

## March 12, 2019, Agenda – Open Meeting Matter

To: The Board

From: Christopher M. Hammer

Date: March 6, 2019

Re: Proposed New Board Rule on Community Boards

As part of its review of the Board's existing rules, practices, and advisory opinions pursuant to City Charter § 2603(c)(4),<sup>1</sup> Staff brings to the Board a proposed new rule for community board members. This proposed Rule would codify the advice and practices articulated in many of the Board's advisory opinions on the particular issues that affect community board members.

With the Board's approval, Staff will formally submit this new rule to the New York City Law Department and the Mayor's Office of Operations, as required by the City Administrative Procedure Act. See Charter § 1043(d).

Attached are the following:

1. Summary of Advisory Opinions (**Exhibit 1**); and
2. Proposed draft Notice of Public Hearing (**Exhibit 2**).

### Analysis & Discussion

For nearly 30 years, the Board has frequently provided advice, both formal and informal, about Chapter 68's unique application to members of community boards, publicizing its

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<sup>1</sup> City Charter § 2603(c)(4) requires the Board to "initiate a rulemaking to adopt, as interpretive of the provisions of [Chapter 68] any advisory opinion of the board issued after the year 1990 and before [October 27, 2018] which the board determines to be consistent with and have interpretive value in construing the provisions of this chapter and which either (a) establishes a test, standard, or criterion; or (b) is anticipated by the board to be the subject of future advisory opinion requests from multiple persons."

interpretations of the law in over a dozen advisory opinions, which are summarized in **Exhibit 1**. Proposed Board Rules § 1-15 would clarify and consolidate these advisory opinions to describe how Chapter 68 guides the three essential functions of community board members: (1) discussing matters at a community board meeting; (2) voting on matters before the community board; and (3) chairing a community board committee or meeting.

The proposed Rule would codify the Board's interpretation of Charter § 2604(b)(1)(b), a provision that applies exclusively to community board service,<sup>2</sup> as well as Charter § 2604(b)(2), the "catch-all" provision,<sup>3</sup> with respect to these three essential functions. In determining whether Chapter 68 permits a proposed action at the community board, a member must evaluate whether he or she has a private interest and whether the proposed action may benefit that private interest.

The proposed Rule would guide the member in each of these inquiries. First, it would identify a community board member's private interests to include the member's other City service as well as the member's private employment, such as the employer itself, any person that determines the terms and conditions of such employment and, if the member works for a not-for-profit organization, any person who or firm that donates at least 10% of the organization's annual budget. Second, it would clarify a standard in the Charter that is unique to community board service: when a community board action may cause a "personal and direct economic gain" to the member's private interests. See Charter § 2604(b)(1)(b).

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<sup>2</sup> Pursuant to Charter § 2604(b)(1)(b), a community board member may not "vote on any matter before the community [] board which may result in a personal and direct economic gain to the member or any person associated with the member."

<sup>3</sup> Charter § 2604(b)(2) prohibits a public servant from engaging "in any business, transaction, or private employment ... which is in conflict with the proper discharge of his or her official duties." Pursuant to Charter § 2606(d), the Board may not impose any fine for a violation of Charter § 2604(b)(2) unless the violation "involved conduct identified by rule of the board as prohibited by such paragraph."

While the proposed Rule would codify the advisory opinions that relate to the unique functions of community board members, it would not codify other advisory opinions that interpret provisions of Chapter 68 that apply equally to community board members and other public servants.<sup>4</sup> In addition, the proposed Rule would also decline to incorporate Advisory Opinion No. 2010-1, and thus would effectively rescind that Opinion, which advised that a community board member who concurrently serves on a Community Education Council (“CEC”) of the New York City Department of Education may vote on matters at one entity that had been or might be considered at the other entity. Staff does not believe that a special exception is warranted for the tiny group of public servants who hold these two part-time positions, as there is no indication that applying the same rule to all community board members with second City positions would be cumbersome or would detrimentally affect the functioning of either a community board or a CEC. The Board could grant individual waivers pursuant to Charter § 2604(e) in the rare instance it is necessary.

The proposed Notice of Public Hearing and Opportunity to Comment appears as **Exhibit 2.**

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<sup>4</sup> For example, in Advisory Opinion Nos. 1996-4 and 1998-9, the Board interpreted Charter § 2604(b)(6), which prohibits a part-time public servant from appearing directly or indirectly on behalf of private interests before the public servant’s own City agency, as applying to equally to community board members as to other part-time public servants. In the latter Opinion, the Board granted a waiver of this prohibition to permit a community board member’s indirect appearance before the community board by another attorney at his law firm, where the community board member recused himself from participating in the matter both at his law firm and in the community board’s vote. Nothing about this Opinion is unique to a community board member, as the Board has granted many similar waivers to public servants at other City agencies.

