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Re: Issues involving City Councilmembers Serving on Not-For-Profits

Dear Dawn:

You have asked us to analyze whether certain legislation passed by the City of New Rochelle (the "City" or "New Rochelle") that benefitted Sustainable Westchester, a local not-for-profit ("NFP"), is valid when it was voted on and approved by certain City Officials that simultaneously served on the NFP's Board.

BRIEF OVERVIEW OF THE FACTS

The legislation at issue benefitted Sustainable Westchester in various ways. The most significant piece of legislation at issue was passed in 2015. That legislation, now codified in New Rochelle Chapter 131, placed New Rochelle in the Community Choice Aggregation Program whereby City residents essentially receive all their power needs through bids by Sustainable Westchester, with the latter receiving considerable compensation for its services. Chapter 131 specifically identifies Sustainable Westchester as the entity that will procure power on behalf of City residents. This legislation was renewed in 2022. Additional legislation also benefitted Sustainable Westchester in other ways. For example, one piece of legislation directed New Rochelle to pay over \$30,000 in compensation to Sustainable Westchester for the latter to run an energy educational program for City residents.

Mayor Bransom has voted in favor of the legislation involving Sustainable Westchester. At the times he voted to approve the legislation, he was also serving on the Board of Sustainable Westchester. Another City Official voted on certain legislation while also serving on the Board of Sustainable Westchester. It appears that both City Officials have at least disclosed their interest in Sustainable Westchester in standard financial forms. It also appears, however, that neither City official actively announced their interest or recused themselves when legislation affecting and benefiting Sustainable Westchester was considered and put up for a vote.

To the contrary, Mayor Bramson apparently listened to Corporation Counsel Mark Blanchard advise a different voting board member about conflicts of interests when discussing Sustainable Westchester due to a family member that worked in the power service industry. That board member recused herself from the vote on legislation that ultimately benefitted Sustainable Westchester. Mayor Bramson, on the other hand, stated that he thought such recusal was "ridiculous," and stayed on the dais during consideration of the legislation and voted in favor of the legislation. Mayor Bamson has repeatedly stayed on the dais during consideration of the

legislation and voted in favor resolutions that benefitted Sustainable Westchester, most notably in 2015 and 2022.

Issues related to the validity of the legislation have taken on increased scrutiny since Mayor Bramson recently announced that he will be taking on a paid position as Executive Director of Sustainable Westchester. A reporter named Robert Cox submitted a complaint about Sustainable Westchester to the City's Board of Ethics. The Board of Ethics received an opinion from outside counsel stating that the legislation passed involving Sustainable Westchester is invalid because Mayor Bramson had a conflict of interest given his relationship to New Rochelle and Sustainable Westchester. You have asked us to assess whether we agree with the opinion received by the Board of Ethics.

SHORT ANSWER

We generally agree with the conclusion of outside counsel to the Board of Ethics that the legislation passed is invalid due to a conflict of interest. In our opinion, Mayor Bramson should have recused himself during consideration of—and voting on—the legislation involving Sustainable Westchester. Although there are a few arguments that could be advanced to support the validity of legislation, we believe that on balance the legislation would be declared invalid if challenged and/or could be declared invalid now by the City.

DISCUSSION

Legal Framework

This area of the law is generally governed by the New York State General Municipal Law ("GML"), most notably §§ 801-806. While the GML does not prohibit municipal officers from simultaneously serving on corporate boards, GML § 801 does prohibit municipal officers from having a personal interest in a contract with the municipality for which they serve, potentially implicating any contract the City enters with a company at which a City Official simultaneously serves. GML § 802, however, contains numerous exceptions to the prohibition. Potentially relevant here, GML § 802(1)(f) provides that GML § 801's prohibition does *not* apply to contracts with NFPs. Further, GML § 802(2)(b) provides that the prohibition does *not* apply to contracts for the procurement of utilities when rates are fixed or otherwise regulated by the Public Service Commission. Based on these exceptions, there is an argument that the New Rochelle could theoretically enter a contract with Sustainable Westchester or pass legislation benefitting Sustainable Westchester despite City Officials simultaneously serving on the Sustainable Westchester Board.

Here, however, there were potentially serious violations that occurred in passing the legislation at issue. Whenever municipal officers have an interest in a contract or potential contract that comes up for discussion to that board, the municipal officer *must* disclose their interest under GML § 803. Further, although it is not explicitly discussed in the GML, Opinions from the New York State Comptroller make clear that City Officials should recuse themselves from any City

Council discussions involving the NFP or contracts with that entity (or potentially any competitor of the NFP). *See* Opinion of the Office of the State Comptroller of New York, available at 2001 N.Y. Comp. LEXIS 9, at *8. Attached is copy of said Opinion.

