

STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

In the Matter of a Complaint by
Mary V. Gadbois, East Lyme

File No. 2010-123

AGREEMENT CONTAINING CONSENT ORDER

This agreement, by and between Paul Formica, Town of East Lyme, County of New London, State of Connecticut, (hereinafter referred to as the Respondent) and the authorized representative of the State Elections Enforcement Commission, is entered into in accordance with Section 9-7b-54 of the Regulations of Connecticut State Agencies and Section 4-177(c) of the General Statutes of Connecticut. In accordance herewith, the parties agree that:

1. Respondent is the First Selectman of the Town of East Lyme, Connecticut.
2. This complaint contains a single allegation, that the East Lyme First Selectman expended public funds by posting a statement on the town's web page to advocate a position on a pending referendum question, relating to a referendum scheduled for September 23, 2010.
3. Connecticut General Statutes § 9-369b, provides in pertinent part:
 - (a) Except as provided in subsection (b) of this section, any municipality may, by vote of its legislative body, authorize the preparation and printing of concise explanatory texts of local proposals or questions approved for submission to the electors of a *municipality at a referendum*. ... Except as provided in subsection (d) of this section, *no expenditure of state or municipal funds shall be made to influence any person to vote for approval or disapproval of any such proposal or question.*
[Emphasis added.]
4. General Statutes § 9-369b prohibits the use of public funds to advocate for a referendum while a referendum is "pending." The Commission has determined that a referendum is pending when the necessary legal conditions have been satisfied to require publication of a warning (notice) that a referendum question will be submitted to a vote of the eligible voters of a municipality on a certain date. *In the Matter of a Complaint by Marie Egbert, Hebron*, File No. 2010-056 at ¶ 6.
5. The Commission has found that the use of town or school district websites and servers are public expenditures. *In the Matter of a Complaint by Matthew Grimes, Brookfield*, File No. 2008-070, ¶ 8 (finding that communication posted on town website while referendum pending and which urged support for budget violations General Statutes § 9-360b; *In the Matter of a*

Complaint by Matthew Paulsen, Bethel, File No. 2002-157, ¶ 7 (finding school principal’s communication posted on a web site owned by town board of education “caused an expenditure of municipal [funds], albeit small, for a communication that advocates a position on the referendum”); *see also In the Matter of a Complaint by Marie Egbert, Hebron*, File No. 2010-056, ¶¶ 12-16 (concluding that using publicly funded web server to advocate question on pending referendum constitutes expenditure of public funds violates General Statutes § 9-369b).

6. The Commission has consistently concluded “that communications that recommend or urge support of or opposition to a referendum question are subject to the restrictions found in Section 9-369b.” *In the Matter of a Complaint by Jennifer Iannucci, Bridgewater*, File No. 2006-166, ¶ 8.
7. The Commission has historically concluded that communications which urge a particular result, either by express wording of advocacy or when considered as a whole, would make the ordinary reasonable person believe that a particular result is urged, would constitute advocacy. *In the Matter of a Complaint by Marie Egbert, Hebron*, File No. 2010-056 at ¶ 15. In determining whether a communication constitutes advocacy, the Commission reviews the entire communication and considers its style, tenor and timing. *Id.*; *see also Sweetman v. State Elections Enforcement Commission*, 249 Conn. 296 (1999).
8. Whether a § 9-369b expenditure of public funds violation occurred in this case hinges on the following elements: (1) were public funds expended (2) to advocate the success or defeat of (3) a pending referendum question.
9. The Respondent, through counsel, “admits that he posted the publication attached to Mary V. Gadbois’ Affidavit of Complaint on the Town’s website when the referendum question was pending.” Letter from Tracy M. Collins (counsel for respondent) to William B. Smith (Nov. 5, 2010).
10. As noted in paragraph five (5) above, the Commission has found that the use of town websites and servers constitutes a public expenditure.
11. The remaining question is whether the Respondent’s communication advocated a position on the pending referendum question.
12. The following excerpts from the respondent’s communication, taken independently and as a whole, would make the ordinary reasonable person believe that a particular result is urged: describing the property as “a key piece of property” and a “significant parcel that the town

should acquire;” referring to the purchase as an “opportunity;” and stating that “I believe this investment to be in our long-term best interest.

Attachment to complaint (emphasis added).

13. The Commission finds that the style, tenor, and timing of the communication advocated a position on a pending referendum question. The communication was posted on the Town’s website during the period when the referendum question was pending, and the Respondent’s word choice unequivocally, as indicated in the quotations in the preceding paragraph, advocates a position and would make the ordinary reasonable person believe that a particular result, that the Town should acquire the land, should result.
14. It is the conclusion of counsel therefore that the Respondent’s communication constituted a public expenditure made to advocate a position on a pending referendum question, in violation of General Statutes § 9-369b.
15. The Commission notes that it has previously found that the use of town or school district web sites to promote a referendum constitutes a violation of General Statutes § 9-369b. *In the Matter of a Complaint by Marie Egbert, Hebron*, File No. 2010-056 at ¶ 6. *In the Matter of a Complaint by Matthew Grimes, Brookfield*, File No. 2008-070; and *In the Matter of a Complaint by Matthew Paulsen, Bethel*, File No. 2003-152A. It nevertheless deems the nature of the violations detailed herein as an emerging issue.
16. There is no record of any prior violations by Respondent, and upon receiving notice of the complaint, Respondent (through counsel) promptly responded to the Commission.
17. Under these circumstances, the Commission will not seek civil penalties and/or restitution against the Respondent. Instead, the Commission and Respondent agree to the Order hereinafter stated in this agreement.
18. The Respondent admits all jurisdictional facts and agrees that this agreement and Order shall have the same force and effect as a final decision and Order entered after a full hearing and shall become final when adopted by the Commission. The Respondent shall receive a copy hereof as provided in Section 9-7b-56 of the Regulations of Connecticut State Agencies.
19. It is understood and agreed that this agreement will be submitted to the Commission at its next meeting and, if it is not accepted by the Commission, it is withdrawn by the Respondents and may not be used as an admission in any subsequent hearing, if the same becomes necessary.

20. The Respondent waives:

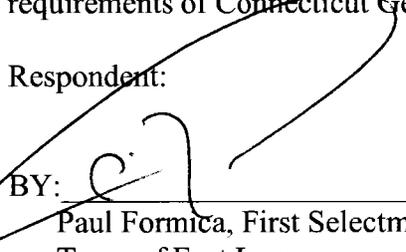
- (a) Any further procedural steps;
- (b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law, separately stated; and
- (c) All rights to seek judicial review or otherwise to challenge or contest the validity of the Order entered into pursuant to this agreement.

21. Upon the Respondent's agreement to comply with the Order hereinafter stated, the Commission shall not initiate any further proceedings against him pertaining to this matter.

ORDER

IT IS HEREBY ORDERED that henceforth, the Respondent shall strictly comply with the requirements of Connecticut General Statutes § 9-369b.

Respondent:

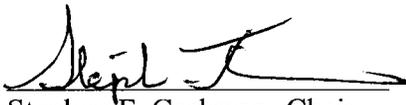
BY: 
Paul Formica, First Selectman
Town of East Lyme

Dated: _____

For the State of Connecticut

BY: 
Shannon Clark Kief, Esq.
Legal Program Director,
and Authorized Representative
Of the State Elections
Enforcement Commission
20 Trinity Street, Suite 101
Hartford, Connecticut

Adopted this 10th day of November, 2011 at Hartford, Connecticut by vote of the Commission.


Stephen F. Cashman, Chair
By Order of the Commission