



To: Commissioner Kirk Menendez

From: Cristina M. Suárez, City Attorney *CMS*

RE: Ponce Park Residences Project and Commissioner Kirk Menendez's Ability to Vote

Date: April 16, 2024

As requested by you, this opinion addresses whether you have a voting conflict with respect to action to be taken by the City Commission regarding various requests for development approval of a proposed project located in proximity to a single-family residence owned by you.

I. Factual Background

An application is pending before the City regarding a proposed development project known as "Ponce Park Residences" on the real property located at 3000 Ponce de Leon Boulevard, 216 & 224 Catalonia Avenue, 203 University Drive, and 225 Malaga Avenue (the "Project"). The Applicant's submission includes several requests that require City Commission approval, most of which are quasi-judicial in nature. Namely, the applicant's requests include the following:

1. Comprehensive Plan Map Amendment
2. Zoning Code Map Amendment
3. Abandonment and Vacation of an Alley
4. Receipt of Transfer of Development Rights (TDRs)
5. Mixed-Use Site Plan and Encroachment Review
6. Tentative Plat Review

The Project is located on the corner of University Drive and Ponce de Leon Boulevard, within walking distance of Ponce Circle Park and proposes development of a mixed-use building to be located fronting Ponce de Leon Boulevard, Catalonia Avenue, University Drive, and Malaga Avenue and consisting of fifty-seven (57) residential units, 20,142 square feet of ground floor and mezzanine level commercial uses and 204 parking spaces below-grade.

You have indicated that the real property located at 346 Malaga Avenue ("346 Malaga"), a single-family residence, is owned by a trust for which you are the trustee and in which you maintain an ownership interest and you have requested an opinion regarding your ability to vote on the applicant's requests, given the proximity of 346 Malaga to the Project. 346 Malaga is zoned Multi-Family 2 ("MF-2") and is located one block away from the proposed site for Ponce Park

Residences, between Le Jeune Road and Salzedo Street. The block between Ponce de Leon Boulevard and Salzedo Street is zoned entirely Mixed-Use 1 (“MX-1”). While the south side of the block between Salzedo Street and LeJeune Road, on which 346 Malaga is located, is zoned Multi-Family 2 (“MF-2”), the north side of the block is zoned MX-1 and a different mixed-use project is currently being developed on a portion of that side of the block. 346 Malaga is located only one house in from Le Jeune Road.

II. Voting Conflicts under Florida Law

Voting conflicts under Florida’s Code of Ethics are addressed in Florida Statutes § 112.3143. As applied to county and municipal officers, it provides as follows:

(3)(a) No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer.

“Special private gain or loss” is defined as

an economic benefit or harm that would inure to the officer, his or relative, business associate, or principal, in which case, at least the following factors must be considered whether determining whether a special private gain or loss exists:

1. The size of the class affected by the vote.
2. The nature of the interests involved.
3. The degree to which the interests of all members of the class are affected by the vote.
4. The degree to which the officer, his or her relative, business associate, or principal receives a greater benefit or harm when compared to other members of the class.

Fla. Stat. § 112.3143(1)(d).

In determining whether a voting conflict exists under § 112.3143, the Florida Commission on Ethics (“FEC”) applies the “remote and speculative test.” For example, in CEO 06-08, the FEC concluded that a city councilman did not have a voting conflict regarding measures concerning redevelopment of a city-owned parcel located *near* properties owned by the councilman or his father because, “any gain or loss to the councilman or his father (relative) would be ‘remote or speculative’ or would not be ‘special.’” See CEO 06-08. Similarly, in CEO 88-31, the FEC concluded that a council member was not prohibited from voting on annexation of property which adjoined property in which she owned an interest. In that matter, the Venice City Council Member’s property was presently not contiguous to Venice City, but would become contiguous if the large tract of land was annexed. The FEC explained that “any gain or loss resulting to [the councilmember] from the annexation of the subject property would be too remote and speculative to allow [the FEC] to conclude that such matter would inure to [the councilmember’s] ‘special

private gain.” The FEC has also concluded that a county commissioner was not presented with a voting conflict regarding a proposed new road and a developer’s plan to develop a large tract of land adjacent to the road, where the county commissioner and family members owned property in the same general vicinity. See CEO 05-03. In its opinion, the FEC noted that, among other circumstances, the properties owned by the commissioner (and her family members) were not immediately adjacent to the developer’s tract or the proposed road adjacent to the developer’s property or the proposed roadway. Consequently, any possibility of gain from the measure would be remote and speculative, and any actual gain would not be “special” within the meaning of the voting conflicts laws. See also CEO 86-44.

In CEO 01-8, however, the FEC was unable to find that the value of the council member’s property would not be impacted by the building of a governmental center adjacent to a parcel owned by the council member’s parcel, and thus, was unable to determine without more information that no voting conflict would. In doing so, the FEC relied, in part, on the fact that that in addition to the parcel being adjacent to the subject property, it was the only large, undeveloped parcel of property left.

346 Malaga is not located within the area to be directly affected by the City Commission’s determination on the requests associated with the Project, i.e. the Commission’s determination will not change the Comprehensive Plan Map or Zoning Code Map for 346 Malaga, or approve any site plan for the 346 Malaga Property. The location of 346 Malaga, which is *not adjacent* to the Project and a block away, along with multiple other properties, makes any gain or loss to you too remote and speculative to constitute a “special private gain or loss.” Accordingly, you do not have a voting conflict under the state law provision.

