

ADVISORY OPINION OF THE AUBURN ETHICS PANEL

I. Procedural Background:

This Advisory Opinion is rendered by the Auburn Ethics Panel in response to the request filed by Mr. Ryan Smith, pursuant to Chapter 2, Article III, Division 2, Section 2-112(b)(3) of the City of Auburn Code of Ordinances. Section 2-112(b)(3) provides:

When a public official does not voluntarily refrain from participation in a matter and there is a question as to the existence of a conflict of interest [...] the matter may be referred to the ethics panel [...] A registered voter within the city may request an advisory opinion from the ethics panel regarding whether an elected or appointed public official who serves on a municipal board has an actual, potential or reasonably perceived conflict of interest. Such request shall be made on forms available from the city clerk and shall be endorsed by the signatures of 25 registered voters within the city. Sec. 2-112(b)(3).

The April 14, 2022 petition was submitted to the City of Auburn Clerk who confirmed that 25 signatures of registered voters were included with the petition, which was presented on the City's provided form for submitting petitions for Advisory Opinions from the Ethics Panel. The Petitioners request that the Ethics Panel answer the following questions:

- *Is it appropriate for Brian [Dubois] to vote on a development in which he was a buyer agent for?*
- *Should Brian [Dubois] had [sic.] disclosed this and refrained from voting?*
- *Does a pre-existing relationship with the developer show a clear conflict?*

The context for the questions asked in the Petitioners' request was clarified and explained in Mr. Ryan Smith's email correspondence to the City Manager of April 13, 2022. In that email, Mr. Smith alleged, *inter alia*, that Auburn Planning Board Member, Brian Dubois, had a conflict of interest, that should have prevented him from voting on a matter considered by the Planning Board at its April 12, 2022 meeting. The Ethics Panel has considered this email correspondence as a part of the Request for an Advisory Opinion as presented on the City's Form. The basis for the alleged conflict of interest is Mr. Dubois' relationship as buyer's agent for the owner and developer of the real estate located 555 Court Street in Auburn (the "Property").

Upon referral of this matter to the Ethics Panel, on or about April 15, 2022, the Ethics Panel, with the assistance of the City Clerk, scheduled a meeting at City Hall to take up the request for an Advisory Opinion on April 26, 2022, at 5:30PM. Pursuant to Section 2-115(a)(2) of the Code of Ordinances, the Ethics Panel Chairman, caused Mr. Dubois to be notified of the Ethics Panel meeting, as the subject of the Petitioners' request for an Advisory Opinion. A copy of this correspondence was also sent to Mr. Evan Cyr, in his capacity as Chairman of the Planning Board. Mr. Dubois was advised in that correspondence of his right to request that the Ethics Panel utilize a formal hearing process to consider the facts at issue in the matter, under Section 2-115(b)(1).

At its meeting on April 26, 2022, the Ethics Panel determined, pursuant to Section 2-115(b)(1), that the Petition (including Mr. Smith's April 13th email) was inadequate to allow the Ethics Panel to formulate and provide an Advisory Opinion, and that additional fact-finding was necessary. Mr. Dubois, being present, was asked if he wished to exercise his right for the Ethics

Panel to conduct its fact-finding through a formal hearing process, which Mr. Dubois declined. The Ethics Panel determined that it would commence its fact-finding informally through interviews and the solicitation of additional information.

The Ethics Panel first heard from Mr. Dubois, who provided background information about his professional relationship with the owner of the Property, and provided additional information to clarify that he does not have a “personal relationship” as defined at Section 2-109. Additional relevant facts were provided by Chairman Cyr, who was also in attendance. The Ethics Panel also heard from Mr. Smith who was in attendance for the meeting. He offered some facts about the events of the April 12th Planning Board meeting and the votes taken. There were approximately 20 members of the public who also attended, as the proposed development for the Property is a matter of public concern. All in attendance were advised by the Chair of their right to submit written comments to the Ethics Panel by directing them to the Chair, or by submitting them to the City Clerk.¹

During the course of the April 26th meeting, the Ethics Panel determined that it would be necessary for it to view the video of the April 12th Planning Board meeting for itself, in order to fully understand the context for the Petitioners’ Request and the facts of what occurred at the meeting. The Ethics Panel, adjourned its meeting and advised those in attendance that a follow-up meeting would be publicly noticed so that the Ethics Panel could continue its fact-finding after it had the chance to view the Planning Board meeting video on YouTube.

