

TOWN OF MIDDLEBURY

Board of Finance
1212 Whittemore Road
Middlebury, CT 06762

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Edith Salub...
TOWN CLERK

Meeting Minutes Wednesday, September 14, 2011 Shepardson Community Center

Present: Michael McCormack, Chairman
Vincent Cipriano, Board Member
Dave Cappelletti, Board Member
Stephen Ruccio, Board Member
- Edward Asselin, Board Member
Michael Kenausis, Board Member
Dick Spierto, Board Member Alternate
Thomas Proulx, Board Member Alternate

Absent: Bart Cutrali, Board Member Alternate

Also Present: Chief Guisti (7:30)
Larry Hutvagner, CFO
Marj Needham, Bee Intelligencier
Tracy B. Graziano, Recording Clerk

Mr. McCormack opened the meeting at 7:05 p.m.

Approval of Prior Minutes

Deferred to next meeting.

Chief Financial Officer's Report

Mr. Hutvagner presented Statements of Revenue and Expenditures as of August 31, 2011 for FY 11-12. He also presented Statements of Revenue and Expenditures as of June 30, 2011 for FY 10-11 stating that they have been revised to reflect an adjustment to the Parks & Recreation Department. He stated that these numbers are not final, adding that all departments are under budget for FY10-11 with the exception of the Police Department and the Dispatch Center, which he acknowledged as an item on this agenda. Mr. Hutvagner fielded specific questions from Board members. Mr. McCormack questioned the amounts in Legal Fees Labor. Mr. Hutvagner replied that the Town is in the process of mediating an issue with the Police contract and arbitration with Clerks/Dispatchers union. Mr. Kenausis questioned why the Town was mediating a closed Police contract. Mr. Hutvagner stated that the mediation involved a wage reopener. Mr. Kenausis commented that the Town should be hiring legal counsel that has labor expertise to litigate these issues. Mr. Cappelletti agreed, but added that it's not the BOF's purview to hire legal representation, it's the BOS.

Board of Finance Committee, Con't

Wednesday, September 14, 2011

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Mr. Cappelletti asked Mr. Hutvagner if he had made the changes to encumbrances' to reflect the Board of Finance Legal fees. Mr. Hutvagner replied not yet.

Mr. McCormack commented on the Planning & Zoning Department stating that their spending rate for FY 11-12 matches that of FY 10-12 adding, "We need to not let happen what happened in the Police Department happen here...when they run out of money, we'll be without a Zoning Enforcement Officer".

Mr. McCormack questioned the status of the Special Duty Fund. Mr. Hutvagner did not prepare a statement for this meeting. Mr. McCormack asked if the Special Duty Pension contribution rate had been increased from 4.5 to 17%. Mr. Hutvagner replied no because it is a Union issue. Chief Guisti said he intends to speak with the Union this week. Mr. Kenausis offered that he spoke with the Police Commission and there is a real need for two new police cars.

Treasurer's Report

None

Tax Collector's Report

Reports for July & August 2011 were provided, (see Appendix I.d).

Budget Transfers

None

Correspondence

Mr. McCormack presented a letter from Dr. Ray Sullivan and Dr. Maurice Falk requesting that the BOF consider approving overtime wages for flu clinics they performed prior to the demise of the health department. The BOF agreed that this is a Human Resource issue and does not fall under the BOF's purview. Mr. Ruccio made a MOTION that Chairman McCormack compose a letter to the doctors explaining the BOF's perception. Mr. Cappelletti SECONDED and the MOTION was unanimously APPROVED.

Chairman's Comments

Mr. McCormack commented, "I've heard some criticism why we are doing this for \$1,800...because the BOF has been rolled-over time and time again under current and former BOS. So we need to do this...we need to send a message".

