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ZONING AND LAND USE PLANNING

When Should Board Members Recuse Themselves?

Local zoning officials and planning board members have an obligation to act ethically, as provided by Article 18 of New York's State General Municipal Law (GML),¹ New York State Penal Law §195.00,² local codes of ethics,³ court decisions, opinions of the New York State Attorney General and New York State Comptroller, and rules applicable to the professions (such as the Rules of Professional Conduct for lawyers). This obligation requires that they avoid conflicts of interest in the discharge of their official duties. In determining whether a conflict of interest exists, "the test to be applied is not whether there is a conflict, but whether there might be."⁴

Conflicts of interest can arise where competing goals make it difficult for government officials to make decisions that protect the common good. Where conflicts of interest exist, board members should disclose the conflicts and determine whether they can fairly make decisions on the issues before the board. Where the answer is "no," board members should recuse themselves and not participate in discussions with other board members, vote on the issues, or otherwise influence the decision-making process.

The decision to recuse is solely within the discretion of individual board members—there is no statutory basis for recusal and recusal cannot be compelled by others—but a failure to recuse where necessary can have severe ramifications, including invalidation of the board action and removal of the board member.⁵

The balance of this column examines a number of common situations that arise for

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board members in the zoning and land use planning context—some requiring recusal and some that do not.

Business Ties

As one would expect, zoning board members might have business ties of one sort or another with applicants seeking relief from the board.

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In one case,⁶ the decision of the zoning board of appeals of the town of Ramapo granting the application of Congregation Mesifta Ohel Torah for certain area variances was challenged in court. The Supreme Court, Rockland County, denied the petition and dismissed the proceeding, and the Appellate Division, Second Department, affirmed. It rejected the petitioners' contention of a conflict of interest between the chairman of the zoning board and the congregation on the ground that he had volunteered as a mathematics teacher at a yeshiva that was not affiliated with the congregation but at which the congregation's president was the principal.

In a case before the Appellate Division, Third Department,⁷ that reached a different result the town board of the town of Schodack removed the chairman of the town's planning board based on a conflict of interest, and he challenged the removal in court.

The petitioner owned a 25 percent interest in a construction company that performed road work and other heavy construction. The town alleged that the company had entered into a road and drainage work contract and had performed work at a subdivision while an application for approval of the subdivision was pending before the planning board. A hearing officer found that although the petitioner had not voted to approve the subdivision, he had participated in the planning board's decision despite his company's contract to perform work at the subdivision and receive compensation.

The Third Department upheld the removal, finding "substantial evidence" to support the determination that a conflict of interest existed when the petitioner participated in the planning board's decision on the subdivision while the petitioner's corporation was under contract to perform work at the subdivision and receive compensation.

By contrast, the Third Department was not persuaded that any problems existed in a case where petitioners challenged a series of actions by Ithaca's town board and planning board in connection with Cornell University's plan to implement a new cooling system for its campus buildings.⁸

It first found that although one board member and the spouse of another were employees of Cornell, these affiliations presented no conflict of interest under GML §801 because neither individual's employment duties involved the preparation, procurement, or performance of any part of the

project, nor was their remuneration directly affected by the project.

The Third Department also decided that two other board members did not have any "impermissible interest" in Cornell's application for a zoning change where one was a graduate student whose tuition and stipend were paid by a foundation unrelated to Cornell and whose studies did not involve participation in the project, and the other was married to a Cornell retiree whose pension benefits similarly were outside its control.⁹

Personal Connections

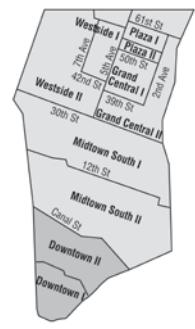
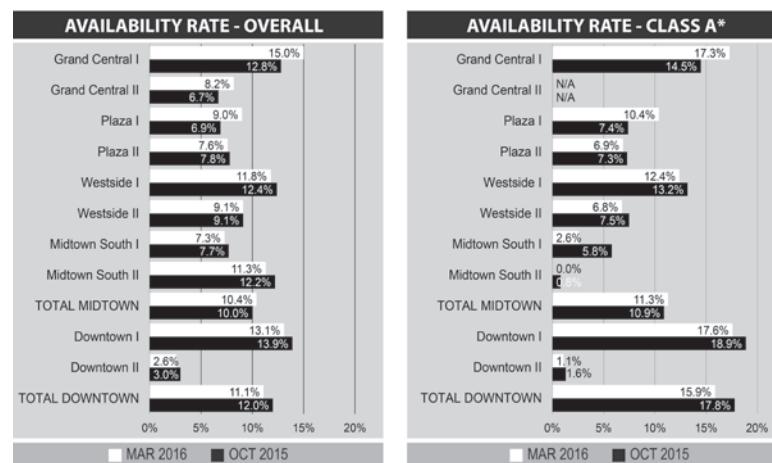
A variety of cases involving "personal" connections between board and community members have arisen. Courts seem rather unwilling to find a problem.

