

# **REPORT AND DETERMINATION ETHICS BOARD TOWN OF NEW CANAAN**

In accordance with Section 17-5B (5)(a) of the Ethics Code of the Town of New Canaan, the Ethics Board hereby issues the following report and determination (“Report”) of the November 1, 2021 ethics complaint (“Complaint”) filed against First Selectman Kevin J. Moynihan (“Respondent”) by Micaela Porta (“Complainant”).

## Procedural History, Pleadings and Submissions

The subject matter of the Complaint is an undated letter sent by Respondent to “New Resident” about the then-upcoming municipal election to be held on November 2, 2021 (“Letter”). The full text of the Letter is set forth in the Fact section of this Report.

The Complaint asserts that the Letter violated several sections of the Ethics Code, claiming that the Respondent “used his position and access to resident names and addresses to give preferential treatment to one slate of candidates....” The Complaint further asserts that the Letter was “misleading to voters,” “erroneous” in its description of Connecticut election law and that Town citizens were “confused” by the Letter and had questioned its “propriety.” Finally, the Complainant asserts that she had never seen such a letter from an elected official and hoped never to see one again.

Pursuant to Code Section 17-5B (1)(d), the Ethics Board delivered a copy of the Complaint and the Ethics Code to Respondent, advising him of his right to confidentiality and his right to submit a preliminary written reply within 30 days if he so chose.

After delivering the Complaint to Respondent, the Ethics Board began its investigation under Section 17-5 B (2) (a) of the Code to determine whether probable cause existed for further proceedings. The Complainant and the two witnesses identified in the Complaint were interviewed and copies of documents and electronic communications about the Letter were provided by them to the Board. The information received by the Board from the Complainant and witnesses corroborated concerns by some Town citizens about the propriety and accuracy of the Letter.

The Respondent delivered his Preliminary Reply to the Complaint to the Board on December 5, 2021. In that reply, Respondent denied violating the Ethics Code, asserting that the “statements made in the Complaint are false and the Complaint should be immediately dismissed.” He also denied that the Letter was misleading in its description of the election laws.

In support of his position, the Respondent claimed that the Complaint “attempts to politicize the Board of Ethics process in violation of my right of free speech guaranteed by Article I of the U.S. Constitution.”

As for the drafting of the Letter, the Respondent explained that he was asked by the New Canaan Republican Town Committee (“RTC”) to “write a letter to the Editor to the local media endorsing the Republican slate for the BOE” but he suggested that he instead “write a letter to new voters to explain the ballot for the BOE race that many voters were finding confusing.” He also said that he “composed the letter myself,” that he had nothing to do with the mailing of the Letter as the mailing list and the mailing itself was the responsibility of the RTC, and that the voter registration lists used by RTC are freely available to the public. As for why he wrote the Letter, the Respondent stated “As a leader of the Republican Party in New Canaan, along with the RTC, I am expected to use my influence to endorse the Republican slate of candidates in municipal elections, and such action does not and cannot constitute a violation of the Code.”

After receipt of Respondent’s Preliminary Reply, the Respondent was interviewed and provided copies of electronic communications that he had had with RTC members about the Letter and various drafts thereof. These emails indicated that there was some input from the RTC in the Letter’s drafting and that Respondent used his office and a Town Hall scanner (with accompanying email) in finalizing the Letter.

The Ethics Board supplemented its probable cause investigation with its own research which included review of examples of Board of Selectmen minutes and notices available on the Town’s website and of various cases, statutes, articles and guides found through internet Searches.

The Complaint, the Preliminary Reply and all the information gathered during the Board’s investigation were analyzed and discussed during executive sessions held as part of public Ethics Board meetings on November 9 and 23, 2021, December 7 and 10, 2021 and January 4, 2022. Following the executive session on January 4, 2022, the Board resumed its public meeting at which time the Chair read a resolution that the Board had drafted. The Board voted unanimously in favor of adopting that resolution.

