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From: Timothe Litt [timothe@litts.net]  
Sent: Friday, August 30, 2019 5:51 PM  
To: SelectmenOffice  
Cc: Jim Hegarty; dmccay@mkickoconnell.com  
Subject: Special Municipal Employee status

Gentlepeople,

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It appears that I will not be able to attend the 3-Sept Selectmen's meeting, so I am writing this note in lieu of "Public Comment".

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The agenda includes a request from Mr. McCay that the Board designate EDC committee members as "Special Municipal Employees". His supporting letter of 19-July in the (web) agenda packet presents the argument for awarding this status. It does not indicate any drawbacks to taking this action. Thus, the following questions and observations:

Question 1: Are there any drawbacks (for either the Town or the Committee member) to designating any board or committee members (positions) as "Special Municipal Employees"?

Question 2: If none, why not designate all (eligible) board, committee, volunteer and part-time positions in Town as "Special Municipal Employees" under M.G.L. ch. 268A, § 1(n)? (Note that the BOS may be automatically so-classified or excluded depending on the town's population. The threshold is 10,000 - the town website indicates that as of 2013, Southborough's population was 9,896. Over the threshold, Selectmen may not be SMEs; under, they are automatically. The Town would seem to be on the edge. See below.)

I see no reason that the EDC is special in this regard - The same case can be made for many other boards and committees. Also, note that attorneys are not the only professionals who may represent a client before a board or committee - among the others are, inter alia: engineers, architects, physicians, scientists, accountants, and educators. I believe that a case can also be made for electricians (electrical inspector), plumbers (plumbing inspector) - and so on.

Thus I urge you to take a broader view of this topic -- as David notes, the status would appear to "provide flexibility and encourage volunteerism", without known drawbacks. This outcome would be desirable for all the town's volunteer positions, as well as for those with de-minimus compensation. Assuming this is correct, it would make sense to designate all possible positions as SMEs, without waiting for requests. This would both be more efficient, and might encourage some citizens to volunteer who currently feel impeded by the current status of the position(s) that they would consider.

Of course, if there are any drawbacks to this designation, they should be fully and publicly understood and considered before designating any more positions as SMEs. (And the existing designations should be reviewed.)

Here is the definition from the MGL

<<https://malegislature.gov/Laws/GeneralLaws/PartIV/Title/Chapter268A/Section1>> - formatted for readability:

(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.

Note: 268A is "CONDUCT OF PUBLIC OFFICIALS AND EMPLOYEES", section 1 is "Definitions".

This note is not in opposition to David's request - rather, it is to point out that he raised an broader opportunity to support citizen participation.

For what it's worth, I have not looked for any other consequences of this designation - I have neither the time nor the qualifications...perhaps Town Counsel can weigh in.

Thank you for your consideration.

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From: Timothe Litt [timothe@litts.net]  
Sent: Thursday, September 05, 2019 2:50 PM  
To: Martin Healey  
Subject: Follow-up on SME

Marty,

I watched the recording of Tuesday's BOS meeting, and noted that you "volunteered" to bring recommendations back to the BOS on "policies" for the SME designation. A couple of comments.

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I heard no one indicate any legal downside (for the town or "employees") to designating positions as SMEs, aside from Aldo's unsubstantiated "use sparingly".

I heard Sam's concern about "possible perceptions of lack of transparency" echoed. And also the "hold to a lower standard" remark, I think initially from Dan. What no-one said was that SMEs are not relieved of their requirements to disclose any conflicts & recuse as necessary. The discussion seemed to be that David's professionalism in that regard might not be expected of others. I think this is off-point: (a) the designation applies to positions, not people; (b) the standard is not "lower" as I understand it - the standard of personal integrity and behavior is the same, but as you pointed out, the "ordinary" ME is subject to various "traps" (unknowing violations); (c) any violation is still subject to the same sanctions, regardless of "special" status.

I would expect the same standards of every municipal employee - and having attended quite a number of meetings in town, have seen only people trying to do the right thing. (If anything, being overly cautious about ethics.)

