

December 21, 2006

CONFIDENTIAL

Joint Advisory Opinion

Mr. Smith

Ms. Jones

Post-Employment

Case No. 06066.A

By letter dated _____ 13, 2006, you (Mr. Smith) asked the Board for an advisory opinion¹ addressing whether you, a former City employee in the Department of X (“X”), could serve as an independent contractor to Y, LLC (“LLC”). The LLC is an affordable housing developer partially owned by (the unrelated) Ms. Jones (“Ms. Jones”). You would assist with respect to an agreement between the LLC and the City to develop four affordable housing properties in Chicago’s L area.

After considering the facts presented under the relevant law, the Board has determined that the Ordinance **does not prohibit** you from assisting the LLC in the manner recited in this advisory opinion in connection with the four following Chicago real estate properties: A, B, C and D (the “Four Properties”). However, the Board’s review of your City duties indicates that you exercised broad City real estate duties and contract management authority with respect to other City projects and redevelopment agreements not addressed in this opinion. Therefore, we remind you that the determinations in this opinion pertain only to your work for the LLC respecting the development project for the Four Properties, and that you may well be subject to permanent or one-year prohibitions with respect to other projects involving the City.

FACTS

Background

Pursuant to a Development Agreement dated _____ 21, 20___, as amended (“RDA”), between the LLC and the City of Chicago, acting through its Department of Z (“Z”). The City caused the Four Properties to be conveyed to the LLC (“Conveyance”). All were improved with residences at the time, and partially occupied by tenants. The Four Properties were in disrepair and are individually described as (i) a one-flat (“one Flat”); (ii) a 1-unit Yellow Brick (“Yellow Brick”); (iii) a 1-unit Greystone (“Small Greystone”); and (iv) a 21-unit Greystone (“Large Greystone”). All four buildings comprise the Four Properties; the latter three are collectively hereinafter the “24 Units.”

¹In which Ms. Jones subsequently joined.

The Four Properties were the subject of an earlier private-owner default on FHA-guaranteed mortgages (“HUD-defaulted”) in the City’s L neighborhood. The HUD-defaulted properties comprise approximately xxxxx residential units that include the L Apartment Project and the L Area, each designated for affordable housing development. The U.S. Department of Housing and Urban Development (“HUD”) succeeded to the HUD-defaulted properties and, ultimately (under the RDA), transferred the HUD-defaulted property to the LLC. Accordingly, the Conveyance (arising from the RDA) came together with and subject to covenants, conditions and restrictions of record (running with the land) benefitting the LLC, HUD, the City and tenants of the Four Properties. Among these limitations were, generally: (i) assurance of affordable housing; (ii) sharing (by HUD) in certain market-driven profit upon a sale of some or all of the Four Properties; (iii) that the LLC obtain certain “up-front grants;” and (iv) that the rehabilitation meet HUD standards.

The LLC is now ready to rehabilitate the Four Properties.

Mr. Smith’s Intended Work for the LLC

LLC is an Illinois limited liability company owned by Ms. Jones and Mr. Miller. The LLC’s purpose is to acquire and develop the Four Properties as affordable housing. The LLC desires to retain you as an independent contractor to aid in that purpose. You have been trained in architecture but are not a licensed architect. For the One Flat, you would be the project architect for design and construction supervision. For the 24 Units, you will be the inspecting architect. To the extent your architectural designs require review or (a stamped) validation, Mr. G, a licensed architect, will perform that service for the LLC. You will be supervised in your architectural work by Mr. G, who is an independent contractor of the LLC.

As project architect for design and construction supervision, you would be involved in a “gut rehab” of the One Flat. During the LLC’s conversion of the One Flat into condominiums, you would completely design the condominium units and common areas. You would create the site plans and specifications (including construction documents for purposes of obtaining building permits); work with City departments in order to obtain requisite permits; supervise the construction; and sign off on contractor completions and payment authority, forwarding those signatures to Ms. Jones, who is your ultimate supervisor. You would attempt to design, and, after any requisite meetings with the Department of P (“P”), obtain building permits for, a “green” building. A green building includes such environmentally-friendly and sustainability features as a green roof (one specially designed to accommodate plants or dirt to provide for improved insulation), and solar heated hot water. The Department of EV has made available to the LLC solar collectors (that you will inspect) for green buildings. In addition, you would work with the subcontractors, answering questions when required, and, subject to Ms. Jones’s approval, approve or deny contractors’ change order requests, or generate LLC requests to contractors for change orders.