Public Comments

None

Discussion on Board of Selectmen Salaries

Mr. Kenausis made a MOTION to enter into Executive Session to discuss pending litigation. Mr. Ruccio SECONDED and the MOTION was unanimously APPROVED. Mr. McCormack invited Ms. Strobel to attend. Executive Session entered into at 7:55p.m. Mr. Kenausis made a MOTION to adjourn the Executive Session. Mr. Cipriano SECONDED and the MOTION was unanimously APPROVED. Executive Session adjourned at 8:15p.m.

Mr. Cappelletti made a MOTION to accept the letter from Grady & Riley, LLP, (see Appendix II.a). Mr. Ruccio SECONDED and the MOTION was unanimously APPROVED.

Mr. Cappelletti made a MOTION to authorize Chairman McCormack to write a letter to the First Selectman requesting that he pay back the rate increase that he voted himself on December 20, 2010 plus the amount paid for Compensated Absences that he authorized for police officers during a snowstorm in January 2011. Mr. Asselin SECONDED and the MOTION was unanimously APPROVED.

Discussion of Police Budget 2010-2011

This discussion to be continued at next meeting. Mr. Hutvagner cautioned the BOF that delaying action on this item could delay the completion of the audit.

Discussion Former Town Heath Department Request

Discussed under Correspondence

First Selectman's Comments

None

Mr. Cappelletti made a MOTION to adjourn the regular meeting. Mr. Spierto SECONDED and the MOTION was unanimously APPROVE. The meeting was adjourned at 8:40p.m.

Respectfully Submitted,



Tracy Graziano
Recording Clerk

Cc: Board of Selectmen
Board of Finance and Alternates
Larry Hutvagner, Chief Financial Officer
John Calabrese, Town Treasurer
Tracy Graziano, Recording Clerk
Email Notification for Website
File

Appendix I.d.

TOWN OF MIDDLEBURY



JEAN DAWES, CCMC
TAX COLLECTOR
1212 Whittemore Road, P.O. Box 392
Middlebury, CT 06762-0392
Phone: 203-758-1373 Fax: 203-758-2915
E-mail: taxcollector@middlebury-ct.org

September 9, 2011

To: Board of Selectmen
Board of Finance

From: Jean Dawes, Tax Collector

Re: July & August 2011 Monthly Reports

Attached are the July and August monthly reports of the Tax Collector. Percentages collected are as follows:

JULY – Real Estate	25.91%
Personal Property	34.67%
Motor Vehicle	42.21%

As of AUGUST – Real Estate	50.25%
Personal Property	54.03%
Motor Vehicle	85.5%

As always, if you have any questions, please contact me.

**TOWN OF MIDDLEBURY
MONTHLY REPORT OF TAX COLLECTOR**

DEP: \$7,046,099.74
O/P : 17,821.29
E/B : \$7,028,278.45

MONTH: JULY 2011

LIST YEAR	TAXES COLLECTED	INTEREST COLLECTED	LIENS & COSTS	TOTAL COLLECTED
2003	\$ 23.73	\$ 285.26	24	\$ 332.99
2004	\$ 23.52	\$ 25.75	25.00	\$ 73.27
2005	\$ 24.12	\$ 22.07	24.00	\$ 70.19
2006	\$ 15.51	\$ 11.40	24.00	\$ 50.91
2007	\$ 2,663.04	\$ 1,168.24	24.00	\$ 3,855.28
2008	\$ 2,574.09	\$ 986.18	24.00 / 6.00	\$ 3,590.27
2009	\$ 36,048.44	\$ 4,796.17	168.00	\$ 41,012.61
2010	\$ 6,985,902.33		50.00	\$ 6,985,952.33
*MV SUPPLEMENTAL INCLUDED IN ABOVE FIGURES				
*2008	*(1015.02)	*(288.98)	*(24.00)/*(6.00)	
*2009	*(559.28)	*(58.48)		
TOTALS:	\$ 7,027,274.78	\$ 7,295.07	312.00 / 56.00	\$ 7,034,937.85
			Minus IFV	6,659.40
			TOTAL COLLECTED	\$7,028,278.45
	LAWFUL DEDUCTIONS	LAWFUL ADDITIONS		

