



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. [\(u\)](#)

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.

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FOOTNOTE

¹Note, 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.

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