

NOTICE OF POTENTIAL VIOLATION 2013-4

On May 16, 2013, a resident of the Glen Alps Service Area (GASA) filed a Notice of Potential Violation, alleging:

Two members of the Glen Alps Road Service Board work for the contractor that maintains the road. Of these two, Mr. Luchsinger is in fact the owner of contracted company. This is a clear conflict of interest ...

(NOPV 2013-4) The Board of Ethics (Board) determined that if the facts as alleged were true, an ethical violation may have occurred. The Board notified the Respondent, Mr. Luchsinger, of the Notice and the procedures that would be followed under the applicable code provisions, e.g. AMC 1.15.070.

The Board interviewed the Complainant and Mr. Luchsinger, another GASA Board member referenced in the NOPV, and Maurice Robinson, the Municipal Public Works Administration Manager. The Board reviewed the on-line minutes of the GASA Board of Supervisors and the Contract documents provided by Purchasing.

GLEN ALPS SERVICE AREA

Although the GASA is not labeled as a road service area, its current primary function is to provide for road maintenance and improvements from funds generated from the service area.¹ As the Municipality's website makes clear, road service areas boards are very important.

There are twenty-one individual services areas serving the hillside. Each service area has a locally elected Board of Supervisors (Board). All road maintenance work is carried out by private contractors, through competitive bids, for each service area. Each service area maintains a separate fund for use exclusively for that service area. Funds not used in any calendar year are carried over to that service area fund balance for future road maintenance and repairs.

Each Board determines the scope of work and directs the contractor doing the road work. The work consists of summer grading, road repair work, pothole repairs, drainage ditch clearing, dust control,

¹ AMC 27.30.190 Glen Alps Service Area.

snow removal, and ice control.²

The role and importance of the Board of the Glen Alps Service Area is the same as that described for road service area boards. And, similarly, while the Municipality awards contracts, the GASA Board of Supervisors plays an important role in developing the scope of the work, the parameters of the contract requirements; and has a certain amount of discretionary decisions regarding its budget—for instance in the use the “fund balance” referenced above. In other words, the decisions and recommendations of the GASA Board of Supervisors can have a significant and material effect on the road maintenance contractor.

INVESTIGATION

The road maintenance contractor for the GASA is Alaska Pollution Control, Inc. (APC). The current majority owner of APC is Ms. Cecilia M. Hidalgo, the wife of Mr. Luchsinger. Ownership interests in APC have changed over time, but Ms. Hidalgo has consistently been listed as the majority shareholder and President.³ Mr. Luchsinger may or may not have divested himself of any interest at this time, but historically he has acknowledged an 8% interest.⁴ Mr. Luchsinger and Ms. Hidalgo reside in the same household and have lived together throughout the time of the contract between the MOA and APC (“Contract”).

The current Contract was executed in September, 2011, for one year with four one year option periods, in an amount not to exceed \$300,000 per year.⁵ Ms. Hidalgo signed the Contract in her capacity as the President of APC.⁶ A summary of funding for this Contract is attached as Exhibit C, which of note also includes an additional \$60,000 fund balance transfer, requested by the GASA Board and ultimately payable to APC. Mr. Luchsinger was elected to the GASA Board of Supervisors in April, 2011.

² ([http://www.muni.org/Department/works/operations/streets/Service/Pages/LRSA\(LimitedRoadServiceArea\).aspx](http://www.muni.org/Department/works/operations/streets/Service/Pages/LRSA(LimitedRoadServiceArea).aspx))

³ See Exhibit A, current State Corporation website showing Mr. Luchsinger as 8% owner.

⁴ See Exhibit B, 2011 and 2013 Biennial Reports listing Mr. Luchsinger as an 8% owner

⁵ See Exhibit D – 2011 Contract and P.O.s

⁶ See Exhibit E – Execution Pages for 2011 and 2012 Contract, Amendment.

