

Monterey Town Administrator

From: Christopher Blair (G) [REDACTED]
Sent: Friday, February 11, 2022 4:06 PM
To: Noe, Melissa
Subject: Select board item for next meeting
Attachments: 220210 Special Muni Employee to Selectboard (2).pdf; 220210 Special Municipal Employee AG Advisory 13.pdf; 220205 Deerfield MA special_municipal_employee_policy.pdf

Melissa

As an appointed Conservation Commissioner please resubmit the attached inquiry before the Selectboard at your earliest convenience.

It asks to be granted Special Municipal Employee status for the Conservation Commission. It is supported with better information from the Office of Ethics.

The attachments are citations from the law and an example from the Town of Deerfield.

Thank you.
-Chris

--
Regards

Christopher Blair

[REDACTED]
[REDACTED]
Monterey MA 01245-8424
[REDACTED]
[REDACTED]

DESIGN+PLANNING, residential design, (w)design-planning.com, (v)413.528.4960

“To those devoid of imagination a blank place on the map is a useless waste; to others, the most valuable part.”
— Aldo Leopold, A Sand County Almanac and Sketches Here and There

Selectboard
435 Main Road
PO Box 308
Monterey MA 01245

10 February 2022

RE: Special Municipal Employee status

Dear Selectboard,

I have read an email from Justin Makuc on behalf of the Monterey Selectboard reflecting your deliberation of my request for you to grant Special Municipal Employee (SME) status for the Monterey Conservation Commission (Concom). I am making this request again.

You are reading a narrow section that says I may obtain a permit in Monterey from other departments or commissions than the Concom.

However without the SME I cannot act as "agent" in any department or commission without violating the Conflict Law.

If I were to petition the Zoning Board of Appeals (ZBA) for a client I would be in violation of the law. With the SME status granted to the Concom, and having no interaction with the Concom and/or recusing myself from any deliberations before the Concom from the ZBA petition, I would not be in violation.

The Selectboard was asked for and did granted this status to the Concom or or about April 2013.

Please provide this status for the Concom membership at your earliest convenience and send me documentation that it has been granted.

Attached is the Attorney Generals' State Ethics Commission Advisory No. 13 parsing this section of the law.

Thank you.


Christopher Blair





Special Municipal Employees

The conflict of interest law, G.L. c. 268A, covers all municipal officials and employees, whether elected or appointed, paid or unpaid, full-time or part-time. However, two sections of the conflict law apply less restrictively to those part-time or unpaid municipal officials who have been designated as "special municipal employees."

"Special municipal employee" status can be assigned to certain municipal positions by a vote of the board of selectmen, board of aldermen, town council or city council. Several specific municipal positions are automatically designated as "special" under the law. Your position is eligible to be designated as a "special municipal employee" position provided that:

- you are not paid; or
- you held a part-time position which allows you to work at another job during normal working hours; or
- you were not paid by the city or town for more than 800 working hours (approximately 20 weeks full-time) during the preceding 365 days.

It is the municipal position that is designated as having "special" status, not the individual. Therefore, all employees holding the same office or position must have the same classification as "special municipal employees." For instance, one member of a school committee cannot be classified as a "special" unless all members are similarly classified.

The designation may be made by a formal vote of the board of selectmen, board of aldermen, town council or city council at any time. Votes should be taken individually for each board or position being designated, expressly naming the positions being designated. Once a position is designated as having "special" status, it remains a "special municipal employee" position unless and until the classification is rescinded. A list of all the "special municipal employee" positions should be on file at the town or city clerk's office. This list should also be filed with the Ethics Commission.

Under no circumstances may a mayor, city councilor, town councilor, alderman, or selectman in a town with a population of more than 10,000 be designated as a "special." However, in towns of 10,000 or less, selectmen are automatically considered "special" employees. Other municipal positions in towns with a population of less than 10,000 must still be designated as "special municipal employee" positions by the selectmen.

The Legislature may also designate certain positions to have "special municipal employee" status. For example, board members and part-time employees of local housing and redevelopment authorities are defined by law as "special municipal employees" and do not need to have local authorities approve their designation as "specials." (See G.L. c. 121B, section 7.)

THE CONFLICT LAW IS LESS RESTRICTIVE FOR "SPECIALS"

Only two sections of the conflict of interest law apply less restrictively to "specials", §§ 17 and 20. All other sections of the conflict law that govern regular municipal employees apply to "special municipal employees" in exactly the same way. See the Summary of the Conflict Law for Municipal Managers or the Practical Guide to the Conflict Law for Municipal Employees for information on your responsibilities under the law (these publications are available from the State Ethics Commission). Remember that even if you serve on an unpaid part-time board or commission, you are still considered a regular municipal employee, unless your position has been expressly designated as having "special municipal employee" status.

Section 17 - Acting on Behalf of Others

Section 17 generally prohibits municipal employees from representing a private party before municipal boards or departments. It also prohibits municipal employees from acting as agent (or attorney) for a private party in connection with any matter of direct and substantial interest to their city or town. Finally, it prohibits municipal employees from accepting

pay or other compensation in connection with any matter of direct and substantial interest to their municipality.

However, if you are a "special municipal employee," you may:

- represent private parties before municipal boards other than your own, provided that you have not officially participated in the matter and the matter is not now (and was not within the past year) within your official responsibility;
- act as agent for private parties in connection with a matter of interest to your city or town, provided that you have not participated in the matters as a municipal official, and that the matter is not (and has not been, during the past year) within your official responsibility; and
- receive pay or other compensation in connection with matters involving your city or town, provided that you have not officially participated in the matters and they are not (and have not been, within the past year) within your official responsibility.

Example: You are a Conservation Commissioner. The Commission has been given "special municipal employee" status. You are also an engineer in private practice in town.

- You may be hired as site engineer and represent a private development company at a Planning Board hearing, as long as the hearing does not in any way involve Conservation Commission matter.
- However, if the hearing is about a wetlands dispute, you could not represent the developer before the Planning Board because the matter is under your official responsibility as Conservation Commissioner.
- Also, if you prepare site plans, blueprints, structural analyses or other professional documents, you may not allow the developer to submit those materials to the Conservation Commission (or to any other municipal boards, in connection with matters under the Conservation Commission's responsibility).
- Also, you may not be paid for giving the developer advice about how to get his project approved by the Conservation Commission, or for any other activity related to the Conservation Commission review process.

Note that the prohibition against "acting as agent" covers any type of activity that involves representing someone other than your city or town. Activities which can be considered "acting as agent" include: serving as someone's spokesperson; making phone calls or writing letters; acting as a liaison; affixing professional seals or signing supporting documentation; and participating as an electrician, plumber or other contractor during municipal building inspections. For more information about section 17, request Advisory No. 13: Municipal Employees Acting as Agent from the State Ethics Commission.

Section 20 -- Restrictions on Having an Interest in Contracts with your City or Town

Section 20 generally prohibits municipal employees from having a direct or indirect financial interest in a contract with their city or town. However, there are many exemptions in this section of the law. For instance, a municipal employee may own less than 1% of the stock of a company that does business with the municipality.

Also, a municipal employee may have a financial interest in a contract with a municipal department which is completely independent of the one where he works, provided that the contract has been publicly advertised or competitively bid, and the employee has filed a disclosure of his interest in the contract with the city or town clerk. Note that there are additional requirements for personal services contracts: contact your town counsel or city solicitor or the State Ethics Commission's Legal Division for more information.

However, if you are a "special municipal employee," you have two additional exemptions to section 20:

As a "special municipal employee," you may have a financial interest in a contract with a department which is completely independent of the one where you work, provided that you file a disclosure of your interest in the contract with the city or town clerk (there is no "public notice" or "competitive bid" requirement for this "special municipal employee" exemption).

