

Spouse's Ownership Interest  
Imputed to Public Servant  
Prohibited Ownership Interest

Charter Sections 2601(16)  
2604(a)(1)(b), (a)(3) and (a)(4)  
2604(b)(3) and (b)(4)

Advisory Opinion No. 95-21 and Order No. 51

The Conflicts of Interest Board (the "Board") has received a request for an opinion from a public servant as to whether, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, he may retain his imputed ownership interest in his spouse's planning firm (the "Firm"), which is engaged in business dealings with the City. Additionally, the public servant is requesting that the Board approve his wife's establishment of an affiliated landscape architecture firm, which would, among other activities, seek to engage in business dealings with the City.

For the reasons stated in this opinion, the Board has determined that it would not violate Chapter 68 for the public servant to retain his imputed ownership interest in the Firm. The Board has also determined that the public servant may retain his imputed ownership interest in the Affiliate upon its formation, but only if the Affiliate does not engage or seek to

engage in business dealings with the City.

Background

The public servant has advised the Board that his official City responsibilities involve the administration of defaulted and delinquent economic development leases, loans and development agreements and that his spouse, a licensed landscape architect, is a shareholder and principal of the Firm, where she works as a planner. Currently, the Firm has a consulting contract with the public servant's City agency which is not active, but it may become so in the future. The Firm is not involved in any other work with the City; however, it has submitted proposals to provide other services to the City. The public servant has represented that his wife would not perform work under any contract between the Firm and his agency.

The public servant has stated that his spouse currently owns less than five percent of the outstanding shares of the Firm, which is valued at less than \$29,000. She anticipates that with the departure of two principals of the Firm, her ownership interest will increase to approximately 8%, but the value of that interest is likely to remain less than \$29,000.

The public servant's spouse has represented that she does not serve as an officer or a director of the Firm, and that the increase in the amount of her interest in the Firm will occur by operation of law, as a result of the departure of two of the Firm's principals, i.e., the proportionate ownership shares of the Firm's remaining principals, including the public servant's spouse, will automatically be increased.

The public servant has further advised the Board that the Firm and his spouse wish to establish a new company which would be affiliated with the Firm (the "Affiliate"). The Affiliate would be owned by the public servant's spouse and engage in the practice of landscape architecture. Moreover, the public servant's spouse would like to seek certification as a Woman-Owned Business Enterprise. If so certified, she intends to compete, as a contractor or a subcontractor, to perform landscape architecture for the City. Once the Affiliate is formed, the public servant has represented that the Affiliate would not seek to engage in business dealings with the City agency which he serves.

Discussion

Charter Section 2604(a)(1)(b) provides that no public servant who is a regular employee of the City shall have an ownership interest in a firm which is engaged in business dealings with the City. Pursuant to Charter Section 2601(16), as modified by Board Rules Section 1-11, an "ownership interest" includes an interest in a firm held by the public servant, or the public servant's spouse, or unemancipated child, which exceeds five percent of the firm or an investment of \$29,000 in cash or other form of commitment, whichever is less, and any lesser interest in a firm when the public servant or the public servant's spouse or unemancipated child exercises managerial control or responsibility regarding any such firm. The public servant in this case is therefore deemed to have an ownership interest in a firm which engages in business dealings with the City, and, when the percentage ownership exceeds 5%, this interest is prohibited by Charter Section 2604(a)(1)(b).

A public servant who, by operation of law, obtains an ownership interest which would otherwise be prohibited by Charter Section 2604(a)(1)(b), shall either divest the interest or disclose to the Board the

interest and comply with the Board's order. See Charter Section 2604(a)(3). In this case, the public servant has disclosed his imputed ownership interest in the Firm which, because of its business dealings with the City, is prohibited by Charter Section 2604(a)(1)(b).

When a public servant discloses an interest to the Board, the Board, pursuant to Charter Section 2604(a)(4), issues an order setting forth its determination as to whether or not the interest, if maintained, would conflict with the proper discharge of the public servant's official duties. In making such determination, the Board takes into account the nature of the public servant's duties, the manner in which the interest may be affected by any action of the City, and the appearance of conflict to the public.

The Board has determined, in accordance with Charter Section 2604(a)(4), that it would not conflict with the proper discharge of the public servant's official duties for him to maintain his imputed ownership interest in the Firm because, based on his representations, if any matters related to the Firm come before his City agency, he will continue to recuse

himself from the consideration of such matters; he has no role in his City agency's selection of contractors; and he is not in a position to influence the procurement procedures of any other City agencies. The Board's determination is also based on the public servant's representation that his spouse will not perform any work pursuant to any contract between the Firm and the public servant's agency.

Additionally, the Board has concluded that the Affiliate's proposed business dealings with the City would conflict with the proper discharge of the public servant's official duties because such dealings might create an appearance of impropriety to the public. While the public servant does not appear to be in a position to assist the Affiliate by making decisions which would affect the Affiliate or by steering City business to the Affiliate, the Affiliate, upon its formation, intends to seek to engage in business dealings with the City, though not with the public servant's City agency. The Affiliate's pursuit of City business under these circumstances may give rise to the appearance that the Affiliate was created to take advantage of the public servant's official position

with his agency. While the public servant has stated that he is not in a position to confer any benefit upon the Affiliate, this does not entirely mitigate the appearance of impropriety. See Advisory Opinion No. 95-10, in which the Board determined that it would not violate Chapter 68 for a public servant to retain his imputed ownership interest in his spouse's newly formed company (the "Company"), but that the Company could not seek to engage in business dealings with the City in that such dealings might have created an appearance that the Company was established with the intention of actively pursuing City business.

Conclusion

Accordingly, the Board has determined, and it is hereby ordered, that the public servant may retain his imputed ownership interest in the Firm, provided that, during his employment with the City, he takes no direct or indirect part in any business dealings which the Firm has with the City and he recuses himself from any matters involving the Firm. Such recusal includes, but is not limited to, not participating in discussions concerning the Firm with anyone at his City agency or the Firm, not attending meetings with City officials

and others to discuss the Firm, and not receiving copies of relevant documents. Furthermore, the public servant must not use or attempt to use his official position or title to obtain any private or personal advantage for himself, his spouse, or the Firm, and he must not disclose or use for private advantage any confidential information concerning the City. See Charter Sections 2604(b)(3) and (b)(4), respectively.

In addition to the foregoing, the Board has determined that the public servant may retain his imputed ownership interest in the Affiliate upon its formation, but only if the Affiliate does not seek to engage in business dealings with the City since such dealings might create an appearance of impropriety, as described above.

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Chair

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