



Palm Beach County Commission on Ethics

Commissioners

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Executive Director

Alan S. Johnson

May 4, 2012

Thomas Carney, Vice Mayor
100 N.W. First Avenue
Delray Beach, FL 33444

Re: RQO 12-039
Voting Conflicts

Dear Vice Mayor Carney,

Your request for an expedited advisory opinion pursuant to Commission on Ethics Rule of Procedure 2.6 was received and set for review at the next scheduled meeting of the Palm Beach County Commission on Ethics (COE). The issue was considered and the COE rendered its opinion at a public meeting held on May 3, 2012.

YOU ASKED in your email of May 1, 2012, whether you, as an elected official of the City of Delray Beach (the City), may represent a customer or client of your firm in front of the Delray Historic Preservation Board so long as you abstain from voting and do not participate in any part of the decision-making process when the matter eventually reaches the City Commission.

IN SUM, as an elected official you are prohibited from using your official position to give yourself, your outside business, or a customer or client of your outside business a *special financial benefit* not shared with similarly situated members of the general public. Voting on a client's proposal or related issues pending before the City Commission, participating in conversations, or attempting to influence your fellow commissioners, city staff or advisory board members in your official capacity constitutes a misuse of office. The prohibition extends to you or someone using your official position on your behalf.

An appearance before a City advisory board is not prohibited provided that you do not use your official position in any manner to obtain a special financial benefit for yourself or your client. This includes interaction with City staff as well as advisory board members.

THE FACTS as we understand them are as follows:

You are a Commissioner and current Vice Mayor of the City of Delray Beach (the City). In addition, you are a practicing attorney, specializing in corporate, land use and real estate transactions.

The City has created a number of boards to deal with various development applications. These include, among others, Planning & Zoning, Site Plan Review, and the Historic Preservation Board (HPB). The HPB is charged with reviewing all development, improvement, and redevelopment applications within a designated historic district and has seven members.

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According to the City Charter and in practice, the various City boards are completely independent of the City Commission in their deliberations and approvals. However, the City Commission does appoint volunteer members to these boards. Appointments to advisory boards are based upon a rotation of City Commissioners as vacancies become available. Once a Commissioner has nominated a person to fill a board vacancy, the nomination is voted on by the entire Commission. Last year, you appointed a member of the public to the HPB. You made this appointment based upon a list of persons interested in serving provided to you by the City Clerk. You do not have a personal relationship with your current appointee to the HPB, nor have you developed such a relationship with any member of the HPB. The other six members were nominated by other City Commissioners. In addition, the City Commission has no operational control over City advisory boards, their decisions or findings.

You have a client who is in the process of preparing an application to develop a vacant piece of land within the historic district. In this regard, the new building will be reviewed by the HPB for compliance with the various zoning requirements and historic requirements, as well as the "compatibility" to the surrounding buildings/structures.

As a land use attorney, your typical representation includes, in addition to assisting with the application and variance waiver support letters, appearing together with the applicant at the time the presentation is made to a particular Board, and in most cases, participating in the presentation as it relates to the justifications submitted for the variances.

The proposed design will require a variance and three waivers of the City's land development regulations. The approval/disapproval of the variance and two of the three waivers are subject to the decision-making authority of the HPB. One of the waivers will likely require specific approval by the City Commission following approval by the HPB. In addition, if any of the approvals/disapprovals by the HPB are appealed, these appeals are heard by the City Commission. If there are no objections or appeals, the City Commission would be asked to ratify the decisions through a Consent Agenda Item.

After reviewing the Code of Ethics, applicable advisory opinions and training materials, you understand that when this matter comes before the City Commission you must disclose the nature of your conflict, that your firm represents the client's plan subject to the Commission's approval, abstain from voting and not participate in any discussion surrounding the vote. Subsequent to the abstention, you understand that you are required to file a state conflict form 8B as required by statute.

