



MEMORANDUM

TO: Mayor Rich Alt
FROM: Tom Terrell
DATE: January 22, 2024
RE: January 17 Meeting with East West Partners and BHI

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

Mayor Alt,

You asked me to analyze and comment on the legal and ethical rules that would have applied to the meeting between city officials and BHI and EW Partners held on January 17. Because your question came after media inquiry into the propriety of the meeting, I have elected to prepare something more formal than you might have intended.

My understanding of the facts, which are necessary to the analysis, and the analysis itself are below. While you did not request it, I have also taken the liberty of providing additional context of how such meetings are routinely handled in other North Carolina municipalities and counties.¹ I think it will provide helpful insights.

Meeting Origination and Purpose

Although I was not included in the earliest communications related to the January 17 meeting, my understanding is that East-West Partners and BHI initiated the meeting to discuss the current zoning status of that portion of the tract in question that lies within the municipal boundaries (loosely referred to as “the marina”). The day before the meeting, Bill Brian, one of the attorneys for BHI, called me to confirm that no comprehensive search of the city’s meeting minutes and other records had been completed to determine the history and details of the existing zoning. I replied that any thorough search would have been done under the previous city manager, and the request would probably have been made immediately prior to his departure.

Bill and I also discussed why such search might not have been done, how it could be done, and whether a public records request would be necessary. We also discussed whether it would serve any purpose for his client to request a judicial determination (technically, a “declaratory judgment”) that

¹ While it is not improper for me to offer legal advice about the propriety of a meeting in which I was a participant, I believe the better course is to acknowledge this fact so that the board may decide whether it wishes to engage another attorney for this purpose for a second opinion.

circumstantial evidence suggests that the marina PUD zoning was for more than a parking lot. Essentially, it would be a challenge to my earlier legal interpretation that BHI's only entitlement is for a parking lot.

Attendance at January 17 Meeting

Roger Perry and McKay Seigel attended for EW Partners. Attorneys Bill Brian and Mack Paul represented BHI. Representing the City were you, Ms. Kelley, Ms. Therrien, and me. I think all would agree that the meeting was rather short in duration.

Discussion at Meeting

I would characterize the discussion as (a) the attorneys being more focused on the process by which we determine the correct legal zoning status and whether it might be necessary to seek judicial review to resolve key issues, but (b) with EW Partners wanting to discuss quantity/quality matters related to the project. The only decision made was the process by which the City would conduct an aggressive search of minutes from past meetings of the planning board and board of aldermen. This was a staff level decision and commitment. It did not require board approval or input.

City representatives and I had a private meeting afterwards that lasted 4 to 5 minutes. I offered my legal *opinion* that a judge would/should be reluctant to declare a zoning density at the marina in the absence of a clear record by the city or the developer of what the zoning was. I also offered my legal *counsel* that this is not a matter to be resolved by litigation, and that my almost four decades in this business have taught me to pay closer attention to the quality of a project than quantity of units.²

Open Meetings Law

The statute governing open meetings is strict. N.C. Gen. Stat. §143-318.11 requires all meetings of a public body to be open to the public except in certain specifically identified situations. The statute governing open meetings was not violated because a majority of the board was not present.

Ethics Policies

State statutes (G.S. 160A-86 and 87) require local boards to adopt codes of ethics (the city did this 2010), and for board members to take ethics courses. A copy of the Code of Ethics from your website is attached.

Rather than dissect each provision as it would be applied, I think it is easier to state that (a) the adopted Code of Ethics is a broad guideline; (b) I find no clear requirement or prohibition that was violated; and (c) the Code's only enforcement is to turn a matter over to the district attorney if there is a suspected violation of a criminal statute or to censure the board member(s) after notice and a formal hearing.

² Although my role has expanded, I was initially hired to assist with drafting a development agreement that would govern, among other things, the terms that governed the quality of the proposed project.

It was my observation that no parts of the Code related to personal conduct found in Section 2 of the Code were violated in fact or spirit.