The Board’s January 4, 2022 resolution found that there “was probable cause, under Section 17-5 B (2) (c) of the Ethics Code, to conduct further proceedings to determine whether the Letter violates Sections 17-2 B (5) (c), 17-2 B (6) and 17-2 B (8) of the Code.” In its resolution, the Board noted that “the use of the title and office of First Selectman, Town of New Canaan, a position held in trust for all New Canaan residents, subjects the letter to the Code,” that the footer referencing the “RTC” and the phrase “leading the Republican slate of candidates” may raise questions of protected political speech, that there was a question whether Respondent misused the authority of his town office, a town resource, and that there was a question of “what resources were used to create and send the Letter.” The Board’s January 4, 2022 resolution also provided that Respondent had “until February 11, 2022 to file a response in accordance with Section 17-5 B (3) of the Ethics Code.”

On February 4, 2022, Respondent, through retained counsel, responded to the probable cause finding, arguing that the Complaint should be dismissed outright because the Complaint, in Respondent's view, was an attack on campaign activities more properly brought before the State Elections Enforcement Commission. The Response also asserted that the Letter, composed by Respondent as "word document with his name and title at the top of the document," did not use the Respondent's official letterhead<sup>1</sup> and did not involve the use of "any Town of New Canaan resources" other than the scanner in Respondent's office which was used to create a PDF for emailing to the RTC.

The Response further asserts that there is no prohibition in Connecticut preventing elected officials from using their titles when campaigning for elected office. In support thereof, Respondent cites a "very thoughtful and carefully written" Advisory 11-1 issued by the Massachusetts State Ethics Commission ("Mass. Ethics Advisory") in which the Commission states that "elected public employees" are "not prohibited ... from referring to or identifying themselves by their official titles in campaigning ...." The Commission's Advisory does, however, also state that public employees may not "use official letterhead stationery, even if privately paid for, to advocate for or endorse a candidate ...."<sup>2</sup>

The Response goes on to argue that Respondent's "mere use of the title" does not subject the Letter to the jurisdiction of the Ethics Board and that the Letter is protected political speech, not subject to scrutiny by the Ethics Board.

On February 8, 2022, the Board met publicly to discuss next steps in the handling of this matter and determined that a request for information should be sent to the RTC. A letter requesting information was sent to the RTC on February 11, 2022.

On February 23, 2022, the RTC responded to the Board's request providing documents and a February 22, 2022 cover letter answering questions that the Board had posed. In its letter, the RTC advised that it had paid for the Letter's printing and mailing, and that the mailing list used to disseminate the Letter was available publicly and had been obtained from the Registrar's office. The RTC also provided an unopened returned envelope showing its return address on the mailing.

On or about February 25, 2022, the Republican Registrar of Voters confirmed that the mailing list in the form obtained by the RTC was publicly available to all at no cost from the Registrar's office.

<sup>1</sup> No example of Respondent's official letterhead was provided or available online. Accordingly, the Board asked for and received copies from Respondent's counsel, who advised that there is no printed official letterhead, that the official letterhead is in electronic form and that there have been no widespread mailings using the official letterhead, only one-off communications from time to time.

<sup>2</sup> The Advisory also contains a catalog of prohibited uses of public property: elected officials may not "use public resources for election-related political purposes," "send campaign-related emails using official computer or email;" use public "equipment to create, reproduce or distribute campaign materials;" or "use public office space and facilities" for political activities. The Advisory also states that "public resources may not be used to notify only a subset of voters to influence the outcome of a vote or meeting... because it would not be neutral."

On March 8, 2022, the Board met in public sessions to discuss, inter alia, whether any further factual investigation was required. After concluding that no additional discovery was required, the Board discussed and rejected the jurisdictional challenges that had been lodged by Respondent, noting that it was not an entity that considers or rules on election law or free speech issues but that it was constituted to determine issues relating to the Ethics Code alone: in this case, whether Respondent's use of his position and Town property and resources to generate the Letter may have violated the Code. The Board also considered the framework effectively similarly posited in the Massachusetts Ethics Advisory: i.e. whether the letterhead Respondent used conveyed official authority like an official letterhead or was it simply an identifier. In the interest of fairness, the Board concluded that Respondent would be offered a further opportunity to address that issue and the issues arising out of his use of Town property and resources to generate the Letter and to have a public hearing if Respondent so chose.

Respondent accepted the Board's offer and on April 13, 2022 Respondent's counsel provided a Supplemental Response to the Complaint, and advised that the Respondent did not seek a public hearing.

