Beyond the Rulebook: Navigating Ethical Dilemmas in Planning & Zoning Board Decisions

David J. Plante, AICP CEP

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Agenda

- What We Hope to Accomplish Today
- Ethical Considerations – The Basics
- DOS Primer on Laws & Codes
- Case Studies:
  - Conflicts of Interest
  - Ex Parte Communications
  - All in the Family
  - Don't Prejudge a Book by its Cover
  - I am the (State) Law
  - Variances (Hooah), What are they Good for?
- Fun in the Time of Ethics



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Presenter Bio

1. Certified Environmental Planner with 21 years of environmental consulting and regulatory experience, specializing in environmental permitting, SEQRA and local municipal permitting
2. Leads E+E practice of 51 engineers, ecologists, environmental scientists, inspection staff and project managers located across several states, primarily on energy (solar, wind, battery, utility, pipeline, etc.) projects
3. Former Deputy Director (Regulatory Programs, Enforcement and Research & Scientific Services), Adirondack Park Agency
4. Member, City of Canandaigua Planning Commission; Former Member, Town of Farmington Comprehensive Plan Update Committee & Solid Waste Reduction Committee, Immediate Past-President, New York Planning Federation
5. Trustee, Wood Library of Canandaigua, Past-President of the Farmington-Victor Kiwanis, Past-President of South Farmington Friends Cemetery Foundation, Former Board Member of The Spot Canandaigua, Former Canandaigua Area Soccer League Coach & Canandaigua Junior Baseball Coach

TODAY'S SPEAKER



David J. Plante, AICP CEP
ENERGY + ENVIRONMENT
PRACTICE DIRECTOR

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What We Hope To Accomplish Today

- Baseline awareness of NYS regulations and standards for planning & zoning board ethical considerations
- Better understanding of when and how to spot potential ethical issues for yourself and your board
- Improvements to the smell test when potential ethical issues arise
- Earn your DOS and/or AICP training credits!
- Have fun!



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Applicability

- Planning Board Members?
- Zoning Board Members?
- Professional Planners (Private Practice)?
- Professional Planners (Municipal Practice)?
- Attorneys?
- Other?



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Applicability

- Article 18 of New York State General Municipal Law
  - Covers municipal officers and employees with respect to:
    - Prohibition on interests in contracts
    - Gifts
    - Disclosure of confidential information
    - Being compensated to appear before your municipality
    - Disclosure in certain applications
    - Establishment of a local board of ethics
    - Financial disclosure for officers/employees of certain municipalities
    - And last, but not least – solemnization of marriages!!

- Disclaimer – I am NOT a lawyer and will not be providing legal advice or legal/court case studies today. Please consult your municipality's land use attorney for legal advice on ethical considerations related to your board!!

