

Town of Greenwich

Board of Ethics



Official Reports

for

Fiscal Years 2005 -2009



Paul de Bary

Editor

This contains reports of the Advisory Opinions of the Board of Ethics of the Town of Greenwich, Connecticut. The reports contain information drawn from the Board's official records. Consistent with the Greenwich Code of Ethics, information concerning the specific identity of the person requesting an advisory opinion has not been included. However, the relevant facts presented to the Board are summarized, the issues dealt with are identified and the conclusions of the Board are reported using the language from the original opinion or previous reports thereof to the extent possible. Please refer to the Introduction for important additional information concerning the use of these reports.

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Library of Congress Control Number: 2012914945

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PRINTED IN THE UNITED STATES OF AMERICA

July 2004 – June 2005

Advisory Opinion No. 05-01

Date: 9/15/04

Topics: Conflict of Interest; Committees; RTM Members; Board of Education

Code Section: Section 4

Statement of Facts:

A member of the RTM who sits on the Claims Committee and the Education Committee recently started a private law practice in Greenwich. The practice includes advocacy and negotiation and representing clients in administrative hearings in which the Greenwich Board of Education is an adverse party. The matters in which the member represents clients do not normally come before either of the committees on which the member sits. However, the Town Attorney sits on the Claims Committee and represents the Board of Education in such matters.

Question Presented:

Does the representation of clients before the Board of Education preclude an attorney from serving on committees of the RTM?

Discussion and Conclusion:

The Board noted that there are many volunteers, including doctors, lawyers, brokers or accountants, in public service with “potential conflicts,” and those with special skills are not precluded from public service because of what might happen. However, the Board expressed the view that a conflict could arise, and confidence that the member would refrain from involvement in such matters.

Advisory Opinion No. 05-02

Date: 11/16/04

Topics: Town Employees; Town Property; Exerting Influence; Financial Interest

Code Sections: Section 2 (a) (4), Section 4

Statement of Facts:

As part of its standard procedures, the Police Department sold a confiscated motorcycle to a member of the Department. The sale was made at a public auction at which the member of the department was the highest bidder. All proper procedures of the town's Purchasing Department had been followed in connection with the auction of the motorcycle. The member of the department who purchased the motorcycle took no part in conducting the auction.

Question Presented:

Is the director of General Services of the Police Department unable to accept a bid from a member of the department because the director or the department has an interest in the transaction?

Discussion and Conclusion:

Section 2 (a) (4) of the Code of Ethics defines a transaction to include the sale of personal property by any person, directly or indirectly, for the benefit of the Town. Section 4 of the Code prohibits Town Officers from influencing or voting on a transaction in which the Town Officer has an interest. Here the individual who had a direct interest in the transaction as purchaser of the motorcycle took no part in the auction transaction through which it was purchased from the Town. In addition, the Town's procedures for the public auction, which provide notice and full opportunity for interested parties to receive all information pertinent to the property, ensure that whatever indirect interest may exist between the purchaser and the other members of the department could not influence the outcome.

Advisory Opinion No. 05-03

Date: 4/3/05

Topics: Conflict of Interest; Boards and Commissions; RTM member

Code Section: Section 4

Statement of Facts:

A member of the RTM was also a member of a special Town commission whose performance could be reviewed by the RTM.

Question Presented:

Is it violation of the Code of Ethics for a person to hold one position in Town government which may involve review the person's performance while serving in another position in Town government?

Discussion and Conclusion:

The Board found no violation of the Code of Ethics by virtue of dual service to the Town, but advised the individual making the request to refrain from participating or voting on matters involving scrutiny by the RTM of the special commission. It was not indicated whether the individual had any financial interest as a result of serving on the special committee.

Advisory Opinion No. 05-04

Date: 5/9/05

Topics: Conflict of Interest; Town Officers; Town Employees

Code Section: Section 4

Statement of Facts:

A member of the RTM was also employed by two agencies of the Town. The member asked whether it was appropriate to refrain from participating in or voting on matters relating to the member's employment by either of the two agencies.

Questions Presented:

May members of the RTM participate in discussion or vote on a contract involving their employment by an agency of the Town?

May a member of the RTM vote on the overall budget of the Town if it contains an appropriation for such contracts?

Discussion and Conclusions:

Section 4 of the Code of Ethics prohibits elected officials of the Town from using their position as a Town Officer to exert influence or vote on matters in which they have a substantial financial interest. The arrangement under which the member provides services to the two Town agencies and is compensated by the Town involves compensation that is more than nominal. Thus the arrangement is clearly a transaction in which the RTM member has a substantial financial interest and should refrain from participating in discussions or voting. However, the Board felt that the member could vote on the Town budget as a whole, even though it contained provisions for such compensation because the level of funding in the overall Town budget, as apposed to the specific allocation of budgeted funds to a particular use, is an interest that the member has in common with the other citizens of the Town.

July 2005 – June 2006

Advisory Opinion No. 06 -01

Date: 8/16/05

Topics: Conflict of Interest; Boards and Commissions; Consultants

Code Section: Section 4

Statement of Facts:

Member on the Inland-Wetlands & Watercourses Agency (IWWA) is a landscape architect and environmental analyst who is a partner in a land-use consulting firm which represents applicants before the IWWA approximately 8 to 10 times per year. In the past, the member has recused himself by refraining from any involvement with such matters. The member had become aware of Advisory Opinion No. 98-02, in which the Board expressed the opinion that “it would be a violation of the Code of Ethics if a town officer or member of his firm were to represent a client before his Agency...” and asked if his recusal was sufficient to remove the conflict.

Question Presented:

By refraining from any discussion or vote in a matter where the firm that employs the member is appearing on behalf of an applicant, may a Town Officer avoid a conflict of interest under the Code?

Discussion and Conclusion:

The Board did not feel that the fact that there were many applications to the IWWA by the member’s firm prevented the member from serving on the IWWA, but stated that “[i]t is important that you continue your policy not to act or appear personally on behalf of any applicant before the IWWA.” The Board also indicated that it was

important for the member to continue to be recused from any matters in which the members consulting firm is involved in any way.

See Related: A-98-02, A-01-02, A-06-02

Advisory Opinion No. 06-02

Date: 12/29/05

Topics: Conflict of Interest; Boards and Commissions; Consultants

Code Section: Section 4

Statement of Facts:

A member of the Inland Wetlands and Watercourses Agency (IWWA) is actively involved as a landscape architect in the Town. The member practices alone and has no staff to assign projects to that require permits from the IWWA. He advised the board that he does not participate in the discussion or voting by the full Board with respect to his client's applications and advised his clients about that in advance. However, the member stipulated that the focus of the member's work was not on wetlands issues and they were dealt with only if they came up.

Although the member did not participate in the Board's deliberations on his clients applications, he noted several areas where he did have contact with the staff of the Agency. He described the process by which the staff received a "Green Sheet" containing a basic description of the project and reviewed it to determine whether an application is required. Discussions with staff might then occur relating to issues that need to be addressed in the final design to be submitted to the Board. On occasion, final design work is left to be worked out with staff after the Agency grants approval for the project and there may be a need to follow up on items that are revealed by inspections. Other members of the IWWA Board and staff appeared on behalf of the member and indicated that in these dealings with staff, the member

was always extremely sensitive to the potential for conflict and confined the discussions to matters of information, never attempting to influence the outcome.

Questions Presented:

May a Town Officer contact the staff of a Town agency when an application is pending before the agency on behalf of a private client of the Town Officer?

Discussion and Conclusion:

The Board noted that the member's work on the agency board was highly valued by the other Board members due to the expertise of the member and that the member did not have additional staff in the member's firm that could handle matters that come before the Board. It further noted that Section 4 of the Code of Ethics prohibits appointed officials from using their position as a Town Officer to exert influence or vote on matters in which they have a substantial financial interest and that the member had been "steadfastly cautious to recuse yourself" on matters that involved clients.

In light of the testimony that the member had been careful to avoid exerting any pressure on the other members of the Board or the staff in connection with applications on behalf of the member's clients, the Board indicated that it might be possible to submit application material and provide information with respect to applications without exerting undue influence in connection with the matter. The Board cautioned, however, that the member's appearance before the Agency in some cases "would create an appearance of impropriety that is simply not in the best interests of the Town." It noted that that issues of ethical behavior are "typically unique to the particular facts of each instance" and encouraged the member to continue to be extremely sensitive to the issues moving forward.

