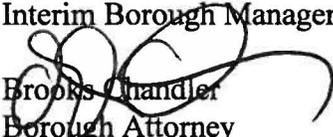


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MEMORANDUM

TO: Brad Ryan
Interim Borough Manager

FROM: 
Brooks Chandler
Borough Attorney

RE: Contracting and Land Use Matters Involving Company Owned by Brother of
Manager

DATE: May 30, 2017

You asked us to review and comment on issues involving contracts between the Borough and any business entity owned by the brother of new Borough manager Debra Schnabel and land use permits for development of property owned by Ms. Schnabel's brother. Based on our review of the Borough code we have concluded as follows:

1. Ms. Schnabel's brother is prohibited from contracting with the Borough
2. The exception for competitively bid contracts will not apply because competitively bid contracts are awarded by the Assembly and the Assembly employs the manager. HBC 2.06.060(B).
3. No provision of Borough code prohibits Ms. Schnabel from involvement in land use permit matters involving her brother or any entity owned by her brother.
4. HBC 18.30.030 provides authority for the Borough manager to delegate any Title 18 duties "as appropriate".

Based on these conclusions we recommend as follows:

1. Ms. Schnabel should complete a separate financial interest disclosure form specific to all companies in which her brother has an ownership interest which identifies any financial interest she has in those companies or any income she has received from those companies in the past year even if it is less than \$5,000.

2. If the Assembly does not feel disqualification of the manager's brother from

contracting with the Borough for non-competitively solicited contracts is appropriate, HBC 2.06.060(A) or HBC 2.990 or both should be amended.

3. If the Assembly does not feel disqualification of the manager's brother from contracting with the Borough for competitively bid contracts is appropriate HBC 2.06.060(B) or HBC 2.990 or both should be amended.

4. If the Assembly believes a blanket prohibition on manager involvement in Title 18 matters involving members of the manager's family is an appropriate public policy, Chapter 2.06 should be amended to add such a prohibition.

5. Regardless of whether code is amended, the manager should delegate Title 18 duties on matters involving property in which her brother has an ownership interest. This delegation should be reflected in a written policy.

The reasons for these conclusions and recommendations are set forth in greater detail below.

FACTS

On June 1, 2017 Debra Schnabel will become Borough manager. Her brother Roger Schnabel is in the construction business and owns real estate inside the Borough¹.

LAW

A. Borough Code.

1. Ethics Code.

The ethics code (HBC 2.06) regulates conduct of a "public officer", which includes specifically identified elected officials and the Borough manager. The general goals of the ethics ordinance are identified in HBC 2.06.010 which indicates "high moral and ethical standards among public officers of the Borough are essential to the conduct of free government" and that "each public officer holds office as a public trust, and any effort to benefit a substantial personal interest or a substantial financial interest through official action is a violation of that trust". The

¹ A search of the Department of Corporations database identifies Mr. Schnabel as a "member" or "manager" of multiple limited liability corporations, as a "shareholder", "officer" or "director" of multiple corporations and as the owner of five differently named construction businesses. We have not reviewed which of these entities is an ongoing active business.

ethics code also indicates it is not a violation of the code of ethics if “as to a specific matter, a public officer’s. . . [a]ction or influence would have an insignificant or conjectural effect on the matter” and recognizes that “[s]tandards of ethical conduct for public officers need to distinguish between those inconsequential conflicts which are unavoidable in a free society, and those which are substantial and material”. HBC 2.06.020(B)(2), 2.06.020(A)(3).

HBC 2.06.030 prohibits a public officer from taking or withholding “official action in order to affect a matter in which the public officer has a personal or financial interest”. The phrase “personal interest” is not defined. Financial interest is defined as “any interest, . . . , held by an officer or an immediate family member, including involvement or ownership of an interest in a business, property, or a professional or private relationship, from which the person has received or expects to receive compensation”².

HBC 2.06.035(A) requires the Borough manager to “file a financial disclosure statement listing each source of income over \$5,000, including business interests, real property interests, and interests in trusts exceeding \$5,000, natural resources leases, government contracts and leases, and loans, loan guarantees, and debts over \$5,000”. The form must be filed within 30 days of the manager taking office and must be updated by March 15th each year. HBC 2.06.035(B).

