The Board of Ethics adopted the following Memorandum as its Advisory Opinion in the matter. The Board's opinion is based on the facts set out in the Memorandum. As with all Board opinions, the Board's opinion in this case is confidential in accordance with the provisions of the City's Campaign Financing and Governmental Ethics Ordinances.

Reliance: The opinion in the following Memorandum may be relied upon by any person involved in the specific transaction or activity with respect to which it is rendered.

MEMORANDUM

To: Board of Ethics

From: Board Staff

Date: [Date], 2011

Re: Case No. 11007.CF

Facts. On [Date], 2011, a third party sent the Board documentation showing that:(i) at a public meeting on [Date], 2009, the City's [X Board] recommended that the [Company] be designated as the developer for a project to redevelop [a Facility], and authorized the City's Department of [Y] to negotiate, execute and deliver an agreement [a "K"] on behalf of the City to and with the [Company]; (ii) the [Company] had been in email communication with City personnel, at least on [Communication Date], 2010, about the introduction of an ordinance to City Council[1] to begin this K process in the very near future; (iii) the [Company] made a $X,000 campaign contribution to the campaign committee of a candidate for [elected City office]), on [Date 1], 2010; and (iv) the K was then introduced to City Council on [Date 2, the very next day following Date 1], 2010.[2]

If the Company was "seeking to do business with the City" on [Date 1], 2010, the date it made its contribution, this contribution would violate § 2-164-040(a) of the City's Campaign Financing Ordinance.

1. The third party explained that, because the Facility project is within a tax incremental finance district ("TIF"), the City and Company must proceed under the authority of the Illinois Tax Increment Allocation Redevelopment Act, 65 ILCS 5/11-74.4-1 *et seq*.("Act") to negotiate and, if successful, to execute a K to implement the Facility project. In these matters, the City acts through ordinances passed by the City Council.

2. The Ordinance [introduced on Date 2] recites that the City Council adopted an ordinance for the certain redevelopment plan and project for the [Facility] Area [in 2006], and then amended it in ordinances adopted [in], 2007 and [later in] 2007. The latter Ordinance designated the Area as a redevelopment Facility project, and approved the use of tax increment allocation financing. According to the third party, at the [Date 2 City Council meeting], the matter was referred to the City's [Z] Committee, which, on [Date 3], 2010, approved the matter, referring it back to City Council. On [Date 4], 2010, a City Council substitute ordinance was approved, authorizing the City to negotiate the K with the Company as [Facility] Developer.

Jurisdiction. Under §§ 2-164-070(a) and (b), and Board Rules 7-1 and 7-2, the Board has the power and duty to initiate and receive complaints alleging that contributors subject to the Ordinance's contribution limitations have violated them and to exercise appropriate discretion in determining whether to investigate and act upon any particular complaint or conduct; further, Rule 7-2 provides that, if the Board or its legal staff have a reasonable basis to believe that a contributor has exceeded the limitations, the Board shall send written notification to the contributor of this, and afford to the contributor the opportunity to refute the Board's belief. The Board shall also send a copy of this written notification to the Candidate.

In the normal course of business, Board staff would have reviewed the relevant public records in this matter and come to this conclusion sometime in the next 24 months. However, as the matter has been brought to our attention [at this time], and Board staff has concluded that there is a reasonable basis to believe that Company has violated the Ordinance's limitations, Board staff recommends that the matter be handled now, "out of turn," so to speak. *See* Case No. 03010.12.1-4.CF, in which the Board handled a matter involving excess contributions identically, "out of turn," when brought to our attention.

Issues. The issues are: i) whether the Company was, on [Date 1], "seeking to do business with the City," and thus whether there is a reasonable basis to believe that its [Date 1] contribution violated the limitations in the City's Campaign Financing Ordinance; and ii) if so, whether the Board should commence a campaign financing investigation to determine whether there was a violation, and if it so determines, effect appropriate corrective action.

