

Advisory Opinion No. 93-13

A former public servant has requested an opinion from the Conflicts of Interest Board (the "Board") as to whether, consistent with Chapter 68 of the City Charter, he may continue to serve a local development corporation (the "Corporation") as its General Counsel.

Specifically, the former public servant requests an opinion as to whether his service as General Counsel would be barred by Charter Sections 2604(d)(2) and 2604(d)(4), which impose limits on the ability of former public servants to appear before their former agencies and/or other City agencies after leaving City service.

Background

The former public servant advised the Board that he joined the Corporation, as its General Counsel, more than one year after leaving City service. Prior to leaving City service, he served as a high-level employee within a City agency (the "Agency").

The former public servant also advised the Board that the Corporation is a not-for-profit, local development corporation, charged with managing and

developing certain facilities (the "Facilities") as an economic development asset for the benefit of the City.

The City owns the Facilities and leases them to the Corporation. The Corporation, in turn, subleases space to business concerns, thus developing the Facilities as an industrial and commercial center. All subleases entered into by the Corporation are subject to review and approval by the City.

Finally, the former public servant advised the Board that the lease between the City and the Corporation was formerly administered by the Agency, but is now administered for the City by another unit within City government. For a period of time, the responsibilities of the former public servant, while employed at the Agency, included the review of all subleases prepared by the Corporation, and submission of those subleases for signature by the appropriate City official. His current responsibilities at the Corporation, as its General Counsel, include documenting subleases which have been negotiated by the Corporation's leasing executives, and enforcing the terms of those subleases when appropriate. He represents that he has not, to date, appeared before the Agency on any matter, including any particular

matter in which he personally participated while employed by the Agency.

For the following reasons, it is the opinion of the Board that it would not be a violation of Chapter 68 of the City Charter for this former public servant to continue to serve as General Counsel of the Corporation and, in the course of his duties, to appear before the Agency and other City agencies on matters affecting the Corporation.

Post-Employment Restrictions

Charter Sections 2604(d)(2) and 2604(d)(4) are part of a series of provisions applicable to former public servants, known as the post-employment restrictions. These provisions are intended to insure that former public servants do not exploit their official positions for personal gain, subordinate the interests of the City to those of prospective employers, or exert special influence on government decision-making, either through contact with former colleagues or access to special or confidential information.

Charter Section 2604(d)(2) prohibits a former public servant from appearing before his or her former agency for a period of one year after leaving City

service. An appearance is defined as "any communication, for compensation, other than those involving ministerial matters." Charter Section 2601(4). A "ministerial matter", in turn, is defined as

an administrative act, including the issuance of a license, permit or other permission by the city, which is carried out in a prescribed manner and which does not involve substantial personal discretion.

Charter Section 2601(15).

Charter Section 2604(d)(4) prohibits a former servant from appearing before any City agency on, or receiving compensation for services rendered in relation to, any particular matter involving the same party or parties with respect to which particular matter such person had participated personally and substantially as a public servant through decision, approval, recommendation, investigation or other similar activities. A "particular matter" is defined as

any case, proceeding, application, request for a ruling or benefit, determination, contract limited to the duration of the contract as specified therein, investigation, charge, accusation, arrest, or other similar action which involves a specific party or parties, including actions leading up to the particular matter;

Charter Section 2601(17).

Although Charter Section 2604(d)(4) would, on its own, appear to prohibit the former public servant from working on particular matters in which he was substantially involved during his tenure at the Agency, and from appearing before City agencies with respect to such matters,¹ Charter Section 2604(d)(6) provides an exception to the post-employment restrictions for positions with, or representation on behalf of, federal, state or local government agencies. This Section was added to the Charter because it was recognized that, in addition to preventing corruption and undue influence, the post-employment restrictions could also work against the public interest by prohibiting government agencies from legitimately engaging the expertise and experience of former public servants. Charter Section 2604(d)(6) therefore provides that

The prohibitions on negotiating for and having certain positions after leaving city service, shall not apply to positions with or representation on behalf of, any local, state

¹Because the former public servant left the Agency over one year ago, the one year appearance ban contained in Charter Section 2604(d)(2) no longer applies to him. However, the lifetime bar contained in Charter Section 2604(d)(4), with respect to appearances on, or compensation for services in relation to, particular matters that he was substantially involved with while at the Agency, commenced at the time he left the Agency and is not limited in duration.

or federal agency.

