



Disclosure of Compensation or Economic Interest when Making Public Statements on Architectural Issues

Summary

The National Ethics Council (“Council” or “NEC”) found no violation of Rule 2.301 of the Institute’s 2007 Code of Ethics and Professional Conduct (“Code of Ethics”) in connection with a Member’s statements about a proposed public project for which the Member had provided his individual services without a fee but for which his firm had provided schematic design services for a fee.

All initials, names, dates, places, and gender references in this decision have been changed.

References

2007 Code of Ethics and Professional Conduct, Canon II, Obligations to the Public

Rule 2.301 Members making public statements on architectural issues shall disclose when they are being compensated for making such statements or when they have an economic interest in the issue.

The Parties

The Complainant, Harold Evans, is a resident of the city that adjoins Brookville.

The Respondent, Barry Ward, AIA, is a principal of the firm Adams Wheeler Architects and is a resident of Brookville.

The Complaint

The Complaint alleges that the Respondent violated Rule 2.301 of the Code in connection with his work on a proposed project at Valleyview Park in Brookville because he “makes public claims that he is working *pro bono* when in fact his firm is being paid.”

During the complaint process, the Complainant also alleged that the Respondent:

- provided free services in anticipation of his firm later receiving a contract, thus enjoying an economic benefit;
- publicly supported the Valleyview Park project without properly disclosing the exact nature of his personal *pro bono* contribution;
- publicly supported the Valleyview Park project while his firm was being paid for design services.

Stipulations of Fact

The Complainant and Respondent could not stipulate to facts prior to the pre-hearing exchange of documents. However, during the hearing, the Complainant entered into the record a one-page document that states, in part, “Barry Ward’s time is indicated as *pro bono*” in his firm’s contract with the City of Brookville. This exhibit indicates three points on which the Complainant agrees.



Respondent's Requests for Dismissal

In his Response and pre-hearing exchange documents, the Respondent requests dismissal of the Complaint based on his denial of a violation; based on Ethical Standard 2.3, which states, in part, "Members should be involved in civic activities as citizens and professionals"; and based on his 18-year history of *pro bono* service to the City of Brookville.

The Hearing Officer concluded that these reasons themselves are inadequate for a dismissal.

The Parties' Witnesses

The Complainant appeared at the hearing in person and testified. The following witnesses also testified at the hearing on behalf of the Complainant:

- Anthony Green, a resident who lives adjacent to Valleyview Park; and
- Margaret Thomas, a resident of Brookville.

The Respondent appeared at the hearing in person and testified. The following witnesses also testified at the hearing on behalf of the Respondent:

- Mary Hanover, a resident of Brookville and a donor and fund-raiser for the Valleyview Park project;
- David Manning, city administrator for the City of Brookville;
- Perry Conrad, a former mayor of the City of Brookville;
- Gerry Gore, vice mayor of the City of Brookville;
- Paul White, mayor of the City of Brookville;

- Mark Penny, P.E., co-founder of Brookville Sports Field Organization ("BSFO"); and
- George Johnson, a board member of BSFO.

Findings of Fact

In 2004, the Respondent and Mark Penny, P.E., created an informal youth sports organization called the Brookville Community Parks Development Group ("BCPDG"). Through BCPDG, various local sports clubs focused on the lack of outdoor play fields in and around Brookville, a city of approximately 10,000 residents. Such space is in high demand and short supply. BCPDG is not a formally organized entity.

At about the same time, the Respondent began work, without compensation, on the conceptual design of a new sports-oriented outdoor play space at Valleyview Park. Valleyview Park is a city park located on Parkslope Boulevard in a largely residential neighborhood of Brookville. Valleyview Park is across the street from an existing park and sports play space known as "Palmer Field." Valleyview Park is largely undeveloped and has been characterized by Brookville's mayor as "underutilized." The design for the development of Valleyview Park that was ultimately produced by the Respondent and his firm, Adams Wheeler Architects ("AWA"), includes a soccer practice field, a larger combination soccer/baseball/softball field, concessions and toilet facilities, and a pedestrian bridge across Parkslope Boulevard connecting to Palmer Field.

The purpose of the conceptual design was to generate interest in the potential project among area youth sports groups, which it did. In 2007, Mr. Ward and Mr. Penny created a 501(c)(3) non-profit organization called Brookville Sports Field Organization ("BSFO"). The formal purpose of BSFO was to "act as the organizational and fund-raising entity" to develop Valleyview Park. Starting with a board of directors composed of only Mr. Ward and Mr. Penny, the



BSFO board has grown to 25 directors and has been actively fund-raising and soliciting support through its website.

