

ADVISORY COMMITTEE
ON STANDARDS OF JUDICIAL CONDUCT

OPINION NO. 13 - 2023

RE: Propriety of a judicial law clerk serving on the city Board of Zoning Appeals.

FACTS

A circuit court judge employs a judicial law clerk. The law clerk has been asked to serve on the city Board of Zoning Appeals. The judge asks for an opinion as to whether such service is permissible.

CONCLUSION

A judicial law clerk may also serve on the city Board of Zoning Appeals.

OPINION

Rule 506, SCACR, contains the Code of Conduct for a judicial law clerk. The Code does not expressly prohibit a law clerk from additional employment. However, a clerk is required to avoid the appearance of impropriety in all activities. Canon 2. In addition, the Code does contain provisions regarding a clerk's activities outside of his/her position. Canon 4.B. provides that a law clerk may serve as "a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice...." Canon 5.C. states that a law clerk should refrain from financial and business dealings that "tend to...involve him in frequent transactions with lawyers or persons likely to come before the court he serves." Canon 7.D. states that a law clerk should not become a candidate for political office.

A Board of Zoning Appeals ("BOZA") is considered to be a quasi-judicial board. *See, e.g.* 91 Am. Jur. Trials 233 (2004) ("Zoning ordinances authorize the creation of zoning boards of appeals, also known as boards of review or boards of adjustment, with administrative and quasi-judicial functions. A zoning board of appeals acts in a quasi-judicial capacity." *See also, Vulcan*

Materials Co. v. Greenville Cnty. Bd. of Zoning Appeals, 342 S.C. 480, 492, 536 S.E.2d 892, 898 (Ct. App. 2000)(stating that chairman and secretary had no authority to promulgate an order on behalf of BOZA, a quasi-judicial agency). In the instant inquiry, the BOZA members are appointed by the city council.

The BOZA is not a “governmental agency devoted to the improvement of the law, the legal system, or the administration of justice” so Canon 4.B. provides no guidance. Likewise, we do not believe a BOZA position is political office prohibited by Canon 7.D.

Thus, the only considerations are whether serving as a BOZA member would cause the appearance of impropriety or involve the law clerk in frequent transactions with lawyers or persons likely to come before the court he/she serves.

This committee has not addressed a judge or law clerk serving on a BOZA and there are only a few opinions in other states that provide guidance. In Virginia, the legal ethics committee determined it was not improper for “for an attorney to serve as a member of the Board of Zoning Appeals while holding the position of substitute judge of a General District Court since Board membership is not an elected office and the General District Court has no jurisdiction with respect to matters pertaining to the Board of Zoning Appeals.” VA Legal Eth. Op. 500 (Virginia Legal Ethics Opinions), 1982 WL 917511.

In New York, the advisory committee found there would be no appearance of impropriety in serving as the *attorney* for the zoning board of appeals (rather than a member of the board), while also serving as acting village justice, but noted that the judge would be disqualified from presiding in any case involving the village zoning board of appeals. An Acting Part-Time Vill. Just. May Serve As the Att’y for the Vill. Bd. of Zoning Appeals, NY Jud. Adv. Op. 91-90 (Sept. 12, 1991). Conversely, in a 1978 opinion, the New York Attorney General determined that the Acting City Judge of that City could not simultaneously serve as Chairman of the Board of

(Zoning) Appeals. 1978 N.Y. Op. Att'y Gen. (Inf.) 290 (1978). However, that decision was based on the City Charter, which provided that no person shall hold more than one city office, and the committee determined that positions of judge and BOZA chairman were both city officers.

None of the other jurisdictions' opinions are on point with the factual scenario in this case. However, using those opinions, and the Canons, as guidance, we find that a law clerk may serve as BOZA board member.¹ However, should a BOZA matter come before the law clerk's judge on appeal, the law clerk should disqualify himself under Canon 3.E., Rule 506, SCACR. Moreover, the law clerk is cautioned that "the official duties of a staff attorney or law clerk take precedence over all his other activities[.]" If service as a BOZA member requires significant time away from judicial duties or requires frequent disqualifications, the law clerk should not continue such service.

s/ Usha Jeffries Bridges
USHA JEFFRIES BRIDGES, CHAIR

s/ William H. Seals, Jr.
WILLIAM H. SEALS, JR.

s/ Keith M. Babcock
KEITH M. BABCOCK

October 25, 2023

¹ This opinion is based only on the Canons. We did not consider any other restrictions, such as those set forth by the Human Resources Division or other state agency.