In his April 13, 2022 Supplemental Response, Respondent asserts that his use of office equipment and space was de minimis and should not be considered an Ethics Code violation. He also asserts that the letterhead used on the Letter is distinctly different from his official letterhead and that it is common practice for politicians to use their titles in political communications. Finally, Respondent asserts that the Ethics Board has no jurisdiction to consider his use of town resources or the "design" of his letterhead because such issues are not specified in the Complaint and that the Ethics Board has sua sponte "presented" these issues for consideration in violation of Section 17-3(f) of the Code.\*

\*The resolution of this jurisdictional challenge is discussed infra.

## FACTS

This following statement of facts is based upon information gathered and reviewed by the Ethics Board both before and after its January 4, 2022 finding of probable cause.<sup>3</sup>

In the fall of 2021, a member of the RTC asked Respondent to “write a Letter to the Editor to the local media endorsing the Republican slate” running in the upcoming municipal election for contested seats on the Town’s Board of Education (“BOE”).

In response to this request, Respondent suggested that he instead “write a letter to new voters to explain the ballot for the BOE race that many voters were finding confusing.” The Respondent also wrote that he “composed the letter” himself and that, “as a leader of the Republican Party in New Canaan,” he was “expected to use [his] influence to endorse the Republican slate of candidates.”

On or about October 20, 2021, a member of the RTC asked the Republican Town Registrar for an “excel file of all new voter registrations from 1 July 2020 until now,” including “name, party affiliation, date of birth, telephone number and full addresses.” That list was provided electronically to the RTC on October 21, 2021. The Republican Registrar of Voters has confirmed that this type of list is publicly available, without charge, to anyone who asks.

During his interview, the Respondent advised that, as the election drew closer, he received several reminders about drafting his proposed letter from members of the RTC.

On the evening of Saturday, October 23, 2021, and the early morning of Sunday, October 24, 2021, Respondent emailed a draft letter, which he had typed himself, to several RTC members for comments, suggestions and thoughts. These emails were sent from Respondent’s own gmail account. This draft of the Letter was addressed to “Dear New Resident,” and, in its first paragraph, stated that “as someone who moved to New Canaan in the last several years...you may not be that familiar with the political landscape in New Canaan regarding the upcoming municipal election....” The text of this first draft follows, although font size may differ from the original:

<sup>3</sup> This information included the November 1, 2021 Complaint, the undated letter signed by Respondent which is the subject of the Complaint, interviews with the Complainant and the witnesses identified in her Complaint, copies of electronic communications received from the Complainant and those witnesses, examples of Board of Selectmen’s minutes and notices found on the Town’s website, the Respondent’s December 5, 2021 Preliminary Reply to the Complaint, an interview with the Respondent, copies of electronic communications and drafts of the letter received from Respondent, the February 4, 2022 Response and April 13, 2022 Supplemental Response submitted by Respondent’s counsel, copies of Respondent’s official letterhead and information pertaining to its use provided by Respondent’s counsel, materials received from the RTC on February 23, 2022, information contained in the RTC’s cover letter dated February 22, 2022, and information received from the New Canaan Republican Town Registrar. All of the written or electronic information received by the Ethics Board is on file with the Town Clerk (or available on the Town’s website) and can be reviewed there in accordance with that office’s hours and rules.

**Kevin J. Moynihan  
First Selectman  
Town of New Canaan**

Dear New Resident,

Welcome to New Canaan!

I am writing to you as someone who moved to New Canaan in the last couple years, and, as such, you may not be that familiar with the political landscape in New Canaan regarding the upcoming municipal election on Tuesday, November 2nd.

I have had the honor and privilege to serve as First Selectman of New Canaan since November 2017, after having served on the Town Council for four years and having had a successful and very satisfying 35-year career on Wall Street as a corporate attorney.

I am fortunate to be running unopposed this year, which I believe is due to our having accomplished a lot over the last four years and having successfully navigated our town through the COVID-19 pandemic.

I am also proud to be leading the Republican state of candidates on the November 2 ballot, or “Row B.” In addition to our unopposed incumbents in the offices of Selectman, Town Treasurer, Town Clerk and others, we have a very important contest for 6 seats on the Board of Education this election cycle.