Under GML § 804, any contract the City enters in violation of the foregoing provisions is rendered “null, void, and wholly unenforceable.” Further, “court cases ... have negated certain actions which, although not constituting a literal violation of article 18, violate the spirit and intent of the statute, are inconsistent with public policy, or suggest self-interest, partiality or economic impropriety.” *See* Opinion of the Office of the State Comptroller of New York, available at 2001 N.Y. Comp. LEXIS 9, at *8.

Similar to the GML, the City has a Code of Ethics in place, codified in Chapter 94. Code Chapter 94.01 broadly prohibits City Officials from having a direct or indirect interest in transactions entered into by the City. Any violation of Section 94.01 shall, at the option of the City Manager, “render forfeit and void the contract, work, business, sale or transaction affected.” Chapter 94.02(e) of the City Code requires City Officials to publicly disclose on the official record any direct or indirect interest the City Official may have in proposed legislation. Further, Chapter 94.02(m) requires a City Official to recuse himself from “acting on a matter before the city when acting on the matter or failing to act on the matter may financially benefit his or her interest.”

Outside counsel for the Board of Ethics did not discuss it, but Public Officers Law § 74 also appears relevant here. Under the Public Officers Law, Public Officials are prohibited from engaging in conduct that constitutes a conflict of interest in the discharge of their official duties. New York State Ethics Opinions have expanded this to include a prohibition where there is even an appearance of a conflict of interest. Thus, “Public Officers Law §74 addresses not only actual conflicts of interest, but also conduct that gives the impression that a conflict exists. The law is intended to restore the public’s trust and confidence in government through the prevention of favoritism, undue influence, corruption and abuses of official position.” New York State Ethics Commission Advisory Opinion No. 93-16. *See* Opinion attached hereto.

Application

Based on the foregoing, Mayor Bramson or any other interested party may seek to defend the legislation involving Sustainable Westchester on a few technicalities, including the fact that Sustainable Westchester is a NFP, it operates in a space with rates governed by the public service commission, certain of the legislation involving Sustainable Westchester—like the one placing the City into Community Choice Aggregation Program—did not technically involve a “contract,” and Mayor Bramson may not have received direct compensation while serving on the Sustainable Westchester Board. We believe these arguments in defense of the legislation would fail for several reasons.

First and foremost, the exceptions under the GML for contracts involving NFPs or rates set by the Public Service Commission, even if they apply, do not necessarily save the legislation involving Sustainable Westchester. The GML has been expanded to negate certain legislative

actions that are not technical violations but are inconsistent with public policy, or suggest self-interest, partiality or economic impropriety. Moreover, the exceptions found in the GML are *not* found in the City Code of Ethics or the Public Officers Law.

Judicial expansion of the GML would also likely undercut any argument that certain of the actions involving Sustainable Westchester do not involve technical contracts. And here, again, the City Code of Ethics is not as limited as the GML because it applies not just to contracts but to any “contract, work, business, sale or transaction.”

Any argument regarding Mayor Bramson’s compensation may come down to details regarding whether he was paid for his service on the Sustainable Westchester Board. We do not have access to his financial disclosures so that issue should be investigated. Regardless, Mayor Bramson recently announced that he will be leaving to serve as the Executive Director of Sustainable Westchester which is almost certainly a well-paid position. Since he has recently voted on legislation that benefits Sustainable Westchester, the timing of his votes in relation to his decision to leave to work there for potentially significant compensation raises serious issues about his impartiality when he refused to recuse himself and voted in favor.

In addition, Mayor Bramson heard Corporation Counsel advise City Council about recusal from voting on Sustainable Westchester matters, and Mayor Bramson referred to such advice as “ridiculous.” That would provide an additional—and potential damning—fact in favor of anyone seeking to invalidate the legislation involving Sustainable Westchester. Based on all of the foregoing, we believe the legislation involving Sustainable Westchester may be deemed “null, void and wholly unenforceable.”

Please let me know if you have any questions about the foregoing. I am happy to discuss these or any other issues you may have.

Sincerely,

HARRIS BEACH PLLC



Darius P. Chafizadeh

Attachments

cc: Kathleen Gill (City Manager)