



VILLAGE OF OAK PARK
LAW DEPARTMENT

MEMORANDUM

To: Tammie Grossman, Director, Department of Development Customer Services
cc: Bob Tucker, Historic Preservation Commission Trustee Liaison
Cara Pavlicek, Village Manager
From: Paul L. Stephanides, Village Attorney *Paul L. Stephanides*
Date: November 1, 2016
Re: Conflicts of Interest of Historic Preservation Commission Member

I understand that the Historic Preservation Commission ("HPC") has further discussed conflicts of interest related to the HPC's business and legal opinions from 2011 and 2016. Per your request, attached are both opinions for your review. As you can see, the Law Department has been consistent with the fact that HPC members are Village officers and as such, HPC members may not represent clients before the HPC.

Please feel free to review these opinions with the HPC. I would be happy to attend an HPC meeting to answer any questions.



VILLAGE OF OAK PARK
LAW DEPARTMENT

Memo

To: President and Board of Trustees
Village Manager Tom Barwin
Members of the Historic Preservation Commission
Teresa Powell
Doug Kaarre

From: Simone M. Boutet, Acting Village Attorney *Simone M. Boutet*

Date: October 20, 2011

Re: Conflict of Interest

It has recently come to my attention that, from time to time, members of the Historic Preservation Commission act as the architect on a project that comes before the HPC for a certificate of appropriateness. The information I was provided is that when a Commissioner acts as the architect on a project before the Commission, he or she will recuse himself from voting. This practice constitutes a prohibited conflict of interest which is not cured by the member's recusal from voting on that project.

Section 2-25-9(D) of the Village's Conflict of Interest Ordinance specifies that members of Boards or Commissions may not accept an interest in any work which the Board has the duty to approve or disapprove.

**Interest in Contract, Legislative or Administrative Action, Transaction,
Zoning Decision, Permit or Licensing Decision, or Other Matter:**

No elected or appointed officer or employee having the power or duty to perform an official act or action, related to a contract, legislative or administrative action, transaction, zoning decision, permit or licensing decision, or other matter which is, may be or has been the subject of an official act or action of the Village during the prior twelve (12) months shall:

1. Have or thereafter acquire an interest in such contract, legislative or administrative action, transaction, zoning decision, permit or licensing decision, or other matter, except as otherwise stated in this Section; or

2. Have an interest in any business entity representing, advising or appearing on behalf of, whether paid or unpaid, any person involved in such contract, legislative or administrative action, transaction, zoning decision, permit or licensing decision, or other matter, except as otherwise stated in this Section.

The Conflict of Interest Ordinance makes clear that HPC members are prohibited from acting as the architect on a project that comes before the HPC for approval, because they have an interest in seeing the work approved.

The next question is whether the Commissioner's recusal is sufficient to cure the conflict. It is not.

Recusal is necessary and appropriate when a Commissioner is presented with a conflict of interest. However, it is a shield, not a sword. A Commissioner may not intentionally create a conflict of interest by accepting employment that conflicts with his or her role as a Commissioner and then use recusal as a means of correcting that conflict. This concept is codified in Section 2-25-9(E) "**Pre-acquisition of Interest**" which states:

No elected or appointed officer shall acquire an interest in, or an interest affected by, any contract, transaction, zoning decision, or other matter at a time when such officer or employee knew, or reasonably should have known, the interest will be directly or indirectly affected by an official act or action of such elected or appointed officer or employee.

Please review and feel free to contact me with any questions.



VILLAGE OF OAK PARK
LAW DEPARTMENT

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION/CONFIDENTIAL
ATTORNEY WORK PRODUCT MEMORANDUM

To: Honorable Mayor Anan Abu-Taleb and Board of Trustees
cc: Cara Pavlicek, Village Manager
From: Paul L. Stephanides, Village Attorney *Paul L. Stephanides*
Date: July 13, 2016
Re: Historic Preservation Commission Chair's Representation of a Client before the Commission

INTRODUCTION

This memorandum provides the Board with legal framework by which Historic Preservation Commission ("HPC") members are deemed to have a conflict of interest and are required to resign due to such a conflict.

BACKGROUND

HPC Commission Chair Rosanne McGrath filed an application on behalf of Samir Gupta and Julie Whorley ("Petitioners"), who are the owners of 215 North Elmwood in the Village, for a Certificate of Appropriateness with the Village. Chair McGrath is an architect with Studio M Architects, Inc. located at 1227 Columbian Avenue, Oak Park, Illinois and represents the Petitioners as part of her architectural practice. The Applicants seek a certificate of appropriateness from the HPC in order to demolish an existing one story two car garage at the property and construct a new garage with additional living space on the upper floor.