For example, the Supreme Court, Westchester County, rejected a challenge to a decision by the zoning board of appeals (ZBA) for the Village of Mamaroneck based on a disclosed "social relationship" between the applicant and two ZBA members who voted in favor of the petition, all of whom belonged to the same social club. The court found that it would be impracticable to require that a member of a town or village board recuse himself or herself every time he or she has a social relationship with an applicant appearing before the board, and, in this case, there was nothing to suggest that the ZBA proceeding was tainted by the social ties. Accordingly, it concluded that the "mere social relationship between an applicant and a zoning board member does not, in and of itself, create a conflict of interest sufficient to require that member's recusal."¹⁰

The Third Department also was quite unwilling to find recusal required due to personal ties in another case.¹¹ There, the petitioner challenged various determinations of the town of Shawangunk's ZBA and planning board granting approvals to Lee and Joanna Titus to construct a planned unit development.

The Third Department found that the petitioner had demonstrated "nothing more" than that, "as active members of their community," the board members had a "variety of political, social and financial interests

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which, through innuendo and speculation, could be viewed as creating an opportunity for improper influence." The appellate court was not persuaded that there was a conflict of interest in the fact that the wife of one of the board members taught piano to the Titus' daughter and was given a Christmas gift for doing so or that one of the Tituses had sold homeowners' and automobile insurance to a board member.

Pre-Judging the Issues

What happens when a board member approaches a decision with a pre-formed point of view?

Recently, a challenge on that ground to decisions of the Village of Southampton's board of historic preservation and architectural review was rejected by the Supreme Court, Suffolk County.¹²

The petitioners contended that a board member had submitted a report "vehemently opposing the project" prior to the hearing and that the report had "tainted the application" and had demonstrated that the board member had "prejudged facts in advance of hearing them."

The court found that recusal had not been warranted and that the board member's "statement of personal opinion without any evidence of financial interest in the rejection of the project" did not constitute a basis for finding a conflict of interest. It also said that the board member could not be "characterized as having taken a dual

role" of "prosecutor" by having submitted the report and then acting as "judge" on the petitioners' application, or as having taken a public position about specific facts at issue in a pending proceeding, concluding that the report "was solely" for the board's use.¹³

The Court of Appeals reached a similar conclusion in a case in which plaintiffs claimed that a town supervisor should have been disqualified from voting to approve a rezoning because of his prior bias in favor of the development proposal.¹⁴ The court found that although the supervisor previously had spoken in favor of the development plan before he had been voted into office, he also repeatedly had stated that he would act in an objective manner and in the best interest of the town when passing on zoning matters as a member of the town board. Although the court reversed the decisions of the trial and appellate courts and invalidated the town board's decision on other grounds, it found that the courts below had been correct in concluding that the plaintiffs had failed to show any action on the part of the supervisor, individually, that provided a basis for setting aside the action of the town board.

Litigation

Informal opinions by the attorney general provide a wealth of guidance on recusal issues in a wide variety of situations, including those that present a potential conflict of interest arising from litigation.¹⁵

For instance, in an informal opinion issued in 2000,¹⁶ the question was whether members of the village board of the village of Great Neck Plaza had conflicts of interest that required them to refrain from deciding two permit applications. The issue arose after a corporation that had applied to the village board under the village's land use regulations for a conditional permit authorizing the operation of a restaurant in a shopping center had received the conditional permit but had, nonetheless, filed a lawsuit in federal court seeking compensatory and punitive damages as a result of certain conditions contained in the permit. The applicant sued the village and the five village trustees in their individual and official capacities.

Thereafter, the applicant transferred other property adjoining the shopping plaza to another corporation, with which it shared corporate principals. This property was used as a parking lot for the shopping center. The related corporation submitted proposed development plans for the adjoining property to the village board, which asked the Attorney General whether the pending litigation prevented board members from deciding the permit applications by the related entity.

