SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of

CYNTHIA GREER GOLDSTEIN,

Plaintiff-Petitioner,

Index No.
54409/2020

For a Judgment Pursuant to CPLR Article 78 and
for Declaratory Judgment under CPLR Article 30

-against-

VILLAGE OF MAMARONECK BOARD OF ETHICS,
VILLAGE OF MAMARONECK BOARD OF TRUSTEES,
INCORPORATED VILLAGE OF MAMARONECK, and
JERRY BARBERIO, in his official capacity as Village Manager,

Defendants-Respondents.

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PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF ARTICLE 78 PETITION AND REQUEST FOR DECLARATORY JUDGMENT

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PRELIMINARY STATEMENT

This is a hybrid action/proceeding seeking a judgment: (i) declaring that the recusal provision of the Village Code of Ethics is unconstitutional and void for vagueness because it fails to give sufficient notice of the proscribed conduct, and (ii) annulling a determination by the Village of Mamaroneck Board of Ethics on the grounds that it was arbitrary, capricious and an abuse of discretion.

STATEMENT OF FACTS

Petitioner is an attorney admitted to practice in the courts of this state, and a certified public accountant. For the past thirty years, she has devoted herself to volunteerism and community service, including, among other things, pro bono legal and tax assistance to local residents and not-for-profit organizations, service on the boards of trustees of Pace University and the Washingtonville Housing Alliance, leadership positions in the Larchmont-Mamaroneck Hunger Task Force and several parent-teacher organizations, and service on numerous municipal boards and committees including as a member of the village of Mamaroneck budget, centennial and flood advisory committees, Chair of the Village Harbor Coastal Zone Management Commission, and member of the Village Planning Board. Petitioner is the recipient of the tri-municipal Martin Luther King, Jr. Award for community service. (*See* Goldstein resume, Exhibit G)

Petitioner has served as a member of the Planning Board of the Village of Mamaroneck (the "Village") since December 3, 2018. On November 29, 2019, the Village Board of Ethics issued a written Decision and Recommendation (Exhibit A) finding that petitioner violated the recusal and disclosure provisions of the Village Code of Ethics in two Planning Board matters:

the Hampshire Country Club subdivision application, and the 203 Hommocks Road application for a wetlands permit.

The pertinent Code of Ethics provisions are as follows:

Village Code § 21-4 (C). Recusal.

> (1) A Village officer or employee, or Board or committee member shall promptly recuse himself/herself from acting on a matter before the Village when acting on the matter, or failing to act on the matter, may benefit the persons listed in § 21-4A, financially or otherwise, or give the reasonable appearance of a conflict of interest or impropriety.
>
> (2) Whenever a Village officer, employee, or Board or committee member is required to recuse himself/herself, he/she must do so on the record and/or in writing and refrain from any further participation in the matter.

Village Code § 21-4(N). Disclosure of interest in legislation and official action.

> Disclosure of interest in legislation and official action. To the extent that she/he knows thereof, any Village officer, board member and/or employee with respect to matters in which she/he participates or in which her/his board is involved in the decision-making process, shall specifically and fully disclose on the official record of the Board of Trustees at a regular public meeting thereof the nature and extent of any direct or indirect interest in legislation or official action pending before the Village. Such public disclosure by the officer, employee or board member shall include disclosure of any political contributions made by any applicant, his/her consultants or legal representatives or their affiliates for the period commencing 12 months prior to the filing of the application and ending 12 months after a final decision has been made. However, no disclosure shall be required at any time under the subsection of any political contributions made by persons who are not applicants or their consultants, legal representatives or affiliates.

A. The Hampshire Country Club Subdivision Application

In 2015, Hampshire Recreation LLC filed an application to redevelop nine holes of the Hampshire Country Club's eighteen hole golf course into a new residential subdivision.

Petitioner lives at 5 Oak Lane with her husband, Steven. The Board of Ethics found that petitioner should have recused herself from hearing the Hampshire application, due to the proximity of her residential property to the 106 acre Hampshire Country Club. However, the evidence in the record showed that:

- The two properties do not share a common boundary; they are separated by the Prickly Pear Inlet, a tidal water body owned by the State of New York up to the mean high water line, pursuant to common law. (Ex. T, Tr. 339)
- Petitioner's property is screened from the Hampshire golf club property by trees, plantings, natural growth and aquatic vegetation. (Ex. T, Tr. 368-369, 400)
- Petitioner's residence is 850 feet from the nearest building construction site and 765 feet from the nearest limit of site work. (Ex. T, Tr. 340)
- Petitioner's property is among 189 residential lots within the notice perimeter for the proposed project. (Ex. Q)
- 210 houses are at the same or lesser distance, 765 feet, from the nearest limit of site work (including two apartment buildings, one of which is 3 stories and the other of which is described as 3-4 stories). (Ex. T, Tr. 344-345)
- 169 houses are at the same or lesser distance, 850 feet, from the nearest site of building construction. (Ex. T, Tr. 340)
- Petitioner's property is at a significantly higher elevation than the surrounding properties, and above the flooding that occurred to some of the neighbors in Superstorm Sandy. (Ex. T, Tr. 294)
- The uncontradicted testimony of a licensed appraiser established that neither the temporary construction impacts, nor the proposed development, will have a material effect on the value of petitioner's residence. (Ex. T, Tr. 365-367)
- Petitioner's property is located on a dead end street. The proposed route of construction vehicles does not pass petitioner's property. (Ex. T, Tr. 395)

B. The 203 Hommocks Road Application.

Petitioner recused herself in this matter after participating at a single meeting during which the Planning Board voted unanimously to open the hearing and classify the action for SEQRA purposes. The Board of Ethics erroneously claimed that petitioner violated the Village Code of Ethics by participating in these ministerial acts of the Planning Board.

The 203 Hommocks Road application was filed by a nearby property owner who required a wetlands permit to demolish his existing house and to construct a new house. Pursuant to §240-30 of the Village Code, wetlands permits are granted by the Planning Board after review by the Harbor and Coastal Zone Management Commission to insure consistency with the Village of Mamaroneck Local Waterfront Revitalization Program.

As a part of the project, the homeowner planned to extend a sewer line along Hommocks Road to a point that would enable him to tie-in to the existing sewer system. Until petitioner received the 1434 page meeting packet approximately five days before the first hearing date, she believed that the owner had decided not to install a sewer line. *See*, Steven Goldstein email dated February 26, 2019 (Ex. I) responding to a question as follows:

> Q. "I thought the main line going up to Hommocks was going to be paid for by a purchaser of one of the homes up on Hommocks by the water. Is that no longer the case?"
>
> A. "No, he has decided he wasn't willing to pay for the project himself."

The details pertaining to the sewer line (engineering data, cost allocation, etc.) were not included in the packet of meeting materials provided to the Planning Board members prior to the hearing. Further, the subject of the application before the Planning Board was an application for a wetlands permit; the Planning Board had no role in reviewing or approving the construction of a sewer line. Petitioner had ample, good faith reasons for believing that her limited participation

in the preliminary matters would not give rise to a conflict of interest or reasonable appearance of impropriety.

Petitioner made no public or private comments about the sewer line, the approval of which is not within the jurisdiction of the Planning Board. However, petitioner's husband, a dedicated environmentalist, believed that a sewer would be more eco-friendly than the existing septic systems. He advocated for sharing of the cost of a further extension of the sewer line beyond Hommocks Road to the full length of Oak Lane. In an unsuccessful effort to persuade his Oak Lane neighbors to share the cost of extending the proposed sewer line from Hommocks Road up Oak Lane, he stated that the sewer line, if so extended, would increase the value of their homes. Then, having failed to persuade his neighbors to share in the cost of extending the sewer line, he tried unsuccessfully to persuade the Village to create a new sewer district, bond the construction costs, and assess the costs to the benefitted parcels.