The City of Brookville has no shopping center, has no City sales tax, and over the years has come to rely on “private-public partnerships” to assist in the development of City assets such as Palmer Field. Donated services in one form or another have been relied upon by City officials to meet municipal facility needs. Over the past decades, contractors and design professionals of many disciplines have provided donated services; the City has not simply come to expect them, it has been compelled to depend upon them.

The Respondent has personally provided the City of Brookville with donated services spanning 18 years. His firm, AWA, has also donated services to the City. In his testimony at the hearing, he acknowledged that the listing he provided as a hearing exhibit is incomplete, especially related to a Swimming Pool Center for Brookville, which was mentioned by City Administrator David Manning.

Brookville’s elected officials have been actively involved in studying the development of Valleyview Park to use for sports fields. Former Mayor Perry Conrad ran for mayoral office in 2007 with three major goals for the community, one of which was to develop additional outdoor play spaces within the City. The fact that practice fields currently being leased will no longer be available in 2011 created a greater sense of urgency. In 2006, Mr. Conrad, who was vice mayor at that time, had encouraged Mary Hanover, a Brookville resident, to contact the Respondent regarding the Valleyview Park project. In 2005, the Respondent also presented his conceptual design for Valleyview Park to then-City Council member Gerry Gore, who is currently vice mayor, at Ms. Gore’s home.

Because Valleyview Park is City-owned property, its development would be subject to the state’s Environmental Protection Act, which, in

part, requires the preparation and municipal approval of an Environmental Impact Statement (“EIS”). In May 2007, the City contracted with Environmental Engineering, Inc. (“EEI”) to prepare the EIS for the project. The \$50,000 cost was paid for with funds donated by sports clubs affiliated with BCPDG.

At about the same time, the Brookville School District undertook renovations on all three of its elementary schools, work that would require the schools to be shut down for a year. The School District considered Valleyview Park as one of several options for siting temporary classrooms, and the School Board and City Council met jointly on November 1, 2007 to consider the matter. In the event Valleyview Park were to be selected as a temporary school site, certain improvements would be needed which could, if properly designed, provide value to the future potential use of Valleyview Park for outdoor sports play spaces. The City solicited a fee proposal from AWA for architectural and engineering services to prepare the Valleyview Park site for portable classrooms, and AWA prepared a proposal dated November 23, 2007. The City Council considered the AWA proposal at a meeting on December 5, 2007. The School District ultimately chose another location, however, so a contract for those design services was never signed.

During preparation of the EIS for Valleyview Park, EEI requested that the City provide more detailed information about the proposed sports fields project. Some of the additional specificity was required because of comments and concerns raised by members of the community. On February 7, 2008, EEI prepared a detailed memorandum that described the additional design work and other information needed to properly complete the EIS.

The City selected AWA to submit a proposal for the additional design work because Mr. Ward and AWA had put together the concept and were already familiar with the project, the City needed to get the work done quickly, and Mr.



Ward was prepared to provide his own time at no cost to the City. AWA submitted its proposal on March 18, 2008. The proposal describes architectural services to be provided by AWA for a “lump sum fee,” the amount of which was calculated based on the amount of staff time and hourly rates. The Respondent’s individual time is listed, but the resulting amount is excluded from the lump sum fee calculation.

The City Council considered the AWA proposal at a meeting on April 6, 2008. Shortly after, the City entered into a contract with AWA based on the proposal.

In accordance with the contract, AWA engaged several subconsultants and other experts, advanced the design for Valleyview Park to a schematic-level of completion, and, on August 12, 2008, issued two volumes containing a Design Summary and a Technical Summary. The Respondent has submitted as evidence in this case copies of AWA invoices submitted to the City for the project and AWA invoices for work on the project that were not submitted to the City.

Subsequently, EEI completed the EIS, which was in the public comment phase at the time of the hearing in this ethics case. Fund-raising continues for the Valleyview Park project even though it has not yet been formally approved by the City. Gifts in excess of a million dollars have been pledged by private citizens.

The Respondent’s Statements about the Valleyview Park Project

The Complainant alleges that the Respondent made public statements in support of the Valleyview Park project without disclosing compensation or other economic benefit that he had received or might receive as the result of his firm obtaining a design contract for the project. The Complainant also makes the related allegation that the Respondent was not providing *pro bono* services, as he has claimed. Instead, the

Complainant alleges, the Respondent had been providing free services in anticipation of his firm later receiving a design contract, thus enjoying an economic benefit because he is one of the owners of AWA. The Complainant acknowledges that the Respondent’s individual time spent on the project has never been billed to or paid by the City.

The parties and their witnesses have expressed various views on whether the Respondent’s involvement in the Valleyview Park project has been *pro bono*, whether he has had an economic interest in the project, and whether his disclosures have been sufficient.

