

April 18, 2013
CONFIDENTIAL
ADVISORY OPINION

[Jake Rock]
[Assistant]
[Division]
City of Chicago
121 N. LaSalle Street, Room [1]
Chicago IL 60602

Re: Case No. 13018.A

Dear [Mr. Rock]:

You are an attorney in the [Division] in the [Department]. In a [Date], 2013 email to [staff] of this agency, you asked whether Mayoral appointees serving on the following newly constituted boards will need to complete the FIS (statement of financial interests) form and whether they are subject to the Ethics Ordinance. The boards are the [X Commission] (“X”) and [Y Commission (“Y”). Attached to your email were the State enabling statutes for each: [xxx ILCS xx/1] *et seq.* and [yy ILCS yyy/1] *et seq.*, respectively. After considering the facts, the statutes you provided and Board case law, the Board has determined that neither [X] nor [Y] is a City agency, and thus that the mayoral appointees of both bodies are not required to file a statement of financial interests with the Board of Ethics, and are not City appointed officials and thus not subject to the provisions of the Governmental Ethics Ordinance. Our reasoning follows.

FACTS

You told staff that [X] was authorized by state law and was approved by voter referendum, and that [Y] is created by state law. You also informed the Board that both boards are still being formed, so you did not have any by-laws, but you assumed that there will be non-city monetary support for both.

1. [X]. The [X Commission] was (generally) envisioned in the [Community Act], xxx ILCS xx (“[X Act]”), which was signed into law [Date], 2011, to provide direct free [services] for any resident of the territory (with funding through property taxes). However, it was not until [Date], 2012 that [X] was constituted, after a binding referendum. (*See*, [web site], visited [Date], 2013.) The [X Act], xxx ILCS xx/1 *et seq.*, provides that, should a referendum be passed by the affected citizens (as in this case) to adopt the [X Act’s] object for the citizens to create an “[Expanded Program],” then the Governor and mayor of the affected municipality shall appoint members as commissioners “to serve as the governing body [“X”] of the [Expanded Program].” (emphasis supplied) [X Act] §§15(a) and (b). The names of appointees shall be provided by community organizations. *Id.* §§15(c) and (d). Commissioners may only be removed by fellow commissioners for cause. *Id.* §15(h). The duties of [X] include: (i) adopting

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rules for both itself and the Program “concerning the rendition or operation of services and facilities which it directs, supervises, or funds...” *Id.* §20(1); (ii) “[t]o employ necessary personnel, acquire necessary office space, enter into contractual relationships, and disburse funds...” *Id.* §20(5); and (iii) “[t]o disburse the funds annually from tax revenue in such a way that no less than 85% of those funds are expended on direct [services]...” *Id.* §20(6). “The expanded [services] fund shall be raised by means of an annual tax levied on each property within the territory of the Program.” *Id.* §25(b). The authority or duty to establish or prohibit the establishment of [Expanded Programs]...are declared to be exclusive powers and functions of the State which may not be exercised concurrently by any such municipality.” *Id.* §50.

2. [Y]. [Y] was created by the Governor on [Date], 2011 to administer a “[district] [that] is intended to attract [sector] related commerce and research, as well as new business ventures, to this severely underserved community. The creation of a [sector] district provides for the orderly creation, maintenance, development and expansion of [facilities] and other ancillary or related facilities for the study [and collateral services] to promote [sector] knowledge.” [web site], visited [Date], 2013.

In the [Y District Act], yy ILCS yyy/1 *et seq.* (“[Y Act]”), the State of Illinois created the [district]. *Id.* §5. The [Y Act] itself creates the [Y Commission], *Id.* §10(a), in order to maintain the proper surroundings for a [sector] center; provide for the orderly creation, maintenance, development, and expansion of [sector facilities] and [sector] research and high technology parks together with necessary lands, buildings, facilities, equipment and personal property. Three of its members “shall be appointed by the mayor.” *Id.* §10(c). Six of its other 9 members are appointed: 3 by the Governor and 3 by the Chairman of the County Board of Cook County. The remaining members serve *ex officio*; they are the State’s Director of Commerce and Economic Opportunity, Director of Public Health and Secretary of Human Services. The [Y Commission] is perpetual, and retains the authority to contract and sue and be sued, among other things. *Id.* §10(b). The [Y Commission] may apply for and accept grants, loans, or appropriations from the State, federal government or local government, or any other person, including using other monetary vehicles to raise funds. *Id.* §15. The [Y Commission] is authorized to acquire property, *Id.* §20; and construct [facilities] and other institutions *Id.* §25. The [Y Commission] may adopt rules. *Id.* §45. The [Y Commission] shall account for excess monies over that which is necessary to carry out its mandate. *Id.* §70.

