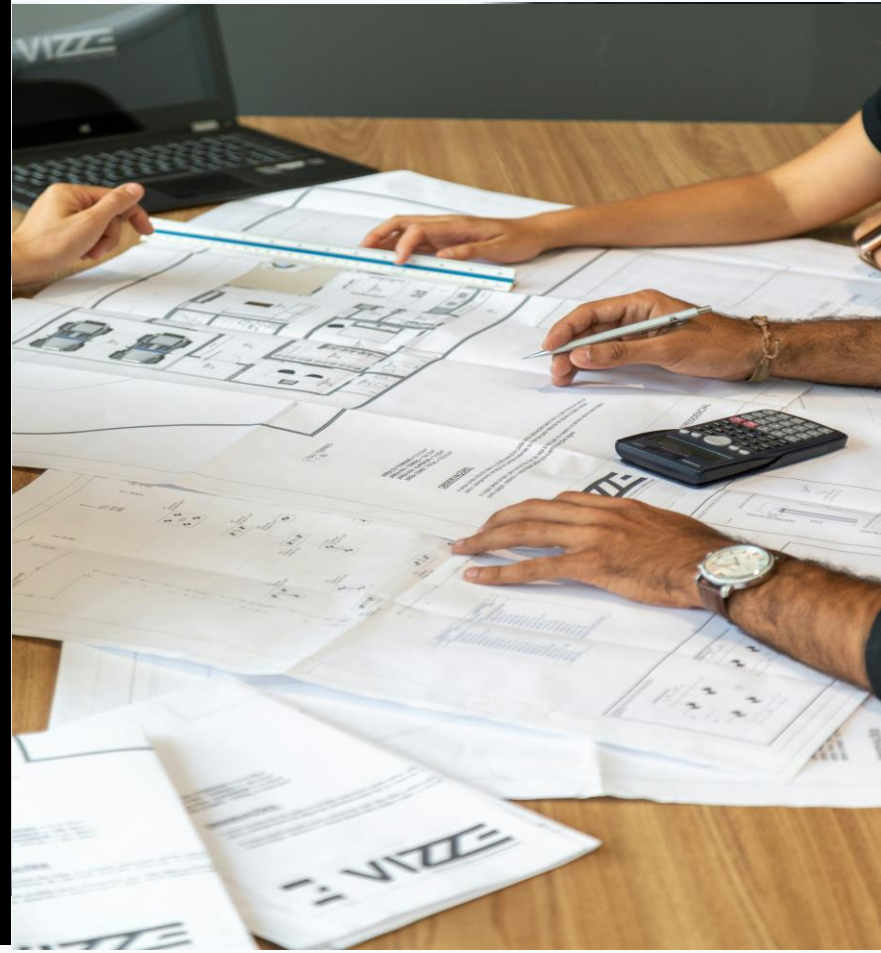
2024 Local Government Training - Erie County Case Law Update for Planning and Zoning, and Ethical Standards

May 6, 2024



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Agenda

I. Case Law Update for Planning and Zoning
    A. Introduction
    B. Recent Case Law
    C. Notable Issues and Cases
    D. Attorney General Opinions
II. Ethical Standards for Planning and Zoning Boards
    A. General Municipal Law Article 18
    B. Common Law Conflicts
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A. Introduction

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Municipal Authority

- Zoning: Regulation of the use of land.
- Police Powers: regulate to protect the health, safety, and welfare of the community.
- "Because Zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of constitutionality and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt. [ ] In claims such as this, the analysis follows traditional due process rules: if the zoning ordinance is adopted for a legitimate governmental purpose and there is a 'reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end,' it will be upheld. [ ] An amendment which has been carefully studied, prepared and considered meets the general requirement for a well-considered plan and satisfies the statutory requirement. [ ] The court will not pass on its wisdom."
- *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 131-132 (1988).

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Zoning and the Constitution

The concerns addressed by zoning are at the center of the state's police power, to safeguard "the public health, safety, morals, or general welfare." *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Only when municipalities stray from the proper exercise of that power is the Constitution at issue.

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Code Interpretation

- Who interprets the zoning code in the first instance?
  - *Quentin Rd. Development, LLC v. Collins*, 150 A.D.3d 859 (2d Dep't 2017).
    - NYC Department of Buildings ("DOB") determined that a provision of the zoning ordinance setting forth a maximum permitted floor-to-area ratio for a portion of a building applied.
    - Following the DOB determination, the NYC Board of Standards and Appeals ("BSA") upheld the DOB determination.
    - The Court held that a determination of the BSA may not be set aside in the absence of illegality, arbitrariness, or abuse of discretion.

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Code Interpretation

- What is the remedy for an aggrieved party?
  - *Sullivan v. Albany Bd. of Zoning,* 144 A.D.3d 1480 (3d Dep't 2016).
    - Church notified City of its intention to establish a "home base" for up to 14 homeless individuals in its parsonage. Church asked the City whether it needed a use variance.
    - City ZEO responded that the proposed use was not for a "house of worship" and stated that a use variance was required.
    - Thereafter, the church sought an interpretation from the ZBA whether this use was permitted.
    - ZBA found that the proposed use is consistent with the mission and actions of a house of worship and that no additional zoning exemptions or permissions are necessary.
    - Neighbor commenced an Article 78 proceeding.
    - Supreme Court annulled the ZBA's determination.

Definitions Are Key

- *Atkinson v. Wilt*, 94 A.D.3d 1218 (3d Dep't 2012).
  - Petitioners own lakeshore property in the Town of Arietta
  - Property located in a single- or multi-family residential zoning district.
  - The structure is a 6-bedroom residence.
  - Petitioners bought the property in 2009, joined the Chamber of Commerce, and began marketing their property for short-term rentals on the internet.
  - Neighbors complained about short-term rentals.
  - The ZEO determined Petitioners were operating a tourist accommodation in violation of the zoning code.
  - The ZBA affirmed.
  - Petitioners then commenced an Article 78 proceeding.
  - Supreme Court granted the petition and annulled the ZBA's determination.
  - The Town appealed.

Definitions Are Key

- *Atkinson v. Wilt*, 94 A.D.3d 1218 (3d Dep't 2012).
  - "Although a reviewing court typically will grant great deference to the ZBA's interpretation of a zoning ordinance — disturbing that interpretation "only if it is irrational or unreasonable — where, as here, the issue presented is one of pure legal interpretation of the underlying zoning law or ordinance, deference is not required."
  - "Further, zoning regulations, being in derogation of the common law, must be strictly construed against the municipality which has enacted and seeks to enforce them, and any ambiguity in the language used must be resolved in favor of the property owner."
  - Petitioners contend that Town's definition of "tourist attraction" does not encompass their property.
  - Town definitions held to govern: "Applying these definitions to the record before us, we agree with Supreme Court that the ZBA's characterization of petitioners' property as a tourist accommodation is irrational."

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Code Interpretation

- Holding: Reversed. Zoning Board's decision was reinstated.
  - ZBA is afforded great deference; decision disturbed only if unreasonable or irrational
  - Pure interpretation vs. factual issue
  - If no defined term, court will afford the term its plain or ordinary meaning
  - Ambiguity resolved in favor of the property owner.
  - What is the meaning of "worship"? Black's Law Dictionary "any act of religious devotion"

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Code Interpretation

- Where "the language of a[n ordinance] is clear and unambiguous, courts must give effect to its plain meaning." *Matter of Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington*, 97 N.Y.2d 86, 91 (2001).
- While courts will afford boards broad discretion and will generally defer to their decisions, where the issue "is one of pure legal interpretation of [the code's] terms, deference to the zoning board is not required." *Fox v. Town of Geneva Zoning Bd. of Appeals*, 176 A.D.3d 1576, 1577 (4th Dep't 2019).

