



CITY OF PHILADELPHIA

BOARD OF ETHICS
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**Philadelphia Board of Ethics
Non-Public Board Opinion 2014-001**

July 16, 2014

Re: City Employee Leasing Property to City

Dear Requestor:

You have asked for non-public advice about whether you are permitted to lease an office space to the City and receive rental payments from the City. As discussed below, Philadelphia Home Rule Charter Section 10-102 prohibits you from having an interest in a contract with the City in which you lease your property to the City and receive rental payments from the City.

I. Facts Provided

You provided detailed facts concerning the lease of an office space to the City that have been redacted here. You have been a City employee for a number of years. You have no power in your City job to impact the City occupant of the leased premises. You own a property and have entered into an office lease with the City of Philadelphia, acting on behalf of the City occupant of the leased premises. You provided a copy of the lease.

II. Jurisdiction and Advisory Opinions

The Board of Ethics has jurisdiction to administer and enforce all Philadelphia Home Rule Charter (“Charter”) provisions and ordinances pertaining to ethical matters. Charter §4-1100. The Charter and the Philadelphia Code (“Code”) authorize the Board to render advisory opinions concerning a City officer’s or employee’s proposed future conduct. Charter §4-1100; Code §20-606(1)(d). The Board may address past conduct in an advisory opinion to provide guidance about corrective action or future action that rep-

resents part of a continuing course of conduct that began prior to the advice request. Regulation 4, ¶ 4.3. This Opinion is based on the fact that your involvement in this office lease is a continuing course of conduct. Board of Ethics Regulation 4 describes the procedures related to seeking an advisory opinion and for requesting reconsideration of an advisory opinion issued by the Board. Board Regulation 4, ¶¶ 4.0, 4.26.

III. Discussion

Your lease with the City raises an issue under Charter Section 10-102. This Charter provision is contained within Article X (“Prohibited Activities of Councilmen, City Officers, Employees And Others, And Penalties”) of the Charter, which includes various restrictions on the activities of City officials and employees. Charter Section 10-102 is titled “City Officers and Employees Not to Engage in Certain Activities” and reads in full as follows:

As provided by statute, the Mayor, the Managing Director, the Director of Finance, the Personnel Director, any department head, any City employee, and any other governmental officer or employee whose salary is paid out of the City Treasury shall not benefit from and shall not be interested directly or indirectly in any contract for the purchase of property of any kind nor shall they be interested directly or indirectly in any contract for the erection of any structure or the supplying of any services to be paid for out of the City Treasury; nor shall they solicit any contract in which they may have any such direct or indirect interest.

Although this provision does not make explicit use of the term “lease,” Charter Section 10-102 prohibits you from having a direct or indirect interest in any contract for the purchase of property of any kind that is paid for by City Treasury funds. As explained below, the instant lease agreement is a prohibited contract of this kind.

Charter Section 10-102 prohibits City officers and employees from having an interest in certain City contracts regardless of whether any connection exists between their official duties and those contracts. *See Golden Motors v. Southern Motors*, 9 Phila. Co. Rptr. 212, 219 (1983) (describing Charter §10-102 as having “prophylactic purposes”), *aff’d* 90 Pa. Cmmw. 137 (1985). The relevant Charter annotation describes Charter Section 10-102’s broad purpose: “Ethical standards of conduct preclude one who is a City officer from soliciting in a private capacity or personally profiting or being interested, directly or indirectly, in contracts with the City whose officer he is.” Charter

§10-102, Annotation.¹ Laws forbidding a municipal official from being directly or indirectly interested in a contract with the municipality of which he or she was an officer or agent were well-established in Pennsylvania by 1949 when the Charter Commission began its work. *See, e.g.*, Act of June 25, 1919 P.L. 581 (“1919 Philadelphia Charter”), Art. XX, §3; Act of March 31, 1860, P.L. 400; *Com. ex rel. Kutz v. Witman*, 217 Pa. 411 (1907); *Milford v. Milford Water Co.*, 124 Pa. 610 (1889); *Conner v. Blue Line Transfer Co.*, 59 Pa. D. & C. 535 (Delaware Co. 1946); *Kennett Electric Light Co. v. Kennett Square*, 8 Kulp 105 (1895). Notably, the Charter drafters intended Charter Section 10-102 to have a broader scope than earlier statutes and enlarged upon the proscriptions in those statutes. *Compare* Charter §10-102 *with* 1919 Philadelphia Charter, Art. XX, §3 (prohibiting contracts “for work to be done for, or property or material to be sold or supplied to [] such city, or any department thereof”) *and* 1939 Pa. Penal Code (prohibiting contracts “for the sale or furnishing of any supplies or materials to be furnished to or for the use of such [] municipality”); *see also Golden Motors*, 9 Phila. Co. Rptr. at 218 (describing Charter §10-102 as harmonious with and more stringent than the 1919 Charter).

