

TOWN OF SHELBURNE ETHICS COMMITTEE

DECISION ON THE MERITS

Re: Complaint #20181211 – 001

On December 18, 2018, the Town of Shelburne Ethics Committee found probable cause under the Ethics and Conflict of Interest Ordinance with respect to the allegations of Complaint #20181211 – 001 (filed on December 11, 2018 by Dean Pierce (complainant) against Shelburne Development Review Board (DRB) member Jeff Pauza (respondent)). The Complaint alleged that the respondent made statements at a March 2, 2016 DRB hearing on a permit amendment application filed by Shelburne Green, LLC that showed his support for the applicant on a specific legal issue concerning one element of the application, notwithstanding the applicant's decision to not press the issue and to withdraw that element of the permit amendment's - expanded hours for a café on the subject premises. The Complaint then alleged that when the expanded operating hours request reappeared at a September 2018 DRB hearing, the respondent failed to disclose his prior statements, failed to recuse himself, and also failed to make a statement to demonstrate his ability to act fairly and objectively despite the previous comments, as required by Article XIII.C of the ordinance¹. Upon receiving a copy of the Complaint, the respondent promptly recused himself from sitting on the Shelburne Green amendment application.

The Committee held a hearing on the Complaint on January 9, 2019. The complainant testified, generally reiterating the substance of the Complaint, including the allegation that on March 2, 2016, when the applicant's representative explained that the applicant had concluded that pressing the threshold legal issue associated with the expanded café hours was not likely to be successful, the respondent said, "Really? I was going to support it." Later at the March 2 hearing, after the applicant expressly withdrew the extended hours request, the respondent stated that he had been "looking forward to the debate" on the threshold issue. The respondent testified that he did make these statements but said that it was not clear to him, or that he did not necessarily agree, that the statements were an impermissible prejudgment on the merits requiring disclosure and recusal under the ordinance. He went on to say that at DRB hearings it is not unusual for DRB members to engage candidly with applicants and other DRB members about the merits of some issue raised in an application; that this is a positive aspect of the hearing process; and this is what he had done at the March 2, 2016 hearing.

The Complaint appropriately raised the question of whether the respondent's particular example of this practice – and his 2018 non-disclosure of the statements and non-recusal - violated the ordinance by creating at least an appearance of prejudgment or partiality. The Committee appreciates respondent's straightforward and unequivocal testimony about his statements. We commend both parties for their candor in seeking a guiding decision from the Committee.

As expressly provided for in the ordinance, a number of other witnesses testified briefly in support of the respondent, emphasizing that that DRB members should not be prohibited from making candid statements of opinion during DRB hearings as part of the decision-making

¹ Since both the conduct complained of and the filing of the Complaint occurred prior to the December 11, 2018 effective date of the revised Ethics Ordinance, the Ordinance in effect prior to that date governs these proceedings.

process, and that the respondent's prompt recusal should be the end of this proceeding. We take up the second comment first. While the respondent did promptly recuse himself from any further involvement in the Shelburne Green application, Ordinance Article XVI (f) unambiguously requires the Committee to "issue a written decision as to whether the public official violated the ordinance." If a complainant withdraws a complaint, the Committee could choose to dismiss the proceedings, but the complainant in this proceeding has not withdrawn the Complaint.

We now turn to whether the admitted public statements from March 2, 2016 and the September 2018 non-disclosure and non-recusal violated the ordinance. The statements expressed support for finding that the application had satisfied the legal standard required as a threshold matter for granting the applicant's extended café hours request. Did these statements cross the line of "prejudgment of the matter" pending before the DRB?

The Committee thinks not, although it may be a close question. The respondent made the statements in the context of the DRB discussing whether to approve the extended café hours request. The statements arguably may have been somewhat too casual in tone or delivery, but they were brief. While this was not in the formal portion of a deliberative session after the evidence was closed, the comments certainly anticipated that type of deliberative exchange. The comments, too, were focused on one aspect or issue raised by the application, and not the entire "matter" pending before the DRB. We note that the DRB's own Rules of Procedure, in Section III.C.3, define one type of conflict of interest as:

A situation where a board member has publicly displayed a prejudgment of the merits of a particular proceeding before the board. This shall not apply to a member's particular political views *or general opinion on a given issue*.

