VILLAGE OF MAMARONECK

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In the Matter of the Recommendation of the Board of Ethics that

CYNTHIA GREER GOLDSTEIN,

Be Removed from Office as a Member of the Planning Board.

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MEMORANDUM OF LAW
IN OPPOSITION TO REMOVAL

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PRELIMINARY STATEMENT

This Memorandum is submitted in opposition to the Recommendation of the Village of Mamaroneck Ethics Board dated November 29, 2019, that Cynthia Goldstein be removed from the Village Planning Board.

The evidence adduced at the Mayor's hearing established that there is no legal basis for Ms. Goldstein's removal from office. Ms. Goldstein's good character and fitness for office were established beyond argument to the contrary. The evidence clearly established there was no neglect of duty by Ms. Goldstein that would warrant her removal from office.

The uncontradicted expert opinion and other evidence adduced at the hearing conducted by the Board of Ethics and received in evidence at the hearing conducted by the Mayor established that: (i) 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) the Decision and Recommendation of the Board of Ethics was arbitrary, capricious and an abuse of discretion.

STATEMENT OF FACTS

Ms. Goldstein has served as a member of the Planning Board of the Village of Mamaroneck since December 3, 2018. On November 29, 2019, the Village Board of Ethics issued a written Decision and Recommendation finding that Ms. Goldstein 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.

Ms. Goldstein lives at 5 Oak Lane with her husband, Steven. The Board of Ethics found that Ms. Goldstein should have recused herself from hearing the Hampshire application, due to the proximity of her residential property to the nearest boundary of the 106 acre Hampshire Country Club and five specifically claimed impacts that the project would have upon her property. 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. (BOE Tr. 339)

- Ms. Goldstein's residence is 850 feet from the nearest building construction site and 765 feet from the nearest limit of site work. (BOE Tr. 340)
- Ms. Goldstein's property is among 189 residential lots within the notice perimeter for the proposed project. (BOE Record)
- 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). (BOE Tr. 344-345)
- 169 houses are at the same or lesser distance, 850 feet, from the nearest site of building construction. (BOE Tr. 340)
- 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 Ms. Goldstein's residence. (BOE Tr. 365-367)
- Ms. Goldstein's property is screened from the Hampshire golf club property by trees, plantings, natural growth and aquatic vegetation, allowing only a limited winter view. (BOE Tr. 368-369, 400)
- Ms. Goldstein'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. (BOE Tr. 294)
- Ms. Goldstein's property is located on a dead end street. The proposed route of construction vehicles does not pass Ms. Goldstein's property. (BOE Tr. 395)
- The uncontradicted evidence established that the addition of construction noise to the ambient noise would produce sound levels no greater than a normal conversation, as measured at the two properties adjacent to Ms. Goldstein's residence.

- The uncontradicted evidence established that the disturbance of soil during construction will not result in a material adverse environmental impact, even at the construction site 765 feet from Ms. Goldstein's residence.

B. The 203 Hommocks Road Application.

Ms. Goldstein 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 Ms. Goldstein 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 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 Ms. Goldstein 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 (BOE Record) 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. Ms. Goldstein 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.

Ms. Goldstein made no public or private comments about the sewer line, the approval of which is not within the jurisdiction of the Planning Board. However, Ms. Goldstein's husband, a dedicated environmentalist, believed that a sewer would be more eco-friendly than the existing septic systems, particularly because seepage of contaminants released on the subject wetlands might invade the nearby Long Island Sound. 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 Ms. Goldstein and her husband, would require the expenditure of a prohibitive amount to extend the line well past Ms. Goldstein's home for a total distance of 450 feet, as the Village Engineer said would be required.[1] Ms. Goldstein's husband never stated that he and Ms. Goldstein would absorb the entire cost of extending the proposed sewer line, approximately $108,000 ($160 per

[1] In his testimony before the Board of Ethics, 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 Ms. Goldstein's expert both testified that the feasibility and cost of this alternative could not be determined.

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). (BOE Tr. 276-279) Ms. Goldstein'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. (BOE Tr. 266-270) Accordingly, Ms. Goldstein and her husband had no plans to connect to the proposed Hommocks Road sewer line, even assuming that it was built.

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 Ms. Goldstein's home because her 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, Ms. Goldstein 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 promulgated by the New York State Department of Environmental Conservation (DEC) , 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, Ms. Goldstein recused herself from any further participation in the matter. Thereafter, the Planning Board referred the application to the Harbor 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 Ms. Goldstein's presence or participation.

C. Proceedings before the Board of Ethics

Ms. Goldstein was accused of violating the code of ethics by the Board of Ethics itself, on its own complaint. No accuser was ever identified.

