MEMORANDUM

To: City Commission

From: Robert M. Fournier, City Attorney RMF

Re: February 5, 2024 City Commission agenda item
Presentation Re: Ken Thompson Park at City Island
Proposal for a Public-Private Partnership

Date: March 28, 2024

I. Introduction and Background

At the regular City Commission meeting of February 5, 2024, there was an agenda item under Scheduled Presentations described as "Presentation Re: Ken Thompson Park at City Island - Proposal for a Public-Private Partnership." The Explanation section of the Agenda Request stated "This item was added at the request of Commissioner Arroyo. This item is regarding a presentation on Ken Thompson Park at City Island Proposal for a Public-Private Partnership." The Presenters designated on the Agenda Request were Commissioner Arroyo and Jeff Koffman, Ride Entertainment Services. The minutes of the meeting reflect that at the Other Matters/Administrative Officers portion of the Commission meeting a motion was made by Commissioner Arroyo and seconded by Commissioner Battie to "direct Staff to request the Parks, Recreation and Environmental Protection (PREP) Advisory Board to review the proposal by Ride Entertainment (Ride Entertainment) of Sarasota LLC, for Ken Thompson Park at City Island, evaluate to foresee viability, should something else be desired, and find out what is the City's overall Parks and Recreation Master Plan for Ken Thompson Park, which carried by a 3-2 vote with Vice-Mayor Ahearn-Koch and Commissioner Trice voting no."

On March 13, 2024, an article profiling "Potential City Island Investors" and the proposal for Ken Thompson Park appeared in the electronic edition of the Observer. This article quoted Jeff Koffman as saying, "We're changing the name [of Ride Entertainment] to Park Golf Entertainment. We're doing it because Ride Entertainment is misleading. We're not an amusement and that's why we are changing the name." A few days later, on March 18, 2024, the day of the most recent City Commission meeting, the Sarasota Herald-Tribune ran a story about the proposal for Ken Thompson Park. This article noted that at the February 5 City Commission meeting, "the developer told the City Commission that he owns Park Golf Entertainment" and then continued to state: "What was not mentioned [on

February 5] is that [Commissioner] Arroyo is listed as a registered agent for both Park Golf Entertainment and Koffman's other company, Park Golf Entertainment Orlando, according to Florida business records." As a result of the story, city resident Rob Grant appeared under the Citizens Input section of the meeting and raised the issue of a conflict of interest. Since then, other citizens have done the same.

Under the circumstances, I thought it advisable to prepare a memorandum to the City Commission to outline my thoughts on the issues presented. I want to say at the outset that I am not the final authority on how this matter is resolved. Commissioner Arroyo is free to seek an opinion from the Florida Commission on Ethics. Likewise, any citizen who is not satisfied with what has happened to date or what may happen going forward, may file a complaint with the Ethics Commission. Nonetheless, I thought it might be beneficial to share my thoughts on the subject at this time. I did not comment at the March 18, 2024 Commission meeting because I had only spoken with Commissioner Arroyo about the situation the weekend prior to the meeting and had not had sufficient time to organize my thoughts, to read some of the relevant opinions from the Commission on Ethics and to make sure that I had knowledge of all relevant background information. The action taken by the City Commission on February 5, (which I will refer to as "the February 5 Vote") is the first Commission vote in a process that will require at least one subsequent vote (and possibly more) before a final decision is made. I will refer to the vote at which a final decision is made as "the Final Vote". I am going to take these votes out of chronological order and discuss the Final Vote first.

II. The Final Vote

A. The Voting Conflict Statute

According to Sec. 112.3143(3) *Florida Statutes,* "No county, municipal or other local public officer shall vote in an official capacity upon any measure which would [1] inure to his or her special private gain or loss; [or, 2] which he or she knows would inure to the special private gain or loss of any principal by which he or she is retained . . . " [The balance of the statute is not quoted because it is not relevant to the discussion.] Black's Law Dictionary states that the legal definition of the word "inure" is "to take effect; to result."

In accordance with the above quoted statute, the first question presented when the Final Vote is taken to decide whether the Ride Entertainment / Park Golf Entertainment proposal will be approved or denied is whether there are reasons to believe that the Final Vote will result in a "special private gain or loss" to

Commissioner Arroyo. Gain or loss to an entity, such as a law firm, in which a natural person or individual owns an interest necessarily constitutes a gain or loss to the natural person or individual. (CEO 90-54; CEO 06-20; CEO 08-7) Here, I believe the representation that Park Golf Entertainment, Inc. will be the principal entity involved in the creation and management of whatever proposal might be approved for Ken Thompson Park coupled with the facts that Commissioner Arroyo submitted the Electronic Articles of Incorporation for Park Golf Entertainment, Inc. and accepted appointment to serve as the registered agent for the new corporation is sufficient to support a conclusion that Commissioner Arroyo will experience a "special private gain or loss" as contemplated by the voting conflict statute, as a result of the Final Vote. Consequently, it is my opinion that he should declare a conflict of interest and not participate in the Final Vote.

