

TOWN OF DERRY

Town Council Special Meeting
Derry Municipal Center

July 11, 2006
Tuesday 6:30 p.m.

Members Present:
Chairman Chirichiello
Councilor Reisdorf
Councilor Ferrante
Councilor Bulkley
Councilor Fairbanks
Councilor Coyle

Staff Present:
(none)

Town Administrator Russ Marcoux
Town Clerk Denise Neale

Called to Order at 6:30 p.m.

Salute to the Flag, Notice of Fire Exits & Handicap Access

Roll Call Present: Fairbanks, Reisdorf, Coyle, Bulkley, Ferrante, Chirichiello

Agenda

Selection of a Council replacement for the At-Large vacancy for the term that expires March 13, 2007.

Councilor Chirichiello stated that there were eight candidates; however one letter was received after the deadline and that candidate was informed it would not be accepted.

Each candidate will be given 6 -10 minutes to present their experience and why they should be appointed by the council.

Chairman Chirichiello addressed the council regarding discussion on the new councilor being requested not to run in the next regular election for this seat as it would give an advantage to this candidate.

Councilor Coyle personally did not feel it was appropriate to give an advantage to anyone. "It is fair to ask the candidate not to run."

Councilor Ferrante expressed that the newspaper and fellow councilors she'd spoken to agreed with Councilor Coyle.

Councilor Reisdorf had no opinion

Councilor Bulkley stated that he didn't believe the council could hold the candidate to this agreement as there are no term limits or laws that would preclude the candidate from doing this. There's no way to enforce.

Councilor Fairbanks agreed with Councilor Coyle and Ferrante, however she would like it

clarified before any voting would take place for the candidate. Either option should be “no strings attached” or honor a “gentleman’s agreement” by not running for election.

Chairman Chirichiello has agreed with not holding the candidate to the agreement not to run.

Motion by Councilor Coyle: To ask any candidate selected, under a “gentleman’s agreement” not to run in the next annual election.

(seconded Councilor Ferrante)

Vote 4-2-0 (Bulkley, Chirichiello)

In order by list candidates addressed the council

Paul Hopfgarten – reserved his right to decide on the “Gentleman’s Agreement” until when he was chosen. He has had nine years experience on the Town Council, has recently completed his first year as a State Representative. Has many years experience with other Town and School boards and committees.

(Council had no questions for Candidate)

Patricia Dowling – Has been a citizen of the Town of Derry since 1964. Has owned her own Real Estate business been involved with the Town budget committee and has also been a State Representative for 14 years. She has worked on large budgets within the state. Was appointed to the Judicial Ethics committee. Currently Vice Chair of the Criminal Justice & Public Safety Committee. Was involved in the new Pedophile & Sex Offender Bill. Does not plan on running for State Rep again. Is involved in community boards and committees. Has also taught business classes. Will not vote based on a personality but rather on principle and policy.

Councilor Coyle question what Ms Dowling’s feeling was on the “Gentleman’s Agreement”. Ms Dowling replied she had no problem adhering to the request.

Councilor Coyle asked what District Ms Dowling was in.
Ms Dowling is in District 4.

Jim MacEachern – Served on the Council for past nine years until recently. Addressed question on “Gentleman’s Agreement” has no problem living up to this agreement. Spent time on other various boards and committees and is experienced with the town budgeting and capital planning. He has also kept up to date on issues presently being worked on.
(Council had no questions)

Joseph DiChiaro, Jr. – Has lived in Derry 10 years and has not been involved in the town prior to applying as Council candidate. Has no problem with not running in next election. Has been watching the council and feels they need a calming influence. Experience in City of Los Angeles as PW Rep, Certificate in Public Works, and went to Private Practice. Has seen both sides of the issues. Has worked for the Federal Government in environmental and wetlands issues. Then went to work for State of California and has a sense of liabilities to cities and towns. Feels that a new face is better than recycling politicians. The town needs fresh Ideas and the new Councilor should not be affiliated with either organization.

