ETHICAL ISSUES IN LAND USE LAW

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I. GENERAL MUNICIPAL LAW ARTICLE 18

General Municipal Law Article 18 governs conflicts of interest by municipal officers and employees. GML §§801, 802, 803 and 804 deal with contracts with municipal employees, may require disclosure of certain interests, and prohibit certain contracts. GML §805-a prohibits certain gifts, and states that a board member or other employee or officer may not "disclose confidential information acquired" in the course of his or her official duties, or "receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relations to any matter before any municipal agency of which he is an officer, member or employee."

GML §806 also requires the governing body of each municipality to adopt a Code of Ethics. Under GML §808, each municipality may appoint a Board of Ethics to render advisory opinions with respect to ethical issues. Clearly, the local Code of Ethics will apply to a local planning or zoning board, and the local Board of Ethics may determine a relevant issue. Note that alternate board members may be appointed, pursuant to local law. *See, e.g.,* Village Law §7-718(16).

More important to land development issues is GML §809(1), which requires that every application for a zoning or planning approval identify "any officer or employee of such municipality" that has an "interest in the applicant." This includes "a party to an agreement with such an applicant, express or implied, whereby he may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of such application, petition or request." General Municipal Law §809(2).

II. COMMON LAW PRINCIPLES

It is not necessary, however, that a specific provision of the General Municipal Law be violated before there can be an improper conflict of interest. *Zagoreos v. Conklin*, 109 A.D.2d 281, 491 N.Y.S.2d 358, 363 (2d Dep't 1985); *DePaolo v. Town of Ithaca*, 258 A.D.2d 68, 694 N.Y.S.2d 235 (3rd Dep't 1999). Thus, public servants are held to the same standard as trustees -- "'something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, as then the standard of behavior.'" *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). Thus, bias, meaning "a predisposition to decide one way on a matter before the board, without having heard the matter in an open-minded fashion," is grounds to nullify a board's decision. Salkin, *New York Zoning Law and Practice* (4th ed.) §31:09.

According to the State Comptroller, a board member "should consider abstaining from discussions and voting on any matter which, will not violate any article 18 or the town's code of ethics, suggests even an appearance of self–interest, partiality or economic impropriety." Op. State Compt. 88-68. In *Tuxedo Conservation and Taxpayers Association v. Town Board of the Town of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep't 1979), the court held that "the test to be applied is not whether there is a conflict, but whether there might be." 69 A.D.2d at 325, 418 N.Y.S.2d at 640. However, courts have not been quick to nullify board actions based on conflicts of interest.

In several cases, indirect financial benefits has been raised as a possible conflict. In *Tuxedo Conservation and Taxpayers Association v. Town Board of the Town of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep't 1979), where a town board member who voted on the project was vice-president of an advertising agency which included as a client a subsidiary of the applicant. The Court held that "[i]t requires no feat of mental gymnastics to infer that if the application is approved, " the board member's agency might benefit. 69 A.D.2d at 323, 418 N.Y.S.2d at 639. Even though "the letter of the law [General Municipal Law §809] may not apply to his action, the spirit of the law was definitely violated." 69 A.D.2d at 324, 418 N.Y.S.2d at 640. Thus, the project approval was annulled, since "the test to be applied is not whether there is a conflict, but whether there might be." 69 A.D.2d at 325, 418 N.Y.S.2d at 640.

However, in *DePaolo v. Town of Ithaca*, 258 A.D.2d 68, 72, 694 N.Y.S.2d 235, 239 (3rd Dep't 1999), the connections of board members to Cornell University did not constitute a conflict. The court held:

> Although one Board member and the spouse of another were employees of Cornell, these affiliations presented no conflict of interest under General Municipal Law § 801 since neither individual's employment duties involved the preparation, procurement or performance of any part of the CLSCP, nor was their remuneration directly affected by the project (*see,* General Municipal Law §802 [1] [b]). Furthermore, neither of the two remaining Board members in

> question had any impermissible interest in Cornell's application for a zoning change; 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 CLSCP, and the other was married to a Cornell retiree whose pension benefits were similarly outside its control. And while violation of a specific section of the General Municipal Law is not critical to a finding of an improper conflict of interest (*see, Matter of Zagoreos v Conklin,* 109 AD2d 281, 287), we are satisfied that none of these four Board members had any direct or indirect interest, pecuniary or otherwise, in the CLSCP such that their vote could reasonably be interpreted as potentially benefitting themselves. Given the absence of any actual conflict of interest, or the significant appearance thereof, Cornell's acknowledged failure to comply with the disclosure provisions of General Municipal Law §809 is not a defect requiring invalidation of the Town Board vote.

Likewise, indirect financial interest of the board chairman did not present a conflict in *Friends of Hammondsport v. Village of Hammondsport Planning Bd.*, 11 A.D.3d 1021, 784 N.Y.S.2d 748 (4th Dep't 2004).