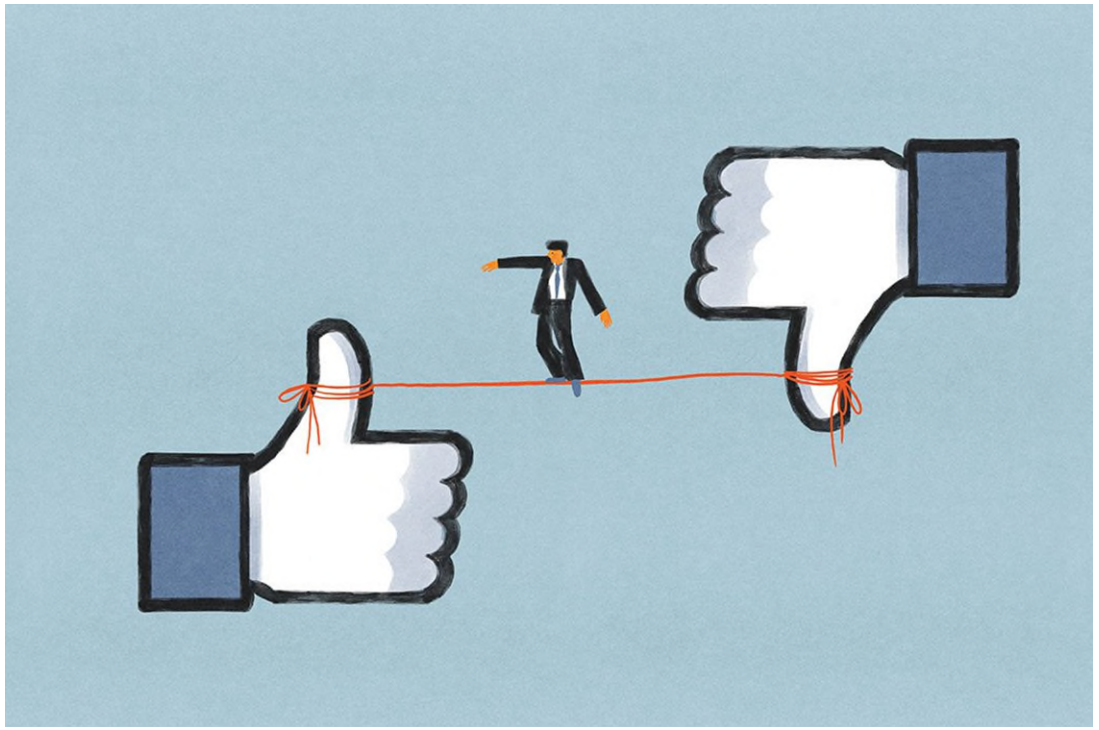
Ethics Refresher

- What are ethics? According to Merriam Webster:
  - "A set of moral principles;"
  - "A theory or system of moral values;"
  - "The principles of conduct for governing an individual or group;"
  - "An awareness of the moral importance of a specified thing;" and
  - "The discipline dealing with what is good and bad and with moral duty and obligation."



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Ethics Refresher



- What are public officers responsible for?
  - In New York State, public officers are individuals elected or appointed to government positions or boards authorized by code, statute, resolution, or charter to exercise a portion of the sovereign power of the government.
  - They are responsible for acting in the public interest, upholding the law, and managing public affairs, subject to strict ethical standards and accountability measures.
- What are conflicts of Interest?
  - "An interest by a member of a planning or zoning board in an action that may result in some kind of personal or professional gain."
  - The conflict could be real, or it could only be perceived.

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Laws and Codes

- NYS Public Officers Law § § 73 & 74
- NYS Town Law § 271
- NYS Village Law Article 7
- NYS General City Law Article 5-A
- NYS Open Meetings Law
- Local Ethics Code
- AICP Code of Ethics & Professional Conduct - Planners
- NYSBA Rules of Professional Conduct