As inspecting architect of the 24 Units, you would be constantly “on site” and walking through the buildings. For instance, you would inspect the solar collectors from the Department of EV. During construction, you would report to the LLC on progress and problems (after reviewing the appropriate contract or plans), *e.g.*, noting that a lintel is not long enough above a door, that it should be longer and, thereafter, you would notify the contractor and ensure rectification of the issue. When there are questions, you would be part of discussions with subcontractors, give your input on change orders, and sign off on payoffs to contractors.

In both positions assisting the LLC, you would be communicating and meeting with HUD inspectors. In addition, it is likely you would be performing landscape design for some or all of the Four Properties. Although you would meet with City employees of P, you would not do the same in connection with Z or X. In neither position would you supervise a staff.

Mr. Smith’s Past Work for the City

You stated you began City service in October 19__ and left on _____ 31, 20__, spending all your time in X, xxxxx Division. You said you worked on two different, though related, tasks involving two different types of real estate development City-wide: Lakefront developments and Planned Developments. Generally, Lakefront developments involve realty along the City’s lakefront (occasionally within downtown or on Michigan Avenue). Development (sometimes new development is involved) or modifications of this realty is controlled by the “Chicago Lake Michigan and Lakefront Protection Ordinance” (“Lakefront Ordinance”). Planned Developments exist throughout the City, and may include new or existing improved or vacant property. They are typically complicated commercial properties, *e.g.*, more than 75,000 square feet, or larger multi-unit residential developments, *e.g.*, at least 100 units in a structure, and are governed by the City’s Zoning Ordinance. You stated that, while at X, you never worked on, or were involved with, the RDA, the Conveyance, the L Area or the L Apartment Project.

Lakefront Ordinance

In connection with the Lakefront Ordinance, developers or owners who, typically, want to make changes to existing structures along the Lake or River submit the project in an application to X. If approved, an X report is submitted to the Chicago Plan Commission (“Commission”)². If the

²As described on the City’s web site, “Initially appointed in 1909 as one of the recommendations of the Burnham Plan for Chicago, the Chicago Plan Commission is one of the city’s most widely known and respected agencies. The commission is staffed by the Zoning Division which provides technical review and recommendations. The current 18 member Commission, appointed by the Mayor, must approve, disapprove or defer any proposal by a public body or agency ‘to acquire, dispose, or change any real property within the territorial limits of the City’ on the basis of whether or not the referral complies with the City’s long range planning goals and objectives. The Plan Commission also reviews land use proposals in Tax Increment Finance Redevelopment Plans, Planned Developments, and Lakefront Preservation

Commission approves, then the application package is ready for the developer to go to P to obtain permits. You would review the initial plans, *e.g.*, add a penthouse to a building, construct a new building, under the Lakefront Ordinance criteria; determine if there would be an adverse impact on the Lakefront; and, if so, negotiate with and cause the developer to modify its application to accommodate the Lakefront Ordinance. Your goal was to recommend to the Commission approval of the project if it met all legal criteria. Often, in order to help carry out your task, you would work with X staff to obtain comments from members of the affected neighborhood. Sometimes, you would go to neighborhood meetings. When the application was complete - as determined by you and the developer - you would submit a report to the Commission, often presenting the report for the Commission's consideration. The report included X staff reports, a description of the project and a recommendation for approval of the project from X. Upon presentation to the Commission, your assignment on that application would be complete.

You offered an example of your work under the Lakefront Ordinance. You worked on the park to be located on N. You met with community groups (such as Friends of the Parks, Lake Michigan Federation and the Metropolitan Planning Council) to obtain their input to help with your work in helping design the proposed park; helped in preparing sketches to present to community groups, and the Mayor's Office; met with the Department of EV to determine the park's effect on the shoreline; obtained input from the Departments of T, AV and F regarding the park's effect on their presence or absence from N; and worked directly with the private architect hired by the City who was responsible for the overall park's design in order to coordinate the architect's concepts with community members' concerns. Once the concept for the park was reduced to the Park District's application, you reviewed it, and you helped write the report, based on the application, for the Commission, which you presented to the Commission.

Planned Developments

Whether a developer's proposed development is considered a Planned Development depends on criteria in the Zoning Ordinance such as: type of improvement, size and number of units involved (if residential). A developer must submit its project in an application to X³ before permits may be obtained from P to build improvements or modify property that is a Planned Development. The

matters. The Commission does not have the statutory power to enforce its decisions, but its recommendations have always had an unofficial and usually effective sanction."