Ms. Goldstein 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. (BOE Record) 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. (BOE Record) 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 continued to take no action on Ms. Goldstein's complaint against Ms. Chapin for four months, despite repeated inquiries from Ms. Goldstein's counsel. (BOE Record) 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 20)

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 IV, *infra*)

In its Decision and Recommendation dated November 29, 2019, the Ethics Board found that Ms. Goldstein 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 Ms. Goldstein'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 Ms. Goldstein's well founded disagreement with their interpretation of a vague standard of conduct, and effectively punished her for her good faith and conscientious defense against their charges.

D. Removal Hearing Before the Mayor

On May 27, 2020, Mayor Thomas A. Murphy held a hearing pursuant to Village Law §7-718 (9) to determine whether Ms. Goldstein should be removed for cause based on the Ethics Board's Recommendation. Due to the pandemic, the hearing was conducted by remote video conferencing.

Ms. Goldstein's counsel renewed a previous application for recusal of the Mayor on the ground that he was on the witness list for the Board of Ethics hearing against Ms. Goldstein and based on then Planning Board Chair John Verni's testimony before the Board of Ethics that the Mayor called him to discuss the matter prior to the March 27, 2019 Planning Board meeting. (BOE Tr. 35-37).

Counsel also objected that a 2017 local law that transferred the power to appoint members of the Village Planning Board from the Mayor to the Board of Trustees had the effect of also transferring removal authority.

Counsel's objections were summarily denied and the hearing proceeded.

Ms. Goldstein and Planning Board Chair Kathy Savolt testified in opposition to Ms. Goldstein's removal from the Planning Board, and Ms. Goldstein presented documentary and demonstrative evidence. Public comments were heard, and the Mayor announced that written comments would be accepted through June 10, 2020.

E. Summary of Argument

The evidence adduced by the Board of Ethics and received at the Mayor's removal hearing demonstrated that there was no legal cause for removal. Ms. Goldstein's good character and fitness for office were established beyond dispute, and the evidence showed that there was no neglect of duty warranting removal.

The Ethics Board's Decision and Recommendation 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 Ms. Goldstein 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 Ms. Goldstein 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 Ms. Goldstein from the Hommocks Road application was entirely speculative, as the costs to connect to the proposed sewer line were prohibitive, and all attempts by Ms. Goldstein's husband to persuade others to share the costs had failed.

- With regard to the Hampshire matter, the alleged grounds for disqualification were not private or personal to Ms. Goldstein. 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 Ms. Goldstein's motion to disqualify one of its members, and its *ad hominem* attacks against Ms. Goldstein in its Decision and Recommendation, were caused by animus and bias against Ms. Goldstein, and were inconsistent with due process, and just plain fairness.

POINT I

THE RECORD DOES NOT SUPPORT THE FINDINGS OF THE BOARD OF ETHICS THAT MS. GOLDSTEIN VIOLATED THE CODE OF ETHICS, NOR ITS RECOMMENDATION THAT SHE BE REMOVED FROM OFFICE

A. No Legal Cause for Removal

The elements that must be established to justify removal of a Planning Board member for cause under Village Law §7-718 (9) are as follows:

> The cause assigned must not be a mere whim or caprice of the one clothed with the power of removal, a mere subterfuge to get rid of the person holding the position; on the contrary, it must be of substance, relating to the character, neglect of duty or fitness of the person removed to properly discharge the duties of his position.

Gersh v. Tuckahoe, 23 A.D. 2d 258, 259 (2d Dept. 1965), *quoting*, People ex rel. Van Tine v. Purdy, 221 N. Y. 396, 399 (1917). Here, the evidence established that none of these elements were present.

B. Ms. Goldstein's Character is Beyond Reproach

Ms. Goldstein 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. Ms. Goldstein is the recipient of the tri-municipal Martin Luther King, Jr. Award for community service. (*See* Goldstein resume, Exhibit 3.)

C. Ms. Goldstein did not Neglect the Duties of her Office

1. The Hommocks Road Application

a. Ms. Goldstein's Ministerial Acts in the Hommocks Application Did Not Give Rise to a Prohibited Conflict of Interest

On March 27, with Ms. Goldstein'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. Ms. Goldstein did not participate in the discussion, deliberation or vote on the merits of the application.

Conflicts of interest are prohibited because they actually or potentially interfere with the judgment involved in the exercise of discretion. 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 involve no exercise of discretion and, therefore, 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 State Environmental Quality Review Act ('SEQRA") recognizes the distinction between discretionary and ministerial acts – ministerial acts are not "actions" subject to SEQRA review. 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 v Town of Brookhaven Planning Bd., 2015 N.Y. Misc. Lexis 2847, 2015 NY Slip Op 31444(U) (Sup. Ct. Suffolk Co. 2015).