See Related: A-989-02, A-01-02, A-06-01

Advisory Opinion No. 06-03

Date: 1/25/06

Topics: Conflicts of Interest; Financial Interest; Insurance

Code Section: Section 4

Statement of Facts:

A member of the board of Parks and Recreation owns an insurance brokerage firm that places insurance for certain organizations that use the facilities of the Department of Parks and Recreation. The brokerage firm places insurance with a number of different insurers. Among the insured using Town facilities whose insurance was placed by the brokerage firm were youth sports league participants, an educational organization and a vendor to the Town golf course. The brokerage firm had provided insurance for all of these entities prior to the time that the member joined the Board. Total commissions for these placements equal less than $\frac{1}{2}$ of 1% of the firm's annual gross operating revenue. The firm also sponsors a junior golf tournament each year at the Town golf course, the cost of which represents four times the amount of the gross revenue derived from the placement of these policies. There are no direct commissions payable to any individual agent in connection with these policies.

The Town requires some of these organizations to maintain insurance for the activities that they conduct on the facilities, but does not specify a particular insurer. Recently the Board has discussed enlarging the group of insurers that are eligible to provide such insurance, without the participation of the member.

Questions Presented:

Where the Town requires insurance as a condition to the use of Town facilities by various organizations, does a Town Officer who serves as an insurance broker for such organizations have a financial interest in a transaction with the Town?

Under the circumstances described is such interest substantial?

Discussion and Conclusions:

The Board found that the member of the board of Parks and Recreation would have a conflict of interest in discussing the broadening of eligible insurers, noting that Section 4 of the Code of Ethics prohibits Town Officers from using their position as to exert influence or vote on matters in which they have a substantial financial interest. However, the Code of Ethics does not preclude persons from participating in Town government because of a potential conflict; it only prohibits participating in specific actions or transactions in which the individual has a substantial direct or indirect financial interest.

Moreover, the Board did not see that the brokerage firm's existing relationships with the entities described in the request had given the member an interest in the Board's action to require acceptable insurance policies, noting that 1) the Board had only insisted that the organizations have an acceptable insurance policy, 2) coverage of all these organizations had been initiated by the firm prior to the time that the policy was adopted, and 3) the amount of commission "seems less than substantial."

See Related: S-92-01

Advisory Opinion No. 06-04

Date: 1/25/06

Topics: Gift or Favor; Town Employees; Conferences

Code Section: Section 3

Statement of Facts:

The director of a Town department indicated that a vendor of consulting services had invited the director to attend a conference in Florida in April with all expenses paid. The vendor has not done business with the Town and the director stated that "at this point, we have no plans to use them in the future." The supervisor of the

director was aware of the offer and encouraged the director to attend, subject to the approval of the Board of Ethics.

Questions Presented:

Is the acceptance of an invitation to participate in a conference, with all expenses paid, a gift or favor under Section 3 of the Code?

If the likelihood that the gift or favor would influence a Town Officer is extremely remote, may the Town Officer accept the gift or favor?

Discussion and Conclusions:

Section 3 of the Code of Ethics provides that:

“No town officer shall accept any valuable gift, thing, favor, loan or promise which might tend to influence the performance or non-performance of his official duties.”

The Board considered the offer to attend the conference as a potential gift or favor. However, based on the directors’ assurance that there was practically zero likelihood that the Town would do future business with the vendor, the Board did not view the acceptance of the invitation as necessarily a violation of the Code. However, the Board indicated that any future involvement in consideration of the vendor by the Town would be seen as a violation of the Code.

See Related: A-02-01

July 2006 – June 2007

Advisory Opinion No. 07-01

Date: 11/6/06

Topics: Exerting Influence; RTM Members; Town Employees; Financial Interests; Complaints; Advisory Opinions

Code Sections: Section 4, Section 8 (a), Section 8 (b)

Statement of Facts:

The chair of a committee of the Representative Town Meeting (“RTM”) and several other members sent a letter to the Board seeking guidance on the behavior of one of the members of the committee during discussions, deliberations and votes. The member in question was an employee of a Town department, but engaged in extensive discussion and debate on matters relating to the department. In addition, without disclosing the member’s employment by the department, the member had volunteered to be the liaison between the committee and the Board that oversees the department. Subsequently, after the interest in the department became known, the employee objected to the suggestion that a non-employee member of the committee should be appointed to serve as liaison. The chair estimated that approximately one-third of the committee’s work involves reviewing, discussing, and voting on the department’s budget and nominations for the Board of Social Services. The letter alleged that the employee member “argues at length” for the member’s point of view, “is incensed when prevented from dominating the discussion,” and “never found a situation” where the member believed it was appropriate to refrain from any vote.

The Board held a hearing on the matter, which extended over several meetings. At the hearing the committee member whose actions had been questioned provided testimony indicating that the member had been a lifelong resident of the Town and had been involved in several social service positions with the Town. The member indicated that no one else on the committee had the degree of knowledge and experience that the member could provide and that no one else had volunteered to take on the role of liaison to the Board that oversaw the department. The member felt that the policy issues regarding the department were issues in which all citizens of the Town have a common interest and that the member's expertise allowed the committee to better understand the needs of the most disadvantaged citizens of the Town, who were most in need of a voice. In addition, a number of Town residents spoke in favor of the member having freedom of speech rights that needed to be balanced against the Code's interest in protecting the public against possible self-interest. At the hearing both the members of the committee and the member whose actions had been questioned indicated that they would appreciate having an advisory opinion from the Board. The committee Chair and the remaining members of the committee who had submitted the original letter submitted a follow-up letter explicitly confirming that they had intended their original letter as a request for an Advisory Opinion.

Questions Presented:

Where a letter from a Town Officer questions the actions of another Town Officer, should it be considered as a Complaint or request for an Advisory Opinion?

May a town employee serve on the RTM?

Should a Town employee serving on the RTM vote on or engage in discussions of matters related to the employee's department?

May a town employee serve on an RTM committee that has oversight responsibilities with respect to the employee's department?

Should a Town employee serving on a committee of the RTM vote on or engage in discussions in that committee of matters related to the employee's department?

Discussion and Conclusions:

Should the Board treat the letter as a Complaint?

The Board considers it consistent with its mandate not to raise too high a bar in determining when information provided to it constitutes a Complaint for purposes of the Code. As long as the allegations are sufficiently specific to put the respondent on notice of the violations complained of, the Board will view the allegations made in the light most favorable to the petitioner when determining whether an investigation is warranted. In this case, the petitioners have confirmed that they are seeking guidance as to prospective actions only. Accordingly, the Board will treat the matter as a request for an Advisory Opinion.

May a town employee serve on the RTM?

The fact that the petitioners and the respondent seek an answer to this question may be rooted in an apparent conflict between the Section 169 of the Greenwich Municipal Code and Section 7-421 of the Connecticut General Statutes. Section 169 prohibits any person holding a salaried position in a Town department from being eligible for election as a member of the RTM. However, CGS Section 7-421 grants municipal employees the right to serve on any governmental body where such employee resides, with only certain limited exceptions not germane to our discussion here.

This apparent conflict has never been reconciled by any court decision. In 1984, the Fairfield Superior Court addressed this apparent conflict in a case involving a request for a declaratory judgment by Leonard J. LaLuna. Mr. LaLuna, an employee of the Greenwich Fire Department, was elected to serve as a member of the RTM, but was not sworn in on the basis that Section 169 of the Municipal Code made him ineligible. Due to procedural issues relating to the failure to serve notice on certain Town employees, Judge Jacobsen determined that he did not have subject matter jurisdiction to decide the case, but indicated, in dicta with perhaps more practical than precedential value, that if the jurisdictional defect had not been present, he “would declare Section 169 invalid.” Subsequent to this decision, Mr. LaLuna was reelected to and permitted to serve as a member of the RTM.

Despite the unsettled state of the law, the RTM has evidently chosen to change its policy with respect to allowing municipal employees to serve. The Board notes that

under Section 169, the Greenwich Municipal Code provides that the RTM itself is charged with the responsibility for determining the qualifications of its members. In the absence of express direction to the contrary from the Legislature or the courts, the Board will abide by the practices of the RTM in determining who is qualified to serve as a member. Therefore, for purposes of this decision, we have assumed that the respondent is qualified to serve as a member of the RTM.

