



ISSUE ONE TOPIC:
**Working with
Municipal
Arborists**

I was recently contacted by a local government agency asking if I would be interested in applying for the position of County Arborist. This would be an “as needed” hourly position. If I accept the position, would I then be unable to accept assignments from residents of the county, if the county could potentially become involved?

Ethical standards of practice would prohibit you from engaging both sides of a conflict unless the assignment is to mediate or arbitrate, in which case you are prohibited from taking sides. It would not be possible to arbitrate or mediate a case that involved your employer. Likewise, you would not be able to take on any assignment from a county resident that could result in conflict with the county. If your public service duty and private practice commingled, it may present a conflict of interest down the road. I would be very cautious about managing private clients and public service careers. It would be easy to get hung up in a conflict of interest trap. In cases where there is no potential conflict, there would be no problem.

—Marty Shaw

It sounds like a conflict of interest to me but why not ask the county???

—Lew Bloch, RCA #297

Your first question may not be about accepting other jobs in the county after accepting the county position, but rather whether existing cases or relationships might preclude you from accepting the county position. In either case, the issue is maintaining Independence, that is, freedom from any influences



on your Objectivity. According to SPP §3.4(A)(i)(a), this freedom must be not only in fact, but in appearance. According to SPP §3.4(A)(ii)(c), one potential influence is any “conflict of interest,” and if you work for the county and any client regulated by the county, that certainly creates the potential for conflicts of interest.

If the county does not want you accepting other assignments in the county, then that will be a function of your position and is no longer an issue. You accept the position with that condition or you don't. That's your business decision. But given that this is a part-time, “as needed” position, you and the county may want to agree on an arrangement that allows you to accept certain cases in the county. SPP §3.4(A)(iii) explains the range of conditions across which Independence must be maintained, and how; and also clearly states that some cases cannot be accepted even with disclosures because the appearance of conflict is just too great.

—Scott Cullen, RCA #348

Accept the part-time County position if you want it. If the client contacts you before the County does regarding a case, work for anyone you want. If the County subsequently contacts you with the case, tell the County to use someone else for that one.

—Peter Torres, RCA #372

I would, but only if written into the contract, approved by our lawyers—with wording that states that if the appearance of a conflict of interest occurs in an assignment, then I will not take that assignment. I actually have that kind of understanding with our county's Extension Service, for which I volunteer as a Master Gardener. If a caller wants a site visit for advice on trees, they are asked if they are willing to pay for a professional arborist. If so, I bill the client independently. Otherwise, a Master Gardener will go out.

—Herlwyn Lutz

A good rule of thumb is “does that sound right to you?” More important than a rule of thumb are the specifics of the ethics laws in the state, county, and municipality you are practicing in, and the ASCA Code of Ethics. Put the ques-

tion in writing to the City Solicitor or Ethics Commission. Key questions would include: Does the County Arborist have any regulatory authority? Would the county be essentially just another client like any other client I have? Would members of the public contact me for tree care advice that I would also be able to bid on? What if someone called and asked, “I need some tree work done...do you know anyone you can recommend?” (I am asked this frequently—because we regulate the industry, I do not give recommendations.) It is customary in many places for a person to be ineligible to practice privately in the political subdivision (city, county, state) in which he or she is employed as a public agency person. If the scope of the person's job takes them beyond those borders, they should likely decline offers to practice beyond those borders.

—Michael Galvin, RCA #432

Last month I accepted an assignment: to assist a local municipality in creating guidelines regulating the preservation of shade trees. Yesterday, on the ASCA listserve, I read the recent Fairfax, Virginia, ruling regarding neighbor's trees and encroachment. This decision seems to impact some of my work. Should I consider “adjusting” my recommendations to better fit this new ruling?

Yes. Anything that can increase clarity and reduce the chance of a misunderstanding or lawsuit should be a part of the guidelines. This, of course, should not be carried to the point of trying to cover every possibility, in detail; these should be covered by disclaimers.

—Herlwyn Lutz

Only if you live in Virginia (or another state recognizing the Hawaii Rule) and even then tread carefully and don't try to play lawyer. This decision reflects thinking and actions over 20 years ago so it is not really anything so revolutionary nationally. Also, it does not have much influence “regulating the preservation of shade trees,” only of protecting landowners from possible nuisance-causing trees from their neighbors.

