

# **T O W N O F G R E E N W I C H**

## **Board of Ethics**

### **Regularly Scheduled Meeting**

**December 9, 2008**

**5:30 P.M.**

**Mazza Conference Room**

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### **A G E N D A**

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- 1. Approval of Minutes**
- 2. Chairman's Report:**
  - a. Status of Budget Request**
  - b. Reporting Project**
- 3. Continuing Items:**
  - a. Review of Draft Advisory Opinion (attached as Exhibit A)**
- 4. Other Matters**
  - a. Election of Officers**
  - b. Training**
    - i. Instructions for Disclosure Form**
    - ii. Training sessions**
- 5. Adjournment**

# **EXHIBIT A**

## **WORKING GROUP DRAFT FOR DISCUSSION AT 12-09-08 MEETING**

### **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 <sup>t</sup>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:

1. Discuss and vote on matters, other than budget items, that affect the Greenwich public schools in general?
2. Vote on the Town budget, which includes funding of the Board of Education?
3. Discuss and vote on specific issues which pertain to the public school budget at RTM meetings and Budget Overview Committee meetings?

### **Discussion and Conclusion:**

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 which 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 “insiders 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 criticize 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 its members 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 they have 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 that is a teacher, we will attempt to address each of these areas.

*Areas of Relative Safety.* There are three circumstances under which an RTM member cannot not be guilty of a violation of the Code, even where a real or imagined conflict exists:

1. 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.
2. 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.
3. 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 their 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, 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.

4. 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.
5. 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:

1. 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.
2. 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.
3. Discussion of 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 only presents 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 can not 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 a open and forthright manner.

Where the member is advocating a position favorable to their 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 followed procedures intended to ensure that their 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 procedures 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 their District Chair, and can document that they have 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<sup>1</sup>.

As can be seen, 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. These examples show that the Board will pay particular attention to the fact that an RTM member has an obligation to

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<sup>1</sup> 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.

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 comparatively a 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 loathe to suggest 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 they 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 their interest. At the same time, 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. A committee member 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 discussion 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, 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 their 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. 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 that 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 themselves 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.

*This Opinion is limited to interpretation of the Code of Ethics, which the Code gives the Board specific responsibility for. Accordingly, it should not be interpreted as an opinion with regard to any other local, state or federal laws, rules or policies that might be applicable to the circumstances that you describe. You are of course responsible for compliance with such laws, rules or policies that may be applicable to you, including regulations policies and standards of the Town of Greenwich and its various Departments, Boards, Commissions and other agencies.*