Connecting to the proposed sewer line on Hommocks Road, if undertaken by petitioner and her husband, would require the expenditure of a prohibitive amount to extend the line well past petitioner's home for a total distance of 450 feet, as the Village Engineer said would be required.[1] Petitioner's husband never stated that he and petitioner would absorb the entire cost of extending the proposed sewer line, approximately $108,000 ($160 per linear foot x 450 feet = $72,000, plus engineering fees of $16,000, survey cost of $5,000, and lateral connection to house, $15,000). (Ex. T, Tr. 276-279) Petitioner's husband had no success in persuading the neighbors on Oak Lane to share the cost, nor in persuading the Village to create a new sewer district. (Ex. T, Tr. 266-270) Accordingly, petitioner and her husband had no plans to connect

[1] In his testimony, the Village Engineer suggested that residents might be able to tie-in to the sewer line as proposed by the homeowner; but this alternative would have required extending the sewer line through solid rock. The Village Engineer and petitioner's expert both testified that the feasibility and cost of this alternative could not be determined.

to the proposed Hommocks Road sewer line, even assuming that it was built. (Leventhal Affirmation, ¶26)

A licensed appraiser testified at the Board of Ethics hearing that the option of connecting to a sewer line, while generally beneficial, would not increase the value of petitioner's home because her era septic system is still in good condition and is adequate to service the house.

At a meeting of the Planning Board on March 27, 2019, petitioner participated in two ministerial actions on the Hommocks Road application. The Planning Board unanimously voted to open the hearing and, following the recommendation of the Village Planner, voted unanimously to classify the action as a Type II action for SEQRA purposes. This classification was in accordance with the SEQRA Type II List of projects not requiring an environmental impact statement promoulgated by the New York Department of Environmental Control, specifically 6 NYCRR § 617.5(c)(11): "construction or expansion of a single-family, two-family or a three-family residence on an approved lot including provision of necessary utility connections…."

Following the March 27, 2019 Planning Board meeting and before any further action by the Planning Board on the application, petitioner recused herself from any further participation in the matter. Thereafter, the Planning Board referred the application to the Harbor and Coastal Zone Management Commission to insure consistency with the Mamaroneck Local Waterfront Revitalization Program. The wetlands permit was ultimately approved by a unanimous vote of the Planning Board, without petitioner's presence or participation.

C. Proceedings before the Board of Ethics

Petitioner was accused of violating the code of ethics by the Board of Ethics itself, on its own complaint.

Petitioner filed a pre-hearing motion to disqualify a member of the Board of Ethics, Deborah Chapin, due to Ms. Chapin's history of antagonism toward her. (Exhibit U) In a decision dated October 10, 2019, the Board of Ethics denied the motion to disqualify on the grounds that it lacked jurisdiction to take action against one of its own members. (Exhibit V) The Board of Ethics referred the matter to the Village Manager pursuant to Village Code §21-13(E). However, the Village Manager took no action, and the Board of Ethics hearing proceeded to a conclusion with Ms. Chapin present and participating.

The Village Manager took no action on petitioner's complaint against Ms. Chapin for four months, despite repeated inquiries from petitioner's counsel. (Ex. W) Finally, in a letter dated February 14, 2020, he made clear that he had no intention of acting on the matter. The Village Manager stated that:

> … On October 20, 2019, I received a copy of the complaint by Ms. Goldstein against a member of the Ethics Board. Unfortunately, the Code of the Village of Mamaroneck does not provide me with any obligations or responsibilities to act on the complaint; therefore, the requirements of §21-13(E) were met on October 10, 2019 when the Ethics Board provided me with a copy of the complaint. (Exhibit Y)

Thus there is no administrative procedure for disqualification of a biased member of the Board of Ethics; any such complaint will be referred to the Village Manager, who will do absolutely nothing with it. (See Point VIII, *infra*)

In its Decision and Recommendation dated November 29, 2019 (Ex. A), the Ethics Board found that petitioner violated the recusal and disclosure provisions of the Village Code of Ethics in both the Hampshire and Hommocks Road matters, and recommended that she be removed from the Planning Board.

The Decision and Recommendation was replete with *ad hominem* attacks on petitioner's attitude and conduct, and even found fault with her recusal letter and with an e-mail defending

her actions, that she sent to the Mayor, Board of Trustees and Board of Ethics after the hearing was completed. The Board of Ethics unreasonably took into consideration petitioner's well founded disagreement with their interpretation of a vague standard of conduct, and effectively punished her for defending herself against their charges.

D. Summary of Argument

Petitioner demands judgment under Article 78, annulling the Ethics Board's Decision and Recommendation on the grounds that it was made in violation of lawful procedure, was affected by errors of law, was arbitrary, capricious, and an abuse of discretion, and was not supported by substantial evidence, because:

- The Code of Ethics provisions that petitioner was alleged to have violated are unconstitutionally vague, and do not give sufficient notice of the conduct which they claim to prohibit.
- With regard to the Hommocks Road matter, the only actions taken by petitioner prior to her recusal were ministerial and, because they did not involve the exercise of discretion, could not give rise to a conflict of interest.
- Any potential benefit to petitioner from the Hommocks Road application was entirely speculative, as the costs to connect to the proposed sewer line were prohibitive, and all attempts by petitioner's husband to share the costs had failed.
- With regard to the Hampshire matter, the claimed grounds for disqualification were not private or personal to petitioner. Mere proximity to the site in question is not sufficient grounds for disqualification, particularly when hundreds of other members of the community are as close or closer, and would experience the same or greater impacts from the proposed development.

- The Ethics Board failed to adhere to its own precedents in conducting its hearings and issuing its Decision and Recommendation.
- The Ethics Board's denial of petitioner's motion to disqualify one of its members, and its *ad hominem* attacks against petitioner in its Decision and Recommendation, were caused by animus and prejudice against petitioner, and were inconsistent with fairness and justice.

The Court should grant a judgment declaring that the recusal provision of the Village Code of Ethics fails to give adequate notice of the proscribed conduct, in violation of the New York Constitution[2], should annul the decision and recommendation of the Board of Ethics, and should dismiss the ethics charges or, in the alternative, remand the matter for reconsideration after a determination on petitioner's motion to disqualify a Board of Ethics member.

POINT I

THE RECUSAL PROVISION OF THE CODE OF ETHICS ARE UNCONSTITUTIONALLY VAGUE UNDER THE NEW YORK CONSTITUTION

The Second Department recently stated that, in determining whether a statute is unconstitutionally vague:

> [A] court must first determine whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden. Second, the court must determine whether the enactment provides officials with clear standards for enforcement so as to avoid resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Accordingly, a statute is unconstitutionally vague under the Due Process Clauses of the Federal and State Constitutions where it fails to give fair notice to the ordinary citizen that the prohibited conduct is illegal, and it lacks minimal legislative guidelines, thereby permitting arbitrary enforcement.

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[2] Petitioner reserves her claims arising under the United States Constitution for an action commenced or to be commenced in the United States District Court for the Southern District of New York.

People v Lanham, 177 A.D.3d 637 (2d Dept. 2019), *citing* People v Stephens, 28 N.Y.3d 307 (2016).

In People v. Golb, 23 N.Y. 3d 455, 466-467 (2014), the Court of Appeals struck down former Penal Law §240.30(1), which prohibited communicating "in a manner likely to cause annoyance or alarm". The Court observed that "the statute's vagueness is apparent because it is not clear what is meant by communication 'in a manner likely to cause annoyance or alarm' to another person" (citation and internal quotes omitted).

In Matter of Patricia Ann Cottage Pub, Inc. v. Mermelstein, 36 A.D. 3d 816, 819 (2d Dept. 2007), an administrative determination that the plaintiff violated Public Health Law §1399-o was vacated on the grounds of vagueness because the law required bar owners to "make a reasonable effort to prevent smoking, without providing any information as to what those reasonable efforts should be"....

The "reasonable appearance of a conflict of interest or impropriety" standard in Code of Ethics §21-4(C) is unconstitutionally vague because it is not sufficiently definite to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden and it lacks minimal legislative guidelines, thereby permitting arbitrary enforcement.

A. Application of "appearance" standard in cases involving common law conflicts of interest

Courts have invalidated municipal board actions based on clear and obvious conflicts of interest that would undermine public confidence in government. In Matter of Tuxedo Conservation & Taxpayer Assn. v. Town Board of Town of Tuxedo, 69 A.D. 2d 320 (2d Dept. 1979), the Second Department held that a board member who was vice president of an advertising firm could not vote on a zoning application by a client of the advertising firm, because he was in a position to gain business from the approval of the project. Similarly, in

Matter of Zagoreos v. Conklin, 109 A.D. 2d 281 (2d Dept. 1985), employees of a public utility were disqualified from voting on the utility's application seeking variances for a building project.

