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

Office of Government Ethics

VIA EMAIL

[redacted]
C/o Goldblatt Martin Pozen LLP
1625 K Street, NW, Suite 700
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Dear [redacted]:

This letter responds to your request for a determination as to whether the District's post-employment restrictions prohibit you, a former employee of the Department of Consumer and Regulatory Affairs ("DCRA"), from providing testimony on behalf of property owners in an Office of Administrative Hearings ("OAH") appeal of a DCRA disposition of a Certificate of Occupancy (C of O) for "Property A." You also ask for guidance on whether the post-employment restrictions prohibit you from otherwise "advocating on behalf of property owners in matters involving DCRA."

After reviewing the information you provided, we find that you may not testify as an expert witness on behalf of the parties who have appealed DCRA's decision to issue a C of O for Property A because you were personally and substantially involved in this particular government matter before your departure from DCRA. Moreover, due to your personal and substantial participation in the Property A matter, you are permanently barred from acting as a representative, or appearing or communicating with District agencies with the intent to influence District employees regarding Property A. Although you are barred by the post-employment restrictions from serving as an expert witness in the matter, there are circumstances that would allow you to testify under oath.

As to whether you may advocate on behalf of other property owners in matters involving DCRA, we find that you are permanently banned from acting as a representative, or appearing or communicating with District agencies with the intent to influence District employees regarding particular government matters involving specific parties in which you have personally and substantially participated. Given your position at DCRA, we find that your personal and substantial participation in other particular government matters may have included, but may not have been limited to the following activities: (1) determining building code compliance, through inspection, evaluation, or enforcement, including any matters that are essentially the same as the particular government matter involved; and (2) participating in the substantive merits of a matter, such as taking measurements and photographs, which are used to determine compliance. If you have not personally and substantially participated in a particular matter involving specific

parties, then you may advocate on behalf of property owners or other interested parties in matters involving DCRA or any other District agency.

Background

Based upon the information you have submitted through counsel and records available from the OAH filings in this matter, we understand the background in this matter to be as follows: You left your employment with DCRA on [redacted]. At DCRA, you worked as an [redacted] from [redacted], and then as a [redacted] until your departure. Your duties as a [redacted] included selecting, supervising, training, and evaluating staff; participating in the development and administration of division goals, objectives, and procedures; and visiting construction sites for the purpose of evaluating third party inspectors' performance.

In September 2014, Property A's owners secured permits to begin converting the property from a single-family dwelling to a multi-use dwelling unit. On June 23, 2015, DCRA approved a permit allowing three additional significant alterations to Property A. For several months after this permit was issued, neighbors of Property A contacted DCRA to question the approval of the permit and whether construction on Property A complied with the permit. They also requested that DCRA wait to issue a C of O for the multi-use dwelling until these, and other issues, were resolved.

During the same time period that DCRA received complaints from Property A's neighbors questioning the issuance of a permit, you participated in the matter to assess the neighbors' concerns. In 2016, while working as a [redacted] you took measurements and photographs of Property A to verify compliance with the building permit at issue for the property. In addition to taking measurements and photographs, you supervised DCRA inspectors who performed inspections on Property A in accordance with your official responsibilities. On three separate occasions in 2016, you instructed a DCRA Inspector to conduct an inspection of that property. On July 11, 2016, you personally conducted an electrical permit inspection on Property A, which means you verified that the property's entire electrical components met the building code requirement. You then approved the electrical construction work that had been performed on the property.

After your departure, DCRA issued a C of O on October 14, 2016 to the Owner of Property A. According to OAH records, on October 26, 2016, neighbors of Property A (hereinafter referred to as Property A Appellants) appealed DCRA's issuance of the C of O on the basis that it was issued improperly. Along with other claims, Property A Appellants raised issues concerning the validity and methodology of measurements used by DCRA in determining Property A's compliance with permits. The Owner of Property A would now like to call you as an expert witness to testify on their behalf at the next OAH hearing.

