

11/03/08

(10)

Steve Ledoux

From: Stephen D. Anderson [SAnderson@AndersonKreiger.com]
Sent: Thursday, October 30, 2008 3:58 PM
To: Steve Ledoux; John Murray
Subject: Acton/GenHDC - Conflict of Interest Question re 53 River Street
Attachments: COI_92_24.pdf; COI_89_33.pdf; State Ethics Commission Enforcement Actions As to s. 19 and Abutting Property; Scan001.pdf; COMMISSION ADVISORY NO. 05-02

Gentlemen:

On behalf of the Board of Selectmen ("Board"), you have asked for my opinion on the issue below. Please forward this email to the Board and to the affected members of the HDC.

Facts

- The Board appoints the members of the Acton Historic District Commission ("HDC"), a board charged with jurisdiction over projects under G.L.c. 40C (the Historic Districts Act) and Town Bylaw Chapter P (the Local Historic District Bylaw).
- Two appointed HDC members are direct abutters (across a public way) to 53 River Street, a property situated in an Historic District under the jurisdiction of the HDC.
- There is an application for a project at 53 River Street scheduled to be heard by the HDC on November 17, 2008.
- It is reasonably foreseeable that the two members' financial interests - as owners of abutting properties - will be affected as a result of the project - either positively (because the project improves the neighborhood) or negatively (because the project has an adverse effect on the neighborhood).
- Each affected member has reportedly filed with the Board a disclosure form under c. 268A, § 19, seeking an advance written determination that their respective financial interest is "not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee."

Recommendation

I recommend that the Board decline to determine that these members' respective financial interests are "not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee." Rather, I recommend that the Board instruct these members to recuse themselves from participation in any matters concerning the proposed project on this abutting property and to leave the hearing room when such matters are discussed.

Because this issue can recur with a number of land use boards in Town, the Board may want to request a set of instructions from Town Counsel or the Board may want to adopt a formal policy that any member or associate member of a board or commission appointed by the Board of Selectmen shall (a) recuse himself or herself from official participation in any matters concerning a proposed project for which the member or associate member either abuts the project site or is listed on or has an interest in real property listed on the official abutters' list applicable to the hearing concerning the project, and (b) leave the hearing room when such matters are discussed.

Basis for Recommendation

The basis for this recommendation is as follows:

- The State Ethics Act, Chapter 268A, § 19(a) provides that, "Except as permitted by paragraph (b), a

10/31/2008

municipal employee who participates as such an employee in a particular matter in which to his knowledge he [or] his immediate family ... has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both."

- Section 19(b) provides that, "It shall not be a violation of this section (1) if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee,"
- The State Ethics Commission has previously determined that a financial interest will always be presumed in zoning matters where a property owner has property which directly abuts the property in question. See Public Enforcement letter 88-1; EC-COI-89-33 (copy attached); EC-COI-84-96. As with any legal presumption, individual facts and circumstances can be presented to rebut this presumption; however, no such facts are apparent here.
- The State Ethics Commission also presumes that a reasonably foreseeable financial interest arises in connection with matters involving a member who is a "person aggrieved" under the Act in question. EC-COI-89-33 (copy attached).
- The State Ethics Commission has even held that an elected member of a municipal Board of Health may not participate in any votes and discussions concerning a proposed project which would be *adjacent to the member's neighborhood* and which affected the sale price of the member's prior home and the purchase price of the member's new home in the neighborhood. See EC-COI-92-24 (copy attached).
- Where a project abuts the member's property and is presumed by the State Ethics Commission to affect the member's financial interests, it is inadvisable for the Board to conclude that such an interest "is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee."
- Once Board of Selectmen (as the HDC's appointing authority) determines that it cannot make that determination, the affected members must refrain from participating in matters concerning the project in their official capacity. The State Ethics Commission and the SJC have indicated that it is a wise practice for a recused member to leave the hearing room altogether.

The reasons to issue a Town Counsel advisory or to adopt a formal Board policy on this issue are to protect the integrity of the decision-making process and the individual appointed board or commission members:

- "[A]ny violation of section[] [19] ... which has substantially influenced the action taken by any municipal agency in any particular matter shall be grounds for avoiding, rescinding or cancelling the action on such terms as the interest of the municipality and innocent third persons require." So a land use decision by a local board (otherwise correct on the merits) can become a nullity if there is an ethics violation of this type.
- The individual board or commission member can face significant civil or criminal penalties in the event of such a violation.
- The State Ethics Commission has aggressively enforced the provisions of Section 19 in the case of a financial interest triggered by abutting property situations. See attached.

We would be pleased to draft a proposed policy or guidance on request.

