

Appearance Before City Agency
Community Boards
Waiver

Charter Sections 2604(b)(6)
2604(e)

Advisory Opinion No. 98-9

The Conflicts of Interest Board (the "Board") has received requests for an opinion from members of two different community boards. The first, an attorney (the "Attorney") in private practice, asks whether an attorney in his private law firm may appear before the community board. The second, an architect (the "Architect") in private practice, seeks to represent a client before the Board of Standards and Appeals ("BSA") and a Borough President's Office, with respect to a property which lies within the borders of his community board.

For the reasons discussed below, it is the opinion of the Board that it is appropriate to grant the Attorney a waiver under Charter Section 2604(e) allowing the Attorney's firm to appear before the community board, provided that he recuse himself from any matters relating to his firm or his firm's client

that may come before the community board and also recuse himself from working on the matter for his firm.

It is also the opinion of the Board that it is appropriate to grant the Architect a waiver under Charter Section 2604(e) so that the Architect may appear before the BSA and the applicable Borough President's Office. Therefore, in both instances, the Board has determined that a waiver of Charter Section 2604(b)(6) is appropriate.

Background

The Attorney

The first request comes from the Attorney, a community board member who is in private practice in a large law firm. The Attorney seeks permission from the Board to allow another attorney in his law firm to appear before a committee of his community board. The Attorney is not a member of this particular committee and has advised the Board that he is neither involved with nor has knowledge of the matter in relation to which his firm is representing the client. He has advised the Board that he would recuse himself from any community board meeting at which his firm may appear and that he would recuse himself from voting on any

matter on which his firm may appear. He would also recuse himself from working on the matter for his firm.

The Architect

The second request comes from the Architect who is also in private practice and a member of a community board. He is Chairman of one of his community board's committees.

In his architectural practice, the Architect obtains approval of Uniformed Land Use Review Process ("ULURP") actions, such as zoning changes, variances and special permits for his clients. He seeks to represent a client in a ULURP action where the premises are within the area covered by the community board on which he serves. He seeks to be able to present the case to a Borough President's office and to the BSA, but not to the community board. All contact with the community board would be handled by an independent firm with which he is not associated.

Discussion

Pursuant to Charter Sections 2604(a)(1)(a) and 2604(b)(1)(b), community board members may have interests in organizations which have matters before their community boards, and they may represent their

own personal interests before their community boards. However, community board members may not represent the interests of others, including private clients, before the community board which they serve.

In accordance with Charter Section 2604(b)(1)(b), community board members may, upon disclosure of their own personal interests to their respective community boards, participate in their boards' actions affecting those interests by, for example, participating in the boards' discussions. These community board members may not, however, "vote 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." Charter Section 2604(b)(1)(b).

Community board members are considered "public servants" but not "regular employees" of the City for the purposes of Chapter 68.¹ Charter Section

¹ See Charter Section 2601(19), which provides that public servant means "all officials, officers and employees of the city, including members of community boards. . . ." See also Charter Section 2601(20), which provides that regular employee means "all elected officials and public servants whose primary employment, as defined by rule of the board, is with the city, but shall not include members of advisory committees or community boards."

2604(b)(6) provides that a public servant who is not a regular employee may not, for compensation, represent private interests before his or her City agency nor appear directly or indirectly on behalf of private interests in matters involving his or her City agency.

Under Charter Section 2601(4), "appear" means to make any communication, for compensation, other than those involving ministerial matters. Thus, community board members may not represent private interests before their community boards nor may they appear anywhere directly or indirectly on behalf of private interests in matters involving their community boards.

In Advisory Opinion No. 96-4, the Board considered whether a partner or employee of a private law firm in which the community board member has an interest may represent clients before the community board. In that Opinion, the Board determined that neither community board members nor their partners or employees in private firms may represent private clients before their community board committees or appear before their community boards on behalf of their private clients.

Left unanswered in Opinion No. 96-4 was the issue of whether the provisions of Charter Section 2604(b)(6) may be waived by the Board pursuant to Charter Section

2604(e). Charter Section 2604(e) provides that an otherwise prohibited position may be held "where the holding of the position would not be in conflict with the purposes and interests of the city. . . ." Thus, without a waiver from the Board, a community board member is prohibited from representing private clients before his or her community board. Likewise, without a waiver, partners or employees of a community board member's private firm are prohibited from representing clients before the community board. So, too, without a waiver, a community board member may not appear before another City agency on behalf of a client in a matter that is before the community board.

It is the opinion of the Board that the waiver provisions of Charter Section 2604(e) are applicable to Charter Section 2604(b)(6) and that, in certain circumstances, it is appropriate for the Board to waive the provisions of Charter Section 2604(b)(6). In order for the Board to make a determination whether to grant or deny a waiver request, the Board must receive a certification from the community board member that the proposed conduct will not be in conflict with the purposes and interests of the City. The community board member must furnish this certification, in

writing, to the Board along with a complete set of the relevant facts. The Board will then make an independent determination as to whether a waiver is appropriate in the particular case.

If the Board determines that a waiver is appropriate, the community board member would be subject to such restrictions as the Board may determine are appropriate for that particular case. In particular, community board members must recuse themselves from any community board meeting at which their firm may appear and recuse themselves from voting on any matter on which their firm may appear.

The Attorney has certified to the Board that his firm's appearance before his community board on behalf of a client would not conflict with the purposes and interests of the City. He has also provided a complete set of facts to the Board describing the circumstances of his firm's representation. In this case, the Board has determined that the Attorney's law firm may properly appear before his community board, provided that the Attorney recuse himself from any matters relating to his firm or his firm's client that may come before him at the community board and that he not vote on any matter involving his firm or his firm's client

and further provided that he recuse himself from working on the matter for the firm.

The Architect has also certified to the Board that his appearance before the BSA and a specific Borough President's Office in a matter that is before his community board would not conflict with the purposes and interests of the City. In addition, he has provided the Board with a complete set of facts on which the Board relied in determining whether a waiver would be appropriate. The Board has determined that the Architect may properly appear before the BSA and the applicable Borough President's Office with respect to the above-mentioned matter, provided that he recuse himself from any matters relating to this property or his client that may come before him at the community board and that he not vote on any matter involving his client.

Conclusion

It is the opinion of the Board, for the reasons stated above, that Charter Section 2604(b)(6) is subject to the waiver provisions of Charter Section 2604(e). However, for the Board to make a waiver determination in a particular case, members of

community boards must certify to the Board that their proposed conduct would not conflict with the purposes and interests of the City. Further, community board members must provide the Board with a complete set of facts describing the circumstances of their representation or their firm's representation of a client. The Board makes its determination on a case-by-case basis as to whether a waiver is appropriate, given the particular facts and circumstances of each case.

The Board's decision in this matter is conditioned on the correctness and completeness of the facts supplied to the Board. If such facts are in any respect incorrect or incomplete, the advice given in this opinion may not apply.

Benito Romano
Acting Chair

Bruce A. Green
Jane W. Parver

Dated: September 14, 1998