It is the opinion of the Board that, because of the Corporation's specific corporate structure and purpose, it is effectively an arm of City government. Charter Section 2604(d)(6) therefore permits the former public servant to serve as the Corporation's General Counsel and in so doing, to communicate with the Agency, and/or other City agencies, on matters affecting the Corporation, notwithstanding the restrictions contained in Charter Sections 2604(d)(2) and 2604(d)(4).

Among the factors to be considered, in determining whether a local development corporation should be characterized as an arm of government for purposes of Charter Section 2604(c)(6), are the following: (i) the manner in which the corporation was formed; (ii) the degree to which the corporation is controlled by government officials or government agencies; and (iii) the purpose of the corporation.

The Corporation is a local development corporation, originally incorporated under Article 19 of the Membership Corporations Law. These statutory provisions have been superseded by Section 1411 of the Not For Profit Corporation Law, which provides that the

purposes of a local development corporation are [the] public purposes of relieving and reducing unemployment, promoting and providing for additional and maximum employment, bettering and maintaining job opportunities, instructing or training individuals to improve or develop their capabilities for such jobs, carrying on scientific research for the purpose of aiding a community or geographical area by attracting new industry to the community or area or by encouraging the development of, or retention of, an industry in the community or area, and lessening the burdens of government and acting in the public interest,

These aims are reflected in the Certificate of Incorporation of the Corporation, and in its efforts to attract industrial and commercial businesses to the Facilities, so as to increase and augment employment opportunities in the City.

In addition, the Corporation was formed by City and State officials,² and is under the operational control of City government. The Corporation's By-Laws provide that it is to be governed by a Board of Directors, and that a majority of the members of the Board of Directors are to be appointed by the Mayor. Although the Corporation is in the process of revising its By-Laws, the new By-Laws will preserve the right of

² A review of the Certificate of Incorporation of the Corporation indicates that its incorporators included, among others, State, county and City officials.

the Mayor to appoint a majority of the members.

The City also retains ownership of the Facilities leased to the Corporation, and reviews and approves the Corporation's subleases.

In sum, although the Corporation is a corporate entity separate and distinct from the City, the manner in which it was formed, the fact that it is effectively controlled by the City, and its stated public purpose all lead us to conclude that it should be treated as an agency of City government, for purposes of Charter Section 2604(d)(6).³

³ This opinion is limited to the specific facts presented in the instant case, and should not be read as concluding that (x) Charter Section 2604(d)(6) applies to all local development corporations, or (y) former public servants may, as a general matter, accept positions with any local development corporation doing business within the City and in so doing appear before City agencies without limit or restriction under Chapter 68. The deciding factors in this case are, as noted above, the origin of, level of City control over, and public purpose of the Corporation. By way of contrast, there are numerous local development corporations serving communities within the City that are privately organized, and that operate under private control (that is, under boards or other governing bodies the majority of whom are neither City officials nor subject to appointment or approval by City government). In addition, although all local development corporations formed under the Not for Profit Corporation Law serve a public purpose, we note that there are often disagreements between the City and local development corporations (both public and private) over what best serves the public interest in their respective communities. Local development corporations, including those that are publicly controlled, may also compete for City funding of

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projects. With this backdrop, there may well be situations in which it would be inappropriate for former public servants to appear before City agencies on behalf of such entities, because of concerns over undue influence, preferential treatment or access to special or confidential information.