—Lew Bloch, RCA #297

Is the municipality you are working for in Virginia? If it is, you would certainly want to craft an ordinance that is not at odds with court rulings. If it is not, the ruling may at some point, but does not presently, have an affect. Review it with the City Solicitor.

—Michael Galvin, RCA #432

Unless the Fairfax ruling applies to your local municipality, you are free to ignore it.

—Peter Torres, RCA #372

Your conclusions, opinions and recommendations should always be based on your best understanding of facts and circumstances. If any regulation, ruling or statute changes facts and circumstances in a manner that affects your conclusions, opinions and recommendations, then certainly you should adjust them as appropriate.

An obvious question is whether a regulation, ruling or statute in another jurisdiction affects your jurisdiction. According to SPP §3.1 you must practice with Competence. A consulting arborist may not be competent to fully understand the implications of any legal regulation, ruling or statute. You may want to obtain or have your client obtain a qualified legal interpretation before reaching conclusions, opinions and recommendations based on a legal regulation, ruling or statute.

—Scott Cullen, RCA #348

If the ruling overturned the intent of the guidelines or had an unintended affect on your guidelines, you should take action and have the guidelines rewritten to bring about the desired results.

—Marty Shaw

I am considering bidding on an assignment that would provide me with many hours of consulting. The city managers of a large public park would like to retain me to inspect the trees within the park against their existing standards. My only problem—I disagree with the intent or wording of a few of their stan-

dards. Must I simply refuse to bid or do I have options?

You should decline any assignment if you feel the conditions of that assignment prevent you from reaching conclusions, opinions and recommendations that are Objective (i.e. based on facts and reasonable assumptions, see SPP §3.6), reliable and usable. If your “disagreement” with the city’s standards creates that kind of problem, then decline the assignment.

If, however, the “wording” issues are simply a matter of preference or can be explained or clarified in your reports, they may not be a problem. You might also discuss your concerns with the city and suggest some changes.

Intent is another issue. Is it really up to you to decide the intent of city policy?

—Scott Cullen, RCA #348

I believe you can fulfill the assignment without violating any ethical standard. In your report you might make mention of any problems found in the wording of the standard. After you fulfill the assignment, go back to the city managers and ask them if they would be interested in hiring you to assist them in rewriting the standard.

—Marty Shaw

I recommend responding to their request for bids as if it were a request for proposals. That way you can bid on the work and make recommendations at the same time. If they accept your proposal, you get it all. If not, you don’t have to agonize.

—Peter Torres, RCA #372

Again, why not contact the city managers about these differences of opinions. If you cannot come to some agreement about the differences, you must either alter your opinions or do not bid on the job.

—Lew Bloch, RCA #297

I would try for options. I would state my high standards, and how my standards seem to be in dissonance with their standards. However, I would ask to discuss this with them to see if we can arrive at a solution. If the meeting

could be arranged without my stating exactly how I disagree, there’s a greater chance that they would be more flexible.

—Herlwyn Lutz

A Township Solicitor recently contacted me and asked if she could retain me to investigate and report on an accident in which the Township is being sued over an alleged negligent act. Following a brief discussion, I agreed to accept the assignment and then requested my usual fee for retainer. She responded, “Ah...we don’t do that,” but rather offered to fax me a Purchase Order (PO), agreeing to my fee schedule. Is this generally acceptable and typical of municipalities?

It probably is generally typical of most municipalities, but it could possibly be changed if you really feel that important about it. Once I did such a thing with a State Attorney General’s Office and did receive a retainer in advance even though it was not their normal operation. If they do not budge and you do not budge, there will be no contract.

—Lew Bloch, RCA #297

Acceptable to whom? It’s up to you to decide what business arrangements are acceptable to you. I have no idea what is “generally typical.” Many public agencies work on a PO system. Submit your proposal for various segments of the work and establish a payment schedule for these various segments of work. If the funds to cover your fees come out of general revenue, then you have minimal risk that you will not be paid. If, however, the funds to cover your fees must come from collection in a suit or any other payment to the agency by a third party, you may have a risk. Again, whether to accept payment risks or potential payment delays is your business decision.

—Scott Cullen, RCA #348

I have contracted using the PO method and it was satisfactory.

