

### ZONING AND LAND USE PLANNING

# When Conflicts Mandate Recusal of Board Members

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Developers and property owners are entitled to have their applications for zoning changes or permits decided by members of zoning and planning boards based solely on the merits of the application, free of any bias, predisposition, or self-interest. Indeed, community members and society at large also are vitally interested in having local officials make land use decisions fairly, and with the best interest of the community in mind. Although state law sets forth a variety of prohibited family and business relationships and financial interests,<sup>1</sup> and although local towns and villages often have ethics rules that are even more stringent than the state law,<sup>2</sup> in many instances it can be surprisingly difficult to determine whether a particular official's decisions can be challenged on conflict of interest grounds.

the court found that the likelihood that such a "de minimis" interest would or did in fact influence the chairperson's judgment or impair the discharge of his official duties was "little more than speculative."<sup>5</sup>

#### General Municipal Law §809

Article 18 of the New York General Municipal Law sets forth the provisions regulating conflicts of interest for municipal officers and employees.<sup>6</sup> With respect to land use applications, General Municipal Law §809 serves to identify potential conflicts of interest by requiring that applications for zoning or planning approvals disclose whether any board member, or other officer or employee of the municipality, has an interest in the application. "Interest" is broadly defined and includes circumstances where the municipal officer or employee or his or her family member is a party to an express or implied agreement with the applicant and would receive a benefit if the application is approved.<sup>7</sup> Although the language of GML §809 requires only disclosure by applicants, courts have extended the section to mandate recusal by interested board members.<sup>8</sup>

One of the clearest cases of a conflict of interest arose in the 1980s when a member of the Board of Trustees of the upstate Village of Mexico voted on a request for a zoning variance on property of which she was a co-owner; the trustee had indicated that she preferred not to vote, but felt that she must "in the best interest" of the village. After she cast the tie-breaking vote in favor of granting the zoning variance, the Supreme Court, Onondaga County, had little trouble in deciding that she should have disqualified herself from voting at the meeting based on General Municipal Law §809. It then annulled the board's decision granting the variance.<sup>9</sup>

Disqualification also can be required in cases where the spirit, as opposed to the letter, of Section 809 is violated. For example, in *Matter of Schweichler v. Village of Caledonia*,<sup>10</sup> the court found that there was no technical violation of

the General Municipal Law but decided that three members of a village planning board appeared to have impermissibly prejudged an application for rezoning inasmuch as they had signed a petition in favor of the rezoning and the project. In addition, the court added, the planning board's chairperson "manifested actual bias" when she wrote a letter to the village mayor supporting both the rezoning and the project that noted that she "would really like to see new housing available to [her] should [she] decide to sell [her] home and move into something maintenance free." The court concluded that the appearance of bias and actual bias in this case<sup>11</sup> required annulment of the planning board's site plan approval.

#### Social Ties

The very nature of local zoning boards is that their members live and work in the municipalities where they serve. They often own property in the community, and know other people who live and own property in that same community. Thus, absent facts that demonstrate a personal or private interest, courts will not require recusal by a board member who merely has social ties or owns property in the community. A 2007 decision by then-Justice Jonathan Lippman illustrates the courts' reasoning in these kinds of cases.<sup>12</sup>

In this case, petitioners challenging the decision of a zoning board of appeals to grant a variance request objected to the "social relationship" between two of the board members who voted in favor of the request and one of the property owners, who was a fellow "Vittorio Society" member. The board members pointed out that they also were acquaintances of many of the residents opposing the application, and they argued, therefore, that they did not have to recuse themselves from the decision.

The court declined to find that the social ties provided a basis to annul the zoning board's decision as arbitrary and capricious. The court pointed out that, as

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In those situations, resolution of questions of conflict of interest requires a case-by-case examination of the relevant facts and circumstances.<sup>3</sup> Moreover, not every conflict of interest is sufficient enough to warrant recusal.<sup>4</sup> In one case, for example, a court refused to invalidate the decision of a town planning board, notwithstanding that the chairperson of the board had a business relationship with one of the principals of the applicant seeking subdivision approval that amounted to, at most, .15 percent of his company's gross sales;

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observed by former Chief Judge Benjamin Cardozo, “[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”<sup>13</sup> The court added that, in determining whether a conflict of interest existed, the test to be applied was not whether there was a conflict, “but whether there might be.”

According to the court, the law also was “very clear” that the interest that disqualified a member of a board to vote was “a personal or private one,” not such an interest as the official had “in common with all other citizens or owners of property.” Simply put, Justice Lippman found, the “mere social relationship between an applicant and a zoning board member” did not, in and of itself, create a conflict of interest sufficient to require that member’s recusal. Justice Lippman declared 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 had a social relationship with an applicant appearing before the board. Because there was nothing to suggest that the zoning board proceeding had been tainted by the social ties, Justice Lippman concluded that these alleged social connections were insufficient to render the proceeding tainted and the determination arbitrary and capricious based on the social club connection.

