



**City of Atlanta Board of Ethics
Formal Advisory Opinion 2009-2
Beltline Affordable Housing Advisory Board**

Opinion Summary

Current members of Beltline Affordable Housing Advisory Board (BAHAB) should not personally be involved in applications for trust fund dollars while serving on the board, and former members of BAHAB should not personally be involved in applications for trust fund dollars during the year after they leave the board. The firm, company, or employer of BAHAB members should not apply for trust fund dollars while an officer, director, stockholder, creditor, trustee, partner, or employee continues to serve as a member of BAHAB; the firm, company, or employer of a former BAHAB member may appear before a city agency and apply for trust fund dollars during the member's one-year cooling off period, provided the firm creates a firewall and the firm and former BAHAB member submit affidavits that they have complied with the Code of Ethics.

Questions Presented

1. Can members of the Beltline Affordable Housing Advisory Board or their affiliated businesses apply for Beltline Affordable Housing Trust Fund grants that will be awarded in part based on the board's policy recommendations?
2. May former members of the Beltline Affordable Housing Advisory Board or their affiliated businesses file applications for funds from the Beltline Affordable Housing Trust Fund during the one-year period after the board members leave their city position?

Facts

The Atlanta Development Authority (ADA) and Atlanta Beltline, Inc. set up BAHAB in 2007 to make policy recommendations on affordable housing related to the Beltline Affordable Housing Trust Fund. In 2008, the Atlanta City Council approved BAHAB's recommendations, as modified by ADA and Atlanta Beltline, Inc. See 08-R-1900. The first bonds were issued in October 2008, and applications for grant funds were accepted in January 2009. A second round of applications begins in April.

BAHAB recommended that trust fund dollars be used to provide down payment assistance for home buyers, grants to create and preserve affordable housing, and funds for property acquisition. The board proposed different income eligibility caps for rental and owner-occupied

housing, the use of funds for both new construction and rehabilitation, the equitable distribution of housing around the Beltline, and minimum periods of affordability. It also identified scoring criteria and preferences. The final policy recommended setting aside 20 percent of all trust funds for use by Community Housing Development Organizations (CHDO), granting points to projects with nonprofit development organizations as significant partners, giving a strong scoring preference to projects with Community Land Trust units, providing a preference for housing to city residents and public servants, and awarding additional points for developments in existing CHDO and Community Development Corporation neighborhoods. These recommendations are reflected in the scoring preferences described in the grant fund applications. See, e.g., Beltline Multifamily Developer Grants, Program Description and Application for Funding.

BAHAB did not recommend a budget or any specific dollar amounts for any program component and is not involved in reviewing or grading grant applications. The ADA Housing Committee awards the grants based on staff recommendations. The applicant of an approved development must then enter into a Beltline Grant Agreement.

Current BAHAB members include officers, directors, principals, employees, and associates of developers who are interested in applying for grants from the Beltline Affordable Housing Trust Fund. Most of these potential applicants are non-profit organizations, some of them are CHDOs. The board members work in different fields of affordable housing, including multi-family rental housing and single family housing. One member works for an organization, Mercy Housing, which applied for trust fund dollars earlier this year; the board member says she works as a project manager at Mercy and is not involved in its application for Beltline projects.

In December, the chair of BAHAB requested an informal advisory letter from the Ethics Officer concerning the ability of BAHAB members and their affiliated entities to apply for trust fund dollars while serving on the board and during the one-year cooling off period. The informal advisory letter concluded that it would be a conflict of interest for members of BAHAB to apply for funds while serving on the board and for one year after they leave the board. Based on that letter, two board members sought a conflict-of-interest waiver from the Board of Ethics. Subsequently, the Ethics Officer issued a second informal advisory letter concluding that BAHAB members could not apply for grants from the trust fund under policies they adopted, but their affiliated businesses could apply for trust fund dollars during the member's one-year cooling off period provided that the former board member had no involvement in the application. The Ethics Officer has asked the Board to consider how the one-year cooling off period applies to former BAHAB members and their affiliated organizations.

Discussion

The Code of Ethics seeks to ensure that a public board's decisions are based solely on the city's best interest. See Atlanta, Ga., Code § 2-802. A conflict of interest occurs when a city official acting in his or her official capacity is involved in a decision or public action that affects the official's financial or personal interests. The code's provisions against conflicts of interest apply to city board members and persons appointed by the City of Atlanta to other public boards and authorities of the city, county, and state. See § 2-801.

