MEMORANDUM

TO: New Members of Cape Elizabeth Boards and Commissions

FROM: Thomas G. Leahy, Town Attorney

RE: Right To Know Law/Conflicts of Interest/Bias

DATE: December 12, 2007

RIGHT TO KNOW LAW

Maine's "Right to Know" or "Freedom of Access" Law is set forth in 1 M.R.S.A. §401 *et seq.* The Legislature declared that "*public proceedings exist to aid in the conduct of the people's business,*" that "*actions be taken openly,*" and that the records of their actions be open to public inspection and their deliberations be conducted openly (1 M.R.S.A. §401).

This law applies to transactions of any functions by "*any board, commission, agency or authority of any county, municipality....*" (1 M.R.S.A. §402(2)).

➢ Records: Written or transcribed records must be available for inspection. The exceptions in this statute do not include legal opinions from the Town's Attorney. Therefore, you must assume they are generally available. Any member of the public may tape or film a public proceeding, subject to reasonable rules.

➢ Notice: Public notice must be provided if the public proceeding is a meeting of three or more persons. Notice must give "ample" time to allow public attendance and be disseminated in a manner calculated to notify the general public.

➢ Meetings: Meetings must be open to the public. This does not mean that the public must be allowed to participate. The public is allowed to participate if the public meeting is a public hearing, but not necessarily during other portions of the meeting and not during deliberations.

➢ Executive Sessions: These sessions can be called only after a board has commenced a public meeting; only by a publicly recorded vote of 3/5 of the members present and voting; and only if the motion states the precise nature of the business of the executive session and includes a citation of the statutory or other authority that permits such executive session. No vote or action can be taken in executive session. Deliberations in executive session may only be for the following matters:

(1) Certain described employment issues and then subject to specific limitations;

(2) At school board meetings, suspension or expulsion of a student;

(3) Consideration of the condition, acquisition or use of real property, but only if premature disclosure would prejudice the Town's bargaining position;

(4) Negotiation of labor contracts unless otherwise agreed to by the parties;

(5) Consultation with the Town Attorney concerning the rights and duties of the board; settlement offers; where such attorney's professional responsibility clearly conflicts with

the Freedom of Access Statute; or where premature disclosure would place the board at a substantial disadvantage.

(6) Discussion of information in records where access is prohibited by law.

(7) Discussion of approval of the content of examinations by a licensing body.

(8) Consultation between municipal officers and their code enforcement officer relating to a pending enforcement matter.

- E-Mail: Communications by electronic mail among board members raises two issues. First, are such communications covered by the Right To Know Law? Second, is such an e-mail a public record under the Law, subject to the right of an interested party or the public to inspect and copy? The answer to both questions is "yes." Conduct of public business of a board by e-mail is prohibited. Presumably, there is no notice to the public and no opportunity to observe such business. So, while a simple note confirming a time or place of a meeting, whether by e-mail or phone, would not constitute conducting business, any e-mail dialogue about a pending matter would. If there is no dialogue, but simply sending a report, such report must be introduced at the next meeting or immediately placed in the file. As to inspection and copying your e-mail communications, the public would have the right to do so unless such communications were otherwise confidential.

  Our highest court has stated that the Freedom of Access Law should be liberally construed and applied to promote its underlying purpose. Guy Gannett Publishing Co. v. University of Maine, 555 A.2d 470, 471 (1989). It has also held that public bodies will have the "burden of proof" that an executive session was lawful. Underwood v. City of Presque Isle, 715 A.2d 148 (Me. 1998).

- Training: Beginning July 1, 2008, elected officials with executive or legislative powers will be required to complete an approved training course covering the Right to Know Law (1 M.R.S.A. § 412). Newly elected executive or legislative officials must take the course within 120 days of taking office. Existing executive or legislative officials must take the course by November 1, 2008. The course should take no longer than two hours to complete. Although the new legislation only imposes the training requirement on elected officials who exercise "executive or legislative powers," the training may be beneficial for other board members as well. Those required to take the training must certify in writing or electronically to the Right to Know Advisory Committee that they have completed the training.

CONFLICTS OF INTEREST

By statute, the Maine Legislature has set forth a fairly narrow standard and rules for a financial conflict of interest (30-A M.R.S.A. §2605). Specifically, this statute provides that if the party has a 10% or greater ownership interest in the economic entity to which the contract or question relates, then such party is deemed to have a conflict of interest and the vote on the question and the contract, if approved, is voidable.