Applications for certificates of appropriateness are heard by the HPC and absent an appeal to the Board of Trustees of a denial of a certificate, are decided by the HPC. Oak Park Village Code at Sec. 7-9-13. A certificate of appropriateness is defined as follows:

CERTIFICATE OF APPROPRIATENESS: A certificate issued by the Commission indicating its approval of plans for the alteration, or construction, or relocation of an historic landmark, or the removal or demolition of an historic landmark or a building, structure or improvement within an historic district.

Oak Park Village Code at Sec. 7-9-2.

The Petitioners' application is scheduled to be heard by the HPC at its July 14, 2016 meeting. In order to represent the Petitioners on their application, Chair McGrath resigned her position on the

~~HPC effective July 12, 2016. A legal analysis is provided below as to why Chair McGrath's resignation was legally required.~~

DISCUSSION

I. Village Code Prohibition

Members of the HPC are designated as Village officers pursuant to Section 2-1-7 of the Village Code:

2-1-7: DESIGNATION OF VILLAGE OFFICERS:

All elected officials, the Village Manager, the Deputy Village Manager, all department heads, members of the Board of Fire and Police Commissioners, Zoning Board of Appeals, Historic Preservation Commission, and members of the boards of trustees of the police and fire pension funds are designated as officers of the Village.

The members of all other appointed Village boards and commissions shall not be deemed to be officers of the Village as said boards and commissions serve solely in an advisory capacity to the Board of Trustees.

All other salaried personnel of the Village shall be deemed employees and not officers.

Oak Park Village Code at Sec. 2-1-7 (emphasis added).

Chapter 2 ("Administration"), Article 25 ("Conflict of Interest and Ethics") of the Village Code governs when Village officers have a conflict of interest. As officers of the Village, HPC members are prohibited from having any interest in a contract or legislative or administrative action "which is, may be or has been the subject of an official act or action of the Village" as follows:

2-25-9: CONFLICTS OF INTEREST AND STANDARDS OF CONDUCT:

* * * *

D. Interest in Contract, Legislative or Administrative Action, Transaction, Zoning Decision, Permit or Licensing Decision, or Other Matter: No elected or appointed officer or employee having the power or duty to perform an official act or action, related to a contract, legislative or administrative action, transaction, zoning decision, permit or licensing decision, or other matter which is, may be or has been the subject of an official act or action of the Village during the prior twelve (12) months shall:

1. Have or thereafter acquire an interest in such contract, legislative or administrative action, transaction, zoning decision, permit or licensing decision, or other matter, except as otherwise stated in this Section; or

2. Have an interest in any business entity representing, advising or appearing on behalf of, whether paid or unpaid, any person involved in such contract, legislative or administrative action, transaction, zoning decision, permit or licensing decision, or other matter, except as otherwise stated in this Section;
or

3. Have solicited or accepted present or future employment with a person or business entity involved in such contract, legislative or administrative action, transaction, zoning decision, permit or licensing decision, or other matter for a period of twelve (12) months following the Village's action on such matter;
or

4. Have solicited, accepted or granted a present or future gift, favor, service or thing of value from or to a person involved in such contract, legislative or administrative action, transaction, zoning decision, permit or licensing decision, or other matter, or from a person who would receive a material benefit, direct or indirect, from same except:

a. An occasional consumable gift or an occasional nonpecuniary gift, with a value of less than fifty dollars (\$50.00);

b. A nonpecuniary award publicly presented in recognition of public service;
or

c. Gifts from family members. No family member, however, may be used as a conduit for a gift which would not otherwise be permitted.

5. Have encouraged, made or accepted any ex parte or unilateral application or communication where a determination is to be made after a public hearing and such person fails to make the contents of the communication a part of the record.

Oak Park Village Code at Sec. 2-25-9(D) (emphasis added). The issuance of a certificate of appropriateness by the HPC is an official act of the Village pursuant to the above provision of the Village Code. Thus, Chair McGrath would have an illegal conflict of interest if she were to represent the Petitioners and remain on the HPC because she would be representing, advising and appearing on behalf of a person involved in the ultimate decision on whether to grant the certificate. Because the HPC will take final action on the application, absent an appeal to the

~~Village Board, the Chair's representation of the Petitioners is prohibited. Thus, recusal and not appearing before the HPC on the application are not sufficient pursuant to this prohibition due to the fact that it is a blanket prohibition and such remedies are not provided for in this section of the Code.~~

Section 2-25-9(F) of the Village Code further provides that no officer shall appear on behalf of a private person:

F. Appearances: No elected or appointed officer or employee shall appear on behalf of or against any private person, other than himself or herself, his or her spouse, or minor children, before any Village agency or municipal court, except for members of the Village Board, who may appear before Village agencies on behalf of Board member's constituents in the course of his or her duties as a representative of the electorate or in the performance of public or civic obligations and in accordance with applicable provisions of Robert's Rules of Order. Such Board members shall not receive compensation for such appearances, other than compensation from the Village.

