

Michelle Eddy

From: Toby Babich <toby@rmlodging.com>
Sent: Monday, February 12, 2024 9:05 AM
To: Michelle Eddy; rwidner@lawwj.com
Subject: Citizen Comment- Toby Babich

Hello Trustees,

During the 2-8-24 Trustee meeting “communications to the Trustees” Dan Cleary delivered printed material to each Trustee, and was allowed and uninterrupted 8-10 minutes of verbal communications, all centering around a candidates eligibility to hold elected office based on his opinion and own research. Based on his opinion of eligibility alone we all had to had to bear witness to what felt like a hostile personal attack against me, during a public meeting. I sat there, as Mayor, and listened to a concerned citizen, allowing time well beyond the normal three minutes, to ensure there were no questions about bias or suppression. Today I write to you all as a citizen, and candidate, to provide my side of the story and clear up many of the misrepresentations spoken and written by Mr. Cleary. I am determined to set the record straight regarding eligibility and ensure Mr. Cleary does not cause interruption of a free and fair election, nor publicly slander an eligible candidate due to his individual biased opinion. What was laid out by Mr. Cleary during this premeditated and orchestrated scene is not based in any fact, legal precedent, statute, or legal opinion and seems to be an effort to slander my name and my eligibility based on his statement in an email that he is “disappointed by what I perceive to be bias when considering the town's interpretation of the law as it applies to my eligibility”. To be clear, as I understand, the “Town” has not “interpreted” anything, and does not have the ability to interpret, judge, or determine eligibility regarding term limits of any candidate. I submitted my petition knowing I was eligible to hold office, having researched my eligibility, and did so with the intent to competently serve the residents of the Town. When I picked up my petition, I had no doubt I was eligible, and when I dropped it off there were no questions of my eligibility.

I write to you today for your consideration as a Blue River citizen, and candidate for the office of Mayor. Mr. Cleary has called into question my eligibility, motives, and integrity with his recent communications, spreading false claims and misrepresentations of fact. Today I offer my perspective, and would welcome an individual discussion with any of you who desire it.

I ask this email to be included in the upcoming Trustee meeting packet as a “communication to the Trustees”.

Is the TOBR able to determine candidate eligibility:

In short, no. Mr. Cleary repeatedly communicates that he is a victim of bias, and that the Town needs to determine if I am eligible. This is not possible, as the Town is not empowered with that ability, nor is the Town Attorney, or Town Clerk. As I understand it, Mr. Cleary was given a petition by our election official along with the opinion from the attorney, he circulated the petition and obtained signatures, and upon turning that petition in (knowing he may be ineligible) it was accepted by the election official and certified. Where is the bias in that? He states among other comments in his email- “notify me that I was **unable** to run for mayor due to term limits:”, “my ineligibility to run due to term limits, based on Attorney Wider's position”, “noted the attorney's case against my eligibility”, “while I am told that I am not eligible”- indicating he believes the Town, attorney, or Clerk have taken an official legal position on his specific eligibility. This has not happened, as none of these parties are able to render a judgment. Only a court would be able to settle the matter, if challenged by a citizen as a civil matter. As Mr. Cleary well knows, and in his own words **“The clerk informed me that if elected, my eligibility could be challenged or contested by a resident and I may find myself in court.”** This is the only statement on the matter that is accurate, and speaks to the legal process that is articulated in statute. To note here, any citizen is able to

challenge the eligibility of any elected official, including Mr. Cleary, myself, or anyone else who currently serves or will serve in the future. This is codified in state statute as well. However, the TOBR has no authority to determine eligibility of a candidate beyond more obvious and clear criteria such as age, voter registration, residency, etc. The Town Attorney should be consulted on this matter.

