

**Town of Greenwich**

**Board of Ethics**



**Official Reports**

**for**

**Fiscal Years 2010 -2014**



*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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## June 2009 - July 2010

### Advisory Opinion No. 10-01

**Date:** 12/8/09

**Topics:** Boards and Commissions; Substantial Financial Interest; Common Interests; Participation

**Code Sections:** Subsection 2 (a) (2), Sections 4 and 5

**Statement of Facts:**

A person who is a principal in an engineering firm is also a member of the Greenwich Flood Erosion Control Board (the "FECB"). The FECB was established by the RTM in 1957 and consists of five members, the first selectman and four members appointed by the RTM. The FECB establishes policies for the Department of Engineering with respect to erosion and flood control, including master plans and criteria for selection and prioritization of storm water management and drainage control projects, and is responsible for monitoring and making recommendations concerning storm water utilities, erosion and flood control matters generally.

The engineering firm that the FECB member is a principal in provides a variety of engineering services, including topographic, hydrographic and other property surveys, various environmental studies, such as flood, pond and lake studies, planning for stream and wetlands restoration and mitigation and environmental and flood management, and engineering for storm water management, runoff, coastal projects, septic systems, sanitary sewers, pumping stations and sediment and erosion control systems. The firm also assists in applications for local, state and federal planning and zoning, inland wetlands, health department, traffic and other permits.

The firm's clients are both private individuals and public agencies and have included the Town of Greenwich. Services for private clients have included representation before the Planning and Zoning Commission, the Board of Zoning Appeals and the Inland, Wetlands and Watercourses Agency in Greenwich. Services for the Town have included various surveying and civil engineering projects. During the last fiscal year, the firm provided engineering services on two projects for the Department of Parks and Recreation and received compensation from the Town of over \$100. The member's interest in these projects was disclosed in an annual disclosure form filed in accordance with Section 5 of the Code of Ethics.

The FECB is currently requesting clarifications about the precise scope of its authority from the RTM, but it has never been suggested that the FECB's role would include the selection of contractors, including engineering firms, for the Town's flood control projects. Such selection would normally be done by the Town department responsible for the project, in conjunction with the Town's Department of Purchasing and Administrative Services. Recently, the Town's Department of Public Works has identified flood control as an urgent need and the FECB has been actively working with the Department to prioritize a number of flood control projects whose scope of work and estimated cost have been identified.

This process has involved review and refinement of the criteria used by the Town for prioritizing projects, as well as review of specific projects and groups of that the system identifies as priorities at the time that the Town makes a formal decision to fund and proceed with them. The criteria being used to prioritize projects are general and not site-specific and were based on the recommendations of an independent third-party engineering firm. The Board has never voted on a specific schedule of prioritized projects or on the overall list of projects that the Town has under consideration. Rather, the FECB has made recommendations concerning those projects that are identified as having the highest priority after applying the criteria being used by town after consultation with the Board.

One of the higher priority projects will provide storm water drainage for a street in the general neighborhood where the member lives, but the project will not affect the street on which the member's residence is located or any of the streets that serve the

immediate neighbors of the member. The member has participated in the discussions and recommendations concerning this project.

Another lower priority diversion project will impact flood hazard areas that include or are near several properties that the FECB member either owns or has responsibility for managing. Although this project would be expected to improve conditions relating to those properties, it is not expected that the Town will be proceeding with it in the foreseeable future due to budget constraints. The member expects to avoid any involvement with the approval of this diversion project. The Board has been advised that the member will disclose the interest in these properties to the FECB at any time that the FECB plans to approve the diversion project specifically, include it in any list of projects under consideration or consider a re-prioritization that would affect the priority of this project.

In the request for an advisory opinion, the FECB member indicated that the votes taken by the FECB “have not pertained directly to our client’s projects” and indicated that the FECB works “to establish design criteria for flood control projects and to prioritize the order in which flood control projects get done. I am not aware of any instance where a client’s property has benefited by the projects that have been voted to move forward.” The member also indicated that the firm had recently stopped providing services to the Town in connection with smaller drainage systems in order to avoid the appearance of a conflict, because the FECB had begun to be more involved with those issues, where in the past it had been involved only in larger flood control issues.

The member had read the unpublished recent decision in *Frank v. Westport*, 2005 WL 2435841 (Conn. Super.) and had discussed it with Special Counsel to the Law Department, who had suggested that an Advisory Opinion from the Board of Ethics might be obtained concerning whether the member should continue to be on the FECB in view of the member’s potential representation of clients before the Planning and Zoning Commission, the Board of Zoning Appeals and the Inland, Wetlands and Watercourses Agency. It was noted that in Westport, the Planning and Zoning Commission refers all applications to the Westport Flood & Erosion Control Board for comments, while the Planning and Zoning Commission in Greenwich does not refer applications to the FECB.

### **Questions Presented:**

Is an owner or employee of a firm that provides professional services to the Town or to its residents or businesses disqualified from service as a Town Officer?

Does the Code of Ethics require a Town Officer to refrain from participating in matters that might affect the financial interests of persons to whom the Town Officer (or a firm that the Town Officer has substantial ownership interest in) provides or may provide services to?

