

DrummondWoodsum

MEMO

TO:	Falmouth Town Council		
FROM:	William L. Plouffe	DATE:	January 31, 2011
SUBJECT:	Notes on my meeting of 1/28/11		

I met with Council Chair Tony Payne, Councilor Fred Chase and Community Development Director Amanda Stearns. Nathan Poore attended telephonically. The topic of the meeting was the conflict of interest allegation made against Councilor Chase during the Town Council meeting of January 24, 2011 in connection with his voting on an amendment to the Town's conservation subdivision ordinance which effectively reduces the open space requirements.

I began by stating the facts as I understand them. During the public hearing on the amendment, a member or members of the public asserted that Councilor Chase should abstain from voting because he is a developer of real estate subdivisions in the Town and, therefore, could benefit from a reduction in the open space requirement. This issue was also raised by one or more Town Councilors. Councilor Chase stated at the meeting that he has a subdivision application before the Planning Board but that the amendment will not benefit him because the "existing" ordinance, i.e., the unamended ordinance, will continue to apply to his application. A motion was made to table the amendment until a legal opinion on the conflict of interest issue could be sought from the Town Attorney. That motion failed by a vote of 4 – 3. The amendment then came up for a vote and it passed by a vote of 4 – 3.

I then related my understanding of the procedural status of Councilor Chase's subdivision application. The application has been before the Planning Board for sketch plan review and for a site walk by the Board. The proposal conforms to the existing ordinance with respect to open space requirements. The application is on the February 1 Planning Board Agenda for preliminary subdivision approval.

My general understanding of what happened at the January 24 Town Council meeting was confirmed by Chairman Payne and Councilor Chase. My understanding of the procedural status of the subdivision application was confirmed by Ms. Stearns and Councilor Chase.

The meeting then turned to the legal issues raised by the facts. The status of Councilor Chase's application vis-à-vis the amendment is different from what he apparently thought when he described it at the January 24 Town Council meeting. Under applicable State law, sketch plan review and a site walk do not make the application "pending" for purposes of insulating the application ("grandfathering") from ordinance changes. In order to be so insulated, the application must have received at least one "substantive" review. (1 MRSA sec. 302) This means that the Planning Board will apply the amended open space standards to Councilor Chase's application. In other words, Councilor Chase appears to have been mistaken in his understanding of the procedural status of his application when he spoke at the January 24 Town Council meeting. Councilor Chase stated at our meeting that he had recently consulted legal counsel and received the same advice with respect to the status of his application.

The meeting then turned to the law on conflict of interest. I explained that the relevant statute (30-A MRSA sec. 2605) speaks to “direct or indirect pecuniary interest” creating a conflict of interest and also speaks to public officials avoiding the “appearance of a conflict of interest” by disclosure or by abstention. I also noted the Falmouth Charter section (sec. 1009) which addresses the consequences of a Town official’s violating state law on conflicts of interest. Chairman Payne asked if there is a Council Rule that provides a mechanism for the Council to declare by vote that a member of the Town Council has a conflict of interest. I noted that the statutes governing boards of appeal have such a provision (also found in the Falmouth Code of Ordinances sec. 2-67) and Ms. Stearns noted that the Falmouth Planning Board’s by-laws have such provision. I responded further that I was not aware of a similar provision pertaining to the Town Council. (I also noted that applying such a provision to elected officials, as opposed to appointed, might have legal issues associated with it that would have to be examined.)

I explained that the legal research I had done (it was not exhaustive) indicates that, when examining conflict of interest questions, there is an important distinction to be made between officials who are acting in a legislative capacity and those who are acting in a quasi-judicial or order making capacity. When the Town Council votes on ordinances and amendments to ordinances, it is acting in a legislative capacity. (When it votes on awarding a contract, it is acting in an order making capacity and when it votes on, for example, a victualer or liquor license, it is acting in a quasi-judicial capacity.) While I found no Maine Law Court opinions on the issue, it appears to be the majority view in other jurisdictions that a municipal officer is not precluded from voting on zoning amendments simply because he/she owns land that will be affected by the amendment. (See McQuillin Mun Corp §25.218.20 (3rd ed.))

We then discussed the fact that, here, Councilor Chase was more than just a landowner; at the time he voted, he had a subdivision application before the Planning Board that would be reviewed under the amended ordinance. The reduced open space requirement could result in his being eligible for approval of more lots (perhaps several more lots) than under the unamended ordinance. I expressed my view that this is a problem under the conflict of interest laws notwithstanding that Councilor Chase was under the misimpression that his application would not be affected by the amendment.

Councilor Chase stated that his application before the Planning Board was prepared in compliance with the more rigorous open space requirement, i.e., under the unamended ordinance, and that he has no intention of changing the application to take advantage of the amendment. I said that there certainly is no requirement that he propose a subdivision that meets only the minimum open space standards and that the Planning Board could continue its review of his current application, albeit applying the amended ordinance. We discussed various ways to address the conflict of interest issues posed by the current state of affairs, including withdrawing the subdivision application and re-filing after a Town Council re-vote; reconsideration of the Town Council vote; etc. Councilor Chase indicated that his application is the only Planning Board Agenda item for February 1 and that he wants to move forward with his application.

I offered my view that Councilor Chase should request from Chairman Payne the opportunity at the next Town Council meeting to address the Council and the public on this issue. Councilor Chase should, at a minimum, state: That he was mistaken when he said at the last Town Council meeting that

his subdivision application could not be impacted by the open space amendment; that he is committing not to take advantage of the amendment and will not change his application with respect to open space; and that he is making this statement and commitment in an effort to avoid the appearance of a conflict of interest through full disclosure. Councilor Chase said that he intended to follow this course of action.