



CITY OF DELAWARE CITY

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**MINUTES  
CITY OF DELAWARE CITY  
DELAWARE CITY BOARD OF ETHICS  
OCTOBER 5, 2016**

**CALL TO ORDER**

Board Member Konkus called to order the Board of Ethics Training and Organizational Meeting at 6:00 pm.

**TRAINING & ORGANIZATIONAL MEETING**

Barrett Edwards, Counsel for the Board of Ethics, conducted the necessary training. He explained he could conduct the Hearing, serving as the law officer, if the Board Members chose for him to do so. *Board Member Konkus made a motion to adopt their Counsel as the law officer for this particular hearing. Board Member Dilliplane seconded the motion. A vote was taken, all ayes, motion carried.*

Mr. Edwards explained that if there were any questions regarding procedures, they could be discussed during the training and organizational meeting. If they finished at 7:00, they could proceed right into the hearing. There were no questions.

**ADJOURN TRAINING AND ORGANIZATIONAL MEETING**

*Board Member Fruytier made a motion to adjourn the Training and Organizational Meeting. Board Member Dilliplane seconded the motion. A vote was taken, all ayes, motion carried. Meeting adjourned at 6:48 pm.*

**CALL TO ORDER – HEARING AND DECISION ON MEGAN TITUS’ COMPLAINT**

Board Member Konkus called to order the Board of Ethics Hearing and Decision on Megan Titus’ Complaint at 7:00 pm.

**PLEDGE OF ALLEGIANCE TO THE FLAG**

Board Member Konkus led the Pledge of Allegiance.

**SWEARING IN**

Counselor Edwards said everyone knew the purpose of the hearing. He said he started his recording as a back-up to the City’s recording. He said the meeting was being recorded so there could only be one person speaking at a time. He also asked each speaker to identify themselves when they speak.

He said one of the first orders of business was to swear in anyone who would be speaking or presenting testimony. This would only include those who have been invited by either Council Person Titus or City Solicitor Walton to speak on their behalf. Counselor Edwards swore in Megan Titus, Betty Barrett, Paul Fitzwater, Natalie Greene and Jill Snow. Counselor Edwards asked them to stand and raise their right hand. He asked, “Do you solemnly swear or affirm that the testimony you are going to give will be the truth, the whole truth and nothing but the truth, so help you God?” They all replied “I do” and were duly sworn.

**RESPONDENTS’ MOTION TO DISMISS AMENDED ETHICS COMPLAINT**

Counselor Edwards explained that the respondents in this matter have filed a Motion to Dismiss the amended complaint. The first thing to do is to hear from the respondents and allow them to give a synopsis or overview of their Motion to Dismiss. After City Solicitor Walton presents that, Council Member Titus would have an opportunity to speak against that.

City Solicitor Walton, on behalf of the respondents, introduced himself and his colleague, Lauren DeLuca. He said there were two things at stake in deciding the Motion to Dismiss. The first issue is whether this Ethics Board may be used as a forum for disgruntled applicants to overturn a decision of Council. City Solicitor Walton said the answer to that question is clearly “no”. The Ethics Board has a very important function and that’s to assure that the Delaware City ethics code is followed, but it is not and should not be used as a forum to second guess a Council decision. Council was elected to do a job and if the citizens do not like what they are doing, the residents can vote in new people. But this Ethics Board is not a proper forum to go through that exercise again.

The second issue is whether Ms. Titus may generally allege more than a dozen violations to the Delaware City ethics code without specifying any conduct that actually violates the code. City Solicitor Walton said he submits and he believes the Board should rule that, absent specific factual allegations prior to the hearing, the generalized grievances are insufficient and they fail to state a claim. Ultimately, "trial by ambush" should not be allowed.

City Solicitor Walton said he would like to discuss the Board's rules as he sees them. He said he is sure their Counsel also discussed this with them, but for the benefit of the public, he would talk about that. He said that in this case the Board acts in a quasi judicial capacity. Their charge is to decide whether or not the ethics code was violated when the Council approved the lease of a piece of land known as the Jefferson Paper Street. Whether they believe that Council did the right thing in leasing the property is wholly irrelevant to the question before them. The question is, "Did the Council Members, that the City Solicitor represents, violate the ethics code when making the decision?" Ultimately, the Board's rule has nothing to do with personal beliefs, friendships or alliances. City Solicitor Walton said he has worked with Ms. Titus for years and he considers her to be a friend. He said the Board has to do their job based on the evidence before them.

