

May 2, 2007

**CONFIDENTIAL**

Advisory Opinion  
Mr. Smith  
Post-Employment  
Case No. 06076.A

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On \_\_\_\_\_, 2006, you, a former Deputy Commissioner in the City's Department of A ("A"), met with Board staff and asked how Section 2-156-100, "Post-Employment Restrictions," in the City's Governmental Ethics Ordinance would affect your post-City employment as Director of Development with B Initiatives, Inc., a not-for-profit in Chicago ("B").

Upon careful consideration of the facts you have presented, and the applicable law, the Board determines **THAT you are permanently prohibited from assisting or representing any person, other than the City, on any City contract over which you exercised contract management authority involving a real estate developer or related entity. This prohibition includes, but is not limited to, those City contracts whose performance you supervised during your City tenure, e.g., C Corporation, Services, Inc. and E Corporation (and contracts under the D project); in addition, you are prohibited for one year, that is, until \_\_\_\_\_, 20\_\_ , from assisting or representing B in any real estate project that involves the rehabilitation of buildings in which the construction is funded either through the Department of A's Initiative II or through its F initiative.**

**FACTS:**

Background. You have earned the following academic degrees: in 19\_\_, a B.S. in xxxxx from the University of xxxxxx, xxxxxxx; in 19\_\_, an M.A. in xxxxxxxxxxxx from the University of xxxxxxx, xxxxxxx; and in 19\_\_, an M.A. in xxxxxxxxxxxx from the University of xxxxx, xxxxxxx. In 19\_\_, you started working at Services Inc. ("Services Inc.") in Chicago in the area of affordable housing real estate development. You began your City service in \_\_\_\_\_ 20\_\_ in the Department of A and resigned your position with the City on \_\_\_\_\_, 20\_\_.

Your Work with B. Upon leaving the City, you entered B's service. During your City service, you stated that the only work you performed that involved B were: 1) you caused the City to convey one single-family property to B pursuant to a HUD-related (the Federal Department of Housing & Urban Development) program; and 2) several times, you relayed information to B respecting troubled buildings. (You defined "troubled buildings" as, generally, those that had critical fiscal or physical problems, regardless whether they were owned by the City.) In addition, while in City service, although you were uninvolved, A (through its G division) began a (still), incomplete transaction under the P program.

You said that your job for B is to identify and implement opportunities for development of new single-family affordable housing developments B's branches in the R, Q, T and S Chicago areas of the City and in a suburb ("B Areas"). By driving your car, using real estate agents, or meeting with community members in the B Areas, you will attempt to identify properties - mostly vacant - upon which B would develop new single-family affordable homes; your search could include City-owned properties. After appropriate research to ensure viable properties, you would then work with architects to create acceptable designs; bid out projects to contractors who would present to you feasible construction budgets; calculate unit sales prices; determine if there were a difference or "gap" between development costs and sales prices, and conclude whether and how to "plug" that gap with non-B funding. You said that it would be typical, in those cases, for you to apply (on behalf of B through a limited liability company developer owned by the parent company of your employer (Peculiar) and B ["LLC"]) to A under the P program. That program is administered by Deputy Commissioner Jones of A's Services division. B's application for funding (as more fully described below) would be processed there. If approved (approval includes passage of a City Council ordinance), then the appropriate Redevelopment Agreement ("RDA") would be completed between the LLC and the City. (Even if there were no such application by you to A, you would anticipate working with the City to obtain construction permits or resolve zoning matters.) If there were an RDA, there would be a closing between the LLC and the City, and the City agreement would contain covenants running with the land, such as, that the price from the LLC to a home buyer would remain at an affordable price point. B would be released from any City covenants when, and as, you would sell each single-family home to a buyer who would enter into a junior mortgage with the City, which loan the City typically forgives. After the closing with the City, you would oversee building construction, its completion and payments to contractors. To find a buyer, you would typically go to Services, Inc. ("Services Inc.") or a similar non-profit agency. The home would be marketed by the agency or a private sales agent. When the last single family home is sold, or the entire development's homes are sold, your assignment for that project would be accomplished.

#### Your Work with the City.

*Introduction.* You explained that A has six "line" divisions: Administration; Programs; Services; H; Contract; and Finance. One of A's functions is to provide financing to developers of affordable housing. A separate A function is ensuring the continued viability of any such loans that are made. As is typical in the private sector<sup>1</sup>, those two functions are performed by two separate divisions of A: "Services" loans money; "H" enforces loan defaults (but only on multifamily building loans). You explained the two functions as follows.