As a "special municipal employee," you may even have a financial interest in a contract with your own department (or with a department which has overlapping jurisdiction with your department), provided that you file a disclosure of your interest in the contract with the city or town clerk and the board of selectmen, board of aldermen, town council or city council vote to grant you an exemption to section 20.

Example: You are a member of the School Committee, which has been given "special municipal employee" status. You also own a hardware store in town.

- You may sell light bulbs to the town's Department of Public Works, because Public Works is not under the jurisdiction of the School Committee; however, you must file a disclosure of your interest in the lightbulb sales with the Town Clerk.
- You also may sell light bulbs to the School Department (which is under the School Committee's jurisdiction), but only if you file a disclosure of your interest in the lightbulb sales with the Town Clerk and the Board of Selectmen vote to exempt your lightbulb sales from the restrictions of section 20.

For more information about restrictions on holding an interest in municipal contracts, contact your city solicitor or town counsel or the Legal Division of the State Ethics Commission.

Section 20 -- Restrictions on Holding Multiple Municipal Positions

Because the restrictions of section 20 also apply to employment contracts, municipal employees are generally prohibited from holding more than one municipal position. However, there are many exemptions to this general prohibition. If you are a municipal employee – regular or "special", you may:

- hold any number of unpaid positions, because you do not have a financial interest in any of the positions (however, if you hold even one paid appointed position, you must look for other exemptions);
- hold any number of elected positions, whether paid or unpaid, because you serve in those positions by virtue of your election, rather than because of an appointment or employment contract (however, if you hold even one paid appointed position, you must look for other exemptions); and
- in some instances, you may hold more than one paid appointed position, provided that the jobs are in separate departments (which do not have overlapping responsibilities) and all paid jobs have been publicly advertised. However, your board of selectmen, board of aldermen, town council or city council must vote to exempt you from section 20, and there are also other requirements you must meet. For more information, see Advisory No. 7: Multiple Office Holding from the State Ethics Commission, or contact your town counsel or city solicitor or the State Ethics Commission's Legal Division.
- If you serve in a town with a population of less than 3,500, you may hold more than one position with the town if the board of selectmen formally approves the additional appointments.

If you are a "special municipal employee", you may also:

- hold any number of other "special municipal employee" positions, provided that the positions are with totally independent departments and you file a disclosure of your financial interest in all the positions with the city or town clerk;
- hold any number of other "special municipal employee" positions, even if the departments' jurisdictions overlap, provided that you file a disclosure of your financial interest in all the positions with the city or town clerk, and the board of selectmen, board of aldermen, town council or city council vote to exempt you from section 20.

Example: As a Cemetery Commissioner, you are a "special municipal employee."

- You may also hold "special municipal employee" positions on the Board of Library Trustees and on the Waterways Commission, because the three positions are completely independent of each other. However, you must file a disclosure of your financial interest (e.g., stipends, per diem payments, salary) in the positions with the Town Clerk.

If you wish to hold a "special municipal employee" position with the Department of Public Works (which maintains buildings on the cemetery grounds) or as the town's Tree Warden (who cares for the trees on the cemetery grounds), you must file a disclosure of your financial interest in the positions with the Town Clerk, and the Board of Selectmen must vote to exempt you from section 20.

For more information about holding more than one municipal position, request Advisory No. 7: Multiple Office Holding from the State Ethics Commission, or contact your town counsel or city solicitor or the State Ethics Commission's Legal Division.

The definition of "special municipal employee" can be found in section 1(n) of the conflict of interest law (G.L. c. 268A). Note that town councils are empowered by G.L. c. 39, section 1 to exercise all duties and powers of boards of aldermen.

Commission Fact Sheets are prepared and issued by the Public Education Division of the State Ethics Commission. They are intended to provide guidance to public officials and employees concerning practical applications of the conflict law. For further information, contact your town counsel or city solicitor, or the Legal Division of the State Ethics Commission.

ISSUED: May 1987

REVISED: March 1990

REVISED: January 1991

REVISED: August 1992

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TOWN OF DEERFIELD

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Board of Selectmen Policy 2014-01

Special Municipal Employee

“ The Deerfield Board of Selectmen designates the following officials as special municipal employees, pursuant to MGL c. 268A, §1(n), all members of the Board of Assessors, Cable TV Advisory Committee, Conservation Commission, Historical Commission, Recreation Commission, Planning Board, Zoning Board of Appeals, Personnel Board, Registrars of Voters, Cultural Council, School Committee, Finance Committee, Library Trustees, Community Preservation Committee, Agricultural Committee, Capital Improvements Planning Committee, Energy Resources Committee, Deerfield Elementary School Committee, Deerfield representatives to the Frontier Regional School District Committee, Open Space and Recreation Plan Committee, Moderator, Representatives to FRCOG and the Franklin Regional Planning Board, Town Counsel, Emergency Management Director, Oliver Smith Will Elector, Constables, Deerfield representatives to the Franklin County Technical School Committee, Deerfield representatives to the Franklin County Regional Solid Waste District, Town Memorial Forest Committee, Deerfield representatives to the Tri-Town Beach Commission, Veteran’s Graves Officer, Deerfield representative to the Fred W. Wells Trust, Fence Viewers, Forest Wardens, Franklin Regional Transportation Authority Representative, Hazardous Waste Coordinator, Keeper of the Town Clock”.

Here is the law cited:

(n) “Special municipal employee”, a municipal employee who is not a mayor, a member of the board of aldermen, a member of the city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a “special municipal employee” unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any

city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception.

Adopted by Deerfield Board of Selectmen on February 12, 2014

Monterey Town Administrator

From: Brian Riley <BRiley@k-plaw.com>
Sent: Tuesday, February 8, 2022 7:56 PM
To: 'Monterey Town Administrator'
Subject: RE: Conservation Commission
Attachments: RE: Conservation Commission Bylaw Questions (25.9 KB); DOR Anti-Aid - Grants.pdf

Hi, Melissa. There may be some facts out there that could affect these issues, but I will give you my opinion based on what I have. It appears the Cons Comm agenda item and vote on 12/8/21 and 12/17/21 was to seek to transfer \$38,262.28 from the "Cons Comm Reserve Account" (which I interpret as the "conservation fund" described in G.L. c.40, §8C and discussed in my opinion from last October, attached) to be paid to the Monterey Preservation Land Trust ("MPLT"), a nonprofit organization. The purpose of the proposed transfer was to allow MPLT to perform work to upgrade existing hiking trails and create new trails on "the Mt. Hunger property." While I have not searched Registry records, I understand MPLT owns and maintains this property, which is open to the public.

In my opinion, the main problem with the Commission's request is that this "grant" would not be consistent with the purposes for which the conservation fund may be spent. General Laws Chapter 40, §8C sets forth the primary statutory authority for a Conservation Commission. The Commission's role (outside of its primary regulatory authority over wetlands permitting issues) regarding real property is to accept gifts of property or to acquire such property by purchase of title, options, leases or restrictions in the name of the Town. The Commission may use such funds that are available in the Conservation Fund, or if that is not sufficient, any funds appropriated by Town Meeting for those purposes. In each case, however, it involves the Commission acquiring interests in property to be owned in the name of the Town. Section 8C details how a conservation fund may be set up, and states that "*Money in said fund may be expended by said commission for any purpose authorized by this section.*" In my opinion, the proposal would amount to a "gift" of funds to a private nonprofit (albeit for land conservation purposes) to fund work by that nonprofit on property that it owns. I think the Accountants were correct to flag this as not a proper use of the Fund.