LAW AND ANALYSIS Pursuant to §2-156-150(a)(iii) of the Ordinance, each “appointed official” who is a member of a “City agency, except a member of an agency that is solely advisory in nature, and has no authority to make binding decisions, enter into contracts or make expenditures (other than necessarily incurred for research in connection with its advisory functions),” must file an annual statement of financial interests.” In §2-156-010(q), an “official” is defined as “any person holding any elected office of the City or any appointed non-employee member of any City agency.”

If the board or commission on which an appointee (even a Mayoral appointee) serves is not a City “agency,” then the board member will not be an appointed official, and, thus, not be subject to any of

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the provisions of the Ordinance, and thus not be required to file a statement of financial interests.

“Agency” is defined as “the City Council, any committee or other subdivision thereof, any City department or other administrative unit, commission, board, or other division of the government of the City.” §2-156-101(b). Thus, the initial question is whether [X] and [Y] are “agencies,” that is, City agencies.

Since this Board’s inception, we have made determinations as to whether other newly-formed or long-time boards and commissions are City agencies for purposes of the Ordinance, and whether their appointees are subject to the Ordinance and must file Statements of Financial Interests. These determinations are made on a case-by-case basis, and based on various factors. See, e.g., *Conservation Community Council*, Case No. 91039.A p. 2 (City councils [which were associations located in various parts of the City] are not City agencies: State statute created these “area” City councils, setting forth their powers and duties).

The Board’s prior cases on what is an “agency” (or a City agency) can be summarized generally as follows:

(a) certain boards created by State statute or by intergovernmental agreement, or by federal mandate, were determined not to be City agencies. See *Eng Memorandum, June 27, 1995 (“Eng Memorandum”)* (e.g., Board of Education, Chicago Housing Authority, etc.); and also see Case No. 90013.A (same).

(b) Private, not-for-private organizations that are: (i) not primarily funded by the City; and (ii) primarily offer advice and counsel; and (iii) are designed to support City programs, generally have been determined not be City agencies. See *Chicago Community Trust and Chicago Dwellings Association*; and see *Levy Center Auxiliary Council* (and discussion of the case in Ellen Sewell Memorandum, January 20, 1995) (“*Sewell Memorandum*”).

(c) An early case established three primary elements to analyze for the Board to determine whether an agency is a City agency for the purposes of the Ordinance: (i) it is financed primarily through the City budget; (ii) it is created by City ordinance or Mayoral Executive Order; and (iii) its board membership is confirmed by City Council. *Private Industry Council*, Case No. 87083.E (not a City agency because no elements present); but c.f. *Sister Cities* (City agency though only executive order factor present) *with License Appeal Commission* (not a City agency because established by State statute). Thus, a board that: (i) is not created by City ordinance or Executive Order; or (ii) is not primarily funded by the City; or (iii) does not have its members confirmed by the City Council, has typically been held not be a City agency. *Chicago Workforce Board*, Case No. 96041.E, citing *Private Industry Council*, Case No. 87083.E (see also Case No. 10008.A); cf. see *Sister Cities Committee Board of Directors* (executive order alone enough to warrant the conclusion that the board is a City agency for purposes of the Ordinance). Generally, all three criteria have been present in instances where the Board concluded that particular boards or commissions were City “agencies,” for purposes of the Ordinance. (“Eng Memorandum”). Consistently, the presence of only one of these factors has been seen as insufficient to warrant the conclusion that

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the board commission is a City agency. *See also License Appeal Commission* (not a City agency: created by State statute though funded by the City).¹

1. Is The [Y Commission] a City Agency? [Y] was created by the State of Illinois, pursuant to state statute. [Y Act] §10(a). The Mayor appoints three of the Commission's twelve members. [Y Act]. §10(c). However, the mayoral appointees are not subject to City Council confirmation. *See Chicago Workforce Board*, Case No. 96041.E. In addition, although [Y] may apply to the City for loans or grants (see [Y Act] §15), you said that you assume there will be non-city monetary support for both. *Cf. Chicago Workforce Board*, Case No. 96041.E.

