

Don Johnson

4/25 (13)

From: Don Johnson
Sent: Thursday, April 21, 2005 5:13 PM
To: Dore' Hunter
Cc: Board of Selectmen
Subject: FW: Acton/GenSel - Right to speak on an issue for which you are recused



Advisory 88-01.htm Primer - 17.htm (9 KB)



Primer - 19.htm (16 KB)



fact sheet 6.htm (10 KB)



Summary 9.htm (12 KB)



Graham v. cGrail.doc (202 KB)

Dore':

I neglected to cc you and the Board on this communication with Steve Anderson. Again, with your permission, I would like to place this on the Board's agenda for Monday, preferably under Executive Session since the names of individuals who have recused themselves might come up in the course of discussion and that might imply violations where none exist.

Regards,
Don

-----Original Message-----

From: Don Johnson
Sent: Thursday, April 21, 2005 5:02 PM
To: Stephen Anderson; John Murray
Cc: George Hall; Daniel C. Hill
Subject: RE: Acton/GenSel - Right to speak on an issue for which you are recused

Steve:

Thank you very much for your analysis and the quick turn-around. I will share this with the Board and get back to you.

As you are aware from our conversation this afternoon, I called Chris Popov at the Ethics Commission and ran all of this by him. I was astounded to find that the Ethics Commission is not uncomfortable with allowing a recused individual to speak from the audience. As I told you, and I will need to go into greater detail when I speak with the Selectmen, the Commission stresses that one must make it clear that he/she is speaking personally, as an individual, and follow certain other guidelines but, if they do that, the Commission is comfortable with them having their say - they judge that not to be a violation of 268A. They go on to say that they have no problem with the Town adopting a policy that is more stringent than 268A but they caution that we would want to be careful of First Amendment rights. As you point out, state law already trounces all over the First Amendment rights of public officials in many areas (Prop 2 1/2 limits on advocacy, restrictions on campaigning, etc., etc.)

All of that having been said, Mr. Popov acknowledged that communities must balance the First Amendment issues with the fact that municipal employees who violate the Ethics Laws (or give the appearance of violating them by speaking after they have recused themselves) taint the actions of their boards and committees, put decisions at risk of being overturned and open the municipality to financial risks by virtue of suits that might ensue.

As I said, I will discuss this with the Board and let you know whether we need more.

Regards,
Don

-----Original Message-----

From: Stephen Anderson
Sent: Thursday, April 21, 2005 2:29 PM
To: Don Johnson; John Murray

Cc: George Hall; Daniel C. Hill

Subject: Acton/GenSel - Right to speak on an issue for which you are recused

<<Advisory 88-01.htm>> <<Primer - 17.htm>> <<Primer - 19.htm>> <<fact sheet 6.htm>>
<<Summary 9.htm>> <<Graham v. McGrail.doc>>

Don:

This is in response to your email forwarding Mike Eder's email referencing Commission Advisory 88-01. Mike says:

After our discussion the other day I have gotten some additional information about ones responsibilities when recused from the State Web site. The view from the State is you can't speak after you have recused yourself if it is a non-public hearing, but if there's a chance for the public to speak, you can speak recused or not, as long as you notify the audience that you are NOT speaking in an official capacity. Here is the relevant advisory on the matter.

In my view, the issue is more complicated and more subtle that Mike's email suggests. First of all, Mike only excerpted a portion of Commission Advisory 88-01. The complete advisory is attached to my email, along with the following additional information which cuts across this issue:

1. Commission's Ethics Primer 17: Officials Appearing Before Town Boards;
2. Commission's Ethics Primer 19: Self-Dealing, Financial Interests and the Rule of Necessity;
3. Commission's Fact Sheet No. 6: Don't Vote on Matters Affecting Abutting or Nearby Property;
4. Commission's Summary of the Conflict of Interest Law No. 9: Conservation Commissions; and
5. The SJC's decision in Graham v. McGrail, 370 Mass. 133 (1976).

In my judgment, there are two main concepts involved here: (a) the obligation to recuse oneself, and (b) the right to represent one's own interests or points of view. You need to read all of the above pronouncements (and others) together to begin to form a complete picture of how these issues interrelate.

The portion of Advisory 88-01 cited by Mike most clearly deals with the simple examples of where "a local employee may file her own grant application, or represent himself before the Zoning Appeals Board." The Commission observes that municipal employees may represent themselves before their own agencies, "although they may not take any type of official action on the matter that affects themselves" and they must observe the safeguards spelled out in Advisory 88-01. This concept is also explained in Ethics Primer 17 as follows (emphasis added):

Can a volunteer board member appear before the board on which he or she serves on behalf of private clients?

A public official, even one who serves as an unpaid volunteer on an appointed board is prohibited from acting as an agent for those clients for whom he or she provides consulting services before the board on which he or she serves. For example, a Historic Commission member who is an architect may not represent a client before the Historic Commission.

A public official always may, however, represent him or herself before his or her own board. For example, a conservation commissioner may seek an order of conditions in order to expand her home. She may not, however participate as a conservation commissioner in any determination or decision regarding her property.

