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ADVISORY OPINION
CASE NO. 97055.A
LOBBYING

To: [REDACTED]

Date: March 11, 1998

In a letter of November 23, 1997, you requested an advisory opinion about whether "expeditors," persons who seek to obtain building permits from your department on behalf of clients, are required to register with the Board of Ethics as lobbyists. After reviewing the materials you sent us, the Board has concluded the following: (1) that an expeditor who represents a client before the Department of Buildings examiners by preparing and submitting permit applications, monitoring their progress through plan examinations, determining and accomplishing necessary plan corrections, and serving as the contact person in case of emergency is not engaged in lobbying; (2) that an expeditor who makes an appeal to the Building Board of Appeals or an application to the Committee on Standards and Tests on behalf of a client and acts in the context of the established hearing procedures, in order to obtain a specific exemption from a provision of the building code or to receive approval for an element of a client's plan that is not addressed by the building code, is not engaged in lobbying; (3) the conclusion with respect to appeals or applications to these two boards is limited to the established procedures of the hearing process, and does not apply to conduct of an expeditor that takes place outside those procedures and that is aimed at persuading and influencing the action of a member of one of the boards or an employee of the Department of Buildings who may have an impact on a board decision; and (4) that an expeditor who appeals to the Department of Buildings Commissioner to render an interpretation or a decision concerning the building code is acting as a lobbyist under the Ethics Ordinance. Our analysis follows a statement of the facts presented.

FACTS: Our understanding of the facts is derived both from your letter and from conversations with your Department's General Counsel, [REDACTED]. In your letter, you explained that an "expeditor" is an individual or a firm that, for a fee, assists clients in obtaining building permits. An expeditor can be either a professional permit expeditor or expediting firm, or an architect, contractor, or other individual or firm acting in the role of expeditor.



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Expeditors are required by Department policy to register with the Department, and to identify the client on whose behalf they act. (Once registered, they need not amend their registration to identify additional clients.) These registration records are maintained by the Department. According to information you provided, there are more than 400 currently registered expeditors.

You wrote that the services provided by expeditors include preparing and submitting permit applications on behalf of their clients, monitoring the progress of applications through plan examinations, determining and accomplishing necessary plan corrections (as required by the examiners who have reviewed the plans), and serving as the contact person in case of emergency.

Under current practice, an applicant submits plans to the Department and the Department circulates them to all the relevant examiners -- for example, to examiners for architecture, environment, fire, ventilation, plumbing, and accessibility. The Department examiners review the plans submitted. (Some of the examiners are employed by other departments, but work in the context of the Department of Buildings -- for example, examiners for fire, accessibility and zoning.) An examiner's job is to ascertain whether the plans meet the requirements of the building code. The building code is extensive, detailed and technical. If a set of plans fails to meet the code requirements, an examiner does not have the authority to deviate from or to waive the requirements. Rather, the plans must be changed to conform with the code before being resubmitted. After the plans have been reviewed by all the relevant examiners, the applicant is notified and, if corrections are needed, provided with a correction sheet. If the applicant needs clarification, the applicant may make an appointment with a relevant examiner to clarify the corrections needed. If the code is ambiguous, or on matters where the code gives the Commissioner authority to approve or disapprove, an expeditor can ask the Commissioner to offer an interpretation or to render a decision. However, the authority to render such decisions is not given to Department examiners.

This describes the usual activity of expeditors on behalf of their clients. Less commonly, an expeditor may also represent a client in proceedings before the Building Board of Appeals or the Committee on Standards and Tests, both appointed boards that the Department staffs. If an applicant (such as an expeditor) submitting plans for approval believes that the letter of the building code is not appropriate to the specific circumstances, or if such an applicant disagrees with a determination made by the Commissioner, the applicant may appeal to the City's Building Board of Appeals. Similarly, in circumstances where a particular material, method or system of construction, or arrangement of materials is not addressed by the building code, one can seek

approval from the City's Committee on Standards and Tests to use that material, method, or arrangement. [REDACTED] said that while it is more common for the property owner to be present at the hearings of these bodies, it sometimes happens that an expeditor will represent the owner at such an appeal.

The procedures for making appeals to the Building Board of Appeals and applications to the Committee on Standards and Tests are provided in the City's Municipal Code (Chapters 13-24 and 13-16). [REDACTED] said that both bodies operate in the same way in all important respects, although that may not be evident from the Municipal Code alone. Proceedings are open to the public. The Commissioner (ordinarily, her designee) sits as chair of the Committee on Standards and Tests, and (although not mentioned in the Ordinance) sits with the Building Board of Appeals as a nonvoting member. The Municipal Code specifies that determinations made by the Building Board of Appeals apply only to the individual case being reviewed, and are not to be construed as precedent for similar work or as a change in the building code. § 13-24-040. Although there is no similar provision relating to the Committee on Standards and Tests, [REDACTED] said that in practice, the Committee on Standards and Tests has also limited its determinations to the case at hand - the individual location and application in question. For both bodies, the applicant is responsible to provide pertinent data and information required for the decision in that case. § 13-24-060 and § 13-16-020. For both bodies, there are general principles on the basis of which decisions about particular facts are to be reached. For example, if the Building Board of Appeals modifies or rejects a decision by the Commissioner, it must find that the particular work proposed does not endanger the life, health and safety of the building occupants or area residents. § 13-24-050. An applicant to the Committee on Standards and Tests with a material not provided for in the code must show that a new material meets a standard at least equivalent to the applicable standard, which is set forth in the code. § 13-16-050.