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Zoning Requirements

- "Because Zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of constitutionality and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt. [ ] In claims such as this, the analysis follows traditional due process rules: if the zoning ordinance is adopted for a legitimate governmental purpose and there is a 'reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end,' it will be upheld. [ ] An amendment which has been carefully studied, prepared and considered meets the general requirement for a well-considered plan and satisfies the statutory requirement. [ ] The court will not pass on its wisdom."
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Regulating Land Use/Operational Details

- *Bonefish Grill, LLC v. Zoning Bd. of Rockville Centre*, 153 A.D.3d 1394 (2d Dep't 2017)
- ZBA conditioned the variance from parking requirements on limiting hours of operation to those where use of the adjacent parking lot were allowed and upon use of valet parking.
- Request to annul conditions put in place by Zoning Board was denied.
- "Here, the ZBA's conditions requiring valet parking and limiting the petitioner's hours of operation to coincide with the hours of access to the 40 off-street parking spaces granted in the license agreement were proper because the conditions related directly to the use of the land and were intended to protect the neighboring commercial properties from the potential adverse effects of the petitioner's operation, such as the anticipated increase in traffic congestion and parking problems"

Regulating Land Use/Operational Details

- "[Z]oning boards may not impose conditions which are unrelated to the purposes of zoning. Thus, a zoning board may not condition a variance upon a property owner's agreement to dedicate land that is not the subject of the variance application. Nor may a zoning board impose a condition that seeks to regulate the details of the operation of an enterprise, rather than the use of the land on which the enterprise is located." *St. Onge v. Donovan*, 71 N.Y.2d 507, 516 (1988).
- "We find the imposition of this condition was no more than an impermissible attempt to regulate the details of the operation of the petitioner's enterprise" - *Old Country Burgers Co. v. Town Bd. of Town of Oyster Bay*, 160 A.D.2d 805, 806 (2d Dep't 1990)

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B. Recent Case Law

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Nunnally v. Zoning Bd. of Appeals of Town of Windsor, 217 A.D.3d 950 (2d Dep't 2023)

- Deference to boards
- "Local zoning boards have broad discretion in considering variance applications, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary and capricious, or an abuse of discretion . . . the record demonstrates that the [Zoning Board of Appeals] engaged in the required balancing test and considered the relevant statutory factors in granting the area variance" *id.* at 953 (internal quotations omitted)
- Impact: courts defer to determinations of local zoning boards.

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Elizabeth St. Garden, Inc. v. City of New York, 217 A.D.3d 599 (1st Dep't 2023)

- Deference to boards
- Challenges to a planned low-income senior housing development
- Court found that NYC Department of Housing Preservation and Development (HPD) appropriately identified relevant areas of concern, took a "hard look" at them, and reasonably elaborated on the basis of its determination
  - Properly analyzed the open spaces in the half-mile study area
  - Rationally concluded that no detailed assessment of neighborhood character was warranted
- Impact: planning commission decisions receive deference from courts, as long as they follow proper procedures

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Gutman v. Covert Town Bd., 222 A.D.3d 1357 (4th Dep't 2023)

- Deference to boards
- Board interpreted zoning rules to prevent Petitioners from modifying their property.
  - Petitioners allege that Board's interpretation was irrational and not supported by substantial evidence
- Court stated that it can only set aside zoning board determinations when the board (1) acted illegally or arbitrarily; (2) abused its discretion; or (3) succumbed to generalized community pressure
  - Court also stated that it sustains zoning board determinations when the board had a rational basis for its decision based on substantial evidence
- Court sustained Board determination because Board considered the law and relevant facts to determine whether a cottage was a "dwelling"
- Impact: zoning board determinations receive deferential treatment from courts

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Town of Beekman v. Town Bd. of Town of Union Vale, 219 A.D.3d 1430 (2d Dep't 2023)

- Conflicts with zoning laws
- Union Vale approved construction of a telecom tower on property owned by Union Vale but located in Beekman.
- Town Board of Union Vale determined that the tower was exempt from Beekman's local zoning law
- Where the local zoning laws of two governmental entities conflict, courts balance the public interest to determine which law applies
  - Factors: nature and scope of instrumentality seeking immunity, the kind of land use involved, public interest, effect of regulation, and impact upon legitimate local interests

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Town of Beekman v. Town Bd. of Town of Union Vale, 219 A.D.3d 1430 (2d Dep't 2023)

- Court held that Town Board properly considered all factors
  - Tower would serve the public interest by remedying a gap in cell coverage and aiding emergency services
  - Benefits flowing to the private company building the tower does not undermine these public purposes
- Impact: Courts balance the public interest to apply conflicting zoning laws, and a development project that benefits a private party can still serve the public interest

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Friends of the Shawangunks v. Town of Gardiner Plan. Bd., 224 A.D.3d 961 (3d Dep't 2024)

- SEQRA and standing
- Organization challenged Board's grant of special use permit for residential construction within a Protection District
- Organizations have standing if one or more members would have standing. The members have standing if they suffer harm different in kind or degree from the public at large
  - A mere interest in environmental conservation does not confer standing
- After finding standing, the court affirmed the grant of the special use permit because courts defer to board SEQRA determinations when the board identifies areas of environmental concern, takes a hard look at them, and provides a reasoned elaboration of the grounds for its determination
- Impact: organizational standing to challenge zoning and land use decisions cannot come from mere interest in environmental conservation

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Jellyfish Prop.'s, LLC v. Inc. Vill. Of Greenport, 220 A.D.3d 778 (2d Dep't 2023)

- SEQRA
- Village Board of Trustees adopted a resolution prohibiting short-term rentals
- Petitioners, owners of residential property that they used as short-term rentals, alleged that Board failed to comply with State Environmental Quality Review Act (SEQRA)
  - SEQRA obligates the government to balance an action's potential adverse environmental impact against the action's social and economic benefits
- Courts can review SEQRA determinations only for (1) procedural violations; (2) errors of law; (3) arbitrary and capricious action; or (4) abuse of discretion.
- Here, Board properly considered SEQRA because Board held two days of public hearings, received written comments, took a hard look at relevant areas of environmental concern, and elaborated on their determination
- Impact: boards can avoid scrutiny of their SEQRA determinations by acting thoroughly

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Hofstra Univ. v. Nassau Cnty. Plan. Comm'n, 80 Misc. 1237(A), 2023 N.Y. Slip Op. 51181(U) (Sup. Ct., Nassau Cnty. 2023)

- SEQRA
- County wanted to lease property to a casino operator; plaintiffs challenged this lease
- Court held, in part, that the County Legislature engaged in improper segmentation under SEQRA
  - Improper segmentation: decision making body does not take the "hard look" at the relevant areas of environmental concern under SEQRA
- Court reasoned that County Legislature engaged in improper segmentation by considering the impact of the transfer of site control, but not the impact of the planned development on that site

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Boise v. City of Plattsburgh, 219 A.D.3d 1050 (3d Dep't 2023)

- SEQRA
- City wanted a mixed-use development in the downtown area
- City Common Council identified two SEQRA concerns, the common loon and soil contamination
- Court held that Council did not take "hard look" at either concern
  - Loons: Council pointed out that project, which was not on lakeshore, would not impact loons because loons prefer open water away from people. Council should have considered whether the development would increase usage of the lake, or impact the waterfront in any way
  - Soil contamination: Council failed to provide any mitigation efforts
- Impact: municipalities must take a "hard look" and SEQRA concerns by thoroughly examining each concern

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A Note on SEQRA

- SEQRA requires agencies
- (1) identify all areas of relevant environmental concern;
- (2) thoroughly evaluate the identified areas - - known as the "hard look" requirement; and then
- (3) issue a reasoned elaboration for the determination of significance - - that is the negative or positive declaration. At issue here is a negative declaration that the Planning Board has issued time and time again even after remand by this Court.

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SEQRA Compliance

- "Literal compliance with the letter and spirit of SEQRA is required, and substantial compliance with SEQRA is not sufficient to discharge an agency's responsibility under the act." *Matter of Rochester Eastside Residents for Appropriate Dev., Inc. v. City of Rochester*, 150 A.D.3d 1678, 1679 (4th Dep't 2017) (annulling negative declaration).

City of New York v. Ball, 80 Misc.3d 1077 (Sup. Ct., Albany Cnty. 2023)

- Conflicting laws
- The City challenged a Department of Ag and Markets determination that the City's local law on the grounds unreasonably restricted or regulated farming operations and contravened the Agriculture and Markets Law.
- The local law concerned force feeding birds to produce fatty livers used for foie gras.
- As required, the local law was referred to the NYS Department of Ag and Markets for consistency review.
- The Department observed a likely conflict, and invited the City to respond to the issues raised.
- The City contended the local law was not in conflict because it did not directly impact farm operations, and instead was meant to curtail an inhumane practice observed in public hearings.

City of New York v. Ball, 80 Misc.3d 1077 (Sup. Ct., Albany Cnty. 2023)

- The Department determined the local law violated the Ag and Markets Law.
- Court held that agency determination was arbitrary and capricious because the agency based its review of legislative history on two brief quotes from a voluminous legislative record.
- Impact: if an agency determination requires an interpretation of legislative history, the agency must thoroughly review the legislative history to avoid making an arbitrary and capricious decision.

