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May 6, 2022

VIA EMAIL

Peter G. Ness, Commission Chair
Gunstock Area Commission
149 Wildlife Blvd.
Belmont, NH 03220

RE: Preliminary reports

Dear Commissioner Ness:

I am attaching our preliminary reports on the matters we were asked to address. Please note these reports are preliminary because they contain our initial views based on the material provided and within the time period allotted. In each of the reports we note what additional materials are requested and what additional review should be undertaken so that our initial views can become final.

I look forward to hearing from you as to next steps.

Sincerely yours,



Peter G. Callaghan

PGC:as
Enclosures

CONFIDENTIAL PRELIMINARY REPORT – REVIEW OF THE GAC ETHICS POLICY
May 6, 2022

Preti Flaherty was asked by the Commission to review the “Code of Ethics Policy” dated February 27, 2019 and address whether it was properly promulgated. Our preliminary conclusion is that it was not and that it is of no force or effect.

As a result of questions raised by Commissioner Peter Ness concerning the legality of the Code of Ethics, the Commission voted on July 29, 2021 to authorize the expenditure of funds to engage legal counsel to review the ethics policy and assess whether it was properly adopted. What followed was preparation of a report on Commissioner Ness that was issued on August 19, 2021. The Commission has asked this firm to address the question approved on July 29.

The Gunstock Area Commission was incorporated by the New Hampshire General Court as a “body politic and as an agency of the County of Belknap, with the powers and privileges herein provided.” Laws of 1959, Chapter 399:2. Chapter 399:6 provides “The commission shall organize, choose a chairman and a secretary, and shall make such rules and regulations for conduct of its business as it may decide.” Chapter 399:10 grants specific powers to the Commission including the power to “adopt by-laws not inconsistent with this chapter for the conduct of its business.” Chapter 399:9 addresses conflicts of interest as it limits the compensation commission members may receive and prohibits any commission member from having “any financial interest in the area, or in its operation, either directly or indirectly.” There have been amendments over the years to expand the Commission’s powers but nothing in those amendments is material to the question addressed herein.

As a creation of the legislature, the Commission possesses only those powers expressly granted by the State. *See Girard v. Town of Allenstown*, 121 N.H. 268, 270 (1981) (addressing ordinance to restrict rents); *Town of Hooksett v. Baines*, 148 N.H. 625 (2002) (addressing ordinance to impose term limits). There is no grant of express authority in Chapter 399 or amendments permitting the Commission to adopt an ethics policy to regulate members of the Commission beyond what is contained in Chapter 399. The authority cannot be implied from the grant of authority in Chapter 399:6 to make rules to conduct its affairs. *See Girard*. The New Hampshire Supreme Court has cautioned that implied authority must be limited to avoid “an abdication and delegation of legislative authority” and the creation of “serious constitutional concerns.” *See Girard*. The New Hampshire Municipal Association has published a comprehensive assessment of local regulation of ethical standards, cautioning against doing so because it exceeds the grant of authority. Local Regulation of Ethical Behavior | New Hampshire Municipal Association (nhmunicipal.org).

A principal of statutory construction employed by courts adds clarity here: “We generally assume that when the legislature enacts a provision, it has in mind previously enacted statutes relating to the same subject matter. Thus, when interpreting two statutes that deal with a similar subject matter, we construe them so that they do not contradict each other and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes.” *Prof'l Fire Fighters of Wolfeboro, IAFF Local 3708 v. Town of Wolfeboro*, 161 N.H. 18, 22 (2012). In 1959 the legislature granted limited authority to the


Commission to regulate its members. Despite granting additional powers in the following decades, during which the legislature set ethical standards for others and specifically empowered agencies to create and enforce ethical standards, did not expand the Commission's powers on this front. The legislature plainly did not grant express authority to regulate the behavior of commission members as the ethics policy purports to do and there is no basis upon which to imply such authority.

It has been suggested that the ethics policy is valid because it is not inconsistent with applicable statutes, but that is not the standard. The standard to assess a Commission policy is whether there is legal authority to enact the policy. Here that does not appear to be the case. If it exceeds the authority granted then it is of no force or effect as explained in the cases cited above. There is good reason to refrain from enforcing an invalid policy: taking adverse action based on an invalid policy could expose the Commission to liability.

This does not mean that there are no ethical standards applicable to Commission members as there are other state laws defining and prohibiting certain conflicts of interest and improper pecuniary transactions, in addition to the provisions of Chapter 399. But the authority to expand restrictions on Commission members remains with the General Court.