The Complainant’s witnesses, Anthony Green and Margaret Thomas, who are both local residents, concur with the Complainant’s allegations. The Respondent had sent an e-mail to Gary Jones, the head of a local soccer club, in which the Respondent advocated and solicited support for the project, while stating that he has “been working *pro bono* for several years” on it. The Respondent apparently sent the e-mail in November 2008, but the exact date is not clear. Mr. Green referred to this e-mail as “remarkable” and stated that it “sticks in [his] mind.” Mr. Green testified that when he had heard the Respondent say that his services were “*pro bono*,” he took that to mean “without benefit.” Mr. Green asked: “How can one characterize this as *pro bono* if it is of clear benefit to the firm in which he’s a partner?”

On November 2, 2008, Margaret Thomas sent an e-mail, both to AWA and to BSFO’s website, complaining that Mr. Ward was advocating on behalf of the Valleyview Park project based on the “interests of Brookville’s youth,” while at the same time his firm had been paid for design services for the project. Ms. Thomas characterized this as a “conflict of interest.” Ms. Thomas testified at the hearing that disclosure of the Respondent’s economic interest in the project “should be made explicitly.” She testified that, as a member of the public, she had assumed when the Respondent talked about his *pro bono*



contributions that “not only was he not getting paid but his firm was not getting paid.”

Ms. Thomas proposed that the Respondent could have and should have made the following disclosure:

I’m not directly billing the city or others for the hours I’ve spent designing this project. My colleagues at my firm AWA will be charging their services at their normal commercial rate. As a principal of AWA I will be compensated in some fashion for the revenue I brought to the firm, thus I stand to benefit financially for bringing this project to AWA. My firm and myself stand to benefit reputationally from doing this project for the city, and we will use our participation in the project as a marketing tool when we solicit business from other municipalities. Because the City of Brookville has carved out an exception to the normal process for new projects when private benefactors are financing a city project or providing a majority of the financing, my design was mandated by those private benefactors and was not subjected to a peer review or competitive bidding process. It is my expectation that given the history of the city in awarding no-bid service contracts that any further design work or associated project management activities will be awarded to AWA on a no-bid basis and I will not recuse myself from such contracts should they eventuate.

Ms. Thomas also testified that the Respondent should not only avoid any conflict of interest but also avoid any appearance of a conflict of interest.

The Respondent testified that his advocacy for the Valleyview Park project was never done in anticipation of AWA securing a design commission. His efforts for the project began as early as

2003, several years before the City decided in 2008 to solicit a fee proposal from his firm.

The Respondent’s seven witnesses at the hearing testified that he and his firm had provided *pro bono* services for the Valleyview Park project. All seven of those witnesses had known, prior to the City awarding a contract to AWA in April 2008, that AWA would be paid for design services to provide information for the EIS.

Mary Hanover testified that she and her family had committed to “personally fund the development of all of the necessary studies and work to get the project through EIS certification.” Her intention was to “lead the fund-raising” and to “make sure that we had a real project,” an “EIS and a design that was practical,” and a project endorsed by a “vast majority of the city.” Ms. Hanover testified that the Respondent’s involvement was on a *pro bono* basis and that it was always “crystal clear” that the Respondent was “involved as a concerned parent and member of the community.”

City Administrator David Manning testified that the Respondent’s individual services have been provided free of charge throughout the entire process. He testified that he had recommended to the City Council in early 2008 that AWA be retained to provide the additional design work requested by EEI because Mr. Ward and AWA had created the concept and were already familiar with it, and Mr. Ward would donate his individual time.

Vice Mayor and former City Council member Gerry Gore confirmed that the City had acted in its own interest in selecting AWA for the design work requested by EEI. When asked if the Respondent would have had any knowledge prior to early 2008 of a future contract, Ms. Gore responded, “Absolutely not.”

Mayor Paul White, who is a former vice mayor and former City Council member, testified that the Respondent’s individual services in connection with the Valleyview Park project were “on a



pro bono basis, without exception,” and that the relationship between AWA and the City, including the Respondent’s involvement, was “openly discussed” in City Council meetings that were “open to the public.” He testified that he was aware that some of the services provided by AWA would be paid for under a contract with the City using donated funds and that other services by AWA would be donated.

George Johnson, who is a practicing attorney and a member of the BSFO Executive Committee, testified that he knew at the time of the City Council meetings on the additional work to be done on Valleyview Park that AWA and its staff were going to be paid but that the Respondent would continue to be donating his time “on a *pro bono* basis.” Being in the legal profession, which has its own tradition of *pro bono* services, he noted that he was “acutely aware” and “always amazed” that the Respondent’s firm would allow him to put in the “huge numbers of hours” of *pro bono* work on the project.