2004	\$	(91.64)		
2005	\$	(93.97)		
2006	\$	(65.70)		
2007	\$	(69.64)		
2008	\$	(133.53)	\$ 770.79	
2009	\$	(608.14)	\$ 2,217.55	
2010	\$	(10,108.03)	\$ 13,414.00	

**TOWN OF MIDDLEBURY
MONTHLY REPORT OF TAX COLLECTOR**

DEP: \$6,550,475.33
O/P : 835.52
E/B : \$6,549,639.81

MONTH: August 2011

LIST YEAR	TAXES COLLECTED	INTEREST COLLECTED	LIENS & COSTS	TOTAL COLLECTED
1999	\$ 28.42	\$ 135.58	6.00	\$ 170.00
2003		\$ 510.00		\$ 510.00
2005	\$ 254.32	\$ 150.39		\$ 404.71
2006	\$ 1,120.75	\$ 850.28		\$ 1,971.03
2007	\$ 4,250.94	\$ 199.57	24.00	\$ 4,474.51
2008	\$ 7,723.91	\$ 2,225.32	48.00	\$ 9,997.23
2009	\$ 35,074.98	\$ 5,532.15	168.00 / 50.00	\$ 40,825.13
2010	\$ 6,495,942.54	\$ 4,438.91	100.00	\$ 6,500,481.45
*MV SUPPLEMENTAL INCLUDED IN ABOVE FIGURES				
*(2008)	*(107.92)	*(15.11)		
TOTALS:	\$ 6,544,395.86	\$ 14,042.20	240.00/150.00	\$ 6,558,834.06
			Minus IF√	9,194.25
			TOTAL COLLECTED	\$6,549,639.81

LAWFUL DEDUCTIONS

2004	\$ (91.64)
2005	\$ (93.97)
2006	\$ (65.70)
2007	\$ (69.64)
2008	\$ (133.53)
2009	\$ (3,495.71)
2010	\$ (20,389.24)

LAWFUL ADDITIONS

	\$ 770.79
	\$ 3,526.27
	\$ 16,926.39

TRANSFERS		
Year	Tax	Interest

FRANCIS J. GRADY
THOMAS V. RILEY
ROBERT C. LUBUS, JR.

RICHARD O. LABRECQUE
J. FOY

FRANK T. HEALEY, JR.
COUNSEL
JULIAN C. BUTTERLY
OF COUNSEL

GRADY & RILEY, LLP

ATTORNEYS AND COUNSELORS AT LAW

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September 13, 2011

Michael J. McCormack, Chairman
Board of Finance
Town of Middlebury
1212 Whittemore Road
Middlebury, CT 06762

Re: Middlebury Selectman Pay Increase

Dear Mr. McCormack:

At the request of the Board of Finance, communicated to me by Board Member David Cappelletti, I have reviewed the actions of the Board of Selectman to determine whether or not the Selectman of the Town of Middlebury acted properly to vote a raise for themselves, effective immediately.

I have reviewed the Charter of the Town of Middlebury, the Constitution of the State of Connecticut, the Statutes of the State of Connecticut, the Minutes of the Board of Selectman, the Minutes of the Board of Finance, the Opinion of Town Counsel and have also done research for caselaw, within Connecticut, of similar situations.

HISTORIC EVENTS:

1. In November, 2009, the Electors of the Town of Middlebury elected three Selectman for a two year term for 2010-2011.
2. In May, 2010, at a Town Meeting called for that purpose, a budget proposed by the Town of Middlebury, Board of Finance, was adopted for the fiscal year July 1, 2010 through June 30, 2011.
3. At the Board of Selectman Meeting of November 1, 2010, a raise for non-union employees was discussed, including a raise for the Board of Selectman. The Minutes reflect the Board of Selectman agreed to pass a decision on pay increases to the Board of Finance. See Exhibit A, page 2, paragraphs 1 and 2.

