

August 4, 2017

Gardiner City Council
Attn: Anne Davis
City of Gardiner
6 Church Street
Gardiner, ME 04345

**RE: CDBG Façade Grant;
Legal Opinion on Local and State Law Governing Conflict of Interests**

Dear Anne:

This letter will serve as a legal opinion regarding a potential conflict of interest issue which has been raised regarding Council Member Terry Berry, CDBG Façade Grant money, and property located at 243 Water Street in Gardiner. Specifically, the Council has requested an opinion on whether the actual circumstances relating to acceptance of CDBG Façade Grant money and the potential for 243 Water Street to be a recipient property (as a portion of the overall grant) is consistent with all local and state conflict of interest laws, regulations, and policies.

Factual Background

The City intends to utilize grant money from the Community Development Block Grant Microenterprise Grant program [the “CDBG” program]. The CDBG program is administered by the Maine Department of Economic and Community Development [“DECD”]. The source of funding for the CDBG program is from the U.S. Department of Housing and Urban Development [“HUD”], a federal agency.

Terry Berry is a member of the City Council and as such has participated and voted to form a citizen steering committee in which the Council delegated authority to, among other things, develop local program guidelines, score prospective projects, oversee environmental review, review projects that request funding, make funding awards, and administer fund allocations (the “Façade Grant Steering Committee” or “Steering Committee”). The committee would only serve for the duration of this particular CDBG grant award. The Council took this action on September 21, 2016. A copy of the Steering Committee’s description detailing this delegated authority is attached as Exhibit A. Councilor Berry is not a member of the Steering Committee. At the time of the Council’s action, no properties had

been selected by the City Council or by the Steering Committee to receive, or potentially receive, any funding allocations from the CDBG program.

On December 21, 2016, the City Council adopted a resolution to accept \$140,000 from the CDBG program to support Gardiner's Façade Improvement Program. Councilor Berry attended, participated in the discussion, and voted on this resolution. At that time, no properties had yet been selected by the Steering Committee to receive, or potentially receive, any funding allocations from the CDBG program.

On March 3, 2017, Three Pillar Properties, LLC, purchased property at 243 Water Street as shown in deeds recorded in the Kennebec County Registry of Deeds in Book 12548, Pages 253 and 255. Three Pillar Properties, LLC is a Maine limited liability corporation of which Terry Berry is a member. As of this acquisition date, no specific properties had been selected to receive, or potentially receive, any funding allocations from the CDBG program.

At its meeting on March 15, 2017, the Façade Grant Steering Committee reviewed applications and reserved funding for fourteen separate projects. Although the Steering Committee reserved funding for these fourteen projects, no specific awards were granted to any one of these project properties. One of the project properties involved 243 Water Street, owned by Three Pillar Properties, LLC. Councilor Berry is not a member of the Steering Committee, and did not vote, participate in, or otherwise influence, or attempt to influence this selection process for the purpose of reserving funds for projects.

Applicable Federal Law

To be eligible for CDBG grant money, the City of Gardiner must comply with federal law (since the source of funds is from HUD, a federal agency). In this case, federal law clearly provides a general prohibition regarding local officials (including any member of the City Council) from having the following:

“a financial interest in any contract, subcontract, or agreement with respect to a CDBG-assisted activity or with respect to the proceeds of the CDBG-assisted activity, either for themselves or those with whom they have business or immediate family ties, during their tenure or for one year thereafter.”

24 C.F.R. § 570.611(b) (emphasis supplied). A copy of this federal regulation is attached as Exhibit B for your reference.

There are, however, exceptions to the above general prohibition. On a case-by-case basis and upon written request of the recipient (in this case the City), the grantor agency under the grant agreement may grant an exception provided that the applicant has met the following conditions:

- The applicant has disclosed the nature of the conflict, accompanied by an assurance that there has been public disclosure of the conflict and a description of how the public disclosure was made; and
- An opinion of the applicant's attorney has been provided that the interest for which the exception is sought would not violate state or local law.

In making its decision on whether to grant an exception, the grantor administering the HUD CDBG funding will consider:

- Whether the exception would provide a significant cost benefit or an essential degree of expertise to the program or project that would otherwise not be available;
- Whether an opportunity was provided for open competitive bidding or negotiation;
- Whether the person affected is a member of a group or class of low- or moderate-income persons intended to be the beneficiaries of the assisted activity, and the exception will permit such person to receive generally the same interests or benefits as are being made available or provided to the group or class;
- Whether the affected person has withdrawn from his or her functions or responsibilities, or the decision-making process, with respect to the activity in question;
- Whether the interest or benefit was present before the affected person was in a local official position;
- Whether undue hardship will result either to the recipient or the person affected when weighed against the public interest served by avoiding the prohibited conflict; and
- Any other relevant considerations.