You are seeking further guidance as to whether you are able to participate and appear before City boards in your professional capacity and have requested an expedited consideration of this matter based upon an upcoming hearing before the HPB on May 16, 2011.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the Palm Beach County Code of Ethics:

Section 2-443(a) prohibits you from using your official position to give yourself, your outside business, or a customer or client of your outside business a financial benefit, in a manner which you *know 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.* A customer or client is defined as a person or entity

to whom your outside business has supplied goods or services in excess of \$10,000 over the previous 24 months.¹

Section 2-443(c) similarly prohibits you from voting on an issue or participating in a manner that would result in a special financial benefit attributable to yourself, your outside business or customer as previously described. Essentially, the voting conflict section addresses the scenario whereby in voting or participating in an issue you would violate the misuse of office prohibitions of the code. In such a scenario you are required to 1) disclose the nature of your conflict before your board discusses the issue; 2) abstain from any discussion or vote or otherwise participate in the matter; and 3) File a state voting conflict form (8B), submitting a copy to the CAB clerk and the Palm Beach County COE. The language of §2-443(c) is as follows:

County and municipal officials...shall abstain from voting and not participate in any matter that will result in a special benefit as set forth in subsections (a)(1) through (7) above...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...

In this context, “participate” means that you may not present your client’s project to the City Commission or take part in any presentation or discussion regarding your client’s project with your fellow Commissioners. You are not prohibited from meeting with and presenting to Zoning staff and other related city advisory boards, such as the HPB.²

While you may submit and discuss your client’s project with staff prior to the matter coming before the Commission and you may present your proposal to advisory boards independent of the Commission, you must *take great care not to use your official position to influence the process*³. The misuse of office and voting conflict prohibitions apply to you personally, or someone using your official title or position at your direction. Therefore, you are not prohibited from working with City staff on your client’s project up and until it goes before the City Commission, so long as it is in your professional as compared to your official capacity. Additionally, this provision does not prohibit other owners or employees of your outside business from representing your client’s interests in these matters.

While there may be no *per se* prohibited conflict of interest created under the Code of Ethics, there may be an appearance of impropriety where you are appearing in your professional capacity before members of a board who may have been appointed by or may ultimately be reappointed by you as a member of the City Commission. Accordingly, you must also take great care not to use your official position or title in *any way* to influence members of staff or sitting advisory board members resulting in a special financial benefit for yourself, your outside business or your customer or client.

¹ §2-442, Definitions

² RQO 11-067 (a municipal advisory board member is prohibited from representing a client before the board on which he sits, but is not prohibited from discussing client matters with staff and other municipal advisory boards in his professional capacity as a landscape architect). This case differs from *Miklos* in that you are seeking advice as to appearing before a board on which you do not sit nor directly control.

³ See, *Siplin v. Commission on Ethics*, 59 So.3d 150, 2011 (in order to violate the misuse of office prohibitions of the Palm Beach County and State of Florida codes of ethics, a public official must not only use their official position to obtain a special financial benefit, but must also obtain that sought after benefit based upon their official position).

Lastly, you may not use your official position to corruptly offer or give a *quid pro quo* or any subsequent benefit to any HPB member in exchange for supporting your client's project before the HPB. Doing so would violate §2-443(b) corrupt misuse of official position.

IN SUMMARY, based on the facts and circumstances presented, you are not prohibited from representing a client and appearing before the HPB in your private professional capacity. However, you may not use your elected office to corruptly benefit a Board member in exchange for supporting your project. Additionally you may not use your official position, or influence others, to give yourself, your outside business or a customer or client of your outside business a special financial benefit, not shared with similarly situated members of the general public.

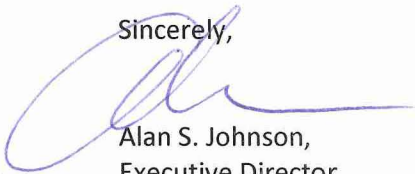
Subsequently, as Vice Mayor, if any issue related to your client comes before the City Commission, you must disclose the nature of that conflict, refrain from participating and file the required conflict disclosure form 8B. The Code of Ethics does not prohibit a business associate or other individual from representing your client's interests before the City Commission provided they do not indirectly use your official position to benefit the client.

While the code of ethics does not prohibit you from appearing before City advisory boards in your professional capacity as an attorney, based upon your status as a sitting City Commissioner you must take great care not to use your official position or title in *any way* to influence members of staff or sitting advisory board members resulting in a special financial benefit for yourself, your outside business or your customer or client.

This opinion construes the Palm Beach County Code of Ethics Ordinance, but 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) 233-0724 should you have any further questions in this matter.

Sincerely,



Alan S. Johnson,
Executive Director

ASJ/mcr/gal