³Occasionally, X would accept (and you would work on) a project that did not neatly fit into the nominative "Planned Development," but clearly should be treated under the Zoning Ordinance. The reason for this "special category" would be because of the type, complexity or size of the project. Examples might include Chicago Housing Authority or Chicago Public Schools' projects, upon which you would work; however, you worked essentially as a technical advisor to the X neighborhood staff person because of your urban perspective experience.

application is processed through X. When it is acceptable to X, under the Zoning Ordinance, X submits the application as part of a report to the Commission. Thereafter, if acceptable to the Commission, the Commission would pass the application on to the City Council's Zoning Committee, which would present the matter to City Council. You would review the plans (including technical plans) from many urban, layout, architectural, ordinance and internal X perspectives. These include design, green features, fire access, transportation, zoning, appearance, floor ratio, security, materials, storm water management, height restrictions, facade and landscaping. You would then seek comments from other City departments or sister agencies, including the Department of T, Department of F, the Mayor's Office and Chicago Transit Authority. You would coordinate this data with zoning requirements and input from the X neighborhood staff (who often obtained comments from the appropriate alderman), or with comments you gleaned from attending neighborhood meetings, and the developer's material, and present the matter on a monthly basis at internal X staff meetings for review and comment.

You would then work/negotiate with the developer (and sometimes X's neighborhood-representative staff member) to ensure that the project accommodated the concerns of neighborhood members, City departments and the Zoning Ordinance. (Sometimes you would visit the site to view it in context.) The developer would modify the plans accordingly. When the final work product was accomplished, you would draft your report to the Commission (including the altered project plans), present the report (similar in its elements to those presented above for Lakefront projects) and would, then, have completed your task for that application.

You said that an example of your work on Planned Developments was work on public schools. You reviewed how schools "fit into" the neighborhood; determined procedures to obtain compliance with the City's initiative that municipal buildings be green buildings; and created concepts, ways and means to make a particular school an "environmental symbol" for the City, meaning that it would have "sustainable" features, which include proper storm water management, be energy efficient and possess a green roof.

In both of these areas of responsibility, you worked with developers to modify project budgets, to reflect your negotiations with a developer, and to reconcile any opposing goals of the developer and the City. You would include your negotiation results in your report to the Commission. Among your responsibilities in X, you described your continuous work with various departments as part of a Green Team, developing and attempting to implement green building throughout the City. You also participated in internal X monthly meetings (reviewing project applications), working with architects from the Commission attending those meetings.

LAW AND ANALYSIS

Section 2-156-100 of the City's Governmental Ethics Ordinance ("Ordinance") entitled "Post-Employment Restrictions," contains the relevant portion of the Ordinance, and Section 21-156-100(b) states 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.

Under this provision, you, as a former City employee, are prohibited for one year after leaving City service from assisting or representing any person in a business transaction involving the City if, during your City service, you participated personally and substantially in the subject matter of that transaction. If you exercised management authority with respect to a contract, then the prohibition is permanent as to that contract.

The facts presented do not warrant the conclusion that you were involved in the RDA, Conveyance, L Area or L Apartment Project. Accordingly, a permanent prohibition is not here at issue.

Thus, the Board will focus on the Ordinance's one-year prohibition. You desire to assist the LLC in its redevelopment of the Four Properties by being a project architect for design and construction supervisor of the One Flat, and an inspecting architect of the 24 Units. You would supervise the contractors on-site at the 24 Units. In connection with the One Flat, you would design the condominiums and common areas in a proposed "green gut rehab," obtain the appropriate building permits and supervise the contractors in the ensuing redevelopment.

The redevelopment agreement between the LLC and the City clearly constitutes a business transaction involving the City. The issue before the Board is whether, during the course of your City service, you were "personally and substantially" involved in the subject matter of that transaction within the meaning of Ordinance §2-156-100(b).

As in this matter, the Board has previously considered other cases involving large, complex City transactions involving real estate. In those cases, the Board has determined that the subject matter has, in effect, been the purpose or goal (or the "bringing-to-fruitition") of a particular City transaction pursuant to City and/or Federal-contract specifications respecting those particular real estate parcels

or improvements. Based on the facts presented here, the Board is of the opinion that such an analysis is appropriate in this matter, and, accordingly, concludes that the subject matter of the transaction is the rehabilitation to affordable housing of HUD-defaulted properties in the City's L neighborhood pursuant to specific requirements imposed by HUD and Z. *See e.g.* Case Nos. 96001.A and 96015.A (in each case, the subject matter of the City project was the acquisition/design/construction of particular real estate improvements on specified sites in accord with City and Federal requirements).