FINDINGS AND DISCUSSION

A. Official Action on Matters in Which Member Holds A Substantial Financial Interest.

The GASA Board of Supervisors is an elected body.⁷ As such, its members have a duty to disclose and avoid official action on matters in which a member has a substantial financial or private interest. AMC 1.15.035D. A financial interest includes the receipt of a pecuniary benefit by any member of the person's household. AMC 1.15.110I.1. Mr. Luchsinger's changing ownership interest does not eliminate the fact that he and his wife were members of the same household during the Contract term and option periods. The GASA Board's entire function is to identify the required road maintenance and capital projects which directly affect the road maintenance contractor. Under the guidelines enunciated in AMC 1.15.035D, the Board finds:

1. The selection of road maintenance and capital projects was a substantial matter under consideration by the GASA Board;
2. Mr. Luchsinger's financial interest varied directly and substantially with the outcome of the Board's official action; and
3. The outcome of the Board's official action has significant monetary effects for Mr. Luchsinger and his household.

Mr. Luchsinger does not dispute the material facts underlying the Ethics Boards findings. He acknowledges that his wife holds a majority ownership interest in APC, that he and his wife are, and have been, household members throughout the relevant time period, and that he as an GASA Board member made decisions affecting the scope of work and selection of capital projects. Mr. Luchsinger disputes the impact his decision might have on other GASA board members, arguing they could choose to override his vote. The Ethic Board finds this argument unpersuasive. Therefore, the Ethics Board finds by substantial evidence that Mr. Luchsinger participated in official actions as a GASA Board member concerning matters in which he held a substantial financial interest – namely the road maintenance Contract with APC.

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⁷ AMC 27.20.220 Glen Alps Service Area Board of Supervisors.

B. Failure to Disclose

The Ethics Board also finds that Mr. Luchsinger did not disclose his interest to the GASA Board for the purpose of the Board determining whether there was conflict of interest. The Code at AMC 1.15.035C requires disclosure:

Disclosure to the elected body. Prior to comment, deliberation or decision on a matter coming before the elected body, an elected official shall disclose any financial or private interest of the member in the matter, including a financial or private interest held by a member of the elected official's household.

AMC 1.15.035K also requires:

Financial disclosure during term of elected office. An elected official shall supplement the APOC disclosure within thirty (30) days of assuming office, and as required under 1.15.035 during elected office, to fully disclose any economic interest in a contract with the municipality, or in an organization or enterprise engaging in business with the municipality, held by the elected official or a member of the elected official's household.

Perhaps the most telling documentation of the clear conflict of interest is the GASA Board of Supervisor Meeting Minutes from January 19, 2012. In the Roll Call of those Minutes, Mr. Luchsinger is listed as *both* a GASA Board member and representative of the contractor (APC). Clearly the fact that this would fail even the coarsest "sniff test" was not lost on Mr. Luchsinger. At his request, the Board voted at its next meeting (April 19, 2012) to revise the January 19 minutes to identify him as a liaison of the contractor, not its representative. At the time of both meetings, Mr. Luchsinger was a co-owner of APC.

While the minutes cited above make clear that the GASA Board knew of the conflict, Mr. Luchsinger could not recall any point in which he formally disclosed his potential conflict to the GASA Board or asked the GASA Board to consider whether his conflict of interest precluded him from participating in deliberations and decisions regarding matters affecting APC. A review of meeting minutes also does not suggest any such discussion.

Mr. Luchsinger's response to these requirements was that no one asked him to fill out any other forms. Mr. Luchsinger relied on what he considered general knowledge of his relationship to APC regardless of resulting conflicts.

The Board finds there is substantial evidence to support a finding by the preponderance of the evidence that Mr. Luchsinger failed to disclose his financial

interest in APC according to Code requirements. In fact, he is still in violation of disclosure requirements including AMC 1.15.035K, which requires disclosure of his economic interests and potential conflicts to the Municipality. This disclosure is important because it should outline how potential conflicts will be managed.

RESOLUTION AND SETTLEMENT

The Ethics Board has the authority to formulate a proposed resolution and settlement if the Respondent admits to the violation. AMC 1.15.070H. This effort was unsuccessful – although undisputed facts supported the Board’s findings, the Respondent would not admit to a violation and rejected remedial measures suggested by the Ethics Board. He did offer to divorce his wife but the Board did not find Respondent’s proposal to be an adequate remedy for the circumstances. The Respondent further threatened economic retaliation (withdrawing all contracts APC has with the majority of road service areas) if this matter proceeds further.

