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).

[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

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[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

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

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

MEMORANDUM OPINION - SUMMARY

Before the Board of Ethics and Government Accountability is a preliminary investigation concerning the conduct of District of Columbia Ward One Councilmember Jim Graham. The Board initiated this preliminary investigation following the public release of an October 11, 2012 report issued by the Washington Metropolitan Area Transit Authority concerning Councilmember Graham's conduct while serving as a member of the WMATA Board.

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. 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 authorized this preliminary investigation and asked Councilmember Graham to respond to the Board's concern that his actions violated the District's Code of Conduct. Councilmember Graham responded in writing on December 11, 2012 and in an oral argument before this Board, through counsel, on January 18, 2013.

The Board must now decide whether to continue the preliminary investigation, initiate a formal investigation, issue a Notice of Violation, 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.

We are today issuing an Order concerning the preliminary investigation and take this opportunity to summarize our findings. The full Memorandum Opinion and Order will be released immediately following this meeting and will be posted on the Board's website. 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 a Notice of Violation.

At issue is Councilmember Graham's conduct in connection with the approval process of two separate contracts: a property development project before WMATA and a lottery contract before the Council of the District of Columbia. 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, W2I, to bid on a contract to administer the District's lottery.

Mr. Williams was also well-known to, and actively disliked by, Councilmember Graham. Councilmember Graham had serious concerns about Mr. Williams. He considered Mr. Williams to be an irresponsible businessman, a negligent landlord, and held him responsible for distributing offensive posters concerning Councilmember Graham. He further believed that Mr. Williams and his family made contributions to a political rival.

While both the WMATA development and the District lottery contracts were pending, Councilmember Graham met with Mr. Williams and his wife in the Councilmember's Office on May 29, 2008. Although the meeting was scheduled to discuss the pending lottery contract, Councilmember Graham used it as a forum to vent his personal objections to Mr. Williams.

Notwithstanding Councilmember Graham's strongly held belief that Mr. Williams was "not a responsible public citizen, much less someone worthy of a management role in a publicly funded project," there is 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. 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.

LaKritz Adler is a real estate company that successfully developed several projects in Councilmember Graham's Ward. LaKritz Adler held a controlling interest in property adjacent to the Florida Avenue site and bid on the WMATA development project. Councilmember Graham demonstrated a strong preference that LaKritz Adler be awarded the WMATA 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 to withdraw from the project and bring on LaKritz Adler as a partner. 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.

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. We find substantial evidence to believe that he acted contrary to these obligations and violated at least three sections of the Code of Conduct:

First, we find substantial evidence that Councilmember Graham violated DCMR § 6B-1803.1(a)(4), losing complete independence or impartiality. 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.

Second, Councilmember Graham violated DCMR § 1803.1(a)(2), giving preferential treatment to any person. 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. Here, Councilmember Graham had a clear preference for LaKritz Adler in the WMATA development deal. He used his legislative office to exert pressure on the principals of Banneker Ventures to withdraw from the project or include LaKritz Adler as a development partner. The fact that LaKritz Adler was a campaign contributor was, in our view, a significant factor in Councilmember Graham's efforts.

Finally, Councilmember Graham violated DCMR § 6B-1803.1(a)(6) by engaging in conduct that adversely affected the confidence of the public in the integrity of government. The public is entitled to have confidence in the integrity of public officials. When legislators take actions based on personal animus or in an effort to give preferential treatment to a close friend, business associate, or campaign contributor, public confidence is eroded. 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. Councilmember Graham's *quid pro quo* offer was part of a concerted effort to benefit LaKritz Adler. His actions adversely affected the confidence of the public in the integrity of the legislative process.

We reject Councilmember Graham's argument that the Board is without jurisdiction to conduct an investigation because the Code of Conduct is impermissibly vague. We similarly reject his claim that his conduct, in May, 2008 is beyond the applicable limitations period. 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.

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, we decline to do so because the Board is without the ability to sanction Councilmember Graham for his misconduct.

We are persuaded, however, that imposition of any sanction against Councilmember Graham by this Board for his misconduct that occurred in 2008 would run afoul of the *Ex Post Facto* Clause of the Constitution. In 2008, when the relevant acts occurred, the Board of Elections was responsible for enforcing the provisions of DCMR § 6B against members of the Council. 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.

The *Ex Post Facto* Clause of the U.S. Constitution prohibits the federal government and states from passing any law that would inflict greater punishment on a person than the law provided for at the time the misconduct occurred. According to the Supreme Court, that clause "protects liberty by preventing governments from enacting statutes with 'manifestly unjust and oppressive' retroactive effects."

Because the Board of Elections had no authority to sanction Councilmembers for violations of DCMR § 6B 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.

We find that Councilmember Graham abandoned his impartiality and demonstrated inappropriate preferential treatment in his dealings with Mr. Williams, Banneker Ventures, and LaKritz Adler thereby adversely affecting

public confidence in the integrity of government. Given this evidence, we would vote to begin a formal investigation and issue a Notice of Violation.

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.

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January 22, 2013

VIA EMAIL: darrin.sobin@dc.gov

Mr. Darrin P. Sobin
Director of Government Ethics
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Office of Government Ethics
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Washington, D.C. 20001

Re: Councilmember Jim Graham

Dear Mr. Sobin:

At Friday's hearing, the Board asked several questions about the statute of limitations argument that we raised in our written response. I wanted to briefly clarify our position regarding the applicable statute of limitations. We request that you provide this letter to the Board.

As the Board pointed out, the District Personnel Manual ("DPM") itself has no explicit statute of limitations. Our understanding, however, is that prior to the Board's existence, violations by a councilmember of the DPM would have been prosecuted by the Board of Ethics and Elections. *See* 6-B D.C. Mun. Regs. § 1802.1(a). The Board of Ethics and Elections, in its actions to enforce conflict of interest matters, had a three-year statute of limitations. *See* D.C. Code § 1-1107.01(f) (2010). Because this was the most analogous statute of limitations available, we believe that a three-year statute of limitations would have applied if the Board of Ethics and Elections had pursued any action against Councilmember Graham.[1] Under a three-year statute of limitations, any claim based on Councilmember Graham's conduct on May 29,

[1] Furthermore, the D.C. Code specifies that when "a limitation is not otherwise specially prescribed," the statute of limitations is also three years. *See* D.C. Code § 12-301. We note that although this code provision appears to broadly except "actions brought by the District of Columbia government," *id.*, this exception applies only when the District sues to recover or enforce "public rights, revenues, and property from injury or loss." *District of Columbia v. Owens-Corning Fiberglass Corp.*, 572 A.2d 394, 397 (D.C.1989) (quoting *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 132 (1938)). An ethics action against Councilmember Graham would not enforce public rights in the manner required to except the action from any statute of limitations.

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2008 would have expired months prior to the passage of the act establishing the Board of Ethics and Government Accountability. Absent a clear legislative statement to the contrary, the D.C. Council's creation of the Board of Ethics and Government Accountability (and its attendant five-year statute of limitations) cannot revive already expired claims. *See, e.g.*, *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (holding that, absent clear legislative intent, legislation will not apply retroactively where it would "increase a party's liability for past conduct"); *In re Enter. Mortg. Acceptance Co., LLC, Secs. Litig.*, 391 F.3d 401, 410 (2d Cir. 2004) ("[T]he resurrection of previously time-barred claims has an impermissible retroactive effect."). As a result, our view is that this Board may not properly bring a claim against Councilmember Graham for conduct that allegedly occurred on May 29, 2008.

Thank you very much.

Sincerely yours,

William W. Taylor, III

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December 11, 2012

VIA E-MAIL AND US MAIL: darrin.sobin@dc.gov

Mr. Darrin P. Sobin
Director of Government Ethics
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Office of Government Ethics
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Re: Councilmember Jim Graham

Dear Mr. Sobin:

In a letter dated November 14, 2012, you requested a response to the factual findings contained in the report prepared by Cadwalader, Wickersham & Taft LLP for the Washington Metropolitan Area Transit Authority, and an explanation of whether Councilmember Graham's conduct violated the provisions of the Code of Conduct for the District of Columbia codified at 6-B D.C. Mun. Regs. §§ 1803.1(a), 1803.14. Enclosed is our response on behalf of Councilmember Graham.

We look forward to hearing from you.

Sincerely yours,

William W. Taylor, III

c: The Honorable Jim Graham

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RESPONSE OF COUNCILMEMBER JIM GRAHAM TO INQUIRY FROM DIRECTOR OF GOVERNMENT ETHICS

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Date: December 11, 2012

In a letter dated November 14, 2012, Darrin P. Sobin, Director of Government Ethics for the Board of Ethics and Government Accountability ("Board") requested that Councilmember Jim Graham provide to him a response to factual findings contained in a report prepared by Cadwalader, Wickersham & Taft LLP ("Cadwalader Report" or "Report") for the Washington Metropolitan Area Transit Authority ("WMATA" or "Metro"), as well as an explanation of whether Councilmember Graham's conduct during the negotiation of a joint development project located on WMATA property on Florida Avenue, NW ("Florida Avenue Project") violated the provisions of the Code of Conduct for the District of Columbia codified at 6-B D.C. Mun. Regs. §§ 1803.1(a), 1803.14. This document constitutes his response to the Cadwalader Report and his demonstration that his conduct did not violate the Code of Conduct.

The Cadwalader Report suffers from both factual and legal errors. It grossly misconstrues the events that transpired, ignores evidence that certain events did not occur at all, and represents as fact the strained inferences of the author. More importantly, however, even if true, none of the conduct attributed by the Cadwalader Report to Councilmember Graham supports a reasonable belief that Councilmember Graham committed an ethics violation.

The principal evil that erodes public confidence in government is the perception that public officials use their position to pursue private interests. As a result, the District ethics provisions, like all ethics rules, chiefly seek to prohibit such abuses. The Cadwalader Report contains no finding or allegation that Councilmember Graham acted to benefit any private interest of his own or anyone else. Even if Councilmember Graham had conditioned his support for Warren Williams, Jr.'s company in the D.C. lottery contract on Williams's withdrawal from the Florida Avenue Project deal, it would not be unethical. By seeking to ensure that the publicly funded WMATA contract ended up in trustworthy hands, Councilmember Graham acted in the public interest. Sharp-elbowed political behavior is not a violation of any District ethics provision. If it were, this Board's docket would overflow.

The Cadwalader Report cast Councilmember Graham's conduct as creating the appearance of an unethical "conflict of interest." It did not. In both Councilmember Graham's role on the WMATA Board and on the D.C. Council, his duty was to serve the interests of the public. Even if the two bodies might be said to have different interests, there was no personal conflict for the individual who attempted to serve them both. At all relevant times, Councilmember Graham served the public interest by attempting to ensure the success of the Florida Avenue Project. This preliminary investigation should be dismissed.

I. Disputed Facts in the Cadwalader Report[1]

A. Councilmember Graham's Concerns about Warren Williams, Jr.

At the center of the events in question is Banneker Ventures, a developer among whose principals were Warren Williams, Jr. and Omar Karim, both of whom were close friends of then-Mayor Adrian Fenty. Mr. Williams was also a principal, along with his wife Alaka, in W2I, a

[1] Counsel notes that the refusal of the Director of Government Ethics to provide us with any of the material underlying the Cadwalader Report, including our client's own statements and emails, has severely limited our ability to respond to the factual errors in the Cadwalader Report.

company that bid for a lucrative contract to operate the D.C. lottery. The Cadwalader Report leaves its readers with the impression that Councilmember Graham had a baseless vendetta against Williams and, by extension, Banneker Ventures. This is simply untrue. Councilmember Graham had legitimate concerns based upon Williams's numerous past professional failures and conduct. His concerns led Councilmember Graham to conclude that Williams was not qualified for or worthy of a lucrative taxpayer funded contract with WMATA. As it turned out, he was entirely correct.

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. Eric M. Weiss, *Club U's Liquor License Is Revoked; ABC Board Cites 'Lax Management,' Slaying of Patron*, Wash. Post, B03 (June 30, 2005). Those events were only the last in a series of violent events at the Club. 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. *Id.*; *see also* Eric M. Weiss & Del Quentin Wilber, *D.C. Suspends Club's License: Fatal Stabbing Is Latest in Series of Crimes*, Wash. Post, B01 (Feb. 15, 2005). Councilmember Graham was involved in the citywide effort to shut down Club U. As a result, he was all too familiar with Warren Williams's abdication of responsibility in the face of increasing violence in and around the club. 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. For years, Williams owned the building at 804 Taylor Street, NW, where tenants repeatedly called the D.C. Department of Consumer and Regulatory Affairs ("DCRA") to complain of the lack of heat or water, cracking walls, and a rat infestation. Debbie Cenziper & Sarah Cohen, *A Failure in Enforcement: Agency's Ineffectiveness Has Helped Landlords Profit from Neglect*, Wash. Post, A01 (Mar. 11, 2008). According to tenants, Williams first tried to force them out and then, when he was unable to do so, let the building fall into disrepair. On one afternoon, the Washington Post found "rotting trash . . . piled in heaps in the back yard, and inside, a ceiling had collapsed and chunks of the walls had fallen into the stairwells." *Id.* In inspections, the DCRA found more than 30 housing code violations. *Id.*

Councilmember Graham was also skeptical of Williams's development experience. 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. *See, e.g.*, Nikita Stewart & Paul Schwartzman, *Friends Share in Fenty's Good Fortune; Council Orders Probe of Contracts*, Wash. Post, A01 (Mar. 7, 2010).

Lastly, Councilmember Graham was dismayed by Williams's involvement in distributing racially offensive campaign posters about Graham. The tone and content of the posters only served to confirm Councilmember Graham's belief that Williams was not a responsible public citizen, much less someone worthy of a management role in a publicly funded project.

Based on these concerns, Councilmember Graham did not trust Williams to be a conscientious steward of taxpayer dollars in the Florida Avenue Project. Moreover, given

Williams's reputation as a careless landlord, Councilmember Graham was particularly troubled by the idea of Williams's involvement in a development project that included housing. As a public official, it was his duty to express and act on his concerns.

B. The May 29, 2008 Meeting

The Cadwalader Report focuses on a meeting attended by Councilmember Graham and Mr. Williams, among others, which took place on May 29, 2008. The author of the Report says that, at this meeting, Councilmember Graham conditioned his support for W2I's bid to operate the D.C. lottery on Williams's withdrawal from the Florida Avenue Project.[2] Councilmember Graham disputes that description of events. Although we have not had access to the depositions or statements of witnesses at that meeting, the facts set out in the Report do not support its conclusion.

It is undisputed that on May 29, 2008, Councilmember Graham met with Warren Williams, Jr., Alaka Williams, and two individuals hired by W2I to advance its interests: public relations executive Crystal Wright and lobbyist James Link. Cadwalader Report 31. Councilmember Graham's staff members, Steven Hernandez and Calvin Woodland, attended as well. *Id.* at 32. Prior to May 29, Councilmember Graham had never met Mr. Williams.

According to the Report, Councilmember Graham began the May 29 meeting by addressing his concerns about Williams's past conduct, including the incidents surrounding Club U, Williams's posting of racially offensive posters, and his lack of experience as a developer. *Id.* at 32-33. The Cadwalader Report says that, at the conclusion of the meeting, Councilmember Graham told Williams that he had "won too much," and that Graham would consider supporting W2I's bid for the D.C. lottery contract only if Williams (or Banneker) withdrew from the Florida Avenue Project. *Id.* at 33-36.

In fact, Councilmember Graham did not condition his support for W2I in the lottery contract on Williams's withdrawal from the Florida Avenue Project. At most, he made an off-hand remark about his frustration that Williams, despite his record of irresponsible business ventures, was being awarded several District contracts largely because of his relationship with then-Mayor Fenty. If any of the meeting participants interpreted Graham's off-hand remark as a *quid pro quo* offer, they flatly misunderstood.

More than half of the seven participants do not recall Councilmember Graham's alleged *quid pro quo* offer (Steven Hernandez, Calvin Woodland, Crystal Wright, and Councilmember Graham). Neither Steven Hernandez nor Calvin Woodland recalled that Councilmember

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[2] In fact, the Cadwalader Report says that Councilmember Graham's request was that Banneker Ventures withdraw from the Florida Avenue Project, but that suggestion is misplaced. If Councilmember Graham had wanted Banneker to withdraw, he would not have addressed such a matter with Warren Williams. Banneker was a bigger organization than Williams, and Councilmember Graham would have directed such a request to a different person in the organization. Additionally, the organizational structure of Banneker was murky at best. Councilmember Graham was unclear as to what Williams's role was within Banneker and would not have assumed that Williams had control over the organization.

Graham made any sort of *quid pro quo* offer. *Id.* at 33-34 n.126. Crystal Wright, who attended on behalf of W2I, testified under oath that Councilmember Graham said something along the lines of Williams was "winning too much," but she did not recall any *quid pro quo* offer. In her words, she understood Councilmember Graham's comments to mean that Graham "would feel a lot better about the lottery contract if Warren wasn't involved in another deal or deals in the city, because he felt like because he was friends with Adrian Fenty, he was getting – his friendship was allowing him to maybe have access to deals that others wouldn't." *Id.* at 34 n.126. In other words, she "took it as [Councilmember Graham] – what he literally said, that he was not happy – he felt, in his mind, that Warren Williams was getting deals because of his friendship with Adrian Fenty." *Id.* But she did not interpret Councilmember Graham's remarks to indicate any *quid pro quo* offer or demand.

Faced with conflicting witness accounts, the Cadwalader Report cites to contemporaneous e-mails that supposedly confirm that Councilmember Graham requested Williams withdraw from the Florida Avenue Project. These e-mails do no such thing. E-mails to and from Mr. and Mrs. Williams, Mr. Link, and their lawyer after the meeting do not establish what Mr. Graham said there.

The e-mails that involve Councilmember Graham hardly establish or corroborate that Councilmember Graham offered Mr. Williams some sort of "*quid pro quo*." On Friday, May 30, 2008, W2I's lobbyist Mr. Link sent Councilmember Graham an e-mail thanking him for the meeting. *Id.* at 37. The Cadwalader Report cites to Councilmember Graham's response as indicating that a "*quid pro quo*" was offered. But Councilmember Graham's email merely states: "Thanks. Do you think they will do anything." *Id.* Mr. Link later replied to Graham's e-mail with an e-mail "refuting the allegations that Mr. Williams was involved in the derogatory posters," suggesting that Councilmember Graham had asked if Williams would do "anything" about the poster incident. *Id.* at 38. Mr. Link's e-mail also contained the line, "as for Metro, there are a number of factors that make it impossible for us to even consider accommodating your request." *Id.* at 38-39. Councilmember Graham responded to Mr. Link by stating: "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." *Id.* at 39-40. This e-mail indicated that nothing raised at the May 29 meeting would affect the WMATA application, thereby undermining Cadwalader's conclusion that Councilmember Graham sought a *quid pro quo*.

These excerpts suggest Councilmember Graham sought follow-up on something related to the offensive posters, rather than anything related to the Florida Avenue Project. Moreover, Councilmember Graham explicitly refuted the suggestion that Banneker's application to WMATA hinged on anything related to the posters or any other matter raised at the May 29 meeting. Even Mr. Link acknowledged that the e-mail asking whether "they will do anything" could have referred to something other than the alleged *quid pro quo* offer. *See id.* at 56 n.221 ("Q: So he wasn't asking about the other things discussed like Club U or Sinclair Skinner?[3] A: It's possible, but that's not the way that we understood it." (quoting Link Dep. 45:22-47:4)).

From conflicting accounts and ambiguous e-mails, the author of the Cadwalader Report concludes that Councilmember Graham offered or demanded that if Williams withdrew from the

[3] Sinclair Skinner allegedly orchestrated the derogatory poster campaign.

Florida Avenue Project, Councilmember Graham would support W2I in the lottery contract. Such a conclusion stretches the facts to their breaking point. Subsequent events even further refute this conclusion. First, if any such deal was offered, Williams made the unlikely decision not to accept it, despite the amount of money at stake in the lottery contract. Second, and even more tellingly, even though Williams did not withdraw from the Florida Avenue Project, Councilmember Graham voted with the rest of the WMATA Board to select Banneker Ventures as the developer less than a month later.

C. Councilmember Graham's Support for LaKritz Adler

The Cadwalader Report also faults Councilmember Graham for supporting LaKritz Adler, another developer that submitted a bid for the Florida Avenue Project. What, we must ask, should an official due when he believes that one development firm is run by dishonest and disreputable people, and the other is run by capable and honest people?

Councilmember Graham's positive view of LaKritz Adler was based on the firm's merits. LaKritz Adler is a leading District real estate development company that has successfully developed properties across the District. Councilmember Graham had witnessed LaKritz Adler's capabilities in a project in Ward 1 on Georgia Avenue, NW. Difficulties had plagued the development, and yet LaKritz Adler persevered, bringing a much-needed pharmacy to an underserved neighborhood. *See* Groundbreaking for Georgia Avenue CVS, DCRealEstate.com (Nov. 12, 2009), *available at* http://dcmud.blogspot.com/2009/11/groundbreaking-for-georgia-avenue-cvs.html (last visited Dec. 10, 2012). As Councilmember Graham evaluated the bids for the Florida Avenue Project, LaKritz Adler offered a solid option, particularly when compared with Banneker's inexperience.[4]

Ultimately, however, Councilmember Graham joined the rest of the WMATA Board in selecting Banneker because it submitted the highest bid (which, of course, was cut by more than half over the course of Banneker's negotiations with WMATA). He also voted in favor of a number of extensions to Banneker's exclusive negotiation period with WMATA. The Cadwalader Report's statement that Councilmember Graham "undermined" Banneker simply ignores these facts.

After the WMATA Board selected Banneker as the developer, Councilmember Graham encouraged Banneker to partner with LaKritz Adler. The Cadwalader Report insinuates that this continued support for LaKritz Adler was inappropriate.[5] It was not. When WMATA approved

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[4] Other members of the WMATA Board Members and joint development staff shared Councilmember Graham's concerns about Banneker's abilities. Cadwalader Report 54 n.217. Nor was Councilmember Graham alone in his support for LaKritz Adler. Derrick Woody, Coordinator of the Great Streets Initiative for the Office of the Deputy Mayor, gave his input on the development proposals. Mr. Woody, who was experienced in joint development projects, "strongly recommended" that WMATA select LaKritz Adler "because its proposal contained the most detailed plans and had the greatest potential for economic and community impact." *Id.* at 15 n.10.

[5] The Cadwalader Report also inaccurately faults the timing of Councilmember Graham's support for including LaKritz Adler. For instance, the Cadwalader Report criticizes

the resolution to select Banneker, it required that Banneker partner with an experienced development firm. Cadwalader Report 5, 26. Banneker had serious difficulty maintaining a relationship with an experienced firm, however, and burned through three development partners during the negotiation period. Without a partner, the project was in jeopardy. It was in everyone's best interests – including Banneker's – for the project to succeed. LaKritz Adler remained interested and had the experience to anchor the project. Thus, Councilmember Graham's support for adding LaKritz Adler to the development team as an experienced partner was reasonable.

Councilmember Graham's support for LaKritz Adler (and opposition to Banneker) in the initial bid process was based on LaKritz Adler's track record. Furthermore, after the WMATA Board selected Banneker as the developer, his encouragement that LaKritz Adler partner with Banneker made sense. As Banneker's inexperience and inability to maintain a relationship with a development partner threatened to sink the deal, Councilmember Graham sought to involve LaKritz Adler in an attempt to help bring the project to fruition. Such support was entirely appropriate and in the public interest.

II. Councilmember Graham's Conduct Did Not Violate Any of the Provisions of the District's Code of Conduct.

We demonstrated in the preceding section that the Cadwalader Report is flawed in material ways. It relies on a distorted, incomplete, and, at places, flatly inaccurate history. But it is not necessary to resolve those inaccuracies or differences in recollection for this Board to conclude, as it should, that there is no reason to believe that Councilmember Graham committed an ethics violation. 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. These regulations are as follows:

Councilmember Graham for encouraging Banneker Ventures to add LaKritz Adler to the development team in June 2008 "despite the fact that Banneker Ventures already had a development partner" at that time. Cadwalader Report 41, 59. But Metropolis, which was Banneker's asserted development partner between January 2008 and "late 2008," was a partner *in name only*. *Id.* at 25 n.79 (recounting that Merrick Malone of Metropolis stated that "he submitted the letter [stating Metropolis's interest in serving as a co-developer] solely because Deputy Mayor Albert . . . asked him to lend Metropolis's name to the Florida Avenue Project until Banneker Ventures could find another developer."); *id.* (noting that Scott Pannick of Metroplis told LaKritz Adler that Metroplis "was not going to be involved with Banneker on Metro sites"). Similarly, the Cadwalader Report insinuates that Councilmember Graham's promotion of LaKritz Adler in early 2009 was untoward because it was so late in the process. *Id.* at 58-59 (criticizing Councilmember Graham for "pushing" for LaKritz Adler's involvement "almost a full year after Metro selected Banneker Ventures"). But as the Report documents, Banneker was without any development partner in early 2009, so Councilmember Graham's support for LaKritz Adler at that time made perfect sense. *Id.* at 26 (noting that WMATA became aware that Metropolis was not involved in the Florida Avenue Project in "late 2008" and that Banneker did not have a new development partner until March 2009).

> (a) 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;
>
> (5) Making a government decision outside official channels; or
>
> (6) Affecting adversely the confidence of the public in the integrity of government.

6-B D.C. Mun. Regs. § 1803.1(a)(1-6).

6-B D.C. Mun. Regs. § 1803.14(a) states "the policy of the District government to avoid conflicts of interest concerning the award, implementation, monitoring, and performance of contracts for services." To achieve this policy, the regulation requires employees to disclose "previous employment relationships . . . , including full disclosure of any ongoing economic benefits to the employee from previous employment relationships" and mandates that employees receiving such benefits "shall not participate in any manner, in the District government's decision to enter into, extend, modify, or renew a contract or consultancy engagement with the employee's former employer," unless so authorized, for a prescribed period of time. *Id.* § 1803.14(a)-(i).

As detailed below, there is no reason to believe that Councilmember Graham violated any of these provisions. At the outset, however, we note due process concerns that render the enforcement of certain of these regulatory provisions against anyone under these circumstances legally problematic. Later, we will also point out that the statute of limitations has run on much of Councilmember Graham's allegedly problematic behavior, including the meeting on May 29, 2008.

a. Several of the cited regulations are so vague that to enforce them in this proceeding would violate due process.

Enforcing the regulations codified at 6-B D.C. Mun. Regs. § 1803.1(a)(2-6) would violate due process because these regulations lack any standards that put District employees on notice as to what conduct is prohibited. To pass constitutional muster, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted). Although 6-B D.C. Mun. Regs. § 1803.1(a)(1)'s prohibition on "[u]sing public office for private gain" is sufficiently well understood to pass this test, the regulations at 6-B D.C. Mun. Regs. § 1803.1(a)(2-6) fail both *Kolender* requirements.

The regulations at issue do not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *see also City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) ("'It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.'" (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966)). For instance, the prohibition on actions "[a]ffecting adversely the confidence of the public in the integrity of government" could encompass nearly limitless conduct. 6-B D.C. Mun. Regs. § 1803.1(a)(6). The regulations nowhere define the kind of conduct that they seek to prohibit, and the terms used in the regulations have no recognized understanding or "settled usage or tradition of interpretation in law." *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1049 (1991); *see also Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971) (holding unconstitutional a city ordinance forbidding persons from assembling in manner "annoying" to passersby). A public employee seeking to avoid the regulations' reach can only guess at their limits.

Without any standards, the regulations also contain no guidelines to govern law enforcement. *Kolender*, 461 U.S. at 358. The regulation could reach a vast range of conduct, from corruption to utterly innocent statements. Accordingly, the regulation "vests virtually complete discretion in the hands of [the enforcement entity] to determine whether [an employee] has satisfied [its provisions]." *Id.* Such unfettered discretion is not constitutional.

These due process requirements apply to the regulations at issue here. The Supreme Court has recognized that "quasi-criminal" regulations with "prohibitory and stigmatizing effect[s] may warrant a relatively strict [vagueness] test." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499-500 (1982) (discussing an ordinance requiring a license for selling drug paraphernalia and imposing civil penalties for selling such paraphernalia without a license). Given the range of sanctions that this Board is empowered to impose, including civil monetary penalties and referral for criminal prosecution, *see* D.C. Mun. Regs. tit. 3, § 5402.1 (2012), the Board's enforcement of the regulations at issue here is at least as "prohibitory and stigmatizing" as the licensing ordinance at issue in *Village of Hoffman Estates* and, more importantly, targets a specific individual's behavior. Thus, this enforcement action functions as a quasi-criminal proceeding and these regulations warrant "relatively strict" review.

In fact, courts in both civil and criminal contexts have already held that identically phrased federal regulations were so vague as to be unenforceable. *See CACI, Inc.-Federal v. United States*, 719 F.2d 1567, 1581 (Fed. Cir. 1983) ("This regulation . . . does not create specific and precise standards, the violation of which would justify enjoining the Department from awarding a contract."); *United States v. Morlang*, 531 F.2d 183, 192 (4th Cir. 1975) ("[T]he [jury] instruction relating to [defendant's] duty not to 'imped(e) Government efficiency or economy' or 'affect adversely the confidence of the public in the integrity of the Government' invokes standards too indefinite and vague to be part of our criminal law in this context . . . .") (internal citations omitted); *United States v. Tetu*, No. ACM 28544, 1992 WL 265980, at *3 (A.C.M.R. Sept. 28, 1992) (stating about Air Force regulations identical to 6-B D.C. Mun. Regs. § 1803.1(a)(1-6) that the regulatory paragraph "is an improper platform from which to launch criminal proceedings. If criminally enforceable, the paragraph's language would arguably put many day-to-day activities at risk. How, for example, is it possible for Air Force members to 'avoid any action' that 'might' result in, or create even 'the appearance' of 'impeding

government efficiency' or of 'losing complete independence'?"). So too here, the Board should recognize the unconstitutionally vague nature of the cited regulations and not attempt to enforce them against Councilmember Graham.

Should the Board seek to construe the regulations to avoid vagueness, as it is required to do, the best reading of them is that 6-B D.C. Mun. Regs. § 1803.1(a)(1-6) are not intended to be enforced on their own. These regulations appear to be an introductory and hortatory statement of principles. They are then followed by specific provisions, which contain substantive prohibited conduct. *See* 6-B D.C. Mun. Regs. §§ 1803.2-1803.14; 6-B D.C. Mun. Regs. tit. 6, ch. B18. The Board should focus its inquiry on the specific provisions in the rest of section 1803 and the other sections of chapter B18. Doing so will not only avoid the constitutional issues presented by enforcing the vague principles contained in section 1803.1(a)(2-6), but also give effect to the structure of the regulatory chapter.

b. Councilmember Graham did not violate any provision contained in 6-B D.C. Mun. Regs. § 1803.1(a)(1-6) even if they are interpreted broadly.

i. 6-B D.C. Mun. Regs. § 1803.1(a)(1)

6-B D.C. Mun. Regs. § 1803.1(a)(1) prohibits "using public office for private gain." Councilmember Graham did not receive any private gain from his actions nor did he expect to. The Cadwalader Report expressly found "no evidence" to suggest that Councilmember Graham's conduct was "motivated by a pecuniary interest." Cadwalader Report 43. Indeed, such motivation would have been nearly impossible because, as the Report noted, he had no financial interest in the Florida Avenue Project or in any of the developers involved in the project. *Id.* Accordingly, without even the possibility of private gain, Councilmember Graham's conduct could not have violated § 1803.1(a)(1).

ii. 6-B D.C. Mun. Regs. § 1803.1(a)(2)

6-B D.C. Mun. Regs. § 1803.1(a)(2) states that District employees must avoid actions that would result in or create the appearance of "giving preferential treatment to any person." This regulation prohibits preferential treatment *for an improper reason*. *Cf.* U.S. Office of Gov't Ethics, OGE Informal Advisory Mem. 88 X 13, 1988 WL 236637, at *7 (Sept. 12, 1988) ("Assisting a friend is not in and of itself prohibited by the Executive Order [consisting of language identical to 6-B D.C. Mun. Regs. § 1803.1(a)]. But, assisting a friend in a manner which misuses official position for the friend's private benefit, which gives that friend *preferential treatment not properly afforded*, . . . is what this section was in part intended to prohibit.") (emphasis added). There are no allegations that Councilmember Graham's support for LaKritz Adler was for any improper reason or that Councilmember Graham stood to gain in any way from the inclusion of LaKritz Adler in the Florida Avenue Project. Accordingly, he did not violate 6-B D.C. Mun. Regs. § 1803.1(a)(2).

In fact, Councilmember Graham's support for LaKritz Adler was based only on the firm's merits and, therefore, entirely proper. Furthermore, Councilmember Graham never suggested that Banneker give up the WMATA contract or that LaKritz Adler replace Banneker. Instead Councilmember Graham promoted LaKritz Adler as a possible experienced partner for

Banneker to help the project (and Banneker) succeed. In so doing, Councilmember Graham, at worst, committed the sin of micromanagement, not an ethics violation.

iii. 6-B D.C. Mun. Regs. § 1803.1(a)(3)

Councilmember Graham's actions in no way "imped[ed] government efficiency or economy" in violation of 6-B D.C. Mun. Regs. § 1803.1(a)(3).

The only "delay" caused by Councilmember Graham was his request for a sixty day deferral of the vote on the resolution to select Banneker Ventures as the developer. At the outset of the development process when the WMATA Planning, Development and Real Estate Committee ("PDREC") met to consider the WMATA staff's recommendation to select Banneker, Councilmember Graham expressed his concerns "about the extent of Banneker Ventures's experience and financial capabilities, and asked to review the proposal of all three finalists." Cadwalader Report 20. Based on those concerns, he moved to defer the vote for sixty days; the PDREC unanimously approved the deferral. *Id.* The WMATA Board also "instructed" its staff "to conduct additional due diligence on Banneker Ventures." *Id.*

Councilmember Graham's request for a sixty day deferral was an entirely appropriate exercise of his role as a WMATA Board Member. Surely, the prohibition on impeding government efficiency does not prevent public officials from seeking additional time for thoughtful consideration of the appropriate recipients of public contracts. Moreover, the PDREC unanimously supported his motion for a sixty day deferral; if Councilmember Graham's motion was somehow dilatory, the entire PDREC was complicit. At the next WMATA Board meeting, Councilmember Graham voted with the rest of the Board to select Banneker Ventures to develop the Florida Avenue Project. *Id.* at 21.

Over the next two years, WMATA and Banneker Ventures were unable to finalize a term sheet, but Councilmember Graham did not cause the delays. As the Cadwalader Report sets forth, these delays stemmed from two causes: (1) WMATA's failure to adopt clear policies on issues relating to joint development projects; and (2) Banneker's lack of development experience and failure to identify a permanent development partner. *Id.* at 43-44; *see also id.* at 50-51. Indeed, even the Cadwalader Report ultimately finds that Banneker's failure to negotiate a deal with WMATA was "[e]ntirely independent from any actions of the Metro Board or any Board Member." *Id.* at 50.

iv. 6-B D.C. Mun. Regs. § 1803.1(a)(4)

Section 1803(a)(4) prohibits actions "which might result in or create the appearance of . . . losing complete independence or impartiality" of action. Similarly to section 1803.1(a)(1), this provision rests on the existence of, or the appearance of, a private interest at stake. Indeed, in language strikingly similar to the District regulation, the federal government mandates that each of its employees "avoid an appearance of loss of impartiality in the performance of his official duties." 5 C.F.R. § 2635.501(a). Unlike the District regulation, however, the federal regulation explains what is actually proscribed. The federal provisions demonstrate that the duty of impartiality requires avoiding matters that may affect an employee's financial interests or the financial interests of family members, business associates, or prior employers.

According to the federal regulation, to avoid the appearance of losing impartiality, an employee

> should not participate in a particular matter involving specific parties which he knows is likely to affect the financial interests of a member of his household, or in which he knows a person with whom he has a covered relationship is or represents a party, if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter.

Id.; *see also id.* § 2635.502. Additionally, an employee "who has received an extraordinary severance or other payment from a former employer prior to entering Government service is subject, in the absence of a waiver, to a two-year period of disqualification from participation in particular matters in which that former employer is or represents a party." *Id.* § 2635.501(b); *see also id.* § 2635.503.

Given the lack of District guidance on what it means to maintain "complete independence or impartiality" of action, these federal regulations persuasively delineate the boundaries of that directive. Moreover, both the federal regulation and the District regulation originate from the same exact language – the regulations codified at 6-B D.C. Mun. Regs. § 1803.1(a) are identical to the federal "model" conduct regulations published in 1967 at 5 C.F.R. § 735.201a (1968).[6] Thus, the existing federal regulations elucidate the very language in the District regulation. Accordingly, the Board should follow the federal regulations' guidance that avoiding the appearance of partiality for a public employee means avoiding involvement in matters where his financial interests, or those of his close associates or prior employers, are at issue.[7] Councilmember Graham had no financial interests at stake whatsoever in the Florida Avenue Project and therefore could not have violated this provision.

v. 6-B D.C. Mun. Regs. § 1803.1(a)(5)

Section 1803.1(a)(5) prohibits "making a government decision outside [of] official channels." Councilmember Graham made no decision outside of official channels; his decisions related to the Florida Avenue Project occurred in WMATA Board meetings. Although he met individually with Banneker principals and other parties involved in the Florida Avenue Project negotiations, such meetings were commonplace and not prohibited by existing WMATA policy. Cadwalader Report 45-50. More importantly, Councilmember Graham made no "decisions" in those meetings.

Even if Councilmember Graham did offer his support for W2I's lottery bid if Warren Williams withdrew from the Florida Avenue Project, such an offer could not possibly be a "government decision." Councilmember Graham's alleged offer would have been just that – an offer, not a "decision." Legislative horse-trading happens all the time in the halls and conference

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[6] The language was originally set out in Executive Order 11222 (May 8, 1965).

