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Keeping it Above Board

Ethics Presentation

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- I. The Appearance of Impropriety: can delay projects and decisions and compromise the public's confidence in their government
 - a. Outward opposition or support of a project currently before a reviewing board
 - i. Bias: unable to act impartially and keep an open mind
 - ii. Favoritism: special consideration to one point of view over another
 - b. Ex parte communication
 - c. Short Answer: appearance/perception/potential conflict: mere appearance of impropriety usually not flatly prohibited, but try to avoid
- II. Overview: Standards and expectations of Board Members
 - a. General Municipal Law: Sections 801, 802, 803, 804, 805-a, 806, 808, 809(1) & (2)
 - b. *Zagoreos v. Conklin*, 109 A.D.2d 281, 491 N.Y.S.2d 358, 363 (2d Dep't 1985): It is not necessary for a specific provision of the General Municipal Law to be violated in order for there to be an improper conflict of interest. Employees of applicant utility company did not disclose their employment and based on the substantial controversy surrounding the matter, the court overturned the variance approval.
 - c. Contrast with: *DePaolo v. Town of Ithaca*, 258 A.D.2d 68, 694 N.Y.S.2d 235 (3rd Dep't 1999): zoning amendment to permit a lake-source cooling project for Cornell University. Decision was not overturned despite two board members being current and former employees of the college because their employment was not related to the project and they did not have a direct or indirect interest, pecuniary or otherwise, in the project.
 - d. *Tuxedo Conservation and Taxpayers Association v. Town Board of the Town of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638, 640 (2d Dep't 1979): Determined that public servants should be held to the same standard as trustees. Involved a local law that removed the Planning Board as overseeing the environmental aspects of a

controversial proposed large housing project and transferred the responsibility to the Town Board. The deciding vote was the vice-president of an advertising agency that was likely to receive all advertising contracts of the \$200 million project. Local law was overturned.

III. Impropriety Discussion: Opinions and Case Law: non-financial conflicts of interest

- a. 1988 NY Op. Attorney General No. 59; See also, N.Y. Op. (Inf.) Atty. Gen. 88-60: The opposition by a neighbor to a proposed building project should disqualify that individual, as a member of a planning or zoning board, from hearing and determining an application on behalf of a project. Neighbors can act out of their own self-interests and may be incapable of measuring the merit of the application in light of the public interest.
- b. 1984 Op. Atty Gen [Inf] 86, 160: Public officials should avoid circumstances which compromise their ability to make impartial judgments solely in the public interest. The appearance of impropriety should be avoided to maintain public confidence.
- c. N.Y. Op. (Inf.) Atty. Gen. 93-6: “a member of a town planning board who has given testimony in opposition to [a project] should recuse herself from participating as a member of the planning board in applications for the development of that area.”
- d. N.Y. Op. (Inf.) Atty. Gen. 93-57: An alternate Zoning Board of Appeals member who was also a nearby property owner who would be affected by the development participated in the public discussion before the application and opposed the project. His recusal is necessary if it went before the Zoning Board of Appeals.
- e. *Schweichler v. Village of Caledonia*, 45 A.D.3d 1281, 1283-4, 845 N.Y.S.2d 901, 904 (4th Dep’t 2007), *mot. den’d* 10 N.Y.3d 703, 854 N.Y.S.2d 103 (2008): Three members of the Planning Board signed a petition in favor of the rezoning and the project; the chairperson went as far as writing a letter to the Mayor in support of the proposed multifamily housing project. The court annulled the decision because when it came before the Planning Board for site plan approval and resubdivision those three members should have recused themselves.
- f. *Cahn v. Planning Bd. of Gardiner*, 157 A.D.2d 252, 557 N.Y.S.2d 488 (3rd Dep’t 1990): Planning Board members who have worked on the development as an engineer and attorney correctly disclosed their interests in a preliminary subdivision for residential development and recused themselves. The court did not find any factual support for the allegations that their interests unduly influenced the board and tainted the proceedings.
- g. *Webster Associates v. Town of Webster*, 59 N.Y.2d 220, 464 N.Y.S.2d 431 (1983): The standard is less clear with legislative bodies. The Town Supervisor was found to not be impermissibly tainted by his statements during and after his political campaign

in favor of a project and did not have to recuse himself because he had no financial interest.

