

Post-Employment Restrictions  
Business Improvement District  
Charter Sections: 2604(d)(3)  
2604(d)(4)  
2604(d)(6)

**Advisory Opinion No. 94-21**

A former high-level public servant has requested an opinion from the Conflicts of Interest Board (the "Board") as to whether, consistent with conflicts of interest provisions of Chapter 68 of the City Charter, he may accept employment with a new business improvement district ("BID"). Specifically, the former public servant has asked the Board whether, in the event he is permitted to accept employment with the BID, his services with the BID would be restricted by Charter Sections 2604(d)(3) and (d)(4), which impose limits on the ability of some former public servants to appear before the branch of City government served by their agencies and to work on particular matters in which they were involved while they were employed by the City.

For the reasons discussed below, it is the opinion of the Board that the former public servant is not

prohibited from accepting employment with the BID. Further, it is the opinion of the Board that, in carrying out his duties for the BID, the former public servant may appear before his former City agency and other City agencies less than one year after the termination of his City employment.

#### Background

The former public servant was employed by a City agency (the "Agency") which develops plans for geographical areas of the City, coordinates policy with City administrators, elected officials and agencies, and discusses the plans at public forums. The day-to-day work on these plans is performed by Agency staff and was overseen by the former public servant.

The Agency has issued a detailed plan containing numerous suggestions for the improvement of a section of the City (the "Plan"). Among the suggestions is one for the creation of the BID. The Plan makes this general recommendation without specifying the structure of the BID. For example, the Plan states that the BID should deal with traditional BID-sponsored activities, such as security, sanitation, and physical improvements, and recommends that the BID develop

strategies for marketing the geographic area of the BID to businesses and promoting tourism and visitors' services.

The former public servant has advised the Board that he has been approached about possible employment with the BID. The former public servant's proposed employment would require him to appear before the Agency and other City agencies prior to the expiration of the one-year appearance ban.

#### Discussion

##### A. Post-Employment Restrictions

The City Charter contains a number of provisions regulating the conduct of public servants and former public servants. Among these are a set of provisions commonly referred to as the post-employment restrictions. These restrictions, contained in Chapter 68 of the Charter, are designed to protect the integrity of government decision-making and to avoid any real or apparent conflicts of interest between a former or current public servant, the City and the prospective or current private employer. Of particular relevance to this case are Charter Sections 2604(d)(3), (d)(4) and (d)(6).

Charter Section 2604(d)(3) provides that no elected official or the holder of certain appointed positions shall, within one year after the termination of the person's employment with the City, appear before any agency in the branch of City government served by the person.<sup>1</sup> "Appear" means to make any communication, for compensation, other than those involving ministerial matters.<sup>2</sup> See Charter Section 2601(4). The former public servant holds one of the titles specified in Charter Section 2604(d)(3), and his agency is in the executive branch of City government.

The Charter also provides that public servants may not appear (whether paid or unpaid) before any City

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<sup>1</sup> The appointed positions governed by Charter Section 2604(d)(3) are: Deputy Mayor, Director of the Office of Management and Budget, Personnel Director, Commissioner of General Services, Corporation Counsel, Commissioner of Finance, Commissioner of Investigation, and Chair of the City Planning Commission.

For the purposes of Charter Section 2604(d)(3), the legislative branch of the City consists of the Council and the offices of the Council, and the executive branch of the City consists of all other agencies of the City.

<sup>2</sup> A "ministerial matter" is defined in Charter Section 2601(15) 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."

agency, or receive compensation for any services rendered, with respect to any "particular matter" in which they were involved personally and substantially while employed by the City.<sup>3</sup> See Charter Section 2604(d)(4). A "particular matter" is a term of art which is used under Chapter 68 to refer to an identified or specific project on which a public servant worked personally and substantially while in public service.<sup>4</sup>

Chapter 68 also provides that the prohibitions on negotiating for and having certain positions after leaving City service do not apply to positions with or

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<sup>3</sup> Charter Section 2604(d)(4) provides: "No 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 matter involving the same party or parties with respect to which particular matter such person had participated personally and substantially as a public servant through decision, approval, recommendation, investigation or other similar activities."

<sup>4</sup> The Charter 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...." Charter Section 2601(17).

representation on behalf of any local, state or federal agency -- the "government-to-government exception."  
See Charter Section 2604(d)(6).<sup>5</sup>

B. Business Improvement Districts As Arms of Local Government

The question before the Board is whether the BID is an arm of local government, thus implicating the government-to-government exception to the post-employment restrictions under Charter Section 2604(d)(6).