## **Summary of Advisory Opinions related to Community Board Members**

**1991-3:** A community board member may not vote on any matter in which the member or any associated person or firm has a personal and direct economic interest or on any matter that has been or may be considered by a City agency employing the member. The community board member may participate in the community board's discussion of these matters provided that, before participating, the member discloses the nature and extent of his or her private interest or other City employment.

**1991-12:** A community board chair and a community board district manager do not exercise substantial policy discretion, defined in Board Rules § 1-02 as having major responsibilities and exercising independent judgment in connection with important agency matters.

**1992-27:** A community board may fundraise to hire a consultant to study land use within the community board district, provided that the board (1) does not solicit funds from any person or firm with a matter pending before the board and (2) ensures that donors affected by the study are not involved in selecting the consultant.

**1992-31:** A community board member may not sell services to his or her own community board.

**1993-2 (*superseded by 2010-1*):** A community board member who is also a member of a local community school board may not chair the community board committee with jurisdiction over the school board or vote on funding recommendations involving the community school board.

**1993-3:** A community board member who holds an unpaid position with a local development corporation or public benefit corporation may vote on matters involving the corporation, as long as the vote would not result in a personal and direct economic gain to the member or an associate of the member.

**1995-18:** A community board member may not chair a committee likely to have before it matters involving the community board member's private interests or employment.

**1995-27:** A community board may fundraise to support its programs and initiatives but may not solicit donations from individuals or firms with matters pending before the board.

**1996-4:** Neither a member of a community board, nor the member's partner or employee at a private firm, may appear before the community board on behalf of private clients.

**1996-8:** A community board chair may have an interest in a firm that regularly has matters before the community board but must step down at meetings involving such matters.

**1998-9:** The Board granted a waiver to permit a community board member's indirect appearance before the community board by another attorney at the member's law firm, on the condition that the member recused himself from participating in the matter both at his law firm and in the community board's vote. The Board also granted a waiver to permit an architect to appear

before the New York City Board of Standards and Appeals and a Borough President's Office on behalf of a private client in connection with a matter pending before the community board.

**2004-3:** Because a community board member is the superior of the paid staff of the community board, a community board may not hire any person associated with one of its members.

**2005-3:** A community board member may vote on the rezoning of a large area in which the member owns a home because such a large area does not constitute a personal and direct economic impact, but the member must disclose the interest at the community board meeting and to the Board.

**2008-2:** A community board member may not vote on any matter that may provide a direct financial benefit to an associated person or firm, such as any person who determines the terms and conditions of the member's private employment. A community board member who serves as an employee of a not-for-profit organization may not vote on any matter that may provide a direct financial benefit to a donor of a significant part of the organization's revenues.

**2010-1:** A community board member who also serves as a member of a community education council of the New York City Department of Education may vote on a matter at one entity that had been or might be considered at the other entity and may chair a committee at one entity that might consider matters that had been or might be considered at the other.

## EXHIBIT 1

## New York City Conflicts of Interest Board

### **Notice of Public Hearing and Opportunity to Comment on Proposed Rule Regarding Community Board Service**

**What are we proposing?** The Conflicts of Interest Board proposes to adopt rules regarding community board service.

**When and where is the hearing?** The Conflicts of Interest Board will hold a public hearing on the proposed rule. The public hearing will take place at [time] on [date]. The hearing will be at [location].

This location has the following accessibility option(s) available: [ ]

**How do I comment on the proposed rules?** Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to the Conflicts of Interest Board through the NYC rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email comments to [rules@coib.nyc.gov](mailto:rules@coib.nyc.gov).
- **Mail.** You can mail comments to Christopher M. Hammer, Deputy General Counsel, Conflicts of Interest Board, 2 Lafayette Street, Suite 1010, New York, New York 10007.
- **Fax.** You can fax comments to the Conflicts of Interest Board at (212) 437-0705.
- **By speaking at the hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by calling (212) 437-0730. You can also sign up in the hearing room before the hearing begins on [date]. You can speak for up to three minutes.

**Is there a deadline to submit comments?** Yes; you must submit written comments by [date].

**Do you need assistance to participate in the hearing?** You must tell the Conflicts of Interest Board if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the address given above. You may also tell us by telephone at (212) 437-0730. You must tell us by [date].

