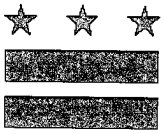
GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



IN RE: JIM GRAHAM,	
Respondent	**CASE No.: AI-002-12**

MEMORANDUM OPINION

I. INTRODUCTION

Before the Board of Ethics and Government Accountability (the "Board") is a preliminary investigation concerning the conduct of District of Columbia Ward One Councilmember Jim Graham. The Board initiated this preliminary investigation *sua sponte* following the public release of a report issued by the Washington Metropolitan Area Transit Authority ("WMATA") concerning Councilmember Graham's conduct while serving as a member of the WMATA Board. The report ("WMATA Report"), issued on October 11, 2012, was prepared by the law firm of Cadwalader, Wickersham & Taft LLP ("Cadwalader") and examined Councilmember Graham's actions in light of the standards of conduct that applied to WMATA board members at the time. The WMATA Report concludes that Councilmember Graham acted contrary to WMATA's standards of conduct by telling a bidder on a WMATA development project that he would support the bidder's efforts to secure a lottery contract before the Council of the District of Columbia if the bidder withdrew from the WMATA project. The WMATA Report further concluded that Councilmember Graham's actions pitted the interests of the D.C. Council against the interests of WMATA, creating a conflict of interest.

The facts recited in the WMATA Report raised the concern that Councilmember Graham's actions transgressed not only WMATA's standards of conduct but also the District's Code of Conduct.[1] The WMATA Report was supported by over 18,000 pages of sworn testimony and documents gathered during the WMATA investigation. Based upon this information the Board made an initial determination that there was reason to believe that Councilmember Graham violated the District's Code of Conduct and authorized this preliminary investigation.[2]

On November 14, 2012, the Board's Director of Government Ethics wrote to Councilmember Graham informing him that the Board commenced a preliminary investigation into his conduct as described in the WMATA Report. The letter asked Councilmember Graham to respond to the Board's concern that his actions violated the District's Code of Conduct. Specifically, the Director asked Councilmember Graham to explain:

1) Whether [he] dispute[s] any of the factual findings contained in the WMATA report; and

2) Whether [he] believe[s] [his] conduct violated the Code of Conduct of the District of Columbia, which includes prohibitions on using public office for private gain, showing preferential treatment, impeding government efficiency, losing complete independence or impartiality, making a government decision outside official channels, affecting adversely the confidence of the public in the integrity of the government (6 DCMR 1803.1(a)(1-6)) and conflicts of interest concerning the award of a contract (6 DCMR 1803.14).[3]

On December 11, 2012, the Board received a written response from Councilmember Graham (the "Graham Letter"), through counsel, William Taylor, III with the law firm of Zuckerman Spaeder, LLP.[4] In his response, Councilmember Graham disagrees with the core factual finding in the WMATA Report that he offered to support the bidder's effort to secure the

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[1] The "Code of Conduct" encompasses "those provisions contained in the following: (A) The Code of Official Conduct of the Council of the District of Columbia, as adopted by the Council; (B) Sections 1-618.01 through 1-618.02; (C) Chapter 7 of Title 2; (D) Section 2-354.16; (E) Chapter 18 of Title 6B of the District of Columbia Municipal Regulations; (F) Parts C, D, and E of subchapter II, and part F of subchapter III of this chapter for the purpose of enforcement by the Elections Board of violations of § 1-1163.38 that are subject to the penalty provisions of § 1-1162.21." D.C. Official Code § 1-1161.01(7).

[2] Based on the information contained in the WMATA Report, the Board determined that there is reason to believe that a violation had been committed and that disclosure of such would not harm the investigation. Accordingly, the Board's investigation, though preliminary in nature, is not confidential. D.C. Official Code § 1-1162.12(d).

[3] Letter from Darrin Sobin, Director of Government Ethics to Hon. Jim Graham, November 14, 2012.

[4] Councilmember Graham publicly released his December 11, 2012 response to the Board.

lottery contract if the bidder simultaneously withdrew from the WMATA project. He further argues that "[even] if we assume that all the facts are true, and they are not, Councilmember Graham's conduct did not violate the District of Columbia's Code of Conduct as codified at 6-B D.C. Mun. Regs. § 1803.1(a)(1-6) and 6-B D.C. Mun. Regs. 1803.14."

Councilmember Graham also challenged the Board's authority to enforce the Code of Conduct against him, under the circumstances related in the WMATA Report, alleging that:

- several of the cited regulations are so vague that to enforce them in this proceeding would violate due process;

- the prohibitions contained in the cited regulations did not apply to Councilmember Graham until late 2009;

- the statute of limitations has run on much of Councilmember Graham's allegedly problematic behavior; and

- given the Ethics Act's[5] new punitive and stigmatizing sanctions for violations, subjecting Councilmember Graham to liability for conduct that occurred more than three years ago would violate the *Ex Post Facto* Clause of the United States Constitution.

As the Board considered Councilmember Graham's response, he asked to appear before the Board, again through counsel, to present oral argument in support of his request that the Board dismiss the preliminary investigation. Mr. Taylor appeared at a public meeting of the Board on January 19, 2013, presented oral argument, and answered questions posed by the members of the Board. He asked that the Board treat his response and argument as a motion to dismiss the preliminary investigation.

The Board is now tasked with deciding whether to continue the preliminary investigation, initiate a formal investigation, issue a Notice of Violation pursuant to DCMR § 3-5509.1, or dismiss the matter entirely. The standard for proceeding to a formal investigation is whether, based upon available evidence, there is reason to believe that a violation has occurred. D.C. Official Code § 1-1161.12(b).

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[5] 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 § 1-1161.01 (2012 Supp.)).

We have considered the WMATA Report, the evidence amassed in support of that Report as forwarded to the Board by Cadwalader, Councilmember Graham's written response, the arguments of counsel as well as the applicable statutes, regulations, and constitutional law. For the reasons that follow, we find there to be sufficient evidence to conclude that Councilmember Graham committed one or more violations of the District of Columbia Code of Conduct, justifying a formal investigation and the issuance of Notice of Violation. However, Constitutional constraints concerning *ex post facto* application of the sanctions available to the Board effectively prevent the Board from imposing any sanction on Councilmember Graham for his misconduct. Without the power to sanction Councilmember Graham, the Board concludes that there is little benefit to advancing the preliminary investigation to a formal investigation and issuing the Notice of Violation. Accordingly, this matter is DISMISSED.[6]

An appropriate ORDER accompanies this Memorandum Opinion.

II. EVIDENCE REVIEWED BY THE BOARD

At issue is Councilmember Graham's conduct in connection with the approval process of two separate contracts before two separate governmental entities: a property development project before WMATA and a lottery contract before the Council of the District of Columbia.[7] Councilmember Graham, as member of the WMATA Board and a member of the Council, was in a position to vote to approve or reject each contract. While the companies bidding on each contract were distinct, they shared a common principal: Warren Williams. Mr. Williams was a principal of Banneker Ventures, the company seeking the WMATA development opportunity, and a co-owner of W2Tech, which formed a joint venture with Intralot, called W2I, to bid on a contract to administer the District's lottery.[8] As we show below, Mr. Williams was also well-known to, and actively disliked by, Councilmember Graham.

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[6] Although the Board concludes the investigation should be dismissed because of the absence of an available sanction, given the public nature of this investigation, the extraordinary body of evidence presented to the Board, and the public release of Councilmember Graham's letter of December 11, 2012, the Board finds it in the public interest to discuss why it would have commenced a formal investigation and issued a Notice of Violation but for the Constitutional restrictions, which are discussed in greater detail in Section IV.D.