September 13, 2011

4. On December 8, 2010, the Board of Finance discussed a budget transferred for salary increases for appointed/elected employees. A Motion carried to approve a transfer of 1% of the salaries of the Chief of Police, Chief Financial Officer, Director of Public Works, Assessor, Administrative Manager and Library Director and 2% of the salaries of all other non-union employees with the exemption (sic) for the Selectman not to exceed \$28,362.00. See Exhibit B, page 4, paragraph 2.

5. At the December 20, 2010 Board of Selectman Meeting, raises for non-union employees, including the recommendation of the Board of Finance were discussed and it was voted to increase non-union employees 2% across the Board, including the raises for the Board of Selectman. The Minutes reflect the Motion passed with Mrs. Strobel abstaining from voting because "this is not what the Board of Finance recommended". The Motion passed 2 to 1. See Exhibit C, page 4, paragraphs 2 - 5. Mrs. Strobel's vote was changed to "No" at the next Board of Selectman meeting.

6. On January 19, 2011, the Board of Finance Members discussed the Board of Selectman decision to reject the Board of Finance recommendation regarding pay increases for appointed and elected employees. After significant discussion of options of the Board of Finance, it was to seek advice from Middlebury Town Counsel. See Exhibit D, page 4, paragraph 1.

7. At a Special Meeting of the Board of Finance on February 9, 2011, the Board reviewed a February 9, 2011 Opinion Letter from Stephen L. Savarese, Town Counsel, who opined "any reserve account designated for employee compensation established by the budgetary process or legislative action of a special Town Meeting by the voters is an appropriation that may be used to fund the pay increases, unless specifically restricted. It is my understanding that a reserve was specifically included in the 2010-2011 Town Budget for adjustment of pay to Town employees. See extraordinary item 01-76-00-9851 entitled Reserve for Contract Negotiations. The Board of Selectman is authorized to spend such appropriation without further approval of the Board of Finance." Attorney Savarese also opined that no material conflict of interest exists by the Board of Selectman voting to increase their compensation by the same percentage as other non-union employees. Mr. McCormack maintains the action of the BOS pertaining to the vote to increase their salaries violated Section 801 of the Town Charter. He asked the BOF Members to review Attorney Savarese's

letter and the Town Charter in preparation for discussion next meeting. See Exhibit E, page 3, paragraph 2 and 3. N.B. - Attorney Savarese's February 9, 2010 Opinion is found at Exhibit F.

8. On May 25, 2011, Finance Board Member David Cappelletti requested Town Counsel review and reconsider Attorney Savarese's February 9, 2010 Opinion Letter, after review of Article XIX of the State Constitution or Connecticut General Statutes (Section 7-460). See Exhibit G, page 2, last paragraph.

9. On June 2, 2011, Attorney Savarese responded to David Cappelletti. Town Counsel Stephen Savarese opined that neither the Connecticut Constitution, Article XIX nor Connecticut General Statutes Section 7-460 are applicable. Attorney Savarese went on to state "A careful review of the few reported cases that have specifically addressed this Statute focus on the opportunity of the budgetary authority - The Board of Finance in the Town of Middlebury, to have reviewed compensation before the "legislative body" voted.

10. Attorney Savarese went on to cite the Connecticut Supreme Court case Scalo v. Mandanici, 179 Conn. 140 (1979) "that reviewed a City of Bridgeport Ordinance passed by the City Council that increased the annual salaries of thirty nine elected and appointed City Officials in response to claim of the offended tax payers that the City Council action as "a raid upon the City's Treasury". The Supreme Court opinion stated its answer as "the Bridgeport City Charter authorized the common counsel to determine and set the appropriate compensation for elected and appointed officials. If there is an abuse of Legislative Power, the ballot box continues to be the avenue of recourse for aggrieved citizens." Attorney Savarese declined to modify his earlier opinion that the Selectman's raises for themselves were permissible.

