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## **Community Boards Voting at or Chairing Meetings**

Charter Sections: 2601(5); 2604(a)(1)(a), (b)(1)(b), and (b)(3); 2800

Opinions Cited: 91-3, 93-2, 93-3, 95-18, 96-8, 2003-2, 2003-4

### **Advisory Opinion No. 2008-2**

The Conflicts of Interest Board (the "Board") has in recent years received several requests for opinions asking when members of community boards may vote on matters affecting organizations, usually not-for-profit organizations, with which they have various types of relationships. Since the Board anticipates receiving similar requests in the future, the Board issues this public opinion to set forth its determinations in these matters.

### **Background**

The City has fifty-nine community boards, each with up to fifty members, appointed by the borough president in consultation with the City Council members whose districts include the community district served by the community board. See Charter Section 2800. Among other duties, community board members serve in an advisory capacity on such matters as

zoning, community planning, City budget, and the delivery of municipal services. Each member of the community board must have a residence, a business, or other significant interest in the community district.

Community board members are public servants subject to the City's conflicts of interest law, Chapter 68 of the City Charter. Because they are people who live or work in the community district, community board members may have associations with various organizations in their local communities that have matters before their community board. For example, a community board member may work for, or be a board member of, a not-for-profit charitable organization or corporation doing business in the community. Or the matter before the community board may concern a board member of the organization, or a funder of a not-for-profit entity, where a community board member works.

This Advisory Opinion addresses several common situations where potential conflicts may arise involving community board members and organizations with which they have such relationships. Inquiries to the Board in this area have, for whatever reason, primarily involved not-for-profit entities. However, because most of the issues, and the outcomes, would be the same with respect to for-profit entities, this Opinion, except where noted, applies to both. It should be noted at the outset that many potential conflicts in this area are fact-dependent, so that a community board member should seek the advice of the Board when in doubt in a potential conflict situation.

Before exploring these common situations, we first set forth the relevant law.

### Relevant Law

Charter Section 2604(a)(1)(a) provides that “no public servant shall have an interest in a firm which such public servant knows is engaged in business dealings with the agency served by such public servant; *provided, however, that, subject to paragraph one of subdivision b of this section, an appointed member of a community board shall not be prohibited from having an interest in a firm which may be affected by an action on a matter before the community or borough board....*” (Emphasis added.)

Notwithstanding the language, highlighted above, permitting community board members to retain interests that might be affected by community board action, Charter Section 2604(b)(1)(b) prohibits community board members from voting “on any matter before the community or borough board which may result in a personal and direct economic gain to the member *or any person with whom the member is associated....*” (Emphasis added.)

In Advisory Opinion No. 91-3 the Board explained the impact of these provisions on the conduct of community board members, as follows:

A community board member is not prohibited by Chapter 68 from having an ownership interest in or a position with a firm which may be affected by the community board's action on a matter. See Charter Section 2604(a)(1)(a). No member may vote, however, on any matter before the community board “[w]hich may result in a personal and direct economic gain to the member or any person with whom the member is associated.” [Footnote omitted.] See Charter Section 2604(b)(1)(b). Pursuant to Charter Section 2601(5), a person “associated” with a public servant includes a spouse, child, parent or sibling; *a person with whom the public servant has a business or financial relationship; and any firm in which the public servant has an interest....* It is also our opinion that a community board member's participation in the board's discussions of such matters does not create a conflict of interest under Chapter 68, provided that, before participating, the member discloses to the other members of the community board the nature and extent of his or her private interest. (Emphasis added.)

In Advisory Opinion No. 95-18, the Board addressed the circumstances under which a community board member may chair a committee which considers matters related to the

community board member's private interests. Relying on, and quoting from, Advisory Opinion No. 93-2, the Board reasoned that the same concerns present when a community board member votes on a matter involving his or her private interests could also be present when a member chairs a committee that considers matters related to that interest, because a committee chair can "greatly influence a committee by controlling the agenda, recognizing speakers and making rulings." See Advisory Opinion No. 95-18 at 3-4. Given that "ability to use his or her position as a committee chair for the private advantage of a firm in which the community board member had an ownership interest or position," the Board ruled that, to avoid potential conflicts, a community board member "may not chair a committee if that committee is likely to have matters before it which concern the community board member's private interests or employment." Id. at 4. Applying the holding of Advisory Opinion No. 95-18 to the specific case of community board members who are owners of licensed liquor facilities, such as bars and restaurants, the Board held in Advisory Opinion No. 2003-2 that such a community board member may not chair a community board committee that, as part of its regular agenda, considers the licensing of such facilities.

