



CITY OF PHILADELPHIA

BOARD OF ETHICS  
PACKARD BUILDING  
1441 Sansom Street  
2nd Floor  
Philadelphia, PA 19102-3026  
(215) 686 - 9450  
FAX 686 - 9453

**Evan Meyer**  
**General Counsel**

**Philadelphia Board of Ethics**  
**Nonpublic Advice of Counsel GC-2010-517**

November 1, 2010

**Re: Potential Conflict / Interests in Real Estate Investing**

A City employee requested a nonpublic advisory on whether there are any issues under the Public Integrity Laws regarding his outside employment as a real estate investor, as a part owner of a company that recovers funds for clients through Sheriff's Sales, and in preparing deeds for friends and family. We were advised that the requestor is a City employee working as a Clerk II in a City operating department, where his duties provide some interaction with transactions involving real property.

The requestor advised that prior to working for the City, he worked for several real estate investors and that he knows how to prepare deeds and has other knowledge related to real estate transactions. He advised that he personally has bought and sold several houses and recently became a principal in a corporation, of which he is Vice-President and part-owner. The requestor advised that this company recovers surplus funds for beneficiaries. He explained the process in this way:

[I]f a property sells at the Sheriff's auction and there is money left over due to the owner after all liens and judgments are paid, my partner and I find the owners or heirs to claim the money through the Sheriff's office for them. My involvement with the Sheriff's office is very minimal; my

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partner is the main person that deals with filing the claims with the Officers in the Department. I have visited the office before to use the "public" computer to access the Real Estate sale transactions while on my lunch break. There are many people that do this business through the Sheriff's office.

We have absolutely no contract with any City agency whatsoever. There are certain requirements that the Sheriff's office required and we complied with all of them. i.e. business license, e.i.n. #, no outstanding business taxes.

Additionally, the requestor advised that at his initial interview with the City, he informed his supervisor that he had real estate knowledge and was involved in real estate investing. He noted that he expressed in writing to his Commissioner his outside employment as required by Civil Service Regulation 33.02.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, my advice is predicated on the facts that I have been provided. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. Accordingly, this Advice does not address anything that may have occurred in the past. The requestor was advised that, although previous opinions of this office that interpret statutes are guidance to how this office 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 the requestor may be concerned about, he was encouraged to contact us for specific advice on the application of the ethics laws to those particular facts.

In his position as a Clerk II for the [] Department, the requestor is a City employee. 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 are avoided. In that regard, the Philadelphia Home Rule Charter, the Philadelphia Code, and the Commonwealth's Ethics Act specify certain conduct which is prohibited for a City officer or employee.

### **Home Rule Charter**

Section 10-102 of the Charter prohibits certain compensated City officers and employees from benefiting from, or having a direct or indirect interest in, certain City contracts, even if they had no official connection with the contract. In this sense, Section 10-102 is a broad prophylactic rule, rather than a typical conflict of interest provision. The full text of the provision is as follows:

City Officers and Employees Not to Engage in Certain Activities. 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.

The question that usually arises is what constitutes a “direct or indirect interest.” Prior rulings have held that where a City employee, as an individual, enters into a personal services contract with the City, that interest clearly violates Section 10-102. When the employee works for a firm that has a contract with the City, the provision is violated when the employee works on that contract for the outside contractor. Where the outside contractor has many contracts, and the employee happens to work for the outside contractor but not in any way related to the City contract, the provision is not violated, unless the City employee has a financial interest in the contract, such as where the employee’s compensation includes a share of profits or revenue generated by the contract or where the employee otherwise benefits from the contract. *See* Advice of Counsel GC-2008-515 at page 3.

The requestor advised that he has no contracts with any City agency. A sale of property is a contract and it is conceivable that the requestor could be considered to have an “interest” in a sale through Sheriff’s Sales. However, the Charter provision is limited in application to “any contract for the purchase of property,” and presumably the City does not purchase property through Sheriff’s Sales.

Otherwise, it appears that there would not be an issue under Charter Section 10-102 as to the services that the requestor's company provides to its clients.

### **Philadelphia Code**

The Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise either from 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 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 . . .