Other Legal Issues

Repeating again that this memorandum is presented as a confidential attorney-client communication, I offer the caution that Southport, like all governments, must be careful that it does not operate under dual rules and policies whereby it treats one citizen differently than others without a clear basis. Broadly, this is potentially a 14th Amendment issue, but I note that all citizens (including EWP and BHI) have constitutional rights of speech/assembly and rights created by statute that protect their interests as they proceed through legislative review of land use entitlements. Among those rights are the rights to speak to decision makers outside of public meetings when the nature of the decision is legislative. However, a citizen's right to speak does not, at the same time, create an obligation on the board member's part to meet or to listen.

If the board adopted a policy prohibiting individual members to meet or speak individually with a particular developer (the authority to adopt and ability to enforce such a policy is questionable), it should make sure that the policy applies equally to communications with all citizens related to the same issue or project. If board members regularly communicate with or meet with residents to discuss the BHI and EW Partners' proposals, then BHI and EW Partners should be accorded similar courtesies.

The Practice in Other Jurisdictions

Members of the elected body in every major N.C. municipality that I am aware of routinely meet with staff, developers, property owners, citizen groups, and adjacent neighbors outside of the public hearing process.³ Counties and smaller municipalities typically do the same, although it is not hard to identify some governments where board members are less communicative.

Many local governments have multiple meetings consisting of less than a majority of board members and an applicant and/or staff to discuss the complexities of a project so that decision makers have ample time to ask meaningful questions and to follow up as needed.

The reasons for doing this are sound. Some projects can singlehandedly alter the character and functionality of a municipality forever, and they often involve the commitment of millions of dollars from public and private sources, complex loan commitments, extensions of public utilities, changes in transportation networks, the addition of jobs and tax base, protections of the environment, and multiple perceived positive and negative effects.

For this reason, most local governments facilitate or encourage communications rather than restrict the flow of information solely to statements from a podium in a large room where the ability of board members to ask probing questions is limited and where public posturing among all parties involved is antithetical to wise public decision-making.

³ In just the past year I have been in meetings and discussions outside public hearings on over two dozen projects in multiple jurisdictions across the state, both on the government and private side.

Summary

It is my legal opinion that the meeting on January 17 did not violate a statute, ordinance, or ethical policy that I can identify. It is my legal counsel that the Board should consider meeting and/or communicating as regularly with the development team as it does with citizens opposed to the potential development of this site. There are no laws or policies requiring board members to share with each other what they learn or have heard from interested parties, but it is often a good practice.

cc: Board of Aldermen

**Code of Ethics for the
Board of Aldermen of
City Of Southport, North Carolina**

WHEREAS, the Constitution of North Carolina, Article I, Section 35, reminds us that a “frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty,” and

WHEREAS, a spirit of honesty and forthrightness is reflected in North Carolina’s State Motto, *Esse Quam Videri*, “To Be Rather than to Seem,” and

WHEREAS, Section 160A-86 of the North Carolina General Statutes requires local governing boards to adopt a code of ethics, and

WHEREAS, as public officials we are charged with upholding the trust of the citizens and residents of Southport, and with obeying the law, and

WHEREAS, as public officials of Southport we believe our citizens and residents are entitled to the most open and ethical government possible under the law.

NOW THEREFORE, in recognition of our blessings and obligations as citizens of the State of North Carolina and as public officials representing the citizens and residents of Southport, and acting pursuant to the requirements of Section 160A-86 of the North Carolina General Statutes, we the Board of Aldermen of the City of Southport, North Carolina, do hereby adopt the following General Principles and Code of Ethics to guide the Mayor and Aldermen in its lawful decision-making.

GENERAL PRINCIPLES UNDERLYING THE CODE OF ETHICS

- The stability and proper operation of democratic representative government depends upon public confidence in the integrity of the government, and upon responsible exercise of the trust conferred by the people upon their elected officials.

