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MEMORANDUM

To: **Mayor and City Council, Board of Zoning Appeals, Construction Board of Adjustment and Appeals, Design Review Advisory Committee, Planning Commission**

CC: **Eric Linton, City Manager**

From: **Cecil G. McLendon and Leonid Felgin, City Attorneys**

Date: **June 6, 2016**

Subject: **Conflict of interests of officials and relationship with outside agencies**

This memorandum is a brief overview of concepts related to conduct by elected and appointed officials as it concerns outside, non-City-related agencies and private individuals and corporations that may have zoning or other actions coming before the Council or Board in the near future.

Section 2.13 of the Charter specifically prohibits, among others, any official engaging

> "in any business or transaction or have a financial or **other personal interest**, direct or indirect, which is incompatible with the proper discharge of official duties or which would tend to impair the independence of his or her judgment or action in the performance of official duties."

It is not hard to determine when one has a conflicted financial transaction. The nuance of that prohibition sits with the phrase "other personal interest." A conflict need not involve obvious economic gain – conflicting personal choices, beliefs and community desires may sometimes hamper the required independence of the government official. In other words, while a member of the City Council or appointed Board is still a citizen of the City, there are some "rights" of citizens and "community leaders" that now become subservient to the specific duties of the official position in several situations.

Membership and Participation in Outside Groups – Dunwoody Homeowners Association

As citizens of the City of Dunwoody, it is understandable and expected that community leaders participate in leading community organizations. Dunwoody's biggest and perhaps one of the oldest community organizations is the Dunwoody Homeowners Association (DHA). Prior to the incorporation of the City of Dunwoody, the DHA served as a defacto community Board that the DeKalb County Commission took advice from, however unofficially, in making zoning and other determinations specifically affecting the Dunwoody Community.

Importantly, however, the DHA is a private organization funded by its membership and is not part, nor should it be, of decision making apparatus of the City government. While there is nothing inherently wrong with Councilmembers belonging to organizations such as HOA's, churches, and other organizations as citizens of the community, in Dunwoody, the DHA also takes upon itself a role that may be considered quasi-governmental policy organization when they are, usually, the first to "review" zoning-related applications filed with the City and voting on whether to support the applications in front of Council, Board of Zoning Appeals, or another City-established Board. Therefore, having Councilmembers or members of policy boards such as the Board of Zoning Appeals, Construction Board of Adjustment and Appeals, Design Review Advisory Committee, Planning Commission be members of the DHA Board, even ex-officio, non-voting members (which would include holding even a minimal personal membership), presents a problem that may be seen to affect the independent decision-making role of Council and Board members. Of note, this restriction would not extend to members of the Council or Board member's spouse and/or family.

Moreover, even if not a member of an organization, active participation in DHA hearings and decisions is, for obvious reasons, a conflict of interest, Likewise, even without active participation, being members of the Board and being present at the discussions the DHA Board has concerning actions coming in front of the City can arguably create an appearance of pre-judgment on issues. Even if this is not the case, the mere presence at a meeting by a decision maker leaves that argument open to any opposing counsel in the event of litigation. Whether the City Council or board members speak at the DHA presentations or remain silent, the information gathered, factual or argumentative, has an effect to the extent that each present Councilmember may, and in many cases most likely, come into the eventual actual hearing on the matter leaning, or even already having decided, which way they will vote. This can be problematic even when the decision being made is legislative (ex: Rezoning); much more so if the decision is quasi-judicial. The appearance of pre-judgment, or gathering information outside of the hearing process, could potentially taint the decision and, in case of a legal challenge, would lead (has led) to claims of due process violations that would undermine the entire process to the detriment of the City, not the least of all financially.

The two most recent examples are the Center for Discovery and the Dunwoody Club Forest subdivision plat litigations. Both of the cases contain written e-mail correspondence between Councilmembers and citizens discussing the issues involved prior to such issues materializing in front of the BZA (Center for Discovery) and Council (Dunwoody Club Forest). Many of those e-mails contain indications that Board members and Councilmembers went to the DHA meetings where these issues were discussed and came away with certain understanding of the issues that should have been reserved for the quasi-judicial hearings that had not yet occurred. The preferred course of action would have been recusal of Councilmembers and, depending on the case, Board of Zoning Appeals members from any discussions in front of the DHA Board or other formal gatherings prior to any public hearings before the Council or Board that concern the same topic. Moreover, the ideal course of action would be to not attend the meetings and/or leave the room entirely and retain the appearance of independence.

Finally, and tangentially, Councilmembers, Board members, and the City should be careful in dealing with all non-governmental organizations in the City. As noted, ideally,

Councilmembers and Board members should not be members of organizations where issues are discussed which may come in front of them for decisions. Moreover it is further important to make sure that staff and resources are not utilized in assisting said organizations in such a way as could be interpreted as an unconstitutional gratuity or, in case of religious organizations, a First Amendment Establishment Clause violation. Utilization of City leased space or City-owned Property should not be allowed without a rental fee or some other compensation. For example, the non-profit organizations that manage some of the City's parks, such as the Nature Center, have Agreements with the City that have compensation provisions for the right to manage/use the property. The City has policies for rental of park facilities for events, such as Brook Run Park, but no policies for rental of facilities such as the Council Chamber for use of non-City of Dunwoody organizations. As the Council Chamber is leased by the City of Dunwoody, allowing a non-City organization to utilize it at no cost is an unpermitted gratuity and, if utilized in a discriminatory manner (such as allowing one group to use it but not another) could be considered a First Amendment Free Speech violation. If the City wants to allow use of the Council Chambers or other City-owned or leased property, a methodology for such use should be established with a corresponding fee, like the pavilions at Brook Run Park.

