MILTON
ETHICS PANEL

CITY OF MILTON ETHICS PANEL

IN RE:

COMPLAINT FILED BY
TONY PALAZZO

against

COUNCILMEMBER PAUL MOORE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the City of Milton Ethics Panel (the "Panel") on August 2, 2022 ("the "Hearing"), pursuant to the ethics complaint (the "Complaint") filed by Tony Palazzo ("Petitioner") against Councilmember Paul Moore ("Respondent") on May 6, 2022.

The Complaint alleges seven (7) violations of the City of Milton Ethics Ordinance (City of Milton Code Section 2-797, *et seq.*; the "Ordinance"), as follows:

- Section 2-861 – Abstention to avoid conflicts of interest
- Section 2-825 – Code of ethics for municipal service generally
- Section 2-831 – Code of ethics for city officials and department directors
- Section 2-848 – Conflict of interest transactions
- Section 2-852 – Withholding of information
- Section 2-855 – Political recrimination and activity
- Section 2-859 – Disclosure of interest

Respondent, though counsel, submitted a response to the Complaint on June 8, 2022 (the "Response"). In addition to responding to the substantive allegations of the Compliant, the Response asserted the Complaint violated the Anti-SLAPP statute, O.C.G.A. § 9-11-11.1.

In accordance with Section 2-882 of the Ordinance, the Panel held an initial review meeting to determine whether there was specific, substantiated evidence from a credible source(s) to support a reasonable belief that there has been a violation of

the Ordinance. Based on such review, the Panel determined that there existed specific, substantiated evidence from a credible source(s) to support a reasonable belief that there has been a violation of the Ordinance.

In both the Response and during the Hearing, Respondent asserted the Complaint should be dismissed because Georgia's anti-SLAPP statute (Strategic Lawsuit Against Public Participation, O.C.G.A. § 9-11-11.1) protected Respondent's conduct at the May 2, 2022 City Council meeting. At both the initial review hearing and the Hearing, the Panel acknowledged Respondent's request to dismiss the Complaint, and deferred further consideration of same.

Upon further consideration, the Panel now concludes the anti-SLAPP statute does not apply to this proceeding. O.C.G.A. § 9-11-11.1 is part of the Civil Practice Act and applies to "lawsuits" asserting "claims for relief" in a "civil proceeding" "in all courts of record of this state." The Complaint is not a civil lawsuit filed in a Georgia court of record. The Complaint does not seek relief flowing to Petitioner. The City of Milton established the Ordinance as an ethics code; and therewith provided a method by which inquiry can be had as to potential violations, including rules of conduct (and further including rules which address due process concerns), as well as potential penalties for such violations. The Ordinance governs how an ethics complaint is to be handled. This proceeding was initiated pursuant to the Ordinance. Simply stated, by its jurisdictional wording, O.C.G.A. § 9-11-11.1 does not apply to this proceeding. See, *Jefferson v Stripling*, 316 Ga. App. 197 (2012) and, *In The Matter of L. Lin Wood, Jr.*, Supreme Ct. Numbers S22B0488 and S22B0645 (a bar disciplinary proceeding in which Mr. Wood asserted that Georgia's anti-SLAPP statute protected him from a State Bar disciplinary action, in which the Special Master rejected such application). Cases relied upon by Respondent to support his argument that he is entitled to anti-SLAPP protection are not persuasive or apposite. The Panel will not address each authority cited, yet observes that each of those involved a pending lawsuit in which the Plaintiff was seeking affirmative relief against the Defendant. (e.g., *Rogers v Dupree*, 349 Ga. App. 777 (2019) and *Greer v. Phoebe Putney Hospital Health System, Inc.*, 310 Ga. 279 (2020)).

Findings of Fact

Petitioner and Respondent were able to stipulate on a number of facts, and provided the Panel with a binder containing such stipulated facts and certain stipulated exhibits. Many of the relevant facts are undisputed.

Petitioner is the president of White Columns Community Association (the "Association"), and Respondent is a member of the Milton City Council. Both parties reside in White Columns. White Columns is a community of more than 400 hundred homes which is divided into four sections, one of which is commonly referred to as the Golf Club Community. The Golf Club Community is comprised of approximately 220 homes. Respondent lives in the golf club section of White Columns. The issues upon which the Complaint is based largely center around a City Council (the "Council") meeting held on May 2, 2022 (the "Meeting"), and in particular, Agenda Item 22-152 (the "Agenda Item"), titled, "*Approval of an Agreement between the City of Milton and While Columns Community Association, Inc. for Installation of Four Radar Feedback Signs*" (the "Agreement").