[7] The WMATA contract was to develop Metro-owned property on Florida Avenue in Northwest Washington, D.C. Metro's joint development staff recommended that the Metro Board select Banneker Ventures, the development firm that presented the highest bid, to develop the property.

[8] The D.C. lottery earns substantial revenue for the District. According to the D.C. Lottery and Charitable Control Board website, the District's gaming revenue in 2011 was $231 million with a gross margin of $91 million for the District.

A. COUNCILMEMBER GRAHAM BELIEVES THAT WARREN WILLIAMS IS NOT A RESPONSIBLE PUBLIC CITIZEN OR WORTHY OF A PUBLICLY FUNDED CONTRACT.

In his July 27, 2012, Cadwalader deposition, Councilmember Graham candidly acknowledged that he had serious concerns about Mr. Williams, his ethical behavior, and his business practices. Referring to Mr. Williams' involvement with Club U, a nightclub that operated at 14th and U Streets, N.W., Councilmember Graham testified that he was concerned that Mr. Williams' "prior behaviors with the license that we posed trust and confidence in him was so irresponsible and so reckless that it did not qualify him for another government entitlement or license." (Graham Dep. 53:15-19.) Councilmember Graham refers repeatedly, in his Cadwalader deposition, to concerns about Mr. Williams' business practices (Graham Dep. 59:19-61:1.) and testified that there is a "clean hands doctrine that affects all of this." (Graham Dep. 53:20-22.)

These statements are echoed in Councilmember Graham's written response to the Board. He recounts, in great detail, his many complaints and concerns about Mr. Williams and his business enterprises:

- "Williams became notorious in District affairs for his ownership of the Club U nightclub which lost its liquor license after an incident on February 13, 2005, in which a patron was fatally stabbed on the dance floor. . . . In revoking the Club's license, the D.C. Alcoholic Beverage Control Board placed the blame for the violence squarely on the club's owners."

- "Councilmember Graham also had heard that Williams had failed to pay certain obligations due to the District government related to Club U, further confirming Williams's unwillingness to perform basic civic responsibilities."

- "Additionally, Williams was a well-known negligent landlord."

- "Indeed, as is now well-known, Williams was a member of Fenty's inner sanctum of friends – many involved with Banneker Ventures – who were alleged to have been awarded lucrative District government contracts because of who they knew and not their qualifications."[9]

Councilmember Graham also made it clear that he believes that Mr. Williams is responsible for, what he described as, offensive and racist posters depicting Councilmember

[9] Graham Letter, p.3.

Graham in a negative light. Throughout his deposition, Councilmember Graham expressed his strong belief that Mr. Williams was responsible for the posters and described the posters as a "very emotional issue [] for me." (Graham Dep. 55:15-16.) He further believed that Mr. Williams and his family made contributions to the campaign of Chad Williams, a Graham challenger.[10]

Summing up his feelings about Mr. Williams, Councilmember Graham told the Board that, in his view, "Williams was not a responsible public citizen, much less someone worthy of a management role in a publicly funded project."[11]

B. THE ORIGINAL PURPOSE OF THE MAY 29, 2008, MEETING BETWEEN COUNCILMEMBER GRAHAM AND WARREN WILLIAM WAS TO DISCUSS THE LOTTERY CONTRACT.

While both the WMATA and lottery contract approval processes were pending, Councilmember Graham met with Mr. Williams, his wife Alaka Williams, lobbyist Jim Link, and public relations consultant Crystal Wright.[12] Mr. Link and Ms. Wright represented the interests of Intralot and W2I but were not involved with Banneker Ventures. (Link Dep. 26:1-22; Wright Dep. 8:11-21.) This meeting was held on May 29, 2008 in Councilmember Graham's office. (Graham Dep. 42:6-9.) Although the sign-in sheet lists "Lottery Contract" as the purpose of the meeting, Councilmember Graham denied that the purpose of the meeting was to discuss the lottery contract.[13] (Graham Dep. 43:19-22, 45:9-15.) Instead, he testified that:

> I think the purpose of the meeting, as it was expressed to me, was to discuss relationships between the folks who had been involved in Club U and me, in an effort to clear the air, is the way I recall them putting it, and to see if a better relationship couldn't be developed between them and me. So I don't think I would have had necessarily a meeting over the lottery contract per se. Now the lottery contract was discussed but only - - only in passing. Only in passing. Only in passing. (Graham Dep. 42:20-43:19.)

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[10] Councilmember Graham testified that the answer to the question of whether the campaign of Chad Williams was discussed at the May 29, 2008 meeting involved the lottery contract. He testified, "I'm not going to answer. I'm not going to delve that deeply into the lottery contract at this point." (Graham Dep. 88:12-14)

[11] Graham Letter, p.3.

[12] According to the Graham Letter, two members of Councilmember Graham's staff, Steven Hernandez and Calvin Woodland, also attended the meeting. Other attendees represented in their Cadwalader depositions that there may have been only one staffer in attendance, Calvin Woodland. (Wright Dep. 20:8-14; Link Dep. 15:19-22.)

[13] At different points in his deposition, Councilmember Graham, through counsel, asserted legislative immunity regarding decision-making about the lottery contract. Accordingly, Councilmember Graham refused to answer questions concerning the lottery contract. (Graham Dep. 63:5-8.)

In contrast, both Ms. Wright and Mr. Link testified that their understanding of the purpose of the meeting, at the time it was scheduled and at its start, was to discuss the lottery contract. (Link Dep. 13:13-20; Wright Dep. 26:4-7.) Mr. Link's email to Mr. and Ms. Williams, Ms. Wright, and others the day before the meeting makes it clear that the meeting with Councilmember Graham is one of a series of meetings Mr. Link was scheduling with Councilmembers, in an effort to "obtain Council approval of the W2I contract."

The weight of the evidence supports a finding that the purpose of the meeting, as originally scheduled, was to discuss the lottery contract. In addition to the sign-in sheet, which identified the purpose of the meeting as "Lottery Contract," it is significant that both Ms. Wright and Mr. Link were hired specifically to represent the interests of Intralot and W2Tech on the lottery contract. If the meeting was not intended to discuss the lottery contract, there would have been no reason for either Mr. Link or Ms. Wright to schedule or attend it. Nor would Mr. Link or Ms. Wright's presence be required to "discuss relationships between the folks who had been involved in Club U and me, in an effort to clear the air," as claimed by Councilmember Graham. (Graham Dep. 42:20-22.)

Notwithstanding the stated purpose of the meeting, Councilmember Graham raised other matters, including Club U and the violent incident at the nightclub,[14] the offensive posters, Mr. Williams' lease violations and unpaid rent, and Councilmember Graham's concerns about whether Mr. Williams responsibly held an alcohol license. (Graham Dep. 50:6-22; 51:1-4.) Mr. Link testified that Councilmember Graham "started going personal right away, and whether it started with the posters or something else, I know that he placed a folder, an accordion folder as if he had been doing all this research on Warren Williams." (Link Dep. 16:10-14.)

Later in his deposition, Councilmember Graham testified:

> Well, my - - what I have said is directly related to the content of the meeting. And the content of the meeting was all about the revocation of the alcohol license, it was all about the revocation of the alcohol license, it was all about signs which were put up on U street which showed me as kind of a plantation owner, standing, watching blacks being lynched, with the message that Graham wants to drive black bars off of U street, signs that were put up not once but twice and three times after they were taken down by residents, not by me who found them offensive and racist. . . . It was also about their various violations of the lease agreement and the fact that they had a large amount of unpaid rent, which was my information at that time, and that they had been totally uncooperative with the ABC board and with the Metropolitan Police Department . . . .