This year, 5 of the 9 BOE seats with 4-year terms are up for election and there is also a special election for a BOE vacancy with a remaining 2 years of a 4-year term.

Because Democrats as the minority party in New Canaan are guaranteed a minimum of 2 seats under CT law, there are only 3 Republican candidates for the 5 seats with 4-year terms versus 5 Democrat candidates. **I urge you to vote only for the “Row B” Republican candidates: Julie Toal, Phil Hogan and Dan Bennet for 4-year terms and Hugo Alves for the special election seat.**

The Republican BOE candidates all have young children in our schools and are accomplished and energetic individuals who stand for academic excellence, fiscal common sense, local control, better curriculum and new initiative transparency and improved communication to all parents.

Due to the ongoing coronavirus pandemic, there is “no excuse” absentee ballot voting under rules adopted by the CT legislature last summer. **If you will be unable or prefer not to vote in person on November 2nd you may go to Town Hall any weekday between 8:00 am and 4:00 pm and vote by absentee ballot at the Town Clerk’s office.** You vote at the High School if you live in the Western 2/3 of New Canaan and you vote at Saxe Middle School if you live in the Eastern 1/3 of New Canaan.

Sincerely,

On Sunday, October 24, 2021, the Respondent circulated, via his gmail account, a new draft to several RTC members, indicating he had “shortened it a bit and made some changes as suggested.” The salutation remained the same but the first paragraph was modified to read “as a relative newcomer to New Canaan...you may not be familiar with the upcoming municipal election... .” Another change added a sentence to the Letter’s discussion of Connecticut state election laws.

On the morning of October 25, 2021, an RTC member sent a revised Letter to Respondent’s gmail account highlighting several proposed changes to the penultimate paragraph of the second draft. That proposed revision reads as follows:

“The Republican BOE candidates all have young children in our schools and are accomplished individuals who stand for academic excellence, fiscal common sense, local control, better curriculum oversight, greater transparency, especially on new initiatives and improved communication to all parents.”

Those changes, as well as several others, were made to the text of the Letter during the morning of October 25, 2021, and a third draft was circulated via Respondent’s gmail account. These changes included a revision to the first paragraph to include a new reference to confusion over the ballot and a new sentence announcing the letter’s purpose: “I am writing to help explain the process for voting.”

This third draft became the final version when, in an email sent to Respondent’s gmail account later that morning, another RTC member added a tag line disclaimer at the bottom of the Letter stating “Paid for by the New Canaan RTC, Gene Goodman Treasurer.” The text of the final Letter follows, although font size may differ from the original:

**Kevin J. Moynihan  
First Selectman  
Town of New Canaan**

Dear New Resident,

As a newcomer to New Canaan, you may not be familiar with the upcoming municipal election on Tuesday, November 2, and you may be confused by the ballot. I am writing to help explain the process for voting.

I am proud to be leading the Republican slate of candidates on the November 2 ballot, or “Row B”. In addition to our unopposed incumbents in the offices of Selectman, Town Treasurer, Town Clerk, Town Council and others, we have a very important contest for the Board of Education this election cycle.

This year, 5 of the 9 BOE seats with 4-year terms are up for election and there is also a special election for a BOE vacancy with a remaining 2 years of a 4-year term.

Because Democrats as the minority party in New Canaan are guaranteed a minimum of 2 seats under CT law, there are only 3 Republican candidates for the 5 seats with 4-year terms versus 5 Democrat candidates.

**I urge you to vote ONLY for the “Row B” Republican candidates: Julie Toal, Phil Hogan, and Dan Bennett for 4-year terms, and Hugo Alves for the special election seat.** The remaining two seats can be determined by voters under guaranteed minority party representation.

The Republican BOE candidates all have young children in our schools and are accomplished individuals who stand for academic excellence, fiscal common sense, local control, better curriculum oversight, especially on new initiatives and improved communication to all parents.

