

DEKALB COUNTY BOARD OF ETHICS MEETING

MINUTES

August 11, 2010
6:00 PM – 10:00 PM
Clark Harrison Bldg. Conference Room A

Meeting called by: Bryan F. Smith, Board of Ethics Chair

Minutes

Agenda Item I

Discussion: Request by Vaughn Irons for an advisory opinion against the County Attorney's rendering an opinion outside of its prevue. The complaint is under the jurisdiction of the Board of Ethics (BOE) and should have been forwarded to the BOE first. It was motioned and seconded that a letter be drafted to the CEO and the County Attorney to recognize the status and jurisdiction of the Board of Ethics. The letter should be drafted by the BOE Chair and properly delivered to all parties concerned. The motion carried by a vote of 6-0. The Board agreed to hear Mr. Irons' complaint at the next special called meeting in September.

Opinions: To draft a letter to the CEO/County Attorney of the BOE's status/jurisdiction.
To hear the case of Vaughn Irons at the September 15, 2010 BOE Meeting.

Motion by the Board:

A motion by Isaac Blythers to draft a letter to the CEO and the County Attorney regarding the status and jurisdiction of the Board of Ethics.

Seconded By:

Thelma Grier

Votes:

6 – Yes
0 – Nay

Action Items:

Draft letter to CEO/County Attorney

Person Responsible:

Bryan Smith

Deadline:

8/13/10

Agenda Item II

Discussion: A complaint is before the BOE from Sterling Bethea against George Maddox and Dorothy Williams, Commissioners of the DeKalb Housing Authority. The Board decided to hear the case at the next special called meeting in September. It was agreed that the complaint was properly filed and should be distributed to each interested party to include all Board members.

Opinion: To hear the complaint against George Maddox and Dorothy Williams, Commissioners of DeKalb Housing Authority, at the special called meeting on Wednesday, September 15, 2010 at 6:00 pm.

<i>Motion by the Board:</i> N/A	<i>Seconded By:</i> N/A	<i>Votes:</i> N/A
Action Item:	Person responsible:	Deadline:
Distribute complaint to interested parties and Board Members.		

Agenda Item III

Discussion: A motion to dismiss was filed on August 3, 2010 on the complaint of Fred Wooten, William Gowen and Fern Garber against Ed McBrayer, PATH Foundation Executive Director regarding a conflict of interest to Mr. McBrayer's participation as a board member of the DeKalb County Development Authority and contracts/monies, awarded/paid to the PATH Foundation by DeKalb County.

Steve Irving, Board Attorney stated that an initial complaint by Fred Wooten against Mr. McBrayer came before the Board on June 17, 2009 and an advisory opinion, with a quorum, was rendered to dismiss. Mr. Irving further stated that at a subsequent meeting of the BOE, on August 21, 2009, an advisory opinion, without a quorum, was rendered to set aside/reconsider the initial advisory opinion to dismiss. Mr. Irving advised that because there was no quorum met and that there is no new evidence presented in the subsequent complaint filed by Wooten, Gowen, and Garber that the Board considers a dismissal of the plaintiffs' complaint.

The Board Chair moved to discuss the motion to dismiss Mr. Wooten's initial complaint for reconsideration. A motion by Bobbie Sanford to uphold the request to dismiss the initial Wooten complaint for reconsideration base on the previous ruling by the BOE was seconded by Susan Neugent. Thelma Grier asked if the package contained information on the Boards opinion from a year ago. BOE attorney answered yes, that is the opinion from a year ago. Grier further asked, if a decision was rendered. BOE attorney stated that a decision was rendered in June 2009 but then it was withdrawn by the Board in August 2009. They withdrew their initial advisory opinion stating, there was no conflict of interest as long as in the conduct of affairs before the DeKalb County Development Authority, Mr. McBrayer, as a board member would recuse himself from anything that involved PATH and that any interest he has should be posted. The reason for the Board's decision to overturn its initial ruling was the consideration of new evidence filed by Mr. Wooten, Mr. Gowen and Ms. Garber indicating Mr. McBrayer was untruthful. The BOE Chair stated that he would like to have a discussion on the matters in light of new evidence rather than dismissing the Gowen, Garber complaint. Terri Thompson agreed. After further Board discussion to: hear new evidence in the Wooten complaint and/or dismiss the motion to reconsider the Wooten complaint and hear Gowen, Garber complaint as separate the Board decided to move forward with the Gowen, Garber complaint separately from Wooten and to dismiss the motion to reconsider new evidence in the Wooten case.