#### The Facts of the Case of the Jefferson Paper Street – Presented by City Solicitor Walton

While the paper street has been under consideration for quite some time, the present dispute began in June 2016, when Council brought up, on its own accord, a lease proffered by Preston Carden of PSC Properties. As the minutes reflect (attached to the Motion to Dismiss), City Solicitor Walton stopped consideration of that discussion as he felt that the issue was not in compliance with FOIA and it needed to be put on the agenda.

The matter was next placed on the July 2016 agenda. As the minutes reflect (attached to the Motion to Dismiss), there was an executive session that was held. Following the Executive Session a motion was made for City Solicitor Walton to work with the attorney for the applicant, to arguably have a code compliant lease. The City Solicitor said that unbeknownst to him, or anyone he knows in City Hall, Ms. Titus apparently made a counter proposal to lease the street after that meeting. He said he just received a copy of this yesterday. He submitted that it would have been attached to the motion if he had had it. It is a July 12, 2016 proposal for the paper street. He gave copies of it to Counselor Edwards and Ms. Titus. He reiterated that the first time he saw it was the day before and that the letter signed by Ms. Titus clearly indicates that she desired to lease the street instead of the street being leased to Mr. Carden.

Thereafter, the lease proposed by PSC Properties, was placed on the agenda for the August 2016 meeting. At that time, Ms. Titus, as the minutes reflect, participated in the discussions during that meeting. After he was advised that Ms. Titus was making an offer, as the minutes reflect, there was a recess, during

which time City Solicitor Walton looked at the code and returned to say that Ms. Titus should disqualify herself from consideration of the matter because she had a personal and financial interest in the case.

Board Member Fruytier asked who was present at the executive session that was held during the July 2016 Mayor and Council Meeting. City Solicitor Walton said Ms. Titus was not present as she was absent from that Council meeting. He said he was present with the four other Council Members. There were no votes taken during the executive session.

After the executive session, a motion was made to charge City Solicitor Walton with working on the lease, proposed by PSC properties, with Mr. Carden's lawyer. At the August meeting, the Council approved the lease, proposed by PSC Properties, as amended, by a three to one vote.

On September 13, 2016, Ms. Titus filed a complaint against the three Council Members for voting in favor of the lease to PSC and for not approving her proposal. City Solicitor Walton handed out copies of the complaint filed by Ms. Titus, which is part of the record. He reviewed the complaint with the Board. He said the allegation is that, by approving the lease for Preston Carden and not her lease, the Council Members showed blatant disregard for the well being of the City and gave preferential treatment to their friend Preston Carden. City Solicitor Walton said that it is not an ethical violation for picking one proposal over another. (sited on pages 12 and 13 in the Motion to Dismiss) Friendship and/or political purposes are not sufficient to cause disqualification, as there is nothing unethical about it. He said if Ms. Titus was correct about an ethics violation, then the Council Members would not have been able to approve a lease with her as they are all Council Members and it would be viewed as unethical. He said it wouldn't matter which lease proposal they adopted, if Ms. Titus' interpretation of the law was correct, there would have been an ethics violation either way. Consequently, there can't be an ethics violation for picking one lease proposal over another.

In her complaint, Ms. Titus also stated that by proposing a lease, Council had interfered with the duties of the City Manager. He stated that this was a Council initiated lease and there is no question about that. However, there is nothing in the ethics code that prevents Council, on its own initiative, from soliciting public comment and taking proposals. The City Manager has made no complaints nor made any indication that his authority has been usurped. In fact, during several Council Meetings, he stated that he needed direction from Council as to how they would like him to proceed with this matter. Surely this is not a violation of the ethics code.

