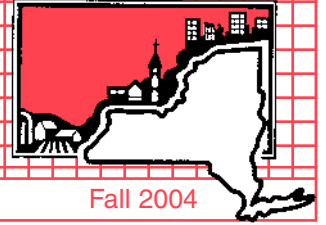


PLANNING NEWS



New York Planning Federation

279 River Street, Suite 302, Troy, NY 12180

Fall 2004

Conflicts of Interest (Part II)

by Drayton Grant, Esq.

Our last newsletter introduced the important topic of conflicts of interest for municipal planning board members. Part II in this issue concludes that discussion.

Prejudice or Bias

The New York case law on prejudice makes it clear that a planning board member's public statements in support or opposition to an application unrelated to a financial benefit will not be the basis for a court to reverse a planning board's decision, so long as the member states that he or she can review the project in a fair manner. *Webster Associates v. Town of Webster*, 464 N.Y.S.2d 431 (1983).

In the *Webster* case, the Court of Appeals held that, despite statements prior to his election by the new chairman of a town board in opposition to a project, his participation was not grounds to overturn the approval. "The conflicts encompassed by Article 18, however, involve pecuniary and material interests rather than expressions of personal opinion (see General Municipal Law, §800, subd. 3)." The Court also noted that "although Kent 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."

Courts still apply the *Webster* standard. *Byer v. Poestenkill*, 232 AD2d 851 (3d Dept., 1996); *Segalla v. Planning Board*, 204 AD2d 332 (2d Dept. 1994); *Laird v. Town of Montezuma*, 594 N.Y.S.2d 939 (4 Dept. 1993).

This problem has also been assessed in the zoning context by professors Arden H. and Daren A. Rathkopf, who wrote: "Appearance of fairness doctrines and the special due process standards governing adjudicatory zoning action often are held to require an unbiased decision maker.

Impartiality in the form of prejudgment bias undermines the basic due process right to a fair hearing. In adjudicatory and quasi-judicial proceedings, a zoning decision maker – whether elected or appointed – functions in a role analogous to that of a judge who is required to fairly hear and weigh the evidence received and to objectively apply established standards for decision to the facts of the case.

"However, in local land use decision making, if courts were to define freedom from bias in a strict dictionary sense of absence of preconceptions, most decisions would probably be struck down, since it is unlikely that zoning decision makers will be totally without opinions concerning the development of their community. In zoning and other cases, courts generally try to distinguish between a strongly held philosophical or policy position as opposed to actual prejudgment of the specific adjudicative facts at issue in a particular case. As stated by the Connecticut Supreme Court:

"The law does not require that the zoning authorities have no opinion concerning the proper development of their communities; the decisive question on a challenge on the ground of bias is whether they have made up their minds in advance of the public hearing and the burden of proving the latter is on those challenging the qualifications of those claimed to be biased." (Disqualifying Prejudgment Bias, Rathkopf's *The Law of Zoning and Planning* §32:18. Edward H. Ziegler, Jr.; Arden H. Rathkopf and Daren A. Rathkopf, 4th ed.)

In other words, a planning board member who thinks that a project would be a good one may still be able to listen at the public hearing, hear of any environmental

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NEW YORK PLANNING FEDERATION

is a non-profit membership organization established in 1937. Our mission is to promote sound planning and zoning practice throughout New York State. Membership, which currently includes nearly 10,000 individuals, is open and welcome to anyone supporting this mission. Membership categories include municipalities, counties, public organizations, private businesses, individuals, and libraries.

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Super 66th!

NYPF's recently-concluded 66th Annual Planning & Zoning Conference drew approximately 400 people to beautiful Lake Placid for four days of workshops, presentations and networking, not to mention sightseeing, shopping and fine dining.

We thank each of you for your help in making this event so successful and hope that you brought home valuable information to share with fellow board members and co-workers. Thanks also to the 33 presenters who volunteered their time and knowledge during the conference, and to keynote speaker Fred Kent, who wowed everyone with his presentation at the plenary session on September 20th.

One reminder -- while many of you dropped off your evaluation forms at the registration desk before leaving, many more conference-goers seem to have taken their evaluations home. Since these are valuable tools in planning our 2005 conference (*October 9-12 in Saratoga Springs*), we hope you will take a minute to fill out your form and return it to us. If you've lost it, please answer the following questions and mail us that information instead.