All appointed Village officers are prohibited from appearing on behalf of any private person before any Village agency pursuant to Section 2-25-9(F) of the Village Code also set forth below. For purposes of Section 2-25-9(F), the HPC would be considered a "Village agency."

On January 18, 1994, the Village Board approved "Rules of Procedure for the Historic Preservation Commission." Section 1.2 of those Rules provides as follows;

Section 1.2 Any Commission member who has a proprietary interest or other conflict of interest, in any matter before the Commission shall not vote thereon and shall remove himself or herself from any meeting or hearing at which said matter is under consideration. If more than four members of the Commission remove themselves from a hearing, the Commission shall refer the matter to the President and Board of Trustee[s] for their direction.

The above rule does not alter the requirement that an HPC member must either resign or not represent an applicant before the HPC for two reasons. First, the Village Code provisions cited above trumps this rule because the Village Code takes precedence over any rule applicable to a board or commission of the Village. Second, the provisions of the Village Code cited above are specific as to their prohibitions and the rule adopted for the HPC is more general and contains undefined terms. A fundamental rule of law is that the specific prevails over the general. *People v. Latona*, 184 Ill.2d 260, 269-70 (1998).

II. State Law Prohibition

The representation of an applicant by an HPC member before the HPC also violates state law and may constitute a Class 4 felony. The Public Officer Prohibited Activities Act, 50 ILCS 105/0.01 *et seq.*, also referred to as the "Corrupt Practices Act", provides as follows:

(a) No person holding any office, either by election or appointment under the laws or Constitution of this State, may be in any manner financially interested directly in his own name or indirectly in the name of any other person, association, trust, or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. No such officer may represent, either as agent or otherwise, any person, association, trust, or corporation, with respect to any application or bid for any contract or work in regard to which such officer may be called upon to vote. Nor may any such officer take or receive, or offer to take or receive, either directly or indirectly, any money or other thing of value as a gift or bribe or means of influencing his vote or action in his official character. Any contract made and procured in violation hereof is void. This Section shall not apply to any person serving on an advisory panel or commission, to any director serving on a hospital district board as provided under subsection (a-5) of Section 13 of the Hospital District Law, or to any person serving as both a contractual employee and as a member of a public hospital board as provided under Article 11 of the Illinois Municipal Code in a municipality with a population between 13,000 and 16,000 that is located in a county with a population between 50,000 and 70,000.

50 ILCS 105/3(a) (emphasis added).

Pursuant to the above language, it is not necessary that the officer actually act or vote; the mere fact that the officer may act or vote can be enough to place the officer in violation of this statute. Abstaining from voting or not even being present at a meeting at which a vote in question might be taken is not enough to absolve the official from a violation of the statute. A violation of the statute is a Class 4 felony which is punishable by a sentence of not less than one year and not more than three years imprisonment, a fine up to \$25,000 and removal from office. 730 ILCS 5/5-4.5-45.

Also, such an act may constitute criminal official misconduct under the following statute:

Sec. 33-3. Official misconduct.

(a) A public officer or employee or special government agent commits misconduct when, in his official capacity or capacity as a special government agent, he or she commits any of the following acts:

~~(1) Intentionally or recklessly fails to perform any mandatory duty as required by law; or~~

(2) Knowingly performs an act which he knows he is forbidden by law to perform; or

(3) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or

(4) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

(b) An employee of a law enforcement agency commits misconduct when he or she knowingly uses or communicates, directly or indirectly, information acquired in the course of employment, with the intent to obstruct, impede, or prevent the investigation, apprehension, or prosecution of any criminal offense or person. Nothing in this subsection (b) shall be construed to impose liability for communicating to a confidential resource, who is participating or aiding law enforcement, in an ongoing investigation.

(c) A public officer or employee or special government agent convicted of violating any provision of this Section forfeits his or her office or employment or position as a special government agent. In addition, he or she commits a Class 3 felony.

(d) For purposes of this Section, "special government agent" has the meaning ascribed to it in subsection (l) of Section 4A-101 of the Illinois Governmental Ethics Act.

720 ILCS 5/33-3. An official misconduct violation is a Class 3 felony which is punishable by a sentence of not less than two years and not more than five years imprisonment and a fine up to \$25,000. 730 ILCS 5/5-4.5-45.

CONCLUSION

An HPC member's representation of a person who has an application pending before the HPC is a conflict of interest under the Village Code. Recusal from voting is not sufficient in order to cure the violation. The member must either resign from office or not represent a person with such an application. Such representation may also violate the Corrupt Practices Act and amount to criminal official misconduct. Thus, Chair McGrath's resignation was required if Chair McGrath wished to proceed with representing the Petitioners and any other persons before the HPC.