

## **GUNSTOCK AREA COMMISSION SPECIAL MEETING**

July 1, 2022

Gunstock Mountain Resort, Powderkeg Pub

### **DRAFT MINUTES**

Page 1 of 10

**GAC:** Peter Ness (Chair), David Strang (Vice-Chair), Douglas Lambert (Secretary), Gary Kiedaisch (via Zoom), Jade Wood (via Zoom)

Chairman Ness called the meeting to order at 10AM. He explained that the purpose of the meeting was to discuss ongoing legal matters and that he had the authority to call such a special meeting pursuant to Article III, paragraph 1 (e) of the Commission's bylaws. Additionally, the agenda as noticed would be to enter a non-public session.

Vice Chairman Strang asked to make a point of order before seconding Chairman Ness' motion to enter into the non-public session. He stated that, after Chairman Ness notified the members of the GAC on Tuesday, June 28 of the July 1st non-public meeting, without being asked to do so, Commissioner Kiedaisch contacted Deborah Shackett, the Belknap County Administrator, and asked her to arrange for Zoom participation of the public in Friday's non-public meeting. Not only was the meeting not going to be a public meeting, it was not going to be held at the County Facility where Ms. Shackett works. In doing so, Cmr. Kiedaisch violated Article II, Section 1 (c) of the GAC Bylaws, which states that "No individual member of the Commission shall act or speak on behalf of the Commission unless specifically authorized by instruction of the Commission." As the current Chair of the GAC, Chairman Ness is the only Commissioner who is authorized to call meetings and schedule them as stated in Article IV, Section 3, (a), 11. Cmr. Kiedaisch is no longer the Chair and was not instructed by Chairman Ness to arrange for a location nor public participation in a non-public meeting. It is unclear how much of Ms. Shackett's time was wasted in this maneuver, but it certainly caused several unnecessary communications amongst the Commissioners as to the location and form of the meeting.

### **ACTION**

**Motion:** Vice Chairman Strang moved that Commissioner Kiedaisch be reprimanded for his violation of Article II, Section 1 (c) of the GAC Bylaws when he attempted to arrange a location for and public participation in today's non-public meeting, when he was not authorized to do so.

**Second:** Secretary Lambert

**Discussion:** Commissioner Kiedaisch claimed he was simply trying to help and to make sure there was a Zoom connection. Vice Chairman Strang replied that if this were true, he should have called Chairman Ness and asked for permission to do so. He added that this was just another instance of Cmr. Kiedaisch trying to take over the process which repeatedly makes it hard for the Commission to do its job. Cmr. Wood stated that this action didn't seem constructive, and that the GAC shouldn't be arguing in front of the public. She stated she would like to move past this. Vice Chairman Strang stated that the public needed to be aware of such actions and that addressing this inappropriate behavior did not qualify for discussion in a non-public session. Secretary Lambert

## **GUNSTOCK AREA COMMISSION SPECIAL MEETING**

July 1, 2022

## Gunstock Mountain Resort, Powderkeg Pub

## DRAFT MINUTES

Page 2 of 10

stated that the various emails coming from Cmr. Kiedaisch shortly after Chairman Ness's initial distribution did not allow him time to respond and seemed premature and inappropriate.

**Roll Call Vote:** Commissioner Kiedaisch- NO  
Secretary Lambert- YES  
Chairman Ness- YES  
Vice-Chair Strang- YES  
Commissioner Wood- NO

## Motion passed

## ACTION

**Motion:** Chairman Ness motioned to enter into a Non-Public Session pursuant to (a) RSA 91-A:3, II(l) regarding legal matters and (b) RSA 91-A:3, II(a) regarding employment matters.

**Second:** Secretary Lambert

**Roll Call Vote:** Commissioner Kiedaisch- YES  
Secretary Lambert- YES  
Chairman Ness- YES  
Vice-Chair Strang- YES  
Commissioner Wood- YES

## Motion passed

Members of the public were asked to exit the room.

## **NON-PUBLIC SESSION, 10:10AM**

Members of the Commission reviewed a “Final Report” distributed the previous afternoon via email by Chairman Ness. This latest document was prepared by Atty Peter Callaghan of the PretiFlaherty law firm as a result of a motion at the April 20 GAC meeting “to engage legal counsel to review the question brought by the Delegation regarding this litigation.” It presented the follow-up findings and further recommendations to the initial May 6 “Preliminary Report.”