Later, in Peterson v. Corbin, 275 A.D.2d 35, 38 (2d Dept. 2000), the Second Department reversed a ruling that a county legislator was disqualified from voting for the appointment of members to the corporate board of the county O.T.B. because his membership in the same bargaining unit that represented O.T.B. employees created an "appearance of impropriety". The court distinguished Tuxedo and Zagoreos because, in those cases, "the questioned official benefited directly and individually from the action that was taken", and "the conflicts of interest on the part of the public officials were clear and obvious".

Here, petitioner had no "clear and obvious" conflict of interest in the Hampshire application. Rather, she had no personal or private interest at all. The potential impacts on petitioner were no different than the potential impacts on hundreds of other residents.

B. Application of "appearance" standard in cases involving judges and lawyers

For lawyers engaged in the practice of law[3], the "appearance of impropriety" standard set forth in Rule 1.11(b)(2) of the NY Rules of Professional Conduct is applied only in the screening of former government lawyers who move from one employer to another. It is otherwise considered "too vague a standard to justify disciplinary measures or disqualification." Essex Eq. Holdings. v. Lehman Bros., 29 Misc. 3d 371, 382 (Sup. Ct. N.Y. Co. 2010). See also, Lovich v. Lovitch, 64 A.D. 3d 710, 711 (2d Dept. 2009) (Absent actual prejudice, appearance of impropriety is not sufficient to disqualify an attorney), Christensen v. Christensen, 55 A.D. 3d 1453 (4th Dept. 2008) ("Appearance of impropriety" is insufficient to disqualify attorney, without actual prejudice to a party.)

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[3] Here the petitioner, although a lawyer, acted as a member of the Planning Board and not as an attorney engaged in the practice of law.

Professor Simon, in his commentary to R.P.C. Rule 1.11(b)(2) criticizes the "appearance of impropriety" standard because it depends on what others might think:

> The 'appearance of impropriety' standard is a highly abstract, catch-all formulation that gives courts virtually boundless discretion to disqualify former government lawyers if anything in the circumstances makes the court uncomfortable. Negating the appearance of impropriety can be a significant hurdle.... Of course, courts have sweeping inherent power to supervise lawyers who appear before them.... But in my view courts should not use the "appearance of impropriety" standard as a disciplinary standard, because a lawyer acting in good faith can easily misjudge what others *might think* about the lawyer's conduct. Lawyers should not be subject to professional discipline for engaging in conduct that they sincerely think is proper but that some others might believe looks improper. The appearance of impropriety standard simply gives lawyers insufficient warning of the circumstances that will subject them to discipline. In rare situations the "appearance of impropriety" standard is appropriate as a basis for disqualification, because a court can presumably weigh all of the facts and circumstances. But even in disqualification matters, the appearance of impropriety should be construed narrowly and invoked sparingly, because construing it too broadly and using it too frequently would result in excessive disqualifications...." (Emphasis in original)

The application of the "appearance of impropriety" standard to judges is unique, based on the heightened standard for members of the judiciary. See, e.g. Matter of Ayres, 30 N.Y.3d 59 (2017) (Town judge removed for "lend[ing] the prestige of judicial office to advance the private interests of others").

C. The Local Law Provides Insufficient Guidance to Village Officials

Petitioner's expert in land use and ethics, Patricia E. Salkin, is Provost of the graduate and professional divisions of Touro College, a professor of land use at Touro Law School, and previously taught land use law at Albany Law School, at Rutgers University School of Planning and Public Policy, and at the University of Pennsylvania. She also taught government ethics at Albany Law School, and is a published author of treatises on land use law and ethics. (11/22/19 Tr. p. 3-6; Salkin resume, Exhibit S)

Provost Salkin testified that, in her opinion, Village Ethics Code §21-4(C) is so vague and lacking in clarity that it leaves full discretion in the hands of the Ethics Board to interpret the

provision without providing adequate notice to those who are covered by the provision. She found it to be impermissibly vague in three respects (Ex. T, Tr. 11/22/19, p. 9-11):

First, §21-4(C) refers to "the reasonable appearance of a conflict of interest or impropriety". These terms are undefined in the Code of Ethics, and do not provide fair notice to village officers and employees as to what circumstances warrant recusal.

Provost Salkin testified that the local legislative body could have enacted a clear standard of conduct. For example, recusal could have been required by a board member who owns property within 100 feet, 500 feet, 1000 feet or another stated distance from the subject property; or by a board member who owns property within the notice zone (as the Board of Ethics recommend to the Board of Trustees, see Point II, *infra*), or by a board member who owns property with a view of the development site, etc. There are countless ways to clearly define the circumstance that would require recusal, but the vague "appearance of a conflict of interest or impropriety" standard fails to provide notice of the conduct that is prohibited, and does a disservice to conscientious officers and employees such as the petitioner by leaving the interpretation to the *ad hoc* whims of an untrained board.

Second, the section prohibits board members from voting on matters that may benefit themselves "financially or otherwise" without quantifying the financial benefit or defining "otherwise". The disqualification of board members who have an interest "financially or otherwise" is problematic in two respects. Every owner of land in the Village has a financial interest in all proposed development projects that will affect the tax base. School taxes and other municipal services may be favorably affected by commercial and retail development, and may be negatively affected by residential development. The code does not clarify whether "financially" refers to a *de minimis* interest, or an interest in the hundreds or hundreds of thousands of dollars.

For example, if a board member owned 100 shares of stock in Verizon, and Verizon applied for a permit to site antenna boxes in the Village, would the board member's Verizon shares be a disqualifying financial interest? Further, the catch-all phrase "or otherwise" provides no explanation as to what benefits would fall into that undefined category.

Third, the requirement of recusal "when acting on the matter, or failing to act on the matter, may benefit [certain] persons" is self-contradictory. Among other things, the phrase can be interpreted to require that a person having a financial interest in a matter must recuse themselves from both acting from and not acting on the matter.

Provost Salkin contrasted the Village Code of Ethics with the Code of Ethics of the City of New York. The City Code of Ethics has a "catch-all" provision prohibiting interests that conflict with official duties but it is supplemented by cross-references to specific examples of the conduct that is forbidden. (Ex. T, Tr. 11/22/19, p. 11) The NYC Conflicts of Interest Board is prohibited from imposing penalties for a violation of the code's "catch-all" provision "unless such violation involved conduct identified by rule of the board as prohibited by such paragraph" (NYC Charter § 2606(d)). The NYC Conflicts of Interest Board adopted a rule specifying certain such conduct. Rules of the City of New York, Title 53, §1-13 Conduct Prohibited by City Charter §2604 (b)(2), https://www1.nyc.gov/site/coib/the-law/board-rules.page#conduct. Here, the Village Board of Ethics has adopted no rule, guidance, prior opinion or educational materials identifying conduct giving "the reasonable appearance of a conflict of interest".

The goal of prevention—and just plain fairness—require that officers and employees have clear advance knowledge of what conduct is prohibited, except in those rare cases involving conflicts that are clear and obvious and thus would seriously undermine public confidence in government, such as where an action is contrary to public policy or raises the specter of self-

interest or partiality. See, Peterson v. Corbin, 275 A.D. 2d 35 (2d Dept. 2000). The Village Code of Ethics fails as a regulation because it gives no guidance to officers and employees, or to the Board of Ethics, as to what conduct is prohibited. Discernable standards of conduct help dedicated municipal officers and employees to avoid unintended violations and unwarranted suspicion. Vague standards of conduct expose Village officers and employees to the risk of unintended ethics violations, and determinations based on the subjective biases of Board of Ethics members rather than on objective criteria. The vague and undefined "appearance of impropriety" standard of conduct lacks any requirement that a person subject to penalty have acted knowingly or intentionally. Yet the Code of Ethics authorizes the imposition of a fine at the discretion of the Board of Ethics— See, Code of Ethics §21-14(B).

D. The Board of Ethics Has Provided No Guidance to Village Officials

Unlike the members of a village planning board, who are required to complete four hours of training each year to enable them to more effectively carry out their duties (*see*, Village Law § 7-718(7-a)) the members of the Board of Ethics are not required to have any government ethics training. Yet, the local Law improperly delegates to them the authority to determine, *ex post facto*, what conduct is prohibited in a particular case, without providing the type of guidance required by the NYC Code of Ethics and implemented by the NYC Conflicts of Interest Board.