May a Town Officer vote on the prioritization of Town projects when one of the projects affects a street in the neighborhood where the Town Officer lives?

Does the Code of Ethics invalidate approvals given by Town Board's and Commissions where a Town Officer participated, directly or indirectly, in the proceedings related to the approval in a manner contrary to the requirements of the Code?

### **Discussion and Conclusions:**

The Board has frequently been asked to provide advisory opinions as to whether a particular individual is prevented from serving as a Town Officer because private business interests may result a conflict with his or her duties as a Town Officer. Such potential conflicts are particularly likely in the case of engineers, accountants, lawyers and other professionals who live and work in the Town, since the skills that make them valuable to a Town board, commission or agency are likely to be the same skills that they use in their profession.

### **SERVING AS A TOWN OFFICER**

Section 4 of the Code of Ethics prohibits elected or appointed officials, employees, consultants and agents of the Town from using their position as Town Officer to exert influence or vote on matters in which they have a substantial financial interest. The Board has frequently noted, however, that this provision does not prohibit persons from serving as Town Officers because of the *potential* for a conflict of interest; it only prohibits participating in *specific actions or transactions* in which the individual has a substantial direct or indirect financial interest.

In some situations, the possibility of repeated conflicts could seriously impair the ability of the individual to perform his or her duties as a Town Officer effectively. The Board has encouraged persons responsible for hiring or appointing Town Officers to consider the potential for such situations when selecting persons to serve as Town employees or appointed officials. The Code itself, however, addresses the standards of behavior to which all Town employees and elected and appointed officials must adhere. It does not assume that only those without conflicts will be hired, elected or appointed. Rather it assumes that all Town Officers may experience situations in which they have a conflict of interest and attempt to provide them with guidance as to what they should do or not do as a consequence.

The Town of Greenwich relies heavily on members of the public to provide the Town with the benefit of their expertise by serving as volunteer members of its various boards and commissions. In many cases, if all those persons who might have a potential conflict of interest were precluded from serving on a board or commission there would be hardly anyone available to perform their important tasks. Thus, in Advisory Opinion 04-01, the Board noted that the Code of Ethics did not disqualify an attorney from serving as a member of the Condemnation Commission, while noting that potential conflicts could arise. Similarly, in Advisory Opinion 01-01, it found no prohibition against a resident of public housing serving on the RTM, as long as the individual did not participate in matters that directly or indirectly affected the resident's rent or the unit that the resident occupied.

In the present case, when the FECB's work has concentrated on matters that might affect potential clients for a certain type of project in a defined geographic area, the member's firm has been careful to avoid the appearance of a conflict by adopting a policy to not represent such clients. Such a policy shows a proper regard for the integrity of the FECB and Board commends both the willingness of the individual to place the interests of the Town ahead of the interest of the firm and the sensitivity that the individual has shown to avoid the potential for a conflict.

### **PARTICIPATING IN MATTERS AFFECTING CLIENTS**

While the Code of Ethics *permits* persons to serve on boards and commissions notwithstanding the potential for a conflict of interest, it does not make it easy.

Where Town Officers represent clients in the areas that involve their duties as Town Officers, they must be careful to avoid violations of the Code. The Town Officer requesting this opinion indicated, in discussions with the Board, that it had been difficult to find clear guidance as to what the Code required in connection with the representation of private clients. As a result, the Board will attempt to clarify in this opinion the provisions of the Code that can apply when a Town Officer becomes involved in a matter that may affect a client or customer of the Town Officer's business.

*Direct Involvement in Matters the Town Officer Participates In*

There are two provisions of the Code that affect a Town Officer's representation of clients. The first, Section 4, affects the ability of Town Officers to represent clients in matters that the individual may influence or vote on in their capacity as a Town Officer. Section 4 of the Code prohibits Town Officers from voting on or otherwise participating in matters that they have a substantial financial interest in so as to influence the decision that is made. Thus, in Decision 89-02, the Board found that a violation of the Code occurred when an attorney who privately represented landowners participated as an Assistant Town Attorney in matters before the Planning and Zoning Commission that affected those owners. Similarly, in Advisory Opinion 98-02, the Board has advised a member of the Historic District Commission not to participate in Commission consideration of the designation of a Historic Overlay Zone that would affect a client for whom the member served as an architectural consultant.

In these cases, it should be noted that the representation of the client existed before the matter was taken up for official consideration. In those circumstances, disclosure of the interest and refraining from participation should be sufficient to avoid a violation of the Code, as recently outlined by the Board in Advisory Opinion 09-04. Where a Town Officer is requested to represent a client in a matter in which the Town Officer has already begun to participate, it is not possible to avoid influencing the decision, so the only possible way to avoid a conflict is to decline to undertake the engagement. We understand that this was the potential that the individual requesting this opinion wished to avoid and commended the individual for proper



judgment in determining not to seek or obtain involvement in Town drainage projects that might be affected by the decisions of the FECB.

