

MEMORANDUM

TO: CTB
FROM: ADK
DATE: July, 18, 2006
RE: Ridiculous memorandum dated June 28, 2006

I have been forced to respond to the above referenced memorandum despite the fact that it completely ignores the real questions presented, while at the same time it gives credence to a sham issue raised by the dishonest to confuse the moronic. While the memo states that, “[t]he first issue was the procedure which must be undertaken to remove a member of the planning board,” the entire rest of the three page memo is void of any discussion of procedure. Next, the memo goes on to state that, “[t]he second issue related to conflicts of interest and was two fold.” This is the lawyer’s equivalent of three-card Monty where multiple distinct issues that are better dealt with separately are combined in order to hide the fact that the writer is refusing to deal with either one (such as confusing tower height with FCC licenses). Beyond that, with regard to the question of whether it is, “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,” instead of legal advice we are given a philosophical discourse on morality masquerading as legal advice. My research and analysis of each of these so called issues is set forth below. Please do not waste any more of my time with any further such memorandum.

Conflict of Interest – Town Board member

The conclusion of the June 28, 2006 memo with regard to this bogus issue is, “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.” Notice the three-card monty legalistic slight of hand. Of course a board member should not vote for removal without substantial cause, regardless of whether that board member has been involved in a lawsuit or not. By scrambling the separate issues, the memo’s author never has to answer the question of whether or not a Town Board member is prohibited from participating in the removal process when there is substantial cause. I will answer that for you now.

Had either the lawyer who prepared the memo, or the one who received and promulgated it (who by the way both participated in the subject litigation, but neglected to disclose same to current Town Board while rendering an opinion) taken a look at the Disciplinary Rules governing New York attorneys they might have noticed DR 9-101[§1200.45] Avoiding Even the Appearance of Impropriety. DR9-101 A. 3 (a) states, “A lawyer serving as a public officer or employee shall not:

a. Participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment, **unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter.**” (emphasis added)

My position as town councilman is non-delegable. There is no substitute councilman who can vote for me. Even if the exact same tower application, with the exact same applicant came before the current Town Board, I would not be prevented from participating in the discussion and voting on the matter. Anyway, although the members of the planning board were named as respondents, the litigation was against the organization, not the individuals. The question of removal involves the individuals.

The town attorney should have been able to dismiss this bogus issue as an adolescent attempt at delay and diversion, the night it was raised at the Town Board meeting. Instead the problem was compounded by forcing me to do research and write a response to a memo that was little more than the unsubstantiated personal opinion about what might appear to be improper.

Conflict of Interest – Planning Board member

Once again the June 28, 2006 memo incorrectly states the question presented by saying, “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.” There was no motion made to remove any planning board member. There was simply a motion made to hold a public hearing to look into the possibility of removal if the facts supported such action. Among the facts likely to come out at a public hearing are these:

- One or more members of the planning board holding private meetings with the applicant to discuss their concerns with regard to the impact of the project on their personal residences.
- One or more members of the planning board engaging in a campaign to disseminate information derogatory to the application in order to foster public opposition.
- The failure of one or more members of the planning board to disclose their personal interests, or to recuse themselves from deliberations and voting.
- The failure of the planning board to meet deadlines for approving or disapproving the application as is required by Constantia Land Development Law.
- The failure of the planning board to keep accurate records of how individual board members voted on decisions made by the planning board.
- The requirement of site plan review for a project that was not a change of land use.
- The request of confidential information that was not required as part of the local site plan review process.
- Statements made by one or more planning board members that tend to show that they knew that they were acting unethically and in their own self interest.

There may be more issues of which I am totally unaware that will come out at public hearing, including facts which are exculpatory to the planning board members involved. But knowing what we know now it seems obvious that at a minimum a public hearing is justified.

Although the memo correctly states that, “the statutory conflict of interest is found in Article 18 of the General Municipal Law,” it focuses only on the definition of conflict of interest found in § 801, while wholly ignoring § 806 Code of Ethics. Section 806 1.(a) states, “[t]he governing body of each county, city, town, village and school district shall and the governing body of any other municipality 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.” Such local code of ethics must provide standards with respect to “holding of investments in conflict with official duties.”

The Town of Constantia Code of Ethics Section 2.(f) states, “Investments in conflict with official duties. He shall not invest or hold any investment directly or indirectly in any financial, business, commercial or other private transaction, which creates a conflict with his official duties.” In the instant case planning members who own or reside at property next to the proposed gravel bed are invested financially in property that may be in conflict with the proposed use. Although the Constantia Code of Ethics predates the Constantia Land Development Law, the failure of planning board members to disclose their interests may also violate the spirit of Section 2. (e) Disclosure of interests in legislation.

The memorandum also states, “if it is 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.” Duh! (who put the dum in memorandum) If the planning board members had disclosed their interest, recused themselves, and refrained from voting on the various issues involved in this application prior to letting the application process drag out beyond the statutory deadline while costing the applicant time and money in the process we would not be calling for a public hearing on their possible removal.

Does anyone honestly think that we must wait until the planning board has taken action that can not be remedied without paying damages to the applicant before we even hold a public hearing on what appears to be unethical conduct? I hope not.