

APR -8 2003

CITY OF NEWTON  
LAW DEPARTMENT  
INTEROFFICE MEMORANDUM

DATE: April 8, 2003

TO: Michael Kruse, Director of Planning and Development  
Stephen D. Gartrell, Director of Community Development  
Jennifer Goldson, Community Preservation Planner

FROM: *BS* Gayle A. Smalley, Associate City Solicitor

RE: Conflict of Interest Opinion -- Employee purchase program

*Opinion req'd  
19 Feb 03 -  
req. attached*

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For your information, I enclose a copy of the Opinion of the State Ethics Commission, which was provided in response to a joint inquiry from by the City and CAN-DO. The main points of the Opinion are as follows:

1. Once the City adopts such a program, employees who receive benefits under the City-sanctioned program will not be considered to receive "unwarranted privileges" within the meaning of section 23(b)(2). Thus, employee-participants will not violate section 23(b)(2); and
2. In order to avoid a conflict under section 20, each employee-participant will have to meet the 4-point test under section 20(b) and file a written disclosure with the City Clerk; and
3. That the employees of the "contracting agency," i.e. the department that enters into the contracts, such as funding agreements, mortgages, notes etc. for this program (as proposed, the department will be the Planning Department) cannot meet the 4-point test. Thus, those employees will not be able to participate in the program. In addition, employees of an agency(ies) that regulates the activities of the contracting agency also will be barred from participation.

Please note that the "contract" (the employee purchase program) must be "publicly advertised" for employees to meet the 4th point under the under section 20 test.

In addition, the Opinion points out that ineligible employees who work to carry out the program may not participate in decisions involving applications from members of their immediate family; and that employees who work on the program must be careful to avoid any appearance of conflict based on their private relationships with the applicant-employees.

Please do not hesitate to call if you have any questions.

enclosure



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Diane Meibaum, Esq.  
State Ethics Commission  
1 Ashburton Place  
Room 619  
Boston, Massachusetts 02108

Re. Request for Advisory Opinion

Dear Ms. Meibaum:

This letter presents a joint request for an Advisory Opinion, submitted on behalf of the City of Newton and the private non-profit organization, Citizens for Affordable Housing in Newton ("CAN-DO"). This matter was previously discussed on an informal basis with Attorney Lauren Duca.

The issue involves a proposed homeownership program for full time employees of the City of Newton, as summarized below and described in the written materials that are enclosed. The questions are 1) whether municipal employees who participate in the home ownership program will violate the state conflict of interest law; and 2) if so, whether the City can establish the program in a manner that will avoid such conflicts.

### Community Preservation Act background

As a result of the Newton voters' acceptance of the Community Preservation Act ("CPA"), G.L. chapter 44B, the City charges a CPA surcharge on the real estate tax bills. The funds raised through the surcharge, together with funds annually distributed by the Commonwealth, create a source of local funding for certain statutory purposes, which include the "creation, preservation and support of community housing." G.L. chapter 44B section 5(b)(2). The statutory definition of "Community Housing" ties it to certain income standards.<sup>1</sup>

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<sup>1</sup> It is noteworthy that CPA funds may be used for housing for persons and families whose annual income is less than 100 per cent of the areawide median income. Most housing assistance programs serve a more limited population, usually up to no more than 80 per cent.

Under this new statutory scheme, the Newton Community Preservation Committee makes recommendations to the Board of Aldermen for expenditures of CPA funds. The Board of Aldermen appropriates funds for expenditure. G.L. chapter 44B section 5(b)(2) and (3) and section 6.

#### Proposed Affordable Housing Program for City employees

The Committee has studied the local "needs, possibilities and resources...regarding community preservation" in accordance with G.L. chapter 44B section 5(b)(1). The outcome of its study was set forth in the "City of Newton Community Preservation Plan," dated October 16, 2002, which identifies community preservation goals. Such Plan sets out the following as one of the City's Community Housing goals:

Create new moderate housing units (80% to 100% of median income) that promote housing for City employees, such as teachers, firefighters and police officers.

At this time, the Newton Community Preservation Committee is considering a number of applications for funding, including one submitted by CAN-DO for a municipal employee home ownership program. CAN-DO has applied for CPA funding that would reduce (the affordable housing term of art is "write down") the sales price of three condominium units for sale to three City of Newton employees and their families. The condominium units would be located at 90 Christina Street, a nine unit residential property that is under construction/rehabilitation by CAN-DO.

Under the proposal, the three units would be subject to long-term, perhaps perpetual, deed restrictions that would limit the re-sale of the three condominium units to other City of Newton employees. It is expected that the deed restrictions would be held by the City and under the restrictions, subsequent sales of the condominium units would be limited to income-eligible municipal employees, at comparably reduced sales prices.

Thus, the City would be involved in several transactions with employees who participate in this affordable housing program.<sup>2</sup> It is expected that the initial selection of employees will be made by lotteries (which may be carried out by either CAN-DO or the City) drawn from a pool of applications from income-eligible employees. In addition, it is expected that the City will receive and hold each deed restriction, which will be executed by the participating employees and delivered to the City as part of the real estate purchase. Following the closing, the City will be involved in monitoring the use of the property to assure compliance with the terms of the deed restriction. When, at some time in the future, the initial buyer-employees sell their units to other eligible employees, the City, as holder of the deed restriction, will be involved in approving the transactions and assuring the continued compliance with the deed restriction.

Deed restrictions limiting re-sale to a limited pool of buyers usually contain a provision to cover the possible scenario that the seller will be unable to find another eligible buyer. Such

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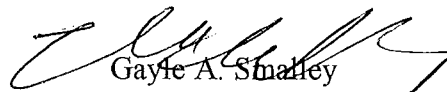
<sup>2</sup> The Newton Community Development Authority (NCDA), established under Chapter 705 of the Acts of 1975, is the legal entity that carries out many of the City's housing development programs. NCDA is staffed by the employees of the City of Newton. For purposes of this letter, NCDA is treated as an agency of the City of Newton.

restrictions typically allow the holder of the restriction to purchase the property in such circumstances. Thus, it is possible that the City and an employee-condominium unit owner could enter into a purchase and sale transaction at some time in the future.


Assuming that the Board of Aldermen approves the funding, the funds will be appropriated for expenditure by a city department, in all likelihood, the Planning and Development Department. At this point in the project, the flow of funding that would follow appropriation is not entirely clear. We want to highlight the two obvious possibilities, which are as follows: 1) the city department disburses the funds to the employee-buyers for use in purchasing the condominium units OR 2) the city department provides the funds to CAN-DO under a grant agreement, and CAN-DO lowers the purchase price for the employee-buyers to reflect the subsidy received from the City. We respectfully request that the Advisory Opinion include both possible avenues for distribution of the funds.

We are eager to receive the guidance of the Commission. If you need additional information, please do not hesitate to contact us.

Very truly yours,



Gayle A. Smalley  
Associate City Solicitor



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enclosures: City of Newton Community Preservation Plan, adopted October 16, 2002  
CAN-DO's Application for funding dated November 1, 2002  
Evaluation of Application dated January 9, 2003  
Letter from CAN-DO to Jennifer Goldson dated January 31, 2003  
"Homeownership Project for City Employees using CPA Funds" prepared by CAN-DO