CITY OF PHILADELPHIA

BOARD OF ETHICS
PACKARD BUILDING
1441 SANSOM STREET
2ND FLOOR
PHILADELPHIA, PA 19102-3026
(215) 686-9450
FAX: 686-9453

Philadelphia Board of Ethics
Opinion No. 2007-004

October 16, 2007

Robert Solvibile, Commissioner
Department of Licenses & Inspections
1401 Arch Street
Philadelphia, PA 19102

Re: Political Activity – Boards and Commissions

You have requested an opinion as to the applicability of the political restrictions in the Charter (Charter §10-107) to the three departmental boards assigned by the Charter to the Department of Licenses & Inspections[1]: the Zoning Board of Adjustment, the L & I Review Board, and the Board of Building Standards. The Board notes that since the original inquiry by your deputy, Fran Burns (who has since left City employment), a fourth departmental board, the Malt and Brewed Beverage Hearing Board, has been added to your department by Council ordinance, pursuant to State legislation[2]. Accordingly, we will interpret your request to include the Malt and Brewed Beverage Hearing Board.

A. Background

Charter Section 10-107 reads as follows:

§ 10-107. Political Activities.

(1) No person shall seek or attempt to use any political endorsement in connection with any appointment to a position in the civil service.

(2) No person shall, for the purpose of influencing the vote or political action of any person, or for any consideration, use or promise to use, directly or indirectly, any official authority or influence, whether

[1] See Charter §3-100(f).

[2] See Code §9-2907 as amended by Bill No. 070367-A (approved June 15, 2007); 47 P.S. §§4-407, 4-442.

possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the civil service, or an increase in pay or other advantage in employment in any such position.

(3) No officer or employee of the City and no officer or employee of any governmental agency whose compensation is paid from the City Treasury shall, from any person, and no officer or member of a committee of any political party or club shall, from any civil service employee, directly or indirectly demand, solicit, collect or receive, or be in any manner concerned in demanding, soliciting, collecting or receiving, any assessment, subscription or contribution, whether voluntary or involuntary, intended for any political purpose whatever. No officer or member of the Philadelphia Police or of the Fire Department shall pay or give any money or valuable thing or make any subscription or contribution, whether voluntary or involuntary, for any political purpose whatever.

(4) No appointed officer or employee of the City shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.

(5) No officer or employee of the City, except elected officers running for re-election, shall be a candidate for nomination or election to any public office unless he shall have first resigned from his then office or employment.

(6) Any officer or employee of the City who violates any of the foregoing provisions of this section shall, in addition to any penalties provided for hereafter, be ineligible for one year for any office or position under the City.

Since subsections (1) and (2) apply to "any person" and subsection (6) relates to penalties, this opinion is concerned only with subsections (3), (4), and (5), which are the substantive provisions that might apply differently depending on which board or commission members are considered to be "officers or employees" of the City.

The Charter does not define "officer or employee." It is perhaps notable that the Ethics Code defines "officer or employee" to include "any person . . . 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; persons serving full-time or intermittently; persons serving with or without compensation." Code §20-601(2). We conclude that the common understanding of the word 'officer' might well include all appointed members of City boards and commissions, regardless

of term, powers, or compensation. However, since 1954, the interpretation of the City Solicitor has not been that expansive.

In 1995 the Law Department issued, and has reissued at least yearly since, the "Law Department Political Activity Guide," which quotes in full Charter Section 10-107. Although the Guide notes that it is not a formal opinion of the Solicitor, it was published as "Opinion No. 95-20" at page 143 of the volume, 1994-1996 City Solicitor's Opinions. Beginning on page 144 is a "Question and Answer" section, the first example of which is the following:

> **Question: Does Section 10-107 apply to members of City boards and commissions?**
>
> Answer: Section 10-107 does not apply to unpaid members of City boards and commissions nor to those members whose compensation for such service is $40 per meeting or less. The provision also may not apply to some boards for which the compensation is above that figure, but no precise dividing line has been set. Individual questions should be addressed to the City Solicitor for interpretation.

