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MEETING MINUTES
TOWN OF LAUDERDALE-BY-THE-SEA
TOWN COMMISSION
SPECIAL MEETING MINUTES
TUESDAY, OCTOBER 13, 2020, 4:00 P.M.
VIRTUAL MEETING

1. CALL TO ORDER

Mayor Chris Vincent called the meeting to order at 4:00 p.m. Also present were Vice Mayor Alfred "Buz" Oldaker, Commissioner Edmund Malkoon, Commissioner Randy Strauss, Commissioner Elliot Sokolow, Town Attorney Susan Trevarthen, and Assistant Town Attorney Robert Meyers

2. VIRTUAL INTERACTIVE ETHICS TRAINING FOR TOWN COMMISSION

Town Attorney Susan Trevarthen advised that today's session would address the Broward County Code of Ethics, including recent amendments, as well as State gift law requirements, social media and public meetings/records, the Town Code of Ethics, and recent opinions and interpretations of the Broward County Code of Ethics. Another ethics training session is scheduled two weeks from today.

Assistant Town Attorney Meyers addressed the Broward County Ethics Ordinance, which was amended twice in 2020: once in relation to campaign contribution fundraising, and once in relation to charitable solicitation fundraising. The amendments address what an elected official should do if another candidate asks for an endorsement, as well as what to do if s/he serves on a host committee. If an individual takes either of these actions, s/he must file a disclosure form within 15 days of the earliest indication of support. The disclosure remains in effect until the conclusion of the election or two years after the date of disclosure. If an official endorses a candidate and does not sign an endorsement card, the disclosure requirement is unnecessary.

Town Attorney Trevarthen advised that a Commissioner may always ask one of the Town Attorneys for a formal safe harbor opinion, which is a written opinion that provides immunity from issues related to the Broward County Code of Ethics. While a safe harbor opinion cannot be issued with respect to State law, it would prevent an individual from being criminally prosecuted, as it demonstrates a lack of criminal intent.

If an elected official speaks at a campaign event and does not receive or ask for a campaign contribution, no disclosure is required. Disclosures must be filed within 15 days each time the official solicits funds for another candidate. The location and date of

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the event must be identified. If a contribution is received to pass on to the other candidate, the official must identify both that candidate and the amount of the contribution. Officials may not use Town Staff or resources in the solicitation or receipt of campaign contributions. It is a crime to solicit or accept a campaign contribution in a Town-owned building, whether or not that building is open at the time.

Regarding charitable fundraising, the first amendment to County Code allows for private capacity solicitations, which means an official in his/her private capacity can solicit funds, goods, or services on behalf of any charitable organization, nonprofit entity, or individual. The official may not represent the solicitation as being done on behalf of the Town or with the Town's approval or endorsement. Town resources or Staff may not be used. The official may use his/her title. These solicitations must be disclosed.

There is also a section of County Code that permits officials to engage in official capacity solicitations, which allows them to solicit funds, goods, or services for charitable causes, individuals in need, or educational/humanitarian/nonprofit entities, so long as there is no *quid pro quo* or special consideration between parties.

The following activities are exempt from the disclosure requirement:

- Social media posts where the primary purpose of the page is not to promote an event or cause
- Email correspondence directed at groups of 50 or more individuals
- GoFundMe or other online fundraising campaigns
- Newsletters identifying or referring to a charitable cause or event, unless the primary purpose of the newsletter is fundraising
- General statements at a public meeting that refer to an event or cause

Officials are allowed to use in-kind services if they engage in official solicitations. This means they may get assistance from direct reports, or use email/telephone or other resources that do not require the affirmative expenditure of public funds. An official is permitted to send an official solicitation from his/her Town email address, or make phone calls from a Town phone, as long as these do not require the expenditure of extra money.

Officials are not allowed to use Town resources or staff if the purpose is to solicit for specific private individuals or for-profit entities without first securing an opinion from the Town Attorney(s) stating that the solicitation serves a public purpose. The County Ordinance requires an opinion stating it would serve a public purpose for the official to engage in these types of solicitations. The official must complete and submit a

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disclosure form within 15 days of the solicitation unless one of the aforementioned exemptions applies.