III. Voting Conflicts in the Miami-Dade County Code¹

The operative provision in the Miami-Dade County Ethics Code is section 2-11.1(d) which is included, in pertinent part, below.

Additionally, no [Commissioner] shall vote on or participate in any way in any matter presented to the [City Commission] 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 [City Commission] 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 [City Commission]: (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 [Commissioner] in a manner distinct from the manner in which it would affect the public generally. Any [Commissioner] who has any of the above relationships **or [emphasis added]** who would or might, directly or indirectly, profit or be enhanced by the action of the [City Commission] shall: (1) announce publicly at the meeting the nature of the conflict before the matter is heard; (2) absent himself or herself from the Commission chambers during that portion of the meeting when

¹ There is no corresponding provision in the City of Coral Gables Ethics Code.

the matter is considered; and (3) file a written disclosure of the nature of the conflict with the Clerk of the Board within 15 days after the vote...

You have advised that you do not have any of the enumerated relationships with the owner of the Project. Accordingly, the analysis is limited to whether you “would or might, directly or indirectly, profit or be enhanced by the action of the City Commission” on applicant’s requests.

In 2022, the Miami Dade Ethics Commission (“COE”) in reviewing Complaint 22-05-02 determined that Miami-Dade County Commissioner Cohen Higgins did not have a prohibited conflict of interest. In that case, the Commissioner lived within 150 feet of a proposed bridge which was being considered by the Board of County Commissioners. The COE determined that there was no evidence that the Commissioner directly or indirectly profited or was enhanced by voting on the matter. In your case, 346 Malaga is a block away from the Property and any potential profit is too remote and speculative to create a voting conflict.

Also recently, the COE opined on a very similar scenario in INQ 2022-73, where a city council was considering a zoning variance application for an existing hospital. The property is surrounded by a large educational institution, other healthcare facilities, a church and church school, and a townhouse development. The hospital was seeking to expand from its 36,950 sq. ft. facility and seventy-two beds to add an additional 10,840 sq. ft and twenty beds. A councilmember lives in a townhouse development that is just less than two square blocks in size and is walled off. In determining whether a voting conflict existed and relying on prior opinions, the COE set forth five factors that should be considered:

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 percent 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 the traffic in the are 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.

In applying those factors, the COE determined that no voting conflict existed and explained that the councilmember is the owner of .08% of the affected area – not reaching the 1 percent threshold. It stated that any increase in traffic is not addressed in the city’s professional staff planner’s recommendation in favor of the variance. Because the hospital already exists, it does not appear that the variance will significantly change the character of the official’s neighborhood. Lastly, the COE determined that any financial impact due to the increase in the size of the hospital would be too remote or speculative to cause a conflict.

Under the factors set forth by the COE in INQ 2022-73, you do not have a voting conflict. While 346 Malaga is located in somewhat close proximity to the Project, you only own one parcel

of land, approximately 7,150 square feet in size and 346 Malaga is not located within an area to be rezoned (i.e. the requested changes do not directly impact your property). Your one parcel is located in an area, known as the Crafts Section, which is approximately 7,122,633 square feet² in area. Additionally, notice of the public hearings for the Project was mailed to property owners within a 1,500 foot radius and the square footage of the area encompassing a 1500 foot radius from the Project includes approximately 7,068,000 square feet. Consequently, your ownership interest in the area is approximately 0.1 percent, significantly less than the one percent (1%) threshold. Additionally, 346 Malaga is one house away from Le Jeune Road, one of the busiest roads in Miami-Dade County, and in between the residential street where 346 Malaga is located and the Project, there is a block that is zoned entirely MX-1. Therefore, the proposed Project will not significantly change the character of the neighborhood. Finally, according to the staff report regarding the Project, a traffic impact study concluded that the Project should not impact or negatively affect the surrounding roadway network and intersections. Taking all of these facts into consideration, any benefit or detriment to the property you own is too remote and speculative to result in a voting conflict.

IV. Conclusion

As explained above, because you do not have a “special private gain or loss” with respect to the consideration of the requests related to the Project due to your ownership interest in 346 Malaga, you do not have a voting conflict under Florida Statutes § 112.3143. Similarly, any benefit or detriment to 346 Malaga is too remote and speculative to result in a voting conflict under Miami-Dade County Ethics Code section 2-11.1(d). However, even if there is no voting conflict, Florida Statutes § 286.012 allows an elected official to abstain from voting when there “appears to be, a possible conflict of interest” under § 112.3143. Thus, an elected official should always consider whether a vote on a particular matter creates an appearance of a voting conflict.

Moreover, when the City Commission sits in a quasi-judicial capacity, each sitting commissioner must also consider whether he or she has a bias or an appearance of bias. Indeed, Florida Statutes § 286.012 provides that “[i]f the official decision, ruling, 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.” Given that 346 Malaga is located in the general vicinity of the Project, you should evaluate whether you have a bias or whether your participation will create an appearance of bias and act in accordance with your determination.

In consultation with special ethics counsel, this opinion is issued pursuant to Sections 2-252(e)(1) and (8) of the City Code and Section 2-300 of the City’s Ethics Code authorizing the City Attorney’s Office to issue opinions and interpretations on behalf of the City.

² This information was provided by the City’s IT Department based on the City’s GIS mapping system.