*Attempts to Influence a Town Officer*

Direct representation in matters that the Town Officer is involved with is not the only way that the Code may affect a Town Officer's ability to work for a client, however. A second consideration arises from Section 3 of the Code of Ethics, which 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."

Section 2 (a) (1) of the Code defines indirect interest to include the interest of any person or his immediate family in any corporation, firm or partnership that has a direct or indirect interest in any transaction with the Town. As a result, Town Officers must be careful to avoid involvement with customers or clients who are involved with matters that the Town Officer may influence or vote on, even where the work is done by other persons in the firm or is unrelated to the matter that the client has before the Town. If, during the period that a prospective or existing client has (or is expecting to have) an interest in such a matter, the Town Officer provides services to the client for a fee, the payment may be viewed as a "favor" under Section 3 of the Code, particularly if it is not disclosed.

Clearly, the most preferable result in these circumstances from the point of view of the Town is for the Town Officer to decline the engagement. While circumstances may not always permit this result, as where the individual has performed extensive or unique prior services with respect to the subject matter of the engagement and the cost of finding a replacement would be prohibitive to the client, the Board can be expected to apply strict scrutiny to such circumstances. Accordingly, Town Officers must take pains to document that any such engagement is necessary under the circumstances, was undertaken strictly the ordinary course of business and that it did not in fact influence the Town Officer's judgment in the matter before the Town.

**PERSONAL VS. COMMUNITY INTERESTS**

In the instant case, the area of Town in which the person requesting this opinion resides, and owns and manages several properties, in is one of the areas that will be

most heavily impacted by the flood control projects that are currently being considered by the Town. One project in the area has received specific consideration by the FECB, with the involvement of the member, but relates to drainage of a street that is several blocks away from the member's residence and is not expected to improve the member's residence, any of the other properties owned or managed by the member in the area, or any properties adjoining the residence or these other properties.

Section 2 of the Code of Ethics defines the interests that are treated as personal interests under the Code. It excludes interests that are "common to other citizens of the Town." In Advisory Opinion 02-02, the Board considered whether a member of the Condemnation Commission should refrain from voting on matters relating to a sewer project that would affect areas whose residents the member represented as a member of the RTM. Absent any showing that the member or the member's family were particularly affected by the decisions of the Commission relating to the project, the Board considered the Commissioner's interest common to the interest of other citizens of the Town. In Advisory Opinion 04-03, however, the Board found that a member of the Condemnation Commission would be particularly affected by sewer assessments in a particular area because the Commissioner and members of the Commissioner's family owned a substantial portion of the land in the area.

Based on the information provided to us concerning the street drainage project near the member's residence, the Board does not believe that FEDB member's participation in establishing the priorities for this project violates the Code of Ethics because the project will not directly impact the value of any property owned or managed by the member. As a result, the member has no interest in connection with that project that is not common to the interest of other citizens of the Town.

The FECB member has, however, identified a lower priority diversion project that could improve properties owned by the member and properties adjacent to those properties. This project has not received specific attention from the FECB at this point because it is not among the higher-priority projects being considered by the Town. The Board appreciates that the member is fully aware of the potential for a violation of the Code in connection with this project and has suggested that the member follow the procedures outlined in Advisory Opinion 09-04 should this

project receive substantive attention from the FECB while the member is still serving on the FECB.

### **EFFECT OF CONFLICTS ON TOWN ACTIONS**

Where a violation of the Code of Ethics occurs in connection with a Town matter, the Code of Ethics itself does not invalidate Town actions that relate to the matter, such as approvals or contracts. However, the Board notes that such actions could be invalidated *as a result of* such a violation. It is noted that the Town's purchasing ordinance currently requires bidders on Town contracts to certify that they have not solicited or facilitated a violation of the Code in connection with the contract, and provides that the contract is void if the representation is falsely made.

It is possible that the decision in *Frank v. Westport*, referred to above, could provide a basis for appealing approvals given by Town boards and commissions on the basis of a claim that a violation of the Code occurred, although the precise reasoning for that decision has not been articulated. In that case, the Planning and Zoning Commission of the Town of Westport approved the construction of a single-family residence on property that was within a "coastal area" as defined by Section 22a-94 of the General Statutes. Adjacent landowners appealed the approval on the grounds that the Planning and Zoning Commission had accepted an environmental report from an expert, hired by the party seeking the approval, who was also a member of the Westport Flood and Erosion Control Board.

Judge Lewis upheld the appeal, but provided only an unpublished opinion explaining the decision. This opinion indicated that, by accepting the report prepared by a member of the Westport FECB, the Planning and Zoning Commission had denied the plaintiff's "common law right to fundamental fairness" in the Commission's proceedings. The opinion did not articulate exactly how the inclusion of the report resulted in a denial of fundamental fairness, but cites as a relevant fact that the acceptance of the report was inconsistent with an opinion rendered by the Westport Town Attorney recommending that the Commission not allow the member of the Westport FECB to represent the applicant before the Commission due to the appearance of a conflict of interest.

It is beyond the scope of the Board's jurisdiction to suggest whether or how the *Frank v. Westport* decision might be applied to other similar situations. We appreciate that the implications of the decision may have a chilling effect on the participation of qualified individuals on various boards and commissions, and that the Town could thereby lose the services of these individuals.

