



CITY OF PHILADELPHIA

BOARD OF ETHICS
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Evan Meyer
General Counsel

Philadelphia Board of Ethics Advice of Counsel GC-2009-504

April 17, 2009

John H. Cluver
Voith & Mactavish Architects LLP
1616 Walnut Street, 24th Floor
Philadelphia, PA 19103

Re: Committee Member's Proposed Representation Before Commission

Dear Mr. Cluver:

As a member of the Historical Commission's Architectural Committee, you have requested public advice on whether the ethics laws allow you to present a project, which you are involved in as a member of your architectural firm, before the Historical Commission or before the Commission's Committee on Financial Hardship. The Board of Ethics discussed your advice request at its April 15th meeting. Based on the facts presented, you are advised that the City Code prohibits these proposed representations.

The Facts

You have provided the following facts:

You are a member of the City's Architectural Committee of the Philadelphia Historical Commission. This committee is an advisory committee to the Historical

Commission. Your firm is directly involved in a project that will be the subject of City action. More particularly, you advise that your firm's involvement can be described as follows:

[W]e are one of the two architecture firms that have been hired . . . as part of the design team for the project. Another architect from Chicago has the primary contract with the developer; my firm's agreement is with the primary architect. As such, our involvement includes working with them on the design of the building, particularly on the exterior and its relationship to the neighborhood context. We are also assisting with preparation for and presentations related to the various city and neighborhood approvals, such as the local neighborhood association, Planning Commission, Historical Commission, and Department of Licenses and Inspections. We will also be involved in interior design elements once the project progress to that level.

The project, which you identify as "2116 Chestnut Street," will be presented before the Architectural Committee later this month (April 21). Representatives of the project will also be appearing before the Commission's Committee on Financial Hardship (anticipated to be around April 21) and before the Historical Commission (May 8). You have sent a letter, dated April 8, 2009, to the Commission, the Board of Ethics, and the Department of Records disclosing your firm's interest in this project and disqualifying yourself from the review of the project when it comes before the Architectural Committee.

You do not sit on either the Financial Hardship Committee or the Historical Commission, nor do you participate in either of their meetings as a member of the Architectural Committee. Meeting minutes of the Architectural Committee meeting are provided to the Historical Commission as part of their review. You advise that you understand that you are not permitted by the City Code to present this project before the Architectural Committee. The question that you have is if you are allowed to present this project before the Committee on Financial Hardship and/or the Historical Commission.

The Historical Commission's Executive Director, Jonathan Farnham, on your behalf has informed us of the facts that follow:

The historic preservation ordinance authorizes the Historical Commission to "Adopt rules of procedure and regulations and establish such committees as the Commission deems necessary for the conduct of its business." Section 14-2007(4)(h) of The Philadelphia Code.

The Commission Rules & Regulations (§3.4) authorizes the Commission to, "by a

majority present and voting, create such standing and ad hoc committees as it deems necessary for the conduct of the Commission's work." Subsections 3.4.a, b. and c of the Rules & Regulations establish the Architectural Committee, Committee on Historic Designation, and Committee on Financial Hardship. They are defined as follows:

3.4.a Architectural Committee. The Commission shall maintain an Architectural Committee to review submissions and to advise the Commission on their appropriateness. This Committee shall be guided by Section 14-2007(7)(k) of the Philadelphia Code and such other portions of the Historic Preservation Ordinance that relate to permit issuance. The Commission shall select no fewer than five or more than seven persons to sit on this Committee without term at the pleasure of the Commission. The Committee may include members of the Commission as well as other qualified persons. The Committee shall consist of professionals who have knowledge of and experience with historic resources and who represent a breadth of perspective. The Chair of the Committee shall be the "architect experienced in the field of historic preservation" appointed to the Commission. Three members shall constitute a quorum.

3.4.b Committee on Historic Designation. The Commission shall maintain a Committee on Historic Designation to review proposals for the designation of buildings, structures, sites, objects and districts and to advise the Commission on their significance. This Committee shall be guided by Section 14-2007(5) of the Philadelphia Code and such other portions of the Historic Preservation ordinance that relate to the designation of buildings, structures, sites, objects and districts as historic. The Committee shall utilize such forms and levels of documentation as established by the Commission. The Commission shall select no fewer than five or more than seven persons to sit on this Committee without term at the pleasure of the Commission. The Committee may consist of members of the Commission and other qualified persons. The membership shall include persons who have knowledge of history, architecture, cultural resources and planning as well as at least one who represents the perspective of the public. The Chair of the Committee shall be a member of the Commission. Three members shall constitute a quorum.

