

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY**

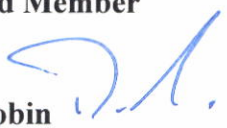



Office of Government Ethics

**MEMORANDUM**

**TO:** Robert J. Spagnoletti  
Chairman, Board of Ethics and Government Accountability (Ethics Board)

Deborah Lathen  
Ethics Board Member

**THROUGH:** Darrin P. Sobin   
Director of Government Ethics

**FROM:** Brian K. Flowers   
General Counsel

**DATE:** August 14, 2015

**RE:** Department of General Services Request for Opinion Regarding Potential  
Conflict and Request for Waiver of Any Potential Conflict

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This responds to the August 12, 2015 memorandum of Camille D. Sabbakhan, General Counsel of the Department of General Services, in which she requests a determination as to whether a conflict of interest exists under DC Official Code § 1-1162.23, as to a specific matter handled by a DGS attorney and if so determined, to request a waiver of any potential conflict of interest.

Based upon the information provided in her memorandum, I conclude that the DGS attorney would be participating in a particular matter which is likely to have a direct and predictable effect on the financial interests of a person closely affiliated with the employee, but that the interest is not so substantial as to be deemed likely to affect the integrity of the services that the government may expect from the employee. I recommend that the Board grant the waiver requested.

**Background**

The memorandum states that the Department of General Services (DGS) is currently engaged in the development of the new soccer stadium at Buzzard Point (the Soccer Stadium Development). In connection with the Soccer Stadium Development, the District will likely condemn a parcel of

property owned by SW Land Holder, LLC.<sup>1</sup> The DGS attorney at issue, from 2000 through 2010, represented the National Electrical Benefit Fund (NEBF), an affiliate that is a member of SW Land Holder, LLC. The DGS attorney represented NEBF in negotiating its loan and joint venture documents, not with respect to any condemnation or litigation matters (and specifically not with respect to the condemnation of land at Buzzard Point).

The DGS attorney's domestic partner currently represents NEBF and its affiliates with respect to tax and equity investment matters. Neither the domestic partner nor his law firm represents SW Land Holder, LLC, nor do they represent NEBF in connection with the condemnation matter. The domestic partner's law firm does not handle condemnation or litigation matters and he has no involvement in the condemnation matter. SW Land Holder, LLC has retained a law firm specifically for the condemnation matter. Additionally, while the DGS attorney is involved in the matter for the District, it is the Office of the Attorney General (not DGS) that will actually initiate, pursue and effect the condemnation.

The DGS attorney has disclosed the potential conflict to DGS, through the attorney's immediate supervisor, in a written statement. Additionally, the DGS attorney has consulted the DC Bar for guidance through its ethics hotline, and the DC Bar opined verbally that no *legal* conflict of interest exists. Based on these facts, DGS concluded that no government ethics conflict of interest exists because (1) no legal conflict of interest exists under the DC Rules of Professional Responsibility, and (2) the DGS attorney's participation in the condemnation matter is not at all likely to have any direct and predictable effect on the DGS attorney's financial interest or the domestic partner's financial interest. Finally, DGS requests that if the Board finds a conflict of interest, that it waive the conflict in accordance with D.C. Official Code § 1-1162.23(b).

## Discussion

Section 223(a) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012 (D.C. Law 19-24; D.C. Official Code § 1-1161.23(a), provides that:

No employee shall use his or her official position or title, or personally and substantially participate, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter, or attempt to influence the outcome of a particular matter, in a manner that the employee knows is likely to have a direct and predictable effect on the employee's financial interests *or the financial interests of a person closely affiliated with the employee*. (Emphasis added).

"Person closely affiliated with the employee" is defined to include a spouse, dependent child, general partner, a member of the employee's household, or an affiliated organization.<sup>2</sup> A domestic partner is included as a member of the employee's household, and an "affiliated

<sup>1</sup> See, District of Columbia Soccer Stadium Development Act of 2014, effective March 11, 2015 (D.C. Law 20-233; 62 DCR 438)(authorizing the Mayor to assemble the soccer stadium site including through the use of eminent domain).

<sup>2</sup> D.C. Official Code § 1-1161.01(43).



organization” includes “a client of the employee or a member of the employee's household.”<sup>3</sup> For that reason, NEBF, a client of the domestic partner, would be considered a person closely affiliated with the employee. Because NEBF, is an affiliate/member of SW Land Holder, LLC, actions that impact the financial interests of SW Land Holder would likely impact the financial interests of its affiliate/member, NEBF.

For purposes of the conflict of interest analysis, the question is whether the DGS attorney's participation in the condemnation of a parcel of property owned by SW Land Holder, LLC, is likely to have a direct and predictable effect on the financial interest of (1) the employee, (2) the employee's domestic partner, or (3) NEBF or SW Land Holder, LLC (persons closely affiliated with the employee through the employee's domestic partner).