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Town of Copake v. N.Y. State Off. of Renewable Energy Sitting, 216 A.D.3d 93 (3d Dep't 2023)

- Preemption
- Town alleges that defendant state agency (ORES) does not have authority to preempt local laws through a waiver provision
  - Waiver provision: allows case-by-case waivers of local zoning and land use laws when determined to be unreasonably burdensome.
- ORES wavier provision is not *ultra vires* because the enabling statute grants ORES waiver power, and unreasonably burdensome local laws thwart the goals of New York's energy policy
- ORES waiver provision complies with New York's constitutional home rule provision because ORES waiver provision applies equally to all municipalities, and energy policy is a matter of state concern
- Impact: ORES retains the power to waive unreasonably burdensome local zoning and land use laws

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301 E. 66th St. Condo Corp. v. City of New York, 224 A.D.3d 423 (1st Dep't 2024)

- Spot zoning
- Challenge of city's approval of rezoning and special permit applications for a proposed blood lab and donation center on the grounds that the city engaged in "spot zoning"
  - Spot zoning: singling out a small parcel of land for a use that differs from that of the surrounding area for the benefit of the owner of that small parcel and to the detriment of others
- Court says that city did not engage in spot zoning because the city brought nonconforming lots into the rezoned area as part of a comprehensive plan to encourage the life sciences industry
- Impact: municipalities can avoid spot zoning challenges by bringing other properties into the plan and creating a comprehensive goal to benefit the community

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Cobleskill Stone Prods., Inc. v. Town of Schoharie, 222 A.D.3d 1122 (3d Dep't 2023)

- Prior non-conforming use
- Owner of quarry sought prior nonconforming use exemption from zoning law requiring special use permits to mine
  - Specifically, Owner wanted exemption for land that he purchased following the enaction of the zoning law, but that he has not used for mining
- Court reasons that a landowner can establish prior nonconforming use for unused land when (1) landowner engages in substantial economic activity on property; (2) economic and practical necessity require leaving some land in reserve; and (3) landowner intended to eventually use the property for an ascribed purpose when the zoning ordinance became effective.
  - Here, Owner did not engage in substantial quarrying activity or intend to use the land left in reserve
- Impact: some landowners can establish prior nonconforming use exceptions based on land left untouched out of economic necessity

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Buenos Hill, Inc. v. City of Saratoga Springs, 223 A.D.3d 1030 (3d Dep't 2024)

- Selective enforcement
- Petitioners alleged that N.Y. Dep't of Transportation (DOT) violated their Fourteenth Amendment rights by denying a special use application and ordering removal of a fence in the state's right-of-way
  - Specifically, petitioners alleged that DOT effectively imposed a permitting requirement by ordering a fence removed, and that such a permitting requirement did not apply to other businesses in the vicinity
- Court dismissed challenge to denial of special use application as not ripe for review because planning board merely issued recommendation letters
- Court dismissed selective enforcement challenge because petitioners cannot show how they were treated differently from other businesses
- Impact: plaintiffs cannot challenge recommendation letters from a board

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Lost Lake Holdings LLC v. Town of Forestburgh, 225 A.D.3d 1020 (3d Dep't 2024)

- Escrow agreements
- Developer planned construction project for resort community in Town
  - Pursuant to Town's Planned Development District Law, Developer placed funds in an escrow account to reimburse costs incurred by Town during review and approval process
- Petitioners purchased the project, becoming beneficiaries of Developer's escrow funds
  - Petitioners alleged that Town breached fiduciary duties by using escrow funds for legal and engineering consultants to review future applications
- Court held that (1) no fiduciary duties attached because the funds were not held in trust by an independent third party; and (2) Town reasonably determined that it needed consultants to assist with factual disputes
- Impact: if a municipality wants to use a similar escrow system with fiduciary duties, it needs an independent third party to hold the money in trust

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Bowers Dev., LLC v. Oneida Cnty. Indus. Dev. Agency, 224 A.D.3d 1240 (4th Dep't 2024)

- Eminent domain
- County wanted to use eminent domain to acquire property to build a parking lot for a newly constructed private medical center
- Petitioners alleged that county exercised eminent domain improperly because the parking lot does not serve public use, benefit, or purpose
- Court reasoned that exercise of eminent domain did serve a public use of mitigating parking and traffic congestion, and that a private development causing the traffic congestion is not determinative
- Impact: municipalities can use eminent domain to serve a public use even when that public use addresses problems arising out of private conduct

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Huntley Power, LLC v. Town of Tonawanda, 217 A.D.3d 1325 (4th Dep't 2023)

- Eminent domain
- Town wanted to use eminent domain to seize industrial property to provide industrial employers with water access
  - Town then planned to sell the industrial property to private developers
- Petitioners challenged Town's use of eminent domain on the grounds that (1) it served no public purpose; and (2) it violated the Takings Clause
- Court holds that (1) condemnation served the public purposes of redeveloping former industrial property and providing employers with cheap water for manufacturing; and (2) condemnation did not violate the Takings Clause because condemning substandard real estate for private developers constitutes public use
  - Dissent argued that condemnation here did violate the Takings Clause because the government provided an economic benefit to the private developers and incidental benefits to the public
- Impact: municipalities can use eminent domain to seize substandard property to sell to private developers

C. Notable Issues and Cases

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Short-Term Rentals

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Wallace v. Grand Island, 184 A.D.3d 1088 (4th Dep't 2020)

- Local Law No. 9 of 2015 amending the Town Code by prohibiting short-term rentals of less than thirty days, except in homes occupied by the homeowner (bed-and-breakfast facilities).
- One-year amortization period to allow pre-existing short-term rentals to terminate. It also permitted affected individuals to apply for an extension of the amortization period to allow additional time (up to three years), provided the applicant met certain criteria. Those criteria track the requirements for the granting of a use variance under N.Y. Town Law § 267-b.

Wallace v. Grand Island, 184 A.D.3d 1088 (4th Dep't 2020)

- Petitioner initially sought the one-year extension under the amortization period, which the Town denied. Petitioner did not challenge this denial.
- Then Petitioner sought a use variance. Again, because he failed to meet his burden, the Town denied this application.
- Petitioner commenced an Article 78 challenge seeking to overturn the denial of the use variance and the constitutionality of Local Law, which he alleged constituted a taking.
- Supreme Court dismissed the Petition, and an appeal ensued.
- On appeal the Petitioner limited his brief to the constitutionality and takings issues, thereby abandoning the challenge to the use variance denial.

Wallace v. Grand Island, 184 A.D.3d 1088 (4th Dep't 2020)

- The Fourth Department affirmed, holding that Petitioner did not meet his burden to invalidate the Local Law or prove that the law effectuated a taking.
- Key to the Court's rationale was Petitioner's own evidence, which showed that he could use the property for other lawful purposes: as a residence or as a rental with a long-term tenant. He could also sell the property. The use as a short-term rental, which was prohibited, was not the only option.
- "Indeed, plaintiff's submissions demonstrated that he had some economically viable uses for the subject premises, i.e., selling it at a profit or renting it on a long-term basis. It is immaterial that plaintiff cannot use the property for the precise manner in which he intended because a property owner 'is not constitutionally entitled to the most beneficial use of his [or her] property.'" Wallace, 184 A.D.3d at 1091 (emphasis and brackets in original).

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Other Cases on Short-Term Rentals

- *Jane Eiseman, et al. v. Village of Bellport, et al.*, 2020 N.Y. Slip Op. 31941(U)(Sup. Ct., Suffolk Cnty. 2020) (Index No. 003374/2018).
  - Village law held arbitrary, capricious, and unconstitutional due to failure to substantiate any reasons set forth in legislative intent. The mayor failed to answer questions about how the law would help "prevent neighborhood blight," "protect residential property values," or "manage the effects of village amenities."
- *Calvey, et al. v. Town Board of North Elba, et al.*, Case 8:20-cv-00711-TJM-CFH (N.D.N.Y. 2021)
  - Court dismissed a number of claims (but not all) related to short-term rentals regulations.
- *Cradit v. Southold Town Zoning Board of Appeals*, 179 A.D.3d 1058 (2d Dep't. 2020).
  - "The Board correctly determined that Cradit's use of the residence for short-term rentals was 'similar to a hotel/motel use,' which had never been a permissible use in her zoning district." *Cradit*, 179 A.D.3d at 1060.