[14] Mr. Williams was an owner of Club U.

And that's why – it wasn't a discussion of, you know, such-and-such in the lottery contract and, you know, here we're looking at your financial sheets and who are you and what, no." (Graham Dep. 50:6-51:14.)

Councilmember Graham's comments demonstrate the intensity of his negative personal feelings toward Mr. Williams. It explains why Councilmember Graham testified that there was a need to clear the air with Mr. Williams.

C. COUNCILMEMBER GRAHAM REQUESTED THAT MR. AND MS. WILLIAMS PERSONALLY ATTEND THE MAY 29, 2008 MEETING.

There is a dispute as to who requested that Mr. and Ms. Williams attend the meeting, which initially was scheduled by Mr. Link and Ms. Wright to meet with Councilmember Graham and/or his staffers. Councilmember Graham testified that he "did not recall" telling a staffer that Warren Williams should be present at the meeting and claimed that either Warren or Alaka Williams made the decision to attend the meeting. (Graham Dep. 39:5.) Both Mr. Link and Ms. Wright testified in their respective Cadwalader depositions that Councilmember Graham's office called and asked Mr. Link to bring Warren and Alaka Williams to the meeting. (Link Dep. 11:1-6; Wright Dep. 21:9-11.) Notably, Mr. Link and Ms. Wright had been conducting similar meetings with other Councilmembers without the presence of Mr. or Ms. Williams. (Link Dep. 10:1-2; Wright Dep. 16:6-17.) Although Councilmember Graham could "not recall" requesting that Mr. Williams and his wife attend the meeting, the clear recollection of both Ms. Link and Ms. Wright was that he did, in fact, make such a request. (Graham Dep. 49:5; Link Dep. 11:1-6; Wright Dep. 21:9-11.) By doing so, Councilmember Graham created a forum during which he could vent his personal concerns with Mr. Williams and his business practices.

D. NOTWITHSTANDING HIS "SERIOUS CONCERNS" ABOUT WILLIAMS, COUNCILMEMBER GRAHAM OFFERED TO SUPPORT WILLIAMS' BID FOR THE DISTRICT LOTTERY CONTRACT PROVIDED WILLIAMS AND BANNEKER VENTURES WITHDREW FROM THE WMATA DEVELOPMENT PROJECT.

Although Councilmember Graham felt the need to "clear the air" and used the May 29, 2008 meeting to address various personal concerns he had about Mr. Williams, the focus of the Board's investigation is whether during that meeting the Councilmember inappropriately bartered his legislative support. Specifically, several meeting attendees testified that Councilmember Graham told Mr. Williams that if he withdrew from the WMATA Florida Avenue project, Councilmember Graham would support him for the Lottery contract. Mr. Link testified that Councilmember Graham mentioned WMATA when he suggested that ". . . if you [Mr. Williams] walk away from WMATA, he would do the same on the lottery contract . . . ." (Link Dep. 21:5-6.) Mr. Link explained in his deposition that "we all afterwards looked at each

other like did he really say what he said, and we all understood him to say there would be some quid pro quo." (Link Dep. 21:21-22:2.) Mr. Link also testified that Councilmember Graham gave the sense that "Warren [Williams] had been quite successful and had been winning too much." (Link Dep. 33:5-6).

Significantly, in his deposition testimony Councilmember Graham did not explicitly deny offering such a *quid pro quo* to Mr. Williams. (Graham Dep. 64:1-8.) He testified, "I don't have any specific recollection of any discussion of a Metro issue. If there was one, it was said in passing. It was not something to which there was any emphasis given whatsoever." (Graham Dep. 92:13-16.) Nor did Councilmember Graham deny saying to Mr. Williams at the meeting that he was "winning too much" (Graham Dep. 62:19), that he would have to "give me something" (Graham Dep. 62:22), or that there was a "quid pro quo." (Graham Dep. 64:4.) Instead, his answer to each of these questions was "I don't recall." (Graham Dep. 62:20, 63:1, and 64:6, respectively.)

Mr. Link testified that after the meeting with Councilmember Graham, he told the others that he would send a thank you note, which he did in an email on May 30, 2008. (Link Dep. 23:9-13.) That email thanked Councilmember Graham for the opportunity "to engage with you in reconciliation" (Link Dep. 43:1-2) and referred to discussing next steps. Councilmember Graham responded to that by email on June 2, 2008, asking Mr. Link, "Do you think they will do anything?" Curiously, Councilmember Graham testified that he did not know to what his response referred. His testimony is as follows:

> Q. And, Councilmember Graham, you will see that you responded to Mr. Link's e-mail. He sends his e-mail on Friday, May 30 at 1:59 p.m., you respond the Monday, June 2, 2008 at 8:12 a.m.
>
> And you say, "thanks," and you write one line. "Do you think they will do anything?"
>
> A. Right.
>
> Q. What did you mean when you said, "do you think they will do anything"?
>
> A. I really don't know. I really don't know what that refers to. That's the e-mail that Jo-Ann Armao[15] showed me.

[15] Ms. Armao is an editorial writer for the The Washington Post.

Q. You have no recollection on what you meant there?

A. No, I don't.

Q. Do anything with respect to what?

A. I don't know. I don't know what that is referring to.

Q. WMATA? WMATA?

A. I don't know.

Q. Could it have been WMATA?

A. I don't know.

Q. Who is they?

A. I don't know.

Q. You have no understanding what the context of your statement there would have meant?

A. I don't know. (quoting Graham Dep. 80:5-81:9).

Mr. Link, by contrast, clearly understood that Councilmember Graham's response referred to whether "Warren and Alaka, will do anything which was would they accept my offer, my proposal. . . . which was sort of a quid pro quo with regard to WMATA and the lottery contract." (Link Dep. 46:9-15.) Mr. Link responded to that email indicating that everyone at the meeting had taken Councilmember Graham's concerns seriously and that wheels were in motion. When asked about that email, Councilmember Graham testified that he did not know what it meant. (Graham Dep. 79, 80.)

The other meeting attendees took seriously Councilmember Graham's remarks at the meeting and in the subsequent email. Mr. Williams, Ms. Williams, Mr. Link, and Ms. Wright exchanged emails among themselves and with Mr. Williams' attorney, A. Scott Bolden. In those emails, they discussed whether to send Councilmember Graham a more detailed email summarizing both the meeting and his statement requesting that Banneker Ventures withdraw from the WMATA project in exchange for Councilmember Graham's support on the lottery

contract. These emails also discuss the impossibility of Banneker withdrawing from the WMATA project – a discussion prompted entirely by comments made by Councilmember Graham, and understood by the meeting participants to be, a *quid pro quo* offer.

In an email dated June 2, 2008, from Mr. Williams to Ms. Wright, copying Ms. Williams, Mr. Link, and Mr. Bolden, Mr. Williams wrote:

> We should discuss with the councilmember the fact that, even though I don't like it to prove to him that I'm "onboard" and "non-threatning"[sic] I would give him the wmata project. The legal realities are that I can't do that. Banneker Ventures own 35% of the rights to develop the sites. Two other companies have much more to lose. If we tried to drop out they would sue us. We've got six figures of expenses as well as a six figure deposit being held by wmata."