In Ms. Titus' complaint, she states that putting the City in danger of a lawsuit is an ethics violation. The City Solicitor said, for informational purposes, it costs \$200 to file suit. He said anyone can file suit against anyone at any time. By the

nature of the actions of the Council, it could result in a law suit at any time. Surely, the risk of a lawsuit does not constitute an ethics violation. He said there is nothing in the ethics code that indicates this would be a violation.

Board Member Fruytier asked when each of the leases was submitted. City Solicitor Walton explained that Mr. Carden's lease had been in the works from June until August. He said Ms. Titus' letter was dated July 12<sup>th</sup>, but he did not receive it until August 15<sup>th</sup> when the mayor read the proposal into the minutes.

City Solicitor Walton handed out a memorandum of the zoning code. He said, as a matter of fact, if the Council had approved the lease proposed by Ms. Titus, which would have allowed boats to be parked on the land, it would have created a greater chance of generating a law suit. One half of the street is zoned residential and one half is zoned commercial. The actual, signed Carden lease accounts for the split in the zoning designation. PSC properties may not use the property in a manner inconsistent with applicable zoning. The other important portion of the lease is where it states that the residentially zoned portion cannot be used for parking boats or water craft. If the Council had approved Ms. Titus' proposed lease, there was a greater chance of a law suit because it would have been illegal to use part of the property for the purposes stated in the lease.

Again, in Ms. Titus' complaint, she stated that the issue of Mr. Carden using the City's land for free, to his benefit for 20 years and, having cut down all the trees on it, has not been addressed at all. That has nothing to do with the Board's charge as the Ethics Commission. He said if something should have been done about this by the City a long time ago, that doesn't mean that his clients had an ethical problem.

Knowing that there was no ethical violation, Ms. Titus amended her complaint. He said he would submit that Ms. Titus parroted the provisions of the ethics code, with no specific allegation against what any specific Council Member allegedly did. City Solicitor Walton cited page 14 of the Motion to Dismiss which states that "trial by ambush" is not allowed. Terse allegations with no supporting facts failed to state a claim as a matter of law. Friendship is not an ethics violation. Public officials are entitled to a presumption of honesty and integrity and merely parroting provisions of the ethics code does not rebut that presumption.

In the end, Ms. Titus did not like the decision of Council. Just because someone disagrees with a decision of the Council, or just because someone is disgruntled because she didn't get the lease she wanted, does not rise to the level of an ethics code violation.

To sum up, City Solicitor Walton said, whether the board agrees with Council's decision on the lease or not is irrelevant. Nothing in this complaint that was given

to them in advance states an ethics violation. He said that based upon the papers that were given in advance the complaint should be dismissed. Questions were posed by members of the Board of Ethics and answered by City Solicitor Walton.

City Solicitor Walton, addressing the Law Officer representing the Board of Ethics, stated that this is not an evidentiary part of the program. He said they have evidence that they would put on if they went further. He said they have moved to dismiss the complaint, to say it doesn't ultimately state a claim as a matter of law. He said the Board doesn't have anything that they can go on that states an ethics violation. He said the Board should address that and if the Board does not grant the Motion to Dismiss, they could go on from there.

Counselor Edwards called Ms. Titus forward and stated that City Solicitor Walton was accurate in that they were discussing a Motion to Dismiss for failure to state a claim. He said she would need to respond to is whether or not, in her amended complaint, she stated facts sufficient for there to be violations of the ethics code. In essence, in the information she submitted to the Board, there is not enough information to know if there was an ethics violation. He said there needs to be more facts.

Ms. Titus stated that she had all the facts, including 21 pieces of evidence to prove unethical behavior. She asked if she could speak on the Allegheny proposal, as the date on that was wrong. It should have been dated August 12<sup>th</sup> not July 12<sup>th</sup>, and the mayor read it at the Mayor and Council Meeting on August 15<sup>th</sup>. She said no one knew about the proposal until August 12<sup>th</sup>. It was read at the beginning of the Council Meeting on August 15<sup>th</sup>. She said she was then to read a statement recusing herself. She said the date can be verified on the check that was given to City Manager Cathcart.

