

# **Exhibit 2**

**From:** [Westcott, Katherine \(COUNCIL\)](#)  
**To:** [Werner, Ruth \(COUNCIL\)](#)  
**Subject:** Ethics of holding a hearing  
**Date:** Wednesday, September 6, 2017 10:05:53 AM  
**Attachments:** [ethics in re hearing memo. kw 8.29.17.docx](#)

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FYI

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KW 8/29/17

The question was whether a Councilmember who may recuse himself/herself from deliberating and voting on a legislative measure due to a potential conflict of interest can hold and chair, as Chairperson of the committee to which the measure was referred, a hearing on the matter.

No; the Chairperson should recuse himself/herself from chairing a hearing on the matter. Pursuant to section 223 of the Government Ethics Act of 2011, a Councilmember is prohibited from personally and substantially participating in a particular matter that the member knows is likely to have a direct and predictable effect on the member's financial interests, or those of a person closely affiliated with the member.<sup>1</sup> A Councilmember substantially participates in a matter when the member's involvement is of significance to the matter, but that involvement must be more than official responsibility, perfunctory involvement or involvement on an administrative or peripheral issue.<sup>2</sup> The existence of "[p]ersonal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter."<sup>3</sup> A "[p]articular matter is limited to deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons."<sup>4</sup>

However, let me point out that an actual conflict must exist before a Councilmember is required to recuse himself/herself from participating in a matter. Most legislation considered by the Council is legislation of general applicability (e.g. it does not deal with one store or all stores owned by one entity but with all qualifying stores). Legislation of general applicability does not give rise to a conflict of interest and does not require recusal. Likewise, the mere appearance of a conflict of interest does not require recusal. Council Rule 202(a) provides that Councilmembers should strive to act solely in the public interest . . . avoiding both actual and perceived conflicts of interest and preferential treatment."<sup>5</sup> But, note, this aspirational language is not part of the Code of Official Conduct, and is not enforced by Board of Ethics and Government Accountability ("BEGA").<sup>6</sup> But, if the legislation in question deals with a specific person[s] or a discrete and identifiable group or entity that could have a direct and predictable financial effect on the Chairperson, or person closely affiliated with the Chairperson, there is a conflict of interest.

Arguably, a hearing may be solely for the purpose of receiving testimony on a measure that has been referred to that committee and ostensibly no Councilmember is making a decision or recommendation on the measure or any issue raised by a witness or approving, disapproving, investigating, or rendering

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<sup>1</sup> Effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1162.23); see also, Code of Official Conduct for the Council of the District of Columbia, Council Period 22 ("Code of Official Conduct).

<sup>2</sup> 5 C.F.R. § 2635.402(b)(4). (See also, Ethics Manual, District of Columbia Board of Ethics and Government Accountability, November 1, 2014 Ed.).

<sup>3</sup> 5 C.F.R. § 2635.402(b)(4).

<sup>4</sup> Rule I(e)(4) of the Code of Official Conduct; see also, D.C. Official Code § 1-1161.01(41) (internal quotation omitted).

<sup>5</sup> Rules of Organization and Procedure for the Council of the District of Columbia (Council Period 22).

<sup>6</sup> 1009-013 – Advisory Opinion – Response to Request by Former Councilmember for Opinion Regarding Post-Employment Restrictions, 9/26/22016 (bega.dc.gov).

advice on the measure. Nevertheless, BEGA would likely consider a hearing an action that is focused upon the interests of those specific person[s] or discrete and identifiable group or entity; thus, recusal would be required.

Assuming that there is, in fact, a conflict of interest or the Chairperson intends to recuse himself/herself from the matter out of an abundance of caution or the desire to avoid even the appearance of a conflict, the Chairperson should deliver the required recusal statement to Chairman Mendelson and designate a member of the committee to act as temporary Chairperson, as provided by a committee's rules, to chair the hearing on the legislation.

While I did have a brief informal exchange with BEGA concerning your question, please feel free to contact BEGA, which is charged with providing binding ethics advice, for further discussion. Brian Flowers is the Interim Director/General Counsel, and the BEGA number is 481-3411.