The ultimate articulation of standards for fundamental fairness is a matter of common law and therefore within the exclusive purview of the courts. In the event of a challenge to the actions of a Town board or commission on the basis of a denial of fundamental fairness, however, the Board considers it likely that a court would find persuasive the fact that a Town Officer adhered to the standards articulated in the Code and in the Board's advisory opinions.

In order to assist Town Officers in meeting these standards, the Board has tried to articulate the requirements of the Code of Ethics and provide other useful guidance for Town Officers to follow through its advisory opinions and other communications. Not all conflict of interest situations can be anticipated in advance, however. Therefore, the Board encourages Town Officers to take advantage of their right to obtain Advisory Opinions relating to their own particular circumstances, as provided for in the Code.

**See Related: A-02-02, A-04-03**

## **July 2010 – June 2011**

**There were no Complaints filed or Advisory Opinions rendered in the 2010-2011 Fiscal Year. One request for an Advisory Opinion was made. The Opinion with respect to this request was rendered in the 2011-2012 Fiscal Year.**

## July 2011 – June 2012

### Advisory Opinion No. 12 – 01

**Date:** December 13, 2011

**Topics:** Indirect Interest; Exerting Influence; Action by Town; Attorneys; Town Attorney; Board of Assessment Appeals; Tax Assessor

**Code Sections:** Subsections 2 (1) and 2 (2), Section 4

**Statement of Facts:**

An attorney who practices with a law firm based in Greenwich is a member of the Board of Estimate and Taxation (“BET”). As elected officials of the Town, members of the BET are Town Officers subject to the requirements of the Code of Ethics. The BET has general responsibility for the proper administration of the financial affairs of the Town. Its principal functions are to set the mill rate for the Town’s real estate tax and to issue the annual Town budget for consideration by the RTM. The Board also acts on requests for additional appropriations, transfers or allotments made during the course of the fiscal year.

In order to avoid the possibility that the attorney might be called on to address issues on the BET that involve matters in which the firm is engaged, it is the policy of the attorney’s firm not to accept retainers from clients with respect to matters that may be expected to come before the Board of Estimate and Taxation.

The attorney is currently handling an appeal of a tax assessment for a client, which has involved several steps. The tax assessment was made on October 1, 2010 and a notice of the change in assessment was sent to the taxpayer in January of 2011. Following receipt of the notice, the attorney and client had an informal conference

with the Town's revaluation consultant. The purpose of this conference was to allow the consultant to explain the basis of the assessment and the taxpayer to provide additional information regarding the property and point out items that the consultant may have overlooked or misunderstood.

The revaluation consultant provides services under a contract that was signed on April 7, 2010 by the Town Assessor, who has ultimate decision-making responsibility for all tax assessments. The contract, which was entered into following Town procurement requirements, provided for the consultant to make recommendations to the Assessor with respect to an overall revaluation process conducted in connection with the October 1, 2010 tax assessment. Follow up conferences with taxpayers are a part of the service provided under the contract. Therefore, the consultant's compensation in connection with these conferences is based upon a contract agreed to before any revaluation recommendations were made with respect to any property. While the general budget targets established by the BET may have some effect on the budget of the Tax Assessor's office, the BET does not have any role in the hiring of the revaluation consultant.

After the informal conference, the consultant made a report to the Assessor that resulted in a modification of the assessment of the taxpayer's property by the Assessor. The taxpayer objected to the revised assessment and filed an appeal with the Board of Assessment Appeals ("BAA"). The Board of Assessment Appeals is an independent Town board whose members are elected by the voters of the Town of Greenwich. Currently the members of this Board receive an annual stipend of approximately \$6,000 per year. The BET appropriates the compensation for the BAA each year and typically adjusts the stipend in accordance with percentages established in its general budgetary guidelines.

After the BAA rendered its decision, the taxpayer filed an action appealing the assessment in the Superior Court. The Superior Court is part of the Judicial Branch of the State of Connecticut and receives no funding from the Town. However, the Town Attorney represents the Town in connection with such appeals. The staff attorney assigned to the matter has requested discovery information and the attorney is currently in the process of working with the client to provide it. One

outcome of the challenge may be a settlement based upon the Town Attorney's recommendation.

Currently, the BET does not review or approve settlements in such appeals. As with the Tax Assessor's office, while the BET establishes overall guidelines for Town expenditures, it does not participate directly in establishing the budget for the Department of Law or play a role in selecting or determining the salary of the Town Attorney. Nevertheless, the BET does review the annual budget for the Department of Law and has from time to time raised issues about the expenditure levels in specific areas. In doing so, it reviews the overall salary levels of the attorneys in the department. For members of the Department other than the Town Attorney, these salaries are a function of the union contract and are determined solely by the position held and years of service.

**Questions Presented:**

Is a change in the valuation of property an "action" taken by the Town?

Does an attorney's representation of a taxpayer in connection with a revaluation of property give the attorney a financial interest in the revaluation?