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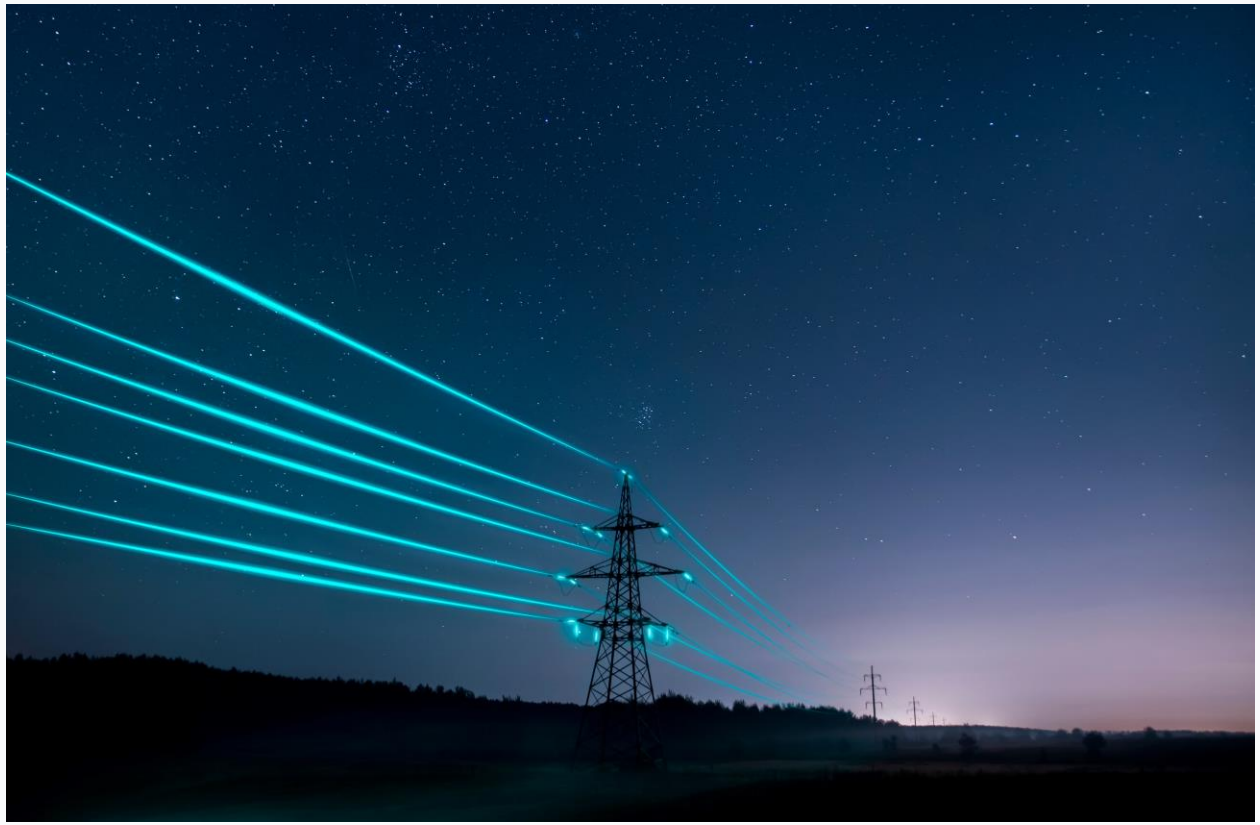
Takeaways for Municipalities

- When regulating short-term rentals, look to what other communities are doing.
- Work with Town Attorney or special counsel as there is higher potential for litigation.
- Make a good record during the public hearing and in legislative findings.
- Consider amortization period to allow for nonconforming uses to terminate. Offer possible extension of period if certain criteria are satisfied.
- Look to existing zoning code and comprehensive plan. But don't rely on old zoning codes to regulate short-term rentals.
- Even where you have a solid basis, courts are siding with property owners.
- Can't rely on traditional deference to municipalities.
- You can prohibit them by specifically defining them.
- In many cases, there will be a need to develop a comprehensive ordinance.

Public Utility Variance Standard



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What is the Public Utility Variance Standard?

- Planners are used to the variance standards set out in the zoning enabling statutes (such as Town Law Article 16). And most planners are aware that local municipalities cannot deviate from those standards. *Cohen v. Bd. of App. of Village of Saddle Rock*, 100 N.Y.2d 395(2003).
- But the Court of Appeals has carved out a significant exception for zoning variances requested by "Public Utilities." Rather than the standard variance rules, a public necessity test is applied.

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The Court of Appeals Creates the PUV Standard

- The Court of Appeals first formally articulated the PUV Standard in *Consol. Edison Co. of New York v. Hoffman*, 43 N.Y.2d 598, 610 (1978)
- ConEd had to upgrade the cooling system at a nuclear facility, requiring both use and area variances. After the Buchanan ZBA denied the variances, the Supreme Court reversed and the Appellate Division affirmed the reversal, largely on federal preemption grounds as the upgrade had been approved by federal regulators. The Court of Appeals affirmed, but first noted it was unnecessary to go beyond state law to reach that conclusion.

The *Hoffman* PUV Standard

- The court stated the traditional tests for use and area variances, "are not appropriate where a public utility such as Con Edison seeks a variance, since the land may be usable for a purpose consistent with the zoning law, the uniqueness may be the result merely of the peculiar needs of the utility, and some impact on the neighborhood is likely."
- The court noted that zoning boards had to look at more than local values, and in particular at the role placed on utilities by the public service law.
- This required wider consideration is an essential takeaway for planners

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What is a Public Utility?

- The rules for what are considered Public Utilities are much broader then might be expected. They not only include the well-known private utilities such as Con Ed and NYSEG, but they also include the cellular telephone companies and renewable energy projects.

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Determining Public Utility Status

- The issue arose in *Cellular Tel. Co. v. Rosenberg*, 82 N.Y.2d 364 (1993) where a use variance was denied to a cellular telephone company under the traditional use variance test, in part because of a lack of evidence "that there exists a public necessity for its service, or what the need of the broader public is relating to such service, or that it is a public utility relating to the zoning ordinance." 82 N.Y.2d at 370-372.

Determining Public Utility Status

- The Court identified three key Characteristics:
- (1) the essential nature of the services offered which must be taken into account when regulations seek to limit expansion of facilities which provide the services
- (2) operation under a franchise, subject to some measure of public regulation; and
- (3) logistic problems, such as the fact that '[t]he product of the utility must be piped, wired, or otherwise served to each user … the supply must be maintained at a constant level to meet minute-by-minute need[, and] [t]he user has no alternative source [and] the supplier commonly has no alternative means of delivery. 82 NY2d at 371 (quotations and internal citations omitted).

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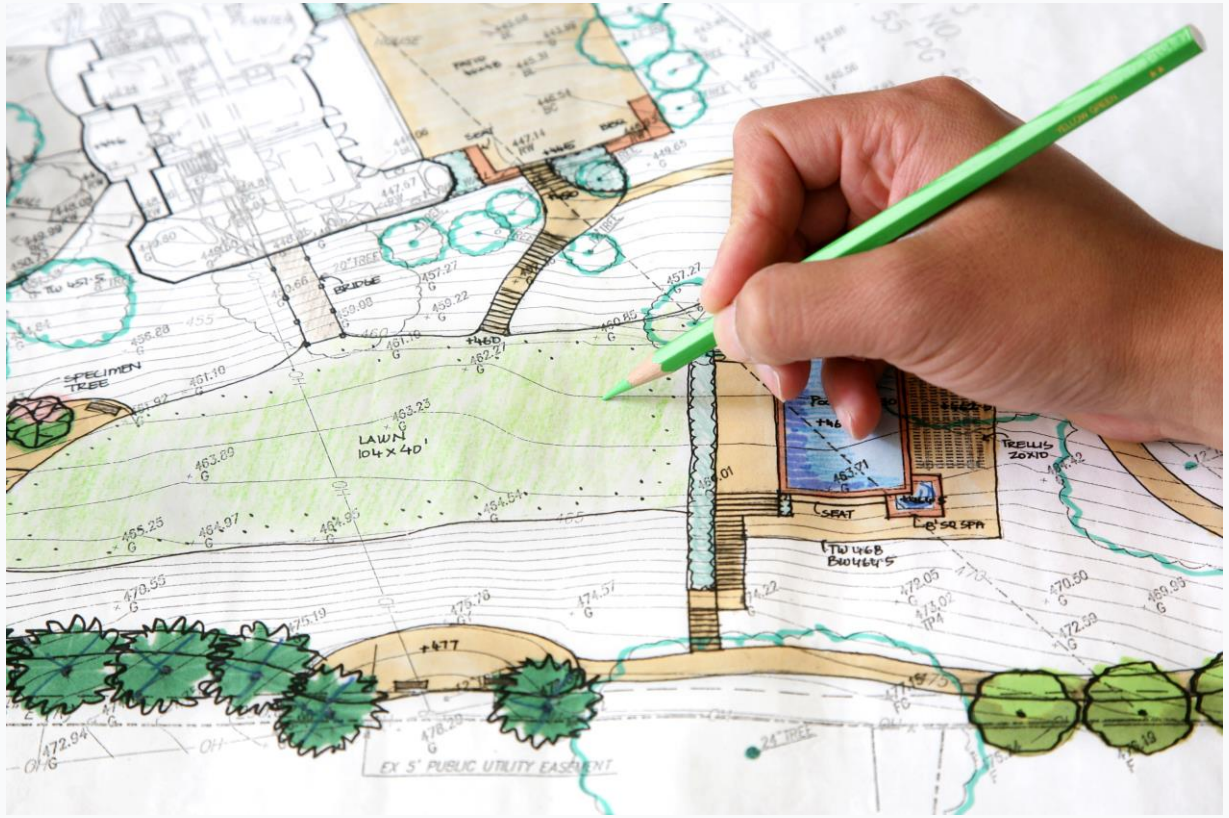
Renewable Projects are Public Utilities Under the PUV Test