Despite the power to impose monetary penalties, the resulting stigma and damage to an individual's personal and professional reputation, and the other consequences that may result from its adverse determinations, the Board of Ethics has failed to adopt and distribute procedures for discharging its duties, as required by Code of Ethics §21-10(C)(1), except to reiterate, without elaboration, the bare due process requirement set forth at Code of Ethics §21-14 (Ex. B).

Other than a cursory and incomplete Plain Language Guide (Ex. C) that does not address recusal or the "appearance of impropriety" standard, no educational materials or ethics training have been provided to municipal officials or Board of Ethics members – despite the duty of the Board of Ethics "to provide training and education to municipal officers, board members and employees", set forth in Code of Ethics §21-10(C)(8). In minutes of a meeting held on April 25, 2018, the Board of Ethics acknowledged that it had provided no training to Village officers and employees:

> There was a discussion about the requirements of the Code of Ethics of the Village of Mamaroneck, particularly with respect to the responsibilities of the Board of Ethics. Mr. Ettenger noted that the Code requires the Board to provide training and education to officers, board members and employees, but it has not done so. (Ex. D)

Planning Board member and former Mayor Kathy Savolt testified that no ethics training or educational materials were provided to Village officers and employees. (Ex. T, 10/29/19 Tr. 152)

Little guidance is provided by prior opinions of the Board of Ethics. Only two prior opinions of the Board of Ethics are posted on the Village website—one rendered in 2010 and the other in 2017 (*See* 2017 Santoro opinion (Exhibit F, discussed at Point VI *infra*), neither of which addressed the "appearance of impropriety" standard.

While this matter was pending, the Board of Ethics acknowledged in a memo to the Board of Trustees that the Code of Ethics does not provide a "bright line rule" for recusal. In order to provide "greater clarity", the Board of Ethics proposed a local law amending the Code of Ethics to require members of land use boards to recuse themselves if they own property or reside within the notice area. See Exhibit E. However, no such local law has been adopted by the Board of Trustees.

E. Arbitrary Enforcement by the Board of Ethics

The record shows that the Board of Ethics and Village counsel have failed to consistently interpret and enforce the Code of Ethics. As more fully discussed at Point VI, the Board of Ethics failed to adhere to its own precedent. In the Santoro case, the participation by a trustee in the discussions leading to approval of his bills for legal services by the Board of Trustees was deemed a "technical violation" of the Code of Ethics, not meriting any penalty. By contrast here, petitioner recused herself from any participation in the Planning Board's consideration of the merits of the Hommocks Road application, and yet the Board of Ethics found her participation in two ministerial acts to be a material violation meriting removal from the Planning Board.

Planning Board Chairman John Verni testified that he did not recuse himself in connection with applications to the Planning Board made by two beach clubs, one of which is adjacent to his home (Orienta Beach Club) and the other of which is across the street (Beach Point Club). *See,* PB minutes April 26, 2017 and July 11, 2018, Exhibit K to the Leventhal Affirmation. Mr. Verni testified that the reason he did not recuse himself in the Beach Point Club application was that the project would have no material impact on him because the proposed development site was on the opposite side of the beach club, more distant from his home. (Similarly, the Hampshire Country Club development site is on the opposite side of the golf course, more distant from petitioner's home, *i.e.* a distance of 792 feet.) Mr. Verni further testified that he was not advised by Village counsel that he should recuse himself in either beach club application. (Ex. T, 10/29/19 Tr. 41-48)

Petitioner's husband testified that he was not advised by Village counsel that he should recuse himself as a member of the Harbor Coastal Zone Management Commission when considering an application by his neighbor. (Ex. T, Tr. 256-257)

Petitioner testified that she was not advised by Village counsel to recuse herself as a member of the Harbor Coastal Zone Management Commission when considering an application by the neighbor of the residence that she was then in contract to purchase.

Board of Ethics member Deborah Chapin did not recuse herself in the instant matter despite the fact that petitioner had filed a complaint against her alleging that prior political and personal disagreements rendered Ms. Chapin unable to judge the matter in a fair and impartial manner.

POINT II

PROXIMITY ALONE DOES NOT CREATE A CONFLICT OF INTEREST OR MANDATE RECUSAL

The Ethics Board denied that its finding of a conflict of interest with regard to the Hampshire application was based on petitioner's proximity to the Hampshire property, but proximity is the centerpiece of its decision.

Proximity to the site of an application, standing alone, does not give rise to a conflict of interest or appearance of impropriety; there must be additional factors present to cause a conflict of interest. In Matter of Troy Sand & Gravel Co., Inc. v. Fleming, 156 A.D. 3d 1295, 1304 (3d Dept. 2017), the court stated that a town board member's location near the subject property, without evidence of financial gain or proprietary benefit, didn't require annulling his vote on an application for a special use permit. In Matter of Tulip Gardens, Inc. v. Zoning Board of Appeals, 2009 N.Y. Misc. Lexis 6437 (Sup. Ct. Nassau Co. 2009), 2009 N.Y. Slip Op. 33159(U), the court held that proximity of a board member to the applicant's property, standing alone, did not disqualify a ZBA member from voting on an application for a variance.

In 2002 N.Y. Op. (Inf.) Att'y Gen. 9, the Attorney General opined that a trustee who owned commercial property within a business improvement district was not necessarily disqualified from voting on the BID's budget, since other factors needed to be considered. "[R]ecusal has not been required where a board member's interest is merely similar to that of other property owners." Recusal would be required where a municipal officer or employee has a "substantial, direct personal interest in the outcome". *Id.*

Former Mayor and current Planning Board member Kathy Savolt, who was mayor when Code of Ethics was adopted, testified that the Code of Ethics does not require that board members recuse themselves for residing within the notice area of an application. (Ex. T, Tr. 153-154)

Here, no material benefit or detriment will accrue to petitioner whether the Hampshire application is granted or denied. *See,* report and analysis of real estate appraiser Carol Vergara, dated July 1, 2019 (Ex. M) ("Considering the distance from the development sites and the density and types of buffering vegetation, the effect on the subject's value now, during the construction phase, and at completion, is minimal to nil.") The analysis and opinion of real estate appraiser Carol Vergara was uncontradicted.

The record is devoid of any evidence that the proposed Hampshire development will result in a financial benefit or detriment to petitioner. Neither the Hampshire premises nor the particular area that is proposed for development are directly proximate to petitioner's residence: the development site is 792 feet distant from her home, and the premises is separated from her residential property by a tidal waterbody (Prickly Pear Inlet), and screened by extensive trees, plantings and natural growth including aquatic vegetation. The impact of petitioner's partial winter view of the proposed development site would be limited due to its distance and existing

extensive screening; the temporary nuisance impacts during construction will be limited because the route of the construction vehicles will not pass her residence, which is situated on a dead end street.

A. Hundreds of Other Residents are Similarly Situated

Petitioner has no personal or private interest because the potential impacts to her would be equal to or less than the impacts on properties in a large segment of the community.

- 189 residential lots were within the notice area.
- The notice radius used by the Village was based on the distance from the boundary line of the Hampshire Golf Course property.
- A radius based on distance from the development site substantially expands the number of similarly impacted homes, as shown in radius maps prepared by planning expert Andrew Tung (Ex. T, Tr. 343-345).
- Petitioner's residence is approximately 765 feet from the nearest "limit of site work".
- 210 residential lots are at the same or lesser distance from the site work area. (Ex. T, Tr. 344-345)
- Petitioner's residence is approximately 850 feet from the nearest Hampshire building to be constructed. (Ex. T, Tr. 340)
- 169 residential lots are at the same or lesser distance from the proposed construction. (Ex. T, Tr. 340)

A disqualifying interest is one that is personal or private. It is not an interest that an official shares with a substantial number of other citizens or property owners. *See,* Friedhaber v. Town Bd. of Town of Sheldon, 16 Misc.3d 1140A (App. Term 1st Dept. 2007), *aff'd* 59 A.D. 3d 1006 (4th Dept. 2009); Town of North Hempstead v. Village of North Hills, 38 N.Y.2d 334

(1975); Byer v. Town of Poestenkill, 232 A.D. 2d 851 (3d Dept. 1996); Segalla v. Planning Board of the Town of Amenia, 204 A.D. 2d 332 (2d Dept. 1992). Here, the Hampshire development site is surrounded by a large condominium development and hundreds of private homes of equal or lesser distance to the site than that of petitioner's home.