1. 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. 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 prior to the Planning Board meeting and mailed by the Village without authorization or approval by the Planning Board.

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

2. SEQRA Classification was a Ministerial Act

Classifying the Hommocks Road application as a Type II action under SEQRA was also a ministerial act.

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 remarks at the Planning Board meeting, 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.

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. (BOE Record)

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 Patricia Salkin, an expert on local government ethics and land use regulation (See Salkin resume, Ex. CCC), 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). (BOE Tr. 11-22-19, p. 16). Planning expert Andrew Tung testified similarly (BOE TR. p. 347).

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.

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.

b. TheVillage Code of Ethics Prohibits the Discretionary Acts of Interested Officers and Employees; It does not Prohibit their Ministerial Acts

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. ~~S~~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 implicitly incorporated in the recusal requirement of Village Code § 21-4 (C), because 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. [2]

[2] Public opinion is not a proper basis for determining whether the evidence has established that removal is warranted pursuant to Village Law §7-718. In particular, petitions were submitted for

Further, Code of Ethics Sections 21-4A and 21-4C(1) should be construed together and harmonized.

> A statute of legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent.

McKinney's Statutes §97

> All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof.

McKinney's Statutes §98

c. Ms. Goldstein'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, Ms. Goldstein 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

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consideration by the Mayor without any indication that the signatories reviewed the evidence adduced at the hearing. The petitions have no probative value.

> 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, Ms. Goldstein read her recusal letter into the public record, left the room, and refrained from any further participation in the matter.

By any reasonable standard, Ms. Goldstein 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 Ms. Goldstein's disclosure of her reason for recusal was inadequate is clearly erroneous. In the letter, Ms. Goldstein 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 Ms. Goldstein'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 Ms. Goldstein'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 Ms. Goldstein, 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 Ms. Goldstein 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. (Decision p. 44)

By her recusal letter to the Mayor and members of the Board of Trustees, Ms. Goldstein 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 Ms. Goldstein 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. Certainly, the form and content of Ms. Goldstein's recusal letter neither warrant nor support her removal from office.

d. A Speculative Interest is not Sufficient to Disqualify a Board Member

Even if Ms. Goldstein 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; and if installed, it would not extend to Ms. Goldstein's home. Ms. Goldstein's septic system showed no sign of deterioration. It was designed for a four bedroom home. Ms. Goldstein and her husband, like the previous owners, have occupied the house as a family of two. (BOE Tr. 11-15-19, p. 374).

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 lands owned by board members were similar to a parcel considered by the board for rezoning, and might be rezoned 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 before the Board of Ethics were unable to determine the feasibility or cost of a connection by Ms. Goldstein 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. (BOE Tr. 10-31-19, p. 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, Ms. Goldstein'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 Ms. Goldstein's husband was unable to obtain. (BOE Tr. 10-31-19, p. 275-276) Unlike her husband, Ms. Goldstein made no public comments about the proposed sewer extension.

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

2. The Hampshire Application

a. Un-contradicted Appraisal Evidence Established that the Project Would not Materially Affect the Value of 5 Oak Lane

Here, no material benefit or detriment will accrue to Ms. Goldstein whether the Hampshire application is granted or denied. *See,* report and analysis of real estate appraiser Carol Vergara, dated July 1, 2019 (Ex. 21) ("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.

b. No Material Impacts were Likely to Occur at 5 Oak Lane

The Board of Ethics contended that proximity alone was not the basis for its decision and recommendation. (BOE recommendation, p. 2). The Board of Ethics identified five, and only five, particularized impacts that would allegedly affect Ms. Goldstein in some way unique or greater than the impacts to the hundreds of other homes within the same radius. (BOE Decision, p. 52).

(i) Visual Impacts

Testimony and photographs presented at the hearing showed that Ms. Goldstein's residence is densely screened by large oak trees and other vegetation, permitting only a partial, winter view of the Hampshire property, the nearest boundary of which is located across Prickly

Pear Inlet. (BOE Tr. p. 372; Mayor's Hearing Ex. 21, 24). Ms. Goldstein's residence is approximately 765 feet from the nearest "limit of site work", and approximately 850 feet from the nearest Hampshire building to be constructed. (Ex. 22; BOE Tr. p. 340-344). There is presently a tennis facility at that location, which would be replaced by town houses under the planned Hampshire development, resulting in no material change in the view from Ms. Goldstein's property.