Discussion

You argue that you should be permitted to testify as an expert in the OAH Property A hearing because the issuance of the permit for Property A, although admittedly a prerequisite for

issuance of the C of O, should be viewed as a distinct particular matter from the disposition of the C of O. Secondly, you argue that even if the permit issuance and C of O for Property A are considered to be one particular matter, that you did not participate personally and substantially in the Property A particular matter. Lastly, you contend that even if you participated personally and substantially in the particular matter involving Property A, you should still be permitted to testify under the testimony exception to the post-employment restrictions.

Applicable Standards

The District Personnel Manual identifies the post-employment restrictions that apply to District employees and requires that District employees comply with the provisions of the federal post-employment restrictions, codified at 18 U.S.C. § 207, and its implementing regulations set forth in the Code of Federal Regulations.[1] As explained below, these restrictions are intended to prevent former District employees from leveraging their previous employment with the District to gain an unfair advantage when dealing with the District government upon joining the private sector.[2]

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

Although former District employees are subject to three categories of post-employment restrictions, only the permanent prohibition is implicated in this request because you left the District government more than two years ago. This restriction is what is commonly referred to as the "permanent ban." The permanent ban prohibits a former District government employee from "switching sides," that is, appearing before any District agency for the life of any particular matter involving specific parties, in which the former employee participated personally and substantially.

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

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[1] 6B DCMR § 1811.1 ("District employees shall comply with the provisions of 18 U.S.C. 207 and implementing regulations set forth at 5 C.F.R. Part 2641, Subparts A and B.").
[2] 6B DCMR §1811.11.
[3] *Id.* at § 1811.3 (emphasis added).
[4] *Id.* at § 1811.4 (emphasis added).

"Matter" refers to any matter that was "actually pending under the former employee's responsibility within a period of one (1) year before the termination of such responsibility."[5] The District Personnel Manual defines "official responsibility" to mean "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action."[6] The scope of an employee's official responsibility is determined by "those functions assigned by statute, regulation, Executive order, job description or delegation of authority."[7]

Particular Matter Involving a Specific Party

A "particular government matter involving a specific party" is defined as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the District government is a party or has a direct and substantial interest, and which has application to (1) or more specifically identified persons or entities.[8] In addition to the District's non-exhaustive list of types of particular matters involving specific parties, the Federal rules describe a "particular matter involving specific parties" as a matter typically involving a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties.[9]

At issue in this matter is whether your involvement in measuring the property to verify permit compliance and overseeing inspections related to permit approvals is a distinct particular matter from the decision regarding the issuance of the C of O. Figuring out whether something is a "particular matter involving specific parties" is a fact-specific inquiry, and the analysis may change as matters evolve over time. According to federal authorities, many "matters evolve, sometimes starting with a broad concept, developing into a discrete program, and eventually involving specific parties. A case-by-case analysis is required to determine at which stage a particular matter has sufficiently progressed to involve specific parties."[10]

Personal and Substantial Participation

The Code of Federal Regulations explains that to 'participate' means to take an action as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, or to purposefully forbear in order to affect the outcome of a matter.[11] An employee has participated "personally" if they participated in a particular matter "directly . . . or [t]hrough direct and active supervision of the participation of any person he supervises, including a subordinate."[12]

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[5] *Id.* at § 1811.6.
[6] *Id.* at § 1899.1.
[7] 5 C.F.R. § 2641.202(j)(1).
[8] 6B DCMR § 1899.1.
[9] 5 C.F.R. § 2641.201(h)(1).
[10] Robert I. Cusick, Office of Government Ethics, DAEOgram 06-029 (October 4, 2006).
[11] 5 C.F.R. § 2641.201(i)(1).
[12] *Id.* at § 2641.201(i)(2).

An employee's participation is "substantial" if it is of "significance to the matter."[13] Merely having "official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue," does not amount to "substantial participation."[14] Instead, whether an employee's participation in a matter is "substantial" turns on the amount of effort an employee devoted to the matter and the importance of the employee's effort to the issue.[15] Therefore, if an employee "participates in the substantive merits of a matter," that participation "may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole."[16]

Analysis

Post-Employment Restrictions applicable to matters involving Property A

After reviewing the facts and applicable standards in this matter, we find that Property A became a particular matter involving specific parties when the owners sought DCRA's approval of permits to convert the property. We further find that your participation in the particular matter involving Property A was both personal and substantial. Thus, we find that you are permanently barred from appearing before a District agency as a representative or communicating with a District agency with the intent to influence regarding Property A. As to your argument that you should be allowed to testify under the testimonial exception to the post-employment restrictions, we find that you are explicitly prohibited from testifying as an expert on behalf of the owners of Property A, unless directed to do so by court order or on behalf of the District.

