

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Application of

JOSH COHN, individually, and as the Mayor and
Member of the City Council of the City of Rye,
CAROLINA JOHNSON, JULIE SOUZA and
BENJAMIN STACKS, individually, and as Members
of the City of Rye City Council,

**NOTICE OF VERIFIED
PETITION**

Index No.: _____

Petitioners,

for Judgment Pursuant to Article 78 of the CPLR

-against-

CITY OF RYE BOARD OF ETHICS,

Respondent.

PLEASE TAKE NOTICE, that upon the annexed Petition of the Members of the City Council for the City of Rye, New York, verified on the 13th day of June 2023, all exhibits attached thereto, and all pleadings and papers in the underlying matter, the undersigned will move this Court at a Special Term thereof, to be held at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd, White Plains, NY 10601 on the 19th day of July 2023, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a Judgment, pursuant to Article 78 of the Civil Practice Law and Rules, granting the relief requested in the Verified Petition, and for such other, further and different relief as to the court seems just and proper, together with the costs and disbursements of this proceeding.

PLEASE TAKE FURTHER NOTICE, pursuant to CPLR 7804(c), that answering affidavits and other responsive papers, if any, shall be served on or before July 14, 2023; and reply papers, if any, shall be served on or before July 18, 2023.

Dated: Albany, New York
June 13, 2023

Respectfully submitted,

LIPPES MATHIAS LLP

/s/ Karl J. Sleight.

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CITY OF RYE BOARD OF ETHICS,

Respondent.

Petitioners, current duly elected members of the City Council for the City of Rye, New York (“Petitioners”), through their attorneys, Lippes Mathias LLP, hereby respectfully allege the following claims against the City of Rye Board of Ethics (“Board,” “BOE” or “Respondent”):

THE PARTIES, JURISDICTION AND VENUE

1. Petitioners are individuals who reside within the City of Rye and are current duly elected and unpaid volunteer members of the City of Rye City Council, pursuant to the City Charter. The City Council holds regularly scheduled meetings at City Hall, City of Rye, 1051 Boston Post Road, Rye, New York 10580.

2. The City of Rye Board of Ethics is a government agency created pursuant to the Council of the City, with its principal office at City Hall, City of Rye, 1051 Boston Post Road, Rye, New York 10580.

3. This Court has jurisdiction over this action pursuant to CPLR §§ 506 and 7804.

4. Venue is proper in Westchester County pursuant to CPLR § 506(b) because the City of Rye Board of Ethics maintains its principal office in Westchester County, Petitioners live in Westchester County, and the determination sought to be stricken was made in Westchester County.

NATURE OF THIS ACTION

5. Petitioners bring this special proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”) and CPLR 3001, seeking an Order and Judgment holding that the Board of Ethics acted in excess of its jurisdiction; its determination to proceed was affected by errors of law, was an abuse of discretion, was irrational and arbitrary and capricious; it is proceeding in violation of lawful procedure; and it has denied Petitioners due process in violation of the United States Constitution and the Constitution of the State of New York.

The Limited Power of the Board of Ethics

6. The City of Rye created and maintains a Board of Ethics with the limited power and authority to issue confidential, non-binding advisory opinions to officers and employees of the City of Rye.

7. Like many municipal codes of ethics provisions in the State of New York, the City of Rye Code of Ethics was created pursuant to General Municipal Law § 808 and was codified as § 15-13 of the City Code of Ethics¹ (see, attached Code of Ethics as **Exhibit “1”**).

8. The Board of Ethics for the City of Rye consists of five members, including the Corporation Counsel, the City Manager, and three (3) members of the public appointed by the Mayor with the approval of the Council, who shall not hold any other City office and shall serve without compensation for a term of three (3) years (Code § 15-13(A)).

¹ As of June 12, 2023, the City of Rye Code of Ethics can also be found at <https://ecode360.com/6971565>.

9. The Board is charged with rendering advisory opinions on specific situations to officers and employees of the City with respect to Article 18 of the General Municipal Law and the Code of Ethics. Pursuant to the Code, advisory opinions shall be rendered pursuant to the written request of any such officer or employee under such rules and regulations as the Board may deem advisable and shall have the approval of the Corporation Counsel with respect to their validity. The Board must publish its advisory opinions with such deletions as may be necessary to prevent disclosure of the identity of the officer or employee involved (see, City of Rye Ethics Code § 15-13(B)).

10. Provisions of the Code of Ethics cover areas including, representation of private interests before City agencies and courts, disclosure of interest, solicitation or acceptance of gifts and favors, disclosure of confidential information, interests in conflict with official duties, incompatible employment, future employment, use of city employees or public property, and prohibited political activities (see, City of Rye Ethics Code § 15-1 *et. seq.*).

11. The Board's power is limited to an advisory role and has no binding authority to dictate the conduct of city officers and employees.

12. The Board has not been empowered to investigate city officers or employees or make findings of a breach of the Code of Ethics.

13. The Board has not been empowered to prohibit any prospective action by City officers or employees, or institute any civil penalties or employment-related punishments for a violation of the Code of Ethics.

14. Despite these limitations, the Board of Ethics decided to conduct an investigation and issue a non-confidential finding that prospectively limits Councilmembers' ability to vote on issues surrounding a tree moratorium.

The Issue of Clear-Cutting of Trees and Consideration of a Moratorium

15. The City of Rye has been plagued with significant amounts of clear cutting of trees. Tree removal has changed the landscape and character of the City and raised concerns among its citizens. Discussions of a possible change in the law regarding trees dates to at least the Spring of 2021.

16. Near the end of January 2023, Mr. Cohn became aware that a wooded parcel of property, home to a grove of approximately 40 mature trees, adjacent to his home in the Turf Avenue neighborhood would be clear cut of trees within a week.

17. By Friday February 3, City officials had received complaints and concerns about the planned clear cutting of the grove of trees near Turf Avenue. After the City Corporation Counsel advised Mr. Cohn that a special meeting would facilitate setting a public hearing on a moratorium, Mr. Cohn recused himself and the special meeting was properly noticed on February 3, with steps taken to hold the meeting on February 6.

18. There are no allegations that the process for special meetings under the City Code was not legally followed.

19. Mayor Cohn recused himself from any proceedings involving the meeting, including the upcoming special meeting noticed by the Deputy Mayor, based on the possible impact of the City's actions to the adjacent Turf Avenue property.

20. On Saturday, February 4, 2023, the grove of trees at issue in the Turf Avenue neighborhood was clear cut, thus eliminating and rendering moot any impact of City governmental action to clear cutting of that property. The clear cutting also eliminated the basis for the Mayor's prior recusal.

21. The Petitioners received communications from constituents in the City in favor of action to examine the issue of clear cutting of trees (see, attached emails from constituents to Petitioners as **Exhibit “2”**).²

22. At the special meeting on February 6, three Council members did not participate in the properly noticed public meeting.³ With the Turf Avenue grove of trees now clear cut, removing the basis for Mayor Cohn’s recusal, Mr. Cohn participated in the special meeting.

23. At the special meeting, the four (4) Councilmembers, now Petitioners in this action, moved to open a public hearing on a tree cutting moratorium at the next regularly scheduled Council meeting on February 15. No other action was taken beyond consideration for language of the moratorium.

The Board of Ethics Inserts Itself in Excess of its Power and Issues an Irrational Opinion

24. In the case before this Court, in advance of the scheduled February 15 special meeting, the Board of Ethics issued a “Confidential Advisory Opinion” (“Opinion”) dated February 13, 2023 (see, Board Opinion attached hereto as **Exhibit “3”**).

Their Opinion cited Code of Ethics §15-10(B), which states in pertinent part:

An officer or employee of the City should not by his/her conduct give reasonable basis for the impression that any person can unduly influence him/her or improperly enjoy his/her favor in the performance of his/her official duties or that he/she is affected by the kinship, rank, position or influence of any party or person.

25. Despite the fact that the sole potential conflict of interest, the clear cutting of the parcel adjacent to the Mayor’s residence had occurred on February 5, and thus removed the conflict for which the Mayor recused himself, the Board’s Opinion concluded the Councilmembers

² The names and identifying information of the constituents has been redacted, but is available to the Court in its unredacted form if necessary.

³ The three Council members who did not participate in the special meeting were Mr. William Henderson, Mr. Josh Nathan, and Ms. Lori Fontanes.

“extraordinary rush to call the [special] meeting gives a ‘reasonable basis for the impression’ that the Councilmembers who attended and voted at the February 6 meeting were influenced to take such action because of the proximity to the Mayor’s property and to protect the Mayor’s property and therefore to provide an elected official with a personal benefit.”

26. The Board’s Opinion served to paint all four Petitioners as in breach of Section 15-10 (B) of the Code of Ethics for simply acting within the proper scope of their public duties.

27. Moreover, the Board of Ethics also concluded that “any action taken by any of the Councilmembers in furtherance of the tree moratorium at the [upcoming] February 15, 2023, meeting would be cloaked with an appearance of a conflict and an impression of impropriety that would violate Section 15-10 (B) of the City’s Code of Ethics [citing the aforementioned section of the Code]”

28. The Board opinion bore the description, “**CONFIDENTIAL ADVISORY OPINION**” and was finalized and dated February 13, 2023. (emphasis in original). Although specifically marked “confidential”, the contents of the BOE opinion were widely distributed to the local media within 24 hours and before the special meeting.⁴ (see attached media report as **Exhibit “4”**).

29. Disclosure of confidential advisory opinions from the Board would appear to be a breach of the Code section prohibiting an officer or employee of the City to disclose confidential information acquired by him/her in the course of his/her official duties (see, Code §15-6 (B)).

30. The Board’s decision is unhinged from the basic principles and tenants of Code §15-10(B), and as such is arbitrary, capricious, and irrational.

⁴ See, *Board Finds Ethics Violation by Mayor & Three Council Members in Tree Debate* (MyRye.com, Feb. 14, 2023); *Deep Schism @ Council on Ethics and Trees* (MyRye.com, Feb. 15, 2023); *Board of Ethics Finds Emergency Council Meeting Violated City Code* (Rye Record, Feb. 15, 2023).

31. The pronouncements of the Board directly impact the actions and functions of the Rye City Council, effectively putting Councilmembers in the untenable position of carrying out their duly elected responsibilities and being portrayed as breaching the City's Code of Ethics or abdicating their elected position as it relates to the tree and clear-cutting issue and crippling the City's ability to address this long-standing issue.

32. The issue of clear-cutting trees and the prospect of a tree moratorium continued to be a matter in need of discussion and address by the City Council. As such, the Opinion of the Board continued to adversely impact the City Councilmembers and Petitioners.

Basis and Request for Relief

33. The Board of Ethics has significantly overstepped its limited authority by issuing an Opinion which is unhinged from the principle in the cited section of the Code of Ethics, and by its actions has grossly interfered with the operation of the City Council making the Board's actions irrational, arbitrary and capricious.

34. The Petitioners sought to resolve this matter without the need for litigation and provided the Board of Ethics with a robust analysis of the Opinion and asked that it be withdrawn (see, Analysis attached as **Exhibit "5"**). The Board summarily rejected the offer, thus necessitating this litigation to permit the City of Rye City Council to function unimpeded by the irrational, arbitrary and capricious actions of the Board of Ethics (see, Board response as **Exhibit "6"**).

35. After the Board weaponized its role and failed to follow its limited grant of power and confine itself to its limited purpose, the Petitioners are now left with no choice but to defend themselves and their reputations through the only means available - this litigation. Moreover, the Petitioners' defense of the City's integrity process will ensure that the Respondent's role is returned to its rightful and limited place, avoid a chilling effect over City officers and employees,

and ensure that future City office holders and employees are not subjected to similar abuses of power.

36. The Petitioners seek relief including vacatur and voiding of the legally infirm opinion, a writ of prohibition against the Board of Ethics' intrusion into the legislative procedure, process and municipal law, and a declaratory judgment that the Petitioners followed procedure and that there is no basis for a conflict of interest.

BACKGROUND

37. Environmental and green space concerns have existed and been a topic of discussion for some time in the City of Rye, New York. These concerns have resulted in action by the Rye City Council.

38. In the Spring of 2021, the Mayor of the City, Joshua Cohn ("Mayor Cohn" or "Mr. Cohn") formed a Council subcommittee to update the City's local laws concerning trees (Chapter 187) for the first time since 1990.

39. The subcommittee identified clear-cutting of trees within the City as a "primary problem," which soon dovetailed with other concerns leading to restrictions on disturbance of steep slopes and subdivisions for flag lots.

40. It is axiomatic that once a stand or grove of mature trees are clear cut, the natural impact to the land is irreversible, at least for a generation. Simply put, once the trees are cut nothing can put them back in place.

The Imminent Clear Cutting of the Turf Avenue Grove and the Response

41. Near the end of January 2023, Mr. Cohn became aware that a wooded parcel of property adjacent to his home in the Turf Avenue neighborhood would be clear cut of trees within a week. *See* Cohn Aff. at ¶11.

42. Mr. Cohn does not have any ownership interest in this adjacent parcel.

43. Rarely is there advance warning to the Mayor or the City Council of a clear cutting because there are no local laws or processes that lend themselves to such advance warning. The imminent planned clear cut of trees became a topic of discussion among homeowners in Mr. Cohn's neighborhood and concerned citizens throughout in the City. *See Cohn Aff.* at ¶16.

44. Mr. Cohn sought to learn whether the property had been sold and went to the City Assessor's office. At the door of that office, he encountered the head of the Building Department, Christian Miller. Mr. Miller advised Mr. Cohn that the City's existing tree law would not apply to the Turf Avenue grove because the property did not abut a public street. *See Cohn Aff.* at ¶12.

**The Corporation Counsel Advises the Mayor on Citywide Options
and the Mayor Recuses Himself**

45. Mr. Cohn raised the issue of the clear cutting with Corporation Counsel Kristen Wilson and asked what legal options were available that might affect the clear cutting. Ms. Wilson told Mr. Cohn that implementing a moratorium on clear cutting, seeking a court ordered temporary restraining order ("TRO"), or trying to trigger the State Department of Environmental Conservation ("DEC") endangered species restrictions may have an impact. *See Cohn Aff.* at ¶13.

46. The panoply of options given to Mr. Cohn by Corporation Counsel Wilson all reflected potential options that would address the imminent harm to the grove of trees. Ms. Wilson suggested a special meeting of the Council to accelerate the moratorium process, although the process still might not be fast enough to impact the Turf Avenue grove of trees. *See Cohn Aff.* at ¶14.

47. Mr. Cohn decided to recuse from pursuing all the options, because, although he did not own the property, it is in the immediate neighborhood. Recusal is the most severe remedy for

addressing an actual or potential conflict of interest.⁵ After Mr. Cohn’s recusal, as required under the City Charter the Deputy Mayor (Petitioner Carolina Johnson, also a City Council member) handled the moratorium process and a neighbor explored the other options.

The City Process Unfolds and the Mayor’s Conflict Becomes Moot

48. City officials had received complaints and concerns about the planned clear cutting of the grove of trees near Turf Avenue (see, Exhibit “2”). The special meeting was properly noticed on February 3, and steps were taken to hold the meeting on February 6. There are no allegations that the process for special meetings under the City Code was not legally followed.

49. On Saturday February 4, 2023, the grove of trees at issue in the Turf Avenue neighborhood was clear cut. As such, the impact of the special meeting and possible moratorium on clear cutting trees on the parcel at issue near Turf Avenue became a moot point. Moreover, the basis for Mr. Cohn to believe that he may have a conflict and the underpinnings for his decision to recuse no longer existed, and thus were not an impediment to his participation in the Council’s special meeting.

50. At the special meeting on February 6, three Council members did not participate in the properly noticed public meeting. With the Turf Avenue grove of trees now clear cut, effectively removing the basis of Mr. Cohn’s conflict and recusal, Mr. Cohn participated in the special meeting. At the special meeting, the Council moved to open a public hearing on a tree cutting moratorium at the next regularly scheduled Council meeting on February 15. No other action was taken beyond consideration for language of the moratorium.

51. The aforementioned circumstances leading up to the special meeting were described by the BOE as “pertinent to our ultimate findings” in their Opinion (see, Advisory

⁵ Disclosure of a conflict of interest is also a generally accepted ameliorative measure.

Opinion attached as Exhibit “3”, p. 1).

The “Confidential” Advisory Opinion Process

52. Subsequently, on February 8 and February 10, Councilmembers Henderson, Nathan and Fontanes asked the BOE for an “advisory opinion”. The BOE described the issue as: “Whether it is appropriate for a councilmember to attend and vote on actions pertaining to the proposed tree moratorium at the upcoming February 15, 2023, council meeting?” (see, Advisory Opinion attached as Exhibit “3”, p.1).

53. Of the five-member City Board of Ethics, members Kristen Wilson (Corporation Counsel) and Greg Usry (City Manager) “recused themselves as a voting member of the Board” (see, Advisory Opinion attached as Exhibit “3”, p.1). The BOE opinion at page 1 states that, “[i]n Attorney Wilson’s stead, Mark W. Blanchard, Esq. sat in as limited special counsel to the [Ethics] Board”.⁶ Ms. Wilson’s thinking on the issue appears to have evolved from the time she suggested a special meeting and moratorium to Mr. Cohn to the time when the special meeting of the Council was held.

54. Ms. Wilson took the position that the Council’s special meeting was an appearance of a conflict of interest and Mr. Cohn’s participation in the special meeting of the Council remained an “appearance of a conflict of interest” despite the Turf Avenue tree clear-cutting having already occurred prior to the special meeting of the Council, because the special meeting was scheduled before the trees were felled (see, attached email correspondence as **Exhibit “7”**).

