerwig's outside business. Therefore, Mayor Gerwig is prohibited from participating in and voting on the land development application submitted on behalf of Dr. Swerdlin individually or through a corporate entity in which he has an ownership interest if the vote will give him a special financial benefit.

¹ Sec. 2-443(a)(5), Misuse of public office or employment; §2-443(b), Corrupt misuse of official position

² Sec. 2-443(c), Disclosure of voting conflicts

³ Sec. 2-442, Definitions

⁴ Id.

⁵ Id.

In determining whether a conflict of interest exists in the circumstance presented, the degree to which there is uncertainty at the time of the vote as to whether there would be any financial benefit to the prohibited person or entity must also be considered.⁶ Financial benefit, in the context of the Code, constitutes economic gain or loss.⁷ To constitute a prohibited voting conflict, the possibility of a financial gain or loss must be direct and immediate, rather than remote and speculative⁸.

Here, the possibility of a financial benefit (gain or loss) to Dr. Swerdlin from a vote to approve or reject a land development application would be direct and immediate. Therefore, based on the facts submitted, Mayor Gerwig may not participate in or vote on the land development application submitted on behalf of Dr. Swerdlin individually or through a corporate entity in which he has an ownership interest. Additionally, in order to comply with the Code, Mayor Gerwig will need to publicly disclose the nature of the conflict before the Village Council discusses the matter, abstain from participating and voting on the matter, and file a state voting conflict form (Form 8B).⁹

FACTS:

You are the attorney for the Village of Wellington, and you are requesting this advisory opinion on behalf of Mayor Anne Gerwig.

Mayor Gerwig is an employee and has a 1% ownership interest in the engineering firm of Alan Gerwig and Associates, Inc., and her husband has 99% ownership interest in that firm. Over the past 24 months, the Firm has provided engineering services valued over \$10,000 to Palm Beach Equine Clinic, LLC and Palm Beach Equine Sports Complex, LLC. Dr. Scott Swerdlin, who has ownership interest in both Palm Beach Equine Clinic, LLC and in Palm Beach Equine Sports Complex, LLC has expressed interest in purchasing and redeveloping a golf course property located in the Village. Dr. Swerdlin would purchase the property either individually or through a corporate entity in which he has an ownership interest. Any plans to redevelop the property will come before the Village Council for approval.

LEGAL BASIS:

The legal basis for this opinion is found in §2-442, §2-443(a)(5), §2-443(b), and §2-443(c) of the Code:

Sec. 2-442. Definitions.

Customer or client means any person or entity to which an official or employee's outside employer or business has supplied goods or services during the previous twenty-four (24) months, having, in the aggregate, a value greater than ten thousand dollars (\$10,000).

Financial benefit includes any money, service, license, permit, contract, authorization, loan, travel, entertainment, hospitality, gratuity, or any promise of any of these, or anything else of value.

Outside business or business includes:

- (2) Any entity located in the county or which does business with or is regulated by the county or municipality as applicable, in which the official or employee has an ownership interest. For purposes of this definition, an "ownership interest" shall mean at least five (5) percent of the total assets or common stock owned by the official or employee or any combination of the official or employee's household members, spouse, child, step-child, brother, sister, parent or step-parent, or a person claimed as a dependent on the official or employee's latest individual federal tax return.

⁶ 112.3143(1)(d), Florida Statutes

⁷ RQO 10-013

⁸ George v. City of Cocoa, Florida, 78 F.3d 494 (1996).

⁹ Sec. 2-443(c), Disclosure of voting conflicts

Sec. 2-443. Prohibited conduct.

- (a) **Misuse of public office or employment.** An official or employee shall not use his or her official position or office, or take or fail to take any action, or influence others to take or fail to take any action, in a manner which he or she knows or should know with the exercise of reasonable care will result in a special financial benefit, not shared with similarly situated members of the general public, for any of the following persons or entities:
- (5) A customer or client of the official or employee's outside employer or business;
- (b) **Corrupt misuse of official position.** An official or employee shall not use his or her official position or office, or any property or resource which may be within his or her trust, to corruptly secure or attempt to secure a special privilege, benefit, or exemption for himself, herself, or others. For the purposes of this subsection, "corruptly" means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of an official or employee which is inconsistent with the proper performance of his or her public duties.
- (c) **Disclosure of voting conflicts.** County and municipal officials as applicable shall abstain from voting and not participate in any matter that will result in a special financial benefit as set forth in subsections (a)(1) through (7). The official shall publicly disclose the nature of the conflict and when abstaining from the vote, shall complete and file a State of Florida Commission on Ethics Conflict Form 8B pursuant to the requirements of Florida Statutes, §112.3143. Simultaneously with filing Form 8B, the official shall submit a copy of the completed form to the county commission on ethics. Officials who abstain and disclose a voting conflict as set forth herein, shall not be in violation of subsection (a), provided the official does not otherwise use his or her office to take or fail to take any action, or influence others to take or fail to take any action, in any other manner which he or she knows or should know with the exercise of reasonable care will result in a special financial benefit, not shared with similarly situated members of the general public, as set forth in subsections (a)(1) through (7).

This opinion construes the Palm Beach County Code of Ethics Ordinance and is based upon the facts and circumstances that you have submitted. The COE does not investigate the facts and circumstances submitted but assumes they are true for purposes of this advisory opinion. It is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at 561-355-1915 if I can be of any further assistance in this matter.

Sincerely,



Mark E. Bannon
Executive Director

CEK/gal