At a duly noticed second meeting of the Ethics Panel, on May 3, 2022, the members of the Ethics Panel affirmed that they had each viewed the YouTube video of the meeting, and discussed their observations of the same. The Chair solicited further facts from the approximately seven (7) members of the public who were in attendance, including Mr. Smith and Chairman Cyr. Upon the suggestion of Mr. Smith and other members of the public who were in attendance, the Ethics Panel viewed video footage of the Planning Board’s March 8, 2022 meeting wherein it considered a vote pertaining to its recommendations to the City Council for a Zone change involving the Zoning District wherein the Property is located. The procedural backdrop and an explanation of the votes taken at the March 8th meeting was provided to the Ethics Panel by Chairman Cyr.

After viewing the YouTube video of the March 8th Planning Board meeting, and hearing briefly from some of those in attendance, the Ethics Panel closed the fact-finding portion of its work and began its deliberations. The Ethics Panel considered and responded to the three questions presented by the Petitioners in their Request for an Advisory Opinion. Upon concluding its deliberations, the Ethics Panel advised that it would meet a final time to adopt a written advisory opinion with findings of fact, application of the standards set forth in Section 2-112(a), and any recommendations that it may make. The City Clerk was requested to issue a public notice that the Ethics Panel would meet at 5:30 on May 17, 2022 to continue its work by considering, adopting, and issuing its final written advisory opinion.

II. Findings of Fact.

¹ Some written comments were received, but they provided commentary and opinions not relevant to the Ethics Panel’s fact-finding.

Mr. Dubois is a Maine licensed Realtor who served as Buyer's Agent for the owner and developer of the Property. There is no dispute that Mr. Dubois received compensation for his professional services in this regard. According to Mr. Dubois the sale of the Property occurred in Fall of 2021.² On April 12, 2022, the Planning Board met to consider the items on its full agenda. Mr. Dubois participated in that meeting remotely via Zoom. Just prior to the Planning Board taking up its substantive meeting agenda, the City's attorney gave a presentation to the Planning Board regarding conflicts of interest and he explained the legal standards and procedural requirements for members of the Planning Board to consider going forward. The City Attorney's presentation explored the standards provided by State law at Title 30-A, Section 2605, which is cross-referenced in the City's ordinances governing the work of the Ethics Panel. Although similar in nature, the Ethics Panel notes that they are not exactly the same standard. Both standards do however, contain language providing, in essence, that all municipal officers "shall attempt to avoid the *appearance* of a conflict of interest." (*See*, 30-A M.R.S.A. § 2605; Section 2-112 of Chapter 2, Article III, Division 2 of Auburn's Code of Ordinances.)

After nearly three (3) hours of the April 12th Planning Board had passed, the Board's attention turned to the issue of whether a special exception should be granted to the owner of the Property to allow for its proposed development of a multi-unit residential housing complex. When the agenda item was called, the Chair allowed for public comment. Multiple members of the public came forward to speak to the agenda item. Among them was Mr. Smith who, himself being a realtor, noted that Mr. Dubois had served as buyer's agent for the developer. Mr. Smith explained that he felt that this was a conflict of interest and that Mr. Dubois should not be permitted to participate in the Planning Board's consideration or vote on the agenda item.

Chairman Cyr observed the procedural rules applicable to those circumstances when an issue of a conflict of interest is invoked by a matter before the Planning Board. Chapter 2, Article V, Division 4, Section 2-473 of Auburn's Code of Ordinances is specific to the Planning Board and provides in relevant part:

No member of the planning board shall participate in the hearing or disposition of any matter in which he or she has an interest. Any question of whether a member has a conflict of interest sufficient to disqualify the member shall be decided by a majority vote of the members present, except the member whose possible conflict is being examined. (Section 2-473.)