Due to the ongoing coronavirus pandemic, there is “no excuse” absentee ballot voting under rules adopted by the CT legislature last summer. **If you are unable or prefer not to vote in person on November 2<sup>nd</sup> you may go to Town Hall, 77 Main Street, any weekday between 8:00 AM and 4:00 PM and vote by absentee ballot at the Town Clerk’s office.**

Sincerely,

**REMEMBER: VOTE ROW B – ONLY!**

Paid for by the New Canaan RTC, Gene Goodman Treasurer



The final Letter was signed by the Respondent on the morning of Monday October 5, 2021 while he was working in his office at New Canaan Town Hall. During that period of time, he used the “Selectmen Copier” to scan the Letter, and the Town email associated with that Copier/scanner to forward the signed Letter to his town email address. The Respondent then sent the signed version from his gmail account to the RTC.

The Letter was printed at the New Canaan UPS Store by the RTC. The Letter was placed in envelopes bearing the names and addresses the RTC had obtained from the New Canaan Town Registrar and the envelopes bore the following return address: “New Canaan Republican Town Committee, P.O. Box 42, New Canaan, CT 06840.” The Letters were mailed on or about October 26, 2021. The RTC has provided receipts indicating that it paid for the Letter’s printing, the envelopes and the postage mailing.

The Letter provoked responses from a number of Town citizens who received or saw the Letter: some asked whether it was appropriate for a Town official to send such a Letter and others questioned its accuracy in making statements about state election laws. Complainant herself fielded a number of questions about the Letter and those laws, and she also made several inquiries to others about the Letter’s contents.

Relevant Letterheads/Headings

Set forth below are relevant letterheads or headings used by the Respondent and examples of headings used for the official minutes and notices of the Board of Selectmen. The actual size of the letterheads and headings are approximate and the originals, on file in the Town Clerk’s office or available on line on the Town’s website, should be consulted for the actual sizes.

**Kevin J. Moynihan  
First Selectman  
Town of New Canaan**

This is the letterhead used by the Respondent on the Letter sent to New Residents. Respondent himself composed this letterhead.

**TOWN OF NEW CANAAN  
TOWN HALL, 77 MAIN STREET  
NEW CANAAN, CT 06840**

KEVIN J. MOYNIHAN  
FIRST SELECTMAN

TEL: (203) 594-3000  
FAX: (203) 594-3123

This is Respondent's official Town letterhead. According to Respondent's attorney, this letterhead does not exist in physical form and has not been used for widespread public communications, just for individual letters.

**TOWN OF NEW CANAAN  
BOARD OF SELECTMEN**

**Regular Meeting  
Tuesday, December 17, 2019  
Town Hall**

**Minutes**

**TOWN OF NEW CANAAN  
BOARD OF SELECTMEN**

**Regular Meeting  
Town Hall Meeting  
Tuesday - November 30, 2021**

**8:30 A.M.**

**Minutes**

**TOWN OF NEW CANAAN  
BOARD OF SELECTMEN**

**Meeting  
Tuesday – August 17, 2021**

**Town Hall Meeting Room  
8:30 A.M.**

**Hybrid Meeting Notice**

These are examples of headings from Board of Selectmen minutes and notices, such minutes and notices are available on the Town's public website.

DISCUSSION  
AND  
DETERMINATION

The Ethics Board met on April 27, 2022 in a public meeting to discuss, deliberate and determine the open issues. Set forth below is discussion and resolution of those issues.

Subject Matter and Jurisdictional Challenges

In his December 5, 2021 Preliminary Reply and his February 4, 2022 Response, Respondent sought dismissal of the Complaint arguing that his Letter was fully protected by his First Amendment rights and that the Complaint, as characterized by Respondent, represented an election law challenge more appropriately brought before the State Election Enforcement Commission. As discussed above, the Board rejected these arguments to dismiss, noting that it was an entity that did not consider or rule on free speech or election law issues, but only issues relating to potential violations of the Ethics Code, in this case Respondent's use of his position, Town property and resources to generate the Letter.

In his April 13, 2022 Supplemental Response, Respondent asserted yet another challenge to the Board's jurisdiction. This time, Respondent claimed that the Ethics Board cannot consider "the issues of Respondent's use of a Town printer/scanner" or "whether Respondent's political communication could be confused with an official communication." In support of this argument, Respondent claimed that the Ethics Board had sua sponte raised these issues in violation of Section 17-3(f) of the Code which states that the Ethics Board "shall have no authority to present matters for inquiry or investigation on its own initiative."