- Courts have held routinely that renewable energy projects are public utilities.
- Wind: *W. Beekmantown Neighborhood Ass'n, Inc. v. Zoning Bd. of Appeals of Town of Beekmantown*, 53 A.D.3d 954, 956 (3d Dep't 2008) *Wind Power Ethics Grp. (WPEG) v. Zoning Bd. of Appeals of Town of Cape Vincent*, 60 A.D.3d 1282, 1283 (4th Dep't 2009)
- Solar: *Delaware River Solar, LLC, et al. v. Town of Aurora Zoning Bd. of Appeals*, Index No. 808123/2022 (Sup. Ct. Erie Cnty. Nov. 7, 2022); *Cipriani Energy Grp. Corp. v. Zoning Bd. of Appeals of the Town of Minetto, New York et al.*, EFC-2022-0043 (Sup. Ct. Oswego Cnty. Apr. 12, 2022)

Zoning for Cannabis Establishments



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The Marihuana Regulation and Taxation Act (MRTA")

- Signed by Then-Governor Cuomo on March 31, 2021
- Sponsored by Majority Leader Crystal Peoples-Stokes & Senator Liz Krueger
- Legalizes adult use cannabis in New York State
- Effective immediately
- Adults 21 & up can possess, obtain, and transport up to 3 ounces of cannabis
- Regulates the use, production, sale, and other aspects related to cannabis
- Changes regulatory scheme for all cannabinoids
- Newly created Office of Cannabis Management & New York State Cannabis Control Board

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MRTA's Provisions

- Creates a regulated, controlled, and taxed cannabis industry.
- Social and economic justice, with the intent of the law "to make substantial investments in communities and people most impacted by cannabis criminalization [and] to address the collateral consequences of such criminalization." Cannabis Law § 2.
- Legalizes possession (3 ounces of cannabis or 24 grams of concentrated forms, such as oils) and recreational use by individuals 21+ as well as personal cultivation and home use. Paves the way for sale of adult-use cannabis.

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MRTA's Provisions

- Establishes the Cannabis Control Board ("CCB") and Office of Cannabis Management ("OCM").
- Creates Chapter 7-a (Cannabis Law) of the Consolidated Laws (§§ 1-139)
- Consolidates NYS's existing medical marihuana and cannabinoid hemp program with NY's adult use cannabis program under the control off the OCM and CCB
- MRTA licenses retail dispensaries, distribution centers, cultivators, processors, on-site consumption, nurseries, delivery businesses, etc.

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What Say do Municipalities Have?

- If not opted out by December 31, 2021, deadline, which has now passed, you may be dealing with applications and questions in your locality.
- Cannabis Law § 131 – State Preemption
  - "[A]ll county, town, city and village governing bodies are hereby preempted from adopting any law, rule, ordinance, regulation or prohibition **pertaining to the operation or licensure** of registered organization, adult-use cannabis licenses, or cannabinoid hemp licenses." Cannabis Law § 131(2).
  - "However, towns, cities and villages may pass local laws and regulations governing the **time, place and manner** of the **operation** of **licensed adult-use cannabis retail dispensaries and/or on-site consumption site**, provided such law or regulation does not make the operation of such licensed retail dispensaries or on-site consumption sites **unreasonably impracticable** as determined by the board."

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What does "Unreasonably Impracticable" Mean?

- Local laws cannot make the operation of licensed retail dispensaries or on-site consumption businesses "unreasonably impracticable."
- What is "unreasonably impracticable" is left up to the discretion of the Cannabis Control Board ("CCB") (Cannabis Law § 131(2)).
  - How is it determined?
  - In what context?
  - Burden of proof?

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Comparative Standards of "Unreasonably Impracticable"

- Michigan: "The measures necessary to comply with the rules or ordinances adopted pursuant to this act subject licensees to unreasonable risk or require such a high investment of money, time, or any other resource or asset that a reasonably prudent businessperson would not operate the marihuana establishment." Michigan Regulation and Taxation of Marihuana Act § 333.27953(3)(x).
- Massachusetts: Local laws cannot "subject licensees to unreasonable risk or require such a high investment of risk, money, time or any other resource or asset that a reasonably prudent businessperson would not operate a marijuana establishment." Mass. General Laws Ch. 94G § 1.
- New York: To be determined at this time by the Cannabis Control Board.

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Compliance with Zoning Law

- Municipalities retain zoning authority as MRTA is silent as to zoning requirements (except for schools and houses of worship).
- Locations near schools and houses of worship. "No cannabis retail licensee shall locate a storefront within five hundred feet of a school grounds as such term is defined in the education law or within two hundred feet of a house of worship." Cannabis Law § 72(6).

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Compliance with Local Zoning Law

- What implications for regulating cannabis uses?
- Time, place, and manner for cannabis?
- Does zoning paint with too broad a brush?
- Laws addressing certain issues (*e.g.*, noise, lighting and security, odor) of general applicability to all potential uses that may fall within general nursery, agriculture, manufacturing, and warehousing categories or definitions in the zoning code
- Municipalities can also regulate personal cultivation (if opted in).

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D. Attorney General Opinions

Attorney General Informal Opinion 2012-1 (Jan. 13, 2012)

- Town of Islip wanted to create a special planning board, in addition to its regular planning board, to review a large development project
- Town has legal authority to create this specialized planning board
  - First, Town Law § 274-a(2) gives towns authority to delegate reviews to other administrative bodies
  - Second, Municipal Home Rule Law § 10 allows a town board to create a special board, and to delegate authority to review site plans to that special board
  - Third, Town Law § 274-a(2) has not been preempted by N.Y. Legislature
- Impact: A town board can create a specialized review board to review plans for a specific development

Attorney General Informal Opinion 2014-6 (Sept. 10, 2014)

- Town of Brookhaven sought clarification on whether Town had authority to spay/neuter dogs and cats at Town animal shelter once redemption period expired
- Municipal Home Rule Law § 10 allows municipalities to adopt laws relating to health, safety, and well-being of persons and property in the municipality unless the law is (1) inconsistent with general state law; (2) inconsistent with the constitution; or (3) the State Legislature expressed an intent to preempt local law on a subject
- Impact: municipalities can set laws relevant to local interests unless preempted by a general state law that applies to all municipalities equally

Attorney General Informal Opinion 2014-2 (Sept. 3, 2014)

- Oneida County wanted to require that security deposits for a rental unit in a building with fewer than six units be placed in an interest-bearing account
- Municipal Home Rule Law § 10 applies, but a general state law exists
  - General law: applies alike to all municipalities of the same form across the state
    - General laws preempt conflicting local laws
  - General Obligations Law § 7-103(2-a) exempts small residential landlords from the requirement to place security deposits in interest bearing accounts; therefore, the County cannot adopt any policy to the contrary
- Impact: municipalities cannot enact laws that conflict with a state general law

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Committee on Open Government OML AO 560 (Dec. 21, 2018)

- Elaboration on how Open Meetings Law impacts Zoning Board of Appeals deliberations
- Open Meetings Laws have historically exempted "quasi-judicial proceedings." However, this provision was amended, removing the exemption for ZBA deliberations. Now, ZBAs must conduct their meetings in the open just like other public bodies, such as town boards
- Impact: unless another exemption applies, ZBAs must comply with Open Meetings Law