While grants to nonprofits are legal under certain specific circumstances, there does need to be a specific appropriation by Town Meeting for them. It is fairly common for municipalities to vote relatively minor appropriations for local nonprofit human services organizations. Typically, however, the funds are expended pursuant to a grant agreement. There are a couple of reasons for using a grant agreement. First, "contracts" for goods or services are governed by G.L. c.30B, the Uniform Procurement Act, so there are various rules that must be followed. A grant agreement is not subject to c.30B, however. The statute defines grant agreement as "an agreement between a governmental body and an individual or nonprofit entity the purpose of which is to carry out a public purpose of support or stimulation instead of procuring supplies or services for the benefit or use of the governmental body."

And second, there is a general rule (actually a provision of the Massachusetts Constitution, known as the Anti-Aid Amendment) against expending public funds that only benefit a private party or entity. The Department of Revenue agrees, however, that if the payment is made under a grant agreement and the municipality is essentially "purchasing services" that will be available to its residents, this does not violate the Amendment. I have attached a letter from the Division of Local Services on this topic. As such, we have assisted in drafting grant agreements for local nonprofits to avoid any legal issues – food kitchens, homeless shelters and the like. The requirement, referenced by DLS, that payments be made after the services are provided is not one that DLS polices, in my opinion, but I have previously recommended that payments be spread out over three or four time periods so it can at least be said that the payment is for the previous period. As I said, this is a long standing practice by municipalities and DOR does not have a big problem with it as long as there is a written grant agreement in place and the entity's services are available to Town residents.

That being said, however, it is my opinion that the Conservation Fund cannot be the source of such a grant. In addition, I don't know if DLS would agree that a grant agreement for trail work would meet their narrow interpretation of providing a "service" to the Town residents; we could explore that for a future time if there is interest.

Brian

Brian W. Riley, Esq.
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From: Monterey Town Administrator <admin@montereyma.gov>
Sent: Tuesday, February 8, 2022 4:25 PM
To: Brian Riley <BRiley@k-plaw.com>
Subject: RE: Conservation Commission

Hi Brian,

The most I can provide you with (all that we were given) can be found in the attached email chain from the then chair of the Con Comm (he has since resigned). Yes the fund they want to use is the one you previously gave an opinion on.

Here are links to the Con Comm minutes where this was discussed: https://www.montereyma.gov/sites/g/files/vyhlif3496/f/minutes/dec_8_2021.pdf and https://www.montereyma.gov/sites/g/files/vyhlif3496/f/minutes/minutes_of_conservation_commission_meeting_december_17.pdf

Melissa

From: Brian Riley [<mailto:BRiley@k-plaw.com>]
Sent: Tuesday, February 8, 2022 3:54 PM
To: 'Monterey Town Administrator' <admin@montereyma.gov>
Subject: RE: Conservation Commission

Melissa, I can get you a full opinion by tomorrow, but as I read back through the attachment, I don't have the specifics of what transfer the Cons Comm is seeking. What is the dollar figure, and do they want the \$\$ to go to the Monterey Preservation Land Trust? Is the \$\$ for anything in particular? And does the Trust provide a "service" that residents can take advantage of (maintain trails, for example)? And finally, are these funds proposed to come out of the "Conservation Fund" that I wrote about last October? We may be able to get around needing a contract if done by a "grant agreement," but that depends on some of these other questions.

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From: Monterey Town Administrator <admin@montereyma.gov>
Sent: Wednesday, February 2, 2022 3:31 PM
To: Brian Riley <BRiley@k-plaw.com>
Subject: Conservation Commission

Hi Brian,

The Select Board has approved my sending you the following for a legal opinion. Please find attached a request made by the Conservation Commission and the response from our Accountant. Our questions are as follows:

1. Is this expenditure exempt from the Anti-Aid Amendment?
2. Is this expenditure subject to Procurement laws and does it require a contract? Our Accountant spoke with DLS and they advised that due to the amount being over \$10k it does and the contract/agreement would need to spell out what work is being done, timeframe, how the project will be billed (not getting the entire funds up front).
3. The Monterey Preservation Land Trust is rumored to be dissolving (<https://theberkshireedge.com/the-future-of-the-monterey-preservation-land-trust/>) does that present any issues if this is an acceptable expenditure?
4. What, if any, action should the Select Board take in regards to this motion by the Conservation Commission?

Please let me know if you need any further information in order to form your legal opinion.

Respectfully,

Melissa Noe

Town Administrator
Town of Monterey
413-528-1443 x111

Let your smile change the world but don't let the world change your smile! ☺

Monterey Town Administrator

From: Brian Riley <BRiley@k-plaw.com>
Sent: Friday, October 15, 2021 11:48 AM
To: 'Monterey Town Administrator'
Subject: RE: Conservation Commission Bylaw Questions

Hi, Melissa. I assume that this is the Fund referenced in G.L. c.40, §8C, the statute that governs creating a Conservation Commission:

A city or town may appropriate money in any year to a conservation fund of which the treasurer shall be the custodian.... He may deposit or invest the proceeds of said fund in savings banks, trust companies incorporated under the laws of the commonwealth, banking companies incorporated under the laws of the commonwealth which are members of the Federal Deposit Insurance Corporation, or national banks, or invest it in paid up shares and accounts of and in co-operative banks or in shares of savings and loan associations or in shares of federal savings and loan associations doing business in the commonwealth, and any income therefrom shall be credited to the fund. Money in said fund may be expended by said commission for any purpose authorized by this section; provided, however, that no expenditure for a taking by eminent domain shall be made unless such expenditure has been approved in accordance with this section.

In my opinion, therefore, the Commission may makes expenditures from the Fund, without the need for another vote of Town Meeting or of the Select Board, and decide what to spend the funds on as long as it is within the purposes set forth in §8C:

The commission may appoint a director, clerks, consultants and other employees, and may contract for materials and services within available funds insofar as the same are not supplied by other departments....

[The Conservation Commission] may purchase interests in such land with sums available to it. If insufficient funds are available or other reasons so require, a city council or a town meeting may raise or transfer funds so that the commission may acquire in the name of the city or town by option, purchase, lease or otherwise the fee in such land or water rights, conservation restrictions, easements or other contractual rights including conveyances on conditions or with limitations or reversions, as may be necessary to acquire, maintain, improve, protect, limit the future use of or otherwise conserve and properly utilize open spaces in land and water areas within its city or town, and it shall manage and control the same.

As stated in the statute, the Conservation Fund is managed by the Treasurer, who decides where to invest it, but expenditure is determined by the Conservation Commission.

There could be a question if someone makes a gift or grant of funds to the Commission but does not specify that is it to go into the "Conservation Fund." Arguably at least, that would be maintained as a gift account under G.L. c.44, §53A. This statute still puts the funds into a special account maintained by the Treasurer, but before the Commission may spend any funds (limited to the purpose stated by the donor), it must be approved by vote of the Select Board.

I hope this helps; if there are questions regarding a particular gift or appropriation, let me know.

Brian

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From: Monterey Town Administrator <admin@montereyma.gov>
Sent: Tuesday, October 12, 2021 9:53 AM
To: Brian Riley <BRiley@k-plaw.com>
Subject: RE: Conservation Commission Bylaw Questions

Hi Brian,

Just following up on the still unanswered question on the trust account for the Conservation Commission.

Respectfully,

Melissa Noe

Town Administrator
Town of Monterey
413-528-1443 x111

Kindness is FREE, sprinkle that stuff everywhere! ☺

From: Monterey Town Administrator [<mailto:admin@montereyma.gov>]
Sent: Wednesday, September 29, 2021 7:27 AM
To: 'Brian Riley' <BRiley@k-plaw.com>
Subject: RE: Conservation Commission Bylaw Questions

Thank you Brian,

I will look at this and distribute it today. I have attached the town meeting warrant (article 23).

