

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



**Office of Government Ethics**

November 22, 2016

Thomas A. Gibson  
WinnCompanies  
4319 Third Street S.E.  
Washington, D.C. 20032

Dear Mr. Gibson:

This responds to your request for a formal opinion as to whether, in your new role as Project Director at WinnCompanies (“Winn”), you are subject to any of the District’s post-employment restrictions due to your previous employment with the District’s Office of the Deputy Mayor for Planning and Economic Development (“DMPED”) and the Department of Housing and Community Development (“DHCD”).

**Background**

Prior to joining Winn, you worked at DHCD as a Housing and Development Project Manager from March 2014 until April 2015. While you were at DHCD, you worked on several projects; however, you explained that Winn did not and will not work on any of those specific projects. In addition, you stated that Winn intends to seek Housing Production Trust Funds (“HPTF”), which are administered by DHCD. You did not review or work on HPTF applications and distributions while you were at DHCD.

After leaving DHCD in April 2015, you joined DMPED, where you were employed as a Real Estate Development Project Manager until March 2016. While you were at DMPED, you worked on a number of different projects with varying levels of involvement. Winn will not be working on any of those projects, with the exception of Sursum Corda, a project over which you had minor administrative involvement.

**A. Post-Employment Restrictions**

The District Personnel Manual identifies the post-employment restrictions that apply to District employees and requires that District employees comply with the provisions of the federal post-employment restrictions, codified at 18 U.S.C. § 207, and its implementing regulations set

forth in the Code of Federal Regulations.<sup>1</sup> As explained below, these restrictions are intended to prevent former District employees from leveraging their previous employment with the District to gain an unfair advantage when dealing with the District government upon joining the private sector.<sup>2</sup>

Importantly, these restrictions do not prohibit District employees from working within the private sector after leaving government service altogether. Rather, the postemployment rules set forth varying restrictions upon the ways in which a former employee may or may not interact with his or her prior government agency (or in your case, agencies). These restrictions are broken down into three categories: (1) permanent ban; (2) two-year cooling off period; and (3) one-year cooling off period.

### **1. Permanent Restrictions**

A former District employee is “permanently prohibited from knowingly acting as an attorney, agent, or representative in any formal or informal appearance before an agency as to a particular matter involving a specific party if the employee *participated personally* and *substantially* in that matter as a government employee.”<sup>3</sup> In addition, a former employee is “permanently prohibited from making any oral or written communication to an agency with the intent to influence that agency on behalf of another person as to a particular government matter involving a specific party if the employee *participated personally* and *substantially* in that matter as a government employee.”<sup>4</sup>

The Code of Federal Regulations explains that to “participate personally” in a matter means that an employee, either directly or through direct and active supervision, took action through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, to affect the outcome of a matter.<sup>5</sup> An employee’s participation is “substantial” if it is of “significance to the matter.”<sup>6</sup> Merely having “official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue,” does not amount to “substantial participation.”<sup>7</sup> Instead, whether an employee’s participation in a matter is “substantial” turns on the amount of effort an employee devoted to the matter and the importance of the employee’s effort to the issue.<sup>8</sup> Therefore, if an employee “participates in the substantive merits of a matter,” that participation “may be substantial even though his role in the matter, or

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<sup>1</sup> 6 DCMR § 1811.1 (“District employees shall comply with the provisions of 18 U.S.C. 207 and implementing regulations set forth at 5 C.F.R. Part 2641, Subparts A and B.”)

<sup>2</sup> 6B DCMR §1811.11.

<sup>3</sup> *Id.* at § 1811.3 (emphasis added).

<sup>4</sup> *Id.* at § 1811.4 (emphasis added).

<sup>5</sup> 5 C.F.R. §2641.201(i), (2)(i).

<sup>6</sup> *Id.* at §2641.201(i)(3).

<sup>7</sup> *Id.* at §2641.201(3).

