



TOWN OF HUNTINGTON

BOARD OF ETHICS &
FINANCIAL DISCLOSURE

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October 20, 2014

OPINION No. 2014-3

Town of Huntington
100 Main Street
Huntington, NY 11743
Att: Honorable Councilman Mark Cuthbertson

Dear Councilman Cuthbertson:

By letters dated October 7, 2014 and October 10, 2014 you filed a request for an Ethical Opinion arising out of certain issues as reported in the recent Newsday Article of October 5, 2014. The Article questioned whether or not as a Councilperson you were required to either disclose the fact that you had been appointed a Receiver in a matter entitled Spencer Savings Bank v. RJP Realty Co. or recuse yourself from voting in the Application for Re-Zoning filed by Kahn Properties LLC (an entity owned in whole or part by Gary Melius). In that Matter of Spencer Savings Bank v. RJP Realty Co. Gary Melius had been independently appointed by the Court as Property Manager. Both you and Mr. Melius are on the list of approved fiduciaries.

The Documents Considered

As set forth in greater detail herein, based upon the documents reviewed and the responses that you have provided we have determined that a technical ethical violation herein has not occurred and that you had neither a duty to recuse nor disclose prior to the Town Board Meeting relative to the Re-Zoning Application which was voted on March 12, 2012 by virtue of the fact that you and Mr. Melius had been appointed as Fiduciaries by the Court. Notwithstanding the foregoing; should a similar situation occur in the future the better course would be simply to place a statement on the record relative to the Court appointment.

In coming to this determination, we have reviewed:

- 1.) The initial Order of the Court which appointed you as a receiver, the entire Court docket history concerning the handling of the receivership, the final Order of the Court which discharged you as a Receiver and cancelled the Receivership Bond.
- 2.) Chapter 29 of the Huntington Town Code entitled Ethics.
- 3.) Each of your individual required Financial Disclosure Statements filed with the Town of Huntington covering the period from December 31, 2009 through December 31, 2012.
- 4.) Each of the Town Board Resolutions dealing with any of the Applications relative to Oheka Castle.
- 5.) The contribution records of Gary Melius as maintained by the New York State Board of Elections.
- 6.) Part 36 Rules, as established by the Unified Court System relative to Receiverships.

The Court Order of November 20, 2008

In the Matter of Spencer Savings Bank v. RJP Realty Company Inc., Suffolk County Supreme Court Index No. 040592/2008 on or about November 20, 2008 the Court appointed you as Receiver in the above referenced Foreclosure Action pursuant to Part 36 (22 NYCRR Part 36 of the Rules of the Chief Judge). The same Order of the Court independently appointed Gary Melius of Kellum Realty as Property Manager. You did not request the appointment of Mr. Melius or Kellum Realty Pursuant to the terms of the Order. No fees were to be paid to yourself as Receiver or to the Property Manager absent further Order of the Court. Pursuant to the Rules of the Court. The Receiver serves in a fiduciary capacity with his obligation running to the foreclosing entity, herein, Spencer Savings Bank. So too, the Property Manager who is independently appointed and not selected by the receiver serves in a fiduciary capacity whose fiduciary duty is owed to the foreclosing entity, namely Spencer Savings Bank. (Part 36.1 (9) (10); 36.2 (a)). The Courts have noted that the role of a Court appointed Fiduciary and the duties owed thereunder differ from that of a traditional business relationship. The Court has traditionally distinguished mere business transactions from Fiduciary relationships pursuant to the Rules of Part 36. The appointment by a Court of an individual as a Receiver is a Fiduciary relationship separate and apart and distinguishable from a business relationship. To this end the Receiver functions as Fiduciary for the foreclosing entity, therein Spencer Savings Bank.

The property which was the subject of the Receivership herein was a 40,000 square foot office complex located in Islandia, Town of Islip, New York and not located in the Town of Huntington. From a review of the Court Docket herein, all Receivership fees were ultimately ruled on and approved by the Court pursuant to the Part 36 Rules and the Civil Practice Law and Rules. The Court Docket discloses that on or about March 7, 2012 as Receiver you had filed your Final Accounting and Report reflecting essentially that your duties as receiver had ceased. The relief sought was ultimately granted by the Court approving the Accounting and discharge of the Bond.

The Town Board Resolutions

On or about November 9, 2011, almost 3 years after your appointment as a receiver, Kahn Properties LLC filed a Change of Zone Application. The Town Board forwarded the Change of Zone Application to the Planning Board, pursuant to Town Code Section 198-27, seeking comments and advice from the Planning Board. No formal determination was made at that time on the Application. The November 9 resolution also set a Public Hearing date on December 13, 2011 to consider the Zone Change Application. The Planning Board essentially recommended approval. Subsequent to receiving the recommendations of the Planning Board, the conducting of a Public Hearing and approval from the Suffolk County Planning Commission on or about February 1, 2012, the matter was set down for the Town Board Calendar on March 12, 2012. On that date by way of *Town Board Resolution 2012-91* in a unanimous vote the Zone Change was approved.

The Duty to Recuse or Disclose

In considering the duty to recuse or disclose we have reviewed each of your required filings relative to disclosure of financial status covering the period from December 31, 2009 through December 31, 2012 as well as all other documents referenced herein. A Fiduciary has no ability to pay themselves a fee which is not subject of Court review and scrutiny. The entity that you were serving in the fiduciary relationship had no matter pending before any department, district, administrative body, board or agency of the Town of Huntington.

Further, the Town Code of Ethics did not prohibit you from voting on matters involving Kellum Properties, Kahn Properties or Gary Melius. The relevant provision of the Code of Ethics is Section 29-7 (A) Subdivision 1 which limits any professional who serves as an officer of the Town or any subdivision thereof from exercising any discretion in any matter pending before the Town which shall involve a person whom or business entity which during the five years prior to said matter arising before the Town has been a client of (*emphasis supplied*).

- a) Their's.
- b) Any firm or professional association that they have been connected with; or
- c) Any other professions which have a shared business relationship.

Based on the information reviewed for this opinion, neither Kellum Properties, Kahn Properties nor Gary Melius was a client of yours, or of any firm or professional association connected to you or of any other professions with which you have shared a business relationship. The Newsday article omits the language from the Code limiting disqualifying relationships to those involving clients.

The Newsday Article questions contributions by Gary Melius to your campaign. Any campaign solicitations were conducted through a filed Campaign Committee, Friends of Mark Cuthbertson, and, accordingly, there is no prohibition to such contributions, nor is there any duty under the Code to disclose those contributions. Contributions are in any event a matter of Public Record. We have reviewed the Campaign Financial Disclosure records from the New York State Board of Elections which cover approximately a ten year period of contributions made by Gary Melius.

The record reflects contributions made essentially to every candidate regardless of party affiliation running for local offices in Nassau and Suffolk counties, Statewide offices and Federal offices as well. The additional Receivership referenced in the Newsday article relative to the appointment of Kelly Melius to be Property Manager in the Matter of US Bank National Association v. Major Holdings occurred after the Town Board vote on March 12, 2012 and has no applicability herein.

THE BOARD OF ETHICS
AND FINANCIAL DISCLOSURE

- Board Member Ralph Crafa has recused himself.