

# Recusal and Abstention from Voting: Guiding Principles

By Lester D. Steinman

Counsel to planning boards are often asked to address whether board members should recuse themselves from consideration and voting on an application or abstain from voting on an application. Set forth below are general principles which may be helpful in advising planning board members regarding the propriety of recusal or abstention in a particular case.



## I. Abstention from Voting

Discharging the duties of a planning board member requires a member to vote on all applications that come before the board, assuming no conflict of interest or appearance of impropriety exists requiring recusal.<sup>1</sup> Indeed, a persistent refusal to vote on applications could constitute grounds for removal from office.

Applicants before the planning board have the burden of proof to support their applications. Thus, where a planning board member determines that the record contains insufficient information to satisfy the legislative criteria for granting a permit or approval, that member should vote to deny the application. Where a member has missed certain meetings on an application, the member should review the minutes and/or recordings of those meetings and discuss the issues with other board members at a public meeting to enable the board member to make an informed decision when voting on the application.<sup>2</sup>

In *Taub v. Pirnie*,<sup>3</sup> the board member in question had been a resident of the village for twenty-five years, a zoning board member for twelve years and a village trustee and was fully familiar with the neighborhood in question and its zoning problems. Before voting on the application, the member had thoroughly discussed the arguments presented at the public hearing with other members. The fact that the member in question neither attended the public hearing nor read the hearing minutes was not outcome determinative. Rather, it was sufficient that the member had the opportunity to make an informed decision by virtue of his knowledge of the neighborhood and familiarity with the issues raised at the public hearing.

Failure to vote is not a benign act of neutrality toward an application. Rather, abstention has significant consequences for the planning board's decision making. Every motion or resolution adopted by the planning board requires the affirmative vote of a majority of all the members of the board.<sup>4</sup> An abstention is not an affirmative vote in favor of the application,<sup>5</sup> and, to the extent that it cannot be counted as an affirmative vote, its effect is akin to a negative vote for purposes of compliance with statutory majority voting requirements.<sup>6</sup>

## II. Recusal Based upon Conflicts of Interest

Where a member of the planning board has a conflict of interest affecting the consideration of an application, that member must recuse him or herself from participating in any discussion of the matter and from voting on that matter.<sup>7</sup> Conflicts of interest may be defined by statute,<sup>8</sup> local law [municipal code of ethics]<sup>9</sup> or common law. Planning board members should familiarize themselves with the provisions of these rules.

Courts have held public officials to a high standard of conduct and have invalidated certain actions which, while not violative of the literal provisions of GML Article 18 or a local code of ethics, are tainted by the votes of members which "violate the spirit and intent of the statute, are inconsistent with public policy or suggest self interest, partiality or economic impropriety."<sup>10</sup> For example, in *Zagoreos v. Conklin*,<sup>11</sup> the court annulled the votes of two zoning board members, who were employees of the applicant, to grant variances on a controversial application to convert oil burning generating units into coal burning units. In *Tuxedo Conservation and Taxpayers Ass'n v. Town Board of the Town of Tuxedo*,<sup>12</sup> a town board member who was an officer of an advertising firm was disqualified from voting on a zoning application by a subsidiary of one of the firm's clients. Also, in *Conrad v. Hinman*,<sup>13</sup> the Court annulled a village board vote to grant a rezoning application where the deciding vote was cast by the co-owner of the property that was the subject of the rezoning petition.

Whether a member has a disqualifying conflict of interest "requires a case-by-case examination of the relevant facts and circumstances."<sup>14</sup> "Public officials must perform their duties solely in the public interest, and avoid circumstances which compromise their ability to make impartial judgments on any basis other than the public good."<sup>15</sup>

Indeed, where circumstances, viewed objectively, could reasonably be deemed to compromise a member's impartiality, avoidance of even the appearance of impropriety is essential to maintaining public confidence in the integrity of government.<sup>16</sup> Thus, the Attorney General has opined:

'It is critical that the public be assured that their officials are free to exercise their best judgment without any hint of self-interest or partiality, especially if a matter under consideration is particularly controversial.' *Matter of Byer v. Town of Poestenkill*, 232 A.D.2d 851, 852-53 (3d Dep't 1996). Thus, where a public official is uncertain about whether he should undertake a particular action due to an actual or potential conflict, he must recuse himself entirely from the matter in question unless he procures an advisory opinion from a local ethics board that concludes otherwise. *See* Op. Atty. Gen. (Inf.) No. 98-38; *see also* Op. Atty. Gen. (Inf.) No. 99-21 (recusal requires the official in question to avoid 'taking any actions with respect to that matter.')