<sup>8</sup> *Id.*



the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole.”<sup>9</sup>

This permanent prohibition lasts the lifetime of the particular matter and bars the former employee from appearing before or communicating with the agency on that particular matter.<sup>10</sup>

## **2. Two-Year Cooling Off Period**

Former District government employees are subject to a two-year ban that can take two forms. The first prohibits former District employees from working on matters over which they had *official responsibility*. Specifically, former District employees are prohibited for two years from knowingly “acting as an attorney, agent, or representative in any formal or informal matter before an agency if [they] previously had official responsibility for that matter”.<sup>11</sup> This two-year restriction period is measured from the date on which the former employee’s responsibility for a particular matter ends, not the termination of government service, unless the two occur simultaneously.<sup>12</sup>

“Matter” refers to any matter that was “actually pending under the former employee’s responsibility within a period of one (1) year before the termination of such responsibility.”<sup>13</sup> The District Personnel Manual defines “official responsibility” to mean “the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.”<sup>14</sup> The scope of an employee’s official responsibility is determined by “those functions assigned by statute, regulation, Executive order, job description or delegation of authority.”<sup>15</sup>

The second two-year restriction applies if a former District employee participated *personally and substantially* over a particular matter involving a specific party. In that case, not only is that employee *permanently* banned from appearing before or communicating with his or her former agency regarding that matter,<sup>16</sup> but the employee also is prohibited for two years from providing behind-the-scenes advice or assistance to any other person regarding the specific matter.<sup>17</sup> Specifically, the former employee cannot “knowingly represent, aid, counsel, advise, consult, or assist” in representing any other person before any agency regarding the specific matter over which he personally and substantially participated.<sup>18</sup> This two-year restriction is measured from

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<sup>9</sup> *Id.*

<sup>10</sup> 5 C.F.R. §2641.201(c).

<sup>11</sup> 6B DCMR § 1811.5

<sup>12</sup> *Id.* at § 1811.7.

<sup>13</sup> § 1811.6.

<sup>14</sup> 6B DCMR § 1899.1.

<sup>15</sup> 5 C.F.R. § 2641.202(j).

<sup>16</sup> 6B DCMR §§1811.3 and 1811.4.

<sup>17</sup> 6B DCMR § 1811.8.

<sup>18</sup> *Id.*

*the date of termination of employment* in the employee position held by the former employee when he or she participated personally and substantially in the matter involved.<sup>19</sup>

### **3. One-Year Cooling Off Period**

A former District employee is prohibited, for one year, from having *any* transactions with the employee's agency that are intended to influence the agency in connection with *any* particular government matter pending before the agency or in which it has a direct or substantial interest. Specifically, 6B DCMR §1811.10 provides that:

A former employee (other than a special government employee who serves for fewer than one-hundred and thirty (130) days in a calendar year) shall be prohibited for one (1) year from having any transactions with the former agency intended to influence the agency in connection with any particular government matter pending before the agency or in which it has a direct or substantial interest, whether or not such matter involves a specific party.

### **B. Analysis**

You have asked what, if any, post-employment restrictions apply to you now that you are employed with WinnCompanies as a Project Director, given the fact that you previously worked for two District agencies: the Department of Housing and Community Development ("DHCD") and the Deputy Mayor for Planning and Economic Development ("DMPED"). For the reasons discussed below, I find that the only post-employment restriction that applies to you is a one-year ban on appearing before your former agency, DMPED, which expires in March 2017.

#### **1. DHCD**

You were employed from March 2014 until April 2015 as a Housing and Development Project Manager in the Development Finance Division within the Department of Housing and Community Development ("DHCD"). That Division is responsible for oversight and rehabilitation and/or new construction of multi-family residential properties and economic development in the District of Columbia primarily for the benefit of low and moderate income individuals. Your duties were to:

- Assess the feasibility and appropriateness of real estate financing, land acquisition proposals, and economic development and -housing proposals which are submitted to the Department by private developers and property owners.
- Coordinate large-scale development projects and special development programs, *as assigned*.

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<sup>19</sup> 6B DCMR § 1811.9.



- Provide guidance and assistance to lower graded professional staff in the review and processing of applications for housing rehabilitation or development.
- Make recommendations to the supervisor relative to the policies and operational procedures of the Division and assists in implementing those recommendations and strategic objective accepted.
- Conduct investment and credit analyses for financing and acquisition proposals and interpret these analyses using local economic conditions. Produce and present these analyses in report form using the computer and spreadsheet software.
- Screen program applicants for program eligibility, financial viability, and community impact.
- Assist developers with securing and maintaining involvement and commitment of private sector financial institutions.
- Carry out functions related to closing financing and acquisition proposals approved by the Department.
- Provide advice and assistance to financing applicants with the preparation and presentation of materials.
- Coordinate activities with appropriate District of Columbia Government and Federal Government agencies.
- Request title reports and property appraisals as appropriate.
- Prepare cost benefit analyses comparative analyses, and economic feasibility studies to support decisions made on development projects.
- Prepare requests for proposals for, residential and commercial development projects and manage the evaluation and selection process of these projects.
- Advise prospective developers regarding the Department's administered development plans, zoning requirements, and project objectives.
- Coordinate the preparation of disposition documents for long—term leases. Monitor construction projects through to completion. Track performance data from development projects.
- Monitor projects post-completion to ensure repayment and compliance with agreements.
- Perform other related duties as assigned.