11. On June 8, 2011, the Board of Finance voted to seek a legal opinion from Grady & Riley, LLP as to the legality of the Selectman voting themselves a raise during a two year term.

MY LEGAL OPINION:

I respectfully disagree with both the reasoning and the conclusion of Town Counsel, Stephen Savarese's opinion approving the Board of Selectman pay increases. That December 10, 2010 vote by the Board of Selectman was

improper and contrary to both the provisions of the Charter of the Town of Middlebury and further the vote by the Selectman to increase their own compensation violates long-standing caselaw regarding conflict of interest by public officials.

The Connecticut Constitution, Article XIX has no applicability to this issue because it specifically excludes application to Towns, which have the Town Meeting as the legislative body.

A. PROVISIONS OF THE MIDDLEBURY TOWN CHARTER, WHICH APPLY TO THE ACTIONS OF THE BOARD OF SELECTMAN ON DECEMBER 20, 2010:

The Middlebury Town Charter, Section 902 establishes "the Town Meeting shall be the legislative body of the Town"...

Section 208 of the Town Charter states: Members of the Board of Selectmen ... shall receive compensation as shall be provided in the budget.

Chapter VII of the Town Charter specifically establishes the Board of Finance as the Town budgetary authority and the budget process is described in painstaking detail in Section 702.

Under Town Charter 702 (C) (2) the Board of Finance Duties require the Board of Finance, by April 15th to prepare a proposed budget ...

The annual budget meeting is described in detail at Section 702 (D) of the Town Charter. "The budget shall be presented by the Board of Finance to the Annual Budget Meeting on the 4th Thursday in May and shall be adopted by the majority vote of those present and voting at said meeting." (emphasis supplied).

"Following approval of the Annual Budget at the Annual Budget Meeting, the Board of Finance shall meet immediately and establish the mil rate on the taxable property of the Town for the next fiscal year."

"Said Meeting shall have the power to decrease or delete any appropriation or item in any appropriation for the same purpose recommended by the Board of Finance. No appropriation shall be made exceeding in amount

that for the same purpose recommended by the Board of Finance and no appropriation shall be made for any purpose not recommended by the Board of Finance." (emphasis supplied).

Section 703 (A) (1) describes Transfers within Appropriation for a Department as follows:

"In the event that money is needed for any particular purpose in excess of the amount budgeted for such purpose and the funds are available within the appropriations for such office, board, commission, authority or committee may with the approval of the Board of Finance transfer funds within the appropriation for such office, board, commission, authority or committee." (emphasis added)

I also disagree with Attorney Savarese's opinion that Connecticut General Statutes Section 7-460 has no applicability to this situation. Conn. Gen. Stat. Sec. 7-460 specifically prohibits increases in compensation of municipal officials unless approved by the legislative body (for Middlebury, the legislative body is the Town Meeting - Middlebury Charter, Section 901).

The December 20, 2010 Selectman's raise was never approved by the Middlebury Town Meeting.

It is my opinion that the Board of Selectman, in voting themselves a raise on December 20, 2010 violated the Town Charter Provisions because the Town Meeting, at the Annual Budget Meeting established the compensation for the Board of Selectman.

The Board of Finance never approved the transfer of funds for the raise of the line item in the Annual Town Budget approved at the Town Meeting and, thus, the Selectman's vote is improper and illegal to increase the Board of Selectman salaries during the present term and the vote specifically violates the above described Town of Middlebury Charter Provisions. See 702 (C) and 702 (D) and 703 (A)(1).

Charter Provision, Section 208 "Compensation" specifically provides "Members of the Board of Selectman, the Town Clerk, Tax Collector and the Treasurer shall receive such compensation as shall be provided in the budget." (emphasis supplied). The Annual Town Budget Meeting approved the specific compensation for the Selectman and since the Charter provides at Section 901

that the Town Meeting is the legislative body of the Town. No modification can take place by action of the Board of Selectman without approval by the Board of Finance and the Town Meeting.