Mr. Bolden responded to this email, also on June 2, 2008:

> I have made my thoughts on this nonsense very clear to [W]arren. [T]his is complete bs [sic] and we are getting very close to corruption, bid rigging and other inappropriate conduct and I am not going to be a part of it. [P]erhaps the us atty [sic] should make the call on this by speaking with Mr. Graham about his request. Am I clear on th[i]s. To even consider it is placing each of us at risk. Period.

Some of the meeting attendees also felt that they should respond to the topics discussed at the meeting. Mr. Link sent Councilmember Graham an email on June 11, 2008:

> We looked into the questions you asked. As you know, Warren Williams spoke emphatically that he had absolutely no involvement in paying for, producing or promoting the racist posters that were painted of you. Warren spoke with his father who said he did not know about or pay for the posters. While he couldn't speak for his partner Paul who is deceased, no one believes he would have paid for them either. Warren also spoke with Sinclair Skinner who denied putting the posters up or paying for them to be produced. He did have a newspaper at one time that he was the editor of called the Georgia Ave. Defender and does remember his editorials that were critical of you and which spoke about gentrification, but that was the extent of his actions. The Williams family confirmed with me again that no family member ever made a contribution to the campaign of Chad Williams, who challenged your seat. . . . As for Metro, there are a number of factors that make it impossible for us to even consider accommodating your request. . . ."

The email also relates that Ms. Wright was contacted by a reporter from the D.C. Examiner regarding the meeting. Less than two hours later, Councilmember Graham responded as follows:

> Sinclair was observed putting the posters up. I would rather not continue this on email. I will check on the examiner. I know I did not speak to them. The rejection of your application at Metro (which has not been approved) is necessitated not by any of this but by other factors relating to the application.

Councilmember Graham's response to the email is significant for several reasons. First, he again raises the issue of the posters; an admittedly important and sensitive personal issue for him. Here, though, Councilmember Graham apparently attempts to hold Mr. Williams – a bidder on the District's lottery contract - responsible for actions Councilmember Graham attributes to Mr. Skinner, a principal in Banneker Ventures.

Second, Councilmember Graham's statement that he "would rather not continue this on email" suggests at a minimum that he is aware that the content of the discussion is such that it should not be memorialized in writing. Read in context with his other emails, it is reasonable to conclude that Councilmember Graham was trying to avoid an explicit discussion of the *quid pro quo* conversation that had occurred on May 29, 2008. When asked in his deposition about this email, Councilmember Graham testified that he wrote that he would rather not continue this on email because "[i]t took too much time to write all of what I had said, you know in terms of a meeting that had lasted many minutes on this very subject." (Graham Dep. 96:1-4.) We find that explanation unconvincing.

Third, this email clearly links the May 29, 2008, meeting to a discussion of the WMATA development project. Mr. Link – who had no involvement with the Banneker Venture proposal before WMATA other than witnessing the *quid pro quo* request from Councilmember Graham – writes to Councilmember Graham: "As for Metro, there are a number of factors that make it impossible for us to even consider accommodating your request. . ." Without even questioning the nature of the "request" identified by Mr. Link, Councilmember Graham responds, "The rejection of your application at Metro (which has not been approved) is necessitated not by any of this but by other factors relating to the application." Given the discussion in the meeting and in the emails, Mr. Williams and/or Mr. Link would understandably believe that Councilmember Graham would work to defeat Banneker's Metro application because of non-substantive issues such as the posters and the campaign contributions.

Finally, in his testimony regarding this email, Councilmember Graham did not deny discussing the WMATA development contract in the May 29, 2008 meeting. He said that "if there was something said about Metro in this meeting on May 29, it was said in passing. It was not something to which there was emphasis given or any kind of real decision accorded."

(Graham Dep. 99:6-10.) Councilmember Graham explained that in his experience it is not unusual for those in a meeting to attach greater or lesser significance to certain things that are said. (Graham Dep. 104:3-7.) Given the conversation that occurred via email following the meeting, however, it seems that all of the meeting participants, including Councilmember Graham, understood that Councilmember Graham wanted Mr. Williams and Banneker to withdraw from the WMATA development project.

The weight of the evidence supports a finding by substantial evidence that Councilmember Graham did, in fact, offer to support Mr. Williams and W2I if he and Banneker Ventures withdrew from the WMATA development project:

- Mr. and Ms. Williams, Mr. Link and Ms. Wright all understood that a *quid pro quo* offer had been made (Link Dep. 35:21-22; 36:1-13.);

- That offer was discussed among the non-government participants immediately following the meeting (Link Dep. 35:21-22; 36:1-13.);

- Mr. Williams consulted with counsel because he was troubled by the Councilmember's request; counsel was similarly troubled; and

- In an email exchange between Councilmember Graham and Mr. Link, who had lobbying responsibility only for the lottery contract, there is an explicit discussion of Councilmember Graham's "request" and the rejection of the Metro deal.

Councilmember Graham's testimony does little to undermine this finding. Unable to recall what was said about the Metro contract in the May 29, 2008, meeting, and unable to explain the meaning or context of his subsequent emails relating to that meeting, Councilmember Graham leaves the Board with no alternative. We conclude, therefore, that notwithstanding the serious business and personal concerns that Councilmember Graham had with Mr. Williams, he offered to support Mr. Williams' bid for the District's lottery contract if Mr. Williams and Banneker withdrew from the WMATA development project. The evidence further reflects a likely motive for Councilmember Graham to seek the withdrawal of Banneker Ventures: he wanted the project to go to another development company, LaKritz Adler.

E. COUNCILMEMBER GRAHAM EXPRESSED A CLEAR PREFERENCE, AND MADE EFFORTS TO SECURE THE WMATA CONTRACT, FOR LAKRITZ ADLER.

In his deposition and in his letter to the Board, Councilmember Graham acknowledged LaKritz Adler, a real estate investment, development, and management company, and a

competitor of Banneker, successfully developed several projects in Councilmember Graham's Ward. (Graham Dep. 183:10-11; Graham Letter, p.6.) LaKritz Adler, which held a controlling interest in property adjacent to the development site, had also bid on the WMATA Florida Avenue project. (Graham Dep. 182:122-15.) LaKritz Adler was not recommended by the WMATA project development committee, however, because its bid would not give WMATA sufficient return on its investment in the property. (WMATA Report, p.16, n.13.) Nonetheless, Councilmember Graham openly supported LaKritz Adler for the Florida Avenue project. (WMATA Report, pp. 40-41.) The WMATA Report details statements and testimony from various WMATA employees and other witnesses who felt that Councilmember Graham was strongly supporting and recommending LaKritz Adler. (WMATA Report, pp. 40-41, nn.146-51.)

LaKritz Adler was a donor to Councilmember Graham's political campaigns. (Graham Dep. 183:7-21.) In his deposition, Councilmember Graham testified, "I had known LaKritz Adler from several projects they had done on Georgia Avenue. And I believe that they did make contributions. I don't know whether you'd consider it significant. I don't think it was much more than a couple thousand dollars." (Graham Dep. 183:10-15.)

When it became apparent that the WMATA project development committee was recommending Banneker Ventures, Councilmember Graham nevertheless continued his efforts to have LaKritz Adler involved in the project. In addition to making efforts to get Banneker to withdraw from the project, Councilmember Graham sought to have Banneker bring on LaKritz Adler as a partner. (Graham Dep. 183:10-15.)