55. Ms. Wilson relied on *Matter of Tuxedo Conservation and Taxpayers Ass’n v. Town Board of Town of Tuxedo*, 96 Misc. 2d 1 (Sup. Ct. Orange Cnty. 1978) *aff’d* 69 A.D.2d 320 and *NY Attorney General Informal Opinion 97-5* to support her view that a conflict continued to exist.

⁶ Mr. Blanchard is Ms. Wilson’s law partner at the Blanchard & Wilson, LLP law firm and not the Corporation Counsel.

56. Four Council members: Mr. Joshua Cohn (Mayor), Ms. Carolina Johnson, Mr. Ben Stacks, and Ms. Julie Souza were targets of the BOE opinion and directives, although they did not request the opinion. None of the four Council members were notified, interviewed or asked for information by the BOE members or Mr. Blanchard in advance of the issuance of the BOE Opinion.

57. After the Confidential Advisory Opinion was issued by the BOE, the affected Council members raised concerns with the BOE and Mr. Blanchard that none had been interviewed or asked for salient facts. Mr. Blanchard declined to engage and advised the BOE members “not to engage in any further discussions relating to the Opinion.” (see, Blanchard email communications attached as **Exhibit “8”**).

58. Notably, the question before the BOE was not whether any aspect of the process concerning the calling of a special meeting on February 6 ran afoul of some government principle, but whether a Councilmember could attend and vote on matters related to the “tree moratorium at the February 15, 2023” City Council meeting.

The Board’s Findings and the So-Called “Confidential Advisory Opinion”

59. Under the heading “Findings and Advisory Opinion,” the Board concluded in the February 13 Opinion “that any action taken by any of the Councilmembers in furtherance of the tree moratorium at the February 15, 2023, meeting would be cloaked with an appearance of a conflict or an impression of impropriety that would violate Section 15-10(B) of the City’s Code of Ethics” (see, Advisory Opinion attached as Exhibit “3”, p.1).

60. Section 15-10(B) of the Rye Code of Ethics relied upon by the BOE in the Opinion states:

An officer or employee of the City should not by his/her conduct give reasonable basis for the impression that any person can unduly influence him/her or improperly enjoy his/her favor in the

performance of his/her official duties or that he/she is affected by the kinship, rank, position or influence of any party or person (see, <https://ecode360.com/6971565>).

61. The BOE conclusion was based on a series of statements made in the opinion, including:

We find that the extraordinary rush to call the meeting gives a ‘reasonable basis for the impression’ that the Councilmembers who attended and voted at the February 6 meeting were influenced to take such action because of the proximity to the Mayor’s property and to protect the Mayor’s property and therefore to provide an elected official with a personal benefit” (BOE Opn., Exhibit “3” at p.3).

Moreover, we do not find that the clear cutting of the turf property erases or negates any conflict or appearance of a conflict going forward with respect to the timing of City Council action relating to a tree cutting moratorium (BOE Opn., Exhibit “3” at p.3).

As such, we do believe that under these circumstances, an elected official could vote ‘no’ or ‘abstain’ on any actions relating to the February 15 public hearing without violating the City’s Code of Ethics (BOE Opn., Exhibit “3” at p.3).

To remove the potential cloud of impropriety yet advance the substantive issue, the Council could simply re-commence the process with a newly called hearing on either a moratorium or on the proposed amendments to City Code Chapter 187 (‘Trees’)” (BOE Opn., Exhibit “3” at p. 3).

The Board of Ethics Opinion is Purposely Leaked in Violation of the Code of Ethics

62. Section 15-13 of the Rye Code of Ethics requires that the identities of the subject of a BOE opinion be withheld. The BOE opinion makes no effort in this regard, naming Mayor Cohn and, by virtue of naming the three opinion recipients, leaving the identities of those others criticized by the BOE open to an easy process of elimination.

63. The BOE opinion bore the description, “**CONFIDENTIAL ADVISORY OPINION**” and was finalized and dated February 13, 2023 (emphasis in original).

64. Although specifically marked “confidential”, the contents of the BOE opinion were widely distributed to the local media within 24 hours.

65. Mr. Blanchard acting as advisor to the BOE members stated that the Opinion “was given only to the Councilmembers who requested it”. It bears noting that Section 15-6 of the Rye Code of Ethics prohibits a public officer or employee from disclosing confidential information acquired by him/her in the course of his/her official duties.

66. Finally, pursuant to Section 15-13(B) of the City Code governing the Board of Ethics, an advisory opinion of the Board of Ethics “shall have the approval of the Corporation Counsel with respect to their validity.” Here, the Corporation Counsel was recused and did not pass on the legal validity of the Opinion at issue creating an irreputable infirmity to the Opinion in addition to its irrational findings.

The Petitioners Seek to Resolve the Matter Without Court Intervention

67. The disjointed Opinion issued by the Board created significant issues relating to the functioning of the City Council and was a distraction from the substance of the ongoing public dialogue concerning clearcutting and tree-related matters in the City.

68. In order to evaluate the legal soundness of the Opinion, the Petitioners sought to have the matter reviewed by outside counsel.

69. Counsel provided the Petitioners with a robust analysis that included communications with all four of the City Council Members that were subjected to the Opinion, City Council Minutes, media reports, the Rye City Code, companion statutes at the State level, and other relevant information.

70. In its *Analysis of City of Rye Ethics Board Opinion* dated May 15, 2023 (“Analysis”) counsel produced a 12-page analytical examination of the facts, applicable law and concluded that “[t]he BOE conclusion that Councilmembers participating in a properly noticed

special meeting of the Council in the future is “an appearance of a conflict or an impression of impropriety” is irrational, and an arbitrary and capricious act. To the extent the BOE sought to control future meetings of the City Council, its actions may have been ultra vires. For these reasons, the BOE should withdraw its fatally flawed Opinion and declare it a legal nullity” (see, Analysis attached as Exhibit “5”).

71. Accompanied by a letter also dated May 15, 2023 addressed to the Chair of the Board of Ethics, outside counsel provided the Analysis to the Chair, encouraged her to share the Analysis with her fellow Board members, and appealed to the Board to withdraw and void their February 13, 2023 opinion (see, Cover letter dated May 15, 2023 as **Exhibit “9”**).

72. By letter dated May 23, 2023, Mark Blanchard, Esq. (counsel to the Board of Ethics) responded to outside counsel that the Board held a meeting on May 22 and was in the process of reviewing the Analysis (see, Blanchard letter dated May 23, 2023 attached as **Exhibit “10”**).

73. By letter dated, June 6, 2023, Mr. Blanchard stated that “the Board will not be modifying, withdrawing or retracting the Advisory Opinion” (see, Board response attached as Exhibit “6”).

74. Despite the Petitioners best and good faith efforts, the Board refused to acknowledge the legal infirmities of their Opinion, the fact that they exceeded the grant of power provided by the City Council and the City Code, and admission of their irrational, arbitrary and capricious actions.

75. As a result, Petitioners had no choice in defending their reputations and legal responsibilities as elected City Council members by commencing this action and seeking the relief requested herein.

THE BOARD EXCEEDS ITS POWERS AND ISSUES A LEGALLY INFIRM OPINION

The BOE's Prospective Opinion Directive Is an Ultra Vires Act

76. In the law, the concept of *ultra vires* means “beyond the powers.” It often applied in circumstances where a governmental body exceeds the limitations put upon it by rule, statute or the constitution.

77. In this case, the Board has exceeded its limited confidential advisory role and effectively sought to prevent duly elected City Council members from fulfilling their oath and legal responsibilities.

78. The Board has also conducted a pseudo-investigation rather than provide advice in this situation, thus going well beyond its limitations since the Board has no legislative grant to conduct such investigations.

79. Moreover, in going so far as to conclude that a violation of the Code of Ethics would depend on whether a Councilmember voted “yes” or “no”, the BOE has gone well beyond its legal authority, interfered with the City’s basic governmental process, and did so without any authority from the City’s Charter or Code.

Infirmities of the Board of Ethics Opinion Process

80. Pursuant to General Municipal Law (GML) §808, the City of Rye Board of Ethics consists of five (5) individuals including the Corporation Counsel, City Manager, and three members of the public to be appointed by the Mayor with the approval of the Council (City Code §15-13(A)).

81. The Board does not have the power to conduct investigations, and is limited to rendering “advisory opinions on specific situations ...” (Id).

82. Importantly for purposes of this matter, the Code requires that “advisory opinions ... shall have the approval of the Corporation Counsel with respect to their validity” (Code §15-13(B)) (emphasis added).

83. The Board may “publish” its advisory opinions “with such deletions as may be necessary to prevent disclosure of the identity of the officer or employee involved” (Id).

84. In the instant matter, after providing certain suggestions concerning immediate attention to the Turf Avenue tree grove and the imminent clear cutting, Ms. Wilson recused as a member of the BOE and its consideration of the matter leading to the infirm Opinion.

85. The City Manager also recused from participation as a BOE member, leaving only three (3) members of the BOE.

86. As referenced in the Opinion, with the recusal of the Corporation Counsel (Ms. Wilson), “[i]n Ms. Wilson’s stead, Mark W. Blanchard, Esq. sat in as *limited special counsel to the Board*” (BOE Opn., Exhibit “3” at p. 1)(emphasis added).

87. The distinction between a “member” of the BOE under the Code and a “legal advisor” is not insignificant here, particularly because only the Corporation Counsel may vote and approve the validity of an advisory opinion under the City Code.

88. There is no evidence that Mr. Blanchard was acting as the Corporation Counsel, in fact, the Opinion itself states that he was not. Because the Opinion does not have the approval of the Corporation Counsel, and there is no mechanism in the Code for an alternative pathway to validity, the Opinion here does not comport with the City Code of Ethics.

89. As a result, the Board acted in an arbitrary and capricious manner in issuing the Opinion and their exercise of power was an abuse.

The Precedent Relied on by the Corporation Counsel and Board Citing a Conflict is Wrong

90. The Corporation Counsel cited the case of *Matter of Tuxedo Conservation and Taxpayers Ass'n v. Town Board of Town of Tuxedo*, 96 Misc. 2d 1 (Orange Co. Sup. Ct. 1978) *aff'd* 69 A.D.2d 320 for the proposition that a conflict may exist in the instant matter. The cases relied upon to support a conflict in this case bear no resemblance to the facts herein and is not persuasive on the question of a conflict of interest in Rye (see, Analysis provided to Board attached as “Exhibit “5” and Memorandum of Law accompanying this Petition).

91. The Corporation Counsel also pointed to *NY Attorney General Informal Opinion 97-5* for meaningful insight into the existence of a conflict of interest. That opinion is an “informal opinion” (rather than a formal opinion) defined in the opinion itself as “the unofficial expression of the views of this office.” (see, Analysis provided to Board as Exhibit “5” and Memorandum of Law accompanying this Petition). Neither case addresses the facts here, and certainly does not stand for the proposition that the recusal of one member of a body warrants an entirely new procedure to decide an issue.

92. To the extent that the Corporation Counsel’s (Ms. Wilson) law partner, Mr. Blanchard as legal advisor to the Board relied on these cases as well to guide the Board, they remain equally irrelevant and unpersuasive, and do not support the notion that a conflict of interest exists surrounding the February 15 special meeting.

The Board’s Reliance on Section 15-10 (B) of the City’s Ethics Code

93. In its Opinion, the Board cites §15-10(B) as the sole basis for the purported “appearance of a conflict or an impression of impropriety ...”. Section 15-10(B) states as follows:

An officer or employee of the City should not by his/her conduct give reasonable basis for the impression that any person can unduly influence him/her or improperly enjoy his/her favor in the performance of his/her official duties or

that he/she is affected by the kinship, rank, position or influence of any party or person.

94. There was no local municipal precedent cited by the Board to consider the prior application of Section 15-10(B). In researching this issue, none was found. However, many municipal codes of ethics in the State of New York were created using Public Officers Law § 74 as a template. As such, it is useful to examine how a very similar passage of the State Code of Ethics has been applied.

95. Section 15-10(B) of the City Code of Ethics closely resembles Public Officers Law §74(3)(f), which states,

An officer or employee of a state agency, member of the legislature or legislative employee should not by his or her conduct give reasonable basis for the impression that any person can improperly influence him or her or unduly enjoy his or her favor in the performance of his or her official duties, or that he or she is affected by the kinship, rank, position or influence of any party or person.

96. The ethics principle involved is designed to police undue influence over public officers by outside influences. Examples are the prohibitions against nepotism and favoritism.

97. The sister agency to the Rye Board of Ethics, the New York State Joint Commission on Public Ethics (recently renamed the Commission on Ethics and Lobbying in Government) has routinely identified the rationale and principles underlying the language relied on by the Board.

98. Importantly, the Rye Code of Ethics specifically states that “[u]nless otherwise defined herein, all terms shall have the same meaning as set forth in the New York Public Officers Law” (Code of Ethics §15-2(A)).

99. A series of state level enforcement actions involving JCOPE illustrate the underlying principles at issue, and provide insight into the prohibition against conduct that could give “reasonable basis for the impression that any person can unduly influence him/her or

improperly enjoy his/her favor in the performance of his/her official duties or that he/she is affected by the kinship, rank, position or influence of any party or person” (see and compare, Code of Ethics § 15-10(B); POL §74(3)(f)).

100. The cases are *Matter of Ferriero*, *Matter of Castellaneta*, *Matter of Guerra*, and *Matter of Paterson* (see, Analysis provided to Board as Exhibit “5” and Memorandum of Law accompanying this Petition).

101. The rule in the Code prohibiting “undue influence” is not applicable to inherently governmental processes that comport with the governing laws and ordinances. Imagine the chaos that would ensue if political office holders were subject to an ethics breach for siding with other political office holders on matters of public concern.

102. Simply put, that is what occurred here. Like-minded duly elected political office holders, after receiving communications from constituents, believed that the long-discussed need to address the clear cutting of trees justified a special meeting and entertainment of a clear-cutting moratorium. This is not the stuff of an ethical breach, or the appearance of one.

103. In concluding § 15-10(B) of the Code of Ethics was violated, the BOE held that “the extraordinary rush to call the meeting gives a ‘reasonable basis for the impression’ that the Councilmembers who attended and voted at the February 6 meeting were influenced to take action because of the proximity to the Mayor’s property and to protect the Mayor’s property and therefore to provide an elected official with a personal benefit ...” (BOE Opn., Exhibit “3” at p. 3).

104. As discussed herein, the lack of facts to support this conclusion, the intervening action of the clear cutting, and the expectations that Councilmembers deal with issues of the community in a timely manner are absent from the Opinion.

105. Instead, in part because the four Councilmembers who attended the February 6 special meeting were not interviewed contributing to incomplete facts, the Opinion issued by the Board is left as a result in search of facts and is unable to withstand even minimal legal scrutiny.

106. Moreover, this examination against the backdrop of State precedent demonstrates that the Board's reliance on § 15-10(B) was misinterpreted and misapplied and is thus irrational.

The "Appearance" of a Conflict and the "Impression" of Impropriety

107. A common mistake or misapprehension in ethics principles, is an overindulgence with the phrase "appearance of impropriety." More specifically, the emphasis on the word "appearance" and the disregard of the equally important word "impropriety."

108. A common suggestion is that if something does not appear to be proper, then it is improper or violates some condition or rule.

109. The clear problem with loosely applying this phrase is that it leads one to determine whether something (or someone) is "ethical" or "unethical" based on the perspective of the viewer rather than on any underlying principle (see, accompanying Memorandum of Law).

110. In the end, when this phrase becomes unhinged from the principle at issue, it is rendered meaningless. And so it was in this case.

111. As evidenced by the Background section above, and to an extent referenced in the Opinion, the conflict of interest question and remedial measure began with straightforward facts. An imminently scheduled clear cutting of trees on property not owned by the Mayor, but on an adjacent lot, and the effect of that situation on a governmental process to consider a tree moratorium.

112. However, that potential conflict was addressed by the Mayor's recusal from participating in the special meeting concerning the tree moratorium, until such time as the Turf Avenue clear cutting occurred and the conflict for the Mayor was eliminated.

113. Mr. Cohn's immediate recusal from the tree moratorium process clearly ameliorated the potential for a conflict. His reengagement in the process after the conflict was removed was proper.

114. The extended application of the Board's irrational Opinion to Councilmembers Johnson, Souza, and Stacks only exacerbated the Board's irrational and arbitrary and capricious actions.

115. The City Council members were all duly elected by their constituents and the decision by a majority of the Council members to convene a special meeting was not in violation of the City Charter or City Code.

116. In fact, it was suggested as an option early on by the Corporation Counsel.

117. The analysis and conclusion of the BOE that any of the above, is an "appearance of a conflict" is severely misguided and contributes to the irrationality of the Board and to the Opinion.

The Embrace of Situational Ethics by the BOE

118. The Board in its "Finding and Advisory Opinion" section, includes an unusual embrace of what is often referred to as "situational ethics", meaning that the ethics principles are flexible depending on their application at any given time.

119. The BOE suggests in its Opinion that depending on how the particular Councilmember voted, that would dictate whether the Code of Ethics was violated. The Opinion, in part, states as follows at page 3:

“[w]e do believe that under these circumstances, an elected official could vote ‘no’ or ‘abstain’ on any actions relating to the February 15 public hearing without violating the City’s Code of Ethics. Accompanying the ‘no’ vote or abstention, the elected official could explain that it is not the substantive issue regarding trees that given rise to concern, but rather, the extraordinary, expedited process that led to calling for this emergency meeting and setting of the public hearing that are the basis for the declination to vote in favor of an otherwise worthy legislative action” (BOE Opn., Exhibit “3” at p. 3).