Mark Penny, P.E., a mechanical engineer, similarly testified about the *pro bono* services that the Respondent had volunteered. When asked whether the Respondent would have had an expectation of landing a contract down the road, Mr. Penny responded:

Not really. If you land the contract, it’s probably the worst form of marketing that you could possibly imagine doing. Before they even started they would lose money.

Conclusions

Burden of Proof

Under Section 5.13 of the NEC’s Rules of Procedure, the Complainant has the burden of proving the facts upon which a violation may be found. In the event the Complainant’s evidence does not establish a violation, the Complaint is dismissed.

Rule 2.301

Rule 2.301 states:

Members making public statements on architectural issues shall disclose when they are being compensated for making such statements or when they have an economic interest in the issue.

There is no commentary in the Code related to this rule. Rule 2.301 has not been the subject of an NEC Advisory Opinion and has been cited only once in the NEC’s published decisions. (*See NEC Decision 2005-09.*)

Interpreting and applying Rule 2.301 requires determining (a) what “public statements” were made by the Respondent, (b) whether those statements were on “architectural issues,” and (c) whether the Respondent either was “being compensated for making the statements” or had “an economic interest in the issue.” In the event that all of these factors are present, it must be determined whether the Respondent failed to “disclose” that he was being compensated or had an economic interest.

Statements may be considered “public” if they are made to planning commissions, other governmental bodies, or to city officials. (*See NEC Decision 2005-09.*) In this case, the Respondent made various statements—orally and in writing—about the Valleyview Park project to City officials and in City Council meetings that were open to the public and also available for online viewing afterward.

The four current and former City officials who testified at the hearing confirmed the Respondent’s personal *pro bono* contributions. Their testimony established that neither the Respondent nor his firm would have expected to receive a request for proposal or paid commission from the City as a result.

Consequently, the National Ethics Council concludes that the Respondent disclosed to City



officials both the nature of his personal *pro bono* work and any economic interest that he may have derived from his involvement in the Valleyview Park project. Disclosure to those officials of the paid commission awarded to his firm, AWA, occurred by virtue of the fact that it was they who awarded the work. Similarly, the Council concludes that the Respondent made any necessary disclosures to anyone who attended or viewed video of the City Council meetings in which the project was discussed.

Statements about the Valleyview Park project made by the Respondent to individuals connected with BCPDG and BSFO might also be considered “public,” within Rule 2.301, although those are non-governmental organizations. The Complainant did not present any evidence that the Respondent had failed to make sufficient disclosures within BCPDG or BSFO. The testimony of Mr. Johnson and Mr. Penny demonstrates the opposite, that they were fully aware of the Respondent’s involvement and interest in the project. Similarly, the testimony of Ms. Hanover, a major financial donor for the project, shows no lack of understanding on her part regarding the Respondent’s involvement and interest in the project.

The Complainant provided an alleged “public statement” made by the Respondent in the form of an e-mail that he sent, apparently in November 2008, to Gary Jones, the President of the Brookville Soccer Club. In the e-mail, the Respondent, as an officer in BSFO and a principal of AWA, encouraged Mr. Jones to:

1. Visit BSFO’s website to learn more about the proposed project. If you like what you see, please sign our online petition. . . .
2. Send a letter supporting the project to Alan Reynolds, Editor, Brookville Gazette
3. Forward this e-mail to anyone who you think would be interested in this

initiative, and ask them to sign the online petition. . . .

The National Ethics Council concludes that the Complainant did not meet his burden to prove that this e-mail was a statement that violated Rule 2.301. The e-mail was not clearly a “public” statement because the Respondent addressed it to and sent it to only one individual. As of November 2008, the Respondent’s firm had already completed its services for the City in connection with the EIS, so there was no compensation pending to the Respondent or his firm. As of that date, any other economic interest the Respondent might have had based on the future possibility of obtaining paid work on the project was tenuous at best. In addition, the nature of the Respondent’s involvement in the effort to develop Valleyview Park had been publicly disclosed in well-attended meetings of the City Council.

The Complainant was unable to produce more examples of e-mail or other specific statements by the Respondent that might be relevant to the alleged violation of Rule 2.301.

The National Ethics Council concludes that the Complainant failed to meet his burden to prove that Respondent violated Rule 2.301 of the Code. Therefore, the NEC has dismissed the Complaint.

Members of the National Ethics Council

Melinda Pearson, FAIA, Chair
Victoria Beach, AIA
Tricia Dickson, AIA
Clyde Porter, FAIA
Michael L. Prifti, FAIA
Benjamin Vargas, FAIA
Bradford C. Walker, AIA

The Hearing Officer, A.J. Gersich, AIA, did not participate in the decision of this case, as provided in the Rules of Procedure.

March 18, 2011