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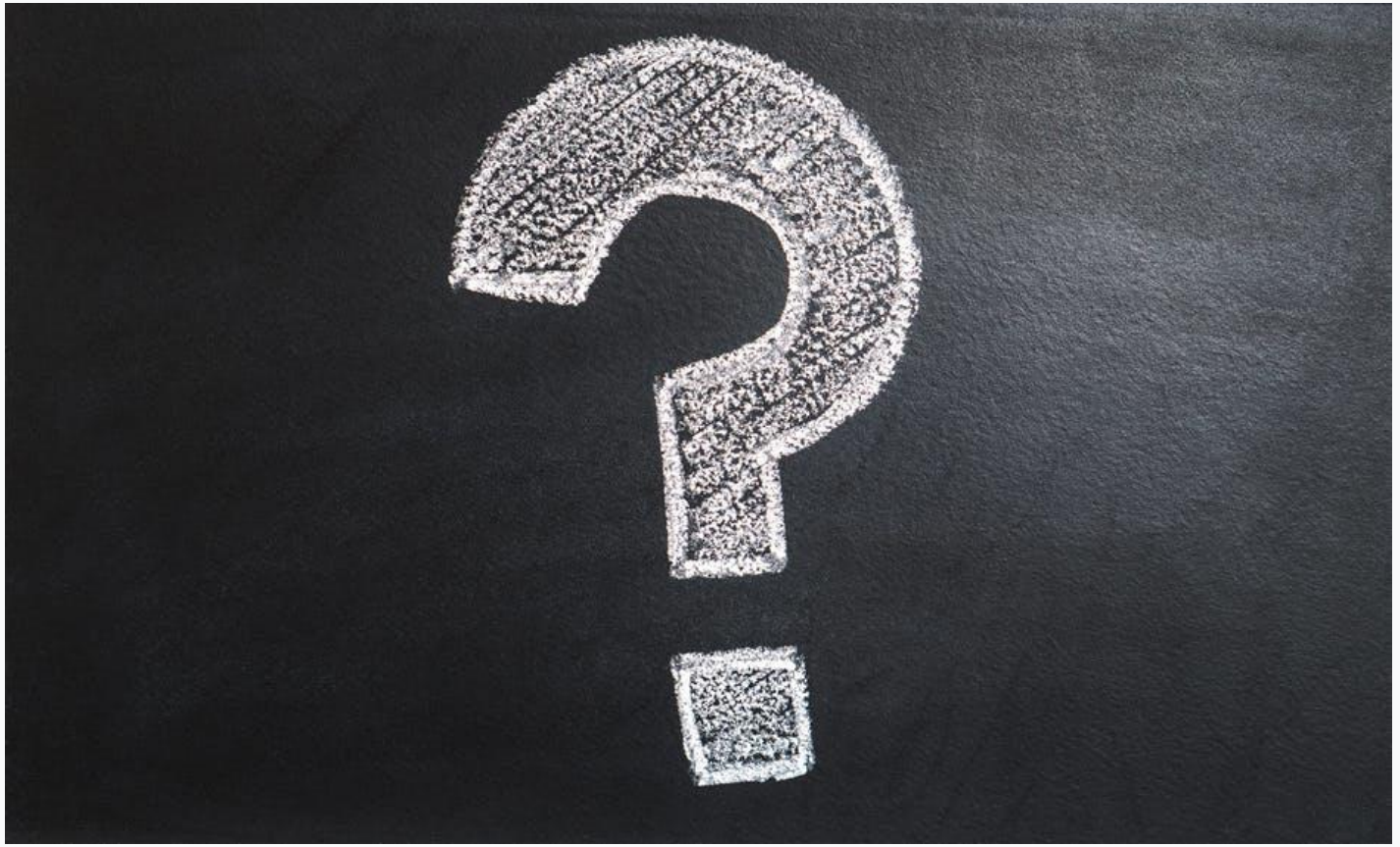
Questions?



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II. Ethical Standards for Planning and Zoning Boards

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A. General Municipal Law (GML) Article 18

Introduction

- GML Article 18 applies to officers, employees, and board members of state and local governments – **paid or unpaid**
  - GML Article 18 is also referred to as the "State Conflict of Interest Law"
  - GML Article 18 includes GML §§ 800–813

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Introduction

- Interest in a contract where the employee has power to negotiate, authorize, or make payment or audit bills and claims, unless a statutory exemption applies. (GML § 801(1)). Four factors must be present, and evaluated on a case-by-case basis.
  - Contract with the municipality
  - Individual has an interest in the contract
  - Individual, in public capacity, must have power or duty over the contract.
  - No statutory exemption.

Introduction

- Building permits, licenses, zoning changes, variances, site plan, or subdivision approvals are generally not considered contracts but do carry the risk of a conflict of interest.
  - 1991 Ops St Comp No. 91-48, at 132; 1988 Ops St Comp No. 88-68, at 135; 1985 Ops St Comp No. 85-60, at 84; 1983 Ops St Comp No. 83-108, at 252
- But there are limited exceptions
  - *People v. Pinto*, 88 Misc.2d 303 (1976) (building permit found to be a contract)
  - *Matter of DePaolo v. Town of Ithaca*, 258 A.D.2d 68 (3rd Dep't 1999), *lv denied* 94 N.Y.2d 751 (1999) (site plan found to be a contract)

Introduction

- Required to disclose interests in contracts with the municipality they serve.
- Must disclose the nature and extent of the interest in writing, as soon as the officer becomes aware. Disclosure must be public.
- Failure to disclose makes the contract unenforceable (GML § 804)
- Willful/knowing failure is a misdemeanor and can result in removal from office (GML § 805)
- Land use disclosures: Responsibility of the applicant, but the circumstances under which a municipal officer or employee is deemed to have an interest are broader than the interest in a contract.
- Includes applicant, spouse, or direct family is applicant, officer/legal or beneficial owner, or party to agreement with an applicant where there will be a benefit.

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Definitions § 800

- **Chief fiscal officer**: a comptroller, commissioner of finance, director of finance, or other person possessing similar powers and duties
  - Except: members of boards of education, or trustees of a school district
- **Contract**: any claim, account or demand against or agreement with a municipality, express or implied, and shall include the designation of a depository of public funds and the designation of a newspaper, including but not limited to an official newspaper, for the publication of any notice, resolution, ordinance, or other proceeding where such publication is required or authorized by law
- **Interest**: a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves. For the purposes of this article a municipal officer or employee shall be deemed to have an interest in the contract of (a) his spouse, minor children and dependents, except a contract of employment with the municipality which such officer or employee serves, (b) a firm, partnership or association of which such officer or employee is a member or employee, (c) a corporation of which such officer or employee is an officer, director or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee.

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Definitions § 800 Continued

- **Municipality**: a county, city, town, village, school district, consolidated health district, county vocational education and extension board, public library, board of cooperative educational services, urban renewal agency, a joint water works system established pursuant to chapter six hundred fifty-four of the laws of nineteen hundred twenty-seven, or a town or county improvement district, district corporation, or other district or a joint service established for the purpose of carrying on, performing or financing one or more improvements or services intended to benefit the health, welfare, safety or convenience of the inhabitants of such governmental units or to benefit the real property within such units, an industrial development agency but shall have no application to a city having a population of one million or more or to a county, school district, or other public agency or facility therein.
- **Municipal officer or employee**: an officer or employee of a municipality, whether paid or unpaid, including members of any administrative board, commission or other agency thereof and in the case of a county, shall be deemed to also include any officer or employee paid from county funds. No person shall be deemed to be a municipal officer or employee solely by reason of being a volunteer firefighter or civil defense volunteer, except a fire chief or assistant fire chief.
- **Treasurer**: a county treasurer, city treasurer, town supervisor, village treasurer, school district treasurer, fire district treasurer, improvement district treasurer, president of a board of health of a consolidated health district, county vocational educational and extension board treasurer, treasurer of a board of cooperative educational services, public general hospital treasurer, or other officer possessing similar powers and duties.

