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February 13, 2012

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Town of Windham
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CONFIDENTIAL LEGAL COMMUNICATION

**Re: Follow-up to 2012 Deliberative Meeting
Citizen Petitions – Articles #18 and #19**

Dear David:

As requested during the Deliberative Session on February 11, 2012, I have given further study to the language of Articles #18 and #19 on the Town Warrant, particularly in light of the floor amendments made Saturday. I would offer the following comments:

As we know, these two (2) articles were submitted as Citizen Petitions. They both purport to address the issues of "Conflict of Interest". New Hampshire already has a fairly long and substantial history of case law which addresses conflicts of interest. See, 13 NH Practice, 3rd Ed (Loughlin) § 581. In addition, New Hampshire law (RSA 31:39-a) grants to Towns the power to enact By-laws "defining and regulating conflicts of interest for local officers and employees". Id. The statute indicates that such locally adopted ordinances:

- May include financial disclosure for officers and employees.
- May establish incompatibility requirements stricter than State law (this is a prohibition on holding multiple positions).
- May establish conditions which can result in removal from office.
- Must include a short term exemption for current office holders.

The Citizen Petitions received for placement on the Warrant would ostensibly be authorized by this statute.

My initial review of the submitted Petitions was in my letter to you dated January 4, 2012. At that time, I raised several concerns about the proposals:

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- That they sought to regulate conduct of persons beyond local officials and municipal employees.
- That the prohibitions against certain participation in actions by the Town would be a violation of equal protection of law afforded by the State and Federal Constitution.
- That certain penalties were not authorized by law.

I am aware that my comments became matters of public record and comment, and apparently the Petitioners came prepared to address these comments because several floor amendments were offered and adopted. At the time those actions were occurring, I indicated it would be difficult for me to evaluate their impact. I was directed to study the amended language, and offer the Town further guidance.

I would begin with Article #18. The amended article still defines a “covered person” to be one which includes Town officials (whether elected or appointed), Town employees and any person or business (including employees) that have performed or are performing services for the Town regardless of whether the services were for compensation or not. It is my opinion that this language is inconsistent with State law because it attempts to regulate conduct of persons far beyond the authority granted under RSA 31:39-a. As I noted in my January 4th letter, New Hampshire law is very limiting in viewing the authority of Towns. Municipalities may only exercise power in areas specifically granted to them by the Legislature. See generally, 13 NH Practice, supra, at § 62, citing, Piper vs. Meredith, 110 NH 291 (1970). Consequently, the ability to restrict the outside third parties (persons or businesses that have or are performing services) does not exist. I also have a practical concern since there is no time limit on the language “have performed”. [If a particular person/business rendered a service twenty (20) years ago, are they still a “covered person” under the ordinance?].

The operative language of the original Article #18 prohibited a “covered person” from “participating” in any “action or decision” if such action or decision could provide a direct or indirect benefit to the “covered person”. This language was removed in the amendment process, and the current language now reads:

“A covered person shall not participate in deciding or acting on any Town matter if the matter may provide a direct or indirect benefit; create a material gain, or provide an advantage to relatives, friends . . . “

The amended language removes some of my original concerns, but not all. By focusing on “deciding”, it appears to now be limited to Town officials who are making decisions or “acting upon” items within their jurisdiction. This is certainly closer to existing New Hampshire law. As Attorney Loughlin points out in his treatise on New Hampshire law, New Hampshire has no statutory definition of a “conflict of interest” and there are several case law definitions. In general, New Hampshire law recognizes that:

“There is a conflict of interest wherein a public officer is involved in a matter in which he has a direct personal and pecuniary interest. In addition, in order to disqualify the public official from acting, the personal pecuniary interest must be immediate, definite and capable of demonstration, not speculative, uncertain, contingent or remote.”

13 NH Practice, supra at 582
citing, Atherton vs. Concord, 109
NH 164 (1968)

The difference between the amended Article #18 and existing State law involves the question of “direct vs. indirect” benefit. This is admittedly a gray area now, and adoption of the proposed amendment will not change this situation.

The remaining provisions of Article #18, as amended do not raise any significant legal objections. The amended language which addresses “deciding or acting on Town matter” significantly narrows the actual impact of the ordinance.

The addition of the “severability clause” through a floor amendment, both simplifies and complicates the matter. It leaves the opportunity to allow parts of the proposal to remain in place, but it does mean that there could be multiple litigations as various parts of the ordinance are tested and challenged.

In the end, I do not view the amended Article #18 as posing the same legal “threats” to the Town as the original language. I still have concerns about the scope of the “covered person” language, but by focusing on “deciding or acting on any Town matters”, that language becomes somewhat irrelevant since those persons would not be “deciding or acting upon any Town matter.”. While I probably would counsel individuals to vote against the proposal, I see no need for any particular response should it pass.

With respect to Article #19, I would say that this article, even as amended, is much more problematic and poses numerous and several serious liability problems for the Town.

As is the case with Article #18, the ordinance purports to encompass “covered persons” to include not only municipal officials and employees, but third parties (individuals or businesses) that have performed, or are performing services pursuant to a contract or arrangement (whether for compensation or gratis).

