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TOWN OF WESTWOOD
OFFICE OF SELECT BOARD

November 8, 2022

Hon. Robert R. Gotti
Chair of the Westwood Select Board
580 High Street
Westwood, MA 02090

Re: Conflict of Interest –Participating in Hale Reservation
Conservation Land Matters

Dear Chairman Gotti,

Per your request, below is a legal opinion as to whether you, in your capacity as Chair of the Select Board (“Board”), would violate the Commonwealth’s Conflict of Interest Law, G.L. c. 268A, by participating in the Board’s consideration of whether to approve a proposed Conservation Restriction designating the majority of the so-called “Hale Reservation” as conservation land.

As discussed in more detail below, in our opinion, by doing so you would violate section 19(a) by participating in a particular matter in which you have a financial interest, unless, that is, you met the so-called “general policy” exception under subsection (b)(3). If you participated pursuant to this exception, the burden would fall on you to prove sufficient facts justifying the exception if your participation were challenged. As you have explained the facts to us, it appears that a defensible argument could be made that the exception applies, but, as explained below, this is a fact-intensive inquiry, the outcome of which would depend on a granular expert analysis.

Based upon the information you have provided to me, I understand that your primary residence, located at 55 Rock Meadow Road, is not abutting the Hale Reservation but is located approximately 330 feet from said property. The Hale Reservation is a 1,100-acre open space area in the Towns of Dover and Westwood. Approximately 554.5 acres of the reservation are in Westwood. That area is composed of sixteen parcels which encompass a sizable portion of the northwestern portion of Town. As explained to me by the Town Planner and Assessor’s Office, there are approximately 264 residential properties which abut the Hale Reservation, or which are abutters to abutters. If the surrounding neighborhood is included, there are approximately 880 residential properties. The breakdown of abutters, abutters to abutters and the surrounding area is depicted on the attached map. I am informed that, Town-wide, there are approximately 5,200 such individual residential properties. It is

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anticipated that the Town will soon engage with the Hale Reservation as to whether and upon which terms the Town may purchase a Conservation Restriction which would encumber most of the Hale Reservation and generally prohibit development in perpetuity. The Town already obtained an appraisal of the portions of the Hale Reservation in Westwood.

Section 19(a) prohibits municipal employees¹ from participating² in a particular matter³ in which to/his/her knowledge, he/she has a financial interest. Because the statute does not define “financial interest,” the State Ethics Commission (the “Commission”) has interpreted the term as being “any financial interest, no matter how small...” *EC-COI-84-98*. Such interest can be “either positive or negative.” *EC-COI-84-96* (financial interest exists where planning board members’ land abuts and is opposite to land for which development permit was requested). The interest must also be “reasonably foreseeable”. *EC-COI-86-25*. Financial interests which are remote, speculative, or not sufficiently identifiable do not require disqualification under G.L. c. 268A. *See EC-COI-89-19; EC-COI-84-98*. Where, as here, a direct financial interest is not self-evident or obvious, whether there is a reasonably foreseeable financial interest must be determined on the facts of your particular case. *See EC-COI-89-33*.

There are two Commission determinations that apply section 19(a) to a municipal employee whose financial interest was not obvious, and whose financial interest arose from his/her ownership of real property. First, in *EC-COI-84-96*, the Commission determined that a planning board member whose property abutted a development that had a special permit pending before said board was prohibited from participating in the approval of said permit even if the member was not a statutory “party in interest.” The Commission further noted that owning property that was merely in “close proximity to the proposed development would raise serious questions” under section 19(a).

Second, in *EC-COI-89-33*, the Commission ruled on a conservation commission member who owned a property located “two lots away from [his/her] property, around the cul-de-sac, but not directly opposite the public way” that was subject to a Wetlands Protection Act filing. The Commission held that, so long as the member did not have financial interest as defined in the statute, such as a “person aggrieved” or “party in interest”, he/she could participate in the matter

¹ “‘Municipal employee’ means a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution.” G.L. c. 268A, § 1(g).

² “‘Participate’ means to participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.” G.L. c. 268A, § 1(j).

