

DRAFT

GREENWICH BOARD OF ETHICS

Minutes of Special Meeting on May 13th, 2020

Members Present: Paul de Bary, Chair and Secretary of the meeting, Robert Grele,
Robert Sisca

Members Absent: John Margenot

Others Present: John Conte, Heidi Brake Smith

The meeting was called to order at 4:36 P.M. by the Chair, who noted that, a quorum was present and that a notice of the special meeting had been provided to all the members and posted in accordance with Freedom of Information Act requirements. As a special meeting, the Chair advised that only items on the agenda would be considered. Consequently, approval of minutes was deferred.

The only item on the agenda was consideration of a request for an advisory opinion on behalf of members of the Architectural Review Committee in connection with the Town's solicitation of proposals for services to prepare a master plan for the redevelopment of Roger Sherman Baldwin Park.

A draft of the opinion had been prepared by a working group consisting of Mr. de Bary and Mr. Sisca. A copy of the draft had been circulated prior to the meeting and revisions resulting from further review and comments received from Mr. Grele were circulated and discussed at the beginning of the meeting.

A discussion of the value of avoiding the appearance of conflicts of interests and associated practical issues followed.

Then, upon motion made by Mr. Grele and seconded by Mr. Sisca, the Board unanimously voted to adopt the opinion attached as Exhibit A to these minutes as Advisory Opinion Number 20-01.

Following this discussion, there was no further business before the Board and the meeting was adjourned by unanimous consent at 5:18: P.M.

Exhibit A

Advisory Opinion No. 20-01

Date: 5/12/20

Topics: Exerting Influence, Indirect Interest, Subcontractors, Substantial Interest, Voting on Actions or Transactions

Code Sections: Sections 2, 4 and 5

Statement of Facts:

A member of the Architectural Review Committee is a professional landscape architect. The Committee member also serves as the managing partner and majority owner of a landscape design firm and requested an advisory opinion prior to submitting a bid on behalf of the firm to provide landscape design services to the Town. The request for the opinion was made as a result of Section 1.10 of the Town's purchasing ordinance, which requires Town Officers to seek an advisory opinion from the Board of Ethics whenever a business in which the Town Officer has a financial interest is involved in a procurement.

The Town's request for proposals calls for the contractor to develop a master plan for a Town park. The bid submitted provides for the Committee member's firm to serve as the primary consultant leading a team that will include members and employees of that firm and several subcontractors. It is estimated that the total cost of the services will be under \$100,000. One of the subcontractors is also a member of the Architectural Review Committee. However, it was expected that the involvement of this other member will be "supplemental and supportive in nature" and the fees associated with the role "would likely be minimal."

The role of the Architectural Review Committee is advisory, but encompasses many aspects of the Town's land use regulations. Its primary role is to assist the Town in preserving the Town's natural landscape and the harmony of newly created landscapes and structures with the Town's natural landscape, terrain, existing structures and streetscapes. The Committee is also responsible to assist the Town in protecting neighboring owners and property users by making sure that reasonable provision has been made in plans approved by the Town for such matters as sight and sound buffers, control of trespass lighting, the preservation of views, light and air, and those aspects of design not adequately covered by specific regulations. The Committee may also be asked to assist the Town in determining whether relevant land use standards have been complied with in connection with its review of projects under construction or completed projects awaiting certification.

Under Section 99 of the Town Charter, any “major” redesign of public property or project that involves relocation of a street or changes to the extent or location of transportation routes is required to be approved by the Planning and Zoning Commission. The Director of the Department of Planning and Zoning has advised the Board that, if the master plan developed under the anticipated contract were considered to involve a major redesign of Roger Sherman Baldwin Park, it is likely that the Planning and Zoning Commission would request review by the Architectural Review Committee. The Committee Member has advised the Board that; in the event of any such review of a master plan prepared by the member’s team, the members of the team would refrain from any discussion of the matter with members or staff of the Committee and from participating in discussions of the Committee and votes on the matter.

Although the request for an advisory opinion was made significantly in advance of the scheduled date for submission of bids, the closure of Town facilities and restrictions on meetings due to current pandemic have limited the opportunities for the Board to discuss the matter with the Committee member or render an opinion prior to the due date for submitting the bid. The Board normally recommends that persons involved in bidding on Town contracts who are members of Town boards, commissions and committees formally notify the head of the body and the director of the Town Department involved in the procurement in advance of submission of the bid. In this case the Board was unable to consider the request in time for this to be done in advance.

In the request for the advisory opinion, however, the Committee member stated: “I would like to clarify that I have had no involvement in the preparation of this RFP or any prior knowledge, involvement or activity with the town or anyone regarding this project in my capacity as a volunteer on the Architectural Review Committee or in any other way at this point. I do feel that I can participate fairly and without bias or unfair advantage of any sort.” The Committee member has also confirmed to the Board that no member or employee of the firm or any subcontractor has had any contact with the individuals who established the specifications for the contract or with any member of the selection committee that will recommend award of the contract.

