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ADVISORY OPINION FOR CASE NO. 90016.A.

[REDACTED]

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Board of Ethics

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INDIVIDUAL W of DEPT. A

[REDACTED], has requested an advisory opinion to determine what post-employment restrictions, if any, apply to his involvement in

PROJECT E

Fact Summary: PROJECT E [REDACTED] envisions the redevelopment of a 20 acre site [REDACTED] that was first developed in the late 1960s, but which has subsequently deteriorated. The City owns [REDACTED] acres of the site that it plans to sell to the selected developer. The developer will either acquire the remaining portion on his own or, if that is impracticable, the City will acquire it for the developer via its power of eminent domain.

As a developer incentive, the area has been designated a TIF [REDACTED] district. [REDACTED] The City will issue bonds, the proceeds of which will be used to subsidize the development of the mall by financing project planning, infrastructure improvements (sewer and water lines or roads), legal or administrative costs, etc. The anticipated development of the property should then increase property tax revenues, which will then be used to retire the City's bonds. The area received its TIF designation in [REDACTED], but the precise amount and purposes of the TIF are yet to be determined. The exact features of the [REDACTED] TIF will be the subject of negotiations between the Department A [REDACTED] and the designated developer, i.e., the real estate developer who submits the winning bid in response to the City's "request for proposals." (The City solicits bids on contracts via "Request for Proposals," or RFPs. The RFP in question sets forth a detailed description of the [REDACTED] site, redevelopment guidelines, submission requirements and selection criteria.)

The idea for PROJECT E [REDACTED] has been floating around in City government for quite some time. [REDACTED] DEPARTMENT M [REDACTED] in cooperation with COMMISSION N [REDACTED] began planning for the redevelopment of [REDACTED]



the area. In its early phases [REDACTED]
PROJECT E [REDACTED] was under the jurisdiction of DEPARTMENT O [REDACTED]
[REDACTED], with DEPARTMENT P [REDACTED] and DEPT. A [REDACTED]
playing secondary roles. [REDACTED]

Nevertheless, documents obtained indicate that DEPT. A took the lead in marketing the project even while it was under the jurisdiction of DEPT. O. Memoranda indicate that INDIVIDUAL W, while a City employee, was very much involved in marketing PROJECT E. [REDACTED]

Despite DEPT. O's longstanding jurisdiction over the project, the current PROJECT E plan calls for [REDACTED]
EMPHASIS IN DEPT. A's, NOT DEPT. O's, JURISDICTION. [REDACTED]

[REDACTED] PROJECT E [REDACTED] began to be transferred into DEPT. A, which documents indicate that INDIVIDUAL W was heavily involved in getting the project transferred into DEPT. A. [REDACTED]

In discussions with the Board staff [REDACTED]
INDIVIDUALS G & R OF DEPT. A [REDACTED] stated that between the time DEPT. A got authority over PROJECT E [REDACTED] and INDIVIDUAL W's departure from the City, the central issues in the PROJECT E [REDACTED] were (1) consolidating jurisdiction over the project in DEPT. A [REDACTED], (2) acquiring property at the [REDACTED] site and (3) getting a TIF [REDACTED] designation for the area. INDIVIDUAL W [REDACTED] was involved in all of these issues directly or was kept informed of them by the other DEPT. A personnel working on the project: INDIVIDUALS G & R [REDACTED] and INDIVIDUAL Y, his assistant.

DEPT. A documents obtained by the Board of Ethics staff also indicate that work on PROJECT E's "Request for Proposals" (RFP) was underway prior to INDIVIDUAL W's departure; INDIVIDUAL W and

his staff were gathering information and negotiating with other City departments with interests in the site over the upcoming RFP, which [REDACTED] expected to issue by the fall of [REDACTED]. No RFP, however, was issued until [REDACTED] about five months after Individual W [REDACTED] had left City employment. INDIVIDUAL Q [REDACTED] drafted the RFP in [REDACTED]. In conversations with our staff, [REDACTED] she stated that she had used standard forms and information compiled by Dept. [REDACTED] in its earlier work on a [REDACTED] RFP.