It seems to me that the interest of transparency is better served by enabling reasonable people to do reasonable things - in the open, with full disclosure - than by setting hurdles and traps that reasonable people will trip-over or go around (usually unintentionally). It is also better served by allowing the broadest possible participation, rather than giving people another reason not to serve...

I was not impressed by the town you cited whose policy has boards/committees applying for and renewing requests for SME designation. I think this is upside-down. This implies that the b/c's role, responsibilities, and/or relationships change over time. This is not typical - the membership may change - but again, it's positions that are designated, not people. In fact, for transparency the designations should be stable, not renewed subject to the whims of the current holders.

I think that requiring Town Entities to ask for SME designations is unwise for several reasons. First, it creates a burden for the Entity to understand the law, the consequences, and then ask for the status. Why, when there is not identified downside? The Entities have limited meeting time, and most have more than enough work. This seems a waste of their time, and that of the BOS which would dispose of the requests. Second, SME designation should be a uniform town policy. The BOS, as the executive authority, should be setting that policy. Also, consider what happens when someone serves on more than one committee - with different designations. Do we really want volunteers to sort out that can of worms? Third, to the extent that some may see SME as a different standard for the holders of the designated positions, carving out some and not others will only inflame suspicions. Fourth, having the Entity request the SME designation means that the positions have been filled -- either with people who

don't value (or understand) the designation, or who are willing to volunteer (or be elected) nonetheless. The point of the designation is, in part, to get more people to serve. Asking the people who are already serving to obtain it seems to be addressing the wrong population. And fifth, changing the designation (e.g. due to non-renewal, or a change of membership) will raise transparency flags - again, stability should be the rule.

David identified this issue/opportunity because he happens to be an attorney in a firm that is knowledgeable enough to ask for the designation. The Town should not rely on other Entities having the same good luck.

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I think that the right "process" would be for the BOS to designate ALL boards/committees/commissions ("Town Entities" in the sense I used it in the MTC bylaw) AND all part-time employees as SMEs. (Except for the BOS, which is prohibited due to the town's population as reported by Jim H.) Period.

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There are some interesting cases to consider, however.

Part-time employees - as in my previous note, consider the inspectors.

The Tree Warden - at one point was a volunteer position, but my understanding is that the position is currently held by a DPW employee. The statute holds that "no municipal employee shall be classified as a SME" ... if he is compensated for more than 800 hours in the preceding 365 days. I read it to mean that in the current case, the SME designation has no practical effect. But if at some point, the position is again held by a volunteer, it would.

Thus, it seems harmless to cast a wide net.

The reason I say "part-time employees" is that, by definition, full-time employees work more than 800 hours/year - though I guess you could have seasonal full-time employees who work less... 800 hours is 20 weeks.

Town Counsel - I agree with Aldo that as a practical matter, the designation of SME is useless (if not unwise) for an individual - I think he's a sole practitioner. Legal ethics would seem to take precedence and obviate the designation. However, David described the situation of his, larger, firm that represents several municipalities. If the Town at some point wanted to contract a member of such a firm to serve as its general counsel, not designating the position might preclude selecting the best firm. (Note that Sam has been advocating for the town to consider putting legal services out for bid. So this is not an entirely abstract point.)

I have not heard of a reason that a Town Entity would oppose SME designation. Should one arise, our understanding of the statute is probably flawed. But allowing for a request to be excluded from the designation might be reasonable - in which case, a time limit would be appropriate. Based on my current understanding, the default should be that an entity is an SME. The exception, if any, should be exclusion.

As for revisiting the SME designations - the only circumstance that comes to my mind is when the charter (or enabling bylaw/statute) of the entity changes its organization. For example, if an unpaid volunteer committee were to be re-chartered as composed of full-time, salaried members, retaining the SME designation would not make sense. There may be less extreme examples...

I'd be happy to chat about this if you like...it may be easier than reasoning via e-mail.