I respectfully disagree with the opinion of Town Attorney, Savarese, as the Charter carefully delineates the duties of the Board of Selectman as described in Chapters III and IV. Those duties provide for administration of the Town Government but do not include budgetary authority, which is reserved in Chapter VII to the Board of Finance (See Section 702 (C) and 702 (D)) or legislative authority, which is reserved for the Town Meeting (See Section 901).

B. THE DECEMBER 20, 2010 VOTE OF THE BOARD OF SELECTMAN TO INCREASE THEIR OWN PAY VIOLATES THE LONG STANDING PROHIBITION OF SELF INTEREST BY GOVERNMENT OFFICIALS AS DETERMINED BY THE COURTS IN VARIOUS CASE RULINGS.

It is noteworthy that the very case cited by Attorney Savarese in his email Opinion Letter to David Cappelletti (Member of the Board of Finance) dated May 27, 2011, Scalo v. Mandanici, 179 Conn. 140 (1979) is clearly misstated by Attorney Savarese. The action was commenced by taxpayers and residents of the City of Bridgeport to have an Ordinance increasing the salaries of thirty nine Bridgeport Officials, including the Mayor declared unconstitutional. It had been passed by the Town Council, the legislative body, but not the budgetary authority, the Board of Apportionment and Taxation.

The taxpayers sought injunctive relief and sought an order directing the City to recover monies paid pursuant to the improper Ordinance. At a Trial in the Superior Court, Judge Levine ordered an Injunction prohibiting the improperly granted raises and subsequently found the Defendants in contempt for failing to comply with the provisions of the Injunction.

The Trial Court found that the pay raising Ordinance was not approved by the Bridgeport Budget Authority, which was the Board of Apportionment and Taxation and the legislative body, the Town Council.

Subsequent to the Trial Court ruling, the Budget Authority approved the raises prospectively but not retroactively. The Trial Court vacated the Contempt

Order after the Town Board of Apportionment and Taxation (the Fiscal Authority of Bridgeport) and all of the Officials receiving raises, reimbursed the Town of Bridgeport for those increases paid prior to the Fiscal Authority approval by the Bridgeport Budget Authority and both sides Appealed to the Supreme Court of the State of Connecticut.

Associate Justice Parsky issued the Supreme Court Ruling on September 18, 1979 and found the actions of the Trial Court to be correct, stating: "Where a municipal act or Ordinance is declared invalid, legally ineffective or ultra vires, it is clear that a Court of Law may grant an Injunction to prevent the illegal exercise of power" ... citing Whitney v. New Haven, 58 Conn. 450 (1890). (other citations omitted).

The Court went on to state there is little dispute that the unauthorized disbursement of public funds by a municipality represents a situation which can best be remedied by an Injunctive Order. The payments, if continued, would be irretrievably lost, to the detriment of the Plaintiffs and other residents and taxpayers of the City of Bridgeport. The Trial Court did not err in granting Injunctive relief to the Plaintiffs. The Court went on to find that Connecticut General Statutes Section 7-460 provides "any municipality or subdivision thereof, through its legislative body may fix the compensation of its officials and employees, subject to the approval of its budget authority. (Emphasis supplied).

In Bridgeport, the Board of Apportionment and Taxation is the only authority with the power to levy taxes and set the final budget appropriations for the City. The Comptroller does prepare and submit to the Board (of Apportionment and Taxation) an estimate of the amount required by each department of the City government for the coming fiscal year ... It is the Board, which approves and adopts the final budget for the City and the lower Court was correct in concluding that the Board is the budget authority for the City of Bridgeport.