120. The obvious corollary to the Board solution to avoid a violation of the Code of Ethics, would be that a “yes” or affirmative vote at the February 15 meeting would violate the same Code.

121. It is axiomatic that ethics principles are not outcome dependent, as such the Board’s reasoning is irrational, arbitrary and capricious.

The Release of the BOE Confidential Opinion and the City’s Code of Ethics

122. An examination of these circumstances does find a likely breach of the City’s Code of Ethics, though not the one discussed in the Board’s Opinion.

123. Section 15-6(B) of the Code of Ethics states, that “[n]o officer or employee of the City shall disclose *confidential information acquired by him/her in the course of his/her official duties* nor use such information to further his/her personal interests or the personal interests of others” (emphasis added).

124. On this issue, the facts are not in dispute.

125. The Board issued what it described on its first page as a “**CONFIDENTIAL ADVISORY OPINION**” (emphasis in original). The fact that the Opinion was intended to be confidential is without dispute. Moreover, the City Code mandates that, “[t]he Board [of Ethics] shall publish advisory opinions with such deletions as may be necessary to prevent disclosure of the identity of the officer or employee involved” (Code of Ethics §15-13(B)).

126. Confidentiality provisions governing treatment of ethics opinions are ubiquitous in the field of government ethics. The reason for the confidential treatment of such opinions is to instill a sense of confidence in those seeking opinions, that their intended actions will not become the subject of outside criticism.

127. Without such safeguards, those governed by government ethics panels that serve the important function of guiding public officials would not be sought out for important confidential advice.

128. As previously noted, the Board's Opinion was the topic of several media stories within 48 hours of its issuance. The circle of individuals who were in possession of a copy of the Opinion was small.

129. The Opinion was not publicly released by the Petitioners.

130. In his June 6, 2023 letter, Mr. Blanchard states that “[i]n February, 2023, the Board ... issued its Advisory Opinion to the requesting Councilmembers [William Henderson, Josh Nathan and Lori Fontanes]; the Board did not expand the distribution of the Advisory Opinion in any other manner.” (see, Exhibit “6” at p. 1).

131. The release of the confidential Opinion was discussed by a certain Councilmember after the February 15 meeting of the Council. Had the Board of Ethics properly and appropriately redacted or otherwise made anonymous the individuals and issues referenced in the Advisory Opinion – as the Code requires – the release of the Advisory Opinion would have had little to no political value or interest from the media.

132. In this regard, given the circumstances surrounding the Advisory Opinion and its distribution to various members of the City Council, the Board of Ethics should have put into the

Advisory Opinion cautionary language to the effect that distributing the opinion would in itself be a violation of the Code of Ethics. They did not.

133. The public disclosure of a confidential Opinion further serves to weaponize what should be a sacrosanct confidential advisory ethics board.

134. The failure to uphold the concept of confidentiality in government ethics opinions cheapens the important function of an ethics panel.

135. The critical nature of the concept of confidentiality is no less relevant to an ethics panel than it is to a grand jury or in the context of the attorney-client privilege (see, Criminal Procedure Law §190.25(4)(a); Penal Law §215.70; CPLR 4503(a)(1)).

136. In 1985, Raymond Donovan, the United States Secretary of Labor was charged with grand larceny and fraud charges in the State of New York. Two years later, in 1987, he was acquitted of all charges. After the verdict, Secretary Donovan uttered the now famous quote, “Which office do I go to, to get my reputation back?” Secretary Donovan died in 2021. He never found the office.

137. Petitioners find themselves in a similar situation. A rogue local Board of Ethics has acted well beyond their legislative grant of authority and made irrational findings that participation in a duly notice meeting of the City Council would be a breach of the City’s Code of Ethics.

138. Moreover, the poor handling of the matter allowed the Board’s infirm Opinion to be portrayed by the local media as a breach of ethical duties, when it clearly was not. Unlike the Secretary Donovan situation from 1987, today with the advent of social media and internet search engines, the damage to the Petitioners is arguably worse and permanent. Their only defense to the unsightly actions of the Board was to bring this matter before a Court of competent jurisdiction for some semblance of rectifying the situation.

139. Accordingly, Petitioners contend that the Board of Ethics acted in excess of its jurisdiction, issued an arbitrary, capricious and irrational opinion, and improperly attempted to interfere with and re-establish a legislative process not set forth in the City Code, all in violation of law. As a result, Petitioners request that the Advisory Opinion be vacated and declared legally infirm, a writ of prohibition foreclosing the Board of Ethics from enforcing the Advisory Opinion or issuing another in the future, and a declaratory judgment be issued affirming the propriety of the process and absence of a conflict of interest.

FIRST CAUSE OF ACTION
(CPLR § 7803(2))

140. Petitioners repeat and re-allege each of the foregoing paragraphs in the Verified Petition as if fully set forth herein.

141. Because the Board of Ethics does not have the authority to receive or investigate complaints, or to publish opinions without redaction, the Board of Ethics has and is proceeding in excess of its jurisdiction.

142. Petitioners have no adequate or other remedy at law.

143. Accordingly, Petitioners request an Order of this Court finding the Board of Ethics acted without or in excess of its jurisdiction, and vacating the Advisory Opinion and declaring that the Advisory Opinion is void and the Board of Ethics was without authority to issue it.

SECOND CAUSE OF ACTION
(CPLR § 7803(3))

144. Petitioners repeat the re-allege each of the foregoing paragraphs in the Verified Petition as if fully set forth herein.

145. The Advisory Opinion and the determinations therein were made in violation of lawful procedure, were affected by an error of law, and were arbitrary and capricious.

146. Petitioners have no adequate or other remedy at law.

147. Accordingly, Petitioners request an Order of this Court vacating the Advisory Opinion and declaring that the Advisory Opinion is void, the Board of Ethics was without authority to issue it, and the finding of a conflict of interest and violation of the Code of Ethics was arbitrary and capricious.

THIRD CAUSE OF ACTION
(Violation of Due Process)

148. Petitioners repeat and re-allege each of the foregoing paragraphs in the Verified Petition as if fully set forth herein.

149. The Board of Ethics' failure to provide notice, an opportunity to provide facts, and an opportunity to review a draft before the Advisory Opinion was finalized and published without redactions denied Petitioners due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 6, of the New York State Constitution.

150. The Board of Ethics' subsequent refusal to conduct a full investigation, receive facts, or reconsider its findings were in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 6, of the New York State Constitution.

151. The Board of Ethics' actions prejudiced Petitioners, both as citizens of the City of Rye and as members of the Council.

152. Petitioners have no adequate or other remedy at law.

153. Accordingly, Petitioners are entitled to an order preliminarily and permanently enjoining the Board of Ethics from enforcing the Advisory Opinion, and from conducting such improper and prejudicial investigations in the future.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that this Court enter an order and judgment as follows:

- (A) Enjoining the Board of Ethics from enforcing the Advisory Opinion;
- (B) Holding that the Board of Ethics acted in excess of its jurisdiction and striking the Advisory Opinion;
- (C) Declaring that the Advisory Opinion was arbitrary, capricious, irrational, and misapplied the law, and instructing the Board of Ethics as to its mandate;
- (D) Awarding Petitioners reasonable attorney fees and cost associated with this litigation, and
- (D) Awarding Petitioners such other and further relief as this Court deems just, proper, and equitable.

Dated: June 13, 2023
Albany, New York

Respectfully submitted,

LIPPES MATHIAS LLP

/s/ Karl J. Sleight.
Karl J. Sleight, Esq.
Caitlin E. O’Neil, Esq.
54 State Street, Suite 1001
Albany, NY 12207
(518) 462-0110 ext. 1460
ksleight@lippes.com
coneil@lippes.com

Attorneys for Petitioners

VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF SARATOGA)

Karl J. Sleight, being duly sworn, deposes and says:

1. I am attorney admitted to practice before the Courts of the State of New York and am the attorney for the Petitioners herein.
2. I have the read the foregoing Verified Petition and the statements therein are true to my own knowledge, except as to statements alleged upon information and belief, and, as to those statements, I believe them to be true.
3. This Verification is made by your deponent because the Petitioners do not reside in or maintain an office in the Counties of Albany or Saratoga in which your deponent maintains his law offices.



Karl J. Sleight

Sworn to before me this 13th
day of June, 2023.



Notary Public

DIANE D DOIG
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01DO6293207
Qualified in SARATOGA County
My Commission Expires 12-2-2025

EXHIBIT 1

City of Rye – Code of Ethics (as of June 12, 2023)

Chapter 15

Ethics, Code of

[HISTORY: Adopted by the Council of the City of Rye 2-16-1966 by L.L. No. 1-1966. Amendments noted where applicable.]

§ 15-1 Declaration of policy.

The proper operation of the City government requires that its officers and employees be independent, impartial and responsible to the people; that government decisions and policy be made in the proper channels of the governmental structure; that public office not be used for personal gain; that public officers and employees observe in their official acts the highest standards of morality and discharge faithfully the duties of their office regardless of personal consideration; and that the public have confidence in the integrity of its government and the officers and employees thereof. In recognition of these goals, there is hereby established a Code of Ethics for all officers of the City of Rye, as defined in its Charter, and for all employees of such City, hereinafter referred to as the "City." In the event of any conflict between the provisions of this/her code and the provisions of Article 18 of the General Municipal Law, the latter shall control.

§ 15-2 Conflicts of interest.

[Amended 9-11-2013 by L.L. No. 2-2013]

A. Unless otherwise defined herein, all terms shall have the same meanings as set forth in the New York Public Officers Law. No elected official, officer or employee of the City shall have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature which is in conflict with or might reasonably tend to conflict with the proper discharge of his/her duties in the public interest.

B. No member of the Rye Golf Club Commission or Boat Basin Commission shall be permitted to engage in any business or transaction with the City for pay or for anything of value.

C. No elected official, officer, employee, department head or assistant department head (or any spouse/domestic partner of any person holding one of the aforementioned positions) shall be an employee, subcontractor, agent, servant or representative, or hold any other position with a vendor of the City.

§ 15-3 Representation of private interests before City agencies and courts.

[Amended 5-16-1984 by L.L. No. 7-1984; 5-16-1984 by L.L. No. 8-1984]

No elected official or employee of the City shall represent private interests before any department, office or agency of the City nor represent private interests in any action or proceeding against the interest of the City or in any litigation to which the City is a party. The preceding sentence shall not preclude any Councilman from appearing in the performance of public or civic obligations. In keeping with Article 18

of the General Municipal Law, a nonpaid voluntary member of the City's various boards, commissions and agencies may not appear for an applicant before the board, commission or agency of which he or she is a member. Prohibited appearances shall include any connection with another's application, including work prepared by, but not identified as work of, such official. No such appearance can be made by such member by surrogate or substitute. However, voluntary, unpaid members of the City's various boards, commissions and agencies may appear before a City board, commission or agency other than his or her own, provided that he or she fully discloses his or her interest in such application, and further provided that his or her compensation for such appearance or application participation is not dependent or contingent upon any action by such agency with respect to such matter.

§ 15-4 Disclosure of interest.

[Amended 9-11-2013 by L.L. No. 2-2013]

A member of the Council or any officer, employee, department head, or board or commission member who has a direct or indirect financial interest in any matter before the Council who participates in the discussion before or makes a recommendation to or gives an opinion to the Council on that matter shall publicly disclose on the official record of the Council the nature and extent of such interest and recuse himself/herself from the discussion and from taking any action on the matter.

§ 15-5 Solicitation or acceptance of gifts and favors.

[Amended 9-16-1970 by L.L. No. 2-1970; 9-11-2013 by L.L. No. 2-2013]

No officer or employee shall, directly or indirectly, solicit any gift, or accept or receive any gift having a value of \$50 or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him/her or could reasonably be expected to influence him/her in the performance of his/her official duties or was intended as a reward for any official action on his/her part, or grant in the discharge of his/her duties any improper favor, service or thing of value.

§ 15-6 Disclosure of confidential information.

A. No officer or employee of the City shall accept employment or engage in any business or professional activity which will require him/her to disclose confidential information which he/she has gained by reason of his/her official position or authority.

B. No officer or employee of the City shall disclose confidential information acquired by him/her in the course of his/her official duties nor use such information to further his/her personal interests or the personal interests of others.

§ 15-7 Interests in conflict with official duties.

An officer or employee of the City shall abstain from making personal investments in enterprises which he/she has reason to believe may be directly involved in decisions to be made by him/her or which will otherwise create conflict between his/her public duty and his/her private interest, and shall refrain from passing upon any questions in which he/she or any member of his/her immediate family has an interest which might reasonably be deemed to create such a conflict.

§ 15-8 Incompatible employment.

No officer or employee of the City shall accept other employment which will impair his/her independence of judgment in the exercise of his/her official duties.

§ 15-9 Future employment.

No officer or employee of the City shall solicit, negotiate for or promise to accept employment by any person, firm or corporation with which he/she or his/her department, office or agency is engaged on behalf of the City in the transaction of business which is or may be affected by his/her official action.

§ 15-10 Obligation to citizens.

A. No officer or employee of the City shall use or attempt to use his/her official position to secure unwarranted privileges or exemptions for himself/herself or others to grant any special consideration, treatment or advantage to any citizens beyond that which is available to every other citizen.

B. An officer or employee of the City should not by his/her conduct give reasonable basis for the impression that any person can unduly influence him/her or improperly enjoy his/her favor in the performance of his/her official duties or that he/she is affected by the kinship, rank, position or influence of any party or person.

§ 15-11 Use of City employees or public property.

A. No officer or employee of the City shall direct or cause any officer or employee of the City to do or perform any service or work outside of public work or employment or accept any such service or work, nor shall any officer or employee of the City offer to do or perform any such service or work for such officer or employee. This section shall not preclude any officer or employee from voluntarily performing any such service or work outside of the hours during which he/she is assigned to perform duties for the City.

B. No officer or employee of the City shall request or permit the use of City-owned vehicles, equipment, materials or property for personal convenience or profit, except when such services are available to the public generally or are provided as City policy for the use of such officer or employee in the conduct of official business.

§ 15-12 Prohibited political activities.

No person who holds any compensated appointive City position shall solicit or receive any contribution for any political party or any candidate for public office or take any part in the management, affairs or political campaign of any political party or any such candidate, nor shall any such person make any contribution for any candidate or political party for public office within the City, but he/she may exercise his/her right as a citizen to express his/her opinion privately and to cast his/her vote.

§ 15-13 Board of Ethics.

A. Pursuant to Section 808 of the General Municipal Law, there is hereby created and established a Board of Ethics to consist of the City Manager, Corporation Counsel and three public members to be appointed by the Mayor with the approval of the Council, who shall not hold any other City office and shall serve without compensation for a term of three years. The Board shall elect a Chairman from among the public members.

B. The Board shall render advisory opinions on specific situations to officers and employees of the City with respect to Article 18 of the General Municipal Law and any Code of Ethics adopted pursuant thereto. Such advisory opinions shall be rendered pursuant to the written request of any such officer or employee under such rules and regulations as the Board may deem advisable and shall have the approval of the Corporation Counsel with respect to their validity. The Board shall publish its advisory opinions with such deletions as may be necessary to prevent disclosure of the identity of the officer or employee involved.

§ 15-14 Distribution of Code of Ethics.

[Amended 9-16-1970 by L.L. No. 2-1970]

The City Manager shall cause a copy of the Code of Ethics of the City of Rye to be distributed to every officer and employee of the City. Each officer and employee elected or appointed after the effective date of this chapter shall be furnished a copy of such code before entering upon the duties of his/her office or employment.

§ 15-15 Penalties.

[Amended 9-16-1970 by L.L. No. 2-1970]

In addition to any penalty contained in any other provision of law, any person who shall knowingly or intentionally violate any of the provisions of this code may be fined, suspended or removed from office or employment in the manner provided by law.

§ 15-16 Waiver procedure.

[Added 9-11-2013 by L.L. No. 2-2013]

Any officer, employee, department head, or board or commission member may apply for a waiver of the prohibitions set forth in this chapter by following the procedures outlined in Subsections A and B below.

A. An employee or department head shall apply for a waiver to the City Manager. Any applications shall be in writing. The City Manager has the authority to condition any waiver on reasonable terms. The City Manager shall seek an advisory opinion from the Board of Ethics if he/she needs clarification on an issue. All waivers and advisory opinions shall also be provided to the City Council as soon as such waiver application is received.

B. An elected or appointed official shall apply for a waiver to the Board of Ethics. All applications shall be in writing. The Board of Ethics has the authority to condition any waiver on reasonable terms.

C. The City Council shall review all waivers on a monthly basis.

EXHIBIT 2

[REDACTED]

[REDACTED]

[External email >](#)

To the members of Rye City Council,

Since my family moved to Rye 21 years ago, I have witnessed the removal of trees in undeveloped lots so that new large houses could be built. I just learned that a contractor purchased a lot behind my house that has been the habitat for birds and other endangered animals for many years. I support the passing of the new tree law as currently being discussed. I believe it is urgent to pass a moratorium since clear-cutting may increase flooding when storms come through.

Sincerely,

[REDACTED]

Hi Mr. Stacks,

Thank you for your service to the city of Rye. I live at [REDACTED] Avenue, and I just recently learned that the wooded lot that is directly behind my property has been sold along with the home that was sold on Turf Lane. This wooded lot was previously owned by the Kornfelds, who sadly have both passed. They owned this lot because they didn't ever want it to be developed. However, I am now finding out that a developer will be clear cutting the lot to put up a new home very soon. This is unacceptable for so many reasons. First and foremost, every square inch of this town should not be developed. Period. As it stands now, this town is already extremely over developed. With little to no wooded areas in any neighborhoods. We need these wooded areas to mitigate watershed, to allow wildlife to have a place to go, and to have trees to help our environment. Currently a road does not even exist to get to this lot, so that would mean putting in a paved road where grass currently exists, and then putting in a bunch of concrete and a home in a fully cleared lot. Where will all the water that would typically be absorbed by the grass and the wooded lot go?? It's going into the properties of all the surrounding homes. I urge you to take action and immediately put a moratorium on tree cutting. I also urge you to not allow this wooded lot to be developed.