3.4.c Committee on Financial Hardship. The Commission shall maintain a Committee on Financial Hardship to review applications, submissions and evidence under the several financial hardship provisions of Section 14-2007 of the Philadelphia Code. The members of this Committee shall include the Chair of the Commission, the Developer member of the Commission, the Chair of the City Planning Commission or his/her designee, the Director of

the Office of Housing and Community Development or his/her designee, the Architectural Historian and the Architect. The Chair of the Commission shall appoint the Chair of this Committee. Three members shall constitute a quorum.

Continuing with the facts supplied by Dr. Farnham, we are advised that the committees are solely advisory to the Commission. The Committee on Historic Designation advises the Commission on the designation of historic resources including amendments to and rescissions of designations. The Architectural Committee advises the Commission on permit applications for designated resources. The Committee on Financial Hardship advises the Commission on permit applications that request variances from the standards owing to hardship. The committees meet separately from one another and from the Commission, and they offer non-binding recommendations to the Commission in writing. The committees do not interact with one another; they never meet with one another or the Commission. All meetings of the committees and Commission are public. The committees are made up of Commission members as well as outside experts. The Commission appoints the members of the committees, except where the membership is defined in the Rules & Regulations. The committee members serve at the pleasure of the Commission. The Commission's staff and budget support the committees. This concludes the statement of facts upon which we have been asked to rely.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this advice is predicated on the facts that have been provided to us. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. Although previous opinions of this Board that interpret statutes are guidance to how this Board will likely interpret the same provision in the future, previous opinions do not govern the application of the law to different facts. Ethics opinions are particularly fact-specific, and any official or employee wishing to be assured that his or her conduct falls within the permissible scope of the ethics laws is well-advised to seek and rely only on an opinion issued as to his or her specific situation, prior to acting. In that regard, to the extent that this opinion states general principles, and there are particular fact situations that you may be concerned about, we encourage you to contact the Board for specific advice on the application of the ethics laws to those particular facts.

Philadelphia Code

In your position as a member of the Historical Commission's Architectural Committee, you are a City officer. *See* Board of Ethics Opinion No. 2007-006 at 10 (finding Philadelphia Home Rule Charter § 10-107 applies to members of the Architectural Committee who are not also members of the Historical Commission);

Board of Ethics Opinion Nos. 2007-004 at 2-3 and 2007-006 at 1-2 (concluding that all members of boards and commissions regardless of powers or compensation are appointed officers of the City); City Code §20-601(2) (defining officer or employee to include “[a]ny person who is elected or appointed to a position in any branch of the government of the City . . . including, but not limited to members of . . . boards and commissions however elected or appointed . . .”). There is no general requirement that City officers or employees avoid all other financial interests while serving the City, provided that outside work is not performed on the City’s time or using City materials or equipment, and conflicts of interest and prohibited representations are avoided. In that regard, the Philadelphia Code prohibits certain conduct for a City officer that is relevant to your request.

Philadelphia Code—Section 20-602: Representation

The Philadelphia Ethics Code imposes restrictions on City officers and employees representing others in matters involving the City. For City employees, the restriction is broad and, with limited exceptions not detailed here, they may not represent others as an agent or attorney whether or not they are compensated in any transaction involving the City.¹ City Code § 20-602(1)(a), (3), (4). The representation restriction is narrower in scope for part-time City officers such as you:

An uncompensated City officer or employee or a compensated City officer or employee whose service is part-time (excluding members of City Council or other City officers or employees who are paid on an annual basis) is subject to the foregoing paragraph only in relation to a particular matter (a) in which he has at any time participated through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or (b) which is pending in the department, agency, authority, board or commission of the City in which he is serving.

Id. § 20-602(2). Clearly, this provision would prohibit your representing your firm or a client before the Architectural Committee on which you serve, and you have advised that

¹ The Ethics Code defines the term “transactions involving the City” as:

Any proceeding, application, submission, request for a ruling, or other determination, contract, lease, claim, case, award, decision, decree, judgment or legislation including ordinances and resolutions or other particular matter which the member of City Council, City officer or employee in question believes, or has reason to believe (a) is or will be the subject of City action; or (b) is one to which the City is or will be a party; or (c) is one in which the City has a direct proprietary interest. This shall not include routine applications or requests for routine information or other matters which are of a ministerial nature and do not require the exercise of discretion on the part of any member of City Council, City officer or employee.