Melissa

From: Brian Riley [<mailto:BRiley@k-plaw.com>]
Sent: Tuesday, September 28, 2021 9:38 PM
To: 'Monterey Town Administrator' <admin@montereyma.gov>
Subject: RE: Conservation Commission Bylaw Questions

Hi, Melissa. In my opinion, two new revolving funds may be added to the Departmental Revolving Funds bylaw to accommodate most of what you ask below. While it would be ideal to have one revolving fund for all Conservation Commission fees, you already have feedback from DLS that NOI fees must go into the Wetland Protection Fund. In addition, DLS advises that while there is flexibility in creating a revolving fund, it may not contradict another statute. And while revolving funds under G.L. c.44, §53E½ authorize the board or officer listed in the bylaw to expend funds directly, the Wetland Protection Fund requires that the Select Board approve any proposed expenditures from that Fund.

I reviewed the Scenic Mountain Act and, in my opinion, establishing a revolving fund for related fees would not conflict with G.L. c.131, §39A. I have attached my suggested amendments to the Revolving Fund bylaw table in Section 5. The

warrant article should be substantially, "To see if the Town will vote to amend Section 5 of the Departmental Revolving Fund by establishing the following two new revolving funds:..." and add the table.

In another email, you provided a summary of certain motions made by the Conservation Commission. One was to address the problems with the fees and revolving funds, and hopefully I have addressed that here. Another was to meet with Town Counsel to establish "status and control of the Conservation Trust." I am happy to assist with this, but would need some background of exactly what this Trust is.

Brian

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From: Monterey Town Administrator <admin@montereyma.gov>
Sent: Thursday, September 16, 2021 10:44 AM
To: Brian Riley <BRiley@k-plaw.com>
Subject: Conservation Commission Bylaw Questions

Good Morning Brian,

According to research by the Accountant after some questions were raised by the Conservation Commission about where monies collected should be deposited and how to use the revolving funds (currently we pay the agent from there and pay advertising fees), the Municipal Finance Law Division has advised that:

Wetland Protection Fund 131, Sec 40 only filing fees relating to this statute can be posted to the Wetland Protection Fund (which is NOI's only).

We will need to approve a RDA local bylaw fee to be able to post fees to the revolving account. The accountant has spoken with the auditor about this and what to do for this year until we can get a bylaw written and approved and he has stated that we can continue to post all fees collected as we have been to the one account as it is not material enough from an audit perspective to make us change it immediately. Can you please send me the proper language to add to our next meeting (it's likely we are going to have a special town meeting in November). Here is our current approved revolving fund bylaws: <https://www.montereyma.gov/select-board/pages/town-bylaws> (2nd from the bottom). Our Accountant has asked that counsel review the bylaw fee and Scenic Mountain Act fee and also determine if should be in General Fund or another acct.

Scenic Mountain Act - Chapter 131 Section 39A, the statute does not state it goes to revolving fund so therefore it falls under Chapter 44 Section 53 and would be General Fund Revenue. So we have been advised that these fees can no longer go to the revolving fund either. It is not clear if a bylaw can be created for these as needs to be done with the WPA RDA noted above. Please advise. <https://www.montereyma.gov/conservation-commission/pages/scenic-mountains-act-documents>

If there is anything else that we need to do please advise.



March 10, 2006

Barbara A. Durand
City Auditor
140 Main St.
Marlborough, MA 01752

Re: Grants to Non-profit Organizations
Our File No. 2006-75

Dear Ms. Durand:

This is in reply to your letter asking about the legality of grants to non-profit organizations.

Such grants are hard to justify under the state constitution's Anti-aid amendment (Art.18, 46 & 103, <http://www.mass.gov/legis/const.htm#cart103.htm>), which prohibits public funds or property from being given to charitable, educational, religious or other private organizations, no matter how worthy. The amendment provides in relevant part as follows:

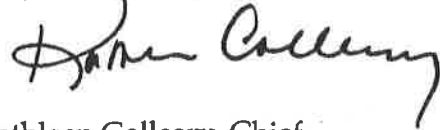
No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents. (Emphasis added)

The kinds of expenditures barred by the amendment are those that substantially benefit or aid private organizations in a way that is unfair, economically or politically. Even indirect benefit to a non-profit organization may fall afoul of the amendment. In *Bloom v School Committee of Springfield*, 376 Mass. 35, the Supreme Judicial Court struck down a statute providing for the loan of textbooks to students attending private schools. For an exception to the prohibition involving the provision of special education services, see *Commonwealth v. School Committee of Springfield*, 382 Mass. 665 (1981); see also *Fifty-one Hispanic Residents of Chelsea v. School Committee of Chelsea*, 421 Mass. 598 (1996) for a case in which a private organization (Boston University) was held to be a public agent under special legislation. "Aid" would include any grants, contributions or donations by the city to the various non-profit organizations you cite for the specific purpose of directly supporting or assisting their operations.

This does not mean that the city is precluded from purchasing services from non-profit organizations in the same way it purchases services from for-profit entities. As a party to a contract, the city would be compensating the organization for services rendered to the city, instead of giving it a gift or grant. Any such contract should be in writing, identify the services to be provided and set forth the payment schedule. Payment for any particular service could only be made after the service was provided. G.L. Ch. 41 §56.

We hope this information proves helpful.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kathleen Colleary".

Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC/CH

Monterey Town Administrator

From: Steven Weisz <steve@montereyma.gov>
Sent: Tuesday, January 25, 2022 11:00 AM
To: Monterey Town Administrator
Subject: Re: Con Com Funds

Yes to all, however the permission to contact counsel must be approved at tomorrow's meeting.

Steven

On Jan 25, 2022, at 10:51 AM, Monterey Town Administrator <admin@montereyma.gov> wrote:

Too late for tomorrow, right? I will add to 2/2. Should I get an updated opinion for 2/2 from counsel and include what the Accountant told Con Comm about this?

Melissa

From: Steven Weisz [mailto:steve@montereyma.gov]
Sent: Tuesday, January 25, 2022 10:47 AM
To: Monterey Town Administrator <admin@montereyma.gov>
Subject: Fwd: Con Com Funds

FYI.

Begin forwarded message:

From: Jeremy Rawitz <[redacted]>
Date: January 24, 2022 at 4:24:31 PM EST
To: Eric Kinsherf <eric@erickinsherfcpa.com>, Jon Sylbert <[redacted]>, Michael Zisser <[redacted]>, Lisa Kelly <Lisa@erickinsherfcpa.com>, Steve Weisz <Steve@montereyma.gov>, Justin Makuc <[redacted]>, "John F. Weingold" <[redacted]>, Nancy Tomasovich <[redacted]>, Leslie Lichter <[redacted]>, Margo Drohan <[redacted]>
Subject: Re: Con Com Funds

Hi all, I am writing to make sure that we can get the warrant on the agenda for the next BOS meeting. BOS you are copied and if they have any questions please respond to all so Eric can fill you in. BOS please make sure this warrant is on the agenda for the next meeting so the transfer of funds to the MPLT can occur. These are funds controlled by the ConCom at our discretion to be distributed to this project.

I have attached the work plan by Greenagers and the budget. Also please find Town Council Opinion.

If you have any questions please let everyone on this email know.