In Byer v. Twn. of Poestenkill, 232 A.D.2d 851, 853 (3d Dept. 1996), the court rejected the argument that a board member may financially benefit by a local law allowing rezoning, because he owned residentially zoned land which may be suitable for mining. Since every owner of property in a residentially zoned district was affected by that local law, "petitioners' argument would make all but a handful of property owners in the [Town] ineligible to sit on the board in such matters".

The court made a similar point in the Tuxedo case, *supra*, 69 A.D. 2d 320, 326:

> 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 interest of the city to a class of persons who have no property rights to protect. (Citations omitted)

See also, Ahearn v. Zoning Bd. of Appeals, 158 A.D.2d 801-802 (3d Dept. 1990), *lv. den.*, 76 N.Y.2d 706 (1990). ("a variety of political, social and financial interests which, through innuendo and speculation, could be viewed as creating an opportunity for improper influence ... do not rise above the type of speculation that would effectively make all but a handful of citizens ineligible to sit on the Board" and are not enough to disqualify.)

B. Recusal Is Not a Neutral Act

A responsible member of a land use board should discharge her duties, and refrain from recusing herself, absent a compelling reason for recusal because recusal is the functional equivalent of a "nay" vote. N.Y. Gen. Construction Law § 41 provides that:

> Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, *a majority of the whole number* of such persons or officers… shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. *For the purpose of this provision the words "whole number" shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting.* (Emphasis added).

Here, because petitioner's home is no closer to the site of the Hampshire subdivision than hundreds of other village residents, she had no personal or private interest in the outcome of the Hampshire development application that would require her recusal; and petitioner acted responsibly in discharging her duties as a member of the Planning Board.

POINT III

PETITIONER'S MINISTERIAL ACTS IN THE HOMMOCKS APPLICATION DID NOT GIVE RISE TO A CONFLICT OF INTEREST

At a meeting of the Planning Board on March 27, 2019, petitioner participated in two votes. The Board unanimously voted to open the hearing and voted unanimously to classify the action as a Type II action, as required by the regulations promulgated by the DEC under SEQRA and as recommended by the Village Planner. Because both votes were unanimous, petitioner's individual votes were not decisive.

Following classification of the action for SEQRA purposes, the application was referred to the Harbor & Coastal Zone Management Commission without any further action by the Planning Board.

After the March 27, 2019 Planning Board meeting, and after consulting with private counsel, petitioner recused herself in writing and on the record at the next Planning Board hearing of the matter, and immediately left the room. The wetlands application was thereafter approved by a unanimous vote of the Planning Board, without petitioner's participation.

A. The Only Actions Taken by Petitioner Were Ministerial Acts

On March 27, with petitioner's participation, the Planning Board opened the public hearing on the application for a wetlands permit and classified the action for purposes of the State Environmental Quality Review Act (SEQRA). These were ministerial acts that did not involve the exercise of discretion and, therefore, did not give rise to a conflict of interest. Petitioner did not participate in any discussions, deliberations or vote on the merits of the application.

An action that is required by a statute does not involve the exercise of discretion and, therefore, is ministerial. Walz v. Town of Smithtown, 46 F.3d 162 (2d Cir. 1995) (the issuance of an excavation permit was a ministerial act and the highway superintendent had no discretion to deny the permit); see also, Matter of Trump v New York State Joint Commn. on Pub. Ethics, 47 Misc. 3d 993 (Sup. Ct. Albany Co., 2015) (the legislature enacted a specific timetable for voting, and respondent does not have discretion to adhere to any other timetable.)

Many municipal actions are ministerial. In Blumberg v. North Hempstead, 114 Misc. 2d 8 (Sup. Ct. Nassau Co. 1982), the court stated that "Site plan approval is a ministerial act which can be compelled by mandamus". Other examples of ministerial acts are addressed in opinions of the Comptroller and the Attorney General: 1979 N.Y. Comp. Lexis 217, Opinion No. 79-147 (Issuance of a check is a ministerial act not contemplated by NY General Municipal Law §801 (Conflicts of Interest Prohibited)), 1982 N.Y. Comp. Lexis 416, Opinion No. 82-319 (Mayor signing contract was ministerial act; there is no prohibited conflict of interest.), 1982 N.Y. AG

Lexis 110, Informal Opinion No. 82-1 (Budgeting for uncollectible taxes is a ministerial act not subject to discretion.).

The Village Code of Ethics acknowledges that ministerial acts cannot give rise to a conflict of interest because they do not involve the exercise of discretion. See, Code of Ethics §21-4A:

> A Village officer, board member or employee shall not use his or her official position or office, or take or fail to take any *discretionary action*, in a manner which he or she knows, or has reason to know, may result in a personal financial benefit for any of the following persons… (Emphasis added).

The distinction between discretionary actions and ministerial acts is incorporated in the SEQRA review process – ministerial acts are not "actions" subject to SEQRA /review. See Shorham Wading River Advocates v Town of Brookhaven Planning Bd., 2015 N.Y. Misc. Lexis 2847, 2015 NY Slip Op 31444(U) (Sup. Ct. Suffolk Co. 2015).

An act that does not involve the exercise of discretion is unlikely to undermine public confidence in government or give rise to a reasonable appearance of impropriety, however that term may be defined.

B. The Vote to Open the Hearing was a Ministerial Act

Opening the hearing on the Hommocks Road application was a ministerial act, not involving the exercise of discretion. A hearing notice was sent by Village administration, without authorization or approval by the Planning Board. Village Code §192-7 requires a hearing in all applications for wetlands permits other than minor actions without objection. Village Code §192-8 requires a hearing on all other applications. Village Code §192-13 provides that the hearing shall be conducted by the Planning Board, with all parties afforded an opportunity to be heard. Here, notice of the hearing was published by the Village prior to the

meeting. Mandamus would lie to compel the Planning Board to open a public hearing and, therefore, the vote to open the hearing was ministerial.

C. SEQRA Classification was a Ministerial Act

Classifying the Hommocks Road application as a Type II action under SEQRA was also a ministerial act. SEQRA Regulation 6 NYCRR § 617.2 defines a ministerial act for SEQRA purposes: "Ministerial act" means an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the act, such as the granting of a hunting or fishing license. See, Shorham Wading River Advocates, *supra*.

In a memo to the Planning Board, the Village Planner recommended that the Planning Board classify the proposed action as a Type II action for SEQRA purposes. The Village Planner stated, in pertinent part, that:

> It is recommended that the action be treated as Type II action under SEQRA in accordance with 617.5(c)(9) which states that "construction or expansion of a single-family, a two family or a three family residence on an approved lot including provision of necessary utility connections as provided in section 617.5(c)(11) and the installation, maintenance and/or upgrade of a drinking water well and a septic system," is a type II action.

See memo of Village Planner Greg Cutler dated March 27, 2019.

In his oral remarks, the Village Planner erroneously stated that SEQRA classification was in the Planning Board's discretion, but, to the contrary, the SEQRA regulations allowed no discretion.

Provost Patricia Salkin, an expert on local government ethics and land use regulation (See Salkin resume, Ex. S), testified that SEQRA classification is a ministerial act that merely involves finding the particular action on one of two lists promulgated by the NYS Department of Environmental Conservation. Actions are either Type I actions (requiring an environmental

impact statement), Type II actions (requiring no further SEQRA compliance), or unlisted actions (requiring a case by case determination). Planning expert Andrew Tung testified similarly (TR. p. 347).

In promulgating the Type II list, the state has taken the discretion away from local municipal agencies in classifying actions appearing on the list. See, ECL § 8-0113 (2)(c)(ii):

> In adopting the rules and regulations, the commissioner shall make a finding that each action or class of actions identified does not have a significant effect on the environment [and does not require environmental impacts statements under this article].

See also, 6 NYCRR § 617.5(a): "Actions or classes of actions identified… are not subject to review under this Part…. "

Provost Salkin testified that if an action appears on the Type II list, SEQRA does not confer any discretion on a municipal land use agency in classifying the action. Nor do the SEQRA regulations permit a municipality to re-classify a Type II action:

> 6 NYCRR § 617.5(b) "Each agency may adopt its own list of Type II actions to supplement the actions in subdivision (c) of this section."

Thus, SEQRA regulations confer authority on a municipal agency to add actions to the Type II list, but confer no authority to remove an action from the list.