Philadelphia Code Section 20-601(4).

you do not plan to present the project before the Architectural Committee. We conclude that your proposed presentation of a project in which your firm is involved before the Historical Commission or the Committee on Financial Hardship would constitute the type of non-ministerial representation that Code Section 20-602(2) addresses because you would be acting as an agent of your firm or of your firm's client in a transaction involving the City. Subsection (a) of Code Section 20-602(2) prohibits you from representing anyone in a matter in which you have "at any time participated" as an officer of the City. The facts that you have presented indicate that you will not have at any time participated in the decision or other activity that will be undertaken by the Historical Commission or the Committee on Financial Hardship at their April 21 and May 8 meetings.

The core question presented by your request arises from subsection (b) of Code Section 20-602(2), and that question is whether the representations you propose (that is, before the Historical Commission and the Committee on Financial Hardship) involve a matter that is—in the words of Subsection 20-602(2)(b)—"pending in the department, agency, authority, board or commission of the City in which [you are] serving." This requires a determination of just what is the City office in which you serve. Given the unique committee-commission relationship your facts present,² we take guidance from the policy considerations that underlie the Code's representation rule: no one should be represented by a part-time City official where that person could gain or be perceived as gaining an advantage due to the possible sway and influence a part-time City official may have with the board or commission of the City in which the official is serving. In other words, members of a board may give more credence and respond more positively to a representation made by another member of that board and an official's City position would thereby give an advantage to the person represented.

Turning to the facts presented, we are advised that the Historical Commission ("the Commission") is served by three committees: the Architectural Committee, the Committee on Historic Designation, and the Committee on Financial Hardship (collectively, "the committees"). The committees assist the Commission in its work by reviewing submissions, proposals and applications; advising the Commission on what they review; and making written recommendations to the Commission. Although the committees do not meet with one another or with the Commission, the Commission's staff and budget support the committees and the committees' members include some Commission members, and they serve at the pleasure of the Commission. The connection between the advisory committees and the Commission is close enough that the committees may be considered to be part of the entity that is the Commission for purposes of Code Section 20-602 and determining whether a matter before a committee

² The Board of Ethics is aware of no other board or commission of the City that has advisory committees comprised of individuals who are not members of the board/commission itself.

or the Commission may be considered to be pending before the board or commission that a member of another of the committees serves. The committees of the Historical Commission are so closely connected to the Commission that the representations you propose present a significant risk of perceived or actual advantage due to a City official's position, which is the harm addressed by Code Section 20-602(2). Accordingly, you are advised that the representations you propose are prohibited and that for purposes of the Code's representation restriction a member of an advisory committee of the Historical Commission may not represent another person as an agent or attorney before the Historical Commission or its other advisory committees, in addition to being restricted from making such a representation before the advisory committee of which he or she is a member.

Please note that the personal prohibition against representation under Code Section 20-602(1), (2) is absolute. A board or commission member may not engage in such representation, even if he discloses the interest and disqualifies himself under Section 20-608. Accordingly, no disclosure would permit you personally to represent the firm or a client before the Commission or its committees. However, under Subsection 20-602(5), another member of the firm with which such a part-time City officer is associated may make such representation, if the City officer discloses and disqualifies.³ Your letter of April 8, 2009 is acceptable in this regard, so another member of Voith & Mactavish Architects, LLP, may represent the firm or its client before the Commission or its committees in this matter.

Philadelphia Code—Section 20-607: Conflict of Interest

The Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise from either having a personal financial interest or from being a member of a business or other entity that has a financial interest in their official decisions. As to the personal interest, Code Section 20-607(a) provides:

- (a) Unless there is public disclosure and disqualification as provided for in Section 20-608 hereof, no member of Council, or other City officer

³ Code Section 20-602(5) provides as follows:

(5) No member or employee of a partnership, firm, corporation, or other business organization or professional association organized for profit of which a member of the Council or other City officer or employee is a member shall represent any person directly or indirectly as agent or attorney in any matter in which such member of the Council or other City officer or employee has the responsibility for decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise determining such matters, unless such member of the Council or other City officer or employee shall disclose such fact and disqualify himself from such responsibility in the manner set forth in Section 20-608.

or employee shall be financially interested in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity . . .

As to the interest through another entity, Code Section 20-607(b) provides:

(b) In the event that a financial interest in any legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment, resides in a parent, spouse, child, brother, sister, or like relative-in-law of the member of City Council, other City officer or employee; or in a member of a partnership, firm, corporation or other business organization or professional association organized for profit of which said member of City Council, City officer or employee is a member and where said member of City Council, City officer or employee has knowledge of the existence of such financial interest he or she shall comply with the provisions of Section 20-608(a) (b) (c) of this ordinance and shall thereafter disqualify himself or herself from any further official action regarding such legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment.