(ii) Storm Water Flooding

The Board of Ethics relied on public testimony given by residents of 3 Oak Lane and 11 Oak Lane that their properties flooded during heavy storms due to drainage from the Hampshire site. However, the evidence demonstrated that Ms. Goldstein's residence at 5 Oak Lane is situated higher than her neighbors on either side, at 3 Oak Lane and 11 Oak Lane. An aerial photograph published by FEMA, depicting the high water mark during Superstorm Sandy in 2012 (Ex. 25), dramatically revealed that the properties at 3 Oak Lane and 11 Oak Lane were flooded during that storm, but that Ms. Goldstein's property was untouched by the water.

(iii) Truck Traffic

Ms. Goldstein lives on a dead end street, away from the path of the construction traffic that would be required for the Hampshire project. None of the trucks supplying the project will pass by or near her residence. All of the construction traffic will go in the opposite direction, toward Boston Post Road. (BOE Tr. p. 432)

Further, Ms. Goldstein works from her home. She is not required to commute to a job during rush hours or at any other specific times, and can adjust her schedule to avoid peak traffic periods. (BOE Tr. p. 427). Traffic at the most heavily traveled portion of the route, at a school located on Hommocks Road, will be subject to traffic control measures. (BOE Tr. p. 430-431).

(iv) Construction Noise

A noise study prepared by project engineers VHB indicated that testing of noise levels from the Hampshire development showed no noise impact at numbers 3 and 11 Oak Lane, the houses on either side of Ms. Goldstein. Specifically, the total existing and construction noise level was 52 decibels at each location, an increase of 4 to 5 decibels over the present ambient noise level. (Exhibit 26). To put that in context, information published by the Center for Disease Control (the "CDC") states that a refrigerator produces 40 decibels, and normal conversation or an air conditioner each produce 60 decibels. (Exhibit 27). Hence, the evidence shows no material impact from construction noise at or near Ms. Goldstein's house.

(v) Disturbance of Soil

The soil management study prepared by the project engineering firm, VHB (Exhibit 28), stated that the Hampshire developer proposed to cover the excavated soil with a minimum of 12 inches of clean material. The engineering firm stated that:

> The FEIS [Final Environmental Impact Statement] demonstrates that, with the mitigation measures outlined in the SWPPP [Storm Water Pollution Prevention Plan] and CWP [Construction Work Plan], and considering the approval from NYSDEC [New York State Department of Environmental Conservation] for material re-use, there would be no significant adverse impacts related to soil management.

Moreover, the evidence established that Ms. Goldstein's residence was located at a distance of 765 feet from the limit of site work, and at significantly higher elevation.

c. Proximity Alone does not create a Conflict of Interest Nor Mandate Recusal

The Ethics Board denied that its finding of a conflict of interest with regard to the Hampshire application was based solely on Ms. Goldstein's proximity to the Hampshire property but, in the absence of any particularized impacts to Ms. Goldstein, proximity remains the only rationale for 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*.

Planning Board Chair 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 merely for residing within the notice area of an application. (Ex. T, BOE Tr. 153-154). Former Village Trustee John Hofstetter stated in a written comment submitted for consideration by the Mayor that:

> I was on the Mamaroneck Village Board of Trustees when the "new" Ethics Law was passed as was Tom Murphy, the current Mayor. Lloyd Green a local attorney with extensive private and public practice history worked with me on the…initial Ethics Law proposal for the Village of Mamaroneck shortly after I was elected to the Board. That version/proposal used the City Of New York Ethics Law as a model for the Village. That law included an extensive list of examples of prohibited conduct, cast a very wide net in

> it's disclosure form and avoided the ambiguity of language at the center of this dispute. The BOT, which included Tom, felt that was too restrictive, would stifle community involvement and make finding qualified people willing to serve on the various land use boards difficult. After many deliberations which Tom actively participated and under the guidance from Janet Insardi our Village Attorney, the Board CHOSE to pass the current law. Prior to voting on the law which went through multiple drafts, we had extensive discussions about the potential for land use board members to hear applications for property in near proximity to property they own or occupy. In fact we did discuss the idea that board members should recuse based on whether they were in the notification area or adjacent to a property and we as the Board of Trustees CHOSE not to include that language. In both cases we acknowledged that living adjacent to or within the notification area did not necessarily mean that an applicant's project had a direct financial impact on the board member or their property. The BOT was concerned that setting that kind of clause into the law would unfairly presume that a board member who lived adjacent to an applicant or within the notification area automatically had a conflict, which our attorney advised us most likely would not be the case. We were also advised that doing so would hamstring the land use boards and potentially delay an applicant's hearing.

