

ADVISORY OPINION

CONFIDENTIAL

July 16, 2008

To: [Mary Doe]]

Re: Case No. 08029.A

You are [title] in the [Department of K]. On July 1, 2008, you contacted the Board, at the suggestion of your Commissioner and First Deputy Commissioner. You asked whether the City's Governmental Ethics Ordinance applies to the situation described in this opinion, involving the proposed purchase of a building by a nonprofit organization on whose Board you serve, the [ZRT], if [ZRT] applies for and receives Tax Increment Financing (TIF) assistance for that purchase. The Board has carefully considered your request, and has determined that: 1) the Ordinance would not prohibit you from continuing to serve as a [ZRT] Board member in the event that [ZRT] purchases this building or applies for or receives TIF assistance or funds for that purchase; but the Ordinance does prohibit you from: 2) making, participating in or attempting to use your City position to influence this or any other City decision involving [ZRT]; or 3) representing [ZRT] in any meetings, negotiations, or presentations with or to City of Chicago officials or employees regarding [ZRT] or its proposed purchase of this building, or from signing any documents to be submitted to the City with respect to it.

Facts. You explained that [ZR] is your domestic partner (you are registered as such with the City of Chicago). She is the founder and Artistic Director of [ZRT], a 501(c)(3) not-for-profit organization. [ZRT] has seven Board members, and 3 full- and 40 part-time staff members. It was organized as a 501(c)(3) in 1974. You sit on the Board of Directors of [ZRT], without compensation. [ZR] is the Artistic Director, a full-time [ZRT] employee, but is not a Board member. She draws a salary from her employment; you said that is her sole monetary interest in [ZRT].

The building in the City's neighborhood in which [ZRT] is currently located was sold recently and unexpectedly. [ZRT] must find a new location by the end of the year. In the last few weeks, your domestic partner and two board members other than you began discussions with Alderman and an official from the City's Department of Planning and Development (DPD) about purchasing a privately-owned building that falls within a Tax Increment Financing (TIF) zone, and for which TIF funds may be available. You said that you have not been involved in any of these discussions with Alderman or DPD. The building that [ZRT] is interested in purchasing, at , is situated within [Alderman X's] ward

You asked whether your role as a [ZRT] board member would create any appearance of

impropriety in the event [ZRT] were to apply for or secure TIF funding for this purchase, given that you are a senior manager at the [Dept. of K] . You also said that, if there is an appearance of impropriety, you would resign your position on the [ZRT] board, and that you disclosed this information to your Commissioner and First Deputy Commissioner, who advised you to contact us.

Law and Analysis. There are four sections of the Ordinance that are relevant in this case. We address each in turn.

1. Interest in City Business. First, § 2-156-110, “Interest in City Business,” states in pertinent part:

No ... employee shall have a financial interest in his own name or in the name of any other person in any contract, work or business of the City, or in the sale of any article, whenever the expense, price or consideration of the contract, work, business or sale is paid with funds belonging to or administered by the City, or is authorized by ordinance.

“Financial interest,” defined in §2-156-010(I), means, in relevant part, any interest “(i) ... as a result of which the owner currently receives or is entitled to receive in the future more than \$2,500.00 per year; [or] (ii) ... with a cost or present value of \$5,000.00 or more.” However, that definition continues, “financial interest shall not include (a) any interest of the spouse or domestic partner of an official or employee which interest is related to the spouse’s or domestic partner’s independent occupation, profession or employment.” The issue here is whether you would have a prohibited financial interest in a City contract, work, or business if [ZRT], of which you are a non-compensated Board member, and which employs your domestic partner, were to receive TIF funds from the City.

i. Domestic Partner’s Independent Occupation, Business or Profession. If [ZRT] constitutes your domestic partner’s independent occupation, business or profession, then you would not. In interpreting § 2-156-010(I)(a), the Board has determined that, for the exception to apply and the spouse’s or domestic partner’s business to be considered independent, the City employee may not participate in the management or operation of or have an ownership interest in the spouse’s project, and may not exercise any legal or financial control over the project or related business. See Case Nos. 91052.A, 88156.A, 88069.A. You are a Board member of [ZRT]. Although you are not compensated for your Board service, you do participate in the management of your domestic partner’s business. Therefore, we conclude that this exception does not apply, and [ZRT] is not your domestic partner’s independent occupation, business or profession.

ii. Financial Interest in [ZRT]. The next question we address is whether you would, by virtue of your service as a non-compensated [ZRT] Board member and/or your domestic partner’s employment as its Artistic Director, have a prohibited financial interest in the organization’s business with the City, namely its possible TIF assistance. The vast majority of cases and situations presented to the Board under this section involve City employees who own, partly or wholly, businesses which then seek or receive City contracts or subcontracts. In those cases, as the Board has interpreted these provisions, if a company or firm is owned partly or wholly by a City employee, the value of the employee’s ownership interest in the firm’s City contract or City business is calculated as the gross or aggregate amount of the company or firm’s contract, work

or business with the City, multiplied by the employee's percentage of ownership interest in the company or firm. Case Nos. 97019.A; 90077.A. If the interest the City employee has in the City contract yields, or entitles the employee to receive, income of more than \$2,500 per year, or has a cost or present value of \$5,000 or more, then the employee has a prohibited financial interest in City business. See, e.g., Case No. 04049.A.