Based upon the Meeting transcript, the Council was to consider entering into a cost sharing agreement with White Columns Community Association pursuant to which the City of Milton would pay a portion of the costs to install traffic calming devices ("TCDs"). City Ordinance Sections 48-257, *et seq*. specifies the process for obtaining TCDs and Section 48-281 provides for the City to potentially share the cost of same.

Prior to Council's discussion of Agenda Item 22-152, Ms. Sara Leaders, the City's Public Works Director, summarized both the terms of the Agreement, as well as the statutory process to obtain the TCDs and the City's cost sharing with respect to same. During the course of her presentation, Ms. Leaders confirmed White Columns had complied with all applicable ordinance requirements.

Following Ms. Leaders' presentation, Council heard public comment in connection with such agenda item. Petitioner, and others, spoke in favor of such agenda item, while several persons opposed the agenda item. There was a significant amount of public comment, covering nearly 11 pages of the Meeting transcript (pages 10-21). While there was disagreement between those speaking about the actual TCDs installed, the speakers were generally in agreement that speeding was a problem in the White Columns neighborhood.

At least one public speaker, Dana Williams Dudley, a former member of the Association's board of directors, and former president of the Association, expressed residents' concern that the TCDs could "potentially adversely impact home values," which had been shared with her during the time she was an officer of the Association. (page 15 of the Meeting transcript)

Based largely upon the public comments offered, Mayor Jamison engaged in a discussion with the City Attorney which largely focused on the authority of the Association to act on behalf of those residing in the community in connection with the TCDs. The City Attorney confirmed that under City ordinances (i.e., Section 48-258(a)) and policies, that mandatory homeowner associations – of which the Association is one – may act on behalf of community residents, thereby avoiding the need to obtain approval of 2/3rds of homeowners. A significant portion of the Council discussion dealt with the Association's authority to act, and whether they should have so acted.

It should be noted that based upon the Panel's review of the Meeting transcript the entire discussion of the Agenda Item appeared contentious and substantial, covering 36 pages in the Meeting transcript (pages 7-43) and nearly 90-minutes (per Exhibit B to the Complaint). It is further noted that, rather than discussing the proposed Agreement itself, Council's discussion quickly devolved into a consideration of the Association's authority to act, and whether or not the homeowners supported the type of TCDs installed (i.e., four radar feedback signs). It could be said that Council's discussion picked-up where the public comments left off.

To that end, upon questioning by the Mayor (page 26 of the transcript), Ms. Leaders indicated that other homeowner associations acted in a similar manner – i.e., without the need to obtain 2/3rds homeowner approval – and in all of those cases, the cost sharing agreements had been approved by Council.

The Respondent was an active participant in the Council's discussion of the Agenda Item, beginning on page 23 of the Meeting transcript. On page 25 of the transcript, and nearly one (1) hour after the Agenda Item came before Council, Respondent first publicly disclosed that he has lived in the White Columns neighborhood for 24 years, and that his home was one of 28 which was beyond the fourth TCD radar sign installed by the Association[1]. While the Respondent conceded the Association acted within its authority, he voiced his opinion that he considered the Association's action "a mistake," and expressed that the TCDs "are not in keeping with the spirit or the tenor or the price point of the neighborhood." (Meeting transcript page 25).

[1] Three of the four TCD radar signs are located on White Columns Drive (the street upon which Respondent's home is located), and the fourth such sign is located on Treyburn Manor View, a street which intersects White Columns Drive near the front of the neighborhood and which Respondent would travel past in order to reach his home (Respondent's Exhibit 1).