Upon the Board Chair's leading the decision to move forward with the hearing began. The Board Chairman recognized legal counsel on behalf of the plaintiffs and the defendant. The hearing began with opening statements from both sides.

Opening Statements:

Attorney Elizabeth ("Lisa") Branch, for the Defendant requested permission to first address the August 3, 2010 motion to dismiss filed by the defendant and enter it as Exhibit 1. Permission was granted. Based on the BOE original ruling on June 17, 2009, an advisory opinion was rendered which stated that there is no conflict of interest

on the part of Mr. McBrayer simply because he serves as a board member of the DeKalb County Development Authority and as Executive Director of the PATH Foundation with a relationship with DeKalb County. It was further agreed that Mr. McBrayer would recuse himself if any matters of PATH should come before the Development Authority's board. As an officer of the Court, Ms. Branch attests to the ruling of the BOE to dismiss Mr. Wooten's initial complaint. Terri Thompson, Board Member and Steve Irving, Board Attorney were present at that BOE hearing and also heard that oral ruling.

The motion to dismiss is argued on two points:

- 1) Improper collateral attack on the BOE, June 17, 2009 ruling of the Mr. Wooten's complaint, more than a year ago and that Mr. Gowen's and Ms. Garber's complaint appears to be based on the same allegations;
- 2) The BOE is not the proper forum for this dispute. The Defendant further asks that the motion to reconsider its initial ruling to dismiss should be dismissed on the basis that there is no new evidence.

The Plaintiffs' complaint was filed against Mr. McBrayer because they oppose the PATH Foundation. Mr. Wooten, Mr. Gowen and Ms. Garber, all have been or are involved with the Three Forks Heritage Alliance that was formed, according to its vision, includes an objection to "intrusive permanent concrete boardwalk design". In fact this organization has sued DeKalb County and the PATH Foundation in Superior Court in DeKalb County over the legality of the underlying contract to try and block the installation of these paths around DeKalb County. The three parties have now moved their dispute to this board in a misguided attempt to try and halt the PATH Foundation's projects. Their complaint and interrogatory responses repeatedly refer to the no bid contract issue of the law suit. The BOE does not have jurisdiction over the dispute involving the legality of DeKalb County contracts. Therefore, we move that the Board dismiss with prejudice this complaint for reconsideration.

Board Member, Isaac Blythers recuses himself from this complaint due to his participation during such time that this case was brought before the Zoning Board of Appeals, prior to the Superior Court hearing. The Board Chair clarified that Mr. Blythers is recusing himself from a vote to an advisory opinion in this complaint and accepted his recusal.

Attorney Brian Daughdrill, for the Plaintiffs: It is a preliminary matter in any motion to dismiss and that this Board is required to take on this complaint is true. Therefore, there is no factual basis to dismiss Mr. Gowen and Ms. Garber's complaint. We have a well plead complaint or allegations of an ethical violation through allegation in his ownership of his involvement with the governing authority and all the allegations necessary to support an ethics violation has been made. Whether the Board will find that these allegations can be proven or not is an entirely different story. But you are entitled to proceed and put on your case. Bill Gowen and Fern Garber were not parties to the original complaint and therefore were not involved in any collateral attack. Bill Gowen and Fern Garber have a right to move forward with their complaint regardless of what this Board said or did with another complaint of a taxpayer. There is also an issue of no new evidence produce. We submit that the Board has before it a stack of documents that shows evidence of payments from DeKalb County to the PATH Foundation, since one of the facts alleged in the previous hearing was that PATH received no monies from DeKalb County. We also submit that new evidence has been placed before you. We would refer you to the eighteen (18) Exhibits filed in response to this Board's request as well as the August 6th decision in Superior Court of DeKalb County. In addition, even as to Mr. Wooten, since your ruling there have been payments from DeKalb County to the PATH Foundation with Mr. McBrayer as Executive Director. Therefore, this would give rise to a whole new cause of action. That is just the nature of the beast when someone who has a vote on the governing authority and someone who is Executive Director of a company that has received since 2005, \$8M dollars. The reference to un-bid contracts we are not here to argue that point. We have already argued that, with success in Superior Court, who found that the South Peachtree Creek Trail contract was in fact a no-bid contract. This Board is charged with determining whether there is a conflict of interest of ethical violation or an appearance of an unethical violation of conflict of interest. Since you have an entity as Executive Director and a member of a governing authority who has received more than \$8M dollar in un-bid contracts, at a time when the County is about \$15M dollars in the hole, there is the appearance at least of unethical impropriety. That is why we brought this complaint before this Board.