(Emphasis added.)

The "general opinion on a given issue" in the DRB Rules of Procedure may be the source of the practice of DRB members asking questions or offering comments about specific issues raised in a pending application – making a distinction between that practice and opining on the *overall* merits of the application. While it is clear from Article I of the Ordinance ("In the event of a conflict between this ordinance and any procedures or policies adopted by any Town board, commission, committee or subcommittee, this ordinance shall prevail.") that the Ordinance controls on conflicts of interest, and not the DRB's Rules, the fact of the DRB Rules provision may be relevant to the Committee's considerations here.

It is worth noting here that neither the ordinance nor the Committee's rules of procedure define the term "prejudgment of the merits," nor does the ordinance specify whether this applies only to facts, to law, or to both. Common dictionary or thesaurus definitions for "prejudgment" include "a judgment reached before the evidence is available" (American Heritage Dictionary of the English Language, 5th ed. (2016)), and "to judge beforehand without possessing adequate evidence" (The Free Dictionary by Farlex: <https://www.thefreedictionary.com/prejudgment>). The respondent's statements appear to have been made after review of the application amendment materials and exhibits and the presentation by the applicant's representative, a Civil Engineer. We also note that the respondent's comments were not covert – they were made on the record in

a public hearing, and video-recorded by local cable access television, available for anyone in the public to watch.

The Committee cautions that pre-deliberative session comments about the merits of some part or all of an application, depending on the context and just how the comments are phrased, can impact the integrity of the decision-making process and the perceptions of the public, parties and others – about the fairness and objectivity of members of quasi-judicial boards and committees. Yet the Committee understands that in a DRB hearing, where an applicant encounters rigorous questioning by the DRB members, the applicant may offer revisions to the application, seeking feedback from the DRB, in order to achieve a better chance of having a modified application approved. The Committee believes that there is a place for such appropriate exchanges at a DRB hearing.

One of the challenges for the Committee in this proceeding is to construe the ordinance by its plain terms while being reasonably mindful that the DRB proceedings (and other Town quasi-judicial proceedings) are not conducted with all of the formalities of a court proceeding. Holding them and their members to that standard would be unrealistic and inconsistent with the realities of volunteer citizen boards, commission and committees.

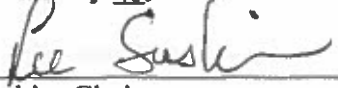
At the same time, members of our Town's public bodies, particular those with quasi-judicial authority over property owners, taxpayers and ethical infractions, must be vigilant to avoid the appearances of favoritism. What to a quasi-judicial body member may be only a routine comment designed to sharpen the issues or lead to a revised application that more fully complies with a town ordinance – to a member of the public or an adverse party may look like an inappropriate sign of favor or disfavor. These were the concerns motivating the complainant to file this complaint.

Ultimately, the Committee was persuaded by the testimony of the respondent and of other members of the DRB, that the respondent's comments were of the type considered acceptable practice by DRB members. Considering the factors discussed above, the Committee does not find that the respondent violated the ordinance. The Committee also concludes, however, that under the circumstances, his recusal from the pending Shelburne Green application was appropriate.

For all the reasons set forth above, the Committee determines that the respondent's statements and subsequent non-disclosure and non-recusal did not constitute a violation of the ordinance.

Finally, and as noted in our public comments at the January 9, 2019 hearing, and entirely separate from these proceedings, the Committee will explore appropriate ways for it to work with other Town committees, boards and commissions, and with the Town Manager and others, to encourage development and implementation of educational and training resources for members of those bodies, particularly those (including this Committee) with quasi-judicial responsibilities, where how a public official comments on a pending matter should not give the appearance of prejudice or partiality.

Dated: January 22, 2019.

A handwritten signature in cursive script, appearing to read "Lee Suskin", written over a horizontal line.

Lee Suskin, Chair

Also participating in the Decision:

Thomas A. Little

William Deming

Michael Ashooh

Gwen Webster