



Meeting Minutes

GOVERNANCE COMMITTEE

Monday, April 11, 2022 at 10:00 a.m.
City Hall in Conference A

Members Present: Councilor Katherine Cook, Councilor Vincent Lombardi, and Councilor John Tabor

Staff Present: Robert Sullivan, City Attorney
Marian Steimke, Legal Secretary

Members of the public were able to participate by Zoom.

Members of the Public: Greg Mahanna, Petra Huda, David MacDonald, Nancy MacDonald, Sue Polidura, Paige Trace

1. Welcome and Call to Order

Chair Cook called the meeting to order at 10:01 a.m.

2. Roll Call

Roll call taken of those present and recorded above.

3. Approval of the Minutes from March 28, 2022

A motion to approve the Minutes of the March 28, 2022 meeting was made by Councilor Lombardi and seconded by Councilor Tabor. A unanimous roll call vote was made and the minutes were approved.

4. Ethics Ordinance – section by section review.

Discussion of the draft Ethics Ordinance which sought to incorporate recommendations from previous meetings and public comment.

Chair Cook shared the draft ordinance on her screen and asked for recommendations. The Committee discussed broadening/generalizing the definition of “Officer” related to formation of new boards and commissions.

City Attorney Sullivan discussed the term “Officer” vs “Employee” as it relates to every member of every board and suggested broadening the term “Officer” to include everyone who serves by Statute or Ordinance. He then discussed how conflicts of interest can arise.

Chair Cook emphasized that blue ribbon committees are subject to the Right-to-Know (RTK) law and will mark that section for “additional language from Legal”. That concluded the Page 1 comments.

Chair Cook suggested coming back to “Conflicts of Interest” on Page 2 since it had not been reviewed directly by Legal.

City Attorney Sullivan said Page 3 is important as this is where all the ethical violations occur. Councilors Tabor and Lombardi agree the language is good. City Attorney Sullivan noted an error in item G: change to “**any** officer [...] shall disclose” versus “**No** officer”.

The Committee reverted to working with the redline copy at this time versus the clean copy. All agreed the language of Section 1.805 was clear.

Speaking to the situation where outside counsel might be needed, City Attorney Sullivan discussed counsel on retainer versus doing the work as a public service. He added that an attorney would not be necessary to conduct an investigation. The last sentence would remove the requirement for a lawyer and read: “The Ethics Investigation Officer (EIO) shall have ... experience and training to conduct the investigation”. Chair Cook said there are people that specialize in Ethics, and Councilor Tabor gave the example of Tom Hart who was a police investigator who did a wonderful job on the Ethics Committee of 2020. He was not a lawyer.

In Section 1.806, the City Attorney said the term “sufficiency” was a broad window and suggested defining the hurdle involved in placing a person before the Board of Ethics. The Committee considered wording and examples of hurdles: “clear and convincing”; “beyond reasonable doubt”; “probable cause”;

and “some evidence to support the allegation”. City Attorney Sullivan said the initial hurdle should be sufficiently low because the real work will be done by the Board of Ethics. Essentially asking if the complaint has substance or not, and Councilor Tabor said there can be apparent conflict. The City Attorney added that in matters of ethics, it is better to have too much evidence.

The Committee discussed wording of “Section C. Investigation phase”. Councilor Tabor suggested saying “refer the following actions to the Ethics Board ... with recommendations” instead of “take the following actions...”

The City Attorney advised that when making decisions it is best to be mindful of the public process for determining the outcome of a complaint. He suggested rewording to say “all actions are to be taken by the Ethics Board”. In some cases the Board will refer to the City Council. City Attorney Sullivan said the removal section gets tricky.

“Section D. Board of Ethics Hearings” – Councilor Tabor said either party should be entitled to cross examination as opposed to only the charged party, as it is worded now.

Chair Cook asked about timing conflicts. The City Attorney Sullivan discussed process of writing of the report. The group discussed the language of Section D and that either party has the right to have legal counsel at any stage.

Section 1.807 – Disposition and Sanction – The Committee discussed Section C: Criminal Sanctions and conflicts that include family. Chair Cook will flag the Conflicts of Interest section for Deputy City Manager/Deputy City Attorney Woodland. At this time (11:29 a.m.), City Attorney Sullivan left the meeting and the Councilor stopped sharing her screen.