Steve

Stephen D. Anderson

10/31/2008

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Christine Joyce

From: Brian Bendig
Sent: Friday, October 24, 2008 5:30 PM
To: Board of Selectmen
Cc: Historic District Commission
Subject: HDC Conflict of Interest forms respecting 53 River Street

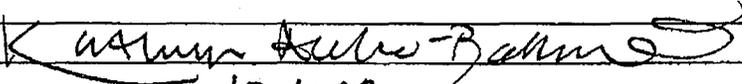
See attached. An application respecting 53 River Street is scheduled to be taken up on November 17, 2008.

Brian Bendig
Chair
Acton Historic District Commission

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Version: 7.5.549 / Virus Database: 270.8.2/1743 - Release Date: 10/24/2008 8:33 AM

**DISCLOSURE OF APPEARANCE OF CONFLICT OF INTEREST
AS REQUIRED BY G. L.C.268A §23(b)(3)**

I make this disclosure pursuant to G.L.c.268 A, §23 (b)(3) in order to dispel any appearance of potential conflict of interest occasioned by the facts set out below, that I may be improperly or unduly influenced in the performance of my official duties, or that I would be likely to act or fail to act as a result of kinship, rank, position or the undue influence of any part or person.

Name:	Kathy Acerbo-Bachmann
Title or Position:	member - HDC
Agency/Department:	Town of Acton
Agency address:	home address: 50 River St. Acton, MA 01720
Office Phone:	
I publicly disclose the following facts (Attach additional pages if necessary):	I am a direct abutter of 53 River Street, as per the appraiser's office.
Signature:	
Date:	10.6.08

G.L.c.268 A, §23 (b)(3): No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know, act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

Appointed state, county and municipal officials and employees should file with their appointing authority.

Elected state officials should file with the appropriate House or Senate Clerk or the Ethics Commission.

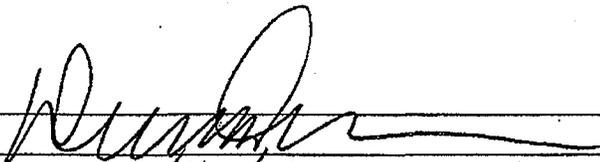
Elected county officials should file with the county clerk.

Elected municipal officials should file with the city or town clerk.

Attach additional pages if necessary.

**DISCLOSURE OF APPEARANCE OF CONFLICT OF INTEREST
AS REQUIRED BY G. L.C.268A §23(b)(3)**

I make this disclosure pursuant to G.L.c.268 A, §23 (b)(3) in order to dispel any appearance of potential conflict of interest occasioned by the facts set out below, that I may be improperly or unduly influenced in the performance of my official duties, or that I would be likely to act or fail to act as a result of kinship, rank, position or the undue influence of any part or person.

Name:	DAVID HOWN
Title or Position:	MEMBER HISTORIC DISTRICT COMMISSION
Agency/Department:	HISTORIC DISTRICT COMMISSION
Agency address:	
Office Phone:	
I publicly disclose the following facts (Attach additional pages if necessary):	<p>IT IS A DIRECT RESULT TO 53 RIVER STREET ACCORDING THE TOWN OF ALTON ASSESSOR'S OFFICE</p> <p>MY ADDRESS IS: 125 SCHOOL STREET</p>
Signature:	
Date:	10/12/08

G.L.c.268 A, §23 (b)(3): No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know, act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

Appointed state, county and municipal officials and employees should file with their appointing authority.
Elected state officials should file with the appropriate House or Senate Clerk or the Ethics Commission.
Elected county officials should file with the county clerk.
Elected municipal officials should file with the city or town clerk.

Attach additional pages if necessary.

Christine Joyce

From: Stephen Anderson
Sent: Thursday, October 30, 2008 3:21 PM
To: Stephen Anderson
Subject: State Ethics Commission Enforcement Actions As to s. 19 and Abutting Property

In the Matter of Raymond Payson (November 29, 2007)

The Commission fined North Attleborough Planning Board Chairman Raymond Payson \$5,000 for violating the state's conflict of interest law, G.L. c. 268A, by participating in several decisions involving property abutting property owned by Payson and his brother. According to the Disposition Agreement, Payson and his brother own land that abuts where a proposed development was planned. Payson stated that he was not going to participate in the property development matter because of his abutter status. Notwithstanding this statement, Payson participated by: approving a site plan application, attending and participating in discussions during a site walk, approving site plan modifications, inspecting the property with the Planning Board engineer and writing a letter on Planning Board letterhead stating that utility work was "at risk of not receiving planning board approval." Section 19 of the conflict of interest law prohibits a municipal employee from officially participating in matters in which to his knowledge, he or an immediate family member has a financial interest. By participating in matters regarding the development of the abutting property, which would have a reasonably foreseeable financial impact on his abutting property's value, Payson violated §19.

Disposition Agreement

In the Matter of Edwin Kiley (August 15, 2001)

The Commission fined former Burlington Zoning Board of Appeals member Edwin Kiley \$1,000 for violating G.L. c. 268A, §19 by, as a ZBA member, voting to continue the public hearing and discussing an application for a variance for land abutting his property.

