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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.