- ✓ What were the best sessions you attended? What made them so good?
- ✓ What sessions fell short of the mark? How could they have been improved?
- ✓ What topics would you like to learn more about?
- ✓ What presenters would you like to hear more from?
- ✓ Did you find the exhibitor displays helpful? ♦

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NYPF Presents Awards for Excellence in Planning & Zoning

Each year the New York Planning Federation invites applications for several competitive awards celebrating excellence in the areas of planning and zoning. This year, in an especially competitive process, the following individuals received recognition both from the Federation and from their peers:

Ann Gallelli, Chair of the Croton-on-Hudson Planning Board, accepted the Heissenbittel Award for Planning Excellence. Described as “an extraordinary worker with tremendous energy, skill and insight,” Ms. Gallelli was nominated by Georgianna Grant, Deputy Mayor of the Village of Croton-on-Hudson. (*Gallelli*) “is widely respected, and her exceptional leadership is evident in her active promotion of citizen involvement in planning issues and in her extraordinary sensitivity to citizens and issues,” the citation noted.



Ann Gallelli accepts the Heissenbittel Award from NYPF Board Chair David Tessier (L.) and Executive Director, Bob Elliott (R.)

In addition to her current municipal work, Ms. Gallelli has served as a member of Croton-on-Hudson's Planning Board, Village Board, chaired the Comprehensive Plan Committee and was a key member of the Waterfront Advisory Committee. She is also the Village's representative to the Westchester County Municipal Planning Commission.



Robert Cardinale receiving the John O. Cross Award at the NYPF Annual Conference in Lake Placid.

Robert Cardinale, Chairman of the Village of Freeport Planning Board, accepted the John O. Cross Award for an outstanding planning board chair. He was nominated for the award by Susan Lyons, attorney for the Planning Board.

In her nomination, Ms. Lyons wrote: “Mr. Cardinale works tirelessly and selflessly for the betterment of the Village, which is undergoing a renaissance of development and revitalization. Presiding over an extremely busy planning board that meets at least twice monthly, he is diligent and dedicated, guiding younger and newer members with gentle, yet firm, leadership and always available to lend his experience and knowledge.”

Larry Happel, Chairman of the Town of Owego ZBA received the David Allee Award given to an outstanding zoning board chair. Nominated by Dean Morgan, Owego's Planning and Zoning Administrator, Mr. Happel has chaired the Town's ZBA for the past 11 years and was a member of that board for 12 years prior.

Conflicts of Interest, continued from page 1

problems with the location proposed for the site and then make a decision, or she may already have made her decision. If it is the latter, she should disqualify herself. If it is the former, she should explain her position and continue to sit in review of the project.

Town and Village Ethics Law

Under General Municipal Law §806, codes of ethics are mandatory for counties, cities, towns, villages and school districts. Under GML §808, the establishment of a local Board of Ethics is permitted but not mandatory. The model code addresses conflicts of interest of a financial nature. It allows appointed and elected officials and employees to seek advisory opinions from the appointed Ethics Board. The perspective of the local law is, like the GML, related to conflicts of a financial nature. It provides that planning board members would have "an opportunity to present his/her interpretation of the facts at issue and of the applicable provisions of the Code before such advisory opinion is made." §10.4. It also provides that anyone who knowingly violates any provisions of this Code of Ethics may be fined, suspended or removed from office." §10.7.

Local Ethics Commissions are often excellent places in which to conduct a dispassionate assessment of the facts and the law. NYCOM's *Handbook for Elected Officials* states on page 38: "Article 18 of the General Municipal Law outlines a set of basic standards of ethical conduct as a guide for public officers...this law has three purposes: to protect the public from municipal contracts influenced by avaricious officers, to protect innocent public officers from unwarranted assaults on their integrity, and to encourage each community to adopt an appropriate code of ethics."

In communities where I practice, these Commissions are valuable resources. If your community does not have one in place it should strive to establish one and then encourage the Commission to follow its procedures carefully. (Many of the court decisions cited in Parts I and II of this article deferred to the decisions of local ethics commissions that reviewed the facts and gave advisory opinions regarding disqualifying oneself.)

State Attorney General and Comptroller Opinions

Both the Comptroller and Attorney General render advisory opinions for local governments in situations such as those above. They interpret the law derived from the sources and advise local governments on conflicts of

interest. The AG has issued several opinions which recommend that a neighbor not participate as a planning board member to review an application. Until local ethics commissions were established, and to the present for conflicts not in the commission's jurisdiction, these opinions offered the only guide.