Vice-Chairman Strang observed that the report consisted of (3) components, the first of which addressed the so-called Ethics Policy of the GAC and its validity. The finding concludes that it has

## **GUNSTOCK AREA COMMISSION SPECIAL MEETING**

July 1, 2022

Gunstock Mountain Resort, Powderkeg Pub

### **DRAFT MINUTES**

Page 3 of 10

none. To that end, Vice-Chairman Strang felt that it should be officially removed and eliminated once and for all.

### **ACTION**

**Motion:** Vice Chairman Strang motioned to remove the Ethics Policy from Commission documents and the website, and prohibit its use or that of any similar policy in future years and for future Commissioners

**Second:** Chairman Ness

**Discussion:** Commissioner Kiedaisch expressed concern that the report, in his opinion, strayed from the original purpose of the origins of the lawsuit. He also claimed he had not had enough time to properly review it. He claimed “the Ethics Policy issue was resolved last October.” He then stated he found “bias in this document” in that it focused on the Ethics Policy in relation to Chairman Ness, which he claimed was already decided. “The issue today is the lawsuit against the (Belknap County) Delegation which was filed to stop a lawsuit based on false allegations.” He further opined that the GAC has now spent eighteen thousand dollars yet had failed to address how it started, which he blamed on the Delegation. He claimed this investigation was necessary because of the Cmr Wood proposal to pay the Delegation’s legal bills, which Cmr. Wood denied was the case. Cmr. Kiedaisch continued and characterized the majority of this most recent report as “ancient history and most troubling in that the Preti Flaherty firm has spent eighteen thousand dollars for something that was to help the public understand how the lawsuit was filed.”

Vice Chairman Strang stated he “strongly disagreed that the Ethics Policy matter was resolved last October.” He stated that if that statement were really true, then why were both he and Secretary Lambert asked to sign it upon joining the Commission earlier this year. At this point Cmr Kiedaisch claimed the Commission had supposedly voted to drop the Ethics Policy at the April 2020 meeting (untrue). Cmr. Wood reiterated that “the reason we’re here is that I offered an olive branch, if you read the May motion, and it failed.” Cmr. Kiedaisch then characterized Wood’s previous motion as “an excellent motion.” He then continued to discuss the conflict with the Delegation: “We tried to meet.” (Belknap County Delegation Chair) “Sylvia refused to meet.” Legal work continued... There are records. Emails. Communication.” Vice Chairman Strang responded in that “if you truly believed it (the Ethics Policy) was over last October, why did you continue to raise it from the dead like Lazarus?” Further, he added that “you had no problem spending over one hundred and ten thousand dollars for supposed ongoing legal matters which were finally stopped by Commissioners Wood, Ness, and myself. For you to now express concern about this current legal expenditure seeking to get to the bottom of this is laughable.” Cmr. Wood reminded Cmr. Kiedaisch that he too had voted in favor of this current legal investigation.

## **GUNSTOCK AREA COMMISSION SPECIAL MEETING**

July 1, 2022

## Gunstock Mountain Resort, Powderkeg Pub

## DRAFT MINUTES

Page 4 of 10

Vice Chairman Strang reminded the Commissioners that the motion on the floor was to remove the Ethics Policy. Cmr. Kiedaisch stated “every board of record has an ethics policy.” He characterized the current discussion as a “dark day” in that this is a non-public subject. Chairman Ness replied this is a discussion of legal advice as presented in page one of the current report. Vice Chairman Strang noted that “nobody is arguing that we should not be held to ethical standards” but that they are already covered in our oath as well as in other State RSAs but anything beyond that, as plainly stated in this report, is not allowed per the current law. Chairman Ness then called the vote.

