

COMMONWEALTH OF MASSACHUSETTS  
HOUSING APPEALS COMMITTEE

STANDING ORDER NO. 05-02

AVOIDANCE OF APPEARANCE OF IMPROPER INFLUENCE

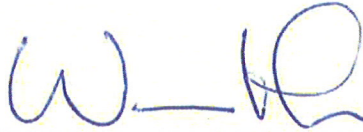
Applicable to all Matters before the Committee on May 9, 2005 and thereafter.

Effective May 9, 2005, it is hereby ORDERED that:

The presiding officer in any matter pending before the Committee, whether a member of the Committee or a hearing officer appointed pursuant to 760 CMR 56.06(7)(e)(2), shall, in addition to observing normal standards of ethical conduct, be alert for situations in which an officer or employee of Stockard & Engler & Brigham, LLC has been retained as an expert witness or consultant to a party or has a financial interest in the matter. In any such case, the presiding officer shall inquire and determine whether that firm or anyone related to it has a financial interest in the outcome of the matter. The results of that inquiry shall be reported to the full Committee before the Committee takes any formal action with regard to the matter. In addition, the presiding officer will inform the parties of Committee member James G. Stockard, Jr.'s past affiliation with that firm, and, if requested, he or she will provide the parties with copies of the State Ethics Commission opinion letter of March 2, 2005 and of Mr. Stockard's letter of April 28, 2005 to his appointing authority.

Adopted: May 9, 2005  
Effective: May 9, 2005.

Housing Appeals Committee

A handwritten signature in blue ink, appearing to read 'W. Lohe', written over a horizontal line.

Werner Lohe  
Chairman



Commonwealth of Massachusetts  
**STATE ETHICS COMMISSION**

John W. McCormack Office Building - One Ashburton Place - Room 619  
Boston, Massachusetts 02108-1501

reed  
3/7/05

March 2, 2005

**CONFIDENTIAL**

Werner Lohe, Chairman  
Housing Appeals Committee  
Department of Housing & Community Development  
100 Cambridge Street, 3<sup>rd</sup> Floor  
Boston, MA 02114

Dear Mr. Lohe:

I am writing in response to your request for advice under the conflict of interest law, G.L. c. 268A, on behalf of James G. Stockard, Jr., with his permission.<sup>1/</sup> You have inquired about Mr. Stockard's service on the Housing Appeals Committee (Committee).

**Question**

If appointed to the Committee, what are the restrictions on Mr. Stockard's conduct under the conflict of interest law in light of his past professional associations?

**Answer**

If he serves on the Committee, Mr. Stockard must comply with the written disclosure requirements of § 23(b)(3) of G.L. c. 268B, the conflict of interest law, as discussed below. In addition, the Committee may adopt stricter standards of conduct for Mr. Stockard pursuant to § 23(e), also discussed below.

**Facts**

This opinion is based on my understanding of the facts from your letter of December 16, 2004 with enclosure<sup>2/</sup> and our telephone conversation on January 25, 2005.

Mr. Stockard is being considered by the Director of the Department of Housing and Community Development for appointment as an unpaid member of the Committee. The Committee, established pursuant to G.L. c. 23B, § 5A, conducts formal adjudicatory hearings pursuant to G.L. c. 40B, §§ 20-23 and 760 CMR 30.00 and 31.01. Those hearings, in which the opposing parties are typically municipal zoning boards of appeals

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<sup>1/</sup> I am also writing to confirm the telephone advice that I gave you on January 25, 2005.

<sup>2/</sup> Curriculum Vitae for James G. Stockard.



Werner Lohe  
March 2, 2005  
Page 2

and developers, concern the issuance of comprehensive permits to permit waiver of certain local restrictions in order to facilitate the construction of affordable housing.

Throughout his career, Mr. Stockard has been prominent in the field of affordable housing. From 1970 until 1997, he was a principal in Stockard & Engler & Brigham, LLC (Firm). The Firm provides a wide variety of consulting services related to housing and municipal planning. In the past and continuing to this day, the Firm has provided services to developers proposing to build affordable housing under the Comprehensive Permit Law. It also has the largest volume of such work of any similar consulting firm in the state. As a result, Robert Engler and other employees of the Firm testify relatively frequently before the Committee.