WHILE AT DEPT. A, INDIVIDUAL W WAS SUBSTANTIALLY INVOLVED IN THE PROJECT E RFP.

INDIVIDUAL W ALSO EXERCISED POLICY-
MAKING AUTHORITY TIF DURING
HIS TENURE, DECISIONS WERE MADE, THOUGH
NOT DIRECTLY BY HIM, CONCERNING
PROJECT E'S TIF STATUS

[REDACTED]

Since leaving the City (INDIVIDUAL W [REDACTED] has become a senior vice-president of [REDACTED] Co. B, and [REDACTED] also holds a 25% partnership interest in this company.

[REDACTED] While INDIVIDUAL W [REDACTED] was still with the City, Co. B [REDACTED] had considerable contacts with DEPT. A [REDACTED] as the principal contractor for another project.

[REDACTED] Co. B [REDACTED] has formed a joint venture with GROUP C [REDACTED]. The Co. B/GROUP C [REDACTED] joint venture is interested in PROJECT E. [REDACTED]. It is in connection with his work for Co. B/GROUP C [REDACTED] on PROJECT E [REDACTED] that INDIVIDUAL W [REDACTED] requested this opinion.

(INDIVIDUAL Q [REDACTED] and INDIVIDUAL R [REDACTED] stated that since leaving his post at DEPT. A [REDACTED] INDIVIDUAL W's [REDACTED] contacts with the City concerning the [REDACTED] PROJECT E [REDACTED] have been limited. He contacted DEPT. A [REDACTED] a few times with inquiries about the project and told INDIVIDUAL R [REDACTED] that he would request an advisory opinion from the Board of Ethics regarding potential Ethics Ordinance post-employment problems. (INDIVIDUAL R [REDACTED] said that INDIVIDUAL W [REDACTED] also had attended and spoken on behalf of Co. B/GROUP C [REDACTED] at a [REDACTED] meeting held by DEPT. A (the "pre-proposal meeting"), and also attended a City-sponsored community meeting held after bids on the RFP were in, but before any recommendation on the "designated developer" had been made. This meeting was attended by interested politicians, representatives of the City departments that are involved in the project, people from the neighborhood around PROJECT E, & developers. [REDACTED]

[REDACTED] Co. B/GROUP C [REDACTED] bid on (DEPT. A's [REDACTED] RFP for PROJECT E. [REDACTED] DEPT. A [REDACTED] made a preliminary decision in favor of Co. T [REDACTED]. The final selection of the "designated developer" will be made following a mandatory public meeting to be held this fall. In addition to a request for an advisory opinion from INDIVIDUAL W [REDACTED] the Board has also received an inquiry concerning the propriety of INDIVIDUAL W's [REDACTED] involvement with (Co. B / GROUP C [REDACTED] and (PROJECT E [REDACTED] from (DEPT. A. [REDACTED]

Ethics Ordinance: Section 26.2-9 of the Ethics Ordinance imposes substantial restrictions on the post-employment activities of former City officials and employees. Subsection (b) of Section 26.2-9 contains two separate restrictions that are applicable to this case: a one-year prohibition and a permanent prohibition. Under the one-year prohibition, a former City employee or elected

official is prohibited for one year after leaving the City from assisting or representing any person in any business transaction involving the City or any of its agencies if both the following conditions are met:

(1) The transaction involves a "subject matter" in which the person participated as a City employee or official; and

(2) The person's participation in this subject matter was personal and substantial.

In past decisions, the Board has understood "subject matter" in this context to mean a general type or area of business; the permanent prohibition was understood to apply to specific contracts/business transactions (See Case Nos. 90012.A, 89142.A, 88107.Q, 88086.A, and especially Case No. 89108.A).

Under the permanent prohibition, a former employee or elected official is prohibited permanently from assisting or representing someone in a business transaction involving the City or any of its agencies if:

(1) The transaction is a contract; and

(2) The person exercised "contract management authority" with respect to this particular contract while acting as a City employee or official.