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<sup>1</sup>This was confirmed during a \_\_\_\_\_, 2007 staff interview of an executive employed by a large local bank that lends on residential development.

*Services*. This A division loans<sup>2</sup> monies to a developer (and, where applicable, ultimate home purchaser) on a new real estate development anytime that the City Council authorizes new City financing for a specific building or a City program. Development includes new or rehabilitated multifamily or single-family buildings. Typically, the developer rents the multifamily residential units to eligible-income tenants and sells single-family homes to eligible-income buyers. The process begins when the developer's application to *Services* (sometimes "DOS"). *Services* reviews the application, including the developer's market analysis, design plans, development team, *etc.* Thereafter, a *Services* Project Manager reviews the application and DOS staff's comments to ensure that the proposed development meets A standards.<sup>3</sup> Upon *Services*' approval of the application, the division introduces an ordinance to City Council for its consent to financing. The application is reviewed by City Council's Finance Committee (or Housing Committee for single-family homes) where testimony from members of *Services* is introduced. If the application gains Committee approval, the proposed ordinance is reintroduced in City Council for passage. Once the ordinance is effective, *Services* is authorized to negotiate and close a loan with the developer pursuant to a Redevelopment Agreement ("RDA") between it and the City. The land upon which the developer would work might be its own or purchased from the City. The RDA contains the restrictions the City places upon the developer, *e.g.*, selling or renting to income eligible families, providing insurance during construction, obtaining necessary permits, passing City construction inspections and operating the completed development within specified guidelines.

Construction then begins. A's Administration division oversees the developer's work. As construction progresses, A's Finance division verifies payments to contractors on the continuing development. Should *Services* financing have taken the form, in whole or in part, of LIHTC, A's Contract division ensures that the developer adheres to federal affordable housing requirements. At closing, or thereafter, as the developer completes a single-family home development, it obtains buyers for its developed residences. In this case, A's Programs division determines whether the home buyer is eligible for an affordable housing subsidy, *e.g.*, from the P Program. If so, Programs advises Finance, which provides the money at the closing (if appropriate) for the home buyer; typically, those monies take the form of a forgivable City loan.

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<sup>2</sup> *Services* financing may also include giving - or arranging for - low income housing tax credits ("LIHTC"), federal HOME monies, community development block grants ("CDBG"), tax exempt City bonds, TIF-assistance, federal or State loans or outright grants, such as under the P Program.

<sup>3</sup> These include design criteria, such as, size of the development, material to be used to build, numbers of bedrooms, energy efficiency; cost criteria such as comparative costs per square foot, "soft" costs that fall within A guidelines, affordable pricing; financial policies, such as, debt coverage, proposed operating expenses and loan-to-value ratios.

H. This is the division of A in which you were Deputy Commissioner for the City. You supervised a staff that had a number of jobs. As to the relation between the H division and the Services division, you stated your responsibility was to ensure that each developer performed the obligations in the notes and mortgages issued to them by Services for the development of multifamily affordable housing (whether or not still under construction). Except in a few extraordinary circumstances recited below, you and H did not make or participate in loans or provide other financing to developers. The City's Comptroller inventories loans issued by Services, and regularly provides H with reports on all such loans. If you noted a delinquent promissory note, you "flagged" that Services loan and followed H protocol (e.g., sending notices to the developer), to bring the note current. You were advised through other sources about City-loan delinquencies or possible future delinquencies, as well as physical problems with the building or other developer problems that could result in a City-loan delinquency (these sources included calls from developers with Services loans, copies of bank notices to/from private lenders, including notices about housing court cases, annual developer affordability certification and biannual report on the buildings' structural integrity from A's Contract division, construction progress reports, and reports on meeting affordability standards or vacancy rates and prior-filed mortgagee foreclosure notices). In summary, Services made loans to developers (including those building multifamily affordable housing) and your division, H, attempted to ensure those multifamily affordable housing loans did not become or remain delinquent.