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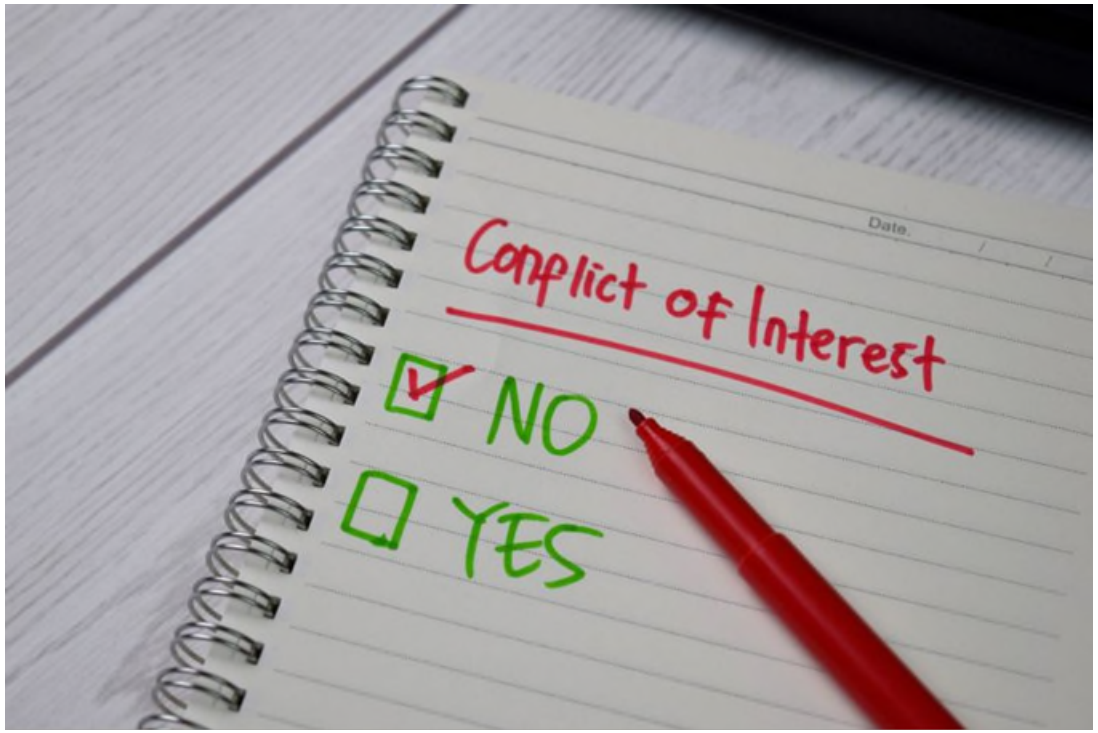
Local Ethics Code & Board



- Enabled under NYS General Municipal Law § 808
- Establishes how a governing board appoints members
- Establishes powers of a board of ethics
- Repository for annual financial disclosure statements

Identifying Potential Conflicts of Interest

- Is there a material benefit?
- Does a contract exist?
- Do you have control over a contract?
- Did you accept a gift?
- Are you related?
- Have you publicly stated an opinion?
- Did someone talk to you outside of a public meeting?
- Were you compensated for services associated with the applicant?
- Is there even an appearance of any of the above?
- Important Final Step – Disclose and, if need be, recuse!



Conflict of Interest Scenario 1 - Situation

Susie Smith owns an engineering firm in the Town of Mulberry Hill. Ms. Smith also serves as chair of the Planning Board for the Town. A very large resort project is coming to the Town and requires a Special Use Permit, and this project is represented by Ms. Smith's firm, who has done all of the design and application work. At the first Planning Board meeting where the project is presented, Ms. Smith states for the record that she recuses herself from the application, gets up from the dais and walks over to the applicant table, where she sits down, and starts to introduce the project to the board.

Conflict of Interest Scenario 2 - Situation

Jon Jones works as a Senior VP of Lending at Loughberry National Bank in the Town of Sarasota. He is building a new house that will need an area variance from the Town ZBA. The first meeting goes well, and the Board sets a public hearing for the next meeting. Before that meeting occurs, ZBA chair Andy Roche walks into the Bank to meet with Jon and to fill out a home equity loan application. Knowing that Andy is ZBA chair, Jon gives Andy half a percent decrease in his interest rate. After the paperwork is signed, Jon winks at Andy and says that he will see him at the next ZBA meeting.

Conflict of Interest Scenario 1 & 2 - Discussion

- Were these scenarios permissible? Ethical?
  - Correct! – Neither are permissible!
- Scenario 1 - Section 805-a(1)(c) of Article 18 of NYS General Municipal Law prohibits municipal officers from receiving compensation for services rendered before a board on which that person is a member, officer or employee.
- Scenario 2 – The ZBA chair needs to recuse himself from any further review of the Jones application (and maybe be investigated??)



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Ex Parte Communications Scenario 1

Barry Sanders is a Planning Commission member in the City of Canopy. Barry is well known in the City from his non-profit work. Barry has a PO box at the local post office, and when he stops in daily to check his mail, residents tend to come up to him to talk. One day, Ethel Flaherty walks up to Barry at the Post Office and starts to ask him questions about a large department store project that is currently before the Planning Commission. She is very concerned about traffic and noise impacts and she starts to convince Barry that the project will destroy the City. Barry doesn't mention the conversation at the Board meeting, but all Barry can think about when he casts the deciding no vote is his conversation with Mrs. Flaherty.