Public Statements

The other side of that same coin is the personal thoughts of Council and Board members voiced out loud in a context outside of a normal process. There is nothing wrong with Councilmembers or Board Members stating thoughts or opinions on broad ideas: "crime is bad," "economic development and cooperation with business and industry will help raise our standard of living," "protection of residential districts from industrial and negative intrusions" – these are some of the many policy goals that Councilmembers, and even Board members, are prone to discuss with citizens, with newspapers, with other policy makers. The problem comes about when thoughts on specific items that are going through the zoning-related process but are not yet at the hearing stage, are not kept close to the vest. All Councilmembers and Board Members are entitled to have initial thoughts on whether a specific rezoning, Special Land Use Permit, Variance, appeal, etc. has merits but prior to the case coming before the appropriate Board, it would be inappropriate for a Councilmember or Board Member to voice that opinion in public, whether to citizens or news organizations. What that does is create an appearance that the Councilmember or Board Member has already made up his/her mind on the specific case and if that Board or Council Member ends up voting for or (more likely) against the specific applicant, all the statements made by the official will be filtered through the prism of a pre-hearing reaction, thus once again tainting the eventual decision (especially a close one).

Certain types of communication with citizens about specific issues by e-mail or appearing to assist citizens in specific actions against an applicant coming in front of the Council or Board can give an appearance (or definitive proof of) bias on behalf of the official prior to any hearing on the issue. The worst is a situation where a Councilmember or Board member appears to "share" the opposition's views, states their opinion to the opposing and complaining citizens that their mind may already be made, or assists the opposition in mounting their attack on an applicant coming for a hearing in front of them. In some situations, the more glaring the assistance the higher likelihood that this official will have to recuse him/herself from the discussion/vote on the matter when it comes to them for decision. But even if the eventual hearing comes before a different Board than one served

by the official making statements, the level of influence that the official may have on that Board or its members, especially if he/she is a recognized community leader will be perceived as trying to influence the decision that he/she should not be a part of in the first place. Additional insinuation of influence will result if the matter is coming in front of a Board and coming from a member of the City Council, specifically because the Mayor and Councilmembers have the power to appoint Board Members, as well as, more importantly, remove them. The insinuation will be that Board members have formed their opinions not based on the evidence presented at the upcoming hearing on the matter but based on the opinions and feelings of respected and elected members of the City Council.

In cases that garner controversy, it is best for Councilmembers and Board Members to keep themselves away from the controversial statements and conversation. When questions or concerns come regarding a specific matter that will come before them or another City Board, it is advisable to defer the response to a Staff member who is not only more acquainted with the issue but will best generate an appropriate response. The City's staff is a resource of expert knowledge, and one that should be utilized liberally. Whenever in doubt, the best practice is to refer specific questions to staff. This will help ensure much less, if any, allegations of bias or pre-judgment by the Council or Board member and/or undue influence by the Council on members of the other Boards.

Legislative vs. Quasi-Judicial

Once a specific case moves through the process and ends up in the hands of the Mayor and City Council or one of the City's Boards, the duty of the Council or Board depends on the nature of the request. Rezoning is a legislative duty; everything else is quasi-judicial. There are only two boards that deal with legislative decisions – Planning Commission and the City Council. The Planning Commission is a recommending body and not a final decision-making body, so their actions are much less scrutinized. The City Council as a legislative body decides a rezoning request. Essentially, "rezoning" is a change in the City's Zoning Ordinance because it changes the City's zoning map. Though there are factors for the Council to consider in determining whether they choose to approve the rezoning request, none of those factors are by themselves determinative of the Council's decision. The Zoning Procedures Act-required public hearing is for the purpose of allowing the applicant to present their case for rezoning and the community a chance to voice their opinion. In the end, whether the Council approves or disapproves the rezoning depends on its conformance to the Comprehensive Plan and the chosen policies of the Mayor and City Council for the zoning district requested, including buffers, locations, etc. There is thus more leeway towards doing outside "investigation," such as listening to the applicant prior to the public hearing or visiting the site, of the request than in a quasi-judicial hearing. However, Councilmembers should still be cognizant that showing possible pre-judgment of the decision by statements and conversations shown above are still highly problematic and would no doubt result in Due Process violation claims filed by the applicant should the rezoning be denied. The more Councilmembers appear independent, the more defensible a denial decision will be.

Quasi-judicial decisions have much less leeway. In a quasi-judicial decision, the Mayor and City Council or Board members act as judges, applying the ordinances and required factors to the facts of the case presented **at the hearing**. A Special Land Use Permit, Variance, or any type of appeal, whether to the Council, Board of Zoning Appeals, Alcohol License

Review Board, or Construction Board of Adjustment and Appeals are all examples of quasi-judicial actions and all have factors which are utilized in making the decision. If a request for a Special Land Use Permit or Variance is denied or, in cases of appeals, whatever the decision of the Board turns out to be, the factors enunciated in the applicable provision of the City Code should be explicitly utilized in making that decision not just as part of the discussion but, more importantly, as part of making a Motion to vote on the decision. Utilization of improper factors, or the factors in an improper way, would present a due process violation that will be the basis of a challenge to the decision.