In 1997, Mr. Stockard ended his formal professional affiliation with the Firm, but retained a financial interest therein. He later ended any financial interest in the Firm as well and has not had a financial interest therein since 2000. In recent years, he occasionally used the Firm's letterhead for personal consulting services though in fact that use was not related to any financial interest. He has since discontinued that practice. Mr. Stockard maintains a close personal relationship with Mr. Engler with whom he worked for over twenty-five years.

You and Mr. Stockard believe that if appointed to the Committee, his past professional associations, principally his past affiliation with the Firm, are such that they might cause a reasonable person to conclude that someone could improperly influence him or unduly enjoy his favor. For this reason, prior to his appointment, Mr. Stockard will disclose in writing to his appointing authority the facts described above. In addition, both Mr. Stockard and the Committee will scrutinize every case involving any officer or employee of the Firm carefully to avoid any appearance of undue influence. The Committee will implement a policy to ensure as much transparency as possible with regard to this issue.

Specifically, in cases in which any officer or employee of the Firm has been retained as an expert witness or consultant to a party, the Committee's presiding officer will inquire and determine whether the Firm or anyone related to it has a financial interest in the outcome of the matter. Though you do not believe that it would be required by law in light of the written disclosure, Mr. Stockard will nevertheless abstain from acting in any such case. In the more likely situations in which the Firm has no direct financial interest in the outcome of the matter, that is, in which they have only professional relationships as paid consultants or expert witnesses, Mr. Stockard will not normally

abstain, but the parties will be informed of his past affiliation. Even if those cases, however, Mr. Stockard and the Committee will review the circumstances carefully and if there are unusual circumstances that heighten the possible appearance of a conflict, he will abstain.

### **Discussion**

Based on the information provided as described above,<sup>3/</sup> I can give you the following advice.<sup>4/</sup>

If appointed to the Committee, Mr. Stockard will become a state employee<sup>5/</sup> for purposes of the conflict of interest law, G.L. c. 268A. In addition, because he will be unpaid, Mr. Stockard will be deemed to be a *special* state employee.<sup>6/</sup> Your inquiry on his behalf raises questions under § 23 of the conflict of interest law.<sup>7/</sup>

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<sup>3/</sup> In providing this opinion, we have relied upon the facts as you have stated them and have not made any independent investigation of those facts. Pursuant to G.L. c. 268B, § 3(g), an opinion rendered by the Commission "shall be binding on the commission in any subsequent proceedings concerning the person who requested the opinion *and who acted in good faith, unless material facts were omitted or misstated by the person in the request for an opinion.*" (*emphasis added*).

<sup>4/</sup> This opinion is intended to provide solely prospective advice under the conflict of interest law, not to address the propriety of conduct that has already occurred, nor the applicability or effect of any other body of law or regulation regarding such conduct.

<sup>5/</sup> State employee is defined as "a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council." G.L. c. 268A, § 1(q).

<sup>6/</sup> Special state employee is defined as "a state employee: (1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, or (2) who is not an elected official and (a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or (b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he

### Section 23

Section 23 contains standards of conduct applicable to all state, county and municipal employees. Section 23(b)(2) provides in relevant part that a state employee may not use his official position to secure unwarranted privileges or exemptions of substantial value<sup>8/</sup> for himself or others. Under § 23(b)(2), the Commission has consistently prohibited state employees from using their titles, public time and public resources to promote a private interest.<sup>9/</sup> Section 23(b)(2) will prohibit Mr. Stockard from using his Committee position to obtain special benefits for himself or the Firm.

Section 23(b)(3) prohibits a state employee from engaging in conduct which gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank or position of any person.<sup>10/</sup> For example, issues may arise under this section if a matter in which the Firm is involved comes before him as a Committee member. His former professional affiliation with the Firm as well as his personal friendships with people at the Firm create an impression of a conflict of interest or bias in his official actions.<sup>11/</sup> To

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earns compensation.” G.L. c. 268A, § 1(o).