The Type II List is found at 6 NYCRR § 617.5(c). It includes at (c)(11), "construction or expansion of a single-family, two-family or a three-family residence on an approved lot including provision of necessary utility connections…." Here the Hommocks Road application, as described in the meeting notice, was the construction of a single-family residence on an approved lot including provision of necessary utility connections:

> The subject project consists of the demolition of an existing single-family residence and the construction of a new dwelling in the same general vicinity located in the southern portion of the project site. In combination with the proposed house construction the

owner/applicant is also proposing a new outdoor tennis court, as well as other ancillary site improvements to the existing driveway and hardscape features. (Exhibit H)

Because the proposed action was "listed" as a Type II action, no discretion by the Planning Board was involved in making the SEQRA determination required by the SEQRA regulations. Therefore, it was a ministerial act.

No benefit or detriment could accrue to petitioner from her participation in the ministerial acts of opening the hearing and classifying the proposed action for SEQRA purposes; and her participation in the ministerial acts did not give rise to a conflict of interest or a reasonable appearance of impropriety.

POINT IV

PETITIONER'S RECUSAL AND NOTICE IN THE HOMMOCKS ROAD APPLICATION WERE PROPER AND SUFFICIENT

After the March 27, 2019 meeting at which the Planning Board voted unanimously to open the hearing and classify the action for SEQRA purposes, petitioner recused herself in a letter addressed to the Mayor and Trustees, the Planning Board Chair, the Board of Ethics Chair, the Village Manager and the Village Attorney. The letter stated that:

> On March 27, an application for a wetlands permit for demolition of existing structures and construction of a new home at 203 Hommocks Road appeared on the Planning Board agenda for the first time. When the matter was called, I stated on the record that I own a home within the notification radius. The Board opened the hearing, and classified the action for SEQRA purposes. No other action was taken. After the meeting, it was suggested that I recuse myself in the matter based on the speculation that I might benefit in the event a sewer line is approved and installed at the property. As you may be aware, the proposed sewer line does not extend to my property where I could tie in without considerable costs that I would have to pay for. On May 14, I received a letter from the Board of Ethics informing me that the Board of Ethics had opened an investigation regarding my participation in the matter. Because I am committed to the highest standards of ethics in Village government, I consulted a prominent legal expert in the field of local government ethics. Based on his advice, I believe that my participation in

> the matter did not give rise to a conflict of interest or a reasonable appearance of impropriety. Nevertheless, to avoid even the speculation that I might benefit from this application as well as any appearance of impropriety whether deemed reasonable or not and to put the matter to rest, I have decided to recuse myself. Therefore, I will not participate in the discussions, deliberations or vote in connection with the application for a wetlands permit at 203 Hommocks Road.

At the next meeting of the Planning Board at which the Hommocks Road application was considered, petitioner read her recusal letter into the public record, left the room, and refrained from any further participation in the matter.

By any reasonable standard, petitioner thus satisfied the requirement of Code of Ethics 21-4(C)(2) that her recusal be made "on the record and/or in writing and [that she] refrain from any further participation in the matter." The surprising claim by the Board of Ethics that petitioner's disclosure of her reason for recusal was inadequate is clearly erroneous. In the letter, petitioner stated that she owned a home within the notice area, and that her recusal was based on the speculation that she might benefit in the event a sewer line is approved and installed at the property. The recusal letter was sufficiently descriptive of the nature and extent of petitioner's purported interest in the application to satisfy the requirements of Code of Ethics §21-4(N). The unreasonable onus embraced by the Board of Ethics, that petitioner's particularized statement of her reasons for recusal was insufficient because she did not agree that she had a disqualifying conflict, would create a "Catch-22" for a board member who, like petitioner, believes that she would not benefit from approval of the application, but recuses herself to avoid the speculation that she might. Even the Board of Ethics characterized the benefit to petitioner as a "potential financial benefit" and acknowledged that there was no certainty that the sewer line would be extended in the future to serve Oak Lane. (Ex. A, Decision p. 44-45)

By her recusal letter to the Mayor and members of the Board of Trustees, petitioner functionally "appeared" before the Board of Trustees and thus satisfied the requirement that she "disclose on the official record of the Board of Trustees at a regular public meeting thereof the nature and extent of any direct or indirect interest in legislation or official action pending before the Village" as contemplated by Code of Ethics §21-4(N). By analogy, the submission to a state agency of a written document that identifies a former state employee is an "appearance" by that former employee before the agency for purposes of the post-employment restriction imposed by Public Officers Law § 73(8)(a)(1). *See,* New York State Ethics Comm'n, Advisory Op. 89-08 (1989).

Even if the Code of Ethics contemplated that petitioner would personally appear before the Board of Trustees for the purpose of announcing her recusal "on the official record of the Board of Trustees at a regular public meeting", her recusal letter addressed to the Mayor and Trustees more than satisfied the standard applied by the Board of Ethics in the Santoro Opinion, i.e. any non-compliance was limited, non-substantive and in good faith.

POINT V

A SPECULATIVE INTEREST IS NOT SUFFICIENT TO DISQUALIFY A BOARD MEMBER

Even if petitioner had not recused herself from participating in the Planning Board's consideration of the merits of the Hommocks Road application, any potential benefit to her from the proposed installation of a sewer line was speculative – the sewer line might not be installed; if installed, it would not extend to petitioner's home. Petitioner's septic system showed no sign of deterioration. It was designed for a four bedroom home. Petitioner and her husband, like the previous owners, have occupied the house as a family of two.

In 2002 N.Y. AG Lexis 5, 2002 N.Y. Op. (Inf.) Att'y Gen. 9. the Attorney General opined that only a "substantial, direct personal interest in the outcome" requires recusal. In Segalla v. Planning Board, 204 A.D. 2d 332 (2d Dept. 1994), the Second Department held that a speculative interest is insufficient to disqualify a board member from voting.

In North Hempstead v. North Hills, 38 N.Y. 2d 334 (1975), the Court of Appeals found no merit in a claim of conflict of interest, where members of a board owned lands similar to a parcel which was being reclassified, and the board members' lands might be reclassified at some future date. "This claim is at best speculative." *Id.* at 344. See also, Parker v. Town of Gardiner Planning Bd., 184 A.D.2d 937 (3d Dept. 1992), *lv. den.*, 80 N.Y.2d 761 (1992). ("The likelihood that a *de minimis* interest would influence [the official's] judgment is little more than speculative."); Peterson v. Corbin, *supra* ("A conflict should be clear and obvious.")

The witnesses were unable to determine the feasibility or cost of a connection by petitioner to the sewer at the location proposed by the owner of 203 Hommocks Road. The estimated cost to further extend the sewer line the additional 450 feet from Hommocks Road up Oak Lane, as would be required by the Village Engineer, and to connect to the extended line would be $108,000.00. (Ex. T, Tr. 276-279) Although the sewer line as proposed by the homeowner would have the capacity (i.e., the diameter) to serve 26 homes, including the homes on Oak Lane, petitioner's husband was unable to persuade the neighbors to contribute to the cost of extending the sewer line beyond the point that the applicant proposed, which would not be sufficient to reach the additional homes on Oak Lane. Furthermore, the establishment of a new sewer district to allocate the installation costs to the respective property owners would require Village approval, which petitioner's husband was unable to obtain. (Ex. T, Tr. 275-276) Unlike her husband, petitioner made no public comments about the proposed sewer extension.

Because of the speculative nature of any advantage to petitioner from the Hommocks Road application, there was insufficient grounds for the Ethics Board to find that petitioner's participation in the matter gave rise to a conflict of interest or reasonable appearance of impropriety, even had petitioner not recused herself.

POINT VI

THE BOARD OF ETHICS FAILED
TO ADHERE TO ITS OWN PRECEDENT

In Lucas v. Bd. of Appeals of Mamaroneck, 57 A.D. 3d 784 (2d Dept. 2008) the Second Department stated that:

> A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious, and mandates reversal, even if there may otherwise be evidence in the record sufficient to support the determination.