The second important issue with quasi-judicial decisions is the evidence that is utilized to make the decision. A Superior Court judge utilizes what is in the Record submitted during a hearing/trial, and the application of the cited law, as the basis for the decision. A quasi-judicial officer does the same. If the quasi-judicial officer comes into the hearing with any pre-conceived notions, those can only be based on the material so far submitted to them as part of the case. Otherwise, the evidence submitted at the hearing is the ONLY evidence that can be considered for the decision. While independent research is usually a commendable quality, in case of quasi-judicial decisions that is a detriment and may taint the decision. If any of the basis for the eventual decision is based on information not received into the Record before or during the Hearing and is based on individual research, commentary, assumptions, etc., that decision will most likely be overturned by the Superior Court upon appeal. Going back to the first issue above, presence at DHA meetings during discussions concerning a topic coming up for a decision, being members of community organizations that would question the independence of the decision or present a much starker conflict of interest, or making public opinion statements prior to making the quasi-judicial (or, in some respects, even legislative) decisions will all serve as glaring and easy basis for appealing an adverse decision. Staying away from those temptations will make it clear that the City and its officials value procedure over politics and law over emotion and will go a long way to the assurance that the decisions of its public officials on the Council and Boards withstand judicial scrutiny.

Attorney Client Privilege

As noted, this Memo is subject to the Attorney Client Privilege of the City. You have received this based upon your position of authority which you have accepted with the City. As an attorney client document, please understand, it would be an ethical violation to reveal the contents of, or discuss the content of, this Memo with anyone other than persons who have been provided this information. That being said, the Mayor, the City Manager and/or the City Attorney would be happy to discuss the issues raised in this Memo at your convenience should you like further discussion of these issues or clarification.

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MEMORANDUM

TO: Dunwoody Homeowners Association, Inc.
Attn.: Robert Wittenstein, President

FROM: Seth G. Weissman

DATE: August 12, 2016

SUBJECT: Conflict of Interest Issues Relating to Dunwoody Homeowners Association Members Serving on City of Dunwoody Board, Commissions and Council

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A. FACTS:

The City Council of Dunwoody has adopted (and now temporarily suspended) a verbal policy where members of City Council, the Planning Commission, the Board of Zoning Appeals and other City Boards (hereinafter collectively, "Governmental Officials" and singularly "Governmental Official") have been banned from simultaneously serving on the Board of Directors of (or from even being a member of) a neighborhood association such as the Dunwoody Homeowners Association, Inc. ("DHA"). The purported explanation for this policy is that if the Governmental Official participates in any way in the neighborhood association's formulation of a position on a zoning case that later comes before the Governmental Official it might arguably taint the Governmental Official's ability to fairly hear the case and thus be a conflict of interest. Based upon the policy, a Governmental Official could not even be a passive member of the DHA (i.e., paying dues but not necessarily participating in the formation of policy decisions of the DHA) without violating the policy. A justification for the policy is that the City is increasingly being sued in zoning cases where the plaintiffs are: 1) alleging such conflicts of interest to exist on the part of Governmental Officials; and 2) the policy will help prevent such litigation. The City of Dunwoody has offered no legal support for the proposition that serving in the dual role described above is a conflict of interest and I am aware of no case law or state statutes that would support such an argument.

Finally, the policy of the City was not adopted at an open meeting of government and is not in writing. If that is the case, it almost certainly makes the policy unenforceable as a matter of law since: 1) the Open Meetings law was not followed; and 2) fundamental to concept of due process is that a law be written and advise a person what is allowed and disallowed. (See *Jekyll Island State Park Authority v. Jekyll Island Citizens Association*, 266 Ga. 152, 153; 464 S.E.2d 808 (1996)) where the Georgia Supreme Court stated that a statute must be definite and certain to be valid and when it is "so vague and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application, it violates the first essential of due process of law".

If any of the above facts are incorrect, please let me know as it could affect the opinions set forth herein.

B. PURPOSE OF MEMORANDUM:

You have requested that I critique the City's policy (which is admittedly somewhat difficult to do since it is unwritten and not subject to being reviewed) and discuss: 1) the constitutionality of the City's policy; 2) the law on conflicts of interest in Georgia; 3) whether the City's policy makes sense in light of the current state of the law; 4) make policy recommendations on how best to avoid conflicts of interest while allowing members of the DHA to serve in dual roles with the City; and 5) the open meeting requirements under Georgia law and how it could affect the actions of Governmental Officials who also serve on the DHA.

My conclusion, after reviewing the law in this area is that the City's policy, however well-intentioned as a means to limit litigation, goes too far to restrict the constitutional rights of Governmental Officials and, if challenged, would likely be struck down.

C. GEORGIA'S CONFLICT OF INTEREST IN ZONING LAWS STATUTE:

Georgia has a state statute dealing with conflicts of interest in zoning laws known as the Conflict of Interest in Zoning Laws. (See O.C.G.A. § 36-67A-1, et seq.).

The Conflict of Interest in Zoning Actions Law is limited to rezoning actions and only applies to local government officials. The term "local government official" includes city

councilmembers, as well as members of a planning commission. (O.C.G.A. § 36-67A-1(5)). Planning staff are also considered "local government officials" under the Act.