<sup>7/</sup> You have also asked for guidance as to whether the Firm should change its name even though Mr. Stockard has no control over the Firm’s decision. On balance, you believe that is preferable ethically for the name to remain as it is. Many people and businesses active in affordable housing in the Commonwealth know of Mr. Stockard’s past relationship with the Firm regardless of its name. You state that it is the past relationship with the Firm, not the name itself that may create an appearance of impropriety. The Firm’s name only minimally heightens that appearance and, in actuality, you believe that it results in a countervailing ethical advantage. That is, for newcomers to the field to whom Mr. Stockard is not well know, retaining that name means that his past relationship will be continuously disclosed publicly rather than hidden, thus giving people an opportunity to probe into any concerns they may have. Please note that the Commission offers no opinion on this issue which is outside the scope of its jurisdiction.

<sup>8/</sup> Substantial value is defined as \$50 or more. *Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000).

<sup>9/</sup> See, e.g., *EC-COI-92-28; 92-12*.

<sup>10/</sup> *EC-COI-92-40; 91-3; 89-19; 89-16*.

<sup>11/</sup> *Id.*

dispel the appearance of a conflict, § 23(b)(3) requires that, prior to participating, Mr. Stockard file a full written disclosure with his appointing authority.<sup>12/</sup> This disclosure is a public record. He should also make a public statement of the same facts for inclusion in the transcript of any adjudicatory proceeding in which he is participating for which he has made a written disclosure.

If Mr. Stockard chooses to participate in a matter which affects the Firm or in which it is involved, he should take care under § 23 to base any such decisions on the merits, using objective standards and following all requisite procedures. If he is unable to judge the matter impartially, then he should abstain.

Section 23(c) prohibits a current or former state employee from accepting other employment or engaging in any business or professional activity which will require him to disclose confidential information that he has gained by reason of his official position or authority, and from improperly disclosing such confidential materials<sup>13/</sup> or using such information to further his private interests.<sup>14/</sup> As such, Mr. Stockard may not use or disclose any confidential information he learns while a Committee member to benefit himself or the Firm.

Finally, § 23(e) provides that state agencies may establish and enforce additional standards of conduct for its employees. For example, under § 23(b)(3), Mr. Stockard may participate in a matter involving the Firm, assuming that he can be fair and impartial, if he first files a full written disclosure of all the relevant facts with his appointing authority. The agency, however, may establish a policy that would prohibit Mr. Stockard from participating in such matters.

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<sup>12/</sup> A § 23(b)(3) form is available from the Downloadable Forms section of the Commission's website at [www.mass.gov/ethics](http://www.mass.gov/ethics). See *Advisory No. 95-01- Avoiding Appearances of Conflicts of Interest* (available from Educational Materials section of website).

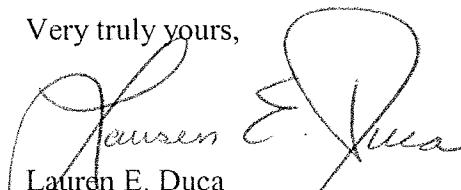
<sup>13/</sup> These materials are defined as “material or data within the exemptions to the definition of public records as defined by [G.L. c. 4, § 7].” G.L. c. 268A, § 23(c)(2).

<sup>14/</sup> See *EC-COI-83-154; 84-9*.

**Conclusion**

I hope that this advice is helpful.<sup>15/</sup> You may obtain other reference materials on the Commission's website. Both this letter and your letter requesting advice are confidential by statute. The Commission may not disclose your identity or Mr. Stockard's identity or any other identifying information without Mr. Stockard's prior consent. You and Mr. Stockard are, however, free to disclose this advice to anyone you wish, but if you or Mr. Stockard publicly disclose that you have requested or received advice from the Commission, the Commission could make the full text of this letter public without Mr. Stockard's consent.<sup>16/</sup> Mr. Stockard, or you on his behalf, are entitled to a formal opinion of the Commission if you feel that one is necessary or desirable. If you have any additional questions or need any further assistance, please do not hesitate to call.

Very truly yours,



Lauren E. Duca  
Staff Counsel, Legal Division

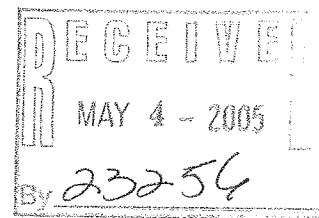
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<sup>15/</sup> I note from Mr. Stockard's Curriculum Vitae that he appears to be involved in a number of municipal activities, including his service as a Commissioner of the Housing Authority in Cambridge which makes him a special municipal employee for purposes of the conflict of interest law. Please note that holding both a state and municipal position at the same time raises a number of additional issues under the conflict of interest law. As such, Mr. Stockard should seek further advice from the Commission's Legal Division to address issues concerning his state and municipal positions.

