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January 25, 1993

The Honorable City Council
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

RE: Midas Muffler Special Permit

Dear Councillors:

At the public comment session on December 14, 1992 concerning non-consent agenda item 28, I told the Council that Carolyn and I had received an oral opinion in November 1989 from Stuart Kaufman, then Chief Counsel of the State Ethics Commission, concerning how we should act in this matter, but that we did not have a written opinion. I then called the Ethics Commission and asked whether there was a record of my discussion with Mr. Kaufman. I was told that the Commission does keep records of such discussions, and I enclose a copy of a communication recently received from Mr. Zampino of the Ethics Commission dated January 19, 1993, in which he describes the opinion that was rendered on November 13, 1989. I ask that this communication be added to the Council's record of the proceeding concerning the aforesaid non-consent agenda item.

Sincerely yours,

Richard D. Clarey
Richard D. Clarey

RDC:emc

4486S

The Commonwealth of Massachusetts State Ethics Commission

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One Ashburton Place, Boston 02108
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January 19, 1993

Richard D. Clarey, Esq.
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CONFIDENTIAL

Dear Mr. Clarey:

This is in response to your recent letter requesting advice under the Massachusetts conflict of interest law, G.L. c. 268A.

Specifically, you have requested that the Commission confirm that you had a telephone conversation with former Commission Legal Division Chief Stuart Kaufman on November 13, 1989 about a matter involving the Cambridge Zoning Board of Appeals and the Cambridge Planning Board. Your wife was a member of the Planning Board in November 1989.

After searching our files, I can confirm that our records do indicate that you and Mr. Kaufman had a telephone conversation about a matter involving those two Cambridge boards in November, 1989. Accordingly to a Commission telephone log sheet dated November 13, 1989, Mr. Kaufman informed you that c. 268A did not apply to you because you were not a municipal employee within the meaning of c. 268A, §1(g).^{1/} Thus, nothing in c. 268A would have prohibited you from appearing before the Cambridge Planning Board on the facts presented to Mr. Kaufman.

^{1/}"Municipal employee," a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

Further, Mr. Kaufman's notes indicate that he also informed you about your wife's participation as a Planning Board member in the matter in question. Mr. Kaufman indicated that no conflict of interest issues arose for her under c. 268A as long as she refrained from participation.^{2/3/} See G.L. c. 268A, §19.^{4/}

^{2/}For purposes of c. 268A, "participation" is defined as the following:

to participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

^{3/}Whether the abstention would have been *required* by c. 268A involves an analysis of §19. The abstention by itself, however, eliminates the necessity of such an analysis.

^{4/}Section 19(a): Except as permitted by paragraph (b), a municipal employee who participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

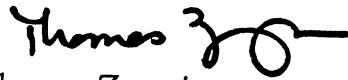
- (b) It shall not be a violation of this section:
 - (1) if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee, or
 - (2) if, in the case of an elected municipal official making demand bank deposits of municipal funds, said official first files with the clerk of the city or town, a statement making full disclosure of such financial interest, or
 - (3) if the particular matter involves a determination of general policy and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality.

Richard D. Clarey, Esq.
January 19, 1993
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Finally, Mr. Kaufman's notes indicate that he also described to you the application of §23 to her conduct, although no specific advice about the section is recorded.^{5/}

I hope that this information has been helpful.

Sincerely,



Thomas Zampino
Deputy Chief, Legal Division

^{5/}Section 23 reads, in pertinent part:

(a) In addition to the other provisions of this chapter, and in supplement thereto, standards of conduct, as hereinafter set forth, are hereby established for all state, county and municipal employees.

(b) No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know:

- (1) accept other employment involving compensation of substantial value, the responsibilities of which are inherently incompatible with the responsibilities of his public office;
- (2) use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals;
- (3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

Consent Comm. # 4

S-50

Comm. from Richard D. Clarey regarding
an oral opinion received by him from the
State Ethics Commission relative to the
Midal Muffler.

In City Council,

February 1, 1993

Placed on file