This provision does not prohibit the requestor from having an outside source of income; it only prohibits him from taking official action in his City job that affects that income. Accordingly, prior to any official action affecting such an interest, the requestor would be required to publicly disclose his interest and disqualify himself from such official action, as provided in Code §20-608.<sup>1</sup> Participation that he should avoid would include not only final decisions, but also any preliminary discussion, review, or action. For example, if a company should contact the [requestor's] Department for assistance

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<sup>1</sup> Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: The requestor should write a letter, which should contain the following elements:

1. That the purpose of the letter is to publicly disclose a potential conflict of interest;
2. The requestor's public position (Clerk II for the [] Dept.) and description of duties relevant to the conflict, if not obvious;
3. The requestor's private position or financial interest (such as a personal real estate transaction or an action by his company on behalf of a client) that presents the conflict;
4. A statement of how his public duties may intersect with his private interest or that of his company (if not obvious from 2 & 3 above); and
5. The requestor's intention to disqualify himself 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 requestor's department head; (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 1441 Sansom Street, 2<sup>nd</sup> 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.

with a transaction in which either the requestor or his company has an interest, he, as an employee of the Department, may not be involved in that matter for that Department. Similarly, if he prepared a deed for a friend or family member, for compensation, and that person seeks City official action related to that deed, the requestor may not handle that Department action as a City employee.

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.

Code Section 20-607(b)(emphasis added). Thus, an action by the requestor that affected any member of his company, or the company itself, would be restricted by this provision, if the requestor is a "member" of the company. As a part-owner, the requestor was advised that he would be a "member" of the company. Thus, even if he somehow had an arrangement with his partner that the partner would receive all income from certain company actions, the requestor would still have a conflict if his company had an interest. Then, disclosure and disqualification, as noted in footnote 1, would be required.

Note, also, that Section 20-609 of the Code provides that no City officer or employee "shall directly or indirectly disclose or make available confidential information concerning the property, government or affairs of the City without proper legal authorization, for the purpose of advancing the financial interest of himself or others." Obviously, if the requestor were to make available to his partner or to any client any confidential City information he learns in his service for the City, that may violate this provision.

### **Philadelphia Code Representation Provision**

The Philadelphia Ethics Code imposes certain restrictions on City officers or employees representing others. Code Section 20-602(1) would prohibit a City officer or employee from engaging in outside employment (even if unpaid) that involved representing another person, directly or indirectly, as that person's agent or attorney in any transaction involving the City.

The term "represent," in the context of Code Section 20-602, is narrow, since the provision is qualified by the phrase, "as agent or attorney." (In contrast, "represent" in the post-employment provision of the State Ethics Act, not applicable here, is interpreted much more broadly.) For example, visiting the Sheriff's Office to use a computer open to the public to access real estate transactions, by itself, would not be "representing" any party. As noted above, this Advice can only address future conduct. Accordingly, the requestor was advised that, so long as he is employed by the City, he may not personally represent his company or any of its clients in any City matter, including those involving the [requestor's] Department and Sheriff's Office, as well as any other City offices. Nevertheless, the requestor's partner or another employee of the company, if not a City employee, would not be subject to this prohibition. In the case of representation by another officer or employee of the company, however, the requestor would be required to file the disclosure and disqualification letter described in footnote 1 above.

This would include acting as an agent representing friends and some family members. However, there is an exception in Code Section 20-602(4) that would allow the requestor to represent himself or his parents, spouse, child, brother, sister or any person for whom he is serving as guardian, executor, administrator, trustee, or other personal fiduciary, except in matters that are his official responsibility in the [requestor's] Department. A matter would not be his official responsibility if he disqualified himself as described in footnote 1.

### **State Ethics Act**

The State Ethics Act, 65 Pa.C.S. §1101 et seq., has a "conflict of interest" provision that is similar to that in the Philadelphia Code. However, on review of the requestor's job description, I conclude that the Act does not apply to a Clerk II for the City. The Act applies only if one is a "public employee," as defined in the Act. I believe that the requestor is not a "public employee," which is defined in the Act to include: "Any individual employed by . . . a political subdivision who is responsible for taking or

recommending official action of a nonministerial nature with respect to (1) contracting or procurement; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interests of any person.” 65 Pa.C.S. §1102. The job description for a Clerk II does not meet this definition.