A number of matters could be discussed in dealing with this challenge, including the meaning and purpose of the section cited, the structure of the Code and the Code's pleading requirements, but the Board need not dwell on these issues because the factual underpinnings of Respondent's claim are incorrect. The Board has not "presented," or raised sua sponte, any matter for inquiry or investigation.

The Board was presented with a legitimate Ethics Complaint about Respondent's political Letter and his use of his "official" Town position to produce same. Similarly, the Board was presented with evidence of Respondent's use of Town resources by Respondent himself in response to its request for communications about the Letter. There was thus no presentment by the Board as contemplated by Section 17-3(f) as neither the inquiry nor the ensuing investigation was initiated sua sponte by the Board.

Just as significant is the fact that Respondent himself understood these matters to be at issue, as evidenced by Respondent's February 4, 2022 Response. On the first page of that Response, Respondent writes that "the Complaint appears to be an attempt to bring a campaign complaint against Mr. Moynihan by framing his campaign activities as the top Republican official in New Canaan as official statements by him in his role as First Selectman." (There are other examples of the political versus official interpretation of the letter on pages. 3, 6, 7 of his Response.)

The same can be said for the use of Town resources. On page 2 of the February 4, 2022 Response, Respondent writes that “he did not use any Town of New Canaan resources in creating or sharing the letter, with one exception: he signed the letter and put the signed letter through his office scanner.” (He also writes about his use of the Town scanner on page 8 of the Response.)

In sum, the Board has not “presented” or “raised sua sponte” the issues which Respondent identifies, as such issues were either part of the Complaint itself or raised by Respondent himself, Respondent understood such issues to be part of these proceedings and Respondent had ample opportunity in his Response and Supplemental Response to address these contested matters. Respondent’s jurisdictional challenge is thus rejected.

#### Use of Town Resources: Town Scanner, and Office Space for Political Purposes\*

Respondent’s incidental use of the Town scanner (and attendant email) while in his office working on the Letter on the morning of October 25, 2021 is uncontested. Respondent does, however, argue that the use of Town resources was de minimus and should be excused.

Section 17-2B (6) of the Ethics Code prohibits Town officials and employees from using “Town property of any nature, including vehicles, equipment, resources, supplies or real property, for the benefit of himself” with two exceptions not relevant here. There is, however, some authority for the proposition that de minimus use may be excused.

The Board has determined that the minor and relatively short use of Town resources, while in contravention of the Ethics Code, was de minimus and has concluded that no formal violation will be issued.

\*This section does not address the issue of whether the letterhead used by Respondent constituted a use of a Town asset. That issue will be discussed in the following section.

Letter: Does the Letterhead Constitute A Prohibited Use of A Town Position or Town Property

The most significant issue presented by the Complaint is whether the Letter, more specifically the letterhead placed thereon by Respondent, represents a use of Town property in violation of Section 17-2 B(6) or a use of Town position in violation of Section 17-2 B(8). The former section forbids an official's use of Town property of any nature ... for the benefit of himself or herself" save for two exceptions not relevant here. The latter section forbids an official's use of "his or her position ... for the purpose of obtaining or furthering ... a personal interest."

Since the first Ethics Code was enacted by the Town in 1964, "Public officials and employees" have been expressly described as "agents of public purpose" and as holding "office for the benefit of the public." (See Introduction to the current Code of Ethics adopted on October 18, 2017 with effective date of November 3, 2017; a copy of such Introduction – and the Ethics Code – is included in the packet given to each public official, whether elected or volunteer, upon being sworn in the office.) This view is consistent with the relatively recent United States Supreme Court decision, Nevada Commission on Ethics v. Carrigan, 564 U.S. 117 (2011) in which the Court wrote that "power is not personal to" an elected official but "belongs to the people, the elected official has no personal right to it but acts as a trustee for his constituents."

For the purpose of this matter, the significance of the Town's and the Supreme Court's statements is that the First Selectman's office is not only a Town position but may also be considered a Town asset effectively held in trust for Town citizens. Consequently, both Sections 17-2B(6) and (8) are potentially applicable to Respondent's use of the letterhead.

