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TO: Benjamin Lee, Chair, Code of Ethics Revision Committee

FROM: Michael S. Toma, Assistant Corporation Counsel *MST*

RE: Opinion Regarding Possible Amendments to Ethics Code

DATE: July 14, 2021

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You have asked for a legal opinion regarding certain possible amendments to the City of Stamford Code of Ethics. Your first question is whether the Ethics Code can be amended to provide that an independent arbitrator will rule on whether there has been a violation of the Ethics Code. My opinion is that the answer is no, as neither the Charter nor the state statutes authorize a municipality to delegate the adjudicatory function to someone other than the Ethics Board.

Starting with the Charter, C6-210-3 provides that “[t]he Board of Ethics shall investigate and adjudicate violations of the Code of Ethics that are brought to its attention.” It is clear from this section that the Charter intends that the Board itself perform the adjudicatory function. Although the next sentence in C6-210-3 provides that “[t]he Board of Ethics may establish such rules of procedure and process as it deems necessary to conduct its business,” I do not believe that such rules of procedure and process can delegate the express responsibility to adjudicate violations.

Turning to the statutes, Section 7-148h authorizes a municipality to establish an Ethics Board, and it states that Section 1-82a of the statutes “shall apply to allegations [of unethical conduct], to an investigation of such allegations conducted prior to a probable cause finding, and to a finding of probable cause or no probable cause.” Section 1-82a, which is part of the state’s ethics code, concerns the confidentiality of complaints and investigations and when findings may be publicized. It references findings made by judge trial referees, providing that a finding of probable cause by a judge trial referee shall be made public, and that a finding of no probable cause by a judge trial referee shall result in the complaint and the record of investigation remaining confidential.

In my opinion, the references in Section 1-82a to judge trial referees cannot be construed as authorizing a municipality to use a judge trial referee, or some other third party arbitrator, to adjudicate violations of the local Ethics Code. First, judge trial referees do not adjudicate violations under the state system – they make findings as to probable cause, and if probable cause is found, the ultimate determination of whether the state ethics code was violated is made

by the State Ethics Board, not by a judge trial referee. A judge trial referee presides over the hearing at the State Ethics Board, but does not rule on a violation. Second, the state ethics code contains a statute that specifically authorizes the use of judge trial referees to preside over hearings and to make findings as to probable cause (Section 1-80e), and this statute was not made applicable to municipalities, in contrast to Section 1-82a.

Your second question is whether it is permissible for the Ethics Code to be amended to create a two-tier structure, with one board charged with investigation of potential offenses and one board charged with holding hearings. Your third question is a variation on the second question – can some Ethics Board members be appointed to the Board but only for the purpose of being an investigator and some members be appointed but only for the purpose of adjudicating? Returning to the Charter, C6-210-3 provides that “[t]he Board of Ethics shall investigate and adjudicate violations of the Code of Ethics that are brought to its attention.” Both the Charter and the statutes contemplate one board, so I do not believe that it would be permissible for two boards to be created.

As for whether the Charter or the statutes prohibit having Board members perform only one of the two functions of the Board, which are to investigate and to adjudicate, it is my opinion that such a division would be allowed. The current Ethics Code of the City of Stamford already recognizes that the Board needs to be divided into an investigatory panel and a hearing panel, and a proposed amendment providing that members shall serve on one panel or the other rather than having members alternate between panels is not inconsistent with this concept. Also, to the extent that the state ethics code can be looked to for guidance, it does not have the board perform both functions; the board adjudicates, while the Office of State Ethics investigates and a judge trial referee makes probable cause findings. Since the framework of different persons performing the investigatory and adjudicatory functions already exists in the local code and in the state code, I do not believe that the Board of Representatives is prohibited from codifying that some members will only perform one function and some members will only perform the other function.