2. Prohibitions on Contracting with the Borough.

HBC 2.06.060(A) states:

A. A public officer³, or an immediate family member⁴, may not attempt to acquire, receive, apply for, be a party to, or have a personal or financial interest in a borough grant, contract, lease, or loan if the public officer or any person supervised by the public officer may take or withhold official action that affects the award, execution, or administration of the borough grant, contract, lease, or loan.

(Emphasis supplied).

² HBC 2.06.990.

³ The manager is identified as a borough officer by HBC 2.04.020(B).

⁴ The manager’s brother is an immediate family member as defined by HBC 2.99.010.

This prohibition does not apply to competitively bid contracts unless the manager “is employed by the agency awarding the . . . contract. HBC 2.06.060(B). “Agency” is defined to include the Borough assembly⁵. The Borough manager is employed by the Assembly.⁶ Borough contracts entered into in violation of any of the prohibitions or disclosure requirements of the ethics code are voidable⁷.

HBC 2.62.030(A) prohibits any Borough employee “who has a substantial interest, direct or indirect, in any contract” with either the Borough or “a contractor supplying the Borough” from participating as a Borough employee “in the making or performance” of the contract⁸.

3. Procurement Code.

HBC 3.60.020 requires the Borough manager to designate a Borough employee as borough purchasing agent. HBC 3.60.060 requires construction contracts to be awarded by “competitive sealed bid . . . to the lowest qualified bidder”. All contracts for more than \$25,000 must be awarded by competitive sealed bid. HBC 3.60.080(A). Competitively bid contracts are awarded by the Assembly. HBC 3.60.150. When awarding contracts the Assembly may consider the “character, integrity, reputation, judgment, experience and efficiency of the bidder”. HBC 3.60.160(A)(3).

HBC 3.60.080(A) authorizes the Borough manager to purchase “[s]upplies, materials, equipment, or contractual services not to exceed \$25,000”. At least three written bids must be received for purchases of more than \$5,000. HBC 3.60.080(B).

4. Title 18.

HBC 18.30.030 authorizes the Borough manager “to carry out all of the duties set forth in this title”. Those duties include the following:

⁵ HBC 2.990.010.

⁶ HBC 2.20.010(“The manager is appointed by the Borough assembly.”).

⁷ HBC 2.06.100(A).

⁸ There is an exception if the total payable under all contracts in which the employee has an interest does not exceed \$500 in any fiscal year. HBC 2.62.030(B)(4).

- a. Conditional Use Permits⁹
 1. Pre-application meeting with developer.
 2. Determine if application complete.
 3. Schedule hearing and give public notice of hearing.
 4. Submit written report to planning commission with recommendations.

- b. Subdivision/Platting¹⁰
 1. Authority to waive surveying requirement for lot consolidation.
 2. Authority to approve short plat procedure for plats that contain vacation or dedication.
 3. Require construction improvement guarantees.
 4. Approve short plats.
 5. Approve changes to approved preliminary plat unless changes are “substantial”.

- c. Land Use Permits¹¹
 1. Determine if permit application complete.
 2. Approve or deny permit application.
 3. Review any change of use within existing structure.
 4. Approve or deny temporary use permit applications.

- d. Enforcement¹²
 1. Issue “cease and desist” enforcement order.
 2. Issue abatement order.
 3. Begin civil enforcement lawsuit.

- e. Coastal Zone Management¹³
 1. Conduct consistency review.
 2. Make recommendations to planning commission.

⁹ HBC 18.50.

¹⁰ HBC 18.100.

¹¹ HBC 18.40.

¹² HBC 18.30.080.

¹³ HBC 18.110. As previously advised the applicability of this chapter has been limited but not completely eliminated by expiration of the state coastal zone management program.

HBC 18.30.030 authorizes the manager to delegate any of the above duties “as appropriate”. There is no provision in Title 18 requiring the manager to refrain from involvement in permit applications submitted by a member of the manager’s immediate family.

ANALYSIS

1. Borough Contracting.

In our opinion, the only plausible interpretation of the ethics code prohibits the manager’s brother from contracting with the Borough. The contracting prohibitions of HBC 2.06.060(A) explicitly apply to “an immediate family member” of the Borough manager who is unquestionably a “public officer” of the Borough. Submitting a bid for Borough work is an “attempt to acquire” a Borough contract. The Borough manager supervises all Borough department heads including the director of public facilities¹⁴. The director of public facilities “shall administer all borough activities” related to “all borough capital projects”¹⁵. This means a person supervised by the Borough manager “may take or withhold official action that affects the award, execution or administration” of non-competitively bid Borough contracts.