Staff has reviewed Board precedent and interpretations of the relevant Ordinance provisions. We recommend that the Board determine that there is a reasonable basis to believe that the Company exceeded the contribution limitations in §2-164-040(a) because it made a $X,000 contribution to the Committee on [Date 1], 2010, and was "seeking to do business with the City" at that time, and that the Board, pursuant to Rules 7-1 and 7-2, direct staff to notify the contributor and the Committee of this determination, and afford the contributor the opportunity to refute the Board's belief, as per standard practice in campaign financing enforcement matters.

Law. Under §2-164-040(a) of the Campaign Financing Ordinance, a person violates the Ordinance's contribution limitations if it makes one or more campaign contributions to any single candidate for elected City office that total more than $1,500 during a single reporting year (July 1-June 30), and if, at the time of the contribution [that exceeds $1,500], the contributor is either:

> i) doing business with the City[3] (or has done business with the City within the preceding four reporting years); or

3. "Doing business," defined in § 2-164-010(f), means "any one or any combination of sales, purchases, leases or contracts to, from or with the City or any City agency in an amount in excess of $10,000 in any 12 consecutive months."

ii) a registered lobbyist with the Board of Ethics; or

iii) "seeking to do business" with the City.

In this case, i) and ii) above are not at issue. But if, on [Date 1], 2010, the date of its contribution, Company was "seeking to do business with the City," then its contribution exceeds the limitations and thereby violates the Ordinance. As in all such campaign financing enforcement actions involving excess contributions, the remedy would then be corrective action: the Company would need to receive a refund from the Committee of the excess amount, here $X,000.

The term "seeking do business" is defined in two places. First, § 2-164-040(a) states:

For purposes of this subsection only "seeking to do business" means (i) the definition set forth in Section 2-156-010(x); and (ii) any matter that was pending before the City Council or any City Council committee in the 6 months prior to the contribution if the matter involved the award of loan funds, grant funds or bond proceeds, bond inducement ordinances, leases, land sales, zoning matters, the creation of tax increment financing districts, concession agreements or the establishment of a Class 6(b) Cook County property tax classification.

Second, § 2-156-010(x) states:

> Seeking to do business means" (1) *taking any action within the past six months* to obtain a contract or business from the City when, if such action were successful, it would result in the person's doing business with the City; and (2) the contract or business sought has not been awarded to any person. (emphasis supplied; note that this same definition is repeated in § 2-164-010(k))

Prior Board Interpretation. At a series of meetings in 2006, the Board formally interpreted the definition in § 2-164-040(a)(ii), cited above. It addressed these two questions: 1) do contributions made on a date that is *more than 6 months before* the introduction of a matter to City Council, but still in the same reporting year, count toward the $1,500 limitation for that reporting year? and 2) do contributions made *after* the matter is introduced to City Council, but still in the same reporting year, count toward this $1,500 limitation? After a series of Board meetings discussing all the ramifications and possible interpretations, the Board ultimately answered each question in the negative. After reviewing an actual case and several hypothetical scenarios, the Board concluded that a person ***would*** occupy the status of one "seeking to do business" ***only*** if its matter was before City Council within ***6 months prior*** to its contribution– but would ***not*** occupy that status if its contribution was made on a date before that six month period (say, seven months before the matter was introduced to City Council, but still in the same reporting year)–and also would ***not*** occupy the status of a person seeking to do business if its matter was first introduced to City Council ***after*** its contribution, but still within the same

reporting year as its contribution.[4]

Analysis

A. Section 2-156-040(a)(ii). In this case, the K was introduced to City Council on [Date 2]–its contribution was made on [Date 1], the day prior. Under the Board's 2006 interpretation of the term "seeking to do business" as defined in § 2-164-040(a)(ii), Company was *not* seeking to do business with the City on [Date 1], the date of its contribution, because there was no matter pending before City Council or any Council committee that day–one day *before* its matter was introduced and became "pending" before City Council. Staff realizes that this interpretation might seem wooden and literal, but it was in fact this very issue that was lengthily debated by the Board for several months, and one of the reasons the interpretation required several months.