B. Prior Opinions of the City Solicitor

As noted by the excerpt from the Political Activity Guide, quoted above, no "dividing line" has been set between statutory compensation of $40 per meeting (which does not subject members to Charter §10-107) and that of $100 per meeting (which has been held to subject members to §10-107). In Opinion No. 95-06, Solicitor Dworetzky noted that unpaid positions on boards and commissions have not been subject to Section 10-107 since a 1954 opinion[3] by Solicitor Freedman in which:

> the Solicitor noted that the drafters of the Charter created numerous unpaid boards and commissions and desired to attract to these agencies "the same kind of devoted and civic-minded volunteer service that has so greatly enriched private civic, health and social service agencies." The Solicitor concluded that the Charter drafters did not intend to discourage volunteer participation on these boards and commissions by prohibiting "all persons who participate in the political life of the City" from serving on them. Accordingly, the Opinion concluded that Section 10-107(5) did not apply to members of unpaid boards and commissions. Formal Opinion No. 133, 1954 City Solicitor's Opinions at 120.

[3] In an apparent typographical error, the 1995 Opinion referred to Opinion No. 133 of 1954 as a "1974 opinion."

> At the time Solicitor Freeman authored that opinion, members of the Planning Commission, like the members of most of the other City boards and commissions, were unpaid. Over the years, however, that has changed and now the members of most boards and commissions are entitled to some remuneration for their service to the City

The 1995 Opinion concluded:

> In 1966, City Solicitor Bauer concluded that Section 10-107(5) did apply to a member of the L&I Review Board who held a compensated--although only modestly compensated ($25 per meeting)--position. Formal Opinion No. 290, 1966 City Solicitor's Opinions at 8. That opinion was subsequently eroded by a 1983 Solicitor opinion that suggested that the appropriate inquiry should not be a "mechanistic 'compensation or no compensation' test," but rather a determination--based on all the factors--of whether the compensation provided to a member of a board or commission was sufficiently "substantial" to suggest that membership on that board or commission had evolved into something "quite different than City Solicitor Freedman's concept of service by interested private citizens." Formal Opinion No. 6, 1983 City Solicitor's Opinions at 39, 44.
>
> Although the suggested approach is not entirely satisfactory as a theoretical matter and requires us to determine in given cases how much compensation is "substantial" under all the facts and circumstances, I do not think it appropriate to substitute an alternative approach, at least without providing some prior warning to the members of our boards and commissions.

1994-1996 City Solicitor's Opinions at 89-90.

In 2005, Solicitor Ramos concluded that Section 10-107 applied to members of the Tax Review Board:

> [T]here are certain positions that are so bound up in City work and City responsibility, and carry with them such significant governmental power, that Charter Section 10-107 necessarily must apply to them. One very significant factor we use in determining whether a position meets this test is whether the position comes with material compensation. Even if we were to apply some kind of "inflation" analysis to Opinion No. 95-06, as your letter seems to suggest, I do not conclude that because an annual maximum compensation of $1680 in 1995 was held to be not sufficiently "substantial" to subject board members to Section 10-107, it necessarily follows that ten years later,

> $10,000 is equivalent to $1680. I conclude that previous opinions of this office must be interpreted to require that members of boards and commissions that are compensated at amounts comparable to the Human Relations Commission and the Civil Service Commission are subject to Charter Section 10-107, and that this includes the Tax Review Board. Thus, you are advised that members of the Tax Review Board are subject to the political activities restrictions in Charter Section 10-107, and in particular the resignation provision of Section 10-107(5), based on the statutory compensation for such service and the powers and responsibilities of the Board. Therefore, a member of the Tax Review Board must resign his or her position upon becoming a candidate for elective office.

Unpublished opinion of March 4, 2005. In summary, prior rulings have concluded that a mechanistic test based solely on compensation, without consideration of the powers and responsibilities of the board or commission, is not desirable.