Ex Parte Communications Scenario 2

Lorelai Gilmore is a ZBA member in the Town of Starrs Hollow. She is often at the supermarket picking up items for her bed and breakfast. While in the produce aisle, she sees her friend Luke Danes, who is also the Stars Hollow ZBA chair. There is a ZBA meeting coming up and they start discussing the merits of a use variance application on the agenda for that night. A third member of the board walks by, says hello and joins the discussion. There are 5 members total on the ZBA. All 3 people part after the discussion convinced that they are going to deny the variance.

Ex Parte Scenario 1 & 2 - Discussion

- Is it ok for Mrs. Flaherty to be discussing the application with Barry?
- What about the impromptu ZBA meeting at Wegmans?
- Both situations problematic
- Open Meetings Law Implications



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Family Matters Scenario 1

Darryl's brother (no, his name isn't Darryl), Steve owns a construction company in the Town of Winslow. Steve is designing a new 150 lot subdivision and will be submitting an application to the Town Planning Board for approval. The project site is very constrained by natural resources – large wetland complexes, endangered species habitat, an old cemetery. Darryl happens to be on the Planning Board. One night at a family function, Steve confides to Darryl that if this application isn't approved, he will have to declare bankruptcy. Feeling conflicted, Darryl decides not to say anything to his fellow board members, sits through months of meetings on the application and then joins the majority to vote in favor of the project.

Family Matters Scenario 2

ZBA member Danny lives in a nice Victorian style home in the Town of Tanner, where he rents out two accessory dwelling units to his friend Joey and brother-in-law Jessie. Jessie is a local developer who is working to develop a music venue on a property zoned as residential in the Town, and needs a use variance in order for the project to pencil. Danny knows that he should probably recuse himself from the application, but fears the other ZBA members will deny the application. If this happens, Jessie can't pay Danny his rent. So, Danny votes to approve the variance.

Family Matters 1 & 2 - Discussion

- Did I do that? Family matters complicate the ability for public officers to impartially do their job.
- Even the appearance of impropriety is enough to require both of these board members in these scenarios to recuse (have mercy).
- Bottom line – A member of a Planning Board or ZBA should recuse themself if a family members appears before their board as an applicant!



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Prejudgment Scenario 1

Jerry lives in a multifamily apartment building in the City of Serenity, and sits on the City's Planning Commission. Dr. Tim Whatley is looking to open a new dentist's practice in the City and will need site plan approval for his new building on Vandalay Road. Jerry has had a lot of dental work in his 35 years and is adamant that the City does not need another dentist. Jerry aired these grievances during the Planning Commission meetings and stated numerous times that he would be voting against the application, even before the applicant had a chance to fully explain the project and its benefits to the community, and even though it met all facets of the code.

Prejudgment Scenario 2

Jen Beall is a resident of the Town of Dalenros. For several years, a very large resort project has been knocking on the Town's door. Jen, who lives near the project site, spent years leading a grassroots effort for a local group called "Save the Trees" and has been on record that she is against the project, attending rallies and protests against the project. After a recent election, the new Town Board appoints Jen to the Planning Board, right before the resort files their Special Use Permit application. Jen thinks to herself…."Now's my chance!...."

Prejudgment 1 & 2 - Discussion

- Being openly against the project in Dalenros gives the appearance that there is bias present for Jen.
- Ditto Jerry!
- Both scenarios highlight the appearance of impropriety and both should recuse.



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SEQRA Procedure Scenario

Don is the chair of a planning board (5 members) in a really small, rural town, where they are lucky to review a handful of applications a year. A large solar project (greater than 10 acres) is coming to town, which is allowed by Special Use Permit in the Agricultural 1 zoning district. The project has access on a state highway and there are state wetlands on the project site. At the first meeting, Don and the board hear the presentation by the developer, and ask a few trivial questions. The first thing Don does is to make a simple motion to approve the project, which the Board does.