The Act defines a "rezoning action" as an "action by local government adopting an amendment to a zoning ordinance which has the effect of rezoning real property from one zoning classification to another." (O.C.G.A. § 36-67A-4(9)). Therefore, all rezoning applications initiated by a property owner or his or her agent would fall under the statute. Therefore, this specific statute does not apply to other types of governmental zoning actions, such the issuance of a building permit or variance. Moreover, the Act does not prohibit a government official from voting on a zoning decision when the local government is adopting a zoning ordinance for the first time or is voting upon a revision of the zoning ordinance initiated by the local government pursuant to a comprehensive plan.

The Act provides that a local government official has a conflict of interest and should not participate in the case whenever he or she: (1) has a property interest in any real property affected by a rezoning action which that official's local government will have the duty to consider; or (2) has a financial interest in any business entity which has a property interest in any real property affected by a rezoning action which that official's local government will have the duty to consider must immediately disclose the interest. (O.C.G.A. § 36-67A-2)). The law defines a "financial interest" as all direct ownership interests of the total assets or capital stock of a business entity where such ownership interest is 10 percent or more. (O.C.G.A. § 36-67A-1(3)). Furthermore, a "property interest" means the direct ownership of real property and includes any percentage of ownership less than total ownership. (O.C.G.A. § 36-67A-1(7)). Speculative or remote interests, however, will not support a claim under the statute. (See *White v. Bd. of Comm'rs of McDuffie County*, 252 Ga.App. 120, 555 S.E.2d 45 (2001)). The interests at issue must be directly and immediately affected by the rezoning action.

The Conflict of Interest statute also applies to family members of a government official who may have "property interests" or "financial interests" similar to those described above. (O.C.G.A. § 36-67A-2). The statute defines "members of the family" as a spouse, mother, father, brother, sister, son, or daughter of a local government official. (O.C.G.A. § 36-67A-1(6)). Any disclosures made by the official as to conflicts of interest will become part of a public record and will be available to the public. (O.C.G.A. § 36-67A-2(3)).

Where a local government official "knows or should have known" about a conflict, he or she must immediately disclose, in writing, the nature and extent of his or her interest in the matter to the local governing authority of which the official is a member. (O.C.G.A. § 36-67A-2). The conflicted official must also disqualify himself or herself from any voting pertaining to the rezoning matter and must "not take any other action on behalf of himself or any other person to influence action on the application for rezoning...." (O.C.G.A. § 36-67A-2(3); see also Little v. City of Lawrenceville, 272 Ga. 340, 528 S.E.2d 515 (2000)). Georgia courts have limited the statute's ban on "any other action[s]" to those actions carried out in the official's public capacity. (Little v. City of Lawrenceville, 272 Ga. 340, 341, 528 S.E.2d 515 (2000)).

Based on the plain meaning of the above law, the actions of government officials who participate in a neighborhood association such as the DHA plainly do not violate the Conflicts in Interest in Zoning Actions law when they participate in a neighborhood association meeting considering the rezoning and then consider and vote on the same rezoning as a government official.

D. LIMITING A GOVERNMENTAL OFFICIAL'S RIGHT TO PARTICIPATE IN CERTAIN PRIVATE ORGANIZATIONS INTERFERES WITH THE OFFICIAL'S CONSTITUTIONALLY PROTECTED RIGHT OF ASSOCIATION AND FREE SPEECH:

Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" guaranteed by the Due Process clause of the Fourteenth Amendment. (See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 451 (1958). Restrictions on the freedom of association are normally subject to the closest scrutiny of our courts. (Id). Freedom of speech is protected under the First Amendment to the U.S. Constitution and restrictions on speech are similarly subject to being strictly scrutinized by our courts. These are fundamental rights and not ones which courts are quick to allow governments to abridge. For such restrictions not to be struck down, they must be narrowly tailored and serve a compelling governmental interest. (See Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S Ct. 925 (1986). This generally means that the restriction must normally employ the least restrictive means for achieving the government's compelling interest. A compelling interest must be more than the government merely having a rational basis for its policy or a substantial

reason for the policy. Instead, a compelling interest must be some interest of the highest order not to be struck down by our courts.

With regards to the City's policy, it is unclear what compelling governmental interest is being served in restricting the right of Governmental Officials to participate in private organizations since the genesis of the concern is the threat of particular types of legal claims which, while capable of being asserted, do not appear to have merit. The policy also appears to be constitutionally overbroad in that it prohibits Government Officials from having any involvement with a neighborhood association whatsoever regardless of: (1) whether the involvement is active or passive; (2) the type of Governmental Official to whom the policy applies; and (3) the type of neighborhood associations to which the policy applies. While there is a line of Supreme Court cases indicating that the associational and free speech rights of government employees can be limited in certain circumstances, the restrictions at hand target Governmental Officials who are not City employees and the rational for restricting the speech and associational rights of employees is not applicable to what the City of Dunwoody is trying to achieve with its policy. Therefore, as stated above, my initial assessment is that if challenged, the policy of the City would be struck down as overly broad and, therefore, unconstitutional.

E. PUBLIC HEARING MUST BE FAIR AND FREE OF CORRUPTION:

Zoning hearings must be fundamentally fair to comply with due process requirements under the U.S. Constitution and Georgia Constitution. Separate and apart from the state statute on conflicts of interest, zoning decisions can be challenged if the decision made by local Governmental Officials is fraudulent or corrupt. (See *DeKalb County v. Wapensky*, 253 GA. 47, 315 S.E.2d 873 (1984); See also *Dunaway v. City of Marietta*, 251 GA. 727, 308 S.E. 823 (1983)).