RECOMMENDATIONS

The Ethics Board’s authority to recommend action and sanctions is set forth at AMC 1.15.100 – Sanctions, referrals and corrective actions.

1.15.100 Sanctions, referrals and corrective action.

A. Based on its findings, the board shall make recommendations for implementation by the governing entity. Sanctions, referrals and corrective actions that may be recommended by the board for imposition by the governing entity based on findings of the board under this chapter include, but are not limited to, the following:

...

2. The municipality or the school board may, with the advice of counsel:

a. Rescind a contract adopted in violation of this chapter.

...

7. Removal from office initiated by the assembly or the ethics board for an assembly member is subject to the separate de novo process and additional requirements set out in AMC 2.70.030. Removal from office initiated by the school board or the ethics board for a member of the school board is subject to the separate de novo process and additional requirements set out in AMC 29.10.060. ~~[Note: removal from GASA is not removal from assembly or school board and thus, does not require a separate de novo hearing]~~

...

9. Nothing in this chapter shall preclude the municipality or the school

board from maintaining an action for an accounting of any pecuniary benefit received by any person in violation of this chapter or other law, or to recover damages for violation of this chapter.

1. Luchsinger

- (1) Given Mr. Luchsinger's substantial financial interest in APC, Mr. Luchsinger should not participate in any deliberations or decisions by the GASA Board on matters that could affect APC. Because APC matters make up the vast majority of the GASA Board's work, it is not clear how he could function as a GASA Board member at this point. Moreover, due to the obviousness of the conflict of interest, the lack of disclosure, the finessing of his role as "liaison," and the healthy dose of evasiveness during his interviews with the Board, the Board believes Mr. Luchsinger should be removed from the GASA Board. Pending such removal, Mr. Luchingser should be prohibited from taking any official action, deliberation, or discussion regarding APC or scope of work for the GASA as a Board member. Mr. Luchingser's presence should not count toward meeting the quorum requirement for any matters addressing APC and the road maintenance contract.
- (2) Because of the role of Mr. Luchsinger as a GASA Board member directly influencing all aspects of the MOA contract with APC, including an additional fund balance transfer payable to APC, the Ethics Board concludes that the circumstances surrounding the GASA contract with APC are ethically tainted beyond the point of public trust. The Board of Ethics therefore recommends that the Assembly terminate the Contract between APC and MOA for the Glen Alps Service Area.
- (3) It is recommended that any other Contract terminated by Mr. Luchsinger in response to this NOV be audited by Internal Audit upon termination and that a legal determination be sought whether APC would be in breach for wrongful termination.

2. Procedural Recommendations.

The Board has learned much from this case resulting in recommendations outside of this case. The staffer for the GASA Board did bring questions concerning this matter to the Municipal Ethics Officer, who subsequently was also contacted by the Ombudsman. Initial steps at a review of this matter were undertaken and a complainant came forward to file a NOV with the Ethics Board. When the complainant was asked to testify, he withdrew his NOV. Thereafter, but many months later, the current complainant came forward.

As a result, this case led to the Ethics Board's current recommendation to incorporate code changes that will provide both the Municipal Attorney and Ombudsman authority to file complaints with the Board of Ethics. In addition, the Administration has instituted a training and review process to ensure that staffers for boards and commissions collect and enforce annual disclosure statements so that the Municipal Clerk can submit the statements to this Ethics Board for review. Within 60 days of the first board meeting in the calendar year, the staffer will forward a statement of compliance to the Clerk's office.

Finally, the Administration has commenced training of an attorney in the Administrative Hearing Office to supplement the Dept. of Law in ethics matters. The Dept. of Law may receive up to a dozen ethics inquiries per month, including at times queries from key administration personnel. The Dept. of Law and the Administrative Hearing Office must be kept separate for legal purposes. A second attorney from a department other than the Dept. of Law not only provides additional resources but facilitates review of the Dept. of Law's advice to administration personnel without the need to hire outside counsel to advise the Board of Ethics.