

## Advisory Opinion No. 09-04

**Date:** February 10, 2009

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

**Code Sections :** 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) The 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 owners refrain from participation in any applications relating to such properties or to abutting properties.
- 2) The 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) The 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 Board with additional information in response to their questions. 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 Town Office complied with Section 4 of the Code of Ethics (the "Code")?

#### **Discussion and Conclusion:**

Section 4 of the Code prohibits town officers from using their office to exert influence or from voting 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 a potential conflicts of interest, and that the Code only prohibits a Town Officer from participating in 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 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 used 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 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 reviewed the relevant facts and circumstances to determine if a financial interest exists and if a Town Officer's participation in such 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 various 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 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 the affected individual 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 that discloses the nature of the conflict in sufficient detail to allow the members of the board or commission or 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 individual 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 particulars of this particular request for an 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 this request for an 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 to respond 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 ensure that when relevant a written statement is placed in the records of the Commission that indicates 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 to be taken. The fact of the Commissioners non-participation in the various proceedings related to the matter should also be clearly indicated in the record, including appropriate notations on the materials circulated to members and notations in the agendas, minutes and any summary information provided to the Board or the general public. The Board understands that it is important to have qualified people on the Town's boards and commissions and that excluding everyone who might have 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 his conduct, 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.

*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.*

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