In order to achieve your Division's goal to keep City loans current, once you discovered a delinquency or related problem (aside from following the aforesaid H protocol), you would review any other facts and circumstances surrounding the delinquency, e.g., known developer which had never been late in payments or never had problems in renting units to eligible-income tenants. You would call a delinquent developer, typically to attempt to restructure its existing Services loan as the "priority" solution to the problem or prospective problem. You could enforce the lien against the property under the City mortgage, but you said you preferred to work with a delinquent developer on a loan restructure. If you and the developer were able to agree to a restructure, you would then process a City Council ordinance to effectuate the restructure. H prepared and followed up on necessary City Council documents and processing. You stated that the purpose of H's restructuring initiative was to maintain the affordability of multifamily housing for low or moderate income residents.

You and H had other tasks besides restructuring (what had become) "bad" loans originally issued by Services: (i) Initiatives I [5 or more units] and II [1- 4 units] (meant your work on troubled buildings: you requested participation from other departments or delegate agencies of H to help, as appropriate, you occasionally loaned monies to developers for rehabilitation if the total development costs exceeded its value, you enlisted the Administration division in overseeing construction rehabilitation on vacant buildings, you worked with other departments to ensure that the building was effectively secured/managed, you worked with other lenders, your staff attended court, where appropriate, and monitored housing court, you transferred a building to a new owner, including a

delegate agency, and you ensured payments were made to a delegate agency if its services were involved); (ii) Receivership (through court-appointed receiver restore a building's services); (iii) Family Building (address vacant buildings through City or Federal programs Preserving Communities Together, HUD good Neighbor and Chicago Rehab Initiative, acquire vacant buildings, secure and maintain them, solicit and review outside proposals directed at a building to purchase it from the City, seek appropriate ordinances to allow building disposition, supervise any building rehabilitation); (iv) Initiative 311 Campaign (market counseling programs for owners of "at risk" of foreclosure homes); (v) D (disposition of xxxx units *via* a HUD foreclosure proceeding, coordinating the stakeholders (including property security) to develop Requests for Proposal and select developers to acquire, rehabilitate and re-sell with appropriate affordable housing deed restrictions, provide some grant funding); and (vi) Chicago Properties (disposition of xxxx units, coordinating safety and rehabilitation, and project the affordability and financial recovery under the disposition plans). In addition, you stated that you were involved in other real estate initiatives. For example, although never more than 10 times in any year, you have made an F loan to a developer willing to rehabilitate a troubled building (including under Initiatives II). Also, you worked several times with DP respecting a particularly distressed single family home, managing it pending its disposition, usually to an A delegate agency.

You told staff that, as Deputy Commissioner in H, you had limited involvement with Services (the division in A to which you would apply under the P Program in your B position). You said that the overlap between your former division's duties and those of Services was rare and only in the area of "catastrophic" problems with multifamily buildings. During your City tenure, your H division intersected with the Services division of A three times: (i) Margaret House; (ii) K, C & W (Town Preservation); and (iii) D (not yet a completed initiative). The Margaret House project involved a xx-unit building with "layered" financing, including LIHTC and other City funds, which project was subject to the first mortgage-holder's foreclosure proceedings. You used a managed foreclosure process (including managing the vacant building that was subject to building code violations) to cause the transfer of the building to B N B, a non-profit, for use as supportive housing for women and children. Services worked with B N B to create a new financing package comprising additional City funding for the building's rehabilitation. The Town Preservation project was similar to Margaret House. D is an on-going project. After the City acquired a number of buildings involving xxxx units arising from a HUD-foreclosure proceeding, H has been involved in Requests for Proposals for rehabilitation from affordable housing developers and, accordingly, disposing of the buildings to various developers while keeping the buildings maintained (where inhabited) and safe (where vacant). The developers have required new financing and Services is processing those developer applications, but you have given some grant funding to the developers because of the catastrophic exigencies of this situation.

You stated that, during your City tenure, you supervised some of the performance of several developers involved in certain City contracts. You said that such supervision occurred with respect

to contracts that are (or were) part of, or associated with, the following specific projects or City contractors: (i) D; (ii) C Corporation; (iii) Services, Inc.; and (iv) E Corporation. By way of example, in D, you managed the orderly transfer of buildings' ownership in a catastrophic HUD-related default situation from the prior developer to a number of new, viable developers, including supervising the activities of building maintenance vendors, and activities of the new developers in acquiring the buildings and grants, and beginning their rehabilitation performance.