Where an attorney is also a Town Officer, does representation of a client with respect to a Town action represent a use of office to influence the action?

**Discussion and Conclusions:**

This request concerns the application of Section 4 of the Code of Ethics, which reads as follows:

"No Town Officer having a substantial interest in any transaction or action to be taken by the Town shall use his office to exert influence or to vote on such action or transaction."

*Change of Valuation as a Town Action*

Revaluations of properties are implemented as part of the legal responsibilities of the Assessor as a Town Official. Any revaluation, or change in revaluation, involves an action taken by the Town. A taxpayer's financial interest in a revaluation carries through to any actions taken by the Assessor or the Board of Assessment Appeals and to any actions taken by the Town in settlement of an appeal of the revaluation.



Therefore, there is a Town action that the attorney becomes involved with by representing a taxpayer in this case.

*The Attorney's Financial Interest*

If an attorney's firm receives payment for representing a client in connection with a Town action, the attorney will have a financial interest in the Town action arising from the firm's fees, which create a financial connection between the representation and the Town action. This connection between the Town action and the retention of the law firm is illustrated by two prior opinions of the Board:

In Advisory Opinion 98-03, the Board was asked whether a Town Commissioner had a substantial financial interest in a matter due to the fact that members of the Commissioner's law firm were representing a client in the matter. The Board confirmed that the involvement of the law firm in the matter gave the member a financial interest and indicated that the Commissioner should refrain from any involvement in the matter.

Similarly, in Advisory Opinion No. 05-01, the Board noted that there was a possibility that conflicts could arise if an attorney who represented clients in administrative hearings before the Board of Education served as a member of the Claims Committee and Education Committee of the RTM. The Board reminded the attorney, however, that the Code could not prohibit conflicts from arising and required only that Town Officers recuse themselves from participation in matters in which they had an interest. Noting that many Town Officers were professionals serving as volunteers, including doctors, lawyers, architects, engineers and accountants, the Board stressed that "those with special skills are not precluded from public service because of what might happen".

It is possible that the engagement of a law firm on an unrelated matter could result in a violation of the Code because of some express or tacit understanding between the Town officer and the client that the engagement is connected to the Town action. However, the Board does not automatically assume that an interest in a Town action arises from legal representation on prior or unrelated matters. Thus, in Decision No. 89-03, the Board did not express concern when a complaint was lodged against an attorney. Since there was no showing that the representation of the client was

related to the Town action, the Board would not find that a violation of the Code existed based solely on the fact that a member of the Board was an attorney who represented an adjoining property owner.

Even where an attorney represents a client directly in connection with the Town action, as in the matter at hand, it is important to bear in mind that the financial interest that the Code is concerned with is the Town Officer's financial interest, not the client's. A client may have no evident financial interest in the Town action that they have hired an attorney to address, while the attorney may have a financial interest in the matter. Conversely, there may be circumstances where an attorney, acting on a pro-bono matter, has no financial interest in a matter that the client has a significant financial interest in.

Here, the attorney has two financial interests. One, averse to the client's, is the interest of a taxpayer in maintaining the valuations of properties in the Town. As an interest "common to the other citizens of the Town", however, this interest is excluded from the definition of "substantial financial interest" under Section 2 (a) (2) of the Code.

The other financial interest that the attorney has here is in the fee being received in connection with the matter. It is conceivable that in a very large law firm, the impact of a small fee on a particular member would only be nominal, and thus also be excluded from consideration under Section 2 (a) (2). In this case, however, it is understood that the Town Officer's interest in the fee will be more than nominal. Accordingly, the Board affirms the conclusion reached by the Town Officer requesting this opinion that the representation of a client in connection with an appeal of a property valuation gives the Town Officer a substantial financial interest in the related Town action.

#### *Undue Influence*

As the Board has pointed out in Advisory Opinion No. 05-01 and on numerous other occasions, the Code of Ethics does not prohibit Town Officers from having an interest in Town actions. Rather it prohibits Town Officers from using a Town office to exert influence on the action. If all elected and appointed officials were required to avoid any employment, investment or other financial relationship that might

conceivably result in an ethical conflict, no one would be eligible to serve as an elected or appointed official of the Town.

The chilling effect that such a policy would have is recognized in the Code of Ethics. Rather than prohibiting Town Officers from having potential conflicts—a circumstance that would disqualify almost everyone from participating in Town government—the Code requires that Town Officers remove themselves from influencing any actions in which they find that they have an interest.

Reasonable steps to avoid potential conflicts are appropriate and in the public interest. In some cases it can be anticipated that frequent conflicts will require an individual to be recused from matters so frequently as to substantially impair the individual's ability to serve effectively as a Town Officer. In others, a Town Officer may need to decline certain engagements or transactions in order not to create the appearance of an improper interest.

To anticipate remote possibilities is an excess of caution, however. In the Town's representative system of government, numerous Town Officers will have professional relationships that may give rise to interests in Town matters. Unanticipated conflicts will arise from time to time and must be dealt with as they present themselves.