<sup>16/</sup> G.L. c. 268B, § 3(g); 930 CMR 3.01(8).

**James G. Stockard, Jr.  
141 Oxford Street  
Cambridge, MA 02140**

April 28, 2005



Jane Gumble, Director  
Department of Housing and Community Development  
100 Cambridge Street  
Boston, MA 02114

Dear Director Gumble:

You have informed me that you are considering appointing me, pursuant to G.L. c. 23B, § 5A, to the five-member Housing Appeals Committee. The Committee adjudicates cases under the state's Comprehensive Permit Law, G.L. c. 40B, § 20-23. I understand the under G.L. c. 268A, § 1 I will be an unpaid, special state employee. Though I anticipate no actual conflicts of interest if I were to become a member of the Committee, my professional associations in the affordable housing community are such that they might cause a reasonable person to conclude that someone could "improperly influence [me] or unduly enjoy [my] favor." See G.L. c. 268A, § 23(b)(3). I am therefore disclosing the nature of my affordable housing associations, and I attach my *curriculum vitae* so that you will be aware of all my affiliations.

The most relevant of my past affiliations is that from 1970 until 1997, I was a principal in Stockard & Engler & Brigham, LLC. The firm provides a wide variety of consulting services related to housing and municipal planning. Among those services, both historically and in the present, the firm not only provides services to developers proposing to build affordable housing under the Comprehensive Permit Law, but it also has the largest volume of such work of any similar consulting firm in the state. As a result, Robert Engler and other employees of the firm testify relatively frequently before the Housing Appeals Committee. In 1997, I ended my formal professional affiliation with the firm, but I retained a financial interest. I later ended any financial interest in the firm as well, and I have none now and have had none since 2000. In recent years, I have occasionally used Stockard & Engler & Brigham, LLC letterhead stationary for personal consulting activities, though in fact that use was not related to any financial interest; I have now discontinued that practice. Finally, having worked with Bob Engler for over twenty-five years, I maintain a close personal relationship with him.

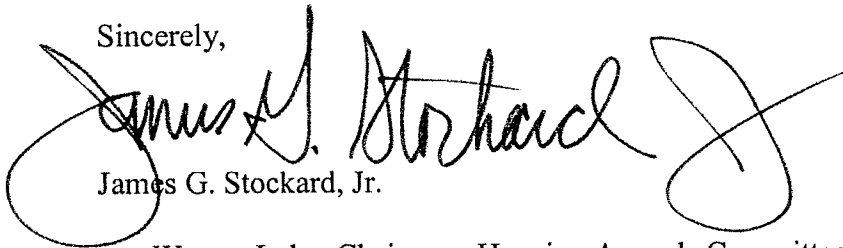
If appointed to the Housing Appeals Committee, regardless of having made this disclosure, I will scrutinize every case involving any officer or employee of Stockard, Engler, & Brigham, LLC carefully to avoid any appearance of undue influence. I have been assured that the Housing Appeals Committee will implement a policy to ensure as much transparency with regard to this issue as possible. Specifically, in cases in which



Jane Gumble, Director  
April 28, 2005  
Page Two

any officer or employee of Stockard, Engler, & Brigham, LLC has been retained as an expert witness or consultant to a party, the Committee's presiding officer will inquire and determine whether that firm or anyone related to it has a financial interest in the outcome of the matter. Though I do not believe that it would be required by law in light of this written disclosure, I will nevertheless abstain from acting in any such case. In the more likely situation in which such people have no direct financial interest in the outcome of the matter, that is, in which they have only professional relationships as a paid consultants or expert witnesses, I will not normally abstain, but the parties will be informed of my past affiliation. Even in those cases, however, I will review the circumstances carefully, and if there are unusual circumstances that heighten the possible appearance of conflict, I will abstain.

Sincerely,

A handwritten signature in black ink, appearing to read "James G. Stockard, Jr.", with a large, stylized flourish at the end.

James G. Stockard, Jr.

cc: Werner Lohe, Chairman, Housing Appeals Committee

LPletlst