My eligibility to petition, and hold office:

As it pertains to my motivations, eligibility, and candidacy, I have chosen to run based on the fact that I have served two terms as an elected official holding the office of Mayor, one short and one full. I served a two-year term (2018-2020) and then I am currently serving a “full” four year term (2020-2024). Based on Colorado Constitution at Article XVIII, Section 11 (1), highlighted below, I am eligible to serve one more full four year term. This is articulated in the Colorado Constitution, and is a current statute, clear in its intent, and has been properly adopted by the Colorado Legislature. There is also some recent case law (we will review this at a future meeting) that supports a partial elected term does not count as a full term, so that would seem to indicate I have only served one full term as Mayor. This is not my opinion, hunch, feeling, or interpretation. I am eligible to run, clearly articulated in state statute and case law, and my motivations are as they have been- to serve the Town of Blue River.

- (1) In order to broaden the opportunities for public service and to assure that elected officials of governments are responsive to the citizens of those governments, no nonjudicial elected official of any county, city and county, city, town, school district, service authority, or any other political subdivision of the State of Colorado, no member of the state board of education, and no elected member of the governing board of a state institution of higher education shall serve more than two consecutive terms in office, **except that with respect to terms of office which are two years or shorter in duration, no such elected official shall serve more than three consecutive terms in office.** This limitation on the number of terms shall apply to terms of office beginning on or after January 1, 1995. For purposes of this Section 11, terms are considered consecutive unless they are at least four years apart.

Mr. Cleary, in his email, insinuates that perhaps there is a motivation to “defeat term limits or circumvent the law” and “exploit perceived loopholes in the language of the Constitution”, which are defamatory claims in nature, and personally insulting. To be clear, when I was elected as a Trustee in 2016 I had no intention of resigning. Months into the first year of my term, the elected Mayor discovered he had cancer, and had to resign to relocate and treat his illness. I agreed to be appointed to fill his seat, fulfilling the remainder of his first two years of his four-year term. Even at this time, future term limits were not a thought. I was doing what needed to be done to ensure the Town had a full Board. I served that term as an appointee, which was less than two years, and was not an elected term. **NOTE- In the 2005 opinion Mr. Cleary is basing his position on, it also states “For the purposes of term limits the person who is appointed and subsequently elected to fill the remainder of the term is deemed not to have served at all”, indicating that someone who is appointed and then elected (as I was) to fill a term is deemed to not have served a term at all. There is an argument to be made here that even my “short” term does not count against my terms, and I have only served on full term as an elected official in the office of Mayor.** However, as mentioned, this is simply a 20 year old opinion, and has no real influence on term limits in a legal sense.

That being said, Mr. Cleary offers his opinion only, not a court ruling/precedent, legal opinion, or state statute. His opinion is not compelling to me. This is his opinion only, based on a 20+ year old AG opinion that is not applicable in this case, and has likely been interpreted by other attorneys in many different ways. I am eligible, and I have no questions about that, or I would not have put my name on the ballot. If Mr. Cleary disagrees, he has options to challenge, but one of those options does not involve sending a misinformed and untruthful assessment he cobbled together of his own efforts to all the Trustees days before ballots are certified. Mr. Cleary is not a lawyer, judge, or expert in this area. In fact, aside from the one court decision Bob sent to us all recently, no court has taken up this matter, and very little legal precedent exists for any experienced attorney, let alone Mr. Cleary, to assess the situation competently. Mr. Cleary offers nothing compelling to discuss, and his intentions in both the content and timing of his request are suspect. If Mr. Cleary had a legitimate concern, he would have contacted me

privately many weeks prior to his submission, so we could have a constructive discussion about the matter as community members, former BOT members, and personal acquaintances.