After the May 29, 2008 meeting, while the attendees were exchanging emails concerning Councilmember Graham's suggestion that Banneker withdraw from the WMATA project, they also exchanged emails concerning LaKritz Adler. The emails demonstrate the interplay between campaign contributions and the development opportunity. They support the testimony of several of the meeting participants that Councilmember Graham's support for LaKritz Adler, and his opposition to Mr. Williams and Banneker, was driven – at least in part – by the fact that LaKritz Adler had contributed to Councilmember Graham while Banneker had contributed to his opponent. In a June 2, 2008, email from Mr. Williams to Mr. Link and Ms. Wright (copying Mr. Bolden and Ms. Williams), Mr. Williams wrote:

> I think being honest with Graham is the right move as well. We have begun some preliminary talks with LaKritz, the developer he wants to see win the site. If Graham wants to cut the deal with LaKritz for a "better project" we could do that. But I just can't give the project to anyone. . . . One other thing that should be mentioned to council member Graham is that we have tried to support him several times during his run for city council and that he has accepted thousands of dollars that were bundled and hand

delivered to him from Club U and various entities that were in my control. Thousands. So when he ask [sic] was I funding his enemies, the answer is no they funded you Mr. Graham.

Omar Karim, another principal of Banneker Ventures, also provided testimony that he was being pressured by Councilmember Graham to bring on LaKritz Adler as a development partner in the Florida Avenue project. (Karim Dep. 36:5-9.) In his deposition, he explained that he contacted LaKritz Adler at the direction of Councilmember Graham and would not have done so but for the Councilmember's request. (Karim Dep. 37:5-9.) He further testified that Councilmember Graham was "pushing LaKritz Adler at the same time and then pushing LaKritz Adler on us,"[16] and that "LaKritz Adler didn't have any of the experience we had." (Karim. Dep. 156:22-157:3.). When Mr. Karim contacted LaKritz Adler at Councilmember Graham's request, the person he spoke with did not seem surprised by his call (Karim Dep. 39:8-9).[17]

Councilmember Graham suggested that Banneker Ventures partner with LaKritz Adler, or purchase the interest LaKritz Adler held in the adjacent property, a move that would serve the financial interests of LaKritz Adler. Graham testified that although he did not recall suggesting that Banneker purchase LaKritz Adler's interest in this adjoining property, he thought:

> . . . that was an obvious step, because in anticipation of their proposal, LaKritz Adler had an option on an adjacent parcel. Obviously, incorporating that into the - - into the deal would have strengthened the development deal. And I don't know whether that option had monetary value or not or whether it would have expired. Because I don't think anybody would have developed that smaller site by itself. But ultimately it was incorporated into the Banneker deal." (Graham Dep. 182:13-183:1).

Other than the campaign contributions, there is no evidence before the Board that Councilmember Graham received any financial benefit from LaKritz Adler or would have benefitted, personally and financially, if LaKritz Adler had been awarded the WMATA project. Nonetheless, there is significant evidence that Councilmember Graham had a strong preference for LaKritz Adler and exerted pressure on the principals of Banneker Ventures to abandon its bid

[16] Mr. Karim was deposed a second time, on August 21, 2012. Karim deposition pages 139 to 202 refer to this second deposition.

[17] Interestingly, Councilmember Graham testified that he does not recall having any meetings or conversations with LaKritz Adler regarding the Florida Avenue project. (Graham Dep. 38:16-22.)

or partner with LaKritz Adler. Each of these outcomes could provide a financial benefit to LaKritz Adler, a Graham campaign contributor.[18]

We conclude, based on the evidence before us, that Councilmember Graham demonstrated a strong preference that LaKritz Adler be awarded the WMATA development project notwithstanding the recommendation of the WMATA joint development committee that its bid would not provide the best return for WMATA. His preference took the form of exerting pressure on the principals of Banneker, Mr. Williams and Mr. Karim, to withdraw from the project, bring on LaKritz Adler as a partner, and/or purchase LaKritz Adler's interest. In his zeal to bring a benefit to LaKritz Adler, the evidence strongly suggests that Councilmember Graham was motivated, at least in part, by the fact that LaKritz Adler contributed to his campaign and that Banneker and Mr. Williams contributed to his opponent.

III. THE EVIDENCE SUPPORTS A FINDING THAT COUNCILMEMBER GRAHAM VIOLATED THE DISTRICT OF COLUMBIA CODE OF CONDUCT.

As a public official, Councilmember Graham is entrusted at all times with acting in the public interest, impartially, within the bounds of his duly appointed office, and not out of any personal *animus*. The weight of the evidence before the Board demonstrates that he acted contrary to these obligations.

As a member of the Council of the District of Columbia, Councilmember Graham is subject to the employee conduct regulations applicable to all District of Columbia employees:

> An employee shall avoid action, whether or not specifically prohibited by this chapter, which might result in or create the appearance of the following:
>
> (1) Using public office for private gain;
>
> (2) Giving preferential treatment to any person;
>
> (3) Impeding government efficiency or economy;
>
> (4) Losing complete independence or impartiality;

[18] Councilmember Graham's own acknowledgment that he did not believe that anyone would develop the smaller, LaKritz Adler site by itself is significant. By pressuring Banneker to partner with LaKritz Adler during the period of exclusive discussions between WMATA and Banneker, Councilmember Graham was offering a lifeline to LaKritz Adler which otherwise would see its financial stake in its property diminished.

(5) Making a government decision outside official channels; or

(6) Affecting adversely the confidence of the public in the integrity of government.[19]

As described above, Councilmember Graham had a significant role in the approval process for two contracts where Warren Williams and his companies had an interest. The Councilmember would be voting on a lucrative and important contract to manage the District's lottery system. Moreover, as one of the two District of Columbia appointees to the WMATA Board, Councilmember Graham's vote and possible jurisdictional veto[20] carried significant weight on development projects in the District, including the Florida Avenue site. In exercising that legislative authority he had a duty to act solely in the public interest. For the reasons discussed above, we find that Councilmember Graham did not do so and violated the District of Columbia standards of conduct. We conclude that there is substantial reason to believe that Councilmember Graham violated at least three sections of the Code of Conduct: DCMR § 6B-1803.1(a)(2) - Giving preferential treatment to any person; DCMR § 6B-1803.1(a)(4) - Losing complete independence or impartiality; and DCMR § 6B-1803.1(a)(6) - Affecting adversely the confidence of the public in the integrity of government.

A. DCMR § 6B-1803.1(A)(4) - LOSING COMPLETE INDEPENDENCE OR IMPARTIALITY

The Board finds that the weight of the evidence demonstrates that Councilmember Graham's opposition to Mr. Williams and Banneker Ventures being awarded the WMATA development project was motivated in significant part by his personal animus against Mr. Williams and his efforts to secure the project for LaKritz Adler. While there may have been legitimate business reasons to prefer LaKritz Adler over Banneker, Councilmember Graham's efforts to oust Banneker and include LaKritz Adler establish that he lost the complete independence and impartiality expected in the decision-making process.

There is substantial evidence that Councilmember Graham bore great personal animosity toward Mr. Williams. Councilmember Graham held Mr. Williams responsible for:

[19] DCMR § 6B-1803.1(a). These proscriptions were in place in 2008, the period of time during which the relevant conduct occurred. As discussed in more detail below, these very same standards were adopted, *verbatim*, by the Council of the District of Columbia when it adopted its own Code of Conduct in 2009.

[20] See WMATA Report, p. 19 for a discussion of the jurisdictional veto held by members of the WMATA Board over projects in their respective jurisdictions.

