

Grafton Town Clerk

From: Robin Stern <rstern@pdsclaw.com>
Sent: Monday, June 06, 2016 10:39 AM
To: 'Grafton Administrator'
Cc: 'Al Sands'; gtclerk@vermontel.net
Subject: escrow fund, ethics

Emily – I am responding to a couple of items pending with the Town of Grafton. You had forwarded to me a letter from Allan Sands regarding a potential escrow account for legal fees to be funded by a company who is potentially interested in siting wind turbines in Grafton. Because of the divisive nature of the topic, some folks have identified the legal escrow fund as inappropriate coming from the wind company. Additionally, Mr. Sands requested that I respond to recent accusations against him for violations of Grafton's Code of Conduct concerning his attending a wind company meeting outside of a formal Selectboard meeting and without prior public notice. The two items are related and I take this opportunity to reply. In summary, I believe Grafton can structure an escrow account to fund counsel to investigate possible wind turbines in Grafton and review any proposals that may result. I also do not believe that Mr. Sands committed any ethical violations in attending a meeting with the wind company. Further, I think that Grafton should clarify its Code of Conduct because of possible misinterpretation of ethical violations. I am happy to meet with the board to discuss in more depth but offer a further brief explanation below and specific recommendations.

I had a lengthy conversation last week with Sarah Jarvis, who is an attorney with the Vermont League of Cities and Towns. As you know, the League is a valuable resource for towns and Ms. Jarvis is familiar with the Grafton wind matter. She has been contacted over the last few years by Grafton selectboards on both sides of the wind issue with various procedural questions that impact the town's internal debate. Essentially, a Selectboard does not sit in a vacuum. Their job is to review current town topics and do their homework to educate themselves regarding any matter. The Selectboard sits as a legislative body, not generally as a quasi-judicial body. In other words, in most instances the Board is not sitting as a judge in a formal hearing setting. An example of a quasi-judicial setting would be a DRB (Development Review Board) in a town that has zoning, where the DRB must take testimony on applications, identify interested parties and make a decision that is subject to appeal under a codified statutory process. In a quasi-judicial setting, having conversations with parties before the board outside of the presence of other board members, the other parties or the public about the pending matter, what is called 'ex parte' conversations, is inappropriate. Imagine a judge sitting in a trial and meeting with one of the parties outside of the presence of the other parties. Such behavior is not permitted. But, that is not the situation with a Selectboard in its legislative capacity. It would be an impossible and irresponsible standard. Imagine a resident not being able to contact a Selectboard member outside of a formal SB meeting to bring a matter to the member's attention, even if that resident has a specific interest in the matter. When the SB debates the matter, transparency is critical and each member should disclose his/her research, meetings and reasoning related to an upcoming vote. Keep in mind that often the specific matter can also dictate appropriate behavior from a 'politic' point of view. The current Grafton Code of Conduct goes outside the parameters of the Vermont League of Cities and Towns Model Conflict of Interest policy. In my discussions with Attorney Jarvis, I believe Section IV of the Code of Conduct relates to the SB when it sits in a quasi-judiciary capacity in contested hearings, which is a rare event (perhaps, for example, in a road hearing case, where witnesses are sworn in, testimony taken, etc). In such an instance, a board member should not be having private conversations with one party, outside of the presence of other parties. Section IV should recite that it is to be applied when the SB is sitting in a quasi-judicial function. Attorney Jarvis also suggested that Grafton take a look at the town of Shelburne's recently adopted conflict of interest policies. I do not see that Mr. Sands violated Grafton's ethical policies. To the extent there is confusion, it should be clarified that Section IV is applicable to a quasi-judicial setting (reference to the statutory municipal procedures act regarding contested hearings is applicable).

Mr. Sands had also asked for an explanation of the concept of escrow account. As escrow account can be set up to hold funds on behalf a party or parties for a particular purpose(s) with the disbursement of the funds agreed upon in advance. Given what a firestorm the wind issue has created, it makes sense to hire an attorney to investigate the various impacts, positive and negative, that a potential wind turbine setting could have on the town. Additionally, the attorney can also identify what legal and jurisdictional rights the town has in any potential wind application submitted to the Public Service Board. The attorney, rather than one or two Selectboard members, can have meetings with company officials as well as state agency personnel and opponents. He/she can report back to the SB in a public meeting. Having an experienced third party would eliminate the accusations leveled against an SB member for attending a meeting set up by an anti-wind group or a member attending a wind company meeting – each doing so for purposes of gathering information and data. Payment of legal expenses would be subject to an agreement as to how funding and disbursement would take place. The town can request an estimate from an attorney of the town's choosing for this preliminary work. It would enter into an agreement with the company to fund that estimate. The town should have complete autonomy in who it chooses for counsel. The town should be responsible for approving the invoices submitted.

If the wind company is offering to fund the town's legal expenses to research and identify the issues (both positive and negative impacts), I would recommend taking advantage of this funding and working on an escrow agreement beneficial to the town in order to obtain what should at least be perceived as unbiased information.

I will be back in the office on Monday, June 13 should you have further questions. I will be checking emails periodically this week. Thank you.

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