May a Town employee serve on a committee of the RTM that has oversight responsibilities with respect to the employee's department?

Just as any potential legal ambiguity concerning the qualification of the members of the RTM are better resolved by the State Legislature, the courts or the RTM itself than by the Board, the qualifications of members to serve on committees of the RTM is also an unsuitable subject for the Board to give advice on. Clearly, this is an internal matter for the RTM in the first instance, and, inasmuch as the courts would be loath to interfere in such internal matters, the Board should be even more so.

The role of the Board is to provide guidance and make recommendations concerning potential or actual violations of the Code of Ethics. Clearly, the appointment of a Town employee to a committee that reviews the budget of the employee's department and the appointment of individuals who evaluate his job performance would seem to provide myriad opportunities for a violation of the Code. But, as suggested by one of the petitioners in the September 5th hearing, these violations might be avoided if the individual scrupulously abstained from discussions and votes that might relate to matters that he or she had a financial interest in. Thus, there does not appear to be any inherent violation of the Code of Ethics resulting from the mere act of an employee of the Town being appointed to serve on an RTM committee that has oversight responsibility for that employee's department nor from the mere act of the employee of accepting the position.

We are mindful that the petitioners may feel that a rule that prohibits an employee from sitting on a committee that has responsibility for reviewing the budget of the employee's department would be beneficial. They may feel that the Board has missed the chance to prevent at the outset what seems to be obviously untenable situation from arising and to give the public reassurance about the integrity of our

legislative body. But this position has been taken, not to make our own task easier, but out of respect for the fact that it is the prerogative of the RTM to govern its own affairs. To the extent that the RTM has not heretofore seen fit to adopt such a preventive rule itself, we have no choice but to accept the consequences.

Should a Town employee serving on the RTM vote on or engage in discussions of matters related to the employee's department?

Since Town employees began to serve on the RTM, this Board has been called upon to address the issue of their voting and participating in debate on a number of occasions. The Board has previously determined that members who are Town employees (or who have family members that are Town employees) should not vote on the labor contract for the bargaining unit that represents the employee, as this is clearly a matter in which the employee has a direct financial interest that is not common to the interest of other citizens in the Town. The Board believes that this position should also apply to any vote or discussion concerning a person who is in a position to supervise, evaluate, or otherwise establish or determine the conditions of employment of a member of the RTM (or a member of his or her family).

On the other hand, the Board has also taken the position that an employee member of the RTM may vote and participate in the debate on the overall Town Budget, but should refrain from any vote on any specific line item that the employee (or family member) has a financial interest in. Also, we have found that where a member serves on the board of another Town agency without compensation and has no other financial interest in the matter, the member may vote on and engage in discussions concerning that agency. Clearly, the Board has not imposed a blanket proscription, but rather makes an analysis that looks to the degree in each instance that the member has an interest that is significant and not common to the interests of other citizens in the Town.

In relation to an employee member's participation in the activities of the RTM as a whole, the Board has also taken the position that employees may engage, under appropriate circumstances, in discussions concerning the matters affecting their department, including those which they may not vote on. This would include providing testimony before a committee that one is not a member of. It is important

to note that this position is based on the language of the Code that prohibits not discussion, but “exerting influence.”

Since Town employees have a right to free expression, the Board will be cautious in concluding that any discussion of an issue constitutes an effort to exert influence. This effort to balance the employee’s right to free expression against the Board’s duty to protect against violations of the Code of Ethics requires the Board to make rather fine distinctions, but this is not unusual in a case where competing interests must be balanced.

Necessarily, the Board will be required to make decisions on a case-by-case basis. However, in the close examination that is necessary to make such careful judgments, it will be guided by the overall objectives of the principles to be served. If the discussion of a matter in which an employee has a financial interest could reasonably be viewed as an effort to inform, rather than to influence, the other members of the RTM, the Board will not find a violation of the Code. On the other hand, if the discussion is in the nature of a filibuster or the employee selectively withholds information that the employee has superior knowledge of by virtue of his or her position, the Board is likely to find that a violation has occurred.

Consequently, the Board has always advised members of the RTM who are discussing items in which they have an interest to disclose the nature of their interest before engaging in the discussion and has encouraged them to exercise restraint in the discussion. Limiting oneself to answering questions in an impartial manner or drawing attention, at the end of the discussion by others, to key information that may have been overlooked, is clearly more appropriate than playing an active role in shaping the continuing discussion. Any attempt to dominate the discussion would clearly represent an effort to influence, rather than inform.

Should a Town employee serving on a committee of the RTM vote on or engage in discussions in that committee of matters related to the employee’s department?

Due to the special role of committees in undertaking the business of the RTM, the Board feels that Town employees will need to be extremely circumspect in serving on a committee that has responsibility for oversight of their department. While any

member of the RTM may testify before a committee, actual participation as a member of the committee is a both a privilege and a responsibility that every member does not share. The establishment of a committee recognizes the need for a heightened degree of involvement in the issues that the committee is chartered to deal with, and presumes that the recommendations of the committee will be given special weight by the general membership of the RTM.

Thus, the very act of accepting a position on the committee may be seen as placing a member of the RTM in a position to exercise heightened influence over the matters that the committee is responsible for. Where these include oversight responsibilities concerning the Town department that the employee has responsibility for, that special influence is likely to involve matters that an employee is likely to have a financial interest in. Respondent's attorney reminded the Board of respondent's substantial interest in his employment when discussing his due process rights to proper notice of any charges that might be made against him. These same substantial interests are likely to be at stake when matters such as the departmental budget, staffing levels and even programmatic priorities are discussed. While the impact of various programmatic items may be slight, they are matters that have an effect on the terms and conditions under which an employee performs his or her job, and one necessarily has a substantial financial interest in the means by which one earns his or her livelihood. Appropriate sensitivity to the heightened ability of a committee member to influence actions taken by the committee and the RTM would suggest that there would be few discussions and votes that the employee member of the committee should actively participate in.

Respondent argues that his position as an employee of the department gives him valuable knowledge that can benefit the committee in its deliberations. The Board is prepared to accept that this may be true. What the Board is unlikely to accept is that it is necessary for the respondent to actually serve on the committee, as compared to testifying before it the way any other concerned citizen would, in order for the committee to receive the benefit of that knowledge. Moreover, in the intimate give and take of committee deliberations, even expressions of an opinion as to matters that one does not have a substantial financial interest in could be used in an attempt

to influence the committee's actions on matters that the employee does have an interest in.

As indicated above, the Board cannot say that the mere determination by a Town employee to accept a position with a committee that has oversight responsibility for his or her department constitutes a violation of the Code of Ethics. But it seems likely that the degree of circumspection necessary for such an employee to serve on the committee without violating the Code would seriously impair the effectiveness of the employee's performance as a committee member. To the extent that the respondent's position as a non-committee member would allow him a better opportunity to inform the committee of the matters that he is particularly knowledgeable about, he might well be more effective in assisting the committee as a non-member of the committee. A non-employee member of the RTM would be much more likely to be an active and productive member of the committee. Accordingly, the Board wishes to express its grave concern over the potential for violations of the Code of Ethics by the respondent as a member of the committee.

Discussion and Conclusions

After careful consideration of the factors involved, the Board finds as follows:

(a) *RTM Membership*. There is no apparent breach of the Code where a Town employee is elected to serve on the RTM.

(b) *Committee Appointment*. Similarly, there is no apparent breach of the Code where a District elects to appoint a Town employee to serve on a committee of the RTM, even where that committee has oversight responsibility with respect to the employee's department. While it may be a violation of the Code for the employee to fail to divulge the potential conflict when appointed, it is beyond the purview of the Board to offer advice to the RTM as to whether such employees are therefore a poor choice to serve on such a committee.

