



SHELTER ISLAND BOARD OF ETHICS

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Board of Ethics Opinion

13 October 2023

Re: Grand and Eklund (Fresh Pond) Opinion 4-2023

Question Presented:

How and when should the chairpersons of two Town water advisory committees disclose potentially conflicting interests and recuse themselves from deliberations and votes on Fresh Pond? They are also co-presidents of a private nonprofit group advocating for Fresh Pond clean-up, and they own properties adjacent to the pond. Can they continue their private efforts for clean water even as they chair Town committees?

Facts:

Peter Grand, chairperson of the Water Advisory Committee (WAC), and James Eklund, chairperson of the Water Quality Improvement Advisory Board (WQI), wrote the Board of Ethics on August 7 to seek our advice on their potentially conflicting roles as Town water advisors and Fresh Pond residents and association leaders.

Mr. Grand wrote: "James and I are both committed to 'whole island/one water' perspectives, and have been deeply engaged in clean water efforts. We would like to continue those efforts, and sometimes this may mean discussion of how Fresh Pond relates to the bigger picture. We would be eager to engage with the ethics committee, and ensure that we can speak to larger issues, drawing on our long study and fairly deep understanding of how Fresh Pond acts as a real and unique window into the aquifer as a whole." That email was also signed by Mr. Eklund.

The board replied August 14 with questions to each and an invitation to appear at a special meeting. Mr. Grand responded to the questions in an email August 14 and met with the board at a special meeting on August 21. Mr. Eklund responded to the questions in an email Sept. 10 and met with the board on Oct. 2. We also spoke with Town Engineer Joe Finora.

The Town of Shelter Island owns Fresh Pond, a 15-acre freshwater body that ties into the island's aquifer and saltwater creeks. There is public access to wade or swim from a town landing off Lake Drive and at the terminus of Turkem's Rest, a public property at the south end of Fresh Pond. But due to potentially

harmful algal blooms, health advisories have been issued by state, county and local officials since 2017 asking people not to swim or wade in those waters and to keep pets and children away.

Mr. Grand and Mr. Eklund live on properties adjacent to the pond with current assessed values of \$1,307,000 and \$2,835,000, respectively. They also serve as co-presidents of the Fresh Pond Neighbors Association (FPNA), a tax-exempt charitable 501(c)(3) organization that raises money and awareness of Fresh Pond.

The FPNA has lobbied the Town to study and clean up Fresh Pond. It has also donated more than \$20,000 for the projects so far. According to a Feb. 6, 2023, article in the Shelter Island Reporter: “After many years of insistence by some former Town officials that Fresh Pond’s water is safe, the Fresh Pond Neighbors Association was finally able to get a study by Lombardo Associates showing phosphorus was creating harmful algal blooms.” (Note: FPNA does not limit its members to pond residents; ethics board member Deborah Grayson, who does not live on the pond, is on the FPNA executive committee and thus recuses herself from this discussion and Opinion.)

The state and Town could spend more than \$1 million on Fresh Pond clean-up if a pilot project now underway is successful. In the last few years:

- \$72,299 went to a pond cleanup engineering study paid by grants and FPNA donations with no direct cost to the Town.
- \$147,600 was committed in Town funds to support engineering design and permitting efforts so a full remediation project could be eligible for New York State grants. This funding was sought by Town Engineer Finora because the state was not giving grants for planning and design of freshwater wetland remediation. The local funds come from a real estate transfer tax, 20% of which is allocated to water quality improvements recommended by the Water Quality Improvement Advisory Board and adopted by the Town Board.
- \$17,496 (\$10,000 from FPNA) has been approved to remove seasonal blooms of harmful vegetation in the vicinity of the public access on Fresh Pond Road.

If the pilot project succeeds, a full restoration of the pond is estimated to cost about another \$800,000 over 7-10 years. According to Mr. Finora, the Town has applied for a \$1 million grant from New York State to fund the full clean-up. The grant requires a 25% local match (\$250,000). The Town has not committed funds for the full clean-up effort.

Mr. Eklund has recused himself from voting on the spending. He wrote us: “As I recall, I recused or abstained from discussion and voting on matters involving Fresh Pond 3 times. Once for the initial funding of the study, once for funding of design and permitting and once for funding of permitting for short term vegetative harvesting. Going forward, I anticipate one more vote for potential funding of a portion of the difference between the proceeds of a grant which has been applied for and the actual cost of the remediation project.”

The WQI, which he chairs, has a variety of other roles including recommending funding for other clean-up activity and drinking water safety.

Mr. Grand, as chairperson of the WAC, initially told us he had recused himself from votes relating to Fresh Pond but then clarified this to mean he limited his participation in discussions, not votes, about the pond due to his private interests in it. Mr. Grand wrote us: “The Water Advisory Committee's role is primarily analytical and educational. The WAC has never been required to vote on Fresh Pond specifically, and I do not expect that to change in the next year or two. Fresh Pond does, however, come up frequently in discussions of the overall hydrology of the aquifer.”

Mr. Grand told us he puts Fresh Pond matters lower on the WAC agendas and discloses his role in the nonprofit advocacy group. He also said he is careful to only use his private email address, not his Town email address, when writing private emails concerning Fresh Pond.