As expected, there are no appellate decisions in Georgia indicating that participating in a neighborhood association either as a member or director and then hearing a zoning case discussed at the neighborhood meeting somehow rises to the level of fraud corruption. However, in the case of *White v. Board of Commissioners of McDuffie County*, 252 App. 120. 121, 555 S.E.2d 45 (2001), residents argued that two members of the Board of Commissioners acted fraudulently and corrupting in voting for the rezoning because both were members of the McDuffie County Development Authority, which was a party to the rezoning. The Georgia Court

of Appeals found no conflict of interest to exist with respect to these commissioners. With respect to one commissioner, the Court found no conflict to exist because the commissioner was not a voting member on the Development Authority and therefore did not directly participate in the decision to purchase the property. With respect to the second commissioner, the Court found that there was no conflict of interest because he was statutorily permitted to serve on the Development Authority and the Board of Commissioners under Georgia law. Since this dual role was specifically sanctioned by statute, it did not invalidate the zoning decision.

Of course, the situation in the *White* case is arguably much more of an extreme case than the one confronting the DHA in that it would be the equivalent of the DHA seeking to rezone property it owned where members of the DHA then voted on the rezoning in their capacity as Governmental Officials) (rather than the situation at hand where Governmental Officials are participating in a neighborhood association which takes positions on zoning cases that later appear before the Governmental Officials).

F. GOVERNMENTAL OFFICIALS WHO ACT IN A LEGISLATIVE CAPACITY WITH REGARD TO ZONING CASES HAVE BROAD DISCRETION REGARDING THEIR ACTIVITIES:

Under Georgia law, Governmental Officials serve in one of two capacities with regard to land use issues. Depending on which role they are serving in can arguably affect their duties and obligations. Governmental Officials who consider or vote on zoning cases act in a quasi-legislative capacity. (See Barrett v. Hamby, 235 GA. 262, 219 S.E.2d 399 (1975)). The power to zone is a legislative power delegated to counties and municipalities by the Georgia legislature in the Georgia Constitution of 1983. (Ga. Const. of 1983, Art. IX, paragraph IV). The delegation is only to the local legislative body which in the case of the City of Dunwoody is the City Council. It may not be delegated to non-legislative bodies or to private individuals. So, for example, if a City Council were to announce that it was going to let a neighborhood association make zoning decisions for the Council, it would almost certainly be viewed as an unconstitutional delegation of the zoning power by the local government. To help avoid that claim, I recommend that the DHA adopt a policy that no member or director of the DHA be bound by the recommendations of the DHA in voting on any zoning matter coming before the Governmental Official.

Other than the delegation issue, Governmental Officials acting in a legislative capacity should be free, as with all legislators, to lobby for particular positions on zoning matters, be lobbied, attend meetings of outside organizations to learn more about a zoning case and fully participate in any outside group considering a zoning case. There is no case law or statutory law of which I am aware in Georgia limiting a legislator's ability to freely pursue information relevant to a zoning case, meet with a neighborhood association to understand its position relative to a zoning case or even help the neighborhood association formulate a policy regarding the rezoning case. While Governmental Officials acting in a legislative capacity have to ensure that the process followed in conducting an official hearing a zoning case is fair, there is nothing in Georgia law which requires them to leave their biases, values, opinions and neighborhood memberships at the door when considering such cases.

G. SOME GOVERNMENTAL OFFICIALS IN DUNWOODY ACT IN A QUASI-JUDICIAL ROLE:

Local legislative bodies, like the Dunwoody City Council may delegate quasi-judicial powers to local administrative zoning boards such as a Board of Zoning Appeals. They handle matters viewed as having limited discretion and not involving the exercise of legislative powers, such as interpreting the ordinances adopted by local governments in the land use area, granting variances, and issuing special administrative permits and special exceptions to a zoning ordinance. A zoning board is considered an administrative agency and its exercises "quasi-judicial and quasi-legislative powers and applies criteria drafted by the legislative body to the particular set of facts before it". (See *Shockley v. Fayette County*, 260 Ga. 489, 396 S.E.2d 883 (1990)). Legislative bodies may delegate administrative or quasi-judicial functions to zoning boards provided the delegation is accompanied by sufficient guidelines for execution.

While there is no case law in Georgia directly on this point, an argument can at least be made that persons serving in a quasi-judicial role owe a greater duty, by the nature of their role, judicial in their deliberations and, thus, to be detached and neutral in hearing only what is presented to them at the meeting of the BZA. Lawyers regularly argue over whether meeting with members of a Board of Zoning Appeals prior to the actual hearing date is an impermissible ex parte contact with persons sitting in a quasi-judicial capacity. (In judicial proceedings, one

side cannot normally meet with the judge without the other side having the opportunity to be present).

Out of an extreme abundance of caution, this may be an area where members of the DHA who are also on the Dunwoody Board of Zoning Appeals ("BZA") may want to recuse themselves from voting on matters at the DHA that will later come before them while serving on the BZA. I do not, however, see any reason why such members could not continue to be passive members of the DHA or even attend meetings of the DHA where matters coming before the BZA are discussed, since any person or group is already free to attend the BZA hearing and provide their views and opinions. I do not see a member of the BZA merely attending a meeting of the DHA to hear that discussion directly as being untoward, illegal or non-judicial in any way.