- the violence at Club U, saying that he was "all too familiar with Warren Williams's [sic] abdication of responsibility in the face of increasing violence in and around the club"[21];
- failing to pay financial obligations to the District;
- negligent management of an apartment building; and
- distributing (what Councilmember Graham found to be) racially offensive posters about the Councilmember.

There is also evidence that Councilmember Graham bore ill will toward Mr. Williams and Banneker because they had contributed to the campaign of someone who challenged the Councilmember for his seat on the Council.

While Councilmember Graham is entitled to his personal opinion of Mr. Williams and Banneker Ventures, this strong animus served as a vehicle for Councilmember Graham to exert pressure on Mr. Williams in an unabashed effort to push Banneker Ventures out of the WMATA development deal. Councilmember Graham himself acknowledged that he had serious concerns which affected him personally and emotionally about Mr. Williams and that these issues came up at the May 29, 2008 meeting during which Councilmember Graham sought to "clear the air." The weight of the evidence is that Councilmember Graham used that personal animus and his vote on the District lottery contract to pressure Banneker's withdrawal from the WMATA deal.

We find unconvincing Councilmember Graham's claim that his opposition to Mr. Williams and Banneker was based entirely on his judgment that Mr. Williams was unqualified to hold the development contract. Indeed, his offer to support Mr. Williams and W2I in the lottery bid belies that claim.

The language Councilmember Graham used in his written response to the Board is striking: "Williams [i]s not a responsible public citizen, much less someone worthy of a management role in a publicly funded project." Unworthy of the WMATA development deal because he was not a "responsible public citizen," Mr. Williams would presumably be equally unworthy of the District's lottery contract, where he would also have a "management role in a publicly funded project." Nevertheless, Councilmember Graham offered his support for the lottery contract, provided Banneker withdrew its WMATA bid. As we discuss below, we find that Councilmember Graham did so primarily to benefit LaKritz Adler. Under these circumstances, we find that the conduct of Councilmember Graham displayed a complete lack of impartiality.[22]

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[21] Graham Letter, p.3.

[22] We distinguish here between Councilmember Graham opposing Banneker solely on the basis that it was unqualified to hold the WMATA project - a reasonable and objective basis to disapprove a contract award - and Councilmember Graham's personal animus toward Mr. Williams and his efforts to aid LaKritz Adler.

B. DCMR § 1803.1(A)(2) - GIVING PREFERENTIAL TREATMENT TO ANY PERSON

At the oral argument before the Board, Councilmember Graham's attorney correctly argued that legislators are entitled to express their preferences when considering and approving contracts. They must do so, however, in a manner that does not reflect inappropriate preferential treatment for any person or company. There is overwhelming evidence before the Board that Councilmember Graham had a clear inappropriate preference for LaKritz Adler in the WMATA development deal. In addition to his communications with the WMATA staff, he used his legislative office to exert pressure on the principals of Banneker Ventures to withdraw from the project (paving the path for LaKritz Adler) and include LaKritz Adler as a development partner. The testimony of the principals of Banneker Ventures on this point was largely uncontested. As we describe above, the fact that LaKritz was a campaign contributor was a significant factor in Councilmember Graham's efforts.

Whether or not Councilmember Graham had sound business reasons to prefer LaKritz Adler, the actions he took to pressure Mr. Williams and Banneker to abandon their bid or include LaKritz Adler were inappropriate. Offering to support Mr. Williams on the lottery contract as a *quid pro quo* for withdrawing from the WMATA project is evidence of his efforts to benefit LaKritz Adler. In doing so, Councilmember Graham went well beyond the contract approval process and sought to steer a benefit to LaKritz Adler, a campaign contributor.

C. DCMR § 6B-1803.1(A)(6) - AFFECTING ADVERSELY THE CONFIDENCE OF THE PUBLIC IN THE INTEGRITY OF GOVERNMENT

The public is entitled to have confidence in the integrity of their public officials and confidence that their decisions are being made transparently and in the best interests of the District of Columbia. When legislators take actions based on personal animus or in an effort to given preferential treatment to a close friend, business associate, or campaign contributor, public confidence is eroded. We find, based on the evidence before us, that notwithstanding Councilmember Graham's serious concerns about Mr. Williams, he did in fact offer to support Mr. Williams and W2I in their bid for the lottery contract if Mr. Williams and Banneker withdrew from the WMATA project. His purpose in doing so was, in significant part, to provide a benefit to his campaign contributor, LaKritz Adler.

We find it especially troubling that Councilmember Graham was willing to support Mr. Williams in his efforts to secure the lottery contract given his strongly held belief that Mr. Williams was "unworthy of a management role in a publicly funded project." Given the *quid pro quo* offer made during the May 29, 2008 meeting, Councilmember Graham was willing to barter his support in an undisguised effort to assist LaKritz, even if it meant having an

"unworthy" businessman in a position of power over the District's lottery. At the oral argument, Councilmember Graham's counsel was unable to reconcile these contrary positions.

Councilmember Graham attempts to characterize his conduct as no more than "sharp-elbowed political behavior."[23] This characterization is misplaced. The public expects its government officials to voice their strongly held beliefs, negotiate, and compromise when necessary to further the public interest. Here, Councilmember Graham's "sharp-elbowed" tactics were designed, not in support of the public interest, but rather to exact punishment on Mr. Williams and steer a benefit to LaKritz Adler, his campaign contributor. Councilmember Graham does not distinguish between the political 'horse trading' that takes place *among elected public officials* acting on public business and the inappropriate *quid pro quo* he attempted to negotiate with a private citizen who was pursuing his own interests.

In sum, Councilmember Graham's *quid pro quo* offer to support Mr. Williams on the lottery contract if Banneker Ventures would abandon the WMATA development project was part of a concerted effort to benefit LaKritz Adler. Under the circumstances presented here, the Board would find that his actions adversely affected the confidence of the public in the integrity of the legislative process. The citizens of the District of Columbia are entitled to know that critical decisions affecting them and their city are made transparently and without personal animus or unfair preferential treatment, thereby ensuring public confidence in the integrity of the District government. We find there is substantial evidence that Councilmember Graham's conduct violated this standard.[24]

Given the substantial evidence that Councilmember Graham violated the District's Code of Conduct, we would vote to commence a formal investigation and issue a Notice of Violation. However, for the reasons discussed below, we decline to do so because the Board is without the ability to sanction Councilmember Graham for his misconduct.

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[23] Graham Letter, p.2.

[24] The Board also considered whether Councilmember Graham's conduct violated DCMR § 6B-1803.1(a)(5): "An employee shall avoid action, whether or not specifically prohibited by this chapter, which might result in or create the appearance of . . . making a government decision outside official channels." There is insufficient evidence before us about Councilmember Graham's role in approving the lottery contract and whether he had the ability to effectively make a "decision" about the contract when he made his offer to support Mr. Williams' bid for that contract. We were therefore unable to conclude that his actions also violated this standard of conduct. Had this matter proceeded to a formal hearing, more evidence may have been adduced on this issue.