Disposition Agreement

In the Matter of George Prunier (November 18, 1987)

In a Public Enforcement letter the Commission said that Grafton Selectman George Prunier appeared to have violated section 19 of the conflict law by participating in the deliberation and negotiations for the town's purchase of a private landfill site directly across the street from his home. But the Commission decided against taking formal action against Prunier because he did not stand to gain financially by his participation and, in fact, placed the town's interest before his own. The letter issued to Prunier states, "Without exception, abutting property owners are presumed to have a financial interest in matters affecting the value of the abutting property It is irrelevant whether the matter beneficially or adversely affects your financial interest. As long as there is some effect, Section 19 prohibits your participation."

In the Matter of Eileen Campanini (May 25, 2004)

Bridgewater Zoning Board of Appeals (ZBA) member Eileen Campanini paid a \$2,000 civil penalty to

resolve allegations that she violated §19 of the state's conflict of interest law when she participated in a ZBA vote upholding the issuance of a building permit that would likely affect her ability to sell property she owned. According to the Disposition Agreement, Campanini sought an "approval not required" endorsement from the Planning Board in 1998 so that she could divide property she owned. The Planning Board endorsed her plan but the building inspector told Campanini she needed a frontage variance from the ZBA. In November 2000, the ZBA denied her variance application and Campanini was unable to divide her property. Campanini was not a member of the ZBA at that time. In June 2002, Campanini participated in a ZBA vote regarding a property in which the ZBA concluded that it was not necessary for the property owner to seek a frontage variance because the Planning Board approved the plan with an "approval not required" endorsement. After the building inspector issued a permit, abutters appealed to the ZBA. In January 2003, Campanini participated in a ZBA vote upholding the issuance of the building permit for that property. At the time of the January 2003 meeting, Campanini knew that the outcome of the matter would likely affect the status of a building permit for her own property because, in November 2002, Campanini and a local developer were parties to a purchase and sale agreement in which the developer would pay Campanini \$150,000 for the property provided he could get a building permit to construct a single family home. Campanini's vote to uphold the permit for the other property made it likely that a building permit would issue for her property, clearing the way for the sale.

Disposition Agreement

In the Matter of Michael J. D'Amico (December 2, 2002)

The Commission fined former Quincy City Councilor Michael J. D'Amico \$1,250 for violating the state's conflict of interest law. In a Disposition Agreement, D'Amico admitted that he violated G.L. c. 268A, §19 by submitting a letter on city council stationery to the Quincy Zoning Board of Appeals (ZBA) requesting that Lappen Auto Supply Company (Lappen), which abuts D'Amico's property at 57-59 Penn Street, install landscaping, retaining walls and fences. According to the Disposition Agreement, Lappen was seeking a variance from the ZBA to construct a new warehouse that would link two buildings already sited on its property. In his letter, D'Amico recommended that the ZBA require Lappen to meet six conditions in order to get the variance to construct the warehouse. While the ZBA did not require all six conditions as recommended by D'Amico, Lappen was required to submit a reasonable landscape plan to the building inspector for review and approval. Lappen subsequently paid \$6,700 for landscaping work at D'Amico's property. Lappen also provided similar landscaping to a second abutter's property.

Disposition Agreement

In the Matter of Arthur Tucker (June 2, 1989)

The State Ethics Commission fined Oakham Building Inspector Arthur Tucker \$250 for participating in his official capacity in a dispute over alleged building code, property subdivision and safety violations involving a house that abutted his own property, and that he had expressed an interest in buying. In a Disposition Agreement reached with the Commission, Tucker admitted he violated Section 19 of Massachusetts General Laws c. 268A. Tucker agreed to pay the fine and to refrain from participating as a town employee in any particular matter that affects his own financial interest, absent a specific exemption. Section 19 of the conflict law prohibits town employees from participating in matters that affect their own financial interest or the financial interest of members of their immediate family, business partner(s) or associates. The Commission found Tucker violated Section 19 by bringing the matters of the abutting property before the Board of Selectmen, and by later asking the Selectmen to inspect the property, by issuing stop work orders in his capacity as Building Inspector, by writing letters concerning the property, by asking that a survey board be convened and by posting the property as being dangerous and unsafe.

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The Commonwealth of Massachusetts State Ethics Commission

John W. McCormack State Office Building, Room 619
One Ashburton Place, Boston 02108
Telephone 617-727-0060

FACT SHEET

MUNICIPAL OFFICIALS: DON'T VOTE ON MATTERS AFFECTING AN ABUTTING PROPERTY

The conflict of interest law states that a municipal official may not participate (by voting, discussing or otherwise acting) in any matter which affects his or her own financial interest. The Ethics Commission has ruled that it will presume that municipal officials have a financial interest in matters affecting property which directly abuts their own. Accordingly, municipal officials may not take action in their official capacity on matters affecting property which abuts their own unless they can clearly demonstrate that they do not have a financial interest in the matter.

This provision of the law is intended to ensure that public officials are acting in the best interest of their city or town and are not pursuing their own self interest.