LAW: "Lobbyist" is defined in § 2-156-010(p) of the Governmental Ethics Ordinance as:

...any person (i) who for compensation or on behalf of any person other than himself undertakes to influence any legislative or administrative action; or (ii) any part of whose duties as an employee of another includes undertaking to influence any legislative or administrative action.

"Legislative action" is not at issue here. "Administrative action" is defined in § 2-156-010(a):

"Administrative action" means any decision on, or any proposal, consideration, enactment or making of any rule, regulation, or any other official non-ministerial 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.

ANALYSIS: You have said that an expeditor (1) prepares and submits permit applications, (2) monitors the progress of applications through examiners' reviews of the plans, that is, notes when different applications are acted upon, and learns what other information may be required, (3) determines what needs to be corrected in the plans in order to conform with code requirements, and makes those corrections, and (4) acts as a contact person in the event of emergency. These 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. [REDACTED] characterizes the transactions between an expeditor and examiner as essentially "explanatory." The examiner is obliged to approve or disapprove a set of plans according to the technical requirements of the building code, which the examiner may neither alter nor ignore. The examiner's actions are highly circumscribed. The Board therefore concludes that an expeditor engaged in any of these four activities -- preparing and submitting permit applications, monitoring their progress through plan examinations, determining and accomplishing necessary plan corrections, and serving as the contact person in case of emergency -- is not attempting to influence administrative action within the intended meaning of the Ordinance definition of lobbying. This conclusion is limited to the specific actions described, and does not extend to other activities by an expeditor.

The question of an expeditor appealing to or appearing before the Building Board of Appeals or the Committee on Standards and Tests on behalf of a client is a separate matter. The decisions of these two boards on specific cases are made in the context of public hearings with established procedures, whose form and purpose are dictated by the Municipal Code. On the basis of earlier cases addressing similar circumstances (see, e.g., Case No. 89022.A, Zoning Board of Appeals), the Board concludes that an expeditor appealing to or appearing before the Building Board of Appeals or the Committee on Standards and Tests on behalf of a client, and in the context of the established hearing procedures, is not thereby engaged in lobbying within the intended meaning under the Ordinance. This conclusion is limited to representation made in the course of the established procedures of these bodies. It does not apply, for example, to conduct of an expeditor that takes place

outside the established procedures of the hearing process and that is aimed at persuading and influencing the action of a member of one of the boards or an employee of the Department of Buildings who may have an impact on a board decision.

Finally, there is the question of an expeditor seeking an interpretation or a decision by the Commissioner on a matter where the code is ambiguous, or where the code gives the Commissioner authority to approve or disapprove. It is clear that, unlike the evaluations carried out by the Department's examiners, the Commissioner is authorized to use discretion. Also, unlike decisions carried out by the Building Board of Appeals and the Committee on Standards and Tests, these interpretations and decisions by the Commissioner are not in the context of established and public hearing procedures. The Board concludes that appeals made by an expeditor to the Commissioner in order to obtain a building permit on behalf of a client, including attempts to influence advisors to the Commissioner in the course of such appeals, are attempts to influence an administrative action, and that an expeditor engaging in such conduct is acting as a lobbyist under the Ethics Ordinance.

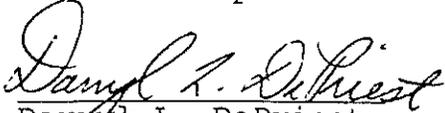
DETERMINATIONS: The Board determines that an expeditor who represents a client before Department of Buildings examiners by preparing and submitting permit applications, monitoring their progress through plan examinations, determining and accomplishing necessary plan corrections, and serving as the contact person in case of emergency is not engaged in lobbying. The Board also determines that an expeditor who makes an appeal to the Building Board of Appeals or to the Committee on Standards and Tests on behalf of a client and acts in the context of the established hearing procedures, in order to obtain a specific exemption from a provision of the building code or to receive approval for an element of a client's plan that is not addressed by the building code, is not engaged in lobbying. Expeditors engaged in such conduct are not required to register as lobbyists with the Board of Ethics, unless they engage in other activities that would require them to register (and their lobbying-related compensation or expenditures total \$1,000 or more in the preceding or current calendar year, § 2-156-210). However, this conclusion with respect to appeals or applications to these two boards is limited to the established procedures of the hearing process, and does not apply to conduct of an expeditor that takes place outside those procedures and that is aimed at persuading and influencing the action of a member of one of the boards or an employee of the Department of Buildings who may have an impact on a board decision.

The Board also determines that an expeditor who appeals to the Building Commissioner for an interpretation or a decision regarding the building code in order to obtain a building permit on behalf of

a client is acting as a lobbyist under the Ethics Ordinance. If such an expeditor's lobbying-related compensation or expenditures total \$1,000 or more in the preceding or current calendar year, the expeditor is required to register as a lobbyist with the Board of Ethics.¹

Our determinations and advice are based on an 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 conclusions.

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.


Darryl L. DePriest
Chair

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¹ Where expeditors who engage in lobbying activities receive lump-sum payments for their services (in which no distinction is made between payment for lobbying and non-lobbying activities), they will have to make "good-faith" estimates of the amount of compensation and expenditures attributable to their lobbying-related activities. Such estimates should take into account the hours spent in discussions with City officials, as well as preparatory activities such as research and consultations that are directly related to influencing City legislative or administrative actions. See Case No. 89022.A, p. 1.