- Governmental decisions and policy must be made and implemented through proper channels and processes of the governmental structure.
- Board members must be able to act in a manner that maintains their integrity and independence, yet is responsive to the interests and needs of those they represent.
- Board members must always remain aware that at various times they place different roles:
 - As advocates, who strive to advance the legitimate needs of their citizens,
 - As legislators, who balance the public interest and private rights in considering and enacting ordinances, orders, and resolutions, and
 - As fair and impartial decision-makers, when making quasi-judicial and administrative determinations.

Board members must know how to distinguish among these roles, to determine when each role is appropriate, and to act accordingly.

- Board members must be aware of their obligation to conform their behavior to standards of ethical conduct that warrant the trust of their constituents. Each official must find within his or her own conscience the touchstone by which to determine what conduct is appropriate.

CODE OF ETHICS

The purpose of this Code of Ethics is to establish guidelines for ethical standards of conduct for the Southport Board of Aldermen and to provide guidance in determining what conduct is appropriate in particular cases. It should not be considered a substitute for the law or for a board member's best judgment.

Section 1.

(a) Board members should obey all laws that apply to their official actions as members of the board. Board members should be guided by the spirit as well as the letter of the law in whatever they do. At the same time, board members should feel free to assert policy positions and opinions without fear of reprisal from fellow board members or citizens. To assert that a board member is behaving unethically due to the fact that one has a

disagreement with that board member based on a question of policy (and not on the board member's ethical behavior) is unfair, dishonest, irresponsible, and is itself unethical.

(b) Board members shall endeavor to keep themselves up-to-date, through the board's attorney and other sources, of the most pertinent constitutional, statutory, and other legal requirements with which they must be familiar in order to meet their legal responsibilities.

(c) Board members shall comply with General Statute 160A-87 in receiving two hours of ethics education within 12 months of each appointment or election to office. Board members may additionally receive two hours of ethics education annually, but failure to receive such additional ethics education shall not constitute a violation of this Code of Ethics.

Section 2.

Board members should act with integrity and with independence from improper influence as they exercise the functions of their offices. Characteristics and behaviors that are consistent with this standard are:

- Adhering firmly to a code of sound values.
- Behaving consistently and with respect towards everyone with whom they interact
- Exhibiting trustworthiness.
- Living as if they are on duty as elected officials regardless of where they are or what they doing.
- Using their best independent judgment to pursue the common good as they see it, presenting their opinions to all in a reasonable, forthright, consistent manner.
- Remaining incorruptible, self-governing, and not subject to improper influence, while at the same time being able to consider the opinions and ideas of others.
- Disclosing contacts and information about issues that they receive outside of public meetings, and refraining from seeking or receiving information about quasi-judicial matters outside of the quasi-judicial proceedings themselves.
- Treating other board members and the public with respect, and honoring the opinions of others even when they disagree.

- Being careful not to reach conclusions on issues until all sides have been heard.
- Showing respect for their office and not behaving in ways that reflect badly on it.
- Recognizing that they are part of a larger group and acting accordingly.
- Recognizing that individual board members are not generally allowed to act on behalf of the board, but may only do so if the board specifically authorizes, and that the board must take official action as a body.

Section 3.

- (a) Board members should avoid impropriety in the exercise of their official duties. Their official actions should be above reproach. Although opinions may vary about what behavior is inappropriate, this board will consider impropriety in terms of whether a reasonable person who is aware of all of the relevant facts and circumstances surrounding the board member's action would conclude that the action was inappropriate.
- (b) If a board member believes that his or her actions, while legal and ethical, may be misunderstood, he or she should seek the advice of the board's attorney and should consider public disclosing the facts of the situation and the steps taken to resolve it, such as consulting with the attorney.

Section 4.

Board members should be faithful in the performance of the duties of their offices. They should act as the especially responsible citizens whom others can trust and respect. They should set a good example for others in the community, keeping in mind that trust and respect must continually be earned.