A member with a financial conflict should disclose it at the public meeting and then abstain from participation as well as from voting on the issue.

A vote is voidable, even if it would have passed without the tainted member's vote.

The above statute goes on to state, that "*[e]very municipal and county official shall attempt to*

avoid even *__the appearance__* *of a conflict of interest by disclosure or by abstention....*" (emphasis added) (30-A M.R.S.A. §2605(6)) Obviously, this statute casts a broader net.

Finally, the statute states that "*in their discretion, the municipal officers* [i.e., Town Council] *may adopt an ethics policy governing the conduct of elected and appointed municipal officials....*" (30-A M.R.S.A. §2605(7)). [Note: State law establishing Boards of Appeal also provides that issues of conflicts of interest shall be decided by a majority vote, excluding the member who is being challenged. (30-A M.R.S.A. §2691(2)(c))]

This latter provision is used from time to time to provide a procedure for having the board or body vote on a conflicts issue, but if a true conflict exists, then notwithstanding a vote allowing a member to participate, the vote will be voidable.

In addition to the above statutory standards for conflicts of interest, we have case law in Maine which sets forth the standard as follows:

> *Whether the town official by reason of his interest, is placed in a situation of temptation to serve his own personal pecuniary interest to the prejudice of the interests of those for whom the law authorized and required him to act...* (__Lesieur v. Inhabitants of Rumford,__ 113 Me. 317 (1915))

__BIAS__

Where the board or body is performing a quasi-judicial function, such as an evaluation of a land use proposal, against a set of standards set forth in an ordinance or Maine statute, then the issue of bias may arise.

A member related by blood or marriage to the applicant within the 6th degree according to civil law, or within the degree of 2nd cousin inclusive, is disqualified for what may be called a "family bias."

A more difficult bias to define or determine is where an interested party, such as an applicant, will not be given the required due process because a board member participates and votes notwithstanding he or she holds such strong feelings or prejudice for or against the applicant or project that he or she could not render an impartial decision.

The burden to establish the basis for disqualification in these cases is upon the party asserting bias.

If, from statements made or involvement with an applicant or project, it is very probable the member could not review the adjudicative facts objectively, he or she should step aside.

While difficult to define a disqualifying bias, as it relates to how a member feels about a person or project, clearly there reaches a point where a constitutionally protected right to a fair hearing would be denied if the member participated.

The 1994 case of __Planche v. The Inhabitants of Cumberland and Robert Benson__ is an example where the Maine Superior Court found "*the probability of a more subtle bias too high to be constitutionally tolerable,*" where the town manager's knowledge of, and involvement in, past actions and proceedings involving a police chief resulted in his bias or predisposition to prematurely accept the truth of the pending charge against the police chief. __Planche v. The Inhabitants of Cumberland and Robert Benson__ (Cumb. Sup. Ct., K. Lipez, Justice, Docket No. CV-93-252)

Ethics for Quasi-Judicial Boards

By Douglas Rooks

A cell phone tower in Manchester. A revaluation in Kennebunk. A rock quarry in Windham. All these seemingly routine municipal matters have led to significant concerns about the ethics or biases of public officials in the recent past, and sometimes even to threats and lawsuits.

Attorneys who deal with quasi-judicial municipal boards say that volunteer service on boards is no longer an informal or routine matter, and can lead to significant time and expense – not to mention headaches – for local government and its officials, particularly when important precautionary steps are not taken.

The legal advice attorneys now provide to towns emphasizes that what worked in the past, and even meeting the minimum standards of state law, may no longer be enough to prevent long-running verbal and legal battles. They also say municipal board members need to avoid not only legal conflicts of interest, but also any strong appearance that they might be biased in deciding a particular case. Stating a possible interest in a case, or recusing oneself when a conflict may exist, is often the right move, and should not be seen as an admission that an official lacks fair-mindedness, they say.

The lawyers cite cases where towns and cities that took steps to head off controversy early came out ahead, and where those that didn't found themselves in the midst of prolonged battles that caused hard feelings and may have undermined public faith in the board.

Ken Cole, an attorney with Jensen Baird in Portland, has spent many long nights with planning boards, boards of assessment review (BAR), and other panels that are not supposed to make policy, but simply interpret and apply the rules as written. Even when boards follow all the procedures, it sometimes isn't easy, particularly when the stakes are high.