A recent case which illustrates this aspect of the law concerns a planning board member who admitted she violated the conflict law when she voted on a zoning matter affecting her neighbor's property. The planning board member voted to recommend that the zoning board deny a variance to her neighbors who wished to convert their barn into an apartment. The planning board in this particular town occasionally sends advisory recommendations on petitions to the zoning board.

In another recent case, the Commission issued a public letter critical of a selectman who participated in negotiations for the town's purchase of a private landfill site located directly across the street from his home. Even though the selectman appeared to have placed the town's interest before his own by supporting the continued operation of the landfill by the town rather than having it closed and restored by the private company, the Commission warned the selectman to exercise caution whenever a town matter dealt with property abutting his own, no matter how small or speculative his financial interest in the matter may be.

The Public Enforcement Letter issued to the selectman states, "Without exception, abutting property owners are presumed to have a financial interest in matters affecting the value of the abutting property....It is irrelevant whether the matter beneficially or adversely affects your financial interest. As long as there is some effect, Section 19 prohibits your participation."

* * *

Commission Fact Sheets are prepared and issued by the Public Education Division of the State Ethics Commission. They are intended to provide guidance to public officials and employees concerning practical applications of the conflict law.

November 1987

Christine Joyce

From: Stephen Anderson
Sent: Thursday, October 30, 2008 3:47 PM
To: Stephen Anderson
Subject: COMMISSION ADVISORY NO. 05-02

COMMISSION ADVISORY NO. 05-02**VOTING ON MATTERS AFFECTING ABUTTING OR NEARBY PROPERTY**

The conflict of interest law is intended to ensure that public employees act in the best interests of the citizens they represent, and do not pursue their own self-interests or other private interests. The law prohibits a public employee from participating, by voting, discussing, delegating or otherwise acting, in any matter that affects:

- his or her own financial interests or those of a business partner;
- the financial interests of his or her immediate family members (i.e., the employee's spouse; and the parents, siblings and children of either the employee or the employee's spouse);
- the financial interests of a private or "after-hours" employer, or anyone with whom the employee is negotiating or has an arrangement for prospective employment; or
- any organization, either charitable or for-profit, in which the employee is serving as an officer, director, partner or trustee.

The term "public employee" includes both elected and appointed state, county and municipal employees, whether paid or unpaid, full-time or part-time. An unpaid volunteer board member as well as, in some instances, a consultant who is a contractor are considered public employees for purposes of the conflict of interest law.

I. PARTICIPATION IN A PARTICULAR MATTER

The conflict of interest law defines participation as participating in agency action or in a particular matter personally and substantially through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. Thus, a public employee participates not only when he makes a final decision or vote on a matter, but also when he discusses the merits of a matter with a colleague or makes a "non-binding" recommendation. A particular matter is any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination or finding.⁽¹⁾

II. DETERMINING PROHIBITED FINANCIAL INTERESTS

The restrictions of the conflict of interest law apply regardless of the size of the financial interest. They apply in any instance when the private financial interests are directly and immediately affected, or when it is reasonably foreseeable that the financial interests would be affected. Also, the conflict of interest law prohibits any type of official action in such matters, regardless of whether the proposed action would positively or negatively affect the private financial interests.

Example: An elected board of health member owns property abutting a proposed landfill. If the landfill is approved, it will negatively affect the value of the board of health member's property value. Despite the fact that it will negatively affect his property value, the board of health member is in favor of the landfill. He may not participate in the discussion and vote of the landfill. (As discussed below, an appointed board member may participate if he discloses and receive from his appointing authority an exemption that would allow him to participate.)

III. ABUTTING OR NEARBY PROPERTY MAY AFFECT A PUBLIC OFFICIAL'S FINANCIAL INTEREST

Under the conflict of interest law, a property owner is presumed to have a financial interest in matters affecting abutting and nearby property. Thus, unless she can clearly demonstrate that she does not have a financial interest, a public employee should not take any action in her official capacity on matters affecting property that is near or directly abuts:

- her own property;
- property owned by a business partner;
- property owned by any immediate family members;
- property owned by a private employer, or prospective employer; or
- property owned by any organization in which the public employee is an officer, director, partner or trustee.

Otherwise, she risks violating the conflict of interest law.

The following factors are considered to determine whether, in a particular situation, a person or organization has a financial interest in an abutting or nearby property. A financial interest is presumed whenever:

- her property directly abuts (i.e., it shares any part of a property line); or
- her property is directly opposite a street, public way or private way, or she is an abutter to an abutter within 300 feet of the property line; or
- she, because of an act or failure to act by the board or commission, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public; or
- the matter would otherwise alter her property value, rights, or use. For example, a property owner is presumed to have a financial interest in zoning changes, variances, nearby subdivision or development approvals, and roadway, sewerage or safety improvements.