The record establishes that, during the course of your City service, you worked exclusively on development projects under: a) the Lakefront Ordinance; and b) Planned Developments under the aegis of the City's Zoning Ordinance. However, during the course of your City service, you had **no** involvement in: i) the designation of the L Area; ii) the designation of the L Apartment Project; iii) the conveyance of HUD-defaulted properties in the L Area or the L Apartment Project to the LLC (or any of the other diverse developers working in the L neighborhood) (you stated that your City work did not involve conveyances of HUD-defaulted property); or iv) the negotiation, drafting or execution of the redevelopment agreement with the LLC (or with any of the other diverse developers working in the L neighborhood). The project for the Four Properties was not sent to the Commission. However, a portion of the plans for the L Area real estate was submitted to the Commission because that portion is contained in a TIF District; however, you had no involvement with those plans or their submission to the Commission. Based on these facts, the Board concludes that, during the course of your City service, you were not "personally and substantially" involved in the subject matter of the transaction at issue, within the meaning of Ordinance §2-156-100(b).

Other Relevant Ordinance Provisions:

Lobbying. Section 2-156-210 et seq. (Lobbyist Registration). You and Ms. Jones stated that your activities on the One Flat on behalf of the LLC would include meetings with City departments, including P plan examiners, in an attempt to convince them to adopt a particular set of plans, notably as such relate to the "green" aspect of your One Flat plans designed on behalf of the LLC.

Article 3 of the Governmental Ethics Ordinance, Section 2-156-210 et seq., regulates lobbying of City employees and officials and requires lobbyists to register and file semi-annual activity reports with the Board of Ethics. The term "lobbyist" is defined in relevant part at Section 2-156-010(p) of the 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 [City] legislative or administrative action...*"

Please be advised that you may well become a "lobbyist"⁴ under the Ordinance if you engage in conduct on behalf of the LLC that, by way of example, extends beyond merely filing an application

⁴Ms. Jone is a registered lobbyist with the City.

for a building permit. Obviously, whether you would be acting as a lobbyist within the meaning of the Ordinance would depend upon the particular conduct in which you engage.⁵

Accordingly, you may be required to register as a lobbyist with the Board of Ethics. If at any time you are unsure of your duty to so register, we advise you to contact the Board, there are a number of sanctions that the Board may impose with respect to unregistered lobbyists and their clients.

Confidentiality. Finally, we advise you that Section 2-156-070, "Use or Disclosure of Confidential Information," prohibits you, as a former City employee, from using or revealing confidential information acquired through your City employment. Confidential Information, for purposes of this section, means information that may not be obtained under the Illinois Freedom of Information Act, as amended.

DETERMINATION

After considering the facts presented under the relevant law, the Board has determined that the Ordinance **does not prohibit** you from assisting the LLC in the manner recited in this advisory opinion in connection with the four following Chicago real estate properties: A, B, C and D (the "Four Properties"). However, the Board's review of your City duties indicates that you exercised broad City real estate duties and contract management authority with respect to other City projects and redevelopment agreements not addressed in this opinion. Therefore, we remind you that the determinations in this opinion pertain only to your work for the LLC respecting the development project for the Four Properties, and that you may well be subject to permanent or one-year prohibitions with respect to other projects involving the City. Therefore, if your work changes, please contact the Board for specific advice.

Our 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 letter. Other City rules or policies may also apply. If the facts stated are incorrect or incomplete, please notify us immediately, as any change may alter those conclusions. Additionally, should the facts presented change, you should contact the Board for further review of the matter.

RELIANCE: This opinion may be relied upon only by persons involved in the specific transactions or activities with respect to which the opinion is rendered.

⁵ By way of illustration only, the Board refers you and Ms. Jones to Case No. 02013.A in which the Board decided that a person is not performing lobbying if the activities are limited to: (i) preparing and submitting permit applications; (ii) monitoring their progress; (iii) meeting with xxx Examiners and other P personnel to clarify what needs to be corrected; (iv) acting as a contact person in the event of emergency, if listed on the permit as the "contact person;" and (v) inquiring as to the status of permit applications. Case No. 02013.A, at p. 8. (review of activities to determine whether expediter is a lobbyist).

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On behalf of the Board, we express our sincere appreciation of your willingness to abide by the standards embodied in the Ordinance. Please contact us with any questions.

Darryl L. DePriest
Chair