

O'keeffe, Athena

From: Bockelman, Paul
Sent: Tuesday, October 15, 2019 12:25 PM
To: Griesemer, Lynn
Cc: Hanneke, Mandi Jo; O'keeffe, Athena; Ziomek, David
Subject: FW: Amherst Planning Board - Conflict of Interest
Attachments: disc-19-munic-financial-interest.pdf

The Planning Board is running into difficulty in achieving a quorum to vote on a particular project (proposed by Amherst College) and the conflicts of interest of two members of the Planning Board. This has been exacerbated by the recent resignation of one other Planning Board member.

Town Attorney Goldberg has offered one way to address this that would require one or both members to seek approval of an exemption which would require a vote by the Town Council. This may be something that could be added to the Town Council's agenda for October 21st or 28th.

See the opinion from the Town Attorney below.

I am sending this to alert you that this may be a request. No request has been received so far.

Paul

From: Lauren F. Goldberg <LGoldberg@k-plaw.com>
Sent: Tuesday, October 15, 2019 11:04 AM
To: Brestrup, Christine <brestrupc@amherstma.gov>
Cc: Joel Bard <JBard@k-plaw.com>; Bockelman, Paul <bockelmanp@amherstma.gov>; 'morrar@amherst.gov' <morrar@amherst.gov>; 'zomekd@amherst.gov' <zomekd@amherst.gov>; Shirin Everett <SEverett@k-plaw.com>
Subject: FW: Amherst Planning Board - Conflict of Interest

Chris, you have requested an opinion concerning issues involving the Conflict of Interest Law. In my opinion, the two Planning Board ("Board") members that received abutters' notices may only participate in the site plan review if they request a §19(b)(1) exemption and the Town Council votes to approve it. The Rule of Necessity is not available, as I will detail below.

Members of the Board are "municipal employees" under G.L. c.268A, the Conflict of Interest Law, and are subject to its prohibitions and restrictions. Section 19 prohibits a municipal employee from participating in a particular matter in which he, his immediate family members, or his business or employer has a "financial interest." This term is not defined but it applies to any financial interest, large or small and positive or negative. In addition, the State Ethics Commission has long held that there is a presumed financial interest if the particular matter involves property where the municipal employee is an abutter, an "abutter to an abutter within 300 feet," or if the matter would otherwise affect the employee's property value. This presumption can only be overcome by a certified appraisal showing no financial impact to the employee's property. Therefore, the two Board members that received abutters' notices are subject to the presumption and are prohibited from participating in the site plan review by §19.

As you have stated, the Ethics Commission holds that the so-called "Rule of Necessity" is only available to elected officials. The Rule only applies when a board lacks enough members to act on a matter due exclusively to other members' disqualification based on a conflict of interest. This typically requires a quorum to be disqualified, but where this site plan requires 5 positive votes, the Board would lack sufficient members if 3 members are disqualified. I first note that if two members are disqualified and then there is a vacancy, the Ethics Commission holds that the Rule is not available, because the lack of sufficient qualified members is not due only to conflicts. In addition, however, the Rule would not be available here because there is a mechanism for an appointed official in this situation to be approved to participate. Chapter 268A, §19 states that:

(b) 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.

Therefore, the two Board members (or either one of them) that received the abutters' notices may request a §19(b)(1) exemption from their appointing authority (Town Council) by making a written disclosure of the nature of the financial interest – in this case, they received an abutter notice for the Amherst College athletic fields project and the Ethics Commission finds this to be a presumed prohibited financial interest. The Town Council may then vote to approve the exemption, finding that the financial interests involved are “not so substantial” as to create a concern of bias on the Board members' part. I have attached the Ethics Commission's §19(b)(1) disclosure form that may be used for this purpose.

As you state, there are currently five Board members that may participate, while the other two are required to recuse themselves pursuant to G.L. c.268A, §19. Nonetheless, the two members may request that the Town Council approve a §19(b)(1) exemption for one or both members. Approval of the exemption is a discretionary decision for the Council, but in my opinion, it may reasonably approve these exemptions. If one or both of the members intend to seek the exemption, the Board may wish to open the Amherst College hearing on October 16 but then continue it, so that the members could seek to have the Town Council approve their exemptions at the Council's October 21 meeting.

If you have further questions, please let me know.

Lauren

Lauren F. Goldberg, Esq.

KP | LAW

101 Arch Street, 12th Floor

Boston, MA 02110

O: (617) 556 0007

F: (617) 654 1735

C: (617) 548 7622

lgoldberg@k-plaw.com

www.k-plaw.com

This message and the documents attached to it, if any, are intended only for the use of the addressee and may contain information that is PRIVILEGED and CONFIDENTIAL and/or may contain ATTORNEY WORK PRODUCT. If you are not the intended recipient, you are hereby notified that any dissemination of this communication is strictly prohibited. If you have received this communication in error, please delete all electronic copies of this message and its attachments, if any, and destroy any hard copies you may have created and notify me immediately.

From: Brestrup, Christine [<mailto:brestrupc@amherstma.gov>]

Sent: Friday, October 11, 2019 4:11 PM

To: Joel Bard <JBard@k-plaw.com>

Cc: Bockelman, Paul <bockelmanp@amherstma.gov>; Morra, Robert <morrrar@amherstma.gov>; Ziomek, David <ziomekd@amherstma.gov>; Shirin Everett <SEverett@k-plaw.com>

Subject: Amherst Planning Board - Conflict of Interest

Importance: High

Joel,

This is a separate topic from the one we spoke of earlier. It has to do with “Rule of Necessity” and it will come up at the Wednesday, October 16 Planning Board meeting. So it is pretty urgent that we have an answer.

The Amherst Planning Board, under the new Charter, now has 7 members. The Zoning Bylaw still requires an affirmative vote of 5 Planning Board members to approve a Site Plan Review application.

A Site Plan Review application has been filed for renovation of athletic fields at Amherst College. Two of the Board members are abutters to Amherst College property and have received abutters' notices. These two Board members also have spouses who work for Amherst College.

A third Board member has recently indicated her intention to resign from the Planning Board, but has not yet done so to my knowledge.

The question is, if the third PB member resigns and is not available to serve on the Amherst College case, can one of the two members (or both) who have the appearance of a conflict serve on the case in order to have the requisite number of members eligible to vote?

It appears that the "rule of necessity" is only available to "elected" board members. Our Planning Board members are appointed by the Town Council.

Please advise by Wednesday.

Thanks,

Chris

Christine M. Brestrup, Planning Director
Planning Department Town of Amherst

Town Hall 4 Boltwood Avenue
Amherst Massachusetts 01002
413-259-3145 brestrupc@amherstma.gov