1. The prohibition on participation in contracts prevents current members of BAHAB and their employers from applying for trust fund dollars

Section 2-812 on contract participation is written broadly and prohibits officials from participating directly or indirectly in any contract, subcontract, solicitation, or proposal by preparing any part of the specifications or requests for proposals, influencing the content of any specification,

rendering advice, or seeking to influence the votes or decisions of others related to the matter when the official knows or should know there is a financial interest possessed by the official, an immediate family member, an employer, a prospective employer, or a business other than a public agency in which the official or an immediate family member serves as an officer, director, stockholder, creditor, trustee, partner, or employee.

This provision precludes members of BAHAB and their related businesses from applying for grants that are being awarded by the ADA based on specifications BAHAB helped develop. In its policy recommendations, BAHAB advised how to rate applications, specified scoring preferences and criteria to use in approving projects, and actively participated in the decision on the amount of the final set-aside for non-profit organizations. These recommendations were used to develop the applications, program guidelines, and scoring preferences. While BAHAB members are not themselves involved in the final decision on which applicants receive a trust fund grant, they have influenced the decisions that others will make.

Unlike some provisions in the code, the ban on participation in contracts is not limited solely to contracts in which the individual board member has a financial interest. Instead, it applies when board members know or should know that they have a financial interest or that a business in which they serve as an officer, director, stockholder, creditor, trustee, partner, or employee has a financial interest. The term “business” is defined as any corporation, partnership, organization, self-employed individual, or business operated for economic gain and “entities which for purposes of federal income taxation are treated as nonprofit organizations.” See § 2-801. This definition recognizes that non-profit organizations and their officers, directors, and employees can have conflicts of interest, just like for-profit businesses.

Because BAHAB helped develop the policies by which ADA will judge applications and award grants from the Beltline Affordable Housing Trust Fund, both the individual board members and the businesses with which they are associated are precluded from applying for funds under those policies.

2. Prohibitions on appearances before city agencies apply to the individual board member and not to the individual’s firm, company, or employer

Section 2-808 states: “No official or employee shall appear on behalf of private interests before any city agency.” The Board of Ethics has interpreted this provision as prohibiting city board members from personally appearing on behalf of private interests before the board on which they serve and its oversight agency. See FAO2005-4 (Board Members Appearing before Their Own Board); FAO2006-4 (Board Members Appearing before Related City Agencies). The purpose of the provision 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.” FAO2005-4. Thus, the Board found that tree commission members could not file applications and personally appear before the arborists on behalf of private interests seeking tree removal, and a member of ACoRA could not personally appear before the Department of Planning and Community Development and advocate affordable housing policies that would benefit his non-profit organization. The Board of Ethics has interpreted this ban on appearances as applying to the individual who serves on a city board and not to other members of the board member’s firm. See FAO2008-8 (Representing Clients in Matters Adverse to the City).

Based on these opinions, section 2-808 precludes the individual board member from personally appearing before the ADA and applying for trust fund dollars. This prohibition does not apply to appearances by the board member’s firm.

3. The one-year cooling off period would not prohibit a former board member's employer from applying for trust fund dollars

The Code of Ethics places two limitations on former city officials for one year after they leave city service. See § 2-810. It provides that former city officials are precluded from appearing before or making presentations to the board on which they served or a related city agency for one year. It also precludes a former board member from being compensated for services rendered in connection with any application or matter in which the official was directly concerned, personally participated, actively considered, or about which knowledge or information was made available while serving the City.

The purpose of this one-year cooling off period is to prevent former officials from receiving favored treatment due to the contacts they made, relationships they developed, work they performed, or special knowledge they acquired while serving the City. The Board previously interpreted this provision as precluding a former city employee from receiving compensation as a taxi driver trainer because he advised the City Council on the final legislation they adopted on the driver training. See FAO2004-3 (Restrictions on Representation after Leaving City Employment).