Neighbors' Applications

Planning board members who oppose a neighbor's project are better off disqualifying themselves. 1988 Op Atty Gen (Inf) 115, 116-117 dealt with neighbors:

"In our view, however, opposition to a proposed project by a neighbor should disqualify that individual from acting as a member of a zoning board of appeals or planning board with respect to the project (see Code of Judicial Conduct, Canon 3 [C][1][a] and [c], McKinney's Judiciary Law). A neighbor's opposition to, for example, a proposed rezoning or variance application is distinguishable from a board member's philosophical approach. Neighbors often act out of their own self-interests as influenced by interests and concerns of their families. In our view, they may be incapable of measuring the merit of the application in light of the overall public interest or, stated differently, the overall needs of the municipality...we believe that a neighbor's opposition to a proposed project creates an appearance of partiality and bias which disqualifies the individual from considering the matter as a member of a zoning board of appeals or planning board. Rather than 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."

Conclusion

In conclusion, as a member of the planning board you are in the best position to know the facts of your own relationships. You should apply these facts to the relevant standards given here and assess, in the first instance in any matter that comes before your board, whether you have a financial stake, whether you have some other meaningful affiliation with the matter, and/or whether you suspect that your judgment may be clouded. If you think it is a close call, the Ethics Commission law is there to help. ♦

Model Easement

On June 17th the New York State Department of Agriculture and Markets released its model agricultural conservation easement. This model easement can be used by local governments or land trusts in Purchase of Development Rights (PDR) projects through the State's Farmland Protection Program. To date, New York's Farmland Protection Program has allocated \$68 million to help protect over 28,000 acres of farmland across the State.

A conservation easement is the binding legal document used to permanently protect enrolled farmland for agricultural use. These agreements generally restrict non-farm development and uses of the property that could interfere with its current or future agricultural use. Land restricted by a conservation easement remains in private ownership and on the tax rolls. Because agriculture is always evolving, agricultural conservation easements must be flexible and tailored to meet ever-changing conditions. Generally, they:

- Limit uses of the land that significantly degrade its agricultural productivity;
- Extinguish virtually all non-farm development rights;
- Encourage the business of farming;
- Permit construction of new farm buildings and farm employee housing;
- Complement right-to-farm provisions in the Agricultural Districts Law;
- Do not require public access;
- Leave the landowner in full ownership of the farm.

For a sample model easement in Word format, visit: www.farmland.org/northeast/ny_policy_061704.htm. More information on conservation easements may also be found at www.agmkt.state.ny.us or by contacting David Haight, American Farmland Trust New York Field Manager at dhaight@farmland.org or 518 581 0078. ♦

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"He has always been fair in his treatment of applicants, allowing residents to voice their concerns about projects and encouraging the use of workshops, special meetings and SEQR scoping sessions as tools to define issues, allow for public participation and develop mitigation measures for potential adverse environmental impacts," Morgan wrote in his nomination. "Both applicants and neighbors have felt involved in the process and respectful of the decisions, even when these decisions have not gone their way."

Edward Umiker, Vice Chairman of the Town of Tonawanda Planning Board, received the Federation's Levine Community Service Award. He was nominated for this honor by George Melrose, the Town's Planning Board chair, "on behalf of the entire board."

Receiving high praise for his leadership and professional approach, supporters of Mr. Umiker noted "his technical skills, enthusiasm, unselfish dedication, perseverance, diplomacy and long, hard work." His accomplishments include leading the development of a local Waterfront Master Plan, helping to negotiate the establishment of a recycling center and spearheading the revision of the Town's comprehensive plan. Mr. Umiker has also volunteered his services at the regional level, serving as Past Chair of the Buffalo-Niagara Regional Planning Board and as Chair of the Niagara Frontier Transportation Council. ♦

MDRA

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DHCR Update

In June of 2004, Governor George E. Pataki announced the creation of the \$20 million New York Main Street grant program to be administered by the NYS Division of Housing and Community Renewal (DHCR). Eligible applicants applied for up to \$200,000 to administer local main street revitalization programs. Eight regional workshops were held throughout the State to explain the program and nearly 600 people attended sessions conducted by DHCR staff Tom Carey, John Conway and Alan Sorensen.

