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New Jersey State Legislature

JOINT COMMITTEE ON ETHICAL STANDARDS

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April 24, 2015

Honorable Jim Whelan
507 Tilton Rd.
Northfield, NJ 08225

Dear Senator:

You have asked whether your receipt of funding related to damage to your home caused by Superstorm Sandy raises ethical concerns.

In the opinion of the Joint Legislative Committee on Ethical Standards (Joint Committee), your receipt of government funds under the circumstances set forth in your letter of March 24th does not violate the New Jersey Conflicts of Interest Law, *N.J.S.A. 52:13D-12 et seq.*, the Legislative Code of Ethics, or Joint Rule 19 of the Joint Rules of the Senate and General Assembly of the State of New Jersey. This advice is limited to the facts as presented in your letter and is based on the assumptions and caveats set forth in this opinion. The Joint Committee has not reviewed any of the documents you or your spouse submitted to State or federal agencies regarding this matter.

I. Facts Submitted

According to the information we received, your home was flooded by Superstorm Sandy, which forced you and your spouse to move out for three months. You received rental assistance from FEMA and money from your insurance carrier to repair your home. You also received a \$10,000 grant, which commits you to remain a resident of your county. You were initially informed that because your home is a twin, you and your neighbor would not be eligible for funding to have both homes raised. You later found out that there was another round of funding available, and you and your neighbor would both be eligible. You and your spouse applied for funding through the Rehabilitation, Reconstruction, Elevation and

Mitigation (RREM) Program administered by the New Jersey Department of Community Affairs (DCA). You and your spouse were deemed eligible for \$150,000, of which you have already received a substantial amount. You advised that your spouse has done all the work regarding this matter, such as filling out forms and meeting with building inspectors. You state that it has been made clear to those who know you are a legislator that you want no extra consideration, favoritism, or special treatment and none has been given. In your letter, you also include a description from the RREM Program's website. The description states that the program is federally-funded but State-administered; its purpose is to fill the gap between the cost of home repairs and other funds the owner has received to repair the structure.

Your letter does not specify the programs under which you received rental assistance and the \$10,000 grant. Our research indicates that it is likely the rental assistance you received was provided through the Individuals and Households Program (IHP), which is administered by FEMA. The \$10,000 grant you received was likely awarded through the Homeowner Resettlement Program. Though funded by a federal block grant from the Department of Housing and Urban Development, the Homeowner Resettlement Program is administered by DCA.¹ Homeowner Resettlement grants may be used for any non-construction purpose that assists the homeowner to remain in the county in which he or she lived at the time of the storm. *Resettlement Program Policy* at 4 (Revised February 2014).

II. Discussion

Your participation in State-administered assistance programs implicates the following provisions of the New Jersey Conflicts of Interest Law, the Legislative Code of Ethics, and Joint Rule 19. However, the IHP rental assistance does not raise State legislative ethics issues because it is administered by FEMA, a federal agency.

a. Contracting with State Agencies

N.J.S.A. 52:13D-19 and section 2:5 of the Legislative Code of Ethics prohibit a legislator, or any other person acting for the legislator's benefit, from executing an agreement with a State agency of \$25 or more in value, unless certain conditions are met and the

¹Our information regarding the RREM and Homeowner Resettlement Programs beyond that which was included in your letter comes from the guidance documents prepared by DCA. The RREM Program is governed by *Recovery Division, Reconstruction, Rehabilitation, Elevation and Mitigation (RREM) Program Policies and Procedures* (Revised July 2014). In the case of the Homeowner Resettlement Program, our information comes from *Resettlement Program Policy* (Revised February 2014). Both documents are available on the website www.renewjerseystronger.org.

legislator obtains the prior approval of the Joint Committee. To participate in the RREM and Homeowner Resettlement Programs, your spouse would have had to execute agreements with DCA, a State agency. This raises the question of whether you should have sought the prior approval of the Joint Committee before your spouse executed an agreement with DCA that was, at least in part, for your benefit. Based on the Joint Committee's prior decisions, you are advised that you do not have to obtain pre-approval under these circumstances.

Since the 1970s, the Joint Committee has held that applying for State agency grants and loans is not within the purview of the conditional ban on legislators contracting with State agencies contained in *N.J.S.A. 52:13D-19* and section 2:5 of the Legislative Code of Ethics. The Joint Committee has consistently advised that members of the Legislature may apply for and receive loans and grants through State programs assuming they are given no special consideration and are evaluated in the same manner as other applicants.