Example: An appointed state employee is reviewing an environmental impact report for a large development. The development abuts property owned by his parents. The state employee must notify his appointing authority, i.e., the individual or board responsible for appointing the public employee to his position, and the State Ethics Commission of the conflict and may not participate in the matter unless he follows the exemption process discussed below.

Example: An elected planning board member is also a business owner. A residential subdivision application is filed with the planning board for property abutting her business. She must not participate in the subdivision application review and approval process.

IV. REBUTTING THE PRESUMPTION THAT A FINANCIAL INTEREST EXISTS

As discussed above, the Commission presumed that a property owner has a financial interest in matters affecting abutting and nearby property unless he can clearly demonstrate that he does not have such a financial interest. If a public official, in good faith, believes that no such financial interest, positive or negative, exists, he can rebut or refute that presumption by getting an independent real estate appraisal that concludes that the matter affecting the abutting or nearby property will not affect the financial interest of the public official. Such an appraisal should be a bona fide appraisal that includes such things as the credentials of the appraiser, sufficient detail about the property and the appraisal and a description of the basis of the opinion.

V. ABSTAINING WHEN A CONFLICT OF INTEREST OCCURS

Not only must a public employee abstain from voting when he has a conflict of interest, he may not participate in any official discussion of the matter. Ordinarily, the best course of action is simply to leave the room during the deliberation and vote of the board.

Example: A selectman who discusses the environmental and traffic impacts of a license application for a business located next to his property but abstains from the final vote will nevertheless have participated through his discussing the license application.

While a municipal employee and members of boards and commissions at both the state and municipal level are not required to disclose the reason for their abstention, an appointed state or county employee who would normally be required to participate in a particular matter as part of his job must disclose, in writing, to his state appointing official and the State Ethics Commission even if he wishes to abstain. The appointing official then determines if such an abstention should occur by following the exemption process discussed below. This disclosure is required even if the appointed state or county employee abstains.

VI. EXEMPTIONS

Statutory exemptions can, in certain instances, allow a public employee to take actions that would otherwise be prohibited.

State and County Employees

One exemption is available to all appointed state and county employees. This exemption is not available to any elected employee. As discussed above, an appointed state or county employee who would normally be required to participate in a particular matter as part of his job must disclose, in writing, to his appointing official and the State Ethics Commission the nature and circumstances of the matter and the financial interest. The appointing official, who receives the disclosure described above, may assume responsibility for the matter, assign responsibility for the matter to another employee or provide the state or county employee with a written determination allowing her to participate in the matter. Both the disclosure and the appointing official's determination are public records and, in addition, must be filed with the State Ethics Commission.

Example: A state employee responsible for approving small business grants must make a written disclosure to her appointing official when a grant application to fund expansion of a day care center across the street from her home is assigned to her and may not participate in reviewing the grant unless the appointing authority provides her with a written determination that will allow her to do so. Both the disclosure and the written determination must be filed with the State Ethics Commission.

Municipal Employees

As noted above, an appointed municipal employee may choose to abstain from a matter in which she has a prohibited financial interest and, if she does so, need not make a disclosure. In order to participate in a matter involving abutting property, a municipal employee must disclose, in writing, to her appointing official the nature and circumstances of the matter and the financial interest. The appointing official, who receives the disclosure described above, may assume responsibility for the matter, assign responsibility for the matter to another employee or provide the municipal employee with a written determination allowing her to participate in the matter. Both the disclosure and the appointing official's determination are maintained as a public record by the appointing official and are not filed with the State Ethics Commission.

This exemption is not available to any elected municipal employee.

Example: The appointed department of public works director may make a disclosure and receive a written determination from his appointing official that will allow him to negotiate a contract that will build a new road in front of his property or he may abstain and his appointing authority may assume responsibility for negotiating the contract or assign it to another. The exemption is not available to the elected Board of Health member approving septic systems in a subdivision abutting her property; rather, she must abstain.

An additional exemption is available to municipal employees. It allows a municipal employee to act provided that the particular matter is one of general policy and provided further that the issue affecting the private financial interests of the municipal official and his immediate family members also affects a "substantial segment" of the municipality's population. The Ethics Commission has advised that at least 10% of a municipality's population is a "substantial segment" for the purposes of the conflict of interest law; therefore, a municipal employee may act on matters affecting his own financial interests, or the interests of immediate family members, if the financial interest also affects at least 10% of his municipality's residents (as determined by the most recent federal census).

Example: An elected city councilor who owns a home in the city may participate in the establishment of residential tax rates. While the tax rate is a matter in which he has a financial interest, it is shared by more than 10% of the

population, i.e., all homeowners in the municipality.

VII. RULE OF NECESSITY

If more than one member of a board or committee is disqualified because of actual conflicts of interest, the board may not be able to act because it does not have a quorum. (If the number for a quorum is not set by law, a quorum is generally a majority of the board members.) In these instances, as a matter of last resort, the board can use what is called the rule of necessity to permit the participation of the disqualified members in order to allow the board to act. Prior to invoking the rule of necessity, public officials should review the Ethics Commission's Primer on Self-Dealing, Financial Interests and the Rule of Necessity or contact the city solicitor, town counsel or the Ethics Commission.

