GREENWICH BOARD OF ETHICS

Minutes of Special Meeting on October 31st, 2018
Executive Session

Members Present: Paul de Bary, Chair and Acting Secretary, Robert Grele, John Margenot, Robert Sisca

Members Absent: Rev. Ian Jeremiah

Others Present: Norma Kerlin

The meeting was called to order at 5:05 P.M. by the Chair, who noted that, although Mr. Grele had not yet arrived, a quorum was present and that a notice of the special meeting had been provided to all the members, posted online and posted in Town Hall in accordance with Freedom of Information Act requirements. As a special meeting, the Chair advised that only items on the agenda would be considered. In addition, the Chair noted that the only matter on the agenda was continuation of a preliminary investigation into submissions made by Ms. Kerlin. Therefore, the meeting was to be held in Executive Session. He further reported that the respondent was not able to attend the meeting due to a conflict. As the respondent had not received the required ten-day notice of the meeting, it would be necessary to schedule another meeting of the Board to obtain his responses if the investigation moved beyond the current stage of reviewing the sufficiency of the submission. At this stage, the Board’s determination would be based solely on the allegations made in the submission and would not require his participation if the submission was determined not to meet the requirements for further investigation.

The Chair then briefed Mr. Margenot and Mr. Sisca on the events at the last meeting. During this briefing, Mr. Grele joined the meeting at 5:09 PM. The Chair indicated that he and Mr. Grele had misgivings about whether influence had in fact been exerted. This is because the Complainant had described the reports submitted by the staff as professional and “courageous”. The complainant indicated that she did feel that the staff reports were thorough and professional, but that she thought that the fact that the individual making the reports was in a subordinate position to the respondent gave the appearance of impropriety. Members of the Board then discussed questions relating to the appearance of impropriety, including mechanisms for recusal, with the Complainant. She indicated that she believed that it would be best practice for Town Officers who held positions on any commission or board relating to land use not to accept employment in connection with applications related to any land use commission, board or agency.

The Chair then reported that he had sent copies of a second supplemental submission from the Complainant (attached as Exhibit A) to all the members of the Board except Rev. Jeremiah, who had recused himself from the matter scheduled to be discussed. Each of the members acknowledged having received and read the second supplemental submission. The Board then discussed the issue of the duty of an appointed
officer to affirmatively advise another body about matters within the expertise of the body on which the officer served. This was contrasted to the obligation to recuse oneself from participation in matters being considered directly by the body on which the individual served. After expressing her view to the Board that an affirmative duty did exist, Ms. Kerlin left the meeting at 3:42 P.M.

The Board then carefully reviewed each of the possible violations of the Code that described in the submission. After reaching a consensus that no violation had been properly alleged, the Board then considered the substance of a written statement documenting the decision to dismiss the complaint as required by the Board’s Statement of Procedures. Following the Board’s review and discussion, Mr. Sisca moved and Mr. Grele seconded a motion to dismiss the complaint and approve a notice of the dismissal to the complaint in the form attached to these minutes as Exhibit B, with such minor corrections and additions as the Chair might find appropriate, if, after further review by the members and consultation with the Chair, such changes or additions were deemed helpful.

Following this discussion, there was no further business before the Board and the meeting was adjourned by unanimous consent at 4:25 P.M.
Exhibit A

Submission dated October 5th, 2018
Palmer Island  
26 South End Court  
Old Greenwich, CT 06870  
October 5, 2018

Paul A. deBary  
Chairman, Board of Ethics  
Town of Greenwich  
25 West Elm Street  
Greenwich, CT 06830

Re: Kerlin Submission to Board of Ethics Regarding Eric Brower

Dear Mr. deBary,

In light of developments occurring after I submitted my August 29, 2018 letter to the Board of Ethics, I would like to provide this update.

As you know, Eric Brower represents Palmer Island LLC, which, in connection with that Corporation’s recently acquired property at 10 South End Court (Palmer Island) in Old Greenwich, filed with the Greenwich Planning and Zoning Commission [P&Z] applications for approval of two Coastal Site Plans and for a Subdivision Plan. Mr. Brower represents and is the chief spokesperson for Palmer Island LLC regarding these applications.

