

ADVISORY OPINION

CASE NO. 02013.A

Lobbying

To: [Charles], [Employee 1]
[Department 1]

Date: June 12, 2002

In a letter dated March 18, 2002, the City's [Department 1] asked the Board to re-visit Case No. 97055.A in connection with recent questions concerning the activities of expeditors. The Board issued its opinion in Case No. 97055.A on March 11, 1998, in response to a request for advice from [Jane], then the [Employee 2] in the Department of Buildings. The opinion addressed whether "expeditors, persons who seek to obtain building permits from [the Department of Buildings] on behalf of clients, are required to register with the Board of Ethics as lobbyists." Rule 3-9 of the Board's Rules and Regulations provides that the person requesting an advisory opinion, or the subject of an advisory opinion, if different, may request reconsideration of that advisory opinion by sending written notice to the Board within 15 days of the Board's determination. Given that the 15 day period established in Rule 3-9 has long expired, the Board construes the [Department 1] March 18, 2002 correspondence, under Rules 3-1 and 3-3 (which concern the authority to render advisory opinions and the form of request for advisory opinions), to be a request for an advisory opinion on the issue of whether expeditors who engage in specific conduct, detailed below, are lobbyists within the meaning of section 2-156-010(p). In what follows, therefore, we review the specific conduct of expeditors, and analyze this conduct under the Governmental Ethics Ordinance. After careful consideration of the facts presented, the purpose of the Ordinance, and prior Board opinions, the Board determines that:

- I) Expeditors while engaged in the following activities (as set forth in Case No. 97055.A and in this opinion), are not attempting to influence nonministerial administrative action, and thereby are not acting as lobbyists:
1. Preparing and submitting permit applications.
 2. Monitoring the progress of these applications through Plan Examiners' reviews of the plans submitted as part of an application.

3. Meeting with Plan Examiners and other Department of Buildings personnel to clarify what needs to be corrected in the plans in order to conform with building code requirements.
4. Acting as a contact person in the event of emergency, if listed on the permit as the “contact person.”
5. Inquiring as to the status of permit applications.

II) Expeditors while engaged in the following activities (as set forth in Case No. 97055.A and in this opinion), are attempting to influence nonministerial administrative action and thereby are acting as lobbyists, and therefore must register with the Board of Ethics in accordance with §2-156-210 *et. seq.*:

1. Attempting, in any way, to persuade Department of Buildings personnel to expedite permit processing, or advocating, in any way, that a request for expedited permit processing be approved by Department of Buildings personnel.
2. Attempting, in any way, to persuade Plan Examiners or other Department of Buildings personnel to adopt a particular interpretation of the building code or attempting to influence their decision to approve a particular set of plans submitted as part of an application.
3. Attempting, in any way, to persuade Aldermen, employees of the Mayor’s office, or any other City employee or official to intercede in, promote or influence the permit application process in any of the following ways: a) requesting expedited permit processing; b) attempting to persuade Plan Examiners or other Department of Buildings personnel to adopt a particular interpretation of the building code; c) attempting to influence the decision of Plan Examiners or other Department of Buildings personnel to approve a particular set of plans submitted as part of an application.

FACTS:

Expeditors work for property owners or developers. According to [John], [Employee 3] in the Division of Plan Examination and Permit Issuance in the Department of Buildings, expeditors have two primary functions: 1) they submit and retrieve permit applications in person (which entails waiting in the appropriate lines in the department’s offices, tracking the status of filed applications, and picking up from the department’s offices applications that have been reviewed) and deliver them, together with any official or unofficial departmental information or commentary about the applications, back to the property owners or their architects; and 2) they serve as conduits for passing information between department employees and property owners seeking building permits, or the owners’ licensed architects. With respect to submitting applications and obtaining permits from the Department of Buildings, [John] confirmed that the following standard procedure, outlined in Case No. 97055.A is correct:

- a) an applicant submits plans to the Department of Buildings

- b) the Department circulates the plans to Plan Examiners¹ who then review the plans for conformity to the building code.
- c) if the examiners decide that the plans fail to conform to the building code, the plans are then changed and resubmitted
- d) if the code is ambiguous, or on matters where the code specifically gives the Buildings Commissioner authority to approve or disapprove the application, an applicant can ask the Commissioner to offer an interpretation or to render a decision. (The authority to render these interpretations or decisions is limited to the Commissioner.)

However, [John] and other Department of Buildings' staff added the following significant details to this standard procedure, and the roles that expeditors can play in it.

1) Pre-submission and Preliminary Review Meetings. The Department of Buildings has several Permit Program Initiatives, including Preliminary Reviews and Customized Reviews that facilitate the permit process for complicated or large-scale developments or rehabilitations by allowing design professionals to request meetings with the Department of Buildings personnel prior to submitting a permit application.