VIII. CONCLUSION

While certain private relationships may not trigger the restrictions discussed above, they may require disclosure and compliance with other sections of the conflict of interest law. Again, for further advice, contact your town counsel, city solicitor or the Legal Division of the State Ethics Commission at 617-371-9500.

ISSUED: November 1987

REVISED: October 1991

REVISED: August 1994

REVISED: June 2, 2005 [as an Advisory]

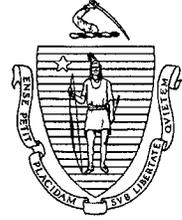
FOOTNOTE

^{1/}Note, however, that general legislation is not a particular matter. Thus, a public official may act on matters of general legislation, and certain home-rule petitions. For example, a legislator, a town manager or a state agency head may draft, promote or oppose general legislation, or legislation related to a municipal government's organization, powers, duties, finances or property. Matters involving other types of "special legislation," regulations or administrative policies are not eligible for this exemption. For a determination as to whether a bill is "general legislation" or "special legislation," contact the city solicitor, town counsel, agency counsel or the Legal Division of the State Ethics Commission.



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-371-9500, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-92-24

FACTS:

You are an elected member of a municipal Board of Health (Board). You wish to know whether you may participate in votes and discussions concerning a proposal for a facility (the project) which would be adjacent to your neighborhood. You state that you recently sold a home in the area and that the value of that home was directly affected by the project. You also recently purchased a new home within the same area (further from the project but within the affected area) and have concluded that the purchase price was, in fact, affected by the operation of the project.

QUESTIONS:

1. May you participate in votes or discussion involving the project?
2. Would the Rule of Necessity permit you to participate in matters involving the project if other members of the Board are also affected by the project?

ANSWERS:

1. No, for the reasons stated below.
2. The Rule of Necessity, if properly invoked, would permit you to participate in matters involving the project, notwithstanding your foreseeable financial interest.

DISCUSSION:

Section 19

Section 19 of c. 268A provides that a municipal employee may not participate^{1/} as such a municipal employee in any particular matter^{2/} in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest. The financial interest may be of any size, and may either be positive or negative. *See, e.g., EC-COI-89-33; 89-19; 84-96.* If the municipal employee's financial interest will be affected either directly or foreseeably, the municipal employee must abstain from the matter in question. *See, e.g., 89-19; Commission Advisory No. 11 (Nepotism); see also Graham v. McGrail, 370 Mass. 133 (1976).* Participation in a particular matter includes both discussions and votes concerning the matter. *See Graham, 370 Mass. at 137-138. Graham v. McGrail* concludes that, while not required by law, it is advisable for the municipal employee to leave the room whenever he is prohibited from participating because of the restrictions of §19. *Id., 370 Mass. at 138.*

You have informed us that the value of the home you recently sold (prior to your becoming a member of the Board) was directly affected by the project, as was the value of the home recently purchased by you in the same area. In light of your facts, it is reasonable to conclude that the value of the home recently purchased by you within the same area will continue to be affected by matters involving the project.^{3/}

Consequently, you may not participate in votes or discussions concerning the project because it is reasonably foreseeable that your financial interest will be affected as a result of your continued home ownership in an area

near the project.

The Rule of Necessity

As an elected member of the Board, you may participate in votes or discussions concerning the project only if the Board has occasion to properly invoke the so-called Rule of Necessity.^{4/} See, e.g., *EC-COI-82-10*. That judge-made rule permits governmental bodies to act on matters when a quorum cannot be obtained because of Board members' conflicts of interest.^{5/} Thus, the Rule of Necessity permits governmental bodies to act when they otherwise would have been forced to forego their governing responsibilities.

However, as *82-10* stated:

[t]he rule should only be utilized where so many members of a tribunal are disqualified that the body is incapable of acting because an insufficient number remain to constitute a quorum.

The Rule of Necessity is considered a rule of last resort and may not be invoked when a way can be found to provide a qualified tribunal, such as by excluding from the tribunal the disqualified member or by counting only the votes of the members who are qualified. 2 K. Davis, *Administrative Law*, §12.04; *EC-COI-82-10*. The mere absence of a quorum because of illness or absence of a member (for example) does not allow the Rule of Necessity to be invoked. See *Graham v. McGrail*, 370 Mass. at 138. Further, once a quorum has been obtained, the Rule of Necessity cannot be used to break a tie vote.

It is always advisable, although not required, that the Rule of Necessity be invoked by the Chairperson of the Board upon the written advice of town counsel, because a Board member would violate §19 if the Rule is improperly invoked. Town counsel's advice should provide the reasons why the Rule of Necessity is being used, and explicitly indicate that a quorum can be obtained only by invocation of the rule. (It is advisable for town counsel to establish guidelines, in advance, describing the circumstances under which the rule should be invoked.) The minutes of the Board should also indicate that the Board was unable to obtain a quorum because of the disqualification of members and, as a last resort, each of those disqualified members will now participate under the authority of the Rule of Necessity.