**Roll Call Vote:** Commissioner Kiedaisch- NO  
Secretary Lambert- YES  
Chairman Ness- YES  
Vice-Chair Strang- YES  
Commissioner Wood- NO

## Motion passed

The Commissioners returned to discussion of the report. Vice Chairman Strang stated that there were three points raised in the document that required the Commission's further attention: (1) On page 6- "*whether any duties were breached and understand whether the Commission is exposed to any liability for what transpired.*" (2) On page 7 where counsel states, "*We have not addressed questions about the decisions to file the lawsuit in the name of the Commission or to take other action in connection with that lawsuit and removal proceedings and to utilize Commission funds in pursuit of those matters.*" (3) On page 5- "*The Commission may want to consider further investigation to determine whether procedural changes and tightening of internal controls should be implemented to prevent the expenditure of funds as occurred in this matter.*" Vice Chairman Strang noted that prior Commissions seemingly contradicted themselves through certain statements, votes, and then not adhering to them. In support of his observation, he referenced the minutes of the July 29, 2020 GAC meeting in which Gunstock CFO Cathy White stated that since there were no legal expenses of significance, they weren't even a line item on the General Ledger. Consider then the minutes of Sept. 30, 2020 where Cmr. Kiedaisch stated if an item was not in the budget, then it must be voted on by the GAC. At the Oct. 21, 2020 GAC meeting, a unanimous vote was taken to require a GAC vote if off-budget expenditures exceeded \$30K.

Vice Chair Strang offered his summation: "Although Cathy White's statement from July 29, 2020 appears to be factually true, the subsequent statements by Cmr. Kiedaisch on Sept. 30, 2020 and the vote taken by the GAC on Oct. 21, 2020, appear to be no more than lip service as both were violated by the expenditure of over \$110K in legal fees over the next 1-1/2 years in the attempts

## **GUNSTOCK AREA COMMISSION SPECIAL MEETING**

July 1, 2022

Gunstock Mountain Resort, Powderkeg Pub

### **DRAFT MINUTES**

Page 5 of 10

to (1) remove Cmr. Ness, (2) the lawsuit against the delegation, and (3) the continued engagement of counsel for related matters, all without GAC approval. I would like to know what liability, what exposure the Commission has incurred by making definitive statements as they did in Sept. & Oct. of 2020, definitive promises of oversight and approval for expenditures that appear, with today's knowledge, to have been violated. Said another way, were the citizens of Belknap County, the owners of Gunstock, deceived or even lied to in Sept. and Oct. 2020 with this obvious failure by the GAC to do what they had promised to do? These facts demand further investigation and I would therefore support a third and hopefully final phase 3 investigation into this complex matter."

Cmr. Wood wondered how much a third phase of the investigation would end up being redundant. Secretary Lambert concurred with Vice Chairman Strang's assessment and, despite reluctance to continue down these legal paths, felt the GAC had no choice but to follow these serious issues raised, address them and fix the deficiencies as found in order to prevent future liability.

### **ACTION**

**Motion:** Vice Chairman Strang motioned to:

Request legal counsel conduct a further investigation to determine:

- 1) Were duties breached and if so, what exposure and liability has the Commission incurred by these actions?
- 2) Did any of these actions constitute a violation of law?
- 3) What should the Commission do based upon any findings?
- 4) Did these Commissioners have the authority to expend Gunstock funds in these legal pursuits?
- 5) What steps should the Commission take to prevent serious actions such as these from ever occurring again?

**Second:** Secretary Lambert

**Discussion:** Vice Chairman Strang, in support of his motion stated that the GAC knew something improper had happened. and therefore it could not walk away. He stated that to fail to investigate and take action with this knowledge, was malfeasance. Cmr. Wood asked that in the event of serious matters, doesn't the Delegation have the duty to act and remove? Chairman Ness noted that while he appreciated Cmr. Wood's concern, it was this Commission's responsibility to provide oversight. This report made it clear that things were done behind the scenes without proper procedure. To not act would be to breach our duties. Cmr. Kiedaisch felt that "this is getting beyond the facts and is in fact, dangerous." Cmr. Wood cautioned that some might perceive this as some sort of agenda in play. Chairman Ness answered that the only agenda is to understand the failures of internal control that, if not corrected, could leave us open to liability. Cmr. Kiedaisch again

## **GUNSTOCK AREA COMMISSION SPECIAL MEETING**

July 1, 2022

## Gunstock Mountain Resort, Powderkeg Pub

## DRAFT MINUTES

Page 6 of 10

referenced the Ethics Policy, his concerns on further legal spending, and that further pursuit of these matters could lead to litigation. He then suggested the Commission consider another outside legal opinion on the present report, to which Vice Chairman Strang asked “how many do we obtain? Do we keep getting and paying for legal opinions until we get one that you agree with?” He asked Cmr. Kiedaisch how many legal opinions he had used before he had investigated Chairman Ness without a GAC vote and then sued the Delegation. Cmr Kiedaisch claimed they had relied on more than one. Vice Chairman Strang noted that in the matter being reviewed, it was clear there had only been one. “It is hypocritical to now denounce our listening to the one we have tasked. I am doing what I was appointed to do, advocate for the citizens who own Gunstock. A prior Commission adopted a thirty-thousand-dollar off budget spending limit and then spent over one hundred ten thousand dollars. We need to understand the liability and exposure. To ignore that creates an even greater harm.”