**Can I review the comments made on the proposed rules?** You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A few days after the hearing, copies of all comments submitted online, copies of all written comments, and a summary of oral comments concerning the proposed rule will be available to the public at the Conflicts of Interest Board, 2 Lafayette Street, Suite 1010, New York, New York 10007.

**What authorizes the Conflicts of Interest Board to make this rule?** Sections 1043 and 2603(a) of the City Charter authorize the Conflicts of Interest Board to make this proposed rule. This proposed rule was not included in the Conflicts of Interest Board's regulatory agenda for this Fiscal Year because it was not contemplated when the Conflicts of Interest Board published the agenda.

**Where can I find the Conflicts of Interest Board's rules?** The Conflicts of Interest Board's rules are in Title 53 of the Rules of the City of New York.

**What rules govern the rulemaking process?** The Conflicts of Interest Board must meet the requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043 of the City Charter.

### **Statement of Basis and Purpose of the Proposed Rule**

Throughout its history, the Board has frequently answered questions from community board members, as part-time public servants, about the application of Chapter 68, the City's conflicts of interest law, to the conduct of their work as community board members. Believing that other community board members would benefit from advice given to the individual requestors, the Board has issued upwards of a dozen advisory opinions relating to community board members. See Advisory Opinion ("A.O.") Nos. 1991-3, 1991-12, 1992-27, 1992-31, 1993-2, 1993-3, 1995-18, 1995-27, 1996-4, 1996-8, 1998-9, 2004-3, 2005-3, 2008-2, and 2010-1. The Board proposes to consolidate these opinions into a single rule that codifies the Board's interpretation of Chapter 68's application to community board members.

Chapter 68 prohibits all public servants, including community board members, from using their City position for the financial benefit of the member or of any person or firm "associated" with the member. See Charter § 2601(5). Proposed Board Rules § 1-15 would address this prohibition with respect to the three basic activities of community board members: (1) voting on matters as community board members, (2) discussing matters at a community board meeting, and (3) chairing a community board committee or meeting.

*1. Voting on Matters as Community Board Members*

Proposed Board Rules § 1-15(a), which applies Charter § 2604(b)(1)(b), would prohibit a community board member from voting on any matter that may result in a personal and direct economic gain to the member or to any associated person or firm. See A.O. 1991-3 at 3 (“[A] community board member is specifically prohibited under the revised Chapter 68 from voting on matters in which he or she has a direct economic interest.”). The definition of “personal and direct economic gain” would distinguish the financial interests of a member or his or her associates from other interests, such as an ideological interest or policy goal, like less noise pollution or more trees. Proposed Board Rules § 1-15(a) would codify the Board’s advice in A.O. 2008-2: “if ... a vote would merely advance a position or cause advocated by” an organization with which a community board member is associated, the member may vote on the matter as long as the matter may not “result in any financial impact on the organization.”

In proposed Board Rules § 1-15(a)(3), the Board would codify its interpretation in A.O. 2008-2 of a person or firm “associated” with a community board member by virtue of a “business or other financial relationship.” First, it would clarify that a community board member is associated with his or her individual boss(es), that is, “any person who determines the terms and conditions of the private employment of the member,” not just the firm that employs the member. See A.O. No. 2008-2 at 6-7 (advising that a community board member employed as the executive director of a not-for-profit organization is associated with someone serving on the board of that organization where that person was “effectively her boss” at the not-for-profit organization. Second, it would clarify that a community board member employed by a not-for-profit organization is associated with a major donor to the not-for-profit, given that an organization’s most substantial donors are “in effect underwriting the member’s salary” at the



not-for-profit. A.O. No. 2008-2 at 9. Proposed Board Rules § 1-15(a)(3) would establish 10% as an easy-to-calculate threshold at which the amount of the donation becomes so substantial to create an association between the donor and the not-for-profit employee.

In proposed Board Rules § 1-15(b), the Board would codify its longstanding advice that community board members who serve another City agency as an official, officer, or employee may not vote on any matter involving the member's other City agency. See A.O. No. 1991-3 at 2 (adopting the position of the Board's predecessor agency, the Board of Ethics, that it would be "inappropriate for an employee of a City agency to cast a formal vote [on a community board] which might be in opposition to a position theretofore or thereafter taken by his or her agency"). This proposed rule thus applies the "catch-all" provision of Charter § 2604(b)(2), which states that "[n]o public servant shall engage in any business, transaction, or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties."