The normal process of submitting a proposal to the Town necessarily involves some degree of contact with the employees of the Purchasing and Administrative Services Department. In response to further inquiry from the Board, the member indicated that: “Once the RFP was issued, I contacted the town through the prescribed method in the RFP process to ask a few questions. My first question was directed to [a member of the Purchasing Department], to ask about whether or not my involvement in ARC would preclude my firm from issuing a bid for this work. She did not initially know the answer to that question, so I reached out to the [Superintendent of Parks]. That inquiry resulted in my sending [the Board of Ethics] a formal request for this advisory opinion. Subsequent to that, I phoned the number listed on the RFP for two other questions to seek clarification in order to prepare our bid accurately. In this regard, I spoke to [another member of the Purchasing Department], who answered my brief questions. One question related to whether the respondents to the RFP were expected to include concept drawings in their proposal. The other was about whether a respondent could submit as a co-equal partnered team, or if it needed to be a single prime design contractor.” The Board has considered these contacts and considers that personal contact

with the employees of the Purchasing and Administrative Services Department handling the bidding has been limited only to questions and responses regarding procedure. In that process and in the bid itself, no mention was made of the position of any member of the team as a Town Officer, except in relation to the need to obtain an advisory opinion.

Questions Presented:

1. For purposes of Section 4 of the Code of Ethics does a Town Officer have a “substantial financial interest” in a Town transaction as a subcontractor for a professional services contract when the subcontractor’s role is expected only to be supplemental and supportive in nature and the fees associated with the role likely be minimal?
2. Is the submission of a bid for a Town contract a “transaction” under Section 3 (4) of the Code of Ethics?
3. Does the Code of Ethics prohibit an individual from providing professional services to the Town?
4. How can a Town Officer avoid exerting influence over an action or transaction that the Town officer has a substantial financial interest in, particularly where persons who are involved with the individual’s work as a Town Officer may act in a supervisory or evaluation capacity with respect to such professional services?

Discussion and Conclusion:

The Code of Ethics only authorizes the Board of Ethics to give advisory opinions to Town Officers. However, it permits any Town Officer to request an advisory opinion with respect to any matter involving the interpretation of the Code. During the 1970’s, a number of the members of the Board were individuals who had served as members of the 1st Selectman’s Special Committee that drafted the code of Ethics. It is noteworthy therefore, that three of the first four advisory opinions rendered by the Board involved questions raised by Town Officers about the activities of other Town Officers. (A71-01, A72-01, A78-01)

Since the Committee member requesting this advisory opinion indicated that another member of the Committee would be serving as a subcontractor in connection with the proposal, the Board will address the issue of the subcontractor’s interest in the proposal, since it believes that the remaining issues apply equally to the subcontractor.

The Subcontractor’s Interest

An indirect interest is defined in Section 1 of the Code as including “the interest of any subcontractor in any prime contract with the Town.” In this case, the role of the subcontracting fellow Committee member has been described as “supplemental and supportive in nature” and the associated fees likely to be “minimal.” However, Section 1 further defines “substantial financial interest” as “any financial interest, direct or indirect,

which is more than nominal.” The Board has always considered this to indicate that Town Officers should take a strict view of what is considered a “substantial financial interest.”

The Board has, for example, considered part time compensation of \$300 a year for services as an instructor in a Town sports clinic to be a substantial financial interest (A09-02). It has also suggested that a coffee table book has value, even if was undeterminable (A02-10). Consequently, the Board believes that the sub-contractor should be considered to have a substantial financial interest in the procurement and in any resulting transaction until the facts clearly prove otherwise.

Submission of the Bid as a Town Transaction

Section 1 of the Code also defines “transaction” in pertinent part as follows:

“Transaction shall mean and include the *offer*, sale or furnishing of any real or personal property, material, supplies or *services* by any person, directly or indirectly, as vendor, *prime contractor*, *subcontractor* or otherwise, for the use and benefit of the Town *for a valuable consideration...*” (*Emphasis added*)

Consequently, the Board has always considered a proposed transaction with the Town as a transaction in which a Town Officer could have a substantial financial interest, even if an award has not been made. This makes Sections 3, 4 and 5 of the Code applicable to bid submissions as well as actual contracts awarded.

Permissible Role of Town Officers in Transactions

The Board of Ethics has consistently cautioned Town Officers against creating the appearance of impropriety, while approving the participation of Town Officers in transactions with the Town as long as appropriate steps were taken to avoid that appearance. For example, in 1983, the Board cautioned against communications with members of the Purchasing Department, indicating “...it is difficult to know what communications may influence a decision. Therefore, the Board advises Town Officers to avoid discussions with those in Town government involved in the purchasing decision with respect to any product or service that the company employing the Town Officer may be seeking to provide the Town.” (A83-02).