5. **City Committee Structure** – The Committee will discuss this at the next meeting.
6. **Public dialogue re the CIP and budget.** The City Manager is working with the Mayor to find time in May to do this. Chair Cook suggested reviewing previous discussions and a time frame to have budget discussions.
7. **Committee Schedule** – The next meeting, which was scheduled for April 25th needed, to be rescheduled. (*Post meeting note, the next meeting will be held on Friday, April 29th.*)

8. **Public Comment** – Commenced at 11:36 a.m.

Greg Mahanna thanked the Committee. He said it would be important for the EIO to have legal experience. He commented on the role of the City Manager. He also provided comment on the conflict of interest provisions and disclosure.

Petra Huda: She provided comment on the definitions section. She suggested a section regarding employees and a different section that applies only to officials. She commented on the conflict of interest provisions. She commented on the EIO being retained by the City Manager. She suggested alternatives to the draft ordinance to reduce taxpayer burden. She discussed legal versus ethical complaints. It is the responsibility of the Ethics Committee to investigate and to bring forth an argument. She said the process we had in place worked.

Paige Trace commented on definitions and on the EIO being hired by the City Manager.

Chair Cook closed Public Comment at 11:55 a.m.

Motion to adjourn was made by Councilor Tabor, seconded by Councilor Lombardi. A roll call vote was unanimous. Meeting adjourned at 11:56 a.m.

Respectfully submitted by
Marian Steimke
Legal Secretary

Approved by Governance Committee on: May 31, 2022

ARTICLE VIII: CODE OF ETHICS

Section 1.801: DEFINITIONS

For purpose of this Article, the following terms shall be defined in the following manner:

- A. **Charged Party:** That Officer or Employee alleged to have violated this Ordinance and is the subject of the Complaint.
- B. **Complaint:** Any written communication meeting the requirements of Section 1.806 (A).
- C. **Complainant:** The person making the Complaint.
- D. **Employee:** The term "Employee" shall include all employees of the City including the Police, School and Fire Departments whose salary is paid in whole or in part from the City Treasury.
- E. **Ethics Investigation Officer (EIO):** That person serving in the capacity as described in Section 1.805.
- F. **Governing Body:** The term "Governing Body" shall mean the City Council, School Board, Police Commission, and Fire Commission.
- G. **Officer:** The term "Officer" shall be defined to include every member of the City Council, School Board, Police Commission, Fire Commission, each member of every land use regulatory board, i.e. the Board of Adjustment, Planning Board, Historic District Commission, Conservation Commission, Technical Advisory Committee, Traffic Safety Committee, Building Code Board of Appeals, Recreation Board, Planning and Development Council, and Economic Development Commission, every department head as that term is used in the Administrative Code, Chief of Police, Fire Chief, Superintendent of Schools, the Trustees of the Trust Funds and members of the Housing Authority.
- H. **Official Duties:** The term "Official Duties" shall mean the following:
 - 1. In the case of members of the City Council, School Board, Fire Commission, Police Commission and the City Manager, those duties and responsibilities set forth in the City Charter and/or established by State law.
 - 2. In the case of members of Land Use Regulatory Boards, the Trustees of the Trust Fund and the Portsmouth Housing Authority, those duties and responsibilities set forth in the legislation that established each board and/or outlines the duties and responsibilities of each board.
 - 3. In the case of the Chief of Police, the Superintendent of Schools, the Fire Chief, and all employees, those duties and responsibilities set forth in the respective job description for each party or employee.

Section 1.802: CONFLICTS OF INTEREST

- A. No Officer or employee shall engage in any business or transaction or shall have a financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his/or her official duties.
- B. Representing Private Interests Before City Agencies: No Officer or employee shall appear in behalf of private interests before any governing body or land use regulatory board of which the officer or employee is a member or membership on which is subject to approval by the officer or employee.

Officers and employees, however, may appear without compensation in behalf of constituents or in the performance of public or civic obligations. This section shall not prohibit appearances upon matters only incidentally requiring official action which do not develop into a substantial part of the employment, provided, that the retainer is not for the purpose of appearing before the governing body or land use regulatory board.