This report is preliminary because there may be additional information that could assist in our effort to review the ethics policy, including the materials utilized and considered during preparation of the original policy, any legal authority provided for the original policy, and any subsequent review and consideration of the policy by other counsel. With this additional information, if any, we would expect to undertake further legal analysis of the policy and issue a final report.

Date: May 6, 2022

By: 
Peter G. Callaghan, Esq.
Preti Flaherty Beliveau & Pachios

CONFIDENTIAL PRELIMINARY REPORT – REVIEW OF THE REPORT ON
COMMISSIONER NESS
May 6, 2022

Preti Flaherty was asked by the Commission to review the “Report on Gunstock Area Commissioner Peter Ness” dated August 19, 2021 and address whether it is properly supported by sufficient evidence. Our preliminary conclusion is that it was not and that additional investigation should be undertaken to address the issues raised in the report.

As a result of questions raised by Commissioner Peter Ness concerning the legality of the GAC “Code of Ethics Policy,” the Commission voted on July 29, 2021 to authorize the expenditure of funds to engage legal counsel to review the ethics policy and assess whether it was properly adopted. What followed was preparation of a document entitled “Report on Gunstock Area Commissioner Ness that was issued on August 19, 2021. It does not appear that the Commission considered a motion to engage counsel to address the conduct of Commissioner Ness. Instead, it appears that two Commissioners requested counsel prepare the report. Indeed, the report states at the outset it was prepared at the request of Commissioners Kiedaisch and Gallagher. It remains unclear how the Commission vote to review the legality of the ethics policy was transformed into a report on a single commissioner or what authority existed to investigate that commissioner.

The report was presented to the Commission during the public portion of the August 25, 2021 meeting and made a part of the public record. The report was also attached to a Complaint filed in the Belknap County Superior Court on November 11, 2021 against the Belknap County Convention.¹ The report alleges that Commissioner Ness violated RSA 95:1, Chapter 399:9 if the Laws of 1959 and the GAC Code of Ethics Policy in attempting to sell a snowsports technology product (known as “Otto”) to Gunstock. And the report concludes that Commissioner Ness had engaged in disruptive, demeaning and intimidating behavior that supports asking for his resignation.

As to the conflict of interest claim, the report contains a number of conclusory assertions but fails to present any evidence in support of those conclusions. For example, the report states “Mr. Ness repeatedly pressured Gunstock Snowsports personnel, Gunstock management, his fellow GAC Commissioners, and members of the Belknap County Legislative Delegation to force Gunstock to buy his OTTO [sic] product.” But there is no mention of any evidence to support this conclusion, such as witness names, dates, statements, emails or context. There is no mention of what supports the allegation that Mr. Ness “repeatedly pressured” anyone or used “force” to accomplish a sale. There are no terms of the sale, such as at what price the product was offered for sale. There is no analysis whether any person contacted possessed the authority to purchase the product or whether anyone was actually interested in doing so. A review of counsel’s invoices in this time period does not reveal any witness interviews or review of documents that could have provided support for such allegations. That is not to say at this point that such information does not exist, but a review of the file materials would confirm what, if

¹ The Complaint alleges in paragraph 6 that at its July 29, 2021 meeting the GAC “authorized hiring an attorney to investigate conflict of interest allegations made against GAC Commissioner Peter Ness” but that is not what is reflected in the minutes of the July 29, 2021 meeting.

anything, existed in support of the claims in the report. And the file review may provide information as to when and under what authority the request for an investigation was made.

As to the claim of improper behavior, there is more information, including one quote and more specifics, but once again there is a lack of sufficiently specific evidence as to the time frame, the context or the actual statements and reactions of those involved in the communications. So much of the report relies on subjective views of what was said and how others reacted. First person accounts, through witness interviews rather than reports of third persons, is critical to fully assess the conduct complained of. The report does not reveal that this occurred. And the legal invoices shed no light.

Importantly, Mr. Ness was not interviewed by counsel prior to issuance of the report. Mr. Ness was not presented with the accusations and asked to respond so that the report could reflect his position on each of the issues. It is standard practice when conducting investigations to speak with the subject of the complaint, but this did not occur. Failing to interview the subject results in an investigation that is incomplete and unreliable. This is particularly true when dealing with state of mind (such as what was Mr. Ness' intent when discussing the product that could potentially benefit Gunstock, or had he approached any legal authority to understand the parameters for raising the issue) and when assessing subjective reactions to conversations. The GAC minutes of August 25 reflect that the Chair may have notified Commissioner Ness of the existence of the report just days before the meeting, but that does not supplant the need to interview the subject during the investigation before any conclusions are reached.