Mr. Brower is also Vice-Chair of the Town of Greenwich Conservation Commission, one of Greenwich’s three land use commissions. P&Z typically refers environmental questions or issues to the Conservation Commission for comment and advice. Its views are not binding upon P&Z, but the Conservation Commission is nevertheless recognized by P&Z as having expertise that P&Z lacks, including Coastal Overlay Zone issues, as set forth in the Coastal Area Management Act, CGS Section 22a-90 et seq. (CAM).

Because of the important role that the Conservation Commission plays in P&Z’s environmental analysis of CAM cases, Mr. Brower’s membership and in fact leadership of that Commission creates a strong appearance of impropriety in connection with representing his principal in three applications before P&Z. In other words, at the same time he serves as Vice-Chair of the Conservation Commission, Mr. Brower also represents the owner of Coastal Overlay Zone property regarding CAM applications before P&Z.

On September 11, 2018, P&Z approved the developer’s application to subdivide the 10 South End Court properties. Not until the last five minutes of the P&Z hearings—which commenced March 6, 2018—did the P&Z Commissioners and staff come to understand that subdivisions in Coastal Overlay Zones in Greenwich are subject to CAM scrutiny.
Specifically, with respect to properties located within the Coastal Overlay Zone, Section 6-111 (c) A of the Greenwich Municipal Code requires Coastal Site Plan review and approval by the Planning and Zoning Commission for 'activities including but not limited to .... subdivisions'.

Notably, the town's own Application For Review of Coastal Site Plan states in its first paragraph of text that such an application must be submitted in connection with applications for approval of subdivisions. See accompanying form.

Mr. Brower never submitted a Coastal Site Plan in connection with his principal's application for a subdivision. He did, however, submit the required forms in connection with the developer's separate applications for two site plans. Subsequently, and assisted by an attorney, Mr. Brower incorrectly informed P&Z that it was not obligated to apply CAM to a subdivision application, but instead could 'wait' until lots have been created by a subdivision, and then consider CAM in its review of development proposals for the subdivided lots. No authority was ever cited for this proposition.

Mr. Brower, as Vice-Chair of the Town's Conservation Commission, should have complied with the requirements of the Municipal Code. At the outset of P&Z's hearing of the Palmer Island LLC applications, he should have acknowledged or informed P&Z of the requirement (as stated in the very forms he submitted in connection with the site plans) that subdivisions in Coastal Overlay Zones are subject to CAM regulations. He repeatedly failed to do so.

His omission emphasizes the ethical difficulty surrounding Mr. Brower's concurrent and conflicting roles as 1) a developer's advocate for a subdivision and for sizable developments in a CAM area and 2) Vice Chair of the Conservation Commission, the land use agency that is in the best position to evaluate the developer's adherence to CAM regulations.

Thank you for your ongoing consideration of this matter.

Sincerely yours,

Norma Kerlin
ATTACHMENT TO OCTOBER 5, 2018 LETTER
APPLICATION FOR REVIEW OF COASTAL SITE PLAN

Applicant’s Name: ___________________________ Date: ________________________________

Address: ____________________________________________________________

Project Address or Locations: _____________________________________________

The following information must be supplied by the applicant and submitted in addition to, and along with, any application, plans and data required for approval of the proposed project under the zoning and/or subdivision regulation of the municipality. Attach additional sheets if more space is required.

1. PLANS

   A. Project Plan(s)
   This application must be accompanied by a plan (or plans) of the entire project indicating 1) project location, 2) design of all existing and proposed buildings, structures, and uses, 3) all proposed site improvements or alterations, and 4) ownership and type of use on adjacent properties.

   B. Coastal Resources
   This application must be accompanied by a plan showing the location of all coastal resources (as defined in Section 22a-93(7) of the Connecticut Coastal Management Act) on and contiguous to the site.

2. WRITTEN INFORMATION

   A. Description of the Proposed Project
   Describe the entire project including types of buildings and structures, uses, methods and timing of construction, type and extent of development adjacent to the site. This information should supplement and/or clarify plans in 1(A) above.
B. Description of Coastal Resources

Identify the coastal resources on and contiguous to the site (as shown on the coastal resources map) and describe their condition. This information should supplement and/or clarify the plan in 1(B) above.

C. Assessment of the Suitability of the Project for the Proposed Site and the Capability of the Resources to Accommodate the Proposed Use.

(1) Identify any and all coastal use policies (in Section 22a-92(10)(b)(1) of Connecticut Coastal Management Act) applicable to the proposed project.