H. OPEN MEETING LAW COULD IMPACT JOINT SERVICE ON DHA AND CITY BOARD COMMISSION OR COUNCIL:

The 2012 amendments to the Open Meetings Law changed the definition of "meeting" under the Act. A "meeting" under the Open Meetings Law no includes:

> The gathering of a quorum of the members of the governing body of an agency at which any official business, policy, or public matter of the agency is formulated, presented, discussed or voted upon; or the gathering of a quorum of any committee created by the governing body at which any official business, policy, or public matter of the committee is formulated, presented, discussed or voted upon. (See O.C.G.A. § 50-14-1).

So, for example, if a quorum of a planning commission has lunch together and begin to discuss an upcoming zoning case, it would constitute a meeting within the meaning of the Open Meetings Act.

The challenge here is that if a quorum of governmental body such as the City Council or Planning Commission were to attend a meeting of the DHA at which the DHA discussed and/or made a recommendation on a zoning case that was to appear before either of these bodies, a good argument can be made that this constitutes a gathering of a quorum of the members. While it can be argued that going to a DHA meeting is not a "gathering" of a quorum of the members, the law also describes specific types of meetings which are exclusions under the law and this scenario is not listed as one of the exceptions. If the gathering is deemed to be a

meeting subject to the Open Meetings Act, then the governmental body would need to send notice of the meeting and provide a published agenda.

While this may sound like a potential major obstacle for the DHA, it does not mean that members of different Dunwoody boards, Commissions and the City Council cannot serve on the DHA. Instead, it simply means that a quorum of them cannot attend a meeting of the DHA at which specific zoning cases or variance requests will be discussed. The DHA can adopt a policy that not more than a quorum of any governmental body hearing zoning cases be permitted to serve on the Board of Directors of the DHA or be allowed to attend a meeting at which a specific zoning case or variance request will be discussed. It should be noted that this would not prevent every elected or appointed official from coming to the annual meeting, fundraiser or holiday party of the DHA since there would not presumably, be a discussion of specific business coming before the DHA.

I. AFTERTHOUGHT:

The law with regard to many of the issues discussed in this memorandum is still in its infancy and there is limited case law guidance on the interplay between serving simultaneously in a private neighborhood organization and on a City Council, Commission or Board. The recommendations set forth in this memorandum are conservative and may well go beyond what the DHA is required to do. While there are a couple of issues where the DHA and the City, out of an abundance of caution, may want to take limited steps to avoid running afoul of the law, there is no logic or justification for the broad limitations imposed by the City in its unwritten policy.

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(Practice Limited to Mediation and Arbitration)

JANE A. RANGE

MEMORANDUM

To: Eric Linton

From: Abb Hayes

Re: Questions from City of Dunwoody re conflicts of interest

Date: 8-19-16

This memorandum is in response to your request that I address two issues: (1) whether the June 13, 2016 executive session was proper; and (2) whether I agree with the June 6, 2016 Memorandum from Cecil McLendon and Leonid Felgin (hereinafter referred to as "the Memo") regarding conflicts of interest. In examining these issues, I have reviewed documents provided to me by you, as well as the video recording of the June 24, 2016 Council meeting. I have talked to you, Laurel Henderson, Cecil McLendon, and Lenny Felgin, and I have researched local and state law on the topics.

EXECUTIVE SESSION

My opinion as to the propriety of the June 13, 2016 executive session is based on two documents: (1) Closed Meeting Affidavit dated June 14, 2016; and (2) Executive Session Minutes dated June 13, 2016. In the Affidavit, the Mayor stated that the subject matter of the meeting was to discuss litigation, real estate, and personnel.[1] The redacted Minutes contain a short discussion of the Memo.

O.C.G.A. § 50-14-2(1) allows executive sessions "to consult and meet with legal counsel pertaining to pending or potential litigation ... brought or to be brought by or against the agency or any officer or employee or in which the agency or any officer or employee may be directly involved[.]" I understand that the issues and concerns discussed in the Memo arose, in part, because they were raised in pending litigation against the City, which litigation is presently being handled primarily by attorney Laurel Henderson. I understand that the issues and concerns contained in the Memo were part of a

[1] Please note that the checked personnel section of the Affidavit contains a reference to O.C.G.A. § 50-14-3(6). The correct reference is O.C.G.A. § 50-14-3(b)(2). You should consider amending your affidavit form.

consultation with City attorneys to review the pending case and also to avoid potential future litigation and claims involving conflicts of interest.

O.C.G.A. § 50-14-3(b)(2) allows executive sessions "when discussing or deliberating upon the appointment . . . of a public officer[.]" I understand that the issues and concerns discussed in the Memo were designed to assist the Council in evaluating how conflicts of interest should affect the Council's appointment of public officers.

Based on the limited information that I have reviewed, I believe that the executive session was proper.

MEMO

In looking at the issue of conflicts of interest, one must look to the City's own ethics code. In the case of Dick v. Williams, 215 Ga. App. 629, 631 (1994), the defendant Cobb County argued that the existence of a conflict of interest should be determined under state law, and not under the Ethics Code of Cobb County. The Court of Appeals disagreed and stated, "We find no merit to this contention. Rather, we believe that state law provides a floor and not a ceiling for the boundaries of ethical conduct by government officials. Local county and municipal governments are free to impose higher standards, and individuals who seek and retain office in local jurisdictions are bound by the standards of the government they serve."