24 C.F.R. § 570.611(d).

Based on our understanding of the facts described above, Councilor Berry currently has a general prohibited interest under federal law. However, as set forth below, we also believe that in the circumstances present here an exception may be granted as Councilor Berry's actions did not violate any local or state law governing conflicts of interest.

Local Law

The City of Gardiner has no ordinance or charter provision that is relevant to a potential conflict of interest issue given the factual circumstances of this matter, which is similar to other municipalities in the State of Maine. State law would therefore govern the conflict issue in this situation.

State Law

Maine State law provides two tests to determine whether or not a conflict exists: (1) a "statutory" conflict test; and (2) a "common law" conflict test. Both tests should be applied to all situations in which a potential conflict may exist.

The “statutory” conflict test is set forth in 30-A M.R.S. § 2605. Under this test, a person has a conflict if that person has a “direct or indirect pecuniary interest.” A “direct or indirect pecuniary interest” is defined as follows:

[W]here the official is an officer, director, partner, associate, employee or stockholder of a private corporation, business or other economic entity to which the question relates or with which the unit of municipal, county government or the quasi-municipal corporation contracts only where the official is directly or indirectly the owner of at least 10% of the stock of the private corporation or owns at least a 10% interest in the business or other economic entity.

30-A M.R.S. § 2605(4).

Section 2605 of Title 30-A goes on to state:

When an official is deemed to have a direct or indirect pecuniary interest, the vote on the question or the contract is not voidable and actionable if the official makes full disclosure of interest before any action is taken and if the official abstains from voting, from the negotiation or award of the contract and from otherwise attempting to influence a decision in which that official has an interest. The official's disclosure and a notice of abstention from taking part in a decision in which the official has an interest shall be recorded with the clerk or secretary of the municipal or county government or the quasi-municipal corporation.

30-A M.R.S. § 2605(4).

In the absence of a “pecuniary interest” as defined above, section 2605 specifically provides that “[e]very municipal and county official shall attempt to avoid the appearance of a conflict of interest by disclosure or by abstention.”

Further, under the “common law” test, a public official has a conflict of interest when, “by reason of his interest, [he] is placed in a situation of temptation to serve his own personal pecuniary interest to the prejudice of the interests of those for whom the law authorized and required him to act . . .” *Tuscan v. Smith*, 130 Me. 36 (1931) (citing *Lesieur v. Inhabitants of Rumford*, 113 Me. 317, 93 A. 838 (1915)).

At the time Councilor Berry participated in the vote to establish the above Steering Committee (September 21, 2016) and accept CDBG program funds for Gardiner’s Façade program (December 21, 2016), he did not have any pecuniary or personal interest in the property located at 243 Water Street, and 243 Water Street was not specifically identified as a property for which grant funding would be reserved or awarded. He did not have a pecuniary

or personal interest because neither he nor a legal entity in which he had an ownership interest owned 243 Water Street. Accordingly, he did not have any conflict of interest which would have required any disclosure or recusal. The circumstances giving rise to the conflict simply did not exist at that time.

When the Steering Committee met on March 15, 2017, to select specific projects for reserved funding Councilor Berry then had an ownership interest that meets the pecuniary interest definition above. However, Councilor Berry did not vote, or participate in, influence, or otherwise attempt to influence that committee's decision. Councilor Berry was not even present for the March 15 meeting. As noted, he is also not a member of the Steering Committee. Accordingly, Councilor Berry's actions complied with state law at all times.

To confirm the above, Councilor Berry publicly disclosed his conflict and the nature of this conflict during a duly advertised City Council meeting, as reflected in the City Council draft minutes of July 26, 2017, attached as Exhibit C.

Please note that when the Steering Committee moves forward with actually awarding the reserved funds to specific project properties, state law prohibits Councilor Berry from voting, participating in, influencing, or from otherwise attempting to influence the Steering Committee's award decisions.

Conclusion

Councilor Berry's participation and vote to establish the Steering Committee and for the City to accept CDBG Microenterprise Grant funds did not violate any local or state law governing conflicts of interests, because he did not have a pecuniary or personal interest at those times. He therefore did not violate any local or state law in this respect. Further, Councilor Berry did not vote, participate, influence, or otherwise attempt to influence the Steering Committee's selection process for the purpose of selecting project properties for reserve funding. He therefore did not violate any local or state conflict of interest laws during those events either. Moreover, Councilor Berry has publicly disclosed his conflict and the nature of the conflict, as reflected in meeting minutes of the Gardiner City Council.

