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**ETHICAL CONSIDERATIONS IN
PLANNING AND ZONING DECISION-MAKING**

MARK SCHACHNER, ESQ.
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I. INTRODUCTION

- A. MANY ISSUES UNDER UMBRELLA OF "ETHICAL CONSIDERATIONS
IN PROPER DECISION-MAKING"
- B. MINIMUM STANDARDS vs. HIGHER "STANDARDS"/GOALS
- C. STRIVE HIGH – SEEK MORE THAN MERE/MINIMAL COMPLIANCE –
"MUST" vs. "SHOULD"
- D. LITERAL/TECHNICAL vs. PRACTICAL/"REAL LIFE"
URBAN/RURAL DISTINCTION
LACK OF "BRIGHT LINES" - SOME RULES HARD AND FAST OR
BLACK/WHITE – SOME RULES SOFT AND GREY – TAKE "HIGHEST
ROAD" (if possible and practical)

II. GENERAL PRINCIPLES

- A. FUNDAMENTAL/OVERRIDING PREMISES – officials should be objective
and unbiased – decisions made on merits of application, regardless of
who are applicant/proponents and who are opponents – decisions



made only on basis of information presented and reviewed at open public meetings

- B. MAINTAIN INTEGRITY – AVOID CONFLICT OF INTEREST AND APPEARANCE OF IMPROPRIETY (more on these later)
- C. BEST “STANDARDS”:
 - “DUCK” TEST – if it quacks, swims and has webbed feet and a bill, then probably a duck
 - “SMELL” TEST – if rancid, foul, malodorous, then probably not right
 - “GUT/SLEEP” TEST – if it feels uncomfortable and causes sleep loss and anxiety, then probably not right
- D. “CASE-BY-CASE” ANALYSIS – outcome often depends upon specific facts and circumstances of particular case and evaluation of magnitude of problem
- E. IF IN DOUBT, ERR TOWARD DISCLOSURE AND RECUSAL – little or no chance of problem due to unnecessary recusal – substantial risk for failing to recuse if required (but don’t recuse or “abstain” without appropriate reason)

III. LEGAL REQUIREMENTS

- A. MUNICIPAL OFFICERS – members of Town/Village Boards, City Councils, Planning Boards and Zoning Boards of Appeals are “Municipal Officers” [General Municipal Law §800(5)]
- B. PROHIBITED INTEREST – Municipal Officers are prohibited from having interest in contract with municipality (if Officer has some control over that contract for municipality) [General Municipal Law §801]



- C. PROHIBITED GIFTS – Municipal Officers are prohibited from accepting “gifts” having value of \$75 or more, regardless of form (if attempted influence could reasonably be inferred) [General Municipal Law §805-a(1)(a)]
- D. PROHIBITED COMPENSATION – Municipal Officer “may not receive or enter into any matter for compensation for services to be rendered in relation to any matter before any municipal agency of which he or she is an officer, member or employee” [General Municipal Law §805-a(1)(c)] (Board Member cannot do work for pay before her/his Board) – should also avoid “free” representation and appearance before other Boards in same municipality
- E. VIOLATIONS – Any person who knowingly and intentionally violates State law shall be guilty of a misdemeanor and may be fined, suspended or removed from office [General Municipal Law §§805 and 805-a(2)]
- F. LOCAL CODE OF ETHICS – General Municipal Law requires Towns/Villages/Cities to adopt Local Code of Ethics [General Municipal Law §806] – may be more restrictive than State statute
- G. LOCAL BOARD OF ETHICS – Local municipality also authorized (not required) to create local Board of Ethics [General Municipal Law §808] – to rule on specific situations arising in Town/Village/City – rulings generally of an advisory nature



IV. CONFLICTS AND BIAS

A. CONFLICTS OF INTEREST (AND APPEARANCES OF IMPROPRIETY)

1. **ACTUAL CONFLICT** – financial incentive or involvement – participation prohibited (i.e. – BAR Member reviewing his own grievance)
2. **APPEARANCE /PERCEPTION/POTENTIAL CONFLICT** – less than actual conflict; appearance of impropriety – usually not flatly prohibited, but certainly strive to avoid

B. BIAS

1. **RELATIVES** – closeness of familial relationship can create presumption of bias
2. **FRIENDS** – much more gray area, especially in small town/rural areas
3. **NEIGHBORS** – mere proximity, absent other relationship, does not necessarily create bias – depends on application, proximity and relationship
4. **SUBJECT MATTER** – personal crusade

V. RECUSAL

- A. **RECUSAL DECISION** – made by individual Member involved – not made by Board, Chairperson, applicant or public – may seek advice of Town/Village/City Legal Counsel, Association of Towns, Conference of Mayors, New York Planning Federation, Department of State or whomever, but not required and not binding



B. **MECHANICS OF RECUSAL** – state existence of conflict (whether actual or potential) – may state details of relationship (but not required) – recommend that official physically step down from Board and either leave room or take seat in audience – physical removal not required, but adds to integrity of process

VI. **“PROFESSIONAL” BOARD MEMBERS AND APPEARANCES BEFORE BOARDS** – engineers, architects, surveyors, lawyers and realtors can be Board Members (and often make excellent ones) – professionals who are Board Members or consultants to municipality cannot represent clients before that Board and should not appear before related entities – should also recuse if their clients appear before Board on which they sit – if too many, then probably not ideal Member

VII. **PARTICIPATION IN PLANNING AND ZONING PROCESS BY MUNICIPAL OFFICIALS AS INDIVIDUAL CITIZENS** – contrary to some popular perception, municipal officials do not relinquish rights to participate in public process, either as applicant or as “mere citizen”

A. **APPLICATIONS BY MUNICIPAL OFFICIALS**

General Municipal Law Section 809(1): “Every application, petition or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license or permit, pursuant to the provisions of any ordinance, local law, rule or regulation constituting the zoning and planning regulations of a municipality shall state the name, residence and the nature and extent of the interest of any State Officer or any Officer or employee of such



municipality or of a municipality of which such municipality is a part, in the person, partnership or association making such application, petition or request (hereinafter called the “applicant”) to the extent known to such applicant.” [107 word sentence] = Disclose if Applicant is Municipal Official [6 words].