Respondent continued to participate in the Agenda Item discussion until its conclusion, ultimately making a motion to defer consideration of the Agenda Item for a period of 90-days to allow for (a) a speed study, (b) installation of stop signs on White Columns Drive, and (c) obtaining additional data from the City's Police Department. The motion also "strongly encouraged" the Association to conduct a survey to gauge community support for the TCD, and the Council's "desire" that such TCD's be approved by a majority of residents. Respondent's motion passed by a 5-2 vote.[2]

Along with the Response, Respondent included several affidavits, one of those being the Affidavit of Steven Krokoff, the City Manager. Mr. Krokoff also testified at the hearing. In his Affidavit and testimony, Mr. Krokoff stated that Respondent asked, "in sum and substance," if there existed a conflict of interest concerning the Agenda Item or if Respondent should recuse himself. In response to the inquiry, "in sum and substance," Mr. Krokoff did not believe a conflict existed. No evidence was presented at the Hearing regarding Mr. Krokoff's legal training, any special ethics training, or qualifications to advise Respondent regarding the existence or non-existence of a conflict of interest. The exchange between Respondent and Mr. Krokoff was described as a very brief, casual conversation, occurring just moments before the Meeting started. In his testimony, Respondent confirmed that he did not consult the City Attorney about a potential conflict of interest with regarding the Agenda Item.

Conclusions of Law

Respondent contends he had no "interest" in the Agenda Item as that term is defined in Section 2-798, and at most, he has a "remote interest." The Ordinance defines "interest" as a "direct or indirect pecuniary or material benefit ... as a result of a transaction which is or may be the subject of an official act or action by or with the city..." Conversely, "remote interest" means an "interest of a person who would be affected in the same way as the general public."

The distinction between an "interest" and a "remote interest" is critical, and is a threshold question. Did Respondent have an "interest" or a "remote interest" in the Agenda Item?

[2] Testimony at the Hearing included disclosure that the Agenda Item had been considered during the August 1, 2022, Council meeting. Respondent took no part in the discussion or vote on the Agenda Item at such meeting in, "an abundance of caution," given the pendency of this ethics matter.

Several cases have considered this issue in the context of zoning matters. It is necessary that the Panel consider all the evidence presented to determine whether Respondent had direct or indirect interest in the outcome of the vote – that being an interest which was not shared by the public generally, and which was more than remote or speculative. *See, Olley Valley Estates, Inc. v. Fussell*, 232 Ga. 779, 208 S.E.2d 801 (1974).

The Panel concludes Respondent had an "interest" in the Agenda Item. Respondent's home is one of 28 in White Columns which must pass by all four TCDs. While his situation is not unique, uniqueness is not required to create an "interest." Respondent's situation certainly differs from that of the "general public" and is vastly unlike the examples of "remote interest" given in the Ordinance.[3]

Respondent cites *Story v. Macon*, 205 Ga. 590 (1949) for the proposition that taking a position on a street paving issue does not create a conflict of interest for a voting city councilperson who happened to own property on one of the streets to be paved. The *Story* court considered the conflict of interest claim by looking at the widespread benefits which accrue to all property owners living on a large number of streets to be paved, and determined that no conflict existed. This situation is different, as the Agenda Item (i.e., approval of the Agreement) affects only a single neighborhood within the City.[4]

We shall now consider each of the seven (7) Ordinance violations alleged in the Complaint, recognizing that violations must be proven by clear and convincing evidence (Ordinance Section 2-883).

Section 2-848 – Conflict of interest transactions,
Section 2-859 – Disclosure of interest,
and
Section 2-861 – Abstention to avoid conflicts of interest

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[3] Those examples are property tax rates, general city fees, city utility charges or a comprehensive zoning ordinance. Each of such examples have near-universal applicability amongst the general public, rather than simply impacting a small subset of city residents as is the case with Respondent and the Agenda Item.

[4] It is not lost on the Panel that Respondent's motion at the May 2, 2022, Council meeting had almost no direct relevance to the issue before Council (i.e., the Agreement), but rather, appeared targeted to whether or not the TCDs were appropriate and whether the Association could/should act on the neighborhood's behalf.

These Sections set forth obligations in the event a conflict of interest exists. Section 2-848 deals with the terms of any transactions, contracts or business with the City, Section 2-859 requires public disclosure of such interest, and Section 2-861 deals with the conduct of city officials in connection with such arrangements.

There was no evidence which established Respondent participated in the making or negotiation of the Agreement and, in fact, based on Ms. Leaders' statements at the Meeting, such agreements are somewhat routine, and are undertaken in accordance with established City ordinances and policy. As such, the Panel concludes that Respondent did not violate Section 2-848 of the Ordinance.