Based on the above, it is my opinion that Councilor Berry did not violate any local or state law governing conflict of interests, and therefore DECD would have reasonable grounds to grant an exception under the applicable federal regulations. The grant of this exception itself would also not violate any local or state conflict of interest laws. As noted above, to continue compliance with local and state conflict of interest laws, Councilor Berry is obligated to refrain from voting, participating in, influencing, or otherwise attempting to influence the decision of the Steering Committee to make awards from the funds it has currently reserved for this purpose.

* * *

Thank you again for the opportunity to be of service to the City of Gardiner. If you have any questions or require additional information, please contact me at any time.

Very truly yours,



Jonathan A. Pottle

Encl. (3)

Gardiner Façade Grant Steering Committee Description

In August of 2016, Gardiner was notified of its successful application to the Maine Community Development Block Grant (CDBG) Microenterprise Grant to develop and execute a façade improvement program in its historic district. In order to comply with state and federal standards, the City of Gardiner must develop an ad-hoc committee for the purpose of overseeing the public process, considering sub-grant awards, and ensuring that the process follows the requirements of the grant. The committee will be comprised of no less than five and no more than seven members, and may include residents and non-residents. Members of the committee shall be appointed by the Mayor and approved by City Council. City staff may support the committee, and may also serve on the committee. Members of the committee shall be governed by the City of Gardiner's conflict of interest policy, and the committee shall abide by the best practices set forth by the City for all citizen committees, and by the laws of the State of Maine that govern municipalities. The Façade Grant Steering committee will make recommendations for council, except for the specific decisions granted them by council, and enumerated below.

1. The committee will consider, finalize, and publish the DRAFT Gardiner Façade Grant Program Guidelines, and update the guidelines as needed throughout the program and manage the schedule.
2. The committee will oversee the public input phase of the environmental review and all other requirements of the CDBG grant. The committee, with staff, will submit required documentation and certifications on behalf of the City.
3. The committee will publicize the availability and progress of the project.
4. The committee will develop and implement a policy for hearing and resolving complaints about the project.
5. The committee, with staff, will make sure that the project is completed in a satisfactory and timely fashion.
6. The committee will hold at least one informational meeting with potential applicants.
7. The committee will consider applications to the program, and will make decisions on funding projects.
8. The committee will ensure that "spot blight" designations are appropriate, and will ensure that historic preservation review of projects is completed.
9. The committee will oversee bid documents and make awards to contractors for both architectural support for the project and make sub-grant award notifications for completion of projects. Note that awards will go to the lowest most responsive and responsible bidder, and must be reviewed by Maine DECD.
10. Ensure that City Staff is following grant protocols for awards, reporting, and release of funds.
11. Provide input for grant close-out reporting.

[Code of Federal Regulations]
[Title 24, Volume 3]
[Revised as of April 1, 2004]
From the U.S. Government Printing Office via GPO Access
[CITE: 24CFR570.611]

[Page 150-151]

TITLE 24--HOUSING AND URBAN DEVELOPMENT

CHAPTER V--OFFICE OF ASSISTANT SECRETARY FOR COMMUNITY PLANNING AND
DEVELOPMENT, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

PART 570_COMMUNITY DEVELOPMENT BLOCK GRANTS--Table of Contents

Subpart K_Other Program Requirements

Sec. 570.611 Conflict of interest.

(a) Applicability. (1) In the procurement of supplies, equipment, construction, and services by recipients and by subrecipients, the conflict of interest provisions in 24 CFR 85.36 and 24 CFR 84.42, respectively, shall apply.

(2) In all cases not governed by 24 CFR 85.36 and 84.42, the provisions of this section shall apply. Such cases include the acquisition and disposition of real property and the provision of assistance by the recipient or by its subrecipients to individuals, businesses, and other private entities under eligible activities that authorize such assistance (e.g., rehabilitation, preservation, and other improvements of private properties or facilities pursuant to Sec. 570.202; or grants, loans, and other assistance to businesses, individuals, and other private entities pursuant to Sec. 570.203, 570.204, 570.455, or 570.703(i)).

(b) Conflicts prohibited. The general rule is that no persons described in paragraph (c) of this section who exercise or have exercised any functions or responsibilities with respect to CDBG activities assisted under this part, or who are in a position to participate in a decisionmaking process or gain inside information with regard to such activities, may obtain a financial interest or benefit from a CDBG-assisted activity, or have a financial interest in any contract, subcontract, or agreement with respect to a CDBG-assisted activity, or with respect to the proceeds of the CDBG-assisted activity, either for themselves or those with whom they have business or immediate family ties, during their tenure or for one year thereafter. For the UDAG program, the above restrictions shall apply to all activities that are a part of the UDAG project, and shall cover any such financial interest or benefit during, or at any time after, such person's tenure.

