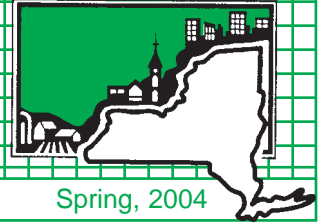


PLANNING NEWS



New York Planning Federation

279 River Street, Suite 302, Troy, NY 12180

Spring, 2004

Conflicts of Interest for Planning Board Members

by Drayton Grant, Esq.

Planning Board members are volunteers. They serve long hours and often do not receive the appreciation they deserve for service to their communities. And, when the atmosphere is contaminated with suspicion, this tough job can become unnecessarily unpleasant. In the past several years, members of the public have grown increasingly concerned about conflicts of interest; we see municipal board members disqualify themselves fairly often on contentious projects. In fact, at a conference of the New York State Bar Association Environmental Section last fall, several speakers described allegations of conflicts of interest as being the most active new area in environmental law.

The clear standard from the statute and court cases is that the type of conflict which should cause an individual to disqualify him or herself generally requires that the individual, or someone in his/her family, have a significant financial interest in the application. Courts and ethics commissions proceed on a case-by-case basis, working to assure the public that their officials are free to exercise their best judgment with no hint of self-interest or partiality, especially if a matter under consideration is particularly controversial. However, even when there is an apparent conflict, if the interest is unlikely to cloud the board member's judgment, the courts, as well as those ethics commissions that have had their decisions reported in subsequent litigation, have ruled that there is no reason for the board member to step aside.

For village planning board members, the applicable statute is General Municipal Law §800:

3. "Interest" means a *direct or indirect pecuniary or material benefit* accruing to a municipal officer or

employee as the result of a contract with the municipality which such officer or employee serves. For the purposes of this article, a municipal officer or employee shall be deemed to have an interest in the contract of (a) his spouse, minor children and dependents, except a contract of employment with the municipality which such officer or employee serves, (b) a firm, partnership or association of which such officer or employee is a member or employee, (c) a corporation of which such officer or employee is an officer, director or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee. (*Emphasis added.*)

The Tuxedo Conservation Case

The leading New York State ethics case that discusses exactly what should lead an individual member of a municipal board to disqualify him or herself involved a town board member who cast the deciding vote to approve a project proposed by a subsidiary of one of his advertising agency's big clients, and who stood to gain a sizeable contract. The court threw out the town board's decision because of this member's conflict of interest.

In 1974, Sterling Forest Corporation made an application to build a 3,900 residential unit "Planned Integrated Development" on a plot of about 1,500 acres within the Town of Tuxedo. The estimated cost of the project in 1974 dollars was \$200 million. Although the Planning Board had been made lead agency under SEQR, after the three members of the Town board favoring the project lost the election, they rushed to

Continued on page 4

PLANNING NEWS

Library of Congress No. 65-29356

Volume 2, No. 2, Spring 2004

Published quarterly by:

New York Planning Federation

279 River Street, Suite 302

Troy, New York 12180

(518) 270 9855 / 270 9857 (fax)

e-mail: nypf@mybizz.net

The New York Planning Federation also maintains a toll-free number for members. Call (800) 366-NYPPF

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.

OFFICERS

David Tessier, ASLA, President
Town of Clay

David Kay, 1st Vice President
Ithaca

Ron Brand, 2nd Vice President
Rochester

Bruce Boncke, Immed. Past President
BME Associates, P.C.

STAFF

Robert W. Elliott, *Executive Director*

Katherine Daniels, *AICP Senior Planner*

Lael Locke, *Community Planner*

Marie Schlosser, *Office Manager*

PLANNING NEWS welcomes responses from its readers. Manuscripts may be submitted for possible publication. Call the newsletter editor, Lael Locke, to discuss your article ideas. If published, such articles or letters become the property of **PLANNING NEWS** and may be edited to conform with format requirements. The opinions and views expressed in **PLANNING NEWS** are those of the authors and do not necessarily represent those of the Planning Federation.

