

Roland Bartl

From: Stephen Anderson
Sent: Monday, October 16, 2006 10:13 PM
To: Roland Bartl
Subject: RE: conflict of interest question

By making the proper disclosure and obtaining the BOS consent, the Board member is protected individually against allegations of violations of the State Ethics Act.

A court is likely to defer to the Board of Selectmen's judgment in this regard. It is not ironclad, but it is probable. Unless the Board member acts in a manner that objectively suggests s/he is biased against the applicant or the application (or in favor of opposing views), the disclosure and consent are an appropriate safeguard.

It is unlikely that an applicant would waive an appeal right in advance, but there is no harm in asking.

Steve

From: Roland Bartl [mailto:rbartl@acton-ma.gov]
Sent: Monday, October 16, 2006 4:30 PM
To: Stephen D. Anderson
Subject: conflict of interest question

Steve:

Where there is before the the Planning Board a special permit matter where a Board member has a potential or perceived conflict of interest, and where this Board member has disclosed his/her situation to the Board of Selectmen stating that he/she does not feel conflicted so as to bias his/her vote in the matter, and where the Board of Selectmen have accepted that disclosure and agreed, can the Board's decision in the matter then still be challenged in court on the basis of the member's potential or perceived conflict?

I am trying to get from the applicant a waiver of the right to appeal a Board decision on the basis of potential or perceived conflict of one or more of its members if they have made the decision to sit after proper disclosures and acceptance of their disclosure by the appointing authority, i.e. the Board of Selectmen. I talked with Don Johnson briefly on the matter, and he seems to think that a disclosure, accepted by the Board of Selectmen is ironclad, so to speak. Does proper disclosure protect the individual member as well as the action of the Board?

Please advise -

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2/20/2007

Roland Bartl

From: Stephen Anderson
Sent: Wednesday, September 27, 2006 7:51 PM
To: Roland Bartl
Subject: RE: Acton/GenPIBd: Planning Board quorum and potential conflict

Roland:

Based on your description below, I recommend the following course of action:

1. If the Planning Board members are within the definition of “parties in interest” as used in G.L. c. 40A, s. 11 (meaning “the petitioner, 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 as they appear on the most recent applicable tax list”), then the Planning Board members should recuse themselves from the proceeding even if doing so renders a super-majority impossible.
2. If the Planning Board members are not within the definition of “parties in interest” as used in G.L. c. 40A, s. 11, but are close enough to raise a possible “appearance of impropriety” issue, each Board member should either (a) recuse him/herself if s/he believes s/he cannot act with impartiality in the matter before the Board even if doing so renders a super-majority impossible, or (b) make the disclosures in paragraph 3 if s/he believes s/he can act with impartiality in the matter before the Board.
3. To conform to the State Ethics Act, c. 268A, a Board member intending to sit in these circumstances should:
 - “first advise[] the official responsible for appointment to his position [i.e. the Board of Selectmen] of the nature and circumstances of the particular matter and makes full disclosure of such financial interest [in this case his/her interest in the value of his/her property in the vicinity of the applicant’s site], and receive[] in advance a written determination made by that official [the Board of Selectmen] 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 [i.e. the Board member]” (§ 19(b)); and
 - “disclose[] in writing to his appointing authority [the Board of Selectmen] ... the facts” which would allow the Board of Selectmen to determine that the Planning Board member will not “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” (§ 23(b)); and
 - Disclose at the outset of the public hearing the relevant facts and circumstances to determine if the applicant or other party in interest objects to the Board member’s participation in the hearing.
4. If the Board of Selectmen does not make the required finding under c. 268A, or if the applicant

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- or other party in interest objects to the Board member's participation in the hearing, the affected Board member should recuse him/herself even if doing so renders a super-majority impossible.
5. If the Board of Selectmen does make the required finding under c. 268A, and if the applicant and other parties in interest do not object to the Board member's participation in the hearing, the Board member may so participate.
 6. If recusal renders a super-majority impossible, the Board should open the public hearing, inform the applicant of the difficulty, and offer the applicant the opportunity to withdraw the application without prejudice.
 7. If the applicant declines to withdraw, the Board will be unable to approve the special permit as a matter of law. Compare *Duddy v. Planning Board of Scituate*, No. 05-P-1011, slip op. (Mass. App. Ct. July 19, 2006) (an ANR plan may only be endorsed by an affirmative vote of a majority of all the members of a planning board, and not simply a majority of a quorum of a planning board; while the applicant received a majority of a quorum of the Planning Board, the two affirmative votes represented a minority of the full Planning Board); *McElderry v. Planning Board of Nantucket*, 431 Mass. 722 (2000) (SJC reached the same result concerning the approval of a definitive subdivision plan). Accordingly, to avoid a constructive approval situation, the Board should deny the application, which would allow the applicant to appeal the denial for a trial de novo.

Let me know if you have any questions.

Steve

From: Roland Bartl [mailto:rbartl@acton-ma.gov]
Sent: Wednesday, September 27, 2006 3:37 PM
To: Stephen D. Anderson
Subject: Planning Board quorum and potential conflict

Steve:

The Planning Board has a special permit hearing coming up on October 10. The Board is chartered with 7 full members and two associates/alternates. One full member is expected to resign before the hearing, and there is currently an associate vacancy. For the special permit hearing, two Board members live in close proximity to the subject property. Although neither appear to be parties in interest as defined in 40A, I feel they may be too close to comfortably participate in the proceedings as Board members. Both share this sentiment. They live across the street, one within about 220 feet, the other within approximately 300 feet. Neither one is an owner of land directly across from the subject special permit parcel. Both are considering recusing themselves from the proceedings. This would probably be the cleanest choice where it not for the potential quorum problem that it might create. With the existing and expected vacancies, and the absence of the one alternate, there would be only four members sitting whereas 5 out of 7 would be needed to give the applicant even a chance of approval. Short of continuing the hearing to another date, which we might do in any case, what other options are there, if any, for the Planning Board to manage this situation. With a short-staffed Board this question seems of general relevance. The Town has not yet adopted the new law that allows absentee members to vote under certain circumstances, and this would not help anyway in the case of the potentially conflicted members. Must they recuse themselves, or could they simply make a public disclosure? And, would that be advisable? Are there rules of necessity for such situation? Please advise -

Thanks

Roland Bartl, AICP

2/20/2007

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