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Formal Advisory Opinion 2006-4 Board Members Appearing Before Related City Agencies

Opinion Summary

City officials who serve as board members may not appear on behalf of their business, clients, or other private interests before the city agency that is regulated by or related to the public board on which they serve. They are not prohibited from appearing in their own behalf before the board or any other city agency.

Question Presented

May city officials who serve as members of a public board represent their own businesses, clients, or other private interests before the city department or office that is regulated by or related to their board?

Facts

The Tree Conservation Commission is a city board that hears and decides appeals of decisions made by administrative officials related to tree removal or destruction. The commission is also responsible for assisting the city arborist in maintaining a record of historic trees, establishing educational programs to encourage proper tree maintenance on private property, approving the city's arboricultural specifications and standards of practice, assisting the city forester in preparing the comprehensive urban forest master plan, and administering the tree trust fund. Atlanta, Ga. Code §§ 158-63, 158-66. The code section establishing the commission sets out specific professional qualifications for a majority of its 15 members, requiring a landscape architect, builder, urban planner, two architects, two developers, and an urban planner. See Code § 158-61.

The City Tree Protection Ordinance requires a permit to remove or destroy trees with a diameter of six inches or more. A person files an application with the director of the bureau of buildings to obtain a tree removal permit for construction, renovation, or demolition and with the city arborist to obtain a tree removal permit for safety, landscaping, or other purposes. The city arborist reviews any application and either gives a preliminary approval or a notice of denial; the city arborist may impose conditions on the issuance of the permit. An applicant may appeal the notice of denial to the

commission, and any person aggrieved by the approval may also appeal to the commission. The commission may affirm, modify, or reverse the decision or direct the issuance of a permit. See Code § 158-101.

Earlier this year a citizen who is co-owner and office manager of a tree company was nominated to the Tree Conservation Commission. The nominee handles all of her company's legal matters related to tree permits, and her company advertises its services in securing permits and removing trees within the City of Atlanta. According to a city arborist, the nominee appears on a weekly basis before the arborists seeking permits to remove trees of behalf of the company or its clients. When asked about the appointment, the ethics officer rendered an informal opinion that it would violate the Code of Ethics for a tree commission member to appear before the arborist division on behalf of a private business or for pay. As a result, the candidate was not confirmed.

Because of the implications of this opinion, the commission requested that the Board of Ethics address whether tree commission members may appear before the arborists on behalf of private interests. At least two, and perhaps three, commission members regularly file applications and appear before the arborists on behalf of their own company, employer, or clients. They submit applications for permits to remove trees, present plans on saving or removing trees in a proposed development project, meet with the city arborists to discuss an application or proposal, and personally negotiate their company's plan to comply with the tree ordinance. These appearances range in frequency from twice a year to approximately once a month. To date, commission members have resolved any problem with an application at the staff level, and no current member has appealed an adverse decision to the commission while serving on it.

Discussion

The Code of Ethics is intended to prohibit any city official, which includes persons appointed to city boards, from engaging in any business or having any contractual interest that conflicts or creates "the justifiable impression in the public of conflict with the proper discharge of the official or employee's official duties or the best interest of the city." Section 2-820 prohibits officials from owning a business or rendering services for private interests when the service is incompatible with the official's proper discharge of his or her official duties.

Besides these general prohibitions, section 2-808 specifically bans any official or employee from representing private interests before any city board, commission, department, or office.

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.

(Emphasis added.)

Interpreting this section in a previous opinion, the board concluded that members of city boards may not file an appeal with the board on which they serve, unless the board member has a personal property interest in the matter. “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.” FAO 2005-4, Board Members Appearing Before Their Own Board.

No appearances on behalf of private interests

For the same reason, the board concludes that a city official who is appointed to a public board may not appear on behalf of private interests before the city office regulated by or directly related to the board on which the official serves. A conflict of interest arises because the board member is being paid to represent a private individual, business, or company in seeking favorable action from the city employees over whom the board member exercises authority. In essence, board members are using their position as a city official for their own private advantage and personal financial gain. Their dual roles as a public official and representative of private interests create the impression in the public of undue influence, place unfair pressure on city employees, and provide a competitive advantage to the city official based on his or her board service.

Applying this general rule to the specific facts presented by the members of the Tree Conservation Commission, this opinion means that commission members may not file applications and personally appear before the arborists and Department of Planning and Community Development on behalf of private interests seeking tree removal or destruction. This prohibition applies to the individual official. It would not preclude other firm members or company employees from appearing on behalf of private interests before the city agency. In that event, the city official should not be involved in any way in the matter, in either a personal or official capacity, and would need to publicly disclose the conflict as provided in section 2-813 of the Code of Ethics. Nothing in the code restricts a city official from appearing before any city agency in his or her own behalf in connection with a personal property interest.

Recusal is an inadequate remedy

Commission members have argued against imposing a blanket rule prohibiting representation of private interests by board members. Instead, they propose that commission members can resolve any conflict by declining to discuss or vote on their appeal at the Tree Conservation Commission public hearing.

In this situation, however, recusal at the hearing does not eliminate the conflict between the official’s financial interests and public responsibilities. First, commission members are appearing before the city’s arborists in the planning department, where any problems are resolved satisfactorily, and these appearances obviate the need to appeal to the Tree Conservation Commission. Second, their appearances are not isolated instances, but occur on a regular basis. Third, the commission members engage in active negotiations with the arborists involving complicated plans and a complex law; their applications do not involve routine matters in which the employee exercises little or no discretion. Finally, the activity is conducted without the openness associated with public hearings and without any public disclosure. Because the appearances take place at the departmental level, occur routinely and without transparency, and involve discretionary decisions by employees, recusal is an inadequate remedy.

Adopted November 16, 2006

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