Here, the precedent established by the Village Board of Ethics was that participation by a conflicted board member which was limited, non-substantive, and in good faith does not merit any sanction. In Opinion 2017-2 (the Santoro matter, Ex. F), the Village Board of Ethics, with Mr. Ettenger as Chair, rendered the following opinion:

> Suzanne McCrory filed a complaint with the Board of Ethics that Village Trustee Louis Santoro violated the Code of Ethics at the February 13, 2017 Board of Trustees' meeting because he "read and introduced the resolution authorizing the payment of his legal bills." Further, Ms. McCrory complains that Mr. Santoro failed to step off the dais after his recusal and during the portion of the Board of Trustee's meeting concerning the legal fees.
>
> Section 21.4(C)(1) of the Ethics Code provides in relevant part that "[a] Village officer or employee, or Board or committee shall promptly recuse himself/herself from acting on a matter before the Village when acting on the matter, or failing to act on the matter, may benefit the persons listed in §21-4A, financially or otherwise, or give the reasonable appearance of a conflict of interest or impropriety." Section 21.4(C)(2) provides that "[w]henever a Village officer, employee, Board or committee member is required to recuse himself/herself, he/she must do so on the record and/or in writing and refrain from any further participation in the matter."

> As a matter of appearance, the better practice is for the member of the body who recuses to step down from the dais after recusal. The Ethics Code, however, does not address the issue of whether a Board member is required to do so. Accordingly, the Board determines that Mr. Santoro did not violate the provisions of the Code of Ethics by failing to step down from the dais.
>
> However, Mr. Santoro did not completely "refrain from any further participation in the matter" as required by Ethics Code § 21.4(C)(2). While Mr. Santoro did not vote on the resolution approving the legal fees or participate substantively in the public comments on the resolution or in the Board of Trustee's discussion on the resolution, he did continue to participate after his recusal in the procedural aspects of the proceedings concerning payment of his legal bills. We find that this was a technical violation of the Code of Ethics.
>
> We further determine, however, that Mr. Santoro's limited, non-substantive participation was in good faith and was not an attempt to exert any influence on the Board of Trustees' decision-making or vote. Accordingly, no sanction, disciplinary action or penalty is warranted under the circumstances.

The Board of Ethics distinguished its decision in the Santoro matter from the case at bar based on the fact that Trustee Santoro did not vote. However, unlike the petitioner here, Santoro influenced or attempted to influence the Board of Trustees in its consideration of the merits of his own claim for payment, in which he had a direct pecuniary interest. *See,* Eastern Oaks Dev. v. Twn. of Clinton, 76 A. D. 3d 676 (2d Dept. 2010) (a recusal from voting is ineffective if the conflicted board member influences his colleagues on the merits of the matter under consideration). In contrast, the petitioner here did not participate in the Planning Board's consideration of the merits of the Hommocks Road application for a wetlands permit. Unlike Trustee Santoro, she recused herself in writing and on the record, and left the room during the Planning Board's discussions, deliberations and vote on the merits of the application. Further, unlike Santoro, petitioner had no direct interest in the application, and did not attempt to exert any influence on the Planning Board's decision-making or vote on the merits of the application.

The Board of Ethics should have followed its own precedent, applied the same standard that it applied in the Santoro matter, and determined that petitioner's limited, non-substantive

participation in the Hommocks Road application was in good faith and warranted no sanction, disciplinary action or penalty.

POINT VII

THE DEMONSTRATED ANIMUS AND HOSTILITY OF THE ETHICS BOARD SHOW THAT RENDERED ITS DECISION WAS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION

Although the Ethics Board acknowledged petitioner's thirty years of volunteer work for the Village and others, and listed some of the details of that work (Ex. A, Decision p. 4), its Decision and Recommendation was replete with hostile and unreasonable remarks about petitioner's supposed attitudes and actions. The Board of Ethics refused to acknowledge the legitimacy of any opinion other than its own.

> Ms. Goldstein at all times rejected out of hand the concerns raised in writing and in person by the Ethics Board and others with not even a suggestion she would consider them. (Recommendation p. 4)
>
> In every setting in which the Ethics Board met with Ms. Goldstein, she refused to even consider the Ethics Board's view that her conduct could be in violation of the disclosure requirements and recusal provisions of the Code of Ethics. (Recommendation p. 4)

The Board of Ethics also refused to acknowledge that petitioner acted in good faith. Despite the fact that petitioner recused herself from any participation in the Planning Board's consideration of the merits of the Hommocks Road application, the Board of Ethics concluded that:

> The Ethics Board found that Ms. Goldstein's conduct surrounding the Last Home LLC [Hommocks Road] application blatantly flouted the language and spirit of the Code of Ethics. In the case of the Last Home LLC matter, Ms. Goldstein ignored the concerns of the Chair of the Planning Board. (Recommendation p. 4)

All of petitioner's attempts to defend herself against the Board's accusations were vehemently characterized as hostility toward the Board and proof of her guilt:

> This was amplified by her unrelenting hostile attitude towards the Ethics Board, Village Attorney, and later towards the Village Engineer, and ultimately directed at the Code of Ethics itself. (Recommendation p. 4)
>
> [T]his hostility, and disregard for truth and disclosure, was most recently evidenced in her attempt to circumvent and discredit the process proscribed by the Code of Ethics, by sending an inaccurate email and an incomplete evidence set to the Mayor, the Village Manager and the Ethics Board just hours after the hearing closed on November 22, 2019. (Recommendation p. 4)

Contrary to the Board's claim that petitioner rejected its concerns, petitioner recused herself in the Hommocks Road application after consulting with her private counsel. (Ex. T, Tr. 211-213, 246-247) However, even petitioner's letter recusing herself was condemned for not acknowledging the alleged impropriety of her prior participation, such as it was, and for making unspecified "misrepresentations":

> [T]he Ethics Board finds that Ms. Goldstein's June 14, 2019 letter recusing herself from Last Home LLC [the Hommocks Road matter] and her subsequent disclosure of that recusal at a Planning Board meeting only acted to further the Board's recommendation. Far from acknowledging that her participation in the Last Home LLC might have been improper, Ms. Goldstein asserted that she was not required to recuse herself and made misrepresentations. (Recommendation p. 6)
>
> Although she ultimately recused herself in that matter after meeting with the Ethics Board, Ms. Goldstein's letter of June 14, 2019, by which she announced her recusal, disingenuously failed to address the actual conflict of interest or explain why she had not acknowledged the conflict and recused herself on March 27, 2019 when the matter was before the Planning Board and the conflict was readily apparent on the record. (Decision p. 2)

The Board unreasonably took respondent's well founded interpretation of the vague ethics code, and her principled defense to the Board's charges, to be an indication that she lacked "contrition" and was likely to engage in future misconduct:

> The Ethics Board believes the evidence and Ms. Goldstein's conduct before, during and after the hearing show no contrition and no willingness to consider the views of the Ethics Board or others with respect to the application of the Code of Ethics.... It strongly suggests that Ms. Goldstein has the potential to ignore the application of the Code of Ethics in other circumstances.... (Recommendation p. 6)

The Ethics Board expressed particular ire for an e-mail which petitioner sent to the Mayor, Board of Trustees and Board of Ethics on November 22, 2019, following the completion of the Board of Ethics hearings:

> … Ms. Goldstein sent an email to the Mayor, Village Manager and Ethics Board within two hours of the conclusion of hearing on November 22nd, only confirming our finding that Ms. Goldstein demonstrates a disregard for the law and refuses to conform her conduct to either the letter or spirit of the Code of Ethics. In the email, Ms. Goldstein transmitted confidential information regarding the proceedings contrary to the provisions of the Code of Ethics, made blatant misrepresentations about the evidentiary record and made baseless personal attacks against the Ethics Board, even going so far as to "hypothesize" that the Ethics Board was motivated by a financial nexus to the Hampshire developer and accusing the Ethics Board of manipulating land use board members. (Recommendation p. 6)

The Board of Ethics refused to acknowledge petitioner's rights, either to defend herself against the Board's charges, or to petition the Village government for relief. Petitioner sent the e-mail to the Board of Trustees because it is the body to which the Ethics Board is authorized to make its recommendation, and because the Board of Trustees has the authority to act upon the recommendation of the Board of Ethics. The Board of Ethics took offense that the petitioner would defend her reputation before the Board of Trustees, rather than accept, unchallenged, the stigma of the adverse determination made by the Board of Ethics. (The Board accused petitioner of transmitting "confidential information regarding the proceedings", but any confidentiality was for the protection of petitioner, and she was in a position to waive it, to the extent that she did.)