Thanks,

Jeremy Rawitz

Crew expenses 24 day work season

Youth	\$	17,280.00	6 youth, average wage of \$15
Leader	\$	4,056.00	26 paid days with average wage of \$19.50
Program Coordination*	\$	5,400.00	200 hours - \$27/hr
Transportation**	\$	1,800.00	\$75 per day
Supplies	\$	1,500.00	hard hats, gloves, basic tools, snacks
Payroll taxes	\$	3,627.12	
Staff travel	\$	500.00	
Subtotal	\$	34,163.12	
Administration***	\$	4,099.57	0.12
Total 24 Day Season	\$	38,262.69	
Per Diem	\$	1,594.28	

*Program Coordination includes project development, recruitment, training, supervision, and post season followup.

**Depending on recruitment, transportation costs may be removed from the total

***Administration costs may be reduced based on the number of crews

Monterey Town Administrator

From: Brian Riley <BRiley@k-plaw.com>
Sent: Friday, October 15, 2021 11:48 AM
To: 'Monterey Town Administrator'
Subject: RE: Conservation Commission Bylaw Questions

Hi, Melissa. I assume that this is the Fund referenced in G.L. c.40, §8C, the statute that governs creating a Conservation Commission:

A city or town may appropriate money in any year to a conservation fund of which the treasurer shall be the custodian.... He may deposit or invest the proceeds of said fund in savings banks, trust companies incorporated under the laws of the commonwealth, banking companies incorporated under the laws of the commonwealth which are members of the Federal Deposit Insurance Corporation, or national banks, or invest it in paid up shares and accounts of and in co-operative banks or in shares of savings and loan associations or in shares of federal savings and loan associations doing business in the commonwealth, and any income therefrom shall be credited to the fund. Money in said fund may be expended by said commission for any purpose authorized by this section; provided, however, that no expenditure for a taking by eminent domain shall be made unless such expenditure has been approved in accordance with this section.

In my opinion, therefore, the Commission may makes expenditures from the Fund, without the need for another vote of Town Meeting or of the Select Board, and decide what to spend the funds on as long as it is within the purposes set forth in §8C:

The commission may appoint a director, clerks, consultants and other employees, and may contract for materials and services within available funds insofar as the same are not supplied by other departments....

[The Conservation Commission] may purchase interests in such land with sums available to it. If insufficient funds are available or other reasons so require, a city council or a town meeting may raise or transfer funds so that the commission may acquire in the name of the city or town by option, purchase, lease or otherwise the fee in such land or water rights, conservation restrictions, easements or other contractual rights including conveyances on conditions or with limitations or reversions, as may be necessary to acquire, maintain, improve, protect, limit the future use of or otherwise conserve and properly utilize open spaces in land and water areas within its city or town, and it shall manage and control the same.

As stated in the statute, the Conservation Fund is managed by the Treasurer, who decides where to invest it, but expenditure is determined by the Conservation Commission.

There could be a question if someone makes a gift or grant of funds to the Commission but does not specify that is it to go into the "Conservation Fund." Arguably at least, that would be maintained as a gift account under G.L. c.44, §53A. This statute still puts the funds into a special account maintained by the Treasurer, but before the Commission may spend any funds (limited to the purpose stated by the donor), it must be approved by vote of the Select Board.

I hope this helps; if there are questions regarding a particular gift or appropriation, let me know.

Brian

Brian W. Riley, Esq.
KP | LAW
101 Arch Street, 12th Floor
Boston, MA 02110
O: (617) 654 1722
F: (617) 654 1735

Monterey Town Administrator

From: Lisa Kelly <Lisa@erickinsherfcpa.com>
Sent: Wednesday, January 19, 2022 6:59 AM
To: admin@montereyma.gov
Subject: Fw: Con Com Funds
Attachments: Chapter 41 Section 56 and Anti-Aid Amendment.docx

FYI - I forgot to add you to this email. See below

Eric Kinsherf, CPA
Phone: 774-994-2361

lisa@erickinsherfcpa.com

To upload or download files securely please use our [Secure File Transfer](#) platform powered by LeapFile

From: Lisa Kelly <Lisa@erickinsherfcpa.com>
Sent: Wednesday, January 19, 2022 6:56 AM
To: Eric Kinsherf <eric@erickinsherfcpa.com>; Jeremy Rawitz <jeremy.rawitz@gmail.com>
Cc: Jon Sylbert <jsylbert@gmail.com>; Michael Zisser <zissermichael10@gmail.com>
Subject: Re: Con Com Funds

Hi Jeremy,
As of follow up to your request for additional information

Chapter 41, Section 56 - Warrants for payment of bills - (See above for all of this section. Copied it into a word document).

The selectmen and all boards, committees, heads of departments and officers authorized to expend money shall approve and transmit to the town accountant as often as once each month all bills, drafts, orders and pay rolls chargeable to the respective appropriations of which they have the expenditure.

Anti- Aid Amendment (No donations to private organizations) - You may know this but sending just in case you weren't aware of this.

(I also copied all of this section in the attachment above) .

However, the Anti-Aid Amendment does not preclude a city or town from purchasing specific services from private organizations in order to carry out a public purpose.(9)

Chapter 30 B (Procurement)- requires a contract or agreement for expenditures greater than \$10,000.

Based on this, we would need you to follow the Town's warrant procedure.
If you have any questions, let us know.

Thank you,

Lisa

Eric Kinsherf, CPA
Phone: 774-994-2361

lisa@erickinsherfcpa.com

To upload or download files securely please use our [Secure File Transfer](#) platform powered by LeapFile

From: Eric Kinsherf <eric@erickinsherfcpa.com>
Sent: Friday, January 14, 2022 3:09 PM
To: Jeremy Rawitz <jeremy.rawitz@gmail.com>
Cc: Jon Sylbert <jsylbert@mat.com>; Lisa Kelly <Lisa@erickinsherfcpa.com>; Michael Zisser <zissermichael10@gmail.com>
Subject: Re: Con Com Funds

Hi Jeremy,

The legal opinion provided by K-P law that you forwarded to us explains that the Treasurer is the custodian of the funds.

Eric

Sent from my iPhone

On Jan 14, 2022, at 2:43 PM, Jeremy Rawitz <jeremy.rawitz@gmail.com> wrote:

Why would the funds not be available?

On Fri, Jan 14, 2022 at 2:36 PM Eric Kinsherf <eric@erickinsherfcpa.com> wrote:
Yes.

We check to see if there is a contract and funds available, make sure it is a legal expenditure, place it on a warrant for to be approved by the BOS. The Treasurer receives the approved warrant and disburses the funds.

Sent from my iPhone

On Jan 14, 2022, at 2:30 PM, Jeremy Rawitz <jeremy.rawitz@gmail.com> wrote:

Not sure what that means warrant process. Can you clarify?

On Fri, Jan 14, 2022 at 2:24 PM Eric Kinsherf <eric@erickinsherfcpa.com> wrote:

Hi Jeremy,

We are not going to transfer the funds today. We need to make sure that the payment follows the warrant process.

Lisa will give you a list of questions or information needed to process the request on Tuesday.

Have a nice weekend!

Eric

Sent from my iPhone

On Jan 14, 2022, at 2:12 PM, Jeremy Rawitz <jeremy.rawitz@gmail.com> wrote:

Hi Eric and Lisa, I have not heard from you that you are going to transfer the funds. Please let me know if there is a problem or anything I can do the help. You have the legal opinion and you should arrange the transfer the funds.

I appreciated in advance getting back to us by EOD today.

Jeremy

On Fri, Jan 14, 2022 at 11:16 AM Jeremy Rawitz <jeremy.rawitz@gmail.com> wrote:

Ok, sorry about that. I just am anxious we are all on the same page.

On Fri, Jan 14, 2022 at 10:42 AM Jeremy Rawitz <jeremy.rawitz@gmail.com> wrote:

Sorry, confused my Lisa's. Curious why you could forward it if she works with you?