(c) Persons covered. The conflict of interest provisions of paragraph (b) of this section apply to any person who is an employee, agent, consultant, officer, or elected official or appointed official of the recipient, or of any designated public agencies, or of subrecipients that are receiving funds under this part.

(d) Exceptions. Upon the written request of the recipient, HUD may grant an exception to the provisions of paragraph (b) of this section on a case-by-case basis when it has satisfactorily met the threshold requirements of (d)(1) of this section, taking into account the cumulative effects of paragraph (d)(2) of this section.

(1) Threshold requirements. HUD will consider an exception only after the recipient has provided the following documentation:

(i) A disclosure of the nature of the conflict, accompanied by an assurance that there has been public disclosure of the conflict and a description of how the public disclosure was made; and

(ii) An opinion of the recipient's attorney that the interest for which the exception is sought would not violate State or local law.

(2) Factors to be considered for exceptions. In determining whether to grant a requested exception after the recipient has satisfactorily met the requirements of paragraph (d)(1) of this section, HUD shall conclude that such an exception will serve to further the purposes of the Act and the effective and efficient administration of the recipient's program or project, taking into account the cumulative effect of the following factors, as applicable:

(i) Whether the exception would provide a significant cost benefit or an essential degree of expertise to the program or project that would otherwise not be available;

(ii) Whether an opportunity was provided for open competitive bidding or negotiation;

(iii) Whether the person affected is a member of a group or class of low- or moderate-income persons intended to be the beneficiaries of the assisted activity, and the exception will permit such person to receive generally the same interests or benefits as are being

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made available or provided to the group or class;

(iv) Whether the affected person has withdrawn from his or her functions or responsibilities, or the decisionmaking process with respect to the specific assisted activity in question;

(v) Whether the interest or benefit was present before the affected person was in a position as described in paragraph (b) of this section;

(vi) Whether undue hardship will result either to the recipient or the person affected when weighed against the public interest served by avoiding the prohibited conflict; and

(vii) Any other relevant considerations.

[60 FR 56916, Nov. 9, 1995]

****DRAFT COPY****
GARDINER CITY COUNCIL MEETING
Wednesday, July 26, 2017
Gardiner City Hall

Mayor Thomas Harnett called the regular Council Meeting to order at 6:23 p.m.

Roll Call:

Mayor Thomas Harnett; Councilors Terry Berry, Tim Cusick, Shawn Dolley, Phil Hart, Maryann White, Jon Ault & Patricia Hart; Also present were Interim City Manager Anne Davis and City Clerk Lisa Gilliam.

Disclosure of City Councilor seeking CDBG Facade Funds, abstention from future discussion and votes Public Hearing: CDBG Grant Close Outs:

Interim City Manager Anne Davis and Director of Gardiner Main Street Patrick Wright both briefed the City Council on this agenda item. At a meeting on 9/21/16, City Council created the Gardiner Facade Steering Committee to develop a facade improvement program. As part of the creation of the committee, council authorized the committee to create the program description, ensure compliance with the grant guidelines, and make individual funding decisions on projects. On 12/26/16, council held a public hearing and officially accepted the grant funds. In early March of 2017, Councilor Terry Berry (Sole member of Three Pillars Properties Real Estate LLC) purchased a building at 243 Water Street and submitted an application for funding through the facade improvement program. The committee reserved a portion of the requested funding for Councilor Berry, along with 13 other projects. Federal regulations prohibit City Councilors from benefitting directly from Community Development Block Grant Programs unless they receive a waiver from the Housing and Urban Development Agency (HUD). In these matters, HUD delegates responsibility to Maine Department of Economic Development (DECD). In order to receive the waiver, Councilor Berry must obtain a letter from the City attorney that no state or local conflict of interest laws have been broken, he must disclose publicly his intent to use funds through the program, and he must abstain from any future discussion, votes, or public discussion on the matter. Discussion followed.

Councilor Berry publically acknowledged that he is the owner of the properties located at 243 and 247 Water Street and that he has requested facade funds through the CDBG program; he also said he purchased this property on March 3, 2017. Councilor Berry stated that he would agree to not participate or have any conversations involving the grant process and that he would recuse himself from any vote regarding this subject.

Motion by Councilor Patricia Hart to acknowledge Councilor Berry's disclosure and commitment to recuse himself from any future vote regarding this matter and to support submission of a waiver to Maine DECD/HUD and the City's attorney under 24CFR570.611; motion seconded by Councilor Cusick. Discussion continued concerning the grant process. Motion carried 6-0 with Councilors Terry Berry & Phil Hart abstaining from the vote.

Respectfully submitted by,
Lisa Gilliam, City Clerk