Conference Update

Watch your mailboxes in late July. That's when we'll be sending the complete information and registration packet for this year's Planning & Zoning Conference in Lake Placid from September 19-22.

The 2004 conference will feature sessions on:

- ✓ A Practical Guide to Comprehensive Planning
- ✓ Planning and Zoning Case Law Updates
- ✓ Site Plan Review and Special Use Permits
- ✓ Shaping and Preserving Community Character
- ✓ Advanced SEQR Case Studies
- ✓ Effective Enforcement
- ✓ Ethics in Planning and Zoning
- ✓ Downtown Revitalization
- ✓ Records, Findings and Decisions
- ✓ Green Energy and Green Buildings
- ✓ Right-to-Farm Laws
- ✓ Behind the Scenes at Planning Board Meetings
- ✓ Planning Board and Zoning Board Short Courses
- ✓ Tools for Open Space Planning
- ✓ The Latest Hot Button Issues
- ... plus many more.

We're also lining up walking tours, recreational packages, a dine-around on Monday night and some very exciting speakers. Please call our office or check our website for ongoing updates. ♦

BFJ Buckhurst Fish & Jacquemart Inc.

- Planning
- Design
- Real Estate Analysis
- Transportation
- Environmental Planning

115 Fifth Avenue New York NY 10003
Tel (212) 353 7474 Fax (212) 353 7494
e-mail: bfj@peapc.com www.bfjplanning.com

Case Law Update

prepared by David R. Everett, Esq.

In 2003, the Court of Appeals, the highest court in New York State, decided a number of land use and environmental cases. We reported on some of these in the Winter newsletter. Following are several more interesting and important cases.

Parkland and Recreation Fees

In Twin Lakes Development Corp. v. Town of Monroe, 1 N.Y.3d 98 (2003), the developer of a 22-lot subdivision challenged the Town's imposition of fees in lieu of parkland dedication. The Court recognized that the New York State Town Law §277 allows a planning board to require parkland or other recreational land as part of a residential subdivision or, in the alternative, to mandate a payment in lieu of such parkland. In this case, the Monroe Code imposed an "in lieu of fee" totaling \$1500 per lot for subdivisions of five lots or more. This fee was adopted in response to the rapid growth in the Town's population and the Town's severely limited recreational facilities. In challenging the fee, the developer argued, without any proof, that the fee was an unconstitutional taking because it was not based on an individuated assessment of the recreational needs generated by the development and was, thus, not proportional to those needs. In evaluating a takings claim, a court must assess whether an "essential nexus" exists between the "legitimate state interest" served by the fees and the amount of fees imposed on the developer. The fees must have a required relationship to the projected impact of the proposed development. In this case, the Court held that the fees were not an impermissible taking because the Town had demonstrated an "essential nexus" between the need for more recreational opportunities and the fees imposed.

SEQRA

In Gordon v. Rush, 100 N.Y. 2d 236 (2003), a group of oceanfront homeowners applied to the Town of Southampton for permission to install steel bulkheads along the beach to prevent erosion. They also applied to NYS DEC for a tidal wetlands permit. During the SEQRA process, the Town asked DEC to assume lead agency status for the coordinated SEQRA review because the project could have significant impacts beyond the local level and DEC could provide a more thorough environmental assessment. DEC agreed to become the lead agency and issued a negative declaration finding that

there would be no significant environmental impact. Following the SEQRA review, DEC issued a permit for the project, but the Town decided to conduct its own SEQRA review by issuing a positive declaration and requiring the homeowners to prepare a DEIS. The homeowners sued the Town, arguing that it was bound by DEC's negative declaration as required by 6 NYCRR §617.6 (b)(3) and, therefore, could not conduct its own SEQRA review. In response, the Town asserted that the positive declaration was merely a step in the agency's decision-making process, and not a final decision which could be reviewed by the Court. In rejecting this argument, the Court held that the Town was bound by DEC's negative declaration and, under the circumstances, the positive declaration could be challenged, saying the obligation to prepare a DEIS imposed an injury on the homeowners as the process may require considerable time and expense. The Court also concluded that the Town failed to advise DEC of its environmental concerns during the SEQRA process. It is safe to assume that this case could serve as the basis to challenge other positive declarations across the State. ♦