### ***General Prohibition***

As a former District employee with DHCD you were prohibited for one year from the date of your separation from service, April 2015, from having *any* transactions with DHCD that were intended to influence DHCD on any particular government matter pending before DHCD or in

which DHCD had a substantial interest.<sup>20</sup> This one-year prohibition has already run in your case (it expired April 2016), so there is no general prohibition against you communicating with, or appearing before, DHCD with the intent to influence the agency.

### ***Specific Prohibitions***

There are no specific prohibitions that I can identify at this stage that would prevent you from appearing before or communicating with DHCD given that Winn has not and will not work on any of the projects that you previously worked on while you are at DHCD. If, however, Winn were to work on projects over which you participated personally and substantially while you were at DHCD, then you would be permanently prohibited from communicating with or appearing before DCHD with respect to those projects because of the permanent bans set forth at 6 DCMR §§1811.3 and 1811.4. If this were the case, you would also be subject to a two-year ban on giving behind-the-scenes advice or assistance to Winn (or any other person) regarding the specific projects over which you had substantial and personal participation because of the two-year restriction set forth at 6 DCMR §1811.8. The two-year restriction would run from the date of your termination of employment in your position at DCHD when you participated personally and substantially in the specific matter.<sup>21</sup> In addition, if Winn were to work on projects for which you had official responsibility, you would be subject to the two-year prohibition which would bar you from “knowingly acting as an attorney, agent, or representative” to Winn (or any other person) for those matters.<sup>22</sup> This two-year prohibition runs from the date on which your official responsibility over the matter ended, not from the termination of your service (April 2015), unless the two occurred simultaneously.<sup>23</sup>

In addition, you have asked whether you can work on Winn projects seeking Housing Production Trust Fund (“HPTF”) funding from DHCD. During your time at DHCD, you did not work on HPTF funding or allocation; your involvement in projects came *after* HPTF funding was already approved. Given that HPTF administration did not fall under your official responsibility and because none of the projects you worked on at DHCD will be worked on by Winn, there is nothing that prohibits you from appearing before DHCD with respect to requesting funding for those new projects for which Winn is seeking funding, given that the one year general prohibition against appearing before your former agency as to any transaction has already run.

## **2. DMPED**

You were employed at DMPED as a Real Estate Development Project Manager from April 2015 through March 2016. In that capacity, you were tasked with managing a portfolio of real estate development, financing, and related projects. Typically, specific real estate projects were

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<sup>20</sup> 6 DCMR § 1811.10.

<sup>21</sup> §1811.9.

<sup>22</sup> §1811.5.

<sup>23</sup> § 1811.7.



assigned to you; however, you occasionally performed small tasks, such as drafting paperwork for the Deputy Mayor to sign, for projects that were not officially assigned to you. With respect to the projects that were assigned to you, your specific responsibilities included:

- Administering multiple real estate and/or financing transactions.
- Negotiating disposition contracts, leases, and funding agreements.
- Reviewing and analyzing detailed financial models of development projects.
- Proactively managing project milestones and budgets.
- Managing solicitation processes by drafting requests for proposals, reviewing submissions, connecting with the community and stakeholders, and making recommendations for award.
- Analyzing and presenting findings and recommendations to senior staff in written and verbal form.
- Briefing DMPED senior staff and elected officials on project status.
- Conducting presentations and meetings with community stakeholders.

### ***General Prohibition***

As a former District employee with DMPED, you are prohibited for one year from the date of your separation from service, March 2016, from having any transactions with DMPED that are intended to influence DMPED on any particular government matter pending before DMPED or in which DMPED has a substantial interest.<sup>24</sup> This prohibition applies regardless of whether the particular government matter involves a specific party and regardless of whether you participated in or had responsibility for that particular matter when you were a DMPED employee. In addition, this one-year prohibition applies to matters that arose *after* you left District service. Therefore, according to the post-employment rules, you cannot have any transactions or communications with DPMED with the intent to influence DMPED until March 2017.