More recently, a member of the Commission on Aging requested an advisory opinion from the Board of Ethics prior to submitting a bid to the Town for services related to outpatients at Nathaniel Witherell, the Town’s rehabilitation and convalescent facility. In that opinion (A17-01), the Board summarized the best practices it recommends to Town boards, commissions, committees and agencies concerning transactions between the Town and their appointed members, including written procedures and disclosures to all appropriate persons. In view of the steps taken by the Commission member in that case to avoid the appearance of a conflict of interest, including requesting an opinion from the Board in advance of submitting the bid, the

Board indicated that it was not necessary for the member to resign from the Commission on Aging prior to submitting the proposal for services.

In that case, the Board summarized prior cases in which it has found consistently that the it is not the *existence of a financial interest* that the Code prohibits, rather it is the *exercise of influence* with respect to that interest that the Code prohibits:

“The Board has previously indicated that Town Officers do not need to resign their positions in order to engage in Town transactions as long as appropriate steps are taken to ensure that Town actions and transactions are not influenced by the Town Officer and the Town Officer does not participate in any votes concerning the actions or transactions. See Advisory Opinion 90-01 (member of Tax Review Committee of RTM employed by Housing Authority), Advisory Opinion 98-02 (RTM member serving on Board of local non-profit), Advisory Opinion 01-02, (member of the Inlands, Wetlands and Watercourses Agency involved with non-profit applying for an approval), Advisory Opinion 02-05 (employee of custom home builder serving on Planning and Zoning Commission). These opinions indicate that the existence of the interest need not require the Town Officer to resign in order to participate in a transaction with the Town. But they also confirm that appropriate procedures should be followed to insulate the Town Officer from the opportunity to influence the transaction.”

Similarly, in this case, neither the existence of a Town Officer as an owner of the prime contractor making a proposal to the Town, nor the involvement of another Town Officer in the team assembled by the contractor, necessarily results in a violation of the Code of Ethics. Rather, the Code only concerns itself with the exercise of influence in connection with the award and performance of the contract.

As volunteers working for Town boards, commissions and committees, many individuals gain a high degree of familiarity with, and understanding of, the Town’s activities, objectives, procedures and requirements. This may give them an advantage when bidding on Town contracts, but it should not be considered an unfair advantage. Indeed, it is an advantage similar to that enjoyed by any existing Town contractor and it would be manifestly unfair, and inimical to the interests of the Town, to make it into a disadvantage. The Code of Ethics does not forbid Town Officers from engaging in transactions with the Town. It simply requires that they maintain an appropriate distance from the selection, supervision and performance evaluation processes and not use their position as Town Officers to influence these processes.

Avoiding the Appearance of Exerting Influence

In prior advisory opinions, the Board has encouraged each Town board, commission or committee to establish procedures relating to participation by its members in Town transactions based on the particular circumstances of their entity. However, it is logical for an entity to wait until the need arises to implement these policies, so that they

aren't formulated in a vacuum. Normally, we would expect such procedures to involve immediate notification of the head of any such board, commission or committee and the director of the Town department involved, but we understand that the Committee has not yet adopted such procedures.

The purpose of adopting such a procedure is to allow the two entities to take steps to avoid any inappropriate entanglements between the Town Officer and the town employees or other officials involved in a transaction. In this case, however, the Committee member has assured the Board of Ethics that there was no prior knowledge and that there has been no involvement between the Town Officers submitting the bid and the persons involved in preparing the specifications for the contract. This indicates that the result intended has been achieved thus far, even though a procedure hasn't been formally adopted. We assume that the Committee members will notify the Chair of the Committee and the Director of the Department of Planning and Zoning promptly, so that steps can be taken to ensure the integrity of the selection process and the administration of the contract if it is awarded to the Committee members' team.

A particular concern of the Board in these situations is that steps be taken to avoid unnecessary contact between persons involved in performing the contract and those supervising it. This is particularly important in the case where the persons involved in performing the contract might, in their position as a Town Officer, be in a supervisory role with respect to the persons who are at the same time responsible for supervising or evaluating them and their performance as contractors.

The Board is confident that, should the Committee member's firm be awarded the contract, appropriate steps will be taken to avoid inappropriate contacts and that if a situation arose where it was impossible to avoid the concurrence of inconsistent supervisory or evaluative roles, the Committee members would resign their positions rather than violate the Code or default on their contractual obligations.

Annual Disclosure

It is also incumbent on the Board to remind the Committee members that they will have an obligation to make reports under Section 5 of the Code should they receive an award of the contract.

See Related: A83-02, A90-0, A91-02, A01-02, A02-05, A02-10, A09-02

**BOARD OF ETHICS OF THE TOWN OF GREENWICH
RECORD OF VOTES BY THE BOARD**

DATE: MAY 13, 2020

**MOTION/RESOLUTION: (1) TO ADOPT ADVISORY OPINION
NUMBER 20-01**

Member	Yea	Nay	Abstain	Absent
Paul de Bary	X			
Robert Grele	X			
John Margenot				X
Robert Sisca	X			