Within the context of the Customized Review Initiative, for example, the applicant, sometimes represented by an expeditor, will contact the Deputy Commissioner or the Director of Plan Examination, to request a project introduction meeting, or "pre-submission" meeting. At this meeting, the project plans and preliminary construction schedule are presented for Customized Program eligibility review. If the Department of Buildings personnel determine that the project does qualify for participation, then the applicant will be provided with an application package which includes the customer agreement, program guidelines, deposit and fee information. If the applicant qualifies, then he executes the customer agreement and returns it with the appropriate fee deposit.

Within the context of the Customized Review Program, once the customer agreement and deposit have been received, the applicant can then schedule a preliminary review meeting, where the applicant can present more detailed design drawings that can be used to address overall code compliance issues or specific questions of code interpretation by the department's technical staff, with respect to the plans that are still in the process of being drawn up and have not yet been officially submitted. During this meeting, the Department of Buildings personnel will advise the applicant about whether an application and its accompanying drawings appear complete, or whether they have patent deficiencies, e.g. necessary electrical or plumbing drawings that are missing.

¹The Examiners are usually in the Department of Buildings, though in the typical course of an application, expeditors do have these contacts with examiners from other departments, particularly from the Departments of Water, Zoning and the Office of Underground Coordination in the Department of Transportation.

Expeditors often represent property owners in pre-submission meetings and are often present, along with architects, at preliminary review meetings. They typically convey back to the property owner the results of those meetings. According to Department of Buildings' staff, the expeditor does not contest the results of the meeting, or argue that the application is or should be deemed to be truly complete.

2) Submission of Applications. Next, chronologically, the expeditor will officially (and physically) submit the application and drawings to the permit section. Appropriate Plan Examiners review the plans. The expeditor will convey any written comments made by City personnel at this stage back to the owner or architect.

3) Plan Review Process. During the actual plan review process, which commences after the submission of the application, an expeditor may, in person or by or telephone, inquire of Department of Buildings personnel about the application's status. On rare occasions, an expeditor will contact an Examiner or a Deputy Commissioner and attempt to persuade them that their client's application should be moved ahead of its assigned position in the review queue. [John] stated that expeditors occasionally approach Examiners informally (in the restroom or lobby of the department, for example) to persuade them to have clients' submissions (or resubmissions) reviewed ahead of schedule. With respect to requests that particular applications be given priority or be moved ahead in the queue, he clarified that expeditors' activity is pursuant to requests, either in phone calls or in letters, from Aldermen, personnel in the Mayor's Office, or property owners.

4) Completion of Review by Building Department. When the Building Department's review is complete, the expeditor may be contacted, if listed on the permit as the "contact person." The results of the review are posted on the internet (on a secure website) and left in the department for pickup. If, in the judgment of the Examiner, the plans do not conform to the building code's requirements, a corrections sheet will be attached to the department's review, outlining the changes that need to be made by the owner. In rare circumstances the expeditor might meet with the Examiner to clarify needed corrections so that they can be explained to the owner or architect. According to [John], at these meetings, expeditors are merely seeking to determine what additional information the department needs in order to approve the application.

5) Presentation of Reviewed Plans to Owner or Architect and Re-submission. The expeditor then presents the corrections to the owner or architect, and ultimately re-submits the modified plans to the Department of Buildings. At this stage, expeditors typically recede from the permit process. [John] confirmed that Examiners do not have the authority to interpret the building code, and that any disagreements of an owner or architect with the department's findings are not conveyed by

expeditors to the Examiners, but rather, by the property owner(s) or the architect(s) directly to a supervisor or Deputy Commissioner.²

6) Other Activities by Expeditors During the Application Process. During the application process, expeditors typically will continue to inquire of department personnel as to an application's status after re-submission. Sometimes, expeditors will request, on their clients' behalf, a face-to-face meeting between the employees of the Department of Buildings (including Plan Examiners or supervisory personnel, such as Deputy Commissioners or the Commissioner), and the owner and the architect, at which the expeditors may be present. When present at these meetings, expeditors typically make no attempt to persuade departmental personnel of particular positions or interpretations— rather, that function is left to the owner or the architect, if done at all. However, according to [John], some expeditors call themselves “code consultants,” and at these meetings they may offer, to the City architectural examiner or to the Department of Buildings personnel present, interpretations of the building code. These “code consultants” may also informally approach Department personnel to offer such interpretations.

7) Other City Employees and Officials Contacted by Expeditors. Expeditors have contacted (or attempted to contact) Aldermen or personnel in the Mayor's Office, on behalf of their clients, to attempt to persuade these individuals to intercede in, promote or influence the permit application process by requesting that the review of an application be expedited or by urging that an application be approved. Expeditors also occasionally lodge “complaints” with aldermen or the Mayor's office the Department of Buildings for alleged “excessive delay” in an application's review.