Where board members have personally spoken out against a project they are generally in a position where they should recuse themself from consideration of an application. In, N.Y. Op. (Inf.) Atty. Gen. 93-6, the Town of Tuxedo Park requested that the Attorney General issue an opinion as to whether or not a member of a town planning board, who had publicly spoken out against a development project could participate in the applications for development of the project. The Attorney General noted that "we have emphasized that public officials should avoid circumstances which compromise their ability to make impartial judgments solely in the public interest. Even the appearance of impropriety should be avoided in order to maintain public confidence in government." *Id*. at 1010. In concluding that "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 development of that area," the Attorney General quoted heavily from an earlier opinion, N.Y. Op. (Inf.) Atty. Gen. 88-60, which also held that a planning board member should be disqualified. N.Y. Op. (Inf.) Atty. Gen. 93-6, at 1012.

The subject of the 1988 Attorney General's Opinion was a planning board member who had publicly opposed the subdivision approval of his neighbor's property. In determining that the member should recuse himself, the Attorney General noted that "[m]embers of local boards unavoidably approach their duties with general views and philosophies concerning land use planning.... [W]e believe that a neighbor's opposition to a proposed project creates an appearance of partiality and bias which disqualifies the individual from considering the merit of the application during deliberations of the board, this individual would have already expressed a view or decided to oppose the project. Under these circumstances, an appearance would prevail that the proceedings

were biased. Thus, if the planning board member has pre-judged the application, he should disqualify himself from the proceedings." *Id.* at 1104.

According to the State Comptroller, "any Planning Board member should consider abstaining from discussions and voting on any matter which, will not violate any article 18 or the town's code of ethics, suggests even an appearance of self-interest, partiality or economic impropriety." Op. State Compt. 88-68.

A recent appellate decision invalidated a planning board decision based on apparent bias. In *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), the court held that "although there was no technical violation of the General Municipal Law... three of the members of the Planning Board appeared to have impermissibly prejudged Hardwood's application for rezoning inasmuch as they signed a petition in favor of the rezoning and the project." Further, "the Planning Board's chairperson manifested actual bias when she wrote a letter to the Mayor supporting both the rezoning and the project, noting therein 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.'" 45 A.D.3d at 1284, 845 N.Y.S.2d at 904. Accordingly, the Appellate concluded "that the appearance of bias and actual bias in this case require annulment of the Planning Board's site plan approval." 45 A.D.3d at 1284, 845 N.Y.S.2d at 904.

While the rules regarding bias clearly apply to planning boards and zoning boards of appeals, it is not so clear they have equal application to legislative bodies, which are political bodies. However, in *Webster Associates v. Town of Webster*, 59 N.Y.2d 220, 464 N.Y.S.2d 431 (1983), the Court of Appeals considered whether votes by the Town Supervisor on a proposed rezoning for a mall was impermissible tainted by his prior statements during and after a political campaign. The court found there was no violation, because the supervisor had no financial interest, and although he "spoke in favor of the Expressway Associates plan, he also repeatedly 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." 59 N.Y.2d at 227, 464 N.Y.S.2d at 433.

III. *EX PARTE* CONTACTS

Normally, an applicant and an opponent make their presentations in public meetings before the board. However, *ex parte* contacts with board members are common, particularly with planning boards. Since a zoning board of appeals is a "quasi-judicial" board, *Knight v. Amelkin*, 68 N.Y.2d 975, 510 N.Y.S.2d 550 (1986), *ex parte* communications seem problematic. Furthermore, evidence is supposed to be taken at a public hearing. *See* Town Law §267-a(7). Thus, in *Stein v. Board of Appeals*, 100 A.D.2d 590, 473 N.Y.S.2d 535, 536 (2d Dep't 1984), the court held that a ZBA improperly received a letter from a neighbor after the close of a hearing, since "[p]etitioner's due process rights were violated by the board's ex parte receipt and consideration of the subject letter in that it arrived at its decision with the aid of new evidence which it had no right to consider under the circumstances presented." At the very least, board members should reveal evidence taken outside

the hearing on the record, so the other side can rebut it. *Hampshire Mgmt. Co. v. Nadel*, 241 A.D.2d 496, 660 N.Y.S.2d 64 (2d Dep't 1997).

If the contact comes from an attorney, the issue is complicated by DR 7-104(A)(1), known as the "no–contact" rule, provides:

> During the course of the representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

In N.Y. State 812 (2007), an ethics opinion of the New York State Bar Association, while this rule was found to apply to communications between an attorney representing a developer and the Planning Board, which was represented by counsel, it was trumped by the First Amendment right to petition, so that the attorney could directly communicate with board members, "provided that counsel for the planning board is given reasonable advance notice that such communications will occur." In the opinion, the State Bar did "not here address *ex parte* communications with an adjudicatory government body, such as a zoning board of appeals, which present different considerations."