I greatly appreciate your attention to this pressing matter.

[REDACTED]

Hi

I am writing to you to express my belief that it is essential to pass the moratorium regarding cutting down trees in Rye, especially in view of managing the flooding risk and preserving endangered animals. This is an urgent issue for me because a developer has purchased the lot adjacent to my property and will soon be in the process of clearing cut the area.

[REDACTED]

To the Rye City Council Members,

My husband and I were surprised and thrilled to receive this email below and to see that there finally is some action taking place to address the serious problem we have in Rye with the intentional destruction of so many mature trees. We realize that this is not yet the hearing, and thus chose to send this note in advance to reinforce the urgent need for this moratorium and then a timely effort to make thoughtful changes to the laws to balance the protection of the trees and home owners' rights.

I actually wrote and or spoke with many of you months ago on this exact topic. We have been actively advocating for the effective protection of six 100+ year old trees on my next door neighbor's property whose subdivision application 'was' under review by the Planning Commission. We were actually torn over what to do. While we believe the subdivision will ultimately lead to the destruction of the historic home, we knew that ironically the subdivision application was what was protecting the trees. We knew that if the homeowner instead sells the property, that there is nothing stopping the next owner from removing all 6 of the trees. And now we've been told that a year after the subdivision the current owner could also choose to cut down the trees.

Something needs to be done as soon as possible to address the situation. Please go forward in voting for this moratorium to put a pause on the destruction of these trees so that you can hear from all stakeholders and make much needed updates to the laws and tree regulations. Of note, if there is any concern by any council members that a prohibition of 'clear cutting' is too broad, then why not pull from a specificity that is already in the Rye subdivision existing regulations, whereby you distinguish by size and prevent cutting down trees of 8" caliper or greater in this 3 month moratorium.

Sincerely,

[REDACTED]

Reply

Reply all

Forward

--

Benjamin Stacks

[REDACTED]

This email has been scanned for spam and viruses by Proofpoint Essentials. Click [here](#) to report this email as spam.

[Redacted]

[Redacted]

External email >

[Redacted]

Begin forwarded message:

> From: "Johnson, Carolina J." <cjohnson@ryeny.gov>
> Date: June 11, 2023 at 2:48:37 PM EDT
> To: [Redacted]
> Subject: Fw: A request by the Owl of Lynden St. for the Rye City Council
>
>
>

> From: [Redacted]

> Sent: Sunday, February 5, 2023 8:29 PM
> To: Cohn, Josh <jcohn@ryeny.gov>; Fontanes, Lori M. <lfontanes@ryeny.gov>; Henderson, William T. <whenderson@ryeny.gov>; Johnson, Carolina J. <cjohnson@ryeny.gov>; Nathan, Josh C. <jnathan@ryeny.gov>; Stacks, Benjamin M. <bstacks@ryeny.gov>; Souza, Julie A. <jsouza@ryeny.gov>
> Subject: A request by the Owl of Lynden St. for the Rye City Council
>
>

Dear Rye City Council Members,
please adopt the 3-month moratorium on the 'clear-cutting' of trees in Rye at the special meeting being held on February 6, 2023. Mature trees, such as the one I am pictured in below, - where I snooze in the early mornings to rest up for my night-shift, - are vital in preserving the vibrancy of my critter community. The felling of these great trees by developers, who are currently transforming the city of Rye lot by lot, must be paused and eventually stopped for the sake of the little animals, such as I. Graciously yours, the Owl of Lynden St. (translated by [REDACTED])



[REDACTED]

External email >

Sent from Carolina's iPhone

Begin forwarded message:

From: "Johnson, Carolina J." <cjohnson@ryeny.gov>
Date: June 11, 2023 at 2:53:22 PM EDT
To: [REDACTED]
Subject: Fw: In support of the new tree law

From: 高 [REDACTED]
Sent: Friday, February 3, 2023 7:21 PM
To: Stacks, Benjamin M. <bstacks@ryeny.gov>; Johnson, Carolina J. <cjohnson@ryeny.gov>; Fontanes, Lori M. <lfontanes@ryeny.gov>; Cohn, Josh <jcohn@ryeny.gov>; Nathan, Josh C. <jnathan@ryeny.gov>; Henderson, William T. <whenderson@ryeny.gov>; Souza, Julie A. <jsouza@ryeny.gov>
Subject: In support of the new tree law

Hi

I am writing to you to express my belief that it is essential to pass the moratorium regarding cutting down trees in Rye, especially in view of managing the flooding risk and preserving endangered animals. This is an urgent issue for me because a developer has purchased the lot adjacent to my property and will soon be in the process of clearing cut the area.

[REDACTED]

This email has been scanned for spam and viruses by Proofpoint Essentials. Click [here](#) to report this email as spam.

[REDACTED]

[REDACTED]

External email >

[REDACTED]

Begin forwarded message:

From: "Johnson, Carolina J." <cjohnson@ryeny.gov>
Date: June 11, 2023 at 2:47:48 PM EDT
To: [REDACTED]
Subject: Fw: Moratorium on tree cutting

From: [REDACTED]
Sent: Friday, February 3, 2023 7:24 PM
To: Johnson, Carolina J. <cjohnson@ryeny.gov>
Subject: Moratorium on tree cutting

Hi Carolina,

Thank you for your service to the city of Rye. I live at [REDACTED] Avenue, and I just recently learned that the wooded lot that is directly behind my property has been sold along with the home that was sold on Turf Lane. This wooded lot was previously owned by the Kornfelds, who sadly have both passed. They owned this lot because they didn't ever want it to be developed. However, I am now finding out that a developer will be clear cutting the lot to put up a new home very soon. This is unacceptable for so many reasons. First and foremost, every square inch of this town should not be developed. Period. As it stands now, this town is already extremely over developed. With little to no wooded areas in any neighborhoods. We need these wooded areas to mitigate watershed, to allow wildlife to have a place to go, and to have trees to help our environment. Currently a road does not even exist to get to this lot, so that would mean putting in a paved road where grass currently exists, and then putting in a bunch of concrete and a home in a fully cleared lot. Where will all the water that would typically be absorbed by the grass and the wooded lot go?? It's going into the properties of all the surrounding homes. I urge you to take action and immediately put a moratorium on tree cutting. I also urge you to not allow this wooded lot to be developed.

I greatly appreciate your attention to this pressing matter.

[REDACTED]

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[REDACTED]

[REDACTED]

External email >

[REDACTED]

Begin forwarded message:

From: "Johnson, Carolina J." <cjohnson@ryeny.gov>
Date: June 11, 2023 at 2:48:07 PM EDT
To: [REDACTED]
Subject: Fw: Moratorium on tree removal

From: [REDACTED]
Sent: Friday, February 3, 2023 7:25 PM
To: Stacks, Benjamin M. <bstacks@ryeny.gov>; Johnson, Carolina J. <cjohnson@ryeny.gov>; Fontanes, Lori M. <lfontanes@ryeny.gov>; Cohn, Josh <jcohn@ryeny.gov>; Nathan, Josh C. <jnathan@ryeny.gov>; Henderson, William T. <whenderson@ryeny.gov>; Souza, Julie A. <jsouza@ryeny.gov>
Subject: Moratorium on tree removal

To the members of Rye City Council,

Since my family moved to Rye 21 years ago, I have witnessed the removal of trees in undeveloped lots so that new large houses could be built. I just learned that a contractor purchased a lot behind my house that has been the habitat for birds and other endangered animals for many years. I support the passing of the new tree law as currently being discussed. I believe it is urgent to pass a moratorium since clear-cutting may increase flooding when storms come through.

Sincerely,
[REDACTED]

[REDACTED]

[REDACTED]

External email >

[REDACTED]

Begin forwarded message:

From: "Johnson, Carolina J." <cjohnson@ryeny.gov>
Date: June 11, 2023 at 2:48:22 PM EDT
To: [REDACTED]
Subject: Fw: Special Meeting of the City Council

From: [REDACTED]
Sent: Sunday, February 5, 2023 7:15 PM
To: Cohn, Josh <jcjohn@ryeny.gov>; jsouza@ryeny.go <jsouza@ryeny.go>; Henderson, William T. <whenderson@ryeny.gov>; Nathan, Josh C. <jnathan@ryeny.gov>; Johnson, Carolina J. <cjohnson@ryeny.gov>; Stacks, Benjamin M. <bstacks@ryeny.gov>; lfontanes@rye.gov <lfontanes@rye.gov>
Cc: [REDACTED]
Subject: FW: Special Meeting of the City Council

To the Rye City Council Members,
My husband and I were surprised and thrilled to receive this email below and to see that there finally is some action taking place to address the serious problem we have in Rye with the intentional destruction of so many mature trees. We realize that this is not yet the hearing, and thus chose to send this note in advance to reinforce the urgent need for this moratorium and then a timely effort to make thoughtful changes to the laws to balance the protection of the trees and home owners' rights.

I actually wrote and or spoke with many of you months ago on this exact topic. We have been actively advocating for the effective protection of six 100+ year old trees on my next door neighbor's property whose subdivision application 'was' under review by the Planning Commission. We were actually torn over what to do. While we believe the subdivision will ultimately lead to the destruction of the historic home, we knew that ironically the subdivision application was what was protecting the trees. We knew that if the homeowner instead sells the property, that there is nothing stopping the next owner from removing all 6 of the trees. And now we've been told that a year after the subdivision the current owner could also choose to cut down the trees.

Something needs to be done as soon as possible to address the situation. Please go forward in voting for this moratorium to put a pause on the destruction of these trees so that you can hear from all

stakeholders and make much needed updates to the laws and tree regulations. Of note, if there is any concern by any council members that a prohibition of 'clear cutting' is too broad, then why not pull from a specificity that is already in the Rye subdivision existing regulations, whereby you distinguish by size and prevent cutting down trees of 8" caliper or greater in this 3 month moratorium.

Sincerely,

From: City of Rye <nyrye@public.govdelivery.com>

Sent: Friday, February 3, 2023 6:31 PM

To: [REDACTED]

Subject: Special Meeting of the City Council

Special Meeting of the City Council

- **Date:** 02/06/2023 6:30 PM
- **Location:** City Hall
[1051 Boston Post Rd](#)
[Rye, New York 10580](#)

There will be a Special Meeting of the City Council in City Hall this Monday, February 6, 2023 at 6:30 pm.

- **Agenda:** [CC Agenda 2023-02-06 SPECIAL MEETING](#)
[Click here for more information](#)

Update your subscriptions, modify your password or email address, or stop subscriptions at any time on your [Subscriber Preferences Page](#). You will need to use your email address to log in. If you have questions or problems with the subscription service, please visit [subscriberhelp.govdelivery.com](#).

This service is provided to you at no charge by [City of Rye, New York](#).

This email was sent to Lisaruderman@yahoo.com using GovDelivery Communications Cloud, on behalf of: City of Rye, New York · 1051 Boston Post Road · Rye, New York 10580

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[REDACTED]

[REDACTED]

External email >

First time sender >

Email from concerned resident prior to clear cutting

[REDACTED]

Begin forwarded message:

From: [REDACTED]
Date: February 3, 2023 at 3:16:24 PM EST
Subject: URGENT ATTENTION PLEASE - Turf Avenue - clear cutting of trees

City Council Members,

As a sustainability professional, I am deeply concerned that a developer has acquired the parcel of land owned by [REDACTED], with the intention of clearing the land (behind my residence: [REDACTED] Ave.) This land contains trees that have been there for many decades and serves as an ecosystem to endangered species. I request that a moratorium be instituted to stop this from happening. I have heard the clearing can happen as early as Monday, February 6th. Thank you for your attention.

Best,

[REDACTED]

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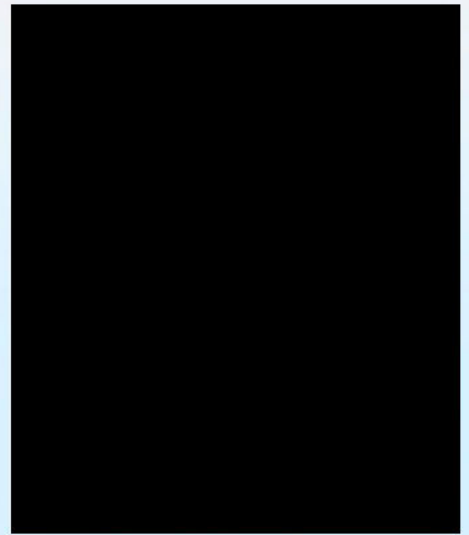
This email has been scanned for spam and viruses by Proofpoint Essentials. Click [here](#) to report this email as spam.

[Redacted]

[Redacted]

 External email >

2:30



Sat, Feb 4 at 10:46

They're clearing the land

So many trees down already



[REDACTED]

[REDACTED]

Begin forwarded message:

From: "Johnson, Carolina J." <cjohnson@ryeny.gov>
Date: June 11, 2023 at 2:53:22 PM EDT
To: [REDACTED] new tree law

From: 高 [REDACTED]
Sent: Friday, February 3, 2023 7:21 PM
To: Stacks, Benjamin M. <bstacks@ryeny.gov>; Johnson, Carolina J. <cjohnson@ryeny.gov>; Fontanes, Lori M. <lfontanes@ryeny.gov>; Cohn, Josh <jcohn@ryeny.gov>; Nathan, Josh C. <jnathan@ryeny.gov>; Henderson, William T. <whenderson@ryeny.gov>; Souza, Julie A. <jsouza@ryeny.gov>
Subject: In support of the new tree law

Hi

I am writing to you to express my belief that it is essential to pass the moratorium regarding cutting down trees in Rye, especially in view of managing the flooding risk and preserving endangered animals. This is an urgent issue for me because a developer has purchased the lot adjacent to my property and will soon be in the process of clearing cut the area.

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Sunday, June 11, 2023 2:22 PM
To: Johnson, Carolina J. <cjohnson@ryeny.gov>
Cc: [REDACTED]
Subject: Re: URGENT ATTENTION PLEASE - Turf Avenue - clear cutting of trees

We received a number of emails to this effect, in addition to calls.

[REDACTED]

Email from concerned resident prior to clear cutting

[REDACTED]

Begin forwarded message:

From: [REDACTED]
Date: February 3, 2023 at 3:16:24 PM EST
Subject: URGENT ATTENTION PLEASE - Turf Avenue - clear cutting of trees

City Council Members,

As a sustainability professional, I am deeply concerned that a developer has acquired the parcel of land owned by my late neighbors, Laura and Leo Kornfeld, with the intention of clearing the land (behind my residence: [REDACTED] Ave.) This land contains trees that have been there for many decades and serves as an ecosystem to endangered species. I request that a moratorium be instituted to stop this from happening. I have heard the clearing can happen as early as Monday, February 6th. Thank you for your attention.

Best,

[REDACTED]

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[REDACTED]

[REDACTED]

 External email >

We received a number of emails to this effect, in addition to calls.

[REDACTED]

Email from concerned resident prior to clear cutting

[REDACTED]

Begin forwarded message:

From: [REDACTED]
Date: February 3, 2023 at 3:16:24 PM EST
Subject: URGENT ATTENTION PLEASE - Turf Avenue - clear cutting of trees

City Council Members,

As a sustainability professional, I am deeply concerned that a developer has acquired the parcel of land owned by my late neighbors, Laura and Leo Kornfeld, with the intention of clearing the land (behind my residence: [REDACTED] Ave.) This land contains trees that have been there for many decades and serves as an ecosystem to endangered species. I request that a moratorium be instituted to stop this from happening. I have heard the clearing can happen as early as Monday, February 6th. Thank you for your attention.

[REDACTED]

**** This message is intended only for the designated recipient(s). It may contain confidential, privileged or proprietary information. If you are not a designated recipient,

you may not review, copy or distribute this message. If you receive this communication in error, please notify the sender by reply email and delete this message. Email transmission cannot be guaranteed to be secure or error-free. Therefore, [REDACTED] does not represent that this information is complete or accurate and it should not be relied upon as such. All information is subject to change without notice.

This email has been scanned for spam and viruses by Proofpoint Essentials. Click [here](#) to report this email as spam.

From: [REDACTED]
Sent: Sunday, June 11, 2023 2:22 PM
To: Johnson, Carolina J. <cjohnson@ryeny.gov>
Cc: [REDACTED]

Subject: Re: URGENT ATTENTION PLEASE - Turf Avenue - clear cutting of trees

[REDACTED]

[REDACTED]

<cjohnson@ryeny.gov> wrote:

Email from concerned resident prior to clear cutting

[REDACTED]

Begin forwarded message:

From: [REDACTED]
Date: February 3, 2023 at 3:16:24 PM EST
Subject: URGENT ATTENTION PLEASE - Turf Avenue -
clear cutting of trees

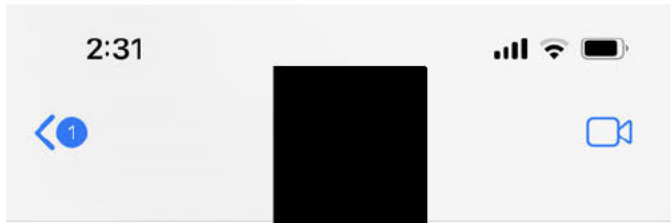
City Council Members,

As a sustainability professional, I am deeply concerned that a developer has acquired the parcel of land owned by my late neighbors, Laura and Leo Kornfeld, with the intention of clearing the land (behind my residence: [REDACTED] Ave.) This land contains trees that have been there for many decades and serves as an ecosystem to endangered species. I request that a moratorium be instituted to stop this from happening. I have heard the clearing can happen as early as Monday, February 6th. Thank you for your attention.