Ms. Titus stated that she came prepared to present her evidence with packets of evidence for each member of the Board and for the attorneys. She said she did not make her claim because Allegheny did not get the lease, but rather that the offer was not made to anyone else except PSC Properties. She said no one even knew the property was for lease, as the City was in the process of having PSC evicted from the property.

She said at the June 20<sup>th</sup> meeting, the Council Members were supposed to go into an executive session to discuss the enforcement stage. Mr. Carden had received three eviction letters. Council Member Barrett presented a lease from PSC and tried to make a motion to have the property leased to PSC. City Solicitor Walton stopped this as it was not on the agenda. She said this lease was not discussed that night. She said it was never discussed in public, but rather behind closed doors. It was never discussed publicly until the August Mayor and Council Meeting. She said she submitted her proposal to make the

point that the offer was just going to PSC. She said the whole process should have started again, allowing anyone interested in submitting a proposal to do so.

She said that City Solicitor Walton did not state all the facts in his history of the issue. She said that it states in the ethics code that all Council Members in Delaware must adhere to the FOIA laws regarding open meetings. She said Ms. Snow's family is not being given the same consideration or fair and equal treatment regarding the use of public property. She said this is why she amended her complaint, so that she could point out all these violations. She said she would like the Board to hear her evidence.

City Solicitor Walton said that he knew that Ms. Titus disagreed with the decision made by Council regarding the lease. He said today they were here to determine if there was an ethics code violation, not just merely an allegation that failed to state a claim. He said he filed their Motion to Dismiss last Friday and if there was evidence that needed to come forward, it should have been presented then. He added that at no point in the time after that filing, before tonight, with that Motion to Dismiss pending, did he receive any additional correspondence, any exhibits, or anything else that supplemented the complaint. He said his point was simple. They could not have trial by ambush before this Board. He said they could not be expected to sort through allegations that have never been brought up previously. The idea that this has not been discussed publicly is refuted by the plain language of the minutes and agendas. He passed out the July 18<sup>th</sup> agenda and the August 15<sup>th</sup> agenda. He said the bottom line was that the mere supposition that things were done behind closed doors could not be a basis for an ethics violation or a basis for a FOIA complaint. If there were a date, time or place when something happened, then there would be a specific allegation that something was done wrong and that maybe there was a basis for a FOIA complaint. However, one can't just act on supposition. There was no notice of additional claims. He said they moved to dismiss last Friday. He said the Board could not and should not allow this trial by ambush.

City Solicitor Walton addressed the issue of Fair and Equal Treatment that Ms. Titus brought up. He said the City leased land all the time. He gave as examples: leasing land in the park for people to have a wedding; leasing the tower at the ball field to be used as cell tower; leasing the property to the charter school to be used for baseball games; letting the little league use the land for baseball games; and leasing the land to DelDOT when they needed land for road improvement. The idea that the mere lease to a particular person was any violation of Fair and Equal Treatment couldn't be the case, because if that were the case the City could not lease land to anyone. There was a public process that the Council went through. It was on the agendas. It was a matter of public concern and everyone had notice and an opportunity to be heard. He said this whole process has been going on since 2012. He said ultimately, this complaint failed to state a claim and the Board should dismiss this.

Ms. Titus asked to speak again. Law Officer Edwards said that the person bringing the action would speak first, followed by the other person who has a right to respond, and followed finally by the person bringing the action. However City Solicitor Walton allowed Ms. Titus to speak again. Ms. Titus said she did not know she could respond to his Motion to Dismiss. She said she had all the evidence, but she couldn't show it even though City Solicitor Walton had shown his evidence.

Board Member Konkus said he had a couple points he would like to make about the Motion to Dismiss. He said the City has a very clear ethics code and he believed City Solicitor Walton helped to write it. He said at no point did it call for discovery. At no point did it say there was even an option to dismiss a claim. It says the Board is issued something from the City Secretary as a complaint. After receiving the complaint, the board comes to a hearing. They decide if they have jurisdiction and if they do, they see evidence. There is nothing in the code that says this will be an extension of the Delaware court system. He said it is unfortunate that we have so many lawyers in our lives but they have twisted this so they expect full discovery and there was nothing on the time line. He explained how it would work in a trial system. He said when he read the code, it appeared to be a meeting of neighbors talking to neighbors about things they thought were not appropriate. He said he doesn't know if they have a right to dismiss anything. City Solicitor Walton read from the ethics code 1-29e, Under the Rules of Procedure, Section G, where it states "the board shall have the authority to dismiss any claim which it deems frivolous or fails to state a claim". Board Member Konkus said it doesn't say where and when such motion is to be brought. City Solicitor Walton agreed that it did not. The only thing the code says is that there will be a complaint, the City Secretary will set a date and at that hearing, a portion of the hearing will be for the Board to determine if they have jurisdiction, and if a complaint is frivolous.