Hearing:

Motion to Dismiss – Mr. Wooten's 2008 complaint for reconsideration. After given permission to speak by BOE Chair, Mr. Wooten stated, in response to Ms. Branch, the Defendant's attorney statements, he has never been a party to Three Forks Heritage Alliance. He further stated that he is not against the PATH Foundation but he is against bad construction. Mr. Wooten submitted that as an expert in landscape architect, plans review and land development he is familiar with everything that is going on at South Peachtree Creek Trail. Therefore, what he is against is the damage that the PATH Foundation has done out at South Peachtree Creek Trail. This is shown in parts of his Exhibits that were submitted to the Board. Mr. Wooten alleged tree damage and other damage from top to bottom. So he is not against the PATH Foundation but is against bad construction. The Board Chair asked Mr. Wooten if he wanted to address the motion to dismiss. Mr. Wooten stated he did not; he only disagreed with part of what the defendant's attorney said. The Board Chair stated that Mr. Wooten's comments are duly noted and will be taken into consideration.

Gowen, Garber – Complaint of Conflict of Interest Against McBrayer, PATH Foundation, Executive Director – After quoting the DeKalb County Organizational Act governing conduct regarding contracts and the DeKalb County Code of Ethics "Section 22A. (a) (1) which says in part of DeKalb County "that the members of its governing authority be and give the appearance of being, independent and impartial; that public office not be used for private gain...when there exists in fact, or appears to exist, a conflict between the private interests and public responsibilities of members of the DeKalb County governing authority, the public interest requires that the General Assembly protect against such conflicts of interest..." Section 22A. (h) (1) was also quoted pointing out that members of the governing authority can not come close to the line of violating this section of the code. "Section 22A. (f), (g) was also quoted as proof of conflict of interest. The "DeKalb County -- Governing Authority; Definition; Code of Ethics; Sanctions; Referendum" as amended to define the term "governing authority" in Section 22A. (b) (8). Ed McBrayer is a member of the Development Authority board appointed by DeKalb County. The Gowen, Garber complaint was not entered into evidence tonight but was filed and served in July to the clerk and Mr. Irving. Also entered into evidence are 18 Exhibits showing agreements, purchase orders and payments made between DeKalb County and PATH, Mr. McBrayer's company totaling \$8M dollars. Mr. McBrayer, at least part of the time that these agreements, payments, purchase order were made sat on the board of the Development Authority. The argument will be that none of these contracts or payments came before the Development Authority but the Code of Ethics says that you must construe the codes "liberally". There is no where in the Code of Ethics that says that these contracts must come before the Development Authority for it to be a conflict of interest for DeKalb County to enter into contract with Mr. McBrayer's company while he is a member of the governing authority. Entered into evidence is the PATH, IRS form 990 showing Ed McBrayer's salary. The argument is that PATH passes any benefit paid to it to someone else. Again this language is not in the Code of Ethics. If you read the Code as it states "liberally", the PATH Foundation paid its Executive Director and DeKalb County paid money to PATH. There is at least an appearance of impropriety even if there is not an actual conflict of interest. The Board is charged with enforcing the Code with authority so that the public can have utmost confidence in the government of this County. We have a member of the governing authority receiving contracts in excess of the Organizational Act which is \$50K - \$100K from DeKalb County. We believe that there is indeed an appearance of impropriety and we ask that Mr. McBrayer steps down from the Development Authority and that the Board rules in our favor.