[REDACTED]

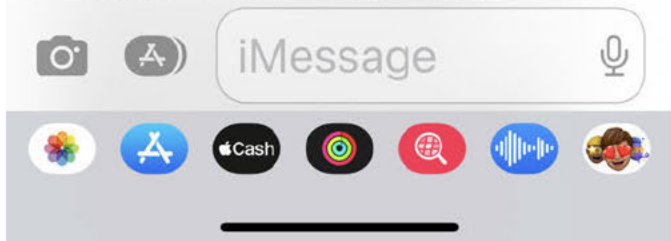
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Thu, Feb 2 at 7:49 PM

Hello my friend. How are you doing? I think you have talked to Josh about the issue in our neighborhood but we have over a dozen homeowners absolutely beside themselves as this developer prepares to clear cut a totally wild and interior to the block parcel. Is there a chance you could get a moratorium passed quickly until the revised





to clear cut a totally wild and interior to the block parcel. Is there a chance you could get a moratorium passed quickly until the revised tree law is passed? I think tomorrow may be too late as this builder is chomping at the bit.

We need to notice the public and I leave for Florida tomorrow first thing. The earliest we can meet is Monday

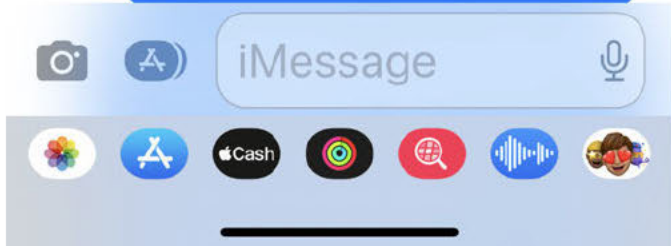


EXHIBIT 3



CITY OF RYE

CITY HALL • RYE, NEW YORK 10580

TELEPHONE (914) 967-5400

CONFIDENTIAL ADVISORY OPINION

To: Councilmembers William Henderson, Josh Nathan and Lori Fontanes

From: Board of Ethics Chairperson Beth Griffin Matthews and Members Edward B. Dunn and Edward J. Stein.

Date: February 13, 2023

Re: Joint Request for Confidential Advisory Opinion related to participation in council actions regarding the proposed tree moratorium

Dear Councilmembers Henderson, Nathan and Fontanes,

We refer to your requests on February 8, 2023 (from Councilmember Henderson) and February 10, 2023 (from Councilmember Nathan) for advisory opinions and Councilmember Fontanes' verbal inquiry on February 10 shortly before the Board meeting. Due to the similarities between the questions raised and in the efficiency of time, we have asked for your consent to provide a single opinion to all of you. All three of you have consented. The threshold question asked is "Whether it is appropriate for a councilmember to attend and vote on actions pertaining to the proposed tree moratorium at the upcoming February 15, 2023, council meeting?"

On February 10, 2023, the fully constituted Board of Ethics convened. Both Greg Usry and Kristen Wilson, Esq. recused themselves as a voting member of the Board. In Attorney Wilson's stead, Mark W. Blanchard, Esq. sat in as limited special counsel to the Board.

While a detailed history is not necessary here, several events we believe are pertinent to our ultimate findings. The pertinent facts as we know them are summarized as follows:

- On Thursday February 2, 2023, Mayor Josh Cohn, presenting himself as a "resident" and therefore not in his Mayoral capacity, inquired with Christian Miller about the property located directly behind his home on Turf Avenue and what the City's regulations permitted regarding tree removal. The Mayor, again presenting himself as a resident, also spoke with Corporation Counsel Kristen Wilson about what, if anything, could be done to stop the

clear cutting of the Turf Avenue property. Corporation Counsel mentioned there is always the option of a moratorium or, for more immediate relief, one could seek a temporary restraining order in court. In response to questions from the Mayor regarding pursuing the option for enacting a moratorium, Corporation Counsel explained the timeframes that would be necessary to notice a special meeting and then schedule a public hearing prior to adoption. The Mayor, so informed, then indicated that he would have to hand this issue off to the Deputy Mayor as he would be directly impacted by any decisions and therefore stated his recusal.

- On the evening of Thursday February 2, 2023, Councilmembers Bill Henderson, Josh Nathan and Lori Fontanes received a text from another Councilmember asking for their availability to attend a Special City Council meeting to occur on Monday February 6, 2023 for the purposes of starting the process to pass an emergency moratorium on "clear cutting" of trees on property in former councilmember Emily Hurd's neighborhood. The Councilmember stated that Emily Hurd and their neighbors were "beside themselves as a developer is looking to chop down a whole lot" in their neighborhood.
- Shortly thereafter, Councilmembers Henderson, Nathan and Fontanes learned that the property where trees were to be chopped down on Turf Avenue abutted the Mayor's property.
- On Friday, all three inquiring councilmembers (Henderson, Nathan and Fontanes) contacted the Councilmember who had requested a Special City Council meeting and advised her that they were concerned about the appearance of impropriety, due to the fact that this type of tree clearing activity had been going on for years and now they were being asked to take the emergency step of calling a special meeting to hurriedly pass a moratorium to stop an action that could and would be seen by many as the Council taking special or extraordinary action that benefitted the Mayor personally.
- As of Friday, February 3, Councilmembers Henderson, Nathan and Fontanes all indicated that they would not be attending and understood that the Mayor was going to recuse himself due to the proximity to his property.
- On Friday, February 3, Corporation Counsel corresponded with the six councilmembers (not the Mayor) addressing the concerns regarding the appearance of a conflict raised by some councilmembers and the Code of Ethics. She also mentioned in an email that Mayor Cohn's complaint was the only complaint she had heard relating to the clear cutting of the Turf Avenue property, in contrast to the broader public outcry that led to the initiation of the legislative process in connection with other recently adopted moratoria.
- Shortly after Corporation Counsel's email, concerned residents began emailing City staff highlighting the purported concern for the Turf Avenue property.
- On Friday February 3, 2023, the Special Meeting was publicly noticed because three Councilmembers called for it.
- On Saturday February 4, 2023, many trees on the Turf Avenue lot were lawfully cut down.
- The emergency meeting took place on Monday February 6, 2023, with three Councilpersons and the Mayor attending; due to the events on February 4, the Mayor no longer believed he had an actual conflict or that there was an appearance of a conflict.

Findings and Advisory Opinion

It is our conclusion that any action taken by any of the Councilmembers in furtherance of the tree moratorium at the February 15, 2023, meeting would be cloaked with an appearance of a conflict or an impression of impropriety that would violate Section 15-10(B) of the City's Code of Ethics, which states:

An officer or employee of the City shall not by his/her conduct give reasonable basis for the impression that any person can unduly influence him/her or improperly enjoy his/her favor in the performance of his/her official duties or that he/she is affected by the kinship, rank, position or influence of any party or person.

Although not raised as a question by Councilmembers Henderson, Nathan and Fontanes, we find that the actions taken by the City Council leading up to the emergency meeting on February 6, 2023, did violate Rye City Code Section 15-10(B), because it appears that the primary reason the emergency meeting was called was to protect the trees on Turf Avenue immediately adjacent to the Mayor's property. We find that the extraordinary rush to call the meeting gives a "reasonable basis for the impression" that the Councilmembers who attended and voted at the February 6 meeting were influenced to take such action because of the proximity to the Mayor's property and to protect the Mayor's property and therefore to provide an elected official with a personal benefit. Moreover, we do not find that the clear cutting of the Turf property erases or negates any conflict or appearance of a conflict going forward with respect to the timing of City Council action relating to a tree cutting moratorium.

As such, we do believe that under these circumstances, an elected official could vote "no" or "abstain" on any actions relating to the February 15 public hearing without violating the City's Code of Ethics. Accompanying the "no" vote or abstention, the elected official could explain that it is not the substantive issue regarding trees that given rise to concern, but rather, the extraordinarily expedited process that led to calling for this emergency meeting and the setting of the public hearing that are the basis for the declination to vote in favor of an otherwise worthy legislative action. To remove the potential cloud of impropriety yet advance the substantive issue, the Council could simply re-commence the process with a newly called hearing on either a moratorium or on the proposed amendments to City Code Chapter 187 ("Trees").

We believe that the above opinion encompasses the primary questions as it relates to the Code of Ethics that all three of you have raised. Councilmember Nathan raised additional questions that have been referred to the Corporation Counsel for a response as the Code of Ethics is not implicated.

Respectfully submitted,

/s/

Beth Griffin Matthews, Edward B. Dunn, Edward J. Stein

EXHIBIT 4

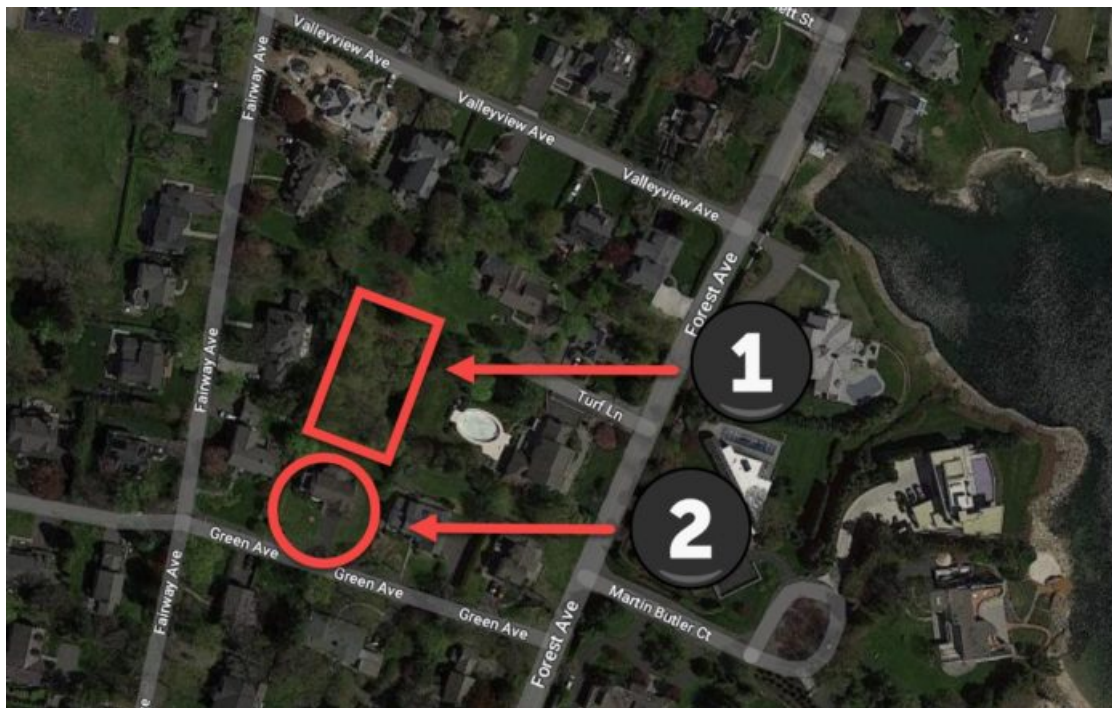
Home > Government > City of Rye > Board Finds Ethics Violation by Mayor & Three Council Members in Tree...

Government City of Rye Rye City Board of Ethics Rye City Council

Board Finds Ethics Violation by Mayor & Three Council Members in Tree Debate

 MyRye.com February 14, 2023

 1363  0



(PHOTO: This map shows #1 the flag lot off Turf Avenue where trees were clear-cut and #2 Mayor Josh Cohn's home at 24 Green Avenue. The two lots are adjacent to each other.)

The Rye Board of Ethics has found Mayor Josh Cohn and three city council members (Councilwoman Carolina Johnson, Councilwoman Julie Souza and Councilman Ben Stacks) have violated the City's Code of Ethics. The violation centers around the city council's emergency meeting on Monday, February 6th that was called to protect trees on Turf Avenue, a property immediately adjacent to Mayor Josh Cohn's home on 24 Green Avenue on Milton Point.

The findings, issued by the Board of Ethics on Monday, recount a series of events where the Mayor, presenting himself as a "resident" (and not as Mayor) expressed concern over the possible removal of trees on the Turf Avenue lot. Subsequent events led to the scheduling of the emergency meeting on February 6th that was intended to take action to stop the clearcutting of the estimated 40 mature trees on the Turf Avenue property – an action that could have been perceived as benefiting the Mayor personally. A message left for Mayor Cohn by MyRye.com has not been returned.

Three council members – Councilwoman Lori Fontanes, Councilman Bill Henderson and Councilman Josh Nathan – became concerned about a real or perceived conflict of interest in an emergency meeting about a prohibition of the clear-cutting of trees that could bring personal benefit to the Mayor. They refused to attend the February 6th meeting. All three were publicly rebuked at the meeting by Councilwoman Julie Souza who accused them of playing politics.



(PHOTO: This lot off Turf Avenue had about 40 mature trees. The trees were clear-cut on Saturday, February 4, 2023. Mayor Josh Cohn's property is the right of the clear-cut area.)

It is worth noting that Councilman Henderson was the leader of EY's Americas Anti-corruption Practice Group for 12 years and as a Department of Justice trial attorney investigated and prosecuted public corruption. Fontanes, Henderson and Nathan contacted the Board of Ethics last week for guidance on how to approach the next council meeting on Wednesday, February 15th given the issues they saw around the February 6th emergency meeting (a public hearing on a tree cutting moratorium is scheduled).

In the process of providing guidance, the Board of Ethics found Mayor Josh Cohn, Councilwoman Carolina Johnson, Councilwoman Julie Souza and Councilman Ben Stacks violated [Rye City Code Section 15-10\(B\)](#) that states:

- "An officer or employee of the City should not by his/her conduct give reasonable basis for the impression that any person can unduly influence him/her or improperly enjoy his/her favor in the performance of his/her official duties or that he/she is affected by the kinship, rank, position or influence of any party or person."

The opinion issued by Board of Ethics Chair Beth Griffin Matthews (a former councilwoman) and members Edward B. Dunn (a former mayor) and Edward J. Stein, said in part:

- “We find that the extraordinary rush to call the meeting gives a “reasonable basis for the impression” that the Councilmembers who attended and voted at the February 6 meeting were influenced to take such an action because of the proximity of the Mayor’s property and to protect the Mayor’s property and therefore provide and elected official with a personal benefit.”

The Board recommended “to remove the potential cloud of impropriety” the Council could “re-commence” the process with a new hearing – essentially a fresh and renewed approach to the issue of tree protection in the City of Rye.

It should be [a revealing City Council meeting on Wednesday](#). The Council will have to heal a fairly deep schism between its members and address the findings of the Board of Ethics before it can properly tackle the thorny and growing concern for protecting trees in the City of Rye.

For those interested in further detail:

The [full opinion of the Board of Ethics](#)

The video of the February 6th City Council emergency meeting with the agenda of “Consider setting a public hearing to adopt a three-month moratorium in the City of Rye temporarily prohibiting the clear-cutting of trees on any lot without a permit for the duration of this moratorium.”:

EXHIBIT 5



VIA ELECTRONIC MAIL

MEMORANDUM

To: Elizabeth Griffith Matthews, City of Rye Board of Ethics Chairperson

From: Karl J. Sleight, Esq.

cc: Joshua Cohn, Benjamin Stacks, Julie Souza and Carolina Jaramillo Johnson

Date: May 15, 2023

Subject: Analysis of City of Rye Ethics Board Opinion

INTRODUCTION

The following is an analysis of a purported ethics breach involving certain members of the City of Rye, City Council in a February 13, 2023, Board of Ethics “Confidential Advisory Opinion” (“Opinion”) which found that the Council members who quickly convened a special meeting created a conflict or the “appearance of a conflict.” This analysis included communications with all four of the City Council Members that were subjected to the Opinion, City Council Minutes, media reports, the Rye City Code, companion statutes at the State level, and other relevant information.

A review and analysis of the February 13, 2023, self-described “Confidential Advisory Opinion” leads to the inescapable conclusion that the Opinion lacks important facts and ignores or downplays the existence of other material facts that, when considered, serves to cripple its ultimate findings. The BOE conclusion that Councilmembers participating in a properly noticed special meeting of the Council in the future is “an appearance of a conflict or an impression of impropriety” is irrational, and an arbitrary and capricious act.

BACKGROUND AND FACTS

Environmental and green space concerns have existed and been a topic of discussion for some time in the City of Rye, New York (“City”). These concerns have resulted in action by the Rye City Council (“Council”). In the Spring of 2021, the Mayor of the City, Josh Cohn (“Mr. Cohn” or “Mayor”), formed a Council subcommittee to update the City’s local laws concerning trees (Chapter 187) for the first time since 1990. The subcommittee identified clear-cutting of trees

Karl J. Sleight | Partner | ksleight@lippes.com

54 State Street, Suite 1001, Albany, NY 12207 **Phone:** 518.462.1001

260 Madison Avenue, 17th Floor, New York, NY 10016 **Phone:** 646.673.8633 **lippes.com**

New York: Albany, Buffalo, Long Island, New York City, Rochester, Saratoga Springs // Florida: Jacksonville // Illinois: Chicago
Ohio: Cleveland // Ontario: Greater Toronto Area // Texas: San Antonio // Washington, D.C.



within the City as a “primary problem,” which soon dovetailed with other concerns leading to restrictions on disturbance of steep slopes and subdivisions for flag lots.¹ It is axiomatic that once a stand or grove of mature trees are clear cut, the natural impact to the land is irreversible, at least for a generation. Simply put, once the trees are cut nothing can put them back in place.