Councilor Coyle asked what district Mr. DiChiaro is in?
Mr. DiChiaro is in District 4.

Michael Gill- Has lived in Derry for 30 years. Wanted to commend Jack Dowd for his services to the town over the years. Disagrees with council for asking for a "Gentlemen's agreement. His experience includes past Chairman of Derry Housing, has worked throughout the Town with various committees. Believes bonding should be voted upon by citizens of Derry. Presently is a Trustee of the Trust funds.

Frank J. Mazzuchelli – was not able to be there. His name has been removed.

Carl V. Accardo - 31 Olsen Rd, E Derry for 12 years. Summarized his personal, professional and entrepreneurial experiences. His entrepreneurial experiences bring with him small business owners concerns. These experiences have given him the ability to spot opportunities. The town has done better in defining and administration. Will work for building and promoting a pro business environment to aid old businesses as well as new ones. He is active in his children's education, was the Town Administrators designee for a brief time and has sat on the Planning Board.

Councilor Coyle asked how Mr. Accardo felt regarding the "Gentlemen's Agreement"? Mr. Accardo replied that he agreed that it would be an unfair advantage.

Council Discussion

Chairman Chirichiello was very proud that 7-8 people came forward for this.

Councilor Ferrante was happy with the positive ness of all the candidates and the feedback.

Councilor Coyle wanted to tell everyone they'd make a fine candidate. He feels the council needs a candidate that would bring the council together.

Councilor Bulkley thanked the candidates for coming and was happy to see new faces.

Councilor Reisdorf thanked everyone and wants the candidates to look into other boards the town has.

Councilor Fairbanks reiterated what everyone has already said. Wants to take advantage of the candidate's fresh face.

Councilor Coyle would like to go with the least political person such as Mr. Accardo.

Councilor Ferrante and individual stated vote principle and policy. This is important. Ms. Patricia A Dowling would bring us together. Councilor Ferrante nominated Ms. Dowling.

Councilor Fairbanks would like to see fresh views, Mr. Accardo stated he would like to bring a new experience to this process.

Chairman Chirichiello agreed that Mr. Hopfgarten and Mr. MacEachern should not be appointed.

Motion for Carl Accardo by Councilor Coyle (second Councilor Fairbanks)
Vote: 2-4-0 (Councilor Bulkley, Ferrante, Reisdorf, Chairman Chirichiello)

**Motion for Patricia Dowling by Councilor Bulkley (second Councilor Ferrante)
Vote: 5-1-0 (Councilor Fairbanks)**

Council took a brief Recess

Agenda

Discussion on the FY 2006 Budget provision for the funding provided for the Derry Economic Development Corp

**Councilor Coyle motioned to open the letters from the Attorney's to be read to the public (second Councilor Fairbanks)
Vote: 6-0-0**

Chairman Chirichiello asked Town Administrator Marcoux to read the Attorney's opinions to the Public

Firms:	(Attachment A)	Boutin & Altieri	Attorney Brenda Keith
	(Attachment B)	Devine Millimet	Attorney Daniel J Callaghan
	(Attachment C)	Boutin & Altieri	Attorney Ed Boutin

Councilor Reisdorf asked since the town has not expended the monies he would like to motion this to another council meeting. Possibly October.

Councilor Bulkley asked that this be agendize at a September meeting to allow the DEDC and the Town Administrator time to come up with some kind of an agreement before the council making decision. [*Scheduled for Sept. 19*]

Councilor Coyle stated economic development is important to this town. It is time to hire someone in-house and remove the politics from this position. Then made a motion to amend Councilor Reisdorf's motion and add freezing of the funding to the DEDC.

Councilor Ferrante agrees with Councilor Reisdorf, Bulkley and Coyle who spoke on the DEDC issue and would like to table this until the new Councilor Pat Dowling can be brought up to speed.

Councilor Fairbanks wanted to point out that the DEDC had the opportunity to confer with Town Administrator Marcoux before hiring a new director and they did not.