This article does establish what I would call a “prohibition period” of two (2) years. Therefore, persons who are “former” Town officials or “former” employees are covered for two (2) years after separation. This language does have the positive benefit

of setting a two (2) year time period on those outside parties who have “performed services” for the Town.

While the thrust of Article #18 (as amended) focuses on the “decision making” process, the language of Article #19 focuses on dealings with the community by covered persons. It enacts two (2) separate and specific prohibitions, both of which I feel are overbroad and result in serious constitutional deprivations:

- A) The first prohibition prevents a “covered person” from “appearing before” any Town Board as a principal, agent, attorney, representative, or otherwise on behalf of any person or entity, I believe this language goes well beyond the authority granted under RSA 31:39-a as outlined above. In addition, I see some very real practical consequences of this language:
 - i) Read literally, it would prohibit any other Town official from appearing before another Board or agency for any reason (i.e. the Conservation Commission Chair could not appear before the Planning Board or Board of Selectmen). This is probably not intended by the article, but does, in fact, appear to violate the ordinance.
 - ii) It will have the real effect of making it difficult, if not impossible, for the Town to secure services from local residents/businesses (particularly donated services) if the effect is to prohibit them from being able to offer their services to other persons seeking to appear before the Town in some fashion.

- B) The second part of Article #19 not only prohibits appearances, but prohibits representing, assisting or directly applying for any “permits, permission, license, variance, grant or approval from the Town.

The original version did contain an exception for applications relating to a primary (now personal) residence. The floor amendment added an exception for tax abatements. However, the floor amendment also made clear that a “covered person” could not apply for any approvals from any land use board or the Board of Selectmen. This appears to be particularly targeted at preventing a person from continuing to serve in office, while he/she or a business they are affiliated with, applies for a land use permit or approval. As we know, there have been recent situations where both a member of the Selectmen and a member of the Board of Adjustment applied for action by the Planning Board. Under this language, they would have been prohibited from doing so.

With regard to this language, I have not changed my position that this language impermissibly restricts the ability of “covered persons” to appear before the Town, or otherwise pursue business in the Town. In my mind, this raises clear constitutional issues that come together in two (2) principals:

- i) The “covered official” is treated differently than ordinary citizens in their request to pursue permits, approvals, etc. from the municipality, and
- ii) The provisions would impermissibly impact the “qualifications for office” as set forth by the Constitution and laws of the State.

Under New Hampshire constitutional principals, an enactment can be void for overbreadth if it attempts to control conduct by means which involve areas of protected freedom. State vs. Hynes, 159 NH 187 (2009). The prohibition on appearances and applications, with absolutely no basis to assume that there is or would be a “conflict of interest” (or that the affected decision makers would not recuse themselves) is, in my mind, a clear impingement of constitutional rights of speech and association, and discriminates impermissibility in the way the municipality would treat the “covered persons” as defined.

Unlike the amendment to Article #18, the amendment to this article left in place the language that any permits or approvals obtained by covered persons during the covered period would be void. This language is problematic to me because:

- i) It is not authorized by law, and
- ii) It does not have any qualifying language that exempts the personal residence variances, tax abatements or building permits. [This could have been a drafting error.]

New Hampshire law does recognize that in some cases when a Board is acting in a quasi judicial manner, the improper participation by the board member can invalidate the action. See, 13 NH Practice, supra at § 585 citing, Winslow vs. Town of Holderness, 125 NH 262 (1984). There is no statutory basis to invalidate a board action when the participating board members were not in a “conflict of interest” situation.

I note that Article #19 was also amended to provide a “severability” clause. In this case, I feel that both of the primary prohibitions which are enacted (i) “prohibition on appearing” and (ii) “applying for permits, permissions, licenses, variances, grants or approvals” are clearly flawed and would violate various provisions of New Hampshire law.

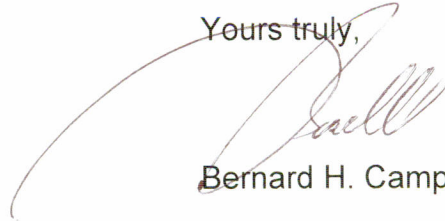
If the article should pass in its current form, the Town will have to evaluate its options in response. Rather than take the time to address those now, I will reserve that work until if/when the amended Article #19 passes. Needless to say, it would be in the best interest of the Town if it did not pass, and the Town did not have to plan a response to this language.

I trust this is the guidance that you were seeking. I would be glad to further elaborate on my comments if you like, or I could attend an upcoming meeting with the Selectmen to respond to their questions.

February 13, 2012

As always, I appreciate the opportunity to serve the Town, its officials and residents.

Yours truly,

A handwritten signature in cursive script, appearing to read "B. Campbell", written in dark ink. The signature is positioned above the printed name and is partially enclosed by a large, thin, curved line that starts to the left and arcs over the signature.

Bernard H. Campbell

BHC:sjt
Windham/Letters/2012 Delib Meeting-Sullivan