(c) *RTM Debate*. A Town employee serving on the RTM is constrained in the ability to participate fully in discussions and debates in matters before the RTM relating to matters that may have a financial effect on his or her salary or the terms and conditions of his or her employment, such as a labor agreement covering the employee, budget matters that specifically affect the employee or the department,

the appointment or performance of supervisory personnel or members of boards and commissions that have oversight responsibility for such employee and numerous other matters which may affect the character of the job or the compensation and benefits associated with it. The same is true if the spouse of an RTM member is a Town employee. Any comments made in such circumstances should include disclosure of the interest and should be limited to matters that inform, rather than influence the outcome of the discussion. If the employee or spouse were to use the position of being an RTM member to attempt to dominate or otherwise control the discussion or to engage in deal making in connection with the issue, on or off the floor, the employee would clearly be seen to have "used his office to exert influence" over a matter in which the employee has a "substantial financial interest" in violation of Section 4 of the Code. Because of the difficulty in discerning the point at which comment to inform instead becomes an attempt to influence the outcome of discussion, the far safer choice is for RTM members with an interest to abstain from participation in discussion and debate of such items altogether, and when they choose to participate, they do so at their peril.

(d) *Committee Debate.* Where an employee serves on a committee of the RTM that has oversight over the department that employs him or her, the problems with participation in discussion or debate are aggravated. The recommendations that an RTM committee makes to the whole RTM have great influence on the ultimate vote of the RTM on that item. Accordingly, an employee serving on a committee of the RTM may be able to influence the reports of that committee to the whole RTM, which is an exercise of substantially more influence than participating in discussions within the RTM as a whole. Moreover, although the employee may disclose the interest to the members of the committee, the RTM may well have no appreciation of that conflict as an indirect source of the information on which it relies. For these reasons, the Board of Ethics believes that the foregoing concerns about employee participation in discussion and debate are exponentially greater when the discussion and debate is occurring in an RTM committee. Employee participation in discussion as a member of the RTM committee on matters pertaining to the department that employs the employee is fraught with danger. The moment that the employee is properly shown to have attempted to influence the outcome and not just to inform

the committee, the employee is in violation of the Code of Ethics. The safer path is to abstain.

(e) *Votes.* It is a clear breach of the Code of Ethics for an employee of the Town to vote as a member of the RTM or an RTM committee on specific budget items that pertain to the employee's department, on union contracts that affect the employee's salary, benefits or the employee's compensation or working conditions, or on other matters that could have a more than nominal effect on employment conditions or compensation. The Board of Ethics is not prepared to opine that a Town employee is precluded from voting as an RTM member on any matter that may pertain to the employee's department. Nevertheless, because conditions of employment and employee compensation can be indirectly affected in so many ways by issues brought to the RTM, the far safer choice is for the employee to abstain from voting on matters that affect the department.

See Related: A-90-02, A-09-03

July 2007 – June 2008

The Annual Report of the Board of Ethics for the 2008 Fiscal Year indicates that there were no Complaints or requests for Advisory Opinions during the Fiscal Year.

July 2008 – June 2009

Advisory Opinion No. 09-01

Date: 7/14/08

Topics: Disclosure of Financial Interest; Town Employees; Public Schools

Code Sections: Section 2 (a) (4), Section 5

Statement of Facts:

The spouse of a Town Officer has a teaching position in a public school in Greenwich. It is stipulated that the interest of the Town Officer in the salary is more than nominal. Teachers in the Greenwich Public Schools are employed through the Board of Education. The Board of Education was established pursuant to a resolution of the Representative Town Meeting that was adopted on June 13, 1966, under authority of the Greenwich Home Rule Act, to implement provisions of the Connecticut General Statutes. Members of the Board of Education are independently elected and, under the Connecticut General Statutes, the Board of Education is not considered an agent of the Town. Therefore, it cannot be assumed that in entering into employment contracts with teachers, the Board of Education is acting as an agent of the Town. However, funds for the payment of teachers' salaries generally are provided for in the budget of the Board of Education. This budget is submitted by the Board of Education for inclusion in the annual operating budget of the Town, and is subject to review by the Board of Estimate and Taxation and to approval by the Representative Town Meeting. As a consequence, through the Town's operating budget, teachers' salaries are paid from funds that are

appropriated by the Representative Town Meeting and include taxes levied on property in the Town.

Questions Presented:

Is a teacher's employment contract with the Greenwich Public Schools considered a transaction within the meaning of the Code of Ethics?

Is an employee of the Board of Education a Town Officer?

If a spouse is a Town Officer, does the transaction qualify for an exception from the reporting requirement?

Discussion and Conclusions:

Employment Contract as a Transaction. The definition of "transaction" in the Code of Ethics includes a contract for the furnishing of services such as a teacher's employment contract with the Greenwich Public Schools. The Code further defines a substantial financial interest as any interest that is more than nominal and is not common to the interest of other citizens of the Town. Since the compensation received in the transaction in question is more than nominal, and is not common to the citizens of the Town, it creates a substantial financial interest, which the spouse of the teacher has an interest in by virtue of the economic relationship between spouses. Unless eligible for an exception, such an interest is reportable in each year that it exists.

Teachers as Town Officers. The financial interest of the Town in the operations of the Board of Education is evident in its budget process. As a result, whether the Board of Education is or is not acting as an agent of the Town in entering into its employment agreements with teachers does not change the status of the teacher as a Town Officer.

Exception for Interest as Town Officer. An employee of the Town is not required to file a disclosure statement disclosing an interest in his or her employment contract, because the employment contract is the transaction that gives rise to his or her position as a Town Officer. Since a Town employee is required to file a disclosure statement because of being a Town employee, filing a disclosure statement showing an interest in the employment contract with the Town would essentially be stating

the obvious. Accordingly, in the instant case, the teacher is not required to file a disclosure statement reporting the contract with the Board of Education. However, the Board does not consider that the reporting exemption provided for the teacher excuses the teacher's spouse from reporting a substantial financial interest. Since spouses have joint economic interests under federal and state laws, the Code of Ethics treats transactions involving an immediate family member such as a spouse as giving rise to a separate indirect interest of the Town Officer as a reporting person. As this is not an interest resulting from the services of the reporting person as a Town Officer, but rather an indirect interest arising from the legal relationship between the spouses, it is required to be included in the annual disclosure statement. The Town Officer is reporting on the indirect interest in the spouse's employment agreement that arises from the marriage contract and the shared economic interests of spouses. That interest becomes relevant because of the fact that the spouse has a contractual arrangement with the Board of Education that is funded through the Town's operating budget.

See Related: A-92-02, A-09-03

Advisory Opinion No. 09-02

Date: 7/14/08

Topics: Financial Interest; Substantiality

Code Section: Section 5

Statement of Facts:

The spouse of a Town Officer has provided part-time services to the Department of Parks and Recreation as an instructor for a sports clinic. The spouse also serves as an umpire for the Town baseball league. In each case, there is no formal contract for such services and they are provided as an independent contractor. During the 2007–2008 Fiscal Year, the amount of compensation that the spouse received for services as an instructor for the clinic was approximately \$300, which was paid by the Town. Fees paid for umpiring services during the same period were approximately \$1,500.

It is noted that the Department collects application fees from participants in its clinics and from the teams in its baseball leagues. Applicants and teams are requested to make their fees “payable to the Town of Greenwich.” The current team entry fee is \$997, which includes a \$322 umpire rebate check to cover 14 games at \$23 per game per team. The teams pay the umpires at the field. The umpires who officiate at each game are not chosen by the Department, however. The League is registered with and operates under guidelines established by the Amateur Softball Association of America (ASA). To be eligible to serve as an umpire for ASA league games an individual must go through the ASA certification process. The Greenwich Umpires Association, rather than the Department of Parks and Recreation, hires and schedules umpires from within the pool of ASA eligible umpires.

In addition to organizing its own programs, the department also grants permits to various organizations for the use of the Town parks. Interests related to the use of Town facilities pursuant to such permits are not the subject of this request.

Questions Presented:

Is a spouse’s part-time employment by the Department of Parks and Recreation considered a transaction within the meaning of the Code of Ethics?

Is the interest in such a transaction not reportable because the amount of compensation received by the spouse is nominal and, therefore, does not give rise to a substantial financial interest?

Does the transaction in question qualify for an exception from the reporting requirement because the interest it creates arises from services rendered by the spouse as a Town Officer?

Discussion and Conclusions:

The definition of “transaction” in the Code of Ethics includes the furnishing of services. There is no exception for part-time as compared to full-time employment. Rather the Code defines a substantial financial interest as *any* interest that is more than nominal and is not common to the interest of other citizens of the Town. The Code of Ethics does not require that a contract be entered into in order for a

reportable interest to occur. Here a course of conduct has been established and the spouse is paid by the Town for being an instructor at the clinics.