The informal opinion acknowledged that, in particular situations, recusal might be appropriate. It added that the factors to consider included the exposure of board members to personal liability; whether there was an appearance of impropriety that would erode public confidence in the integrity of government; and the judgments of board members as to whether they could act impartially. It added that where board members were sued in their personal capacities for compensatory and punitive damages, exposure to personal liability was a "particular concern in determining whether recusal" was appropriate. Another consideration, it stated, was whether the municipality had authorized defense of board members and indemnification, including defense and indemnification in civil actions for punitive damages, related to acts or omissions occurring within the scope of the board members' duties.

It concluded that "pending litigation against a municipal board or board members" did not as a matter of law require that board members recuse themselves in separate applications by the party that commenced the lawsuit, although in particular cases, recusal might be appropriate. "Local facts and circumstances," it said, had to be reviewed to determine whether board members could act impartially in considering the later applications, or whether they should consider delegating the applications to an existing board or to an ad hoc board.

Conclusion

Certainly, not every alleged financial interest, private business relationship, personal tie, or other alleged "conflict of interest" is sufficient to require disclosure and recusal. Indeed, questions of conflict of interest require a case-by-case examination of the relevant facts and circumstances. However, in this time of increased sensitivities to conflicts of interest—real or otherwise—all board members and other land use planning officials should be mindful of potential conflicts and the appearance of impropriety and should disclose and recuse where appropriate.



1. For example, GML §801 prohibits a municipal officer or employee from having an interest in any contract with his or her municipality when the officer or employee either individually or as a member of a board has the power to negotiate, authorize, or make a payment under the contract; audit bills or claims under the contract; or appoint an officer or employee who has any of these powers. There are specified exceptions in GML §802.

2. Article 195 of the Penal Law is entitled, "Official Misconduct and Obstruction of Public Servants Generally." Section 195.00 defines official misconduct and declares that it is a class A misdemeanor.

3. GML §806 requires municipalities to adopt their own code of ethics setting forth the standard of conduct expected of its municipal officials and employees.

4. *Tuxedo Conservation and Taxpayers Assoc. v. Town Board of Town of Tuxedo*, 69 A.D.2d 320 (2d Dept. 1979).

5. See, e.g., *Matter of Keller v. Morgan*, 149 A.D.2d 801 (3d Dept. 1989).

6. *Matter of Rosenfeld v. Zoning Board of Appeals of Town of Ramapo*, 6 A.D.3d 450 (2d Dept. 2004).

7. *Matter of Keller v. Morgan*, *supra*.

8. *Matter of DePaolo v. Town of Ithaca*, 258 A.D.2d 68 (3d Dept. 1999).

9. See, also, Attorney General Informal Opinion No. 90-57, 1990 N.Y. Op. (Inf.) Att'y Gen. 57 (June 15, 1990) (member of village board of trustees should recuse himself from participating in application for a change of zoning that would benefit the industry for which he was employed).

10. *Matter of Lucas v. Board of Appeals of Village of Mamaroneck*, 14 Misc. 3d 1214(A) (Sup. Ct. Westchester Co. 2007).

11. *Matter of Ahearn v. Zoning Board of Appeals of Town of Shawangunk*, 158 A.D.2d 801 (3d Dept. 1990).

12. *MetroPCS New York v. Incorporated Village of Southampton*, 2013 N.Y. Slip Op. 30993(U) (Sup. Ct. Suffolk Co. April 25, 2013).

13. Cf. Attorney General Informal Opinion No. 88-59, 1988 N.Y. Op. (Inf.) Att'y Gen. 59 (Aug. 19, 1988) (opposition of neighbor to proposed building project should disqualify that individual, as a member of a village planning board or zoning board of appeals, from hearing and determining application on behalf of project).

14. *Webster Associates v. Webster*, 59 N.Y.2d 220 (1983).

15. It is worth noting that an attorney general informal opinion might not be the last word in a matter. In one case, the Attorney General concluded in an informal opinion that a conflict of interest existed requiring the chairman of a town planning board to recuse himself from participation in any deliberations or votes concerning certain applications. The town board of ethics, however, reached the opposite conclusion, reasoning in an advisory opinion that the potential financial benefit to the chairman did not rise to a level sufficient to create a conflict of interest. The Appellate Division, Third Department, affirmed. *Matter of Parker v. Town of Gardiner Planning Board*, 184 A.D.2d 937 (3d Dept. 1992).

16. Attorney General Informal Opinion No. 2000-22, 2000 N.Y. Op. Att'y Gen. 1058 (Dec. 19, 2000).