Prior Election Information indicates terms have been erratic, and limits may have been broken:

Over the course of the history of Town elections, many people have served three or more terms in succession, including after 1995 when the current statute was adopted. The Mayor prior to Mitch Weiss (who I was appointed to fill his term) served 4 full terms, 16 years in total, terminating in 2015. An elected official served 1 four-year term, and then 4 two-year terms during the mid 90's. Another elected official served 12 years in a row in the early 2000's completing 1 two-year term, followed by 1 four-year term, another two-year term, and then another four-year term. Historically there are things for you to consider when looking at precedent, and the need to better define terms and eligibility moving forward. The current precedent is an elected official is allowed to serve up to 16 years in a row, which I think we would all agree is not a good thing. Currently as an elected official, I believe **I have served two terms, for 6 years, and it can be considered that the two-year term does not count towards term limits.** One more four-year term would put me in office for 10 years, which is specifically allowed by state statute.

Is Mr. Cleary potentially being dishonest about his motivations:

As part of Mr. Cleary's production, he stated that he has never done anything that should cause anyone to distrust him (paraphrased). Though I do have information from sources that Mr. Cleary has been at work behind the scenes for some time, attempting to disrupt this election, I do have some evidence of potential dishonesty in his own words when juxtaposed with other facts I have first had from other individuals. It is ironic that Mr. Cleary is casting aspersions on others when many of his statements do not align with the actual situation and timeline articulated in his email. I have known him since 2016, and have always been friendly and supportive to him, and had come to respect and trust him as a human. I am hoping I am mistaken here, as I do desire to trust and believe Mr. Cleary and his motivations are pure and in the best interest of the Town.

Cleary Email- **"To be clear, when I pulled my petition to run (on 1/17/24), I had not even contemplated the mayor's eligibility as I believed the mayor had only served 1+ terms, and not having read anything prior regarding term limits I really hadn't considered who was eligible for what position. In my mind, I am a past trustee interested in running for mayor and the (2) positions are different."**

This statement in Mr. Cleary's email is in direct conflict with information I received directly from **another Trustee who stated he had been in touch with Mr. Cleary around Thanksgiving and that Mr. Cleary had "questions about "term limits", and then went on to state that the Trustee sent Mr. Cleary Bob's opinion in early January.** This is the opinion that was disseminated to all of us on 1-3-24 based on a request for information on "term limits" from a Trustee in early December. If Mr. Cleary had been inquiring about term limits in November, and was provided Bob's opinion on term limits as relates to Mayor vs. Trustee seats, his statement above seems suspect. .

Cleary Email- **"When I picked up my petition on 1/17, the deputy clerk called the town clerk / manager. The town manager got on speaker phone to notify me that I was unable to run for mayor due to term limits, that the office of trustee and mayor are the same, and she offered to send me a letter that the attorney had drafted (see below) outlining this. I assume this letter was drafted in the event that someone who was termed out tried to run. I declined the offer of the email and asked just for a petition. I questioned if I were unable to run, then how could the incumbent mayor run for reelection? She opted to provide a timeline of elections through a sequence of events (see thread below)."**

This also seems suspect, if Mr. Cleary already had Bob's opinion. If he had Bob's opinion in early January, he would have known already of the opinion, and what the content was. He would have known why the letter was drafted, and would not have "declined" the offer of the email, as he already had it. I would also question if the Town Manager notified him he was "unable to run for Mayor due to term limits", then why would he have been give a petition?

Cleary Email- "I want to let the town know that **as I've submitted my petition, I have been under the impression that the office of mayor was different from the office of trustee.**"

This again points to potential dishonesty, as he would have submitted his petition after he picked it up, which was after he was told by the clerk of the attorney opinion, and after he received the opinion from the Trustee in early January. How could he still be under the impression the offices were different, having known the opinion that the seats were the same for the purposes of term limits for weeks prior to submitting his own petition. Had Mr. Cleary submitted his petition knowing he was likely ineligible, it would seem to me the petition was submitted mainly to see how the clerk would react, as a test of the system, and not for a legitimate purpose. This seems disrespectful to the sanctity of our Town and a fair election.