"One of the towns we're served for a long time is Cumberland," Cole said. "At one time, we might have gotten one or two calls a month from the town office. Now, we get calls every day."

LEGAL UNCERTAINTIES

Curtis Webber, a partner with Linnell, Choate and Webber in Auburn, says that controversies over municipal procedures have certainly increased over the years, although the condition of Maine law may be responsible for some of the problems. For one thing, the relevant statutes are not very helpful in the kind of disputes that are likely to arise as land use and development rules become increasingly complex and affect larger numbers of abutters and, potentially, involve millions of dollars in investment.

While the statute books contain literally dozens of references to conflicts of interest, the definitions that govern municipal conflicts of interest are contained in Title 30-A, Section 2605, which was adopted in 1987. It covers "municipalities, counties and quasi-municipal corporations" and, in paragraph four, says, "In the absence of actual fraud" officials "deemed to have a direct or indirect pecuniary interest" in contracts must disclose that interest and abstain from voting on the proposed contract. It also specifies that 10 percent or greater stock ownership in a company creates a potential conflict.

As attorneys like Curtis Webber point out, the statute is clear but not very helpful. Most controversies over alleged bias in municipal officials do not involve contracts or direct financial gain. Instead, as in the hot-button cases occurring recently across the state, they revolve around suspicions about what being an abutter or neighbor might do to an official's judgment, whether a revaluation was performed correctly, or whether officials will bow to public sentiment rather than apply the law. Figuring out how to proceed in these instances is, well, tricky.

In addition to the statute's omissions, Webber said, there are few Maine Supreme Court cases dealing with conflict of interest and thus few precedents showing how the law should be applied. In fact, he had to go all the way back to 1983 for a relevant citation, *Mutton Hill Estates v. Town of Oakland*. That case involved meetings between parties to a planning board application before it was formally considered – a mistake Webber believes few municipal officials would now make. Most controversies involving planning and zoning boards have raged and gone away without providing much help to future decision-makers.

Perhaps recognizing the inexact nature of many conflict charges, the municipal conflict of interest statute was amended in 1989, two years after its adoption. The next-to-last paragraph of Sec. 2605 now says, "Every municipal and county official shall attempt to avoid the *appearance* of a conflict of interest by disclosure or by abstention." (Emphasis added.) And finally, it states, "In their discretion, the municipal officers may adopt an ethics policy governing the conduct of

Doug Rooks is a freelance writer from West Gardiner and regular contributor to the Townsman.

elected and appointed municipal officials."

With the law expressly suggesting that conflicts of interest are as much a matter of perception as actual definition, the recent controversies may be as useful a guide to the subject as any.

CHAIRMAN AS ABUTTER

In Manchester, a cellular tower builder submitted an application in 2006 to the planning board, one of hundreds filed across the state in recent years. As it happened, the board chairman was an abutting landowner, and his role rapidly became the focus of contention between the parties – as well as front-page news in the local daily paper.

The attorney for the applicant requested that the chairman recuse himself because of potential bias, but the chairman refused and secured an opinion from town counsel backing his position. The controversy continued, however, with the applicant's attorney charging, in essence, that her client had been forced to jump through far more hoops than necessary during the planning board's preliminary review.

The board of selectmen then got involved, and, in an unusual move, asked the planning board chairman to step down from the case, which he did.

To Curt Webber, this was a relatively clear-cut instance where town officials should avoid the appearance of conflict. "An abutter can have a fairly direct financial interest in an application like this one," he said. "A cell tower, depending on its location, could reduce the value of neighboring properties." In Webber's view, the chairman might indeed have had a financial stake in the outcome and, in any case, could certainly not avoid the appearance of conflict.

The trouble, he said, is that an official has only one opportunity to recuse him – or herself, which is before any hearings on an application take place. By the time a case becomes publicized, or featured in the newspapers, it's too late to step down. This is why he advises his clients to declare an interest in any project due to come before a planning or zoning board "even if they think it's minor or inconsequential." That way, if questions are raised later, the official avoids any suspicion of improper dealing. "It's not that big a thing to step down from a particular vote," he said. "It doesn't affect overall service on the board." Most important, he said, such actions in advance of controversy maintain public confidence in the integrity of the board, which is probably its most important asset.