In Advisory Opinion No. 96-8, citing both Opinion Nos. 93-2 and 95-18, the Board determined that a community board chair must "relinquish his or her role as chair at any meetings at which matters involving his or her private interests are discussed or voted upon." Id. at 8.

### Discussion

With this background, we address four different situations concerning community board members. These four scenarios are not exhaustive, and, as noted above, the outcome may turn on the specific facts of the individual case. Community board members should seek the advice of the Board whenever in doubt.

*Scenario 1: The community board member is an employee or board member of an organization, and the matter before the community board would benefit the organization.*

In this scenario, the community board member is an employee or board member of an organization that has a matter before the board (*e.g.*, a matter concerning funding for a not-for-profit entity or the sale of property by or to the organization). Such a community board member is “associated” with that organization within the meaning of Charter Section 2601(5), since the member plainly, in the language of that provision, has a “business or financial relationship” with the organization. Because Charter Section 2604(b)(1)(b) prohibits a community board member from voting on any matter that may result in a direct financial benefit for an organization with which the member is associated, the member **may not vote** on this matter.<sup>1</sup>

This prohibition on voting applies if the organization might receive a direct economic gain or loss from the matter before the community board. If, however, a vote would merely advance a position or cause advocated by the organization, but not result in any financial impact on the organization, then the member may participate in voting. By limiting this prohibition on voting to votes with direct financial benefits, the drafters of Chapter 68 recognized that members of community boards are selected to reflect the various interests of the community and that any standards erected to preserve the integrity of decision-making should not deprive community boards of this desired diversity. See Advisory Opinion No. 93-3 at 2.

Consistent with Advisory Opinions Nos. 93-2 and 95-18, a community board member who, for these reasons, is prohibited from voting on a matter affecting an organization with

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<sup>1</sup> The Board reads the restriction in Section 2604(b)(1)(b) prohibiting members from voting on matters that may result in a direct economic gain to the member or to any “person” associated with the member to mean the member or any person **or firm** associated with the member. See, similarly, Charter Section 2604(b)(3), which prohibits actions by public servants that advantage any person *or firm* with whom or which they are associated.

which he or she is associated, also may not chair any committee of the community board that is likely, as part of its regular agenda, to have matters before it affecting the organization. See also Advisory Opinion No. 2003-2. Even if there is no such committee of the community board, under the reasoning of Advisory Opinion Nos. 95-18 (basing the decision on a committee chair's ability to "greatly influence a committee by controlling the agenda, recognizing speakers and making rulings") and 96-8, a community board member may not chair any particular meeting, whether a committee meeting or a meeting of the full board, that is considering a matter on which that member is prohibited from voting. However, even when the community board member is prohibited from voting, from chairing a relevant committee, or from chairing a meeting, the member may, as noted above, after disclosing his or her relationship with the organization, participate in the board's or committee's discussion of the matter. See Advisory Opinion No. 91-3.

*Scenario 2: The community board member is an employee of an organization, and the matter before the community board would benefit a board member of that organization.*

In this scenario, the community board member is an employee of an organization, and the board is voting on a matter that would benefit a board member or senior officer of the organization. The outcome in this situation will turn in major part on the community board member's position at the organization. In one case, the Board considered a community board member who was the paid executive director of a not-for-profit entity on whose governing board sat a developer with a matter before the community board. It appeared, as may typically be the case, that the executive director served at the pleasure of the organization's board of directors. Accordingly, the Board determined that the executive director was "associated" with the developer within the meaning of Chapter 68, since the board member was effectively her boss.