With the increasing use of government grants, it has become difficult to apply the traditional distinction between grants and contracts in some cases. Both grants and contracts may require the recipient to perform a service on behalf of the State in exchange for funds. For this reason, it is not unprecedented for a legislator whose firm is seeking a competitively-awarded State grant as part of his or her business to request the pre-approval of the Joint Committee. However, in your case, the grants are not to further your business, but rather to renovate your home and to offset other costs stemming from a natural disaster. The grants in your situation are being awarded based on need, not on the basis of competitive factors. To require each legislator, State officer, and employee in the Legislative Branch to follow the pre-approval process before accepting State-administered disaster aid would likely present administrative issues that could potentially delay much-needed assistance, perhaps causing the assistance to be denied.

Please note that this analysis is specific to the facts of your case. Legislators seeking grants and assistance from the State are encouraged to obtain advice from the Joint Committee specific to their situation.

b. Negotiating with State Agencies

Your situation also arguably implicates the ban on legislators negotiating with State agencies. *N.J.S.A. 52:13D-16* and section 2:2 of the Legislative Code of Ethics generally prohibit a legislator from personally negotiating on behalf of any party other than the State in connection with any specific application before a State agency. Your conduct does not appear to violate these provisions because section 2:3a.(1) of the Legislative Code of Ethics provides that the prohibition on negotiating with State agencies contained in section 2:2 of the Code does not prohibit a legislator from "[r]epresenting himself in negotiations or proceedings

concerning his own interest in real property”² This provision is in keeping with past opinions of the Joint Committee, which advise that a legislator may represent his own interest in real property before a State agency without violating *N.J.S.A. 52:13D-16* and section 2:2 of the Legislative Code of Ethics.

c. Appearance Provisions

Subsection a. of Joint Rule 19 provides that the Joint Committee may consider “allegations concerning the conduct or activities of members of the Legislature and employees of the Legislative Branch of the State Government reflecting upon the good name, integrity and reputation of the Legislature or any member thereof” Similarly, subsection a. of section 2:1 of the Legislative Code of Ethics reads:

No member of the Legislature shall . . . act in any way that impairs the objectivity or independence of judgment of the member of the Legislature in the exercise of his or her duties or is violative of the public trust by an elected official or which creates a justifiable impression among the public that such trust is being violated.

These two provisions are sometimes referred to as “appearance provisions” because they may be construed to ban conduct which, though not explicitly prohibited, creates a negative appearance.

You have stated that you neither requested nor received extra consideration, favoritism, or special treatment from State agencies. As discussed above, it is the opinion of the Joint Committee that your actions in this matter do not violate any specific legislative ethics prohibition. Under these circumstances, it would be difficult to envision a scenario under which the appearance provisions of Joint Rule 19 and section 2:1 of the Legislative Code of Ethics would be construed to prohibit you from receiving the disaster assistance in question. A prior decision of the Joint Committee addressing an analogous situation stated that to prohibit a legislator’s firm from applying for assistance would render “second class citizenship” to the legislator.

² Unlike the Legislative Code of Ethics, *N.J.S.A. 52:13D-16* does not contain an express exception for legislators representing their own interests in real property before a State agency.

d. Other Ethics Provisions

The following ethics provisions are not implicated by the facts as presented in your letter, but legislators in situations similar to yours should be aware of their existence so that further advice may be obtained if needed:

- N.J.S.A. 52:13D-25 and section 2:11 of the Legislative Code of Ethics prohibit legislators from using nonpublic information acquired in the course of and by reason of the legislator's official duties for pecuniary gain.
- N.J.S.A. 52:13D-18 and section 2:9 of the Legislative Code of Ethics prohibit legislators from participating in the enactment or defeat of legislation in which the legislator has a personal interest not covered by any exception.

Finally, please note this opinion is limited to ethics issues arising under the New Jersey Conflicts of Interest Law, the Legislative Code of Ethics, and Joint Rule 19. It should not be construed as offering any opinion regarding the conflicts of interest rules, regulations, and policies of any federal agency or those adopted by DCA as a condition of receiving Community Development Block Grant Disaster Recovery funds.

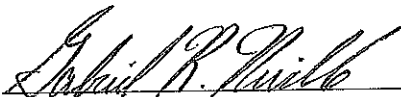
III. Conclusion

It is the opinion of the Joint Committee that your receipt of government funds under the circumstances set forth in your letter of March 24th does not violate the New Jersey Conflicts of Interest Law, the Legislative Code of Ethics, or Joint Rule 19.

Very truly yours,

Joint Committee on Ethical Standards

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c Marci Levin Hochman, Ethics Counsel