The instant matter involving Property A became a particular government matter involving a specific parties when Property A's owners applied for the first building permit; that building permit was subsequently issued in June 2015. Although you argue that DCRA's disposition of the C of O (which you would like to offer expert testimony about) is a distinct particular matter from the issuance of the building permit, your argument ignores the significance of the permit's validity and the property's compliance with the permit to DCRA's decision regarding the disposition of the C of O.

Determining whether the issuance of the C of O is distinct from issuance of the building permit is the same particular matter requires a fact-specific analysis. Relevant factors to consider in determining whether certain matters are the same particular government matter that you participated in include: whether your inspection and the current matter share the same basic facts; whether the facts of your inspection or an inspection which you participated in the merits will be used to make a determination in the matter at hand; whether both matters involve the same property owner and related issues, and the time lapse between the particular matter and the matter at issue. The most significant factor to consider is whether your participation in the particular matter resulted in a final decision by DCRA regarding a certain property.

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[13] *Id.* at §2641.201(i)(3).
[14] *Id.*
[15] *Id.*
[16] *Id.*

A particular government matter involving a specific party, such as a building permit, is the same particular government matter as zoning matter, C of O, license, or a subsequent permit if "the matters involve the same basic facts, the same or related parties, related issues, the same confidential information," and are relatively close in time.[17] Here, in assessing the neighbors' complaints, you took measurements and photographs to verify compliance with the permit at issue, which needed to be done in order to determine whether to issue the C of O. Thus, it was necessary for DCRA to consider the same basic facts, related issues, and confidential information in order to issue the C of O.

The purpose of a C of O is to ensure that the use of a building, structure or land conforms to the Zoning Regulations, DCMR Title 11, and to the provisions of the DC Building Code, DCMR Title 12A.[18] If a change in use to a building occurs, such as that which occurred at Property A, there must be approval of a building permit application, construction, and approval through inspections prior to the issuance of a C of O.[19] The property must pass inspections to ensure that the property is constructed according to the building plans and is in compliance with the building code and zoning regulations. The various building inspections are tantamount to the issuance of a C of O.

Contrary to your argument, the issuance of the C of O and the building permit are not "fundamentally distinct in scope and approach." [20] Rather, they involved the same facts and property owner, and were issued within a two-year period. It appears that Property owner A secured the building permits to complete the construction needed to receive a C of O that would allow them to use the converted property. The issuance of the C of O was dependent upon the approval of the building plans, building permits being granted, and compliance with those permits.[21] Essentially, the C of O is the same particular matter as the building permit because they both include the same basic facts, parties, and issues.[22]

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[17] 5 C.F.R § 2641.201(h)(5)(i); *see also Brown v. Dist. Of Col. Bd. Of Zoning Adj.* 486 A.2d 37, 52 (1984) (agreeing that "when there has been a series of transactions involving the same parties, the same property, and similar (not necessarily single) objectives, the factual contexts are likely to overlap sufficiently that the party who moves for disqualification under DR 9-101(B) will have established a prima facie case, even though the technical legal issues themselves are different").

[18] *See* DCRA Certificate of Occupancy Checklist and Process, found at https://eservices.dcra.dc.gov/DocumentManagementSystem/Home/retrieve?id=Certificate of Occupancy Checklist and Process.pdf (last visited November 26, 2018).

[19] *Id.*

[20] United States Office of Government Ethics ("U.S. OGE") Advisory Opinion 88 x 4, dated March 2, 1988.