Like other code provisions on representation, section 2-810 applies to the individual who served as a city official. This means that former members of BAHAB may not file personally file applications for trust fund dollars, appear before the ADA or Atlanta Beltline, Inc., or advise their employer about an application. Section 2-810 would not prohibit other members of the firm, company, or employer from applying for trust fund dollars during the one-year cooling off period. In that event, the firm needs to create a firewall that insulates the official from any knowledge, discussion, consideration, or participation of the application or project during the one-year cooling off period. See FAO2008-8.

The difficulty in this case is that BAHAB members have already developed the policies affecting their organization's financial interests, the policies provide for continued consultation with BAHAB about matters affecting those interests, and it is not known whether they consulted with or informed other officials, directors, or employees in their organization about the policies. While generally consistent with other city affordable housing programs, BAHAB's policies do vary in one significant area. BAHAB originally recommended a 25 percent set-aside for CHDOs. See BAHAB Minutes, Aug. 13, 2008. By comparison, the Housing Opportunity Fund Policy has a 10 percent set-aside, and the ADA recommended a 15 percent set-aside for the Beltline; the ADA, Atlanta Beltline, Inc., and BAHAB compromised on a final recommendation of 20 percent, with the ADA having authority to reevaluate the distribution after a year and reallocate the funds after consulting with BAHAB. Thus, BAHAB members who work for non-profit and for-profit developers would continue to advise and participate in decisions that affect the financial interests of their organizations.

This extraordinary involvement in establishing the terms and eligibility for the distribution of future funds requires extraordinary disclosure in order to ensure the BAHAB members do not participate in the application process during the one-year cooling off period. Accordingly, the Board recommends that any entity that applies for trust fund dollars during the one-year cooling off period of its officer, director, partner, or employee file an affidavit indicating that the organization has fully complied with the Code of Ethics and not consulted in any way with the former BAHAB member about the application. In addition, the former board member should file an affidavit stating that he or she has fully complied with the Code of Ethics and has not discussed, considered, or participated in the application.

In summary, current BAHAB members and their affiliated businesses may not apply for Beltline Affordable Housing Trust Fund grants that will be awarded in part based on BAHAB's recommendations. Former BAHAB members may not personally appear before ADA to represent their organization. Other members of the firm, company, or employer may apply for trust fund dollars and appear on behalf of their organization provided they submit written affidavits that they are complying with the one-year cooling off period in the Code of Ethics.

Some members of BAHAB have requested conflict-of-interest waivers that would allow them to apply for funds while serving on BAHAB or during the one-year cooling off period. Because none of the members has presented a compelling need for a waiver and any waivers would create an exception that would undermine the purpose and key provisions of the Code of Ethics, the Board denies their request. First, the fact that BAHAB members were not informed about the potential conflict is not unique to BAHAB. The defense of most persons appearing before the Board of Ethics is that they did not know or were not told about their conflict. If the Board of Ethics granted a waiver on that basis, it would set a precedent where city officials and employees could ignore the Code of Ethics and then ask for an exemption from its provisions because someone failed to give them advice or gave them erroneous advice. Second, the fact that BAHAB is an advisory board and adopted policies similar to others developed by the City are not persuasive reasons for granting a waiver because the Code of Ethics applies to advisory boards, including the Atlanta Planning Advisory Board; BAHAB was a full participant in shaping specific policies that were finally adopted by the City Council; and at least one recommendation varied in a critical way from similar programs developed by the City. Third, the fact that BAHAB is not involved in the final decision about the award of trust fund grants does not negate its active participation in developing the original policy by which grants are awarded or its continuing role in the process.

Finally, while the Board acknowledges the importance of attracting experienced people to city boards, it remains confident that the excitement generated by the Beltline project will enable BAHAB to attract qualified, committed, and experienced people to serve on the board. For the past five years, similar claims have been made in response to decisions by the Board of Ethics to require volunteers who serve on advisory boards and as neighborhood planning unit officers to file a financial disclosure statements, to impose penalties on citizens serving on city boards for their failure to file disclosure statements, and to prohibit board members from appearing before the board on which they serve and its related agency. Yet, the City still manages to find good persons who are willing to volunteer their services to make the City as better place to live.

This advisory opinion, which is consistent with the Ethics Officer's informal advisory letter of March 9, 2009, shall take effect immediately on adoption by the Board of Ethics.

Adopted March 19, 2009

City of Atlanta Board of Ethics

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