It is apparent, therefore, that the approval by the Board of Apportionment and Taxation was needed for the Ordinance to be duly enacted into law. This occurred on March 28, 1978. The Supreme Court, in considering Plaintiff taxpayers Appeal, claiming the Constitution of the State of Connecticut, Article 11th Section 2 (2), the Board of Apportionment and Taxation, as the budget authority for the City of Bridgeport, could not give retroactive approval to the implementation of the pay raises.

It is clear that the Supreme Court has considered the budget authority to be the deciding factor in municipal budget modifications. The Board of Finance of the Town of Middlebury is the budget authority. (Middlebury Town Charter, Article VII). The Court goes on to give an exhaustive consideration of Connecticut Charter and Statutory Authority to procedural requirements for increases in municipal and government employees salaries including McGovern v. Mitchell, 78 Conn. 536 (1906), which stands for the proposition of the Connecticut Constitution, Article XI, Section 2, the Court determined that properly enacted compensation by the budgetary authority (Town of Middlebury Board of Finance - Middlebury Town Charter, Chapter 7) and the legislative body (Middlebury, Town Meeting - Middlebury Town Charter, Section 901) could have combined to approve raises for the Selectman, however, neither the Town Meeting nor the Board of Finance approved the December 20, 2010 raise for the Board of Selectman.

Connecticut Courts have considered pecuniary interest of municipal officials on many occasions. In Nazarko v. Conservation Commission of the Town of East Lyme, 50 Conn. App. 548 (1998), an ex-officio Member of the Zoning Board participated as a Member of the Zoning Board at two hearings considering an Application for a Special Permit by the Niantic Sportsman's Club, Inc. for a skeet range.

The Trial Court (Martin, J.) overruled the approval of the Zoning Commission and the Appellate Court (Daly, J.) sustained the Trial Court stating: "No Member or Alternate Member of such Board or Commission shall participate in the hearing or decision of such Board or Commission in which he is a Member upon which any matter in which he is directly or indirectly interested in a personal or financial sense."

The Nazarko Appellate Court stated "We have repeatedly emphasized that neutrality and impartiality of Members are essential to the fair and proper operation of [Zoning Authorities]", citing Fletcher v. Planning and Zoning Commission, 158 Conn. 497, 507 (1969).... and went on to state "It is not unreasonable to apply the same standards to ex-officio Members."

The ex-officio [Zoning Board] Member (Rando) had limited participation in the zoning hearings. He asked several questions during the first Zoning Meeting and one question during the second Zoning Meeting. He did not vote

on the matter. Rando was also a selectman who testified at the Trial Court that part of his duties, as selectman, was to appointment Members of the [Zoning] Commission. He further testified that he had Membership in the Applicant Sports Club and may have sold shotgun shells and guns to fellow club members from his gun shop, which was the only gun shop in East Lyme.

The Court found:

“The appearance of impropriety created by a public official’s participation in a matter in which he has a pecuniary or personal interest, is sufficient to require disqualification.” See Connecticut General Statutes Section 8-11 and 8-21 (Zoning Statutes). Id. p. 2.

Judge Daly, writing the Opinion of the Appellate Court stated: “The prophalactic rule serves the salutary purpose of promoting public confidence in the fairness of the decision-making process and preventing the public official from placing himself in a position where he may be tempted to breach the public trust bestowed upon him.” See Thorne v. Zoning Commission, 178 Conn. 198, 203-205. The Nazarko Court went on to cite Fletcher v. Planning & Zoning Commission, 158 Conn. 506 “Public policy requires that Members of the Public Boards cannot be permitted to place themselves in a position in which personal interest may conflict with public duty.”

In the Supreme Court of Errors case, Low, et al v. Town of Madison, et al, 135 Conn. 1 (July 14, 1948), Judge Alcorn reversed a decision of the Trial Court dismissing an abutter Appeal from a zone change decision and entering a Judgment for the Defendants.