Accordingly, if other members of the Board also have conflicts of interest involving the same particular matter such that a quorum cannot be obtained,^{6/} you may participate in matters involving the project even if the value of your home will be affected by your participation in the matter *once* the Rule of Necessity is properly invoked by the Board.

Date Authorized: September 10, 1992

^{1/}"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

^{2/}"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

^{3/}In an informal staff letter to you dated April 1, 1991, you were informed that you could submit additional information to this Commission which evidenced that your financial interest would not be affected by the project as a result of purchasing a new home in the area. Although you have now requested this formal Commission opinion, you have not asked the Commission to consider any additional facts concerning your financial interest. Thus, we must presume that you do not have any facts available which would indicate that your financial interest will not be affected by the project in question. Cf. *EC-COI-89-33* (presumption of financial interest can be rebutted by evidence to the contrary).

^{4/}Section 19(b)(3) provides an exemption for municipal officials where the particular matter in question involves a determination of "general policy" and the financial interest of the municipal employee is shared with a substantial segment of the population of the municipality. However, we do not have sufficient facts in your case to make a determination under §19(b)(3). Consequently, based upon the facts presented to us, you may not rely upon the §19 exemption.

^{5/}If the number for a quorum is not set by law, a quorum is generally considered to be a majority of the board's members.

⁶The conflicts of interest need not be the *same* conflict which you have. For example, if you serve on a three member Board and you cannot participate for the reasons stated above, and another member cannot participate because she has a direct interest in the project, the Rule of Necessity may be invoked. The Rule of Necessity would permit all three members of the Board to participate, notwithstanding the various potential conflicts of interest.



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-89-33

FACTS:

You are a member of the ABC Conservation Commission. You wish to know whether you may act on a filing made pursuant to G.L. c. 131, s.40 (the Wetlands Protection Act), where the filing involves property which is located "two lots away from [your] property, around the cul-de-sac, but not directly opposite the public way." The filing in question concerns the building of a residence and a permit for a subsurface sewage system involving a "coastal wetland."

You have been previously informed by this Commission that a financial interest is always presumed whenever a person owns property directly abutting the property in question and that the Commission has previously determined that a financial interest arises whenever a person is a so-called "party in interest," as defined by G.L. c. 40A, the Commonwealth's Zoning statute.[1]

You have now requested a formal opinion on whether you have any financial interest in the matter before the conservation commission because (i) the matter does not implicate the Zoning statute (and you are not, therefore, a statutorily defined "party in interest"), (ii) your property does not directly abut the property in question (thereby precluding the automatic presumption), and (iii) you are not a "person aggrieved" for purposes of the Wetlands Protection Act. You also seek guidance as to how the Wetlands Protection Act applies to your situation for s.19 purposes.

QUESTION:

Does a financial interest arise for s.19 purposes even if the matter does not implicate either (i) the "party in interest" test, (ii) the "automatic presumption" test, or (iii) the "person aggrieved" test?

ANSWER:

A financial interest is presumed in matters affecting real property where a party is (i) a direct abutter, (ii) a party in interest, or (iii) a person aggrieved. A financial interest may also be found even if no such rebuttable presumption arises, depending upon other factors in a given case. No presumptions arise in your case and we are aware of no such other factors to indicate a reasonably foreseeable financial interest.

DISCUSSION:

Section 19

Section 19 of the conflict of interest law prohibits a municipal employee[2] from participating[3] in a particular matter[4] in which to his knowledge he has a financial interest.

As a conservation commission member, you are a municipal employee for c. 268A purposes. Whether you have a "financial interest" in a particular matter depends on whether your interest can be quantified in monetary term.[5] This broad definition is limited, however, in at least two important ways.

First, a financial interest does not arise where the interest is one which "involves a determination of general policy and the interest of the municipal employee ... is shared with a substantial segment of the population of the municipality." [6] This exemption would apply, for example, where town selectmen must vote on a matter that would affect the collection of revenue from all town residents, including themselves.

Second, this Commission has determined that the s.19 financial interest test only applies to those interests which are either direct, or, if indirect, reasonably foreseeable. EC-COI-89-19. It is established Commission policy that s.19 will apply to every financial interest regardless of size and regardless of whether the interest affects the municipal employee favorably or adversely. [7] However, if the interest is not direct or reasonably foreseeable (that is if it is "remote~ speculative or not sufficiently identifiable"), s.19 will not prohibit participation. EC-COI-89-19 (municipal employee may participate in zoning matter where husband holds minor stock interest in a corporation affected by zoning change); 84-98; 84-96 (financial interest arises where municipal employee's land abuts and opposite to land to be developed). While a direct financial interest is usually obvious, whether a given financial interest is reasonably foreseeable must be determined on a case-by-case basis. The Commission will, among other things seeks guidance from other applicable statutes to assist in the determination of whether a financial interest is reasonably foreseeable in a given situation.