Cmr. Wood referenced page 7 of the report that states “*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 was 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 even though it was likely to be dismissed. Following additional review, that included a review of counsel’s files, we are unable to conclude that the BCD litigation was patently unreasonable under New Hampshire law...We believe our work is concluded on this question.*” So, why continue? Secretary Lambert pointed out that the answer to her appropriate question was found in the next paragraph on page 7 in which the report concludes, “*We have not addressed questions about the decisions to file the lawsuit in the name of the Commission or to take other action in connection with that lawsuit and removal proceedings and to utilize Commission funds in pursuit of those matters. We would be happy to address those questions with the Commission including potential next steps.*” He stated that as he said earlier, we must do our job and bring this matter to a complete and final conclusion. To do otherwise would be wrong and contrary to our mission of oversight and accountability. Cmr Wood asked Chairman Ness how much more time would be needed to bring this to a conclusion? The Chair replied that, should the Commission vote to proceed the desire would be by the end of July or early August. A matter of three to four weeks. Vice Chairman Strang and Secretary Lambert stated that they agreed that they wanted the matter concluded by then as well. Chairman Ness called the question.

**Roll Call Vote:** Commissioner Kiedaisch- NO  
Secretary Lambert- YES  
Chairman Ness- YES  
Vice-Chair Strang- YES  
Commissioner Wood- YES

## **GUNSTOCK AREA COMMISSION SPECIAL MEETING**

July 1, 2022

## Gunstock Mountain Resort, Powderkeg Pub

## DRAFT MINUTES

Page 7 of 10

## Motion passed

## ACTION

**Motion:** Secretary Lambert motioned the Commission accept the June 30, 2022 report from Atty. Peter Callaghan and release it to the public

**Second:** Vice Chairman Strang

**Discussion:** Cmr. Kiedaisch called its release a “mistake” in that “this is a biased, one-sided report.” Cmr. Wood replied the taxpayers had a right to review it.

**Roll Call Vote:** Commissioner Kiedaisch- NO  
Secretary Lambert- YES  
Chairman Ness- YES  
Vice-Chair Strang- YES  
Commissioner Wood- YES

## Motion passed

At this point, Cmr. Kiedaisch motioned to provide funds to engage another (third) law firm to investigate this matter further and to interview former Commissioners and employees to get a second opinion. Vice Chairman Strang stated that the Commisson was already doing this and discussed this just a few minutes ago. Cmr Kiedaisch asked why they haven't talked to certain people? Chairman Ness pointed out that the Preti-Flaherty law firm had possession of all materials from the Devine-Millimet files that contain much firsthand knowledge of this matter and may perhaps talk to certain persons as needed in the final investigation phase that was just approved. There was no second for Cmr. Kiedaisch's motion and it thus failed.

## ACTION

**Motion:** Chairman Ness motioned the Commission approve the legal invoice of \$17,885.00 and present it for payment.

**Second:** Vice Chairman Strang

**Discussion:** Chairman Ness stated this was in line with the policy as voted by the Commission to review all legal bills prior to payment.. Secretary Lambert asked about an eventual release of the billing narrative in line with the GAC's previous action. Chairman Ness stated that at this time that was privileged information but it can be considered for release at some point. Vice Chairman Strang

## **GUNSTOCK AREA COMMISSION SPECIAL MEETING**

July 1, 2022

## Gunstock Mountain Resort, Powderkeg Pub

## DRAFT MINUTES

Page 8 of 10

agreed and noted that the first release was upon the conclusion of that particular suit. He said it was a different matter entirely to release confidential records while a legal matter was ongoing.

**Roll Call Vote:** Commissioner Kiedaisch- YES  
Secretary Lambert- YES  
Chairman Ness- YES  
Vice-Chair Strang- YES  
Commissioner Wood- YES

## Motion passed

At this point, the Commissioners took up the employment matter as posted in the agenda.

