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Formal Advisory Opinion 2005-4 Board Members Appearing Before Their Own Board

Opinion Summary

City board and commission members may not appear before their own board on behalf of other entities or in the public's interest.

Question Presented

May a member of a city board or commission file an appeal and appear as a litigant before the board on which the individual serves?

Facts

The Tree Protection Ordinance gives any Atlanta citizen, property or business owner, and civic organization in the affected neighborhood planning unit the right to appeal decisions of administrative officials, with one minor exception, to the Tree Conservation Commission. See Atlanta, Ga. Code § 158-65. On two separate occasions, a tree commission member has appeared before the commission as a litigant appealing a decision of the city's arborist. In 2001, Trees Atlanta and 27 individuals, including a commission member, appealed the arborist's decision approving the State Bar of Georgia's plan to remove nine trees to build a new parking deck adjacent to the Bar's headquarters. The commission overruled the arborist, but the decision was reversed in superior court.

In 2004, another commission member appealed the arborist's issuance of a tree removal permit that allowed the Department of Watershed Management to cut approximately 300 trees as part of a tunnel construction project. In connection with that case, the Ethics Officer issued an informal advisory letter concluding that a commission member could not file an appeal on behalf of other citizens challenging the city's issuance of a tree removal permit, but could appear only if the individual had a personal property interest directly affected by the permit. At the hearing, the commission member announced that she was recusing herself from the proceedings because she had filed the appeal. During her testimony, she was asked who she was representing in her appeal. While she initially referred to her NPU and council district, she ultimately answered that she

was appealing “as an individual.” The commission ruled in her favor, and the department appealed to superior court, where the matter is pending.

Because these two examples indicate the need for guidance about when board members may appear before the board on which they serve, the Ethics Office has asked the Board of Ethics to address the issue.

Discussion

The Standards of Conduct in the City’s Code of Ordinances applies to city officials and employees. The code defines city “officials” to include any person elected or appointed to the city or any agency; it defines “agency” to mean any board or commission of the city. See § 2-801. Because the Tree Conservation Commission is a city commission and the Mayor and City Council appoint its members, the commission members are city officials subject to the ethics code. See § 158-61.

Although the Tree Protection Ordinance gives any Atlanta citizen or property owner the right to appeal a decision from an administrative official on any matter that the ordinance regulates, that right must be exercised consistently with the City’s Code of Ethics. The ethics code places restrictions on the ability of city officials and employees to represent private interests before any city agency or the courts and their ability to appear before city agencies for a year after leaving their city position. Section 2-808 addresses the representation of private interests before city agencies. It states:

No official or employee shall appear on behalf of private interests before any agency, except as a matter of public record in a court of law as provided by section 2-809 of this division. Councilmembers may appear on behalf of constituents or in the performance of public or civic obligations before any agency but only without compensation or remuneration of any kind. In no instance may councilmembers appear before the zoning review board on behalf of constituents or in the performance of their public or civic obligations; they may, however, appear in their own behalf, in relation to their own property interests.

Under the plain language of section 2-808, city board and commission members may not appear before their own board or other city boards on behalf of a private interest. The purpose of this prohibition is to prevent conflicts between a board member’s official duties and private interests and to prevent individuals from using their position as a city board member to obtain favorable treatment for another person or entity. Although there is an express exception for councilmembers who appear without compensation before city agencies on behalf of their constituents or in the performance of their civic obligations, this exception is not extended to other city officials, such as appointed board members.

The need to avoid the dual roles of litigant and decisionmaker is especially critical when an individual serves on an adjudicatory or regulatory board that hears appeals. By choosing to file an appeal, the board member places unnecessary pressure on his or her colleagues, creates a perception of undue influence, and undermines public confidence in the fairness of the proceeding. It does not matter that the litigant-board member supports the city’s administrative decision, appears before the board without pay, or argues on behalf of the public’s interest. Because the Code of Ethics seeks to protect the integrity of governmental decisions by limiting appearances of city officials and

employees before city agencies, the Board concludes that section 2-808 prohibits members of a city board or commission from filing appeals before their own board on behalf of other persons or the general public, even when they are not paid for the representation.

While there are restrictions on the voluntary appearance of board members as a party before their own board, a different issue is raised when a board member seeks to represent his or her individual property interests or is involuntarily brought before a city agency. Section 2-808 would not prohibit city board members or employees from appearing as a citizen before a city agency in connection with a permit, license, application, or appeal related to their own property. The right of citizens to appeal an adverse decision concerning their own personal property is a fundamental due process right that they do not relinquish when they accept an appointment to a city board or a city job.

To provide guidance on how to apply this opinion, the Board offers the following examples:

- A member of the License Review Board may not appear before the board representing a bar owner applying for a liquor license whether the member is paid or volunteers his services.
- A member of the Zoning Review Board may not appear before the board on behalf of her civic association to oppose a proposed rezoning in her neighborhood. Instead, another resident should represent the civic association's interests before the board.
- A member of the Board of Zoning Adjustment may appeal to the board the denial of a building permit for a fence she seeks to build in her back yard.
- A member of the Tree Conservation Commission may challenge the arborist's decision on a permit seeking removal of a tree that hangs over the commission member's property.

In conclusion, it is the Board's opinion that members of city boards or commissions may not file an appeal with the board on which they serve, either on their or others' behalf, unless the board member has a specific property interest that is directly affected by the appeal. When a board member does have a personal or financial interest in a pending matter, the board member must publicly disclose that interest and is disqualified from participating on the matter in any way. To disclose the relevant interest, the board member should complete the City of Atlanta Conflicts of Interest Disclosure form that is available online at the city's ethics e-filing system.

Adopted July 21, 2005

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