The Board therefore advised that it **would violate** Chapter 68 for the member to vote at the community board on a project of the developer. The result would obviously be the same, were the developer actually, not just effectively, the member's boss – *e.g.*, a senior executive of the organization for which she worked.<sup>2</sup>

At the other extreme, if the community board member is a lower ranking employee of a large organization, and if the matter before the community board would benefit one of the organization's executives or directors, the Board would be likely to conclude that the community board member was not "associated" with the executive or director, since the job status of the rank-and-file employees of a large organization is not typically affected by its senior executives or board of directors. In fact, in a closer case, where the community board member was the general counsel of a relatively small not-for-profit, but reported to the executive director who in turn answered to the board of directors, the Board determined that the community board member was *not* associated with a member of the board of directors who had a matter before the community board. The community board member could therefore vote on the matter in question. In that case, however, the board of directors of the not-for-profit in question was exceedingly large, and the board member in question was not an officer of the board and did not serve on its audit or finance committee. Had the board been small, or had the affected board member served on a key committee, the outcome may have been different. As this analysis suggests, the outcome in these matters is likely to turn heavily on the specific facts, except in the case of the chief executive of an organization, whom the Board will presume to be associated with members of its board of directors.

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<sup>2</sup> Moreover, as noted above, if the community board member may not vote on the specific matter affecting the developer, he or she may not chair any meeting at which the matter will be discussed or voted upon.

*Scenario 3: The community board member is “associated” with an employee of an organization, and the matter before the community board would benefit the organization.*

In this scenario, the community board member is “associated” within the meaning of Chapter 68 with an employee of an organization, *e.g.*, the member’s spouse or sibling works for the organization, and the community board is voting on a matter that would benefit the organization. Here, the vote will plainly benefit the organization, but the question is whether the vote will also benefit *the associated party*. The outcome in this situation depends on whether or not the associated person appears reasonably likely to benefit materially from the vote. In making that determination, the Board will look to such factors as the person’s position at the organization (the higher-ranking the person, the more likely that he or she will benefit), the size of the organization (the smaller the organization, the more likely that any given employee will benefit), and the nexus between the matter before the community board and the person’s work at the organization.

In one such recent case, the Board considered a community board member whose spouse worked as a mid-level employee at a very large not-for-profit organization. The community board’s vote would plainly benefit the not-for-profit, but, as noted above, the question before the Board was whether the member’s spouse would benefit. In determining that the spouse would not likely benefit materially from the community board vote, the Board noted that the spouse’s job, the nature of her work, and indeed her entire unit had no connection with the proposal before the community board. The Board accordingly concluded, based on this totality of circumstances, that the spouse would not benefit from the proposal before the community board, so that the community board member **could vote** on the matter. If, however, the organization had been considerably smaller, the Board might well have concluded otherwise. Indeed, if the proposal

would have directly impacted on the spouse's work at the not-for-profit, or if the spouse were the executive director of the not-for-profit, the Board almost certainly would have concluded that the community board member could not vote on the proposal and, consequently, could not chair a meeting considering the proposal.

*Scenario 4: The community board member is an employee or board member of a not-for-profit organization, and the matter before the community board would benefit a donor or funder of the organization.*

In this scenario, in its first variation, the community board member is an *employee* of a not-for-profit organization, and a matter before the board would have an economic impact on a donor or funder of the organization. The question presented is whether the member will be deemed to be "associated" with that donor or funder. If so, voting on a matter that would financially benefit that donor or funder would be prohibited. The outcome in this situation will turn in substantial part on the position that the member holds at the not-for-profit organization and the nature and extent of the financial relationship between the funder and the organization. In *COIB v. Bergman*, COIB Case No. 2003-152a (2007), the community board member was the paid president of a not-for-profit organization that, for several years, had been receiving 25% of its annual budget from a real estate developer. As a result of the community board member's senior position at the not-for-profit and the developer's significant funding of the organization, the developer was in effect underwriting the member's salary. The member voted at the community board on a proposal that would provide a direct financial benefit to the developer. The Board determined that the member was "associated" with the developer within the meaning

of Charter Section 2601(5), so that his vote on the matter benefiting the developer violated Section 2604(b)(1)(b).<sup>3</sup>

In contrast with this outcome is the case where donations to the not-for-profit from the person affected by the community board action make up a very small portion of its budget. The Board considered such a case, again involving a community board member who was the paid executive director of a not-for-profit organization and a matter before the board that would directly benefit a donor to the organization. In that case, however, the donation, which was unsolicited, was less than 5% of the organization's budget. In that case, the Board determined that the community board member was *not* associated with the donor within the meaning of Charter Section 2601(5), so that the member would not violate Chapter 68 by voting on the matter involving the donor. As these examples suggest, however, there is no bright line rule as to when an employee of a not-for-profit organization will be deemed to be associated with a financial supporter of the organization, so that community board members with questions in this regard should consult with the Board.