- C. Representing Private Interests Before Courts: No officer or employee shall represent private interests in any action or proceeding against the interests of the land use regulatory board or governing body of which the officer or employee is a member, or membership on which is subject to approval by the officer or employee in any litigation to which the City is a party.
- D. Disclosures of Interest in Legislation: A Councilor who has a direct or indirect financial or other private interest in any proposed legislation shall publicly disclose, on the official records of the Council, the nature and extent of such interest.
- E. Disclosures by Officer or Employee of Interest in Legislation: An officer or employee who has a direct or indirect financial interest or other private interest in any legislation and who participates in discussion before or gives official opinion to the Council, shall publicly disclose on the official record the nature and extent of such interest.
- F. Gifts and Favors: No officer or employee shall accept any gift, over \$100.00, whether in the form of service, loan, thing or promise, any other form from any person, firm or corporation which to his/or her knowledge is interested directly or indirectly in any manner whatsoever, in business dealings with the City. This provision shall not apply to campaign contributions of \$100.00 or less.
- G. Disclosures of Confidential Information: No officer or employee, who holds any investment direct or indirect in any financial, business, commercial or other private entity which creates a conflict with his/her official duties shall publicly disclose on the official record the nature and extent of such interest.
- H. Investments in Conflict with Official Duties: Any officer or employee, who holds any investment direct or indirect in any financial, business, commercial or other private entity which creates a conflict with his/her official duties shall publicly disclose on the official record the nature and extent of such interest.

- I. Incompatible Employment: No officer or employee shall engage in or accept private employment or render or seek services or goods for private interests when such employment or service creates a conflict with his/her official duties.

Section 1.803: CONSEQUENCES OF VIOLATION

Any violation of any provisions of this ordinance shall constitute cause for public censure, fine, suspension or removal from office or, in the case of Employees, disciplinary action as may be set forth in any collective bargaining or employment agreement up to and including termination from employment.

Section 1.804: BOARD OF ETHICS

- A. A Board of Ethics is hereby created. This Board shall consist of five persons: two members shall be selected from the City Council and one member each from the School Board, Police Commission and Fire Commission. The City Attorney (ex officio) or such other legal counsel (ex officio) shall provide legal advice and support for the Board. The Board members shall be selected by lot and drawn at the first meeting of the calendar year of the governing bodies.
- B. Each Board Member selected is required to serve unless the Board Member is the subject of the Complaint, has a conflict of interest, or is excused due to unavailability or exceptional causes (such as a health issue).
- C. The Board of Ethics Member shall elect a chairperson and may adopt such rules for the conduct of their business as they see fit. The Board shall have the power to draw upon City departments for reports and information and stenographic and clerical help. They shall have all subpoena powers as may be available to them under State law.

Section 1.805: ETHICS INVESTIGATION OFFICER

- A. The position of Ethics Investigation Officer (EIO) is hereby created. The City Manager shall have the power to identify and retain an EIO to assist with the investigation and prosecution of any Complaint which has been referred for investigation. The EIO shall be admitted to the practice of law in the State of New Hampshire and shall have sufficient experience and training to conduct the investigation.
- B. In the event the Complaint is against the City Manager, the responsibility to identify and retain an EIO shall reside with the City Attorney in consultation with the Mayor.

Section 1.806: COMPLAINTS, INVESTIGATIONS AND HEARINGS

- A. Complaint Requirements. Any person may submit a written complaint alleging one or more violations of Section 1:802. Such complaint must be based on personal knowledge, and set forth specific facts with enough specificity and detail for a determination of sufficiency for investigation. The Written Complaint must be signed under oath and include contact information including: home address, phone number and email address (such personal contact information to be treated as confidential upon request). The Complaint shall be

delivered to the City Attorney with a copy to the Mayor and City Clerk. The City Attorney shall provide promptly a copy of the Complaint to the Charged Party.

B. Review for Sufficiency.

1. A Review for Sufficiency will be conducted within thirty (30) days of receipt. This review will be based on the allegations contained in the Complaint and the immediately available record of any public meetings or records referenced in the Complaint.
2. The City Attorney and the Mayor shall conduct the Review for Sufficiency except in cases in which either is the subject of the Complaint. Complaints against the City Attorney shall be reviewed by the City Manager and Mayor. Complaints against the Mayor shall be reviewed by the City Attorney and the Assistant Mayor.
3. If the Complaint is deemed insufficient, the Complainant will be notified in writing of that decision with a copy provided to the Charged Party.
4. If the Complaint is deemed to be sufficient for further investigation, it shall be referred to the EIO for further action and all parties will be notified of this step through a communication in writing. That communication in writing will contain the following:

This Determination of Sufficiency does not determine the truth or falsity of any of the allegations contained in the Complaint or constitute any finding or conclusion that a violation occurred.