Mr. Dubois addressed the allegation that he had a conflict of interest based on his representation of the buyer of the Property. Mr. Dubois does not have an ownership interest in the Property or the company that owns it. Mr. Dubois does not have a pecuniary interest in the Property or in the granting of the Owner's requested special exception. Mr. Dubois argued that he should not be disqualified from participating and that he was not biased by his past representation of the buyer. After Mr. Dubois addressed the allegation from Mr. Smith that he had a conflict of interest, per the above cited ordinance, Chairman Cyr called for a vote of the other 6 Planning Board members as to whether there was an appearance of a conflict of interest such that Mr. Dubois

² Reference to Auburn Planning Board documents associated with the April 12th Planning Board meeting reveals that the owner of the Property is American Development Group, LLC ("Owner") and a search at the Androscoggin County Registry of Deeds shows the apparent conveyance from Brent Berry to the Owner dated November 15, 2021.

should be disqualified. The vote was unanimous in concluding that Mr. Dubois' involvement in the Owner's purchase of the Property did not give rise to an appearance of a conflict of interest and he participated in the agenda item and ultimately voted in favor of the special exception. The special exception vote passed on a 4-3 majority vote of the Planning Board.

The Planning Board's Policies and Procedures, Article VIII(G)(1) are derived from the above referenced ordinance, and provide for the voting procedure on the alleged conflict that was applied by Chairman Cyr. The Planning Board's Policies and Procedures incorporate and apply by reference the legal standards for a conflict of interest found both at 30-A M.R.S.A. § 2605 and the standard to be applied by this Ethics Commission under City Ordinance at Section 2-112(a):

In the case where a member does not have a conflict of interest, as defined by [the above referenced state law and City legal standards] but believes he/she may have the appearance of a conflict, the member shall state the situation and the remaining regular members of the Board shall vote whether they believe a conflict does exist and the member should sit or not. (Auburn Planning Board Policies and Procedures, Article VIII(G)(1).)

The Ethics Panel finds that the Planning Board and its Chair appropriately followed the outlined procedures and ordinance for circumstances where there is a question of a conflict of interest on the Planning Board.

III. Application to Legal Standards³

A. Public Official: Brian Dubois is a "public official" within the meaning of Section 2-109, which includes any person holding an elected or appointed position with a municipal board.

B. Standard of Conduct: Section 2-112 provides for the following standard of conduct: *A public official shall refrain from participation in a matter when there exists an actual, potential or reasonably perceived conflict of interest arising from a personal relationship or a financial involvement that would cause a reasonable person to believe that the public official cannot act in his official capacity without self-interest or bias. (Section 2-112.)*

The Ethics Panel concludes that Mr. Dubois *did not* have an "actual" conflict of interest in the outcome of the Planning Board's vote. He neither had a financial incentive to vote one way or the other, nor was there a pending financial arrangement between the Property owner and Mr. Dubois. Any financial benefit to Mr. Dubois was realized by Mr. Dubois at the closing in November of 2021. In the absence of an actual conflict of interest, the Ethics Panel must consider whether there is a "potential or *reasonably perceived* conflict of interest" that arises from Mr. Dubois' prior financial involvement with the Property as agent to the buyer, such that a reasonable person would be caused to believe that Mr. Dubois could not act regarding the Planning Board special exception vote without self-interest or bias. This is a close call for the Ethics Panel.

³ Unless otherwise noted, Section references are to Chapter 2, Article III, Division 2 of the Auburn Code of Ordinances.

Section 2-110(a) sets forth important policy considerations for the Ethics Panel and Public Officials to consider:

It is the policy of the city that the proper operation of democratic government requires that public officials be independent, impartial and responsible to the citizens, that public office not be used for personal gain, and that the public have confidence in the integrity of its municipal government. The purpose and intent of this division is to promote the objective of protecting the integrity of the government of the city against actual or reasonably perceived conflicts of interest without creating unnecessary barriers to public service. (Section 2-110(a).)