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Prohibited Conflicts of Interest § 801

(1) No municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer or employee, when such officer or employee, individually or as a member of a board, has the power or duty to

> (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder;
>
> (b) audit bills or claims under the contract; or
>
> (c) appoint an officer or employee who has any of the powers or duties set forth above

(2) no chief fiscal officer, treasurer, or his deputy or employee, shall have an interest in a bank or trust company designated as a depository, paying agent, registration agent or for investment of funds of the municipality of which he is an officer or employee

- This section does not prohibit municipal officers and employees from receiving compensation for employment, even if they hold multiple positions of public employment

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Exceptions § 802

- § 801 does not apply to the following exceptions:
- **Depository Exception**: the designation of a bank or trust company as a depository, paying agent, registration agent or for investment of funds of a municipality except when the chief fiscal officer, treasurer, or his deputy or employee, has an interest in such bank or trust company; provided, however, that where designation of a bank or trust company outside the municipality would be required because of the foregoing restriction, a bank or trust company within the municipality may nevertheless be so designated
- **Employment Exception**: a contract with a person, firm, corporation or association in which a municipal officer or employee has an interest which is prohibited solely by reason of employment as an officer or employee thereof, if the remuneration of such employment will not be directly affected as a result of such contract and the duties of such employment do not directly involve the procurement, preparation or performance of any part of such contract
- **Newspaper Exception**: the designation of a newspaper, including but not limited to an official newspaper, for the publication of any notice, resolution, ordinance or other proceeding where such publication is required or authorized by law

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Exceptions § 802 Continued

- **Court-Approved Real Estate Purchase Exception**: the purchase by a municipality of real property or an interest therein, provided the purchase and the consideration therefor is approved by order of the supreme court upon petition of the governing board
- **Condemnation Exception**: the acquisition of real property or an interest therein, through condemnation proceedings according to law
- **Non-Profit Exception**: a contract with a membership corporation or other voluntary non-profit corporation or association
- **Public Sale of Bonds Exception**: the sale of bonds and notes
- **Pre-Existing Contract Exception**: A contract in which a municipal officer or employee has an interest if such contract was entered into prior to the time he was elected or appointed as such officer or employee, but this paragraph shall in no event authorize a renewal of any such contract
- **School Physician Exception**: employment of a duly licensed physician as school physician for a school district upon authorization by a two-thirds vote of the board of education of such school district, notwithstanding the fact that such physician shall have an interest

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Exceptions § 802 Continued

- **Small County Municipality Exception**: purchases or public work by a non-county municipality located within a county with a population of 200,000 or less pursuant to a contract in which a member of the governing body has a prohibited interest where (1) the member is elected and serves without a salary; (2) the purchases total less than $5,000 in one fiscal year, and the governing body has followed its procurement policies to accept the contract with the lowest dollar offer; and (3) the contract is approved by each member of the governing body
- **Small Shareholder Exception**: a contract with a corporation in which a municipal officer or employee has an interest by reason of stockholdings when less than five per centum of the outstanding stock of the corporation is owned or controlled directly or indirectly by such officer or employee
- **Public Utility Exception**: A contract for the furnishing of public utility services when the rates or charges therefor are fixed or regulated by the public service commission
- **Room Rental Exception**: A contract for the payment of a reasonable rental of a room or rooms owned or leased by an officer or employee when the same are used in the performance of his official duties and are so designated as an office or chamber

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Exceptions § 802 Continued

- **Part-Time Employee Exception**: a contract for the payment of a portion of the compensation of a private employee of an officer when such employee performs part time service in the official duties of the office
- **$750 Exception**: a contract in which a municipal officer or employee has an interest if the total consideration payable thereunder, when added to the aggregate amount of all consideration payable under contracts in which such person had an interest during the fiscal year, does not exceed the sum of $750
- **Private Industry Council Exception**: A contract with a member of a private industry council established in accordance with the federal job training partnership act or any firm, corporation or association in which such member holds an interest, provided the member discloses such interest to the council and the member does not vote on the contract

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Exceptions § 805-b

- **Marriage Exception**: public officers may accept compensation valued at $100 or less for the solemnization of a marriage at a time or place other than the public officer's normal public place of business, during normal business hours

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Exceptions Summarized

- 17 total exceptions exist; frequent exceptions include:
  - Payments of salary or lawful compensation to officers
  - Contracts entered into prior to time municipal officer or employee is elected
  - No direct effect to person as a result of contract
  - Contracts with voluntary not-for-profit associations

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Disclosure Requirements § 803

- Any municipal officer or employee who has, will have, or later acquires an interest in or whose spouse has, will have, or later acquires an interest in any actual or proposed contract, purchase agreement, lease agreement or other agreement, including oral agreements, with the municipality of which he or she is an officer or employee, shall publicly disclose the nature and extent of such interest in writing to his or her immediate supervisor and to the governing body thereof as soon as he or she has knowledge of such actual or prospective interest. Such written disclosure shall be made part of and set forth in the official record of the proceedings of such body.
- If a § 802(2) exception applies, there is no disclosure requirement (Small Shareholder, Public Utility, Room Rental, Part-Time Employee, $750, Private Industry Council Exceptions)

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Voided Contracts § 804

- Any contract prohibited by this GML Article 18 is null, void, and wholly unenforceable

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Prohibited Conduct § 805-a

- **Gift Prohibition**: no municipal officer or employee shall directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part
- **Disclosure Prohibition**: no municipal officer or employee shall disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests

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Prohibited Conduct § 805-a Continued

- **Private Payment Prohibition**: no municipal officer or employee shall receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any municipal agency of which he is an officer, member or employee or of any municipal agency over which he has jurisdiction or to which he has the power to appoint any member, officer or employee
- **Contingent Compensation Prohibition**: no municipal officer or employee shall receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any agency of his municipality, whereby his compensation is to be dependent or contingent upon any action by such agency with respect to such matter, provided that this paragraph shall not prohibit the fixing at any time of fees based upon the reasonable value of the services rendered

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Code of Ethics § 806

- Mandatory Requirements:
  - The governing body of each county, city, town, village, school district and fire district shall by local law, ordinance or resolution adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them
  - A fire district code of ethics shall also apply to the volunteer members of the fire district fire department
  - Codes of ethics shall provide standards for officers and employees with respect to disclosure of interest in legislation before the local governing body, holding of investments in conflict with official duties, private employment in conflict with official duties, future employment and such other standards relating to the conduct of officers and employees as may be deemed advisable
  - Codes of ethics shall not authorize conduct otherwise prohibited by this article
  - The chief executive officer of a municipality adopting a code of ethics shall cause a copy thereof to be distributed to every officer and employee of his municipality
  - The fire district commissioners shall cause a copy of the fire district's code of ethics to be posted publicly and conspicuously in each building under such district's control

Code of Ethics § 806

- Recommendations
  - The governing body of any municipality other than counties, cities, towns, villages, school districts, or fire districts may by local law, ordinance or resolution adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them
  - Codes of ethics may regulate or prescribe conduct which is not expressly prohibited by this article
  - Codes of ethics may provide for the prohibition of conduct or disclosure of information and the classification of employees or officers
  - Such codes of political subdivisions, as defined in section eight hundred ten of this article, may contain provisions which require the filing of completed annual statements of financial disclosure with the appropriate body

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Code of Ethics § 807

- The chief executive officer of each municipality shall cause a copy of §§ 800–809 of this article to be kept posted in each public building under the jurisdiction of his or her municipality in a place conspicuous to its officers and employees. Failure to post any such copy shall have no effect on the duty of compliance with this article, nor with the enforcement of the provisions thereof

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Board of Ethics § 808

- County Boards of Ethics – procedure
  - The governing body of any county **may** establish a county board of ethics and appropriate moneys for maintenance and personal services in connection therewith
  - The members of such board of ethics shall be appointed by such governing body except in the case of a county operating under an optional or alternative form of county government or county charter, in which case the members shall be appointed by the county executive or county manager, as the case may be, subject to confirmation by such governing body.
  - Such board of ethics shall consist of at least three members, a majority of whom shall not be officers or employees of such county or municipalities wholly or partially located in such county and at least one of whom shall be an elected or appointed officer or employee of the county or a municipality located within such county
  - The members of such board shall receive no salary or compensation for their services as members of such board and shall serve at the pleasure of the appointing authority

Board of Ethics § 808 Continued

- County Boards of Ethics – duties
  - The board shall render advisory opinions to officers and employees of municipalities wholly or partly within the county with respect to this article and any code of ethics adopted pursuant hereto
    - Such advisory opinions shall be rendered pursuant to the written request of any such officer or employee under such rules and regulations as the board may prescribe and shall have the advice of counsel employed by the board, or if none, the county attorney
  - The board may make recommendations with respect to the drafting and adoption of a code of ethics or amendments thereto upon the request of the governing body of any municipality in the county
  - The county board of ethics shall not act with respect to the officers and employees of any municipality located within such county or agency thereof, where such municipality has established its own board of ethics, except that the local board may at its option refer matters to the county board