The Imminent Clear Cutting of the Turf Avenue Grove and the Response

Near the end of January 2023, Mr. Cohn became aware that a wooded parcel of property adjacent to his home in the Turf Avenue neighborhood would be clear cut of trees within a week.² Mr. Cohn does not have any ownership interest in this adjacent parcel. Rarely is there advance warning to the Mayor or the City Council of a clear cutting because there are no local laws or processes that lend themselves to such advance warning. The imminent planned clear cut of trees became a topic of discussion among homeowners in Mr. Cohn’s neighborhood and concerned citizens throughout in the City.

Mr. Cohn sought to learn whether the property had been sold and went to the City Assessor’s office. At the door of that office, he encountered the head of the Building Department, Christian Miller. Mr. Miller advised Mr. Cohn that the City’s existing tree law would not apply to the Turf Avenue grove because the property did not abut a public street. Mr. Cohn raised the issue of the clear cutting with Corporation Counsel Kristen Wilson and asked what legal options were available that might affect the clear cutting. Ms. Wilson told Mr. Cohn that implementing a moratorium on clear cutting, seeking a court ordered temporary restraining order (“TRO”), or trying to trigger the State Department of Environmental Conservation (“DEC”) endangered species restrictions may have an impact. The panoply of options given to Mr. Cohn by Corporation Counsel Wilson all reflected potential options that would address the imminent harm to the grove of trees.³ Ms. Wilson suggested a special meeting of the Council to accelerate the moratorium process, although the process still might not be fast enough to impact the Turf Avenue grove of trees. Mr. Cohn decided to recuse from pursuing all the options, because, although he did not own the property, it is in the immediate neighborhood. Recusal is the most severe remedy for addressing an actual or potential conflict of interest.⁴ After Mr. Cohn’s recusal, the Deputy Mayor handled the moratorium process (BOE Opn. P. 2) and a neighbor explored the other options.

By Friday February 3, City officials had received complaints and concerns about the planned clear cutting of the grove of trees near Turf Avenue (BOE Opn. P. 2). The special meeting was properly noticed on February 3, and steps were taken to hold the meeting on February 6 (BOE Opn. P.2).

¹ See, City Council video recordings of public meetings for December 1, 2021, January 6, 2022, and January 19, 2022 at <https://www.ryeny.gov/government/city-council/meeting-videos>.

² The grove of trees numbered approximately 40 mature trees.

³ For example, to be successful in a TRO application, the plaintiff must demonstrate immediate and irreparable injury, and that loss or damage will result unless the opposing party is restrained before a hearing can be had (see, CPLR §6313(a)).

⁴ Another lesser, but generally accepted ameliorative measure to a conflict is disclosure.



There are no allegations that the process for special meetings under the City Code was not legally followed.

On Saturday February 4, 2023, the grove of trees at issue in the Turf Avenue neighborhood was clear cut (BOE Adv. Opn. P. 2). As such, the impact of the special meeting and possible moratorium on clear cutting trees on the parcel at issue near Turf Avenue became a moot point. Moreover, the basis for Mr. Cohn to believe that he may have a conflict and the underpinnings for his decision to recuse no longer existed, and thus were not an impediment to his participation in the Council's special meeting.

At the special meeting on February 6, three Council members did not participate in the properly noticed public meeting (BOE Opn. P.2).⁵ With the Turf Avenue grove of trees now clear cut, effectively removing the basis of Mr. Cohn's conflict and recusal, Mr. Cohn participated in the special meeting. At the special meeting, the Council moved to open a public hearing on a tree cutting moratorium at the next regularly scheduled Council meeting on February 15. No other action was taken beyond consideration for language of the moratorium.

The aforementioned circumstances leading up to the special meeting were described by the BOE as "pertinent to our ultimate findings" (BOE Opn. P.1).

The Confidential Advisory Opinion Process

Subsequently, on February 8 and February 10, Councilmembers Henderson, Nathan and Fontanes asked the BOE for an "advisory opinion" (Opinion attached hereto as **Exhibit "A"**; BOE Opn. P.1). The BOE described the issue as: "Whether it is appropriate for a councilmember to attend and vote on actions pertaining to the proposed tree moratorium at the upcoming February 15, 2023, council meeting?" (BOE Opn. P.1).

Of the five-member City Board of Ethics, members Kristen Wilson (Corporation Counsel) and Greg Usry (City Manager) "recused themselves as a voting member of the Board" (BOE Opn. P.1). The BOE opinion at page 1 states that, "[i]n Attorney Wilson's stead, Mark W. Blanchard, Esq. sat in as limited special counsel to the [Ethics] Board". Ms. Wilson's thinking on the issue appears to have evolved from the time she suggested a special meeting and moratorium to Mr. Cohn to the time when the special meeting of the Council was held. Ms. Wilson took the position that the Council's special meeting was an appearance of a conflict of interest and Mr. Cohn's participation in the special meeting of the Council remained an "appearance of a conflict of interest" despite the Turf Avenue tree clear-cutting having already occurred prior to the special meeting of the Council, because the special meeting was scheduled before the trees were felled.

Four Council members: Mr. Josh Cohn (Mayor), Ms. Carolina Johnson, Mr. Ben Stacks, and Ms. Julie Souza were the subject of the BOE opinion. None of the four Council members were

⁵ The three Council members who did not participate in the special meeting were Mr. William Henderson, Mr. Josh Nathan, and Ms. Lori Fontanes.



notified, interviewed or asked for information by the BOE members or Mr. Blanchard in advance of the issuance of the BOE Opinion. After the Confidential Advisory Opinion was issued by the BOE, the affected Council members raised concerns with the BOE and Mr. Blanchard that none had been interviewed or asked for salient facts. Mr. Blanchard declined and advised the BOE members “not to engage in any further discussions relating to the Opinion.”⁶

Notably, the question before the BOE was not whether any aspect of the process concerning the calling of a special meeting on February 6 ran afoul of some government principle, but whether a Councilmember could attend and vote on matters related to the “tree moratorium at the February 15, 2023” City Council meeting.

Under the heading “Findings and Advisory Opinion,” the Board concluded in the February 13 Opinion “that any action taken by any of the Councilmembers in furtherance of the tree moratorium at the February 15, 2023, meeting would be cloaked with an appearance of a conflict or an impression of impropriety that would violate Section 15-10(B) of the City’s Code of Ethics” (BOE Opn. P.2).

Section 15-10(B) of the Rye Code of Ethics relied upon by the BOE in the Opinion states:

An officer or employee of the City should not by his/her conduct give reasonable basis for the impression that any person can unduly influence him/her or improperly enjoy his/her favor in the performance of his/her official duties or that he/she is affected by the kinship, rank, position or influence of any party or person (see, <https://ecode360.com/6971565>).

The BOE conclusion was based on a series of statements made in the opinion, including:

“We find that the extraordinary rush to call the meeting gives a ‘reasonable basis for the impression’ that the Councilmembers who attended and voted at the February 6 meeting were influenced to take such action because of the proximity to the Mayor’s property and to protect the Mayor’s property and therefore to provide an elected official with a personal benefit” (BOE Opn. P.3).

Moreover, we do not find that the clear cutting of the turf property erases or negates any conflict or appearance of a conflict going forward with respect to the timing of City Council action relating to a tree cutting moratorium (BOE Opn. P.3).

As such, we do believe that under these circumstances, an elected official could vote ‘no’ or ‘abstain’ on any actions relating to the February 15 public hearing without violating the City’s Code of Ethics (BOE Opn. P. 3).

To remove the potential cloud of impropriety yet advance the substantive issue, the Council could simply re-commence the process with a newly called hearing on either a

⁶ See, Blanchard email to Council members.



moratorium or on the proposed amendments to City Code Chapter 187 ('Trees')" (BOE Opn. p. 3).

Section 15-13 of the Rye Code of Ethics requires that the identities of the subject of a BOE opinion be withheld. The BOE opinion makes no effort in this regard, naming Mayor Cohn and, by virtue of naming the three opinion recipients, leaving the identities of those others criticized by the BOE open to an easy process of elimination. The BOE opinion bore the description, "**CONFIDENTIAL ADVISORY OPINION**" and was finalized and dated February 13, 2023 (emphasis in original). Although specifically marked "confidential", the contents of the BOE opinion were widely distributed to the local media within 24 hours.⁷ Mr. Blanchard acting as advisor to the BOE members stated that the Opinion "was given only to the Councilmembers who requested it".⁸ It bears noting that Section 15-6 of the Rye Code of Ethics prohibits a public officer or employee from disclosing confidential information acquired by him/her in the course of his/her official duties.

Finally, pursuant to Section 15-13(B) of the City Code governing the Board of Ethics, an advisory opinion of the Board of Ethics "shall have the approval of the Corporation Counsel with respect to their validity." Here, the Corporation Counsel was recused and did not pass on the legal validity of the Opinion at issue.

ANALYSIS

The Timeline of Events and the Impact of Incomplete Facts

The hallmark of a sound ethics opinion is a full understanding of all the relevant facts. An ethics opinion is only as good as the facts provided. In the case at hand, it is notable that none of the four Councilmembers who desired the special meeting of the Council received any outreach from the BOE seeking information that would have been relevant and material to the Opinion. Not only should an analysis and ultimate determination by the BOE include complete facts, but a precarious situation develops when only one-sided perspectives are provided and relied upon. In such circumstances, the purported facts are more susceptible to being found incomplete or worse, inaccurate. That is the situation here. The Opinion issued by the BOE cites ten (10) separate bullet points described as "pertinent facts" (BOE Opn. P. 1). As set forth in the Facts section above, significant information was not included or taken into consideration by the BOE. For instance, had the BOE spoken to the Councilmembers they would have realized that the issue of the tree cutting did not just affect property adjacent to the Mayor, but had broader implications, raising concern amongst other Rye property owners living far from the site.

⁷ See, *Board Finds Ethics Violation by Mayor & Three Council Members in Tree Debate* (MyRye.com, Feb. 14, 2023); *Deep Schism @ Council on Ethics and Trees* (MyRye.com, Feb. 15, 2023); *Board of Ethics Finds Emergency Council Meeting Violated City Code* (Rye Record, Feb. 15, 2023)

⁸ Blanchard email to Councilmembers. Council members Mr. William Henderson, Mr. Josh Nathan, and Ms. Lori Fontanes requested the Confidential Advisory Opinion.



The timeline of the events in this matter is also important to keep in mind while considering issues of government ethics. In this case, it is as follows:

- Spring 2021 a subcommittee is formed by the City Council concerning clear cutting of trees.
- Late January, 2023: Mayor Cohn learns that a grove of trees adjacent to his property will be clear cut. He receives input from a City official and the Corporation Counsel. He recuses himself on the issue based on the possible impact of government action on the adjacent parcel and grove of trees.
- February 3, 2023: A special meeting of the City Council is publicly noticed concerning the City's trees. There is no question the meeting was properly noticed.
- February 4, 2023: The grove of trees near the Mayor's property is clear cut.
- February 6, 2023: The special meeting of the Council is held. The Mayor participates given any conflict related to property in his neighborhood has been removed. Three other members of the Council do not appear for the meeting. The next Council meeting is scheduled for February 15, where a public hearing will be held on a tree cutting moratorium.
- February 13, 2023: The Board of Ethics issues a "Confidential Advisory Opinion" to three members of the City Council on the question of the propriety of participating in the upcoming February 15 Council meeting, finding the calling of the meeting was improper due to a conflict or appearance of a conflict of interest based on the Mayor's personal interest in the matter.
- February 14, 2023: Media reports are published alleging ethics violations by the Mayor and the other City Council members based on the BOE advisory opinion.
- February 15, 2023: Additional media reports concerning the confidential opinion are published. Later that day, the City Council meets and the issues of tree clear cutting and the BOE opinion are a focus of the Council meeting. No action was taken, nor could it be, by the City Council related to Turf Avenue property because the trees had been cut. The discussion concerned future action to be broadly taken concerning property owners of the City of Rye.

The Application of Precedent to the Matter at Hand

The cases relied upon to support a conflict in this case bear no resemblance to the facts here. The Corporation Counsel cited the case of *Matter of Tuxedo Conservation and Taxpayers Ass'n v. Town Board of Town of Tuxedo*, 96 Misc. 2d 1 (Orange Co. Sup. Ct. 1978) *aff'd* 69 A.D.2d 320 for the proposition that a conflict may exist in the instant matter. The case is not persuasive on the question of a conflict of interest in Rye. In *Matter of Tuxedo*, the trial court concluded that a town board member employed by an international advertising agency that stood to benefit handsomely from a major land development in the town had a conflict of interest. On the issue, the trial court held that, "it is not all that unjustified or unreasonable for members of the public



to perceive an appearance of conflicting interests when they know that a top executive of a corporate advertising agency is in a position to cast a crucial vote in a quasi-judicial proceeding involving a \$200,000,000 venture of one of his agency's clients." On appeal, the Appellate Division was even more pointed, noting that the conflicted board member cast the deciding vote in a 3-2 board decision allowing the massive project to proceed. The Court noted the board member's relationship with the advertising company and its developer client, holding "[i]t requires no feat of mental gymnastics to infer that if the application is approved, the [advertising] agency will be a strong contender to obtain all the advertising contracts in the 200 million dollar project" (see, *Matter of Tuxedo at 323*).

The *Matter of Tuxedo* facts are a far cry from the circumstances in Rye. Most notably, in *Matter of Tuxedo* the conflicted public board member was able to receive substantial personal remuneration based on his vote. That is not the case here.

The Corporation Counsel also pointed to *NY Attorney General Informal Opinion 97-5* for meaningful insight into the existence of a conflict of interest. That opinion is an "informal opinion" (rather than a formal opinion) defined in the opinion itself as "the unofficial expression of the views of this office." This Informal Opinion of the Attorney General examined the application of General Municipal Law §§806, 808 requiring municipalities to maintain a code of ethics and a board of ethics. Both exist in Rye. The core question asked in the Informal Opinion was whether two members of the City of Oswego City Council should participate in certain matters before the Council that affected their employer, power company Niagara Mohawk. The Informal Opinion is self-described as providing "only broad guidance on these questions." The Informal Opinion references the facts and cites the *Matter of Tuxedo* case. The Informal Opinion notes the "subtle but powerful psychological pressures that are placed on an employee in these situations" citing Op. Atty Gen (Inf) No. 86-54. The remainder of the Informal Opinion references broad-based government ethics principles, without meaningful insight to determine the purported ethics issue in the City of Rye.

The BOE Reliance on Section 15-10 (B) of the City's Ethics Code

In its Opinion, the BOE cites §15-10(B) as the sole basis for the purported "appearance of a conflict or an impression of impropriety ...". Section 15-10(B) states as follows:

An officer or employee of the City should not by his/her conduct give reasonable basis for the impression that any person can unduly influence him/her or improperly enjoy his/her favor in the performance of his/her official duties or that he/she is affected by the kinship, rank, position or influence of any party or person.

There was no local municipal precedent cited by the BOE to consider the prior application of Section 15-10(B). In researching this issue, none was found. As such, it is useful to examine how a very similar passage of the State Code of ethics has been



applied.⁹ The ethics principle involved is designed to police undue influence over public officers by outside influences. Examples are the prohibitions against nepotism and favoritism.

In *Matter of Ferriero*, a matter examined by the New York State Joint Commission on Public Ethics (JCOPE), now the Commission on Ethics and Lobbying in Government, an employee of the State Gaming Commission violated POL §74(3)(f) when he failed to notify the Gaming Commission that he was judging races in which his brother was a harness driver ([2019-03-01-ferriero-executed-agreement.pdf \(ny.gov\)](#)). In *Matter of Castellaneta*, a supervisor at the MTA violated POL §74(3)(f) when he asked his subordinates to assist his son in obtaining employment at the MTA ([eustace-castellanetasubstantial-basis-investigation-report-and-settlement-agreement.pdf \(ny.gov\)](#)).

Similarly, in *Matter of Guerra*, an employee of the MTA violated POL §74(3)(f), when he engaged in discussions about his future employment with Bombardier while serving on an MTA [Vendor] Selection Committee ([mario-guerrasubstantial-basis-investigation-report-and-settlement-agreement.pdf \(ny.gov\)](#)). In *Matter of Paterson*, the Commission concluded the Governor “solicited, accepted and received complementary tickets for his son and his son’s friend further supports the Commission’s determination that the Governor violated Public Officers Law §74(3)(f)” ([https://ethics.ny.gov/system/files/documents/2017/12/decision-and-notice-civil-assessmentgovernor-david-paterson.pdf](#)).

The rule in the Code prohibiting “undue influence” is not applicable to inherently governmental processes that comport with the governing laws and ordinances. Imagine the chaos that would ensue if political office holders were subject to an ethics breach for siding with other political office holders on matters of public concern. Simply put, that is what occurred here. Like-minded duly elected political office holders, after receiving communications from constituents, believed that the long-discussed need to address the clear cutting of trees justified a special meeting and entertainment of a clear-cutting moratorium. This is not the stuff of an ethical breach, or the appearance of one.

In concluding §15-10(B) of the Code of Ethics was violated, the BOE held that “the extraordinary rush to call the meeting gives a ‘reasonable basis for the impression’ that the Councilmembers who attended and voted at the February 6 meeting¹⁰ were influenced to take action because of the proximity to the Mayor’s property and to protect the Mayor’s property and therefore to provide an elected official with a personal benefit ...” (BOE Opn. P. 3).