Here, there was no evidence that a material benefit or detriment would have accrued to Ms. Goldstein whether the Hampshire application was granted or denied. Rather, the evidence was to the contrary. *See,* report and analysis of real estate appraiser Carol Vergara, dated July 1, 2019 (Ex. 21) ("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 Ms. Goldstein. Neither the Hampshire premises nor the particular area that is proposed for development are directly proximate to Ms. Goldstein's residence: the development site is 765 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 Ms. Goldstein'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.

d. Hundreds of Other Residents are Similarly Situated

Ms. Goldstein has no personal or private interest because the potential impacts to her would be the same as, or less than, the impacts on hundreds of properties representing 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 (BOE Tr. 343-345).
- Ms. Goldstein'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. (BOE Tr. 344-345)
- Ms. Goldstein's residence is approximately 850 feet from the nearest Hampshire building to be constructed. (BOE Tr. 340)
- 169 residential lots are at the same or lesser distance from the proposed construction. (BOE 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 Ms. Goldstein'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.

3. Ms. Goldstein did not Breach any Duty of Confidentiality

The Board accused Ms. Goldstein of transmitting "confidential information regarding the proceedings" (Ex. 35), but the requirement of confidentiality, if any, was for the protection of Ms. Goldstein, and was hers to waive.

The Freedom of Information Law mandates open government and requires disclosure of public agency documents unless they are covered by a specific exemption in the statute. Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y. 2d 562, 565-566 (1986). In Matter of Journal News v. City of White Plains, 39 Misc. 3d 1235(A), 972 N.Y.S. 2d 144 (Sup. Ct. Westchester County 2012), a confidentiality requirement imposed by the City code of ethics did not exempt Board of Ethics records from public disclosure ("A local agency … cannot immunize a document from disclosure under state law by designating it as confidential").

Ms. Goldstein's email to the Mayor and Board of Trustees was an exercise of her constitutional right to petition government and to argue her own case, guaranteed by the First Amendment to the United States Constitution and by Section 9(1) of the Constitution of the State of New York. Her email did not disclose any confidential information about the hearing before the Board of Ethics, as the intended purpose of the hearing was to produce a recommendation to the Mayor and Trustees. Moreover, the entire record before the Board of Ethics has now been posted on the Village website for all the world to see, as surely it had to be in order to conduct this public hearing required by state law. The Ethics Board cannot operate in secret, as a "star chamber", and shield its operations from public disclosure by the target of its investigation.

D. Ms. Goldstein's Fitness for Office is Beyond Dispute

Ms. Goldstein has a long history of service to the Village as a volunteer in various positions, including Chair of the Harbor Coastal Zone Management Commission and member of

the Planning Board. In seven years of service to the Village on the land use boards, she missed only one meeting, and that was an excused absence. She has a reputation and history of preparing diligently for meetings by reading the material that is circulated in advance of each meeting. She has completed all required training in planning and zoning matters, and obtained a certificate in those subjects (Ex. 4).

Kathy Savolt, the current Chair of the Planning Board, testified at the May 27 hearing that she has known Ms. Goldstein for twenty years, and considers her to be of the highest character and fitness for duty. In her service on the Planning Board, Ms. Goldstein exhibited common sense, a willingness to work, and an ability to engage in critical thinking. She was always prepared for meetings, reviewed the relevant applications in advance, and was effective and objective in her service on the Planning Board. Finally, Ms. Savolt testified that if Ms. Goldstein was removed, it would be a huge loss for the Planning Board and the Village.

E. Faulty Reasoning of Board of Ethics

1. There was no Pattern of Conduct

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) However, two cases do not make a "pattern", particularly when Ms. Goldstein recused herself in one of them.

2. Ms. Goldstein had a Conscientious and Good Faith Belief that her Actions were Lawful and Proper

The events preceding and surrounding the Ethics Board's charges against Ms. Goldstein demonstrate that she consistently had a reasonable and well-founded belief that her actions on the Planning Board were lawful and proper.

The first letter that Ms. Goldstein received from the Board of Ethics stated that "we suggest that you consider whether Ethics Code Sections 21-4 N (Disclosure) and 21-4 C (Recusal) are applicable to your participation in the Hampshire matter". It also stated that "this is not an investigation and no complaint has been filed". Ms. Goldstein sent a written reply the following day, stating that she had no direct or indirect interest and received no benefit, financial or otherwise, with regard to the Hampshire project.