Section 26.2-1(g) of the Ordinance defines "contract management authority" as "personal involvement in or direct supervisory responsibility for the formulation or execution of a City contract, including without limitation the preparation of specifications, evaluation of bids or proposals, negotiation of contract terms or supervision of performance."¹ In a past post-

¹The full text of Section 26.2-10(b) reads as follows: "No former official or employee shall, for a period of one year after the termination of the official's or employee's term of office or employment, assist or represent any person in any business transaction involving the City or any of its agencies, if the official or employee participated personally and substantially in the subject matter of the transaction during his term of office or employment; provided, that if the official or employee exercised contract management authority with respect to a contract this prohibition shall be permanent as to that contract."

employment decision, the Board determined that a contract did not have to be executed during an official's tenure in office for him to be permanently barred from representing a developer interested in securing that contract (See Case No. 89119.A).

Analysis: This case requires a review of both the permanent and one year post-employment prohibitions.

One year Prohibition

Application of the one-year prohibition is based on the extent of INDIVIDUAL W'S involvement in the subject matter of the transaction as a City employee. The issue of what constitutes subject matter was addressed in Case No. 89108.A. In that case the Board stated that the prohibition dealt with more than a particular business transaction or project, and looked to the aspects and duties of the former employee's City position to determine the subject matter. Case No. 89108.A, p. 4.

Applying Case No. 89108.A to INDIVIDUAL W'S situation, the subject matter would involve not only PROJECT E but those duties and aspects of his position AT DEPT. A.

The facts show that in addition to being on the staff of the COMMISSION N, INDIVIDUAL W while AN EE in DEPT. A assisted in consolidating the jurisdiction of the project in DEPT. A, in acquiring property for PROJECT E in obtaining a TIF designation for the area, in marketing the project IN OBTAINING A SIGNIFICANT amount of information to facilitate the implementation of the project, and in meeting with other departments to address and resolve many issues raised by the project. This involvement in the specific project is clearly personal and substantial.

Since INDIVIDUAL W was personally and substantially involved in the subject matter of the (Co. B/GROUP C bid, he was prohibited for one year from representing and assisting B/C with the PROJECT E transaction. INDIVIDUAL W contacted DEPT. A on behalf of B/C and represented the latter in a pre-proposal meeting. Therefore, after leaving City employment, he violated the one year ban which expired on

Permanent Prohibition

The focus of the analysis on the permanent prohibition is two-fold: 1) Since the project is still at the bidding stage, the Board must decide the degree to which the prohibition covers a

business transaction which has not yet resulted and may never result in a contract, and 2) Whether (INDIVIDUAL W's) actions amount to contract management authority over that business transaction. Although it is clear that (INDIVIDUAL W) was subject to the one year ban, it is less clear that he is subject to the permanent prohibition. The determination will turn on the degree to which the project progressed under (INDIVIDUAL W's) supervision, and the Board's interpretation of the Ordinance.

In the present case, there is no contract between Co. B/Group C and the City. Although the literal language of the Ordinance indicates the necessity of a contract, the Case No. 89119.A indicates otherwise:

Contract management authority clearly includes activities related to the formulation of a contract. A finding that a person exercised such authority does not hinge on the single factor of whether or not the contract actually came into being. The execution of a contract is not a condition precedent for finding that a person exercised contract management authority within the meaning of the post-employment provision, there would be absurd results, and the post-employment provisions would be denied much of their intended effect.

Case No. 89119.A, pp. 7-8. In that case, the contract at issue was consummated after the former employee left City employment. Although this was the case, the Board held that the former employee's involvement in various steps of the project subjected him to the permanent prohibition. Thus, the Board has determined that the contract need not be consummated while one is employed by the City. In the present case, the Board must determine whether a contract is at all necessary.

The Board in the Case No. 89119.A set forth the purposes of the post-employment sanction as 1) impeding government employees from representing private interests having business before that former employee's agencies, 2) promoting public confidence in the fairness of governmental decision by preventing both the actual abuse of influence as well as its appearance, 3) limiting the former employee's use of influence to reap improper benefits for himself or new clients, 4) ensuring that "City employees will not be influenced in the performance of their public duties by the thought of later reaping a benefit from a private individual," and 5) reducing the possibility of a former employee's disclosing or using confidential government information for private gain. Case No. 89119.A, p. 8.

