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Formal Advisory Opinion 2007-1 Board Members Appearing Before the City Council and Oversight Departments

Opinion Summary

City board members may appear before the City Council and represent private interests before that body. They may not appear on behalf of private interests before the board on which they serve or the department with oversight responsibility for that board.

Question Presented

May city board members appear on behalf of private interests before the City Council and city agencies other than the board on which they serve?

Facts

A member of the Atlanta Renewal Community Coordinating Responsible Authority (ACoRA) Board of Directors has been hired as the president of a non-profit organization that builds affordable and mixed income housing in the metropolitan area and manages a loan fund targeted at developers of affordable housing. In his role as president, the board member plans to meet with elected officials and city employees to advise them on housing policies, advocate the building of affordable housing, and seek city grants or housing subsidies for his organization's housing projects. He asks whether section 2-808 of the Code of Ethics prohibits him from appearing before city elected officials or city agencies other than ACoRA, the board on which he serves.

ACoRA is a non-profit organization that the City of Atlanta created to use federal tax incentives to promote economic development and to administer the remaining Title XX funds from the city's former Empowerment Zone. The Department of Planning and Community Development is the oversight department for ACoRA; its deputy commissioner is an ex officio member of the ACoRA board and serves as ACoRA's liaison to the City. The department's deputy commissioner is also the direct supervisor of the city's housing director, who heads the Bureau of Housing, which provides technical assistance and contract monitoring services to ACoRA.

Discussion

Representing Others Before Government

Section 2-808 bans city officials and employees from representing private interests before any agency. 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. Council members 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 council members 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.

Code section 2-801 defines “agency” as “any board, bureau, body, commission, committee, department or office of the city, including any joint board to which the council or the mayor has appointment powers.” This Board has interpreted the term “appear” to mean formal presentations, letters, telephone calls, conversations, and other forms of communication.

The representation provision is written broadly to prohibit any appearance before any city board, department, or office, if the appearance is on behalf of a private interest. The term “private interests” is not defined in the Code of Ethics, but the second and third sentences in section 2-808 suggest that “private interests” do not include constituents that an elected official represents without pay or an elected official’s appearance in his or her own behalf as a property owner. The Board would also exclude any local, regional, state, or federal governmental agency and any public school, college, or university from the term. When considered in the context of the entire section, the Board interprets “private interests” to include entities operated for private gain, non-profit organizations and foundations, and individuals who provide compensation or remuneration for the representation. Thus, the non-profit group headed by the ACoRA board member is a “private interest” under the Code of Ethics.

The total ban on representing private interests before city agencies makes sense when applied to elected officials and city employees. It prevents them from using their position as a public servant to obtain favorable treatment for a private entity, avoids potential conflicts that would arise between an individual’s official duties and financial interests, and provides a clear standard for elected officials and employees to follow.

Due to competing public policies, the strict ban is more problematic when applied to volunteer board members. For example, a ban on appearances before the City Council would prevent board members who work for downtown business groups from appearing at a committee meeting to advocate public funding of the proposed Civil Rights Museum. While ethical standards seek to prevent city board members from using their city position for their own private advantage and personal financial gain, cities also have an interest in “encouraging the most highly qualified individuals to serve the city in uncompensated positions while allowing these individuals to earn their livelihood.” See Detroit, Mich. Code §2-6-66 commentary.

Law in Other Jurisdictions

A survey of the laws on representing others before government shows that there are at least five different ways that other jurisdictions handle the issue as it relates to board members:

- a complete ban on appearances for compensation
- a ban on board members appearing before the board on which they serve and the department responsible for the board
- a ban on board members appearing before the board on which they serve and on matters related to the board member's official duties
- a ban on board members appearing before the board on which they serve
- at the state level, several states permit appearances for compensation before any state agency so long as there is disclosure

In addition, one model municipal code proposes a general ban on appearances before any city department, agency, or board, except on one's own behalf, but suggests in the commentary that towns may want to permit volunteer members of specific boards to appear before any city agency, when the opportunity for a conflict is small. See Robert Wechsler, Draft Model Municipal Ethics Code (City Ethics, Inc., 2006).

The Board has previously addressed the ban on board members' appearances in two opinions involving the Tree Conservation Commission. The first opinion concluded: "City board and commission members may not appear before their own board on behalf of other entities or in the public's interest," but only on behalf of their own property interests. See FAO 2005-4, Board Members Appearing Before Their Own Board. The second opinion concludes that city officials who serve as board members may not represent their businesses, clients, or other private interests before the city agency that is regulated by or related to the city board on which they serve. See FAO 2006-4, Board Members Appearing Before Related City Agencies.

Appearances before Oversight Departments

Based on the language and purpose of the prohibition against representation of others, the Board concludes that a member of the ACoRA Board is prohibited from appearing on behalf of his non-profit organization before the Department of Planning and Community Development and Bureau of Housing. The planning department is the oversight department for the ACoRA Board and the location for the Bureau of Housing. The two city agencies work together on providing services and programs to the communities that are part of the former Empowerment Zone. The department's sole deputy commissioner is the direct supervisor of the director of the Bureau of Housing and the Title XX compliance officer and serves as the city's representative on the ACoRA board. Because of these overlapping interests and relationships, there is a potential conflict of interest between the official duties of the ACoRA board member and the private interests of the non-profit group that employs him.

Appearances before City Council

The second question is whether section 2-808 prohibits a city board member from representing a private interest before the City Council. The Board believes that the Code of Ethics does not prevent volunteer board members from lobbying or advocating policies before the City Council. First, the definition of city "agency" does not appear to include the City Council or its committees. Second, all appearances before the City Council and its

committees occur at open, public meetings that are televised on the local city cable channel, and persons appearing before the council are required to identify themselves and describe their interest in the subject matter before making their comments. This process provides for public disclosure of any financial or personal interests that the speaker has in the matter. Finally, the Board of Ethics is reluctant to restrict advocacy before the City Council or deprive that body of the best advice from its citizens on proposed policies and legislation.

Guidelines for Representation of Others Before City Agencies

To provide guidance to board members, the Board provides a summary of its decisions interpreting section 2-808 on representing others before city agencies:

1. Board members may not appear before their own board on behalf of other entities or in the public's interest.
2. Board members may not appear on behalf of their own business, clients, or other private interests before the city office or department that is regulated by the public board on which they serve.
3. Board members may not appear on behalf of private interests before the department that is related to or provides oversight of the public board on which they serve.
4. Board members may appear before any city agency in their own behalf in connection with their own property interests.
5. Board members may appear before the City Council and its committees in their own behalf and on behalf of private interests.

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