⁹ This section of the City Code of Ethics closely resembles Public Officers Law §74(3)(f), which states, “An officer or employee of a state agency, member of the legislature or legislative employee should not by his or her conduct give reasonable basis for the impression that any person can improperly influence him or her or unduly enjoy his or her favor in the performance of his or her official duties, or that he or she is affected by the kinship, rank, position or influence of any party or person.” Many municipal codes of ethics in the State of New York were created using POL 74 as a template.

¹⁰ Mayor Cohn and Councilmembers Carolina Johnson, Julie Souza, and Ben Stacks were present for the February 6, 2023 special meeting.



As discussed herein, the lack of facts to support this conclusion, the intervening action of the clear cutting, and the expectations that Councilmembers deal with issues of the community in a timely manner are absent from the Opinion. Instead, in part because the four Councilmembers who attended the February 6 special meeting were not interviewed contributing to incomplete facts, the Opinion issued by the BOE is left as a result in search of facts and is unable to withstand even minimal legal scrutiny.¹¹

Moreover, this examination against the backdrop of State precedent demonstrates that the BOE's reliance on §15-10(B) was misinterpreted and misapplied.

The “Appearance” of a Conflict and the “Impression” of Impropriety

A common mistake or misapprehension in ethics principles, is an overindulgence with the phrase “appearance of impropriety.” More specifically, the emphasis on the word “appearance” and the disregard of the equally important word “impropriety.” A common suggestion is that if something does not appear to be proper, then it is improper or violates some condition or rule. The clear problem with loosely applying this phrase is that it leads one to determine whether something (or someone) is “ethical” or “unethical” based on the perspective of the viewer rather than on any underlying principle. In the end, when this phrase becomes unhinged from the principle at issue, it is rendered meaningless. And so, it was in this case.

As evidenced by the Facts section above, and to an extent referenced in the Opinion, the conflict of interest question and remedial measure began with straightforward facts. An imminently scheduled clear cutting of trees on property not owned by the Mayor, but on an adjacent lot, and the effect of that situation on a governmental process to consider a tree moratorium. However, that conflict was addressed by the Mayor’s recusal from participating in the special meeting concerning the tree moratorium, until such time as the Turf Avenue clear cutting occurred and the conflict for the Mayor was eliminated.¹²

Another of the fatal flaws with the Opinion is that there is no “impropriety” or breach of an ethics principle to support the “appearance” thereof. Mr. Cohn’s immediate recusal from the tree moratorium process clearly ameliorated the potential for a conflict. His reengagement in the process after the conflict was removed was proper. The City Council members were all duly elected by their constituents and the decision by a majority of the Council members to convene

¹¹ There is some public banter that the three Councilmembers that requested the BOE opinion may not be aligned with the four members that attended the February 6 special meeting (see, *Tensions Run High*, Journal News, (March 16, 2023.)). To the extent that there may be some disagreements between political office holders, that should have no bearing on the soundness of the Opinion itself. If, however, the BOE fell victim to manipulation for political purposes, and this analysis does not delve into that possibility, it would not be the first time that such a panel has been weaponized (see, *Inspector General Rebukes Commission on Public Integrity for Improper Conduct*, May 13, 2009 at <https://ig.ny.gov/news/inspector-general-rebukes-commission-public-integrity-improper-conduct>).

¹² Because Mr. Cohn did not own the adjacent wooded lot, disclosure of his proximity to the property rather than recusal, may have been a sufficient remedy to the perceived conflict.



a special meeting was not in violation of the City Charter or City Code. In fact, it was suggested as an option early on by the Corporation Counsel.

The analysis and conclusion of the BOE that any of the above, is an “appearance of a conflict” is severely misguided and contributes to the numerous infirmities of the Opinion.¹³

The Embrace of Situational Ethics by the BOE

The BOE in its “Finding and Advisory Opinion” section, includes an unusual embrace of what is often referred to as situational ethics, meaning that the ethics principles are flexible depending on their application at any given time. The BOE suggests in its Opinion that depending on how the particular Councilmember voted, that would dictate whether the Code of Ethics was violated. The Opinion, in part, states as follows at page 3:

“[w]e do believe that under these circumstances, an elected official could vote ‘no’ or ‘abstain’ on any actions relating to the February 15 public hearing without violating the City’s Code of Ethics. Accompanying the ‘no’ vote or abstention, the elected official could explain that it is not the substantive issue regarding trees that given rise to concern, but rather, the extraordinary, expedited process that led to calling for this emergency meeting and setting of the public hearing that are the basis for the declination to vote in favor of an otherwise worthy legislative action” (BOE Opn. P. 3).¹⁴

The obvious corollary to the BOE solution to avoid a violation of the Code of Ethics, would be that a “yes” or affirmative vote at the February 15 meeting would violate the same Code. It is axiomatic that ethics principles are not outcome dependent, as such the BOE logic is flawed.

The Release of the BOE Confidential Opinion and the City’s Code of Ethics

An examination of these circumstances does find a likely breach of the City’s Code of Ethics.

Section 15-6(B) of the Code of Ethics states, that “[n]o officer or employee of the City shall disclose confidential information acquired by him/her in the course of his/her official duties nor use such information to further his/her personal interests or the personal interests of others (emphasis added).

On this issue, the facts are not in dispute. The BOE issued what it described on its first page as a **“CONFIDENTIAL ADVISORY OPINION”** (emphasis in original). The fact that the Opinion was intended to be confidential is without dispute. Moreover, the City Code mandates that, “The Board [of Ethics] shall publish advisory opinions with such deletions as may be necessary to prevent disclosure of the identity of the officer or employee involved.” (Code of Ethics §15-13(B)).

¹³ The BOE conclusion that a violation of §15-10(B) occurred due to the existence of an “impression of impropriety” is amorphous and typically not a phrase or standard used in the field of government ethics.

¹⁴ As previously mentioned, as the BOE stated at the onset in framing the issue before them, the expedited process was not the issue or question before them, but in fact the BOE applied the Code of Ethics to the upcoming February 15 Council meeting.



Confidentiality provisions governing treatment of ethics opinions are ubiquitous in the field of government ethics. The reason for the confidential treatment of such opinions is to instill a sense of confidence in those seeking opinions, that their intended actions will not become the subject of outside criticism. Without such safeguards, those governed by government ethics panels that serve the important function of guiding public officials would not be sought out for important advice.

The failure to uphold the concept of confidentiality in government ethics opinions cheapens the important function of these ethics panels. The critical nature of the concept of confidentiality is no less relevant to an ethics panel than it is to a grand jury or in the context of the attorney-client privilege (see, Criminal Procedure Law §190.25(4)(a); Penal Law §215.70; CPLR 4503(a)(1)).

The Prospect of Infirmities of the BOE Opinion Process

Pursuant to General Municipal Law (GML) §808, the City of Rye Board of Ethics consists of five (5) individuals including the Corporation Counsel, City Manager, and three members of the public to be appointed by the Mayor with the approval of the Council (City Code §15-13(A)). The Board does not have the power to conduct investigations, and is limited to rendering “advisory opinions on specific situations ...” (*Id*). Importantly for purposes of this matter, the Code requires that “advisory opinions ... shall have the approval of the Corporation Counsel with respect to their validity” (Code §15-13(B)) (emphasis added). The Board may “publish” its advisory opinions “with such deletions as may be necessary to prevent disclosure of the identity of the officer or employee involved” (*Id*).

In the instant matter, after providing certain suggestions concerning immediate attention to the Turf Avenue tree grove and the imminent clear cutting, Ms. Wilson recused from the BOE’s consideration of the Opinion at issue. The City Manager also recused from participation as a BOE member, leaving only three (3) members of the BOE. As referenced in the Opinion, with the recusal of the Corporation Counsel (Ms. Wilson), “[i]n Ms. Wilson’s stead, Mark W. Blanchard, Esq. sat in as limited special counsel to the Board” (BOE Opn. At p. 1). The distinction between a “member” of the BOE under the Code and a “legal advisor” is not insignificant here, particularly because only the Corporation Counsel may vote and approve the validity of an advisory opinion under the City Code.

There is no evidence that Mr. Blanchard was acting as the Corporation Counsel, in fact, the Opinion itself states that he was not. Because the Opinion does not have the approval of the Corporation Counsel, and there is no mechanism in the Code for an alternative pathway to validity, the Opinion here does not comport with the City Code of Ethics.

The BOE’s Prospective Opinion Directive May Be an Ultra Vires Act

In the law, the concept of *ultra vires* means “beyond the powers.” It often surfaces when a governmental body exceeds the limitations put upon it by rule, statute or the constitution. In this case, the BOE has effectively sought to prevent duly elected City Council members from



fulfilling their oath and legal responsibilities. Moreover, in going so far as to conclude that a violation of the Code of Ethics would depend on whether a Councilmember voted “yes” or “no”, the BOE has gone well beyond its legal authority, interfered with the City’s basic governmental process, and did so without any authority from the City’s Charter or Code.

CONCLUSION

A review and analysis of the February 13, 2023, self-described “Confidential Advisory Opinion” leads to the inescapable conclusion that the Opinion lacks important facts and ignores or downplays the existence of other material facts that, when considered, serves to cripple its ultimate findings. The application of the complete facts to the ethics principles cited by the BOE demonstrates that the BOE conclusion is unhinged from Rye Code of Ethics §15-10(B). The section of the Code cited by the BOE has not been applied in a similar situation and the facts of this case do not implicate the principle in the Code, as evidenced by similar interpretations of nearly identical language at the State level found in Public Officers Law §74(3)(f). The BOE conclusion that Councilmembers participating in a properly noticed special meeting of the Council in the future is “an appearance of a conflict or an impression of impropriety” is irrational, and an arbitrary and capricious act. To the extent the BOE sought to control future meetings of the City Council, its actions may have been *ultra vires*. For these reasons, the BOE should withdraw its fatally flawed Opinion and declare it a legal nullity.

EXHIBIT A



CITY OF RYE

CITY HALL • RYE, NEW YORK 10580

TELEPHONE (914) 967-5400

CONFIDENTIAL ADVISORY OPINION

To: Councilmembers William Henderson, Josh Nathan and Lori Fontanes

From: Board of Ethics Chairperson Beth Griffin Matthews and Members Edward B. Dunn and Edward J. Stein.

Date: February 13, 2023

Re: Joint Request for Confidential Advisory Opinion related to participation in council actions regarding the proposed tree moratorium

Dear Councilmembers Henderson, Nathan and Fontanes,

We refer to your requests on February 8, 2023 (from Councilmember Henderson) and February 10, 2023 (from Councilmember Nathan) for advisory opinions and Councilmember Fontanes' verbal inquiry on February 10 shortly before the Board meeting. Due to the similarities between the questions raised and in the efficiency of time, we have asked for your consent to provide a single opinion to all of you. All three of you have consented. The threshold question asked is "Whether it is appropriate for a councilmember to attend and vote on actions pertaining to the proposed tree moratorium at the upcoming February 15, 2023, council meeting?"

On February 10, 2023, the fully constituted Board of Ethics convened. Both Greg Usry and Kristen Wilson, Esq. recused themselves as a voting member of the Board. In Attorney Wilson's stead, Mark W. Blanchard, Esq. sat in as limited special counsel to the Board.

While a detailed history is not necessary here, several events we believe are pertinent to our ultimate findings. The pertinent facts as we know them are summarized as follows:

- On Thursday February 2, 2023, Mayor Josh Cohn, presenting himself as a "resident" and therefore not in his Mayoral capacity, inquired with Christian Miller about the property located directly behind his home on Turf Avenue and what the City's regulations permitted regarding tree removal. The Mayor, again presenting himself as a resident, also spoke with Corporation Counsel Kristen Wilson about what, if anything, could be done to stop the

clear cutting of the Turf Avenue property. Corporation Counsel mentioned there is always the option of a moratorium or, for more immediate relief, one could seek a temporary restraining order in court. In response to questions from the Mayor regarding pursuing the option for enacting a moratorium, Corporation Counsel explained the timeframes that would be necessary to notice a special meeting and then schedule a public hearing prior to adoption. The Mayor, so informed, then indicated that he would have to hand this issue off to the Deputy Mayor as he would be directly impacted by any decisions and therefore stated his recusal.

- On the evening of Thursday February 2, 2023, Councilmembers Bill Henderson, Josh Nathan and Lori Fontanes received a text from another Councilmember asking for their availability to attend a Special City Council meeting to occur on Monday February 6, 2023 for the purposes of starting the process to pass an emergency moratorium on "clear cutting" of trees on property in former councilmember Emily Hurd's neighborhood. The Councilmember stated that Emily Hurd and their neighbors were "beside themselves as a developer is looking to chop down a whole lot" in their neighborhood.
- Shortly thereafter, Councilmembers Henderson, Nathan and Fontanes learned that the property where trees were to be chopped down on Turf Avenue abutted the Mayor's property.
- On Friday, all three inquiring councilmembers (Henderson, Nathan and Fontanes) contacted the Councilmember who had requested a Special City Council meeting and advised her that they were concerned about the appearance of impropriety, due to the fact that this type of tree clearing activity had been going on for years and now they were being asked to take the emergency step of calling a special meeting to hurriedly pass a moratorium to stop an action that could and would be seen by many as the Council taking special or extraordinary action that benefitted the Mayor personally.
- As of Friday, February 3, Councilmembers Henderson, Nathan and Fontanes all indicated that they would not be attending and understood that the Mayor was going to recuse himself due to the proximity to his property.
- On Friday, February 3, Corporation Counsel corresponded with the six councilmembers (not the Mayor) addressing the concerns regarding the appearance of a conflict raised by some councilmembers and the Code of Ethics. She also mentioned in an email that Mayor Cohn's complaint was the only complaint she had heard relating to the clear cutting of the Turf Avenue property, in contrast to the broader public outcry that led to the initiation of the legislative process in connection with other recently adopted moratoria.
- Shortly after Corporation Counsel's email, concerned residents began emailing City staff highlighting the purported concern for the Turf Avenue property.
- On Friday February 3, 2023, the Special Meeting was publicly noticed because three Councilmembers called for it.
- On Saturday February 4, 2023, many trees on the Turf Avenue lot were lawfully cut down.
- The emergency meeting took place on Monday February 6, 2023, with three Councilpersons and the Mayor attending; due to the events on February 4, the Mayor no longer believed he had an actual conflict or that there was an appearance of a conflict.

Findings and Advisory Opinion

It is our conclusion that any action taken by any of the Councilmembers in furtherance of the tree moratorium at the February 15, 2023, meeting would be cloaked with an appearance of a conflict or an impression of impropriety that would violate Section 15-10(B) of the City's Code of Ethics, which states:

An officer or employee of the City shall not by his/her conduct give reasonable basis for the impression that any person can unduly influence him/her or improperly enjoy his/her favor in the performance of his/her official duties or that he/she is affected by the kinship, rank, position or influence of any party or person.

Although not raised as a question by Councilmembers Henderson, Nathan and Fontanes, we find that the actions taken by the City Council leading up to the emergency meeting on February 6, 2023, did violate Rye City Code Section 15-10(B), because it appears that the primary reason the emergency meeting was called was to protect the trees on Turf Avenue immediately adjacent to the Mayor's property. We find that the extraordinary rush to call the meeting gives a "reasonable basis for the impression" that the Councilmembers who attended and voted at the February 6 meeting were influenced to take such action because of the proximity to the Mayor's property and to protect the Mayor's property and therefore to provide an elected official with a personal benefit. Moreover, we do not find that the clear cutting of the Turf property erases or negates any conflict or appearance of a conflict going forward with respect to the timing of City Council action relating to a tree cutting moratorium.

As such, we do believe that under these circumstances, an elected official could vote "no" or "abstain" on any actions relating to the February 15 public hearing without violating the City's Code of Ethics. Accompanying the "no" vote or abstention, the elected official could explain that it is not the substantive issue regarding trees that given rise to concern, but rather, the extraordinarily expedited process that led to calling for this emergency meeting and the setting of the public hearing that are the basis for the declination to vote in favor of an otherwise worthy legislative action. To remove the potential cloud of impropriety yet advance the substantive issue, the Council could simply re-commence the process with a newly called hearing on either a moratorium or on the proposed amendments to City Code Chapter 187 ("Trees").

We believe that the above opinion encompasses the primary questions as it relates to the Code of Ethics that all three of you have raised. Councilmember Nathan raised additional questions that have been referred to the Corporation Counsel for a response as the Code of Ethics is not implicated.

Respectfully submitted,

/s/

Beth Griffin Matthews, Edward B. Dunn, Edward J. Stein



MARK W. BLANCHARD
PARTNER

ALAN H. ROTHSCHILD
OF COUNSEL

KRISTEN K. WILSON
PARTNER
**Also admitted in CT*

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June 06, 2023

VIA ELECTRONIC DELIVERY ONLY- ksleight@lippes.com

Lippes Mathias
54 State Street, Suite 1001
Albany, New York 12207
Attention: Karl J. Sleight, Esq.

Re: Response to Correspondence Dated May 15, 2023

Dear Mr. Sleight,

The City of Rye Board of Ethics ("Board") has completed its review of the memorandum dated May 15, 2023 (the "Sleight Memorandum") containing your analysis of the Board of Ethics Advisory Opinion dated February 13, 2023 (the "Advisory Opinion"). It is noted that the initial demand, which was then revised, that the Board respond in accordance with an arbitrary schedule was unreasonable, especially since the Advisory Opinion was sent to the requesting Councilmembers over three months ago.