An issue that is frequently examined during the investigation of complaints is the motives of the accusers. This does not appear to have been addressed. It is unclear from the report who made the complaints and why. But there are surrounding facts that call into question the goal of pursuing this issue. It appears from legal invoices that a member of the Commission sought legal advice in November 2020 on the right to remove or discipline a Commissioner. In June 2021 counsel was consulted about the "huge" requests for information made by Mr. Ness and how to "constrain Ness." Later in the month work was performed on assessing how to remove a commissioner and possible avenues to pursue. In July 2021 counsel was consulted again about Mr. Ness' document requests and the strategy surrounding a "no confidence" vote. Following the July 29 vote regarding the ethics policy legal advice was sought again on the "no confidence" vote and time was devoted to generating the report on Commissioner Ness which appears to have been prepared over the course of a few days. Putting aside the fact that the Commission vote on July 29, 2021 did not include engaging counsel to prepare a report to oust Commissioner Ness, there is a troubling timeline that suggests it was designed to punish Commissioner Ness for asking difficult questions and requesting financial and other records in the performance of his duties and responsibilities as a Commissioner. The questions surrounding what led to the request for an investigation should be explored more deeply.

Even if the report's conclusions are well-supported by facts, the conclusions of wrongdoing seem to miss the mark. It is undisputed that there was no sale: Gunstock did not purchase the Otto product and appears to have never seriously considered doing so. RSA 95:1 applies to sales, not attempts to sell. It also does not prohibit sales: the statute permits sales that occur "by open competitive bidding." With no sale and no serious consideration of a sale, there

is plainly insufficient evidence set forth in the report to support a violation of RSA 95:1. The conclusion there was a violation of Chapter 399:9 also appears flawed. It prohibits additional compensation for serving as a Commissioner and prohibits having a financial interest in the recreational area. This does not appear to prohibit a sale of a product for fair value as there is no financial interest in the area in such a sale. And RSA 95:1 permits such a sale if by open competitive bidding. If there was a real concern by the Commission that a sale of Otto could violate Chapter 399:9, the proper way to address that would be to wait until there is a demonstrated interest in purchasing it (which has not been shown and the evidence suggests there was no interest at Gunstock in purchasing Otto or any such product) and seek a legal opinion as to the legality of that transaction. If there was a legal opinion cautioning against the purchase, the transaction could be abandoned or the parties could explore steps to make the transaction compliant with applicable statutes (such as procuring it at no cost).

The apparent effort to oust Commissioner Ness included the “no confidence” vote. That had no obvious legal effect and could only have been to embarrass a fellow Commissioner and provide some basis to seek his removal. But the sole power to remove a Commissioner rests with the Belknap County Delegation. Attempting to secure the removal of Commissioner Ness appears to have been an effort to usurp the power of the Delegation. The timeline raises concerns that this may have been done because, at least in part, Commissioner Ness was assertive in fulfilling his role as a Commissioner. Requesting records, reviewing the finances and insisting on compliance with RSA 91-A are hallmarks of our approach to open government. Even when assertive, those efforts must be respected. Taking steps to punish those who diligently pursue access to public records can have a chilling effect on future efforts which runs contrary to the principles behind RSA 91-A (New Hampshire’s Right-to-Know law).

Additional investigation is needed to determine whether there was any basis for the complaints and, if so, how to address those complaints. This additional investigation should begin with a review of the documents that were utilized in preparing the report. Based on the information provided, witnesses should be interviewed to provide first-hand accounts, motives should be reviewed to assess witness credibility and a conclusion reached as to the merits of any complaints and how best to address the conclusions. In addition, there should be a review of why this was handled in this manner and whether the GAC is exposed to any liability for these actions.

Date: May 6, 2022

By: 

Peter G. Callaghan, Esq.