Attorney for Defendant Ed McBrayer – We are here to address whether Mr. McMcBrayer is in violation of the Code of Ethics simply because he is the Executive Director of the PATH Foundation which is a non-profit corporation which does not receive a profit from anyone, DeKalb County or otherwise. This is not Mr. McBrayer's company. This is a different type of enterprise not like the entity where DeKalb County enters into contracts for profit. The Code of Ethics specifically deals with this distinction. What we are here to determine is whether Mr. McBrayer is in violation of the Code of Ethics because he is the Executive Director of the PATH Foundation and a board member of the Development Authority, a body that has no dealings with the PATH Foundation. Mr. McBrayer is present and will testify to the partnership between the PATH Foundation and DeKalb County. In fact the PATH Foundation has provided more than \$8M dollars in private donation for the use and enjoyment of the taxpayers of DeKalb County. Mr. McBrayer will demonstrate that the PATH Foundation has in fact received no

compensation for salaries, overhead or any profit from DeKalb County. Instead the PATH Foundation received partial reimbursements from DeKalb County for amounts paid by the PATH Foundation to third parties for project cost. Mr. Rhinehart, Deputy Chief Operating Office of DeKalb County is here to testify to the relationship between DeKalb County and the PATH Foundation. Mr. McBrayer will also testify that he only began serving on the board of the Development Authority in 2005 more than 10 years after the relationship between the PATH Foundation and DeKalb County began. He will testify that his work with the PATH Foundation is not a secret; it is publicly exposed. Ms. Judy Turner is present and will testify to the functions of the Development Authority and corroborate that no PATH business has come before the Development Authority. We will also demonstrate that Mr. McBrayer as a matter of law is not in violation of the Ethics Code of DeKalb County. We put forth that Mr. McBrayer is not in violation of "Section 22A. (b) (8) because he is not the Chief Executive or a member of the commission; he is not a county officer so it has no application. So what we are here to decide is Section 22A. and whether it applies. The Code of Ethics does not define "governing authority" but a "member of the governing authority" and we will walk through what that means by using the Code itself. In fact there are provisions that deal with governing authority and it makes it clear that the prohibitions of those Code Sections deal with PATH business coming before the Development Authority. Mr. McBrayer does in fact receive a salary from PATH but we will demonstrate that DeKalb County does not compensate PATH for any of its employee's salaries. PATH is simply being reimbursed for expenses by DeKalb County. It is not being paid in any traditional, for profit contract sense. We respectfully request that this Board find that no conflict of interest exists and dismiss with prejudice Ms. Garber and Mr. Gowen's complaints. Thereby, prohibiting them from filing any future complaints against Mr. McBrayer before this Board based on these same facts.

Testimonies:

Ed McBrayer answers for the Plaintiffs that he is the Executive Director for the PATH Foundation since 1993 and receives a salary. He does not dispute IRS Form 990, presented to the Board by Gowen, Garber reflecting the salary that he was paid by PATH. He is also a Development Authority board member since 2005. PATH Foundation Inc. has contracts with DeKalb County. PATH has received checks from DeKalb County made out to PATH. The Plaintiffs rest on the documents presented to the Board and the testimony of Mr. McBrayer that he falls squarely into the definition of Section 22A. and therefore is in violation of a conflict of interest.

Board Examinations: What is an example of a reimbursement? Mr. McBrayer answers, typically a contractor is hired by PATH or DeKalb County and PATH receives as reimbursement checks for a portion of what the contractor is paid. PATH applies private money to match that. The Board asked if the Defendant in his later testimony would address his role as a board member of the Development Authority. Ms. Branch agreed.