B. Section 2 -156-010(x)/2-164-040(i). Resolution of the issue therefore hinges upon whether the Company was "seeking to do business" as that term is defined in § 2-164-010(k)(i)/§ 2-156-010(x) on [Date 1]: (i) did it "take any action" (ii) within the "past six months," when, (iii) if that action had been "successful, it would have resulted in [the Company] doing business with the City?" We can safely assume that the K would have been for more than $10,000. Staff concludes that the answer is yes to all three questions.

1. Take Any Action. Company's Managing Director for [AA] sent an email on [Communication Date], 2010 [16 days prior to Date 1] to the Managing Deputy Commissioner and an Assistant Commissioner in the Department of [Y] (with cc's to an attorney in the Law Department and an outside attorney), stating that he is

4. The $1,500 limitation would apply *only* to contributions made while the contributor actually occupies the status of one "seeking to do business" and the contributor could make unlimited contributions during the balance of the Reporting Year (unless it were seeking to do business under § 2-164-040(a)(i)). Here is the hypothetical that the Board considered:

Example 1

July 1 — REPORTING YEAR — June 30

Oct 1: Matter referred to Council
Nov 1: Matter disposed by Council
Mar 1: $2000 Contribution

Example 2

July 1 — REPORTING YEAR — June 30

July 1: $1500
Aug 1: $2000
Sept 1: $2000
Oct 1: Matter to Council
Nov 1: Matter disposed of by Council
Feb 1: $1500
June 1: $3000

Example 1 shows a violation but Example 2 does not, because at the time of the $1500 contribution on February 1 (in Example 2), the contributor has no matter pending before City Council. Though this interpretation would allow unlimited contributions during the balance of the reporting year, it is most consistent with a "plain language reading" of the Ordinance. By contrast, the person in Example 1 was occupying the status of one "seeking to do business" on the date of its March 1 contribution, as the matter was before City Council within *6 months prior* to March 1.

> "again very disappointed with the constant delays on getting this [Facility project] finalized ... We are now going on three and a half years since [a sitting City elected Official] promised his support ... What can be done to have this introduced in the [next] City Council meeting and avoid further delays?"

This email, a communication with two City employees responsible for preparing and introducing the K to City Council, on its face, constitutes "taking action."

But was it "within the past six months?" And, if this action had been "successful," would it have resulted in the Company doing business with the City? If the answers to these questions are yes, then this contribution was made in violation of the Ordinance.

2. Within the Past Six Months. This email clearly was sent ***within*** the 6 month period ***prior*** to [Date 1], the date of Company's contribution. Is this what the statute means when it uses the phrase "within the past six months?" We believe that is ***exactly*** what it means. This is an ordinance that limits political contributions. Thus, it can be referring only to the six month period prior to the date of the contribution–here, from [Date 1 less 6 months]-[Date 1], 2010. This is consistent with the Board's December 2006 interpretation of "seeking to do business," when there is a matter "pending...6 months prior to the contribution." And, when this definition of seeking to do business is read as part of Section 2-164-040(a) (which incorporates it), it mirrors the structure of the ***other*** half of § 2-164-040(a), namely, having a matter pending before the City Council in the 6 months prior to the contribution. ***This*** part of the definition covers matters that are not before City Council, but are in, or still in, the executive branch. The two halves of the definition are thus in harmony: one side covers actions leading to contracts or other business that can be valued precisely and monetarily, and might or might not be introduced to City Council; the other half covers certain types of City Council actions, some of which, like zoning matters or TIF designations, do not directly result in contracts with precise monetary values.

3. If Successful, Would It Result in Doing Business? As set forth in footnote 1, above, the passage of an Ordinance by City Council that authorizes the City to negotiate and execute the K is a necessary step in the process. If the K is executed, the Company will have obtained a contract with the City, and would then actually be doing business with it. Although City Council introduction and passage are necessary, but not by themselves sufficient, to result in the Company doing business with the City (there are other, interim steps that of course would need to occur, and other contingencies that would need to be met, such as negotiations not breaking down, etc.), we believe that introducing the Ordinance to City Council is the ***precise*** step that the Company needed to take in order to press forward with the K. Thus, its [Communication Date] communication with two senior employees in the Department of [Y] (who are responsible for shepherding the matter through City Council), in which it urged the City to move forward with the City Council introduction, constitutes, for purposes of interpreting this section of the Ordinance, an action as to the City that had as its purpose the urging the City to move forward

toward closing this contract.