Following that exchange of letters, Ms. Goldstein had an informal meeting with two members of the Board of Ethics on March 12, 2019. After a discussion of the Hampshire matter, the Board of Ethics members stated as follows (Ex. 17, p. 25):

: Mr. Newgaard: I can't see where there'd be a formal complaint out of this though.

Mr. Meighan: No.

Mr. Newgaard: Absolutely not.

Ms. Goldstein: Okay.

Nevertheless, on May 14, 2019, the Board of Ethics notified Ms. Goldstein that it was opening an investigation of her. Ms. Goldstein then retained counsel who specializes in government ethics. She submitted a letter on June 14, 2019 recusing herself from any further participation in the Hommocks Road matter. Through counsel, she retained Patricia Salkin, the Provost of Touro Law School, as an expert in ethics and land use matters to advise her on the Village Ethics Code. She also hired an appraiser, who confirmed that neither the Hommocks Road project nor the Hampshire project would have any material effect on the value of her home.

On July 2, 2019, Ms. Goldstein and her counsel met with the Ethics Board's Chairperson and counsel, following which, on July 15, counsel submitted a memorandum of law to the Ethics Board, citing authorities in opposition to all charges against Ms. Goldstein. A further meeting

was held on August 12, 2019 with Ms. Goldstein, her counsel, and the Chair and counsel to the Ethics Board. A full time line of communications between Ms. Goldstein and the Board of Ethics, introduced as Exhibit 16, further demonstrates her responsiveness to that Board.

The fact that the Ethics Board later determined to pursue charges against Ms. Goldstein in no way detracts from the history showing that she was always responsive to the Ethics Board, and consistently presented a well-documented and well-supported defense to the charges against her, founded on her good faith belief that her actions were lawful and proper.

3. 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). Because the Code of the Village of Mamaroneck does not provide for alternate members, Ms. Goldstein's recusal would have created a vacancy that could not have been filled, even if the recusal deprived the Planning Board of a quorum. Thus, Ms. Goldstein's recusal would have been counted as a nay vote. In any event, the Planning Board unanimously denied the application and, therefore, Ms. Goldstein did not cast a decisive vote.

Here, because Ms. Goldstein'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 Ms. Goldstein acted responsibly in discharging her duties as a member of the Planning Board.

4. Arbitrary Enforcement by 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. 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 of April 26, 2017 and July 11, 2018 (BOE Ex. R and S). 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 Ms. Goldstein's home, *i.e.* a distance of 850 feet.) Mr. Verni further testified that he was not advised by Village counsel that he should recuse himself in either beach club application. (10/29/19 BOE Tr. 41-48)

Ms. Goldstein'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. (BOE Tr. 256-257)

Ms. Goldstein 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 Ms. Goldstein 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.

5. 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), 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.

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, Ms. Goldstein 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.

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 Ms. Goldstein 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 Ms. Goldstein 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, Ms. Goldstein 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 Ms. Goldstein's limited, non-substantive participation in the Hommocks Road application was in good faith and warranted no sanction, disciplinary action or penalty.

POINT II

THE APPLICABLE CODE OF ETHICS PROVISIONS ARE UNCONSTITUTIONALLY VAGUE

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.

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. The Code of Ethics Amendment Proposed by Board of Ethics Was Not Adopted by Board of Trustees

In its charges against Ms. Goldstein in the Hampshire matter, the Board of Ethics applied a proximity test for recusal of land use board members that does not appear in the Code of Ethics. The case law shows that proximity alone has never been the standard for finding a conflict of interest. Further, Kathy Savolt, who was Mayor at the time the Village Code of Ethics was enacted, testified that the local law was not intended to require the recusal of land use board members based on a proximity test. (BOE Tr. 153-154)

On July 17, 2019, the Board of Ethics sent a written proposal to the Board of Trustees (Ex. 30) arguing that the Code of Ethics does not provide a "bright line rule" for recusal and proposed an amendment to the Ethics Code in order to clarify the circumstances in which members of land use boards must recuse themselves. "the best way to provide greater clarity for land use board members" would be to require recusal of board members who live within the "notice area" of land use projects. However, the Board of Trustees did not adopt the Board of Ethics proposal.

This proposed recusal requirement for those in the notice area is not and has never been adopted as the standard for recusal under the Code of Ethics. The Board of Ethics *ad hoc* imposition of its own standard for recusal invalidates its Recommendation that Ms. Goldstein be removed from office.

B. 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, Ms. Goldstein had no "clear and obvious" conflict of interest in the Hampshire application. Rather, she had no personal or private interest at all. The potential, insignificant

impacts on Ms. Goldstein were the same or less than the potential impacts on hundreds of other residents. (See Point I C 2 d, *supra*)

C. 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.)

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)

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

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").