While it may seem obvious that an attorney seeks to influence a Town action when representing a client affected by the Town action, it is important to examine whether the effort to influence the action makes use of the attorney's position as a Town officer. What the Board must consider carefully is whether the persons responsible for the Town action are likely to be influenced by more than just the attorney's knowledge of the law and rhetorical skill.

In the facts presented to the Board in this case, it seems clear that the attorney's role on the BET is far removed from anything that would influence the Town's valuation consultant, the Board of Assessment Appeals, the Assessor, the Town Attorney or the members of the Department of Law. While BET members participate in setting broad financial goals for the Town and review Departmental budgets for conformity with those goals, they do not play a direct role in the revaluation process, the selection or compensation of Town consultants, the selection of any of the Town

officials involved in the valuation or appeals process or the development of the budgets for their specific departments.

In requesting this opinion, the BET member took pains to point out that the Town Attorney sometimes appears before the BET to comment on the legality of various contracts or financial arrangements that the BET is reviewing. However, the Town Attorney, unlike the Controller, does not report to the BET. Thus, while a member of the BET might normally be expected to exercise a certain amount of influence over members of the Controller's office, members of the BET have no such special influence over the office of the Town Attorney. Moreover, the Town Attorney is not required to seek input from the BET with respect to settlements of Town legal actions.

Nevertheless, since the BET does review the annual budget for the Department of Law, the Board recommends that the attorney should refrain from any involvement on any BET matters that could have a direct impact on the Town Attorney or the Department of Law until the revaluation matter has been resolved. Since the appeal of the tax assessment, the BET has not considered any matters relating to the Town Attorney's office and the Board has been advised that the attorney will promptly advise the Chair of the BET of an interest in the revaluation matter if it has not been resolved before any such matters are considered by the BET.

In Advisory Opinion No.09-04, the Board proposed guidelines to provide a safe harbor for Town Officers in connection with matters in which they might have a direct or indirect financial interest. The Board notes approvingly that by advising the Chair of the BET of his financial interest, the attorney would allow the BET to follow the procedures in Advisory Opinion No 09-04, under which the attorney could be recused from discussing or voting on issues of substantial economic interest to the Town Attorney's office.

The Board is mindful that attorneys have an ethical responsibility to their clients to continue their representation until a matter that they have been retained to handle has been concluded. The Board appreciates the fact that the attorney has evidenced considerable sensitivity to potential conflicts of interest and the appearance of impropriety in this revaluation matter. We are confident that the attorney

requesting this opinion, the BET and the Town Attorney will take all appropriate steps to avoid any conflict of interest in this matter.

**See Related: D89-03, A98-03, A05-01, A09-04**

**July 2012 – June 2013**

**There were no Complaints filed or Advisory Opinions rendered in the 2012-2013  
Fiscal Year.**

## July 2013 - June 2014

### Advisory Opinion No. 14-01

**Date:** 05/11/14

**Topics:** Board of Estimate and Taxation; Boards and Commissions; Common Interests; Discussion; Exertion of Interest; Substantial Financial Interest; Common Interests; Participation; Voting

**Code Sections:** Subsection 2 (2), Section 4

**Statement of Facts:**

A person who has been nominated as a member of the Board of Estimate and Taxation (the "BET") is married to a teacher in the Greenwich public school system and has requested an advisory opinion as to how this might affect the ability to serve effectively on the BET. The primary issue is the degree to which it might be considered appropriate to refrain from participating in discussions or votes on matters concerning the budget of the public schools or, even more broadly, the Town budget or the establishment of tax rates. This person, referred to in this opinion as the "applicant," is currently an elected member of the Representative Town Meeting (the "RTM") and is therefore an acting Town Officer eligible to apply for an advisory opinion from the Board of Ethics.

The following is a summary of facts as presented in the applicant's request for an advisory opinion:

The applicant's spouse has been employed in the public school system for twelve years. The collective bargaining agreement between the Board of Education and the Greenwich Education Association establishes the spouse's salary. This agreement covers approximately 888 full time employees, with a full time base payroll of approximately \$78,275,782. The spouse's salary and benefits are determined by a formula of general application which applies two factors: educational attainment of the teacher (e.g. masters or doctorate level degrees) and years of service in the Greenwich Schools. These factors determine the salaries of every teacher, in a systematic manner, without regard to performance evaluations or other discretionary factors. Accordingly, there is no opportunity for anyone to exert influence on the compensation of the applicant's spouse specifically, as distinct from all teachers with the same attainment and seniority. The applicant states that "it would not be practical for me to abstain from participating in the analysis and voting to approve the schools budget," noting that the BET includes an equal number of members from each party.

At a public meeting during which the request was discussed, the applicant further advised the Board of Ethics that the BET does not have any role in reviewing or otherwise acting upon the collective bargaining agreements between the Board of Education and the Greenwich Education Association, prior to their execution.



### **Applicable Code Sections:**

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 any such transaction or action.”

Section (2) subparagraph (2) of the Code defines “substantial financial interest” to mean “any financial interest, direct or indirect, which is more than nominal and which is not common to the interest of other citizens of the town.”

### **Questions Presented:**

(1) Is the interest of a Town Officer in a collective bargaining agreement covering his or her spouse a “substantial financial interest” within the meaning of the Code of Ethics?