Board Member Fruytier asked if Ms. Titus was given any guidance as to what she needed to do to follow through. City Solicitor Walton explained that it puts him in a difficult position because he can't give her legal advice as we go through this. Ms. Titus asked if the City could appoint her legal help and was told "no".

Mr. Edwards said, speaking as the law officer, at this point the Board needs to decide whether they want to move forward and hear all the evidence or whether they feel the Motion to Dismiss should be granted and everyone should go home. Ms. Titus reiterated that she asked City Solicitor Walton if she could be appointed counsel as she is a Council Member and the answer was no. City Solicitor Walton said he discussed it with Ms. Titus, as he is here to represent the official action of the City of Delaware City because they took a vote and rendered a lease. He said in this case it is a Council Member filing a complaint against Council. He said Ms. Titus would have the right to bring her own counsel, but there is no right to an appointed counsel for someone who wants to make a complaint. Especially for someone who was disqualified at the hearing when it



was discussed. At that hearing Ms. Titus was speaking as a citizen, not serving as a Council Member. Ms. Titus said everything did not happen at that particular time. City Solicitor Walton added that there would be no right for someone who is a complainant to be appointed counsel to come before the Ethics Board either as a citizen or a Council Member.

Mr. Edwards explained the Board needs to vote whether or not to approve or deny the Respondents' Motion to Dismiss. Under that umbrella, they need to decide whether or not the claimant failed to state a claim and whether or not there is jurisdiction. At the end of the day, the issue that is being voted on is whether or not Ms. Titus has sufficiently raised ethical issues in her amended complaint. And effectively, whether or not we are going to have a hearing with an opportunity to present all the evidence Ms. Titus and City Solicitor Walton have. Board Member Konkus said that they have to decide whether they dismiss the complaint in its entirety without any of the other complexities, because the next thing on the agenda would be to determine jurisdiction. There are 18 allegations, only one of which has been challenged by the respondents. He said looking at the code, it says the first thing the board should do is determine what they have jurisdiction over and determine the frivolousness. Mr. Edwards said he had no issue with that, but he is not sure the board needs to vote on whether something is frivolous unless they are concerned that it may be. He said the options are something they can choose from: if they think something is frivolous, if they think there is a jurisdictional issue, and/or if they think the complainant failed to state a claim.

*Board Member Dilliplane made a motion to approve the Respondents' Motion for Dismissal of the complaint. Board Member Fruytier seconded the motion. A vote was taken, with the Board Members voting as follows: Fruytier – aye, Dilliplane – aye, Konkus – nay. Mr. Edwards said the result of the motion of the Ethics Board is that the Motion to Dismiss of the Respondents has been granted so the matter has been dismissed. He asked if there were any questions. There were none.*

#### **ADJOURNMENT**

*Board Member Dilliplane made a motion to adjourn the Public Meeting and Hearing of the Delaware City Board of Ethics. Board Member Fruytier seconded the motion. A vote was taken, all ayes, motion carried. The meeting was adjourned at 8:02 pm.*

Respectfully submitted,  
*Dawn K. Gwynn*  
City Secretary

## **Board of Ethics 10-5-16 Minutes**

The following needs to be attached to the minutes:

June 20, 2016 Minutes

July 18, 2016 Agenda

July 18, 2016 Minutes

July 12, 2016 Titus Proposal

August 15, 2016 Agenda

August 15, 2016 Minutes

September 13, 2016 Titus Formal Complaint

September 22, 2016 Respondents' Motion to Dismiss Amended Ethics Complaint