### Local Rules

As noted above, local village or town ethics rules also can require recusal when a board considers a land use application. Consider the case of *Matter of Zagoreos v. Conklin*.<sup>14</sup> At issue were the efforts of Orange and Rockland Utilities Inc. (O&R) to obtain municipal approval for the construction of several structures O&R believed was necessary to effectuate conversion of two oil-burning generating units into coal-burning units at a plant in the Town of Stony Point. After O&R obtained the requisite variances and permit, the petitioners argued that certain proceedings before the zoning board and the town board were fatally tainted by a conflict of interest arising from the participation in these proceedings of several employees of O&R who were also members of those public bodies.

As the Second Department pointed out, the decisive votes in favor of O&R’s application were cast by two zoning board members who were employed by O&R as a repairman and a supervisor of rubber goods testing, respectively. Similarly, the determinative vote at the town board meeting was cast by an O&R training administrator. The Second Department agreed with O&R that these individuals had not acted in violation of the specific provisions of the General Municipal Law dealing with conflicts of interest by municipal officers and employees.

However, the Second Department continued, pursuant to General Municipal Law §806, the Town of Stony Point had promulgated a code of ethics that was more stringent than the specific provisions of Section 809. As the appellate court noted,

the preamble of the town code provided a “clear statement” of its broad scope and intent to ensure that “the public have confidence in its Town Government, that public office shall not be used for personal profit, and that its public officials must be independent and impartial in their actions” and to prevent “a potential or actual conflict of interest between the private interests of an official, and his duties as such an official.” The appellate court then pointed out that a portion of the code provided that, “No officer or employee of the Town of Stony Point, shall accept other employment, or make any investment, which will impair his independence of judgment or interfere in any manner, with the exercise or discharge of their [sic] official duties.”

Given these provisions of the town’s ethics code, the Second Department found that although the mere fact of employment might not require disqualification in every instance, under the circumstances of these proceedings, “the failure of the three O&R

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employees to disqualify themselves was improper.” It reasoned that in light of what it characterized as “the unusual nature of the applications and the substantial controversy surrounding the matter,” it was “crucial” that the public be assured that the decision would be made by town officials “completely free to exercise their best judgment of the public interest, without any suggestion of self-interest or partiality.” Anything less, in the appellate court’s view, “would undermine the people’s confidence in the legitimacy of the proceedings and the integrity of the municipal government.”

Noting that the importance of the project to O&R was “obvious,” the Second Department recognized the “powerful psychological pressures” that the knowledge of that importance “must inevitably place upon any employee of the utility” who was in a position to either effectuate or frustrate the project and who was concerned for his or her future with the company. Under these circumstances, the Second Department found, the likelihood that their employment by O&R could have influenced their judgment was “simply too great to ignore.” Thus, it concluded that the zoning and town board decisions had to be set aside due to an improper conflict of interest.

### Conclusion

At the time when a land use application is made, it is important for counsel to analyze whether a member of a zoning or planning

board has a conflict of interest that is sufficient to bar him or her from participating in a decision to approve or reject that application.<sup>15</sup> It is equally important for a board member to consider whether he or she is able to act fairly on the application. A board member who fails to recognize a conflict of interest not only places the board’s decision at risk, but may even face removal from his or her office.<sup>16</sup> At the very least, a potential conflict of interest that is not addressed can taint the process and prolong proceedings, to the detriment of all parties.<sup>17</sup>

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1. See General Municipal Law §809.

2. See, e.g., 23 Town of Southampton Code §23-4, available at <http://www.ecode360.com/8693117#8693168>.

3. See *Matter of Parker v. Town of Gardiner Planning Board*, 184 A.D.2d 937 (3rd Dept. 1992).

4. See 1984 Opns Atty Gen 86.

5. *Matter of Parker*, supra.

6. See, General Municipal Law §§800-813.

7. General Municipal Law §809(2)

8. See, e.g., *Tuxedo Conservation & Taxpayers Ass’n v. Town Board of Tuxedo*, 69 A.D.2d 320 (2nd Dept. 1978).

9. *Matter of Conrad v. Hinman*, 122 Misc. 2d 531 (Sup. Ct. Onondaga Co. 1984).

10. 45 A.D.3d 1281 (4th Dept. 2007), appeal denied 10 N.Y.3d 703 (2008).

11. Cf. *Matter of Application of Sterling Basin Neighborhood Association*, 13 Misc. 3d 1219A (Sup. Ct. Suffolk Co. 2006) (“conclusory allegations” that zoning board of appeals chair had prejudged issue before the zoning board of appeals were insufficient for court to reverse or vacate its determination).

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

13. *Meinhard v. Salmon*, 249 N.Y. 458 (1928).

14. 109 A.D.2d 281 (2d Dept. 1985).

15. It should be noted that recusal alone may be insufficient; a board member with a conflict should not participate in any aspect of the decision-making process. See, e.g., *Matter of Eastern Oaks Dev., LLC v. Town of Clinton*, 76 A.D.3d 676 (2d Dept. 2010) (allegations that town board member, although recused from the official vote, influenced the town board’s decision provides a basis for setting aside the town board’s determination).

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

17. See, e.g., *Matter of Heustis v. Town of Ticonderoga Planning Board*, 11 A.D.3d 868 (3rd Dept. 2004).