Chairman Chirichiello will be looking for a recommendation from Town Administrator Marcoux and would like to make sure he is comfortable whether it is working with the DEDC or hiring internally since economic development has been required as part of Town Administrator Marcoux duties.

Councilor Bulkley made the motion to agendize the DEDC discussion for the September 19th meeting as a public hearing, with Council discussion to follow. (Second by Councilor Reisdorf)
Vote 6-0-0

Chairman Chirichiello amended the motion by adding to freezing the funding until discussion

on September 19th, 2006 meeting. (Second by Councilor Coyle)

Vote 6-0-0

Chairman Chirichiello asked for agreement among to the Councilors to have the Town Administrator continue discussion with the DEDC as well as other options in-house or contracting on Economic Development.

Motion to move into a Non Public by Councilor Coyle, second by Councilor Ferrante.

Vote: 6-0-0

**Town Clerk Recording
Denise Neale**

Approved:_____

BOUTIN & ALTIERI, P.L.L.C
Attorneys at Law

(Attachment A)

Brenda E. Keith

COMMUNICATION

ATTORNEY-CLIENT

PRIVILEGED

June 22, 2006

Russ Marcoux, Town Administrator
Town of Derry

14 Manning Street
Derry, NH 03038

Dear Russ:

You have asked whether Jack Dowd's appointment by the Derry Economic Development Corporation ("DEDC") as its Executive Director ("E.D.") violates section 5.11 of the Town Charter. Jack resigned his Council position on June 20, 2006. The DEDC is a registered New Hampshire nonprofit corporation. The Town of Derry is a municipal corporation. The Town of Derry does not have any ownership interest in the DEDC and, therefore, the two are separate entities. Therefore, Jack Dowd has not violated section 5.11 of the Town Charter.

The Provisions states:

SECTION 5.11 Town Councilors - Incompatible Offices.

Except as otherwise provided in this Charter, members of the Town Council shall not hold any other office or employment with the town. Former members of the Town Council shall not be eligible for appointment as a compensated Town officer or employee until one year after the expiration of their service. (emphasis added)

I have examined both the Charter and the Code to find a definition of "town officer" and find, that these two documents are generally speaking about Town Councilors, Town Clerk, Treasurer, etc. Under the Code of the Town of Derry, section 5-6, Community Development is an official department of the Town and the Department Head is the Community Development Director. Chapter Five of the Code sets out, e.g., the powers and duties of department heads, appointment procedures for department heads; removal and compensation, etc. The position

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ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Russ
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June 22, 2006
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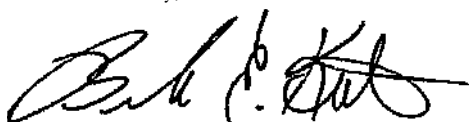
described in the Code is the Town's Community Development Director and most certainly would be covered by the Town's Charter Provision §5.11. (Has this position been abolished?) In today's case, if Jack Dowd was appointed a department head actually employed by the Town of Derry that would be a violation of §5.11.

The Town does have the authority to contract with other entities, including private entities, to provide contract services to the Town, and indeed has done so in the past. (Examples: snowplowing services, secondary education (Pinkerton, as to the School District), and some recreational services.) Unless specifically prevented by statute (e.g., the welfare function), municipalities may contract for outside services. As to economic development, it appears to me that this is at the Town has done or intends to do-contract with a private entity to provide the Town with economic development services. The Town of Derry would not contract with the DEDC and pay for D C provided services and employ the DEDC' Executive Director to act as the Town's Economic Development Director. (Although the Town could have, I suppose, ~ y hired the DEDC' E.D. as a part time employee of the Town whose time would be shared or divided with the DEDC' employment of the same person-but this is not the arrangement the Town has made.) Because today Jack Dowd is not an employee of the Town of Derry, but an employee of the DEDC, and because the two entities have separate legal corporate existence, by the clear language of § 5.11 of the Charter, there is no violation.