Assistant Town Attorney Meyers stated that there are concerns regarding a number of provisions in the County Code. This may include definition of an individual “in need.” No opinions have been issued on either County Code amendment thus far. The Attorneys may issue a general guidance opinion to the entire Commission to assist in the Commissioners’ interpretation of a given amendment.

If an official is part of a fundraising committee or serves on the board of directors of a 501(c) organization, s/he is not required to file a disclosure form each time a solicitation is made; however, s/he must file one disclosure form, which will remain in effect for two years from the date of the initial disclosure. Solicitation on behalf of a nonprofit by which the official is employed is not a violation.

Mayor Vincent asked if the amendments were implemented because issues of this nature have arisen. Assistant Town Attorney Meyers replied that the Office of the Inspector General (OIG) had issues with how the Ordinance was drafted; in addition, some County Commissioners felt their hands were tied when they wished to solicit on behalf of individuals in need in their communities.

Other aspects of the County Code of Ethics have not changed, including the limitation on gifts that can be received from certain parties, such as contractors, lobbyists, or vendors. When it was first adopted, Ethics Code barred any such gifts from these individuals; later, this was amended to apply to any gift over $5 in value, and exceptions were noted. The general rule is that an elected official may not accept a gift of more than $5 in value from a Town contractor, unless the item is a condolence gift. If the gift is for training purposes, its value may exceed $5. The cost limit applies to non-alcoholic beverages.

Admission to charitable events may be accepted if the official reimburses the donor for the value of food and beverages consumed by the person using the ticket. This applies to an individual elected official or a third party to whom the ticket is given.

If tickets to an event are provided to the Town by a nonprofit organization and the Town gives them to elected officials, a recent opinion from the Florida Commission on Ethics recommends that the tickets be reported. This is a change from previous interpretation: the giver is now considered to be the charity rather than the Town. One example would

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be if the Town purchases a table at a charitable event and elected officials attend. It is recommended that an opinion be requested by the Attorney(s) in this case.

Assistant Town Attorney Meyers explained that under State law, officials are not permitted to accept a gift of over $100 from a contractor or lobbyist. If a contractor or lobbyist gave a gift to a governmental entity, and that entity gave the gift to elected officials, this was considered an indirect gift. This may have contributed to the change in County Code regarding the source of gifts.

Other governmental entities are not considered lobbyists or contractors: for example, a gift from someone at the Broward Sheriff's Office (BSO) would be acceptable. An official is only allowed to accept gifts of up to $50 in his/her official capacity. Gifts from an official's own local government are not considered gifts that must be reported. If a gift is received in an official's personal or professional capacity, there is no limit on the value of what may be accepted.

Officials are not allowed to solicit or accept anything of $100 or more in value based upon the understanding that the action taken would be influenced by that gift. If an official receives multiple gifts from the same source that cumulatively total $100 or more in one calendar quarter, these gifts must be disclosed under State law.

Town Attorney Trevarthen commented that some organizations provide a breakdown of food/beverage and charitable contribution costs in accordance with County Ethics Code. The Attorneys may provide additional guidance in these areas if necessary.

Exceptions and limitations to gift reporting rules include:

- Gifts received in association with private employment
- Gifts given in recognition of public service
- Gifts for which the value is paid back to the giver within 90 days

Broward County Ethics Code includes rules regarding outside and concurrent employment, which is defined as "providing services for any person or entity other than the Town in exchange for remuneration." Volunteer work is not considered outside employment. This portion of Code refers to compensation outside an official's Town salary for providing services to a third-party corporation or individual.

There is an option for disclosure of an official's exact amount earned, or disclosure within a range. The official is also expected to identify retirement contributions, which fall within the definition of remuneration.

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Elected officials or their immediate family members are not allowed to lobby any covered individual in the subject Town or in any other governmental entity in Broward County. Lobbying in another county is permitted. While an official or his/her family member is permitted to do business with his/her municipality within a contractual relationship, this is not advisable.

Lobbyists are now responsible for completing contact logs reporting any contact with elected officials, irrespective of the location at which the lobbying activity takes place or the mode of communication, within three days.