—Peter Torres, RCA #372

If a solicitor is retaining you, what are they retaining you with, a promise to pay? Normally, retainers are greater than \$0.00. Some consultants will not do any work at all until the money is there in the bank account; and if the retainer is used up, they stop work until they receive another check. This is because once you take on an assignment, you are locked into that side of the conflict and you cannot change sides—even if they don’t pay or the other side offers to pay more. Policy varies from municipality to municipality. If the municipality has a high bond rating, and you get a contract to pay in writing, you could take the assignment knowing that getting the money might be difficult. If I have to take an assignment without retainer for any reason, I always make it clear to the client that I will receive payment upon delivery of the report. If they cannot pay at delivery—I keep the report until they have payment prepared for delivery to me. Just remember that you are locked in, and if they decide they don’t want the report and they don’t want to pay, with a contract, you can make them pay but it may take time and (depending on how the contract is written and laws in your area) it may cost you.

—Marty Shaw

I’d like to pursue some Arboricultural Consulting work with local municipalities. Is there any generally required insurance coverage that is a must-have, such as General Liability or E&O? Further, are there any generally required accreditations?

The professional liability policy that I use has general liability with business vehicles and E&O as a prerequisite. Make sure you have the professional liability (\$1,000,000). Beware of the “additional insured certificate.” Find out what it will cost from your agent (it could be \$0.00 or it could be \$400) and have the client pay for it, plus 15% in advance.

—Peter Torres, RCA #372

This is just so dependent on each individual entity that it is impossible respond to.

—Lew Bloch, RCA #297

It is. A budget or appropriation is authority to spend. Funding is money to spend. So you need actual money and budget authority to use it. Once you execute a contract, you can encumber money (reserve it to be spent for a specific reason), provided: 1) you actually have some (funding); 2) you have authority to spend it; and, 3) the encumbrance, along with any other existing encumbrances, does not exceed your appropriation and/or your funding. Once you encumber the money it is considered spent—it is reserved for the purpose of paying the vendor until the expiration of the contract. Once the contract is accepted and an encumbrance is placed on the funding, a purchase order is issued. You have to invoice for an item recognized by the contract to get paid. If the contract includes a retainer in the scope of work or terms and conditions, you should be able to get it after

the steps described are completed, but you will likely have to invoice for it first.

—Michael Galvin, RCA #432

The requirements of each municipality will be clearly outlined in their vendor package. You will definitely want to have Professional Liability Insurance and General Liability coverage even if they are not required. Lots of consulting cases go to court, and if you are ever sued (which happens from time to time), you wouldn't want to pay out of your own pocket. Credential requirements also vary from municipality to municipality. I personally feel that anyone engaged in consulting for a municipality should be an ASCA member. Beyond that requirement, the more you have the better in my book.

—Marty Shaw

I have worked for municipalities that never even asked about insurance and have talked to others that had much higher insurance requirements than I could meet. It is your business decision to determine what forms and levels of insurance coverage to carry. It is also your business decision whether to incur the cost of more insurance to qualify for some municipal work.

I have heard that some municipalities require consultants to have certain accreditations. I know some do not. Certainly your experience and qualifications (including any accreditations) may set you apart from the competition.

Blanket answers are not much use to you. Just ask the municipalities you would like to work for what their requirements are.

—Scott Cullen, RCA #348 🌿

Member Profile

Jack Phillips, RCA #449



Jack Phillips is an ASCA Registered Consulting Arborist based in Omaha, Nebraska. He has worked on a variety of projects throughout the Midwest and the U.S. He is a graduate of the 2007 ASCA Consulting Academy. Jack is a member of the Tree Function and Education Group, founded under the direction of the late

Dr. Alex Shigo, and coordinates seminars for this group in New Hampshire. In May 2007, he presented “The Soul of a Tree: Conversations with Alex Shigo” at the Shigo Science Conference in Las Vegas, sponsored by the Western Chapter International Society of Arboriculture. A two-part

series of articles on this subject appeared in *Tree Care Industry Magazine* in 2006.

Jack was a college humanities professor before becoming a full-time arboricultural consultant in 2003. He is committed to sustainable tree planting and preservation, based on sound tree biology and ecology, and his consulting work has included urban and suburban development, as well as wildlife conservation projects. He also gives workshops and presentations on a variety of arboricultural subjects. His most recent presentation on the relationship between humans and trees, “Planting the Tree of Life,” was given in Cambridge, New York, for the Communities of New Skete. Jack lives with his wife and sons in Omaha. 🌿