³ “‘Particular matter’ means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.” G.L. c. 268A, § 1(k).

provided that the facts of the case “did not indicate any other direct or reasonably foreseeable financial interests;” specifically, the Commission stated that it “would consider, among other things, reasonably foreseeable increases or decreases in the value of [the member’s] property, or upward or downward revisions in property tax assessments resulting from the filing in question.” *Id.*

Here, there is little question that the imposition of a Conservation Restriction on the Hale reservation would affect the value of your property – and hence its tax assessment – as the value of residential real estate is, in large part, determined by the desirability of its immediate surroundings, see, e.g., oceanfront verses inland or large residential development verses open space. Specifically, the Town’s August 2021 appraisal of the reservation states the following regarding the residential neighborhoods immediately surrounding it: “Demand for large lots with good privacy is higher than for standard building lots, due to both scarcity, and desirability of recreational access.” Given your property’s proximity to the reservation, its value would thus almost certainly be affected by the Board’s determination on the Conservation Restriction. As noted above, it does not matter how small your financial interest is, nor does it matter whether your interest is positive or negative; all that matters is whether your interest is reasonably foreseeable. Hence, while it is uncertain whether your property would increase or decrease in value – and by what amount – a change in value is reasonably foreseeable, nonetheless. Accordingly, it would be exceedingly difficult to argue that your participation would not violate section 19(a).

There is, however, an exception⁴ under subsection (b)(3) for particular matters that involve a determination of general policy and the municipal employee’s financial interest is therefore shared with a substantial segment of the population of the municipality. The State Ethic Commission has opined that a “substantial segment” means “generally 10% or more of the [Town’s] population” and gives the example of a real estate tax or municipal utility rate. *See EC-COI-92-34*. Given the Hale Reservation’s relatively large size, its proximity to multiple residential neighborhoods and properties, and the relatively small size of Westwood, there is appears to be an argument that the approval of a Conservation Restriction would affect the real property values of a substantial segment of the Town’s population. The sixteen parcels that comprise the Westwood portion of the Hale Reservation appear to encompass a sizable segment of the northwestern portion of the Town. Since the financial benefit implicated here appears to be the assessed/appraised value of nearby property, abutting property owners and nearby property owners would all appreciate some financial impact. In other words, arguably, although you may realize some benefit, that benefit is no more unique or different than any other property owner near or around the Hale Reservation. Here, we know with some certainty that there are 5,200 residential properties in Westwood and there are 264 residential properties which abut the Hale Reservation or which are abutters to abutters. Accordingly, using the “person aggrieved” or “party in interest” standard, no less than 5% of the neighboring residential property owners would have a financial impact. The effect on assessed/appraised valuations would, however, certainly extend beyond abutters and abutters to abutters. How far it extends is difficult to say with any mathematical certainty. It stands to reason however that the neighborhood(s) closest to the Hale Reservation with direct foot or vehicle access would all experience some financial

⁴ There is another exception; however, it is only available to appointed officials. As an elected public official, this, exemption would not be applicable here.

impact as they too would all be affected by the restriction, or lack thereof, upon the Hale Reservation. If the surrounding neighborhood is included, there are approximately 880 residential properties affected or approximately 17% of the residential property owners in Town. It is, however, difficult to say with certainty if this segment is overinclusive and therefore we cannot say if that segment meets the '10% or more' standard or if it would otherwise constitute a "substantial" segment in the opinion of the State Ethics Commission. Proving this argument would require the services of additional professionals, and that burden would fall on you if you participated in the matter and said participation was challenged as violating section 19(a).

Please be advised that this an advisory opinion issued by a town counsel under G.L. c. 268A, § 22 and that, ultimately, the authority to determine whether the foregoing conduct violates the Conflict of Interest Law resides with the State Ethics Commission, who provide such legal opinions on a case-by-case basis. In accordance with G.L. c.268A, § 22 and 930 CMR 1.03(3), I have filed a copy of this opinion with the Town Clerk and the State Ethics Commission. The Commission may respond within 30 days of receipt of this opinion in accordance with 930 CMR 1.03(2) & (3).

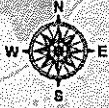
Very truly yours,

A handwritten signature in cursive script, appearing to read "Brian Winner".

Brian Winner

Enc.

cc: Town Clerk
State Ethics Commission








ABUTTERS MAP

November 4, 2022

Prepared By the Town of Westwood, MA
To be used for information only

LEGEND

-  HALE PROPERTY
-  PARCELS WITHIN 300-FT OF HALE (ABUTTERS)
-  SECOND SEMI-CIRCLE PARCELS (ABUTTERS TO ABUTTERS)
-  THIRD SEMI-CIRCLE PARCELS
-  WESTWOOD TOWN BOUNDARY

STRAWBERRY HILL

POWISSETT PEAK

OAK HILL

DOVER

WESTWOOD

FOX HILL

WESTWOOD