In contrast to those cases and situations, here, neither you nor your domestic partner have or have had any ownership of [ZRT]; she is employed as its Artistic Director, and you serve as an uncompensated Board member. We have recognized that, where a City employee is not an owner of a business which then receives a City contract, he has no financial interest in that contract, although he does have an "economic interest"¹ in the business entity itself. See Case Nos. 91072.A; 98009.Q. Thus, while your domestic partner has an economic interest in [ZRT], by virtue of her employment with and salary from it (we also recognize that she founded it and it bears her name)—and you have an economic interest in [ZRT] by virtue of both her employment with and your Board service on it, as [ZRT] is not her independent occupation, business or profession—we conclude, based on this line of cases, that you would not have a prohibited financial interest in City business were [ZRT] to receive City TIF assistance. We note that this case is clearly distinguishable from Case No. 02024.A, the one other case we have decided that involves City employees and nonprofit entities. There, a City employee proposed to establish a nonprofit corporation of which she would be the sole member. She asked whether the corporation could then apply for \$10,800 in grants from a private agency that administered funds from a City department; this would have been the corporation's sole "income." We determined that she would have had a prohibited financial interest in City business were her nonprofit to receive that money. Our decision was based on the rationale that this nonprofit corporation was, in effect, her "alter ego" and she was identical to it. Here, by contrast, [ZRT], a nonprofit since 1974, employs 43 persons, and uses its operating funds to pay expenses, including employee salaries. Although [ZRT] bears your domestic partner's name, and she established it, it is not her "alter ego" in the sense that the proposed nonprofit in Case No. 02024.A was.

2. Conflicts of Interest; Improper Influence. Under our analysis above, we have concluded that you have an economic interest in [ZRT]. Therefore, we advise you that, pursuant to §§ 2-156-030(a) and -080(a) of the Ordinance, you are prohibited from making, participating in, or in any way attempting to use your position with the City to influence any City decisions or actions that would affect [ZRT] or this particular TIF-related proposal. While it is unlikely that, in your position with [K], you would even have that opportunity, we still advise you of this prohibition.

3. Representation. Section 2-156-090(a) of the Ordinance, "Representation of Other Persons," provides, in relevant part:

No ... employee may represent ... any person other than the City in any formal or informal proceeding or transaction before any City agency in which the agency's

1. "Economic interest" is defined in § 2-156-010(i) as "any interest valued or capable of valuation in monetary terms; provided that 'economic interest' is subject to the same exclusions as 'financial interest.'" We have established that a City employee who has outside, non-City employment with a business entity or non-City person and receives a salary from it has an economic interest in that entity/person by virtue of that salary, regardless of amount. See Case Nos. 94009.A; 98062.A. By this reasoning, your domestic partner has an economic interest in [ZRT] by virtue of her salary from it.

action or non-action is of a nonministerial nature; provided that nothing in this subsection shall preclude any employee from performing the duties of his employment ...

This section prohibits you, as a City employee, from representing any person or organization other than the City, whether for-profit or nonprofit, such as [ZRT], in any “formal or informal proceeding or transaction before any City agency.” Proceedings or transactions may include informal meetings or gatherings with representatives of DPD, or aldermen, or formal proceedings before, for example, the Community Development Commission. See Case No. 06037.Q. While this provision does not prohibit you from serving as a Board member of [ZRT], it does prohibit you from engaging in a broad range of activities in which you might act as a spokesperson for [ZRT], or seek to communicate or promote its interests. It includes speaking at face-to-face meetings with or making telephone calls to City personnel, or signing documents submitted to any City department, employee, official or agency on behalf of [ZRT]. Thus, we advise you that, in the event [ZRT] will be required to submit applications or documents to the City, and representatives of the organization will need to sign it, you are prohibited from doing so. The Ordinance does not prohibit your name from being listed as a Board member in any such submissions, however. See Case No. 96032.A.

As to whether this situation creates an “appearance of impropriety,” the Board advises you that, as long as you adhere to the advice stated in this opinion, you will have acted properly and well within the bounds of the City’s Governmental Ethics Ordinance. Our advice in this opinion is consistent with our prior case law, and with the plain meaning of and intention behind this Ordinance.

Determinations. Based on the facts presented in this opinion, the Board determines that: 1) the Ordinance would not prohibit you from continuing to serve as a [ZRT] Board member in the event that [ZRT] applies for or purchases the building at ., or receives TIF assistance or funds for that purchase; 2) the Ordinance does prohibit you from making, participating in or attempting to use your City position to influence this or any other City decision involving [ZRT]; and 3) from representing [ZRT] in any meetings, negotiations, or presentations with or to City of Chicago officials or employees regarding [ZRT] or its proposed purchase of this building, or from signing any documents to be submitted to the City with respect to it.

The Board’s determinations do not necessarily dispose of all issues relevant to this situation, but are 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 opinion. Other laws or rules may also apply to this situation.

Reliance. This opinion may be relied upon only by persons involved in the specific transaction or activity with respect to which this opinion is rendered.

Miguel Ruiz, Chair