PERFECT STORM FOR REVALUATION

When Dan Robinson became town assessor in Kennebunk in 1999 – succeeding Barry Tibbetts, who is now town manager – he knew there was a storm brewing on the horizon. The coastal town, like most of its neighbors the focus of a booming real estate market, had not had a full-scale revaluation since 1979. Property values had not only skyrocketed since then, but had also shifted sharply toward desirable shorefront lots. A shorefront property valued at $300,000 back in 1979 might be worth $2 million two decades later, and the town braced for a whole lot of taxpayers unhappy with their new assessments.

The revaluation was done in-

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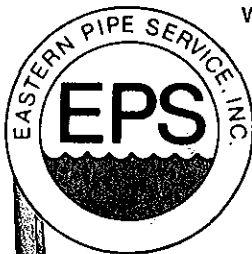

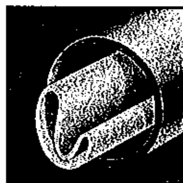
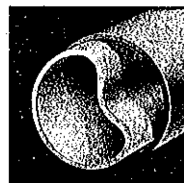
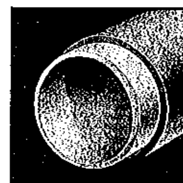

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house, and was completed in 2003. As Robinson expected, there were lots of phone calls. From 6,000 tax bills, there were 500 requests for abatements, and 80 appeals to the BAR. Of the appeals, Robinson said, "95 percent of them involved waterfront property."

The revaluation also spawned a number of Superior Court filings by taxpayers unhappy with the town's decision on their appeals, and Kennebunk was upheld on all matters relating to the actual value of assessments. One case has just been adjudicated by the state Supreme Court where the plaintiff prevailed, though Robinson said it involved technical issues that won't affect the valuations of any properties.

What he did not expect was the sheer level of animosity created by the reassessment. "There were threats," Robinson said, "and since I live in town, the police were watching my house." One contract employee, who lived in Massachusetts, got a call from police there saying that "someone from Kennebunk is going through your garbage."

Although things have since settled down, Robinson still seems to be figuratively shaking his head: "None of this was necessary. No assessor gains anything through the value put on a particular property."

Nonetheless, the town weathered the legal challenges in good shape, according to Attorney Ken Cole, in part because it followed his advice to provide separate counsel for the assessor and the board of assessment review. Cole's firm represented the assessor, while the board worked with a different law firm. "You can't really claim to be neutral when you're representing both sides of the case," he said — in this instance an appeal to the assessment board of a valuation supplied by the assessor.

Cole notes that state law does not require towns to do this, and in smaller municipalities there may be resistance to the expense of hiring an additional law firm. "In the long run, you'll probably save money," Cole said. "Imagine what it would be like if we were trying to provide advice to both sides concerning all those disgruntled taxpayers in Kennebunk. It was like a perfect storm for appeals."

A CHANGING LANDSCAPE

The rock quarry in Windham was a case in which Cole was personally involved. "I must have spent a dozen evenings between April and December (of 2006) attending many-hour meetings in Windham," he said.

The issues raised were in many respects like those brought up in Manchester. "One of the town councilors was an abutter, and several others lived nearby," he said. While the project, proposed by Peter Busque (doing business as Windham Properties LLC), was frequently described in the press as a "gravel pit," the application for a site off Route 302, the town's busiest road, involved rock crushers and the noise such operations necessarily produce, Cole said.

The application was turned down by both the planning board and the zoning board of appeals. Windham Properties is now suing in Cumberland County Superior Court.

As for the town councilor who is an abutter, he took Cole's advice and stepped down. "He was happy to do so," Cole said. "Why would you want all the grief that comes from having people suspect your judgment? Who needs it?"

The prevalence of controversial planning and zoning cases, particularly in the southern Maine area where Cole has most of his clients, can be attributed to one big factor: intense

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growth and the resulting pressure on neighborhoods and natural resources. Referring to his own lengthy service on Portland's planning board, he said, "We had a lot of difficult decisions because a lot of the sites were marginal. The good land has already been built on. What you're dealing with lately are a lot of sites with problems."

AN OUNCE OF PREVENTION

Controversy concerning the role of volunteer, unpaid boards reviewing planning, zoning and assessment decisions seems certain to grow, not diminish. So what advice do the attorneys have for citizens dauntless enough to accept these appointments?

First, when in doubt, recuse, or at least declare an interest. Whether one feels a sense of bias or not, the official is always going to lose out when his or her conduct becomes the focus of discontent. "It's always going to come from the losing side," Webber said, "but you know it's going to be there, so you might as well anticipate it."