There was no accuser in this case other than the untrained Ethics Board itself, and it used its position as complainant and judge to malign petitioner for defending herself against its own accusations. The animus, prejudice and hyperbole shown by the Board of Ethics in this case demonstrate that its Decision and Recommendation was arbitrary, capricious and an abuse of discretion. The Code of Ethics was "applied and administered by public authority with an evil eye and an unequal hand" (*quoting* Yick Wo v. Hopkins, 118 US 356, 373-374 (1886)). The

Ethics Board's hostile view of petitioner's legitimate defense to its charges formed a basis for its determination. The Ethics Board purported to consider "the number and pattern of violations as an adverse factor when considering [the] appropriate penalty or recommendation." (Recommendation p. 3)

The evidence shows that petitioner was treated entirely differently from others who have served on Village boards. Louis Santoro, a member of the Board of Trustees, introduced a resolution to pay his own legal bill, then stayed on the dais and continued to participate while it was being considered, only refraining from participating in the vote. The conclusion of the Board of Ethics in his case was that his "limited, non-substantive participation was in good faith" and that no sanction, disciplinary action or penalty was warranted. The Board of Ethics justified its disparate treatment of petitioner by noting that Mr. Santoro did not vote (but did participate) in the decision to approve his own payment. Here, in the Hommocks application, petitioner's only participation, and her only votes, were on ministerial matters that did not involve the merits of the application and could not result in any benefit or detriment to her. On these more benign facts, the Board of Ethics recommended that she be removed from the planning board.

John Verni, the Chairman of the Planning Board, testified that he did not recuse himself from Planning Board hearings on permit applications made by two beach clubs, one of which was next door to his house, the other of which was across the street. In one case, his rationale for not recusing himself was that the building project was "on the other side of the property, so it wasn't really anything I could see" (10/29/19 Tr. at 50). Similarly, petitioner has only a limited partial winter view of the distant Hampshire development site located on the opposite side of the golf course, where an indoor tennis facility already exists (Ex. T, Tr. 366-369).

Further, as more fully discussed in Point VIII below, Board of Ethics member Deborah Chapin participated in the Board's consideration and determination of the instant matter despite her history of antagonism toward petitioner and despite petitioner's complaint and motion seeking her disqualification (Ex. U). Petitioner's complaint was referred to the Village Manager, but he declined to act upon it. Ms. Chapin did not recuse herself and fully participated in the hearing and determination. Left with no means by which to challenge Ms. Chapin's participation, petitioner was deprived of a fair hearing by the Board of Ethics.

The treatment given to petitioner was markedly different than the deference given to Mr. Santoro, Mr. Verni and Ms. Chapin. In reaching its conclusions, the Board of Ethics considered not only whether petitioner's conduct conformed to the ethics code, but whether her "attitude" conformed with the Board's view of the "spirit" of the ethics code. With crocodile tears, the Board of Ethics claimed that its irate determination was reluctantly made:

> Each member of the Ethics Board is a volunteer and each has great reluctance to recommend removing a volunteer board member, let alone someone who has devoted considerable time and energy serving on land use boards in the Village. However, the evidence, coupled with Ms. Goldstein's attitude and conduct, has overwhelmed that reluctance. Throughout the entire process, Ms. Goldstein consistently demonstrated a disregard for and refusal to conform her conduct to the letter or spirit of the Code of Ethics. (Recommendation p. 7)

The Decision and Recommendation of the Board of Ethics must be vacated as arbitrary, capricious, an abuse of discretion, and unsupported by substantial evidence.

POINT VIII

IF THE ETHICS COMPLAINT IS NOT DISMISSED THE BOARD'S DETERMINATION SHOULD BE VACATED AND THE MATTER REMANDED FOR A REHEARING

Petitioner filed an ethics complaint against Board of Ethics member Deborah Chapin, and moved to disqualify her on the grounds that she was biased and prejudiced against petitioner.

(Exhibit U) Petitioner worked closely on Ms. Chapin's successful campaign for mayor, but they had a bitter falling out when Ms. Chapin was defeated for re-election. The Board of Ethics denied the motion for lack of jurisdiction and referred the complaint to the Village Manager pursuant to Village Code §21-13(E) (Ex. V), which provides that:

> Nothing in this section shall be construed to permit the Ethics Board to conduct an investigation of itself or any of its members or staff. If the Ethics Board receives a complaint alleging that the Ethics Board of any of its members or staff has violated any provision of this chapter, or of any other law, the board shall promptly transmit a copy of the complaint to the Village Manager.

The Village Manager took no action on petitioner's complaint against Ms. Chapin for four months, despite repeated inquiries from petitioner's counsel. (Ex. W) Finally, in a letter dated February 14, 2020, he stated that "... the Code of the Village of Mamaroneck does not provide me with any obligations or responsibilities to act on the complaint ...". (Ex. X) The case against petitioner proceeded through multiple hearing sessions and a decision with the full participation of Ms. Chapin.

The result was that petitioner's motion to disqualify was never considered. Beyond that, there is no way for any person summoned before the Village's Board of Ethics to challenge any member of that Board for bias or prejudice; the motion will simply be referred to the Village Manager, where it will die without ever being considered.

It is violation of due process to deprive an accused person of a right to challenge a board member for bias. As the U.S. Supreme Court stated:

> [A] fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness.

Withrow v. Larkin, 421 U.S. 35, 46-47 (1975) (citations and internal quotes omitted)

As the Court of Appeals stated, it is unconstitutional to subject a party to the judgment of a prejudiced or biased board:

> Of course, an applicant is constitutionally entitled to unprejudiced decision-making by an administrative agency. It follows that a determination based not on a dispassionate review of facts but on a body's prejudgment or biased evaluation must be set aside.

Warder v. Bd. of Regents, 53 N.Y. 2d 186, 197 (1981).

By making it impossible for petitioner to challenge a board member for her bias the Village denied petitioner her right to due process. At the very least, the Decision and Recommendation of the Board of Ethics must be set aside, and the matter remanded for an impartial consideration of petitioner's motion to disqualify a member of that Board.

POINT IX

THE DETERMINATION OF THE BOARD OF ETHICS IS RIPE FOR JUDICIAL REVIEW

The Board of Ethics is not merely an advisory board. It is empowered to make final determinations as to whether an ethics violation has occurred, and to assess civil fines for each violation or take other enforcement action. *See* Village Code § 21-14.

Pursuant to Village Code § 21-13, all adverse dispositions made by the Board of Ethics are a matter of public record:

> All dispositions, including negotiated dispositions, in which the Ethics Board finds a violation of this chapter, shall be available for public inspection and copying.

In fact, two prior determinations of the Board of Ethics are posted on its website.

Because its dispositions are a matter of public record, the reputational injury to a stigmatized officer or employee is complete when the determination is made, even where, as here, the Board of Ethics assesses no civil fine. Here, the petitioner has suffered injury to her reputation in the very community in which she lives and engages in professional practice as an

attorney and as a certified public accountant. The Court of Appeals has found that the harm to an attorney's reputation from an administrative determination is neither moot nor academic:

> Given these statements, the potential for damage to appellant's professional reputation from the posting of the Commission's censure determination is obvious. Therefore, we conclude that the identification of appellant by name, and the detailed description of his involvement in Judge Doe's misconduct, has enduring consequences for appellant so long as the Commission's censure determination remains posted on its website. Thus, we reverse the Appellate Division order dismissing the appeal as moot.

Matter of N.Y. State Commission on Judicial Conduct v. Rubenstein, 23 N.Y. 3d 570, 578 (2014).

Petitioner must have recourse to judicial review of the adverse determinations made by the Board of Ethics in order to redress the injury to her reputation. Indeed, Village Code § 21-17 provides that "[a]ny person aggrieved by a decision of the Ethics Board may seek judicial review and relief pursuant to Article 78 of the Civil Practice Law and Rules." The decision of the Board of Ethics stands independent of any action that may be taken by the Board of Trustees. The decision is final, and there are no administrative remedies or appeals available to petitioner. The Board of Ethics has "come to a definitive position that caused an actual, concrete injury". Essex County v. Zagata, 238 A.D. 2d 796, 798 (3d Dept. 1997), quoting Matter of Dozier v. New York City, 130 A.D. 2d 128, 133 (2d Dept. 1987). Accordingly, the determination of the Board of Ethics is ripe for judicial review.

CONCLUSION

For the reasons state above, the Court should: (i) declare that Village Code §21-4C(1) is void for vagueness; (ii) annul the Board of Ethics' Decision and Recommendation in its entirety and (iii) dismiss the proceeding against petitioner on the merits or, in the alternative, remand the

matter for a rehearing after determination of petitioner's motion to disqualify a member of the Board of Ethics.

Dated: Roslyn, New York
March 16, 2020

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