D. The Local Law Provides Insufficient Guidance to Village Officials

Ms. Goldstein'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 the author of countless books, treatises, and articles on land use law and ethics. (11/22/19 BOE 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, BOE 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 A, *supra*), 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 Ms. Goldstein 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. (BOE 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).

E. 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 (BOE Record) 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.

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 BOE 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 (discussed at Point I E 5, *supra*), 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.

POINT III

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

Although the Ethics Board acknowledged Ms. Goldstein's thirty years of volunteer work for the Village and others, and listed some of the details of that work (Decision p. 4), its Decision and Recommendation was replete with hostile and unreasonable remarks about Ms. Goldstein'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 Ms. Goldstein acted in good faith. Despite the fact that Ms. Goldstein 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 Ms. Goldstein'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 Ms. Goldstein rejected its concerns, Ms. Goldstein recused herself in the Hommocks Road application after consulting with her private counsel. (Ex. 8, BOE Tr. 211-213, 246-247) However, even Ms. Goldstein'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". In a conclusion evocative of the famous novel by Franz Kafka, *The Trial*, the Board of Ethics stated that Ms. Goldstein's recusal "only acted to further the Board's recommendation" that she be removed from office:

> [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)

If Ms. Goldstein's recusal letter, with its clear and specific reference to the facts that gave rise to her alleged conflict of interest, acted to further the Board's recommendation that she be removed from office, then surely every member of a land use Board in the Village of Mamaroneck must fear that they too may be subjected to investigation and a recommendation of removal from office for their own good faith disagreement with the Board of Ethics, even where they recuse themselves to avoid any appearance of impropriety.

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 Ms. Goldstein 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 Ms. Goldstein's rights, either to defend herself against the Board's charges, or to petition the Village government for relief. Ms. Goldstein 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 Ms. Goldstein 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.

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 Ms. Goldstein 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" (*see,* Yick Wo v. Hopkins, 118 US 356, 373-374 (1886)). The Ethics Board's hostile view of Ms. Goldstein'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 Ms. Goldstein 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 Ms. Goldstein by noting that Mr. Santoro did not vote (but did participate) in the decision to approve his own payment. Here, in the Hommocks application, Ms. Goldstein'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 BOE Tr. at 50). Similarly, Ms. Goldstein has only a limited partial winter view of the distant Hampshire development site located on the opposite side of the golf course, where a tennis facility already exists (BOE Tr. 366-369).

Further, as more fully discussed in Point IV 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 Ms. Goldstein and despite Ms. Goldstein's complaint and motion seeking her disqualification (BOE Record). Ms. Goldstein'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, Ms. Goldstein was deprived of a fair hearing by the Board of Ethics.

The treatment given to Ms. Goldstein 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 Ms. Goldstein's conduct conformed to the ethics code, but whether her "attitude" conformed to 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)

Not satisfied to rely upon the arguments that it advanced in support of its recommendation to the Mayor that Ms. Goldstein be removed from office, the Board of Ethics sought to intimidate a witness to prevent him from testifying in support of Ms. Goldstein at the Mayor's removal hearing. (Ex. 2). On May 22, 2020, five days before the removal hearing, the Board of Ethics ominously warned Trustee Dan Natchez that he should consider recusing himself from "ongoing participation in *any* issue regarding the Cindy Goldstein mater." (Emphasis in original). The Ethics Board's asserted basis for tampering with a witness favorable to Ms. Goldstein was a single instance in 2017 when Mr. Natchez, through his consulting firm, inspected the septic system at 5 Oak Lane.

The repeated references to Ms. Goldstein's "attitude" in the Board of Ethics Decision and Recommendation were the subject of a letter to the Mayor and Board of Trustees from Ellen Styler, an experienced human resources director, who stated the following:

> When I first read the Village decision on Cindy Goldstein, I noticed the repeated references to her "attitude." Use of that word is a red flag to those of us involved in HR or employment law because it is subjective. It does not describe specific, measurable behavior. "Attitude" refers to our impression, not to what the person did or said.

> Saying someone had a "poor attitude" generally means that his or her communication or communication style struck us as not sufficiently respectful, complimentary to us, or positive. (Ex. 37)

Ms. Styler also focused on the Ethics Board's conclusion that Ms. Goldstein did not show "contrition". "Apologies are not required, so I think it opens a very good question as to why Ms. Goldstein is being singled out in this way." *Id*. Ms. Styler concluded that the Village has not demonstrated a reason to remove Ms. Goldstein from the Planning Board.