Chairman Ness referenced recent tension between Gunstock General Manager/President Tom Day and himself in recent emails and others on the Commission at its most recent regular meeting. "It needs to be reiterated that the GAC is Mr. Day's employer and that he works for us. He has recently stated that he is the one that decides who the Commissioners can speak to." It was noted that ALL employees of Gunstock work for the GAC. The Commissioners felt that they needed to be able to talk to employees yet Mr. Day felt that he has the right to direct who they can and cannot talk to. Cmr. Kiedaisch stated that Mr. Day's "President" title enables him and his management team to implement a management plan and that he felt it was inappropriate for a Commissioner to interfere and direct employees as he felt it would create chaos. He felt that it was dangerous to allow the GAC access to Gunstock employees as evidenced by recent remarks of a "toxic" atmosphere referenced by an employee. Secretary Lambert asked Cmr Kiedaisch "what exactly IS the role of a Commissioner? Is it simply to rubberstamp everything placed before them and then get verbally berated and abused by employees and others at meetings?" Cmr Kiedaisch did not answer the question and instead reiterated that the GAC should maintain a "nose in, hands-off approach" Chairman Ness suggested a conversation be arranged with Mr. Day to remind him that he in fact works for the Commissioners.

At this point, Cmr. Wood indicated Internet connection issues. Discussion continued regarding this employee access matter. It was pointed out that on some occasions, an employee might be more candid in a conversation without a manager present. Secretary Lambert proposed a gentle, non-confrontational conversation with GM Day to remind him of the chain of command. At 11:35, Cmr Wood completely lost her connection to the meeting. Secretary Lambert further reiterated his positive relationship with Mr. Day and stated he had total confidence in his managing the operation itself and would very much like to build trust between him and ALL of the Commissioners. Vice Chairman Strang also stated that he liked the work Mr Day performed but recognized that he had issues, especially with Chairman Ness. He stated that he was disappointed

## **GUNSTOCK AREA COMMISSION SPECIAL MEETING**

July 1, 2022

## Gunstock Mountain Resort, Powderkeg Pub

## DRAFT MINUTES

Page 9 of 10

in his responses, that he has not been asked to perform illegal acts, only to display a spirit of cooperation. Cmr. Kiedaisch reiterated his disagreement with this discussion and stated it should be in a public meeting with Mr. Day. Cmr. Wood returned to the meeting via Zoom. Vice Chairman Strang expressed his agreement with Secretary Lambert in calling for a “gentle” reminder to Mr. Day of his position.

## ACTION

**Motion:** Chairman Ness motioned to have two Commissioners have a conversation with General Manager/President Day to remind him that he is an employee of and works for the GAC.

**Second:** Cmr. Wood

**Discussion:** Cmr. Wood volunteered to be one of the Commissioners to speak with Mr. Day. Secretary Lambert indicated he would be willing to do so as well. Chairman Ness stated he would decide at a future date who the two Commissioners would be that would meet with General Manager Day.

**Roll Call Vote:** Commissioner Kiedaisch- NO  
Secretary Lambert- YES  
Chairman Ness- YES  
Vice-Chair Strang- YES  
Commissioner Wood- YES

## Motion passed

## ACTION

**Motion:** Chairman Ness motioned to exit the non-public session.

**Second:** Vice Chairman Strang

**Roll Call Vote:** Commissioner Kiedaisch- YES  
Secretary Lambert- YES  
Chairman Ness- YES  
Vice-Chair Strang- YES  
Commissioner Wood- YES

## **THE PUBLIC MEETING RESUMED AT 11:45 am**

## **GUNSTOCK AREA COMMISSION SPECIAL MEETING**

July 1, 2022

## Gunstock Mountain Resort, Powderkeg Pub

## DRAFT MINUTES

Page 10 of 10

It was the consensus of the Commissioners that there would be no need to seal the minutes of the non-public meeting. Minutes would be prepared, and the June 30 legal counsel report would be made available to the public.