## *2. Discussing Matters at a Community Board Meeting*

Proposed Board Rules § 1-15(b) would codify the Board's long-standing advice to community board members, starting in A.O. No. 1991-3, that they may participate in any discussion at the community board in matters involving the member's private interests or other City service, provided that the member discloses his or her interest prior to such discussion.

## *3. Chairing a Community Board Committee or Meeting*

In A.O. No. 93-2, the Board explained that "a committee chair can, if she or he so wishes, greatly influence a committee by controlling the agenda, recognizing speakers, and making rulings." In proposed Board Rules § 1-15(c), the Board would both codify and clarify its prior advice on chairing meetings. Specifically, the proposed rule would state that a community board

member may not serve as the chair of a committee or subcommittee that regularly considers matters involving that member's private interests (A.O. No. 95-18) or that member's other City agency (A.O. No. 93-2) and may not chair any meeting considers matters involving such private interests or other City agency (A.O. No. 96-8). The Board had not specified how frequently a matter involving the member's private interest or other City service must arise for the committee to "regularly consider" such matters; the Board now proposes to define that frequency as three or more times over a twelve-month period or, in the case of another City agency, jurisdiction or oversight over that agency.

### **Text of the Proposed Rule**

New material is underlined.

[Deleted material is in brackets.]

**Section 1.** Section 1-15 of Title 53 of the Rules of the City of New York is amended to read as follows:

[Reserved.]

- (a) **Voting and Private Interests.** For purposes of Charter §§ 2604(b)(1)(b) and 2604(b)(2), a community board member may not vote at the community board on any matter that may result in a personal and direct economic gain to the member or to any person or firm associated with the member, but the member may participate in discussions at the community board on such matters, after the member discloses his or her private interest at the meeting.
- (1) For purposes of this paragraph, a "personal and direct" economic gain means a specific economic gain that would flow to the member or associated person or firm as a proximate result of the matter's ultimate approval or rejection.

(2) For purposes of this paragraph, “economic gain” includes the mitigation of a loss.

(3) For purposes of the definition of “associated” in Charter § 2601(5), a person who or firm that has “a business or other financial relationship” with a community board member will include the following:

(i) Any person who determines the terms and conditions of the private employment of the member.

(ii) Any person who or firm that donates to the member’s not-for-profit employer in an amount of 10% or more of the not-for-profit’s annual operating budget.

(b) **Other City Service.** For purposes of Charter § 2604(b)(2), a community board member who serves another City agency as an official, officer, or employee:

(1) may not represent the other City agency before the member’s community board;

(2) may not vote at the community board on any matter involving the member’s other City agency; and

(3) may participate in discussions at the community board on matters involving the member’s other City agency, after the member discloses his or her role at that agency at the meeting.

(c) **Service as Chair of Community Board or Committees or Subcommittees.**

(1) For purposes of Charter §§ 2604(b)(1)(b) and 2604(b)(2), a community board member:

(i) may not chair a committee or subcommittee that regularly reviews matters particularly affecting the member’s private employer, financial interest, or other private interest, including the interest of any person or firm associated with the member; and

(ii) may not chair any meeting of the community board, committee, or subcommittee where any matter particularly affecting the member's private employer, financial interest, or other private interest is being considered.

(iii) For purposes of this paragraph, a committee or subcommittee of a community board "regularly reviews" matters involving the member's private employer, financial interest, or other private interest if the committee or subcommittee considers or expects to consider a matter involving the member's employer or interest three or more times over a twelve-month period.

(2) For purposes of Charter § 2604(b)(2), a community board member who serves another City agency as an official, officer, or employee:

(i) may not chair a committee or subcommittee that regularly reviews matters involving the member's other City agency; and

(ii) may not chair any meeting of the community board, committee, or subcommittee that considers any matters involving the member's other City agency.

(iii) For purposes of this paragraph, a committee or subcommittee of a community board "regularly reviews" matters involving the member's other City agency if either (A) the committee or subcommittee has jurisdiction or oversight over that agency or (B) the committee or subcommittee considers or anticipates considering matters involving that agency three or more times over a twelve-month period.

(d) **Public Members of Community Board Committees.** A public member of a community board committee, appointed pursuant to Charter § 2800(i), is not a public servant within the meaning of Charter § 2601(19).

(e) **Agency Head Designations.** For purposes of Charter Section 2604(e) and the Board Rules, a community board member serves as the agency head for any designation or approval for him or herself. The chair of a community board is the agency head for the public servants employed by the community board.