**LAW AND ANALYSIS:** Section 2-156-100(b) of the Governmental Ethics Ordinance, "Post-Employment Restrictions," states in relevant part:

**No former official or employee shall, for a period of one year after the termination of the official's term of office or employment, assist or represent any person in any business transaction involving the City or any of its agencies, if the official or employee participated personally and substantially in the subject matter of the transaction during his term of office or employment; provided, that if the official or employee exercised contract management authority with respect to a contract this prohibition shall be permanent as to that contract.**

To "assist" or "represent" a person in business transactions involving the City encompasses helping a person to seek a contract as well as helping a person perform a contract. *See* Case No. 92035.A The Governmental Ethics Ordinance ("Ordinance") defines "contract management authority" as:

**personal involvement in or direct supervisory responsibility for the formulation or execution of a City contract, including without limitation the preparation of specifications, evaluation of bids or proposals, negotiation of contract terms or supervision of performance. §2-156-010(g)**

This section of the Ordinance imposes both a one-year and a permanent prohibition on former City employees' post-employment activities. The one-year prohibition begins on the date City employment ends, not on the date an employee stops participating in specific projects or transactions. We will analyze each of these provisions in turn with respect to your employment with B.

The Permanent Prohibition. The Ordinance permanently prohibits former City employees from assisting or representing persons or entities in connection with City contracts if the former employee exercised contract management authority with respect to that contract while employed by the City. For purposes of the Ordinance, "contract management authority" encompasses both preparation of specifications and supervision of performance.

You stated that, during your City tenure, you supervised some of the performance of several developers under certain City programs. You said that such supervision occurred with respect to contracts that are (or were) part of, or associated with, the following specific projects or City contractors: (i) D; (ii) C Corporation; (iii) Services, Inc.; and (iv) E Corporation. By way of example, in D, you managed the orderly transfer of buildings' ownership in a catastrophic HUD-related default situation from the prior developer to a number of new, viable developers, including supervising the activities of building maintenance vendors, and activities of the new developers in acquiring the buildings and grants, and beginning their rehabilitation performance.

Based on the facts presented in this opinion, the Board concludes that you exercised contract management authority over real estate developers and related entities. The Board concludes you exercised contract management authority over, but not limited to, those City contracts whose performance you supervised during your City tenure, *e.g.*, C Corporation, Services, Inc. and E Corporation (and contracts under the D project). In addition, your description of your City work indicates that you may have exercised such authority with respect to other contracts on which you do not anticipate being asked to work.

The One-Year Prohibition. Under the one-year prohibition, you are prohibited for one year after leaving City service from assisting or representing B or any other person in any business transaction involving the City if you participated personally and substantially in the subject matter of that transaction while you worked for the City.

You stated that your job with B will likely involve A's financing program, administered by DOS, titled "P Program." In that case, your work for B will involve a business transaction with the City - the issue for the Board is to delineate the transaction's "subject matter." Based upon the facts you told us, your job duties at B under the *aegis* of the City transaction will be to obtain and use P Program subsidies granted by the DOS division of A. You will not, and cannot, service that subsidy, as it is not a loan, but a payment made to a developer from DOS when the financing closes. The Board notes that all of A's affordable housing financing, including that denominated P Program, is handled by DOS, and not by H, the separate division in A for which you worked as an employee of the City. DOS's job is to finance developers as part of the City's affordable housing initiative. Except under limited exigencies, your former division of A essentially serviced multifamily loans originated by DOS. DOS uses many financing tools.<sup>4</sup> H also uses many programs;<sup>5</sup> but these are not the same tools used by DOS. The Board concludes that A's Services and H divisions have separate mandates and operate separately. Case No. 02044.A (former Department of Health employee not

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<sup>4</sup>See footnote 2.

<sup>5</sup>Initiatives I and II; (ii) Receivership; (iii) Family Building through Preserving Communities Together, HUD good Neighbor and Chicago Rehab Initiative; (iv) Initiative 311 Campaign; (v) D; and (vi) Chicago Properties.

prohibited from functioning as “programmatic monitor” under City contract with one division of that Department, though she had worked during her City tenure in a similar assignment in a *separate* division of the Department) (emphasis added). Moreover, except in the “catastrophes” you recited, there was no overlap between DOS and H: DOS originated loans (both multifamily and single-family affordable housing); however, your division, H, serviced the multifamily loans (attempting to restructure them when you identified delinquencies or potential delinquencies). The Board concludes that, with certain exceptions you enumerated, DOS and H perform separate functions. Case No. 93010 (former Department of Housing (“DOH”) employee was not prohibited from consulting with the City’s Department of Aging, as DOH’s aging initiatives were performed by a separate division of DOH than that in which the former employee worked). Based on these facts and analysis, the Board concludes that the subject matter, applicable to you, of such a City transaction is the acquisition, development and sale of Chicagoland properties as affordable single-family homes under the P Program subsidy program administered by the Services division of the City’s A Department.