There can be no doubt, and this Ethics Panel believes, that Mr. Dubois was not and is not using his position on the Planning Board for personal gain. The Ethics Panel believes that Mr. Dubois was acting independently, and impartially when he cast his vote with the majority of his Planning Board colleagues on April 12th. But it is a far closer question as to whether Mr. Dubois' participation in the vote promoted or impaired the purpose and intent of Auburn's ethical standards set forth in ordinance.

Twenty-five (25) registered voters signed a petition within 48 hours of the Planning Board vote, seeking an Advisory Opinion from the Ethics Panel. While the Ethics Panel appreciates that many of those signatures may have been from citizen who opposed the development of the Property in the manner contemplated by the Owner, there was clearly a backlash caused by Mr. Dubois' voting on the Planning Board, leading to the conclusion that at least *some reasonable people* perceived that Mr. Dubois could not act independently and without bias due to his representation of the buyer when it purchased the Property. The Ethics Panel cannot characterize that conclusion as *unreasonable*. The Ethics Panel concludes that Mr. Dubois prior financial relationship as the buyer's agent in its purchase of the Property, gave rise to a reasonably perceived bias. Again, this is not to conclude that Mr. Dubois was in fact biased when he cast his vote, only that a reasonable person would conclude that he was.

The above cited Section 2-110(a) requires that we carefully consider whether such a conclusion protects the governmental interest in the integrity of City decision making without creating unnecessary barriers to public service. The Ethics Panel is mindful of the importance of this balancing that is required by the ordinance. During its May 3rd meeting, the Ethics Panel spent some time discussing the closeness and complexities of the many relationships that Auburn community members who volunteer to serve have with and among one another, the business community, and commerce generally within the City and its surrounding areas. Although Auburn is a City of some 25,000 people, the people who volunteer to serve roles in local government are often community and business leaders, who have earned the public's trust through their professional, organizational, and business activities. The naturally existing network of an interconnected business community lends itself to the likelihood that reasonably perceived bias occurs far more often than is formally identified or complained of. Add to this the nationwide erosion of public trust in government, and one might ask why any successful business person would wade into public service. While the Ethics Panel is mindful of the potential impact of these findings, its members would hope that it does not deter Mr. Dubois, or any other well qualified individual from volunteering to serve on important local boards. In fact, the Ethics Panel hopes that this decision will help guide public boards in the future so that they

can better protect their members from the trap that can arise from “reasonably perceived conflicts of interest.”

In this case, the Ethics Panel believes that the Planning Board’s unanimous vote finding that Mr. Dubois *did not* have a reasonably perceived conflict of interest was erroneous. The Ethics Panel concludes that Mr. Dubois did nothing wrong by participating in the vote. After all, the Planning Board’s established procedures were followed by the Planning Board based on the provisions of Chapter 2, Article V, Division 4, Section 2-473 of Auburn’s Code of Ordinances, which governed the Planning Board’s conduct. The language of the ordinance removes Mr. Dubois judgment about the matter from the process, “Any question of whether a member has a conflict of interest sufficient to disqualify the member **shall be decided by** a majority vote of the members present, except the member whose possible conflict is being examined.” (Chapter 2, Article V, Division 4, Section 2-473, emphasis added.) Although from Mr. Dubois’ comments addressing the alleged conflict of interest at the Planning Board meeting reveal that he would have voted in the same manner as the other members of the Planning Board did (if the question concerned another member), the ordinance does seem to compel participation of a potentially conflicted Planning Board member if it is the vote of the Planning Board that there is no conflict.

Given this analysis, the Ethics Panel answers the questions posed in the Petitioners’ Request for an Advisory Opinion as follows:

Q: Is it appropriate for Brian [Dubois] to vote on a development in which he was a buyer agent for?