Ed McBrayer is called to testify on his behalf that he is a resident of DeKalb County. The PATH Foundation is a non-profit 501(c) (3) organization established to help build pedestrian facilities in the Metropolitan areas. The benefit of the partnerships formed with Metropolitan areas and PATH is that of the citizens of those respective areas. The county provides the land and PATH seeks private, federal and state dollars to fund each project. The current contractual agreement with DeKalb County and PATH is for PATH to anticipate path projects that need to move forward and oversee the design, surveying, planning and environmental work. We then turn the project over to the County for bid. Once the bid process is completed PATH oversees the construction process to ensure proper completion of the project. PATH also established a maintenance endowment because the County could not maintain the paths/trails. There are four phases of a PATH project. Planning and engineering which PATH pays for, the bid process handled by DeKalb County, construction, paid for by DeKalb County and overseen by PATH and maintenance paid for by PATH. Previously, PATH would also handle the bid process in addition to all other phases and DeKalb County would reimburse PATH for half of the project. Under the current process there have only been a few reimbursements from DeKalb County for repairs due to storm damage. DeKalb County did not think it was normal maintenance and decided to pay for a portion of the repairs. The PATH Foundation does not receive funding for salaries, overhead or for any of its employees from DeKalb County. PATH raised over \$25M dollars in private donations over the past 20 years to fund its own operations which pay for more than three employee's salaries and overhead. The PATH Foundation has contributed over \$4M to DeKalb County trails and an additional \$4-5M in the maintenance of trails. Exhibit 2, DeKalb County and PATH Agreement, page 2, Article

3, Scope of Work states, at no cost to the County, PATH shall provide and donate its professional expertise and guidance to DeKalb County during all phases of multi-use trail projects. PATH agrees that it shall not be paid for any of the services pursuant to the terms of this contract. PATH was not paid by DeKalb County for any of the services it provides. PATH further agrees that none of its employees or agents shall be paid by DeKalb County for any of the services provided pursuant to the terms of the contract. Mr. McBrayer's role as a member of the Development Authority's board began in January 2005. The Development Authority is charged with issuing bonds for the purpose of bringing commerce to DeKalb County and creating jobs. Mr. McBrayer serves as treasurer of the Development Authority and his term ends December 2010. He did not keep his position as Executive Director of the PATH Foundation a secret once he joined the Development Authority's board. Exhibit 3 entered into evidence by the defense is the letterhead of the PATH Foundation listing Mr. McBrayer as Executive Director. Exhibit 1 is the Answer in the motion to dismiss filed on Mr. McBrayer's behalf. The money that is paid by DeKalb County comes to PATH based on an invoice for work that is completed by the contractors. PATH has paid up front and DeKalb County reimburses a portion of the cost. The Development Authority issues revenue bonds to Developers who come in to get part of their projects bonded.

Board Examinations:

Mr. McBrayer's answers: Is any monies paid by DeKalb County in advance for projects? There is no money paid by DeKalb County to PATH prior to a projects completion. Does PATH have an account that is designated for DeKalb County funds? There is no special treatment of DeKalb County funds from any other county funds received by PATH. There are no designated or restricted accounts for DeKalb County. By the time PATH gets money from DeKalb County it belongs to PATH. There is no need to reserve it. How long have you served on the Development Authority board and what are your duties as treasurer? Mr. McBrayer has served on the Development Authority for four years. His duties as treasurer are to present a balance budget; to anticipate expenses and revenue and monitor these monthly. Carefully monitoring the Authority's interest rates and bank accounts. The Development Authority depends on Mr. McBrayer's advice on large purchase items. Does this mean you can be called an advisor to the Development Authority's board? Mr. McBrayer can be considered as an advisor with only one vote or opinion to the Development Authority's board. As an answer to the complaint, would you consider stepping down or some other passion when your term is up in December? Mr. McBrayer has no passion around resigning from the Development Authority when his term is up in December 2010. He also considers his work for PATH as contributing to the quality of life for citizens of DeKalb County. No Developer has come before the Development Authority that was involved with PATH projects.

Ms. Judy B. Turner testifies on behalf of the defendant. She is President and CEO of Decatur First Bank. Ms. Turner has served as Chair for the Development Authority's board for the past year and has served on the board a total of 12 years. Her duty on the Development Authority's board is to preside over its meetings. The types of bonds issued by the Development are revenue bonds for large development. Ms. Turner is aware of Mr. McBrayer's position as Executive Director of the PATH Foundation. Her testimony is that she would hope that Mr. McBrayer would recuse himself if any matters of PATH would come before the Development Authority board. The Development Authority's goal is to issue revenue bonds in DeKalb County.

