

## **Russ Swatek (Chair of the CA Board): Investigation Results Letter**

*(Posted with permission of the author)*

Fellow Board Members,

On November 28<sup>th</sup>, 2014 I received an ethics complaint charging Board Member Alan Klein with violations of CA's *Code of Ethics and Conflicts of Interest Policy*. This complaint is pasted in at the bottom of this message below the line of V's.

CA's *Policy for Reporting Violations of the Code of Business Conduct and Ethics* states: "The complaint, investigation, and report of the findings and recommendations shall remain confidential to the extent that confidentiality is reasonably consistent with a proper investigation of the complaint, not in violation of the rights of another person, and not in conflict with any action necessitated by the report or CA policy." I therefore request that all Board Members keep this report confidential, with the provision that the accused person has the right to have any charges against them and findings made public if they so wish.

CA's *Policy for Reporting Violations of the Code of Business Conduct and Ethics* also states for both Complaints by CA Personnel and for Complaints by persons other than CA Personnel: "If a complaint concerns the President of CA or a member of the CA Board of Directors of CA (other than the Chair of the Board), the complaint should be made directly to the Chair of the Board."

In the course of my investigation of this complaint I have:

1. Verified with Mr. Klein that the description of the actions attributed to him in the subject ethics complaint were accurate. He agreed that they were, except that the stated context (i.e. "according to an attorney hired by the opponents of the Inner Arbor Plan") within which the action described in #3 of the ethics complaint occurred was not accurate.
2. Discussed how the attorney John C. Murphy was found and his opinion obtained with those involved with that effort. They assured me that no Board Member was responsible for either action, and that Mr. Murphy after discussion with them volunteered to write his opinion. Mr. Murphy did not have a contract nor any expectation of being paid for providing his opinion.
3. Reviewed the portion of the CA Charter, Bylaws and Policies relevant to the ethics complaint.

Following are the findings about each of the three Mr. Klein actions described in the ethics complaint:

**Action #1** – Mr. Klein sent a group email to “The Coalition for Columbia’s Downtown” which included the opinion of Mr. Murphy that the easement agreement to the Inner Arbor corporation to run Symphony Woods was in violation of the original Deed granting land to CA, and an entreaty to provide testimony to the Howard County Planning Board to not approve the Inner Arbor plan under consideration.

In addition to the CA policy statements included in the text of the ethics complaint, a not all inclusive list of several other CA policy statements having bearing on this issue is:

1. From *Policy for Reporting Violations of the Code of Business Conduct and Ethics*: “Further, CA is committed to compliance with the law and regulations to which it is subject and to promulgating policies to promote adherence to these laws and regulations.”

2. From *Code of Ethics and Conflicts of Interest Policy for Directors, Officers and Senior Team Leaders*: “Personal Ethics: ... The principles of personal ethics include: ... Respect for the autonomy of others. ... Compliance with the law.” This policy also states: “Each Board member also has a right to: Speak publicly as an individual board member on issues that affect those the Board member serves; State publicly that the Board has or has not taken action on a matter and to state individual disagreement with such action or inaction as long as such disagreement does not interfere with the execution of the action.”

3. From *Code of Business Conduct and Ethics*: “If a law conflicts with a policy in this Code, you must comply with the law.”

4. From *Columbia Association Board/Council Values*: “4. Speak as a Board through unified messages that present both majority and minority positions. If consensus cannot be reached, end the discussions by summarizing both sides to their mutual satisfaction. When speaking outside of Board meetings, identify whose opinion you’re discussing (your own or the Board’s).”

I find that Mr. Klein did clearly identify that he was not speaking for the CA Board.

I find that an issue of CA’s compliance with the law has been raised, and that Mr. Klein is within his rights to notify his constituency of this. Our policies clearly state that we must comply with the law. The original Deed granting land to CA is a contract, and since the law is used to enforce contracts, this becomes a de facto extension of the law. The fact that CA’s General Counsel has “refuted the outside attorney’s interpretation of the easement agreement” does not negate the issue being raised. Mr. Klein has a legitimate interest in seeing this matter resolved by an independent impartial entity.

I find that Mr. Klein did advocate that the public give testimony asking that the Planning Board disapprove of the Inner Arbor plan in an attempt to thwart the Board's expressed desires. Although an individual Board Member has a right to disagree as an individual, it is a violation of our ethics policies to use a public podium to exhort others to oppose CA Board actions. I have reprimanded Mr. Klein for doing so, and have requested he limit any future disagreements to being simply from an individual.

Although Mr. Klein's action could have interfered with the execution of the action, in this case the Planning Board's 5-0 vote of approval for the Inner Arbor plan shows it ultimately did not interfere.

**Action #2** – At the Planning Board hearing Mr. Klein stated that the CA President did not have the authority of the Board to give the testimony he had, and then proceeded to express his "personal disagreement" with the proposed Inner Arbor plan.

In addition to the CA policy statements included in the text of the ethics complaint and several policy references referenced under Action #1 above, another CA policy statement having bearing on this issue is:

From *Code of Ethics and Conflicts of Interest Policy for Directors, Officers and Senior Team Leaders*: "In accordance with the foregoing Code of Conduct, and in addition to the requirements of this Code, no member of the Board shall: ... Speak for or act on behalf of CA unless specifically authorized to do so by the Board."

Planning Board decisions on zoning matters are similar to legislation. Linking testimony to the Planning Board to the *Columbia Association Policy Regarding Proposed Legislation's* requirement that the CA President notify the Board of any planned action in advance and seek at least tacit approval of that action is understandable. More definitive is the policy statement above stating "unless specifically authorized to do so by the Board." However the CA President by his position was hired to be the voice of CA. Also the Board approved Symphony Woods Easement Agreement's statement that the "Grantor shall (collectively, "**Grantor's Obligations**)": ... iii. Cooperate with Grantee in the execution and delivery of applications, filings, requests, and other documents relating to required governmental approvals" can be construed to constitute authorization.

I have admonished Mr. Klein for his statement about the President's lack of authorization. He has already apologized for this.

I also find that while Mr. Klein is authorized to speak as an individual, at the Planning Board hearing he spoke as the Spokesperson for the Coalition for Columbia's Downtown. One does not surrender the right to express their personal opinions just because they are now on the CA Board, but should not speak for groups opposed to CA Board's expressed desires. I have reprimanded Mr. Klein for doing so, and requested that in the future if groups to which he is connected wish

to advocate against the CA Board's expressed desires that they find another spokesperson to do so.

**Action #3** – Mr. Klein, writing as the Harper’s Choice Columbia Council Representative, posted a letter on the Harper’s Choice website stating there was a land-use attorney’s opinion that the 1966 Deed was being violated, and telling people how they could make their voice heard at the Planning Board hearing.

Several of the CA policy statements included in the text of the ethics complaint and referenced under Action #1 above also bear on this issue.

Mr. Klein stated that he was speaking as the Harper’s Choice Columbia Council Representative. Each Village elects a Columbia Council Representative. Although the role of the Columbia Council has been diminished in recent years, the Council has not completely disappeared. Many when they interface with a Columbia Board Member only think of them as a Director, but when a Director is relaying information to their Village they are acting as the Village’s Columbia Council Representative. It is the Village’s Columbia Council Representative who sits ex-officio on the Village Board.

Mr. Klein, when telling people how they could make their voice heard at the Planning Board hearing, did not tell or suggest what they should say. He did state his concerns, but did not advocate for any specific testimony.

I find that Mr. Klein was acting within his responsibility as Columbia Council Representative.

Russ Swatek

Chair, CA Board of Directors