David Everett is a partner in the land use, environmental and real estate practice groups of Whiteman Osterman & Hanna in Albany, NY. He is also a member of the Board of Directors of the New York Planning Federation and Chairman of the Town of Chatham Zoning Board of Appeals.



**Wetland
Mitigation, Inc.**

10 North Street - Cold Spring, NY 10516
tel: (845)265-4400 - Contact: Steve Marino
email: steve@wetlandmitigationinc.com

- ↓ Wetland Landscaping & Construction
- ↓ Long Term Monitoring
- ↓ Planning & Permitting
- ↓ Restoration of Existing Wetlands
- ↓ Water Quality Basin Maintenance
- ↓ Stormwater Detention/Retention
- ↓ Wildlife Habitat Enhancement

Wetland Mitigation, Inc. (WMI) assists builders, property owners and government agencies in the design, permitting, and construction of new wetlands and the maintenance of stormwater facilities such as retention, detention and water quality basins.

Our professionally designed and constructed wetlands assist in the treatment of stormwater, provide educational and passive recreational resources to the general public, provide wildlife habitat and offset unavoidable impacts that may occur to wetlands as a result of land use activities. We can also design and implement the enhancement and/or restoration of existing wetland systems.

WMI is owned and managed by registered landscape architects, professional wetland scientists and environmental planners with a cumulative total of more than 100 years of experience in the fields of applied ecology, hydrology, botany, geology and landscape design and implementation. We employ field staff who are experienced in site preparation and hand planting of wetlands in a wide variety of environments.

For information and updates
www.nypf.org

Conflicts of Interest (continued from page 1)

approve the project. The Town Board voted 3-2 on December 28, 1977 in order to beat the new board taking office on January 1 of the new year.

The controlling vote in favor was cast by a Town Board member named Martineau who was also Vice-President of an advertising agency that counted City Investing Corp. among its clients. The applicant for the PID was Sterling Forest Development Corporation, a wholly-owned subsidiary of City Investing Corp. Still, Martineau refused to disqualify himself, casting the decisive vote with full realization of the possible conflict of interest involved. (There is no question that he was aware of the potential conflict, having submitted his inquiry to the local ethics committee, which failed to respond.)

As the Court said: "It requires no feat of mental gymnastics to infer that if the application is approved, the agency will be a strong contender to obtain all the advertising contracts in the \$200 million project." The Court further directed Martineau's attention "to the soaring rhetoric of Chief Judge Cardozo in his opinion in *Meinhard v. Salmon*: '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.'" (Emphasis added.)

While the Court found that General Municipal Law §809, which requires the applicant to describe any relationship they have with board members, did not apply directly to the Tuxedo case, since there was no contract discovered between Martineau and Sterling Forest or City Investing, the Court was not deterred. They smelled a conflict worth millions.

"On behalf of Martineau it is asserted that he did not violate §809 of the General Municipal Law, which forbids certain specified conflicts of interest. Be that as it may, while the anathema of the letter of the law may not apply to his action, the spirit of the law was definitely violated. And, since his vote decided the issue, we deem it egregious error...Thus the question reduces itself into one of interest. Was Martineau's vote prompted by the 'jingling of the guinea' or did he vote his conscience as a member of the Town Board? In view of the factual circumstances involved, the latter possibility strains credulity. For, like Caesar's wife, a public official must be above suspicion."