C. Policy

Annotation No. 1 to Charter Section 10-107 sets forth the policy for the provision:

> Merit principles of governmental employment require the divorcement of politics from such employment. They presuppose employment upon merit and not because of political connections, powers and pressures. They also presuppose that governmental employment will not serve as a means for political tribute to maintain political parties and regimes. The prohibitions of this section are intended to sustain these basic principles and precepts subject to certain qualifications which political necessities require to be made at certain levels of employment and office-holding. Absolutism in this area is neither necessary nor practicable for the fact is that political parties are essential parts of the democratic form of government in the United States. This section attempts to balance the public interest involved.

In a column in the Philadelphia Inquirer on September 30, 2007, Tom Ferrick, Jr. noted:

> In a poll done in March by Temple's Public Affairs Institute for the Economy League of Greater Philadelphia, 74 percent of city residents said government was doing only a fair to poor job. Only 26 percent graded it good or excellent. That's a C-minus.

> Adding to the poor public perception is a widespread feeling that city government is, as the Temple report put it, "pretty much run by a few big interests looking out for themselves."
> Forty-two percent of those surveyed believe that many people running government are corrupt.

A history of the Charter by The Committee of Seventy reinforces these points:

> In the five (5) decades preceding the adoption of the 1951 Home Rule Charter, Philadelphia's County and City Governments were completely dominated by political party organizations. . . . Determining who was elected, whom the City employed and to whom lucrative City contracts were awarded, those in control of the political organization manipulated City government to serve and sustain the machine. . . . Philadelphia, as one observer described, was "a city of petty crimes, small-time gamblers and give-and-dime shakedowns, where too often a citizen's first protection [was] not the law, the court, or the police, but his ward leader."

The Committee of Seventy, *The Charter: A History* at 1 (footnote omitted). Reforms imposed by the 1919 legislative charter failed to prevent the political machine from continuing to infiltrate and exploit city government, *id.* at 1, 3, and local professional, business, and civic organizations pressed for home rule as a means of placing the city's fate into the hands of its own citizens "instead of relying on the distant state legislature." *Id.* at 3.

The Board of Ethics strongly affirms the principle that the public interest lies in maintaining a system of public office holding based on merit and not on political connections or willingness to serve political purposes.

D. Analysis

The Board of Ethics has concluded that, in order to answer your query regarding the four departmental boards of the Department of Licenses and Inspections, it is necessary to consider the powers and duties of the individual bodies in conjunction with the compensation provided for members.

As to "powers and responsibilities," the Board of Ethics concludes that a relevant consideration should be whether a board or commission exercises significant powers of government. In this regard, it is instructive whether the City has considered members of a particular body to be "public officials" as defined in the State Ethics Act, and thus required, as members of their board or commission, to file the State Financial

Disclosure Form[4] and to be subject to other provisions (such as the conflict of interest section) of the act that apply to "public officials."

The definitions section of the State Ethics Act defines "public official" as follows:

> "Public official." Any person elected by the public or elected or appointed by a governmental body or an appointed official in the executive, legislative or judicial branch of this Commonwealth or any political subdivision thereof, provided that it shall not include members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense or to otherwise exercise the power of the State or any political subdivision thereof.

65 Pa.C.S.A. §1102. All three of the Charter-designated departmental boards of the Department of Licenses and Inspections have long been determined by the Law Department to be subject to the State Ethics Act. In addition, it is clear that, since it conducts due process hearings in matters relating to substantive rights with significant financial impact, the Malt and Brewed Beverage Hearing Board also exercises the power of City government and is not merely advisory. Thus, we conclude that its members, too, are subject to the State Ethics Act.

E. Conclusion

Nevertheless, the Board of Ethics does not necessarily conclude that being subject to the State Ethics Act is dispositive of whether a City board's members are subject to Charter §10-107. Moreover, the Board concludes that this is not the appropriate time to decide the question as to all the City's boards and commissions. Accordingly, the Bill addresses only the four departmental boards of the Department of Licenses and Inspection. The Board concludes as follows:

1. Zoning Board of Adjustment. Compensation: $100 per meeting, annual maximum of $22,000. Duties include:

> (a) Hear and decide appeals in zoning matters where error is alleged in any order, requirement, decision or determination made by an administrative official in the enforcement of zoning ordinances, regulations and maps;

[4] The Commonwealth of Pennsylvania Statement of Financial Interests, as required in the State Ethics Act, 65 Pa.C.S. §1104.