The umpiring payments involve a more complex fact pattern. Although payments are made to the umpires by the teams, the Town has directed the teams to make the payments and the Town makes a rebate to the teams that it identifies as an “umpire rebate check” in an amount expected to be equal to or less than the expected umpire payments. (If the rebate check is less than necessary, the teams and their sponsors must make up the difference.) But the Town is not involved with the selection of umpires. Since the umpires are not selected by members of the Department of Parks and Recreation, it is the understanding of the Board that the Town’s involvement with the League is not determinative of either the amount of an umpire’s compensation or the specific choice of umpire for a given game. Thus, the financial interest relating to the umpiring fees is not connected either directly or indirectly to the Town and is not reportable on the annual disclosure statement.

A Town Officer is not required to disclose an interest in the very transaction for services that gives rise to his or her position as Town Officer. Under the Code, a Town Officer includes any official, employee, agent, consultant or member, elected or appointed, of any board, department, commission, committee, legislative body or other agency of the town. In this case, based on the facts as presented to the Board, the spouse’s sole relationship with the Town is as an independent contractor who is not an agent or consultant to the Town. Accordingly, the spouse is not required to report the interest because the spouse is not a Town Officer.

However, since spouses have joint economic interests under federal and state laws, the Code of Ethics treats transactions involving a spouse as giving rise to a separate interest on the part of the Town Officer. The Code of Ethics provides that any Town Officer who has a substantial financial interest in a transaction with the Town during a fiscal year is required to file a written statement disclosing such interest within thirty days of the end of the fiscal year. In this case, if the interest is more than nominal, it would create a substantial financial interest that is required to be reported.

See Related: A-92-01, 09-01, 09-03

Advisory Opinion No. 09-03

Date: 12/9/08

Topics: Conflict of Interest; Exerting Influence: RTM Members; RTM Committees; Discussion; Voting

Code Section: Section 4

Statement of Facts:

A member of the Representative Town Meeting (RTM) is married to a teacher in the Greenwich Public School system. In Advisory Opinion 09-01, dated July 14, 2008, the Board determined that an RTM member whose spouse is a teacher has a substantial financial interest in the salary of the spouse and is required to file an annual disclosure statement describing the nature of that interest in order to comply with the Code. In the instant request, the RTM Member asks whether such an interest prevents the RTM member from exerting influence or voting on any matters concerning the schools and specifically the Town Budget. As a whole, the RTM votes on the budget submitted by the Board of Education, not separately but as a component of the entire town budget.

The budget of the Board of Education is developed through collaboration between the Board of Education and the First Selectman working under guidelines established by the Board of Estimate and Taxation (BET). At this time, the BET has encouraged the Board of Education to explore all areas of opportunity to reduce their budget and has suggested that the Board of Education focus on the results achieved by the staffing model currently being deployed in other school systems.

In the request for this Advisory Opinion, it was indicated that this RTM member also serves as an alternate member of the RTM's Budget Overview Committee, whose primary task is reviewing and considering various items during the budget preparation process, including matters related to the Board of Education budget. It

is expected that such discussions will include changes in the staffing model, such as performance pay for teachers.

Questions Presented:

Does the Code of Ethics permit an RTM member who is married to a public school teacher to:

Discuss and vote on matters, other than budget items, that affect the Greenwich public schools in general?

Vote on the Town budget, which includes funding of the Board of Education?

Discuss and vote on specific issues which pertain to the public school budget at RTM meetings and Budget Overview Committee meetings?

Discussion and Conclusions:

Section 4 of the Code of Ethics provides that:

“...no town officer having a substantial financial interest in any transaction with the town or in any action to be taken by the town shall use his office to exert his influence or to vote on such transaction or action.”

Thus the Code appears to be quite explicit that an RTM member with a substantial financial interest in a matter may not vote on or “exert influence” on the matter either at the larger RTM meetings or at the smaller committee meetings. Previous rulings of the Board of Ethics have, however, suggested that there are circumstances in which an RTM member, after disclosing a substantial financial interest, may enter into discussions by the RTM as a whole, and, in more limited circumstances, even vote on, matters in which they appear to have a substantial personal financial interest.

One of the purposes of Advisory Opinions is to provide guidance to Town Officers facing difficult ethical situations. Ideally, these situations are clearly defined and the Board is able to express an opinion with a high degree of confidence that all the relevant facts have been provided for and can be articulated in the opinion. Far more frequently, however, the need for guidance is greatest when the prospect of a conflict is apparent, but the precise circumstances under which it will appear are less so. Such situations present a difficult challenge for the Board, because it must

balance its responsibility to provide guidance to the Town Officer seeking advice against the likelihood that, the more general the factual pattern it considers, the less chance there is that its Opinion will be adequate to properly deal with the underlying issues.

Background

One way to provide general guidance while avoiding the difficulties of not having a crystal ball to peer into the future is to draw on the lessons of the past. By searching the record for previous instances where similar questions have been raised and reviewing the circumstances surrounding them, the Board may be able to provide constructive insights into the present. This is the approach the Board adopted in the Spring of 1990, when a similar situation arose. It is particularly useful to examine this situation because the request for an Advisory Opinion was made toward the end of the budget process.

In Advisory Opinion No. 90-01 a member of the RTM requested an advisory opinion to clarify “how the conflict of interest provision of the Town Ethics Code applies to RTM members who wish to speak on an issue and vote on an issue.” The member had been advised that the Moderator’s Committee had considered the need for such an Advisory Opinion and had reached a consensus that it was not necessary at the time and that most situations could be handled by a speaker simply disclosing the nature of the interest when addressing the RTM. Although not specifically mentioned in the request, the question was raised in advance of an RTM vote on a controversial \$2 million reduction in the Town’s \$144 million budget for FY 1990–91. The proposal included the elimination of 94 Town employee positions and the Board was aware that a number of the members of the RTM or their spouses were Town employees.

The Board responded to the rather general request made in 1990 by summarizing its past opinions with respect to voting and discussions in the RTM, noting that it had previously opined that: 1) an RTM member whose spouse is a paid employee of the Town may not vote on a labor contract for the bargaining unit that represents such spouse, but may vote on a contract for a bargaining unit which does not represent such spouse, 2) an RTM member whose spouse is a paid employee of the Town may

participate in discussion by the RTM as a whole concerning a contract in which such spouse has an interest, so long as that interest is fully disclosed prior to the time of such participation, and 3) an RTM member may participate in discussion of and vote on the adoption or rejection of the overall Town budget, but should refrain from discussing or voting on a specific item of the general budget if the spouse has a substantial financial interest in the item in question.

In the following year, the Chairman of the Board also received a letter from a new member of the RTM seeking guidance over when to abstain from RTM votes. The new member listed a number of items that had come before the RTM and indicated the member's reasons for voting or abstaining on the matters. As a civil engineer, the member had abstained from voting on appointments to various boards and commissions that the member or the member's firm might be called upon to appear before on behalf of clients. The member also abstained from voting on a matter that involved a condition to an approval by the Planning and Zoning Commission because the member's firm did surveys and prepared the maps that were being approved by the RTM. On the other hand, the member had voted on changes to Town regulations that could have a future impact on the firm's clients, as well as on a waiver for a non-client of the firm. Although the Board did not render a formal Advisory Opinion with regard to this request, the chairman advised the other members of the Board that he had visited with the individual requesting guidance and "advised him that his ethical sensitivity seemed about right."

Subsequently, in Advisory Opinion No. 96-01, dated August 14, 1995, the Board addressed the question of whether a member of the BET could serve as a member of the Board of a non-profit organization that received funding from the Town. While noting that a specific answer to this question was beyond the province of the Board, the Board indicated that it assumed that the BET member would be allowed to serve on the non-profit board and then noted with approval the fact that the individual had announced the intention to refrain from discussing or voting on matters before the BET that involved the non-profit organization.

Similarly, in Advisory Opinion No. 02-02, dated January 1, 2002, the Board cautioned an RTM member who was serving on a Condemnation Commission that care should be taken to refrain from discussing or voting on actions in which the

Commissioner or a family member personally had a direct or indirect financial interest.

