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May 18, 2009

BY HAND DELIVERY

Ms. Pamela Dolby
Town Administrator
Edgartown Board of Selectmen
P.O. Box 5157
Edgartown, MA 02539

RE: Ethics Question

Dear Pam:

You have asked me whether it is permissible, under the State Ethics Act (G. L. c. 268A, the "Act"), for a member of the Community Preservation Committee ("CPC Committee") or the Affordable Housing Trust Committee (the "Trust Committees")¹ to vote or participate in a decision to grant, or to recommend the grant of, public funds to a non-profit entity on which the Committee member serves as a board member. My answer is "no", provided that the non-profit entity seeking public funds is substantially engaged in business activities, as that term is defined by the State Ethics Commission (the "Commission") and as set forth below. My reasoning follows.

Section 19(a) of the Act prohibits:

"a municipal employee [from] participat[ing] as such an employee in a particular matter in which . . . a business organization in which he is serving as [a] . . . director . . . has a financial interest"

¹ There are actually two committees: the Affordable Housing Committee and the Municipal Affordable Housing Trust Fund. We refer to both of these committees as the "Trust Committees".

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Members of the CPC and Trust Committees are municipal employees for purposes of the Act.² Whether a particular non-profit organization is considered a "business organization" for purposes of § 19 hinges on whether it is substantially engaged in business activities. The Commission has historically treated "[a] wide variety of non-profit organizations . . . as business organizations for the purposes of G. L. c. 268A . . . [and] ha[s] construed the term 'business organization' broadly to include non-profit organizations in general and, more narrowly, to include non-profit organizations that 'conduct business,' such as 'the buying and selling of commodities or services.'" Conflict of Interest Opinion 07-02, at 2 (footnotes omitted.) In Ethics Opinion 07-02, the Ethics Commission ruled that the Vineyard Conservation Society was not a "business organization" within the meaning of G. L. c. 268A because its "educational, advocacy and land preservation activities . . . do not fall within the common and ordinary meaning and usage of the term 'business' . . . [and] is neither organized for the purpose of engaging in commerce or trade for gain, benefit, advantage or livelihood, nor is it substantially engaged in the provision of goods or services for payment or fees." Id. at 5 (footnotes omitted.)

In the VCS opinion, the Ethics Commission articulated the following four part test to determine whether a non-profit entity is a "business organization":

"(1) whether the organization's activities involve commerce, trade, the sale of goods or the provision of services in exchange for fees (or other compensation) or any other activities, including professional activities, that are commonly understood to be business activities; (2) whether the organization's business activities are engaged in for its support or profit; (3) whether the organization's business activities are continuously or regularly engaged in; and (4) whether the organization's business activities constitute a significant rather than

² G. L. c. 268A, § 1(g). We note that, pursuant to G. L. c. 44, § 55C, the Trustees of the Municipal Affordable Housing Trust Fund are deemed to be special municipal employees for purposes of the State Ethics Act. This designation has no impact on our opinion.

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de minimis portion of the total activities of the organization. . . ."

As a general matter, it is likely that any non-profit seeking public funds to assist with a land acquisition, a construction project, or similar effort - that is, a project involving the procurement of housing units in the marketplace - is sufficiently engaged in business activities to meet the criteria set out in the VCS opinion.

Assuming the non-profit organization is a business organization for purposes of the Act, then, under § 1(j), "participation" means to "participate in agency action or in a particular matter personally and substantially . . . through approval, disapproval, decision, recommendation . . . or otherwise." (Emphasis added.) Section 1(k) of the Act further defines the term "particular matter", in part, as follows:

"[A]ny . . . application, submission, request for a ruling or other determination, contract . . . determination [or] finding" (Emphasis added.)

In an analogous situation (see EC-COI-88-4), the Ethics Commission ruled that a municipal official may not participate in the municipality's decision to contract (by selling certain products) with an organization on which they serve as a member of the board of directors. A later Ethics Commission opinion, EC-COI-98-5, similarly held that a School Committee member was precluded, under § 19, from even signing schedules of accounts payables, which schedules included payments to a non-profit on which the member sat a board member.

Based on my analysis of the referenced statutory texts and opinions of the Ethics Commission, it is my opinion that a member of the CPC or Trust Committees is barred from participating³ in any matter in which either Committee decides

³ The Committee member should simply excuse him or herself from the meeting and leave the room during the discussion and vote, and that fact should be noted in the minutes.

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to award, or to recommend the award of, public funds⁴ to a non-profit on which the Committee member sits as a board member, unless the non-profit entity is not a business organization under the guidelines issued by the Ethics Commission.⁵

It is also my view - confirmed by the Ethics Commission - that such a Committee member is similarly conflicted, and should not participate in, the decision-making process for a competing applicant, as that would be tantamount to direct participation in a particular matter in which an organization he or she serves has a financial interest.

Please call with any questions.

Very truly yours,



Ronald H. Rappaport

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⁴ This includes Community Preservation Act funds or funds held by the Trust Committees.

⁵ Under Section 19(b)(1) of the Act, the appointing authority of a committee member may, after full disclosure, "waive" the conflict by making a written determination the Committee member's "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" There is no cognate provision for elected officials.

The members of the Trust Committees are appointed by the Board of Selectmen. See also G. L. c. 44, § 55C(b). Under the Community Preservation Committee By-law (the "CPC By-law"), the CPC is comprised of specifically enumerated members of other boards and commissions - designated to serve on the CPC by their respective boards and commissions - most of which are elected to their designating board. The Ethics Commission advised us that CPC members who are elected to the board or commission from which they are designated under the CPC By-law are treated as elected officials and, therefore, are not eligible for a waiver.