

MEMORANDUM

TO: WWB
FROM: WSR
DATE: June 28, 2006
RE: Constantia Planning Board member removal and conflict of interest

You have asked me to research two topics relative to recent issues in the Town of Constantia. The first issue was the procedure which must be taken to remove a member of the planning board. The second issue related to conflicts of interest and was two fold: (1) is it a conflict of interest for a planning board member to participate in a case before the board where the member resides next door to the applicant; and (2) is it a conflict of interest for a Town Board member to move for and participate in the removal of a planning board member where that Town Board member was the attorney in a lawsuit against the planning board members prior to being elected to the Town Board. My research and analysis of each issue is set forth below. Please let me know if you require anything further.

Planning Board Member Removal

Pursuant to Town Law § 271, the Planning Board was created by the Town Board and its members were appointed by the Town Board. As to removal of Planning Board members, Town Law provides as follows:

Removal of members. The town board shall have the power to remove, after public hearing, any member of the planning board ***for cause***. Any planning board member may be removed for non-compliance with minimum requirements relating to meeting attendance and training as established by the town board by local law or ordinance.

Town Law § 271(9) (emphasis added). As such, the planning board members may only be removed by the Town Board ***for cause*** and after a public hearing. As to what represents “for cause”, one court has stated as follows:

As a general rule, the word "cause" means legal cause as distinguished from discretion, and is a cause which specifically relates to and affects the proper administration of the office involved. The cause assigned must not be a mere whim of 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 or duty or fitness of the person removed to properly discharge the duties of his position.

Gersh v. Willage of Tuckahoe, 23 A.D.2d 258 (1965).

In addition, it should be noted that case law has held that, in certain circumstances, a planning board member may be removed because of an undisclosed conflict of interest. See NYJUR Counties § 721: *Keller v. Morgan*, 149 A.D.2d 801 (3d Dep't 1989). For example, in *Keller*, the planning board member held a 25% interest in a construction company. See *Keller*, 149 A.D.2d at 801. The Town alleged that the construction company entered into a road and drainage work contract and performed work at a subdivision while an application for approval of the subdivision was pending before the planning board. Further, the planning board member voted to approve the subdivision without disclosing his interest in the construction company and the work being performed. Based upon that conflict of interest and the failure to disclose the same, the planning board member was properly removed from the board by the Town Board. However, it should also be noted that there was a dissent in that case wherein the dissenting judge indicated that despite the conflict of interest, the planning board member *should not* have been removed because, under the circumstances, the planning board member did not knowingly and intentionally violate the conflict of interest rules.

Conflict of Interest - Planning Board member

In the instant case, the argument being made is that a planning board member should be removed from the board because his property adjoined a property which was the subject of a planning board decision. First, the statutory conflict of interest is found in Article 18 of the General Municipal Law (§ 801, et seq.). It is questionable whether the statutory provisions would apply in this interest because it is questionable whether an application before the planning board would be considered a "contract" and the statutory definition prohibits interests in "contracts". Moreover, if it was determined that the statutory provision does apply, the conflict would be resolved by

disclosure of the interest and, if necessary, recusal from participation and/or voting on the proposal. In addition to the statutory rules, common law rules also provide that the town officers should always avoid the appearance of impropriety, even if not a technical violation of the statutory rules. Typically, again, this is dealt with by disclosure and/or recusal. In addition, one opinion indicated that “mere membership in a neighborhood association expressing concerns but not opposition to an application, in which the planning board member took no part, does not, in our view, establish a basis for a conflict of interest.” 1988 N.Y. Op. Atty. Gen. (Inf.) 117. Another key consideration is whether the planning board member is deemed to have pre-judged the application. *See id.*

In the instant case, the planning board member resided adjacent to an applicant who was before the planning board. It is likely that a court would find that there was no conflict of interest unless the planning board member clearly held a position regardless of the facts presented. In any event, even if there was a technical conflict of interest, it is likely that the courts would find that the conflict of interest is not sufficient for removal. *See Keller, supra.*

Conflict of Interest - Town Board member

Finally, a question is raised as to whether a Town Board member who was previously involved in litigation representing a client in an action against the planning board members has a conflict of interest which would require him to refrain from participating in the potential removal of the planning board members and should refrain from making or voting in any motion to remove the planning board members. I have found no cases directly on point. Similar to the analysis above, it is likely that there is no statutory conflict of interest because there does not appear to be a “contract” involved. However, looking at the common law conflict of interest standard, it is highly likely that his motion to remove a planning board member without substantial cause would create an appearance of impropriety. Therefore, it would be recommended that the town board member not make any motion to remove a planning board member unless substantial cause existed and should recuse himself from voting with regard to any such motion.

WSR: