

DELAWARE CITY BOARD OF ETHICS

IN RE: BETTY BARRETT, :
NATALIE GREEN, and : **Case No. 2016-001**
PAUL D. FITZWATER, III, in their official :
Capacities. :

DECISION OF THE DELAWARE CITY BOARD OF ETHICS

I. NATURE OF THE PROCEEDINGS

The matter before the Delaware City Board of Ethics (“Board”) is a complaint filed by Megan Titus (“Councilwoman Titus”) in which she alleges her fellow City Council Members Betty Barrett, Natalie Green, and Paul D. Fitzwater, III (“Respondents”) violated various provisions of Article IV, Ethics for Officials and Employees, of the Delaware City Code (“Code of Conduct”). The Code of Conduct violations allegedly occurred in conjunction with the City Council’s vote on August 15, 2016 to lease an undeveloped portion of Jefferson Street to PSC Properties, LLC (“PSC”). Councilwoman Titus filed a complaint with the Board on September 13, 2016 (“Original Complaint”), and she subsequently filed an amended complaint on September 22, 2016 (“Amended Complaint”). Respondents, through their counsel Max Walton and Lauren DeLuca, filed Respondents’ Motion to Dismiss Amended Ethics Complaint on September 30, 2016 (“Respondents’ Motion to Dismiss”).

At a hearing held on October 5, 2016, the Board granted Respondents’ Motion to Dismiss by a vote of 2 to 1. On October 13, 2016, Councilwoman Titus filed a letter with the Board to further clarify her allegations against Respondents. This submission is being treated as a second amended complaint (“Second Amended Complaint”).

The Board held a hearing on November 16, 2016 (“November Hearing”) to consider the merits of the Second Amended Complaint. Chairman Tim Konkus and Board Members Tim Dilliplane and Ray Fruytier were present, along with Barrett Edwards, Esq. representing the Board. Max Walton, Esq. and Lauren DeLuca, Esq. appeared on behalf of Respondents. Councilwoman Titus represented herself at the November Hearing.

II. STATEMENT OF FACTS

1. Background Information

Councilwoman Titus’ complaints involve an undeveloped portion of a street known as Jefferson Street (“Jefferson Street Property”). After several rounds of negotiations, the City Council for Delaware City approved leasing the Jefferson Street Property to PSC at a council meeting held August 15, 2016.¹ Prior to the lease’s approval, Councilwoman Titus submitted a competing lease for the City Council’s consideration.² As a result of the City Council’s vote to

¹ See Respondents’ Delaware City Ethics Hearing Exhibits, Exhibit 10.
² See Second Amended Complaint, Exhibit A, sub-exhibit 11 (unmarked).

approve the lease, Councilwoman Titus filed a series of successive complaints against the Respondents, culminating with the filing of the Second Amended Complaint.

2. Lease Negotiations

The Jefferson Street Property lease (“Lease”) has been periodically considered by Delaware City for several years. Most recently, Councilwoman Barrett brought the Lease forward for Council consideration at the June 20, 2016 council meeting. She testified that prior to the June 20 meeting, Preston Cardon gave her a copy of the Lease at the gas station where she worked. Without discussing the Lease details with Mr. Cardon, Councilwoman Barrett agreed to present the Lease to the City Council for consideration, which occurred at the June 20 council meeting. The Lease was brought forward at the June meeting, but at the suggestion of the City Solicitor Max Walton, the discussion was tabled until the following meeting. Councilmembers Barrett, Green, and Fitzwater all testified that at no time prior to the June meeting or after this meeting did they discuss the terms of the Lease amongst themselves. Councilmembers Barrett and Green testified that they never met with Preston Cardon to negotiate the Lease. Councilman Fitzwater testified to discussing the Lease with a handful of people outside of council meetings, including Mr. Cardon.

The propriety of obtaining public bids to lease the Jefferson Street Property was debated by Councilwoman Titus and the Respondents. Based upon the evidence presented, the City Code of Delaware City does not require the City to go through a formal request for proposals (“RFP”) process prior to leasing property. It was undisputed at the November Hearing that the City Council never went through the RFP process and no evidence was presented to indicate the City Council offered to lease the Jefferson Street Property to anyone else. Councilwoman Titus alleged in her Second Amended Complaint that failing to use the RFP process violated section 1-27(a) of the Code of Conduct.³ She testified that while not legally required, the use of the RFP process was a general practice followed by the City and failing to do so in this situation was unethical.

Councilwoman Titus alleged the Respondents interfered with the City Manager’s duties to negotiate the Lease and that the Lease negotiations occurred in violation of the Delaware Freedom of Information Act (“FOIA”). In an affidavit of the City Manager submitted by Councilwoman Titus, City Manager Richard Cathcart stated that he was responsible for negotiating leases “as authorized by City Council.”⁴ In an affidavit submitted by Respondents, Mr. Cathcart stated that he had instructed the City Council that he “was not going to take any further action on [the Lease] and that any resolution of the issue would have to be an action of Council.”⁵ No evidence of FOIA violations was presented at the November Hearing.

3. Conflicts of Interest

The relationship between the Respondents, Mr. Cardon, and PSC is central to the allegations at hand. Councilwoman Barrett denied having any personal or financial relationship

³ See Second Amended Complaint, ¶ 5.

⁴ Complainant’s Affidavit of Richard Cathcart, p. 2.

⁵ Respondents’ Affidavit, Richard Cathcart.

with Mr. Cardon or PSC. Councilwoman Green acknowledged receiving money from Mr. Cardon for her campaign and putting campaign signs on his property, but she testified that she was not friends with Mr. Cardon and did not have a family, business, political, or romantic relationship with him. Councilwoman Titus testified that placing a campaign sign on someone's property would not necessarily create a disqualifying conflict of interest between the councilmember and the property owner.

Councilman Fitzwater openly acknowledged having business and social dealings with Mr. Cardon. He worked for Mr. Cardon for a brief period of time in 1999, and he leased a bar from Mr. Cardon from approximately 2001 to 2004. No evidence was presented of any business dealings between Councilman Fitzwater and Mr. Cardon after 2004. Councilman Fitzwater did not receive campaign contributions from Mr. Cardon, but he did place one or more campaign signs on Mr. Cardon's property. Although Mr. Cardon had been a friend of the Fitzwater family for many years, Councilman Fitzwater testified that he did not have a close relationship with Mr. Cardon.

III. STANDARD OF REVIEW AND DISCUSSION

1. Standard of Review

The Code of Conduct requires the Board to find by a preponderance of the evidence that the Code of Conduct has been violated. Section 1-29(E)(4)(n) requires the Board to be satisfied, "by a preponderance of the evidence, that Delaware City's ethical standards have been violated by [the Respondents]." Preponderance of the evidence "has been defined to mean the side on which 'the greater weight of the evidence' is found." *Taylor v. State*, 748 A.2d 914 (Table) (Del. 2000). The findings of the Board are made based on the preponderance of the evidence.

The Board has jurisdiction over violations of the Code of Conduct. Section 1-29(E)(3) of the Code of Conduct expressly states that "[i]t shall be the function of the Board to administer the ethical standards adopted by the Council for public officers and employees." Any allegations made against Respondents that do not implicate a Code of Conduct violation are not within the jurisdiction of the Board.

2. Fair and Equal Treatment – Impartiality

The Code of Conduct requires city officials and employees to act fairly and impartially when dealing with the public. Section 1-27(a) states, "No official or employee shall grant or make available to any person any consideration, treatment, advantage or favor beyond that which it is the general practice to grant or make available to the public at large." Councilwoman Titus alleges this section was violated by failing to go through a formal RFP process. Although the RFP process was not a legal requirement, Councilwoman Titus testified that the general practice of the City was to use the RFP process to lease property. No evidence was submitted to the Board to indicate that the opportunity to lease the Jefferson Street Property had been presented to any other parties.

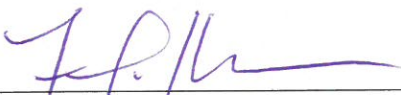
Based on this evidence, the Board finds the Respondents violated section 1-27(a) of the Code of Conduct. The Board finds that because no one else was given an opportunity to submit a proposal to lease the Jefferson Street Property, and because there was a deviation from the City's regular practice of using the RFP process to lease property, Respondents granted to PSC an advantage "beyond that which it [was] the general practice [of the City] to grant or make available to the public at large."⁶ Respondents' failure to question the wisdom of leasing the Jefferson Street Property to PSC without seeking other proposals further evidenced a violation of section 1-27(a). For the foregoing reasons, the Board finds, by a preponderance of the evidence, that Respondents violated section 1-27(a) of the Code of Conduct by leasing the Jefferson Street Property to PSC.

3. Remaining Allegations

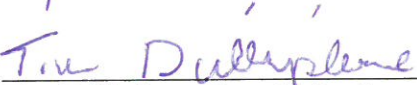
Councilwoman Titus alleged various other ethical violations in the Second Amended Complaint including, *inter alia*, inappropriate encroachment on the duties of the city manager and violations of the Delaware Freedom of Information Act. No motions were made by the Board to find violations of any other claims alleged by Councilwoman Titus.

IV. CONCLUSION

For the reasons outlined herein, the Board has determined by unanimous vote that Respondents violated section 1-27(a) of the Code of Conduct by leasing the Jefferson Street Property to PSC. The Board has not found any other Code of Conduct violations in connection with Respondents' dealings with the Lease. The Board unanimously approved a recommendation to have the Board's written decision and a copy of the Code of Conduct sent to Respondents with a cover letter instructing Respondents to review the Board's written decision and Code of Conduct in order to avoid future Code of Conduct violations.



Tim Konkus, Chairman



Tim Dilliplane, Board Member



Ray Fruytier, Board Member

Date of filing the Delaware City Board of Ethics' written decision with the office of Delaware City and mailing the Decision to the Parties: 12-19-16

⁶ Delaware City Code of Conduct, § 1-27(a).

**EXHIBITS PROVIDED TO THE
DELAWARE CITY BOARD OF ETHICS**

Complainant' Exhibits

Exhibit A – Second Amended Complaint (including exhibits), October 13, 2016.

Exhibit B – Letter from Councilwoman Titus to Board of Ethics (including exhibits), November 9,
2016.

Exhibit C – Affidavit of Richard C. Cathcart, November 14, 2016.

Respondents' Hearing Exhibits

Exhibit A – Delaware City Ethics Hearing Exhibits