[7] To be sure, broader notions of impartiality exist in ethics codes, but those broad notions are reserved for judges and various judicial officers.

rooms of any legislature. Such bartering may be undesirable, but if it constitutes "making a government decision outside [of] official channels," legislators across the District and the country are in constant violation.

vi. 6-B D.C. Mun. Regs. § 1803.1(a)(6)

6-B D.C. Mun. Regs. § 1803.1(a)(6) forbids District employees from taking actions that could "affect[] adversely the confidence of the public in the integrity of Government." This prohibition is particularly vague and standardless, making its enforcement acutely problematic. We can attempt to glean some meaning from breaking up the provision into its constituent parts, however. The most crucial part, of course, is "the integrity of Government."

Leading ethicists agree that the value of "integrity in government" expresses the notion that our public officials should act as fiduciaries to their constituents. *See, e.g.*, Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 Nw. U.L. Rev. 57, 73-75 (1992) (identifying the principle of "integrity" in government as a fiduciary obligation to act in the public interest); *see also* Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. Ill. L. Rev. 57, 73-77 (arguing that the theory of fiduciary obligation underlies ethics regulations). Under this theory, a public official impugns "the integrity of government" when he fails to act on behalf of the best interests of the governmental entity or constituency that he serves.

Councilmember Graham might have failed to live up to this principle if he acted to serve some private interest rather than in the best interests of the District. Nothing in the Cadwalader Report supports the conclusion that Councilmember Graham's conduct was on behalf of any private entity or interest. Throughout the relevant events, Councilmember Graham acted in the public's best interests and attempted to ensure that the Florida Avenue Project was successfully completed. Accordingly, he did not act adversely to "integrity of government" and gave the public no reason to believe otherwise.

vii. 6-B D.C. Mun. Regs. § 1803.14

Section 1803.14 plainly does not apply to the conduct at issue. That section prevents conflicts of interest that could arise if District employees are involved in contracts affecting their previous employers. Because Councilmember Graham has never had any employment relationship with any of the developers involved in the Florida Avenue Project, he did not violate 6-B D.C. Mun. Regs. § 1803.14.

The legislative history of § 1803.14 makes clear that it governs only District employees' relationships with their former employers: it was intended to "establish standards governing the circumstances under which District government personnel may be engaged as part of their official duties in matters involving former employers or may be required to refrain from such contact on grounds of real or potential conflicts of interest." Notice of Final Rulemaking, 52 D.C. Reg. 10406 (Nov. 25, 2005).

The text of the regulation bears out that purpose. The first provision of § 1803.14(a) reads:

> It is the policy of the District government to avoid conflicts of interest concerning the award, implementation, monitoring, and performance of contracts for services. As a means of assisting District government agencies to evaluate real or potential conflicts of interest in this area, a new hire will be required to disclose to the personnel authority upon initial appointment such previous employment relationships . . . as the personnel authority may direct, including full disclosure of any ongoing economic benefits to the employee from previous employment relationships.

6-B D.C. Mun. Regs. § 1803.14(a). The rest of the regulation sets forth the procedures for dealing with conflicts of interest involving former employers, including restrictions on District employees' ability to participate in government decisions relating to their former employers, unless authorized to do so, for a prescribed period of time. *Id.* § 1803.14(b)-(i).

Although the first sentence of the provision states a "policy" of "avoid[ing] conflicts of interest concerning . . . contracts for services," *id.* § 1804(a), this broad statement must be read in the context of the regulation. The regulation's specific focus on District employees' involvement in matters concerning former employers demonstrates that the regulation targets only those conflicts of interests arising out of past employment relationships. Councilmember Graham had no prior employment relationship with any of the developers involved with the Florida Avenue Project. Accordingly, he could not have violated the provisions of 6-B D.C. Mun. Regs. § 1803.14(a).

c. The Board may not consider the events of the May 29, 2008 meeting in determining whether Councilmember Graham's conduct violated any of the foregoing provisions because the cited regulations did not apply to Councilmember Graham at the time and, if even they did, the statute of limitations under the old regulatory scheme has run on that time period.

Even if the Board were able to take account of all of Councilmember Graham's allegedly troubling conduct, it should not find reason to believe that he violated any of the foregoing provisions. But legal barriers prohibit the Board's consideration of the events of the May 29, 2008 meeting in its assessment.

i. The prohibitions contained in the cited regulations did not apply to Councilmember Graham until late 2009.

On September 22, 2009, the D.C. Council adopted a Code of Official Conduct for the Council, which included the same prohibitions as are codified in 6-B D.C. Mun. Regs. § 1803.1(a). *See* Resolution 18-248, 56 D.C. Reg. 7804 (Sept. 22, 2009). Previous to that date, there does not appear to have been a legal code of conduct in place for the Council that contained such prohibitions, and it is not at all clear that the cited municipal regulations applied to D.C.

Council members.[8] The Board may not punish Councilmember Graham on the basis of regulations that did not apply to him at the time of the conduct in issue, especially in the absence of any indication by the D.C. Council that it intended its Code of Official Conduct to apply retroactively. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

ii. The statute of limitations has run on much of Councilmember Graham's allegedly problematic behavior.

Additionally, although the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act ("Act") instituted a five year statute of limitations, *see* D.C. Code § 1-1162.21(d) (2012), the previous applicable statute of limitations was only three years. *See* D.C. Code § 1-1107.01(f) (2001).[9] The bulk of Councilmember Graham's allegedly troublesome conduct, including the meeting on May 29, 2008, took place more than three years before the passage of the Act. The Board cannot use the Act to revive Councilmember Graham's exposure to liability for conduct on which the statute of limitations had already expired.

Where, as here, there is no clear legislative statement to the contrary, newly passed statutes of limitation cannot revive a cause of action already barred. *See, e.g.*, *Landgraf*, 511 U.S. at 280; *Enter. Mortg. Acceptance Co., LLC, Secs. Litig. v. Enter. Mortg. Acceptance Co.*, 391 F.3d 401, 410 (2d Cir. 2004) ("In our view, the resurrection of previously time-barred claims has an impermissible retroactive effect."); *Kansas Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608, 615 (8th Cir. 1995) (holding that amendment to state limitations statute applied retroactively but could not revive time-barred actions); *Chenault v. USPS*, 37 F.3d 535, 538 (9th Cir. 1994) (recognizing "that a statute of limitations may not be applied retroactively to revive a claim that would otherwise be stale under the old scheme"); *see also Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 950 (1997) (observing that

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[8] The municipal regulations apply to District "employee[s]." 6-B D.C. Mun. Regs. § 1803.1; *see also id.* § 1802.1. That chapter of the code defines an "employee "as an "individual employed by the District of Columbia government and subject to D.C. Code title 1, chapter 6 (1981)." 6-B D.C. Mun. Regs. § 1899. In 1981, D.C. Code title 1, chapter 6 applied primarily to the executive branch of the District government; members of the D.C. Council were only subject to D.C. Code title 1, chapter 6 to a "limited" extent. D.C. Code § 1-602.02 (1981). Thus, it is not clear that these municipal regulations applied to members of the D.C. Council. Moreover, the D.C. Council apparently did not believe that the municipal regulations applied; if the Council had thought such regulations applied, their inclusion in the Code of Official Conduct for the Council would have been entirely redundant.

[9] D.C. Code § 1-1107.01(f) applied a three-year statute of limitations to actions of the D.C. Board of Elections and Ethics or the U.S. Attorney for the District of Columbia to enforce the provisions of D.C. Code, title 1, chapter eleven. That chapter addresses "Election Campaigns; Lobbying; Conflict of Interest." Although an enforcement action of the cited regulations would not technically be an action enforcing D.C. Code, title 1, chapter eleven, it appears to be the only statute of limitations for Board of Elections and Ethics, which enforces applicable employee conduct regulations against members of the D.C. Council. *See* 6-B D.C. Mun. Regs. § 1802.1(a). Thus, the three-year statute of limitations almost certainly would have applied.

"extending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action") (citation omitted). To permit the resurrection of previously time-barred claims would impermissibly "increase a party's liability." *Landgraf*, 511 U.S. at 280.

Indeed, given the Act's punitive and stigmatizing sanctions for violations, subjecting Councilmember Graham to liability for acts that occurred more than three years ago may also violate the *Ex Post Facto* Clause. *Stogner v. California*, 539 U.S. 607, 632-33 (2003) (holding that a state law that revives a previously time-barred prosecution violates the *Ex Post Facto* Clause).

Accordingly, the Board may not hold Councilmember Graham liable for any conduct that occurred more than three years prior to the passage of the Act.

III. The Cadwalader Report's Conclusion that Councilmember Graham Violated the Standards of Conduct for Members of the WMATA Board Misconstrues those Standards.

Councilmember Graham did not violate the District's Code of Conduct that this Board enforces. While Cadwalader's conclusion that Councilmember Graham violated the WMATA's Standards of Conduct for Members of the WMATA Board ("WMATA's Standards of Conduct") is not subject to review in this proceeding, we note the Director's observation that the District's Code of Conduct "contains ethical strictures similar to those of WMATA." Lest the Director's observation suggest that a violation of the WMATA Standards of Conduct might, in and of itself, constitute a violation of the District's Code, we note that the Cadwalader report's conclusion that Councilmember Graham violated the WMATA Standards of Conduct was itself erroneous.

First and foremost, the alleged "conflict of interest" described by the Report exists nowhere in ethics law or literature, much less as conduct proscribed by the WMATA Standards of Conduct. According to the Report, "Councilmember Graham pitted the interests of the Council of the District of Columbia against the interests of Metro, and thereby unnecessarily created a conflict of interest, or, at the least, the appearance of a conflict of interest." Cadwalader Report 53. This asserted conflict, or appearance thereof, is not cognizable under WMATA's Standards of Conduct. The WMATA's Standards of Conduct in force during the relevant time period address only conflicts of interest based on gifts or favors and from financial or employment interests. *See* Standards of Conduct for Members of the WMATA Board of Directors, Art. I (Feb. 16, 2006) ("WMATA Standards of Conduct") ("These Rules address several types of conflicts: those arising from gifts and favors and from financial and employment interests."). By the Cadwalader Report's own admission, Councilmember Graham's conduct implicated none of these conflicts of interest. Cadwalader Report 43 (finding no evidence that "any payments were offered to, or accepted by" Councilmember Graham and that he had no "financial interest in the Florida Avenue Project or in any of the developers involved in the joint development process").

Moreover, no conflict of interest or appearance thereof existed between Councilmember Graham's roles on the D.C. Council and the WMATA Board: in both positions, Councilmember Graham's duty was to the public. Indeed, the WMATA Standards of Conduct instruct that each

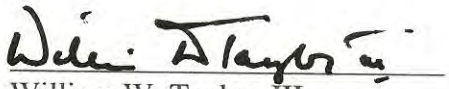
WMATA Board Member's "duty" is "to place the public interest foremost in any dealings involving WMATA." WMATA Standards of Conduct, Art. III, § A. Councilmember Graham believed that it was not in the public interest for Warren Williams to receive the WMATA contract and may have said as much. But, in seeking to ensure that publicly funded contracts ended up in trustworthy hands, Councilmember Graham at all times placed the public interest foremost.

Furthermore, the section of the WMATA Standards of Conduct that Cadwalader asserts Councilmember Graham violated contains only introductory principles. The Cadwalader Report contends that Councilmember Graham violated Section A of Article III's prohibition on actions which "create conflicts of interest or the appearance of a conflict of interest" or which "might result in favored treatment or appearances thereof." *Id.* But Section A serves only as an introduction to the "Policy" part of the Standards. The next paragraph – Section B – contains the specific prohibitions. *Id.* at Art. III, § B. Critically, the WMATA Standards of Conduct provides sanctions *only for violations of Section B*, further confirming that Section A is merely introductory, whereas Section B contains the enforceable provisions. Yet the Cadwalader Report does not allege that Councilmember Graham violated Section B. Accordingly, the Cadwalader Report's view that Councilmember Graham acted in contravention of the WMATA Standards of Conduct simply misunderstands those Standards.

IV. Conclusion

For the foregoing reasons, there is no reason to believe that Councilmember Graham violated any provision of the District Code of Conduct. We respectfully request that the Director of Government Ethics and the Board of Ethics and Government Accountability dismiss this preliminary investigation.

Respectfully submitted,



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Attorneys for Councilmember Graham

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

Office of Government Ethics

VIA HAND DELIVERY

November 14, 2012

Hon. Jim Graham
John A. Wilson Bldg.
1350 Pennsylvania Avenue, NW
Suite 105
Washington, DC 20004

Dear Councilmember Graham:

The enclosed material contains allegations about your conduct which require the Board of Ethics and Government Accountability ("Board") to obtain information 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 Law19-124; D.C. Official Code § 1-1161.01 (2012 Supp.)).

The Board's decision to investigate this complaint is based upon D.C. Official Code § 1-1162.12(a), which states in pertinent part: "The Director of Government Ethics shall conduct a preliminary investigation of a possible violation of the Code of Conduct or of this subchapter brought to the attention of the Director of Government Ethics or the Ethics Board . . ."

Accordingly, this inquiry is routine under the Ethics Act which requires a preliminary investigation to be conducted in certain instances. It may be based upon a complaint which is neither signed nor corroborated, a media or other report, or information that has otherwise come to the Board's attention.

The enclosed material is a report resulting from an investigation initiated by the Washington Metropolitan Area Transit Authority (WMATA) and conducted by the law firm Cadwalader, Wickersham & Taft LLP. The report, in pertinent part, examines your role as both a sitting member of the Council of the District of Columbia and as a member of the WMATA Board with regard to the award of a contract to develop property owned by WMATA. The report makes findings and conclusions that you violated WMATA's Standards of Conduct in two ways: 1) creating a conflict of interest between the Council and WMATA by bartering support for a matter before the Council with another matter pending with WMATA; and 2) by acting contrary to your duty to appear impartial. As you know, the Code of Conduct applicable to all District employees contains ethical

strictures similar to those of WMATA. Accordingly, I am asking that you provide an explanation with regard to the following:

1) Whether you dispute any of the factual findings contained in the WMATA report.
2) Whether you believe your 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).

At this stage, the Board has taken no final position with regard to the allegations in the WMATA report, though it has determined that there is reason to believe that a violation has been committed and that disclosure of such would not harm the investigation. Accordingly, this investigation, though preliminary in nature, is not confidential. D.C. Official Code § 1-1162.12(d).

In order for the Board to further evaluate this matter and make an appropriate disposition as soon as possible, please provide a substantive written response to each allegation of misconduct contained in the attached report on or before ***November 27, 2012.***

Finally, please be advised that pursuant to D.C. Official Code § 1-1162.11(1), the Director of Government Ethics is empowered to require any person to submit answers to questions relating to the administration of the Ethics Act, which includes the Code of Conduct applicable to District employees. You are advised that this letter constitutes such a request. Your failure to respond to this letter as requested may result in compulsory action by the Board or other remedial relief.

Please let me know if you have any questions or wish to discuss this matter further. I may be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Sincerely,

DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

Enclosure: As stated.

(Dollar Amounts in Thousands)

2011

	D.C. Three	D.C. Four	Powerball	Keno	Hot Lotto	Daily 6	D.C. Five	Mega Millions	Race 2 Riches	Fast Play	Instant Games	Others	Total
Gaming Revenues	$ 53,383	$ 65,368	$ 13,923	$ 11,545	$ 3,324	$ 486	$ 12,877	$ 8,685	$ 3,675	$ 2,085	$ 56,106	$ 292	$231,749
Prizes	(26,395)	(32,711)	(6,548)	(7,362)	(1,603)	(113)	(5,191)	(4,480)	(2,494)	(1,379)	(37,584)	-	(125,860)
Agents Commissions	(3,448)	(3,840)	(750)	(783)	(188)	(27)	(714)	(466)	(252)	(145)	(4,156)	-	(14,769)
Gross Margin	$ 23,540	$ 28,817	$ 6,625	$ 3,400	$ 1,533	$ 346	$ 6,972	$ 3,739	$ 929	$ 561	$ 14,366	$ 292	$ 91,120
Transfers	$ 17,075	$ 21,615	$ 5,075	$ 2,165	$ 1,210	$ 305	$ 5,590	$ 2,585	$ 470	$ 385	$ 5,700	$ -	$ 62,175

2010

	D.C. Three	D.C. Four	Powerball	Keno	Hot Lotto	Daily 6	Rolling Cash 5	D.C. Five	Mega Millions	Raffle	Instant Games	Others	Total
Gaming Revenues	$ 56,361	$ 68,619	$ 20,175	$ 12,582	$ 2,871	$ 3,382	$ -	$ 11,392	$ 4,313	$ 39	$ 49,972	$ 453	$230,159
Prizes	(29,166)	(28,563)	(9,321)	(7,983)	(1,378)	(1,325)	246	(5,270)	(2,230)	(60)	(33,882)	-	(118,932)
Agents Commissions	(3,696)	(3,844)	(1,072)	(848)	(164)	(202)	12	(624)	(231)	(2)	(3,807)	-	(14,478)
Gross Margin	$ 23,499	$ 36,212	$ 9,782	$ 3,751	$ 1,329	$ 1,855	$ 258	$ 5,498	$ 1,852	$ (23)	$ 12,283	$ 453	$ 96,749
Transfers	$ 16,450	$ 27,625	$ 7,025	$ 2,500	$ 1,000	$ 1,525	$ 255	$ 4,325	$ 1,200	$ -	$ 4,845	$ -	$ 66,750

2009

	D.C. Three	D.C. Four	Powerball	Keno	Hot Lotto	Daily 6	Rolling Cash 5	D.C. Five	Raffle	Instant Games	Others	Total
Gaming Revenues	$ 60,831	$ 79,908	$ 33,003	$ 12,578	$ 3,831	$ 3,957	$ 2,713	$ 2,908	$ -	$ 45,253	$ 388	$245,370
Prizes	(27,504)	(41,890)	(15,557)	(7,762)	(1,872)	(1,596)	(1,351)	(1,212)	-	(29,314)	-	(128,058)
Agents Commissions	(3,869)	(4,558)	(1,899)	(840)	(219)	(238)	(168)	(160)	-	(3,365)	-	(15,316)
Gross Margin	$ 29,458	$ 33,460	$ 15,547	$ 3,976	$ 1,740	$ 2,123	$ 1,194	$ 1,536	$ -	$ 12,574	$ 388	$101,996
Transfers	$ 21,770	$ 23,145	$ 11,025	$ 2,625	$ 1,200	$ 1,610	$ 860	$ 805	$ -	$ 5,735	$ -	$ 68,775

This table provides a comparison of sales, prizes, agent commissions, gross margin, and transfers to the District's General Fund generated by each lottery product offered.

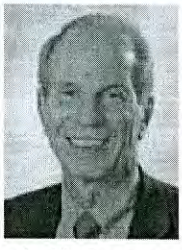
Innovation is the Hallmark of the New DC Lottery

Fiscal Year 2011 was a year marked by innovation at the D.C. Lottery and Charitable Games Control Board (DCLB). With the introduction of a new, state-of-the-art gaming system, DCLB leveraged its products and business acumen to deliver profits to the city and entertainment value to its customers.

Positioned in the most unique city in the world between two thriving lottery jurisdictions, the D.C. Lottery is challenged to stand out from the crowd and cut through the clutter. All this while delivering revenue, awarding winners, partnering with local businesses, and supporting nonprofit organizations with charitable gaming initiatives.

Reflecting on Fiscal Year 2011, our efforts to increase sales successes were rewarded, even when uncertain economic conditions persisted. We shattered our instant ticket sales record, reaching an all-time high of $56.1 million. This growth in instant ticket sales contributed to an overall sales increase reversing a long-term trend of declining sales over the previous five fiscal years. As a result, new sales in Fiscal Year 2011 reached over $231.7 million with more than $62 million being transferred to the District of Columbia General Fund.

Guided by our mission to raise revenue for services benefitting the residents of the District of Columbia, Fiscal Year 2011 introduced a new D.C. Lottery -- an agency that remains steadfast in its purpose and at the cusp of gaming innovation.



Buddy Roogow
Executive Director

Dr. Natwar M. Gandhi
Chief Financial Officer

Vincent C. Gray
Mayor

CADWALADER

REPORT OF INVESTIGATION

FOR THE

BOARD OF DIRECTORS FOR THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

October 11, 2012

C A D W A L A D E R

October 11, 2012

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October 11, 2012

I. SUMMARY OF REPORT

Cadwalader's investigation reviewed the decisions of the Metro Board with respect to a joint development project located on a Metro-owned property on Florida Avenue in Northwest Washington, D.C. (the "Florida Avenue Project") and examined allegations that Metro Board Members may have violated Metro's Standards of Conduct.

The relevant provision of the Standards of Conduct in force during the time period at issue in this investigation is:

> Article III § A: Public funds must be expended in a manner which assures the highest degree of confidence and public trust in WMATA. It is imperative that Board Members in their private financial relationships and *in their official conduct strictly avoid engaging in actions which create conflicts of interest or the appearance of a conflict of interest. It is likewise imperative that Board Members act impartially in their official conduct by avoiding any actions which might result in favored treatment or appearances thereof toward any individual, private organization, consultant, contractor or potential consultant or contractor. Each Board Member while acting in his/her capacity as a WMATA Board Member, has a duty to place the public interest foremost in any dealings involving WMATA* (emphasis added).

Our investigation focused on, and was limited to, evaluating the conduct of Metro Board Members related to the development of the Florida Avenue property. Accordingly, we offer no views on the conduct of other persons involved in this matter. Equally important, this investigative report by its nature focuses on historical conduct of Board Members, many of whom no longer serve on the Metro Board, and on events that transpired between 2007 and 2010. This report does not address the changes to the joint development process and enhancements to Metro Board governance that took place subsequent to these events. Although not reflected in this report, Cadwalader is supporting the Board's continuing commitment to improving governance.

A. Factual Background

The Metro Board first considered the Florida Avenue Project at a meeting of the Planning, Development and Real Estate Committee ("PDREC") on April 24, 2008. At that meeting, Metro joint development staff recommended that the Metro Board select Banneker Ventures, the development firm that presented the highest bid, to develop the property. D.C. Councilmember Jim Graham, then one of two Metro Board Members representing the District of

Columbia, expressed concerns about Banneker Ventures's experience and financial capabilities. Councilmember Graham suggested that the PDREC defer a vote to select Banneker Ventures to develop the Florida Avenue Property for 60 days.

Before the Metro Board met again to consider the Florida Avenue Project, Councilmember Graham held a series of meetings with parties involved in the development. He met with Banneker Ventures principal Omar Karim and suggested that Banneker Ventures partner with LaKritz Adler, another finalist for the Florida Avenue Project. Councilmember Graham also met with Metro joint development staff and Metro's General Counsel to discuss additional information that he had independently gathered about Banneker Ventures and to raise additional concerns.

Councilmember Graham met with another principal of Banneker Ventures, Warren Williams, on May 29, 2008. At that time, Mr. Williams and his wife were involved in a separate venture that had submitted a bid to operate the D.C. lottery. In connection with this endeavor, lobbyists hired by Mr. and Mrs. Williams arranged a meeting with Councilmember Graham. While Mr. and Mrs. Williams and their lobbyists expected to discuss the lottery, Councilmember Graham immediately began to air complaints about Mr. Williams. After he concluded these remarks, according to several participants in the meeting, Councilmember Graham then told Mr. Williams that he was "winning too much" and that Councilmember Graham would consider supporting Mr. Williams's lottery bid only if Banneker Ventures withdrew from the Florida Avenue Project. Following the meeting, Mr. and Mrs. Williams and their lobbyists exchanged e-mails expressing surprise and concern about Councilmember Graham's statements.

Banneker Ventures did not withdraw from the Florida Avenue Project and was selected by the Metro Board on June 26, 2008 to develop the property. The Metro Board resolution approving Banneker Ventures's selection stipulated that the Florida Avenue Project must include an affordable housing component and stated that Metro staff should provide further definition of the roles and responsibilities of the members of the development team. Banneker Ventures and Metro joint development staff then commenced further negotiations with the goal of presenting a final term sheet to the Metro Board.

Metro and Banneker Ventures confronted numerous obstacles to finalizing a term sheet. Metro lacked clear policies on key aspects of the term sheet, such as affordable housing requirements and acceptable leasing arrangements. Concerns and inquiries raised by individual Board Members delayed negotiations. Banneker Ventures was unable to provide an acceptable financial offer or maintain a partnership with a more experienced developer. The financial and economic crisis affecting the nation and the region impacted the real estate market and created additional difficulties for the parties.

Despite these setbacks, Metro and Banneker Ventures continued to negotiate an agreement for nearly two years. The Metro Board extended the time period allotted for Metro and Banneker Ventures to negotiate a term sheet three times. Finally, on March 25, 2010, the Metro Board unanimously voted to table a motion to extend the negotiation period. Banneker Ventures's exclusive negotiation period expired shortly thereafter.

B. Findings and Conclusions

As discussed *infra* in greater detail, based on the information reviewed in the course of the investigation, the investigative team came to the following findings and conclusions:

1. Metro's Selection Process Did Not Address Key Operational and Policy Issues before Metro Joint Development Staff Presented the Proposal to Select Banneker Ventures to the Metro Board

At the time Metro joint development staff recommended Banneker Ventures's proposal to develop the Florida Avenue Property to the Metro Board, Metro lacked policies or guidelines in the key areas of affordable housing and acceptable leasing arrangements. Although the Metro Board considered affordable housing to be an essential component of joint development projects, it had not adopted the District of Columbia's DUKE Plan or any other policy that would have provided Metro joint development staff and potential development partners with specific requirements, guidelines or goals for affordable housing. As a result, Metro and Banneker Ventures struggled to implement the Metro Board's requirement that the Florida Avenue Project include an affordable housing component, leading to delays in the negotiations. Metro's lack of clarity about acceptable leasing arrangements also stalled the negotiations. Banneker Ventures and Metro joint development staff spent several months exploring ways in which Banneker Ventures could include an adjacent property into the project, before eventually concluding that such an arrangement would not be feasible for Metro.

2. The Lack of a Clearly Defined Role for Metro Board Members Allowed Certain Board Members to Become Involved in Negotiating with Banneker Ventures

During the time the Metro Board considered the Florida Avenue Project, Metro lacked a clear policy on the appropriate level of involvement for individual Board Members in joint development projects. While the Procedures for the Metro Board of Directors, dictated that Metro Board Members "shall not direct or supervise . . . any Metro employee or contractor," the Procedures did not prohibit individual Metro Board Members from meeting or consulting with Metro staff or developers. Without this guidance, the Maryland, Virginia and federal government Board Members believed the proper scope of their actions on the Florida Avenue Project needed to be confined to Board Meetings, while the Metro Board Members representing the District of Columbia, Councilmember Graham and Neil Albert, then Deputy Mayor for

Economic Development, displayed a different understanding of their role. Both Councilmember Graham and Deputy Mayor Albert had direct dealings with Banneker Ventures and Metro staff concerning the Florida Avenue Project, even engaging in detailed negotiations outside of the Metro Board process. In the absence of a clear policy governing their interactions, the direct and substantial involvement of Councilmember Graham and Deputy Mayor Albert in the Florida Avenue Project may have contributed to an appearance of political pressure being inserted into Metro Board decision making.

3. Even with Adequate Opportunities, Banneker Ventures Could Not Successfully Identify a Permanent Development Partner or Address Other Issues that Arose During the Negotiations within the Allotted Time Period

In the two years that Banneker Ventures spent negotiating with Metro, Banneker Ventures did not adequately resolve two significant issues: making a reasonable financial offer and finding a reliable development partner. Banneker Ventures initially lowered its offer price on the grounds that the Metro Board's requirement to include affordable housing caused a drop in the value of the project. While Banneker Ventures raised its financial offer somewhat in the ensuing negotiations, it was unable to raise its offer to a level that was acceptable to the Metro Board. Banneker Ventures was also unable to retain an experienced development partner, even though the Metro Board made it clear to Banneker Ventures that it must partner with one. At the time Banneker Ventures's negotiating period expired, Banneker's third development partner had dropped out of the project and Banneker Ventures had not identified a replacement. As Banneker Ventures struggled to resolve these issues, it lost support among Metro Board members.

4. Councilmember Graham Acted in a Manner Contrary to Metro's Standards of Conduct

As discussed within this report, the evidence establishes that Councilmember Graham acted in a manner contrary to Metro's Standards of Conduct in two ways. First, by telling Warren Williams that he would consider supporting W2I's lottery bid if Banneker Ventures withdrew from the Florida Avenue Project, Councilmember Graham pitted the interests of the Council of the District of Columbia against the interests of Metro, and thereby unnecessarily created a conflict of interest, or, at the least, the appearance of a conflict of interest. The fact that Councilmember Graham served on both the D.C. Council and the Metro Board was not the source of the conflict, and we take no position on the fact that elected officials serve on the Metro Board. Indeed, the Metro Board has an extensive history of elected officials dutifully serving on the Metro Board without issue, and the Metro Board had in place during the relevant period Standards of Conduct designed to promote a fair, transparent, and ethical contracting process. Councilmember Graham created the conflict through his own actions of appearing to barter a Metro joint development project with a matter before the D.C. Council. Rather than

operating within the confines of the Metro boardroom to garner the necessary votes to oppose Banneker Ventures, he circumvented the Metro Board by attempting to single-handedly persuade Mr. Williams to withdraw from the Florida Avenue Project by using the lucrative D.C. lottery contract as leverage. These actions were done without the knowledge and consent of the Metro Board. Regardless of whether Councilmember Graham was correct in his concerns about Banneker Ventures, the method he used toward achieving his goal undermined the integrity of the joint development process.

Second, by appearing to continue to support LaKritz Adler's proposal for, or inclusion in, the Florida Avenue Project while at the same time opposing Banneker Ventures, Councilmember Graham acted contrary to his duty to appear impartial. This is not to suggest that LaKritz Adler acted inappropriately to warrant Councilmember Graham's support. Instead, Councilmember Graham appeared to be motivated by some combination of his own animosity toward Warren Williams and his interest in shaping the Florida Avenue Project as he thought appropriate. Regardless of whether another developer would have been a better choice than Banneker Ventures, the appropriate venue for Councilmember Graham to air his concerns with Banneker Ventures or to propose changes to the joint development team was the Metro boardroom.

As a consequence of the foregoing, the public's trust in Metro's joint development process has been harmed and thus Councilmember Graham's actions resulted in a breach of his duty to place the public interest foremost in any dealings involving Metro.

REPORT OF INVESTIGATION

II. INTRODUCTION

On February 23, 2012, the Board of Directors for the Washington Metropolitan Area Transit Authority ("Metro" or "WMATA") unanimously approved a resolution directing the Audits and Investigations Committee to appoint an independent counsel to investigate certain allegations surrounding a joint development project located on a Metro-owned property on Florida Avenue in Northwest Washington, D.C.

Pursuant to the resolution, Metro's Office of Procurement and Material issued a request for proposals. On May 9, 2012, the Audits and Investigations Committee retained Cadwalader, Wickersham & Taft LLP ("Cadwalader"), an international law firm with extensive experience in internal investigations, to undertake a thorough review of the joint development process for the Florida Avenue property, and the Metro Board's decisions regarding the project. The Audits and Investigations Committee also specifically directed Cadwalader to investigate allegations that Metro Board Members may have violated Metro's Standards of Conduct during the joint development process for the Florida Avenue property.[1] Finally, the Audits and Investigations Committee directed Cadwalader to create a report with findings of fact for the Metro Board of Directors and to advise the Metro Board concerning changes to the joint development process, the Standards of Conduct, and other governance matters.

III. SCOPE

The investigation commenced in May 2012 and ended in September 2012. The investigation included a review of public and nonpublic information obtained from Metro and various other parties and a review of prior investigations conducted by other agencies. Unlike any prior

[1] Prior to our investigation, Metro had not conducted any investigation related to the Florida Avenue Project, let alone any investigation into allegations of misconduct by any of its Board members. At present, Metro's Office of Inspector General is prohibited by the Metro Procedures from investigating misconduct of Metro Board members. *See* Procedures of the Washington Metropolitan Area Transit Authority Board of Directors, Article X § (B), adopted July 21, 2011. Although Metro's General Counsel responded in 2010 to some allegations raised in an April 27, 2010 letter from A. Scott Bolden, an attorney for Banneker Ventures, she did not interview witnesses, did not collect and review documents from the parties involved, and did not examine allegations of Board Member misconduct when formulating her response. Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Carol O'Keeffe Interview Memorandum (June 21, 2012) ("O'Keeffe Interview Memo") (stating that she did not investigate possible misconduct by the Board Members because she did not believe the actions of any Board Member affected Banneker Ventures's inability to successfully negotiate an agreement).

investigations, the present investigation specifically examined allegations made against Board Members and whether their actions violated provisions of Metro's Standards of Conduct.

In addition, the Cadwalader team questioned thirteen current and former Metro Board Members, six current and former Metro employees, and fourteen other involved persons, in some instances under oath and using a court reporter.[2]

Our investigation focused on, and was limited to, evaluating the conduct of Metro Board Members related to the development of the Florida Avenue property. Accordingly, we offer no views on the conduct of other persons involved in this matter. Equally important, this investigative report by its nature focuses on historical conduct of Board Members, many of whom no longer serve on the Metro Board, and on events that transpired between 2007 and 2010. This report does not address the changes to the joint development process and enhancements to Metro Board governance that took place subsequent to these events. Although not reflected in this report, Cadwalader is supporting the Board's continuing commitment to improving governance.

[2] The full list of persons interviewed is on file with Cadwalader, Wickersham & Taft LLP. Attempts to interview former Metro Board Members Marion Barry and Michael Brown were unsuccessful. Former Board Member Marcell Solomon was unable to be contacted. LaKritz Adler, a developer involved in issues relating to the development located on Florida Avenue in Northwest Washington, D.C., partially cooperated with the investigation, only after months of negotiations. A subpoena was issued to LaKritz Adler on June 29, 2012, calling for it to produce documents required for the investigation. After initially refusing to produce documents and questioning our legal authority, LaKritz Adler produced a small number of documents on July 25, 2012, and later produced more documents on September 7, 2012 and September 12, 2012 after extensive and time-consuming negotiations. Moreover, counsel to LaKritz Adler was unwilling to make Joshua Adler, one of the company's principals, available for testimony under oath, but did allow him to be interviewed.

IV. LIST OF RELEVANT PERSONS

Voting Metro Board Members during the Relevant Period

- Neil Albert, Metro Board Member for D.C. (2008 to 2011) and former Deputy Mayor for Economic Development for the District of Columbia;
- Peter Benjamin, Metro Board Member for Maryland (2007 to 2011);
- Jim Graham, Metro Board Member for D.C. (January 1, 1999 to 2011) and D.C. Councilmember, Ward 1;
- Elizabeth Hewlett, Metro Board Member for Maryland (2007 to 2011);
- Catherine Hudgins, Metro Board Member for Virginia (2004 to present) and Chair of the Metro Board (2012 to present);
- Emeka Moneme, Metro Board Member for D.C. (2007 to 2008);
- Christopher Zimmerman, Metro Board Member for Virginia (1998 to 2010);

Developers Involved in the Florida Avenue Project

- Banneker Ventures
  - Omar Karim, Principal of Banneker Ventures;
  - Warren Williams, Former Principal of Banneker Ventures and Co-Owner of W2Tech;
- Donatelli Development
  - Larry Clark, Principal of Donatelli Development;
  - Christopher Donatelli, Principal of Donatelli Development;
- Metropolis Development Company
  - Merrick Malone, Principal of Metropolis Development Company;

- Scott Pannick, Principal of Metropolis Development Company;

- LaKritz Adler Development
  - Joshua Adler, Principal of LaKritz Adler Development;
  - Robert LaKritz, Principal of LaKritz Adler Development;

Relevant Participants in the District of Columbia Lottery

- Jim Link, Partner, American Capitol Group;
- Alaka Williams, Co-Owner of W2Tech;
- Crystal Wright, Principal of the Baker Wright Group;

Metro Joint Development Staff

- Nathaniel Bottigheimer, Metro Assistant General Manager for Planning and Joint Development;
- John Catoe, Metro General Manager (2007 to 2010);
- Rosalyn Doggett, Metro Senior Transit Oriented Development Specialist;
- Carol O'Keeffe, Metro General Counsel;
- Joshua Montague, Metro Assistant General Counsel;

Staff Members for Councilmember Graham

- Steven Hernandez, former Director of Committees for D.C. Councilmember Graham (2003 to 2010);
- Calvin Woodland, Chief of Staff for D.C. Councilmember Graham.

V. CHRONOLOGY OF EVENTS

Spring 2007	The Washington Metro Area Transit Authority ("Metro") issued Requests for Expressions of Interest for the redevelopment of Metro-owned land at Florida Avenue and 8th Street, NW, in the District of Columbia ("Florida Avenue Project").
August 24, 2007	Metro issued a Joint Development Solicitation to six of the twelve developers that expressed interest.
October 5, 2007	Metro received final proposals from three development teams: Banneker Ventures LLC ("Banneker Ventures"), LaKritz Adler Development ("LaKritz Adler"), and Moddie Turay Company.
December 16, 2007	Banneker Ventures's development partner, Donatelli Development, withdrew from the Florida Avenue Project development team.
January 24, 2008	The Office of the Chief Financial Officer for the District of Columbia awarded W2I, a joint venture between W2Tech, a company formed by Banneker Ventures principal Warren Williams and his wife, and Intralot, an international lottery vendor, a contract to administer the D.C. lottery. The contract was subject to the approval of the D.C. Council.
January 28, 2008	Metropolis Development Company, LLC ("Metropolis") joined the Banneker Ventures development team.
February 26, 2008	The Metro staff team assigned to evaluate the proposals recommended that Metro select Banneker Ventures to develop the Florida Avenue Project.
April 24, 2008	The Planning, Development and Real Estate Committee ("PDREC") of the Metro Board of Directors ("Metro Board") considered Metro's recommendation to select Banneker Ventures to develop the Florida Avenue Project. District of Columbia Councilmember Jim Graham moved to defer the PDREC's vote by sixty days. The Committee Members voted unanimously in favor of Councilmember Graham's motion.