In any case, I hope that these thoughts are helpful in shaping your opinion.

P.S. <https://www.mass.gov/service-details/special-municipal-employees> makes interesting reading.

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From: Marnie Hoolahan [marniehoolahan@gmail.com]  
Sent: Wednesday, September 11, 2019 5:45 PM  
To: Brian Shea; Marty Healey; Martin Healey; Mark Purple  
Subject: Hoolahan- EDC and SME status Letter to BoS

Brian, Marty and Mark,

Please find my letter attached addressing the concerns that I have with Mr. McKay's request for SME status for EDC. Obviously this is public record and I encourage redirect to EDC. Unfortunately, I think there is too much public perception that negatively impacts this request and as such feel that this should not be granted. Should you have any questions, please advise. I am hopeful of attending the EDC's meeting tomorrow morning if the stars align so I can share my thoughts directly with them in the interest of full transparency and honest communications.

Sincerely,  
Marnie

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Marnie L. Hoolahan  
26 Clifford Road  
Southborough, MA 01772

Brian Shea-Chair, Board of Selectmen  
Marty Healey- Leading review on Special municipal employee process  
Mark Purple -Town Administrator  
Town of Southborough  
17 Common Street  
Southborough, MA 01772

September 11, 2019

Re: EDC Request for Special Municipal Status

Dear Brian and Mark,

In July you received a letter from David McKay, partner at Mirick O'Connell requesting Special Municipal Employment (SME) status for the Economic Development Committee. Last Tuesday, September 3<sup>rd</sup> you discussed this matter as a Board at your public hearing. From that discussion, I understood that Marty Healey will lead a process and procedural review evaluating other town policies relative to criteria by which to support an SME status for a role and/or committee. I attended the meeting as a private citizen and unfortunately came later than public comment and was not able to make my concerns publicly known. I am using this forum to do so, as a private citizen.

I have serious concerns specific to the Economic Development Committee's charter and role relative to SME as well as concerns specific to some members' daytime employment. David McKay, is a partner in Mirick O'Connell and Susan Duca is Research Director at CBRE Boston. Both of their employers have past, current and potential future engagement with businesses who conduct work in our town and both are in positions of potential financial

benefit. My concern rests primarily, although not solely, on financial benefit and the SME status allowance on conflict of interest relative to financial benefit and public disclosure.

- 1) 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).
- 2) 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.

There are probably past and current conflict of interests that have already arisen based on EDC engagements with local businesses. I have not done diligence to pull any disclosure statements, but I suspect that individuals in conflict have done the "right" thing, filed disclosures and recused themselves from those discussions. That process should continue, particularly seeing that the EDC (of all committees in town) is actually well populated with eight appointed members suggesting that if one would need to be recused, there are many others to step in to represent the Town.

My bottom line, the EDC should not be given SME status and have the ability to deflect conflict of interest simply based on filing disclosure forms and having a protection under this status for behavior that will be perceived negatively by your taxpayers. The public perception is challenged already in our Town and allowing this SME status to the EDC whose role is to support the Town's economic viability and to negotiate in the best interest of the TOWN only heightens that perception. Knowing that there are potential current/future financial gains and potential current/ future ethical challenges from members of EDC creates a conflict and I recommend that the **Town does not advocate** with SME status.

As Marty develops the process for criteria and evaluation of SME status, I highly recommend that we include the following criteria (or language similar) for use in evaluating whether or not a committee/role shall be granted or rescinded SME status.

- Committee members, appointed, elected officials are not currently Owner/Partner/Employee with a company that does significant business with the Town of Southborough, defined as active engagement in supplying the town with services (engineering, consulting, legal), builds, supplies materials, leases or owns commercial, industrial or office buildings utilized by the Town of Southborough (Contractors and Agents), is currently or has been involved in litigation with the Town of Southborough elected and/or appointed officials or its residents.

Should you have any questions or concerns, I do plan on attending the meeting on Tuesday to verbalize my concerns.

Thank you for consideration,

Marnie Hoolahan

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