Section 2-859 requires the immediate public disclosure by City Council members of any financial or personal interest in any proposed legislation or action. Insofar as Respondent had at least a personal interest in the outcome of the discussion of the Agenda Item, Respondent was required to "immediately disclose publicly" such interest. By clear and convincing evidence, Respondent failed to disclose his interest in the matter, and in fact, did not publicly disclose his interest as a resident of the While Columns community, and being one of 28 similarly situated residents, for nearly an hour after discussion of the Agenda Item began.

Section 2-861 prohibits the affected city official from participation in the discussion, debate, deliberation or decision-making process. Further, to avoid even the appearance of impropriety, this Section requires the city official to leave the meeting room (except in the case of public meetings). The Section additionally requires the city official to announce their intent to abstain prior to the beginning of the discussion, debate, deliberation or vote on the item.

Disclosure of an interest – and the attendant prohibitions – engenders public confidence in the legislative process. The transparency effectuated by disclosure is essential to a properly functioning democratic process. The Panel believes Respondent either knew or should have known of the potential conflict of interest; however, rather than consulting with the City Attorney,Respondent chose to have brief, off-the-cuff encounter with the City Manager concerning such matter. We find this explanation unsatisfactory, and it certainly does not absolve Respondent from his responsibilities under the Ordinance or, more generally, as a public elected official.

It is without doubt that Respondent failed to immediately and publicly disclose his interest, and that he fully participated in the Agenda Item discussion, including

voting thereon. The Panel, by clear and convincing evidence, concludes the Respondent violated Sections 2-859 and 2-861 of the Ordinance.

Section 2-825 – Code of ethics for municipal service generally
and
Section 2-831 – Code of ethics for city officials and department directors

These Sections are a local codification of O.C.G.A. §§ 45-10-1 and 45-10-3, establishing broad ethical standards applicable to city officials. Section 2-831, item 9 of the Ordinance provides that the city official should,

> "[n]ever take any official action with regard to any matter under circumstances in which he knows *or should know* that he has a direct or indirect monetary interest in the subject matter or outcome of such official action."

Respondent had actual knowledge the TCDs were a hot-button issue in White Columns, and that at least some While Columns residents believed the TCDs could adversely impact home values (as Dana Williams Dudley stated during public comment), Respondent, being only one of 28 homes beyond the fourth TCD, certainly should have known he had a monetary interest in the Agenda Item. In fact, Respondent acknowledged such interest while opining that the TCDs were not at the "price point" of the neighborhood.

Consequently, by clear and convincing evidence, the Panel concludes the Respondent violated Section 2-831(9) of the Ordinance. Section 2-825 is less specific, and the Panel is unable to conclude that Respondent violated such provision.

Section 2-852 – Withholding of information
and
Section 2-855 – Political recrimination and activity

Section 8-252 relates to the withholding of information which would impair the Council's proper decision-making ability. The Complaint claims that Respondent failed to disclose his participation in a neighborhood group opposing TCDs. However, Respondent's position vis-à-vis TCDs was expressed at the Meeting, and that there was no impairment of the Council's proper decision-making process.

The Panel further notes the Response included affidavits from 5 City Council members, each of which established the affiant was aware Respondent lived in White Columns prior to the Meeting.

Based on the foregoing, the Panel concludes that Respondent did not violate Section 8-252 of the Ordinance.

Section 2-855 prohibits the city official from improperly using their position to reward or punish political activity, and further prohibits use of City resources (time or equipment) to aid a political candidate, party or cause. The Panel heard no evidence establishing by clear and convincing evidence that Respondent violated Section 2-855 of the Ordinance.

Conclusion

The Panel has determined Respondent violated Sections 2-831, 2-859 and 2-861 of the Ordinance by clear and convincing evidence. Having found such violations, in accordance with Ordinance Section 2-892(b), the Panel is required to recommend to the Mayor and City Council certain penalties and actions as stated therein. Upon careful consideration, the Panel hereby recommends to the Mayor and City Council that Respondent be given a written censure or reprimand with respect to such ethics violations, and further recommends that such action be publicly announced at a regular City Council meeting and included in the official minutes of such meeting.

SO ORDERED, this 30th day of August 2022.

Samuel P. Pierce, Jr., Chairperson

Charles Pollack, Member

Ron Debranski, Member