In the context of Charter Section 10-102, the phrase “any contract for the purchase of property of any kind” is properly read to include a lease.² When the drafters repeatedly used the modifier “any,” they cast a wide net for prohibited contracts. A lease is a contract in which a tenant purchases possession of the leased property in exchange for the payment of rent. *See Pawco, Inc. v. Bergman Knitting Mills, Inc.*, 283 Pa. Super. 443, 447-454 (1980) (holding tenant’s obligation to pay rent and landlord’s obligation to convey premises as promised in lease are mutually dependant); *see generally Commonwealth v. Monumental Properties*, 459 Pa. 450, 467-470 (1974) (lease held equivalent to a sale of the premises for a term); *Hackett v. Emporium Borough School District*, 150 Pa. 220, 226 (1892) (interpreting a statutory authorization to purchase property to include authority to lease property) (“A lessee is a purchaser as truly as he who becomes grantee in fee. The difference is in the estate acquired. The estate of the former is a leasehold, of the latter a freehold, but the mode of acquisition is by purchase

¹ The annotations that accompany the Charter were intended to state the intention and effect of a section. Philadelphia Charter Commission Drafting Committee, *Preface* to Philadelphia Home Rule Charter, xxi (annot. ed. 1951). Courts and the City Solicitor regularly rely on the annotations when interpreting Charter provisions. *See, e.g.*, *Comm. to Recall Rizzo v. Bd. of Elections of City & Cnty. of Philadelphia*, 470 Pa. 1 (1976); *Schultz v. Philadelphia*, 385 Pa. 79, 109 (1956); *Carrow v. Philadelphia*, 371 Pa. 255, 260 (1952); Solicitor Opinion No. 02-34 (2002).

² We apply a strict reading to Charter Section 10-102 and note that strict construction does not require that the words of a statute be given their narrowest possible meaning or that legislative intent be disregarded. *Com. v. Booth*, 564 Pa. 228, 234 (2001); *Com. v. Yaste*, 166 Pa. Super. 275, 278 (1950). Rather, it requires that the words be given their fair meaning in accord with the manifest intent of the lawmakers. *Yaste*, 166 Pa. Super. at 278 (“Even the canon of strict construction of a penal statute is not an inexorable command to override common sense and evident statutory purpose.”).

in both cases.”)³. Moreover, the goal of Charter Section 10-102 – to prevent the flow of money from the City treasury to City employees through any contracts for the purchase of property of any kind – would be frustrated by a reading that excluded leases and that allowed a City employee to lease real estate to the City and for the City to pay its own employee rent.

Prior interpretation of Charter Section 10-102 also appears to have considered leases to be included in the restriction. The opinions in the matter of *Golden Motors v. Southern Motors* support the reading that Charter Section 10-102 prohibits lease contracts. The central issue in *Golden* was whether Charter Section 10-102 prohibited a City employee’s private company from contracting to sell cars to a public leasing authority that would in turn lease the cars to the City. 9 Phila. Co. Rptr. 213. In the course of finding that a violation of Charter Section 10-102 was present, the Philadelphia Court of Common Pleas and the Commonwealth Court specifically included City-paid lease-rental payments in describing the financial obligation of the City and the money flow from the City treasury to the benefit of a City employee that was problematic under Charter Section 10-102. 9 Phila. Co. Rptr. 219-220; 90 Pa. Cmmw. 142. In addition, a prior Solicitor’s Opinion indicates that the Solicitor would have considered a lease contract in which the City leases property from its employee to be a prohibited contract for the purchase of property or the supplying of services to be paid out of the City treasury. Formal Opinion No. 300, Dec. 22, 1969 (opining that a Charter 10-100⁴ problem would not arise but noting as important that a Councilmember’s proposed lease with a non-profit did not involve the City as a party).

For the foregoing reasons, your office lease with the City is in contravention of the requirements of Charter Section 10-102. You should act expeditiously to terminate the lease, and we trust that this will occur in a manner that is equitable to all involved.

V. Conclusion

Thank you for being concerned about compliance with the City’s ethics restrictions and for seeking advice. Advisory opinions are fact-specific, and this Opinion is predicated on the facts that you have provided as stated here. If you have questions

³ Extensive case law from other jurisdictions is in accord with the proposition that authorization given to a municipal corporation to acquire property by “purchase” includes the lesser power to acquire such property by lease where it effectuates the larger purpose of a statute. C. T. Drechsler, Annotation, *Granting or taking of lease of property by municipality as within authorization of purchase or acquisition thereof*, 11 A.L.R.2d 168 (citing cases from 11 states other than Pennsylvania).

⁴ Charter Section 10-100 provides a parallel restriction to Charter Section 10-102 for Councilmembers. *Compare* Charter §10-100 *with* Charter §10-102 (both prohibiting an interest in contracts for the purchase of property of any kind, erection of any structure, or the supplying of any services).

about scenarios that vary from these facts, you should ask for specific advice on the application of the law to those particular facts.

Since you requested a non-public opinion, the original Opinion will not be made public. As required by the City Code, this version of this Opinion that is redacted to conceal facts that are reasonably likely to identify the requestor is being published on the Board's website. Please let Board Staff know if you have any questions or concerns.

BY THE PHILADELPHIA BOARD OF ETHICS⁵

Michael H. Reed, Esq., Chair
Judge Phyllis W. Beck, (Ret.), Vice-Chair
Father C. Kevin Gillespie, Member

⁵ Board Members Sanjuanita González, Esq., and Brian J. McCormick, Jr., Esq. participated in consideration of this Opinion, but they were not present for the final approval vote.