[21] *See* U.S. OGE Advisory Opinion 84 x 16, dated December 17, 1984, (determining that two proceedings were the same particular matter because they both concerned the same important Federal interest, the same party, and the same underlying factual and adjudicatory context). *See also* U.S. OGE Advisory Opinion 02 x 5, dated July 31, 2002, (concluding that licensing proceedings were a continuation of the same particular matter that involved an earlier site characterization process, as well as other efforts that were in anticipation of a potential license application) and (citing *United States v. Medico Indus., Inc.*, 784 F.2d 840, 843 (1986) "Two particular matters are viewed as the same, for purposes of section 207(a), if they share a common 'nucleus of operative facts.'").

[22] *See* U.S. OGE Advisory Opinion 99 x 16, dated September 10, 1999, (finding that the statement of principles and program A contracts were the same particular matters because the statement of principles were incorporated into the request for qualification statement and established contracting policies for pricing, price bundling, use of non-contractor facilities, adding optional services, limiting the Government's obligation to minimum revenue guarantees, the duration of contracts, the award process, and agency participation in specific competitions).

At issue in the OAH proceeding is the validity of the C of O and the facts of your inspection or other inspection will be involved.[23] This is exactly the type of switching sides that the restriction is designed to prevent. Thus, because you participated personally and substantially in decisions related to determining permit compliance with building codes, which was a prerequisite for the issuance of the C of O, we find that you are permanently banned from having any communication or appearances with a District agency concerning the permit and C of O for Property A.

Next, you argue that even if the permitting and issuance of the C of O are considered to be the same particular matter, that your participation was not personal and substantial. To participate personally means to participate directly; to participate substantially means that your involvement is of significance to the matter.[24] While working as a [redacted] you personally engaged in activities that were of significance to assessing permit compliance and validity, and hence were of significance in determining whether to issue the C of O. Specifically, in 2016 with respect to Property A your personal and substantial participation included: making determinations of building code compliance, through inspection, evaluation, or enforcement; and participation in the substantive merits of the matter, such as taking measurements and photographs which were used to determine compliance. Thus, you are permanently prohibited from acting as a representative, or appearing or communicating with any District agency with the intent to influence District employees regarding Property A.

Finally, you argue that even if you are prohibited from acting as a representative, or appearing or communicating with any District agency with the intent to influence District employees regarding, that you may be able to still testify as an expert witness in this matter under a testimonial exception. The DPM requires that District employees comply with federal post-employment statutes and post-employment guidance found in the Code of Federal Regulations.[25] DPM § 1811.14 states that the post-employment restrictions shall not "prevent a former government employee from giving testimony under oath, or from making statements required to be made under penalty of perjury." "Testimony under oath is evidence delivered by a witness either orally or in writing, including deposition testimony and written affidavits, in connection with a judicial, quasi-judicial, administrative, or other legally recognized proceeding . . . ."[26] However, the federal rules have an exception that prevents employees who are permanently barred from representing others in a particular matter before the government from serving as an expert witness in that matter, unless on behalf of the government or under court order.[27]

Thus, given that you are permanently banned with respect to Property A from knowingly representing a third party interest before the District, or communicating with the District with the intent to influence on behalf of another, you will not be allowed to testify as an expert witness on behalf of Property Owner A in the OAH proceeding on the appeal of DCRA's issuance of a C of O for Property A.[28] Despite not being able to serve as an expert witness in the matter regarding

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[23] *See* supra footnote 17.
[24] 5 C.F.R. § 2641.201(i)(2) and (3).
[25] *See* DPM § 1811.1.
[26] 5 C.F.R. § 2641.301(f)(1).
[27] *Id.* at § 2641.301(f)(2).
[28] *Id.*; *see* also U.S. OGE Advisory Opinion 04 x 11, dated July 29, 2004.

Property A, you may still be able provide testimony under oath at the upcoming OAH hearing as a fact witness if subpoenaed to do so.

General Advocacy on behalf of property owners in matters involving DCRA

You also request more general advice on whether you may advocate on behalf of property owners in matters involving DCRA with certain limitations. In particular, you wish to continue to work in the field on behalf of property owners in matters involving DCRA, including by: (1) serving as the [redacted][29] and (2) testifying as a witness in administrative and judicial proceedings on behalf of property owners.

Generally, you may only advocate on behalf of property owners in matters involving DCRA if the permanent ban does not restrict your involvement in the matter. If it is clear that you have had no prior involvement with a particular matter, then you are free to advocate before the District on behalf of others, to serve as a [redacted], or to testify as an expert or fact witness in administrative and judicial proceedings on behalf of property owners.