Mandatory Disclosure – “I’m a Member of the Town Board and former Member of the Town Planning Board. I seek no different, special or preferential treatment and I should be treated just the same, neither any better nor any worse, as any other applicant.”

- B. COMMENTS BY MUNICIPAL OFFICIALS ON THE APPLICATIONS OF OTHERS – official can also participate in public review process from audience, same as any other member of public, but should specifically disclose official position and recusal and make clear that comments are offered as individual citizen, not public official – this type of participation allowed, but not recommended (and could probably be prohibited as condition of appointment)

VIII. INTEGRITY OF DECISION-MAKING PROCESS

- A. DECISIONS MADE AT OPEN PUBLIC MEETINGS, PROPERLY NOTICED
- B. DECISIONS MADE BY SIMPLE MAJORITY OF ENTIRE BOARD, UNLESS SPECIAL REQUIREMENTS – “of entire Board”, not just Members present at particular meeting – special requirements include local override of County Planning Board (“supermajority”) and Zoning Board of Appeals rehearing (“unanimous of all Members present”)



- C. **DECISION BASED ON ADMINISTRATIVE RECORD** – application, supporting materials, public comments (written and verbal), discussion among Members, applicants and public which occur at public meetings
- D. **EX-PARTE COMMUNICATIONS TO/WITH/AMONG PLANNING BOARD AND ZBA MEMBERS** – don't communicate with applicants, agents, proponents, opponents or fellow Board Members "out-of-school" about matters to be considered by your Board – "communicate" includes in-person, telephone, mail, e-mail, text and all social media – very difficult, but very important – inappropriate, but (practically) impossible to avoid – don't initiate – disclose on record when they occur
- E. **SITE INSPECTIONS** – Board Members can go individually or as a group – very helpful to aid review, but raises lots of Open Meeting, *Ex-Parte* and Administrative Record issues – only appropriate to view site, not engage in discussions with applicant or each other – very difficult in practical reality

IX. WRITTEN DECISIONS, COLLABORATION AMONG MEMBERS AND COUNSEL ROLE

- A. **WRITTEN DECISIONS** – perfectly appropriate to prepare written Decision prior to meeting – not advisable to prepare Decision prior to full consideration including Public Hearing, but Decision need not be made on same night as Public Hearing
- B. **COLLABORATION AMONG MEMBERS** – while a couple of Members could lawfully get together to discuss or prepare Decisions without violating Open Meetings Law, "deliberations" should occur at public meetings – therefore, collaboration allowed, but not recommended



- C. COUNSEL ROLE – attorney should guide and advise Board to help make sure that Board follows proper procedures in making Decision and applies relevant standards and criteria – attorney should not make Decision for Board – attorney can draft proposed Decision, but only if and as directed by Board

X. COMPATIBILITY OF POSITIONS

- A. COURSE UNTO ITSELF – many Decisions about many dual roles (and even some triple roles)
- B. SURPRISINGLY INCONSISTENT RESULTS – not always what one would expect
- C. GENERAL PRINCIPLES
1. Common misconception that any multiple office holding is prohibited – many positions not incompatible and multiple office holding allowed – unity of interest is permissible
 2. Offices incompatible if one subordinate to other – one has substantial decision-making authority over the other in terms of compensation, promotion, etc. (“you cannot be your own boss”) – cannot be “cured”
 3. Offices incompatible if “inherent inconsistency” – what is good for one office is bad for the other – such substantial overlap that exercise of unbiased, independent judgment is compromised – may be “cured” through recusal if only speculative/occasional, but not if inevitable/frequent



Mark Schachner is the Senior Principal Attorney of MILLER, MANNIX, SCHACHNER & HAFNER, LLC in Glens Falls and Round Lake. While the firm maintains a general practice of law, Mr. Schachner's efforts are concentrated in the areas of municipal, environmental, land use and planning/zoning law. Mr. Schachner and his colleagues represent numerous municipalities in Essex, Franklin, Fulton, Hamilton, Herkimer, Saratoga, Warren and Washington Counties. He also serves as Counsel to the Saratoga County Water Authority, the Gloversville-Johnstown Joint Sewer Board and the Open Door Mission. His practice includes extensive participation in regulatory proceedings before the New York State Department of Environmental Conservation, Adirondack Park Agency and Lake George Park Commission. Mr. Schachner is a graduate of Brown University and Boston University School of Law. He is author of the chapter entitled "Environmental Law - New York State Environmental Quality Review Act ("SEQRA")" in the book Pitfalls of Practice published by the New York State Bar Association in 1993 and 2002. Mr. Schachner has lectured about municipal, environmental, planning and zoning law matters at numerous conferences throughout the State. He is Second Vice President of the New York Planning Federation.