An "officer" is defined in City Charter § 2-2-8 as "any person elected or appointed to hold an office, as defined in the city Charter." City Charter § 2-209(c)(3) provides, "It is sound public policy for standards of ethical conduct for public servants to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts which are personal, material and avoidable[.]" City Charter § 2-213(a)(1) provides, "No elected official, appointed officer, or employee of the city or any agency or political entity to which this Charter applies shall knowingly: ... have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of official duties or which would tend to impair the independence of his or her judgment or action in the performance of official duties[.]"

The issue of whether participation by Dunwoody elected officials and/or appointees in the DHA is a conflict of interest is not crystal clear. Like most ethical issues not involving direct financial conflict, it is a judgment call. The City has passed an ethics code recognizing that public servants' primary responsibility in their performance of their official duties is to put the City first and avoid conflicts. A city attorney's primary responsibility in representing a city client is to protect that city. Based on those considerations, I agree with Mr. McLendon and Mr. Felgin, as well as Ms. Henderson, that active participation by Dunwoody elected officials and appointees in DHA activities, such as service on committees, service as an officer, and attendance at meetings to consider rezoning and other applications made to the City, is a conflict of interest that arguably tends to impair the independence of his or her judgment or action in the performance of official duties, in violation of City Charter § 2-213(a)(1).

Just as one example for the basis of my opinion, I refer you to the July 17, 2016 "DHA Message Regarding City of Dunwoody Board Policy" that you sent to me, which can also be found under the "News" tab on the DHA website. In the second paragraph, the DHA states, "We have fought some developments—and supported others." When serving as an appointee or an elected official, a public servant must be independent when hearing applications and making decisions and/or recommendations on applications. To align oneself with the DHA, which expressly states that it supports and opposes developments, would raise a potential appearance of conflict.

I recognize from a review of the DHA website that it is possible to be a member of the DHA simply by filling out a short application and paying a $40 annual fee. Again, a city attorney's primary responsibility in representing a city is to protect that city. That requires a cautious approach. A public servant refraining from even joining the DHA as a member would be the best way to eliminate any potential appearance of conflict. However, joining as a member, without taking a more active role and attending meetings, does not strike me as a serious conflict, and I believe that Dunwoody elected officials and appointees could choose to merely join the DHA without subjecting the City to serious problems.

RECENT PRESS AND DHA MEMO

You have alerted me to the recent coverage of this issue by the press, as well as the issuance of a legal memo by an attorney for the DHA, and I want to address a few issues related to that coverage. Based on my understanding of what transpired at the closed meeting, the City Council did not adopt a policy, verbal or otherwise, that elected officials and board appointees are banned from being members of or serving on the Board of Directors of the DHA.

The Memo at no point communicates that Dunwoody elected officials and board appointees are banned from being members of or serving on the Board of Directors of the DHA. Nor does the Memo imply that membership in a church or a PTO could result in a conflict of interest. In fact, the Memo specifically distinguishes the DHA from more traditional homeowners associations, churches, and other community organizations based on the fact that the DHA takes upon itself a role that could be considered to be a quasi-governmental policy organization.

What the Memo does provide is a legal opinion that participation by elected officials and board appointees in the DHA presents an issue that may affect, or may be perceived as affecting, the independent decision-making role of the City officials and therefore can have the damaging effect of undermining the process to the City's detriment: financially, legally, and otherwise. As set forth above, I am generally in agreement with the City's attorneys' assessment of the potential conflict of interest. However, these opinions are legal opinions intended to protect the City. They do not amount to a ban, by policy or law, which unconstitutionally abridges, or potentially unconstitutionally abridges, anyone's right of association or freedom of speech.

As set forth above, it is my opinion that active participation by Dunwoody elected officials and appointees in DHA activities, such as service on committees, service as an officer, and attendance at meetings to consider rezoning and other applications made to the City, is a conflict of interest that arguably tends to impair the independence of his or her judgment or action in the performance of

official duties and therefore should be avoided in order to protect the City. As previously stated, membership as a passive member, through payment of annual dues, gives me less pause with respect to the conflict of interest analysis.

CONCLUSION

In your initial communications, you mentioned that the City may need help in developing new policies on conflicts of interest and a code of conduct for board appointees as it relates to zoning matters. Please let me know if I can be of further assistance with those items or if you have questions or comments concerning this memorandum.

HULSEY, OLIVER & MAHAR, LLP
SUBMISSION TO THE CITY OF DUNWOODY TO PROVIDE LEGAL SERVICES

1) **Overview of the firm (to include history of firm, staffing levels, physical location, services provided):**

Hulsey, Oliver & Mahar, LLP enjoys an AV Preeminent Peer Review rating by Martindale Hubbell, which is the highest rating a firm can receive. Our law firm consists of fifteen (15) attorneys and eleven (11) staff. In 2014, we celebrated our founder E.D. Kenyon's 100th anniversary of providing legal services to the North Georgia community. We have a strong history of service to a myriad of nonprofit organizations in the area, and five (5) members of our law firm have served on the Gainesville City School Board. We are located at 200 E. E. Butler Parkway, N.E., Gainesville, Georgia 30501.