Please allow the following points to correct some of the inaccurate statements set forth in the Sleight Memorandum. In February 2023, the Board appropriately responded to an inquiry and issued its Advisory Opinion to the requesting Councilmembers; the Board did not expand the distribution of the Advisory Opinion in any other manner. More specifically, the Board was not responsible for publishing its Advisory Opinion in any public forum. Furthermore, the Board did not identify any City of Rye Councilmember by name, except for the Mayor, whose personal appearance and conduct in City Hall made it impossible for the Board to exclude a description of his actions from its Advisory Opinion.

Contrary to your many incorrect assertions, the Board carefully considered the timeline of events, with a focus on the most critical period of activity that occurred between Thursday, February 2, 2023, and Friday, February 3, 2023. Because the requesting Councilmembers' question related to the upcoming regularly scheduled Council meeting on February 15, the Board wanted to provide its opinion in advance of that meeting. The Advisory Opinion purposefully did not restate a detailed timeline of events that occurred in the few days leading up to the calling of a Special Meeting nor did it need to. The Board reviewed correspondence and accounts from City Hall employees and arrived at the sound conclusion expressed in the Advisory Opinion. If your clients commence litigation against the Board, which appears to be the path this matter is taking, the Board's responsive papers will include the following: a detailed timeline of events that will comprise its responsive counterstatement of facts, copies of email and text correspondence; and witness affidavits from City employees, officials, and Councilmembers. If the threatened litigation is commenced and the Board is forced to defend its actions, the full record that will form the basis of its defense will become a part of the public record once the papers are filed with the court. The Board is confident that its decision shall be upheld.

As stated in the Advisory Opinion, the Board relied upon a review of the flurry of activity driven by personal appearances, emails and text correspondence, telephone conversations, and other available evidence, to conclude that there was sufficient evidence to determine that certain conduct and correspondence gave a reasonable basis for the impression that an appearance of an impropriety existed. Focusing on the actions during the relevant time period will highlight the actions forming the basis for the Advisory Opinion. The Board sees no beneficial outcome for any party if this matter proceeds to litigation. The full record is highly unlikely to be seen as favorable to your clients. The full record will likely exacerbate the concerns relating to the impact the actions of a volunteer Councilmember may have on the professional lives of the Councilmembers. The litigation itself, between volunteer members of the Rye City Government, will be seen as unseemly. Furthermore, the litigation defense of the Board's actions will be funded by taxpayers' dollars, something that many citizens are likely to view as a waste of City resources and taxpayer money.

The Advisory Opinion was unanimously approved by the non-recused Board members. After careful deliberation of the Sleight Memorandum, the Board has determined that no further

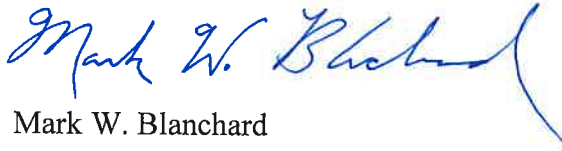
action relating to the Advisory Opinion is necessary or warranted. Therefore, the Board will not be modifying, withdrawing or retracting the Advisory Opinion.

Any actions of third parties that have caused concern or unwanted awareness of the actions took place at the Special Meeting and the subsequent Council Meetings, including publishing of the Advisory Opinion in the press or any other statements, shall be indisputably demonstrated not to have been made by the Board.

From a practical perspective on next steps, please be advised that the Rye City Council is required to approve, by resolution at a public hearing, the City's funding for the Board's defense and indemnification of the threatened litigation. This is not a discretionary act; the Rye Charter and Code provide for same. If litigation is commenced, it will be necessary to immediately call for a special meeting to authorize funding and the retention of litigation counsel for the Board.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in blue ink that reads "Mark W. Blanchard". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Mark W. Blanchard

Fwd: Attorney Client confidential communication - moratorium and special meeting

Souza, Julie A. <jsouza@ryeny.gov>

To: Cohn, Josh <jcohn@ryeny.gov>

Begin forwarded message:

From: "Wilson, Kristen K." <kwilson@ryeny.gov>
Date: February 6, 2023 at 1:57:49 PM EST
To: "Souza, Julie A." <jsouza@ryeny.gov>
Cc: "Stacks, Benjamin M." <bstacks@ryeny.gov>, "Johnson, Carolina J." <cjohnson@ryeny.gov>, "Nathan, Josh C." <jnathan@ryeny.gov>, "Henderson, William T." <whenderson@ryeny.gov>, "Fontanes, Lori M." <lfontanes@ryeny.gov>, "Usry, Greg G." <gusry@ryeny.gov>
Subject: RE: Attorney Client confidential communication - moratorium and special meeting

Hi,

The Mayor stated to me he was recusing himself and, if he asked me, I would have agreed that he should recuse himself given the timing of events (recent sale of property, trees being tagged, request for special meeting for a moratorium, etc.). I do see a difference when the Council has voted on other matters that impact all of you (zoning changes, the VZW pole, steep slope legislation, etc.) as the immediacy of the action was not being requested because of a direct and imminent impact to your property.

To put it differently, I do not believe any councilmember would have a conflict in acting on the substantive tree law changes after a duly noticed hearing, etc. This is a community-wide issue and arguably could impact each of you in the same way as every other homeowner. The timing of holding a special meeting and adopting a moratorium that appears to be called as a result of the Turf property clear cutting has a direct impact on the Mayor. I understand that unfortunately the trees have been removed but it does not negate the reason why the meeting was initially scheduled.

From: Souza, Julie A. <jsouza@ryeny.gov>
Sent: Monday, February 6, 2023 12:25 PM
To: Wilson, Kristen K. <kwilson@ryeny.gov>
Cc: Stacks, Benjamin M. <bstacks@ryeny.gov>; Johnson, Carolina J.

<cjohnson@ryeny.gov>; Nathan, Josh C. <jnathan@ryeny.gov>; Henderson, William T. <whenderson@ryeny.gov>; Fontanes, Lori M. <lfontanes@ryeny.gov>; Usry, Greg G. <gusry@ryeny.gov>
Subject: Re: Attorney Client confidential communication - moratorium and special meeting

I am still confused. We aren't talking about an issue esoteric to someone's own property. We all live next to things in this community. I have visibility to the enormous pole that Verizon is building near my home but I wasn't asked to recuse myself. Is a council member not allowed, for example, to go to BAR or ZBA to express concern about a neighbor's plans? Should I not have voted on steep slope legislation because I have a neighbor with a steep slope? I don't understand the conflict. This is a community wide issue. This has nothing to do with Josh's home. Are others on council saying Josh shouldn't be involved here in addressing a community wide issue? Who protests his involvement?

On Feb 6, 2023, at 11:50 AM, Wilson, Kristen K. <kwilson@ryeny.gov> wrote:

Good morning,

It is my opinion that the Mayor's participation in the emergency meeting would still result in the appearance of a conflict. The Mayor made it clear to me on Thursday he was recusing himself due to the close proximity of the Turf property to his own home and that any action by the Council could directly impact his property. The special meeting was originally requested and ultimately calendared on Friday at the request of three councilmembers. I understand that the Turf lot has been clear cut at of today but that does not erase the appearance concerns I have as to why the emergency meeting was called. Again, this is my opinion and I want to protect any actions that are taken by the Council so that if someone does challenge your actions, your decisions can be upheld.

I have received a few comments earlier today regarding the proposed language in the moratorium. The Friday draft was posted on-line earlier today. If there is consensus tonight to make changes (e.g., 10 inch caliper to 8-inch, etc.), you can make those changes tonight and they can be included in the draft for consideration.

Thank you,
 Kristen

From: Souza, Julie A. <jsouza@ryeny.gov>
Sent: Monday, February 6, 2023 10:41 AM
To: Stacks, Benjamin M. <bstacks@ryeny.gov>
Cc: Wilson, Kristen K. <kwilson@ryeny.gov>; Johnson, Carolina J. <cjohnson@ryeny.gov>; Nathan, Josh C. <jnathan@ryeny.gov>;

Henderson, William T. <whenderson@ryeny.gov>; Fontanes, Lori M. <lfontanes@ryeny.gov>; Usry, Greg G. <gusry@ryeny.gov>
Subject: Re: Attorney Client confidential communication - moratorium and special meeting

I don't even understand how it was an issue to begin with since we all live next to properties that could be impacted. And it's not as if he personally profits for anything in this scenario. This is my third email asking for clarification on this topic bc I don't see the conflict. Especially now that the deed is done (which is so sad).

On Feb 6, 2023, at 10:12 AM, Stacks, Benjamin M. <bstacks@ryeny.gov> wrote:

Hi Kristen-
With the clear-cutting nearly complete and the proposed moratorium unable to affect this particular property, does the Mayor's potential conflict still remain?
Thanks
Ben

Sent from my iPhone

On Feb 5, 2023, at 3:48 PM, Wilson, Kristen K. <kwilson@ryeny.gov> wrote:

Good afternoon,

I have heard from a few of you but to follow up on my email from Friday evening, I want to point out a few additional factors in considering whether the Council is comfortable with the proposed moratorium and what it does (and does not do) (draft law is attached):

-The moratorium prevents a property owner (regardless of how zoned or how large of a parcel) from removing more than three trees of over 10-inch caliper as measured at a particular height during the length of the moratorium (currently proposed to be three months with possible extensions up to a total of one year). It treats the Osborn's property the same as a .2 acre lot;

-If you are proposing a foundation, you now will need to submit a tree inventory as part of your application for review and consideration by the board/department. It is implied (but may need to be clearer) that the board/department would have the ability to approve an application conditioned on certain trees being preserved. The moratorium does not specify what a "tree inventory" includes but maybe it is self-explanatory.

-There is an exception that if a tree(s) were authorized to be removed as part of an approval granted by the Board of Appeals, Planning, or Bd. Of Architectural Review, prior to the effective date of the moratorium, the owner can proceed. Approved applicants are "grandfathered." Off the top of mind, I know this would allow recent approvals for 290 Milton (subdivision) to proceed, 12 Trails End, Shenorock Shore Club Paddle Tennis court, and likely others. I will have to speak with Christian and the Building Dept. tomorrow to have a better understanding of how many recent jobs have been approved. This effectively gives those property owners who needed to go through a review process a "pass" but it prevents an owner simply wishing to do some tree clearing from moving ahead.**

-Waivers are proposed to be heard by City Council.

Again, I want to make sure that the moratorium is drafted concisely to prevent the actions you are seeking to stop. It is very broad reaching as currently drafted and I do not know how many appeals the Council may receive from property owners. Another factor I want to raise is that we will need to work on publicizing any moratorium that impacts property owners that currently do not need a permit to perform any work. As you know, tree removal can occur fairly readily without a property owner needing to step inside City Hall for any form of permit and they will have no way of knowing that what they want to do is now prohibited. With the other moratoria we have recently drafted, the owner needed to come before at least one board or seek a permit from the building department or clerk so that was a way to

easily notify owners what activities were no longer permitted, etc. Here, I do not know how many property owners regularly remove trees for general property maintenance or minor improvements.

Finally, in terms of timing, it is my understanding that if there is a quorum present tomorrow evening, the public hearing would be set for February 15, 2023 (the Council's next regular meeting). In the alternative, the Council could wait until February 15 to set a hearing and either schedule the hearing for the Council's March 1, 2023 meeting or you could consider whether you want to hold a special meeting for the hearing sometime the week of February 20th. The impact of waiting until 2/15 to set the hearing is at most a 14-day delay or, as mentioned, the Council could set a special meeting earlier to shorten the length of time.

As far as ethical concerns and whether a councilmember feels they are using their position to grant special consideration to a citizen that is not available to every other citizen, I have attached an attorney general opinion and a case that address conflict of interest questions. In short, **the fundamental principle is that a public official must avoid circumstances that compromise his or her ability to make impartial decisions solely in the public interest.** The appearance of impropriety should be avoided in order to maintain public confidence in government. Op. Atty. Gen. (Inf.) No. 97-5. In most of the opinions, the attorney general or the court suggest referring the matter to the local board of ethics as the cases are usually very fact intensive.

Again, if you have comments on the moratorium, please let me know so that I may incorporate them into the draft for tomorrow evening. As I mentioned in my Friday email, if there are substantive changes to the moratorium on February 15, we would have to keep the hearing open, and the delay would defeat the purpose of holding the special meeting tomorrow.

Thank you,
Kristen

<Attorney General Opinion re conflict of board member owning property in BID district.pdf>

<Matter of Tuxedo Conservation And Taxpayers
Assn v Town Bd of Town of Tuxedo.pdf>
<Attorney General - conflict of interest and
appearance of one.pdf>
<Draft moratorium regarding clear cutting of
trees.docx>

EXHIBIT 8

Rye Board of Ethics**Mark Blanchard <mblanchard@blanchardwilson.com>**

To: Cohn, Josh <jcohn@ryeny.gov>;Souza, Julie A. <jsouza@ryeny.gov>;Johnson, Carolina J. <cjohnson@ryeny.gov>;Stacks, Benjamin M. <bstacks@ryeny.gov>;Henderson, William T. <whenderson@ryeny.gov>;Nathan, Josh C. <jnathan@ryeny.gov>;Fontanes, Lori M. <lfontanes@ryeny.gov>

Good afternoon Mayor Cohn and members of the Rye City Council,

The Rye Board of Ethics ("Board") has now received emails from the Mayor and the three other Councilmembers who did not request an opinion from the Board. As you are aware, on Monday, February 13, the Board issued a confidential advisory opinion ("Opinion"), which was given only to the Councilmembers who requested it.

Upon my advice as special counsel to the Board on this issue, the Board has been advised not to engage in any further discussions relating to the Opinion.

Best,
Mark

Mark W. Blanchard
Blanchard & Wilson, LLP
235 Mamaroneck Avenue, Suite 401
White Plains, NY 10605
Office: (914) 461-0280
Mobile: (914) 582-7809

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February 13th Advisory Opinion

Cohn, Josh <jcohn@ryeny.gov>

To: Beth Griffin <bgm22@optonline.net>;edward30dunn@gmail.com <edward30dunn@gmail.com>;Ted Stein <tedstein01@gmail.com>

Beth, Ted and Ted:

I was out of the country last week and was distressed to hear of the BoE position on the recent Council special meeting. I now have had the chance to read the BoE opinion in full and talk to my colleagues, and my distress has only increased.

I have learned, and it is clear from the opinion, that you did not speak to the Council members who called the meeting. Nor did you speak with me. As a result, the BoE process lacked fundamental fairness.

The factual summary in the opinion is plagued by misstatement and omission. The opinion lacks important context.

The conclusion robs my independent and hard-working Council colleagues of the respect their autonomy deserves. Even worse, the conclusion robs my neighbors of their right to timely Council action on issues that they may share with me.

All this despite the fact that I voluntarily recused before any Council action, including the call to meeting, was taken.

I understand that the effort by my colleagues to call a special meeting has been deemed extraordinary (and damning) by the BoE. The only thing extraordinary in this situation was the rare opportunity for Council action prior to a quarter-acre clear cut.

Would you please withdraw the opinion (the confidentiality of which has been violated) and hear Council Members Johnson, Souza and Stacks, and me?

Thank you,

Josh

EXHIBIT 9



May 15, 2023

VIA ELECTRONIC MAIL – bgm22@optonline.net

Elizabeth Griffin Matthews
Board of Ethics Chairperson
City Hall - City of Rye
1051 Boston Post Road
Rye, NY 10580

Re: Rye Board of Ethics Opinion Dated February 13, 2023

Dear Chair Griffin Matthews:

Please be advised that I represent Josh Cohn, Carolina Johnson, Julie Souza, and Ben Stacks in connection with a “Confidential Advisory Opinion” dated February 13, 2023 (the “Opinion”).

I am writing to you as the Chair of the City of Rye Board of Ethics “(BOE)”, to request that the Board review the Opinion, withdraw it, and declare it to be a legal nullity.

The Opinion is grossly flawed for many reasons and is also detached from several basic principles of governmental ethics. For your review, I am including a detailed analysis of the Opinion, which I encourage you to share with your fellow BOE members and legal counsel for the BOE.

I have been authorized to give the BOE until the close of business on Tuesday May 23, 2023 to withdraw this infirm Opinion. If the BOE decides to withdraw the Opinion, please advise me by email or letter.

If you or your legal counsel have any questions regarding this matter, please do not hesitate to contact me.

Thank you.

Very truly yours,

LIPPES MATHIAS LLP

A handwritten signature in blue ink that reads "Karl J. Sleight".

Karl J. Sleight

cc: Josh Cohn
Carolina Johnson
Julie Souza
Ben Stacks

Enclosure

Karl J. Sleight | Partner | ksleight@lippes.com

54 State Street, Suite 1001, Albany, NY 12207 **Phone:** 518.462.1001

60 Railroad Place, Suite 402, Saratoga Springs, NY 12866 **Phone:** 518.462.0110 **lippes.com**

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Ohio: Cleveland // Ontario: Greater Toronto Area // Texas: San Antonio // Washington, D.C.

MARK W. BLANCHARD
PARTNER

EXHIBIT 10



ALAN H. ROTHSCHILD
OF COUNSEL

KRISTEN K. WILSON
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BlanchardWilson.com

May 23, 2023

VIA ELECTRONIC MAIL – ksleight@lippes.com

Karl J. Sleight
Lippes Mathias, LLP
54 State Street, Suite 1001
Albany, NY 12207

Re: Rye Board of Ethics Opinion Dated February 13, 2023

Dear Mr. Sleight,

The Rye Board of Ethics is in receipt of your letter dated May 15, 2023, and the accompanying memorandum date the same date therein.

Please be advised that at a duly noticed meeting on May 22, 2023, the Rye Board of Ethics held a meeting and began its review and discussion of your letter and memorandum. Upon the completion of the review by the participating members, the Board will direct me to follow up accordingly.

Best Regards,

Mark W. Blanchard