Advisory Opinion 89-01, dated November 14, 2007, considered a request by an RTM member who was also a Town employee. The member was a member of the RTM committee that had oversight responsibility for the department in which the RTM member worked. The position of the RTM member was that the financial interest that created the conflict was the employment contract with the Town, negotiated with the Town by the union bargaining unit, in which the member played no part. In addition, the member urged that giving the committee access to an “insider’s view” of the department was beneficial to the committee. The Board agreed that the committee would benefit from the expertise of the employee and found no objection to the employee serving as a member of the committee. However, the Board cautioned the RTM member that as a member of the committee that had oversight of the department in which the RTM member worked, there were quite likely to be conflicts that presented themselves. The Board indicated that, under the Code, the existence of a conflict did not depend on who negotiated the contract, but on who benefited from it and that the financial interest in the contract extended to the terms and conditions of employment, including the appointment of supervisors who would conduct and review the member’s performance reviews, whose own appointment and performance review would be the subject of the committee’s responsibility, as well as work allocations, promotions of co-workers and, in some cases, major policy initiatives which might affect the inclination of departmental employees to perform well or even resign. The Board noted that service on a committee of the RTM was inherently an influential position relative to the department and cautioned the member that participation in discussions of many matters relating to the department would be likely to be viewed by the Board as a violation of the Code, particularly if the member’s participation appeared to be to influence the outcome, rather than simply inform the other members.

It is important to note that in these previous decisions the Board has been more circumspect in finding violations of the Code with respect to discussions and votes before the RTM as a whole than it has been with respect to discussions and votes in smaller bodies such as the BET or the Condemnation Commission. Thus, while

encouraging members of the BET or the Condemnation Commission to refrain from any participation in matters in which they might have a personal financial interest, the Board permitted an individual to engage in discussion before the RTM as a whole, even though there was a direct financial interest, as long as the interest was disclosed.

The Role of the RTM

In order to understand this apparent inconsistency, it is important to consider the differences between participation in the RTM as a whole and participation in smaller committees, boards or commissions. When the state legislature authorized the creation of the Greenwich Representative Town Meeting in 1934, it vested the body with all of the powers of the citizens of the Town of Greenwich. As a result, the RTM exercises sovereign powers on behalf of the citizens of Greenwich, one aspect of which is the adoption and amendment of the Town Charter, which includes the Code of Ethics. Thus, the Board's authority to render Advisory Opinions derives from the RTM. When dealing with matters unrelated to the internal affairs of the RTM, it has a responsibility to give full weight to the ordinary meaning of the provisions of the Code as they apply to all the activities of Town Officers in the conduct of Town business. Revising and amending the Code of Ethics is not the responsibility of the Board of Ethics. Only the RTM has the power to amend and change the meaning of the Code.

The RTM, however, may revise the Code by direct action or by implication. A proper respect for the sovereignty of the RTM requires the Board to defer to the procedures established by the RTM for the conduct of its internal affairs and to avoid any interference in the manner in which it conducts its business. It is significant that in rendering its opinion in 1990, the Board did not express an opinion on or render an opinion contrary to the positions taken by the moderator or moderator's committee with respect to the conduct of RTM meetings.

It is also important to note that the sovereignty of the RTM derives from its representative nature and that the Board must be mindful of the obligation of a member of the RTM to represent the interests of his or her constituents when interpreting questions concerning the propriety of actions taken by an RTM member

during RTM proceedings. It is certainly not unlikely that a member of the RTM would support a position adverse to a personal financial interest because of the sincere belief that it was in the best interests of his or her constituents. Indeed, in voting to approve the overall budget, each member of the RTM is voting on a matter in which he or she has a personal financial interest. The Code recognizes this when it makes an exception for interests “common to the other citizens of the Town.” *See Code Section 2 (a) (2).*

At the same time, the Code of Ethics is a standard for the personal behavior of Town Officers and deference to the sovereignty of the RTM and the right of the RTM as a whole to govern the conduct of its own affairs does not relieve the individual members of the RTM from the responsibility to comply with the Code. In the absence of an express indication that the RTM has adopted procedures for the conduct of its affairs that mitigate the requirements of the Code, the Board will fully enforce its provisions as they apply to the behavior of members within the RTM to the same extent that the Code would apply to any other activity by a Town Officer.

Discussion and Voting

Within this context, it is possible to understand the distinctions made by the Board with respect to discussions and votes in the RTM in its past Advisory Opinions and to provide some assistance to members of the RTM in determining how or whether to participate in discussion and voting on matters in which they have a potential conflict of interest. While the Board has established no hard and fast rules, it has indicated that there are circumstances where discussion and voting on matters before the RTM is permissible, even where a substantial financial interest might be involved. Conversely, there are situations where the nature of the conflict is readily apparent. Even in the inevitable cases that fall between these two extremes, there should be ways that an RTM member can proceed without risking a finding that the Code of Ethics has been violated. In the context of the current request, where the RTM member has a spouse who is a teacher, we will attempt to address each of these areas.

Areas of Relative Safety. There are five circumstances under which an RTM member is clearly unlikely to be guilty of a violation of the Code, even where a real or imagined conflict exists:

The first and most obvious of these is where the member takes no part in any discussion or voting with respect to the matter. Absent a showing that the member attempted to influence the voting on a matter in which they have a potential conflict outside the RTM, it is simply impossible to find a violation of the Code for actions taken within the RTM or a committee when an individual is absent from the RTM or the committee when the discussion and voting of a matter occurs.

Another obvious situation where no violation of the Code would exist is where the interest giving rise to the conflict is not financial in nature. It is in the nature of the political process that many ideological and personal conflicts exist. The Code wisely confines its proscriptions to conflicts of interest that are financial in nature. In the context of public schools, there are doubtless a number of pedagogical and management issues that might come before the RTM from time to time that do not bear significantly on the terms and conditions of a teacher's employment.

A further area in which violations of the Code would not seem likely to occur is where conceptual issues or long-term planning items are under consideration whose financial impact on an RTM member or spouse is not particularly distinct from other members of the community. This would occur where the financial impact on the RTM member is only a minor side effect of a larger policy issue under consideration. So, for example, a major shift in curriculum might result in the need to buy new textbooks and thereby reduce the funds available for teacher salaries, but the impact would likely be so insignificant that it would not rise to the level of a "substantial financial impact." In like manner, the decision to build a new school or renovate an existing one is likely to affect a specific teacher only eventually and coincidentally, since the main focus is likely to be on providing facilities for students. There should be no hesitation about freely engaging in discussions and votes with respect to such matters in the RTM or in RTM committees.

The Board has previously indicated that a vote on the approval or disapproval of the Town budget as a whole is not a violation of the Code even where it includes

items in which the individual RTM members have a specific interest. The reason for this is clear. In a vote on the approval or disapproval of the overall budget, the members of the RTM are voting on the implementation of the budget as a whole, which is a matter common to all the citizens of the Town. If the budget is not approved, the general result is that the BET, the selectmen and the various departments, boards and agencies of Town government, together with the appropriate committees of the RTM, will need to develop a new budget for submission to the RTM at a later date. Within this process of revision the Board would expect individual Town Officers to refrain from discussions and votes on matters that involve their personal financial interests. Additionally, in the rare instance where the process of approving a budget were to involve a vote by the entire RTM on a specific line item in which a member has a personal financial interest, the Board has previously made it clear that the member must refrain from discussion and vote on that particular matter.

There are other circumstances where discussion of and voting on matters in which a member has a financial interest is permissible, provided that the member has fully and completely disclosed the interest prior to engaging in the discussion or vote. Clearly, one instance in which such discussion is permissible is where the member is advocating a position against that interest.

Areas of Particular Concern. Contrasted to these situations are situations in which an RTM member has an evident interest at stake. These would include:

Discussion of or voting on a contract that affects the individual or his immediate family as an employee, lessee, owner or manager. As indicated above and in other matters, the Board has always considered it a conflict of interest to engage in discussions of or vote on the contract for one's employment, a transaction between the Town and a business entity in which the member has a significant ownership interest or a transaction with an entity in which a member has a management role, even where the entity is non-profit enterprise and the Board member or officer involved serves without pay. The solvency, survival and efficiency of an organization are financial interests relating to the stewardship of a manager, even if the manager has no personal ownership stake in the organization.

Discussion of or voting on the imposition of taxes, assessments or fees that have a particular impact on a member, as compared to most other citizens of the Town.