Assistant Town Attorney Meyers recalled that in the past, Broward County Commissioners sat in on selection committee meetings, which created discomfort among other attendees. Ethics Code no longer allows elected officials to participate in these committees, although they may sit in if they do not interfere. The exception is a selection committee that consists of a municipality's elected officials.

Assistant Town Attorney Meyers reiterated that if a Commissioner has any questions regarding local Ethics Code, he or Town Attorney Trevarthen may provide them with a safe harbor opinion, which insulates the official from prosecution or investigation by the OIG. The OIG must confirm that the facts of the case are the same as those presented when the official sought the opinion: if the facts are not the same, the opinion will not necessarily protect the individual.

A request for a safe harbor opinion does not have to be in writing, although the Attorneys request this in order to ensure there is no misunderstanding. An official may also request a safe harbor opinion at a public meeting. Town Attorney Trevarthen encouraged the Commissioners to reach out in advance of the public meeting if they wish to request an opinion in that setting. Safe harbor opinions are transmitted to Broward County and made available in a searchable database along with opinions by other municipal attorneys.

Assistant Town Attorney Meyers briefly reviewed a number of safe harbor opinions issued with respect to speaking fees, frequent flyer miles and travel points, raffles, and travel costs.

Assistant Town Attorney Meyers addressed social media, explaining that the Sunshine Law must be followed regardless of the platform or medium used to communicate. If an issue is in front of the Town Commission or may conceivably come before them, any

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communications are required to occur “in the sunshine” with reasonable notice provided and minutes recorded. A social media post on which another elected official comments on an issue that may come before local government is a violation of the Sunshine Law, as it is considered dialogue. This applies to posts on platforms such as Facebook, Twitter, NextDoor, Instagram, blog posts, or any other social media medium.

Another issue regarding social media is one-way communication. Whether this communication is made on social media, via telephone or text, or any other method, one-way communication in which no response is received from another elected official is not a violation of the Sunshine Law; however, Assistant Town Attorney Meyers strongly discouraged this type of communication.

Town Attorney Trevarthen agreed, pointing out that one issue in this example is the relationship between elected officials. The one-way communication of one official restrains other officials and requires them to exercise self-control or risk exposing both themselves and the one-way communicator to violation of the Sunshine Law.

Assistant Town Attorney Meyers noted that this is not unlike sending a memo via email to the Town Clerk for dissemination to the other Commissioners: a problem occurs when that email is sent directly to the other Commissioners. Even if a communication is sent via the Town Clerk, however, it has the effect of suppressing other responses until they may be made in a public setting.

Town Attorney Trevarthen noted that there is a NextDoor Facebook group for Lauderdale-By-The-Sea, through which the Town sometimes posts items of interest. Assistant Town Attorney Meyers advised that elected officials in some cities use NextDoor to communicate on some issues, which constitutes potential Sunshine Law violations as well as other concerns about the use of private platforms. He pointed out that municipalities cannot control what is deleted from private platforms such as Facebook or NextDoor: a public records request made to these platforms does not absolve an elected official from liability if the platform cannot accommodate that request.

Town Attorney Trevarthen stated that the Town subscribes to Archive Social, which is software that handles public records obligations for most social media platforms. She cautioned, however, that it is unlikely that a solution of this nature will ever be able to capture all social media outlets. While there are other ways to retain materials, such as screenshots, these are not acceptable solutions in the long run.

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If a municipality has a Town-sponsored social media platform that is used by elected officials, the question arises regarding what sort of discussions should be posted on those platforms. While the site may be used to permit officials to present their views on Town business, it may not permit exchange of ideas between elected officials on matters that have or are likely to come before the governing body.

Another example is “liking” another elected official’s post or comment, which can also be a violation of Sunshine Law if the item addresses Town business. A “like” can be seen as supportive of the entirety of a post, and if that post includes a reference to Town business, it can be interpreted as consent or agreement that constitutes dialogue. The exception would be posts that have nothing at all to do with Town business.

The Florida Attorney General’s opinion on municipal social media pages, such as Facebook, also addresses how long a post must be retained. If a post is made or received in connection with Town business, it is considered public record and must be retained for a specified period of time. The posts of “friends” of those pages may or may not be considered part of public record depending upon the information included on their pages. The Attorney General’s opinion requires municipalities with social media pages to post warnings that information posted on those pages is considered public record in most cases.