The facts in that case included a Member of the Zoning Commission, George Fisher, Husband of Aldene Day Fisher (Applicant for a Zoning Change from Residential to Business of property in the Town of Madison). George Fisher participated in the Zoning Commission Meeting. Because 20% of the property owners directly affected by the zone change, filed a protest with the Zoning Commission, a unanimous vote was required by Town of Madison Zoning Rules. George Fisher was one of the five member Zoning Commission and participated in approving the Zoning Change, which was approved unanimously.

The Supreme Court reversed.

The abutting property owners took the position that the Applicant's Husband participating in the vote rendered it invalid.

Judge Alcorn indicating that Fisher's belief that he had a duty to vote does not require discussion. His Wife's property had been in a residential zone for some thirteen years. She could have deferred her application until her husband was no longer a Member of the Zoning Commission. If greater urgency existed he could have resigned.

The Court indicates pecuniary interest lies at the foundation of many of the reported decisions, citing Buffington Wheel Co. v. Burnham, 60 Iowa 493, 496, 15 N.W. 282; Smith v. Centralia, 55 Wash. 573, 577, 104 p. 797; Arbogast v. Shields, 123 W.Va. 167, 173, 14 S.E.2d 4; dicta, Daly v. George S. & F.R. Co., 80 Ga. 793, 799, 7 S.E. 146, 12 Am.St.Rep. 286. Other decisions involve statutes or charter provisions. Woodward v. Wakefield, 236 Mich. 417, 210 N.W. 322; Sturr v. Borough of Elmer, 75 N.J.L. 443, 445, 67 A. 1059; Haislip v. White, 124 W.Va. 633, 641, 22 S.E. 2d 361; (other citations omitted).

...In situations where the the interest was shown to be pecuniary, we have held it to disqualify. Woodbridge v. Raymond, Kirby 279; Baker v. Wales, 1 Root 265; Lyon v. Lyon, 2 Root 203; Fairbanks' case 2 Root 386; Gallup v. Tracy, 25 Conn. 10, 17 ... we have denied a Member of a Municipal Board, the power to cast the deciding vote to elect himself clerk of the Board; State ex rel Bergin v. Goodrich, 86 Conn. 68, 71, 84 A. 99; see also State ex rel Oakley v. Fowler, 66 Conn. 294, 298, 32 A. 162, 33 A. 1005.

It is very clear that the Selectman have a pecuniary interest in a raise granted during the present term and they should have refused to vote on such a proposal as it not only violates public policy but specifically violates Section 801, the conflict of interest section of the municipal Charter of the Town of Middlebury. (See Exhibit "U" attached).

I respectfully disagree with the February 9, 2010 (sic 2011) Opinion of Attorney Savarese where he excuses the actions of the Board of Selectman stating his opinion that no material conflict of interest exists. That opinion flies directly in conflict with Section 802 of the Town Charter.

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September 13, 2011

I conclude that the error of the Board of Selectman can be attributed to their inexperience and unfamiliarity with the Town Charter. I have more of a problem with Town Attorney Savarese's opinion.

It is my understanding that only the First Selectman, Thomas Gormley accepted the raise.

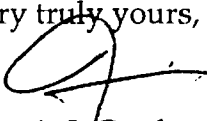
I respectfully suggest you request Selectman Gormley return the raise and that a vote of Selectman proceed in a proper manner to revoke the improperly granted raise.

The Selectman are free to propose a raise for themselves in a proper manner, which would be to have the Board of Finance approve it, within the new budget, or present it to a Town meeting, if funds are available within the current budget and the Board of Finance approves of the transfer. The Town Meeting would have to approve the Board of Finance recommendation for the raise to take place.

I believe it is important to delineate the respective administrative function of the Board of Selectman from the financial control of the budget by the Board of Finance and that the Charter be complied with as well as Connecticut Law regarding self-interest by Public Officials.

I trust you will contact me if further information is needed.

Very truly yours,



Francis J. Grady
FJG/slv