Discussion of or voting on limitations on business activities in which the member is engaged or restrictions that particularly affect property that the member owns to a significantly greater degree than similar property owned by other residents of the Town.

Areas of Doubt. More difficult questions arise when an issue under discussion presents only a potential conflict, where the financial implications are vague or where degree to which the matter affects the individual member as compared to other citizens cannot be assessed with much certainty. With respect to the current request, for example, one teacher staffing approach that has been proposed recently is performance pay for teachers. If merit pay were adopted, it is uncertain whether the RTM member's spouse's pay might be increased or reduced. The existence of such uncertainties would make it more likely that the member would be evaluating the decision on its general merits and not with respect to any particular personal interest. The need to promote full and open discussion within the RTM will cause the Board to be careful to approach potential violations of the Code carefully. In these instances, the Board will be particularly mindful of the circumstances surrounding any alleged conflict of interest and give the benefit of the doubt to individuals who proceeded in an open and forthright manner.

Where the member is advocating a position favorable to his or her personal interest, the Board would be more inclined to feel that a violation of the Code has occurred, but in making such determination the Board will give particular deference to the general and specific procedures and practices of the RTM regarding such discussion. Even where such procedures have not been clearly articulated, the Board will not be inclined to find a violation of the Code where the member addressed the issues in a logical and forthright manner and implemented logical steps intended to ensure that his or her interest was understood by the members of the RTM.

Safe Harbor

The Board feels that it will be constructive to provide RTM members with a set of safe harbor guidelines to use in connection with discussions and votes on matters in which they may have a potential conflict of interest. Where a member of the RTM has identified an area of potential conflict in a matter to be discussed by the RTM as a whole, brings the potential conflict to the attention of the moderator of the RTM, either directly or through his or her district chair, and can document that he or she has both (1) fully and completely disclosed the interest to all the members of the RTM in attendance at the time that the matter was discussed and /or voted on, and (2) followed the general practices of the RTM and the specific instructions of the moderator in discussing or voting on the matter, the Board will defer to the RTM's prerogative to mediate the applicability of the Code of Ethics to that particular situation (Obviously, this is not the only way to avoid a violation of the Code of Ethics. Were the member to be absent from the room during the discussion and vote and refrain from any other effort to influence the outcome, the lack of disclosure would not, in and of itself, result in a violation of the Code.)

As we have shown, the Board has been particularly sensitive to the prerogatives of the RTM in making determinations with respect to potential violations of the Code of Ethics in connection with participation in RTM meetings. The examples above show that the Board will pay particular attention to the fact that an RTM member has an obligation to represent constituents both at the larger RTM meetings and at the committee level. One of the unique features of the RTM is that it is a comparatively large legislative body relative to the size of its constituency. With over 200 members, the influence of a particular voice or vote is attenuated and a premium is placed on vigorous participation and the ability to represent divergent views. Consequently, the Board will be loath to suggest a course of behavior that might deprive constituents of representation in the legislative process.

However, the Board has previously recognized that there is a distinction between voting on and discussing matters in which a member has a potential conflict of interest at general RTM meetings and voting on and discussing such matters at the committee level. As noted above, the vote of one individual at the larger RTM meeting is proportionally quite small. Therefore, if a member clearly indicates the

existence and nature of their interest in a particular issue and how he or she might be affected, the rest of the RTM membership could certainly evaluate any views the member might offer and make their own judgment of the merits taking into account the potential conflict. The expression of one's point of view, even if self-interested, within the RTM at large is more likely to be informative than influential, assuming that the individual has fully disclosed his or her interest.

The Board is mindful of the fact that the interest of constituents in being represented is not confined to the role of their representatives within the larger body. Because of the express proscription of the Code of Ethics against "exerting influence" on actions or transactions, however, the Board feels that there needs to be a much stricter scrutiny at the committee level than with respect to the RTM as a whole. As there are many fewer members at committee meetings, each vote proportionally is more influential on the result and participating in discussion of matters in which a member has an interest in the committee setting is fraught with potential peril. Committee members can influence other members with non-verbal cues, some of which they may not even be aware they are giving. A raised eyebrow, an impatient sigh and many other cues are picked up by other committee members during a discussion and may influence how they vote. In addition, the role of a committee is to forward its findings to the larger RTM. It would be difficult to inform the members of the full RTM of the degree of influence that a particular member who had a financial interest in an issue might have had on the outcome of the committee's votes. As a whole, the RTM has the right to rely on unbiased decision making at the committee level. Therefore, the Board believes that the best way to insure that members with a financial interest do not exert undue influence on committee deliberations is for such members to refrain both from active debate and voting on issues in which they have an interest at the committee level.

There is no reason that this should prevent committee members from stating their opinions on a particular matter to the committee on the same basis as any other member of the RTM, or the general public might be entitled to, however. If the member discloses the nature and extent of his or her interest in the matter from the outset and is absent from any further discussion of the matter, the Board sees no reason why a committee member could not make an appearance before the

committee, state his or her position with respect to the matter and respond to any questions from the rest of the committee. As with participation in discussion of matters before the general RTM, such a procedure would ensure that the member's constituents would not be unnecessarily deprived of the ability of the member to communicate his or her views on their behalf. Such an appearance before a committee is, after all, the prerogative of any RTM member in the interest of representing his or her constituents. By contrast, however, participation in extended discussion and debate is clearly more related to influencing the outcome than simply giving the committee the benefit of one's views.

Undoubtedly, the need to absent one or more members of a committee from discussion of a particular item or aspect of an item will be an inconvenience to the members of the committee. In recognition of that, members who anticipate having a conflict of interest with respect to a particular item on the agenda should make an effort to inform the chair of the committee as soon as possible. The chair will undoubtedly make every effort to ensure that the member is able to absent him- or herself at the appropriate time and be able to return to the committee as soon as possible in order to participate fully in all other matters on the agenda.

The Board is aware that the nature of the legislative process is quite dynamic. Therefore, it may not be practical to follow any particular procedure rigidly or avoid all situations in which a possible conflict is present. Members may become aware of a conflict in the middle of, or even after a discussion has occurred. Most of these situations will be able to be resolved without complaint based on the openness and sensitivity of the persons involved in the matter. In this Advisory Opinion, we have attempted to provide members of the RTM with some understanding of the approach that the Board will take in dealing with these matters, as well as safe harbor procedures that can be used to avoid any appearance of a violation of the Code. To the extent that the issues identified in this Opinion are kept in mind, and the suggested procedures followed as appropriate to the circumstances, we are confident that potential violations of the Code of Ethics can be avoided.

See Related: A-91-01

Advisory Opinion No. 09-04

Date: February 10, 2009

Topics: Boards and Commissions; Planning & Zoning Commission; Substantial Financial Interest; Discussion and Voting

Code Section: Section 4

Statement of Facts:

The Town Officer seeking this advisory opinion has been a member of the Planning & Zoning Commission (the "Commission") since 2004 and is referred to herein as the "Commissioner." During most of the Commissioner's tenure as a member of the Commission, the Commissioner was active in the commercial real estate business in New York and was not active in the Greenwich real estate market. In 2008, however, the Commissioner became a member of the Greenwich Association of Realtors, Inc., and has been active in the sale of homes and properties in Greenwich. In order not to violate the Code of Ethics, the Commissioner has declined to represent persons who are, or are expected to be, involved in matters before the Commission.

Recently, the Commissioner has also become active as a real estate developer in Greenwich. In the request, the Town Officer outlined three projects in the Greenwich area that the Town Officer was active in:

1) *Purchase of a two-family home as a rental property.* This property has not been the subject of any application before the Commission. The Commissioner indicated that three other members of the Commission owned investment properties in Greenwich and that it was the practice of the Commission that such members refrain from participation in any applications relating to properties that they have an ownership interest in or to abutting properties.

2) *Proposed development of a five unit multi-family apartment.* The site for this development has been identified, but has not yet been purchased as due diligence is being conducted. In addition, no application with respect to this project has been submitted to the Commission. However, in the event the project does proceed, the

Commissioner has asked both the Chairman of the Commission and the Assistant Town Planner to ensure that no information about the site be routed to the Commissioner. A third party has been engaged to interact with the staff of the Commission, and to process any application before the Commission that may be required. In addition, the seller of the proposed site and members of the surrounding community were advised of the Commissioner's position as a member of the Commission.