LAW AND ANALYSIS: “Lobbyist” is defined in § 2-156-010(p) of the Governmental Ethics Ordinance, as:

“Any person who, on behalf of any person other than himself, or as any part of his duties as an employee of another, undertakes to influence any legislative or administrative action... *provided, however, that a person shall not be deemed to have undertaken to influence any legislative or administrative action solely by submitting an application for a City permit or license or by responding to a City request for proposals or qualifications.*”³

²This fact stands in contrast to facts presented in 97055.A, which stated that expeditors sometimes appeal to the Department of Buildings Commissioner to render an interpretation or a decision concerning the building code. In that advisory opinion, this fact led to the Board's determination that “an expeditor who makes such appeals is acting as a lobbyist under the Ethics Ordinance.”

³The Board notes that the italicized portion of the definition of “lobbyist” was added to the Ordinance by amendment, effective in June 2000, more than two years after it issued its advisory opinion in Case No. 97055.A.

“Legislative action” is not at issue in the facts of this case, as they have been set forth above. “Administrative action” is defined in § 2-156-010(a) as:

“any decision on, or any proposal, consideration, enactment or making of any rule, regulation, or any other official nonministerial action or non-action by any executive department, or by any official or employee of an executive department, or any matter which is within the official jurisdiction of the executive branch.”

The Exchange of Information

Case No. 97055.A identified four different activities that involve interaction between City employees and expeditors: 1) preparing and submitting permit applications, 2) monitoring the progress of applications through examiners’ reviews of the plans, 3) clarifying and communicating what needs to be corrected in the plans in order to conform with code requirements, and 4) acting as a contact person in the event of emergency. With regard to these activities, the analysis of Case No. 97055.A states that “[t]hese activities as described involve primarily the exchange of information in the course of applying for building permits; although they of course have the goal of obtaining the permits for the client, they do not involve advocacy on behalf of a client, in the usual sense of advocacy.” (p. 4) Further characterizing this “exchange of information,” the opinion concludes that the transactions between examiners and expeditors are “essentially ‘explanatory.’” In describing these conversations as essentially explanatory, the opinion understands that the subject matter to be explained by the expeditor is the plans submitted by the expeditor’s client.

Because of the intricacies of the building code and the uniqueness of at least some of the numerous applications submitted, the process of obtaining building permits involves a certain amount of on-going communication, clarification and explanation. Some of the activities identified by [John], in addition to those articulated in Case No. 97055.A, such as inquiring about the application’s status, meeting with an Examiner to clarify needed corrections to the application, and attending meetings with Department of Buildings personnel, are, in our view, the “exchange of information.” The Board continues to be convinced, as we were in Case No. 97055.A, that these activities are clearly distinct from those activities that we characterize as advocacy. Thus, we conclude that the performance of such activities does not constitute lobbying, as defined by the Ethics Ordinance.

Other Activities

[John] described other activities undertaken by expeditors that, in our view, exceed the scope of facilitating the “exchange of information,” activities that may constitute “seeking to influence administrative action.” Included in the definition of “administrative action” is “any official nonministerial action or non-action by a City employee.” In past cases, the Board has understood the term “nonministerial” to apply to actions where employees exercise discretion in taking administrative actions or making administrative decisions. (See Case No. 89126.A) The Board

addresses three specific activities that, in our view, constitute “seeking to influence administrative action.”

A. Requesting Expedited Permit Processing. After an application has been officially submitted and placed in the review queue, Aldermen, personnel in the Mayor’s Office or property owners sometimes request, either by phone or by letter, that an application be prioritized and its position in the queue of applications be advanced. [John] stated that the Department of Buildings sometimes grants these requests and sometimes does not. In deciding whether to grant such requests, Department of Buildings personnel exercise discretion and cannot rely entirely on a pre-determined set of criteria. Therefore, the Board concludes that requesting that an application be prioritized or moved ahead in the queue of applications is attempting to influence an official nonministerial administrative action. Thus, if expeditors make such requests or advocate for the approval of such requests, they are acting as lobbyists. We note, however, that this conclusion does not extend to an expeditor merely inquiring about the status of such requests made by Aldermen, personnel in the Mayor’s Office, property owners, or any other City officials or employees. (City officials, City employees, and individuals acting on their own behalf do not fall under the definition of a lobbyist.)