(2) Identify and all coastal resource policies (in Section 22a-92(10)(b)(2) of Connecticut Coastal Management Act) applicable to the proposed project.

(3) Describe how the proposed project is consistent with all of the coastal policies identified in C (1) and (2) above (i.e. describe the extent to which the project complies or conflicts with each policy, the project should be modified to reduce or eliminate the conflict.

D. Evaluation of the Potential Beneficial and Adverse Impacts of the Project and Description of Proposed Methods to Mitigate Adverse Effects.

(1) Identify and describe the potential adverse impacts (as defined in Section 22a-93(15) of Connecticut Coastal Management Act and potential beneficial impacts of the project on coastal resources.

FOR WATERFRONT PROPERTY ONLY:

(2) Is the project a water dependent use as defined in Section 22a-93(16) OF THE CONNECTICUT Coastal management Act? If, so, explain why.
FOR WATERFRONT PROPERTY ONLY:

(3) Describe the impacts of effects (either positive or negative) that the project will have on future water dependent uses or development on and adjacent to this site as defined in Section 22a-93(17).

(4) Describe the proposed measures to mitigate (reduce or eliminate) any adverse impacts on coastal resources described in D(1) and, if applicable, on future water dependent development opportunities described in D(3).

E. Demonstration of the Acceptability of Remaining or Unmitigated Adverse Impacts on Coastal Resources and Future Water Dependent Uses and Development.

(1) Describe any adverse impacts that remain after employing all reasonable mitigation measures.

(2) Explain why these remaining adverse impacts were not mitigated.

(3) Explain why the commission reviewing this application should find these remaining adverse impacts to acceptable.
Exhibit B

Notice of Dismissal

TOWN OF
GREENWICH
Town Hall, 101 Field Point Road, Greenwich CT 06830

Board of Ethics
Peter Tesei, 1st Selectman, Ex Officio Member
Paul A. deBary, Chairman
Rev. Ian Jeremiah, Secretary
Robert F. Grele, Member
John Margenot, Member
Robert Sisca, Member

November 1, 18

Norma Kerlin
26 South End Court
Old Greenwich, CT 06870

Re: Decision 19-01- Dismissal of Complaint

Dear Ms. Kerlin,

This is to advise you of the decision of the Greenwich Board of Ethics with regard to your submission concerning the activities of the Vice-Chair of the Conservation Commission. Your submission relates to the activities of the respondent in connection with a subdivision application before the Planning and Zoning Commission. Under our Statement of Procedures, we have proceeded with a confidential investigation to determine if there is probable cause that a violation of the Code has occurred.

The first step in any such investigation is for the Board to evaluate whether the submission alleges a violation of the Code by a Town Officer and whether the Board has jurisdiction over the subject matter and the person alleged to have violated the Code. In performing this review, we consider only the allegations contained in the submission and assume the truth and completeness of these allegations without further investigation. After this evaluation, the Board makes a finding as to whether the submission makes a complaint that should be further investigated or whether the submission should be dismissed because it fails to state a specific violation of the Code over which the Board has appropriate jurisdiction.

Your submission was received in three stages: The first was submitted on the Board’s official complaint form and dated June 15th, 2018. The second and third were
addressed to the Board as supplemental to the original submission and were submitted under the dates of August 29th and October 5th, 2018.

The Board has determined that the respondent is a Town Officer within the meaning of the Code. We have also determined that your allegations involve possible violations of Sections 3, 4 and 5 of the Code of Ethics. As to each of these, however, we have determined that the submission does not allege facts supporting the conclusion that a violation of the Code exists. We have made this determination for the following reasons:

**Section 3 Gifts and Favors.** The submission indicates that the respondent represents an applicant before the Planning and Zoning Commission. Taken at face value, we believe this alleges the acceptance of a “valuable thing”, within the meaning of Section 3, which prohibits the acceptance of a valuable thing that might tend to influence the performance or non-performance of official duties.

The submission further indicates that the respondent’s client did not submit a Coastal Site Plan in connection with a proposed subdivision approval as required by the Town’s application form for review of Coastal Site Plans1. You suggest that the respondent, as Vice-Chair of the Conservation Commission, failed in his duty to inform the Planning and Zoning Commission of the requirement to submit a Coastal Site Plan because the Planning and Zoning Commission would “typically” rely on Conservation Commission advice in connection with reviewing such a plan. In effect, this suggests that volunteer service on a Town Commission creates an obligation on the part of an individual serving on that Commission to suggest to other Commissions when they might wish to call upon the advice of that Commission.