This situation is quite different from a case of (a) advocating one's personal point of view, (b) on a matter before one's own Board, (c) where the member was forced to recuse himself or herself by virtue of a conflict of interest. For instance, as Commission Fact Sheet No. 6 indicates:

The conflict of interest law prohibits public employees, including elected officials, from participating (by voting, discussing, delegating or otherwise acting) in any matter that affects:

- * their own financial interests;
- * the financial interests of their immediate family members (i.e., the employee's spouse; and the parents, siblings and children of both the employee and the employee's spouse);
- * the financial interests of a private or "after-hours" employer, or anyone with whom the employee is negotiating prospective employment; or
- * any organization, either charitable or for-profit, in which the employee is serving as officer, director, partner or trustee. Note that state and county employees who have a conflicting financial interest must disclose that interest to their appointing authorities; municipal employees may simply abstain from participating in the particular matter.

These prohibitions are "intended to ensure that public employees are acting in the best interests of the citizens they represent, and are not pursuing their own self-interest or other private interests." As the Commission points out, under the law, "property owners are presumed to have a financial interest in matters affecting abutting and nearby property" (emphasis original). For this reason, "unless they can clearly demonstrate that there is not a financial interest, public employees may not take any action in their official capacity on matters affecting property that is near to or directly abuts:

- * their own property;
- * property owned by any immediate family members;
- * property owned by a private employer, or prospective employer; or
- * property owned by any organization for which the employee is an officer, director, partner or trustee.

The Commission uses a "four-part legal test to determine whether, in a particular situation, a person or organization would have a financial interest in an abutting or nearby property." A financial interest is presumed whenever:

- * their property directly abuts (i.e., it shares any part of a property line);
- * they are a "party in interest" under G.L. c. 40A (i.e., their property is directly opposite a street, public way or private way, or they are an abutter to an abutter within 300 feet of the property line);
- * they are a "person aggrieved" for the purposes of G.L. c. 131, the Wetlands Protection Act (see 310 CMR 10.04); or
- * the matter would otherwise alter their property value, rights, or utilization. For example, property owners are presumed to have a financial interest in zoning changes, variances, nearby subdivision or development approvals, and roadway, sewerage or safety improvements.

(Three statutory exemptions (not directly germane to our discussion) can, in certain instances, allow public employees to take official actions which would otherwise be prohibited.)

So let's assume that a developer files a special permit application for a substantial, controversial development abutting a Board member's property. Let's assume the public hearing is # 5 on the Board's agenda of 10 hearings on one night. Let's assume the Board member sits on matters 1-4; recuses himself from matter # 5; and returns to the Board table to sit on matters 6-10. It would clearly be acceptable for the Board member to follow the SJC's pronouncement: "Ordinarily, the wise course for one who is disqualified from all participation in a matter is to leave the room." *Graham v. McGrail*, 370 Mass. 133, 138 (1976). But let's say this particular Board member has other ideas: he recuses himself, walks down from the Board's podium, stands in line to speak in opposition to the project, announces that he is going to speak in his individual capacity only, and launches into an impassioned speech against the project, complete with a slide show, technical data, expert opinion, legal argument, etc. Is this permissible?

The Board member would point to the statement in Commission Advisory 88-01 which states, "Since acting on one's own behalf is not considered acting as agent, a municipal employee may always represent his or her own interests or points of view" (emphasis

added). The developer, on the other hand, would be understandably concerned with the appearance of impropriety if the Board member's impassioned plea in his "individual capacity" were to sway the Board against the project, where the Board member clearly enjoys a unique position with respect to the Board compared to any other speaker pro or con. (Conversely, if the recused Board member spoke in favor of the project, the developer might like it but other neighbors might be quite troubled - particularly if say the Board member advocated "I'm all in favor of the project, as long as you keep it as far from my property line as possible and as close to the neighbors' on the other side of the site as possible")

While the State Ethics Commission may not take enforcement action against (or even be overly troubled by the conduct of) the individual Board member in these circumstances, the Town would be understandably concerned about (a) being forced to expend legal fees to defend the integrity of a quasi-judicial decision of the Board against the developer's (or other neighbors') appeal claiming that it tainted by an appearance of impropriety, (b) ensuring that its public employees are acting in the best interests of the citizens they represent, and are not pursuing their own self-interest or other private interests in a potentially over-reaching manner, and (c) properly balancing the free speech rights of its citizens (including its Board members where appropriate) against the allegations of unseemliness in the Town's decision-making process.

Upon request, we would be please to research whether there is a definitive answer to the question whether the Board member's conduct is permissible or not under the State Ethics Act and decisions construing it. Even if the State Ethics Act does not expressly prohibit such conduct, however, the Town may determine to explore whether or not to adopt a stricter ethical policy for its public employees and officials. For example, the Town may want to investigate judicial codes of conduct to inform its standards of conduct for quasi-judicial decisions by its Boards. If so, we would be pleased to work with you in that regard.

Let me know how you would like to proceed.

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