On Fri, Jan 14, 2022 at 10:17 AM Lisa Dorr <LisaD@erickinsherfcpa.com> wrote:

Hi Jeremy,

I keep receiving emails from you that should be going to the town accountant Lisa Kelly Lisa@erickinsherfcpa.com. I know it can be confusing with 2 Lisa's. I only process your warrants. She may not be receiving your emails. I did not see her CC'd on a few.

Lisa Dorr

Eric A. Kinsherf, CPA

116 State Road, Unit # 8
PO Box 791
Sagamore Beach, MA 02562
Cell: 508-989-2224

To upload or download files securely please use our [Secure File Transfer](#) platform powered by LeapFile

From: Jeremy Rawitz <jeremy.rawitz@gmail.com>
Sent: Friday, January 14, 2022 7:05 AM
To: Eric Kinsherf <eric@erickinsherfcpa.com>; Jon Sylbert <sylbert@mass.gov>; Lisa Dorr <LisaD@erickinsherfcpa.com>; Michael Zisser <zissormichael10@gmail.com>

Subject: Fwd: Con Com Funds

Lisa, please find the opinion attached. Again I ask for the transfer of funds. If there is a reason this cannot occur please inform us. Thanks again for your help and attention to this.

----- Forwarded message -----

From: **Jeremy Rawitz** <jeremy.rawitz@gmail.com>
Date: Sun, Jan 9, 2022 at 9:25 PM
Subject: Fwd: Con Com Funds
To: John F. Weingold <johweingold@gmail.com>

FYI

--

Jeremy Rawitz

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Jeremy Rawitz

Section 56: Warrants for payment of bills

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[Section impacted by 2020, §2, Secs. 12, 13, 16 and 17, as amended by 2020, 201, Secs. 39 to 42 effective November 10, 2020, relating to service contracts in order to address disruptions caused by the outbreak of COVID-19]

Section 56. The selectmen and all boards, committees, heads of departments and officers authorized to expend money shall approve and transmit to the town accountant as often as once each month all bills, drafts, orders and pay rolls chargeable to the respective appropriations of which they have the expenditure. For purposes of this section, the board of selectmen and any other board, committee or head of department consisting of more than 1 member authorized to expend money, may designate any 1 of its members to approve all bills, drafts, orders and payrolls; provided, however, that the member shall make available to the board, committee or other department head, at the first meeting following such action, a record of such actions. This provision shall not limit the responsibility of each member of the board in the event of a noncompliance with this section. Such approval shall be given only after an examination to determine that the charges are correct and that the goods, materials or services charged for were ordered and that such goods and materials were delivered and that the services were actually rendered to or for the town as the case may be; provided, however, that such approval may be given to any bill received from a state agency for the town's share of the costs of a federal urban planning assistance program, established under the provisions of section 701 of Public Law 83-580, as amended, before any goods, materials or services ordered or to be ordered under such a program have been delivered or actually rendered, as the case may be. The town accountant shall examine all such bills, drafts, orders and pay rolls, and, if found correct and approved as herein provided, shall draw a warrant upon the treasury for the payment of the same; and the treasurer shall pay no money from the treasury except upon such warrant approved by the selectmen. If there is a failure to elect or a vacancy occurs in the office of selectman, the remaining selectman or selectmen, together with the town clerk, may approve such warrant. The town accountant may disallow and refuse to approve for payment, in whole or in part, any claim as fraudulent, unlawful or excessive, and in such case he shall file with the town treasurer a written statement of the reasons for such refusal. The treasurer shall not pay any claim or bill so disallowed by the town accountant. So far as apt this section shall apply to cities.

1.) Anti-Aid Amendment

The first is a prohibition against the giving of money or property by a city or town to or in aid of any individual, association or corporation embarking upon any private enterprise. This prohibition is referred to as the Anti-Aid Amendment.⁽²⁾ It provides in pertinent part:

"No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth."

This amendment prohibits the use of public money or property by cities and towns for the purpose of maintaining or aiding any institution or charitable or religious undertaking that is not publicly owned. The kinds of expenditures barred by the amendment are those that directly and substantially benefit or "aid" private organizations in a way that is unfair, economically or politically.⁽⁶⁾

The prohibition against using public funds for private organizations includes any grants, contributions or donations made by a city or town to an organization for the specific purpose of directly supporting or assisting its operations. However, the Anti-Aid Amendment does not preclude a city or town from purchasing specific services from private organizations in order to carry out a public purpose.⁽²⁾ Further, as with the public purpose limitation discussed above, if an expenditure is for a public purpose but also incidentally benefits a private organization, the expenditure generally will not violate the Anti-Aid Amendment.^(1,2)



Botanica S. L. Malhotra, 8-11, Esplanade, Bangalore 560002, India. U.S. Field No. 1041, and the site of the last collection.

Monterey Town Administrator

From: Steven Weisz <steve@montereyma.gov>
Sent: Monday, February 14, 2022 1:53 PM
To: Monterey Town Administrator
Subject: Fwd: [FWD: FW: Conservation Commission]
Attachments: RE_ Conservation Commission Bylaw Questions.eml (26.0 KB); Untitled attachment 01720.htm; DOR Anti-Aid - Grants.pdf; Untitled attachment 01723.htm; 2009-12-7-ConComm-email.pdf; Untitled attachment 01726.htm; 090616 DOCS-#571547-v1-Town_of_Monterey_Enforcement_Order.pdf; Untitled attachment 01729.htm; 091207 M.G.L. - Chapter 40, Section 8C.pdf; Untitled attachment 01732.htm

For discussion

Begin forwarded message:

From: Michele Miller <michele@bolagranola.com>
Date: February 13, 2022 at 3:53:15 PM EST
To: Colta Ives <coltaives@gmail.com>, Narain Schroeder <[REDACTED]>, Joyce Scheffey <joyce.scheffey@gmail.com>, Steve Weisz <Steve@montereyma.gov>, justin@montereyma.gov, BRiley@k-plaw.com, Monterey News <montereynews9@gmail.com>, [REDACTED]
Subject: Fwd: [FWD: FW: Conservation Commission]

To Whom It May Concern,

This communication raises a number of questions.

1. Sylbert uses "Finance Committee" in his sign-off. Although he is a member he is operating in this case as an individual and without any authorization from the Finance Committee.
2. As president of the MPLT, Sylbert could potentially have a conflict of interest. The "finances" and operations of the MPLT are not transparent and there is no accountability. No fundraising, community outreach or engagement has occurred for some time. Before any Town funds are committed an audit of the MPLT would be necessary.
3. Is it not the policy of the Town of Monterey to require permission of the Selectboard prior to engaging with Town Counsel? Certainly the MPLT would have no standing to do so.
4. If monies are available then the use should be subject to Town discussion and vote.
5. If I understand Town Counsel's statement then the use suggested is not permitted.

Thanks Steve for keeping us apprised of these developments.

Michele Miller

----- Forwarded message -----

From: Michele Miller <michele@bolagranola.com>
Date: Sat, Feb 12, 2022 at 1:52 PM
Subject: Re: [FWD: FW: Conservation Commission]

To: Steven Weisz <steve@montereyma.gov>

Cc: Monterey Town Administrator <admin@montereyma.gov>

NO

Sent from my iPhone

On Feb 12, 2022, at 1:05 PM, Steven Weisz <steve@montereyma.gov> wrote:

Michelle,

Has the Finance Committee asked Jon to speak on its behalf on this matter?

Also.. who gave authorization for him to contact Counsel?