Preti Flaherty Beliveau & Pachios

CONFIDENTIAL PRELIMINARY REPORT – REVIEW OF THE BCD LITIGATION
May 6, 2022

Preti Flaherty was asked by the Commission to review the lawsuit filed by the Gunstock Area Commission against the Belknap County Delegation filed November 11, 2021. We were asked to determine whether the suit lacked merit. Our preliminary conclusion is that it was an aggressive attempt to significantly delay a removal hearing, control how the hearing would be conducted and preclude certain members of the delegation from participating in a hearing, but it was not well-founded and was likely to be dismissed. We are unable to determine at this time whether it was patently unreasonable under New Hampshire law.

The Delegation has requested the GAC reimburse it for the fees incurred in defending the matter. The Delegation did not request a fee award from the Superior Court. Generally, the court is the proper forum to seek an award of fees against the other party.

In order to respond to the question, we consider the standard utilized by courts to determine whether to award fees to the prevailing party. The general rule in New Hampshire is that parties pay their own attorney's fees, but a prevailing party may be awarded fees pursuant to an established judicial exception to that general rule. One judicial exception allows an award when a party has "acted in bad faith, vexatiously, or wantonly, or for oppressive reasons, where the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and where it should have been unnecessary for the successful party to have brought the action." *Harkeem v. Adams*, 117 N.H. 687, 691 (1997). A fee award is viewed "as compensation for those who are forced to litigate against an opponent whose position is patently unreasonable." *In the Matter of Mason & Mason*, 164 N.H. 391, 398 (2012). "Underlying the rule that the prevailing litigant is ordinarily not entitled to collect his counsel fees from the loser is the principle that no person should be penalized for merely defending or prosecuting a lawsuit." *Harkeem*, 117 N.H. at 690.

"A claim is patently unreasonable when it is commenced, prolonged, required or defended without any reasonable basis in the facts provable by evidence, or any reasonable claim in the law as it is, or as it might arguably be held to be." *Glick v. Naess*, 143 N.H. 172, 175 (1998). *See also Fat Bullies Farm, LLC v. Devenport*, 170 N.H. 17 (2017). Even if a party's claim or view of the law is erroneous that does not mean it is frivolous, patently unreasonable or taken in bad faith. *In the Matter of Mason & Mason*, 164 N.H. at 398.

There is insufficient evidence at this time to determine whether the suit was patently unreasonable despite being unsuccessful in securing injunctive relief. The filing sought to prevent the removal of certain commissioners by preventing a hearing on their removal and to control who could sit in judgment when a hearing was held. From the start the request for injunctive relief was unlikely to succeed as there could be no showing of irreparable harm. Indeed, the court denied the *ex parte* request for a temporary restraining order and later denied the request for a preliminary injunction after a hearing, finding the GAC had presented an insufficient basis for the relief sought. The court also denied a motion to reconsider.

It appears likely the court would have dismissed the action on procedural grounds and on the merits. There were significant issues raised by the BCD in its motion to dismiss: (1) whether

the GAC had standing to bring the claims as the individual Commissioners, not the GAC, were subject to removal;² (2) whether the claims were sufficiently ripe for the court to consider, as the public hearing had not yet been held and while there were concerns expressed by the Commissioners about the procedures to be employed at the hearing and the impartiality of the delegation, there was no certainty as to how the hearing would be conducted, what procedures would ultimately be employed, who would attend and sit, and how the attendees may vote; and (3) whether the litigation was an impermissible attempt to usurp the statutory authority of the BCD to determine who sits as a GAC commissioner. Typically, such actions are dismissed as premature (not ripe) so that the court is not speculating as to what might happen but is reviewing what actually did happen. If the challenging party is successful the common result is to remand the case to provide the process that is due. But here the GAC (not the individual Commissioners) sought to prevent a hearing until its declaratory judgment claim could be heard, where the GAC sought to control how the hearing would be conducted and who could sit as delegation members. And it appears from the available documents that some commissioners pressed complaints against several members of the BCD through one or more options applicable to public officials, which raises further questions about the goals of the complaint.

In order to respond to the request of the BCD, additional information is needed to fully assess why the litigation was filed, what was known as to the likelihood of success, and what other steps have been taken in the name of the GAC against others. Upon that review a determination can be made on whether the suit was patently unreasonable. This includes a review of file materials and witness interviews. The GAC requested counsel's files on May 4 and it is anticipated the review can be undertaken shortly.

Date: May 6, 2022

By: 

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Preti Flaherty Beliveau & Pachios

² Chapter 399:4 plainly states that each member shall be subject to removal for cause by the appointive agency after public hearing. It was undisputed the BCD possessed the sole authority to determine whether to remove a commissioner it had appointed.