*If and when the planning and Zoning Commission requests a determination from the Conservation Commission with respect to this matter, we would expect the respondent to be recused from any involvement with the matter as a member of the Conservation Commission. However, while it might have been admirable to have done so, we cannot conclude that the respondent had an obligation to give unsolicited advice about conservation matters to the Planning and Zoning Commission in order to be in compliance with the Code of Ethics. Accordingly, we find that your submission does not allege a violation of Section 3 of the Code.*

**Section 4 Improper Influence.** The submission further alleges that the respondent exercised influence over the approval of the subdivision. You suggest that the respondent is in violation of Section 4 of the Code of Ethics, which prohibits Town Officers from exercising influence over a Town action in which they have a financial

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1 Section 6-111 (c) (A) of the Greenwich Municipal Code provides in pertinent part that:

“Coastal Site Plan review and approval by the Planning and Zoning Commission…shall be required for all projects and activities…fully or partially within the Coastal Overlay Zone. These activities shall include…all applications for building permits, subdivisions, rezoning, special permits, special exceptions, variances, and Municipal improvements.”

It is noted that your submission also indicates that the Coastal Site Plan was submitted in connection with separate site plan approvals and that counsel advised that the Planning and Zoning Commission could defer the Coastal Site Plan review until that review was undertaken. This advice may have been erroneous, but there are many exceptions to the requirement. Therefore, it does not seem obvious that the respondent could not rely on the opinion of counsel.
interest. You believe that this influence might have been exercised because a staff member of the Land Use Department (who provided memoranda concerning the project to the Planning and Zoning Commission using Conservation Commission stationary) would be reluctant to advise against the proposed project by virtue of the respondent’s position as her superior. During our hearing on the matter, however, you indicated that the staff member had “courageously” provided a detailed list of concerns to the Planning and Zoning Commission, although you speculated that her reports might have been “muted” as a result of the respondent’s position on the Conservation Commission. You indicated that your concern was not with the substance of the reports, but with the appearance of a conflict. We applaud the extensive efforts made by many Town Officers to avoid “appearances” of conflicting interests and commend you for your concerns in this regard. However, we note that appearances are subjective matters and that a violation of the Code requires actual influence to be exercised. There is no indication that the staff member had any contact with the respondent concerning the matter (and the respondent has confirmed that there was no such contact) or that her report on the matter indicates any such influence. Accordingly, we find that the submission does not allege a violation of Section 4 of the Code.

Section 5 Failure to File. The submission further alleges that the respondent did not file a disclosure statement with regard to the project in accordance with Section 5 of the Code. It is noted that Section 5 requires disclosure statements to be filed with respect to Town “Transactions”, as defined in the Code and that, while an application may ultimately involve a transaction with the Town, an application to the Town does not in-and-of itself normally create a Town Transaction. Moreover, no direct financial interest in the project by the respondent has been alleged (and the respondent has confirmed the absence of any direct financial interest in the project or any transaction related to it). Accordingly, we find that the submission does not allege a violation of Section 5 of the Code.

Accordingly, while we commend the high standard that you and many other Town Officers seek to achieve in order to avoid any appearance of conflicting interests in connection with your service to the Town, the Board has determined that your submission does not allege facts sufficient to qualify as a complaint that should be investigated under the Code.

This decision is limited to interpretation of the Greenwich Code of Ethics, which the Board has specific responsibility for. Accordingly, it should not be interpreted as an decision with regard to any other local, state or federal laws, rules or policies that might be applicable to the circumstances that you describe. In addition, this decision is limited to the facts and circumstances described in the submission you made. Additional facts and circumstances may become available that would change the decision made by the Board in this instance. Since the Board is only responsible for investigating complaints that are made to it, it cannot assume responsibility to undertake ongoing monitoring of the circumstances described in this decision and would require a further complaint to be filed.

In accordance with our policies, the Board’s records concerning the matter, including copies of the submission, will become public records available to any person...
requesting them. You are also relieved of your obligation to maintain the confidentiality of our investigation as it is now complete.

cc.: Eric Brower

Yours truly,

Paul de Bary, Chair