I also understand that some councilors have asked about ethical violations. I only have a few excerpts from the minutes. You, or the Council, should closely examine the minutes to see if there was any vote taken that could raise a conflict question. I cannot tell from examining the minutes when votes related to the Department of Community Development or to the DEDC position. If Jack Dowd knew, at the time he voted on any of these funding issues for DEDC, that he was leaving the Council to accept the E.D. position, then I expect you would ask for further legal advice. Specifically, the Town should examine the issue as to the legality of the votes under the Winslow v. Holdemess case.

I trust that I have answered your initial question, but I believe you may need additional advice once you examine the minutes to answer the questions I have posed

Sincerely,



Brenda E. Keith

DEVINE MILLIMET

ATTORNEYS AT LAW

June 23, 2046

DANIEL J. CALLAGHAN 603.645.5501 DCALLAGHAN@DEVINEMILLET.COM

(Attachment B)

Russell R. Marcoux Town
Administrator Town of Derry
 14 Manning Street Derry, NH 03038

Re: ATTORNEY CLIENT PRIVILEGED COMMUNICATION Possible violation of **Section 5.11** of the **Town Charter**
Dear Mr. Marcoux:

You had us to provide an opinion regarding recent resignation of a councilor from the Town Council and his acceptance of the position of Executive Director of the **Derry Economic Development Corporation (DEDC)**, to determine whether the circumstances may be in violation of Section 5.11 of the Town of Deny Charter (the "Charter").

You have advised us of the following facts:

1. Jack Dowd was a member of the Town Council until his resignation on June 20, 2006.
2. Subsequent to June 20, 2006, DEDC hired Mr. Dowd to serve as executive director of DEDC.
3. During the fiscal year budget process, the Town Council requested a hiring freeze for the fiscal year. As a result you created an option to find a position of economic development director by providing \$60,000 to DEDC it's the understanding that the

executive director of DEDC would provide economic development services to the T o w n .

4. You drafted a job description for the position and you and Town Council expected that you would participate in the hiring process with DEDC. You did not participate in the interviews or selection of the executive director of DEDC.
5. The Town has not expended the \$60,000.

DEVINE, MILLIMET	lit AMHERST STREET	T 603.664.1000	MANCHESTER, NH
a BRANCH	MANCHESTER NEW HAMPSHIRE	F 603_664.8547 DEVINEMILLIMET_COM	ANDOVER, MA CONCORD, NH
PROFESSIONAL ASSOCIATION	03101		NORTH HAMPTON, NH

Russell R Marcoux June 23, 2046
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Under Section 5.11 of the Charter, former members of the Town Council "shall not be eligible for appointment as a compensated Town officer or employee until one year after expiration of their service." As executive director of DEDC, W. Dowd is neither an employee nor officer of the Town. Therefore, his employment by DEDC may not violate the express provisions of Section 5.11 of the Town Charter. However, in light of the specific facts presented herein, the retention of W. Dowd by DEDC may implicate the policies and intent underlying the provisions of Section 5.11 of the Town Charter. Based on the foregoing, we recommend that the Town Council exercise its authority under Section 5.9 of the Charter and hold a public hearing on the issue.

Please *contact me if you have any* questions.

Very truly yours,



Daniel J. Callaghan

BOUTIN & ALTIERI, P.L.L.C. (Attachment C)
Attorneys at Law

Edmund J. Boutin

**ATTORNEY-CLIENT
PRIVILEGED COMMUNICATION**

June 27, 2006

Russ Marcoux, Town Administrator
Town of Derry
14 Manning *Street*
Derry, NH 03038

Dear Russ:

Brenda showed me the documents relating to Jack Dowd's appointment as Executive Director of the Derry Economic Development Corporation. Brenda issued a preliminary opinion that this appointment does not violate Section 5.11 of the Charter. Her analysis is that the Executive Director is not a Town employee. This is so because the DEDC is a separate Chapter 292 corporation.