IV. ANALYSIS OF LEGAL ISSUES RAISED BY COUNCILMEMBER GRAHAM

A. WHETHER THE DISTRICT CODE OF CONDUCT IS VAGUE

Councilmember Graham claims that the District of Columbia Code of Conduct is so vague as to violate due process. He asserts that the Code fails to meet the standard articulated by the Supreme Court in *Kolender v. Lawson,* 461 U.S. 352, 357 (1983) that a statute must give proper notice as to what conduct is prohibited. *Kolender* concerned a California statute that "requires persons who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when requested by a peace officer." *Id.* at 352. The Court held that the statute was "unconstitutionally vague on its face because it encouraged arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Id.* at 357. The statute left too much discretion to the "moment-to-moment judgment of the policeman on his beat." *Id.* Ordinary people, the Court held, must be able to understand the conduct that is prohibited and the statute must not encourage arbitrary and discriminatory enforcement.

Unlike the statute at issue in *Kolender*, the District's Code of Conduct is written in plain language that makes it clear to average employees at all levels of District government that they cannot engage in conduct that creates the appearance of impropriety. The rules are based on common sense and are easily followed. We do not find them to be vague. They are written in a way to encompass a wide variety of behavior that is improper and prohibited. Given the numerous and various ways that government employees could use their office for private gain, to give preferential treatment, or adversely affect public confidence in the integrity of government, it is unrealistic to expect statutes and regulations to spell every method in detail.

Similarly, there is nothing about the District's Code of Conduct that encourages arbitrary and discriminatory enforcement, as evidenced by the dearth of court cases challenging its application to District government employees. Enforcement of the provisions of the District Code of Conduct is not left to the momentary judgment of a single individual, as was the case in *Kolender*. Instead, enforcement is vested in the Board and the Ethics Act provides a series of constitutional and procedural safeguards, including an adversarial evidentiary hearing, before a final decision is rendered by the Board and sanctions are imposed.

As was discussed in the oral argument before the Board, the Council chose to adopt its own, separate Code of Conduct on September 22, 2009 (now included as part of the District's Code of Conduct). It is telling that the Council adopted the exact same standards using the exact same language as contained in DCMR § 6B-1803.1. Indeed, the six types of prohibited conduct

listed in DCMR § 6B-1803.1 are contained, *verbatim*, in the Council's Code of Conduct.[25] Clearly the Council itself – including Councilmember Graham who voted to adopt the Council's Code of Conduct – did not feel that the language was impermissibly vague. Nor do we.

B. WHETHER ENFORCING DCMR § 6B-1803.1 UNDER THESE CIRCUMSTANCES VIOLATES THE APPLICABLE STATUTE OF LIMITATIONS

Among Councilmember Graham's jurisdictional challenges to the Board's authority is a claim that the applicable "statute of limitations has run on much of Councilmember Grahams' allegedly problematic behavior."[26] He claims that a three-year limitations period applies to the Board's ability to enforce DCMR § 6B-1803.1 and since his actions occurred in 2008 we are without authority to enforce the regulations against him. We disagree.

The Board is empowered to investigate and sanction violations of the District Code of Conduct that occurred within five years of the discovery of the alleged violation. D.C Official Code § 1-1162.21.[27] There is no other limitations period that directly applies to DCMR § 6B-1803.1 which are the standards of conduct that apply to all District government employees, including members of the Council.[28] Previously violations were subject only to the equitable limitation of laches.

We find unpersuasive Councilmember Graham's argument that the three-year statute of limitations provided for in D.C. Official Code § 1-1107.01 pertaining to conflict of interest actions brought by the District of Columbia Board of Elections ("Board of Elections") would apply here. Nothing about the language of that provision compels the conclusion that violations of DCMR § 6B-1803.1 should be subjected to the same limitation. The fact that the Board of Elections was previously responsible for enforcing conflict of interest violations, as well as

[25] "Councilmembers shall avoid all actions which might result in, or create the appearance of, the following: (a) Using public office for private gain; (b) Giving preferential treatment to any person; (c) Impeding government efficiency or economy; (d) Losing complete independence or impartiality; (e) Making a government decision outside official channels; or (f) Affecting adversely the confidence of the public in the integrity of government." Resolution Number 18-0248, 56 D.C. Reg. 7804 (Sept. 22, 2009).

[26] Graham Letter, p. 15.

[27] The relevant provision of the Ethics Act reads as follows: "All actions of the Ethics Board . . . to enforce the provisions of this title must be initiated within 5 years of the discovery of the alleged violation."

[28] For purposes of DCMR § 6B-1803.1, an "employee" is an "[a] individual employed by the District of Columbia government and subject to D.C. Code title 1, chapter 6 (1981)." DCMR § 6B-1899.1. Councilmembers are subject to Title 1, Chapter 6: "The term "employee" means, except when specifically modified in this chapter, an individual who performs a function of the District government and who receives compensation for the performance of such services." D.C. Official Code § 1-603.01(7).

violations of DCMR § 6B-1803.1, does not alter our view. Different violations may have different limitation periods, or none at all. With a five-year limitations period, it would appear that the Board has jurisdiction to consider alleged violations of the Code of Conduct that occurred in May, 2008.

C. WHETHER RETROACTIVE APPLICATION OF THE ETHICS ACT STATUTE OF LIMITATIONS IS CONSTITUTIONALLY PROHIBITED.

We reject Councilmember Graham's assertion that his conduct is beyond the reach of the Board because the limitations period has expired. The Board's five-year limitations period applies to all proceedings by the Board to enforce the Code of Conduct, including DCMR § 6B-1803.1. We recognize, however, that there are parts of the Code of Conduct – e.g., the three-year limitations period prescribed by D.C. Code § 1-1107.01 to conflict of interest enforcements – that previously had a shorter limitations period than the current five-year limit contained in the Ethics Act. We agree that application of the five-year period to violations that expired under the previous limitations period amounts to retroactive application of the new limitations period. We take this opportunity, therefore, to clarify our position on the issue of retroactivity.

In *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) the Supreme Court recognized that there is a presumption against statutory retroactivity "founded upon elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* at 245. The Court held that "[w]here the new statute would have a genuinely retroactive effect - i.e., where it would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed - the traditional presumption teaches that the statute does not govern *absent clear congressional intent favoring such a result.*" *Id.* (emphasis added).

We then turn to the Ethics Act, itself. The Act is completely silent on whether the Council intended the new five-year limitations period to apply retroactively. While legislative intent can sometimes shed light on the purpose of the provision, the Council of the District of Columbia Committee on Government Operations Report for Bill 19-511, dated December 5, 2011, ("Committee Report") is equally silent on the issue of retroactivity. We are unable to conclude, therefore, that the five-year limitations period was meant to encompass conduct occurring before the previous limitations period expired.[29] Without this language the Board may only enforce violations of the Code of Conduct where the offending actions took place within the pre-existing limitations period. The Council, of course, is free to specify otherwise, but until such time the five-year limitations period may only be applied prospectively.

[29] To be clear, that is not the situation with Councilmember Graham. His conduct occurred in 2008 and was governed by DCMR § 6B-1803.1 where no limitations period then applied.

D. WHETHER RETROACTIVE APPLICATION OF THE ETHICS ACT'S INCREASED SANCTIONS IS CONSTITUTIONALLY PROHIBITED.

In 2008, when the relevant acts occurred, the Board of Elections was responsible for enforcing the provisions of DCMR § 6B-1803.1 against members of the Council of the District of Columbia.[30] However, the Board of Elections was without the power to sanction a Councilmember; it did not have the power to levy fines or censure a member of the Council for violations of those provisions. The Ethics Act gives the Board enhanced power to sanction government employees for misconduct, including the ability to fine or censure a member of the Council for a violation of the Code of Conduct. Councilmember Graham argues that retroactive application of the Board's enhanced sanction authority on his conduct that occurred before the effective date of the Ethics Act violates the constitutional prohibition on *ex post facto* legislation. We agree.