SEQRA Procedure - Discussion



- Hello Article 78, it's me, Margaret!
- No SEQRA compliance
  - Lead Agency/Action Classification
  - Coordinated review
  - Determination of significance
- No GML 239 referral
- No required public hearing
- No elaboration on how project meets Special Use Permit criteria in code.

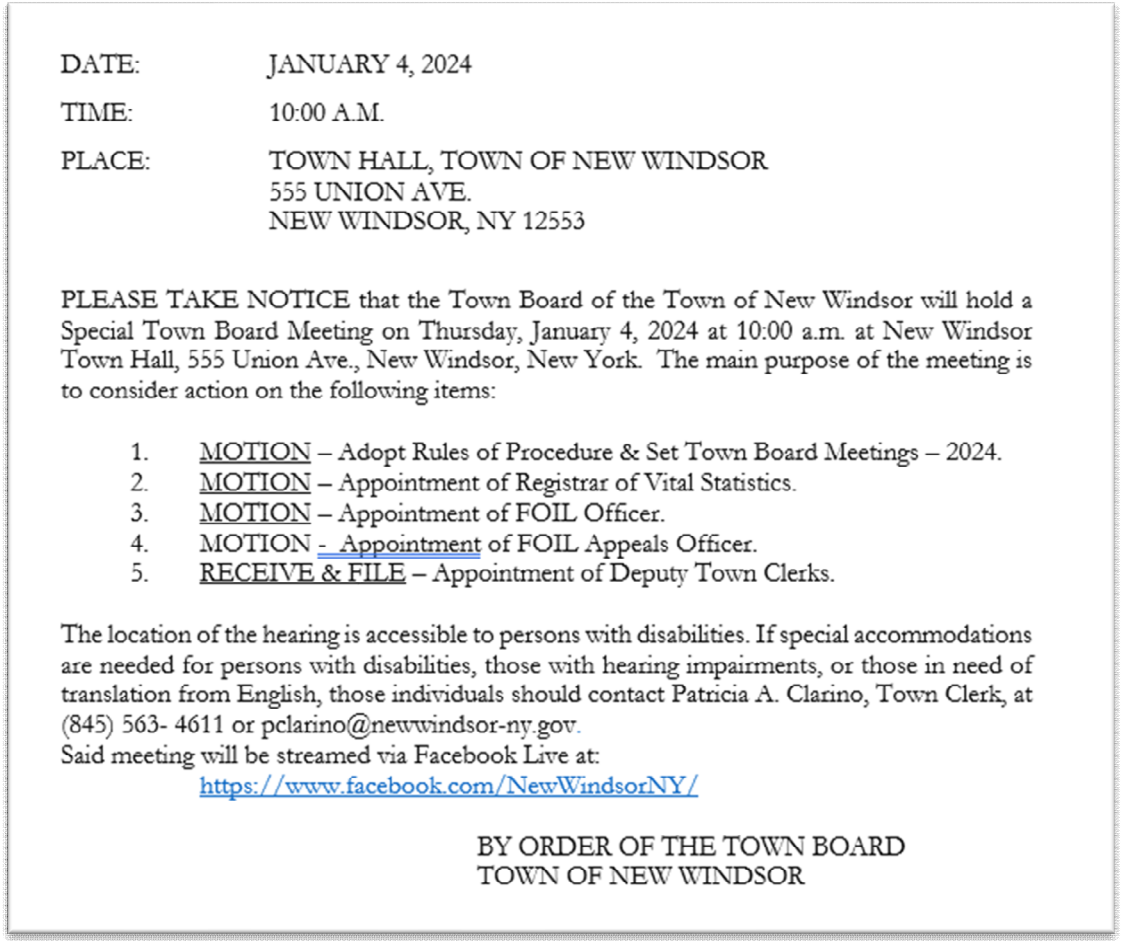
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Open Meetings Law Procedure Scenario

Sally is the ZBA chair of the Town of Pawnee, which has a 5 person board. One cold December night, only Sally and another board member made it to the Board meeting. Sally called the meeting to order and started running through the Agenda items, opening/closing hearings, and offering/voting on motions to approve the area and use variances on the Agenda. After the Agenda items are complete, Sally adjourns the meeting and goes home.