## ACTION

**Motion:** Chairman Ness motioned to adjourn

**Second:** Vice Chairman Strang

**Roll Call Vote:** Commissioner Kiedaisch- YES  
Secretary Lambert- YES  
Chairman Ness- YES  
Vice-Chair Strang- YES  
Commissioner Wood- YES

Meeting adjourned at 11:47 am

Respectfully Submitted

Douglas Lambert  
Secretary, Gunstock Area Commission

Portland, ME

Augusta, ME

Concord, NH

Boston, MA

Washington, DC

Peter G. Callaghan  
pcallaghan@preti.com  
P: (603) 410-1500

June 30, 2022

## VIA EMAIL

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

### RE: Final reports

Dear Commissioner Ness:

I am attaching our updated reports on the matters we were asked by the Gunstock Area Commission to address. Please note these reports are now final and we recommend additional investigation to address other issues.

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

Sincerely yours,



Peter G. Callaghan

PGC:as  
Enclosures

FINAL REPORT – REVIEW OF THE GAC ETHICS POLICY  
June 30, 2022

Preti Flaherty was asked by the Commission to review the “Code of Ethics Policy” dated February 27, 2019, and to address whether the Gunstock Area Commission properly promulgated the ethics policy. On May 6, 2022, we issued our preliminary conclusion that it was not properly promulgated and thus it is of no force or effect. Following further review that remains our conclusion, because we have discovered no new information that would cause us to amend the reasoning set forth in the May 6 report.

As set forth in our May 6 report, this conclusion 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, including the provisions of Chapter 399. But the authority to expand restrictions on Commission members remains with the General Court and not with the Commission.

We believe our work is concluded on this question.



Date: June 30, 2022

By: \_\_\_\_\_

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

FINAL REPORT – REVIEW OF THE REPORT ON  
COMMISSIONER NESS  
June 30, 2022

Preti Flaherty was asked by the Commission to review the “Report on Gunstock Area Commissioner Peter Ness” dated August 19, 2021, and to address whether it is properly supported by sufficient evidence. Our preliminary conclusion on May 6 was that it was not properly supported, and that additional investigation should be undertaken to address the issues raised in the report.

The additional investigation was approved by the Commission. It included a review of prior counsel’s files, review of new material and an interview of Commissioner Ness (which was not conducted before the issuance of the August 19 Report). We determined it was not necessary to interview other witnesses in order to address the current questions posed by the Commission. However, additional investigation is recommended as set forth at the end of this report.

Based on the information available, we have determined that the report’s conclusions of wrongdoing by Commissioner Ness are unfounded and that there was a concerted plan to remove Commissioner Ness from office following his requests for information, particularly financial information, and his asking questions about the Gunstock operation. Indeed, one Commissioner wrote on July 19, 2021, “The goal is to present a picture and vote of no confidence to Ness that prompts him to resign. Alternatively build the case that goes to the Delegation and advocates removal.” This was before the collection of the information that served as the basis for the August 19, 2021, report.

### **Alleged Ethical Violations**

The August 19, 2021, document concluded that Commissioner Ness had engaged in a prohibited conflict of interest by attempting to sell his company’s software (known as Otto) to Gunstock Mountain Resort. Some of the facts we discovered on this issue during the time Peter Ness has been a Commissioner are: (1) Peter Ness, shortly after becoming a Commissioner, engaged in due diligence during the 2019-2020 ski season to prepare a detailed confidential report on the business model of the snowsports school and informed the then current Commission Chair of his work; (2) the Chair encouraged Commissioner Ness to meet with the Gunstock President/General Manager; (3) Based on that encouragement, Commissioner Ness met with the President/General Manager in the spring of 2020 and the President/General Manager reportedly expressed his opposition to using technology in connection with the snowsports school; (4) Mr. Ness issued his report to the Chair, with reliance on his due diligence, publicly available data and industry trends, recommending changes to the business model of the snowsports school on June 24, 2020, and the Chair described the report as “well written and founded on many facts that we should all be aware of;” (5) the Commission Chair encouraged Mr. Ness to share the report with the other Commissioners and the President/General Manager; (6) the report did not mention the Otto software or advocate for its use at Gunstock but instead focused on improving the delivery of the snowsports school services through better trained and better compensated ski instructors, improving the conversion rate of those receiving lessons, and modernizing the use of technology; (6) the Commission declined, in July 2020, to implement any