### ***Specific Prohibitions***

You explained that during your time at DMPED, you did “extensive work” on four projects: (1) The St. Elizabeth’s East Campus Redevelopment; (2) The MLK Gateway Community; (3) Waterfront Station II; and (4) 1125 Spring Road, and that you did “some preliminary work” on two projects: (1) Truxton Circle; and (2) 8<sup>th</sup> & O Street, N.W. However, you indicated that Winn will not be working on *any* these projects. As such, no post-employment

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<sup>24</sup> See 6 DCMR § 1811.10.

restrictions apply to you at this time (besides the one-year cooling off period) with respect to these projects because you have indicated that Winn (and therefore you) will not be working on them.<sup>25</sup>

In addition, you noted that Winn may respond to the “Northwest One/ Our RFP” project or other projects at DPMED *that you did not work on*. Because you did not work on or have responsibility over those projects, the only post-employment bar that would apply to you is the one-year ban, which expires in March 2017.<sup>26</sup>

You noted that in addition to those above-referenced projects, you also assisted in putting together Planned Unit Development (“PUD”) submission documents for the Deputy Mayor to sign in connection with Sursum Corda, a neighborhood located several blocks north of Union Station. You explained that the District owns the land at Sursum Corda, but it is “not an official project” of DMPED and you did no “official work” on Sursum Corda. Instead, you explained that an attorney from the Sursum Corda Cooperative Association (the “Co-Op”) submitted the PUD paperwork to the Zoning Commission and the Deputy Mayor had to sign off on the PUD forms, which you helped to assemble. You have indicated that Winn will partner with the Co-Op to do pre-development work on Sursum Corda, but you also stated that it is unlikely that Winn will appear before DMPED with respect to Sursum Corda.

Your stated involvement over Sursum Corda while you were at DMPED does not amount to “personal and substantial participation” which would permanently bar you from appearing before or communicating with DMPED regarding Sursum Corda. Instead, I find that your participation in this project was minor and administrative, given that it was limited to preparing forms and did not involve any decision-making or recommendations on your part.

In addition, based on the position description you provided and your stated involvement in the project, I also conclude that you did not have “official responsibility” over Sursum Corda, which would warrant a two-year cooling off period. As the District Personnel Manual provides, official responsibility means having “direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, personally or through subordinates, to approve, disapprove, or otherwise direct governmental action.”<sup>27</sup> This definition usually applies to former managers or agency heads who had oversight of many matters under their jurisdiction, but generally did not perform work on those matters. Instead, these individuals provided general supervision over the matters for which they were ultimately responsible. In your case, Sursum Corda was not an official project that was assigned to you to manage. Instead, you were asked to perform small tasks with respect to Sursum Corda. As such, your role in that regard - preparing administrative paperwork - does not amount to official responsibility, as that

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<sup>25</sup> The same analysis discussed at page 6 regarding specific prohibitions would apply in the event that Winn began working on DMPED projects over which you participated personally and substantially or had official responsibility.

<sup>26</sup> 6B DCMR § 1811.10.

<sup>27</sup> 6 DCMR § 1899.1.



term is defined and understood. Consequently, other than the one-year general restriction prohibiting you from communicating with DMPED, there are no specific post-employment restrictions that apply to you with respect to Sursum Corda.

This advice is provided to you pursuant to section 219 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 19-124; D.C. Official Code § 1-1162.19), which empowers me to provide such guidance. As a result, no enforcement action for a violation of the District's Code of Conduct may be taken against you in this context, provided that you have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

You are also advised that the Ethics Act requires this opinion to be published in the District of Columbia Register within 30 days of its issuance, but that your identity will not be disclosed unless you consent to such disclosure in writing. We encourage individuals to so consent in the interest of greater government transparency. Please, then, let me know your wishes about disclosure.

Pursuant to section 219(c)(1) of the Ethics Act (D.C. Official Code § 1-1162.19 (c)(1)), you may appeal this determination to the Ethics Board. If you wish to do so, please send a written appeal to: Board of Ethics and Government Accountability, Attn: John Grimaldi, Esq., 441 4th Street, N.W. Suite 830 South, Washington, D.C. 20001, or email to [bega@dc.gov](mailto:bega@dc.gov).

Sincerely,

A handwritten signature in dark ink, appearing to read "D. P. Sobin", is written over a horizontal line.

DARRIN P. SOBIN

Director of Government Ethics

Board of Ethics and Government Accountability

#1583-001