May 29, 2008	Mr. Williams, his wife, and two lobbyists for W2I met with Councilmember Graham and his staff at Councilmember Graham's office to discuss the lottery contract.
June 26, 2008	The PDREC voted to approve Metro's recommendation to select Banneker Ventures as the developer for the Florida Avenue Project. The resolution reflected Councilmember Graham's request that the final term sheet further define the roles of the development firms involved in the project as well as include an affordable housing component.
Summer 2008	Banneker Ventures and LaKritz Adler discussed a potential partnership for the Florida Avenue Project.
October 24, 2008	Metro learned that Banneker Ventures intended to purchase a lot adjacent to the Florida Avenue Project and include the lot in the development.
December 16, 2008	The D.C. Council voted to reject W2I's lottery contract.
March 6, 2009	Banc of America Community Development Corporation ("BACDC") joined the Banneker Ventures development team.
April 23, 2009	The Metro Board unanimously voted to extend Metro and Banneker Ventures's exclusive negotiation period by 120 days to provide the parties with additional time to negotiate the terms of the Florida Avenue Project. Councilmember Graham abstained from the vote.
September 17, 2009	Metro received an independent appraisal for the Florida Avenue Project. The second appraisal for the capitalized lease value of the property reflected a significant depreciation in value compared to the initial appraisal for its sale.
September 24, 2009	The Metro Board unanimously approved a motion to provide Metro and Banneker Ventures with a second 120-day extension to negotiate the terms of the Florida Avenue Project.
January 14, 2010	The PDREC voted a third time to extend Banneker Ventures's exclusive negotiation period until March 31, 2010. Metro Board Member Peter Benjamin abstained from the vote and Alternate Board Member Councilmember Michael Brown voted against the motion.
January 28, 2010	The Metro Board voted to extend the exclusive negotiation period until March 31, 2010. Councilmember Graham abstained from the vote.

March 14, 2010	Metro learned that BACDC withdrew from the Florida Avenue Project.
March 18, 2010	Councilmember Graham instructed the Secretary for the Metro Board to remove the Florida Avenue Project from the March 25, 2010 PDREC agenda. The PDREC did not discuss the Florida Avenue Project.
March 25, 2010	At the Metro Board meeting, Councilmember Graham moved to provide Metro and Banneker Ventures with additional time to negotiate the terms of the Florida Avenue Project. Deputy Mayor Neil Albert moved to table the matter. The Metro Board unanimously voted to approve Deputy Mayor Albert's motion.
March 31, 2010	The exclusive negotiation period between Metro and Banneker Ventures expired.
July 21, 2011	Metro sold the Florida Avenue property to JBG Construction for $10.2 million.

VI. BACKGROUND

A. Standards of Conduct

Metro has adopted and periodically revised the Standards of Conduct that govern all members of the Board of Directors in all activities relating to their positions as Board Members. The Standards of Conduct also apply to individuals, corporations, and other entities that have an actual or prospective business relationship with Metro.[3]

Because the activities and events pertinent to this report took place between 2007 and 2010, Cadwalader used the 2006 and 2010 versions of the Standards of Conduct to evaluate the Board Members' conduct. The provision of the Standards of Conduct relevant to the investigation is identical in both the 2006 and 2010 versions.

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[3] Code of Ethics for Members of the WMATA Board of Directors, Article I (2011), *available at* http://wmata.com/about_metro/docs/code_of_ethics.pdf. The investigation did not evaluate the conduct of the Metro staff. Any investigations of staff conduct should be conducted by Metro's Inspector General.

The relevant provision of the Standards of Conduct at issue in this investigation is:

> Article III § A: Public funds must be expended in a manner which assures the highest degree of confidence and public trust in WMATA. It is imperative that Board Members in their private financial relationships and *in their official conduct strictly avoid engaging in actions which create conflicts of interest or the appearance of a conflict of interest. It is likewise imperative that Board Members act impartially in their official conduct by avoiding any actions which might result in favored treatment or appearances thereof toward any individual, private organization, consultant, contractor or potential consultant or contractor. Each Board Member while acting in his/her capacity as a WMATA Board Member, has a duty to place the public interest foremost in any dealings involving WMATA* (emphasis added).

B. Facts

1. Metro's Selection of Banneker Ventures as Developer

In early 2007, Metro issued Requests for Expressions of Interest for its Shaw-Howard/Florida Avenue joint development sites ("Florida Avenue Project").[4] The proposed joint development project would include a 3,800 sq. ft. parcel on Florida Avenue at 9th Street, NW; a 8,600 sq. ft. parcel on Florida Avenue between 8th and 9th Streets, NW; and a 16,500 sq. ft. parcel on Florida Avenue between 7th and 8th Streets, NW (collectively, the "Florida Avenue Property").[5] Metro received twelve responses to the Requests for Expressions of Interest.[6] Rosalyn Doggett (Metro Senior Transit Oriented Development Specialist), who served as the project manager for the Florida Avenue Project, reviewed the proposals and asked six developers to submit more detailed applications.[7]

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[4] Memorandum from Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA, to John Catoe, Jr., General Manager, WMATA (Feb. 26, 2008) ("Bottigheimer Feb. 26, 2008 Memo").

[5] *Id.*

[6] Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Rosalyn Doggett Interview Memorandum (July 2, 2012) ("Doggett Interview Memo") (stating twelve firms responded to the Florida Avenue Property solicitation).

[7] Bottigheimer Feb. 26, 2008 Memo; *see also* Doggett Interview Memo (explaining that Ms. Doggett reviewed the twelve initial responses).

October 11, 2012

In the fall of 2007, Metro received proposals from three of the six developers: Banneker Ventures LLC ("Banneker Ventures"),[8] LaKritz Adler Development ("LaKritz Adler"), and Moddie Turay Company ("Moddie Turay").[9] Metro then formed an evaluation team composed of Ms. Doggett and representatives from Metro's Office of Station Area Planning and Asset Management, Office of the General Counsel, and Office of Joint Development and Adjacent Construction.[10]

Ms. Doggett and her team decided that, as a threshold matter, they would reject any proposal which did not offer more than $7.5 million, the value of the Florida Avenue Property determined by a recent independent appraisal.[11] According to Ms. Doggett's calculations, the net present

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[8] Banneker Ventures is a minority-owned construction firm formed in 2005. At the time Ms. Doggett and her team recommended Banneker Ventures's proposal to the Metro Board of Directors, the principals of the firm were Omar Karim and Warren Williams. Banneker Ventures website, *available at* http://bannekerventures.com/about_overview.html (last visited Sept. 20, 2012); Letter from Omar Karim, Principal, Banneker Ventures, to Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA (June 26, 2007). Banneker Ventures was also the subject of another recent investigative report released on March 11, 2011. The D.C. Council commissioned an investigation regarding multi-million dollar contracts which the District of Columbia Housing Authority oversaw for the construction and renovation of city recreation centers, ball fields, and parks. The Special Counsel investigated Banneker Ventures's central role in these contracts, and found that Banneker Ventures engaged in certain questionable contracting practices. The investigation referred the contracting matters to the United States Attorney for further examination. The Special Counsel also recommended further inquiry into the question of whether Mr. Karim provided false testimony in the course of the investigation. Robert P. Trout, *et al.*, Report of the Special Counsel to the Special Committee on Investigation of Capital Projects of the Department of Parks and Recreation (2011), *available at* http://dcclims1.dccouncil.us/media/libraries_parks_rec/capprojectinvestigation_finalreport_03112011.pdf.

[9] Bottigheimer Feb. 26, 2008 Memo.

[10] *Id.* Ms. Doggett also asked Derrick Woody, Coordinator of the Great Streets Initiative for the Office of the Deputy Mayor for Planning and Economic Development, who had experience in joint development projects, to provide input on the proposals. Mr. Woody strongly recommended that Metro select LaKritz Adler to develop the Florida Avenue Property because its proposal contained the most detailed plans and had the greatest potential for economic and community impact. Although Ms. Doggett typically valued Mr. Woody's opinion highly, she did not follow his recommendation for the Florida Avenue Property because the value of LaKritz Adler's proposal was below the appraised value of the property. Doggett Interview Memo; E-mail from Derrick Woody, Coordinator of the Great Streets Initiative for the Office of the Deputy Mayor for Planning and Economic Development, to Rosalyn Doggett, Senior Transit Oriented Development Specialist, WMATA (Nov. 16, 2007, 10:19 a.m. EST).

[11] Memorandum from Rosalyn Doggett, Senior Transit Oriented Development Specialist, WMATA, to Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA (Jan. 29, 2008) ("Doggett Jan. 29, 2008 Memo").

value of the offers in the proposals were as follows: $14 million, Banneker Ventures; $11.8 million, Moddie Turay; and $6 million, LaKritz Adler.[12] Ms. Doggett's calculations led her and her team to eliminate LaKritz Adler's $6 million proposal because it did not provide a sufficient financial benefit to Metro.[13]

After interviewing the development firms and conducting additional due diligence,[14] Ms. Doggett and her evaluation team determined that the qualifications of the two remaining firms, Banneker Ventures and Moddie Turay, and the development projects outlined in their proposals were very similar.[15] The evaluation team found that the two finalists were relatively inexperienced but had partnered with more experienced development firms.[16] The evaluation team determined also that the proposals submitted by Banneker Ventures and Moddie Turay were equivalent in other respects, such as reflecting the principles of transit-oriented development.[17]

On January 29, 2008, Ms. Doggett and her team sent a memorandum to Nathaniel Bottigheimer (Metro Assistant General Manager of Planning and Joint Development), recommending that the Metro Board of Directors ("Metro Board") select Banneker Ventures to develop the Florida Avenue Property.[18] The selection of a developer in a joint development project by the Metro Board only establishes a period of time in which that developer has the exclusive right to negotiate a binding development agreement with Metro.[19] Ms. Doggett and her team explained

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[12] *Id.* Based on a sixty-year lease period.

[13] *Id.*; *see also* Doggett Interview Memo (explaining that Ms. Doggett eliminated LaKritz Adler from consideration first because its proposal did not exceed the appraised value of the property).

[14] Doggett Jan. 29, 2008 Memo.

[15] *Id.*; *see also* Bottigheimer Feb. 26, 2008 Memo.

[16] Doggett Jan. 29, 2008 Memo. Specifically, Ms. Doggett observed that Banneker Ventures's development partner Metropolis had extensive experience in developing residential buildings with ground floor retail and recently had completed a joint development project with WMATA, while Banneker Ventures was less experienced. *See also* Doggett Interview Memo (stating that neither Banneker Ventures nor Moddie Turay presented strong qualifications); Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Nathaniel Bottigheimer Interview Memorandum (July 3, 2012) ("Bottigheimer Interview Memo") (explaining that he had concerns about Banneker Ventures's level of experience, but those concerns were mitigated because Banneker Ventures partnered with a more experienced developer).

[17] Doggett Jan. 29, 2008 Memo.

[18] *Id.*

[19] Shaw-Howard/Florida Avenue Joint Development Site: Proposal Submission Requirements, §§ 1.6, 1.7.

in the memorandum that they recommended Banneker Ventures because its financial offer of $14 million was clearly superior to Moddie Turay's offer of $11.8 million.[20] Ms. Doggett and her team also based their recommendation on the fact that, unlike Banneker Ventures's proposal, Moddie Turay's proposal included development on an adjacent non-Metro-owned parcel which could complicate the project.[21]

2. Metro Board's Approval of Metro's Selection of Banneker Ventures as Developer

a. Composition of the Metro Board of Directors

The Metro Board is composed of eight voting Principal Directors and eight Alternate Directors. Maryland, the District of Columbia, Virginia, and the federal government each appoint two Principal Directors and two Alternate Directors.[22] For the District of Columbia, the D.C. Council appoints the Metro Board Members.[23] One of the Metro Board Members from the District of Columbia is selected to represent the D.C. Council, while the other Board Member is selected to represent the Mayor.[24]

In 2007, D.C. Councilmember Jim Graham and Emeka Moneme represented the District of Columbia as Principal Directors on the Metro Board. Councilmember Graham joined the Metro Board in 1999 and served in that capacity until 2010.[25] Throughout his tenure on the Metro Board, Councilmember Graham also represented Ward 1 on the D.C. Council.[26] District of

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[20] Doggett Jan. 29, 2008 Memo.

[21] *Id.*

[22] WMATA Compact, art. III § 5(a), D.C. Code § 9-1107.1. The federal government has not appointed a second Alternate Director as of the time of this report.

[23] *Id.*

[24] *See* Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Elizabeth Hewlett Interview Memorandum (July 19, 2012) ("Hewlett Interview Memo") (explaining that Deputy Mayor Albert was the Mayor's representative); *see also* Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Neil Albert Interview Memorandum (June 29, 2012) ("Albert Interview Memo") (stating that he was the Mayor's representative on the Metro Board).

[25] Deposition of Jim Graham, Councilmember, Washington, D.C. (July 27, 2012) at 13:17–18 (confirming that he served from January 1, 1999 to December 31, 2010). Councilmember Graham cooperated with the investigation in providing documents and testimony under oath. During his testimony, at the direction of counsel, he did not answer one question on the grounds of legislative immunity.

[26] *Jim Graham, Ward 1*, D.C. Council website, *available at* http://dcclims1.dccouncil.us/jimgraham (last visited Aug. 16, 2012).

Columbia Mayor Adrian Fenty selected Mr. Moneme to serve on the Metro Board. Mr. Moneme served on the Metro Board from early 2007 to September 2008.[27] Both before and during Mr. Moneme's appointment to the Metro Board, he served as the Director of the D.C. Department of Transportation.[28] Neil Albert replaced Mr. Moneme on the Metro Board in November 2008 and served in that capacity until 2011. During his tenure on the Metro Board, Mr. Albert was the Deputy Mayor for Economic Development.[29]

b. Metro Board's Process for Approving Joint Development Projects

According to the Washington Metropolitan Area Transit Authority Compact, the Metro Board may enter into and perform contracts, leases, and agreements related to the development of Metro property.[30] Joint development projects, like any other project or proposal, are assigned to a Metro Board Committee.[31] The Committee discusses the details of the project and recommends to the full Metro Board the action that Metro should take to negotiate with the selected developer.[32] The Metro Board often adopts the Committee recommendations.[33]

In 2008, the Planning, Development, and Real Estate Committee ("PDREC") oversaw joint development projects.[34] From 2008 to 2011, all Metro Board Members, including alternate Board Members, served on the PDREC.[35] Deputy Mayor Albert was the Chair of the PDREC

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[27] Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Emeka Moneme Interview Memorandum (July 3, 2012) ("Moneme Interview Memo").

[28] *Id.*

[29] *Neil Albert Sworn in as Metro Board Member*, WMATA (Nov. 6, 2008), *available at* http://www.wmata.com/about_metro/news/PressReleaseDetail.cfm?ReleaseID=2335; *Neil O. Albert*, Holland and Knight, *available at* http://www.hklaw.com/Neil-Albert/ (last visited Aug. 16, 2012).

[30] *See* WMATA Compact, art. v § 12(f), D.C. Code § 9-1107.1.

[31] Bylaws of the Washington Metropolitan Area Transit Authority Board of Directors, Article XII § (C), adopted July 21, 2011, *available at* http://wmata.com/about_metro/docs/Bylaws.pdf.

[32] *See generally id.* ("The Committee specifically reviews and recommends to the Board actions on Real Estate acquisitions and Real Estate dispositions"); *see also* Hewlett Interview Memo (explaining that the Metro Board had several committees that would recommend action to the Metro Board).

[33] Hewlett Interview Memo (stating that the Metro Board usually accepted committee recommendations); *see also* Bottigheimer Interview Memo (explaining that, in the context of joint development projects, the Metro Board rarely voted contrary to a Metro joint development staff recommendation).

[34] Procedures of the Washington Metropolitan Area Transit Authority Board of Directors, Article VII § (A), adopted Feb. 16, 2006.

[35] Proposed Committee Assignments WMATA Board of Directors, Feb. 28, 2008, *available at* http://wmata.com/about_metro/board_of_directors/board_docs/022808_ReptbyChairmanC2008CmteAssi

from February 2009 to January 2010, and Councilmember Graham was the Chair of the PDREC from January 2010 to January 2011.[36]

In joint development projects, Board Members deferred largely to their colleagues in whose jurisdiction the project resided for two principal reasons. First, any action by the Metro Board is required under the Metro Compact to have the affirmative vote of at least one Board Member from each jurisdiction.[37] This is commonly known at Metro as a jurisdictional veto, and its practical effect is that a "no" vote or abstention by two Board Members from the same jurisdiction can block a proposed action by the Metro Board.[38] Second, Board Members generally believed that the Board Members in the jurisdiction where a joint development project resided had the most knowledge of local issues.[39] In the Florida Avenue Project, the Metro

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gnments.pdf; Proposed Committee Assignments Metro Board of Directors, Jan. 29, 2009, *available at* http://wmata.com/about_metro/board_of_directors/board_docs/012909_RptbyChairmanC.pdf; Revised Committee Assignments Metro Board of Directors, Jan. 28, 2010, *available at* http://wmata.com/about_metro/board_of_directors/board_docs/012810_REV2010CmteMembershipProp12510.pdf.

[36] Agenda from Planning, Development and Real Estate Committee, WMATA (Mar. 12, 2009), *available at* http://www.wmata.com/about_metro/board_of_directors/board_docs/031209_Agenda.pdf; Revised Committee Assignments Metro Board of Directors, Jan. 28, 2010, *available at* http://wmata.com/about_metro/board_of_directors/board_docs/012810_REV2010CmteMembershipProp12510.pdf.

[37] WMATA Compact, art. iii § 8(a), D.C. Code § 9-1107.1. This rule does not apply to a plan of financing or a mass transit plan.

[38] Bylaws of the Washington Metropolitan Area Transit Authority Board of Directors, Article VIII § (H), adopted July 21, 2011, *available at* http://wmata.com/about_metro/docs/Bylaws.pdf.

[39] Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Peter Benjamin Interview Memorandum (July 11, 2012) ("Benjamin Interview Memo") (stating that in D.C. joint development projects the concerns of D.C. voting Board Members carried more weight); Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Mortimer Downey Interview Memorandum (Aug. 29, 2012) ("Downey Interview Memo") (stating that he was informed by Peter Benjamin that, because of the jurisdictional veto, the Metro Board gave deference to the Metro Board Members where the joint development resided); Hewlett Interview Memo (stating that, typically, Board Members from the jurisdiction would be more concerned about a joint development project, and the other Board Members would not oppose the project if it was in the interest of Metro); Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Catherine Hudgins Interview Memorandum (July 23, 2012) ("Hudgins Interview Memo") (stating that it was not unusual for Board Members to be more concerned about projects in their jurisdiction); Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Jeffrey McKay Interview Memorandum (Aug. 31, 2012) ("McKay Interview Memo") (stating that Board Members typically deferred to the Metro Board Members from the jurisdiction of the joint development project); Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Chris Zimmerman Interview Memorandum (July 16, 2012) ("Zimmerman Interview Memo") (stating that Board Members typically did not get involved in

Board Members gave deference to the opinions of Councilmember Graham and Deputy Mayor Albert as issues arose during the negotiations.[40]

c. Metro Board's Decision to Defer Selecting Banneker Ventures to Develop the Florida Avenue Property

On April 24, 2008, the PDREC considered Metro's recommendation to select Banneker Ventures to develop the Florida Avenue Property.[41] Councilmember Graham expressed concerns about the extent of Banneker Ventures's experience and financial capabilities, and asked to review the proposals of all three finalists.[42] He then moved to defer the Metro Board's decision for at least 60 days until the June 26, 2008 PDREC meeting.[43] The PDREC unanimously approved the deferral.[44] To address Councilmember Graham's concerns, the Metro Board also instructed Ms. Doggett (Metro Senior Transit Oriented Development Specialist) and her joint development staff to conduct additional due diligence on Banneker Ventures, particularly regarding any outstanding taxes that members of the Banneker Ventures's team may have owed to the District of Columbia.[45]

Ms. Doggett's additional inquiries uncovered no problems with Banneker Ventures and established that none of the principals of Banneker Ventures owed any outstanding taxes to the District of Columbia.[46] On June 24, 2008, Councilmember Graham met with Ms. Doggett, Mr. Bottigheimer (Metro Assistant General Manager of Planning and Joint Development), Carol O'Keeffe (Metro General Counsel), Mr. Moneme (Metro Board Member) and two additional Metro joint development staff members to discuss the additional information that Ms. Doggett and her team had gathered about Banneker Ventures.[47] At the meeting, Councilmember Graham

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projects outside their individual jurisdictions); *see also* Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Gordon Linton Interview Memorandum (Aug. 29, 2012) ("Linton Interview Memo") (stating that Councilmember Graham's concerns about Banneker Ventures arose from issues Banneker Ventures had related to the District of Columbia).

[40] *Id.*

[41] Agenda from Planning, Development and Real Estate Committee, WMATA (Apr. 24, 2008).

[42] Handwritten notes from Metro Board Executive Session, Rosalyn Doggett (Apr. 24, 2008).

[43] Meeting Minutes, Planning, Development and Real Estate Committee Meeting, WMATA (Apr. 24, 2008).

[44] *Id.*

[45] Handwritten notes from Metro Board Executive Session, Rosalyn Doggett (Apr. 24, 2008).

[46] Letter from Omar Karim to Joel Washington, Director of WMATA's Office of Station Area Planning and Asset Management, WMATA (May 9, 2008).

raised additional concerns about Banneker Ventures, including its financial resources and its ability to manage the project.[48]

d. Metro Board's Decision to Select Banneker Ventures to Develop the Florida Avenue Property

On June 26, 2008, the PDREC reconsidered Metro's recommendation to select Banneker Ventures as the developer for the Florida Avenue Property.[49] Councilmember Graham proposed that the Metro Board's final resolution selecting Banneker Ventures include an affordable housing requirement, policy guidelines on business ethics and integrity, and further definition of the roles and responsibilities of the members of the development team.[50] Councilmember Graham abstained from the PDREC vote that approved Metro's selection of Banneker Ventures.[51] Later that day, the entire Metro Board, including Councilmember Graham, unanimously voted to approve the resolution that selected Banneker Ventures to develop the Florida Avenue Property.[52] The resolution included Councilmember Graham's stipulations regarding affordable housing, business ethics, and further definition of the roles of the development team.[53]

3. Impediments to Metro and Banneker Ventures's Negotiations

Over the next two years, Metro and Banneker Ventures confronted numerous obstacles to finalizing a term sheet, including Banneker Ventures's lack of development experience, the absence of a clear Metro policy on key aspects of the term sheet, concerns and inquiries raised by Metro Board Members, and the financial and economic crisis that impacted the real estate market. The inability of Banneker Ventures and Metro to anticipate and solve these problems

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[47] Doggett Interview Memo (recalling that she attended a meeting with Councilmember Graham on June 24, 2008); *see also* E-mail from Nathaniel Bottigheimer, Assistant General Manager of Planning and Joint Development, WMATA, to Carol O'Keeffe, General Counsel, WMATA, and Rosalyn Doggett, Senior Transit Oriented Specialist, WMATA and others (June 18, 2008, 11:44 a.m. EDT).

[48] Handwritten notes from Rosalyn Doggett (June 24, 2008).

[49] Meeting Minutes, Planning, Development and Real Estate Committee Meeting, WMATA (June 26, 2008).

[50] *Id.*

[51] *Id.*

[52] Meeting Minutes, 1331st Meeting of the Board of Directors, WMATA (June 26, 2008).

[53] *Id.*

caused numerous delays that ultimately prevented the parties from presenting a final term sheet to the Metro Board before Banneker Ventures's exclusive negotiation period expired.[54]

a. The Affordable Housing Requirement

Although the Metro Board long considered affordable housing to be an important aspect of joint development projects,[55] it did not implement or adopt any formal requirements for affordable housing in its joint development projects in general[56] or in the proposal submission requirements for the Florida Avenue Project specifically.[57] As a result, even though Banneker Ventures's original proposal indicated that the Florida Avenue Project would include affordable housing, the term sheet between Banneker Ventures and Metro that was presented to the Metro Board on June 26, 2008 did not include an affordable housing component.[58] Following the June 26, 2008 Metro Board meeting, Ms. Doggett and her colleagues who were responsible for managing the Florida Avenue Project were unsure how they should implement the Metro Board's vague requirement that the Florida Avenue Project include some unspecified amount of affordable housing.[59] The Metro joint development staff's uncertainty caused delays in their negotiations with Banneker Ventures.[60]

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[54] In our investigation, Mr. Karim of Banneker Ventures produced to Cadwalader a confidential attorney-client privileged memorandum from Metro's General Counsel to Metro's General Manager for distribution to the Metro Board regarding a legal question about the Florida Avenue Project. During his testimony under oath, Mr. Karim stated that he was "not sure" how or when he obtained the internal Metro memorandum. Deposition of Omar Karim, Principal, Banneker Ventures (July 23, 2012) at 60:20-61:19.

[55] Doggett Interview Memo (stating that some Board Members displayed a great interest in affordable housing); *see also* Albert Interview Memo (explaining that he wanted the Florida Avenue Project to include 35% affordable housing).

[56] Bottigheimer Interview Memo (stating that the Metro Board did not adopt a policy proposal he presented to the Board addressing affordable housing); *see also* Doggett Interview Memo (explaining that Mr. Bottigheimer presented an affordable housing policy to the Metro Board that was not adopted).

[57] Memorandum from Joshua Montague, Assistant General Counsel, WMATA, to Carol B. O'Keeffe, General Counsel, WMATA, Bruce P. Heppen, Deputy General Counsel, WMATA, Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA, and Rosalyn Doggett, Senior Transit Oriented Development Specialist, WMATA, Re: Florida Avenue Affordable Housing (May 7, 2009).

[58] *Id.*

[59] Doggett Interview Memo (explaining that Metro joint development staff were uncertain about how to incorporate affordable housing into the project).

[60] *Id.*

Following the June 26, 2008 meeting, Banneker Ventures responded to the Metro Board's affordable housing requirement by lowering its bid.[61] In April 2009, Banneker Ventures reduced the value of its bid from $14 million to $5.8 million.[62] Banneker Ventures's new offer was below the value of LaKritz Adler's $6 million bid and Moddie Turay's $11.8 million bid; it also fell well below the initial appraised value of $7.5 million for the property.[63]

In May 2009, Metro agreed to order a new appraisal for the Florida Avenue Project that would measure the impact of the affordable housing requirement on the value of the property.[64] The appraisal provided a significantly lower estimate of the value of the Florida Avenue Property.[65] The new appraisal caused Banneker Ventures to lower its bid further.[66] The Metro Board responded by questioning whether Metro should proceed with the development in such a poor real estate market.[67]

b. Adjacent Property

Metro joint development staff and Banneker Ventures also spent over a year discussing different lease and sale options for the Florida Avenue Property. In October 2008, Mr. Karim of Banneker Ventures told Joshua Montague (Metro Assistant General Counsel) that he had entered into an agreement to purchase a parcel of land adjacent to the Florida Avenue Property.[68] In

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[61] *Id.*; Bottigheimer Interview Memo (stating that the revised proposal including affordable housing was significantly lower than Banneker Ventures's original proposal).

[62] Draft Memorandum, Re: Florida Avenue, unknown author (Apr. 30, 2009).

[63] E-mail from Nathaniel Bottigheimer, Metro Assistant General Manager for Planning and Joint Development, WMATA, to Emeka Moneme, Metro Board Member (May 7, 2009, 6:58 p.m. EDT).

[64] *Id.*

[65] Comparison of Terms – Shaw-Howard U/Florida Avenue Site, author unknown, WMATA (Mar. 16, 2010). An August 2007 appraisal estimated the appraised land value of the property as $7.5 million, not including an estimated $2.3 million reduction for costs of building over Metro tunnels. The 2010 appraisal estimated a capitalized lease value of approximately $2 million.

[66] Handwritten notes from Rosalyn Doggett (Sept. 29, 2009).

[67] Bottigheimer Interview Memo (explaining that Board Members asked why Metro should dispose of the property at that time because current real estate market conditions would not allow Metro to receive maximum value for the property); *see also* Presentation to the Planning, Development and Real Estate Committee in Executive Session, Amended Term Sheet for Lease of Shaw-Howard U/Florida Avenue Joint Development Site (Jan. 14, 2010).

[68] E-mail from Rosalyn Doggett, Senior Development Specialist, WMATA, to Joshua Montague, Assistant General Counsel, WMATA (Oct. 24, 2008, 10:57 a.m. EDT). Mr. Karim stated in his testimony that the adjacent parcel was the same one that Moddie Turay included in its bid for the Florida

November 2008, Mr. Montague informed Mr. Karim that expanding the development property to include the adjacent lot was not part of the agreed term sheet, and that the lease options for such a development were not feasible for Metro because they limited Metro's right to terminate Banneker Ventures's lease in the event of default.[69] Nonetheless, Mr. Montague subsequently agreed to review Banneker Ventures's proposal to include the adjacent lot.[70]

In September 2009, after months of negotiations on potential lease arrangements, Mr. Karim and Nathaniel Bottigheimer (Metro Assistant General Manager for Planning and Joint Development) considered whether Banneker Ventures should buy the Florida Avenue Property outright and began negotiating terms of a sale agreement.[71] Mr. Bottigheimer supported the sale option because it would simplify the transaction and allow Banneker Ventures more leeway in the development of the parcels.[72] Councilmember Graham strongly opposed the idea of a sale because it would be difficult to unwind the transaction if Banneker Ventures did not develop the property.[73] In November 2009, after Councilmember Graham and Mr. Karim met to discuss the issue,[74] Banneker Ventures abandoned the sale option and reverted to the lease agreement in the proposed term sheet.[75]

Avenue Project. Mr. Karim explained that a contract for Banneker Ventures to assume control of the adjacent property was never executed. Karim Dep. 94:15-95:2 (July 23, 2012).

[69] Memorandum from Joshua Montague, Assistant General Counsel, WMATA, to Carol B. O'Keeffe, General Counsel, WMATA, and Bruce P. Heppen, Deputy General Counsel, WMATA (Oct. 21, 2009).

[70] *Id.*

[71] E-mail from Nathaniel Bottigheimer, Assistant General Manager of Planning and Joint Development, WMATA, to Candace E. Smith, Office of the General Manager, WMATA (Sept. 29, 2009, 8:38 a.m. EDT).

[72] Bottigheimer Interview Memo (explaining that the Florida Avenue Property should have been classified as excess property and sold).

[73] E-mail from Jim Graham, Councilmember, Washington, D.C., to Carol O'Keeffe, General Counsel, WMATA, Neil Albert, Deputy Mayor for Economic Development, Office of the Mayor of Washington, D.C., Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA, and John Catoe, Jr., General Manager, WMATA (Oct. 20, 2009, 5:44 p.m. EST).

[74] E-mail from Omar Karim, Principal, Banneker Ventures, to Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA, and Steve Goldin, Director of Real Estate, WMATA (Nov. 4, 2009, 10:51:56 a.m. EST).

[75] E-mail from Omar Karim, Partner, Banneker Ventures, to Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA (Nov. 3, 2009, 1:58 p.m. EST).

c. Changes in Banneker Ventures's Development Team

Changes in the development team at Banneker Ventures also delayed the negotiations. When Banneker Ventures submitted its proposal in October 2007, it had partnered with Donatelli Development ("Donatelli"),[76] a firm with experience developing projects similar to the Florida Avenue Property.[77] In the fall of 2007, after Donatelli withdrew from the Florida Avenue Project, Mr. Karim approached Merrick Malone and Scott Pannick of Metropolis Development Company ("Metropolis") about a potential partnership.[78] Metropolis submitted a letter to Banneker Ventures on January 28, 2008 stating its interest in serving as a co-developer.[79] Banneker Ventures immediately informed Metro of Metropolis' participation.[80] Ms. Doggett (Metro Senior Transit Oriented Development Specialist) took the partnership between Banneker Ventures and Metropolis into consideration when evaluating the bids for the Florida Avenue

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[76] Doggett Jan. 29, 2008 Memo; Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Christopher Donatelli Interview Memorandum (September 14, 2012) ("Donatelli Interview Memo") (stating Donatelli Development joined the Banneker Ventures team in the summer of 2007).

[77] Draft Memorandum regarding FL Ave EOI's Supplemental Information, unknown author, undated.

[78] Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Merrick Malone Interview Memorandum (Aug. 16, 2012) ("Malone Interview Memo") (stating that Mr. Karim approached Metropolis and offered a partnership on the Florida Avenue Project).

[79] Letter from Merrick Malone, Principal and Executive Vice President, Metropolis Development, to Omar Karim, Principal, Banneker Ventures (Jan. 28, 2008). Merrick Malone of Metropolis indicated during an interview by Cadwalader that he submitted the letter solely because Deputy Mayor Albert, who was not a Metro Board Member at the time, asked him to lend Metropolis's name to the Florida Avenue Project until Banneker Ventures could find another co-developer. Malone Interview Memo. Scott Pannick of Metropolis also apparently left a voicemail for Joshua Adler of LaKritz Adler shortly after the Metro Board selected Banneker Ventures to develop the Florida Avenue Property which informed Mr. Adler that Metropolis was not "going to be involved with Banneker on Metro sites." E-mail from Joshua Adler, Principal, LaKritz Adler, to Robert LaKritz, Principal, LaKritz Adler (July 10, 2008, 1:56 p.m. EDT). Mr. Adler stated that, in the spring of 2008, he had lunch with Mr. Pannick and Mr. Malone of Metropolis and that they told him Metropolis did not have an agreement with Banneker Ventures to be co-developers on the Florida Avenue Project. Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Joshua Adler Interview Memorandum (Sept. 25, 2012) ("Adler Interview Memo"). Mr. Karim did not recall that Metropolis did not intend to participate in the Florida Avenue Project. Deposition of Omar Karim, Principal, Banneker Ventures (Aug. 21, 2012) at 176:22–177:6 (stating that he did not recall Metropolis being involved only so Banneker Ventures could obtain approval from Metro), while Deputy Mayor Albert could not recall the reason for Metropolis's withdrawal. *See* Albert Interview Memo (stating that he did not remember why Metropolis dropped out of the Florida Avenue Project).

[80] Doggett Jan. 29, 2008 Memo.

Project.[81] Metro became aware that Metropolis was no longer involved in the Florida Avenue Project in late 2008, when Mr. Karim's attorney informed Mr. Montague (Metro Assistant General Counsel) that Banneker Ventures "bought out" Metropolis.[82] Mr. Montague informed Mr. Karim's attorney that Metropolis's absence might be a problem because WMATA approved the resolution to select Banneker Ventures, in part, on the basis that all members of the development team would participate in the Florida Avenue Project.[83]

In March 2009, Banc of America CDC ("BACDC") replaced Metropolis as the partner for Banneker Ventures.[84] Although BACDC was unknown to Metro, the subsequent due diligence, conducted at the request of the Metro Board, revealed that the BACDC principal received favorable references for both development management and construction oversight expertise, and that BACDC had completed other local development projects.[85] BACDC partnered with Banneker Ventures on the Florida Avenue Project for a year, and withdrew from the project by March 2010.[86] Banneker Ventures did not identify a new development partner.[87]

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[81] *Id.*

[82] E-mail from Joshua Montague, Assistant General Counsel, WMATA, to Rosalyn Doggett, Senior Transit Oriented Development Specialist, WMATA (Dec. 3, 2008, 11:23 a.m. EST). Mr. Karim believed that Metropolis dropped out of the Florida Avenue Project at some point in the fall of 2008 and could not recall when he informed Metro joint development staff that the composition of his team had changed. Karim Dep. 169:1–5, 169:13–18 (Aug. 21, 2012).

[83] E-mail from Joshua Montague, Assistant General Counsel, WMATA, to Rosalyn Doggett, Senior Transit Oriented Development Specialist, WMATA (Dec. 3, 2008, 11:23 a.m. EST).

[84] Letter from Maurice Perry, Vice President, Banc of America CDC, to Omar Karim, Principal, Banneker Ventures (Mar. 6, 2009).

[85] Memorandum from John Catoe, Jr., General Manager, WMATA, to Chairman and Members of the Board of Directors, WMATA (Apr. 3, 2009); *see also* Doggett Interview Memo (stating that Ms. Doggett called BACDC principal Maurice Perry's references and received positive recommendations from each one).

[86] E-mail from Steve Goldin, Director of Real Estate, WMATA, to Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA, Rosalyn Doggett, Senior Transit Oriented Development Specialist, WMATA, and Joshua Montague, Assistant General Counsel, WMATA (Mar. 14, 2010, 6:15 p.m. EDT); *see also* E-mail from Rosalyn Doggett, Senior Transit Oriented Development Specialist, WMATA, to Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA (Mar. 14, 2010, 8:38 p.m. EST). Mr. Karim stated that BACDC left the development team because they preferred the transaction to be structured as a sale rather than as a lease. Karim Dep. 69:7–22 (July 23, 2012).

[87] E-mail from Steve Goldin, Director of Real Estate, WMATA, to Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA, Rosalyn Doggett, Senior Transit Oriented Development Specialist, WMATA, and Joshua Montague, Assistant General Counsel, WMATA (Mar. 14, 2010, 6:15 p.m. EDT).

Ms. Doggett (Metro Senior Transit Oriented Development Specialist) was concerned about Banneker Ventures's lack of notification to Metro when its development partners withdrew from the project, so she discussed with the representatives from Donatelli and Metropolis the reason why they withdrew from the development project.[88] According to Ms. Doggett, Larry Clark from Donatelli told her they were unable to work with Banneker Ventures, and Mr. Malone of Metropolis told her that Mr. Karim had been unwilling to give them sufficient control over the development and construction of the project.[89] According to Ms. Doggett, Mr. Malone also informed her that his firm withdrew because it did not want to anger Councilmember Graham by working on the Florida Avenue Project with Banneker Ventures.[90]

4. Expiration of Exclusive Negotiation Period

The Metro Board granted two extensions to Banneker Ventures before January 2010 to address the issues that arose during negotiations.[91] On January 28, 2010, Deputy Mayor Albert moved to extend the negotiation period to March 31, 2010.[92] The Metro Board unanimously voted to extend the negotiation period.[93] Councilmember Graham abstained from the vote.[94]

In February 2010, Councilmember Graham became the Chair of the PDREC. On March 18, 2010, Councilmember Graham removed the Florida Avenue Project from the agenda of the

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[88] Doggett Interview Memo (explaining that she spoke with Donatelli and Metropolis to discuss why they dropped out).