(2) In BET meetings, may a member who is married to a public school teacher vote: (A) on the establishment of tax rates, which provide funding for the overall Town budget, of which teachers’ salaries are a substantial part, (B) to approve or disapprove the Town budget, which includes allocations of funds for the Board of Education, or (C) on matters relating to the public schools budget generally?

(3) Is a member of the BET “exerting influence” on Town transactions or actions, within the meaning of the Code of Ethics, by participating in BET discussions and reviews relating to the establishment of tax rates, spending limits and budget targets?

### **Discussion and Conclusions**

Town employees typically can rely on superiors or subordinates to handle matters in which their participation might create a real or perceived conflict of interest. Similarly, members of an appointed board, commission or other body may have no responsibility to represent any constituency other than the Town as a whole, which can alleviate concerns about whether those bodies can properly discharge their duties without the participation of a member who wishes to avoid the appearance of a real or perceived personal interest. In addition, some bodies whose members are appointed to represent specific constituencies have alternates who are ready to serve when a member might have a conflict of interest. Elected officials, such as members of the BET, have a responsibility to represent their constituencies that cannot be delegated to others, however. For elected officials, avoiding the appearance of a conflict can have ethical implications of its own, since non-participation may result in a failure to properly discharge their responsibility to represent a specific geographic or political constituency. As a result, it is necessary to carefully analyze the facts and the provisions of the Code in each particular instance before recommending that an elected official refrain from participation in a matter in order to avoid the possibility of a violation of the Code of Ethics.

In order to respond properly to the applicant's request in this case, such an analysis requires an understanding of the role and procedures of the BET as well an appreciation of the responsibilities that elected officials have in general. The applicant has previously sought guidance with respect to the impact of spousal employment on service to the Town as an elected member of the RTM and as an

appointee to its Budget Overview Committee<sup>1</sup>. In making the current request, the applicant notes that there are similarities and differences between the activities of members of the RTM and the BET. Clearly members of the BET act as elected officials and feel a special responsibility to their individual constituencies, as indicated by the applicant's concern over the impact of abstaining from participation in a major matter under consideration by the BET. But this concern also highlights the importance of each individual vote in influencing the outcome.

### THE ROLE OF THE BET

A singular distinction of the RTM is that, in its primary function of setting property tax rates for the Town, all of its members have a tangible financial interest as residents and taxpayers. If the Code of Ethics did not exclude interests "common to the interest of other citizens of the Town" from the definition of substantial financial interest, its members would effectively have to recuse themselves from doing their job.

It is rather evident that members of the BET have a common interest with other citizens of the Town in the case of establishing tax rates. But the degree to which their interests are common interests is less clear in the case of other activities, such as reviews of departmental budgets<sup>2</sup>. For example, a BET member may have a

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<sup>1</sup> In Advisory Opinion 09-03, noting the role of the RTM as the body responsible for adopting the Code, the Board indicated that it would "give particular deference" to the actions of RTM members following specific procedures adopted by the RTM to address conflicts of interest. The Board also established safe harbor guidelines under which RTM members, after ensuring that all other members were aware of the existence and nature of a personal interest in a matter, might participate in discussions of and votes on the matter at general meetings of the RTM.

<sup>2</sup> In Advisory Opinion 12-01, the Board responded to a request from a member of the BET regarding the effect of handling a matter before the Board of Assessment Appeal. The BET clearly had no

higher interest in the budget of the Board of Education than other citizens in the Town if he or she has children attending public schools or, as in the instant case, a spouse whose salary is included in the budget. How far the exemption for interests common to the interest of other citizens of the Town extends is a matter the Code does not clarify, but rather leaves to Board of Ethics to determine on a case by case basis.

### COMMON AND PERSONAL INTERESTS

The applicant has a common interest in the mill rates set by the BET because the rates are of general applicability. The ability of members of the BET to avoid the financial burdens, or gain the financial benefits, associated with the establishment of a particular rate is no greater or less than any other resident of the Town. By contrast, the Board of Education's contract with the Greenwich Education Association applies only to members of the Association. As this contract contains provisions concerning salaries, seniority, grievance procedures and other conditions of employment related to the spouse's services as a teacher, the applicant is indirectly interested in this contract and any actions the Town takes in connection with it. The contract also contains provisions which convey rights with respect to health coverage, pensions and other matters which the applicant has a direct interest in independent of any services performed by the applicant for the Town. These interests are clearly personal because most other Town residents are not affected financially in the same manner as the applicant. Therefore, the applicant's interest in

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involvement in the property valuation that was being appealed, nor did it have a role in the selection or compensation of the members of the Board of Assessment Appeals. There was, however, a possibility of future involvement in the matter by the office of the Town Attorney, whose budget is included in the normal reviews the BET makes on an annual basis.

the contract and any actions the Town takes in implementing it constitutes a “substantial personal financial interest” within the meaning of the Code.