Colonel Ed, as E.D. Kenyon was affectionately called, began practicing law on June 1, 1914. In 1946, Colonel Ed was joined by his son, A. R. "Dick" Kenyon, and William D. Gunter in a partnership known as Kenyon, Kenyon & Gunter. William D. Gunter served as City Attorney for Gainesville during the 1950s and 1960s. Our firm offers a full-service legal practice, and we have developed a strong local government law practice over the years, representing the State of Georgia, agencies and authorities, municipal corporations, and counties. Our firm has expertise in a wide variety of issues relating to local government representation, including employment issues, eminent domain, zoning, real estate, and litigation.

2) **Municipal services Hulsey, Oliver & Mahar, LLP are capable of providing:**

Our firm is uniquely equipped to handle all local government legal matters because of our experience and concentration in the following areas:

- Open meetings and Open Records Acts
- Zoning and development codes
- SPLOST
- Election laws
- Condemnation, including road rights-of-way, sewer plant, and extensions of airport runways
- Employment law
- Water and sewerage
- Administrative law
- Government ethics
- Environmental law
- Local government finance and issuance of bonds
- Ad valorem taxation
- Real estate
- Law enforcement issues

Additionally, many of our attorneys are seasoned trial lawyers with experience in both state and

federal courts. We have extensive experience in the drafting of municipal ordinances, personnel matters, federal Section 1983 claims, zoning hearings, LOST and SPLOST negotiations, annexations, and other nuts and bolts issues pertaining to municipalities. One member is past chairman of the local government section of the State Bar of Georgia. A number of our attorneys serve as Special Assistant Attorneys General ("SAAGs"), by special appointment of the Attorney General of the State of Georgia in order to represent various State agencies and authorities, such as:

- Georgia Department of Transportation
- Lake Lanier Islands Development Authority
- Georgia Department of Natural Resources
- Georgia Mountain Community Services
- Georgia Environmental Finance Authority
- Superior Court Clerk's Retirement Authority

3) **What other governments do you currently serve or have you served in the past? How long have you served these governments?**

Hulsey, Oliver & Mahar, LLP either currently serves or in the past has served as City Attorney or County Attorney for the following local governments:

- City of Gainesville (1954 – 1970 and 2016 to present)
- City of Blue Ridge (2003 to present)
- City of Baldwin (1994 to present)
- City of Clermont (2005 to present)
- City of Tallulah Falls (2006 – 2013)
- City of Maysville (2007 to present)
- City of Gillsville (1995 to present)
- City of Flowery Branch (1988 – 1997)
- Hall County (1979 – 1989)
- Jackson County (2005 – 2013)
- Jackson County Water and Sewerage Authority (2005 – to present)
- Jackson County Airport Authority (2005 – 2013)
- White County (2006 – 2012)
- Union County (1996 – 2000)[1]

Additionally, in the past and at present, we continue to be employed by city and county attorneys to perform specific legal services on behalf of various local governments, identified as follows:

- City of Oakwood
- City of Blairsville
- City of Dahlonega

[1] The dates given are best estimates.

- Town of Braselton
- Hall County
- Dougherty County
- Lumpkin County
- Fannin County
- Pickens County
- Washington County
- Stephens County
- Towns County
- Forsyth County
- Morgan County
- Walton County
- Hart County

4) Who will be the primary attorney? (Provide resume)

Abbott S. Hayes, Jr. will serve as the primary attorney. His resume is attached.

5) What is the hourly rate for your attorneys, paralegals, secretaries, and other personnel?

Our hourly rate for all attorneys would be $200.00 per hour. The $200.00 per hour rate is significantly less than our standard rates for private clients. There is no charge for legal secretaries and other personnel.

6) References

Bryan Lackey
City Manager, City of Gainesville
678-602-2249
blackckey@gainesville.org

Matt Tate
Planner, City of Gainesville
770-531-6573
mtate@gainesville.org

VITA OF ABBOTT S. HAYES, JR.

DATE OF BIRTH: Born Gainesville, Georgia, May 21, 1969.

EDUCATION: Gainesville High School, 1987.

University of Georgia, B.A. Degree, 1990.

University of Georgia School of Law, 1994.

EMPLOYMENT HISTORY: Internships during Law School at Myers & Stroberg, Stewart, Melvin & Frost, Hulsey, Oliver & Mahar, and Hall County DA's Office, 1991-1994.

Law Clerk to Honorable Richard W. Story, 1994-1996.

Hulsey, Oliver & Mahar, 1996-present.

PROFESSIONAL AND CIVIC ACTIVITIES: President, Gainesville-Northeastern Bar Association, 2012-2013.

President, Chattahoochee American Inn of Court, 2010-2011.

Boys & Girls Clubs of Hall County Board member, including service as President, Vice-President, Board Development Chair, Resource Development Chair, 1996-2016.

Gainesville First United Methodist Church lifetime member, including service as chair of Capital Campaign, Debt Campaign, Outreach Committee, and Evangelism Committee.

President, Gainesville High School Athletic Booster Club, 2013 - 2015.

Meals on Wheels volunteer, 2003-present.

Hall County Mentor Program Board member, including service as President, 1995-2000.

Named Young Man of the Year for Gainesville/Hall County by Gainesville Jaycees, 2003-2004.

Kiwanis Youth Service Award winner, 2014.

Active member of the State Bar of Georgia and the Gainesville-Northeastern Bar Association.

Martindale-Hubble Lawyer Competency Rating is AV, which is highest rating given by fellow attorneys.