Considering the totality of the circumstances present here, including: i) the stage in the process when the communication is made or the action is taken; ii) the substantive or forward-looking nature and intent behind the communication or action; and iii) the desire of the person making it to press forward through the legislative or contracting process, we believe that this is ***exactly*** the type of action contemplated by the Ordinance which, if "successful," would lead to a City contract and to the person "doing business with the City," and is ***exactly*** the type of action that, if taken, would cause the person taking it to thereby be "seeking to do business with the City" as defined in §2-164-040(a)(i). A contrary, more literal reading of this provision would mean that only the very last step taken in the contracting process (that which inexorably leads to a person doing business with the City)–here, inking the K at the closing–would put the person in the status that triggers the campaign contribution limitations. Such a reading would gut the meaning of this contribution limitation statute, because at that point in the business process–at the closing, that is–the preliminary, substantive but necessary steps leading up to the contract's execution, including convincing the City to award a contract, negotiating its price, term, specifications, scope, *etc*., would have ***already*** been taken. But it is during those same preliminary steps that campaign contributions can potentially have the most far-reaching, influential results over City decisions. So it is during those preliminary steps that campaign contribution limitations have their greatest impact, which is to limit the influence that money can have in both the elective and City decision-making processes. Once the parties are ready to ink a contract, the decisions most subject to prohibited influence have already been made.

C. Section 2-164-020. In the course of analyzing this fact situation, staff considered the possibility that the Company's contribution might have been made in violation of § 2-164-020(a)(ii), which provides:

> No person shall give or offer to give to any candidate ... and none of them shall accept ... (ii) anything of value, including but not limit to a gift, favor, or promise of future of employment, based on an understanding, either implicit or explicit, that the candidate's votes, official actions, decisions or judgments as an elected official of the City government would be influenced thereby.

Under this section, which is analogous to §2-156-040(b) [of the Governmental Ethics Ordinance], there must be an explicit or implicit understanding between the contributor and candidate that the contribution would influence the candidate's decisions, once he or she is elected. What we have here is an email from the Company to several City officials responsible for shepherding the Company's K matter through City Council. The email seems intended to urge these officials to move the matter forward, and among the techniques the writer employs is to inform these City officials that it has an upcoming meeting with a Candidate (scheduled before the date of the next City Council meeting) and asks, seemingly rhetorically, whether it should raise the matter with that Candidate. There is no mention of a political contribution and no implication that the Candidate–who at this time is not an elected official or in any position to

act officially–can or will expedite the matter or bring any pressure to bear on these City officials. On these facts, staff has recommended to the Executive Director, pursuant to Rule 4-3, that there does not exist reasonable cause to commence an investigation into this situation as a possible violation of § 2-164-020(a)(ii), and that he dismiss the matter for this reason. The Executive Director concurs, and the entire staff also recommends that the Board, pursuant to §§ 2-164-070(a) and (b), approve staff's recommendation, and exercise its discretion not to investigate this conduct for a possible violation of § 2-164-020(a)(ii).

Recommendations. Board staff recommends that the Board, pursuant to its authority under §2-164-070(a) and (b) and Rules 7-1 and 7-2: i) determine that the Board and staff have a reasonable basis to believe that the Company exceeded the contribution limitations in §2-164-040(a) by making a $X,000 contribution to the Committee on [Date 1], 2010, on which date it was "seeking to do business with the City" under § 2-164-040(a)(i); ii) direct staff to notify the Company and the Committee of this determination, and afford the Company the opportunity to refute the Board's belief, as per standard practice in campaign financing enforcement matters ; iii) approve staff's recommendation that reasonable cause does not exist to investigate and exercise its discretion not to investigate this conduct for a possible violation of § 2-164-020(a)(ii); and iv) direct staff to adapt this Memorandum as the Board's formal advisory opinion in this matter.