Thus, for either a personal financial interest that you may have or an interest that Voith & Mactavish may have in City action, the rule is the same: You must disclose the conflict and disqualify yourself. In any matter before your City agency, whether it is considered to be the Historical Commission or any of its committees, you must publicly disclose the financial interest and announce your intention to disqualify yourself from all official consideration of the matter. See the discussion of "Disclosure and Disqualification" below. Participation that you should avoid would include not only final decisions, but also any preliminary discussion, review, or action. I note, however, that you have identified only matters before the Architectural Committees as official action in which you would normally participate, and your letter of April 8, as noted above, is sufficient disclosure and disqualification in that regard. Having disqualified yourself from taking official action, there is no conflict of interest in any official action on the subject project.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., may apply to you.⁴ Section

⁴ The Act applies only if you are a "public official," as defined in the Act. The definition clearly includes members appointed to City boards and commissions, except those that are merely advisory. It is not certain whether the State Ethics Commission would find that a member of the Architectural Committee of the Philadelphia Historical Commission would be a "public official."

1103(a) provides:

(a) Conflict of interest. No public official or public employee shall engage in conduct that constitutes a conflict of interest.

What is a “conflict of interest” may be determined by reference to the definitions section of the Act for a definition of that term and terms included within that definition, as follows:

Section 1102. Definitions.

The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

...

“Authority of office or employment.” The actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of public employment.

“Business.” Any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or any legal entity organized for profit.

“Business with which he is associated.” Any business in which the person or a member of the person’s immediate family is a director, officer, owner, employee or has a financial interest.

...

“Conflict” or “conflict of interest.” Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated. "Conflict" or "conflict of interest" does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate

family or a business with which he or a member of his immediate family is associated.

...

“Financial interest.” Any financial interest in a legal entity engaged in business for profit which comprises more than 5% of the equity of the business or more than 5% of the economic interest in indebtedness.

65 Pa.C.S. §1102.

You are advised that for you to take official action, as a City official, that has an economic impact on Voith & Mactavish would be a conflict under the State Act in the same way it would be under the City Code. In such a case, Section 1103(a) would restrict your activities as a public official relative to the use of authority of office to obtain a private pecuniary benefit for your firm or a client, and would require disclosure and disqualification, as set out in City Code Section 20-608(1)(c), prior to any City action being taken, as described in “Disclosure and Disqualification” below. *See also* 65 Pa.C.S.A. §1103(j). As noted above, your letter of April 8 appears to satisfy this requirement.

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. Please note that the Act provides that: “A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision . . . shall not be subject to the penalties provided for in [certain provisions of the Act].” 65 Pa.C.S. §1109(g). *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). Since the Board of Ethics is not “the solicitor” of the City, requestors have the option to obtain an opinion from the Law Department as to the application of the State Ethics Act. Any such request, to receive the protection, could not be confidential, and will only protect the subject from the criminal penalties in subsections 1109(a) and (b) and from treble damages under subsection 1109(c) of the Act. (A violation of the Ethics Act can still be found, and restitution can still be ordered.)

Philadelphia Code—Section 20-608: Disclosure & Disqualification

Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: In the event of any future conflicts, you should write a letter, which should contain the following elements:

1. State that the purpose of the letter is to publicly disclose a potential conflict of interest/representation by a member of your firm;

2. Your public position (member of the Historical Commission's Architectural Committee) and a description of duties relevant to the conflict, if not obvious;
3. Your private position or financial interest that presents the conflict or prohibited representation;
4. A statement of how your public duties may intersect with your private interest (if not obvious from 2 & 3 above); and
5. Your intention to disqualify yourself from any official action in matters affecting the private interest (should indicate that such disqualification precedes any official action being taken in any such matter).

The letter should be sent by certified mail to the following: (1) the Chair, Executive Director, or Secretary of the board in which you would be acting, the Historical Commission; (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 1441 Sansom Street, 2nd Floor, Philadelphia, PA 19102; and (3) the Department of Records, Room 156, City Hall, Philadelphia, PA 19107. The letter should indicate on its face that copies are being sent to all three of the above addressees.

Conclusion

Based on the facts you have supplied, you are advised that the representations you propose, regarding the 2116 Chestnut Street project, before the Historical Commission and the Commission's Committee on Financial Hardship are prohibited by Code Section 20-602(2). However, another member of your firm could permissibly provide such representation.

If you have any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. Since you have requested public advice from the Board of Ethics, we will make this letter public as required by Code Section 20-606(1)(d)(iii).

Sincerely yours,



Evan Meyer
General Counsel

cc: Richard Glazer, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director