



MEMORANDUM

TO: Karen Krieger, Director
Dana Hernandez, Program Manager
Art Design Board Members

FROM: Margaret Plane, City Attorney *MP*
Megan DePaulis, Senior City Attorney *MJP*

RE: Conflict of Interest: Art Design Board Member and Seven Canyons Fountain Project

DATE: October 12, 2017

Alex Huggins is a member of the City's Art Design Board ("Board"). In September 2017, we were asked to provide an opinion regarding whether a conflict of interest would arise between Mr. Huggins' role on the Board and his former personal relationship with Stephen Goldsmith, ("Artist"), who is presumed to have designed the Seven Canyons Fountain in Liberty Park ("Fountain") as a subcontractor of the architecture firm hired by the City, Boyd A. Blackner, AIA, and Associates P.C. ("Architect"), if the Board were to discuss or decide any actions that might impact the Fountain.

BACKGROUND

The Art Design Board

Under City Code 2.30, the Board makes recommendations to the Mayor regarding the City's appropriations for capital expenditures in certain "construction projects designated be set aside for the acquisition of works of art and ornamentation to be used in and around public facilities." The Board's stated purpose is, among other things, to "provide assessment of the artistic needs of future individual city construction projects; [and] [t]o be responsible for recommending the nature and type of acquisition and placement of works of art and ornamentation to be used in and around the construction projects and to implement the decisions of the mayor with respect thereto." City Code 2.30.020.

As a member of the Board, Mr. Huggins will have to decide whether to vote for or against recommendations to the Mayor regarding capital expenditures for certain projects, which may include restoration or alteration of the Fountain.

The Seven Canyons Fountain

In 1992, the City hired the Architect to design and install the Fountain, pursuant to an agreement, as amended (the "Agreement"), attached as Exhibit A. Though the Artist is listed as part of the "Project Personnel" in Exhibit B of the Agreement, his role in the design of the Fountain is not specified, nor his relationship to the Architect described. Presumably, the Architect subcontracted with the Artist to provide design services for the Foundation. Under the Agreement, "[a]ll tracings, plans, specifications, estimates and miscellaneous items purported to contribute to the completermenss of the Project shall be delivered to and become the sole and exclusive property of the City." Agreement, Article VIII.A, Exhibit A. Therefore, neither the Architect nor the Artist has any ownership interest in or control of the Fountain.

The Fountain was designed and installed in Liberty Park sometime in 1993 or 1994, where it continued to operate until approximately 2016. Over that time, the Fountain became a popular park attraction, with many young children climbing over the large rocks, and wading through the water. So many small children began wading in the water that the City decided to chlorinate the water to prevent the spread of disease. Over the years, the City continued to repair and replace the mechanical systems for the Fountain, but the systems deteriorated over time due to natural processes. In the spring of 2017, the City decided not to turn the water back onto the Fountain for health and safety reasons, and began evaluating how to repair or replace the Fountain. The City contacted the Artist to see if he would like to consult on any repairs or alterations, but the Artist's proposed fees of \$300/hr ended the negotiation.

Mr. Huggins' Relationship with the Artist

Mr. Huggins does not possess any ownership interest in the Architect or the Artist, nor is he an officer, director, trustee, partner, or employee or hold any position of management in the Architect or the Artist. It has been alleged that Mr. Huggins may have a conflict of interest because of his former personal relationship with the Artist. However, since it was amended in 2011, the City's conflict of interest ordinance, City Code 2.44, no longer addresses "personal interests."

ANALYSIS

Members of City boards are "volunteer public servants" subject to the City's conflict of interest rules. City Code 2.07.080; 2.44.020. Under the City's conflict of interest ordinance, if the performance a volunteer public servant constitutes "any governmental action on any matter involving the . . . volunteer public servant's financial or professional interest and it is reasonably foreseeable that the decision will have an individualized material effect on such interest, distinguishable from its effect on the public generally, the . . . volunteer public servant shall publicly disclose such matter....[and] . . . [a] volunteer public servant who has a financial interest shall disqualify himself or herself from participating in any deliberation as well as from voting on

such matter.” City Code 2.44.030. Furthermore, a volunteer public servant who “has only a professional interest need not disqualify himself or herself.” *Id.*

“Governmental action” is defined in Section 2.44.020 as “official action on behalf of the city,” including “[a]ny legislative, administrative, appointive or discretionary action of any . . . volunteer public servant.” We believe that “governmental action” occurs when members of the Board participate in discussions about or vote on recommendations to the Mayor regarding public art projects.

Section 2.44.030 requires recusal if: (1) the volunteer public servant’s action would involve his or her financial or professional interest; and (2) it is reasonably foreseeable that the decision will have an individualized material effect on such interest, distinguishable from its effect on the public generally. Recusal is required in such circumstances only for a financial interest.

Section 2.44.020 defines “financial interest” to include holding “a position in a business entity as an officer, director, trustee, partner, or employee or hold any position of management” in a business entity. “Business entity” is defined to include an “organization or entity used in carrying on a business.”

Mr. Huggins does not hold a position as an officer, director, trustee, partner, or employee or hold any position of management in the Architect or Artist and has no ownership interest in them either. Accordingly, Mr. Huggins has no financial interest in the Architect or the Artist. Therefore, Mr. Huggins has no disclosure or recusal obligation in this case based on a financial interest.

Section 2.44.020 defines “professional interest” to include: “Any interest which: ...[r]esults in a direct or immediate professional benefit or detriment to a public servant; or [c]reates a fiduciary duty with respect to a professional interest and is distinguishable from the professional benefit or detriment to the public generally or the public servant’s profession, occupation, or association generally.”

Mr. Huggins is in no different situation than the other members of the Board because Mr. Huggins had no professional role in the creation of the Fountain and will have no professional role in any changes to the Fountain. Accordingly, Mr. Huggins has no professional interest in this matter. Therefore, Mr. Huggins has no disclosure or recusal obligation.

Based on the facts presented, this office is of the opinion that, under City Code Chapter 2.44 and with respect to the Artist and the Architect, Mr. Huggins does not have a conflict of interest regarding any governmental action he might take as a member of the Board related to the Fountain.