Board members should faithfully attend and prepare for meetings. They should carefully analyze all credible information that is properly submitted to them, mindful of the need not to engage in communications outside the meeting in quasi-judicial matters. They should demand full accountability from those over whom the board has authority.

Board members should be willing to bear their fair share of the board's workload. To the extent appropriate, they should be willing to put the board's interests ahead of their own.

Section 5.

Elected members of local governing boards should conduct the affairs of their boards in an open and public manner. They should comply with all applicable laws governing open meetings and public records, recognizing that doing so is an important way to be worthy of the public's trust. They should remember when they meet that they are conducting the public's business. They should also remember that the records of their local government belong to the public and not to them or their employees. They should make clear that a climate of openness is to be maintained at all times in their governmental units.

In order to insure strict compliance with the laws governing openness, governing board members should strive to be open. They should prohibit unjustified delay in fulfilling public records requests. They should take deliberate steps to insure that any closed sessions held by the board are lawfully conducted, and that such sessions do not stray from the purposes for which they are called.

Section 6.

If a majority of the board has reason to believe that one of its members has violated a provision of this Code of Ethics, it may at a regular meeting of the Board of Aldermen open an investigation into the matter. All information compiled, including the grounds for the finding of probable cause, shall be shared with the member when it is received. All information pertaining to the case shall be open to public inspection and copying pursuant to the North Carolina public records statutes. If upon investigation the board concludes that a violation of a criminal law may have occurred, it shall refer the matter to the local district attorney.

Should the board determine that it wishes to proceed further with censure proceedings, it shall, by majority vote, call for a hearing, to be held at a regular meeting or at a special meeting convened for that purpose. Notice of the hearing stating its time, place, and purpose shall be given

once a week for two successive calendar weeks in a newspaper having general circulation in the jurisdiction. The notice shall be published the first time not less than 10 days nor more than 25 days before the date fixed for the hearing. In computing such period, the day of publication is not to be included but the day of the hearing shall be included. Alternatively, the hearing shall be advertised on the jurisdiction's website for the same period of time, up to and including the date of the hearing. The notice shall state that a detailed list of the allegations against the member is available for public inspection and copying in the office of the clerk or secretary to the board.

The hearing shall be convened at the time and place specified. The hearing and any deliberations shall be conducted in open session in accordance with the requirements of the North Carolina open meetings statutes.

The accused board member shall have the right to have counsel present, to present and cross-examine expert and other witnesses, and to offer evidence, including evidence of the bias of any other board member or the presiding officer. An audio or video and audio tape of the proceedings shall be prepared. Any and all votes during the hearing shall be taken by the ayes and noes and recorded in the board's minutes.

Once the hearing is concluded, it shall be closed by vote of the board. The presiding officer shall next entertain a motion to adopt a resolution censuring the member based on specified violations of the Code of Ethics. Any motion made must be an affirmative one in favor of adopting a non-binding resolution of censure. If the motion or resolution does not state particular grounds for censure under the Code of Ethics, the presiding officer shall rule it out of order.

If a motion to adopt a resolution of censure stating particular grounds under the Code of Ethics has been made, the board shall debate the motion. The accused member shall be allowed to participate in the debate, but shall not vote on the motion to adopt the resolution of censure.

At the conclusion of the debate, the board shall vote on the resolution. If the motion to adopt the resolution of censure is approved by a two-thirds vote of those present and voting, a quorum being present, the motion passes and the non-binding resolution of censure is adopted.

The text of the resolution of censure shall be made a part of the minutes of the board. Any recording of the board's proceedings shall be approved by the board as a permanent part of the board's minutes. The proceedings shall then be considered concluded, the board having done all that it legally can with respect to the matter in question.

Adopted, this the 31st day of July, 2010 by a unanimous vote of the Southport Board of Aldermen. (Vote 6-0)

Robert D. Howard, Mayor

ATTEST:

Regina W. Alexander, MMC- City Clerk