Looking to these purposes, the Board's decision cannot be based upon the fact that no contract exists between the City and Co. B/GROUP C. It is important to note that the Board in Case No. 89119.A focused not on the specific contract, but rather the specific subject matter of the business transaction. In the present case, the specific subject matter is PROJECT E.

The second aspect of this analysis is the extent of contract management authority INDIVIDUAL W had over PROJECT E. Contract management authority is defined as "personal involvement in or direct supervisory responsibility for the formulation or execution of a City contract, including without limitation the preparation of specifications" Section 26.2-1(g).

A review of Case No. 89119.A shows that the former employee was employed during a period of time when the City was negotiating for a particular project. While a City employee, he was present at City meetings where the project was discussed, voted on issues dealing with the project, received progress reports from his subordinates regarding the project, had direct supervisory responsibility over these subordinates, and had discussions with the project sponsor on the project. P. 5. This, the Board determined, was sufficient to constitute contract management authority over the project. Therefore, the former employee was precluded from representing the project sponsor with regard to that particular project.

In the present case, INDIVIDUAL R of DEPT. A drafted the RFP which was issued a few months after INDIVIDUAL W left City employment. During a telephone conversation with our staff, INDIVIDUAL R stated that she used the boilerplate form and information from DEPT. P in formulating the RFP. It is this RFP which gave rise to the bid submitted by B/C.

Even though INDIVIDUAL W did not draft the RFP which was issued, DEPT. A documents indicate that the RFP was anticipated and well under way prior to INDIVIDUAL W's departure. As described above, he was significantly involved with PROJECT E as a whole and with gathering information and making decisions which affected the RFP. In addition, INDIVIDUAL W by his own admission, was the moving force and decision maker behind the RFPs which are important in PROJECTS such as this one.

Consideration of the purposes of this Ordinance section and the fact that the very aspects of (INDIVIDUAL W's involvement with PROJECT E led to the RFP weighed heavily in favor of the permanent prohibition. (INDIVIDUAL W had contract management authority over the project in that he was personally involved in and had direct supervisory responsibility for the formulation of the project.

For the foregoing reasons, it is the decision of the Board that (1) INDIVIDUAL W was subject to the one year ban, and his representation of Co. B/ GROUP C was a violation of that ban; and (2) INDIVIDUAL W involvement in the development of the PROJECT E while employed by the City is sufficient to constitute contract management authority over the project, and that he is therefore prohibited from representing or assisting anyone in obtaining the PROJECT E contract, including appearing on behalf of another at community meetings. Accordingly, the Board has determined that INDIVIDUAL W must cease all such representation and assistance.

Further, in light of the violations of the Ethics Ordinance that have occurred, the Board recommends that Department A impose sanctions in conformity with Sections 26.2-43 and 26.2-44 of the Ethics Ordinance. The relevant portion of Section 26.2-43 of the Ordinance (Invalid Actions) states:

Any contracts negotiated, entered into, or performed in violation of any of the provisions of this chapter shall be voidable as to the City. Any permit, license, ruling, determination or other official action of a City agency applied for or in any other manner sought, obtained or undertaken in violation of any of the provisions of this chapter shall be invalid and without any force or effect whatsoever.

Under Section 26.2-44, the City may maintain "an action for an accounting for any pecuniary benefit received by any person" due to a violation of the Ethics Ordinance and/or may recover damages for any violations.

In a memorandum accompanying its advisory opinion, the Board informed INDIVIDUAL W of his right for reconsideration.

Reliance: This advisory opinion may be relied upon by (1) any person involved in the specific transaction or activity with respect to which this opinion is rendered and (2) any person involved in any specific transaction or activity which is

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indistinguishable in all its material aspects from the transaction or activity with respect to which this opinion is rendered.

cc:

[REDACTED]

90016.0