Second, hire separate counsel for boards performing separate functions. The attorney defending a code enforcement officer's decisions, Cole said, should not be the same one representing the zoning board's review of those decisions. The Kennebunk cases make it clear that assessors and review boards are in the same category.

Third, be aware of the ethics laws, and of the standards behind them. The Legislature is currently reviewing the definition of conflict of interest for legislators, based in part on a case that led to charges that a lawmaker was doing the bidding of his employer. The incident also led to the resignation of the then-commissioner of the Department of Environmental Protection.

No comparable review is apparently in the offing for the municipal conflict statute, so town and cities will have to make due with the current "unhelpful" definition and only a handful of legal precedents. In other words, they will have to strive to avoid not only conflicts of interest, but also the appearance of conflict – which in towns small or large can be very much in the eye of the beholder. [mt]

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Conflicts *In* Interest

By John Alfano and Roger Moody

There is a distinct difference between the legally defined "conflicts of interest" in state statutes and in municipally adopted ordinances and policies, and "conflicting interests". The two are separate and distinct concepts. When charges of a "conflict of interest" are levied in a municipality, often the concern is based on a "conflict *in* interest". Conflicts *of* interest are narrowly defined, and arise out of historically long-standing concerns about pecuniary or financial gain wherein a public officer or official might find a financial advantage from the public position they hold. By contrast, "conflicts *in* interest" or "conflicting interests" are much more prevalent and often disputes where mediators and facilitators are used to help resolve the conflict.

Conflicts *in* interests are disputes between individuals and among parties to a dispute. The parties have a 'horse in the race' that they want to see win. To address such conflicts, professional mediators and facilitators are available to help the disputing parties find the common ground. It is not their duty or responsibility to help one party at the expense of the other. They may suggest ideas to resolve the dispute. But they may not manipulate the situation so that the outcome favors one party at the expense of the others.

Facilitation is the process of conducting a discussion or series of discussions wherein the parties arrive at their own conclusions and agreements. The facilitator is a professional neutral who assists in maintaining civility among the parties, and offers an even-handed approach which allows issues to be addressed and understandings and solutions to be developed by the disputing parties in a structured process. By contrast, mediation can be less structured, with the parties meeting together or meeting separately, to address the issues that are blocking them from settlement. The mediator may offer suggestions to bridge the gaps to an agreement. In both processes, the disputants work with each other to find their solution to the problems, with much less involvement from a facilitator than from a mediator who may be more active on the issues.

Conflicts *in* interest may occur, for example, between town managers and councilors or selectmen, supervisors and employees, special purpose district members, schools and municipalities, and developers and neighborhoods, and can be successfully addressed through mediation or facilitation by seasoned professionals.

Municipal officials should be aware that there is protection for "neutrality" when they contract for facilitation or mediation services. For mediation and facilitation professionals, conflict *of* interest, in the traditional sense, may occur, when the mediator or facilitator has a personal or a professional relationship with the disputing parties or directly may benefit from the result. Conflicts *in* interest occur when mediators or facilitators have an interest or a stake in the outcome or they have a bias toward one parties' goals and objectives. Their professional association's written Standards of Conduct, however, require impartiality, and freedom from favoritism, bias or prejudice.

How we define those interests is difficult in many cases. Is it a per se conflict of interest for mediators and facilitators to take on governmental disputes within their own town? There is a fine line that mediators and facilitators walk when taking on those disputes. The answer is easy when the result will have a direct effect upon them, such as a zoning dispute where they own property. The line becomes more obscure when the outcome of the dispute has a tangential effect, such as a labor dispute or a dispute among governmental officials or between the council and school board members.

For example, a mediator was asked to mediate a dispute between two towns in a school union, where one town claimed that it was carrying too much of the financial burden. The mediator accepted the job even though his spouse was an employee of the school district, because the outcome of the dispute would not alter his spouse's income, which was set by collective bargaining, and the parties were disputing over how much each would pay for a school budget that was already set. The distribution of money within the budget was not at issue.

The local knowledge of mediators and facilitators can assist municipalities to settle disputes more quickly, and with a lot less fuss.

Experienced facilitation and mediation professionals are available throughout Maine. The best way to reach them is through the Maine Association of Mediators, whose website is www.mainemediators.org

John Alfano is president of the Maine Association of Mediators and Roger Moody, a former Camden town manager, is its executive director.