Often, conflicts of interest arise out of familial relationships [recusal of planning board chairman required where his son had a pending employment application with the attorney for the applicant before the planning board];<sup>18</sup> prejudgment of the issues attendant to a specific application;<sup>19</sup> opposition to an application as a neighbor [often a neighbor acts out of their own self-interest and concerns about their own property values and families and may not be capable of measuring the merits of an application in light of the overall public interest];<sup>20</sup> or ongoing business relationships [where two board members were employed by the applicant, the board members must recuse themselves because "the likelihood that their employment . . . could have influenced their judgment is simply too great to ignore."].<sup>21</sup> However, not every private business relationship between an applicant and a board member is sufficient to require recusal. For example, in *Ahearn v. Zoning Board of Appeals of the Town of Shawangunk*,<sup>22</sup> the fact that one zoning board member had purchased insurance from an applicant and the spouse of another zoning board member had received a Christmas gift for teaching the applicant's daughter piano lessons was deemed to be so insubstantial that no common law conflict or appearance of impropriety was created when those members voted to grant the applicant a special use permit to construct a planned unit development.

Nor is recusal required where the interest of the member in the matter under review is not a personal or private one, but rather "an interest he has in common with all other citizens or owners of property" in the community.<sup>23</sup> Thus, where most of the property in a village met the acreage requirement for reclassification to a cluster residence floating zone under a proposed zoning amendment, village board members who owned qualifying property were not disqualified from voting on that zoning amendment.<sup>24</sup> Similarly, in *Segalla v. Planning Board of the Town of Amenia*,<sup>25</sup> the court refused to annul the vote of a planning board member to adopt a new master plan where the value of that member's property and the value of nearly every other property owner in the town would be similarly affected by the adoption.

Where recusal is required, the board member in question must refrain from deliberating and voting on the application or matter:

We have stated that members with conflicts of interests must recuse themselves from participating in any deliberations or votes concerning the application creating the conflict. Op. Atty. Gen. (Inf.) No. 90-38. The board member's participation in deliberations has the potential to influence other board members who will exercise a vote with respect to the matter in question. Further, we believe that a board member with a conflict of interests should not sit with his or her fellow board members during the deliberations and action regarding the matter. The mere presence of the board member holds the potential of influencing fellow board members and additionally, having declared a conflict of interests, there would reasonably be an appearance of impropriety in the eyes of the public should the member sit on the board.<sup>26</sup>

Obviously, this article cannot address every potential situation in which recusal and/or abstention becomes an issue. However, by adhering to the general principles which guide those decisions, planning board members will be better able to discharge their responsibilities.

## Endnotes

1. *See Cromarty v. Leonard*, 13 A.D.2d 275, 216 N.Y.S.2d 619 (2d Dep't 1961), *aff'd*, 10 N.Y.2d 915 (1961).
2. *See Taub v. Pirnie*, 3 N.Y.2d 188 (1957), holding that even where a board member has not attended the public hearing and not read the transcript, he may nevertheless vote on an application

where he has the means available to him to make an informed decision.