[89] *Id.* (stating that Donatelli told her they were unable to work with Banneker Ventures, and Metropolis told her that Banneker Ventures wanted too much control over the development process). Mr. Donatelli stated in his interview that he withdrew because he was concerned about Banneker Ventures's ability to handle the project. Donatelli Interview Memo. *See also* Malone Interview Memo (stating that he did not recall a conversation with Ms. Doggett about the Florida Avenue Project, but he stated that he did not want to participate in the Florida Avenue Project because Banneker Ventures would not give him sufficient control); Graham Dep. 131:4–6 (explaining that Metropolis withdrew due to a lack of confidence in Banneker Ventures).

[90] Doggett Interview Memo (describing conversations with Donatelli and Metropolis); *but see* Karim Dep. 65:18-67:9 (July 23, 2012) (stating Metropolis withdrew because one of its principals became ill).

[91] The Metro Board granted extensions on 4/23/2009 and 9/24/2009. Meeting Minutes, 1340th Meeting of the Board of Directors, WMATA (Apr. 23, 2009); Meeting Minutes, 1344th Meeting of the Board of Directors, WMATA (Sept. 24, 2009).

[92] Meeting Minutes, 1348th Meeting of the Board of Directors, WMATA (Jan. 28, 2010).

[93] *Id.*

[94] *Id.*

PDREC's March meeting, and, therefore, the Committee did not consider it.[95] On March 25, 2010, the Metro Board, after Executive Session, added the Florida Avenue Project to the agenda for that day's meeting.[96] After Board Members voiced concerns about the lack of a reliable development partner for Banneker Ventures, and Banneker Ventures's decision to lower the amount of its offer for the Florida Avenue Project,[97] Councilmember Graham moved to provide Metro joint development staff with additional time to negotiate the term sheet for the Florida Avenue Project.[98] Deputy Mayor Albert, cognizant that a majority of the Metro Board Members were planning to vote against extending the negotiation period, [99] countered Councilmember Graham's proposal with a motion to table the item, which the Metro Board Members unanimously approved.[100] Deputy Mayor Albert and Councilmember Graham coordinated these actions in advance during the Executive Session of the March 25, 2010, Metro Board Meeting.[101]

Banneker Ventures's exclusive negotiation period for the Florida Avenue Project expired on March 31, 2010. In July 2011, Metro sold the Florida Avenue Property to JBG Construction for $10.2 million.[102] The property remains undeveloped as of the date of this report.[103]

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[95] E-mail from Loyda Sequeira, Board Secretary, WMATA, to Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA, Steve Goldin, Director of Real Estate, WMATA, John B. Catoe, General Manager, WMATA, and Shiva K. Pant, Chief of Staff, Office of the General Manager, WMATA (Mar. 18, 2010, 7:05 p.m. EDT).

[96] Meeting Minutes, 1350th Meeting of the Board of Directors, WMATA (Mar. 25, 2010).

[97] Handwritten Notes from Meeting with Loyda Sequeira, Board Secretary, WMATA, author unknown (Apr. 2, 2010).

[98] Meeting Minutes, 1350th Meeting of the Board of Directors, WMATA (Mar. 25, 2010).

[99] Albert Interview Memo (stating that there were not enough votes to extend Banneker's negotiation period).

[100] Meeting Minutes, 1350th Meeting of the Board of Directors, WMATA (Mar. 25, 2010).

[101] Graham Dep. 157:4–160:13 (explaining that he and Deputy Mayor Albert agreed that Deputy Mayor Albert would make the motion to table the extension); Benjamin Interview Memo (stating that Councilmember Graham and Deputy Mayor Albert came to an agreement to stop negotiations with Banneker Ventures during executive session); *cf.* Albert Interview Memo (explaining that he moved to table the extension because there were not enough votes to grant Banneker Ventures another extension).

[102] Sarah Krouse, *JBG buys Metro's Florida Ave. sites for 10.2M*, Wash. Bus. J. (July 27, 2012), *available at* http://www.bizjournals.com/washington/news/2011/07/26/jbg-buys-metros-florida-ave-sites.html?page=all.

[103] As of the date of this report, JBG has not yet obtained necessary approval from D.C. Historic Preservation Review Board for its plan for the Florida Avenue Property. *See* Historic Preservation Review Board Staff Report and Recommendation (July 26, 2012), *available at* http://planning.dc.gov/DC/Planning/Historic+Preservation/About+HPO+&+HPRB/Who+We+Are

C. Councilmember Graham's Involvement in Metro's Negotiations with Banneker Ventures

Councilmember Graham's active involvement in the Florida Avenue Project prompted allegations from Banneker Ventures that Councilmember Graham's conduct contributed to the delays in the negotiations and paved the way for the Metro Board's decision to refuse to extend the negotiation period.[104] These allegations merited a closer examination of Councilmember Graham's activities related to the Florida Avenue Project.[105]

/Historic+Preservation+Review+Board/Monthly+Public+Notice/HPRB+July+2012/U+Street+HD+-+Florida+Avenue+at+9th+and+8th+Streets+NW+-+HPA+12-159.

[104] Letter from A. Scott Bolden, Partner, Reed Smith LLP, to Richard Sarles, Interim General Manager, WMATA, Re: Status of Banneker Ventures Term Sheet and Award of Jazz at Florida Avenue Project (Apr. 27, 2010). Metro's Deputy General Counsel Bruce Heppen stated during his interview that, in response to the allegations in Attorney Bolden's letter, Councilmember Graham asked to be represented by Metro's in-house lawyers against the allegations. Mr. Heppen informed Councilmember Graham that Metro could not represent him under Metro's indemnification policy. Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Bruce Heppen Interview Memorandum (Aug. 13, 2012) ("Heppen Interview Memo"). In response to the phone call, Mr. Heppen wrote Councilmember Graham a letter stating that "the General Counsel and her staff will work closely with you in addressing your concerns raised by the letter from A. Scott Bolden. . . . I can assure you that your interests and the interests of the Authority will be addressed in the response." Letter from Bruce Heppen, Deputy General Counsel, WMATA, to Jim Graham, Councilmember, Washington, D.C. (Apr. 30, 2010); *but see* Graham Dep. 164:5–170:12 (stating that while he did not recall a conversation with Mr. Heppen it may have happened, that he did not recall receiving the letter where Mr. Heppen stated the General Counsel would work closely with Councilmember Graham to address his concerns, and denying involvement in the response by Metro's General Counsel to A. Scott Bolden). Metro's Audits and Investigations Committee directed Cadwalader to investigate the allegations as they pertained to Councilmember Graham and other Board Members. As discussed above, despite her letter to Banneker Ventures's attorney responding to concerns, the Metro General Counsel did not interview witnesses, review documents, or investigate the conduct of any Board Member. O'Keeffe Interview Memo (stating that she did not investigate possible misconduct by the Metro Board Members because she did not believe the actions of any Board Member affected Banneker Ventures's inability to negotiate an agreement).

[105] A recent report of the District of Columbia Office of the Inspector General found that Councilmember Graham had engaged in questionable conduct. *See* D.C. Office of the Inspector General, 2010-0492, Report of Investigation into the Office of the Chief Financial Officer's Lottery Contract Award (2012) ("During the course of W2I's meeting with a councilmember, who also chaired the board of a quasi-public entity, the councilmember indicated that he could not or was not inclined to go along with voting for or awarding the lottery contract to W2I because W2I's participating local partner had been awarded a contract with the quasi-public entity"). During the Inspector General's investigation, Mr. Williams and Ms. Williams of W2I separately met with investigators. Their prior statements to the D.C. Inspector General are consistent with the information Mr. and Ms. Williams provided to Cadwalader.

1. Councilmember Graham's Objections to Warren Williams and Banneker Ventures

Councilmember Graham's dislike and distrust of Mr. Williams (principal of Banneker Ventures) were well known to Metro staff and Board Members[106] and to Banneker Ventures.[107] In addition to Councilmember Graham's numerous statements questioning Mr. Williams and Banneker Ventures during Metro Board meetings,[108] Councilmember Graham contacted several individuals involved in the Florida Avenue Project directly to express his concerns. For example, Councilmember Graham expressed his low opinion of Mr. Williams to Mr. Malone (principal of Metropolis) when Metropolis announced that it was going to partner with Banneker Ventures on the Florida Avenue Project.[109] In fact, Councilmember Graham's objections, which ranged from Mr. Williams' reputation as a landlord to his alleged outstanding taxes,[110] were so severe that they prompted Ms. Doggett (Metro Senior Transit Oriented Development Specialist) to suggest to Mr. Karim (principal of Banneker Ventures) in April 2008 that Mr. Williams withdraw from the project.[111]

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[106] Bottigheimer Interview Memo (recalling that Councilmember Graham expressed concerns about Mr. Williams's financial situation); *see also* Doggett Interview Memo (stating that Councilmember Graham raised concerns about Mr. Williams on multiple occasions, including at the April 24, 2008 Metro Board meeting); Moneme Interview Memo (explaining that Councilmember Graham expressed concerns about Mr. Williams at the April 24, 2008 Metro Board meeting).

[107] Karim Dep. 70:17-71:19 (July 23, 2012) (stating that he heard from Metro joint development staff that Councilmember Graham disliked Mr. Williams, and had claimed that Mr. Williams owed money to D.C.).

[108] Handwritten notes from Metro Board Executive Session, Rosalyn Doggett (Apr. 24, 2008); Moneme Interview Memo (explaining that Councilmember Graham expressed concerns about Mr. Williams at the April 24, 2008 Metro Board meeting).

[109] Malone Interview Memo (stating that Mr. Malone and Councilmember Graham had a conversation immediately after Councilmember Graham learned of the partnership. Councilmember Graham asked Mr. Malone why he would lend his support to a "joker" firm such as Banneker Ventures); *but cf.* Graham Dep. 132:13–21 (stating that he did not suggest to Metropolis not to do business with Banneker Ventures, and was relieved when Metropolis entered the Florida Avenue Project).

[110] Doggett Interview Memo (stating that Councilmember Graham criticized Mr. Williams's reputation as a landlord and said that he did not want to contract with individuals who failed to pay taxes). As discussed above, Ms. Doggett's additional inquiries uncovered no problems with Banneker Ventures and established that none of the Banneker Ventures principals owed any outstanding taxes to the District of Columbia.

[111] Doggett Interview Memo (explaining that after hearing Councilmember Graham's concerns, she probably spoke with Mr. Karim and told him that his firm probably would not be selected if Mr. Williams remained on the team); Handwritten Notes from Rosalyn Doggett (Apr. 15, 2008). *See also* Karim Dep. 70:20–71:22 (July 23, 2012) (stating that Ms. Doggett informed him that Councilmember Graham was concerned about Mr. Williams).

Councilmember Graham's only direct interaction with Mr. Williams related to the Florida Avenue Project occurred on May 29, 2008 at a meeting that Mr. Williams intended to be about the D.C. lottery. At this time, Mr. Williams and his wife, Alaka Williams, were trying to gain support from D.C. Councilmembers for W2I to be awarded the contract to administer the D.C. lottery.[112] W2I was a joint venture between Intralot, an international lottery vendor based in Greece, and W2Tech, a company founded by Mr. and Ms. Williams.[113] W2I had hired public relations executive Crystal Wright from the Baker Wright Group and lobbyist James Link from American Capitol Group to meet with Councilmembers and their staff to discuss W2I's bid.[114] After Mr. Link and Ms. Wright approached Councilmember Graham's staff about a meeting regarding the lottery, Councilmember Graham explicitly requested through his staff that Mr. Williams attend the meeting.[115]

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[112] On January 24, 2008, the Office of the Chief Financial Officer for the District of Columbia awarded a contract to administer the D.C. lottery to W2I, subject to the approval of the D.C. Council. Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Alaka Williams Interview Memorandum (July 9, 2012) ("A. Williams Interview Memo") (explaining that the May 29 meeting was one of a series of meetings that W2I held with D.C. Councilmembers in efforts to lobby for votes on W2I's lottery bid); Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Warren Williams Interview Memorandum (July 27, 2012) ("W. Williams Interview Memo") (stating that the May 29 meeting was one of a series of meetings that W2I held with D.C. Councilmembers in efforts to lobby for votes on their lottery bid); Deposition of Crystal Wright, Principal, Baker Wright Group (July 26, 2012) at 18:3–23:10 (stating that W2I hired her and Mr. Link to educate D.C. Councilmembers about the merits of W2I's proposal). On December 16, 2008 the D.C. Council denied a resolution to award W2I the lottery contract by a vote of five in favor of the resolution and eight against. Councilmember Graham voted against awarding W2I the contract. Contract No. CFOPD-07-C-053, with W2I Venture, LLC, On-line Gaming System and Related Services Approval Resolution of 2008, PR17-1160, Council of the District of Columbia (2008).

[113] W. Williams Interview Memo; *see also* A. Williams Interview Memo.

[114] Wright Dep. 10:10–11:20 (stating that she was hired by W2Tech and Intralot to handle public relations, and that she brought in Mr. Link to lobby the D.C. Council); *see also* Deposition of James Link, Partner, American Capitol Group (Aug. 2, 2012) at 9:8–10:3 (stating that Ms. Wright hired him to lobby for W2I).

[115] Link Dep. 10:13–11:14 (stating that Councilmember Graham's office had called his office to request Mr. and Ms. Williams attend the meeting); *see also* A. Williams Interview Memo (explaining that Mr. Link and Ms. Wright said that Councilmember Graham required Mr. Williams to be present at the meeting); W. Williams Interview Memo (stating that Mr. Link and Ms. Wright said that Councilmember Graham would not take the meeting unless Mr. Williams was present at the meeting); Wright Dep. 18:3–21:8 (stating that the morning of the meeting Mr. Link received a phone call insisting that Mr. and Ms. Williams attend the meeting); *but see* Graham Dep. 42:15–55:1 (explaining that either Mr. or Ms. Williams initiated the meeting, and the purpose of the meeting was to "clear the air" and see if the parties could build a more productive relationship).

On May 29, 2008, Mr. Link, Mr. Williams, Ms. Williams, and Ms. Wright met with Councilmember Graham and two of his staff members, Steven Hernandez and Calvin Woodland, in Councilmember Graham's office.[116] Mr. and Ms. Williams assumed that the topic of the meeting would be limited to W2I's bid to administer the lottery and had planned their remarks accordingly.[117] They did not plan to discuss the Florida Avenue Project with Councilmember Graham.[118] Moreover, Mr. Link and Ms. Wright's work with Mr and Mrs. Williams was limited to the lottery contract, not the Florida Avenue Project, and the sign-in sheet for the meeting from Councilmember Graham's office indicated the subject of the meeting was the lottery contract.[119] After exchanging pleasantries and before any discussion of the D.C. lottery could begin, Councilmember Graham consulted a file of information that he had in his office[120] and began to elaborate on his various complaints about Mr. Williams,[121] including issues revolving around Club U, a club that was owned by Mr. Williams that had lost its liquor license after a clubgoer was fatally stabbed,[122] and his lack of experience as a developer.[123] Councilmember Graham

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[116] Graham Dep. 43:19–45:2 (stating that Ms. Williams, Mr. Williams, Ms. Wright, Mr. Link, Mr. Woodland and Mr. Hernandez attended the meeting); *see also* Meeting Sign-in Sheet for Lottery Contract Meeting at the Office of Councilmember Jim Graham (May 29, 2008).

[117] W. Williams Interview Memo (explaining that the purpose of the May 29, 2008 meeting was to discuss the lottery contract); A. Williams Interview Memo (stating the meeting's purpose was to discuss the W2I lottery bid, which needed the approval of the D.C. Council).

[118] *Id.*

[119] Link Dep. 72:2–7 (stating that he did not act as a lobbyist for Banneker Ventures or in connection with the Florida Avenue Project); Wright Dep. 10:10–21, 144:8–11 (stating that she was retained by W2Tech to handle public relations work and local lobbying, and that she did not have any clients involved with Metro); Meeting Sign-in Sheet for Lottery Contract Meeting at the Office of Councilmember Jim Graham (May 29, 2008).

[120] W. Williams Interview Memo (explaining that Councilmember Graham pulled a large file from his file cabinet and began to read from it); *see also* E-mail from Jim Graham, Councilmember, Washington, D.C. to Scott Butterworth, Washington Post (Feb. 16, 2012, 8:30 p.m. EST) (acknowledging that he [Councilmember Graham] had a "big fat file" regarding Mr. Williams's "irresponsible actions").

[121] Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Steve Hernandez Interview Memorandum (Aug. 1, 2012) ("Hernandez Interview Memo") (stating that almost immediately during the meeting, Councilmember Graham began complaining about Club U and a smear campaign involving posters); *see also* Link Dep. 16:7–19 (explaining that Councilmember Graham immediately made personal attacks against Mr. Williams); Wright Dep. 26:12–21, 35:22–37:5 (stating that Councilmember Graham spoke about Mr. Williams funding his enemies and Mr. Williams's involvement with a poster); A. Williams Interview Memo (stating that Councilmember Graham went on a tirade attacking Mr. Williams); W. Williams Interview Memo (explaining that Graham immediately started talking about his complaints with Mr. Williams).

also complained that Mr. Williams had participated in posting signs that depicted Councilmember Graham in a derogatory way.[124] After airing his personal grievances, Councilmember Graham told Mr. Williams that he had "won too much."[125] According to witnesses, Councilmember Graham next indicated that he would consider supporting W2I's bid for the lottery contract if Mr. Williams gave Councilmember Graham "something."[126]

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[122] Tim Lemke, *D.C. Takes Liquor License from Club U*, Wash. Bus. J. (June 29, 2005), *available at* http://www.bizjournals.com/washington/stories/2005/06/27/daily28.html. On the night in question, a patron of the club was stabbed to death, a woman inside the club was knocked unconscious, and the emergency medical team transporting her to an ambulance was fired at over ten times by a gunman. *Why Club U Matters*, Wash. Post (Feb. 19, 2005) *available at* http://www.highbeam.com/doc/1P2-14154.html. Councilmember Graham had a prominent role in shutting down Club U. Eric Weiss, *Revoke Club U's Licence, D.C. Says*, Wash. Post (Apr. 14, 2005), *available at* http://www.washingtonpost.com/wp-dyn/articles/A51709-2005Apr13.html.

[123] A. Williams Interview Memo (explaining that Councilmember Graham attacked Banneker Ventures's legitimacy and expertise).

[124] Graham Dep. 49:18–51:4, 74:11–20 (stating that posters depicting Councilmember Graham in an offensive way were discussed at the meeting); Hernandez Interview Memo (stating that Councilmember Graham complained about the offensive posters); Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Calvin Woodland Interview Memorandum (July 23, 2012) ("Woodland Interview Memo") (stating that the offensive posters were discussed at the meeting).

[125] Link Dep. 20:9–15 (explaining that Councilmember Graham said something to the effect that Mr. Williams had been winning too much); *see also* A. Williams Interview Memo (stating that Graham said that Mr. Williams had won too much); W. Williams Interview Memo (stating that Graham told Mr. Williams that he was winning too much). Councilmember Graham does not recall saying this. Graham Dep. 62:18–20:

> Q Did you say, Councilman Graham, to Warren Williams that you're winning too much?
>
> A No, I don't recall that.

[126] W. Williams Interview Memo (stating that Graham told Mr. Williams he had to "give me something"); *see also* A. Williams Interview Memo (stating that Councilmember Graham told Mr. Williams to "get off WMATA"); Link Dep. 20:9–22:2 (explaining that Councilmember Graham made a quid pro quo offer to Mr. Williams regarding the lottery contract and the Florida Avenue Project). Neither Councilmember Graham nor his staff recalled these statements. Hernandez Interview Memo (stating that he did not recall Councilmember Graham saying "you are winning too much" or "you have to give me something," but that he also could have "zoned out" during the meeting); Woodland Interview Memo (stating he did not recall Councilmember Graham saying "you are winning too much"); Graham Dep. 64:1–6, 65:14–20:

> Q Councilman Graham, did you make any statement whatsoever during that meeting that could have been interpreted or misinterpreted as a quid pro quo – if you give me something, I will give you something?
>
> A I don't recall.
>
> . . .

Q Why don't you think you recall one way or another whether you said that?

A Because I – my recollection of the meeting is entirely different than that, as I have expressed. And anything that would have been said along any of the lines that you're suggesting would have been said in passing.

However the testimonies of Mr. Link, Mr. Williams and Ms. Williams, as well as the contemporaneous documents discussed *infra* at notes 128-141, substantiate that Councilmember Graham stated that his support for the lottery contract was conditioned on Banneker Ventures withdrawing from the Florida Avenue Property.

Ms. Wright testified under oath that she did not recall Councilmember Graham making any such quid pro quo statement and that she was not concerned by anything said at the meeting. Wright Dep. 31:10–11, 32:3–33:18, 34:8–17:

Q Did Councilman Graham say something to the extent that Warren Williams had won too much?

. . .

A He would feel a lot better about the lottery contract if Warren wasn't involved in another deal or deals in the city, because he felt like because he was friends with Adrian Fenty, he was getting – his friendship was allowing him to maybe have access to deals that others wouldn't.

. . .

Q And did you interpret that, Ms. Wright, as Mr. Graham suggesting that Warren Williams pull out of another deal in order to get the lottery contract?

A You know, I don't remember. I don't really remember what – I would hate to try to speculate on what I thought about something 4-1/2 years ago. I didn't really have an opinion about it.

Q Well, as I understand, Ms. Wright, you'd expressed to other folks that you thought Mr. Graham's comment during that meeting was inappropriate.

A I really don't remember saying that.

Q Okay. Did you think his comment was inappropriate?

A I don't remember having an opinion on it at the time.

Q Do you have an opinion now? Was his comment inappropriate?

A I can't – I just remember thinking, gosh, I wish we could talk about the lottery. That's really what I remember thinking at the time.

Q Do . . . you believe his comment, though, was inappropriate?

A I don't have an opinion on whether it was inappropriate or appropriate.

. . .

Q Did you interpret Councilman Graham's statement about the other deals as being a quid pro quo? In other words, I'll support you for the lottery if you pull out of another development deal?

A No, I interpreted – or rather I took it, because I don't really have an interpretation, but I took it as him – what he literally said, that he was not happy – he felt, in his mind, that Warren Williams was getting deals because of his friendship with Adrian Fenty. That's how I took it.

Councilmember Graham then indicated what that "something" was by referring either to Metro generally or the Florida Avenue Property specifically.[127]

Mr. Link, Mr. Williams, Ms. Williams, and Ms. Wright were surprised by Councilmember Graham's suggestion that Banneker Ventures should withdraw from the Florida Avenue Project

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Her testimony is contradicted by the testimony from other participants at the meeting discussed *supra*, and contemporaneous e-mails, *see*, *e.g.*, E-mail from Crystal Wright, Principal, Baker Wright Group, to Alaka Williams, Co-Owner, W2Tech, Warren Williams, Co-Owner, W2Tech, Jay Lapine, General Counsel, Intralot USA, Byron Boothe, VP Government Relations, Intralot USA, James Link, Partner, American Capitol Group, and A. Scott Bolden, Partner, Reed Smith LLP (June 2, 2008, 2:05 p.m. EDT) (writing "It is pretty clear [Councilmember Graham] wants us to come back with something."); E-mail from Crystal Wright, Principal, Baker Wright Group, to Alaka Williams, Co-Owner, W2Tech, Warren Williams, Co-Owner, W2Tech, Byron Boothe, VP Government Relations, Intralot USA, James Link, Partner, American Capitol Group, and A. Scott Bolden, Partner, Reed Smith LLP (June 8, 2008, 1:07 p.m. EDT) (writing that she spoke with a lawyer who advised "against putting anything in writing, acknowledging this meeting and its contents, as it would have far reaching implications, even though we did nothing wrong."); and the interview of Byron Boothe of Intralot, Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Byron Boothe Interview Memorandum (Aug. 23, 2012) ("Boothe Interview Memo") (stating that Ms. Wright told him shortly after the meeting that Councilmember Graham indicated that he would support the lottery if Mr. Williams withdrew from the Metro project); *but see* Wright Dep. 48:13–50:2 (stating that she did not make a call to Mr. Boothe after the meeting).

When presented with the above e-mails during her deposition Ms. Wright stated that she did not remember what they meant. Wright Dep. 66:13–19, 83:3–6:

> Q Could you please read the e-mail?
>
> A "Jim said that Graham e-mailed back thanking him also and say do you think they will do anything. It is pretty clear he wants us to come back with something."
>
> Q What does that mean?
>
> A I couldn't tell you. I don't remember.
>
> . . .
>
> Q You said that acknowledging this meeting would have far-reaching implications. What did you mean?
>
> A I actually have no idea what I meant.

[127] *See* Link Dep. 21:10–17 (explaining that he knew Councilmember Graham was referring to the Florida Avenue Project because Councilmember Graham said the word "WMATA"); *see also* A. Williams Interview Memo (stating that Councilmember Graham told Mr. Williams to "get off WMATA"); W. Williams Interview Memo (recalling that Councilmember Graham complained that Mr. Williams had the WMATA project and the lottery); Hernandez Interview Memo (recalling that, during the meeting, a project over a Metro station was discussed, but that he did not recall the context).

in order to obtain Councilmember Graham's support for W2I's bid for the lottery contract.[128] Mr. and Ms. Williams contacted their attorney, A. Scott Bolden of the law firm Reed Smith LLP, to explain the situation.[129] Ms. Wright, concerned about the ramifications of Councilmember Graham's request, also sought and obtained legal counsel.[130]

Contemporaneous internal communications confirm a clear concern with Councilmember Graham's request. On June 2, 2008, Mr. Williams sent an e-mail to Mr. Bolden, Mr. Link, Ms. Williams and Ms. Wright, in which he said, "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 a deal with LaKritz for a 'better project' we could do that. But I just can't give the project to anyone."[131] Later that evening, after further discussions of ways in which Mr. Williams could comply with Councilmember Graham's request, Mr. Bolden sent an e-mail to Mr. Link, Mr. Williams, Ms. Williams, and Ms. Wright, in which he said, "this is complete bs 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. perhaps the us atty should make the call on this by speaking with Mr. Graham about his request. Am I clear on this. To even consider it is placing each of us at risk. Period."[132]

After Mr. Bolden's e-mail made it clear that Mr. Williams should not entertain Councilmember Graham's request to withdraw from the Florida Avenue Project, the W2I team circulated multiple draft e-mails that tried to find a delicate way to inform Councilmember Graham that Banneker Ventures could not comply with his request to withdraw from the Florida Avenue Project. On June 7, 2008 at 8:51 p.m., for example, Mr. Bolden suggested that Mr. Link or Ms. Wright send Councilmember Graham an e-mail that stated, in part, that "[d]espite our legal and general concerns regarding your request that the Williams' withdraw from the WMATA

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[128] Link Dep. 36:15–37:2 (explaining that the reactions of the W2I team were of surprise, shock and disgust after the meeting).

[129] A. Williams Interview Memo (stating that, within 48 hours of the May 29, 2008 meeting, she, Mr. Williams, Ms. Wright and Mr. Link met with Mr. Bolden).

[130] E-mail from Crystal Wright, Principal, Baker Wright Group, to Alaka Williams, Co-Owner, W2Tech, Warren Williams, Co-Owner, W2Tech, Byron Boothe, VP Government Relations, Intralot USA, James Link, Partner, American Capitol Group, and A. Scott Bolden, Partner, Reed Smith LLP (June 8, 2008, 1:07 p.m. EDT).

[131] E-mail from Warren Williams, Co-Owner, W2Tech, to A. Scott Bolden, Partner, Reed Smith LLP, Crystal Wright, Principal, Baker Wright Group, James Link, Partner, American Capitol Group, and Alaka Williams, Co-Owner, W2Tech (June 2, 2008, 7:05 p.m. EDT).

[132] E-mail from A. Scott Bolden, Partner, Reed Smith LLP, to Crystal Wright, Principal, Baker Wright Group, Warren Williams, Co-Owner, W2Tech, and Alaka Williams, Co-Owner W2Tech (June 2, 2008, 8:26 p.m. EDT). We offer no views concerning Mr. Bolden's statement.

development contract — contracts they won fair and square and other contract information, in exchange for your support of the lottery contract. . . ."[133]

E-mails between Councilmember Graham and Mr. Link (lobbyist for W2I) also reveal the general understanding among the meeting participants that Councilmember Graham wanted Banneker Ventures to withdraw from the Florida Avenue Project. On Friday, May 30, 2008, Mr. Link sent Councilmember Graham an e-mail thanking him for the meeting.[134] Councilmember Graham responded in an e-mail on Monday June 2: "Thanks. Do you think they will do anything."[135] Later that day, Mr. Link responded to Councilmember Graham's e-mail by

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[133] E-mail from A. Scott Bolden, Partner, Reed Smith LLP, to Crystal Wright, Principal, Baker Wright Group, Warren Williams, Co-Owner, W2Tech, and Alaka Williams, Co-Owner, W2Tech (June 7, 2008, 8:51 p.m. EDT).

[134] E-mail from James Link, Partner, American Capitol Group, to Jim Graham, Councilmember, Washington, D.C. (May 30, 2008, 1:59 p.m. EDT).

[135] E-mail from Jim Graham, Councilmember, Washington, D.C., to James Link, Partner, American Capitol Group (June 2, 2008, 8:12 a.m. EDT). Councilmember Graham initially did not recall what the e-mail meant. Graham Dep. 80:12–81:9:

> 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 showed me.
>
> 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 Could it have been WMATA?
>
> A I don't know.

Councilmember Graham later stated during the deposition that he thought the statement could have been referring to whether Mr. Williams was looking into the allegations Councilmember Graham made at the May 29, 2008 meeting about the offensive posters. Graham Dep. 84:11–85:5:

> Q Okay. He says, "I know you're out of town, but hopefully you are checking e-mail." First paragraph he says, "we looked into the questions you asked." Do you understand what he means by question you asked?
>
> A I think this could very well be the follow-up. This could very well be the follow-up that he's talking about, what next steps. And now that you show me this e-mail and refresh my memory, this could be the follow-up here, is that he had promised to look into this to determine whether or not, in fact, the allegation – the thoughts that were in my mind were true. And here he's giving me the information that he found. Because Jim Link had no

writing, "Yes, wheels are in motion. Everyone took your concerns seriously. . . ."[136] The next day, Councilmember Graham, apparently referring to the fact that the Metro PDREC vote to select Banneker Ventures to develop the Florida Avenue Project had been delayed at Councilmember Graham's request until June 26, responded, "I will be gone from the 6th to the 16th,....but [sic] I am sure nothing will happen during that time."[137]

On June 11, 2008, Mr. Link continued the e-mail chain from May 30, 2008 by sending Councilmember Graham an e-mail refuting the allegations that Mr. Williams was involved in the derogatory posters.[138] Mr. Link went on to write that, "as for Metro, there are a number of

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involvement whatsoever with these earlier events. So this is probably what's being referred to as the next steps and the follow-up.

[136] E-mail from James Link, Partner, American Capitol Group, to Jim Graham, Councilmember, Washington, D.C. (June 2, 2008, 2:56 p.m. EDT). During his deposition Councilmember Graham did not know what Mr. Link meant. Graham Dep. 81:19–82:3:

Q What did you understand him to be meaning when he wrote to you in response to your inquiry of "do you think they will do anything" that "wheels are in motion"?

A I don't know.

Q Wheels for what?

A I don't know.

[137] E-mail from Jim Graham, Councilmember, Washington, D.C., to James Link, Partner, American Capitol Group (June 3, 2008, 7:54 a.m. EDT). Councilmember Graham did not recall what was scheduled between those dates. Graham Dep. 82:7–83:4:

Q You say, "I will be gone from the 6th to the 16th, but I am sure nothing will happen during that time."

A Hmm. I have no idea what that –

. . .

Q Could you be referring to something that dealt with WMATA there?

A I don't know.

Q And where were you the 6th to the 16th?

A It could have been referring to the lottery contract, though.

Q Okay. What –

A I don't know, but I can check that.

Q How would you check that?

A I don't know. I could check my calendar for that date to see where I was.

[138] E-mail from James Link, Partner, American Capitol Group, to Jim Graham, Councilmember, Washington, D.C. (June 11, 2008, 12:31 p.m. EDT).

factors that make it impossible for us to even consider accommodating your request."[139] Mr. Link concluded by informing Councilmember Graham that Ms. Wright (public relations consultant for W2I) had been contacted by a reporter from the *Washington Examiner* and asked questions about the May 29, 2008 meeting.[140] Mr. Link assured Councilmember Graham that no one from W2I had discussed the meeting with the press because "it would not be in our interest or your interest to publicize what was discussed."[141] Later that day, Councilmember Graham responded to Mr. Link's e-mail, writing that "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

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[139] *Id.* The decision to reject Councilmember Graham's request occurred after Mr. Bolden's internal e-mail telling the W2I team that "[t]o even consider it is placing each of us at risk." E-mail from A. Scott Bolden, Partner, Reed Smith LLP, to Crystal Wright, Principal, Baker Wright Group, Warren Williams, Co-Owner, W2Tech, and Alaka Williams, Co-Owner W2Tech (June 2, 2008, 8:26 p.m. EDT). Councilmember Graham initially did not recall what this statement by Mr. Link meant. Graham Dep. 90:10–19, 91:18–92:3:

> Q And if you flip the page to the end of his e-mail, he says, "as for Metro, there are a number of factors that make it impossible for us to even consider accommodating your request."
>
> A Uh-huh.
>
> Q What did you understand Mr. Link to mean when he wrote that?
>
> A I don't know what he meant by that. I do know that in my subsequent e-mail, I have a response to it.
>
> . . .
>
> Q Okay. Mr. Graham, why would Mr. Link raise this point, "as for Metro, there are a number of factors that make it impossible for us to even consider accommodating your request"?
>
> A Maybe this is a misinterpretation of something that was said at the prior meeting.
>
> Q Maybe something related to Metro?
>
> A Maybe.

Councilmember Graham later thought he was referring to Banneker Ventures's qualifications. Graham Dep. 98:19–20.

[140] E-mail from James Link, Partner, American Capitol Group, to Jim Graham, Councilmember, Washington, D.C. (June 11, 2008, 12:31 p.m. EDT).

[141] *Id.*

application."[142] Councilmember Graham also wrote that he would "rather not continue this on email."[143]

The June 11, 2008 e-mail exchange was the last communication between Councilmember Graham and Mr. Link, Ms. Wright, Mr. Williams or Ms. Williams concerning the Florida Avenue Project.[144] Although Councilmember Graham's exact statements at the May 29, 2008 meeting are unclear, as discussed in Section VII(D)(1) of this report, it appears that Councilmember Graham suggested or, at the very least, implied that he would consider supporting W2I's bid for the lottery before the D.C. Council only if Banneker Ventures withdrew from the Florida Avenue Project. Indeed, Councilmember Graham has not outright denied making the statement, instead positing that he may have said something in passing that was misinterpreted by the participants of the May 29, 2008 meeting.[145]

2. Councilmember Graham's Support of LaKritz Adler

Councilmember Graham's support for LaKritz Adler, a real estate development firm, was well known to all parties involved in the Florida Avenue Project, including the principals of Banneker Ventures,[146] the principal of Donatelli Development,[147] Ms. Doggett (Metro Senior Transit

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[142] E-mail from Jim Graham, Councilmember, Washington, D.C., to James Link, Partner, American Capitol Group (June 11, 2008, 2:26 p.m. EDT). Councilmember Graham speculated that his statement might have been related to Banneker Ventures's qualifications. Graham Dep. 97:13–105:22 (explaining that the statement related to the qualifications of Banneker Ventures, and that anything said about Metro was said in passing or was misinterpreted).

[143] E-mail from Jim Graham, Councilmember, Washington, D.C., to James Link, Partner, American Capitol Group (June 11, 2008, 2:26 p.m. EDT); *but see* Graham Dep. 95:20–96:5 (explaining that he did not want to continue by e-mail because writing an answer would take too much time).

[144] Following the May 29, 2008 meeting, the Metro Board selected Banneker Ventures as the developer of the Florida Avenue Project and negotiated with Banneker Ventures concerning the terms for twenty months. As discussed above in Section VI.B.3, during this time period Banneker Ventures substantially lowered its offer, and its three development partners withdrew from the project.

[145] Graham Dep. 65:2–66:22, 69:19–22 (explaining that anything said about Metro was said in passing or was misinterpreted).

[146] Karim Dep. 33:10–13, 36:6–9 (July 23, 2012):

> Q What did you discuss over lunch with Mr. Graham?
>
> A So he – he strongly recommended that we add LaKritz Adler to our development team.
>
> . . .
>
> Q Why would it have been in your interest to get involved with LaKritz?
>
> A Because the guy that's controlling our deal suggested that we do it. Jim Graham, that is.

Oriented Development Specialist),[148] Mr. Bottigheimer (Metro Assistant General Manager for Planning and Joint Development),[149] Deputy Mayor Albert,[150] and Mr. Moneme (Metro Board Member).[151]

Councilmember Graham met with Mr. Karim (principal of Banneker Ventures) at a restaurant before the June 26, 2008 meeting in which the Metro Board selected Banneker Ventures to develop the Florida Avenue Project.[152] At the restaurant, Councilmember Graham encouraged Mr. Karim to add LaKritz Adler, one of the finalists for the Florida Avenue Project, to Banneker Ventures's development team despite the fact that Banneker Ventures already had a development partner.[153] Councilmember Graham did not deny that this meeting took place.[154] He recalled that he may have suggested that Banneker Ventures add LaKritz Adler to the development team when Banneker Ventures's former development partner withdrew from the project.[155]

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see also E-mail from Warren Williams, Principal, Banneker Ventures, to A. Scott Bolden, Partner, Reed Smith LLP, Jim Link, Partner, American Capitol Group, and Crystal Wright, Principal, Baker Wright Group (June 2, 2008, 7:05 p.m. EDT).

[147] Donatelli Interview Memo (stating that at a meeting where the bidders on the Florida Avenue property presented their proposals to the community Councilmember Graham expressed to Donatelli that he preferred the LaKritz Adler proposal because it included development on an adjacent property).

[148] Doggett Interview Memo (recalling that Councilmember Graham expressed support for LaKritz Adler at a meeting).

[149] Bottigheimer Interview Memo (explaining that Ms. Doggett told him that Councilmember Graham favored LaKritz Adler).