of the recommended changes to the snowsports school business model that were outlined in the report, and instead opted to give the President/General Manager time to develop and execute a plan to improve the operation of the snowsports school in the upcoming winter and to reevaluate the matter in 2021; (7) Commissioner Ness thereafter requested, on multiple occasions, that the President/General Manager provide him with a copy of his plan to improve the operation of the snowsports school but no plan was provided; (8) Commissioner Ness pressed in 2021 for more insight into the Gunstock financial reporting and advocated for changes to the ski school; (9) there is no documentation that the Otto software was offered for sale to Gunstock Mountain Resort; (10) the Commissioners and Gunstock management had no interest in using Otto and at least implicitly conveyed that to Commissioner Ness; and (11) there was no documentation that anyone expressed to Commissioner Ness that the perception of discussing Otto was a potential ethical violation or that anyone timely reported an actual or apparent ethical violation.

The clear record of communications demonstrates that the entire time Commissioner Ness has been a commissioner he has advocated for change to the snowsports school; and that references to Otto as an example of industry technology were occasional and in a very open way with no documented references to Otto in the year before the August 19, 2021 report.

### **Alleged Disruptive Behavior**

The August 19, 2021 report also concluded that Commissioner Ness engaged in disruptive, intimidating, and demeaning behavior with staff and fellow Commissioners.

As for the reports of misbehavior towards staff, much of the information was outdated (ranging from more than one year old to three or five years old) with just one or two allegedly occurring in the winter of 2020-2021 and consisted of second (or third)-hand accounts. The one or two that were less than one year old (which were not first-hand accounts) appear relatively minor on their face and, in the interview Commissioner Ness explained the context of those encounters. Commissioner Ness denied the truth of many of the allegations and had a different, more credible, take on those he acknowledged. There was no evidence that any of the alleged incidents were reported to Gunstock management or the Commission and addressed at the time, which corroborates his responses to questions. If they really were as serious as later portrayed they should have been reported and promptly addressed. The only documentation of the alleged incidents was emails written in 2021 as part of the effort to gather information to build a case against Commissioner Ness and later to push for his removal. As with the claimed ethical violation regarding Otto, the failure to timely raise and address alleged issues, taken together with the time and manner in which they were raised, calls into question the characterization of them years later and this is particularly true when many were not first-hand accounts.

As for the report of misbehavior toward the Commission, many of the instances outlined in the August 19, 2021 document seem more in line with a commissioner who is performing his duties by asking questions about finances and operational planning and insisting on compliance with RSA 91-A. The questions should have been relatively easy to answer, and documentation readily provided. There were instances where Commissioner Ness left meetings, but that was after he voted in opposition to what the Commission was doing, and he stated that he left rather than participate in what he considered an improper gathering. There is also reference to charging

for legal services (at the daily rate of \$25) but the invoice was paid without dispute, which corroborates Commissioner Ness' recollection that there was a discussion and approval to invoice for the work before the work was performed.

## **Legal Conclusions**

Based on the absence of credible factual information and the legal conclusions outlined in our May 6, 2022, report, we conclude Commissioner Ness did not violate any New Hampshire law.

## **Origin of the Investigation**

While reviewing the materials we discovered troubling facts surrounding the origin of the investigation into Commissioner Ness. We wanted to make the Commission aware of these facts in order to inform them about potential next steps that are outlined below.

In November 2020 there is a reference in counsel's invoices to a member of the Commission seeking legal advice on the right to remove or discipline a commissioner. The emails and other available documents shed no light on who was the subject of that request or what happened in response. On June 19, 2021, the President/General Manager forwarded an email to counsel seeking a legal opinion on whether the information requested by Commissioner Ness should be discussed in non-public session. Commissioner Ness had requested on June 19, 2021, that the President/General Manager provide him with financial records regarding the snowsports school and the 2022 budget, raising specific questions and reasons for the request. On June 22, 2021 (nearly one year to the day after encouraging Commissioner Ness to share his snowsports school report with the Commission and praising the quality and content of the report) the Commission Chair replied to add "color" to the June 19 email from the President/General Manager and expressed his opinion that Commissioner Ness was trying to discredit the ski school in order to sell his Otto software. The Chair stated the Commission and Gunstock management "has given Peter an audience to present OTTO even though if its services were to be purchased by by [sic] Gunstock, Peter would be violating the GAC code of conduct and be self serving [sic]." The legal invoices reflect that in June 2021 counsel was consulted about the "huge" requests for information made by Mr. Ness and how to "constrain Ness." Later in June, there was work performed on assessing how to remove a commissioner and possible avenues to pursue.