A: It depends. While there could be a reasonably perceived conflict of interest, in certain circumstances, important factors to consider are the nature and size of the project, and the temporal relationship between the subject transaction and the vote. In this particular case, the Planning Board was considering a controversial development project. The greater the controversy, the more likely it is that a reasonable person will perceive that there is a conflict of interest. In this case, the closing on the Property occurred about five (5) months prior to the April 12th vote. This amount of time seems remote enough to mitigate against a reasonably perceived conflict of interest. Noting the stated policy interest in not creating unnecessary barriers to public service, the Ethics Panel feels that the passage of this amount of time would weigh against a finding of a reasonably perceived conflict of interest. This is supported by the vote taken by the Planning Board. Unfortunately, the nature of this proposed development, and the controversy surrounding it, had many reasonable citizens on guard, and feeling cynical about the Planning Board’s work. That context needs to be considered.

Q: Should Brian [Dubois have] had to disclose [his relationship as buyer’s agent for the Property] and refrained from voting?

A: The Ethics Panel concludes that Mr. Dubois should have disclosed his relationship of buyer’s agent to the Property Owner. However, the Ethics Panel also concludes that Mr. Dubois did not fail to make the disclosure, as his relationship was raised by Mr. Smith during public comment, prior to the Planning Board’s consideration and discussion of the issue. That is to say that the Ethics Panel does not believe that Mr. Dubois can be found to have failed to disclose his relationship, as the opportunity to do so, was effectively (though not intentionally) usurped by Mr. Smith’s raising the issue. While Mr. Dubois might have preliminarily addressed the

potential conflict with Chairman Cyr prior to the meeting, or immediately before the agenda item was introduced for public discussion, the Ethics Panel cannot conclude that Mr. Dubois failed to disclose. Mr. Dubois also participated via Zoom, which represents at least some disparity in his level of participation in the meeting compared with those who were present. Regardless, the Ethics Panel, after viewing the YouTube video of the April 12th meeting does not conclude that Mr. Dubois failed to disclose, because Mr. Smith raised the issue before the Planning Board began its deliberations on the agenda item.

The second part of this question asks whether Mr. Dubois should have refrained from voting on the special exception. The Ethics Panel believes that there was a reasonably perceived conflict of interest. However, the mandatory nature of the ordinance governing how it handles conflicts of interest required Mr. Dubois to participate. While Mr. Dubois probably should have appreciated the possibility that a reasonable person would view his prior relationship as buyer's agent as affecting his ability to remain unbiased, he voted in accordance with the unanimous vote of his colleagues that no conflict of interest could be reasonably perceived. Under the applicable ordinance, Mr. Dubois appropriately participated in the vote, with the decision having been rendered by the Planning Board. Mr. Dubois cannot be faulted for abiding by the decision of his colleagues, who like him, seemed to fail to appreciate what the Ethics Panel and others believe was a "reasonably perceived conflict of interest."

Q: Does a pre-existing relationship with the developer show a clear conflict?

A: No. A pre-existing or prior professional relationship does not show a clear conflict of interest. It can, however, give rise to the possibility of a reasonably perceived conflict of interest. When weighing the policy underlying the City's ordinances governing conflicts of interest, we must balance the City's interest in avoiding the appearance of conflicts, with the significant interest in avoiding the creation of *unnecessary barriers to public service*. A volunteering public official should not be forced to "sit on the sidelines" of an issue because they had a previous business relationship with a party affected by his or her vote. The Ethics Panel believes that enough time passed from the time of Mr. Dubois representation of the Owner in its purchase of the Property, and the vote on April 12th so as to avoid any actual or clear conflict of interest. Public officials should not have their hands tied indefinitely because of a prior professional relationship, lest they be discouraged from volunteering to serve. Unfortunately, in this particular case, the matter was sufficiently controversial that a reasonable person could perceive a conflict of interest on the basis of the previous professional relationship and could conclude that Mr. Dubois, or any individual in his situation could not remain unbiased when voting.

IV. Recommendations

This Request for an Advisory Opinion highlights some important issues for City government in Auburn.