While the nature of the Town Officer’s interest in an action or transaction typically does not change, the degree of influence the Town Officer might have over a particular matter may change depending on the timing, nature and significance of the action or transaction. Although the applicant may have a substantial personal interest in the Greenwich Education Association contract, the BET is not involved in negotiating or approving the contract itself. Rather, the contract is negotiated by other Town officials and approved by the RTM. Moreover, the nature of the BET’s budget review process makes it unlikely that a member could influence any specific Town action or transaction in which he or she may have an interest. In this process, the Town budget is presented to the BET as a whole, and the budget of the Board of Education as a component of that overall budget is typically reviewed in the context of overall Town expenditures, rather than as a matter of line by line analysis. In this regard, the BET acts in many respects as the budget review committee for the Town as a whole, attempting to ensure that expenditures are kept within the revenues estimated to be collected.

The BET is not involved in, and does not act upon or approve, collective bargaining agreements such as the contract between the Board of Education and the Greenwich Education Association. It is therefore difficult to see how any vote by the BET with respect to the Town Budget as a whole, or the establishment of tax rates, would have any effect on the applicant’s personal interest in the Greenwich Education Association contract. Even though the collection of taxes may be a necessary step in providing funds to be used to pay for the contract, the BET’s votes

establishing tax rates do not affect the availability of funds to pay for the contract any more than they affect the availability of funds to pay any other expenditure. Only in the remote and extraordinary circumstance where action by the BET might influence the outcome of the contract negotiations, would the applicant have to refrain from voting because of a personal interest<sup>3</sup>.

Similarly, whether the applicant can engage in BET discussions concerning the budget of the Board of Education will depend on the degree to which the items being discussed have a connection to interests common to others in the Town or to personal interests the applicant may have. In this regard, it is important to note that the Board of Education develops and promulgates the schools budget and the BET only reviews it as part of its consideration of the Town budget in its entirety. Thus, the BET does not normally vote to approve or reject specific portions of the school

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<sup>3</sup> Noting that the size of the RTM as a whole made the impact of any individual vote less influential, in Advisory Opinion 09-03 the Board drew a distinction between participation in discussions and votes in the RTM as a whole and participation in committee matters. The Board indicated that the recommendations and reports of committees were generally considered more influential than the views of individual members and that less votes were required for committee actions. Although members were permitted to make appearances before their committees to the same extent that other RTM members could, the Board indicated that any participation in extended discussion and debate in support of a position favorable to the member's private interest would be likely to be seen as an effort to "exert influence" within the meaning of the Code. This followed the Board's admonition in Advisory Opinion 07-01 that, while an RTM committee member may participate in limited discussions on a matter where his or her interest is disclosed, that participation is "fraught with danger" and the Board will find a violation of the Code if the member is shown to have attempted to influence the outcome, rather than simply inform the committee about relevant facts and considerations. While the role of the BET is similar in some ways to that of the RTM's Budget Review Committee, it should be noted that its individual members have the potential to be much more influential, since the BET alone has the ability to refuse to approve the mill rate necessary to fund the Town budget if it has objections to any part of the budget, while any recommendations made by the RTM's Budget Review Committee must be acceptable to the RTM as a whole in order to take ultimate effect.

budget, but typically limits its recommendations to setting overall targets for the budget. In this regard, its actions are in furtherance of the common interest all citizens have in the Town's budget. To the extent that the BET's review of the Board of Education's budget was to specifically focus on the contract with the Greenwich Education Association, however, the applicant's personal interest would have a greater role.

### **Conclusions**

1. The Board of Ethics considers the collective bargaining agreement between the Board of Education and the Greenwich Education Association to be a Town "transaction" and considers any actions taken in connection with the approval, execution or implementation of that agreement to be Town "actions" within the meaning of the Code of Ethics. A Town Officer who is a spouse of an individual employed under that agreement has direct and indirect interests that are "substantial financial interests" within the meaning of the Code.

2. The BET does not vote on the collective bargaining agreement under which teachers are employed or on the specific terms and conditions of such employment. Absent conditions relating such votes to the terms and conditions of the spouse's employment, a BET member who is married to a public school teacher may vote: (A) on the establishment of tax rates, (B) to approve or disapprove the Town budget, and (C) on matters relating to the budget of the public schools generally.

3. The role of the BET is generally limited to establishing broad budget targets and setting tax rates of general applicability, which are matters in which the members' personal interests are closely aligned with other citizens of the Town.

Therefore, unless such discussions are linked specifically to the matter of the collective bargaining agreement with the Greenwich Education Association or otherwise to the terms and conditions of the spouse's employment in such a way that they could be influenced by the member's actions as a BET member, the employment of the applicant's wife as a teacher in the Greenwich public schools should not prevent the member from discussing the overall Town budget, the budget of the Board of Education, or any proposals for tax rates, general spending limits or the establishment of overall budget targets. By participating in BET discussions and reviews relating to the establishment of tax rates, spending limits and budget targets generally, the applicant would not be considered to be "exerting influence" on Town transactions or actions, within the meaning of the Code of Ethics unless such discussions were to relate specifically to the terms and conditions of employment of the applicant's spouse.

**See Related: A98-03, A05-01, A07-01, A09-04, A12-01**