(b) Hear and decide special exceptions to any zoning ordinance upon which the Board is required to pass;

(c) Authorize, upon appeal, in specific cases, such variance from the terms of any zoning ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

Charter §5-1006. See also Code Ch. 14-100 and Ch. 14-1800. The Board concludes that these are significant duties and significant compensation, and that the Zoning Board is subject to Section 10-107.

2. Licenses & Inspections Review Board. Compensation: $85 per meeting, annual maximum of $6,375. Duties include: Hearing appeals of actions of the Department of Licenses and Inspections. Code §§6-602, 6-603, 6-604, 6-605, 9-617, 9-909, 19-2602(4)(h). The Board concludes that in light of these very significant duties adjudicating rights, in connection with the compensation, that the L & I Review Board is subject to Section 10-107.

3. Malt and Brewed Beverage Hearing Board. Compensation: $100 per meeting, annual maximum of $22,000. Duties include: receiving applications for permits for the take-sale of malt or brewed beverages and protests against such applications, holding hearings on such protests, and approving or disapproving the application. Code Chapter 9-2900, as amended by Bill No. 070367-A (approved June 15, 2007). The Board concludes that in light of these very significant duties adjudicating rights, in connection with the compensation, that the Malt and Brewed Beverage Hearing Board is subject to Section 10-107.

4. Board of Building Standards. Compensation: $60 per meeting, annual maximum of $4,500. Duties include:

a) Advise the Commissioner of Licenses and Inspections, upon his request, on the interpretation of the Building Code and of any regulations relating to building safety and sanitation;
(b) Suggest regulations applying standards of good practice in the enforcement of statutes and ordinances dealing with building safety and sanitation;
(c) Upon request of the Commissioner of Licenses and Inspections pass upon the worth of new and substitute materials proposed to be used in building construction and also upon new methods of construction;
(d) Consider any suggested changes in standards and regulations, new and substitute materials, or new methods of construction, either with or

> without holding public hearings; but before the Board shall recommend any change or modification of such standards and regulations, it shall hold a public hearing at which all interested parties may present their views. After such public hearing the Board shall submit its findings and recommendations to the Commissioner of Licenses and Inspections for his approval. Upon approval by the Commissioner they shall become a part of the standards and regulations.

Charter §5-1007. Also, the Board makes recommendations to the Commissioner, Code §A-203.3, A.802.2.1; makes determinations on damage to buildings, Code §A-302.1.2; and is the Technical Appeal Board for various Codes. Code §A-802 (see Table A-802.1) and Code §9-2201(3). The Board concludes that in light of these very significant duties making determinations having a significant impact on public safety and the costs and methods of building construction, in connection with the compensation, that the Board of Building Standards is subject to Section 10-107.

In summary, the Board of Ethics advises you that members of all four departmental boards of the Department of Licenses and Inspections are subject to Section 10-107 of the Home Rule Charter, and must abide by the political activity restrictions of Section 10-107(4), the restrictions on political fund-raising in Section 10-107(3), and the requirement to resign if announcing a run for elected office, as provided in Section 10-107(5).[5]

By the Board:

Richard Glazer, Esq., Chair
Stella M. Tsai, Esq., Member
Phoebe A. Haddon, Esq., Member

Issued October 16, 2007. Richard Negrin, Esq., Vice-Chair, participated in all prior consideration of this matter, but was not present for the approval vote on October 16, 2007. Pauline Abernathy participated in an initial general discussion of this matter at the July 2007 Board meeting, but did not participate in the consideration or approval of this Opinion.

[5] Subsections (1) and (2) of Section 10-107 apply to any person, not just City officers and employees.