B. Requesting that Permits be Approved. [John] stated that expeditors occasionally approach Department of Buildings personnel and attempt to persuade them to have clients’ submissions (or re-submissions) approved. Generally, this activity is carried out by expeditors who style themselves as “code consultants,” and offer interpretations of the City’s building code in an attempt to persuade Plan Examiners or Department of Buildings personnel that particular plans conform to the code. The Board notes that there is a distinction between offering an explanation of a plan and offering an interpretation of the building code, particularly when the code interpretation offered is aimed at persuading a Plan Examiner or a member of the Department of Buildings to approve a particular set of plans. In such circumstances, offering an interpretation of the building code is analogous to activity we concluded in Case No. 97055.A is lobbying. There, we determined that attempting to persuade the Commissioner of the Department of Buildings to adopt a particular interpretation of the building code was lobbying. (We also stated that attempting to influence advisors to the Commissioner to persuade the Commissioner to adopt a particular interpretation of the building code was lobbying.) The Board notes that certain City employees have the discretion to interpret the building code and decide whether particular plans conform to that code. We conclude that expeditors who attempt to influence the interpretation of the building code or attempt to influence the decisions of Plan Examiners or Department of Buildings personnel to approve a particular set of plans are attempting to influence a nonministerial administrative action, and are thereby acting as lobbyists.

C. Contacting City Officials and Employees outside of the Department of Buildings. [John] stated that expeditors also occasionally contact Aldermen or personnel in the Mayor’s Office on behalf of their clients, to attempt to persuade these individuals to intercede in, promote or

influence the permit application process by requesting that the processing of an application be expedited or by urging that an application be approved. Expeditors also occasionally lodge “complaints” against the Department of Buildings for alleged “excessive delay” in an application’s review.

By attempting in any way to persuade an Alderman or a member of the Mayor’s Office, or any other City official or employee to intercede in, promote or influence the permit application process, either by requesting an expedited review or by urging that an application be approved, an expeditor is ultimately attempting to influence a nonministerial administrative action by a City employee, i.e., the expedited review or approval of a permit application. In view of this conclusion, which is consistent with the conclusions in parts *A* and *B* of this section, the Board determines that an expeditor who undertakes these activities is acting as a lobbyist. We note that expeditors may in fact contact City employees and officials for a variety of reasons. We do not attempt, in this opinion, to address whether *all* of these instances constitute acting as a lobbyist. Specifically, for example, we do not address whether an expeditor who files a complaint with City employees or City officials is thereby acting as a lobbyist under the Governmental Ethics Ordinance.

DETERMINATIONS:

Based on the facts described and for the reasons set forth above, the Board determines that:

- I) Expeditors while engaged in the following activities (as set forth in Case No. 97055.A and in this opinion), are not attempting to influence nonministerial administrative action, and thereby are not acting as lobbyists:
 1. Preparing and submitting permit applications.
 2. Monitoring the progress of these applications through Plan Examiners’ reviews of the plans submitted as part of an application.
 3. Meeting with Plan Examiners and other Department of Buildings personnel to clarify what needs to be corrected in the plans in order to conform with building code requirements.
 4. Acting as a contact person in the event of emergency, if listed on the permit as the “contact person.”
 5. Inquiring as to the status of permit applications.

- II) Expeditors while engaged in the following activities (as set forth in Case No. 97055.A and in this opinion), are attempting to influence nonministerial administrative action and thereby are acting as lobbyists, and therefore must register with the Board of Ethics in accordance with §2-156-210 *et. seq.*:

1. Attempting, in any way, to persuade Department of Buildings personnel to expedite permit processing, or advocating, in any way, that a request for expedited permit processing be approved by Department of Buildings personnel.
2. Attempting, in any way, to persuade Plan Examiners or other Department of Buildings personnel to adopt a particular interpretation of the building code or attempting to influence their decision to approve a particular set of plans submitted as part of an application.
3. Attempting, in any way, to persuade Aldermen, employees of the Mayor's office, or any other City employee or official to intercede in, promote or influence the permit application process in any of the following ways: a) requesting expedited permit processing; b) attempting to persuade Plan Examiners or other Department of Buildings personnel to adopt a particular interpretation of the building code; c) attempting to influence the decision of Plan Examiners or other Department of Buildings personnel to approve a particular set of plans submitted as part of an application.

Our determination is not necessarily dispositive of all issues relevant to this situation, but is based solely on the application of the City's Governmental Ethics Ordinance to the facts stated in this opinion. If the facts stated are incorrect or incomplete, please notify the Board immediately, as any change may alter our determination. Other laws or rules also may apply to this situation. Be advised that City departments have the authority to adopt and enforce rules of conduct that may be more restrictive than the limitations imposed by the Ethics Ordinance.

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

RECONSIDERATION: This advisory opinion is based on the facts outlined in this opinion. If there are additional material facts or circumstances that were not available to the Board when it considered this case, you may request reconsideration of the opinion. A request for reconsideration must (1) be submitted in writing, (2) explain the material facts and circumstances that are the basis of the request, and (3) be received by the Board within fifteen days of the date of this opinion.

[signature]

Darryl L. DePriest
Chair