Planning Board chair Kathy Savolt testified at the May 27 hearing regarding the appearance of implicit bias in the Ethics Board's investigations. Specifically, since December, 2017 there have been 24 people who have served on the Village's land use boards; 14 of those are men and 10 are women. To the best of Ms. Savolt's knowledge, the Ethics Board has conducted inquiries regarding five of the women and none of the men.

The Decision and Recommendation of the Board of Ethics was arbitrary, capricious, an abuse of discretion, and unsupported by substantial evidence. It cannot be used as a basis to remove Ms. Goldstein from the Planning Board.

POINT IV

MS. GOLDSTEIN WAS DENIED DUE PROCESS BY THE FAILURE TO DECIDE HER MOTION TO DISQUALIFY A MEMBER OF THE ETHICS BOARD FOR BIAS

Ms. Goldstein 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 Ms. Goldstein. (BOE Record) Ms. Goldstein 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), 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 ignored Ms. Goldstein's complaint against Ms. Chapin for four months, despite repeated inquiries from Ms. Goldstein's counsel. 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. 20) The case against Ms. Goldstein proceeded through multiple hearing sessions and a decision with the full participation of Ms. Chapin.

The result was that Ms. Goldstein's motion to disqualify was never considered on its merits. 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).

At the removal hearing conducted by the Mayor, the following colloquy took place:

MR. LEVENTHAL: There is only one woman on the Board of Ethics and that woman, demonstrably, was biased against Ms. Goldstein as Ms. Goldstein set forth in her disqualification motion. The decision by the Board of Ethics was made…

MAYOR: I have to stop you right there. You say demonstrably, it hasn't been demonstrated.

MR. LEVENTHAL: Have you read the motion papers?

MAYOR: Yes I have. It's been alleged. It hasn't been demonstrated. Let's just be clear.

MR. LEVENTHAL: Well I'm not sure what distinction you're making between alleged and…

MAYOR: [Inaudible] it's been alleged and when you demonstrate something it's beyond fact.

MR. LEVENTHAL: Well, no, when you allege you make a claim; when you present evidence you demonstrate, and we presented evidence in the form of an affidavit, a sworn statement. The…

MAYOR: Ridiculous.

These statements by the Mayor – the person who will decide whether to accept the recommendation of the Board of Ethics and remove Ms. Goldstein from office – indicate that he discounted the claim of bias on the part of an Ethics Board member based on the fact that Ms. Goldstein's disqualification motion was ignored by the Village Manager and never decided.

By making it impossible for Ms. Goldstein to challenge a board member for her bias, the Village denied Ms. Goldstein her right to due process. Under these circumstances, the Decision and Recommendation of the Board of Ethics cannot be used as a basis to remove Ms. Goldstein from the Planning Board.

POINT V

THE MAYOR LACKS THE AUTHORITY TO REMOVE MS. GOLDSTEIN FROM OFFICE

In June, 2018, the Village of Mamaroneck Board of Trustees used its home rule powers to change Village Law §7-718 regarding the appointment of members of the Village's Planning Board.

Village Law §7-718 confers upon a village mayor the authority to appoint and remove members of the planning board. Local Law 7-2018 provided, in pertinent part, that "[a] Planning Board is hereby created pursuant to §7-718 of the Village Law … The Board of Trustees shall appoint the members and Chairperson of the Planning Board and fill vacancies in those offices". By transferring the power to appoint members to the Board of Trustees, the Local Law necessarily changed the power to remove members, and gave both powers to the Board of Trustees.

Courts have repeatedly ruled that the power to remove an official is a function of the power to appoint. Mc Comb v. Reasoner, 29 A.D. 3d 795 (2d Dept. 2006), Correia v. Inc. Village of Northport, 12 A.D. 3d 599 (2d Dept. 2004), Waters v. Glen Cove, 181 A.D. 2d 783 (2d Dept. 1992), see also, Inc. Village of Manorhaven v. Toner, 51 Misc. 3d 545 (Sup. Ct. Nassau Co. 2016). This rule has the advantage of logic; if the power to appoint were split from the power to remove, an official could be removed by one entity, only to be re-appointed by the other entity.

Therefore, the Mayor lacks the authority to remove Ms. Goldstein from the Planning Board. Furthermore, because the Mayor was a witness identified by the Board of Ethics see Ex. 1), and discussed the matter with then Planning Board Chair John Verni prior to the Planning

Board meeting of March 27, 2019 (BOE Tr. p. 35-37), he should have recused himself from presiding at the removal hearing.

CONCLUSION

For the foregoing reasons, the Recommendation of the Board of Ethics to remove Ms. Goldstein from the Planning Board should be denied.

Dated: Roslyn, New York
June 10, 2020

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