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June 26, 2008

Geno Duran, Esq.
Town of Silt
P.O. Box 70
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Re: Request for Recusal of Trustee Tod Tibbetts, Autumn
Ridge PUD Application

Dear Mr. Duran:

My law firm represents the interests of Town of Silt Trustee Tod Tibbetts. We are in receipt of a letter dated May 8, 2008 from Edward Sands on behalf of High Point Ventures, LLC. In that letter Mr. Sands requests that Trustee Tibbetts be recused from deliberations with respect to the proposed Autumn Ridge Subdivision PUD, based upon a perceived conflict of interest. The basis for the recusal request is the claim that Mr. Tibbetts is biased against Mayor David Moore, who is a principle in the entity which is the applicant.

Mr. Sands claims that because Tod Tibbetts' wife, Peggy Tibbetts, authors a web commentary on matters related to the Town of Silt, that Mr. Tibbetts must recuse himself because of his wife's opinions with respect to the Autumn Ridge project. It is also charged that Mr. Tibbetts must recuse himself because of his past involvement on behalf of the committee that sought a recall election against Mayor Moore. Neither of these allegations supports recusal with respect to the instant application.

Mr. Sands points to C.R.S. § 24-18-109(3), which provides that a member of a governing body "who has a personal or private interest in any matter" brought before the local government shall disclose his interest and not vote on the matter in which he has an interest. Likewise, Section 1-17 of the Silt Home Rule Charter is cited, which prohibits a trustee from voting or participating in a matter in which that person:

"...has a substantial personal or financial interest, direct or indirect, including an interest held through a spouse or family member, *other than the common public interest...*" *emphasis added.*

The plain meaning of both the statute and the ordinance is to disqualify a trustee from deliberations in situations where he either has a monetary stake in the outcome of a matter, or in situations where the individual's judgment may be clouded by a personal

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or family connection to the matter that is the subject of official action. Thus, Mayor Moore is rightly subject to recusal because he presumably stands to gain financially from the approval of the Autumn Ridge project. Similarly, it is reasonable for a trustee to be recused on personal grounds where, for example, the trustee would have a conflict in deliberations involving a land use application in which a family member has an interest.

In contrast, simply having an opinion, or having a family member with opinions, on matters of municipal governance is not a valid reason for recusal. Section 1-17 of the Silt Home Rule Charter expressly recognizes that having an interest on matters of the “common public interest” is not grounds for disqualification. Moreover, a decision maker is not disqualified based on constitutional due process grounds simply for taking a position on a public issue, provided that there is no showing that the decision maker is incapable of judging the matter in question fairly on the basis of its own circumstances. Mountain States Telephone and Telegraph Company v. Colorado Public Utilities Commission, 763 P.2d 1020, 1028 (Colo. 1988)¹. Neither Mr. Tibbetts nor his wife have any financial interest whatsoever with respect to the approval or denial of the Autumn Ridge application. The applicant does not even hint at such an allegation.

Nor are the opinions of Peggy Tibbetts in any way to be imputed to Mr. Tibbetts. It is a fact that spouses often have opinions on public policy matters that differ from one another. Quite apart from the sexist assumptions behind the applicant’s claim of bias, it is a highly dubious legal proposition to hold that a public official must be recused because of the opinions of his spouse. A fair reading of Section 1-17 is that it was intended to provide for recusal where an official is deliberating on matters affecting or pertaining to a family member. None of the other legal authorities cited by the applicant justify recusal on the grounds sought in this matter. As a matter of law, the Town is simply wrong in giving any consideration to the views or opinions of Peggy Tibbetts in making a decision to recuse Tod Tibbetts from this matter.

Likewise, the support of Mr. Tibbetts for the past recall effort, or any past differences with the Mayor should have no bearing on the instant application. The recall election is over,

¹ The applicant cites Booth v. Trustees of Town of Silverplume, 474 P.2d 227 (Colo. App. 197), for the proposition that the participation of even one member with a conflict invalidates any decision issued by the governing body. Although Booth does not stand for the proposition cited by the applicant (it invalidated a decision where all members of the board of trustees had signed written petitions against an application prior to a hearing and clearly ignored statutory approval criteria), more recent precedent says that a balancing test must be applied based upon: the extent of disclosure; the extent of the apparent conflict; and the overall involvement of the official. See Shocki v. Colorado Air Quality Control Commission, 12 P.3d 274 (Colo. App. 2000) *cert den.* (participation of officials in administrative proceeding was not invalid where their interests were known to the participants and there was no direct link between the final decision and any interest of the official). As noted above, there is no link in this matter.

and Mr. Tibbetts has nothing more to say on the subject. The Autumn Ridge application played no part in the recall effort, nor has Mr. Tibbetts made any public pronouncements about the project. Mr. Tibbetts has demonstrated, in his role as Town Trustee, his ability to move beyond past differences with Mayor Moore. Any review of the Autumn Ridge application by Mr. Tibbetts will be based upon the merits, and not on the basis of any perceived animosity felt by Mr. Moore.

The Town should rightfully be suspicious of the actions of the applicant here. Though we recognize that due process concerns are important, an attenuated charge of bias is really nothing more than an attempt to "stack the deck" in the applicant's favor². Though the applicant relies upon C.R.S. § 24-118-109(3) as justifying recusal, the statute itself also prohibits efforts by any person with a conflict from "attempting to influence the decisions of other members." The applicant admits that its connection to the Mayor creates a personal stake justifying the Mayor's recusal. But the applicant improperly seeks to influence the decision by requesting the exclusion of Mr. Tibbetts from deliberations. Moreover, recusal in this instance will simply invite every land use applicant to do the same based upon some claim of bias, however weak, directed against any trustee who is perceived to be an opponent. In a small town like Silt this practice is an invitation for gridlock and balkanized decision making.

Finally, I remind the Town that the applicant is not the only person with constitutional rights in this matter. The act of a municipality unseating an elected official because of his views on matters of public policy amounts to state action directly bearing upon that official's First Amendment right of expression. Concurrently, the Town has no business in sanctioning any person, whether a Town official or not, because of that person's criticisms of government, or his or her past involvement in a recall election. These activities are core values guarded by the United States Constitution.

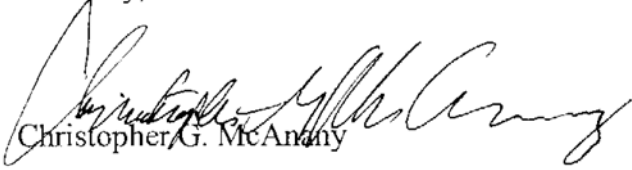
Tod Tibbetts takes his duties as an elected official seriously. He has not prejudged the Autumn Ridge application and he is committed to affording the applicant procedural fairness. He intends to represent his constituents in the review of the Autumn Ridge application when it comes before the Trustees.

My suggestion is that this letter and the applicant's letter be placed in the development file on this project. Any charge of bias has now been fully disclosed to the Trustees, who can presumably take it into account in determining any weight to be given to statements by the applicant or Mr. Tibbetts at the hearing. If you wish to discuss this matter please feel free to contact me.

² We do not concede that the exclusion of Mr. Tibbetts would be beneficial to the applicant, but it is clear that the applicant is acting on that assumption.

Gen Duran, Esq.
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Sincerely,



Christopher G. McAnany

xc: Tod Tibbetts