The Court then went on to explain the type of interest in a project that was appropriate for board members:

"The general rule as expressed in 133 ALR 1257, 1261-62 is: 'The interest which disqualifies a member of councils to vote is a personal or private one, not such an interest as he has in common with all other citizens or owners of property'...To say in general terms that a member of a city council cannot vote on the passage of an ordinance providing for the construction of some important public improvement, because he owns real property in the city, when the improvement is a general one, is at once to disqualify every property owner in the city from belonging to the city council, and committing all the material interests of the city to a class of persons who have no property rights to protect."

The Court was making a distinction between the general interest shared by members of a community in those projects proposed for their community and the personal benefit, generally of a financial nature, that makes it inappropriate for someone to serve the community when it reviews a project.

To repeat: "The interest which disqualifies a person is a personal or private one, not such an interest as he has in common with all citizens or owners of property." In other words, if a planning board member cares about historic preservation, this does not disqualify him or her from reviewing a project involving an historic site. The same is true of a wetlands enthusiast sitting in review of a project involving wetlands, or a supporter of assisted living reviewing an assisted living project.

Subsequent Cases

The Courts' decisions continue to distinguish between personal and community benefit. Even though a person may work in the same industry as another applicant, it is not enough to disqualify him/her from voting. Two recent mining cases: *Byer v. Poestenkill* 232 AD2d 851 (3d Dept. 1997), and *Segalla v. Planning Board* 109 AD2d (2d Dept. 1994) each found that the specific proposal under review, though it was a mining project and the board member was also a miner, and although mining is always a controversial activity, as the board member did not personally benefit, he was not disqualified.

Continued on following page

Conflict of Interest (continued from page 4)

Courts will overturn tainted decisions when there is a conflict between the interest of the board in seeking the good of the community as a whole, and interest of the board member in his or her economic benefit.

Three employees of a utility were on a town Zoning Board of Appeals that reviewed an application from their employer to convert from oil to coal burning. Even though there was no evidence of any improper influence by the utility, the town code prohibited officers of the town from accepting any employment which impaired their independence of judgment. The application was of an unusual nature, controversial in the community, and important to the employer. The Court ruled that the three employees should have disqualified themselves. *Zagoreos v. Conklin*, 109 AD2d 281, 287-288 (2d Dept. 1985).

It was also a conflict of interest when a Planning Board member neither disqualified himself nor made any statement about his conflict and participated in the project review, even though he owned 25% of a corporation that

was already under contract to perform work at a subdivision and received compensation before the board voted on subdivision approval. *Keller v. Morgan*, 149 AD2d (3d Dept. 1989).

It was not grounds to overturn the decision approving Cornell University's new geothermal cooling system, even though one member of the Town Board and the spouse of another were college employees; another board member was a student at the University. The Court noted that none of the individuals worked on the application for Cornell or would be involved in its installation or operation, and the student's studies had nothing to do with the project and his scholarship came from a source other than the University. *DePaolo v. Town of Ithaca*, 258 AD2d 68 (3d Dept. 1999). ♦

Drayton Grant is an environmental and land use attorney with the Rhinebeck firm of Grant & Lyons. The topic of "Conflict of Interest" will be continued in the next issue of "Planning News."

THE SARATOGA ASSOCIATES

LANDSCAPE ARCHITECTS, ARCHITECTS, ENGINEERS, AND PLANNERS, P.C.

*Planning the Right Place....
Designing the Place Right
for successful project implementation.*

Main Street Revitalization
■
Community Planning
■
Brownfield Redevelopment
■
Development Regulations
■
Waterfront Revitalization
■
Economic & Market Strategies
■
Funding & Grant Sourcing
■
Regulatory Compliance

443 BROADWAY, SARATOGA SPRINGS, NY 12866
518/587-2550 FAX 518/587-2564 E-MAIL postmaster@tsasaratoga.com

SARATOGA SPRINGS ■ NEW YORK CITY ■ BOSTON

Laberge
ENGINEERING
ARCHITECTURE



Group
SURVEYING
PLANNING

Community Planning & Zoning
Main Street Revitalization
Waterfront Development
Economic & Community
Development
Market Analysis & Feasibility
Grant Funding & Administration

Consultants to Governments of New York State
Offices in Albany, Plattsburgh & Utica
518/458-7112 800/755-2237
clientservices@labergroup.com

Farmland Information Center

Those concerned about the loss of agricultural land now have easier access to assistance, thanks to an expanded Farmland Information Center (FIC) website. A partnership between the American Farmland Trust and the US Department of Agriculture's Natural Resources Conservation Service (NRCS), the FIC is available online at www.farmlandinfo.org and by calling 800 370 4879.