A total of 143 applications were received by the September 20th deadline, with requests for funding exceeding \$25 million. Applications came from communities within 51 of the State's 62 counties, thereby demonstrating a strong interest in the program. It is anticipated that a second round of funding for the New York Main Street Program will be announced in late fall, 2004. For more information, visit www.nymainstreet.org. ♦

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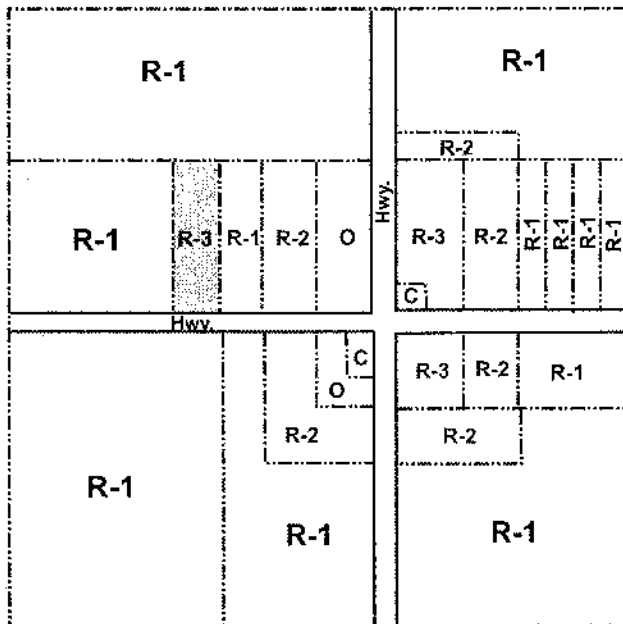
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Hitting the Spot

by Katherine Daniels, AICP

Few planning and zoning issues arouse more interest and debate than spot zoning. What exactly is spot zoning? Often, it is thought of as the rezoning of a small parcel of land to benefit an individual landowner to the possible detriment of adjacent landowners.

While these factors may raise concerns, the real litmus test in New York State law is whether a rezoning is in accordance with a community's adopted comprehensive plan. Spot zoning is invalid because it does not advance a municipality's development objectives as spelled out in the comprehensive plan.



TOTAL AREA = 1 square mile

Depicted above is a probable case of spot zoning. Why? (1) This community tiers intensity/density with office {O}, commercial {C} and multi-family residential {R-3} the most dense and R-1 the least dense; (2) The R-3 shaded property is a single parcel proposed for rezoning from R-1; (3) The Future Land Use map depicts all the shaded land for low density, single family residential. The zoning plan calls for that area to be R-1; (4) The text of the Plan says that R-1 should be buffered by R-2 and P (public) park land and schools where it is not surrounded by R-1.

Spot zoning most often occurs in response to a request by a developer or landowner for zoning that will permit more intensive development than is allowed by current zoning and/or that is allowed on adjacent properties. Spot zoning has been cited in New York case law since 1951 and, in evaluating claims, the State's highest court typically considers a number of factors, including:

- ✓ Consistency with a comprehensive plan;
- ✓ Compatibility of the rezoning with surrounding uses;
- ✓ Likelihood of harm to surrounding properties;
- ✓ Availability and suitability of other land parcels;
- ✓ Recommendations of professional planning staff;
- ✓ Economic benefit to the community.

Each of the above factors has been illustrated in *Boyles v. Town Board of the Town of Bethlehem*, 278 A.D. 2d 688 (2000); and *Matter of Yellow Lantern Campground v. Town of Cortlandville*, 716 N.Y.S. 2d 786 (A.D.3rd Dept. 2000)

While consistency with a community's comprehensive plan has been the overriding consideration in claims of spot zoning in New York, other states have used slightly different approaches. Texas courts, for example, look mainly at whether preferential benefits resulted for one or a few landowners, while courts in Massachusetts weigh the public benefits of rezoning against its detrimental effects on neighborhood landowners.

The deference of New York's courts to a community's comprehensive plan gives greater flexibility to municipalities in zoning and rezoning to meet specific local planning objectives. However, this flexibility is only as good as comprehensive plans that are up-to-date and specific in their goals, objectives and future land use mapping. ♦

The land use map and italicized text were reprinted courtesy of the Planning & Zoning Center, Inc. 715 North Cedar Street, Lansing, MI 48906. This information appeared in "Planning & Zoning News" Vol. 22, No. 3, January 2004.

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✓ **A Practical Guide to Comprehensive Planning**

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✓ **A Comprehensive Plan: Village of Chatham, New York** 1995. This 52-page illustrated plan has been recognized by several organizations as a model plan for municipalities in New York State. \$8.00 + \$1.50 s/h.

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