Therefore, none of the three salient elements exist, of which at least one (if not more) must exist to warrant the conclusion that a particular board or commission is a City agency. *Chicago Workforce Board*, Case No. 96041.E; *Eng Memorandum*. The fact that [Y] is a "working" board does not vitiate the requirement that to be considered a City agency, it must have mayoral appointees subject to City Council approval; or be primarily funded by the City; or be established by the City Council by ordinance or by the Mayor through an executive order. *The Chicago Community Land Trust Board*, Case No. 06005.CNS.

For these reasons, we conclude that [Y] is not a City agency.

2. Is The [X Commission] A City Agency? A referendum passed to adopt the [X Act's] object of creating a [services] program. Funding for the program would be obtained through property taxes levied in the affected territory designated by the [X Act]. *Id.* The funding procedure follows the [X Act] §25(b). Only after the referendum, under the [X Act], do the governor (5 in number) and mayor (4 in number) make appointments, the majority taken from names provided by community organizations, *Id.* §§15(c) and (d), to [X] to administer the program. *Id.* §§15(a) and (b). Among other things, as set forth in the [X Act's] duties followed by [X], *Id.* §20 *et seq.*, [X] promulgates rules; employs personnel; and disburses funds. The establishment of such [services] programs is exclusively that of the State to the exclusion of any affected municipality. *Id.* §50.

In sum, the legal analysis and reasoning applied for [Y], above, is entirely applicable here for five reasons: (i) there is no City Council confirmation of the mayoral appointments; (ii) there is no funding from the City; (iii) a State implementation of the programs that came into existence through a citizen

¹ Not-for-profit corporations (or "501(c)(3)" corporations) have not been typically analyzed as in (b) above for the purpose of determining City agency status. They have been examined in a manner more consonant with the process in (c) above. *See* Case No. 96053. CNS and memoranda therein.

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referendum vote; (iv) [X] is a “working” board, however, except for unconfirmed-by-City-Council mayoral appointments, there are no indications that the City controls the administration of [X] or the programs anticipated in the [X Act]; and (v) it is the State that provides in its legislation for the incipient [X] and its duties to come into existence once the citizens of the affected territory vote their interest in having [services] programs. See [X Act] §5, §15(a).

See also *Chicago Workforce Board*, Case No. 96041.E; *The Chicago Community Land Trust Board*, Case No. 06005.CNS; Case No. 90013.A (addressing many boards, including those enabled by State statute).²

For these reasons, the Board concludes that the [X Commission] is not a City agency.

DETERMINATIONS. The Board has determined that neither the [X Commission] nor the [Y Commission] is a City agency, and thus that the mayoral appointees of each are not required to file a statement of financial interests with this agency.

RELIANCE This opinion may be relied upon by any person involved in the specific transaction or activity with respect to which this opinion is rendered.

Stephen W. Beard, Chair

² Moreover, in analyzing [X] to determine whether it is a City agency, under Case No. 90013.A, the Board specifically notes that, in the [X Act], funding is accomplished through tax levy; appointments by the mayor are made from a list provided by community organizations; and the establishment of [services] programs is exclusively authorized by the State and may not be exercised by the municipality. In *Northwest Home Equity Assurance Commission*, Case No. 91038.A, the Board determined that the City commission was not a City agency. That commission existed to distribute monies pursuant to a State program that it collected from the County real estate tax and distributed to participants in a home equity assurance program. In addition, the determination of terms of the program remained exclusively with the State and could not be exercised by the municipality. In Case No. 91039.A, again, the Board determined that a Conservation Community Council was not a City agency. In that case, the councils in different areas of the City came into existence because of a State law (providing for a City Urban Renewal Board) with respect to blighted areas; that statute set forth powers and duties for councils established by the Urban Renewal Board. The councils used volunteer members from the blighted areas, though a City department did aid in some mailings. *Id.* p. 2. The members were appointed to the councils by the mayor after the names were vetted by the Urban Renewal Board. Under these facts, the Board determined these councils were not City agencies, as they were more like community organizations. *Id.*

Applying the facts in both *Northwest Home Equity* and Case No. 91039.A to the facts of the [X Act] and the powers of [X] in the areas of: a board appearing like a community organization; a list from which the mayor makes appointments; and the funding coming from real estate levies, [X] is not like any board or commission determined by the Board to be a City agency and, instead, much closer in its establishment and operations to the commission administering the equity assurance program and the councils administering the blighted areas program reviewed in *Northwest Home Equity* and Case No. 910039.A, *supra*.