[150] Albert Interview Memo (explaining that Deputy Mayor Albert heard that Councilmember Graham favored LaKritz Adler or Donatelli Development).

[151] Moneme Interview Memo (stating that LaKritz Adler was understood to be Councilmember Graham's favorite developer).

[152] Karim Dep. 33:18–34:5 (July 23, 2012) (stating that the meeting occurred between April and June 2008).

[153] Graham Dep. 126:7–17 (stating that he may have asked Mr. Karim to consider LaKritz Adler as a development partner after Metropolis withdrew); Karim Dep. 33:12-22 (stating that Councilmember Graham "strongly encouraged" Mr. Karim to add LaKritz Adler to the development team).

[154] Graham Dep. 124:8–125:4 (stating he recalled the meeting with Mr. Karim at the restaurant, but was unsure of the date of the meeting)

[155] Graham Dep. 126:7–17 (stating that he may have asked Mr. Karim to consider LaKritz Adler as a development partner after Metropolis withdrew).

At Councilmember Graham's suggestion, Banneker Ventures and LaKritz Adler explored a potential partnership in the summer of 2008.[156] After a few months, it became clear that Banneker Ventures and LaKritz Adler could not agree on the terms of any partnership.[157] In the fall of 2008, Banneker Ventures and LaKritz Adler ceased their discussions of working together on the Florida Avenue Project.[158]

Both during and after the discussions with Banneker Ventures, LaKritz Adler's principals called Ms. Doggett (Metro Senior Transit Oriented Development Specialist) every few months to discuss the Florida Avenue Project.[159] On February 3, 2009, for example, Joshua Adler, one of the principals at LaKritz Adler, called Ms. Doggett and, according to Ms. Doggett, told her that Councilmember Graham had asked him to "make a deal" with Banneker Ventures.[160] According to Ms. Doggett and her contemporaneous notes, during these discussions the principals of LaKritz Adler usually took the opportunity to promote their proposal for the Florida Avenue Property and provide negative information about Banneker Ventures.[161]

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[156] Karim Dep. 33:10–39:18 (July 23, 2012) (stating that he contacted LaKritz Adler in 2008 after meeting with Councilmember Graham); Adler Interview Memo (stating that he and Mr. Karim had a meeting in July 2008); *see also* Handwritten Notes from Rosalyn Doggett (Feb. 3, 2009); *but see* Graham Dep. 126:7–17 (stating that he may have asked Mr. Karim to consider LaKritz Adler as a development partner after Metropolis withdrew). Banneker Ventures and LaKritz Adler's potential partnership involved an option to purchase a parcel of land adjacent to the Florida Avenue Property. The agreement to purchase the property was not consummated. Karim Dep. 76:19–81:7 (July 23, 2012) (stating that negotiations began in June 2008 for Banneker Ventures to add LaKritz Adler as a development partner or buy their adjacent parcel).

[157] Karim Dep. 87:15–89:2 (July 23, 2012) (explaining that negotiations continued until at least August 2008, and ceased because Banneker Ventures thought the price of the adjacent parcel was too high); Adler Interview Memo (stating that LaKritz Adler immediately rejected the idea of becoming a development partner with Banneker Ventures, and that Banneker Ventures eventually lost interest in the purchase of the adjacent parcel); Handwritten Notes from Rosalyn Doggett (Feb. 3, 2009).

[158] *Id.*

[159] Doggett Interview Memo (stating that Mr. Adler called every few months to discuss the Florida Avenue Project); *see also* Handwritten Notes from Rosalyn Doggett (Feb. 3, 2009). Mr. Adler indicated that he would call Ms. Doggett every six months between the time period in which Banneker Ventures was selected as the joint developer (March 2008) and the point when the negotiation period expired (March 2010). Adler Interview Memo.

[160] Handwritten Notes from Rosalyn Doggett (Feb 3, 2009). Mr. Adler did not recall making this statement to Ms. Doggett. Adler Interview Memo. In internal LaKritz Adler communications Councilmember Graham was referred to as "our friend." E-mail from Joshua Adler, Principal, LaKritz Adler, to Robert LaKritz, Principal, LaKritz Adler (Aug. 5, 2008, 1:55 p.m. EDT).

[161] Doggett Interview Memo (explaining that Mr. Adler would often speak highly of his team and negatively about other developers); *see also* Handwritten Notes from Rosalyn Doggett (Feb 3, 2009). Mr.

D. No Evidence of Motivation Based upon Pecuniary Interests

Although the scope and duration of our investigation was limited and we lacked certain tools commonly used by law enforcement to trace the flow of money, we are not aware of any facts to suggest that the conduct of any Metro Board member or Metro employee was motivated by a pecuniary interest. We are not aware of evidence that any payments were offered to, or accepted by, any Metro Board member or Metro employee. Similarly, we are not aware of evidence that any Metro Board member or Metro employee had a financial interest in the Florida Avenue Project or in any of the developers involved in the joint development process.

VII. INVESTIGATIVE FINDINGS AND CONCLUSIONS

A. Metro's Selection Process Did Not Address Key Operational and Policy Issues before Metro Joint Development Staff Presented the Proposal to Select Banneker Ventures to the Metro Board

Many of the difficulties that Metro and Banneker Ventures encountered during the negotiation period could have been avoided if Metro had adopted policies or guidelines on issues relating to joint development projects, such as affordable housing and acceptable lease arrangements. Metro's lack of clear statements on these crucial issues delayed the negotiation process by creating difficulties for the inexperienced Banneker Ventures team and the Metro employees.

Although the Metro Board had considered affordable housing to be an essential component of joint development projects,[162] the Metro Board decided against adopting the affordable housing requirements set forth in the DUKE Plan, a policy adopted by the Council for the District of Columbia in 2005 that addressed affordable housing in the Shaw/U Street area.[163] The Metro Board also did not adopt any other policy that would have provided Metro joint development staff and potential development partners with specific requirements, guidelines or goals for

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Adler did not recall expressing any views about Banneker Ventures to Ms. Doggett. Adler Interview Memo.

[162] Albert Interview Memo (stating that the Deputy Mayor's office had a goal of 35% affordable housing in each project); Zimmerman Interview Memo (stating that he supported affordable housing); Graham Dep. 180:16–181:2 (stating that affordable housing strengthens the development and is an important public policy issue); Doggett Interview Memo (stating that some Board Members displayed a great interest in affordable housing).

[163] Doggett Interview Memo (stating that, although the DUKE plan had been implemented by D.C., she was confused about how to apply it to Metro).

affordable housing.[164] The lack of a clear policy allowed Councilmember Graham to argue that, consistent with other developments in the area, twenty percent of the units in the Florida Avenue Project should be rented as affordable housing.[165] Mr. Karim (principal of Banneker Ventures) counter-argued that such a requirement would decrease the value of the Florida Avenue Project.[166] With both parties taking opposite, albeit arguably reasonable positions, Ms. Doggett (Metro Senior Transit Oriented Development Specialist) and her team were left to resolve the dispute without any criteria or policy statements to guide them, leading to delays in the negotiations.[167]

Metro's lack of clarity about acceptable leasing arrangements also stalled the negotiations. Mr. Karim notified Metro joint development staff in October 2008 that Banneker Ventures wanted to include a lot adjacent to the Florida Avenue Property in the development.[168] Joshua Montague (Metro Assistant General Counsel) told Mr. Karim that he could not include the adjacent property because the lot was not part of the original term sheet and the proposed lease arrangement was not feasible for Metro.[169] Over the next year, however, Mr. Bottigheimer (Metro Assistant General Manager for Planning and Joint Development), Ms. Doggett (Metro Senior Transit Oriented Development Specialist), Mr. Karim (principal of Banneker Ventures), Councilmember Graham, and Deputy Mayor Albert continued to discuss ways that Banneker Ventures could include the adjacent lot in the Florida Avenue Project. For example, they discussed changing the term sheet so that the Florida Avenue Project became a property sale instead of a lease arrangement.[170] In November 2009, after hours of negotiations, Banneker Ventures finally realized that it would be impossible for Metro to proceed with a sale or accept a lease arrangement that included the adjacent lot.[171]

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[164] Draft Memorandum regarding Material Change to Approved Term Sheet, unknown author, undated; *see also* Bottigheimer Interview Memo (stating that the Metro Board did not adopt the policy proposal he presented to the Metro Board addressing affordable housing).

[165] Handwritten Notes from Joshua Montague (Sept. 26, 2008).

[166] Karim Dep. 20:15–21:22 (July 23, 2012) (stating that Banneker Ventures ran projections on the affordable housing requirement and reduced its offer based on that impact).

[167] Doggett Interview Memo (explaining that Metro joint development staff were uncertain about how to incorporate affordable housing into the project); Bottigheimer Interview Memo (stating that there was no binding joint development agreement in place at the time Banneker Ventures's term sheet was tabled in March 2010).

[168] Memorandum from Joshua Montague, Assistant General Counsel, WMATA, to Carol B. O'Keeffe, General Counsel, WMATA, and Bruce P. Heppen, Deputy General Counsel, WMATA (Oct. 21, 2009).

[169] *Id.*

[170] *Id.*

[171] E-mail from Omar Karim, Partner, Banneker Ventures, to Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA (Nov. 3, 2009, 1:58 p.m. EST).

To date, the Metro Board has not addressed the problems that caused the fatal delays in the Florida Avenue Project negotiations. The Metro Board rejected the affordable housing policy drafted by Mr. Bottigheimer in the wake of the negotiations for the Florida Avenue Project,[172] and did not include an affordable housing requirement in Metro's Joint Development Guidelines.[173] These shortcomings appear to continue to trouble and delay Metro's current developments to the point that experienced developers hesitate to bid on Metro projects.[174]

B. The Lack of a Clearly Defined Role for Metro Board Members Allowed Certain Board Members to Become Involved in Negotiating with Banneker Ventures

During the time the Metro Board considered the Florida Avenue Project, the Metro Board lacked a clear policy on the appropriate level of involvement for individual Board Members in joint development projects. Although two documents addressed the proper role for the Metro Board and its Members, neither document sufficiently clarified the limits within which an individual Board Member must stay when the Metro Board was weighing a proposal such as the Florida Avenue Project. The first document, the Joint Development Policies and Guidelines ("Joint Development Policies"), stated that the Metro Board was responsible for approving the selection of a developer, and the Metro staff had authority to negotiate with the selected developer before the Metro Board approves the final contract.[175] The second document, the Procedures for the Metro Board of Directors ("Metro Procedures"), focused on how Board Members should perform their duties on the Metro Board.[176] According to the Metro Procedures, the Metro Board should determine policy and oversee Metro operations.[177] The Metro Board should act collectively,[178] and "No member individually shall direct or supervise . . . any [Metro] employee

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[172] Bottigheimer Interview Memo (stating that the Metro Board did not adopt the policy proposal he presented to the Board addressing affordable housing).

[173] Joint Development Policies and Guidelines, WMATA (Nov. 20, 2008), *available at* http://www.wmata.com/pdfs/business/Guidelines%20Revision11-20-08.pdf.

[174] Bottigheimer Interview Memo (explaining that Metro's joint development program was difficult for developers and that many experienced developers refused to work with Metro because the process was too complicated); O'Keeffe Interview Memo (explaining that the development community did not like working with Metro); *see also* Malone Interview Memo (stating that developers who worked with Metro usually had bad experiences); Donatelli Interview Memo (stating that the lengthy joint development process led to Metro missing opportunities to engage in development).

[175] Joint Development Policies and Guidelines, WMATA (July 21, 2005).

[176] Procedures of the Washington Metropolitan Area Transit Authority Board of Directors, Article I, adopted Feb. 16, 2006.

[177] *Id.*

[178] *Id.*

or contractor."[179] As applied to the Joint Development Policies, the Metro Procedures discouraged, but did not clearly prohibit, individual involvement in joint development projects by Board Members. Specifically, although the Metro Procedures stated that individual Board Members shall not direct or supervise Metro employees or contractors, the Metro Procedures did not prohibit individual Board Members from meeting or consulting with Metro staff or developers.[180] Because the Metro Procedures did not provide Metro Board Members with any direction on the appropriate amount of individual contact with Metro staff and developers, Metro Board Members lacked sufficient guidance for their involvement in the Florida Avenue Project.

Without this guidance, Metro Board Members displayed disparate understandings of the appropriate role of Board Members in joint development projects. The Maryland, Virginia and federal government Board Members believed the proper scope of their actions on the Florida Avenue Project needed to be confined to Board Meetings;[181] they did not think it was appropriate to contact the selected developer.[182] Other Metro Board Members, specifically those representing the District of Columbia had a different view. Both Mr. Moneme and Deputy Mayor Albert stated they were responsible for furthering Mayor Fenty's interests in promoting development.[183] Deputy Mayor Albert also acknowledged that his development team in the Mayor's office met with Banneker Ventures and he likely also attended some of those

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[179] *Id.*

[180] *Id.*

[181] Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Marcel Acosta Interview Memorandum (Aug. 31, 2012) ("Acosta Interview Memo") (stating the Metro Board should act as a collective body); Benjamin Interview Memo (stating he did not contact the Metro joint development staff or the selected developer during the Florida Avenue Project); Downey Interview Memo (stating that he did not contact Metro staff or developers); Hewlett Interview Memo (stating she only asked questions during Board Meetings, and did not contact the Metro joint development staff or the selected developer during the Florida Avenue Project); Hudgins Interview Memo (stating that she let the Metro staff implement the Metro Board's policy, and that she never contacted the Metro staff or developers directly); Linton Interview Memo (stating that he did not individually contact developers or Metro staff); Zimmerman Interview Memo (stating that he did not think it was appropriate to contact developers).

[182] Acosta Interview Memo (stating that he did not interact individually with developers in his capacity as a WMATA Board Member); Benjamin Interview Memo (stating he did not ever contact developers); Downey Interview Memo (stating that he did not contact developers and thought it was inappropriate to do so); Hewlett Interview Memo (stating that she did not contact developers); Hudgins Interview Memo (stating she never contacted developers in Virginia about Metro projects); Linton Interview Memo (stating that he will not speak with developers who pursue Metro contracts); Zimmerman Interview Memo (stating that he did not think it was appropriate to contact developers).

[183] Moneme Interview Memo (stating that his role as a Metro Board Member was to represent the Fenty administration on financial and political topics impacting D.C.); *see also* Albert Interview Memo (explaining that Mayor Fenty's Administration wanted the Florida Avenue Property to be developed).

meetings.[184] Similarly, Councilmember Graham stated that he was involved extensively in development projects that affected his district, Ward 1.[185] Metro's General Counsel, Carol O'Keeffe, supported the D.C. Board Members' views that their involvement in development projects extended beyond the Metro boardroom.[186] In a letter to A. Scott Bolden, Attorney for Banneker Ventures, she stated: "Board Members frequently discuss the progress of joint development negotiations with the parties involved. The nature of these discussions is dynamic and may include ways to strengthen the development team, but these discussions do not bind the [Metro] Board of Directors."[187]

The lack of clear limits on Metro Board Member interactions with developers and Metro staff, combined with Ms. O'Keeffe's apparent support of Board Members' discussions with developers, resulted in Councilmember Graham and Deputy Mayor Albert engaging in direct communications with the developer for the Florida Avenue Project and Metro joint development staff outside of the Metro boardroom. Ultimately, the involvement of Councilmember Graham and Deputy Mayor Albert in the detailed negotiations of the Florida Avenue Project – largely without the knowledge of the other Board Members – may have contributed to an appearance of political pressure being inserted into Metro Board decision making.

Councilmember Graham met directly with principals of Banneker Ventures on several occasions to discuss the Florida Avenue Project.[188] He and his D.C. Council staff negotiated directly with

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[184] Albert Interview Memo (stating he met with Banneker Ventures after they became selected developer, and that he believed his team in the Mayor's office met with Banneker Ventures before they were selected and that he may have attended those meetings); *see also* Meeting Confirmation from Neil Albert, Deputy Mayor for Economic Development, Office of the Mayor of Washington, D.C., to Omar Karim, Partner, Banneker Ventures, and Yohance Fuller, Program Manager, Office of the City Administrator, District of Columbia, Re: WMATA (Aug. 31, 2009).

[185] Graham Dep. 16:1–5:

> A So my involvement in this predated by a number of years, you know, the actual solicitation. The site is located in Ward 1. I had previously been extensively involved in other joint development sites which were located in Ward 1.

[186] O'Keeffe Interview Memo (stating that she thought Board Members might have regular contact with developers in their jurisdictional roles).

[187] Letter from Carol O'Keeffe, General Counsel, WMATA, to A. Scott Bolden, Partner, Reed Smith LLP, Re: Status of Banneker Ventures Term Sheet and Award of Jazz at Florida Avenue Project (May 28, 2010). Councilmember Graham cited the quoted passage in his testimony to Cadwalader. Graham Dep. 37:6–21.

[188] Graham Dep. 179:2–180:5 (stating that he met with Mr. Karim at his D.C. Council office and again at a restaurant to discuss the Florida Avenue Project).

Banneker Ventures over specific terms, such as different possibilities for lease arrangements.[189] When the Metro joint development staff was considering a sale of the Florida Avenue Property to Banneker Ventures, Councilmember Graham intervened to convey his dissatisfaction with the idea of a sale directly to Mr. Bottigheimer (Metro Assistant General Manager for Planning and Joint Development), John Catoe (Metro General Manager), Ms. Doggett (Metro Senior Transit Oriented Development Specialist) and Ms. O'Keeffe (Metro General Counsel).[190]

Similarly, Deputy Mayor Albert had direct dealings with Banneker Ventures and Metro staff concerning the Florida Avenue Project. He individually met with Banneker Ventures prior to joining the Metro Board,[191] and members of his staff in the Deputy Mayor's office negotiated directly with Banneker Ventures over specific terms even while Deputy Mayor Albert served on the Metro Board.[192] In addition to meetings, Deputy Mayor Albert communicated over e-mail

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[189] E-mail from Jonathon Kass, Committee on Public Works and Transportation, Council of the District of Columbia, to Maurice Perry, Vice President, Banc of America CDC, Omar Karim, Partner, Banneker Ventures, Yohance Fuller, Program Manager, Office of the City Administrator, District of Columbia, Joshua Montague, Assistant General Counsel, WMATA, John Hagner, Attorney at Law, Womble Carlyle Sandridge & Rice, LLP, Marshall Malcolm, Head, Appraisal Branch, WMATA, Rosalyn Doggett, Senior Transit Oriented Development Specialist, WMATA, and Steven Goldin, Director of Real Estate, WMATA (Oct. 22, 2009, 4:06 p.m. EST); *see also* E-mail from Jonathon Kass, Committee on Public Works and Transportation, Council of the District of Columbia, to Omar Karim, Partner, Banneker Ventures, Yohance Fuller, Office of the City Administrator, District of Columbia, Steven Goldin, Director of Real Estate, WMATA, and Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA (Nov. 4, 2009, 11:27 a.m. EST).

[190] E-mail from Jim Graham, Councilmember, Washington, D.C., to Carol O'Keeffe, General Counsel, WMATA, Neil Albert, Deputy Mayor for Economic Development, Office of the Mayor of Washington, D.C., Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA, and John Catoe, Jr., General Manager, WMATA (Oct. 20, 2009, 5:44 p.m. EST).

[191] Albert Interview Memo (explaining that he met with Banneker Ventures in his capacity as Deputy Mayor before becoming a Metro Board Member); *see also* Meeting Confirmation from Neil Albert, Deputy Mayor for Economic Development, Office of the Mayor of Washington, D.C., to Omar Karim, Partner, Banneker Ventures, and Yohance Fuller, Program Manager, Office of the City Administrator, District of Columbia, Re: WMATA (Aug. 31, 2009).

[192] E-mail from Jonathon Kass, Committee on Public Works and Transportation, Council of the District of Columbia, to Maurice Perry, Vice President, Banc of America CDC, Omar Karim, Partner, Banneker Ventures, Yohance Fuller, Program Manager, Office of the City Administrator, District of Columbia, Joshua Montague, Assistant General Counsel, WMATA, John Hagner, Attorney at Law, Womble Carlyle Sandridge & Rice, LLP, Marshall Malcolm, Head, Appraisal Branch, WMATA, Rosalyn Doggett, Senior Transit Oriented Development Specialist, WMATA, and Steven Goldin, Director of Real Estate, WMATA (Oct. 22, 2009, 4:06 p.m. EST); *see also* E-mail from Jonathon Kass, Committee on Public Works and Transportation, Council of the District of Columbia, to Omar Karim, Partner, Banneker Ventures, Yohance Fuller, Office of the City Administrator, District of Columbia, Steven Goldin, Director of Real Estate, WMATA, and Nathaniel Bottigheimer, Assistant General Manager for Planning

with Mr. Karim of Banneker Ventures about the Florida Avenue Project while the Deputy Mayor served on the Metro Board,[193] and Mr. Karim even sent talking points about deal terms for the Florida Avenue Project to Deputy Mayor Albert to use at a Metro Board meeting.[194]

Because the Joint Development Policies and Metro Procedures that defined appropriate interactions with Metro Board Members were unclear, Metro staff members were uncertain how to respond to Board Members who contacted them directly. Of the Metro staff interviewed during the investigation, Ms. Doggett (Metro Senior Transit Oriented Development Specialist), Mr. Bottigheimer (Metro Assistant General Manager for Planning and Joint Development), and Mr. Montague (Metro Assistant General Counsel) were unaware that the Metro Procedures expressly prohibited Board Members from directing or supervising Metro staff.[195] Ms. Doggett and Mr. Bottigheimer thus felt compelled to try to accommodate all Board Member requests, such as Councilmember Graham's request that Ms. Doggett conduct additional due diligence on Banneker Ventures.[196] Without a clear policy to guide their interactions with the Metro Board, Metro's ambiguous Joint Development Policies and uncommunicated Metro Procedures left Mr.

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and Joint Development, WMATA (Nov. 4, 2009, 11:27 a.m. EST). In his interview with Cadwalader, Mr. Adler of LaKritz Adler stated that at one point Councilmember Graham told him he had never seen a public official "go to the mat" for someone to win a bid like the Deputy Mayor's Office of Economic Development. Adler Interview Memo.

[193] Meeting Confirmation from Neil Albert, Deputy Mayor for Economic Development, Office of the Mayor of Washington, D.C., to Omar Karim, Partner, Banneker Ventures, and Yohance Fuller, Program Manager, Office of the City Administrator, District of Columbia, Re: WMATA (Aug. 31, 2009); E-mail from Neil Albert, Deputy Mayor for Economic Development, Office of the Mayor of Washington, D.C., to Omar Karim, Partner, Banneker Ventures (June 27, 2009, 9:21 p.m. EDT); E-mail from Neil Albert, Deputy Mayor for Economic Development, Office of the Mayor of Washington, D.C., to Omar Karim, Partner, Banneker Ventures (July 19, 2009, 8:42 p.m. EDT).

[194] E-mail from Omar Karim, Partner, Banneker Ventures, to Neil Albert, Deputy Mayor for Economic Development, Office of the Mayor of Washington, D.C. (Dec. 4, 2008, 7:55 a.m. EST). Deputy Mayor Albert did not respond to Mr. Karim's e-mail, and it is unclear whether he used those talking points during any meetings of the Metro Board. Nonetheless, the fact that Mr. Karim felt comfortable in sending those talking points to Deputy Mayor Albert supports the notion that the two had direct interactions and that Mr. Karim believed through those interactions that he could count on Deputy Mayor Albert's support during Metro Board meetings.

[195] Bottigheimer Interview Memo (explaining that Metro's culture dictated that when a Board Member asked for information, a staff member would provide it); Doggett Interview Memo (stating that Board Members frequently contacted lower level Metro staff); Memorandum from Cadwalader, Wickersham & Taft LLP to Investigation File, Re: Joshua Montague Interview Memorandum (July 6, 2012) ("Montague Interview Memo") (stating that he was unaware the Metro Board Procedures prohibited Board Members from directing or supervising Metro staff).

[196] Handwritten Notes from Rosalyn Doggett (June 24, 2008).

Bottigheimer and Ms. Doggett with little to no basis to challenge or deny requests from individual Board Members.[197]

Mr. Bottigheimer stated to the investigative team that Metro Board Members attempted to persuade Metro staff to adopt a specific Board Member's position on a specific issue and present it to the rest of the Metro Board as a recommendation from the Metro staff.[198] Asking Metro staff to advocate for a Board Member's preferred outcome obscures the division between the judgment of the Metro staff and the arguments of individual Metro Board Members.

A clearly stated policy governing the interaction between Metro Board Members and Metro staff, supported by unambiguous procedures, as to which all Metro Board Members and Metro staff are trained, could have reduced any interference from individual Board Members, increased the transparency of Metro Board proceedings, and reduced delays during negotiations between Banneker Ventures and Metro joint development staff.

C. Even with Adequate Opportunities, Banneker Ventures Could Not Successfully Identify a Permanent Development Partner or Address Other Issues that Arose During the Negotiations within the Allotted Time Period

Entirely independent from any actions of the Metro Board or any Board Member, Banneker Ventures was unable to succeed in negotiating a joint development agreement acceptable to the Metro Board. Although the expressed concerns of some Metro Board Members may have delayed the project, the Metro Board also repeatedly extended the negotiation period to allow Banneker Ventures to address those concerns.[199] In the two years that Banneker Ventures spent negotiating with Metro, Banneker Ventures did not adequately address the concerns raised by the Metro Board and did not solve various other problems that it faced.[200]

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[197] *Id.*; *see also* E-mail from Jonathon Kass, Committee on Public Works and Transportation, Council of the District of Columbia, to Maurice Perry, Vice President, Banc of America CDC, Omar Karim, Partner, Banneker Ventures, Yohance Fuller, Program Manager, Office of the City Administrator, District of Columbia, Joshua Montague, Assistant General Counsel, WMATA, John Hagner, Attorney at Law, Womble Carlyle Sandridge & Rice, LLP, Marshall Malcolm, Head, Appraisal Branch, WMATA, Rosalyn Doggett, Senior Transit Oriented Development Specialist, WMATA, and Steven Goldin, Director of Real Estate, WMATA (Oct. 22, 2009, 4:06 p.m. EST).

[198] Bottigheimer Interview Memo (stating that Metro Board Members tried to convince Metro staff to take positions based on their arguments).

[199] Meeting Minutes, 1340th Meeting of the Board of Directors, WMATA (Apr. 23, 2009); *see also* Meeting Minutes, 1344th Meeting of the Board of Directors, WMATA (Sept. 24, 2009); Meeting Minutes, 1348th Meeting of the Board of Directors, WMATA (Jan. 28, 2010).

[200] In contrast, the usual time period Metro provides to negotiate a Development Agreement is 150 days. Shaw-Howard/Florida Avenue Joint Development Site: Proposal Submission Requirements, § 3.3(C).

Importantly, Banneker Ventures was unable to retain an experienced development partner that was acceptable to the Metro Board. From the beginning of the Florida Avenue Project, the Metro Board made it clear to Banneker Ventures that it must partner with a more experienced development firm.[201] Although Banneker Ventures partnered with two experienced firms, Donatelli and Metropolis, both firms eventually withdrew.[202] Banneker Ventures's third development partner, BACDC, dropped out of the project; and Banneker Ventures did not identify a replacement.[203] According to Metro Board Members, by March 2010, the majority of Metro Board Members believed that Banneker Ventures would be unable to maintain a partnership with an experienced development firm.[204]

Banneker Ventures also lost Metro Board support because it was unable to provide a financial offer that was acceptable to the Metro Board. Banneker Ventures initially lowered its offer price on the grounds that the Metro Board's requirement to include affordable housing caused a drop in the value of the project.[205] Ms. Doggett (Metro Senior Transit Oriented Development Specialist), Ms. O'Keeffe (Metro General Counsel), and Mr. Montague (Metro Assistant General Counsel) each concluded that, although some reduction in the amount may have been reasonable due to the increased affordable housing requirement, Banneker Ventures's new offer, which was less than half of its original proposal,[206] was too low even in light of the appraised value of the property.[207] Although Banneker Ventures increased the value of its financial offer in 2010,

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[201] Meeting Minutes, Planning, Development and Real Estate Committee Meeting, WMATA (June 26, 2008); Meeting Minutes, 1331st Meeting of the Board of Directors, WMATA (June 26, 2008).

[202] Doggett Interview Memo (explaining that she spoke with both Donatelli and Metropolis about their withdrawal from the Florida Avenue Project); *see also* Malone Interview Memo (stating that he did not want to participate in the Florida Avenue Project because Banneker Ventures would not give him sufficient control); Donatelli Interview Memo (stating that his firm withdrew because Donatelli lacked confidence in Banneker Ventures).

[203] E-mail from Rosalyn Doggett, Senior Transit Oriented Development Specialist, WMATA, to Nathaniel Bottigheimer, Assistant General Manager for Planning and Joint Development, WMATA, and Steve Goldin, Director of Real Estate, WMATA, and Joshua Montague, Assistant General Counsel, WMATA (Mar. 14, 2010, 8:38 p.m. EDT).

[204] Handwritten Notes from Meeting with Loyda Sequeira, Board Secretary, WMATA, author unknown (Apr. 2, 2010).

[205] *See, e.g.*, Karim Dep. 20:15–21:22 (July 23, 2012) (stating that Banneker Ventures ran financial projections on the affordable housing requirement and reduced its offer accordingly).

[206] Draft Memorandum, Re: Florida Avenue, unknown author (Apr. 30, 2009).

[207] Doggett Interview Memo (stating that she did not think that Banneker Ventures's offer reflected the value of the property); *see also* O'Keeffe Interview Memo (explaining she believed there was legal risk in approving a term sheet that had less value than the lowest bid proposal); Montague Interview Memo (stating that Banneker Ventures's offer was so low the deal did not make sense for Metro).

Metro Board Members felt that the increase was not enough, and that providing time for further negotiations was not likely to yield a different result.[208] Metro joint development staff who worked on the project and Metro Board Members who recalled the details of the Florida Avenue Project uniformly agreed that Banneker Ventures's reduced offer was the main reason that the Metro Board refused to extend Banneker Ventures's negotiation period.[209]

Several Metro Board Members said that it became increasingly clear throughout the negotiations that Banneker Ventures would not be able to resolve two significant issues: making a reasonable offer and finding a reliable development partner.[210] By the time the March 25, 2010 Metro Board meeting took place, support among the Metro Board Members had dissolved to the point that the Metro Board Members who had initially supported Banneker Ventures did not have enough votes to pass a resolution to extend the negotiation period.[211] As a result, the Metro

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[208] Benjamin Interview Memo (stating that Councilmember Graham and Deputy Mayor Albert thought at this point that the project needed to be started over from scratch); Hudgins Interview Memo (stating that the Metro Board needed to table the project because it was unable to resolve key issues). Similarly, Metro was unable to reach a successful joint development agreement for a joint development project at Navy Yard in Southeast Washington, D.C. that was being negotiated at the same time as the Florida Avenue Project. Michael Neibauer, *Metro, Donatelli Development nix plan for ballpark district property*, Wash. Bus. J. (Aug. 23, 2010), *available at* http://www.bizjournals.com/washington/stories/2010/08/23/story4.html.

[209] Albert Interview Memo (stating that Banneker Ventures's offer did not meet Board Member expectations); Graham Dep. 137:10–18 (stating that Banneker Ventures could not assemble a suitable financial deal); Benjamin Interview Memo (stating that financial trouble or the lack of an experienced co-developer led to the expiry of the negotiation period); Downey Interview Memo (stating that the financial terms of Banneker Ventures's offer diminished throughout the negotiations); Hudgins Interview Memo (explaining that erosion in the offer price caused the Metro Board to table the project); McKay Interview Memo (stating that the project was tabled because the Metro Board believed they could get a better deal by holding the property until the economy improved); *see also* O'Keeffe Interview Memo (stating that she understood the reason that the Metro Board did not accept the term sheet was that it did not contain enough value); Montague Interview Memo (stating that Banneker Ventures's offer was so low the deal did not make sense for Metro); Linton Interview Memo (stating that he did not recall why the negotiation period was not extended, but that the value of the offer became an issue for Board Members during the negotiations); *but see* Acosta Interview Memo (stating he was not directly involved in the Florida Avenue Project); Hewlett Interview Memo (stating she was unable to recall the discussion related to the expiry of the exclusive negotiation period); Zimmerman Interview Memo (stating he thought the parties involved should get their act together, but expressing no other opinion as to the reason the negotiation period expired).

[210] Benjamin Interview Memo (stating that negotiations ceased because Banneker Ventures had financial trouble and restructured the development team several times); *see also* Hudgins Interview Memo (stating that the Metro Board needed to table the project at this point because it was unable to resolve key issues).

[211] Albert Interview Memo (stating that there were not enough votes to extend Banneker's negotiation period).

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Board unanimously voted to table a motion to extend the negotiation period,[212] thereby effectively ending Banneker Ventures's opportunity to develop the Florida Avenue Project. We found no evidence to suggest that the Metro Board lacked a rational basis for its decision.

D. Councilmember Graham Acted in a Manner Contrary to Metro's Standards of Conduct

The Metro Standards of Conduct prohibit Board Members from acting in a manner that undermines the public's confidence in Metro. The Standards of Conduct broadly prohibits types of conduct and the appearance of that conduct. Specifically, Article III § A of the Standards of Conduct states:

> Public funds must be expended in a manner which assures the highest degree of confidence and public trust in WMATA. It is imperative that Board Members in their private financial relationships and *in their official conduct strictly avoid engaging in actions which create conflicts of interest or the appearance of a conflict of interest. It is likewise imperative that Board Members act impartially in their official conduct by avoiding any actions which might result in favored treatment or appearances thereof toward any individual, private organization, consultant, contractor or potential consultant or contractor. Each Board Member while acting in his/her capacity as a WMATA Board Member, has a duty to place the public interest foremost in any dealings involving WMATA* (emphasis added).[213]

After careful review, the facts establish that Councilmember Graham acted in a manner contrary to Metro's Standards of Conduct in two ways. First, by telling Warren Williams (principal of Banneker Ventures) that he would consider supporting W2I's lottery bid if Banneker Ventures withdrew from the Florida Avenue Project, Councilmember Graham pitted the interests of the Council of the District of Columbia against the interests of Metro, and thereby unnecessarily created a conflict of interest, or, at the least, the appearance of a conflict of interest. Second, by appearing to continue to support LaKritz Adler's proposal for, or inclusion in, the Florida Avenue Project while at the same time opposing Banneker Ventures, Councilmember Graham acted contrary to his duty to appear impartial. As a consequence of the foregoing, Councilmember Graham's actions resulted in a breach of his duty to place the public interest foremost in any dealings involving Metro.

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[212] Meeting Minutes, 1350th Meeting of the Board of Directors, WMATA (Mar. 25, 2010).

[213] Standards of Conduct for Members of the WMATA Board of Directors, Article III § A (2006).

1. Conflict of Interest

Councilmember Graham's animosity toward Mr. Williams as well as his continued attempts to oppose Banneker Ventures were well known by those interviewed or deposed during this investigation, namely Metro joint development staff, Board Members, and other persons involved in the Florida Avenue Project.[214] While Councilmember Graham's views appear to have been colored by his personal dislike of Mr. Williams, other objections appear to have been based on his legitimate concerns with public safety and welfare. For example, Councilmember Graham was concerned with Mr. Williams's reputation as a landlord as well as his ownership of a club in Ward 1 that had lost its license to operate due to a fatal stabbing of a club patron.[215] Moreover, Councilmember Graham appeared genuinely concerned throughout the joint development process with the development experience and expertise of Banneker Ventures[216] – legitimate concerns that manifested themselves in the outcome of the process.[217]

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[214] Bottigheimer Interview Memo (recalling that Councilmember Graham expressed concerns about Mr. Williams' financial situation); Doggett Interview Memo (stating that Councilmember Graham raised concerns about Mr. Williams on multiple occasions, including at the April 24, 2008 Metro Board meeting); Moneme Interview Memo (explaining that Councilmember Graham expressed concerns about Mr. Williams at the April 24, 2008 Metro Board meeting); Karim Dep. 70:15–71:19 (July 23, 2012) (stating that he believed that Councilmember Graham was trying to kill the deal by inquiring into Mr. Williams's finances).

[215] Hernandez Interview Memo (stating that Councilmember Graham discussed Club U at the May 29, 2008 meeting); *see also* Link Dep. 16:7–18:8 (stating Councilmember Graham suggested he had doubts about Mr. Williams's ability to handle the lottery contract based on the way Mr. Williams ran Club U); A. Williams Interview Memo (explaining that Councilmember Graham raised concerns about Club U at the May 29, 2008 meeting); W. Williams Interview Memo (explaining that Councilmember Graham raised concerns about Club U at the May 29, 2008 meeting); Graham Dep. 33:1–35:10 (stating that he was concerned about the way Club U was run).

[216] Graham Dep. 36:6–13 (stating that he had concerns about the expertise and ability of Banneker Ventures); Handwritten notes from Metro Board Executive Session, Rosalyn Doggett (Apr. 24, 2008) (Councilmember Graham expressed concerns about the extent of Banneker Ventures's experience and financial capabilities at the April 24, 2008 PDREC meeting); Handwritten Notes from Rosalyn Doggett (June 24, 2008) (Councilmember Graham expressed concerns about Banneker Ventures, including its financial resources and its ability to manage the project, at a June 24, 2008 meeting with Metro staff).

[217] Doggett Interview Memo (stating that Banneker Ventures did not present strong qualifications); Bottigheimer Interview Memo (explaining that he had concerns about Banneker Ventures's level of experience); Benjamin Interview Memo (stating that negotiations ceased because Banneker Ventures had financial trouble and restructured the development team several times); *see also* Hudgins Interview Memo (stating that the Metro Board needed to table the project because it was unable to resolve key issues with Banneker Ventures).

Notwithstanding his objections to Mr. Williams or Banneker Ventures, Councilmember Graham disregarded his duty to Metro when he explicitly conditioned his consideration of his support for W2I's lottery bid on Banneker Ventures's withdrawal from the Florida Avenue Project during the May 29, 2008 meeting between Councilmember Graham, Mr. Williams, Ms. Williams, and two lobbyists for W2I.