The requestor was advised, however, that the State Ethics Commission is the ultimate arbiter of interpretations of the Act, including on the question of whether the Act applies to him. Our advice as to the Act is guidance only and does not provide protection from possible enforcement action by the State Ethics Commission. To those who rely in good faith on advice from the Commission itself, the State Act provides a complete defense in any enforcement action by the Commission and evidence of good faith conduct in other criminal or civil proceedings. 65 Pa.C.S. § 1107 (10), (11). Upon request, advice from the State Ethics Commission can be redacted to protect the identities of those involved. The State Act also provides certain protection from penalties for those who rely on a non-confidential Solicitor’s opinion. 65 Pa.C.S. §1109(g) (“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].”). 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. *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). Any such request, to receive the protection, could not be confidential. For these reasons, the requestor may choose to seek advice about the State Ethics Act directly from the State Ethics Commission or from the Law Department.

### **Unauthorized Practice of Law**

The requestor also asked whether it would be unethical for him to prepare deeds for friends and family. The preparation of a deed itself would not raise any issues under any of the Public Integrity Laws discussed above, so long as any City action involving the deed does not implicate any of the above advice.

The requestor was advised to be aware that there is a criminal statute in Pennsylvania that makes it a misdemeanor to engage in the “unauthorized practice of law” without being an attorney. It is beyond our jurisdiction, or my particular expertise, to advise a requestor on the application of this statute. Based on very cursory research, it

appears that it may be permissible for certain businesspersons, such as realtors, to prepare deeds, even if not a lawyer, so long as the deed is being prepared as part of a business transaction in the person's function as a realtor and the realtor does not hold herself out as being an attorney. The requestor may wish to consult an attorney about this question, as well as to whether he would be possibly subject to any liability in a civil action if he were to make a mistake in drafting any deed. Lawyers, of course, carry malpractice insurance to insure themselves against any such liability.

However, the Advice emphasized that the above paragraph is not advice of this office on which the requestor is entitled to rely, but represents only a suggestion that he investigate further. This office advises only on the Public Integrity Laws that are specifically under our jurisdiction.

### **Conclusion**

A City employee asked for advice concerning the application of the Public Integrity Laws as to his position as a Clerk II with an operating department of the City, in light of his outside interests as a real estate investor, a co-owner of a company that recovers surplus funds for beneficiaries from Sheriff's auctions, and as a person with experience in real estate who occasionally prepares deeds for friends and relatives. Based on the facts that provided to us, the requestor was advised as to the following:

1. The Board of Ethics can only issue advice as to future conduct. Accordingly, this Advice does not address anything that may have occurred in the past.
2. Charter Section 10-102 prohibits a City employee having a direct or indirect financial interest in a City contract, including a purchase of property by the City.
3. The requestor may not take official action as a Department employee on any matter in which he or his company has a financial interest. If he or his company has been or will be paid in any transaction, and Department action is required connected to that transaction, the requestor must disclose his financial interest and disqualify himself from working on that matter for the Department, as provided in footnote 1 of this Advice.
4. The requestor was advised that he may not represent any person as agent or attorney in any transaction involving the City, except that he may represent himself or a parent, spouse, child, brother, sister or person whom he serves as a personal fiduciary, if he discloses the interest and disqualifies himself per footnote 1 of this Advice.



5. The requestor was advised that the State Ethics Act does not apply to a Clerk II for the City.
6. Remember that for any issues under the State Ethics Act, the guidance in this Advice does not bind the State Ethics Commission, and the requestor may wish to seek the advice of the Commission or a nonconfidential opinion from the Law Department.
7. This Advice is limited to the Public Integrity Laws. Specifically not addressed is any question of civil or criminal liability for the unauthorized practice of law.

The requestor was advised that, if he has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. Since the requestor requested nonpublic advice from the Board of Ethics, we will not make the original letter public, but are required to make public this revised version, edited to conceal the requestor's identity, as required by Code Section 20-606(1)(d)(iii).

Evan Meyer  
General Counsel

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