Should a municipality be unable to comply with a public records request that includes social media, the cost is not only personal or criminal liability but fines and fees that may be imposed against the municipality, which can be prohibitive. Town Attorney Trevarthen strongly emphasized the necessity of ensuring that public and private email accounts remain separate. It was also noted that public records law is included in officials’ annual ethics training, which shows that an individual was properly advised on that issue.

Assistant Town Attorney Meyers continued that if an elected official uses Town-sponsored social media to discuss Town business, that account should be limited to Town business only. This means excluding reelection efforts or private business, which can be construed as misuse of an official position. He recommended that resources provided by the Town, such as cell phones or email accounts, be considered in these terms as well.

Items not captured through a service such as Archive Social or a Town server that address Town business are of concern, as the Town may or may not know about these posts unless the elected official informs them of it. The official must keep copies of

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these items or provide them to the Town Clerk for retention in recognition of the possibility of a public records request. The nature of social media means other individuals will be aware of the existence of posts and may make public records requests for them.

Another aspect of government-sponsored social media pages is related to the First Amendment. Town Attorney Trevarthen explained that members of the public who have their own blogs or web pages, or are active in social media groups, may allow public comments on matters of public concern. Once they have made this option available, however, they may not restrict comments that may include controversial or inflammatory statements. This creates a First Amendment concern, as an individual's opinion of public comment is not content-based but viewpoint-based.

Town Attorney Trevarthen continued that municipal pages may be considered "the speech of the municipality," in which there may be some moderation of what is said; however, she strongly emphasized that law is relatively new in this area.

An elected official may not decide who can or cannot access his social media account if that account deals with government business, and the deletion of individual comments may also be a First Amendment issue, depending upon their content. Deletion of an entire post and all its comments that are tied to government business is also an issue, as is the disabling of comments on a post. Assistant Town Attorney Meyers emphasized that if an official uses interactive social media to communicate about Town business, s/he is required to "accept the good with the bad." If a public entity has a social media page, that individual or municipality should also have a social media policy that identifies objectionable material.

The Town Ethics Code applies to situations that are above and beyond the State's Ethics Statute and may require elected officials to abstain from voting. These include matters involving Town vendors with which officials are affiliated in a paid or unpaid capacity. Officials may participate in discussions of these items but may not vote upon them and must file disclosures within 15 days. This is independent of any State requirements. An affiliation is defined as being in close formal or informal association with a vendor.

The Town Ethics Code was drafted in 2010 and required the aforementioned abstention from voting, as well as a requirement that individuals may not participate in shade sessions if they are involved with the adverse parties. These restrictions stemmed from experiences in the Town prior to 2010. Affiliation applies to business entities by which

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an official may be employed, serve as an independent contractor, or have a material interest.

The OIG was created with a broad mandate to investigate any violation of local, state, county, or federal law contributing to misconduct and gross mismanagement. Their jurisdiction extends to Town elected officials and staff, and they may accept complaints anonymously. The standard for review is to investigate only if good cause can be shown. They may also initiate investigations if they learn about situations in a given municipality from a news source.

The Broward County OIG has subpoena power as well as audit authority, and is permitted to issue reports of what they believe to be misconduct. These reports may identify violations of law, however, that are supposed to be referred to other entities: a violation of Broward County Ethics Code must be directed to a hearing examiner, who conducts a hearing that entitles parties to due process. A report by the OIG, however, may assert that a violation exists and refer it to the State for further investigation.

Reports from the OIG are provided first to the person or persons who are the subject of that report so they have an opportunity to respond before the report is made public. Some preliminary reports, however, are issued to the subject at the same time as other elected officials, or “leaked” to the public, without the subject having an opportunity to respond. The report is intended to be confidential until the subject responds, after which time the OIG issues a final report that becomes public record.

Town Attorney Trevarthen asked that if the Commissioners wished to hear more information about a particular topic, they advise the Attorneys so it can be addressed in the next session, which will be held at 4:00 p.m. on Tuesday, October 27, 2020.

With no further business to come before the Commission at this time, the meeting was adjourned at 5:47 p.m.

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Mayor Chris Vincent

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11/13/2020

Town Clerk Tedra Allen | Date