Although there are differing recollections of the precise statements made during the May 29, 2008 meeting, the weight of the evidence supports that Councilmember Graham bartered the Florida Avenue Project in exchange for his support of the D.C. lottery contract. During his deposition, Councilmember Graham stated that he did not recall making a statement linking his support for W2I's lottery bid with Banneker Ventures's withdrawal from the Florida Avenue Project, but he speculated that such a statement, if made, would have been made in passing.[218] However, three witnesses at the May 29, 2008 meeting clearly recall Councilmember Graham linking his support for the D.C. lottery contract to Banneker Ventures withdrawing from the Florida Avenue Project. In addition, two other persons stated during their interviews that they had been told by meeting participants within a few days of the May 29, 2008 meeting that Councilmember Graham had conditioned his support for the lottery on Banneker Ventures withdrawing from the Florida Avenue Project.[219]

Further, written communications subsequent to the May 29, 2008 meeting suggest that Councilmember Graham pressured Mr. Williams into withdrawing from the Florida Avenue Project during the May 29, 2008 meeting and that he continued to exert pressure following that meeting. E-mail communications between the members of W2I team in the days following the May 29, 2008 meeting indicate that they genuinely believed that Councilmember Graham had conditioned his support for the D.C. lottery on Banneker Ventures withdrawing from the Florida Avenue Project.[220] And importantly, e-mail communications *to and from* Councilmember

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[218] Graham Dep. 104:8–22 (not recalling making such a statement but explaining that anything that might have been discussed to that effect would have been done in passing).

[219] A. Williams Interview Memo (stating that, within 48 hours of the May 29, 2008 meeting, she, Mr. Williams, Ms. Wright and Mr. Link met with Mr. Bolden); Boothe Interview Memo (explaining that while he did not participate in the meeting, within two days of the meeting at most, Ms. Wright, Mr. Link and Mr. Williams all conveyed to him a similar understanding that Councilmember Graham asked Banneker Ventures to withdraw from the Florida Avenue Project in order to gain his support for the lottery contract).

[220] E-mail from Warren Williams, Co-Owner, W2Tech, to A. Scott Bolden, Partner, Reed Smith LLP, Crystal Wright, Principal, Baker Wright Group, James Link, Partner, American Capitol Group, and Alaka Williams, Co-Owner, W2Tech (June 2, 2008 7:05 p.m. EDT); E-mail from A. Scott Bolden, Partner, Reed Smith LLP, to Crystal Wright, Principal, Baker Wright Group, Warren Williams, Co-Owner, W2Tech, and Alaka Williams, Co-Owner W2Tech (June 2, 2008, 8:26 p.m. EDT); E-mail from A. Scott Bolden, Partner, Reed Smith LLP, to Crystal Wright, Principal, Baker Wright Group, Warren Williams, Co-Owner, W2Tech, and Alaka Williams, Co-Owner, W2Tech (June 7, 2008, 8:51 p.m. EDT).

Graham following the May 29, 2008 meeting establish that he had interjected the Florida Avenue Project into the bartering. On June 2, 2008 – four days after the meeting in his D.C. Council office where witnesses indicated that Councilmember Graham pressured Mr. Williams to withdraw – Councilmember Graham asked in an e-mail to Jim Link, the lobbyist working with Mr. Williams on the lottery, "Do you think they will do anything. [sic]"[221] While such a question may appear innocuous, Mr. Link (and his colleagues) clearly understood Mr. Graham to be asking whether Banneker Ventures would withdraw from the Florida Avenue Project and eventually indicated in response, "As for Metro, there are a number of factors that make it impossible for us to even consider accommodating your request."[222] In his reply to Mr. Link, Councilmember Graham neither expressed surprise that a lottery lobbyist was referring to a

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[221] E-mail from Jim Graham, Councilmember, Washington, D.C., to James Link, Partner, American Capitol Group (June 2, 2008, 8:12 a.m. EDT); *see also* Link Dep. 45:22–47:4:

Q The next e-mail is from Jim Graham sent after the weekend on Monday, June 2, 2008 at 8:12 a.m. sent to you, Jim Link. Subject is "RE: Thank you."

A Yep.

Q Jim Graham writes back "Thanks. Do you think they will do anything?" What do you understand Jim Graham to mean when he wrote this to you?

A I thought he meant that they, being Warren and Alaka, will do anything which was would they accept my [Councilmember Graham's] offer, my proposal.

Q And that offer was?

A What we discussed earlier, which was sort of a quid pro quo with regard to WMATA and the lottery contract.

Q And that's what you understood and that's what Alaka and Warren also understood?

A Yeah, I think so.

Q Is it possible there could have been anything else that Graham was asking about?

A No. I mean, it's possible, but that's not how we understood it.

Q So he wasn't asking about the other things discussed like Club U or Sinclair Skinner?

A It's possible, but that's not the way we understood it.

Cf. Boothe Interview Memo (explaining that while he did not participate in the meeting, within two days of the meeting at most, Ms. Wright, Mr. Link and Mr. Williams all conveyed to him a similar understanding that Councilmember Graham asked Banneker Ventures to withdraw from the Florida Avenue Project in order to gain his support for the lottery contract).

[222] Mr. Link's response to Councilmember Graham was informed by separate communications Mr. Link had with Attorney A. Scott Bolden, who, subsequent to the May 29, 2008 meeting, stated in an e-mail to Mr. Link, Mr. Williams, Ms. Williams, and Ms. Wright that Graham's request was "very close to corruption, bid rigging, and other inappropriate conduct." *See* E-mail from A. Scott Bolden, Partner, Reed Smith LLP, to Crystal Wright, Principal, Baker Wright Group, Warren Williams, Co-Owner W2Tech, and Alaka Williams, Co-Owner W2Tech (June 2, 2008, 8:26 p.m. EDT). We offer no views concerning Mr. Bolden's statement.

Metro development project nor attempted to correct Mr. Link's interpretation of his initial question as to whether Banneker Ventures would "do anything." Instead, Councilmember Graham stated "[T]he rejection of your application at Metro (which has not been approved) is necessitated not by any of this but by other factors related to the application."[223] If Councilmember Graham had meant something otherwise, one would have expected him to have corrected Mr. Link's interpretation in his reply.

In our view, Councilmember Graham's actions created the appearance of a conflict of interest, if not an actual conflict of interest, in a manner that is contrary to Metro's Standards of Conduct.

2. Appearance of Favoritism toward One Party

While attempting to oppose Banneker Ventures, Councilmember Graham promoted another developer, LaKritz Adler. Deputy Mayor Albert,[224] Mr. Bottigheimer (Metro Assistant General Manager for Planning and Joint Development),[225] Mr. Donatelli (principal of Donatelli Development),[226] Ms. Doggett (Metro Senior Transit Oriented Development Specialist),[227] Mr. Karim (principal of Banneker Ventures),[228] Mr. Malone (principal of Metropolis),[229] Mr. Moneme (Metro Board Member),[230] and Mr. Williams (principal of Banneker Ventures)[231] all

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[223] E-mail from Jim Graham, Councilmember, Washington, D.C., to James Link, Partner, American Capitol Group (June 11, 2008, 2:26 p.m. EDT).

[224] Albert Interview Memo (explaining that Deputy Mayor Albert heard speculation that Councilmember Graham favored LaKritz Adler or Donatelli Development).

[225] Bottigheimer Interview Memo (explaining that Ms. Doggett told him that Councilmember Graham favored LaKritz Adler).

[226] Donatelli Interview Memo (stating that, at a public bid presentation for the Florida Avenue Project, Councilmember Graham told Mr. Donatelli that he preferred the LaKritz Adler proposal because it involved an adjacent property).

[227] Doggett Interview Memo (recalling that Councilmember Graham expressed support for LaKritz Adler at a meeting).

[228] Karim Dep. 33:12–17 (July 23, 2012) (stating that Councilmember Graham suggested to him to add LaKritz Adler to the development team).

[229] Malone Interview Memo (stating that he and Councilmember Graham had a conversation immediately after Councilmember Graham learned of the partnership. Councilmember Graham asked Mr. Malone why he would lend his support to a "joker" firm such as Banneker Ventures).

[230] Moneme Interview Memo (stating that LaKritz Adler was understood to be Councilmember Graham's favorite developer).

[231] W. Williams Interview Memo (explaining that he heard that Councilmember Graham wanted LaKritz Adler to be the developer of the Florida Avenue Project).

heard either directly from Councilmember Graham or from other sources that Councilmember Graham wanted LaKritz Adler to be awarded the Florida Avenue Project.[232]

Although LaKritz Adler had some experience and expertise, particularly in Ward 1, LaKritz Adler's proposal offered the least financial benefit to Metro. In setting its bid at $6 million, LaKritz Adler submitted the lowest initial offer for the Florida Avenue Property.[233] Its bid fell $1.5 million short of the $7.5 million that an independent appraiser determined to be the value of the property at the time.[234] LaKritz Adler's offer was $5.8 million less than Moddie Turay's offer of $11.8 million, and it was less than half of the $14 million offer submitted by Banneker Ventures.[235] The significantly lower bid was the primary reason the Metro joint development staff eliminated LaKritz Adler early in the bidding competition.[236] Yet, despite LaKritz Adler's lowest bid and the Metro joint development staff's rejection thereof, Councilmember Graham continued to advocate for LaKritz Adler.[237]

The Metro joint development staff's recommendation that the Metro Board select Banneker Ventures as the developer for the Florida Avenue Project did not stop Councilmember Graham from pushing the Metro joint development staff to involve LaKritz Adler in the project. On January 29, 2009, almost a full year after Metro selected Banneker Ventures, Councilmember Graham expressed his support for LaKritz Adler to be involved in the Florida Avenue Project to Ms. Doggett (Metro Senior Transit Oriented Development Specialist) at a meeting regarding the Florida Avenue Project.[238] According to Ms. Doggett, five days later, on February 3, 2009, Joshua Adler, one of the principals at LaKritz Adler, called to say that Councilmember Graham had asked him to "make a deal" with Banneker Ventures.[239] Ms. Doggett explained to the

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[232] *Contra* Graham Dep. 32:18–22, 134:6–13 (explaining that he preferred Clark Construction to LaKritz Adler). Mr. Adler stated that he did not know why it was perceived that Councilmember Graham preferred LaKritz Adler to develop the Florida Avenue properties, but speculated it could be due to LaKritz Adler's reputation for development in Ward 1. Adler Interview Memo.

[233] Based on a sixty-year lease period; Doggett Jan. 29, 2008 Memo.

[234] *Id.*

[235] *Id.*

[236] *Id.*; Doggett Interview Memo (explaining that Ms. Doggett eliminated LaKritz Adler from consideration first because its proposal did not exceed the appraised value of the property).

[237] Doggett Interview Memo (recalling that Councilmember Graham expressed support for LaKritz Adler at a meeting); Handwritten Notes from Rosalyn Doggett (Feb. 3, 2009).

[238] Doggett Interview Memo (recalling that Councilmember Graham expressed support for LaKritz Adler at a meeting).

[239] Handwritten Notes from Rosalyn Doggett (Feb. 3, 2009). During his interview, Mr. Adler did not recall discussing these topics with Ms. Doggett and did not recall specific conversations about Banneker Ventures with Councilmember Graham. Adler Interview Memo.

investigative team that Mr. Adler spoke with specificity about Banneker Ventures's proposal, and that she did not know how he obtained the information.[240] By openly advocating for LaKritz Adler to the Metro joint development staff and by encouraging LaKritz Adler to pursue opportunities to develop the project, Councilmember Graham continued to demonstrate an appearance of favoritism for LaKritz Adler.

Councilmember Graham also made known his views on LaKritz Adler to the principals of Banneker Ventures. According to Omar Karim (principal of Banneker Ventures), Councilmember Graham explicitly told him that he should add LaKritz Adler to the development team, apparently going so far as to give him Mr. Adler's phone number.[241] Councilmember Graham's preference for LaKritz Adler was echoed further in Mr. Williams's e-mail after the May 29, 2008 meeting, in which Mr. Williams wrote, "We have begun some preliminary talks with LaKritz, the developer that he wants to see win the site."[242] Despite the fact that Banneker Ventures already had an experienced development partner, Mr. Karim reluctantly acquiesced to Councilmember Graham's request by contacting and meeting[243] with LaKritz Adler in the summer of 2008 to discuss a potential partnership for the Florida Avenue Project.[244]

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[240] Doggett Interview Memo (stating that representatives of LaKritz Adler would call her and speak with specificity about Banneker Ventures's proposal, and that they seemed to have more information than was publicly available). During his interview, Mr. Adler did not recall discussing these specific topics with Ms. Doggett. Mr. Adler stated that he did not recall being provided any documents about Banneker Ventures's submissions to Metro. Adler Interview Memo.

[241] Karim Dep. 33:12–17 (July 23, 2012):

> A So he – he strongly recommended that we add LaKritz Adler to our development team. It's a development company, he told us to do it. He might have even given me Josh Adler's phone number, because immediately thereafter, I contacted him. . . .

[242] E-mail from Warren Williams, Co-Owner, W2Tech, to A. Scott Bolden, Partner, Reed Smith LLP, Crystal Wright, Principal, Baker Wright Group, James Link, Partner, American Capitol Group, and Alaka Williams, Co-Owner, W2Tech (June 2, 2008, 7:05 p.m. EDT).

[243] Karim Dep. 36:6–12, 37:6–9 (July 23, 2012):

> Q Why would it have been in your interest to get involved with LaKritz?
>
> A Because the guy that's controlling our deal suggested that we do it. Jim Graham, that is.
>
> . . .
>
> Q Would you have gotten LaKritz involved and had discussions with LaKritz, had Councilman Graham not told you to contact LaKritz?
>
> A Absolutely not.

[244] Karim Dep. 87:15–89:2 (July 23, 2012) (explaining that negotiations continued until at least August 2008, and ceased because Banneker Ventures thought the price of the adjacent parcel was too high); *see also* Handwritten Notes from Rosalyn Doggett (Feb. 3, 2009); *see also* Graham Dep. 126:7–17 (stating

LaKritz Adler kept trying to stay involved in the Florida Avenue Project. Even after discussions between LaKritz Adler and Banneker Ventures proved futile, representatives from LaKritz Adler continued to call Ms. Doggett every few months to inquire about the Florida Avenue Project.[245] These conversations apparently continued until at least January of 2010.[246] According to Ms. Doggett, during these phone calls LaKritz Adler's principals would reiterate the benefits of their proposal while interjecting negative statements about Banneker Ventures.[247] The principals of LaKritz Adler also appeared to stay closely abreast of the actions of the Metro Board regarding the Florida Avenue Project.[248] In January 2010, Mr. Adler wrote to Mr. LaKritz to relate that the PDREC had extended negotiations with Banneker Ventures until March 31, 2010, and specifically mentioned that Councilmember Graham was ill and unable to attend the committee hearing.[249] In short, LaKritz Adler persisted in its efforts to have a role in a project that had been awarded previously to Banneker Ventures in 2008.[250]

Instead of working to bring the Florida Avenue Project to fruition, Councilmember Graham attempted to undermine the selected developer, Banneker Ventures, and tried to promote LaKritz Adler or to orchestrate the composition of the development team in favor of LaKritz Adler. Councilmember Graham's actions created an appearance that he was not impartial and thereby were contrary to Metro's Standards of Conduct.

* * *

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that he may have asked Mr. Karim to consider LaKritz Adler as a development partner after Metropolis withdrew).

[245] Doggett Interview Memo (stating that Mr. Adler called every few months to discuss the Florida Avenue Project); Handwritten Notes from Rosalyn Doggett (Feb. 3, 2009). Mr. Adler indicated that he would call Ms. Doggett every six months between the time period in which Banneker Ventures was selected as the joint developer (March 2008) and the point when the negotiation period expired (March 2010). Adler Interview Memo.

[246] E-mail from Joshua Adler, Principal, LaKritz Adler, to Robert LaKritz, Principal, LaKritz Adler (Jan. 11, 2010, 5:34 p.m. EST).

[247] Doggett Interview Memo (explaining that Mr. Adler would often speak highly of his team and negatively about other developers including Banneker Ventures). Mr. Adler did not recall making any statements about Banneker Ventures during his phone conversations with Ms. Doggett. Adler Interview Memo.

[248] E-mail from Joshua Adler, Principal, LaKritz Adler, to Robert LaKritz, Principal, LaKritz Adler (Jan. 15, 2010, 1:03 p.m. EST).

[249] *Id.*

[250] LaKritz Adler's delays in providing documents to the investigative team and refusal to cooperate fully in this investigation hindered our ability to investigate these issues. *Supra*, note 2.

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In sum, the evidence establishes that Councilmember Graham acted in a manner contrary to Metro's Standards of Conduct in two ways. First, by telling Warren Williams that he would consider supporting W2I's lottery bid if Banneker Ventures withdrew from the Florida Avenue Project, Councilmember Graham pitted the interests of the Council of the District of Columbia against the interests of Metro, and thereby unnecessarily created a conflict of interest, or, at the least, the appearance of a conflict of interest. The fact that Councilmember Graham served on both the D.C. Council and the Metro Board was not the source of the conflict, and we take no position on the fact that elected officials serve on the Metro Board. Indeed, the Metro Board has an extensive history of elected officials dutifully serving on the Metro Board without issue, and the Metro Board had in place during the relevant period Standards of Conduct designed to promote a fair, transparent, and ethical contracting process. Councilmember Graham created the conflict through his own actions of appearing to barter a Metro joint development project with a matter before the D.C. Council. Rather than operating within the confines of the Metro boardroom to garner the necessary votes to oppose Banneker Ventures, he circumvented the Metro Board by attempting to single-handedly persuade Mr. Williams to withdraw from the Florida Avenue Project by using the lucrative D.C. lottery contract as leverage. These actions were done without the knowledge and consent of the Metro Board. Regardless of whether Councilmember Graham was correct in his concerns about Banneker Ventures, the method he used toward achieving his goal undermined the integrity of the joint development process.

Second, by appearing to continue to support LaKritz Adler's proposal for, or inclusion in, the Florida Avenue Project while at the same time opposing Banneker Ventures, Councilmember Graham acted contrary to his duty to appear impartial. This is not to suggest that LaKritz Adler acted inappropriately to warrant Councilmember Graham's support. Instead, Councilmember Graham appeared to be motivated by some combination of his own animosity toward Warren Williams and his interest in shaping the Florida Avenue Project as he thought appropriate. Regardless of whether another developer would have been a better choice than Banneker Ventures, the appropriate venue for Councilmember Graham to air his concerns with Banneker Ventures or to propose changes to the joint development team was the Metro boardroom.

As a consequence of the foregoing, the public's trust in Metro's joint development process has been harmed and thus Councilmember Graham's actions resulted in a breach of his duty to place the public interest foremost in any dealings involving Metro.

October 11, 2012

Respectfully submitted,

Bradley J. Bondi

CC: Kenneth L. Wainstein, Esq.
Dale Chakarian Turza, Esq.
Emily J. Rockwood, Esq.
Samantha A. Dreilinger, Esq.
Brett A. Sisto, Esq.

Contributor Report

Total Records: 4

Recipient	Contributor/Contributor Type	Address	Amount	Date
Reelect Jim Graham 2010	Lakritz, Robb / Individual	4326 8th St., NW. Washington DC 20011	$500.00	1/23/2010
Citizens to Elect Linda Cropp Mayor	Lakritz, Robb / Individual	4326 - 8th St., NW Washington DC 20011	$2,000.00	6/10/2006
Fenty 2006	Lakritz, Robb / Individual	4326 8th Street NW Washington DC 20011	$776.00	8/9/2006
Re-Elect Jim Graham (2006)	Lakritz, Robb / Individual	4326 8th Street, NW Washington DC 20011	$500.00	9/6/2006

Contributor Report

Total Records: 35

Recipient	Contributor/Contributor Type	Address	Amount	Date
Reelect Jim Graham 2010	Adler, Joshua / Individual	4326 8th St., NW. Washington DC 20011	$500.00	1/23/2010
Barry for Ward 8 Re-Election Committee	Adler, Adam / Individual	1840 Langston Place SE Washington DC 20020	$500.00	12/14/2011
Kenyan Forward 5's Future	Sadler, Felicia / Individual	11822 Capstan Drive Upper Marlboro MD 20772	$100.00	3/5/2010
Committee to Elect Sekou Biddle At-Large	Sadler, Felicia / Individual	11822 Capstan Drive Upper Marlboro DC 20772	$50.00	3/9/2011
Citizens to Elect Linda Cropp Mayor	Sadler, Charles / Individual	7529 Morningside Dr. N.W. Washington DC 20012	$50.00	3/7/2006

Contributor Report

Total Records: 35

Recipient	Contributor/Contributor Type	Address	Amount	Date
Michael Brown for Mayor Committee	Nadler, Floyd / Individual	130 E Randolph Dr. #1200 Chicago DC 60601	$250.00	2/7/2006
Citizens to Elect Linda Cropp Mayor	Adler, Joshua / Individual	2151 Florida Ave., NW Washington DC 20008	$2,000.00	6/10/2006
Evans 2004	Adler, Laurie / Individual	2138 California Street, NW, #305 Washington DC 20008	$5.00	5/24/2004
Committee to Elect Sekou Biddle At-Large	Stadler, Ken / Individual	314 Braeburn Glen Ct. Millersville MD 21108	$200.00	4/22/2011
Gaull 2006	Adler, Jim / Individual	5630 Wisconsin Ave NW #1205 Washington DC 20815	$500.00	6/10/2006
Gaull 2006	Adler, Esthy / Individual	5630 Wisconsin Ave NW #1205 Washington DC 20815	$500.00	6/10/2006
Muriel Bowser for Ward 4 2008	Sadler, Charles / Individual	7529 Morningside Dr NW Washington DC 20012	$100.00	4/3/2008
Gaull 2006	Adler, Esthy / Individual	5530 Wisconsin Ave Suite 1460 Chevy Chase DC 20815	$500.00	6/13/2006
Committee to Elect Kwame R Brown	Sadler, Jacquelyn W. & Zara / Individual	7529 Morningside Drive, NW Washington DC 20012	$20.00	7/29/2004
Fenty 2006	Adler, Adam / Individual	38 B East Main St Newark DE 19711	$1,000.00	8/2/2006
Fenty 2006	Sadler, Jackie & Chuck / Individual	7529 Morningside Dr NW Washington DC 20012	$100.00	7/15/2006
Re-Elect Jim Graham (2006)	Adler, Joshua / Individual	3002 13th Street, NW Washington DC 20009	$500.00	9/6/2006
Committee to Elect Vincent Gray	Sadler, Andrew / Individual	1440 New York Avenue, NW Washington DC 20005	$500.00	11/1/2004
Committee to Elect Kwame R Brown	Nadler, Jonathan / Individual	1901 Wyoming Ave, NW #45 Washington DC 20009	$500.00	11/2/2004
Committee to Re-Elect Tony Williams	Adler, Alison / Individual	3001 Veazey Ter, NW Washington DC 20008	$100.00	10/29/2002
Committee to Elect Victor Reinoso	Adler, Martha / Individual	5025 Weaver Terrace, NW Washington DC 20016	$150.00	10/28/2004
Citizens to Elect Dave Kranich Mayor	Adler, John / Individual	4362 Westover Place, NW Washington DC 20016	$50.00	11/3/2006
Committee to Elect Almetia Hairston Hamilton	Sadler, Felicia / Individual	2000 Concord Ln. District Heights DC 20747	$50.00	8/26/2004
Muriel Bowser for Ward 4	Sadler, Jackie & Chuck / Individual	7529 Morningside Drive NW Washington DC 20012	$125.00	4/12/2007

Committee to Elect Julie MiKuta	Adler, Eric / Individual		$100.00	9/21/2000
Wells for School Board	Adler, Gary / Individual	3047 Cedarwood Lane Falls Church VA 22042	$25.00	10/12/2000
Committee to Elect Adrian Fenty	Sadler, Jacqueline / Individual	7529 Morningside Dr NW Washington DC 20012	$20.00	5/19/2000
Committee to Re-Elect Kevin P. Chavous for 2000	Adler, James / Individual	5600 Wisconsin Avenue, #1408 Chevy Chase, MD 20815	$500.00	9/7/2000
Committee to Re-Elect Kevin P. Chavous for 2000	Adler, Esther / Individual	5600 Wisconsin Avenue, #1408 Chevy Chase, MD 20815	$200.00	9/8/2000
Committee to Re-Elect Sandy Allen	Nadler, Jonathan / Individual	1901 Wyoming Avenue, NW, #45 Washington DC 20009	$250.00	11/3/2000
Citizens to Elect Linda Cropp Mayor	Nadler, Jonathan / Individual	1901 Wyoming Avenue, NW Apt. 45 Washington DC 20009	$200.00	12/8/2005
Citizens to Elect Linda Cropp Mayor	Nadler, Jonathan / Individual	1901 Wyoming Avenue, NW Apt.45 Washington DC 20009	$200.00	12/8/2005
Fenty 2006	Nadler, T / Individual	1835 Phelps Pl NW Washington DC 20008	$100.00	1/24/2006
Bolden 2006 DC Council Member at Large	Nadler, Jonathan / Individual	1901 Wyoming Ave NW #45 Washington DC 20009	$250.00	12/11/2006
Fenty 2010	Adler, Adam / Individual	9 Chantilly Court Rockville MD 20850	$2,000.00	9/14/2009
Reelect Jim Graham 2010	Adler, Joshua / Individual	4326 8th St., NW. Washington DC 20011	$500.00	1/23/2010
Barry for Ward 8 Re-Election Committee	Adler, Adam / Individual	1840 Langston Place SE Washington DC 20020	$500.00	12/14/2011
Kenyan Forward 5's Future	Sadler, Felicia / Individual	11822 Capstan Drive Upper Marlboro MD 20772	$100.00	3/5/2010
Committee to Elect Sekou Biddle At-Large	Sadler, Felicia / Individual	11822 Capstan Drive Upper Marlboro DC 20772	$50.00	3/9/2011
Citizens to Elect Linda Cropp Mayor	Sadler, Charles / Individual	7529 Morningside Dr. N.W. Washington DC 20012	$50.00	3/7/2006

Contributor Report
Total Records: 7

Recipient	Contributor/Contributor Type	Address	Amount	Date
Fenty 2010	Lakritz Adler Development / Business	4326 8th Street NW Washington DC 20011	$2,000.00	1/15/2010
Reelect Jim Graham 2010	Lakritz Adler Construction, LLC. / Business	4326 8th St., NW. Washington DC 20011	$500.00	1/23/2010
Reelect Jim Graham 2010	Lakritz Adler Development, LLC. / Business	4326 8th St., NW. Washington DC 20011	$500.00	1/23/2010
Reelect Jim Graham 2010	Lakritz Adler Investments, LLC. / Business	4326 8th St., NW. Washington DC 20011	$500.00	1/23/2010
Muriel Bowser for Ward 4	Lakritz Adler Development LLC / Business	4326 8th Street NW Washington DC 20011	$500.00	2/9/2007
Evans 2008	Lakritz Adler Development / Business	4326 8th St. NW. Washington DC 20011	$500.00	6/20/2008
Mary Cheh for DC Council	Lakritz Adler Development LLC / Corporation	4326 8th St NW Washington DC 20008	$500.00	8/11/2006

Statement of Irvin B. Nathan
District of Columbia Attorney General

Before the

Committee on Government Operations
Muriel Bowser, Chairperson

Regarding Ethics Legislation

Office of the Attorney General
District of Columbia

November 30, 2011

Council Chamber
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, D.C.

Chairperson Bowser, members of the Committee on Government Operations, staff, and guests: I am Irv Nathan, Attorney General for the District of Columbia. On behalf of the Executive Branch of the District, I am pleased to appear before the Committee today to testify regarding pending ethics legislation.

As you know, I testified in June before this Committee under the former leadership of Councilmember Cheh on bill 19-297, the "Comprehensive Ethics Reform Act of 2011." Since then, 10 other bills have been introduced that touch on this important subject, and Committee Chairperson Bowser has made public her own draft bill that will be the focus of my testimony today. I believe the bill incorporates important features of several other bills, reflects a number of the basic ethics principles that the Mayor has enunciated and is strong bill, although I believe there are a number of improvements and modifications that should be made before the bill is passed.

I commend Chairperson Bowser for focusing on this issue and for the diligent effort that this bill represents. I also commend Council Chair Brown, Council Members Cheh, Mendelson, Orange, and Wells for their efforts in recently introduced legislation.

As I noted in June, one need only look at the news headlines to realize that the District's government faces serious challenges on the ethics front. That has not changed over the past five months. This is a particular concern to our office as we serve as the District's ethics counselor, and we have been required to consider or bring litigation on behalf of the District to remedy misconduct by city officials and employees.

At the hearing in June, I promised that over the summer I would work with the Council to improve the legislation that had been proposed in order to help create an effective, workable mechanism to alert employees to their ethical obligations, to train them, to provide helpful advice to them and to impose meaningful sanctions where there are failures to live up to the ethical standards that our constituents expect of us. In carrying out that pledge, at the suggestion of citizen-activist Dorothy Brizill, I have had extensive consultations with a large number of stakeholders in the District's ethics process, including former Council members, leaders of the District's business community, political activists, law school deans and professors, lobbyists, representatives of public interest and non-profit organizations, and others.

My testimony today and my previous advice this fall to Council Members and staff represent a synthesis of the views expressed to me by those familiar with the District's ethics problems and potential solutions.

Their comments to me echoed the words of President John F. Kennedy, who almost a half century ago said: "[n]o responsibility of government is more fundamental than the responsibility for maintaining the highest standards of ethical behavior by those who conduct the public business...This principle must be followed not only in reality but in appearance. For the basis of effective government is public confidence, and that confidence is endangered when ethical standards falter or appear to falter."

Our citizens, like citizens throughout the country, want to see a commitment to these high standards of ethical conduct. It is, of course,

going to take more than legislation to accomplish this. Not only do elected officials and other high level appointed officers of the government have to comport themselves in an exemplary fashion but they cannot appear to tolerate questionable conduct by their peers. A number of our citizens have expressed disappointment that there has been little or no condemnation by most elected officials of apparent violations by others. Hopefully, the proposed legislation will assist in this regard, but it will not be sufficient unless it is matched by a change in the attitude reflected in the reaction to ethics failures.

The Mayor has taken an important first step in this regard by pledging and having each of his cabinet officers and all Excepted Service appointees pledge in writing to abide by a comprehensive code of ethical conduct. At his direction, my office prepared a one-page document, "Ten Principles of Ethical Conduct," that summarizes the many substantive ethics standards that apply to District employees. I have appended a copy of the pledge to my testimony. The pledge makes two points clear: First, the problem in the District is not the lack of substantive standards. We have good sound standards, stemming from federal law, D.C. Code provisions previously enacted by the Council and a mature system of regulations in the District Manual. Second, ethical lapses will not be tolerated in the Executive branch, and any significant deliberate violations will result in termination of employment. Quite apart from the legislation you are considering, each member of the Council may want to consider taking a similar public pledge and insisting that all top officials live up to it.

There are three principal components to an effective ethics program: substantive standards that protect the public trust; prevention of violations of those standards through training, advice,

and review of financial disclosures; and strong enforcement that can reach our top elected and appointed officials.

As noted, the good news is that the District already has strong ethics standards on the books. These include the criminal conflict-of-interest laws that apply to both federal employees and to District employees and a very strict local limit on gifts from outside sources. Your draft bill lists many – but not all – of these standards, and labels them a "Code of Conduct." We believe this assembly is very helpful, but believe it should also include reference to the federal conflict and ethics laws that apply to District employees and officials. We also believe it is helpful that the bill requires certain government employees, including elected officials, to certify that they have reported known illegal activity to the appropriate authorities.

We welcome your bill's requirement for an ethics manual, which amplifies on the statutory and regulatory standards. Indeed, at the Mayor's direction, my office has already created an initial version of such a manual, which will be made available to all District employees before the end of the year. The Manual attempts to explain the sometimes confusing array of ethical standards in plain, easily understood language. My Special Counsel for Ethics, Kathleen Clark, is with me today and at the end of my testimony will briefly elaborate on the Ethics Manual that she has drafted. We have also created a web page that gathers in one place a list of the many ethics standards – federal and District, from statutes, regulations and orders – that apply to District employees. (http://oag.dc.gov/DC/OAG/Information+to+Help+You/Ethical+Standards+for+DC+Government+Workers/Ethics+Laws. We hope this is similarly helpful to District employees.

Your bill is also sensible in focusing on training and advice. The bill provides that annual ethics training should be focused on those who are in high-risk positions and have most need of sensitivity to the issues. We also support the increased availability of ethics advice and its positive consequences. We can prevent some violations by training employees and advising them in response to specific questions. Anyone who sincerely seeks guidance, sets forth accurately the proposed course of action and diligently follows the advice received should be protected in following that advice in good faith. We therefore applaud the safe harbor provisions of your bill. On the other hand, the bill appears to authorize terminating an employee for failure to attend ethics training. As much as we believe in ethics training, we think that terminating an employee for the equivalent of cutting class is extreme. We will want the Board to demonstrate proportionality in its sanctions, and the bill should do the same.

The Office of the Attorney General already provides ethics training and advice to District employees. We have strengthened our advisory functions to encourage employees across the District to seek advice on ethically sensitive matters, to make full and accurate disclosure of planned activities, and to follow advice provided by ethics counselors fully and conscientiously. The Office of the Attorney General has already started reaching out across the District government, ensuring that each subordinate agency has an Ethics Counselor, and is providing them with training and legal memoranda that explain applicable ethics standards. It also is working with the Department of Human Resources to develop a training program to ensure that employees in sensitive or powerful positions, from Cabinet members to those involved in government contracting, are familiar

with our ethics standards. Your bill would transfer these training and advice responsibilities to the new Board, and the Office of the Attorney General will be pleased to work with the Board during the transition to transfer the expertise and resources we have developed so that the Board can benefit from the strides we have made in recent months and use the resources that we have already created.

We do not support, and urge the elimination of, the provision that allows anyone "adversely affected" by an advisory opinion to take an appeal to the Superior Court. Our courts properly do not provide advisory opinions, and an appeal to the court would precisely be for an advisory opinion of the court. There is also the possibility that the provisions would violate the Home Rule Act, which prevents the Council from changing the local courts' jurisdiction. At the advisory stage, it is simply premature to bring a judicial action. If someone believes that the Board or any government agency has provided an incorrect advisory ethics opinion, and if they cannot receive relief from a supervisor, they are of course free to act in accordance with their own view, or their counsel's view, of the applicable provisions of law. If the Board or other enforcement agency contends that the actions were unwarranted, the employee will have ample opportunity in such enforcement action to prove that their actions were warranted and the advice of the Board was erroneous. This provision, as currently drafted, is unlikely to be enforced by the courts and may create unnecessary litigation.

In our view, the most significant feature of the bill is the creation of a new three-person Board that will have principal responsibility for enforcement of our ethical standards. Although we do not lightly reach the conclusion that a new entity separate from the BOEE is warranted,

we believe on balance that this is a material improvement over the current situation and, if properly implemented, could result in a meaningful upgrade in the imposition of sanctions for ethical violations and hopefully over the long haul an increase in adherence to ethical standards by all of our officials.

Unfortunately, as things currently stand, the District has distributed responsibility for ethics enforcement among many different players at several layers of government. Responsibility is fragmented, with the U.S. Attorney's Office handling federal-law enforcement, the U.S. Office of Special Counsel dealing with the Hatch Act, the head of every District agency responsible for investigating violations by its own employees, and the D.C. Attorney General responsible for investigating violations of post-employment regulations by former District employees. The Office of Campaign Finance, within the Board of Elections and Ethics, is responsible for investigating violations by the highest-level officials. While it has auditors, it has no full-time investigators and little enforcement power beyond the ability to publish a censure. The OCF does not have a strong track record of enforcing ethics standards against District officials.

Creating an entity, separate and apart from the Board of Elections and Ethics as currently constituted, focused on enforcing ethical standards, would address these concerns, leaving the former Board to focus on campaigns and elections. We believe the Council has the authority to make this change. As the Mayor indicated in his October 26, 2011 letter to Councilmember Bowser, in which he outlined his key principles of ethics reform, the District needs clarity of responsibility for ethics standards. Your bill would create a single organization, an independent Board of Ethics and Government Accountability, and that

is a step in the right direction. Of course, its success very much depends on the nature of the appointments to the Board and the willingness of the Council to confirm strong, independent nominees. I am confident that the Mayor will nominate extremely well qualified candidates with a willingness to take strong corrective actions. They must also be willing to appoint an Executive Director with substantial enforcement credentials and experience, who will not shrink from making the hard calls and recommending effective remedies. We also agree with the suggestion that the credibility of the Board will be enhanced if there is a requirement that no more than two Board members be from the same political party.

The bill has a provision that suggests that the Council can make a decision whether to uphold the Mayor's removal of a Board member in closed session. Apart from the fact that we believe anything to do with the appointment or removal of a Board member should be public, we believe that only the Mayor should have removal authority and that authority should be limited to for cause removal, reviewable, if at all, only in court to see that the for cause standard was met.

As for the penalties available, it is helpful that the bill provides for a civil penalty of $5,000 per offense or "three times the amount of an unlawful contribution, expenditure, gift, honorarium or receipt of outside income. " I also applaud the fact that that the Board can impose equitable remedies such as disgorgement, restitution and rescission of certain improperly issued contracts or grants. It needs this authority because we presently do not know the nature and parameters of future ethical violations, and we should give the Board the maximum authority to remedy the problems that we cannot foresee precisely. I also commend the provision that makes clear the

Board may censure a public official for a violation of the Code of Conduct that violates the public trust and that allows the Board to recommend to the Council action that could result in removing a Council member's committee chairmanship or suspending or removing the member's committee votes. I also agree with the premise of the bill that removal of an elected official should be left to his or her constituency with the full knowledge of the action of the Board, while an appointed employee can be terminated by the appropriate office if there is finding of a serious, intentional violation of the Code.

The bill attempts to make a minor adjustment to the recall procedure, permitting a recall if there has been a Board finding either within one year of election or within a year of the end of a term. While we have no problem with the concept, since the recall provisions are covered in the DC charter, such a provision would presumably have to be accomplished either through an Act of Congress or through a referendum, following Council legislation.