The second question presented when the Final Vote is taken is whether the Final Vote will result in a "special private gain or loss" to "a principal" by whom Commissioner Arroyo is retained. A "principal" by whom a public officer is retained includes a client of the public officer's legal practice or other professional practice. (CEO 79-02; CEO 84-11; CEO 84-1; CEO 85-14; CEO 08-7) As noted during the February 5, 2024 City Commission discussion, it is reasonable for a private entity making a proposal to partner with a public entity to use or develop a public park to provide recreational opportunities for the public to do so with the expectation that the endeavor will be profitable. Consequently, there is reason to believe that the Final Vote will also result in a special private gain or loss to a principal by whom Commissioner Arroyo is retained, which is also supports the above stated opinion that this situation presents a voting conflict.

[In the event that Commissioner Arroyo's service as registered agent for Park Golf Entertainment and attorney-client relationship with that business entity will be terminated in the foreseeable future, prior to the Final Vote, the termination could be brought to the attention of the Commission on Ethics in the context of a request for an opinion as to the continued existence of a voting conflict.]

B. Conflicting Employment or Contractual Relationship Statute

If the Final Vote is taken (with Commissioner Arroyo abstaining) and the decision is to accept the February 5th proposal, this may present another problem with the application of Section 112.313(7) *Florida Statutes*, the so called "Conflicting employment or contractual relationship" statute. This statute prohibits a public officer (e.g. a City Commissioner) from having (1) a contractual relationship

or (2) employment with a business entity that is either (1) subject to regulation by or (2) "doing business with" the public officer's agency (i.e. the City Commission)

Members (partners, shareholders, associates), but not "of counsel" attorneys of law firms have contractual relationships with each client of the firm regardless of whether a particular attorney performs or supervises work for a particular client. (CEO 80-79; CEO 94-5; CEO 96-1; CEO 03-7; CEO 04-9) Consequently, Commissioner Arroyo would have a "contractual relationship" with Park Golf Entertainment, Inc. for purposes of this statute. Also, Park Golf Entertainment would be "a business entity" that is "doing business with" the City Commission (i.e. Commissioner Arroyo's agency) if the proposal were implemented by a lease, a management agreement or other form of contract (which would seem necessary). A business entity is "doing business with" an agency when the parties have entered into a lease, contract, or other type of arrangement where one party could have a cause of action against the other party in the event of a breach or default. (CEO 86-24; CEO 07-11)

This means that it would be a violation of Section 112.313(7) *Florida Statutes* for Commissioner Arroyo to serve on the City Commission and for his firm to simultaneously have a business entity as a client if that entity is going to be a party to a lease or contract approved by the City Commission. The statutory prohibition is intended to prevent situations in which private economic considerations might conflict with the faithful discharge of public responsibilities. While there is no present violation of this statute, it is my opinion that if the City Commission were ever to enter into a lease, a management agreement or some other contractual relationship with Park Golf Entertainment, that Commissioner Arroyo, after abstaining from voting, would then have to terminate any professional relationship with this business entity that might exist at the time.

III. The February 5 Vote

A. Too "remote or speculative" exception to voting conflict statute

The voting conflict statute provides that in determining whether a public officer should abstain from voting due to a conflict under the statute that a valid consideration is "the degree to which there is uncertainty at the time of the vote as to whether there would be any economic benefit or harm to the public officer." This exception is commonly referred to as the "too remote or speculative exception." While the application of this exception can sometimes be the subject of debate, I do not believe that it is an absolute certainty that the February 5 Vote to refer the Ride

Entertainment proposal to the PREP Board would, standing alone without further Commission action, result in a special private gain or loss to Commissioner Arroyo or to a principal by whom he has been retained. That is, there is no certainty that the PREP Board will endorse or recommend approval of the proposal to the City Commission. Furthermore, the assignment given to the PREP Board was broadened somewhat by the amendment to the original motion that was offered by Mayor Alpert, which was essentially, in addition to evaluating the Ride proposal, was to also enable the PREP board to go into whether something else might be desired and to look at the City's overall Parks and Recreation Master Plan and the Park Master Plan to recommend if these plans deserve further amendment or review. I believe that this amendment increases the degree of uncertainty associated with whether the February 5 Vote will necessarily result in the "special private gain or loss" necessary to trigger a voting conflict.

B. Sequence of multiple votes

In some situations, a series of decisions are made on a particular subject (and thus a series of votes), some of which would inure to the special private gain of a public officer (and thus precipitate a conflict) and some that would not, depending on the circumstance and the nature of the vote. Some votes either simply pertain to procedural matters or are preliminary to later votes that would result in actual gain or loss. These types of votes do not necessarily present voting conflicts for public officers who might well have a voting conflict when a vote is subsequently taken on a more substantive measure concerning the same subject.

Because of the matters I have described in Section III, A and B above, I am not able to advise the City Commission that the February 5 Vote is undisputably void, as some have suggested, contending that it was really a tie because Commissioner Arroyo's vote cannot count.

C. Best Practice

I have to conclude by saying that under the circumstances described in subsection B above, I believe that it is always preferable to disclose any conflict or potential conflict as early in the process as possible in order to maintain a higher level of public trust. When there will be a series of votes, if a potential conflict is discussed with legal counsel prior to a public meeting and disclosed early on, then it may be possible for the public official to vote early in the process, but with a simultaneous explanation of why that is so and with an acknowledgment of a future obligation to declare a conflict and abstain. The public official also has the option

of abstaining under these circumstances because Sec. 286.012 *Florida Statutes,* which otherwise requires public officers to vote in the absence of a statutory conflict, allows abstention when the voting conflict is not a certainty, but when there "appears to be a possible conflict of interest."