Open Meetings Law - Discussion

- NYS Open Meetings Law:
  - ""*Public body" means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function..*"
- Quorum means "of the total members"
- Do NOT be a Sally!



DATE: JANUARY 4, 2024

TIME: 10:00 A.M.

PLACE: TOWN HALL, TOWN OF NEW WINDSOR
555 UNION AVE.
NEW WINDSOR, NY 12553

PLEASE TAKE NOTICE that the Town Board of the Town of New Windsor will hold a Special Town Board Meeting on Thursday, January 4, 2024 at 10:00 a.m. at New Windsor Town Hall, 555 Union Ave., New Windsor, New York. The main purpose of the meeting is to consider action on the following items:

1. MOTION – Adopt Rules of Procedure & Set Town Board Meetings – 2024.
2. MOTION – Appointment of Registrar of Vital Statistics.
3. MOTION – Appointment of FOIL Officer.
4. MOTION - Appointment of FOIL Appeals Officer.
5. RECEIVE & FILE – Appointment of Deputy Town Clerks.

The location of the hearing is accessible to persons with disabilities. If special accommodations are needed for persons with disabilities, those with hearing impairments, or those in need of translation from English, those individuals should contact Patricia A. Clarino, Town Clerk, at (845) 563- 4611 or pclarino@newwindsor-ny.gov.
Said meeting will be streamed via Facebook Live at:
https://www.facebook.com/NewWindsorNY/

BY ORDER OF THE TOWN BOARD
TOWN OF NEW WINDSOR

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Zoning Board of Appeals Procedure Scenario

Sally is back from the Pawnee ZBA. During a subsequent meeting, the Board heard an application for a use variance to allow for a fast-food restaurant called "Little Sebastian's" in a zoning district where fast food restaurants are not an allowed use. Sally listens to the presentation and then makes a simple motion to approve the project, which passes the full board.

Zoning Board of Appeals - Discussion

- Easy one, right?
- Sally forgot to eat her 4 Part Test Wheaties today:
  - **Lack of Reasonable Return:** The property cannot realize a reasonable economic return for any permitted use under current zoning (must be "dollars and cents" proof).
  - **Unique Hardship:** The hardship is unique to the specific property and not shared by a substantial portion of the district or neighborhood.
  - **Neighborhood Character:** The requested variance will not alter the essential character of the neighborhood.
  - **Not Self-Created**



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ZBA Public Utility Variance Scenario

Jared is the ZBA chair for a small Town in rural New York. Last year, the Town passed a very restrictive solar ordinance that allows community-scale solar projects in the tiny Industrial zone that is centered on a mine in Town. As such, nearly every solar project needs a use variance, and nearly every request for a use variance is denied. A recent application came before the ZBA and the board used the traditional 4-part use variance test to justify the eventual denial of the project. The Town was sued by the applicant and the applicant won their Article 78 challenge.

ZBA Public Utility Variance - Discussion

- The ZBA used the wrong use variance test.
- In Freepoint Solar LLC et al. v. Town of Athens Zoning Board of Appeals ("Freepoint") the Appellate Division, Third Department ruled that solar projects are public utilities, and as such, they are entitled to the lighter public utility variance standard, rather than the traditional and more restrictive variance criteria required of other projects by law.
- Applicants only need to demonstrate a "compelling reasons, economic or otherwise, which make it more feasible" than alternative locations (i.e. due to IX constraints)
- Battery storage projects not yet tested under this standard, but only a matter of time



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Jeopardy!



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