The FIC maintains an ever-growing collection of state laws, reports and other literature related to farm and ranch land protection. It also offers an answer service providing direct technical assistance via phone, e-mail and fax. In addition, FIC staff monitor and report on farmland protection activities around the country and identify, acquire and develop new materials.

"The Farmland Information Center is a bounty of information for those toiling to protect the land that provides locally grown foods, wildlife habit, scenic vistas and jobs in communities across America," said Ralph Grossi, AFT president. "It is far and away the most comprehensive source of information on farm and ranch land protection in the world."

Bruce Knight, chief of the NRCS, added: "The FIC is an essential resource for anyone interested in minimizing the unnecessary and irreversible conversion of important farmland to nonagricultural uses."

The new format makes it easier to find the materials typically requested – statistics about the loss of farmland and its consequences, sample ordinances and documents from successful initiatives around the country, and fact sheets and articles conveying basic information about farmland protection approaches and the consequences of farmland loss.

For additional information on the FIC, contact Jennifer Dempsey at the AFT, 413 586 4593, extension 13, or e-mail her at jdempsey@farmland.org. ❖

The above article appeared in the February 2004 issue of "Planning & Zoning News."

SACCARDI & SCHIFF, INC. Planning and Development Consultants



Land Development
Comprehensive Planning
Zoning
Real Estate Economics
Environmental Studies
Housing
Community Development



245 Main Street
White Plains, New York 10601
914-761-3582
Fax: 914-761-3759
sands@saccschiff.com

Welcome New Members

Towns:

Town of Northumberland

Firms:

Planit Main Street, Inc.
Alan J. Sorensen, AICP

Plumley Engineering, P.C.
Julian F. Clark, P.E.

Individuals:

Courtney A. Haff, AICP
Dirk Oudemool
Stephen Tomasik

In Memoriam: Rod Carey

The Board of Directors of the New York Planning Federation lost one of its long-time members this past winter. Rod Carey, past Chairman of the Town of Jay (Essex County) Planning Board, passed away on February 27th.

In addition to his responsibilities as an NYPF Board member and Planning Board chair, Rod also served as the assessor for the Town of Jay, was for several years a school bus driver, and was a member of the Rotary, Knights of Columbus and the Elks Club. Married for more than 56 years, Rod was also a father, grandfather, brother and friend to many in his community and beyond.

The Town of Jay, in remembering Rod, called him "a great man and a great friend who will be greatly missed," adding that "Rod liked serving the Town and felt that his volunteer role as Planning Board Chair was one way in which he could help out."

Both the Town of Jay and Essex County passed official resolutions of condolence to his family. The Board of the Planning Federation joins them in offering their deepest sympathy. ❖

MDRA

MATTHEW D. RUDIKOFF ASSOCIATES, INC.
PLANNING • ENVIRONMENT • DEVELOPMENT

- Sustainable Development and Greening
- Zoning and Planning Consulting
- Wetland and Natural Resource Consulting
- Public/Private Environmental Consulting
- Public/Private Development Management
- Private Development Services
- Community and Economic Development

427 Main Street • Suite 201, Beacon, New York 12508
Ph 845.831.1182 • Fax 845.831.2696
www.rudikoff.com

NYPF Award Applications

As part of its mission, the Planning Federation offers several annual awards that help celebrate excellence and achievement in New York State. These awards are presented during a luncheon at our conference in Lake Placid (*see page 2 for more information*). Applications are due by August 16th in the following categories:

Heissenbittel Award for Planning Excellence: Given to an individual, municipality or agency for outstanding or innovative accomplishment in the *planning* field and/or for consistent support of the Federation in its efforts towards better planning;

Pomeroy Award for Zoning Achievement: Given to a municipality, individual or agency for consistent high quality work and/or outstanding contributions to *zoning* in New York State through the development of a specific zoning law or legal agreement;

Levine Community Service Award: Given to a volunteer member of a municipal board who has done an outstanding job for his or her community and/or the Planning Federation;

David Allee Award: Given to an outstanding Zoning Board Chair;

John O. Cross Award: Given to an outstanding Planning Board Chair.

For more information and an application, call the Federation at 518 270 9855. ❖

Pace University School of Law's Land Use Law Center is seeking contributions to the Regional Events section of its newsletter, *Gaining Ground*. If you or your organization have any land use events planned during 2004, please send them a brief description with all relevant information. Submissions should be e-mailed to jstone@law.pace.edu with the subject line "regional events." ❖

NEW YORK PLANNING FEDERATION PUBLICATIONS

Send request with a list of the books you want or call (800) 366-NYPF to order
Checks or vouchers accepted. Prepayment not required. (M) member / (NM) non-member

✓ **The Short Course: A Basic Guide for Planning Boards and Zoning Boards of Appeals in NYS**

by Harry J. Willis, David Church, and James W. Hotelling
2001, updated 2004 (83pp. Illus.) A review of the full range of knowledge and skills needed by any planning or zoning official. *Awarded the 1996 Public Education Award by the American Planning Association Upstate New York Chapter.* \$16 (M) / \$18 (NM) + \$4 s/h. Bulk orders (5+) \$14(M) / \$16 (NM) + \$4 s/h.

✓ **A Practical Guide to Comprehensive Planning**

David Church & Cori Traub, 1996. Updated 2002. Practical advice on completing and implementing plans with case studies. \$16.00 (M) / \$18.00 (NM) + \$3 s/h. Bulk orders (5+) \$14.00 (M) / \$16.00 (NM) + s/h.

✓ **Rural Development Guidelines, Hamlet Design Guidelines, & Building Form Guidelines**

3 vol. set by Joel Russell, Anne Tate w/ Dutchess Co. Dept. of Planning, et.al., 1994 (illus.) "principles for better design in development." \$6.00/ single volumes + \$1.50 s/h or \$15.00/ 3-vol. set + \$3 s/h.

✓ **Model Cellular Tower Ordinance**

by Federation Staff. A short article followed by a model ordinance. Free.

✓ **Software Provider Directory**

by Federation Staff. A six page brochure describing companies that sell planning and zoning board software. Free.

✓ **All You Ever Wanted to Know About Zoning...**

3rd Edition by Sheldon Damsky, Joseph Catalano & James Coon. Update to the 1993 volume. "The most widely used source of zoning information in the State." Key legislation and case law through the 1999 legislative session. \$50 (M) / \$60 (NM) + \$4 s/h.

✓ **Survey and Compendium of Local Laws for Protecting Water Quality from Nonpoint Source Pollution.**

NYS DEC, 1996 (63pp). A compilation of actual local laws and model regulations. \$6.00 plus \$1.50 s/h.

✓ **The Interaction of Commercial Forestry with Town Government in New York State**

NYS Forest Resources Development Council, 1995. Results and analysis of a survey on local attitudes and regulations addressing timber harvesting. \$6.00 + \$1.50 s/h.

✓ **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.

✓ **Adult Entertainment Tech Memo.** A 12-page brochure prepared by Lydia R. Marola, Attorney for the Village of Scotia, and Rebecca Lubin, AICP. Free.

NEW YORK PLANNING FEDERATION
279 RIVER STREET, SUITE 302
TROY, NY 12180

Non-Profit Org. U.S. Postage PAID Permit No.200 Albany, New York
--