This situation impacts other potential and current candidates:

This situation not only impacts this election, me personally, our Town, and our ability to focus on other Town matters, but more importantly it also impacts other current and potential candidates directly who may have chosen to pull a petition to be Mayor for this election. **I have personally spoken to three people who had intended to pull permits to run for Mayor if I did not run**, but chose not to when I indicated I was running again, and I would have fully supported them. These people matter, and they deserve to not be subject to this circus. There are other Trustees and citizens who may have take a shot at being Mayor if I had not run, that now have foregone that opportunity, unable to recapture it. What about these people? They are also victims of Mr. Cleary's actions in this election process, and deserve to have their choices be excluded from this political game, and those choices to have been made in an environment of transparency, honesty, and ethical rigor.

In closing:

I approached Mr. Cleary calmly following adjournment of the 2-7-24 meeting and let him know that when I cleared my name regarding his accusations, I would appreciate a full public apology. His response to me was a flippant "we'll see", followed with a sarcastic "Sorry I hurt your feelings.". He is correct, though he was being sarcastic, that my feelings are hurt, I am human. More than that, without any time to consider his opinion prior to ballots being certified (He submitted his email to the Trustees on 1/26 at 8:24 am, and ballots were to be certified less than 8 business hours later, over a weekend) he sent an email full of insinuations and accusations in what I can only consider to be an attack on my eligibility, character, and motivations. The sense of profound disbelief, confusion, disappointment, and sadness cannot be overstated. What is the purpose of all of this at this late hour, in advance of an election, in which he submitted and then retracted a petition to run for Mayor. When Mr. Cleary picked up his petition, he knew he was likely ineligible, when he asked for signatures on the petition he questioned his eligibility, and when he submitted the petition he was aware he was likely ineligible. The opinion of the Town Attorney related to the Mayor/Trustee offices was NOT given because Dan pulled a petition or to impact his ability to run for office. This opinion was given many weeks prior to Dan indicating he was pulling a petition on 1/17 and had nothing to do with Mr. Cleary. I had asked Dan weeks ago to sign my petition, inviting him to meet me, as I assumed we had a solid relationship based on trust and mutual respect. I spoke with him in person around Thanksgiving, with him asking me if I was running, which I confirmed to him in person. No concerns or questions came from him at that time, until late January, after my petition was turned in, and leaving me no time to react or research before the ballots were certified.

I can only speculate, but my gut tells me Mr. Cleary has an agenda to keep me from office, motives unknown. His presentation during the meeting certainly seemed to be a personal character attack, layered with questions surrounding my eligibility. I believe this is the foundation for a campaign against me. I wonder if Mr. Cleary has done any research on this subject that does not support his position, or has he only looked for and presented that which is supportive of his opinion?

Is that where we are as neighbors in our small town? I believe the campaign should be about issues directly impacting our community, and we have real issue to deal with. I have a record of honorable leadership, success, collaboration, outreach, and involving the community in the government process (along with my fellow Trustees, volunteers, and staff), and I am prepared to campaign on issues, as that is what our citizens deserve. Our Town is

in a wonderful place as a result of the work of many elected and appointed citizens and our staff, we have developed into a respected community with a seat at the table and voice in the wider county. We are financial sound, and have built out a wonderful staff who loves serving this community. Our residents are comfortable and happy to a great extent, and we provide multiple opportunities for them to be involved with their government. Things are good.

Though certainly not the norm, I am asking as a candidate and citizen for the BOT to consult with our attorney, have a robust discussion, and publicly support the position that I am indeed an eligible candidate for the upcoming election.

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President

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Thank you for your email- Email is always the most efficient way to contact me as I am better able to manage my time and prioritize. I rarely am available by phone, unless by appointment. I am very dedicated to my clients and customers, and also my family and free time, so I respond to email during normal business hours with great vigor, but likely will not communicate outside of business hours. If you need immediate assistance with an actual emergency, I have a staff of wonderful folks that can assist if you will email hoa@rmlodging.com or call [970-547-4800](tel:970-547-4800).