However, consistent with the guidance above, you will be prohibited from advocating on behalf property owners before the District for any particular government matters involving specific parties in which you participated personally and substantially. This means you are prohibited from providing testimony as an expert witness in any future judicial or administrative proceedings regarding other matters in which you participated personally and substantially through a determination of compliance, such as an inspection, evaluation, or enforcement of the building codes; or for which you participated in the substantive merits of the matter.

In addition, you have also asked for guidance on how to determine when particular matters involving specific parties in which you have participated relate to other particular matters about which you may be consulted. You assert that "particular matters involving specific parties are limited to particular permits for specific properties and that even if a specific property is part of a particular matter involving specific parties, it is not necessarily the same particular matter as the permit." You provide, for example, that a property may be part of a matter involving zoning, C of O, license, or a subsequent permit; and that "only those cases concerning the permit itself should be considered the same particular matter as the permit." Without a specific matter on which we are asked to provide advice, we must provide only general advice about potential future matters which you may be subject to restriction under the post-employment rules.

DPM § 1899.1 provides that a "particular government matter involving a specific party is any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the District government is a party or has a direct and substantial interest, and which has application to one (1) or more specifically identified persons or entities." A particular

[29] According to your submission, a [redacted] is authorized by DCRA to perform inspections and plan reviews, and to certify that such work complies with the D.C. Construction Codes, under certain conditions. The [redacted] directly supervises all of a [redacted] work."

government matter "typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case."[30] "New particular matters have been found where there are fundamental changes or differences between related matters."[31] According to 5 CFR § 2641.201(h)(5), "the same particular matter may continue in another form or in part." "In determining whether two particular matters involving specific parties are the same, all relevant factors should be considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed."[32] Because our analysis of these cases tends to be very dependent upon the specific facts presented, feel free to reach out to our office with for informal advice as needed on a case-by-case basis.

Lastly, you ask for guidance on when you can testify as a witness in administrative and judicial proceedings on behalf of property owners. In general, a fact witness can be subpoenaed by the court simply because they have knowledge of the facts relevant to the matter in dispute. An expert witness cannot.[33] Hence, the District generally recognizes an exception to the post-employment restrictions for giving testimony under oath. A former employee is not restricted by any of the substantive restrictions of the post-employment restrictions from giving testimony under oath or from making statements required to be made under penalty of perjury, unless the former employee is covered by a permanent ban with respect to a matter in which they were personally and substantially involved. Hence, if you are subject to a permanent post-employment ban with respect to a matter, you may not testify or serve as an expert witness for that matter, unless called by the government or under court order.

Please be advised that this advice is provided to you pursuant to section 219(a) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012 (D.C. Law 19-124, D.C. Official Code§ 1-1161.01 et seq.), which empowers me to provide such guidance. As a result, no enforcement action for violation of the District's Code of Conduct may be taken against you in this context, provided that you have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

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

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[30] 5 C.F.R. § 2641.201(h)(1).

[31] U.S. OGE Advisory Opinion 99 x 14, dated July 7, 1999.

[32] 5 C.F.R. § 2641.201(h)(5); *see also United States v. Medico Indus., Inc.*, 784 F.2d 840, 843 (7th Cir. 1986) (stating that the parties, facts, and subject matter must coincide to trigger the prohibition of § 207(a)). *See also Brown v. Dist. Of Col. Bd. Of Zoning Adj.* 486 A.2d 37, 52 (1984) (agreeing that "when there has been a series of transactions involving the same parties, the same property, and similar (not necessarily single) objectives, the factual contexts are likely to overlap sufficiently that the party who moves for disqualification under DR 9-101(B) will have established a prima facie case, even though the technical legal issues themselves are different").

[33] *See* OGE Advisory Opinion, 90 x 4, dated March 7, 1990.

or wish to discuss this matter further. I may be reached at (202) 481-3411, or by email at Brentton.wolfingbarger2@dc.gov.

Brentton Wolfingbarger
Director of Government Ethics
Board of Ethics and Government Accountability