On the other hand, if the community board member is not a paid member of the staff of the not-for-profit, but is instead an unpaid member of its *board of directors*, the Board has determined that such an unpaid board member is not "associated" with funders of the not-for-profit within the meaning of Chapter 68. Thus, where the matter before the community board would benefit such a donor, but the community board member is merely a volunteer board member of the not-for-profit, the community board member **may** vote on the matter. However,

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<sup>3</sup> Once again, if, as a result of the potential benefit of a community board matter to the not-for-profit's funding source, the community board member may not vote on the matter, the member also may not chair a relevant meeting.

whether or not the board member may vote, he or she may not solicit support for the not-for-profit from *any* donor at a time when the donor has, or is about to have, a matter before the community board.<sup>4</sup>

### Conclusion

1) A community board member who serves as an employee or board member of an organization may not vote on any matter before the community board that would provide a direct financial benefit to the organization, or chair any meeting considering that matter.

2) A community board member who serves as an executive director of an organization may not vote on (or chair a meeting considering) any matter before the community board that would provide a direct financial benefit to a more senior executive or a member of the board of directors of the organization. Similarly, a community board member who serves as an executive of an organization may not vote on (or chair any committee considering) any matter that would provide a direct financial benefit to a more senior executive or board member of the organization. Voting *may* be permitted where the community board member is an employee of the organization, and where it does not otherwise appear that the affected executive or member of the board of directors determines the terms and conditions of employment of the employee/community board member.

3) A community board member whose spouse, sibling, or other “associated” party is employed by an organization that would be materially affected by a matter before the community board may not vote on that matter (or chair a meeting considering it) if it appears reasonably

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<sup>4</sup> See Advisory Opinion No. 2003-4 at 24. This restriction on soliciting contributions for not-for-profits from persons or firms with matters before, or about to be before, the community board applies whether or not the community board member is considered to be “associated” with the donor.

likely that the associated party will receive a direct financial benefit from the matter before the board. The higher ranking the associated party is in the organization, the more likely that he or she will benefit, and accordingly the more likely that voting will be impermissible; where the associated party is the chief executive of the organization, the Board will presume that he or she would benefit. Other relevant factors are the size of the organization (the smaller the organization, the more likely voting will be impermissible) and the nexus between the work of the associated party at the organization and the matter before the community board.

4) A community board member who serves as an employee of a not-for-profit may not vote on (or chair a meeting considering) any matter before the community board that would provide a direct financial benefit to a donor of such a significant part of the revenues of the not-for-profit that these funds could underwrite the salary of the community board member. In contrast, where the community board member is an unpaid member of the board of directors of the not-for-profit, the member may vote on matters at the community board that would benefit even major funders of the organization. In no case, however, may a community board member, whether an employee *or* a board member of a not-for-profit, solicit contributions for that not-for-profit from any person or firm with a matter before, or about to be before, the community board.

5) Even where a community board member is prohibited from voting on, or chairing a meeting considering, a matter, the board member may participate in the community board's discussion of the matter, provided that he or she discloses the disqualifying interest.

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Because, as noted at the outset of this Opinion, many potential conflicts in this area are fact-dependent, the four common scenarios discussed above are merely illustrative. **Any community board members who are in doubt about when voting or chairing a meeting is**

**permissible should consult with the Board before voting or chairing a meeting on matters involving *any* organizations with which they or their “associated” persons may be affiliated.**

A handwritten signature in black ink that reads "Steven B. Rosenfeld". The signature is written in a cursive style with a large initial 'S'.

Steven B. Rosenfeld  
Chair

Monica Blum  
Kevin B. Frawley  
Angela Mariana Freyre  
Andrew Irving

Dated: September 18, 2008