Steven

Steven Weisz, Chair
Monterey Selectboard

Begin forwarded message:

From: jons@montereyma.gov

Date: February 12, 2022 at 12:54:31 PM EST

To: Brian Riley <BRiley@k-plaw.com>

Cc: Steve Weisz <Steve@montereyma.gov>, Justin Makuc

<justin@montereyma.gov>, John Weingold

<johnw@montereyma.gov>, nschroeder@bnrc.org

Subject: [FWD: FW: Conservation Commission]

Dear Brian and Select Board, please see attached email from the Monterey Conservation Commission to the Select Board regarding the 2009 enforcement order and the intended use of the \$25,000 fine.

See attachments:

2009-12-7-ConComm-email.pdf

090616 DOCS-#571547-v1-

Town_of_Monterey_Enforcement_Order.pdf

091207 M.G.L. - Chapter 40, Section 8C.pdf

As the \$25,000 fine appears to be for the purchase of interest in land for the purpose of conservation, and not merely upkeep of existing conserved land, I would like to forward this information to the Berkshire Natural Resources Council. BNRC is actively involved with conservation in the town of Monterey—as is the Monterey Preservation Land Trust—and BNRC may have upcoming conservation projects in Monterey. The town could

partner with BNRC, MPLT, DFW and/or DCR to use the \$25,000 to help purchase property for the stated purpose of conservation.

Nairain Schroeder is the contact at BNRC. I have copied him on this email.

Thanks,
Jon

Sincerely,
Jon

Jonathan Sylbert
Finance Committee
Monterey

----- Original Message -----

Subject: Fwd: FW: Conservation Commission
From: Justin Makuc <justin@montereyma.gov>
Date: Thu, February 10, 2022 12:52 pm
To: jons@montereyma.gov

Hi Jon,

Per your request, Town Counsel's writing on the Con Comm expenditure to MPLT:

Justin Makuc

----- Forwarded message -----

From: **Monterey Town Administrator**
<admin@montereyma.gov>
Date: Wed, Feb 9, 2022 at 11:58 AM
Subject: FW: Conservation Commission
To: 'John Weingold' <johnw@montereyma.gov>, Justin Makuc
<justin@montereyma.gov>, Steve Weisz
<steve@montereyma.gov>

For tonight.

From: Brian Riley [<mailto:BRiley@k-plaw.com>]
Sent: Tuesday, February 8, 2022 7:56 PM
To: 'Monterey Town Administrator' <admin@montereyma.gov>
Subject: RE: Conservation Commission

Hi, Melissa. There may be some facts out there that could affect these issues, but I will give you my opinion based on what I have. It appears the Cons Comm agenda item and vote on 12/8/21 and 12/17/21 was to seek to transfer \$38,262.28 from the ?Cons Comm Reserve Account? (which I interpret as the ?conservation fund? described in G.L. c.40, ?8C and discussed in my opinion from last October, attached) to be paid to the Monterey Preservation Land Trust (?MPLT?), a nonprofit organization. The purpose of the proposed transfer was to allow MPLT to perform work to upgrade existing hiking trails and create new trails on ?the Mt. Hunger property.? While I have not searched Registry records,

I understand MPLT owns and maintains this property, which is open to the public.

In my opinion, the main problem with the Commission's request is that this grant would not be consistent with the purposes for which the conservation fund may be spent. General Laws Chapter 40, §8C sets forth the primary statutory authority for a Conservation Commission. The Commission's role (outside of its primary regulatory authority over wetlands permitting issues) regarding real property is to accept gifts of property or to acquire such property by purchase of title, options, leases or restrictions in the name of the Town. The Commission may use such funds that are available in the Conservation Fund, or if that is not sufficient, any funds appropriated by Town Meeting for those purposes. In each case, however, it involves the Commission acquiring interests in property to be owned in the name of the Town. Section 8C details how a conservation fund may be set up, and states that *"Money in said fund may be expended by said commission for any purpose authorized by this section."* In my opinion, the proposal would amount to a gift of funds to a private nonprofit (albeit for land conservation purposes) to fund work by that nonprofit on property that it owns. I think the Accountants were correct to flag this as not a proper use of the Fund.

While grants to nonprofits are legal under certain specific circumstances, there does need to be a specific appropriation by Town Meeting for them. It is fairly common for municipalities to vote relatively minor appropriations for local nonprofit human services organizations. Typically, however, the funds are expended pursuant to a grant agreement. There are a couple of reasons for using a grant agreement. First, contracts for goods or services are governed by G.L. c.30B, the Uniform Procurement Act, so there are various rules that must be followed. A grant agreement is **not** subject to c.30B, however. The statute defines grant agreement as "an agreement between a governmental body and an individual or nonprofit entity the purpose of which is to carry out a public purpose of support or stimulation instead of procuring supplies or services for the benefit or use of the governmental body."

And second, there is a general rule (actually a provision of the Massachusetts Constitution, known as the Anti-Aid Amendment) against expending public funds that only benefit a private party or entity. The Department of Revenue agrees, however, that if the payment is made under a grant agreement and the municipality is essentially purchasing services that will be available to its residents, this does not violate the Amendment. I have attached a letter from the Division of Local Services on this topic. As such, we have assisted in drafting grant agreements for local nonprofits to avoid any legal issues food kitchens, homeless shelters and the like. The requirement, referenced by DLS, that payments be made after the services are provided is not one that DLS polices, in my opinion, but I have previously recommended that payments be spread out over three or four time periods so it can at least be said that the payment is for the previous period. As I said, this is a long standing practice by municipalities and DOR does not have a big problem with it as long as there is a written grant agreement in place and the entity's services are available to Town residents.

That being said, however, it is my opinion that the Conservation Fund cannot be the source of such a grant. In addition, I don't know if DLS would agree that a grant agreement for trail work would meet their narrow interpretation of providing a service to the Town residents; we could explore that for a future time if there is interest.

Brian

Brian W. Riley, Esq.
KP | LAW
101 Arch Street, 12th Floor
Boston, MA 02110
O: (617) 654 1722
F: (617) 654 1735
C: (617) 909 9084
briley@k-plaw.com
www.k-plaw.com

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From: Monterey Town Administrator
<admin@montereyma.gov>
Sent: Tuesday, February 8, 2022 4:25 PM
To: Brian Riley <BRiley@k-plaw.com>
Subject: RE: Conservation Commission

Hi Brian,

The most I can provide you with (all that we were given) can be found in the attached email chain from the then chair of the Con Comm (he has since resigned). Yes the fund they want to use is the one you previously gave an opinion on.

Here are links to the Con Comm minutes where this was discussed: https://www.montereyma.gov/sites/g/files/vyhlif3496/f/minutes/dec_8_2021.pdf and https://www.montereyma.gov/sites/g/files/vyhlif3496/f/minutes/minutes_of_conservation_commission_meeting_december_17.pdf

Melissa

From: Brian Riley [<mailto:BRiley@k-plaw.com>]
Sent: Tuesday, February 8, 2022 3:54 PM
To: 'Monterey Town Administrator' <admin@montereyma.gov>
Subject: RE: Conservation Commission

Melissa, I can get you a full opinion by tomorrow, but as I read back through the attachment, I don't have the specifics of what transfer the Cons Comm is seeking. What is the dollar figure, and do they want the \$\$ to go to the Monterey Preservation Land Trust? Is the \$\$ for anything in particular? And does the Trust provide a ?service? that residents can take advantage of (maintain trails, for example)? And finally, are these funds proposed to come out of the ?Conservation Fund? that I wrote about last October? We may be able to get around needing a contract if done by a ?grant agreement,? but that depends on some of these other questions.

Brian W. Riley, Esq.