The August 7 inquiry to us acknowledged there may be a benefit to property values on Fresh Pond if public and private funds help to clean up the pond, as well as broader benefits to Shelter Island. Fresh Pond is an asset to the entire community.

Relevant laws:

Shelter Island Town Code Chapter 8, entitled “Ethics, Code of”

§ 8-5. Disclosure of interest in legislation and other matters where discretion is used. *Whenever a matter requiring the exercise of discretion, including proposed legislation, comes before an officer or employee, either individually or as a member of a board or committee, and disposition of the matter could result in a financial benefit to the officer or employee, a relative of theirs, or any private organization in which they are deemed to have an interest, the officer or employee shall disclose in writing the nature of the financial benefit.*

A. The disclosure shall be made when the matter requiring disclosure first comes before the officer or employee, or when the officer or employee first acquires knowledge of the benefit requiring disclosure, whichever is earlier.

B. In the case of a person serving in an elective office, the disclosure shall be filed with the Town Board and the Board of Ethics. In all other cases, the disclosure shall be filed with the Board of Ethics and that person’s supervisor or, if the person does not have a supervisor, the disclosure shall be filed with the officer, employee or board having the power to appoint the person’s position. In addition, in the case of a person serving on a board, a copy of the disclosure shall be filed with said board and included in the minutes of the board’s meeting

§ 8-6. Recusal and abstention. *No officer or employee may participate in any decision or take any official action with respect to any matter requiring the exercise of discretion, including proposed legislation, when they know or have reason to know that the action could confer a financial benefit on the employee, a relative, or any private organization in which the employee is deemed to have an interest. Further, once recused, that person may not be in the room (or appear via videoconferencing) when the matter is being discussed, voted on, nor participate in any discussions or communications including e-mail or text regarding it.*

§ 8-2 provides relevant definitions, including the following:

FINANCIAL BENEFIT- Anything of value, whether in the form of money, property, services, loan, travel, entertainment, hospitality, or promise, or any other form. The benefit can be direct or indirect but does not include any benefit arising from the provision or receipt of any services generally available to the residents or taxpayers of the Town or an area of the Town, or a lawful class of such residents or taxpayers.

OFFICER or EMPLOYEE- Any Town employee whether paid or unpaid, whether serving full-time, part-time or in an advisory capacity.

Analysis:

While Fresh Pond clean-up would benefit anybody who wants to swim or wade there, the people who live on the pond have a special interest in it. So those people who serve as government advisors have potentially conflicting interests between investing public funds in the pond and in other water quality priorities.

Government funding of Fresh Pond cleanup activity could result in a financial benefit to both chairpersons seeking our advice because of their property ownership on Fresh Pond. The WQI votes on spending for Fresh Pond; the WAC does not.

WQI and WAC discussions of Fresh Pond occurred before adoption of the Town's new ethics code in June. That code, for the first time, followed state law for municipal ethics by requiring more disclosure and full recusal for public officials facing potentially conflicting financial interests.

Conclusion:

Any conflict-of-interest concerns here are avoidable by specific public disclosure of the potentially conflicting interests and by full recusal from discussion and voting on Town committee matters affecting Fresh Pond. Mr. Grand and Mr. Eklund are clearly sensitive to these potential issues. They are doing the ethical thing in seeking our advice.

Mr. Eklund has properly abstained from Fresh Pond spending votes. We recommend he needs to go further under the new ethics code and state law to (1) state the reason for his recusal in the public minutes and (2) fully recuse himself from any Town discussion on financing Fresh Pond clean-up. As the new code says: "Further, once recused, that person may not be in the room (or appear via videoconferencing) when the matter is being discussed, voted on, nor participate in any discussions or communications including e-mail or text regarding it."

Mr. Eklund in his meeting with us concurred with this assessment.

Regarding non-financial issues, Mr. Eklund and Mr. Grand do have expertise and lead the Fresh Pond advocacy group. But since they are leading Town officials, we would urge them to avoid any appearance of conflict of interest in that context and to generally stay out of all discussions about Fresh Pond, including email, in the committees they chair. They can let other experts such as the Town Engineer and consultant and other committee members talk about Fresh Pond on their respective committees.

Significantly, there is nothing to prevent them from talking to the other's committee. They can effectively tag-team: when one recuses from a discussion and/or vote on the committee he chairs, the other can still appear as a Fresh Pond expert and advocate before that committee, and vice versa.

Mr. Eklund and Mr. Grand are, of course, free to continue speaking out in all other settings about Fresh Pond and other water quality issues. The Board of Ethics has no jurisdiction over the private nonprofit Fresh Pond Neighbors Association. As Mr. Grand suggests, they should not use their Town official email addresses when corresponding with anyone concerning their interests as pond residents or advocacy group leaders.

Please be so advised.

Shelter Island Board of Ethics

A handwritten signature in black ink that reads "Duff Wilson". The signature is written in a cursive style with a large, prominent "D" and "W".

Duff Wilson (Chairperson)

Laura Cunningham

Shelby Mundy

Robert Raiber

cc: Stephen Kiely, counsel