The issue critical to determining whether there has been a violation of either of these sections is how to interpret the prominent, bold-faced, large-font letterhead used by Respondent on the Letter: does it convey an official's authority and power in a way that constitutes a use of a Town position or asset, or does it, as Respondent argues, serve merely as an identifier of who he is? Put differently, does this letter look like campaign correspondence from a politician or does it look like it has the imprimatur of an official communication from a Town official? In support of his argument about the letterhead being a permissible title identifier, Respondent relies upon the above-referenced Mass. Ethics Advisory and argues that his use is no different than that of other politicians who use their titles in running for reelection or endorsing candidates. (No examples of such similar use were presented to the Board for consideration other than a citation to Governor Lamont's website. The title page and presentation of that website is distinctly different from Respondent's letterhead and of no particular relevance to the present inquiry.)

In further support of his position, Respondent asserts that the letterhead he used for the Letter was not his official letterhead and thus did not run afoul of the Mass. Ethics Advisory that condemns use of such letterhead even if paid for by private sources. This argument is blunted somewhat by the fact that Respondent's official letterhead is not publicly available or used for widespread communications, making it unlikely that any recipient of the Letter would have seen the official letterhead or known that the letterhead used by Respondent was not his official letterhead.

The Mass. Ethics Advisory relied upon by Respondent did present the Board with a helpful analytical framework: was Respondent's letterhead more akin to an identifier of his title or an official letterhead? Factoring into the Board's analysis of this question was the similarity between the letterhead Respondent used and the format, font and bold faced headings on official town documents, which are publicly available, like the official Board of Selectmen minutes and notices, examples of which are reproduced above.

Taking all the information available into account, the Board believes that the letterhead presents more like the letterhead of an official document than a letterhead serving as a mere identifier and that an appearance of impropriety was caused by its use, particularly when the Letter was to be sent to new residents or new voters who would likely have had little experience with Town officials, Town politics or official town letterhead or correspondence.

Whether this constitutes a violation of the two relevant sections of the Ethics Code is another question, particularly when the Board considers the express purpose of the Code: "to establish clear standards of ethical conduct." Ethics Code Section 17-1A.

While the Code can – and perhaps should – be read to prohibit Respondent's use of the letterhead as either a misuse of Town property or a misuse of a Town position, is there a sufficiently clear standard being applied to reach that result? Because this is a question of first impression in the Town, and because it does involve an interpretation of the letterhead and Code, the Board is hesitant to find a violation absent an established, clear standard and accordingly does not find formal violations of Sections 17-2 B(6) or 17-2 B(8). Instead, the Board will adopt an approach taken by some state commissions when encountering, for the first time, conduct that may represent a violation of the rules they are charged with enforcing. On these observed occasions, the state commission (having no precedent to apply) has, in effect, pronounced the conduct suspect and issued guidance that, should similar conduct come before it again, it might be considered a violation.

In adopting this approach, the Board notes that it has already discussed the appearance of impropriety generated by the Letter and discussed some of the factors considered in reaching that conclusion, including the prominent, bold faced large font letterhead that resembles official Board of Selectmen minutes and notices and the analytical framework found in the Mass. Ethics Advisory. It now adopts those factors in issuing the following guidance against which future similar conduct will be judged: from hence forward any written or electronic political or campaign communication by an elected or appointed official or Town employee that uses, mimics, or resembles an official Town document, letterhead or format, whether it be official letterhead, official minutes or notices or other official documents in which the Town's authority

is being demonstrated or exercised, will presumptively be considered a use of a Town asset and/or a Town position for purposes of examining such use under the Ethics Code.

During a public meeting on May 12, 2022, this Report and Determination was approved by the Ethics Board, by a 4-1 vote, as its formal resolution of the Complaint. In accordance with Section 17-5 B(5), this Report and Determination will be filed with the Town Clerk and copies will be mailed to Complainant and Respondent within three business days of such filing.

Ethics Board

Town of New Canaan

Thomas F. Clauss, Jr.

Tammie C. Garner

Steven Simon

Robert Schott

Alexandra van Nes

Interim Chair

Interim Secretary

Member

Member (Dissenting)

Member

Issuance Date: May 12, 2022