“Direct and predictable effect” means there is:

- (A) A close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest;
- (B) A real, as opposed to a speculative possibility, that the matter will affect the financial interest; and
- (C) The effect is more than *de minimis*.<sup>4</sup>

It is unclear from the memorandum exactly what the DGS attorney's participation will be (only that the attorney would be “involved in the matter”), but the participation would nonetheless include advising on a particular matter that would potentially affect the financial interest of SW Land Holder, LLC or NEBF. Unlike the legal ethics analysis, whether it was the same matter on which the DGS attorney represented the former client is not the central question, but whether the participation would likely have a direct and predictable effect on the financial interests of one of the persons covered by the statute. Here, I believe the attorney's involvement could affect the financial interests of SW Land or NEBF if the advice rendered by the attorney is adverse to them.<sup>5</sup>

A particular matter will not have a direct effect on a financial interest, “if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter.”<sup>6</sup> However, in this instance, DGS is the client of the Office of the Attorney General and may direct them as to certain aspects of the litigation. A particular matter will have a predictable effect if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.<sup>7</sup>

<sup>3</sup> D.C. Official Code § 1-1161.01(3)(A)(iii), (25), and (26).

<sup>4</sup> D.C. Official Code § 1-1161.01(11).

<sup>5</sup> It is also possible that the financial interests of the domestic partner may present an appearance of lack of impartiality on the part of the DGS attorney and disqualify the attorney on that basis. *See, e.g.*, DPM § 1810.3 (“no employee shall ... have any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.”).

<sup>6</sup> 5 CFR §2635.402(b)(i).

<sup>7</sup> 5 CFR §2635.402(b)(ii).



## **Waivers issued pursuant to D.C. Official Code § 1-1162.23**

Despite the finding that a person affiliated with the DGS attorney likely has a financial interest in the particular matter on which the attorney will act, the Ethics Act permits the Ethics Board to grant a waiver of the conflict under specific circumstances. An employee other than an elected official may seek a waiver, and the prohibition in subsection (a) of this section (prohibiting employee from participating), shall not apply, if the employee:

- (1) Advises the employee's supervisor and the Ethics Board of the nature and circumstances of the particular matter;
- (2) Makes full disclosure of the financial interest; and
- (3) Receives in advance a written determination made by both the supervisor and the Ethics Board that:
  - (A) The interest is not so substantial as to be deemed likely to affect the integrity of the services that the government may expect from the employee; or
  - (B) Another legally cognizable basis for waiver exists.<sup>8</sup>

In this instance, the employee has notified the employee's supervisor and the Ethics Board. In doing so, the employee has also made full disclosure of the financial interest and has received a written determination from the supervisor that the financial interest is not so substantial as to likely affect the integrity of the services provided to the government. Notwithstanding the potentially disqualifying financial interest, I concur with the supervisor's determination and recommend that the Board grant the waiver to permit the DGS attorney to participate in the pending matter involving the Soccer Stadium Development, including the condemnation of the parcel of property owned by SW Land Holder, LLC.<sup>9</sup> In making the determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of the services that the government may expect from the employee, I have considered the following factors:

1. The disqualifying interest, that has been fully disclosed, is that of an affiliate/member of a client of the DGS attorney's domestic partner.
2. The DGS attorney will not actually represent the District in the condemnation proceeding, but will be advising DGS on the matter.
3. DGS, through the attorney's supervisor, has determined that the interest is not so substantial as to be deemed likely to affect the integrity of the services that the

<sup>8</sup> D.C. Official Code § 1-1161.23(b). A similar waiver procedure exists under the federal conflict of interest statute. See, 18 U.S.C. 208(b)(1).

<sup>9</sup> DPM § 1805.9, also requires either a waiver or recusal where there is an employee has a disqualifying financial interest:

A District government employee who is called upon to act for or on behalf of the District government in a matter relating to or involving a non-governmental entity in which the employee or a member of the employee's immediate family has a financial interest, shall make this fact known to his or her immediate supervisor and a person designated by the agency head, in writing, at the earliest possible moment. Unless a waiver of the conflict of interest is granted by BEGA pursuant to D.C. Official Code § 1-1162.23(b), the head of the employing District government agency subsequently shall determine whether or not the employee must divest him or herself of such interest, or merely disqualify him or herself from taking part in any official decision or action involving the matter.

government may expect from the employee. Where possible, I defer to the agency's discretion in this respect.

4. Because the principal entity, SW Land Holder, LLC, is a parent company, with a number of other affiliates and members, a reasonable person would not be likely to question the DGS attorney's impartiality if the domestic partner were to continue to perform unrelated services for the affiliate, NEBF.
5. The nature of condemnation actions involve independent appraisals and a valuation formula, therefore, there is not much discretion involved.
6. The Soccer Stadium Development is a major undertaking by the District government, and the attorney's services are needed.

If you have any questions or wish to discuss this matter further, I can be reached at 202-481-3411, or by email at [darrin.sobin@dc.gov](mailto:darrin.sobin@dc.gov).

Agreed:

Signed



ROBERT J. SPAGNOLETTI

Chairperson  
Board of Ethics and Government Accountability



DEBORAH LATHEN

Member  
Board of Ethics and Government Accountability

# 13xx-001