In Advisory Opinion No. 93-13 the Board determined that a local development corporation could be considered an arm of local government for the purposes of Charter Section 2604(d)(6), provided that certain factors have been established. Among the factors are the following: (1) the manner in which the corporation was formed; (2) the degree to which the corporation is

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<sup>5</sup> In Advisory Opinion No. 93-13 the Board noted that Charter Section 2604(d)(6) "was added to the Charter because it was recognized that, in addition to preventing corruption and undue influence, the post-employment restrictions could also work against the public interest by prohibiting government agencies from legitimately engaging the expertise and experience of former public servants." Advisory Opinion No. 93-13 at p. 4.

controlled by government officials or government agencies and (3) the purpose of the corporation. See Advisory Opinion Nos. 94-7 at p. 5 and 93-13 at p. 5.

The instant case involves a business improvement district, not a local development corporation. However, in Advisory Opinion 92-16 the Board determined that "district management associations and business improvement districts are similar to local development corporations.... As with local development corporations, these are quasi-governmental entities and service with these organizations does not conflict with the City's interests."<sup>6</sup> Accordingly, the Board finds

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<sup>6</sup> In Advisory Opinion No. 92-16 the Board found that the prohibition contained in Charter Section 2604(d)(1)(ii) on negotiating for future employment "with any person or firm involved in a particular matter with the city, while such public servant is actively considering, or is directly concerned or personally participating in such particular matter on behalf of the city" is not applicable to business improvement districts, inasmuch as a business improvement district is not a "firm" as that term is defined in Charter Section 2601(11). Advisory Opinion No. 92-16 is not dispositive in the instant case because the post-employment provisions considered herein are Charter Section 2604(d)(3), which involves appearances before the executive, legislative or judicial branches of City government, and Charter Section 2604(d)(6), which provides an exception to this particular provision, if a former City employee goes to work for another government entity. This case does not turn on whether the former public servant's new employer is a "firm" for the purposes of Chapter 68; rather, it addresses the issue of the former public

that the factors set forth in Advisory Opinion No. 93-13 are applicable to a determination of whether a particular business improvement district is an arm of local government within the meaning of Charter Section 2604(d)(6).

In applying the factors discussed above to the instant case, the Board notes that Section 25-401 et seq. of the New York City Administrative Code (the "Code") governs the manner of formation, the financial aspects, the governing board and the manner of governmental approval of the BID and all other business improvement districts.

The Mayor is responsible for the preparation of the district plan, which includes the proposal for a business improvement district. See Code Section 25-405(a). The district plan contains the boundaries of the proposed business improvement district, the present and proposed use of the lands, the proposed improvements, the amounts to be expended for improvements, maintenance and operation, and proposed sources of financing, including the power to tax. See

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servant's appearances before his former branch of City government.

Code Section 25-403.

A district management association carries out the activities of the district plan. The district management association must be incorporated pursuant to the Not-For-Profit Corporation Law. See Code Section 25-414.

The district plan is subject to approval by the City Planning Commission after a public hearing. Thereafter, the City Council considers the business improvement district and may adopt a local law approving the establishment of the business improvement district. See Code Section 25-406. This local law becomes effective only upon a determination by the State Comptroller that the debt and tax limitations in the district will not be exceeded by establishing the district. See Code Section 25-408.

The Code also provides that the board of directors of the district management association must be composed of owners and tenants within the district. In addition, the board of directors must include one member appointed by each of the following: the Mayor; the Comptroller; the applicable Borough President; and the Council member representing the council district in

which the proposed district is located. These City-appointed board members serve as incorporators of the business improvement district. See Code Section 25-414(b).

The Board's review of the statutorily mandated functions of a business improvement district reveals that business improvement districts are responsible for governmental functions such as security, sanitation and physical improvements. Business improvement districts also are responsible for activities which are in the public interest, such as promoting tourism and visitor services, developing strategies to market the geographic area of the business improvement district to prospective businesses, and maintaining or expanding the business base of the geographic area of the business improvement district.

#### Conclusion

Based upon a review of the Code, the statutorily mandated functions of business improvement districts, and the particular activities to be performed by the BID, the Board has determined that, although business improvement districts are technically corporate

entities separate and distinct from the City, they are established by the City and have a mandate to perform both governmental functions and other functions which are in the public interest.

Based on the facts discussed above, the Board concludes that the business improvement district here involved is an arm of local government for the purposes of the post-employment restrictions in Charter Section 2604(d). Consistent with Chapter 68 of the Charter, the former public servant may, while employed by the BID, appear before the executive branch of City government within one year after termination of his City service and work on particular matters on which the public servant had participated personally and substantially while employed by the City.

Sheldon Oliensis  
Chair

Benjamin Gim

Beryl R. Jones

Robert J. McGuire

Shirley Adelson Siegel

Dated: September 13, 1994