In addition to considering whether the extended limitations period would properly apply, the Court in *Landgraf* found that a statute authorizing punitive damages that were not available when the conduct occurred "would raise a serious question under the Ex Post Facto Clause if retroactively imposed." *Id.* at 246. The *Ex Post Facto* Clause is found in Article I, §9, cl. 3[31] and Article I, §10, cl. 1[32] of the U.S. Constitution and applies to the federal government and the states, respectively. *Ex post facto* means "after-the-fact" and the *Ex Post Facto* Clause "protects liberty by preventing governments from enacting statutes with 'manifestly unjust and oppressive' retroactive effects." *Stogner v. California*, 539 U.S. 607, 607 (2003). The *Stogner* Court, relying on the 1798 case of *Calder v. Bull*, 3 Dall. 386, 391, identified the four categorical descriptions of *ex post facto* laws:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
> 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed.
> 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.
> 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

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[30] DCMR § 6B-1802.1.

[31] "No Bill of Attainder or ex post fact Law shall be passed."

[32] "No state shall . . . pass any . . . ex post facto Law...."

(Stogner at 611 quoting Calder at 390-391, "emphasis altered from original"). Here, Councilmember Graham argues that application of the Board's increased sanction authority would violate the third category of prohibited *ex post facto* laws by inflicting a "greater punishment[] than the law annexed to the crime, when committed." *Stogner* at 611, citing *Calder* at 390-391.

Generally speaking, the *Ex Post Facto* Clauses of the U.S. Constitution are interpreted to apply only to criminal laws. The Clauses do, however, apply to civil or regulatory statutes that are essentially masquerading as criminal ones in that they are punitive in nature. As noted by the Supreme Court in *Collins v. Youngblood,* 497 U.S. 37 (1990), "[s]ubtle ex post facto violations are no more permissible than overt ones." *Id.* at 46.

The Court has developed an "intent-effects test" to determine whether the intent of the legislature when passing a new statute was to make it punitive. The first prong of the analysis is whether "the intention of the legislature was to impose punishment . . . ." *Smith v. Doe*, 538 U.S. 84, 92 (2003). If so, the inquiry into the intent of the legislature ends. If, however, "the intention of the legislature was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Id.*, quoting *United States v. Ward,* 448 U.S. 242, 248-249 (1980). In conducting this analysis in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the U.S. Supreme Court examined factors such as whether the sanctions involve restraint, historically have been regarded as punishment, and/or promotes the traditional aims of punishment, retribution and deterrence. *Id.* at 168-169.

The question before the Board then is whether the Council intended the sanctions available under the Ethics Act to impose punishment or to be civil or regulatory in nature. We readily conclude that the intention of the Council in enacting the Ethics Act and its penalty provisions was to impose punishment.

The Ethics Act authorizes the Board to assess financial penalties of up to $5,000 per violation of the Code of Conduct. D.C. Official Code § 1-1162.21(a)(1). In addition, "[a]ny person who commits a violation of the Code of Conduct that substantially threatens the public trust shall be fined not more than $25,000, or shall be imprisoned for not longer than one year, but not both." D.C. Official Code § 1-1162.21(b)(1). With respect to public officials such as Councilmembers, the Ethics Board may also "censure a public official for a violation of the Code of Conduct that the Ethics Board finds to substantially threaten the public trust." D.C. Official Code § 1-1162.22(a). The Ethics Board "may recommend in such censure that the Council suspend or remove a Councilmember's committee chairmanship, if any, . . . or vote in any

committee." D.C. Official Code § 1-1162.22(b).[33] By vesting the Board with the power to levy fines, censure public officials, and by creating criminal consequences, the Ethics Act created a sanction scheme that was clearly designed to be punitive

The preamble to the Council's Committee Report in support of the Ethics Act demonstrates the Council's intent to impose "enhanced penalties" for violations of the Code of Conduct. (Committee Report, p. 2.) The Committee Report notes that the Code of Conduct set forth in the DCMR § 6B was not being enforced by the Board of Elections, but rather by the employer, who was responsible for taking adverse employment action. Under then-existing law, elected officials were expected to comply only with the general policy of maintaining a high level of ethical conduct and refraining from conduct that adversely affects the public trust. There were "no penalties [monetary or otherwise] for violating this policy" (*Id.* at 8-9). The Committee Report refers to the Ethics Act as "an enhanced ethics regime" (*Id.* at 9) designed to restore the public trust. The Committee Report language supports our conclusion that the Council intended the penalties section of the Ethics Act to be punitive in nature and intended the punishments to be greater than those previously available.

Since the Board of Elections had no authority to sanction Councilmembers for violations of DCMR § 6B-1803.1, the imposition of *any* sanction by this Board would be both punitive and greater than what was available prior to the Board's effective date. This increased punishment would violate the *Ex Post Facto* Clause of the U.S. Constitution.

V. WITHOUT AN AVAILABLE SANCTION, THE BOARD DECLINES TO BEGIN AN ENFORCEMENT ACTION.

Before the Board is a substantial body of evidence that Councilmember Graham violated at least three provisions of the District of Columbia Code of Conduct. For all of the reasons and based on all of the evidence recited above, we find that Councilmember Graham abandoned his impartiality and demonstrated inappropriate preferential treatment in his dealings with Mr. Williams, Banneker Ventures, and LaKritz Adler. By offering his support for Mr. Williams and his bid for the District's lottery contract in exchange for Banneker's withdrawal from the WMATA development project – a move designed to benefit LaKritz Adler, a campaign contributor - Councilmember Graham engaged in conduct that adversely affected the public confidence in the integrity of government. Given this evidence, we would vote to begin a formal investigation and issue a Notice of Violation.

[33] As we note above, none of these sanctions was available to the Board of Elections.

We are, however, without any sanction authority. To proceed with an evidentiary hearing would require the Board, its staff, and Councilmember Graham to invest significant time and resources to prosecute and defend an action where no sanction could be imposed. We find this to be an unwise use of resources. Instead, because of the extensive factual record that has been developed and the opportunity for Councilmember Graham to explain his conduct – in his deposition, in his letter to the Board, and in his arguments through Counsel – we are confident that our analysis of the evidence at this preliminary stage is more than adequate to support the required finding that would justify a formal investigation and Notice of Violation. If the Board had the ability to sanction Councilmember Graham for his conduct, we would proceed with such a Notice.

Accordingly, it is the decision of the Board to dismiss the preliminary investigation of Councilmember Graham. An appropriate Order accompanies this Memorandum Opinion.

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

IN RE: JIM GRAHAM, **Respondent**	**CASE No.: AI-002-12**

ORDER OF THE BOARD

Pursuant to 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 § 1-1161.01 (2012 Supp.)), in October 2012, the Board of Ethics and Government Accountability ("Board") initiated a preliminary investigation of possible violations of the Code of Conduct by District of Columbia Councilmember Jim Graham.

By Order of the Board on this date, and as explained in the Memorandum Opinion that accompanies this Order, the Board concludes that *ex post facto* principles prevent it from imposing sanctions in this matter. Accordingly, the preliminary investigation is dismissed pursuant to D.C. Official Code § 1-1161.12(c).

Dated: February 7, 2013.

ROBERT J. SPAGNOLETTI
Chairman
Board of Ethics and
Government Accountability

DEBORAH LATHEN
Member
Board of Ethics and
Government Accountability

LAURA RICHARDS
Member
Board of Ethics and
Government Accountability