The Borough manager is employed by the Assembly. The Assembly awards all competitively bid capital project contracts. Since the manager is employed by “the agency awarding the contract” the competitive bid exception of HBC 2.06.060(B) does not apply.

This interpretation is consistent with the stated purpose of the ethics code to establish “high moral and ethical standards” even when distinguishing between “inconsequential” and “unavoidable” conflicts. Public works contracts can involve large amounts of public funds which cannot be considered “inconsequential”. This type of conflict can be avoided if there is more than one qualified bidder proposing to do work for the Borough.

The logic behind this analysis is easy to understand. Suppose the manager’s brother is under contract to the Borough and questions arise as to the quality of the work. Will the public facilities director be as insistent on obtaining the expected quality of performance knowing that his or her employment can be terminated at any time by the Borough manager? Maybe yes and maybe no, but the ethics code is currently written to avoid placing the facilities director in that situation. That was the policy choice made by the Assembly that adopted the ethics code.

If a decision is to be made on whether a company owned by the manager’s brother should

¹⁴ HBC 2.58.010 (public facilities director appointed by the manager).

¹⁵ HBC 2.58.030.

be allowed to contract with the Borough it should be made by the Borough Assembly through modification of the ethics code not by the Borough attorney's strained conclusion that any such conflict is "inconsequential" or "unavoidable in a free society".

2. Title 18.

There is no corresponding code prohibition on manager involvement in permitting and land use enforcement actions. Whether there should be is a policy matter for the Assembly to consider. In the absence of any explicit prohibition there is nothing illegal about the manager making recommendations on permit applications for development of property owned by a family member or making decisions on code enforcement issues involving family members.

Nevertheless, we believe it would be consistent with high standards of ethics and improve public perception of the permitting and land use enforcement process if the manager delegated all duties related to permit approval of applications submitted on behalf of immediate family members. Similarly, we believe the manager should delegate all duties related to land use enforcement issues involving immediate family members. Such delegation is allowed by 18.30.030. We believe it would be preferable for the manager to develop a written policy in advance rather than make decisions on a case by case basis.

RECOMMENDATIONS

We believe the first step in consideration of the policy issues discussed in this memorandum is for the manager to make "full disclosure" of any financial interest direct or indirect she has, if any, with property or businesses in which her brother has an ownership interest. We believe using the existing financial disclosure form but eliminating the \$5,000 threshold for disclosure is a practical way to make this public. This disclosure would provide some of the baseline information the Assembly would want to consider when deciding whether to amend the ethics code.

If the Assembly does not believe it is in the best interest of the Borough to prohibit the Borough from contracting with a company owned by the manager's brother. HBC 2.62.060 or HBC 2.990 or both should be amended. One possible amendment is to change the definition of "immediate family member" to include only spouses, children and parents but not siblings.

Another possible amendment would allow immediate family members to contract with the Borough when the contract is "competitively solicited". HBC 2.62.060(B) could be amended to read as follows:

B. The prohibition in subsection (A) of this section does not apply

to a Borough grant, contract, or lease which is competitively solicited.

Another possible amendment would allow immediate family members to contract with the Borough in all situations including where contracts are not competitively bid. This could be accomplished by deleting the phrase “immediate family member” from HBC 2.62.060(A) and from the definition of “financial interest” in HBC 2.990.

When considering these code changes the Assembly should not just focus on the current situation but on similar situations that could arise in the future. The current limitations on Borough contracting in the ethics code may not be practical for a community the size of the Borough. Alternatively, the current limitations could be considered essential to overall public confidence in the Borough’s contract award process. This is a decision for the Assembly.

Whether a code change to add land use permitting matters to the ethics code is needed is also a decision for the Assembly. As indicated above, there is a way to address the situation without a code change. That solution does rest with the policy on delegation adopted by the manager. A code change has a more “permanent” aspect than an individual manager policy. If a code change was desired adding a new section to the ethics code specific to land use permitting and enforcement is recommended.

If you have any additional questions on these topics, please let me know.