A. Public officials are well advised to be aware that the more controversial an issue is, the more likely it is that reasonable people will perceive bias where there may in fact be none. The interest in maintaining and fostering public confidence in government action is certainly critical to a functioning democracy. When matters of public concern are highly controversial, public

officials need to have a heightened sense of awareness about how their relationships with involved parties will be perceived by the public. “Perception is reality,” is the old, but appropriate maxim. The Ethics Panel does not believe that Mr. Dubois failed the public, or the trust it places in the Auburn Planning Board. But, because this was a matter of heightened controversy, there were many more eyes perceiving the actions of the Planning Board and a spotlight fairly or not has been shined on Mr. Dubois because of the controversy surrounding the proposed development of the Property. For better or worse, public officials need to be sensitive to the public’s perceptions about their actions. In controversial matters, public officials need to be even more sensitive to these realities. The Ethics Panel struggles to understand the unanimous vote of the Planning Board that Mr. Dubois’ participation in the deliberation and vote would not give rise to a reasonably perceived conflict of interest, or that a reasonable person could not conclude that Mr. Dubois would be affected by bias attributable to his past relationship with the Property Owner.

B. The process by which agenda items are considered should automatically provide an opportunity for public officials involved to disclose any relationships that could reasonably be perceived as creating a conflict. As noted above, in this case Mr. Dubois did not have a clear opportunity to speak-up to disclose his past professional relationship in the context of the special exception vote. Some procedural mechanism should be established for public officials to identify potentially conflicting relationships, whether at the beginning of formal meetings, or upon introduction of each agenda item before any further action is taken. This is especially true for those controversial agenda items that draw dozens of members of the public to a meeting. By failing to provide this opportunity and clear window for public officials to disclose, they are easily put on the defensive by others who may raise an issue before they have the chance.

C. The ordinance that dictates how the Planning Board resolves an issue of a conflict of interest⁴ should be amended to allow for the question to be referred to the Ethics Panel upon a vote of the Planning Board, before the Planning Board votes on the potential conflict. Arguably the Planning Board can do that, but a strict reading of the ordinance seems to not consider that as an option. Furthermore, the Planning Board’s Policies and Procedures do not reference the Ethics Panel as a resource or option in such circumstances. The ordinances governing the Ethics Panel certainly contemplate that City boards will utilize it as a resource *before* voting on a matter. The Planning Board would likely benefit from feeling free to seek Advisory Opinions from the Ethics Panel when matters of heightened controversy raise conflict questions, as in this case. Unfortunately, little can be achieved retroactively, and the process as it was utilized in this case only allows for “Monday morning quarterbacking” of the Planning Board’s actions. The Ethics Panel does not serve its best and intended function when it is in the position of looking retroactively at a situation that already occurred. While a Request for an Advisory Opinion from the Ethics Panel will certainly add delay to action by a local board, it seems it can provide the most benefit to the board making the request, and to the public by considering an issue before the vote occurs.

D. Finally, it is note worthy that there are at least two (2) standards of conduct applicable to public officials in Auburn when it comes to conflicts of interest. State statute is often the focus, but the standard of conduct contained in local ordinance should also on the minds of public

⁴ Chapter 2, Article V, Division 4, Section 2-473 of Auburn’s Code of Ordinances.

officials. While the distinction between the two standards is not great, there is a difference between: “Every municipal and county official shall attempt to avoid **the appearance of a conflict of interest** by disclosure or by abstention,⁵” in State statute, and, “reasonably perceived conflict of interest... that would cause a reasonable person to believe that the public official cannot act in his official capacity without self-interest or bias,”⁶ as set forth in local ordinance. Conflict of interest training for local officials should ensure that both standards are explored and understood by public officials, with adequate warning about the heightened attention to conflict issues that comes with controversial issues before the board. Such training should also ensure that local boards know about the Ethics Panel and the proactive role that it can play in helping to resolve conflict issues.

Adopted: May 17, 2022.

By The Auburn Ethics Panel:

/s/ James F. Pross

Jim Pross, Chairman

/s/ Sara E. Bartlett

Sara Bartlett, Member

/s/ Leonard Kimble

Leonard Kimble, Member

⁵ See, 30-A M.R.S.A. § 2605(6).

⁶ See, Chapter 2, Article III, Division 2, Section 2-112.