Board’s review of your employment responsibilities at A shows that, among other assignments, you were responsible to ensure the viability of the multifamily affordable housing loans originated by DOS. You monitored City Comptroller reports and were privy to other sources of data allowing H to review the performance of DOS’s loans. If you “flagged” problems you followed H protocol in the form of notices to delinquent developers, or communicated directly with developers (and perhaps others within or outside the City) in order to service the loan - and bring it current. Your job was to maintain the affordability of the housing project. Your work at the City comprised the subject matter of ensuring, usually through working with a developer to restructure debt, that the loans originated by DOS at A in connection with multifamily affordable housing, were current. Except in rare and exigent circumstances, H did not originate loans or other financing for developers. Based on these facts, the Board concludes that your work for B (set forth in the subject matter above) is a different subject matter from that in which you were engaged while employed by the City. Accordingly, the Board concludes that, while with the City, you did not personally and substantially participate in the subject matter of the City transaction above, namely, the P Program. *See* Case No. 97062.A (former Department of Housing employee not prohibited from lending monies from new employer for facilities development financing for social service agencies though, at DOH, she had, among other things, “worked out technical financing mechanisms to finance construction of affordable housing in the City.”).

However, you said that, while in H, you occasionally provided limited financing to developers of affordable housing in the City. Specifically, you were personally and substantially involved in two areas in which you loaned monies to developers: (i) although never more than 10 times in any year, you made a small F loans to a developer willing to rehabilitate a troubled building (including under Initiatives II); and (ii) if the developer’s total development costs exceeded the value of the project, you made loans under an H program known as the Initiatives II for rehabilitation purposes. Accordingly, the Board concludes that, while a City employee, you were personally and substantially



involved in granting F loans to developers willing to rehabilitate a troubled building, and loaning monies for rehabilitation under Initiatives II.

**DETERMINATIONS:** In summary, after careful consideration of the facts you presented and the relevant law, the Board has determined that:

- 1) **you are permanently prohibited from assisting or representing any person, other than the City, on any City contract over which you exercised contract management authority involving a real estate developer or related entity. This prohibition includes, but is not limited to, those City contracts whose performance you supervised during your City tenure, e.g., C Corporation, Services, Inc. and E Corporation (and contracts under the D project).** In addition, your description of your City work indicates that you may have exercised such authority with respect to other contracts or projects on which you do not anticipate being asked to work. Thus, the Board advises you that you should seek further advice from the Board if you are asked to work on any contracts or projects resulting from specific affordable housing development projects or transactions that were considered by or involve the A, as this permanent prohibition may apply to those contracts or projects; and
- 2) under Section 2-156-100(b) of the Governmental Ethics Ordinance, **you are prohibited for one year, that is, until \_\_\_\_\_, 20\_\_**, from assisting or representing B in any real estate project that involves the rehabilitation of buildings in which the construction is funded either through the Department of A's Initiative II or through its F loan initiative. This one-year prohibition applies both to providing services to B or to managing, advising or supervising B's outside consultants, or seeking any contracts (on behalf of B or its consultants) with any of the City's agencies, respecting working on transactions with the City that involve **the rehabilitation of buildings in which the construction is funded either through the Department of A's Initiatives II or through its F loan initiative.**

Our determinations do not necessarily dispose of all the issues relevant to your situation, but are based solely on the application of the City's Governmental Ethics Ordinance to the facts stated in this opinion. If the facts presented are incomplete or incorrect, please notify the Board immediately, as any change in the facts may alter our opinion. Other law or rules may also apply to your situation. We note that any City department may adopt restrictions that are more stringent than those imposed by the Governmental Ethics Ordinance.

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**CONFIDENTIAL INFORMATION:** We also bring to your attention Section 2-156-070 of the Governmental Ethics Ordinance, "Use or Disclosure of Confidential Information." this section prohibits you, as a former employee, from using or revealing confidential information you acquired through your City employment. Confidential information, for purposes of this section, means any information that may not be obtained under the Illinois Freedom of Information Act, as amended.

**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.

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Darryl L. DePriest  
Chair