I have asked some hard questions about whether or not it matters that the Town provides some funding to DEDC. Part of the reason for those funds appears to be that some of the Executive Director's time will be devoted to Economic Development for the Town, reporting to the Town Administrator. This sounds suspiciously like employment to me. However, the two separate entities preclude a legal conclusion that this role is "employment", within the meaning of Section 5.11 of the

Charter, prohibiting former members of the Town Council from appointment as a compensated Town officer or employee until one year after the expiration of their service.

I then looked at the minutes relating to DEDC funding. I notice that there was discussion of line item 330 on April 20, 2006. The minutes do not disclose anything other than that this line item contains DEDC funding, among other things. Notes of the meeting taken by you (Russ) indicate that the Council made a specific decision not to have an Economic Development Director and to provide funding to DEDC for the contract use of their services. On May 2, 2006 it appears that the Town Council confirmed this decision. There is a minute entry of a motion to table additional funding for an Economic Development Director. The motion was seconded, but

Russ Marcoux, Town Administrator June 27, 2006

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the minutes do not show that there was a vote. I am assuming that there was, and this should be confirmed. I am also assuming that, if asked, Councilor Bulkley would confirm that this motion effectively eliminated having a Town employee, Economic Development Director. The May 9, 2006 minutes of the public meeting, a workshop, indicated that there was discussion of providing \$60,000 "for an Executive Director that would also act as the Economic Development Director for the Town." I can only read this language in connection with the previous votes. That is, the Town Council did not want to employ an Economic Development Director, but wanted to use the DEDC on a contract services basis. If my readings were correct, Section 5.11 of the Town Charter would not be violated by Mr. Dowd's employment by DEDC.

Having said this, I am troubled by Mr. Dowd's participation as a Town Councilor in these various proceedings. I know that Mr. Dowd did recuse himself in the non-public meeting of May 9, 2006, although I am uncertain about the following workshop. Since there was no official meeting or votes, that issue is perhaps irrelevant. However, on May 16, 2006, the Council voted to add \$50,000 to "administration-to establish funds for economic development initiatives." It is hard for me to tell what that money was for and whether any of it went to DEDC. If not, then the May 16 vote to that affect is a non-issue. However, if the budget adopted that night contained the funding for DEDC, consistent with the understanding that its use was for the contract services of the Executive Director, further inquiry is warranted.

I do not mean by this letter to cast aspersions on anyone and I caution those that might want to use its contents for political purposes that there are assumptions stated in this letter that are subject to proof. As we investigate further, if we are asked to do so, these assumptions may not become matters of fact.

As a practical matter, if Mr. Dowd had applied for the position when he voted specifically on funding the DEDC, he was acting in conflict of interest because he would have had a direct pecuniary interest. Having said this, the conflict does not allow for a remedy since the Charter provides for removal from office, and Mr. Dowd has already resigned. Under the law of New Hampshire, a vote under such circumstances could be voidable if the conflicted party affected the outcome. In this case, the vote of May 16, 2006 appears to have been unanimous and the vote of Mr. Dowd would not have mattered. Bear in mind that this analysis assumes a conflict where there may have been none.

Russ Marcoux, Town Administrator

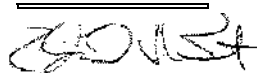
June 27, 2006

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The following are questions remaining to be answered:

1. Can the Council confirm my view of the May 2, 2006 tabling motion, that it was a conscious Council decision not to do economic development in house, but to seek outside Services?
2. Did Councilor Dowd vote on that motion?
3. If he did, was he a candidate for the Executive Director's position at the time?
4. Was the May 16, 2006 vote, to the extent that it added \$50,000 to Administration, directed at funds earmarked for DEDC or were they funds for a Town of Derry department of expenditure?

Please let me know if you wish me to investigate further. Sincerely

A handwritten signature in black ink, appearing to read "R. Marcoux", is positioned below a horizontal line.