This Commission has previously determined that a financial interest will always be presumed in zoning matters where a property owner has property which directly abuts the property in question. See Public Enforcement letter 88-1; EC-COI-84-96. As with any legal presumption, individual facts and circumstances can be presented to rebut this presumption. To date, because Commission cases concerning financial interests in real property have always implicated some aspect of the zoning statute, the Commission has always looked to the zoning statute for guidance on s.19. This Commission has not yet had an opportunity to address directly how activities falling outside of 40A interact with s.19.

In EC-COI-84-96, however, the Commission stated that a financial interest could arise

even where a party is not a statutorily defined "party in interest" (as defined in the zoning statute) where one's property rights stand to be "significantly affected." Although the facts of that case implicated the statutory scheme of c. 40A, EC-COI-84-96 (and its definition of a "party in interest") need not be limited strictly to zoning applications.

Whether you would have a reasonably foreseeable financial interest in the matter in question depends, therefore, on what effects the proposed act or acts will have on your property. The Wetlands Protection Act recognizes those instances where a financial impact will be felt by property owners whose property is near the proposed activity. Consequently, regulations promulgated under the Wetlands Protection Act establish the "person aggrieved"[8] test which, in effect, is designed to vest certain rights in those persons, who would have an interest in the proposed activity, with a mechanism by which to act. The necessary implication of this test that "persons aggrieved" may financially suffer as a result of the activity in a way not likely felt by others. By its own terms, a "person aggrieved" is, therefore, unlike the person who might otherwise be eligible for a s.19 participation exemption[9] because the interest is different in either "kind" or "magnitude" from that of other property owners.

Accordingly, this Commission will presume that a reasonably foreseeable financial interest arises in connection with matters involving the Wetlands Protection Act where a party is a "person aggrieved" (as defined therein). Further, if any party could be considered a "party in interest" (that is, if the party is an abutter, an owner of land directly opposite on any public or private street, or an abutter to an abutter within three hundred feet of an activity affecting real estate), the Commission will also presume a financial interest regardless of whether the zoning statute or the Wetlands Protection Act is implicated, because of the likely significant affects of the proposed activity on a property owner.[10] Finally, a direct abutter will be presumed to have a financial interest in any matter affecting real estate, regardless of whether it implicates the zoning statute, the Wetlands Protection Act, or any other statutory scheme.

You have informed us that in the present matter, the wetlands filing concerns an application for "coastal" property as opposed to "inland" property. "Inland" property is regulated by the Wetlands Protection Act such that any activity which would likely increase flooding potential in the surrounding areas must meet specific guidelines to minimize the problem, that is, an applicant would need to provide "compensatory flood storage" such that his lot has no "net runoff." "Coastal" property, on the other hand, is not subject to these same guidelines. Presumably, no such coastal requirements exist because there is little or no increased potential for such flooding damage to any but a direct abutter, thereby eliminating the presumption that surrounding neighbors will suffer damage different in "magnitude" or "kind" from anyone else (insofar, at least, as to flooding damage).[11]

In any event, you have informed us that the matter in question has become moot because of the time constraints involved. You have also informed us that you did not participate in the matter while awaiting this opinion. We can inform you that no automatic presumption will arise in future matters based on similar facts because you

have represented to us that you are not (i) a direct abutter, (in) a "party in interest," or (iii) "a person aggrieved." Beyond that, however, a final determination as to any financial interest you might have in a particular filing would require additional facts not presented here.[12]

DATE AUTHORIZED: December 21, 1989

[1] A party in interest, for purposes of c. 40A, includes "abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner."

[2] "Municipal employee," a person performing services for or holding an office, position, employment, or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution.

[3] "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

[4] "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

[5] See *Graham v. McGrail*, 370 Mass 133,139 (1976) (although the term "financial interest" is not defined in c. 268A, it is any interest "capable of evaluation in financial terms.")

[6] G.L c. 268A, s.19(b) (3).

[7] See, Public Enforcement Letter 88-1 (even participation in a way which is contrary to one's own financial interest is prohibited by s.19).

[8] A "person aggrieved," for purposes of the Wetlands Protection Act, means any person who may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the Act. See 310 CMR 10.04.

[9] Because here the interest is not shared with a "substantial segment" of the municipal population.

[10] Wetlands protection is, in effect, a type of Zoning regulation. See, e.g., *Golden v.*

Board of Selectmen of Falmouth, 358 Mass. 519(1970).

[11] This would result in a municipal employee being able to rely upon the s.19(b)(3) exemption for certain coastal, as opposed to inland, filings.

[12] This Commission would consider, among other things, reasonably foreseeable increases or decreases in the value of your property, or upward or downward revisions in property tax assessments resulting from the filing in question. See, EC-COI- 84-96.