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From: Monterey Town Administrator

<admin@montereyma.gov>

Sent: Wednesday, February 2, 2022 3:31 PM

To: Brian Riley <BRiley@k-plaw.com>

Subject: Conservation Commission

Hi Brian,

The Select Board has approved my sending you the following for a legal opinion. Please find attached a request made by the Conservation Commission and the response from our Accountant. Our questions are as follows:

1. Is this expenditure exempt from the Anti-Aid Amendment?
2. Is this expenditure subject to Procurement laws and does it require a contract? Our Accountant spoke with DLS and they advised that due to the amount being over \$10k it does and the contract/agreement would need to spell out what work is being done, timeframe, how the project will be billed (not getting the entire funds up front).
3. The Monterey Preservation Land Trust is rumored to be dissolving (<https://theberkshireedge.com/the-future-of-the-monterey-preservation-land-trust/>) does that present any issues if this is an acceptable expenditure?
4. What, if any, action should the Select Board take in regards to this motion by the Conservation Commission?

Please let me know if you need any further information in order to form your legal opinion.

Respectfully,

Melissa Noe

Town Administrator

Town of Monterey

413-528-1443 x111

Let your smile change the world but don't let the world change your smile! ☺

Monterey Town Administrator

From: Jim Hunt <dpw1@montereyma.gov>
Sent: Monday, February 14, 2022 10:55 AM
To: johnweingold@gmail.com
Cc: Monterey Town Administrator; Steve Weisz; Justin Makuc; 'John Weingold'
Subject: RE: [Monterey MA] Fairview road weekends (Sent by John Weingold, johnweingold@gmail.com)

Hello.

As in the past, I have invited all to come visit the highway department and learn how operations are handled. Justin has taken the time to do so. Also referring to the not so distant past, 2/4/2022 the board was notified via e-mail that Fairview Road was closed due to mud, and on 2/5 (Saturday) a subsequent e-mail informs of the reopening of this road. I personally rough graded the effected sections at first light on Saturday 2/5. I made the decision to take no action on 2/12 as there was little that could be done until the road dried up or froze. Any motorist that chooses to pass through mud that deep is doing so at their own risk. No different than snow two feet deep.

As far as weekends in general go, I spend way more time checking the roads in this town than is necessary. In fact, I have logged 94.5 hours above 40 hours per week since November 16th.

I am the only Highway employee that worked all of Christmas eve, Christmas day, and through the rest of the holiday season as Covid ran through our crew. In retrospect, I probably should have followed the CDC recommendation and the order of the local health official and stayed home. This would have left the town with ZERO coverage for a number of weather events. Instead I took the time to write a disaster recovery procedure and line up mutual aid partners and local contractors to see that the roads were cared for if needed. This document was shared with the Town Administrator as a draft and should be adopted as policy. While I work hard for the good people of this town, I work at the will of the board. If this does not demonstrate enough dedication to satisfy this board, please consider my application for the Highway II position that is still open.

Jim

From: Contact form at Monterey MA [mailto:cmsmailer@civicplus.com]
Sent: Saturday, February 12, 2022 8:08 PM
To: jhunt <dpw1@montereyma.gov>
Subject: [Monterey MA] Fairview road weekends (Sent by John Weingold, johnweingold@gmail.com)

Hello jhunt,

John Weingold (johnweingold@gmail.com) has sent you a message via your contact form (<https://www.montereyma.gov/user/981/contact>) at Monterey MA.

If you don't want to receive such e-mails, you can change your settings at <https://www.montereyma.gov/user/981/edit>.

Message:

I understand the highway department is off on weekends. Frankly, your department should be checking the dirt roads on a more consistent basis, including weekends. Leaving a major east to west artery on the weekends like

Fairview road unattended and frankly unpassable is concerning. Fairview road in the early days was called mud road. Given the warm temperatures the road has turned to mud and there are trenches at least a foot deep. I would like to hear your solutions to this problem on weekends.

Winter Road Watch Proposal for Weekends and Holidays

Purpose:

To monitor road conditions as impacted by weather. As best possible, provide safe and convenient passage of gravel and paved road surfaces by monitoring changing weather conditions during off hours (Monday to Friday prior to 7:00am and after 3:00pm) as well as Observed Holidays.

Scope of Work:

Travel all town roads at various times once per day as weather patterns dictate. Monitor weather forecasts for rain, snow, ice, sleet, extreme cold, and extreme rise in temperatures that may cause changes to safe travel conditions. Report all findings to Director and or Forman for further actions.

May be charged with closing roads and contacting the Town Administrator, Elected Officials, Police and Fire of same.

Answer calls for service for trees down, animal carcass removal, mud, drifting snow, freezing conditions and any other related hazards.

Schedule:

Rotating weekends at 5 week intervals with 4 hourly staff and the director taking a shift.

On call Friday from 3:00pm to Monday at 7:00am. On call will involve checking the various resources available (weather forecast and radar, weather monitoring stations, etc) remotely and then performing road checks as described above if necessary.

Beginning November 1st and ending May 1st. The remaining months will be monitored by the director and/or their designee.

Call-ins for staff members will remain as needed and hourly rates will begin at the time of actual call.

Compensation:

Weekend - Rate times 1.5

Holiday – Rate times 2 (8 hours at regular rate is unaffected)

Stipend – \$250.00 monthly.

Minimum 4 hours call in time if required to go in.

	Regular Rate	Regular Hours	Overtime Rate x1.5	Holiday Rate x2	Winter/Fuel Stipend Monthly
Director	\$ 37.14	42	\$ 55.71	\$ 74.28	\$ 250.00
Forman	\$ 26.33	40	\$ 39.49	\$ 52.66	\$ 250.00
Highway II	\$ 24.24	40	\$ 36.36	\$ 48.48	\$ 250.00
Highway III	\$ 20.50	40	\$ 30.75	\$ 41.00	\$ 250.00
Highway IV	\$ 19.50	40	\$ 29.25	\$ 39.00	\$ 250.00
***Minimum: 4 hours call time**					

A little over three months ago, as the Select Board contemplated hiring Jim Hunt to replace Shawn Tryon as Director of Highway Operations, I said to Jim that he had 'big shoes to fill'.

He knew it. We knew it.

Over the past few years, it seems like mud season comes four to five times per year rather than just once, and it makes driving and maintaining the roads a challenge. This is the price we pay for living in the beautiful, serene, and rural Berkshires – and for us – a price worth paying.

Here we are, perhaps at the end of the snow season and hopefully at the beginning of the last mud season. My wife, Janet, and I could not be more pleased with how well maintained the roads have been this winter. We want to thank Jim, Randon, Tyler, Pete, and Cody for their diligence and commitment in keeping our roads open, passable, and safe.

Hillel M Maximon

Spoken at the 2022 02 16 Select Board Meeting

Monterey Town Administrator

From: Steven Weisz <steve@montereyma.gov>
Sent: Tuesday, February 15, 2022 8:41 AM
To: Monterey Town Administrator
Subject: Executive Session answer by Town Counsel

Executive Session answer by Town Counsel

Begin forwarded message:

From: "Brian M. Maser" <BMaser@k-plaw.com>
Date: February 15, 2022 at 7:08:02 AM EST
To: Steven Weisz <steve@montereyma.gov>
Subject: RE: Text messages written by Justin Makuc

Steven:

Thank you for sharing the e-mails following our conversation yesterday. Given the posting requirements, the Board cannot lawfully meet tomorrow night in Executive Session with the Town Clerk to address any "complaints" against the Town Clerk regarding her office hours as the Board is within the 48 hour posting period to meet in Executive Session. Following my read of the e-mails, however, and our discussion, the matter should be addressed in open session as the Board should simply discuss the Clerk's office hours and come to a consensus as to what those hours actually are. It appears as if there is some miscommunication between people as to office hours that need to be ironed out.

Let me know if you have any questions.

Brian

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