I also applaud the investigative tools and resources provided by the bill and due process protections built into the procedures for the benefit of a public official against whom charges are brought. The section dealing with dismissals of claims needs to be revised slightly. The bill provides that the Board can dismiss any claim or complaint that it considers "without merit or made in bad faith." (Emphasis added.) It also allows the Board to impose fees where the claim or request for investigation was "made in bad faith." We suggest that the dismissal would only be where the claim is without merit, and fees should only be allowed where the claim is both without merit and brought in bad faith. Where a claim is merited, it is probably not appropriate to be examining the motives of the complainant.

I am troubled by the amorphous criminal provision which provides that any violation of the Code of Conduct "that substantially threatens the public trust," can result either in a fine up to $25,000 or imprisonment for not more than a year. I believe the courts may find this too vague since the bill does not specify which of these provisions should be enforced criminally and reasonable people could differ about what kind of ethical infractions "substantially threatens the public trust." Current statutes make clear what kinds of corrupt activity, such as bribery, carry with them criminal penalties. I believe those statutes provide sufficient criminal coverage, but if the Committee believes that additional proscribed conduct needs criminal sanctions or current criminal laws need enhanced penalties, my office would be pleased to work with you to identify specific provisions that need criminal sanctions or enhanced penalties. As Attorney General, I want to avoid unnecessary litigation and uncertainty about whether particular provisions are subject to criminal prosecution.

I am troubled by the bill's apparent unwillingness to staff the Board adequately. Apart from the Executive Director and the General Counsel, the bill does not seem to provide for a significant permanent staff. It suggests that the Board can draft on a temporary basis (presumptively for no more than 90 days) investigators from the Office of the Inspector General and from the Office of the Attorney General and can retain temporary consultants and attorneys but only on a pro bono basis. If, as this Administration believes, ethics is important to the District, we should be willing to pay for it and come up with a sensible budget outlay that will adequately finance the staff for all of its responsibilities, including the audits of disclosure filings. The budgeting

should be done as normally prescribed, without the limitations included in the bill.

We agree that we do not want a cadre of investigators assigned to the Board and sitting idle if there is nothing to investigate. We also agree that in emergency situations, subject to budget approval, investigative assistance could be enhanced by seconding for a limited period qualified individuals from executive agencies or by adding outside personnel for a limited period. But there needs to be a core of dedicated, qualified staff to render opinions, consider additional regulations and undertake routine investigations. The Committee and the Council should be forthright in recognizing that we will simply have to pay for the work we are asking the Board to undertake on our behalf. And it should be able to come for a supplemental budget to hire outside counsel, if needed on its investigations, if *pro bono* assistance is not available. In addition, the bill could provide that in certain circumstances, when its forces are otherwise occupied, it could request an agency that already has a team of investigators, such as the Inspector General, to conduct investigations. At least one other jurisdiction – New York City – has taken this approach.

One way to ease the burden on the Board is to leave litigation of its decisions and sanctions to our office. The bill should be amended to make clear that the Office of Attorney General has the power to bring civil suits to enforce sanctions imposed by the Board for ethics violations. We could also, if requested by the Board, and in the absence of a conflict of interest, enforce its subpoenas and other requests for information in the courts, thereby leaving the staff of the Board to undertake its other important tasks.

Another aspect of the bill that I would like to address is the new disclosure provisions. As Mayor Gray said in his letter to the Council, we need to overhaul the financial disclosure process so that we are asking only for information relevant to ethics concerns, end duplicative disclosures, and ensure that all high-level officials are subject to public financial disclosure. This includes elected officials, agency heads, political appointees, and members of the most important boards and commissions.

Your bill takes steps to ensure that disclosure forms ask for relevant information and would end duplicative disclosure. We welcome the mandate for increased disclosure of outside employment, including the identity of outside employers and clients.

Your bill makes the sensible suggestion to require full public financial disclosure for elected and other high-level officials making decisions in areas of procurement, grants and licensing. We would also suggest requiring financial disclosure of those involved in land use planning, as is currently the case. Making these disclosures easily available would help insure transparency for District residents. At the same time, under the bill, there would be confidential financial disclosures for lower-level officials who are in sensitive positions who do not "substantially participate" in these decisions. So long as these are actually reviewed and monitored, we have no objection to keeping these disclosures confidential or to include within those making confidential disclosures employees who do not have the final decision-making authority. Of course, if any improprieties are found, we believe charges should be made publicly against any offending employees. Your bill would transfer responsibility for handling all of these disclosures to the new Board. What we think is most important is that any problems

revealed by a review of the disclosures be presented to the Board for such action as the Board is authorized to take. I want to emphasize that the purpose of financial disclosure is not just transparency but also prevention: to prevent officials from engaging in conflicts of interest and to ensure that these officials get appropriate advice on ethics standards. Your bill mandates "audits" of these disclosures. We agree that there should be mandated review of these disclosures and counseling available to those who file. This kind of review and counseling can help prevent inadvertent conflicts of interest.

Your draft bill would clarify that the District's conflict of interest statute applies to non-profit organizations as well as for-profit companies. We think that is well warranted. In light of some prior interpretations, we believe that the bill properly clarifies that conflicts of interest can arise with non-profits as well as for-profit organizations.

There could be two additions to the disclosure requirements. First, the disclosure forms require officials to state whether they hold interests in companies that do business with the District. But in many instances, individuals filing these forms have no knowledge of which companies do business with the District. It would make sense for the District to compile a list of businesses which provide goods or services to the District so that an official could check this list when filling out the form to know which businesses are covered by the request for information. This list will, of course, be subject to frequent change, which means that the answer to the question will have to be given as of a specific date. Second, there should be a list of positions that the government deems sensitive for post-employment restrictions. Then anyone holding that position would know to seek counseling before

taking post-government employment or before returning to the government to seek benefits for a client.

Government employees are sought after in the private sector because of their ability to navigate through government bureaucracies and for their relationships with high-ranking officials. Ethics reform legislation should address post-government employment. The D.C. law addresses post-employment conflicts of interests but fails to require reporting when the employee has held an information-sensitive position. The bill should ensure that former District employees do not violate post-government employment standards by requiring those who have held sensitive positions -- elected officials, political appointees, Board or Commission members, and employees involved in procurement or grants -- to receive counseling on post-employment standards before leaving the District government. These preventive measures can help ensure that employees do not use sensitive information learned during their government service for personal gain.

In light of all the duties the resource-challenged Board would have under the new legislation, we oppose the concept that it should also administer the Open Meetings Amendment Act of 2010. The Mayor was properly tasked by that legislation in standing up the Open Government Office with a Director, and we believe that task should remain properly within the Executive branch, subject to the Mayor's control, particularly when issues of open governance so often involve delicate decisions of executive responsibility. As to the Open Meetings Act, it is applicable to the new Board, thus making the other provisions in this bill relating to public meetings either superfluous or inconsistent with existing law. We suggest these additional provisions should be stricken.

In connection with concerns about burdens that the bill would impose, we have an additional concern. The bill as drafted would as of its effective date task the OCF temporarily until July 2012 with administering the new standards and new set of investigative and enforcement tasks established in the bill, while requiring that the Board assume such duties by July 1, 2012. In our judgment, this approach should be modified. The OCF is not funded or staffed to perform the additional duties of the Act, and the transition contemplated in the draft bill would threaten to cause confusion and inefficiencies without necessarily offering the benefits of the contemplated new Board. In addition, for the Board to be effective, some planning time will be necessary. Therefore, we recommend that the OCF not be burdened with temporary implementation of the Act. Instead, the Act should call for the Board to have its authority as of the Act's effective date and for the Board to begin executing its duties no later than a date certain after enactment.

Of course, because of the breadth of the bill, I am not able in this short statement to address all of its provisions. I and my staff remain willing to work with the Committee and its staff to cover any additional provisions that I have not had an opportunity to address in this prepared testimony. One of those issues would be to make sure that the disciplinary procedures and sanctions provided to the Board are consistent with the District's existing employment procedures and collective bargaining agreements.

Finally, the bill would require the Board to assess our ethics standards, review best practices across the nation, and recommend changes. The Office of the Attorney General has already begun such an assessment and review, and we will be pleased to share with the new

Board the insights that we have gained and to work with it to be sure that the District has the very highest ethical standards and practices and full compliance with them.

With the modifications we have suggested, we believe the time has come for this Council to pass legislation that will improve the state of ethics and accountability in our government so that we will have an effective system in which all residents of the District—and the nation—can take pride.

I would be pleased to answer any questions.

TESTIMONY OF

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS

BEFORE THE COMMITTEE ON GOVERNMENT OPERATIONS

WEDNESDAY, OCTOBER 26, 2011

GOOD AFTERNOON, MADAM CHAIR AND MEMBERS OF THE COMMITTEE ON GOVERNMENT OPERATIONS. MY NAME IS KEN MCGHIE, AND I AM THE GENERAL COUNSEL OF THE D.C. BOARD OF ELECTIONS AND ETHICS. WITH ME ARE PAUL STENBJORN, THE BOARD'S EXECUTIVE DIRECTOR; CECILY COLLIER-MONTGOMERY, THE DIRECTOR OF THE OFFICE OF CAMPAIGN FINANCE; AND WILLIAM SANFORD, THE GENERAL COUNSEL FOR THE OFFICE OF CAMPAIGN FINANCE.

ON BEHALF OF THE BOARD, I WILL BE ADDRESSING THE BOARD'S OVERALL SENTIMENTS AND CONCERNS ON HOW TO RESTORE THE PUBLIC'S FAITH IN GOVERNMENT AND HOW THE BOARD, AS ONE OF SEVERAL AGENCIES CHARGED WITH RESPONSIBILITY FOR ADDRESSING ISSUES OF ETHICS IN THE DISTRICT OF COLUMBIA, CAN CONTRIBUTE TO THE RESTORATION OF THAT TRUST ALONG WITH THE OTHER AGENCIES CALLED TO TESTIFY TODAY. MS. COLLIER-MONTGOMERY WILL ADDRESS THE SPECIFIC PIECES OF LEGISLATION THAT IMPACT THE RESPONSIBILITIES OF HER OFFICE WITHIN OUR AGENCY.

FIRST, LET ME BEGIN BY THANKING YOU AND THE COMMITTEE ON GOVERNMENT OPERATIONS FOR THE OPPORTUNITY TO APPEAR BEFORE YOU

AT THAT JUNE HEARING, WE DISCUSSED THAT THE DISTRICT IS NOT THE ONLY STATE OR CITY IN THE NATION TO CONSIDER IMPROVEMENTS TO ITS ETHICS LAWS. MY COLLEAGUE PAUL STENBJORN IS PREPARED TO DISCUSS SOME OF THOSE EXAMPLES TODAY. HOWEVER, I WOULD SPECIFICALLY LIKE TO POINT THE COMMITTEE TOWARD THE REPORT OF THE SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY, WHICH IN 2005 CONDUCTED AN EXTENSIVE REVIEW OF ITS ETHICS LAWS AND COMPLIANCE AND MADE SPECIFIC RECOMMENDATIONS TO THE GOVERNOR ON HOW TO IMPROVE THE STATE'S GOVERNMENT ETHICS.[1] I BELIEVE WE CAN LEARN A LOT FROM THAT REPORT AND I WOULD BE HAPPY TO PROVIDE A COPY OF THAT REPORT TO THIS COMMITTEE. IN THE REPORT, THE NEED FOR IMPROVEMENT TO THE STATE'S CURRENT ETHICS SYSTEM WAS SUGGESTED IN FOUR BASIC AREAS: (1) THE LAWS; (2) TRAINING PROCEDURES; (3) COMPLIANCE PROCEDURES; AND (4) ENFORCEMENT PROCEDURES. I BELIEVE THE DISTRICT CURRENT ETHICS SYSTEM IS ALSO DEFICIENT IN THESE AREAS AND THE COMMITTEE SHOULD CONSIDER THE FOLLOWING IMPROVEMENTS:

IMPROVE CURRENT LAWS

FIRST, THE DISTRICT NEEDS TO IMPROVE ITS LAWS. THE ETHICS LAWS OF THE DISTRICT OF COLUMBIA ARE FRAGMENTED THROUGHOUT THE DISTRICT CODE[2]

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[1] Report of the Special Ethics Counsel to the Governor of the State of New Jersey, March 15, 2005, Daniel J. O'Hern, Sr., Professor Paula A. Franzese, Peter W. Rodino, Professor of Law, Seton Hall University School of Law: http://www.nj.gov/ethics/docs/reports/ethics_report_summary.pdf

[2] D.C. Code §1-615.51 (whistleblower protection), D.C. Code §1-1105.06(a)and(b) (lobbying), D.C. Code §1-1106.01(Conflict of Interest), D.C. Code §1-1106.02(Disclosure of Financial Interest), D.C. Code §1-1106.51(use of government resources) and D.C. Code §2-702 et.seq. (Use of official mail).

AND DIFFERENT AGENCIES ARE RESPONSIBLE FOR DIFFERENT ETHICS INVESTIGATIONS AND ENFORCEMENT. IN SOME CASES THERE IS OVERLAP; IN OTHERS, THERE IS NO AGENCY CHARGED WITH ENFORCEMENT. THERE IS A CODE OF CONDUCT FOR AGENCIES UNDER THE EXECUTIVE;[3] ANOTHER FOR THE COUNCIL[4] AND INDEPENDENT AGENCIES MAY HAVE THEIR OWN RULES. OUR OWN BOARD, IN ITS REGULATIONS, HAS ITS OWN SEPARATE POLITICAL AND ETHICAL CODE OF CONDUCT FOR BOARD MEMBERS AND EMPLOYEES.[5] WHILE THERE MAY BE REASONS FOR INDIVIDUAL AGENCIES TO HAVE THEIR OWN RULES IN ADDITION TO UNIFORM RULES, THERE SHOULD BE AT LEAST ONE UNIFORM ETHICAL CODE OF CONDUCT WHICH IS APPLICABLE TO ALL GOVERNMENT EMPLOYEES. THE UNIFORM LAW SHOULD ADDRESS, FOR EXAMPLE, THE MISUSE OF AN EMPLOYEE'S GOVERNMENT POSITION FOR PERSONAL GAIN OR FOR THE GAIN OF OTHERS, OUTSIDE EMPLOYMENT, POST-EMPLOYMENT RESTRICTIONS, THE SOLICITATION OR ACCEPTANCE OF GIFTS BY EMPLOYEES FROM PROHIBITED SOURCES, ENGAGING IN POLITICAL ACTIVITY WHILE ON DUTY, TRAVEL, AND FINANCIAL DISCLOSURE. THE UNIFORM ETHICS CODE SHOULD SET OUT THE PROCEDURES TO BE USED IN SPECIFIC ETHICAL SITUATIONS AND OUTLINE WHAT REMEDIES SHOULD BE IMPOSED IF VIOLATED. COPIES OF THE CODE OF ETHICAL CONDUCT SHOULD BE PROVIDED TO ALL DISTRICT EMPLOYEES WHO SHOULD AFFIRM THAT THEY UNDERSTAND THE PROVISIONS CONTAINED THEREIN AND THAT THEY AGREE TO ABIDE BY THEM.

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[3] The Merit Personnel Act (D.C. Code §1-618.01 et seq. and Chapter 18 of the District of Columbia Municipal Regulations (DCMR)

[4] Council Rule 201a. Code of Official Conduct

[5] 3DCMR Chapter 2

IMPROVE CURRENT TRAINING PROCEDURES

SECOND, THE DISTRICT NEEDS TO IMPROVE AND HARMONIZE ITS CURRENT ETHICS TRAINING. DISTRICT GOVERNMENT EMPLOYEES WILL NEED TO BE FAMILIAR WITH THE DISTRICT'S NEW UNIFORM ETHICAL CODE OF CONDUCT ONCE IT IS IN PLACE. THE DISTRICT'S CURRENT ORIENTATION PROCESS FOR NEW EMPLOYEES INCLUDES AN ETHICS ORIENTATION. BUT IT IS VERY GENERAL IN NATURE SINCE THERE IS NO UNIFORM CODE OF CONDUCT AND NOT EVERYONE IS REQUIRED TO ATTEND. ALL NEW OFFICIALS, BOARD MEMBERS AND GOVERNMENT EMPLOYEES SHOULD BE REQUIRED TO ATTEND AT LEAST A TWO-HOUR ETHICS-ORIENTATION TRAINING UPON ENTERING GOVERNMENT SERVICE. A MORE ELABORATE PROGRAM INCLUDING ONE FULL DAY OF ETHICS TRAINING SHOULD BE MANDATED ANNUALLY FOR ANY GOVERNMENT EMPLOYEE SERVING IN A POLICY OR DECISION-MAKING ROLE, SUCH AS A DIRECTOR, OR IN A FINANCIAL POSITION SUCH AS A PROCUREMENT OR REVENUE OFFICER.

IN THE PAST, THE OFFICE OF CAMPAIGN FINANCE, THE ETHICS COUNSELOR FOR THE CORPORATION COUNSEL AND THE OFFICE OF SPECIAL COUNSEL CONDUCTED VOLUNTARY ETHICS WORKSHOPS, ESPECIALLY AROUND AN ELECTION, THAT WERE AVAILABLE TO ANY GOVERNMENT EMPLOYEE. ALTHOUGH ATTENDANCES AT THESE WORKSHOPS WERE SOMETIMES SPORADIC, THE INFORMATION AND GUIDANCE OFFERED BY THOSE AGENCIES WERE GENERALLY FOUND TO BE EXTREMELY HELPFUL TO THE PARTICIPANTS. UNDERSTANDING THE LAW IS ONE OF THE BEST WAYS TO PREVENT CONFLICT. I

WOULD RECOMMEND THAT THE DISTRICT CONSIDER REINTRODUCING THOSE JOINT WORKSHOPS TO EMPLOYEES.

ESTABLISH AN OFFICE FOR ETHICS COMPLIANCE

PERSONALLY, I BELIEVE THAT AN ENTIRELY NEW OFFICE FOR ETHICS COMPLIANCE OR A CHIEF ETHICS COMPLIANCE OFFICER POSITION SHOULD BE CREATED. THIS NEW ENTITY OR POSITION SHOULD BE PRIMARILY RESPONSIBLE FOR OVERSEEING AND MANAGING COMPLIANCE WITH OUR ETHICS LAWS. THIS NEW ENTITY OR PERSON WOULD MAKE SURE THAT ALL OFFICIALS OR EMPLOYEES ARE COMPLYING WITH ANY DISCLOSURE OR REPORTING REQUIREMENTS UNDER THE UNIFORM ETHICS CODE. THEY WOULD ALSO BE RESPONSIBLE FOR MANAGING AUDITS AND INVESTIGATIONS AND FOR RESPONDING TO REQUESTS FOR ADVISORY OPINIONS THAT FALL UNDER THE ETHICS CODE.

THIS ENTITY OR PERSON WOULD, OF COURSE, HAVE TO HAVE MAXIMUM INDEPENDENCE AND GIVE THE APPEARANCE AS WELL AS THE FACT OF UNCOMPROMISED INTEGRITY AND IMPARTIALITY. WHERE THERE IS AN OVERLAP OF INVESTIGATIVE OR ENFORCEMENT AUTHORITY AMONG DISTRICT AGENCIES, THEY WOULD BE RESPONSIBLE FOR COORDINATING THE EFFORTS BETWEEN THE AGENCIES. THEY WOULD ALSO BE RESPONSIBLE FOR CREATING, PUBLISHING, AND DISSEMINATING THE APPROPRIATE TRAINING MATERIAL TO GOVERNMENT EMPLOYEES.

IMPROVE CURRENT ENFORCEMENT

A NUMBER OF AGENCIES WITH ETHIC RESPONSIBILITIES, INCLUDING THE OFFICE OF CAMPAIGN FINANCE, HAVE EXPRESSED CONCERN THAT THEY LACK THE PROPER ENFORCEMENT TOOLS TO ADEQUATELY PERFORM THEIR DUTIES. THE OFFICE OF CAMPAIGN FINANCE WHICH IS CHARGED WITH ADMINISTERING AND ENFORCING DISTRICT LAWS THAT PERTAIN TO CAMPAIGN FINANCE OPERATIONS, LOBBYING ACTIVITIES, CONFLICT OF INTEREST MATTERS AND THE ETHICAL CONDUCT OF PUBLIC OFFICIALS HAS ON NUMEROUS OCCASIONS TESTIFIED AS TO THE NEED FOR ADDITIONAL STAFF AND RESOURCES TO EFFECTIVELY CARRY OUT ITS MISSION.

FINALLY, A NECESSARY PART OF STRENGTHENING THE ETHICS LAWS IN THE DISTRICT IS THE CREATION OF APPROPRIATE SANCTIONS WHERE MISCONDUCT OCCURS. YOU CANNOT ENFORCE A NEW ETHICS CODE WITHOUT APPROPRIATE SANCTIONS. AT THE PRESENT TIME, THE BOARD HAS NO AUTHORITY TO ISSUE FINES OR ANY OTHER SANCTIONS FOR VIOLATIONS OF THE MERIT PERSONNEL ACT. IF WE IDENTIFY A STANDARD OF CONDUCT VIOLATION, ALL THAT WE CAN DO IS NOTIFY THE APPROPRIATE AGENCY HEAD.

CONCLUSION

HIGH STANDARDS OF HONESTY, INTEGRITY, AND IMPARTIALITY ARE ESSENTIAL STANDARDS FOR ANY GOVERNMENT EMPLOYEE. THE DISTRICT MUST ADOPT ETHICS RULES WHICH CAN GUIDE AND REGULATE GOVERNMENT EMPLOYEES IN ORDER TO ACHIEVE THESE ETHICAL STANDARDS.

YOU HAVE BROUGHT TOGETHER THOSE OF US WHO ARE CHARGED WITH THE RESPONSIBILITY FOR INVESTIGATING, MONITORING AND/OR ENFORCING ETHICAL CONDUCT IN THE DISTRICT FOR THOROUGH CONVERSATIONS WITH YOU AND YOUR STAFF IN PREPARATION FOR THIS HEARING. I BELIEVE THAT WE HAVE ALL IDENTIFIED WAYS IN WHICH OUR GOVERNING LEGISLATION CAN BE STRENGTHENED. WE ARE PREPARED TO CONTINUE THOSE CONVERSATIONS IN THIS PUBLIC FORUM, AND IN ANY OTHER SETTING THAT THE COUNCIL CONSIDERS NECESSARY IN ORDER TO MOVE FORWARD WITH ETHICS LEGISLATION. BUT REGARDLESS OF THE MODEL YOU CHOOSE – WHETHER YOU CREATE A NEW AGENCY OR STRENGTHEN AND SHIFT RESPONSIBILITIES AMONG EXISTING AGENCIES – I BELIEVE THAT WE ARE ALL PREPARED TO MOVE AHEAD WITH AT LEAST THE PIECEMEAL COMPONENTS OF ETHICS REFORM IN THE DISTRICT.

THE BOARD STANDS READY TO SUPPORT THE COUNCIL IN ANY WAY IN THE DEVELOPMENT OF A STATUTORY FRAMEWORK TO FULLY IMPLEMENT A COMPREHENSIVE ETHICS SYSTEM IN THE DISTRICT.

REPORT OF INVESTIGATION
2010-0492

INVESTIGATION INTO THE OFFICE OF THE CHIEF FINANCIAL OFFICER'S LOTTERY CONTRACT AWARD, THE COUNCIL OF THE DISTRICT OF COLUMBIA'S APPROVAL OF THE LOTTERY CONTRACT AWARD, AND THE ENACTMENT OF THE LOTTERY MODERNIZATION AMENDMENT ACT OF 2010

I. INTRODUCTION

On July 21, 2010, the District of Columbia Office of the Inspector General (OIG) received a letter from the then Attorney General for the District of Columbia and the then Chief Procurement Officer, D.C. Office of Contracting and Procurement (OCP), requesting an investigation into: the award of Contract No. CFOPD-09-C-013 for a new gaming system; the approval of the contract by the Council of the District of Columbia (Council); and the capability of the contractor that secured the bid.

Subsequently, on September 6, 2011, a D.C. councilmember requested that the OIG include in its investigation of the lottery contract an examination of the circumstances and propriety surrounding the adoption and/or implementation of games of chance and games of skill played via the Internet (iGaming) in the District.

During the investigation, OIG investigators received additional information and/or allegations of supposed impropriety concerning: the Office of the Chief Financial Officer's (OCFO) first attempt to award the lottery contract in 2008; the reasons for the Council's disapproval of OCFO's first attempt to award the lottery contract; a councilmember's conduct during a meeting with officials from the 2008 lottery contract award recipient; a councilmember's and his aides' conduct with respect to drafting legislation legalizing online gambling; the outside employment of two councilmembers creating possible conflicts of interest in light of their legislative conduct; and the Department of Small and Local Business Development (DSLBD) improperly denying a bidder's application to become a Certified Business Enterprise (CBE) during the OCFO's second attempt to award the lottery contract in 2009, resulting in that bidder not receiving CBE preference points.

These requests and the receipt of subsequent, related information raised questions about the integrity of the lottery contract award, the process by which the District became the first jurisdiction in the United States to legalize online gaming, and multiple councilmembers' conduct with regard to both issues. Accordingly, the OIG initiated a review of the 2008 lottery contract award, the 2009 lottery contract award, approval, and execution, and the enactment of the Lottery Modernization Amendment Act of 2010.

II. SCOPE OF INVESTIGATION

A. Investigative Synopsis

The activities subject to this investigation occurred over approximately a 3½-year period, from May 2007 to December 2010. OIG investigators interviewed employees of OCFO, OCP, the Office of the Attorney General for the District of Columbia (OAG), and the Council. OIG investigators also interviewed the: Vice President for Government Relations, Intralot, LLC (Intralot); Vice President/Chief Operations Officer (COO), Veterans Service Corporation (VSC)[1]; owners of W2 Tech LLC (W2 Tech); owner of LSG Strategies; and a longtime District civic activist.

In addition, OIG investigators reviewed OCFO's contracting and procurement authority, the Council's contract approval authority, and procurement documents related to the 2008 lottery contract award to W2I[2] and the 2009 Intralot lottery contract award, approval, and execution. OIG investigators also reviewed copies of: VSC's DSLBD certification file; Intralot and VSC's Business Relationship Formation Agreement; Intralot's subcontract with DC09, LLC (DC09);[3] Digidoc Inc.'s (Digidoc) DSLBD joint venture application to certify D.C. Lottery Partners as a CBE; and audio recordings of the Small and Local Business Opportunity Commission (SLBOC) hearings regarding Digidoc's appeal of DSLBD's decision to deny its joint venture application.

Further, OIG investigators reviewed electronic mail (email) pertaining to the lottery contract and the Lottery Modernization Amendment Act of 2010, as well as video footage of the Council's April 7, 2008, December 16, 2008, November 24, 2008, and December 1, 2009, hearings on the lottery contract award and approval process. Finally, OIG investigators reviewed articles from various news outlets including *The Washington Times*, *The Washington Post*, *Washington Examiner*, and the *Washington City Paper*.

Based on the requests from the former Attorney General and the councilmember, and information acquired in the course of the investigation, the OIG examined the following issues:

1. Whether the lottery contract should have been returned to the contracting officer for further action when the Council became aware that Intralot was adding major players to the team, especially since the contracting officer had not been informed of the change in team composition, and had not had an opportunity to review the impact of the change on the evaluation and ranking of the offerors;

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[1] VSC's initial filings with the District listed the COO as the company's "Chief Executive Officer (CEO)/Vice President". During DSLBD's CBE certification process, VSC amended its application changing his title from CEO to COO. Currently, on VSC's website he is listed as VSC's President/COO.

[2] W2I was a joint venture between Intralot and W2 Tech.

[3] DC09 is a joint venture between Intralot and VSC.

2. Whether the contracting officer conducted a sufficient responsibility assessment of Intralot, VSC, and DC09 after becoming aware of the subcontracting agreement;

3. Whether the circumstances mentioned in recent *Washington Times* articles concerning VSC and its misrepresentations of its business status and its references are supported in fact and if so, require further inquiry by the contracting officer into VSC's capabilities to serve as the Operations Manager for the contract; and

4. Whether councilmembers acted improperly in the Council's review and consideration of either awarding the lottery contracts or drafting and enacting online gambling.

B. Timeline of Significant Events

2007

- May 23 – OCFO issues a Request for Proposals (RFP) for the D.C. Lottery and Charitable Games Control Board (DCLB) gaming system platform (Solicitation No. CFOPD-07-R-053).

- June 29 – W2Tech formed in the District of Columbia.

2008

- January 24 – OCFO awards lottery contract to W2I.

- March 3 to December 16 – Mayor submits W2I contract to Council for approval and withdraws submission on the same day. Mayor submits proposed W2I contract to Council for approval three more times, each time withdrawing the submission prior to the expiration of the 45-day approval period.

- November 14 – Mayor submits fifth and final proposed W2I contract to Council for approval.

- December 16 – Council votes to disapprove W2I contract.

2009

- February 6 – OCFO issues RFP for DCLB gaming system platform (Solicitation No. CFOPD-09-R-013).

- June 15 – VSC formed in the District of Columbia.

- June 17 – Digidoc submits joint venture application to DSLBD for CBE certification of D.C. Lottery Partners.

- June 26 – DSLBD grants D.C. Lottery Partners provisional certification.
- July 16 – DSLBD Notice of Decision denying D.C. Lottery Partners joint venture certification.
- August 3 – Digidoc appeals DSLBD Notice of Decision to SLBOC.
- August 7 – VSC applies to DSLBD for CBE certification and requests certification for three lottery industry NIGP codes and one telecommunications management code.
- August 26 – DSLBD staff conduct VSC site visit and determine that: VSC is not qualified for four NIGP code certifications; VSC did not meet requirement for local business enterprise; they are not able to determine VSC eligible for CBE certification. Staff recommends that VSC take additional time to structure and organize acceptable office location for all staff.
- August 28 – DSLBD approves VSC's CBE certification, to include the three lottery industry NIGP codes.
- September 29 – OCFO awards lottery contract to Intralot.
- October 19 – Mayor submits Intralot contract to Council for approval.
- October 27 – SLBOC hearing and decision to overturn DSLBD decision. SLBOC approved D.C. Lottery Partners joint venture certification.
- October 29 – OAG submits to SLBOC Motion to Set Aside Decision from SLBOC October 27 hearing.
- November 10 – Second SLBOC hearing. D.C. Lottery Partners did not receive notice of the hearing and did not attend.
- November 23 – Intralot and VSC execute Business Relationship Formation Agreement contingent on Council approval of lottery contract award to Intralot.
- December 1 – Council approves lottery contract award to Intralot.
- December 8 – SLBOC issues Denial of Appeal of DSLBD's denial of D.C. Lottery Partners joint venture certification.

2010

- January 1 – Intralot executes subcontractor agreement with DC09 to perform work under the lottery contract.
- January 19 – Intralot and VSC incorporate DC09 in Delaware.

- February 25 – OCFO letter to Intralot reminding Intralot that it is responsible for executing the terms of the lottery contract as well as the terms of the subcontracting agreement with DC09.

- March 29 – DC09 registers with the District to conduct business as a foreign limited liability corporation.

- May 25 – CFO memorandum to a councilmember expresses concerns with legality of implementing iGaming and potential violations of 31 USC § 5361 (Prohibition on Funding Unlawful Internet Gambling) and 15 USC § 1171 (Transportation of Gambling Devices).

- Dec. 1, 2009 – March 30 – Sometime between these dates, OCFO adds B-On system as an offered option to Intralot lottery contract.

- March 30 – OCFO executes Intralot lottery contract, which includes B-On system and implementation contingent upon determination that games offered under B-On platform are legal, or after legislation enacted to legalize online gaming in the District.

- November 23 – the Fiscal Year 2011 Supplemental Budget Support Act of 2010, which includes the Lottery Modernization Amendment Act of 2010, is introduced at the request of the Mayor. A councilmember sponsors the Lottery Modernization Amendment Act of 2010 (iGaming).

- December 7 – Council's first reading of the Fiscal Year 2011 Supplemental Budget Support Act of 2010, including the Lottery Modernization Amendment Act of 2010.

- December 17 –Attorney General letter to Chairman of the Council expresses concerns about legality of online gaming under certain federal anti-gambling laws, implementation challenges, and lack of public hearings on the issue.

- December 21 – Lottery Modernization Amendment Act of 2010 enacted with the passage of the Fiscal Year 2011 Supplemental Budget Support Act of 2010. Sponsoring council-member votes for the legislation.

III. FINDINGS

A. OCFO's 2008 Lottery Contract to W2I

1. The OCFO Contract/Procurement Process

On May 23, 2007, OCFO issued a RFP, Solicitation No. CFOPD-07-R-053 (RFP-1), seeking a contractor to provide the DCLB with a new gaming system platform under a multiyear contract.

CFO received two proposals in response: one from W2I and one from Lottery Technology nterprises (LTE).[4]

V2I was a joint venture comprised of Intralot and W2 Tech. Intralot, incorporated in Greece, is ne of three major lottery vendors worldwide (the other two are GTECH Corporation and cientific Games Corporation). According to its website, Intralot supplies integrated gaming and ansaction processing systems, innovative game content, sports betting management, and nteractive gaming services to state-licensed gaming organizations worldwide. Its North merican subsidiary is Intralot USA. In the course of its investigation, the OIG learned that to id on the District's lottery contract, Intralot USA formed Intralot DC LLC, a Delaware ompany. W2 Tech is owned by a husband and wife and the husband's father, who formed V2Tech in the District of Columbia on June 29, 2007, for the purpose of bidding on the lottery ontract. Based on Intralot's recommendation, W2 Tech hired two individuals as W2 Tech's Vice President of Operations and Vice President of Marketing, respectively, because of their ottery industry experience.

LTE is a joint venture between GTECH and New Tech Games. GTECH, which manages many state lotteries throughout the United States, is a gaming technology and services company based in Providence, Rhode Island. On August 29, 2006, GTECH became a wholly owned subsidiary of Lottomatica, the license holder for the Italian National Lottery. New Tech Games Inc. is a District owned and operated corporation.

OCFO convened a seven-member Source Selection Evaluation Board (SSEB) to evaluate the proposals. The SSEB gave W2I's proposal a score of 3,279.7 and LTE's proposal a score of 2,612.5. On January 24, 2008, OCFO determined that W2I had the best offer and selected it to be awarded the lottery contract (W2I lottery contract).

The then Mayor submitted the proposed W2I lottery contract to the Council for approval a total of five times. According to the then Attorney General, on March 3, 2008, the proposed W2I lottery contract was submitted but immediately withdrawn that same day because of a typographical error in the contract package. The OIG also was informed that the second, third, and fourth contract submissions each were submitted and then withdrawn as the 45-day approval period neared expiration, to prevent the contract from being disapproved because of the Council's failure to act on it. After the fifth submission, on December 16, 2008, the Council voted to disapprove the lottery contract (Council Contract No. CA17-672).[5] Eight council-members voted against the contract and five voted in favor of it.

2. Contract Process

During the Council approval process, W2I hired the Owner/Political Relations Strategist of the Baker Wright Group and Intralot hired the Owner/Political Strategist of LSG Strategies, as lobbyists. The lobbyists arranged for W2I executives to meet with councilmembers, individually, in an effort to persuade them to vote in favor of the contract. The meetings were held with several councilmembers to discuss W2I's capabilities and to address council-

[4] LTE held the lottery contract for more than 25 years (1982 to 2007). Its last renewal period expired in November 2009.
[5] See December 16, 2008, Council Public Hearing, Legislative Session, Committee of the Whole.

members' questions or concerns. Those questions or concerns involved, among other things, entities participating in proposed joint ventures just to secure the lottery contract. Also, the OIG received information asserting that, during the meetings, a councilmember made statements, at best, suggesting that he would not vote for the W2I contract because of a dislike for or ill feelings toward certain joint venture participants.

During the course of W2I's meeting with a councilmember, who also chaired the board of a quasi-public entity, the councilmember indicated that he could not or was not inclined to go along with voting for or awarding the lottery contract to W2I because W2I's participating local partner had been awarded a contract with the quasi-public entity. The councilmember told W2I executives that he would support W2I's bid for the lottery contract if its local partner withdrew from the quasi-public entity's contract because he could not give the local partner everything. While the councilmember's action, in his capacity as a councilmember and chairman of the quasi-public entity's board, may give the appearance that he lost complete independence or impartiality, and may have affected adversely the confidence of the public in the integrity of government, the OIG did not find sufficient evidence to support or conclude that the council-member had acted improperly. Specifically, the OIG finds that the statement attributed to the councilmember, without more, such as some sort of quid pro quo, does not reflect misconduct rising to the level of a violation of a standard of conduct.

The OIG investigation did not substantiate the assertion that the Council disapproved the proposed W2I contract because councilmembers did not particularly like the joint venture participants. It does appear that several councilmembers voted to disapprove the W2I contract because they had concerns about whether W2I had submitted the best offer in terms of the proposed contractor's qualifications and nature of the proposed local business participation. The investigation did reveal that during the attempt to award the W2I contract, officials at the OCFO became aware that the Council had concerns and questions about W2 Tech and the qualifications of some of its joint venture participants. The information indicated that these concerns and questions had been raised with OCFO representatives during meetings with Council staffers (and possibly with councilmembers), as well as during public hearings. Further, during the Council's December 16, 2008, hearing, concerns were voiced regarding whether W2I was a true joint venture, and over the accuracy of the financial statements Intralot had submitted to OCFO.

B. OCFO's 2009 Lottery Contract to Intralot

1. The OCFO Contract/Procurement Process

On February 6, 2009, after the Council disapproved the proposed W2I lottery contract, OCFO cancelled RFP-1. Shortly thereafter, OCFO issued a new RFP, Solicitation No. CFOPD-09-R-013 (RFP-2), seeking a new lottery gaming system, which included lottery software (Base Lottery Software and Application Lottery Software),[6] lottery network, lottery equipment, and

[6] According to the RPF, "Base Lottery Software" is the software to be provided by the contractor, including all necessary functionality to meet the DCLB's requirements in a base system and the ability to add new applications for new games. "Application Lottery Software" refers to the games and other applications designed and implemented pursuant to the requirements in the RFP and are intended to be executed in conjunction with the contractor's Base Lottery Software.

any other components that perform all lottery functions. In addition to equipment and software, RFP-2 sought support services for the lottery including technical support, training, marketing, and data; and call center management. The goods and services sought under RFP-2 were divided into 2 categories: "Base System and Services", and "Options". RFP-2 defined Base System and Services only as any and all requirements, goods, and services described in the RFP that were not specified as an "option." Options were described as a system feature or capability that DCLB, at its sole discretion, may have included in or added to the [Base] System. The Options could have had additional costs quoted or included in the baseline price. DCLB made no schedule or quantity commitments for Options.

