



Committee on Professional Ethics

Opinion # 501 - 1/5/79 (62-78) Topic: Conflict of interests;
assistant town attorney;
zoning board of appeals.

Digest: Assistant town attorney
may not accept assignment
to act as counsel to zoning
board of appeals in connec-
tion with Article 78 pro-
ceeding instituted by town
board against zoning board
of appeals.

Code: EC 5-1, EC 5-14, EC 5-15 ;
DR 5-105(A) and (B)

QUESTION

May an assistant town attorney accept an assignment to act as counsel to the town's zoning board of appeals in connection with an Article 78 proceeding instituted by the town board against the zoning board of appeals?

OPINION

Article 16 of the New York State Town Law empowers town boards to issue zoning ordinances and, further, authorizes the creation of zoning boards of appeal to grant variances therefrom "in harmony with their general purpose and intent." Town Law, §§ 261, et seq. Article 3 of the Town Law places the employment of assistant town attorneys under the jurisdiction of the town board and essentially permits the board to remove any assistant at will. Id., § 20(2)(a).

Under normal circumstances, a town's zoning board of appeals may properly be viewed as "a creature of the town board [and] the instrumentality through which town zoning ordinances are enforced." 14 Op. State Compt. 477 (1958). Again, normally, there is no conflict between the mandate of the town board's zoning ordinances and the work of its zoning board of appeals in granting variances. See, e.g., Matter of Karras v. Michaelis, 19 N.Y.2d 449, 453 (1967); Matter of Otto v. Steinhilber, 282 N.Y. 71, 75-76 (1939); and, Van Deusen v. Jackson, 35 App. Div.2d 58, 60 (2d Dept. 1970), aff'd 28 N.Y.2d 608 (1971). The zoning board of appeals is an agency of the town and the assistant town attorneys are generally obliged to act in a manner consistent with the broad scope of the duties impressed upon the office of the town attorney. Those duties include rendering legal advice to the town's zoning board of appeals. Cf., 21 Op. State Compt. 322 (1965) (duties of town attorney include acting as legal advisor to all town officers) with 1973 Atty. Gen. (Inf.) 208 (interpreting Town Law § 20[2] to require town attorney to render legal advice to all town boards).

As was explained by the ABA's Standing Committee on Ethics and Professional Responsibility in ABA Inf. 1244 (1972):

"[G]enerally no conflict of interest exists which would make it inappropriate or unethical for the same attorney to represent the Township in connection with those procedures culminating in the enactment of a zoning ordinance, and also the Zoning Hearing Board, in any hearing in which it is administering the ordinance or taking testimony in order to determine the validity of an ordinance."

Accord, N.Y. Op. 782 (1972) indexed at 9533, O. Maru, Digest of Bar Association Ethics Opinions (1975 Supp.); cf., N.Y. State 385 (1975).

Hence, the duties owed to the town board by the office of the town attorney, as well as the preeminent authority of that board, usually will be of no ethical relevance to the assistant's service as counsel to the zoning board of appeals; and, under normal circumstances, there would be no impropriety in an assistant town attorney accepting an assignment to act as counsel to the zoning board of appeals.

When, however, the relationship between the two boards has become antagonistic to the point where one seeks to institute suit against the other, the theoretical harmony of their relationship must give way to the reality of their conflicting interests. Under such circumstances, we believe that counsel fully independent from the office of the town attorney should be retained to represent the zoning board of appeals. See, N.Y. State 462 (1977). In this latter connection, we note subdivisions (A) and (B) of DR 5-105 which respectively provide in relevant part:

- "A. A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests...."

- "B. A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or

if it would be likely to involve him in representing differing interests...."

See also, EC 5-1, EC 5-14 and EC 5-15; cf., N.Y. State 484 (1978) with N.Y. State 292 (1973).

The duty owed to the town board by the office of the town attorney, when coupled with that board's preeminent authority, precludes the exercise of independent professional judgment on the part of an assistant regularly employed in the office of the town attorney concerning matters adverse to the interests of the town board. Any such assistant would virtually be required to serve two masters if asked to undertake the representation of a zoning board of appeals against which the town board has determined to bring suit.

For the reasons stated, the question posed is answered in the negative.