Board of Ethics § 808 Continued

- Non-County Board of Ethics – Procedure
  - Procedurally identical to County Board of Ethics, except:
    - The board shall act only with respect to officers and employees of the municipality that has established such board or of its agencies
    - The members of a local board shall be appointed by such person or body as may be designated by the governing body of the municipality to serve at the pleasure of the appointing authority and such board shall consist of at least three members, a majority of whom are not otherwise officers or employees of such municipality
    - Such board shall include at least one member who is an elected or appointed municipal officer or employee

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Board of Ethics § 808 Continued

- A board of ethics of a political subdivision and of any other municipality, which is required by local law, ordinance or resolution to be, or which pursuant to legal authority, in practice is, the repository for completed annual statements of financial disclosure shall file a statement with the clerk of its municipality, that it is the authorized repository for completed annual statements of financial disclosure

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Limited Disclosure Rules § 809

- Every application, petition or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license or permit, pursuant to the provisions of any ordinance, local law, rule or regulation constituting the zoning and planning regulations of a municipality shall state the name, residence and the nature and extent of the interest of any state officer or any officer or employee of such municipality or of a municipality of which such municipality is a part, in the person, partnership or association making such application, petition or request (hereinafter called the applicant) to the extent known to such applicant
- An officer or employee has an interest in the application when the employee, their spouse, or their brothers, sisters, parents, children, grandchildren, or the spouse of any of them:
  - is the applicant
  - is an officer, director, partner or employee of the applicant
  - legally or beneficially owns or controls stock of a corporate applicant or is a member of a partnership or association applicant
  - is a party to an agreement with such an applicant whereby he may receive any payment or other benefit, dependent or contingent upon the favorable approval of such application, petition or request

Exception to Limited Disclosure Rules § 809

- Ownership of less than five per cent of the stock of a corporation whose stock is listed on the New York or American Stock Exchanges shall not constitute an interest for the purposes of this section

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Supporting Provisions to GML Article 18

- § 810: provides additional definitions
- § 811–12: provides guidelines for annual statements of financial disclosure

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B. Common Law Conflicts

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Duty

- "It is not necessary, however, that a specific provision of the General Municipal Law be violated before there can be an improper conflict of interest." *Zagoreos v. Conklin*, 109 A.D.2d 281, 287 (2d Dep't 1985)
  - Courts have used language like this to impose an implied duty on government officials
- "[G]overnment officials have an implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated." Davies & Leventhal, *Local Government Ethics* 28 NYSBA MUNICIPAL LAWYER 22, 29 (2014)

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C. Legal Repercussions

Criminal Penalties

- **GML § 805**: any municipal officer or employee who violates GML Article 18 is guilty of a misdemeanor
- **GML § 809(5)**: any person who knowingly and intentionally violates the § 809 Limited Disclosure Rules is guilty of a misdemeanor

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Civil Penalties

- **GML § 805-a(2)**: in addition to any other punishment, any person knowingly and intentionally engaging in the conduct prohibited by § 805-a (Gift, Disclosure, Private Payment, and Contingent Compensation Prohibitions) shall be fined, suspended, or removed from office

Equitable Remedies[1]

- Courts may set aside board decisions when a member has an undisclosed disqualifying interest, or when a recused member with a disqualifying interest exerts undue influence on the voting members
  - Disqualifying interest: a personal or private interest, different from that of the general public, that raises the appearance of impropriety
    - Look to whether an employee engaged in or influenced official action despite having a disqualifying interest

[1] Davies & Leventhal, *Local Government Ethics* 28 NYSBA Municipal Lawyer 22, 28–29 (2014)

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D. There is a Conflict. Now What?

Dealing with Conflicts

- Recuse from participating in any discussion of the matter and from voting on the matter. (1995 Op. Atty. Gen. 2, Op. Atty. Gen. No. 90-38)
- If member does not recuse themselves, vote may be invalidated.
  - *Zagoreos v. Conklin,* 109 A.D.2d 281 (2d Dep't 1985) (votes of two ZBA members annulled because ZBA members were employee of applicant and granted variance on controversial oil to coal burning generation unit conversion).
  - *Conrad v. Hinman,* 122 Misc.2d 531 (Sup. Ct. Onondaga Cnty. 1984) (Village board vote to grant a rezoning application annulled because deciding vote cast by co-owner of property being rezoned).

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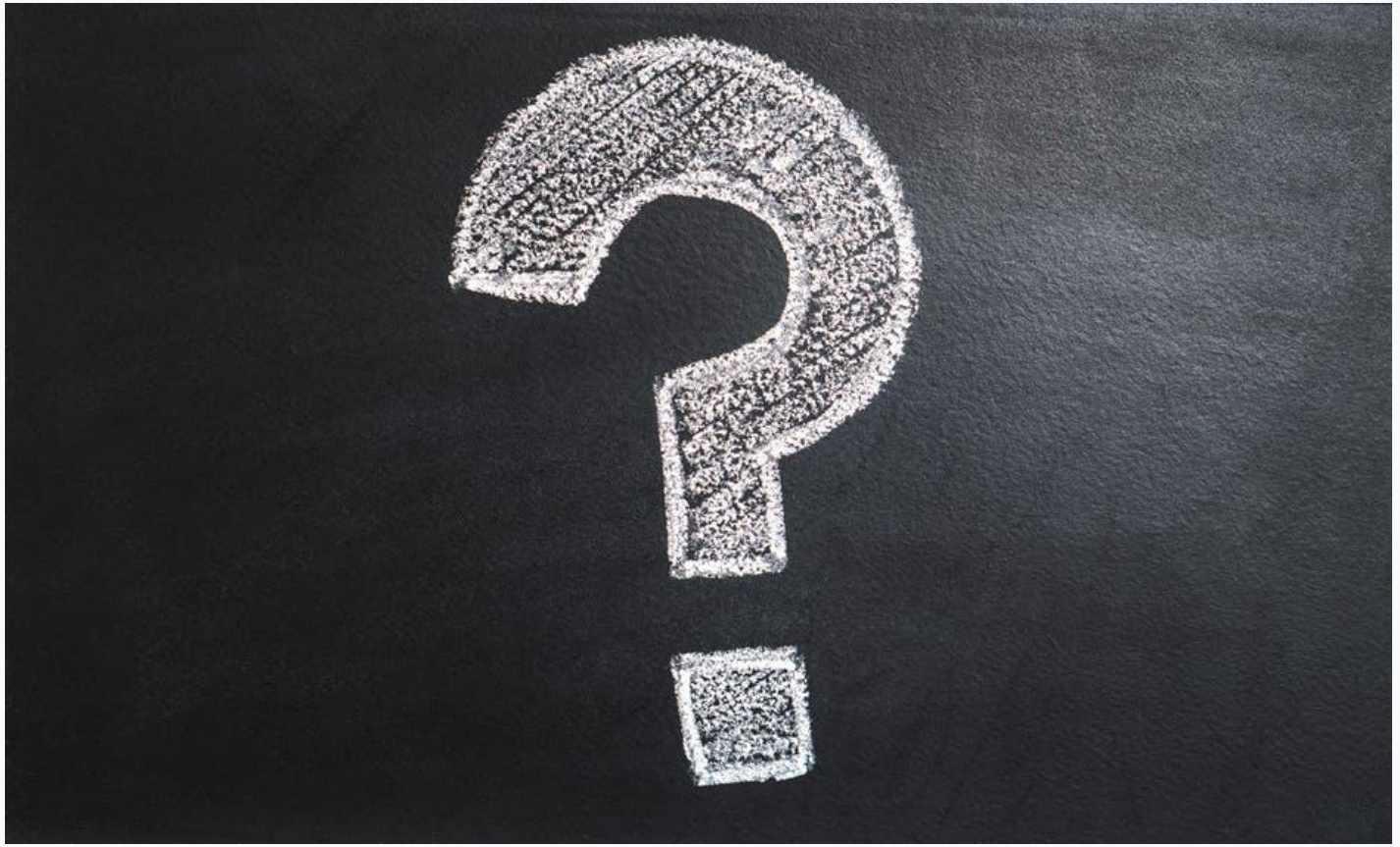
Dealing with Conflicts

- Recusal is not necessary where the interest is not personal or private, but rather, shared with all owners of property in the community.
  - *Segalla v. Planning Board of the Town of Amenia,* 204 A.D.2d 332 (2d Dep't 1992) (Court would not annul planning board vote to adopt master plan when the value of nearly every other property owner in the town would be similarly impact by the zoning amendment).
  - *Town of North Hempstead v. Vill. of North Hills*, 38 N.Y.2d 334 (1975) (Village Board members not disqualified when voting on amendment that would allow cluster zoning when most of the land in the Village was similarly affected.

Questions?



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