Through investigation, the OIG learned that Intralot did not intend to bid on RFP-2 because it anticipated that the contract's profit margin would be low. Nonetheless, Intralot decided to bid on RFP-2 because of the prestige it would gain in the international lottery industry if it held the lottery contract for the "capital city" of the United States. OIG investigators learned that before Intralot submitted its proposal, it met with several local businesses that had approached Intralot about partnering to bid on the lottery contract. The businesses told Intralot that it would need a local partner. As a result, Intralot officials met with officials of VSC, which had been formed in June 2009, and proposed to use VSC as a subcontractor to take advantage of VSC's anticipated CBE preferences. However, VSC rejected Intralot's proposed business arrangement.

Three bidders submitted proposals in response to RFP-2: Metropolitan Games, D.C. Lottery Partners, and Intralot. Metropolitan Games was a joint venture between Scientific Games Corp. and a local partner. Scientific Games Corp. is a New York City-based company that provides gaming solutions to lottery and gaming organizations worldwide. Its products include instant lottery games, lottery gaming systems, terminals and service, and Internet applications. D.C. Lottery Partners was a joint venture comprised of GTECH, Digidoc Inc. (Digidoc), and D.C. Gaming Advisors, LLC (DGA). Digidoc, a District CBE, is a local professional services and IT solutions firm that specializes in document management and conversion. Intralot submitted its bid without a local partner.

a. DSLBD Denied Digidoc Joint Venture Certification / DSLBD Granted VSC CBE Certification

During the summer of 2009, both Digidoc and VSC submitted applications to DSLBD for certification. DSLBD denied Digidoc's application, but approved VSC's application.

With respect to Digidoc's application, on June 17, 2009, Digidoc submitted a joint venture application to DSLBD requesting CBE certification for D.C. Lottery Partners. Initially, DSLBD granted provisional certification to the joint venture. A month later, on July 16, 2009, DSLBD denied the joint venture certification.

At the time Digidoc submitted its joint venture application, D.C. Municipal Regulations (DCMR), 27 DCMR §817[7](a)(8) required that the joint venture agreement provide that the local business enterprise participant would exercise more than 50% of the control over contract performance, including the manner in which contract specifications would be completed, day-to-

[7] Title 27 DCMR § 817 was amended in October 2009 and recodified as 27 DCMR § 811.

day operations would be carried out, personnel decisions would be made, employees would be managed, and equipment and goods necessary to perform the contract would be purchased. In addition, 27 DCMR §817(d) required that the joint venture applicant demonstrate that the local business enterprise participant had the competence and expertise necessary to perform the contract in connection with which the applicant sought certification, but lacked the necessary capacity to independently perform the contract due to factors which may include inadequate financial or technical resources or an inability to secure sufficient bonding.

DSLBD determined that Digidoc would be unable to exercise more than 50% of the control over the contract's performance because, based on the OCFO's evaluation criteria, Digidoc would perform less than 5% of the contract. DSLBD also determined that even the 5% of the contract that Digidoc was to perform was related to support services and not the more critical functions. In addition, DSLBD determined that Digidoc was unable to demonstrate that it had the competence and expertise necessary to perform the contract, but lacked the capacity to do so independently. DSLBD based this determination on the fact that DSLBD previously had not certified Digidoc as capable of performing the National Institute of Governmental Purchasing (NIGP) industry codes necessary to perform any other contract's technical factors, and Digidoc had not applied for any certification upgrades. Furthermore, DSLBD determined that Digidoc did not have the competence and expertise necessary to perform even the work for which it would be responsible because GTECH first had to train Digidoc. Therefore, DSLBD reasoned, even if Digidoc had hired an additional individual[8] to work on the contract, that individual's experience would not provide Digidoc with the competence and expertise necessary to perform the contract independently.

The OIG found, however, that DSLBD erred in its determinations. A review of the joint venture agreement reveals that it required Digidoc to exercise more than 50% of the control over the Contract performance. The D.C. Lottery Partners Joint Venture Agreement specifically stated that Digidoc would have "exercised 51% or more of the control over [c]ontract performance in the areas of [c]ontract specifications to be completed, day-to-day operations, [personnel] decisions, management of employees, and the purchase of supplies, materials, and equipment." In addition, Digidoc would have selected and appointed, from its employees, the joint venture's key executives and management staff, who would have been responsible for exercising control over contract performance. Furthermore, the Joint Venture Labor and Profit Breakdown and Work Performance schedule submitted with the joint venture's application indicated that Digidoc would have been responsible for project administration. Therefore, the joint venture agreement met the requirements of 27 DCMR §817(a)(8).

Regarding whether Digidoc demonstrated that it had the competence and expertise necessary to perform the lottery contract, from the OIG standpoint, the mere lack of a previous certification for NIGP codes related to the lottery industry is insufficient to determine that Digidoc did not have the requisite expertise or competence. According to Digidoc, the NIGP codes for which DSLBD previously certified Digidoc and the experience it gained from servicing the District and federal governments (while not lottery specific) evidenced that its capabilities were both relevant

[8] According to Digidoc's joint venture application and DSLBD's Notice of Denial, Digidoc informed DSLBD that it intended to hire this individual, and he intended to accept employment with Digidoc, if the joint venture was awarded the lottery contract.

and transferable to the performance of the work for which it was to be responsible under the lottery contract. Further, Digidoc's application showed that it lacked the technical resources specific to the lottery industry. The lack of technical resources specific to the lottery industry dictates the need for a joint venture because Digidoc did not have the necessary capacity to perform the contract independently, which was part of the statutory requirement. Therefore, based on all of the above, the OIG finds that DSLBD improperly denied Digidoc's application for a joint venture certification.

On August 3, 2009, Digidoc appealed DSLBD's decision to SLBOC. On October 27, 2009, SLBOC held a hearing on the matter. At the conclusion of the hearing, SLBOC orally overturned DSLBD's decision and approved the joint venture application. On October 29, 2009, OAG filed a Motion to Set Aside Decision. Subsequently, on November 10, 2009, SLBOC held a second hearing to consider OAG's Motion to Set Aside Decision. At the conclusion of the hearing, SLBOC granted OAG's motion, and on December 8, 2009, denied Digidoc's appeal and affirmed DSLBD's July 16, 2009, decision.

D.C. Lottery Partners testified under oath during the Council hearing that it was not notified of the second hearing, and, therefore, was not present and did not provide testimony in response to OAG's motion.[9] Similarly, the OIG found no evidence to indicate that Digidoc was given the opportunity to respond to OAG's Motion to Set Aside Decision. Therefore, Digidoc was denied due process and SLBOC's subsequent denial of the joint venture application was improper.[10]

With respect to VSC, in August 2009, 2 months after Digidoc submitted its joint venture application to DSLBD, in its application, VSC requested CBE certification and certification for a number of NIGP codes including: 578-53-00 (Lottery Equipment and Supplies), 578-53-50 (Lottery Machines), 958-66-00 (Lottery Management Services), and 958-89-00 (Telecommunications Management Services).

On August 26, 2009, as part of DSLBD's CBE certification process, two DSLBD compliance specialists, conducted a site visit of VSC's principal office, 724 Mississippi Avenue, S.E. According to the Site Visit Report, 724 Mississippi Avenue, S.E. is the VSC President's private home. VSC's office was located in the family room of the house. Besides home furniture "including a television, sectional sofa, family photos, and other personal items," the only business equipment in the room were two Dell desk top computers, two wooden desks, one HP all-in-one printer, and two executive chairs. During the site visit, the specialists spoke with VSC's then President and its COO. VSC's Executive Vice President was not present. The COO primarily worked from his Burtonsville, Maryland home or in the field, occasionally coming into the District office. The specialists found no evidence during the site visit of bookkeeping and other record keeping, payroll maintenance, receipt of business telephone calls and telephones, receipts evidencing payment of telephone services by VSC, or VSC stationery bearing the District address.

[9] See November 24, 2009, Committee of the Whole and Finance and Revenue Committee joint hearing.
[10] The OIG also received information that a member of the SLBOC board, who voted in favor of granting OAG's motion during the November 10, 2009, hearing, possibly had a conflict of interest. However, because the OIG determined that the SLBOC's denial of the joint venture application was improper for other reasons, the allegation was considered moot and not meriting further inquiry.

After conducting the site visit and reviewing the VSC COO's résumé and that of a VSC employee who was a former Director of the Florida State Lottery, the specialists concluded that that VSC did not qualify for the four NIGP codes. In addition, the specialists determined that VSC did not meet the requirements for a local business enterprise (required for CBE certification) because VSC's COO, did not maintain his office at the business' District office as required. They did note that VSC's President and Executive Vice President were both District residents and maintained their office at the District office. The specialists ultimately concluded that they were not able to determine VSC's eligibility for CBE certification in accordance with the definition of a local business enterprise, regarding the requirement that the highest level managerial employees maintain their offices and perform their managerial functions in the District. They recommended that VSC take additional time to structure and organize an acceptable office location for all employees.

Nonetheless, on August 28, 2009, a former DSLBD compliance manager approved VSC's CBE certification, which included the three NIGP lottery industry codes. The compliance manager noted that, "The two majority owners are residents of the District. D.C. Code § 2-218.31 (Local business enterprises) states, in part, a business enterprise shall be eligible for certification as a local business enterprise if, [among other things], the business enterprise requires that its chief executive officer and the highest level managerial employees of the business enterprise maintain their offices and perform their managerial functions in the District." Accordingly, based on the foregoing, the VSC COO would be required not only to perform his functions in the District, but also to maintain his office in the District. Thus, in light of the fact that the VSC COO appears to have maintained his office in and worked out of Maryland, VSC did not satisfy the requirements to be certified as a local business enterprise under District law.

b. OCFO's Responsibility Assessment of Intralot

OCFO conducted a responsibility determination of Intralot in September 2009.[11] The OCFO contracts director told OIG investigators that during the procurement process, OCFO reviewed Intralot's Dun and Bradstreet (D&B) report, past performance, previous experience, and the résumés of its key personnel. The OCFO also checked to ensure that Intralot had not been debarred from contracting with and had no outstanding debt with either the District or federal governments. In addition, the OIG found that during both attempts to award the lottery contract, DCLB determined that Intralot had the required technical capabilities to perform the work. Therefore, OCFO's responsibility to assess Intralot was satisfied.

c. OCFO's Responsibility Assessment of VSC and DC09

VSC is the local partner in the joint venture created with Intralot (the contractor) to perform the contract. As the contractor, Intralot was responsible for ensuring that VSC and the joint venture subcontractor (DC09) met the responsibility criteria under D.C. Code §2-353.01.

[11] The OIG notes that Intralot's District corporate status was revoked in September 2009 for failure to file its biannual report for 2009. Its corporate status was reinstated in November 2011. There is no rule or regulation that invalidates a District contract where the entity's corporate status has been revoked after the business has been vetted.

An OCFO Contracting Officer told OIG investigators that contracting officers are responsible for vetting the prospective contractor. Usually, subcontractors are not vetted as part of the contracting process because, as here, subcontractors are rarely identified in bid proposals. However, both the OCFO Contracting Officer and the OCFO Director of Contracts told OIG investigators that even though it was not required, OCFO decided to vet VSC once it became aware that Intralot had partnered with VSC to form DC09, with the intention of subcontracting the lottery work to DC09. OCFO obtained VSC's D&B report and checked to ensure that it was not on the federal or District debarment lists. Because VSC was a newly formed business, it had no previous record of performance to assess. However, by the time OCFO performed its responsibility determination, VSC was a CBE, even though the DSLBD compliance specialists and compliance manager differed in their determinations regarding whether VSC met the requirements for CBE certification, and at the time of DSLBD's site visit (4 months prior to Intralot deciding to partner with VSC to create DC09), VSC did not appear to be a fully functioning business.

OCFO also reviewed one of VSC's executive's résumé[12] and determined that he had general management experience.[13] Neither VSC nor the executive had experience in the lottery industry. However, OCFO reviewed another VSC executive's résumé and determined that she had executive level experience in the lottery industry. In performing its responsibility assessment of DC09, OCFO also reviewed the Business Relationship Formation Agreement between Intralot and VSC that formed DC09. OCFO also reviewed the subcontract agreement between Intralot and DC09. Because DC09 was created to perform the lottery contract work, it had no history of previous performance for OCFO to review. In a February 25, 2010, letter to Intralot, OCFO reiterated that Intralot "shall remain responsible for the execution of the requirements of [the contract] and the execution of the subcontracting agreement." Therefore, the contracting officer's responsibility to assess DC09 was satisfied and the Determination of Contractor Responsibility was sufficient to meet the requirements of D.C. Code §§ 2-353.01 and 2-353.02. The OIG cannot determine whether OCFO's responsibility assessment would have resulted in a different determination if OCFO had been aware of the discrepancies surrounding VSC's CBE certification.

d. VSC's Alleged Misrepresentations

OIG investigators reviewed *The Washington Times* articles alleging that VSC had misrepresented its previous work experience on its website. OIG investigators questioned VSC's COO about the Construction and Construction Management Capability Statement that was posted on VSC's website indicating that the company had worked on several federal government construction projects. The COO acknowledged that VSC, which did not exist during the time periods of these construction projects, did not work on them. The COO explained that these

[12] The executive's résumé lists several management positions with Fannie Mae. OIG investigators confirmed the executive's Fannie Mae work history.

[13] OCFO officials determined that the executive had gained management experience during his employment with Fannie Mae. In addition, they found that he had managed several business ventures, some of which were successful and some of which failed.

construction projects had been included in the company's capability statement not as a description of VSC's past performance, but to showcase the construction industry experience of VSC personnel, who had worked on these projects in connection with previous employment.

The OIG was unable to determine whether this information was posted on VSC's website at the time OCFO vetted VSC, or, if it was, whether OCFO was aware of it. VSC's COO told OIG investigators that none of these construction projects were included in the background information VSC provided to OCFO or DCLB during VSC's vetting process. OIG investigators reviewed the materials submitted to OCFO and DCLB during VSC's vetting process and verified that they did not include information regarding these construction projects. Therefore, there was insufficient evidence that OCFO considered the construction projects in determining VSC's capability to perform the lottery contract.

2. Contract Approval

OCFO convened an SSEB, which was comprised of three of the evaluators from RFP-1's SSEB, to evaluate the proposals. The SSEB gave Intralot's proposal a score of 94, D.C. Lottery Partners' proposal a score of 84, and Metropolitan Games' proposal a score of 77. OCFO determined that Intralot's bid was the best offer (gaming library, marketing and research strategy, technology). The OCFO Director of Contracts told investigators that because of the issues experienced in the first attempt to award the lottery contract, OCFO hired an independent consultant during the second attempt to review the vendor proposals and OCFO's contract award process for compliance and sufficiency. The OCFO Director of Contracts said that the independent consultant concurred with Intralot's selection. On October 19, 2009, the former Mayor submitted the proposed Intralot lottery contract to the Council for approval.

During the Council approval process, OCFO and Intralot representatives met with council-members in an effort to persuade them to approve the lottery contract. During those visits, several councilmembers expressed concern that Intralot lacked a local business partner. And, through investigation, OIG investigators learned that before Intralot submitted its proposal, it met with several local businesses that had approached Intralot about partnering to bid on the lottery contract. The businesses informed Intralot that it would need a local partner to win the bid. As previously noted, after meeting with the VSC COO, Intralot proposed to use VSC as a subcontractor in order to take advantage of VSC's CBE preferences. No partnership ensued at that time. However, in the course of the investigation, the OIG acquired information that, purportedly, due to feedback from the Council that Intralot would need to secure a local partner if it wanted Council's approval, VSC and Intralot established a partnership in November 2009, when Intralot executed a Business Relationship Formation Agreement with VSC to form DC09.

Through its investigation the OIG determined that prior to the Council's approval, Intralot disclosed to OCFO and the Council that it intended to partner with VSC to form a joint venture, to which it intended to subcontract the lottery contract work. Notwithstanding the disclosure, in December 2009, the Council approved the lottery contract. On January 1, 2010, Intralot entered into a subcontractor agreement with DC09 for the purpose of performing the work under the lottery contract. On January 19, 2010, Intralot and VSC incorporated DC09 in Delaware. On March 29, 2010, DC09 registered with the District as a foreign limited liability company.

a. No Additional OCFO Contract Review After Intralot Partners with VSC

After the OCFO learned that Intralot planned to subcontract the lottery work, it assessed the capabilities of VSC's key members who would make up DC09's executive staff. It appears that if OCFO had concerns about Intralot's intention to subcontract the lottery work or the capabilities of the subcontractor, it could have withdrawn the contract from the approval process. Alternatively, OCFO could have exercised its continuous right to approve or reject any employee or subcontractor by rejecting VSC, DC09, or any key employee. OCFO continued to recommend the lottery contract's approval.

The Council approved the lottery contract without returning it to the contracting officer, even after it became aware of Intralot's intentions. According to a former OCP Chief Procurement Officer, to have, as in this case, the prime contractor create a separate entity and give this entity, which had not been introduced either in the bid proposal or during the bid evaluation processes, a "material responsibility" in the performance of the contract, is an "anomaly" in government contracting. Yet, based on its review, the OIG was unable to find any requirement that the Council return the lottery contract to the contracting officer for further action.

Furthermore, the District contracted with Intralot to perform the lottery contract. Notwithstanding Intralot's intent to subcontract the work to DC09, which appears to be permissible, Intralot remained solely responsible for executing the contract requirements. The former Chief Procurement Officer also agreed with this position. Intralot's Vice President for Government Relations told OIG investigators that it was his understanding that the Council wanted Intralot to have local business participation in the lottery contract. This was communicated to him by a councilmember and an OCFO representative. The Intralot Vice President for Government Relations told OIG investigators that Intralot based its decision to subcontract the lottery work on these representations of the Council's desire to for local business participation in the lottery contract. Intralot was to be a major participant in DC09's management in that two of DC09's three managing board member positions were to be filled by Intralot employees. Further, DC09 was required to use Intralot's technology.

In addition, the Council held a joint committee hearing to review the lottery contracting process. During the hearing, the Council heard testimony and questioned representatives of Intralot, VSC, OCFO, the DSLBD, and DCLB prior to approving the lottery contract award to Intralot. Based on all the above, the OIG finds that it was appropriate for the Council to approve the lottery contract award to Intralot.

3. Contract Execution – B-On System Added to Intralot Contract

Between the time the Council approved the lottery contract in December 2009 and OCFO executed the lottery contract in March 2010, OCFO added to the contract a couple of Intralot's Offered Options, including the B-On system (a gaming system that allows games of skill and games of chance to be played over the Internet). However, RFP-2 had not identified (as a requirement) a gaming platform capable of implementing games of skill and games of chance played on the Internet, either as part of the Base System or an Option. When OCFO decided to include the B-On system in the lottery contract, it materially changed the contract requirements.

Under DCLB procurement regulations, 30 DCMR § 2317.1, it appears that the contracting officer must issue a written amendment to the RFP if the agency increases or otherwise changes its requirements after receipt of the proposals from the bidders

It appears that even though the Council already had approved the lottery contract, OCFO should have issued a written amendment to RFP-2 identifying a gaming platform capable of implementing games of skill and games of chance played on the Internet as a requirement. OCFO should have issued the amendment to Intralot, D.C. Lottery Partners, and Metropolitan Games, to allow them to submit a best offer and final offer. Furthermore, Intralot's B-On system was not listed in the proposed lottery contract OCFO submitted and the Council approved. OCFO added the Offered Options section to the lottery contract after the Council's approval. Consequently, it appears that OCFO executed the contract without adhering to procurement regulations and, as a result, may not have received the best price for the District.

C. The Lottery Modernization Amendment Act of 2010 – iGaming Legalized

In the course of its investigation, as noted above, the OIG received information of possible conflicts of interest of councilmembers with respect to drafting or sponsoring legislation and conducting hearings due to their outside employment.

With respect to drafting or sponsoring legislation, based on and in the course of its investigation, the OIG determined that after the Council approved the Intralot contract, a councilmember and his staff began drafting legislation to legalize iGaming within the District. After reading a news article that discussed the potential revenue generated by offshore gaming via the Internet, the councilmember wanted legalized iGaming in the District and took steps to sponsor such legislation. His staff researched the possibility of adding iGaming to the District's lottery, by contacting various individuals and organizations (i.e., legal professionals and the American Games Association) for guidance and legal opinion. According to the councilmember, once it became known that he intended to sponsor a bill proposing iGaming in the District, he and his staff began receiving unsolicited advice and information from various sources including Intralot. He also received legal analyses to support legalized iGaming in the District. The councilmember told OIG investigators that after considering the information received during their research, he and his staff decided that the easiest and simplest way to legalize iGaming in the District would be to define "lottery" and include iGaming in the definition in the legislation.

Through its investigation, the OIG found that at the same time he and his staff were drafting legislation for iGaming, the councilmember also worked as a federal sector lobbyist at a law firm. According to the law firm's website, the firm, among other things, counseled clients in the gaming industry. As a law firm employee, the councilmember lobbied on behalf of the firm's public body and corporate clients.[14] The OIG investigation revealed that GTECH Inc., a gaming technology and services company, was one of the law firm's clients. The councilmember told OIG investigators that he knew that the law firm had a gaming practice but he had no interaction with the gaming practice. He also told OIG investigators that he knew that GTECH was one of the firm's clients. The councilmember told OIG investigators that he reported to the D.C. Office of Campaign Finance his outside income from outside employment.

[14] The councilmember reported his income from the law firm to the D.C. Office of Campaign Finance.

Though the Office of Campaign Finance does not require councilmembers to report the source of the earnings, the amount of income that the councilmember stated he earned from the law firm is consistent with the amount reported to the Office of Campaign Finance. The councilmember further told OIG investigators that when he sponsored the Lottery Modernization Amendment Act of 2010, he did not notify the Council that his law firm had a gaming practice. The councilmember further acknowledged that he did not notify the law firm that he was sponsoring the Lottery Modernization Amendment Act of 2010.

Because of his sponsorship of iGaming legislation and employment at a law firm that has a gaming practice, there is a suggestion of a possible conflict of interest that the councilmember is using his public office for private gain. While the better course of action might have been for the councilmember to alert the Council that his firm had a gaming practice and his law firm that he was sponsoring iGaming legislation, or to seek an interpretive opinion from the Council's Office of the General Counsel or the D. C. Office of Campaign Finance, so that all parties would have the appropriate information beforehand and act accordingly, if necessary, the OIG found no evidence that the councilmember lobbied or received anything on behalf of any gaming entity, or did anything improper which resulted in the Council voting for the legislation. The OIG finds that the mere fact that a legislator who is associated with an entity that provides or performs work in a subject area that may be the subject of possible legislation under consideration by such legislator, in and of itself does not constitute a use of public office for private gain. Similarly, the OIG notes and finds that the holding of public hearings on the District's lottery that merely inquire into the status of the lottery and iGaming contracts by a councilmember who chairs a Council committee that oversees the DCLB, and is of Counsel with a law firm that has gaming clients, does not constitute or rise to the level of constituting a conflict of interest.

The CFO and the former Attorney General both expressed concerns about the legality of internet gambling especially in light of the federal statutes of 31 USC §§ 5361-5367 (Prohibition on Funding of Unlawful Internet Gambling) and 15 USC §§ 1171-1178 (Transportation of Gambling Devices). In a December 2010 letter to the former Chairman of the Council, on which he copied all the members of the Council, the former Attorney General addressed, "the very real legal and law-related technological obstacles that stand in the way of the District's enjoying any influx of revenue from the new on-line gaming," and pointed out that "no consensus exists on whether the proposed on-line gaming would be legal under certain federal anti-gambling laws." He further added, "the District's unique geographical characteristics pose gaming-related implementation challenges that, in turn, raise potential legal problems."

On December 21, 2010, the Council approved the Fiscal Year 2011 Supplemental Budget Support Act of 2010 enacting the iGaming legislation (codified at D.C. Code § 3-1313, Operation of Lottery).

ANALYSIS AND CONCLUSIONS

1. Whether the lottery contract should have been returned to the contracting officer for further action when the Council became aware that Intralot was adding major players to the team,

especially since the contracting officer had not had an opportunity to review the impact of the change on the evaluation and ranking of the offerors.

Based on the foregoing, the OIG finds that the Council was not required to return the lottery contract (as submitted to the Council for approval) to the contracting officer for further action, when the Council became aware that Intralot was adding major players to the team, even though the contracting officer had not had an opportunity to review the impact of the change on the evaluation and ranking of the offerors. However, from the OIG's standpoint, the relevant authorities appear to indicate that when the B-ON system was added to the contract after Council approval, its inclusion, in effect, changed the contract requirements in a material fashion. Therefore, OCFO should have amended the RFP and allowed the three bidders to resubmit a best and final offer. Once the new bids were received and processed by OCFO, the selected contract should have been submitted to the Council for review and consideration.

2. Whether the contracting officer conducted a sufficient responsibility assessment of Intralot, VSC, and DC09 after becoming aware of the subcontracting agreement.

Based on the evidence and information acquired in the course of the investigation and reflected herein, the OIG finds that the contracting officer's responsibility assessments of the entities met the requirements of D.C. Code §§ 2-353.01 and 2-353.02, by, among other things: reviewing Intralot and VSC's Dun and Bradstreet report and the resumes of key personnel; reviewing Intralot's past performance and previous experience; and checking to ensure that Intralot had not been debarred from contracting with and had no outstanding debt with either the District or federal governments.[15]

3. Whether the circumstances mentioned in recent *Washington Times* articles concerning VSC and its misrepresentations of its business status and its references are supported in fact and if so, require further inquiry by the contracting officer into VSC's capabilities to serve as the Operations Manager for the contract.

Based on the evidence and information acquired in the course of the investigation and reflected herein, the OIG finds that, even though the purported misrepresentations largely were substantiated, there was insufficient evidence that OCFO was aware of the misrepresentations, let alone considered them, in determining VSC's capability to perform the lottery contract. Therefore, from OIG's standpoint, no further inquiry by the contracting officer into VSC's capabilities to serve as the Operations Manager for the contract was required because OCFO had considered the qualifications of the executives as part of its review.

4. Whether councilmembers acted improperly in the Council's review and consideration of either awarding the lottery contracts or drafting and enacting online gambling legislation.

[15] Because VSC and DC09 were newly formed businesses, they had no previous performance record to assess.

As stated above and for the reasons indicated above, the OIG found insufficient evidence to conclude that councilmembers acted improperly and violated standards of conduct in the Council's review and consideration of either the awarding of the lottery contracts or drafting and enacting of online gambling.

ACTIONS TAKEN

Recommendations referred to Kwame R. Brown, Chairman, D.C. Council; Natwar M. Gandhi, Ph.D., Chief Financial Officer, OCFO; Clifford D. Tatum, Executive Director, Board of Elections and Ethics; and Harold B. Pettigrew, Jr., Director, DSLBD. This Report of Investigation also was provided to Buddy Roogow, Executive Director, DCLB.

RECOMMENDATIONS

The OIG recommends the following:

1. The Council consider clearly defining the purpose for its contract review and approval process and developing specific written procedures governing such review, and the applicable criteria for such, inclusive of the prohibition, if deemed appropriate, of subsequent contract modifications not specifically approved by the Council.

2. The Council should consider whether legislation is needed to address concerns that it may have with particular contracting methods, procedures, and the like with respect to the performance of its role in the contract review and/or approval process, and whether such reviews and/or approvals are better conducted by it exercising its legislative powers through the promulgation of law and policy, rather than nullifying the results of the competitive bid process.

3. With the current emphasis on ethics with respect to councilmembers, the Council and BOEE should assess or, at a minimum, may want to consider, whether existing codes of ethics for the Council and it employees provide adequate guidance to councilmembers, including a delineation of prohibited conduct, when performing duties concerning review and approval of contracts, and sponsorship and/or drafting of legislation, or whether a separate or revised code of ethics is needed.

4. With respect to outside employment, the Council should consider requiring council-members to report, with specificity, the amount and source of income received from outside employment in their financial disclosure filings with appropriate District entities.

5. OCFO should develop clear guidelines and regulations, among other things, that require submission to the Council for review and approval, any modifications or adjustments to contracts that the OCFO is processing and that the Council is required to approve, prior to effectuation of the contract. Further, OCFO should refrain from including an Offered

Option in a contract award unless the Request for Proposals was amended to reflect the change in requirements produced by the inclusion of such an option and distributed to all bidders in accordance with existing regulations.

6. DSLBD should develop clear guidelines and regulations that ensure uniform certification for the CBE program and NIGP industry codes. Further, DSLBD determinations as to CBE status should include details regarding its compliance review process and the basis for its final determinations, especially where the final determination contravenes the compliance specialists' findings.

Report Approved by:

Stacie Pittell
Assistant Inspector General
for Investigations

Charles J. Willoughby
Inspector General

Date of Approval: 1/20/12

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Chief Financial Officer

Office of Integrity and Oversight

DRAFT

REPORT OF INVESTIGATION

TO: The File

FROM: Robert G. Andary, Executive Director
Office of Integrity and Oversight

DATE: July 29, 2008

SUBJECT: Report of Investigation 2008-0154

This investigation was undertaken as a result of an allegation by D.C. Councilmember Jim Graham regarding Office of the Chief Financial Officer (OCFO) Contracting Officer Eric Payne. The investigation was conducted from June 26, 2008, through July 24, 2008, and consisted of interviews of persons having knowledge of the circumstances that gave rise to Councilmember Graham's allegation. The investigation did not implicate Mr. Payne in any impropriety and exonerated him of the allegations made by Councilmember Graham. Moreover, the investigation revealed how highly politicized the Lottery contract has become, and revealed inappropriate actions by Mr. Graham with respect to the Council's consideration of the Lottery contract. Accordingly, this investigation is now closed without further action.

The allegation against Eric Payne

I met with Mr. Graham on June 26, 2008. Mr. Graham stated that he wished not to be identified as the source of this information. He was assured that the information would not be attributed to him. Graham told me that he had mentioned to Payne that if Payne wanted any information about how the Lottery operated in the 1980's, Payne should talk to Dottie Wade, who was on the Lottery Board in the 1980's. Graham has known Wade for ten years. Wade is semi-retired now and serves as the Chair of ANC 1A in Graham's Ward. The next day, which would be April 10, 2008, according to the timing described by Councilmember Jim Graham, Wade just dropped by Graham's office. Wade was alone and told Graham that the Greek Company (Intralot) was at the Marriott hotel at that moment and they would come over to see Graham and bring Dottie into the deal. The implication by Wade was that a condition to bringing Dottie into the deal was that Graham would have to support Intralot in their bid for the Lottery contract.

Graham simply looked at Wade with astonishment and told Wade that that it would not be a consideration for Graham in considering the Lottery contract matter and that she shouldn't anticipate any reaction from Graham.

Graham assumed that Payne must have taken Graham's suggestion about Wade as meaning that she should somehow be included in the deal. The timing of Wade's contact with Graham coming the day after Graham's hallway conversation with Payne is what led Graham to believe this. Graham does not believe the timing was a coincidence. Graham was not happy with the contact from Wade, and called Dr. Gandhi to complain about Payne. This investigation resulted from that contact between Graham and Dr. Gandhi.

The investigation

As part of this investigation I interviewed Councilmember Graham, Eric Payne, Associate General Counsel Cynthia Gross (OCFO), Dottie Love Wade, and Alaka Williams. I also reviewed copies of emails provided by Alaka Williams' attorney, A. Scott Bolden. Copies of these interviews are attached to this report.

Investigative Findings

1. Mr. Graham was not candid in his description of his conversation with Eric Payne in which Graham suggested that Payne contact Dottie Love. According to Graham, he mentioned to Payne that if Payne wanted any information about how the Lottery operated in the 1980's, Payne should talk to Dottie Wade, who was on the Lottery Board in the 1980's. However, according to Eric Payne, after a Council hearing in which Graham was critical of W2I, Payne approached Councilmember Jim Graham and introduced himself as the contracting officer and asked Councilmember Jim Graham to tell Payne what issues or questions Graham might have about the Lottery contract. Councilmember Jim Graham told Payne he should call Dottie Love Wade, and she will tell Payne what the issues are regarding W2I. Payne asked Graham if there was anything specific, and Graham encouraged Payne to call saying that Wade had information about W2I's ability to manage the Lottery contract. Graham told Payne that Wade was a former Lottery Director and that Wade had worked with Warren Williams Sr. and had concerns about W2I's ability to fulfill the terms of the contract.

Payne's account was corroborated by Associate General Counsel Cynthia Gross, who also attended the hearing, and joined Payne afterwards as Payne spoke with Graham. According Ms. Gross, Payne told Graham that Payne would be happy to have any information Graham had about W2I. Payne asked him for anything Graham wanted to relay to the OCFO, and asked him to share the information Graham had mentioned during the hearing. Graham gave Payne a business card or a contact name or number of some woman who had made allegations against the successful bidder for the lottery contract. Graham told Payne to call the woman, that the woman can tell him anything she knows about W2I, including that the company doesn't have enough years of experience with lotteries, and that they are not who they claim to be. Payne told Graham that he would follow-up on it.

Therefore, it appears that Graham did not reveal to me that his suggestion to Eric Payne to call Ms. Wade was motivated by Graham's opposition to the W2I contract award. Graham seems not to want to appear to be involved in behind-the-scenes efforts to derail the contract award to W2I,

when in fact Graham is using the controversy to promote his own political agenda (see finding 3 below). This also suggests a motive for Graham asking for confidentiality in the matter. Although Graham already discussed the matter with Dr. Gandhi, Graham now wants to act behind the scenes to bring additional pressure on those responsible for the lottery contract award.

2. The investigation did not reveal that Payne played any role in the meeting between Wade and W2I. Graham's allegation against Payne was based on speculation and was not supported by the facts. When Graham was interviewed, Graham told us he assumed that Payne must have taken Graham's suggestion about Wade as meaning that she should somehow be included in the deal. The timing of Wade's contact with Graham coming the day after Graham's hallway conversation with Payne is what led Graham to believe this. Graham did not believe the timing was a coincidence. Graham was not happy with the contact from Wade, and called Dr. Gandhi to complain about Payne. Graham had no further conversation with either Wade or Payne about this matter. One must question Graham's motives in complaining to the head of Payne's agency based solely on an assumption that was based solely on a coincidence in timing.

Eric Payne was interviewed and told me that he did not believe Graham was suggesting to Payne that Payne get a job for Wade with W2I when Graham initially recommended that Payne call Wade. Payne only found out about Williams and Wade discussing a job when Graham made his complaint against Payne. Payne immediately called Alaka Williams and asked if it was true, then met with Williams and told her it was inappropriate to be having conversations with people such as Wade without having a contract in place. Payne told Williams that all such discussions should cease because they could be viewed as improper. Payne was angry at Williams for having the contact with Wade.

Dottie Love Wade was interviewed and she told me that when Payne initially called her he never mentioned any future meeting between Wade and W2I. Their entire conversation involved Payne trying to determine what her objections to W2I as the Lottery contractor were. The meeting with W2I was arranged by an individual named Cornell Jones, a mutual friend of Wade's and the Williams. Wade supported Payne's version of their telephone conversation.

Alaka Williams was interviewed and told me that she did not know how her first meeting with Dottie Wade was arranged, but that the first contact the Williams had about Wade was from Cornell Jones who called Warren Williams Jr. and suggested that he meet with Wade. Alaka Williams said that Wade told her that it was Payne who first told Wade about the new Lottery contract, but Williams did not think Wade meant that Payne had put Wade onto W2I.

Finally, the alleged coincidence in timing between Graham's suggestion to Payne about Wade, and Wade's meeting with Graham, turned out to different from what Graham told us. Graham said that the two incidents were only separated by a day. Yet Graham's own calendar showed that he met with Wade on April 17 instead of April 10. Wade's calendar showed that she met with W2I on April 16, and she said she met with Graham the next day, on April 17.

3. The investigation disclosed that Graham met with W2I representatives and tried to get Warren Williams to withdraw from a WMATA contract in exchange for Graham's support on the Lottery

contract. Graham did this notwithstanding his public opposition to the Lottery contract and the fact that Graham is one of two District of Columbia representatives on the Board of Directors of WMATA. After I had interviewed Alaka Williams, she and Scott Bolden, her attorney, volunteered information about a later meeting they had had with Councilmember Graham. This was at a time when W2I representatives were meeting with all the members of the Committee. Graham scheduled the meeting and it lasted about two hours.

Graham talked about how Warren Williams has all the good real estate deals. Graham also talked about how it would take a lot to move him on the lottery contract issue. Graham told them the conversation is completely off the record, and then said that if Warren Williams Jr. would step off the WMATA contract, then Graham would be willing to get on board with the lottery contract. Alaka Williams told me that Williams had two contracts at the same time, a contract with WMATA to develop property around the Metro station in Graham's ward, and the lottery contract. Graham was trying to negotiate with Williams to back off the WMATA contract so Graham could re-bid the contract and another one of the bidders, who was Graham's favorite contractor, could get the contract. Graham said he had talked to a lot of other people who were qualified for these contracts and they were not getting a chance. Williams told Graham that he had already been awarded the contracts and the process had been fair and that Williams couldn't do what Graham wanted.

I did not investigate this additional information because it was not directly relevant to Graham's allegation against Payne, because there was no clear violation of any criminal statute, and because I have no jurisdiction to investigate impropriety on the part of a D.C. Councilmember. Instead I recommended that Scott Bolden report the information to the Inspector General. The information about Graham does suggest, however, that Graham's actions regarding the Lottery contract are part of his separate political agenda, and that his allegation against Payne may have been another means for Graham to advance that agenda.

Confidential Source