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SUFFOLK, SS

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
NO. 02-2076H

VINEYARD CONSERVATION SOCIETY, INC. ET. AL., PLAINTIFFS

vs.

STATE ETHICS COMMISSION, DEFENDANT

*notice sent
7-3-04
PS
DAW
LED
ECG
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MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR
JUDGMENT ON THE PLEADINGS

JH

The remaining count (II) of this complaint seeks a declaratory judgment that a March 12, 2002 advisory opinion on a conflict of interest question submitted by plaintiffs to the defendant State Ethics Commission (the Commission) is arbitrary, capricious, unsupported by substantial evidence, an abuse of discretion, a violation of the governing statute, and a violation of plaintiffs' state and federal constitutional rights. The case comes before me on cross-motions for judgment on the pleadings.

Richard Toole, until March 27, 2001, was a director of Plaintiff Vineyard Conservation Society, Inc.(VCS) and a Commissioner of the Martha's Vineyard Commission (MVC), a regional planning agency. In 1999 VCS opposed a request for a permit from the MVC for the development of a golf course. Toole voted on the application, which was denied. Toole then resigned from the VCS. The developer raised an issue whether Toole's participation was a conflict of interest. The permit request is once more before the MVC. Toole wishes to rejoin the VCS as a board member; and in August, 2000, Toole and the VCS requested an advisory opinion from the Commission

whether he would have a conflict of interest in acting on the permit request if he simultaneously served on the VCS board of directors.

The primary question addressed to the Commission by plaintiffs was whether the VCS had a "financial interest" in the matter. G.L.c. 268A, section 19 forbids a "municipal employee" such as Mr. Toole from participating in a manner in which a "business organization" in which he is serving as a director has a "financial interest". The Commission opined that if "the only expenditure by the VCS is for advocacy of a policy view during the public process prior to decision, there is no financial interest." However, "if at the time the particular matter is pending before the MVC, you know or, after reasonable inquiry, discover that as a result of the MVC's decision, the VCS intends to expend its financial resources to continue its opposition to the project or has made an offer to engage in fundraising efforts on behalf of a purchaser for the property, you may not participate because the VCS will be deemed to have a financial interest. Finally, if at the time the particular matter is pending before the MVC, after making a reasonable inquiry as to the intentions of the VCS, you learn that the VCS is truly undecided about its future course of action, you may participate."

The request for an Advisory opinion and the Opinion itself assumed without discussion that VCS was a "business organization" under G.L.c. 268A. Because plaintiffs did not raise as an issue before the Commission whether VCS, a nonprofit environmental advocacy organization, was a "business organization", they may not do so now. It would not be appropriate for the court to declare the meaning of a phrase in the statute without the Commission first rendering its interpretation after proper submission of the issue to it.

I agree with the Commission's interpretation of "financial interest". The term is not defined in G.L.c. 268A. The Commission interprets the phrase as meaning a financial interest of any size so long as it is direct and immediate or reasonably foreseeable, as opposed to remote or speculative. The Commission's view that VCS would have a financial interest for section 19 purposes where it intended to continue its opposition if the agency granted the permit (e.g., by appealing the grant of a permit) was reasonable. It is well established that "[a]n agency's interpretation of its own regulation and statutory mandate will be disturbed only 'if the interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious.'" BoxPond Associates v. Energy Facilities Siting Board, 435 Mass. 408, 416 (2001), citing TBI, Inc. v. Board of Health of North Andover, 431 Mass. 9, 17 (2000). As the Supreme Judicial Court has noted, a "state administrative agency... has considerable leeway in interpreting a statute it is charged with enforcing." Berrios v. Department of Public Welfare, 411 Mass. 587, 595 (1992). It is not unduly burdensome to require Mr. Toole to ascertain in advance whether the VCS intends to appeal the granting of a permit. If the VCS is undecided, then there is no conflict of interest. Given the deference which the court should give to the Commission's interpretation of the statute, I see no basis to conclude that the Commission was wrong.

The complaint also raises the issue of whether the Commission properly interpreted G.L.c. 268A, section 23 (b) (3), in requiring disclosure of certain relevant information, even if there was no conflict of interest. The Supreme Judicial Court characterized the purpose of this statute "as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing." Scaccia V. State Ethics Commission, 431 Mass. 351, 359 (2000), citing Selectmen of Avon v. Lindner, 352

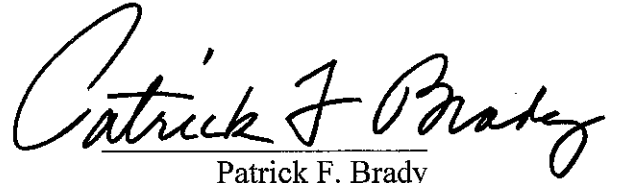
Mass. 581, 583 (1967). The Commission described the relevant facts to be disclosed as all expenditures and actions of VCS relating to the pending matter of which Toole has knowledge or reason to know including such things as the VCS's past history of advocacy and/or opposition involving the same or similar developments, the amount of money which VCS spent on opposing the project and how it was spent. The decision does not require disclosure of future expenditures, confidential internal strategy or names of consultants hired. There is no good reason why this information should not be disclosed. It does not interfere with any privilege identified by plaintiffs, or litigation work product.

I likewise reject plaintiffs' argument that the advisory opinion violated plaintiffs' first amendment rights. The conflict of interest statute regulates conduct, not speech or expression, Zora v. State Ethics Commission, 415 Mass. 640, 651 (1993), and any incidental limitation of speech is justified by the Commonwealth's substantial interest in regulating conduct of its public officials.

ORDER

Plaintiffs' motion for judgment on the pleadings is **denied**. Defendant's motion for judgment on the pleadings is **allowed**. A declaratory judgment shall enter declaring that the commission's decision of March 12, 2002 was not arbitrary, capricious, unsupported

by substantial evidence, an abuse of discretion, a violation of the governing statute or a violation of plaintiffs' state and federal constitutional rights.



Patrick F. Brady
Justice, Superior Court

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