- h. *Matter of Troy Sand & Gravel Co., Inc. v. Fleming*, 156 A.D.3d 1295, 68 N.Y.S.3d 540 (3rd Dep't 2017): The fact that the Town Supervisor owned property near a proposed quarry was not a sufficient conflict of interest to constitute recusal because many other people lived near the quarry and he did not stand to gain any financial or proprietary benefit of the decision. In addition, his comments as a candidate running for political office were also found insufficient because his comments were an expression of personal opinion.
- i. *Matter of Pittsford Canalside Props., Village of Pittsford*, 137 A.D.3d 1566, 29 N.Y.S.3d 709 (4th Dep't 2016): Again, expressions of personal opinion by a village board member and the mayor were not deemed a conflict of interest that would result in disqualification. The court stated that expression on matters of public concern should be encouraged, not penalized.
- j. *Lexjac, LLC v. Inc. Vill. Of Muttontown*, 2011 U.S. Dist. LEXIS 28655 (2011): A Village Board member correctly disclosed his interest and recused himself from a vote on an easement he was potentially granting to the Village.
- k. *MetroPCS N.Y., LLC v. Incorporated Vil. Of Southampton*, 2013 N.Y. Misc. LEXIS 1943: A Board of Architectural Review and Historic Preservation member who had written a report to the Board in opposition to the project was not a conflict because it was a matter of personal opinion without any financial interest and did not require recusal. Another member who had represented neighbors who opposed the project was also not required to recuse himself.
- l. *Town of N. Hempstead v. Vill. Of N. Hills*, 342 N.E.2d 566 (N.Y. 1975): The asserted conflict of interest by the Village Board did not fall within the criteria with respect to an application for a zoning amendment as defined in General Municipal Law Sec. 809. Alleged conflicts without a personal or private interest that can be distinguished from the public generally, are usually determined to not be conflicts of interest.
- m. *Segalla v. Planning Board of Amenia*, 611 N.Y.S.2d 287 (2d Dep't 1992): A planning board member is not disqualified from voting to approve a master plan that affected nearly every property in the Town equally.
- n. *Friedhaber v. Town Bd. of Sheldon*, 851 N.Y.S.2d 58 (N.Y. Sup. Ct. 2007), *aff'd*, 872 N.Y.S.2d 361 (4th Dep't 2009); *Peterson v. Corbin*, 713 N.Y.S.2d 361, 364 (2d Dep't 2000): A proposed wind farm would benefit two board members who would receive a direct or indirect pecuniary or material benefit. However, because they recused themselves there was no violation.
- o. *Peterson v. Corbin*, 73 N.Y.S.2d 361, 364 (2d Dep't 2000): A County Legislator was not preliminarily enjoined from voting on appointments to the Nassau Off-Track

Betting Board of Directors despite being employed by the NYC Off-Track Betting and representing union members. Because the potential conflict of interest was too speculative, the court distinguished this case from *Tuxedo* and *Zagoreos*, where the conflicts of interest were found to be clear and obvious.

IV. Ex Parte Communication

- a. Communication with the reviewing board outside the presence of all sides to a matter.
- b. Open Meetings Law; AICP Code of Ethics Rules 8 & 9.
- c. Rule: immediately place on the record the substance of what was discussed and be available to any interested side to a matter.
- d. *Duffy v. Town of Berwick*, 82 A.3d 148, 151-52 (Me. 2013): Emails between Planning Coordinator and the attorney for the developer had limited gravity because they were based on the costs associated with outside consultant review that the developer was required to pay for.
- e. *Stein v. Board of Appeals*, 100 A.D.2d 590, 473 N.Y.S.2d 535, 536 (2d Dep't 1984): ZBA improperly received a letter from a neighbor after the close of the hearing which violated the due process rights because receipt and consideration of the ex parte letter that aided in new evidence which it had no right to consider.
- f. *Villages, LLC v. Enfield Planning & Zoning Comm'n*, 89 A.3d 405, 416-417 (Conn. Ct. App. 2014): Connecticut case where a member of the Planning and Zoning Commission was a former friend of the owner of the applicant of a 38 unit residential subdivision. The member had "personal animus" against the owner and she "played a significant role in the deliberations and voted to deny the applications." Thus, her engagement in ex parte communications with an official from the local water company to discuss the issue of whether there was sufficient water pressure for the fire department was found harmful and deprived the applicant of a fair hearing.

V. Conclusion:

- a. Ethical Checklist
 - i. Review state ethics laws regularly;
 - ii. Review local ethics laws regularly;
 - iii. Evaluate any business interests you have that relate to any issues that may come before your board;
 - iv. Evaluate any potential benefits or harms that could affect your business by a decision by your board;
 - v. Consider your professional capacity and that of your immediate family and the likelihood of coming before your board:
 - 1. Architect;
 - 2. Attorney;

3. Engineer;
 4. Builder, developer;
 5. Land surveyor;
 6. Mortgage broker/agent;
 7. Realtor;
 8. Subcontractor for work on new construction/remodeling
 9. Title insurance company;
 - vi. Real estate investments that you hold within the municipality of your board;
 - vii. Stocks/ownership interest (including silent limited partnership interest) in any company or organization that may appear before your board;
 - viii. Business/professional/familial relationships with any other municipal board member where you may review each other's decisions;
 - ix. Familiarity with conflict of interest policies and recusals;
 - x. Where to get answers to ethical questions.
- b. Bottom line: In the interest of propriety, as evidenced through attorney general opinions, even though the courts have tended to uphold board members' actions unless the conflict or bias is clear and obvious. Therefore, it is important to not be too outspoken on a personal level about projects that may be reviewed by your board, unless you recuse yourself from the proceedings.