

Post-Employment Restrictions
Local Development Corporation
Charter Sections: 2604(d)(2)
2604(d)(4)

Advisory Opinion No. 94-7

A public servant has requested an opinion from the Conflicts of Interest Board (the "Board") as to whether, consistent with Chapter 68 of the City Charter, he may accept employment with a newly forming local development corporation ("LDC"). Specifically, the public servant has asked the Board whether, if he accepts employment with the LDC, his services as the Director of the LDC would be curtailed by the prohibitions contained in Charter Sections 2604(d)(2) and (d)(4), which impose limits on the ability of former public servants to appear before their former agencies and to work on particular matters.

For the reasons discussed below, it is the opinion of the Board that it would not be a violation of Chapter 68 for the public servant to be employed by the LDC and, in carrying out his duties, to appear before his former City agency or other City agencies.

Background

The City recently created the LDC, a not-for-profit corporation, to conduct various public and quasi-public functions. Section 27-228.6 of Local Law No. 107 (the "Local Law") permits the Commissioner of the Department of Buildings (the "Department") to enter into a contract with the LDC for the examination and approval of plans for the installation or alteration of plumbing and plumbing systems and fire suppression piping systems.

The Local Law requires that: (1) a majority of the members of the LDC's board of directors include officers or employees of the Department and the Fire Department, serving ex officio; (2) the LDC shall examine and approve plans in accordance with and in the manner prescribed by the Charter, the Code and the rules of the Department; (3) the LDC shall use forms for applications prescribed by the Department; (4) the LDC shall act in accordance with the Department's guidelines and defer approval of plans or issuance of permits pending action by other City agencies; (5) the LDC has no power to revoke permits it has issued, but may recommend revocation to the Department; (6) all determinations of the LDC shall be subject to review by the Board of Standards and Appeals to the same extent

and in the same manner as if the determination had been made by the Department; and (7) the Department shall establish procedures for the audit, inspection, examination and review of services performed by the LDC to ensure that the examination and approval of plans, issuance of permits and inspections performed by the LDC comply with the Local Law. Further, the Local Law provides that the LDC is authorized to maintain its operations for two years and, after the expiration of the two-year period, the operations of the LDC will be transferred to the Department.

The LDC's board of directors consists of nine members, a majority of whom are employees of the City of New York. In addition, all employees of the LDC are, by law, subject to the conflicts of interest provisions contained in Chapter 68 of the City Charter.

Discussion

Charter Section 2604(d) of Chapter 68 contains a number of provisions restricting the conduct of public servants who have left, or are contemplating leaving, City service. These provisions, referred to as the post-employment restrictions, are intended to prevent public servants from exploiting public office for personal gain, exerting special influence on government

decision-making, or subordinating the interests of the City to those of a prospective employer.

Of particular relevance to this case are Charter Sections 2604(d)(2), (d)(4) and (d)(6). Charter Section 2604(d)(2) provides, in pertinent part, that "[n]o public servant shall, within a period of one year after termination of such person's service with the city, appear before the city agency served by such public servant"¹ Further, "[n]o person who has served as a public servant shall appear, whether paid or unpaid, before the city, or receive compensation for any services rendered, in relation to any particular matter² involving the same party or companies with respect to which particular matter such person had

¹ An appearance is defined as "any communication, for compensation, other than those involving ministerial matters." Charter Section 2601(4). A "ministerial matter," in turn, is defined as "an administrative act, including the issuance of a license, permit or other permission by the city, which is carried out in a prescribed manner and which does not involve substantial personal discretion." Charter Section 2601(15).

² Charter Section 2601(17) defines a "particular matter" as "any case, proceeding, application, request for a ruling or benefit, determination, contract limited to the duration of the contract as specified therein, investigation, charge, accusation, arrest, or other similar action which involves a specific party or parties, including actions leading up to the particular matter...."

participated personally and substantially as a public servant through decision, approval, recommendation, investigation or other similar activities." Charter Section 2604(d)(4).

In addition, Charter Section 2604(d)(6) contains an exemption from the post-employment restrictions. This Charter provision, commonly referred to as the "government-to-government exception," provides that "[t]he prohibitions on negotiating for and having certain positions after leaving city service, shall not apply to positions with or representation on behalf of any local, state or federal agency." Charter Section 2604(d)(6).

In Advisory Opinion No. 93-13 the Board considered whether a local development corporation could be considered an arm of local government for purposes of Chapter 68. "Among the factors to be considered, in determining whether a local development corporation should be characterized, as an arm of local government for purposes of Charter Section 2604(d)(6), are the following: (1) the manner in which the corporation was formed; (2) the degree to which the corporation is controlled by government officials or government agencies and (3) the purpose of the corporation." See

Advisory Opinion No. 93-13 at p. 5.

In applying the factors set forth in Advisory Opinion No. 93-13 to this case, the Board notes that the LDC was incorporated pursuant to Section 1411 of the Not-For-Profit Corporation Law, which provides as one of its purposes that a local development corporation is responsible for "lessening the burdens of government and acting in the public interest." In addition, the LDC's Certificate of Incorporation indicates that the three incorporators of the LDC are all City employees; two are from the Department, and one is from another City agency.

In considering the degree to which the LDC is controlled by government officials or government agencies, the Board reviewed the Local Law and the LDC's Certificate of Incorporation. The operation of the LDC is governed by its enabling statute, the Local Law, which outlines the composition of its board of directors and ensures that it will be subject to the control of City government, particularly the Department. In this regard, many of the operations of the LDC are subject to the control of the Department. Specifically, the LDC: (1) may be audited by the Department; (2) must use forms prescribed by the

Department; (3) lacks the power to revoke permits the LDC has issued; (4) must examine and approve plans in the manner prescribed by law and the Department; and (5) is subject to review by the Board of Standards and Appeals. In addition, pursuant to the Local Law, a majority of the LDC's board of directors are employed by the City of New York, either by the Department or the Fire Department.

The Board's review of the Local Law and Certificate of Incorporation and Bylaws of the LDC reveal that the LDC is charged with the performance of public functions. The purpose of the LDC includes activities which are either in the public interest (e.g., developing and improving methods of furnishing and installing piping systems for water, steam gas, and other products) or the performance of functions that are currently governmental functions being performed by the Department (e.g., examining and approving plans and applications in relation to construction, or alteration of buildings, inspecting buildings, and issuing permits).

Conclusion

The Board has determined that although the LDC is technically a corporate entity separate and distinct

from the City, it is controlled by the City, has a mission of performing governmental functions and its functions will be transferred to the Department after the LDC has been in operation for a period of two years, unless the Local Law is re-enacted.

Accordingly, it is the opinion of the Board that the LDC should be treated as an arm of local government, for the purposes of Charter Section 2604(d)(6).

Therefore, the public servant may appear before the Department and work on particular matters while employed by the LDC.

In making this determination, the Board wishes to reiterate that a determination as to whether a local development corporation is an arm of local government pursuant to Charter Section 2604(d)(6) is a determination to be made by the Board on a case-by-case basis. See Advisory Opinion No. 93-13, n.3. This opinion, like Advisory Opinion 93-13, does not confer blanket approval for all local development corporations to be treated as arms of local government.

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