These communications are troubling on several levels. If some members on the Commission truly believed that hearing from Commissioner Ness about Otto was going to lead to an ethical violation, it seems that should have been addressed at the time to stop it to avoid any misunderstanding or avoid the appearance of impropriety. Or the concerned party could have sought a legal opinion as to the legality of that transaction. But there is no documentation that any of that occurred. And it appears from our review that there was no interest in using Otto at Gunstock so it is puzzling why "an audience" would even be granted. Indeed, the Commission Vice Chair indicated that in the July 2020 Commission meeting the consensus was to politely decline to use Otto at Gunstock. The conduct as events were occurring and the later characterizations of those events are inconsistent.

In July 2021, prior to the July 29 Commission meeting, counsel was consulted again about Mr. Ness' document requests and the strategy surrounding a "no confidence" vote. Following the July 29 Commission vote to seek a legal opinion on the legality of the ethics policy, counsel's legal advice was sought again on the "no confidence" vote and time was devoted to generating the August 19, 2021 report on Commissioner Ness. This report appears to have been prepared over the course of just a few days.

It remains unclear how a request for a legal opinion in June to address Commissioner Ness' request for financial information was connected to an alleged ethical issue a year earlier. And it remains unclear how the report advocating for change to the snowsports school business model, that was praised when written, became an unfounded attempt to discredit the snowsports school.

There was no vote by the Commission to engage counsel to pursue this investigation. There was no motion to engage counsel to address the conduct of Commissioner Ness. Instead, two Commissioners requested counsel prepare the report. The Complaint filed in Superior Court 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. Indeed, the report states at the outset it was prepared at the request of Commissioners Kiedaisch and Gallagher. We have not identified any evidence to explain how the Commission vote to review the legality of the ethics policy was transformed into a report on a single commissioner or, if there was no vote, what authority existed to investigate that commissioner.

The August 19, 2021 document was publicly presented at the August 25, 2021 Commission meeting. The minutes of that meeting describe what was said under the heading "Old Business. a. Ethics policy: Review of Commissioner Ness Conduct, Proposed Vote of No Confidence and Referral to County Delegation." But the review, proposed vote and referral were never "new business" discussed by the full Commission. The minutes then state "Chair Kiedaisch reported that at the last GAC meeting there was a lengthy discussion about this matter, as memorialized in the minutes, and the legal issues brought forward. A vote was taken to authorize funds to pay for legal counsel to review these issues..." But that is simply not true. The minutes of the July 29, 2021 Commission meeting reflect a discussion about the legality of the ethics policy and whether it was *ultra vires* as asserted. The vote was to authorize funds to pay for a legal opinion on the legality of the ethics policy. There was no discussion that some commissioners had been working behind the scenes to oust Commissioner Ness or that counsel should be engaged to review his conduct.

## **Next Steps**

The Commission may want to consider further investigation to determine whether procedural changes and tightening of internal controls should be implemented to prevent the expenditure of funds as occurred in this matter. Based on the evidence to date one commissioner was targeted for removal (when the power to remove resides exclusively with the Delegation), he was not interviewed during the short time it was investigated or made aware it was happening,

and there was no Commission vote authorizing these endeavors. The Commission minutes inaccurately portray the events leading up to the public presentation of the August 19, 2021 document. This led to filing a lawsuit against the Delegation and other actions, incurring more expense. The review may also examine whether any duties were breached and understand whether the Commission is exposed to any liability for what transpired. Steps should be implemented to prevent a recurrence and further investigation to gain a better understanding of what happened and why would inform what steps would be appropriate.



Date: June 30, 2022

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

FINAL REPORT – REVIEW OF THE BCD LITIGATION  
June 30, 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 was 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 even though it was likely to be dismissed. Following additional review, that included a review of counsel's files, we are unable to conclude that the BCD litigation 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. Because we are not able to conclude the suit was patently unreasonable then the reimbursement is not likely to be mandated and any payment would be purely voluntary.

We believe our work is concluded on this question.

We have not addressed questions about the decisions to file the lawsuit in the name of the Commission or to take other action in connection with that lawsuit and removal proceedings and to utilize Commission funds in pursuit of those matters. We would be happy to address those questions with the Commission including potential next steps.



Date: June 30, 2022

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