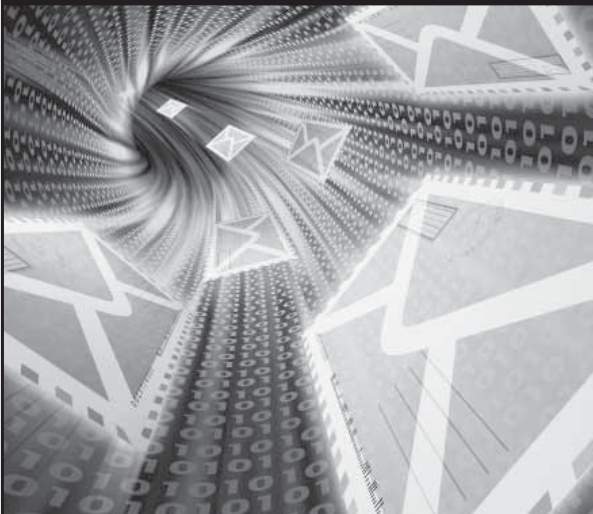
3. *Id.*
4. Village Law § 7-718(17); Town Law § 271(16); General City Law § 27(17).
5. See *Rockland Woods, Inc. v. Village of Suffern*, 40 A.D.2d 385, 340 N.Y.S.2d 513 (2d Dep't 1973).
6. Cf. *Pinnacle Consultants Ltd. v. Leucadia National Corporation*, 94 N.Y.2d 426 (2000).
7. 1995 Op. Atty. Gen. 2.
8. Article 18 of the General Municipal Law contains provisions of law pertaining to conflicts of interest arising out of direct or indirect financial interests of municipal officers and employees in contracts with their municipality. For purposes of Article 18, "contract" is defined broadly to include any "claim, account or demand against or agreement with a municipality, express or implied." GML § 800(2). With certain exceptions, a municipal officer or employee is deemed to have an interest in the contract of a spouse, minor children and dependents and an entity of which the person is an officer, member or employee. GML § 800(3). Such interest is prohibited, with myriad exceptions [GML § 802], where the officer or employee, individually, or as a member of a board, has the power or duty to negotiate, prepare, authorize or approve the contract or authorize or approve payment or audit bills or claims under the contract, or appoint an officer or employee who has any of those powers or duties. GML § 801. Regardless of whether the interest is prohibited, the officer or employee having an interest in a contract with his or her municipality must publicly disclose that interest, in writing, to the governing body of the municipality. GML § 803. Applicants for a broad spectrum of land use permits and approvals must identify the name, nature and extent of the interest of any municipal officer or employee in the application. GML § 809. A willful and knowing violation of Article 18 constitutes a misdemeanor. GML § 805.
9. Local codes of ethics typically establish standards of conduct to ensure that municipal officers and employees maintain high standards of morality and faithfully discharge their duties, regardless of personal consideration, in an independent and impartial manner. A board of ethics is established to render advisory opinions to municipal officers and employees

requesting same regarding their own conduct. Among other sanctions, a knowing and willful violation of the code of ethics constitutes a violation punishable by fine and could result in disciplinary action.

10. 1991 Op. Atty. Gen. 48.
11. 109 A.D.2d 281, 491 N.Y.S.2d 358 (2d Dep't 1985).
12. 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep't 1979).
13. 122 Misc. 2d 531, 471 N.Y.S.2d 521 (Sup. Ct., Onondaga Co. 1984).
14. *Parker v. Town of Gardiner Planning Board*, 184 A.D.2d 937, 585 N.Y.S.2d 571 (3d Dep't 1992), *lv. denied*, 80 N.Y.2d 76 (1992).
15. 2002 Op. Gen. 8; see *Tuxedo*, *supra* note 12 at 325 ["It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest."].
16. 2002 Op. Atty. Gen. 8; *Tuxedo*, *supra* note 12 ["The test to be applied is not whether there is a conflict, but whether there might be]."
17. 2002 Op. Atty. Gen. 8.
18. 1989 Op. Atty. Gen. 50.
19. 1988 Op. Atty. Gen. 60.
20. 1988 Op. Atty. Gen. 59.
21. *Zagoreos*, *supra* note 11.
22. 158 A.D.2d 801, 551 N.Y.S.2d 392 (3d Dep't 1990), *lv. denied*, 76 N.Y.2d 706 (1990).
23. *Tuxedo*, *supra* note 12.
24. See *Town of North Hempstead v. Village of North Hills*, 38 N.Y.2d 334, 344 (1975).
25. 204 A.D.2d 332, 611 N.Y.S.2d 287 (2d Dep't 1992).
26. 1995 Op. Atty. Gen. 2.

**Lester D. Steinman is the Director of the Edwin G. Michaelian Municipal Law Resource Center of Pace University and serves as Counsel to the law firm of Wormser, Kiely, Galef & Jacobs LLP in White Plains, New York.**

## Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact the *Municipal Lawyer* Editor:

Lester D. Steinman, Esq.  
Municipal Law Resource Center  
Pace University  
One Martine Avenue  
White Plains, NY 10606  
Lsteinman@pace.edu

Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

[www.nysba.org/MunicipalLawyer](http://www.nysba.org/MunicipalLawyer)