3) *Proposed purchase of a commercial property.* This property is also pending a closing, but has been the subject of an application before the Commission. The Commissioner sought the opinion of the Town Attorney before proceeding with the project and refrained from participation in any matters relating to the application, including leaving the room during discussions of the application.

At a meeting held by the Board to consider the Commissioner's request, the Commissioner appeared and provided the members of the Board with additional information in response to their inquiries. The Commissioner indicated that some questions had been raised concerning his participation on the Commission since becoming active in the local market and that a review of the materials posted by the Board on the Town website had not provided sufficient guidance with respect to procedures to avoid actual or perceived conflicts in connection with participation in applications or other matters in which members of the Commission might have a direct or indirect personal interest.

Questions Presented:

Do the Commissioner's professional activities conflict with his duties as a member of the Planning & Zoning Commission and preclude him from serving as a member of the Commission?

By disclosing his interest and not participating as a member of the Commission in connection with any matters in which he may have a direct or indirect financial interest, has the Commissioner complied with Section 4 of the Code of Ethics (the "Code")?

Discussion and Conclusions:

Section 4 of the Code prohibits Town Officers from using their office to exert influence or vote on matters in which they have a substantial financial interest:

“No town officer having a substantial interest in any transaction with the town or in any action to be taken by the town shall use his office to exert his influence or to vote on such transaction or action.”

In considering various situations in which potential conflicts of interest have been raised, the Board of Ethics has consistently held that the Code does not preclude persons from serving in town government because of potential conflicts of interest. Rather, the Code prohibits a Town Officer from participating in those specific actions or transactions in which the Town Officer has a substantial direct or indirect financial interest. Thus, in Advisory Opinion 01-01, the Board indicated that a resident of public housing was not barred from service on RTM Committees and encouraged the resident to participate in discussions relating to public housing generally, while disclosing the interest, although not in matters that had a direct impact on the resident personally. Similarly, in Advisory Opinion 04-01, the Board advised Town employees that the conduct of business in a field that employed the same skills that they used as Town employees did not necessarily result in a conflict of interest as long as the work did not involve any matters in which they would participate as Town employees.

The Board has also addressed the issue of whether a Town Officer's employment or other activities would disqualify the Town Officer from serving on a particular board or commission. In Advisory Opinion 96-01, the Board considered whether a director of the Greenwich Emergency Medical Service (“GEMS”) could also serve on the Board of Estimate. The Board indicated that service on GEMS did not disqualify the individual from membership in the Board of Estimate, but cautioned that the individual should not participate in matters related to GEMS itself. Similarly, in Advisory Opinion 01-02, the Board found that an executive officer of a non-profit organization that was a major landowner in Town could serve as a member of the Inland Wetlands and Watercourses Agency, although it indicated several situations

in which the executive might need to refrain from participation in the proceedings of the Agency.

The Board has not yet directly addressed the specific procedures that might be used by a board or commission to limit the participation of a member in order ensure that undue influence is not being exercised with respect to a matter in which a member has an interest. However, recently, in Advisory Opinion 09-03, the Board has suggested safe harbor procedures for the use of RTM members in connection with matters in which they may have a direct or indirect financial interest. Similar guidance with respect to the procedure used by boards and commissions generally may also be appropriate.

In each specific situation presented to it, the Board will review the relevant facts and circumstances to determine if a financial interest exists and if a Town Officer's participation in the related Town actions or transactions constituted an attempt to exert influence in violation of the Code of Ethics. In suggesting safe harbor procedures, the Board is not suggesting that any failure to adhere to such procedures will automatically be considered an attempt to exercise undue influence; nor would technical adherence to a particular formula result in a finding that no attempt to exert influence had occurred where the intent and spirit of the Code was being consciously violated. However, as the Commissioner making the instant request has pointed out, it is useful to have a set of guidelines that can be followed, and it is the obligation of the Board to respond to such a request.

The various boards and commissions involved in Town government have different areas of responsibility and operate in a variety of ways. Because of this, the Board will pay particular attention to the procedures that a particular board or commission has adopted for its own governance as well as its longstanding practices in evaluating complaints concerning potential violations of the Code. Similarly, the circumstances of the RTM are not directly analogous to the Town's various boards and commissions, as pointed out in Advisory Opinion 09-03. However, the Board feels that the general objectives outlined in that opinion can provide guidance with respect to the operation of the Town's boards and commissions and that the procedural controls suggested there with respect to proceedings in committees of

the RTM can also be considered relevant to the operation of boards and commissions.

In Advisory Opinion 09-03, we identified a number of situations in which an RTM member would not need to be concerned with potential conflicts. These included situations in which no financial interest existed or where the financial interest of the member was shared by the broader community. The Board also pointed out that a member might speak against the member's own interest because of a belief that the public interest was being better served. These situations are also of general applicability as applied to the actions taken by members and staff of the Town's boards and commissions.

Another area in which the Board indicated there would be no violation of the Code, even if a member has an interest, was where the member with an interest took no part in the matters relating to the action or transaction in which the member had an interest. Since it is not always easy to prove a negative, however, the Board suggested safe harbor procedures that could avoid any suggestion of impropriety in a committee setting. The principles behind these guidelines for RTM committee members may also be considered broadly applicable to the workings of the Town's boards and commissions. Of particular importance is the need for affected individuals to make immediate and effective disclosure of a potential conflict of interest as soon as they become aware of it. This is best done in a written statement for the record that discloses the nature of the conflict in sufficient detail to allow the members of the board or commission and the general public to appreciate the nature and magnitude of the individual's interest and how the Town action or transaction will affect that interest. We also indicated that it was permissible for the member involved to appear at meetings in order to provide basic information concerning the matter and to answer questions, so long as the procedure used in connection with the appearance was the same as that of any other interested party and the member immediately left the proceedings and did not participate in any discussion of the matter.

As to the particular fact situations described in the Commissioner's request for this Advisory Opinion, we do not believe that the mere fact of ownership of investment property in the Town of Greenwich or participation as a broker in sales of homes or

other property in the Town disqualifies the Commissioner from serving on the Commission. Obviously, if matters relating to the properties involved are, or are expected to come before the Commission, the Commissioner will need to take appropriate steps to avoid a violation of the Code. The Commissioner appears to be quite aware of this possibility and we commend the Commissioner for declining to serve as a broker with respect to properties with applications before the Commission.

In the other situations described in the request for this Advisory Opinion, the Board believes that the Commissioner would not be in violation of Section 4 of the Code if the Town Officer appropriately refrains from any involvement with the Commission or its staff in connection with any such transaction, project or property or any application or proceeding pending before the Commission. In determining whether appropriate restraint has been exercised, the Board will be inclined to find that no violation of the Code has occurred as long as the Commissioner (a) appropriately advises the Chairman and other members of the Commission of the nature and extent of the Commissioner's involvement and financial investment in the transaction, property or project which is the subject of proceedings before the Commission; (b) is recused from the matter by avoiding all formal or informal, direct or indirect contact with the members or staff of the Commission in connection with the matter, other than providing basic information as required by the appropriate application forms or responding to requests by the staff or the members of the Commission, which would preferably be submitted and responded to in writing; and (c) is absent from any hearings on the matter or the portion of any meeting of the Commission at which the matter is discussed or voted on.

The Board advised the Commissioner to be sure that, when relevant, a written statement is placed in the records of the Commission. Such statement should indicate the nature and magnitude of any financial interest so that the members and staff of the Commission and the members of the general public will understand why recusal is appropriate. The Commissioner's non-participation in the various proceedings related to the matter should also be clearly indicated in the record. In addition, appropriate notations on the materials circulated to members and on the

agendas, minutes and any summary information provided to the Board or the general public are recommended.

The Board understands that it is important to have qualified people on the Town's boards and commissions and that excluding all individuals having a potential conflict would not be in the best interest of the Town. The Board appreciates the fact that the Commissioner has evidenced considerable sensitivity to potential conflicts of interest. By past conduct and by bringing this matter to the Board, the Board believes that the Commissioner has recognized, and will continue to recognize, conflicts that might arise in particular situations and will act in accordance with the guidelines set forth in this Advisory Opinion.

See Related: 96-01, 01-01, 01-02, 04-01, 09-03