- C. Investigation Phase. The EIO shall be provided the full cooperation of the City government to conduct such investigation as may be necessary to determine whether any violation may have occurred and next steps. The EIO shall have all subpoena powers as may be available under State law. The Charged Party shall have an opportunity to provide a response to the Complaint.

The EIO's investigation shall be completed within forty five days (45) unless the Charged Party and the City's representative (City Manager or City Attorney) mutually agree to a longer period.

The EIO may take the following actions as a result of the investigation:

1. Dismiss the Complaint with a written decision describing the reasons for such action;
2. In the event of a minor or unintentional violation of this Ordinance by an Employee who is not the City Manager, or in the event of a proposed stipulation with the Charged Party, refer the matter to the City Manager with a recommendation for action which may include training or other discipline;
3. In the event of a minor or unintentional violation of this Ordinance by an Officer, with regard to the Charged Party, refer the matter directly to the Governing Body with a recommendation for action that may include training, admonition or public censure only;

4. In the event of a proposed stipulation with the Charged Person who is an Officer, refer the matter to the City Council for consideration of the stipulation and the EIO's recommendation; or
5. Refer the matter to the Board of Ethics for a hearing.

D. Board of Ethics Hearings.

1. Within 21 days of the referral, the Board shall hold a preliminary hearing at which the EIO, in the first instance, presents the EIO's initial investigation efforts, any findings, and any recommendations for next steps. At the Preliminary Hearing the Board shall set a schedule, adopt procedural rules as may be necessary including determining whether the hearing will be public or non-public and how recorded, determine the extent to which the EIO will have a continuing role, and establish any other matters necessary to conduct a fair and full hearing. The Charged Party shall be given notice at least five (5) business days in advance of this Preliminary Hearing.
2. The Charged Party shall be entitled to be represented by legal counsel at their own expense and to reasonably participate and be heard at any hearing. The Charged Party shall have the opportunity to examine the Complainant, to summon witnesses and to present evidence.
3. For any hearing on the merits of the Complaint, the Board of Ethics shall make reasonable efforts to schedule the hearing on a date and at time that is acceptable to the Charged Party and any legal counsel. The Charged Party shall be given notice at least fourteen (14) days in advance of the merits hearing. The hearing on the merits shall be held within sixty (60) days of the referral from the EIO.
4. The Charged Party and the Board of Ethics may mutually agree to waive any notice requirement or to extend any deadline in this section.
5. The Board shall issue a written decision within thirty (30) days of any final hearing with findings and a disposition, dismissal or referral for further action if a violation has been found. If a violation has been found, the Board shall recommend a sanction or penalty, and refer the matter to the City Council (if an Officer or the City Manager) or to the City Manager (if an Employee) for disposition, sanction or other action as set forth in Section 1:807.

Section 1.807: DISPOSTION AND SANCTION

- A. In the event that the Board of Ethics determines that any Officer or the City Manager committed a violation of this Ordinance, the City Council may take any of the following actions:
 - a. Vote for removal pursuant to the City Charter as amended;
 - b. Vote to publicly censure or admonish the offending member;
 - c. Vote to place the matter on file; or
 - d. Vote to overturn the finding of a violation.

- B. In the case of Employees, the City Manager shall have all rights available under any employment agreement or collective bargaining agreement to discipline or terminate the employee and the City Manager shall make such report to the City Council as it determines necessary, in public or non-public session as may be determined at the time, as to the action taken.
- C. Criminal Sanctions: In addition to the civil sanctions imposed by this ordinance, violation of any provision of this ordinance shall constitute a criminal offense and the City Council may authorize the City Attorney or any other attorney approved by it to prosecute such a violation in the Portsmouth District Court.

The penalty for violation of any provision of this Ordinance upon conviction in the Portsmouth District Court shall be \$1,000 for each offense.

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