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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.



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