Mr. Ted Rhinehart, Deputy Chief Operating Officer of DeKalb County testifies on behalf of the defendant. He oversees Public Works, Facilities Management, Watershed Management, Parks and Recreation the Libraries and PDK Airport. Mr. Rhinehart knows Mr. McBrayer as the person who oversees the PATH Foundation which is a non-profit organization that raises private donations to assist in construction and maintenance of bicycle and pedestrian facilities around the metro area. Mr. Rhinehart has been involved in overseeing, for DeKalb County, the PATH projects since 2003. In 2003, the existing agreement with PATH was expiring and he took a request for a five year extension, on the existing agreement, to the Board of Commissioners. In 2008, Mr. Rhinehart took a new agreement to them with some changes in the terms. The differences in the previous agreement and the current one are that PATH raised private money which allowed it to do more projects than DeKalb County and allowed for a lower cost in the bid process in the previous agreement. The current agreement changed because the County Attorney found that if DeKalb County money is being spent for these projects then it should regulate the bid process. Mr. Rhinehart further testifies that he is aware of Exhibit 2 entered into evidence by the defendant which is the current Agreement by and between DeKalb County and the PATH Foundation. He states that this agreement

does set forth that PATH shall receive no funds from DeKalb County for services, salaries pursuant to the terms of the contract.

Board Examinations:

Ted Rhinehart answers: It is not the responsibility of Mr. McBrayer to appear before the Board of Commissioners to get their approval for an agenda item for projects. Mr. McBrayer is only there to answer any questions the Board of Commissioners may have regarding a project. Mr. McBrayer's salary is not paid by DeKalb County because all projects are specifically budgeted. We do not reimburse any of their time or project management. They know to submit to us third party reimbursements. All current projects are financed by DeKalb County.

Redirect by the Plaintiffs: Does DeKalb County audit PATH's books? Ted Rhinehart states that DeKalb County has no need to audit PATH's book, they are a non-profit.

Closing Statement for the Defendant is that the Board dismiss with prejudice the two remaining complaints based on no new evidence. The Defense argues that Mr. McBrayer has not violated any of the Code of Ethics in any of Sections, 22A: (c) (2), (3), (4), (6) remote interest is not included, (7) transactions prohibited by law not applicable, (d), (e), (f) and (g) timing is at issue. The testimony of Ted Rhinehart and Judy B. Turner demonstrated that Mr. McBrayer as Executive Director of a non-profit organization did not gain any profit from his relationship with DeKalb County.

Closing Statement for the Plaintiffs: The Plaintiffs ask that Mr. McBrayer be removed from office based on his violation of Section 22A. (a) (1) and (b) (8). They further argue that when money comes into the PATH bank account that it is not treated separately. So Mr. McBrayer gets paid out of an account that DeKalb County puts money into. Further, members should make known any possible conflict of interest. Mr. McBrayer has not notified the Board of any such possibility.

Board Decision: The Board Chair thanked all for their interest in tonight's meeting. No decision will be rendered. The Board needs time to look over all documents submitted by both sides. The Board will proceed further with this complaint on Wednesday, September 15, 2010 at 6:00 p.m.

Opinions: An advisory opinion to dismiss the motion to reconsider the Wooten complaint was rendered by the Board.

An advisory opinion on the Gowen, Garber complaint will be considered at a Special Called Meeting, September 15, 2010.

<p>Motion by the Board: A motion by Bobbie Sanford to uphold the request to dismiss the initial Wooten complaint for reconsideration base on the previous ruling by the BOE.</p>	<p>Seconded By: Susan Neugent</p>	<p>Votes: 6 - Yes 0 - Nay</p>
<p>A motion by Susan Neugent to deny the motion to dismiss and to hear Gowen, Garber's complaint of conflict of interest as separate from Wooten.</p>	<p>Thelma Grier</p>	<p>5 - Yes 1- Recues</p>
<p></p>	<p></p>	<p></p>
<p>Meeting adjourned at 9:30 p.m.</p>		