Training Packet
for
Roles and Responsibilities

NYS Tug Hill Commission
18 June 2015

Web Sites Useful to Planning and Zoning Officials in the Tug Hill Region

New York State Statutes
http://public.leginfo.state.ny.us/menugetf.cgi?COMMONQUERY=LAWS

Department of State Publications
http://www.dos.ny.gov/lg/publications.html

Committee on Open Government – Open Meetings Law
http://www.dos.ny.gov/coog/#

State Environmental Quality Review Act (SEQR)
6 NYCRR Part 617:
http://www.dec.ny.gov/regs/4490.html
SEQR Handbook:
http://www.dec.ny.gov/permits/6188.html
SEQR Publications:
http://www.dec.ny.gov/permits/36860.html
Downloadable SEQR forms and EAF Mapper Application:
http://www.dec.ny.gov/permits/6191.html
Environmental Notice Bulletin (ENB):
http://www.dec.ny.gov/enb/enb.html

Tug Hill Commission – Planning
http://www.tughill.org/services/planning/

Jefferson County
Agricultural district map (county wide):
http://www.co.jefferson.ny.us/Modules/ShowDocument.aspx?documentid=5321
Referral form:
http://www.co.jefferson.ny.us/Modules/ShowDocument.aspx?documentid=5639

Lewis County
Referral manual, referral form and agricultural data statement (links at bottom of page):
http://lewiscountyny.org/content/Generic/View/115
Agricultural districts map (by town):
http://lewiscountyny.org/content/Generic/View/90

Oneida County
Referral forms and agricultural data statement:
http://www.ocgov.net/planning/forms
Agricultural district maps (by town):
http://www.ocgov.net/planning/AgDistrictMaps

Oswego County
Referral form:
http://co.oswego.ny.us/planning/239%20lm%20review%20form.pdf
Agricultural Data Statement:
http://co.oswego.ny.us/planning/agricultural%20data%20statement.pdf

Policies and Standards for the Design of Entrances to State Highways
https://www.dot.ny.gov/divisions/operating/oom/transportation-systems/repository/Policy%20and%20Standards%20for%20the%20Design%20of%20Entrances%20to%20Stat.pdf

Stormwater Management Guidance Manual for Local Officials
http://www.dec.ny.gov/chemical/9007.html

NYS Stormwater Management Design Manual
http://www.dec.ny.gov/chemical/29072.html

NY Standards and Specifications for Erosion and Sediment Control
http://www.dec.ny.gov/chemical/29066.html

Residential Onsite Wastewater Treatment Systems Design Handbook - NYSDOH
http://www.health.ny.gov/environmental/water/drinking/wastewater_treatment_systems/docs/design_handbook.pdf

Agricultural District Guidance Documents
http://www.agriculture.ny.gov/ap/agservices/agdistricts.html

Planning and Zoning Roles and Responsibilities

Town/Village Board

- Adopts/amends comprehensive plan
- Adopts/amends zoning, subdivision laws, fee schedules, etc.
- Establishes administrative boards
- Appoints/removes administrative officials and designates board chairmen
- Authorizes enforcement actions in state court
- Revokes licenses

Zoning Officer

- Administers zoning permit system/license system
- Brings enforcement actions in local court

Zoning Board of Appeals

- Hears appeals for area/use variances to zoning law
- Hears appeals for interpretations of zoning law
- Others as assigned by local laws

Planning Board

- Administers subdivision law
- Administers site plan reviews*
- Administers special permit reviews*
- Others as assigned by local laws or town/village board direction

Town/Village Clerk

- Files and retains records
- Handles fees

Town/Village Attorney

- Reviews laws and procedures
- Provides legal advice to boards and administrative officials
- Assists zoning officer in preparing cases for local court
- Brings enforcement actions in state court

Town/Village Justice

- Hears actions brought by zoning officer

* Note: This is typical assignment. NYS Statutes allow some discretion on assignment of site plan review and special permits, and may be assigned to the town/village board, planning board, or zoning board of appeals.

LOCAL REGULATION OPTIONS

WHAT DO THINGS DO?

New York State Uniform Fire Prevention and Building Code

- regulates the structural elements of buildings

Does NOT
- regulate the use of the land
- regulate lot sizes or dimensions, yard sizes or building coverage
- allow review of the layout of new parcels of land (new lot lines and roads)
- allow review of the site layout of development projects
- allow review of the architectural features of buildings
- allow review of the aesthetics of the site

Site Plan Review

- allows a review of the site layout of development projects
- allows a review of the architectural features of buildings
- allows a review of the aesthetics of the site

Does NOT
- regulate the use of the land
- regulate the structural elements of buildings
- regulate lot sizes or dimensions, yard sizes or building coverage
- allow review of the layout of new parcels of land (new lot lines and roads)

Subdivision controls

- assures that lots are sized in accordance with the dimensional requirements of the zoning law
- allows review of the layout of new parcels of land (new lot lines and roads)
- provides guarantee that developer will complete public facilities (roads, water lines, sewerage, drainage facilities, parks, etc.) as planned

Does NOT
- regulate the use of the land
- regulate lot sizes or dimensions, yard sizes or building coverage
- regulate the structural elements of buildings
- allow review of the site layout of development projects
- allow review of the architectural features of buildings
- allow review of the aesthetics of the sites in the plat

Zoning

- regulates the use of land
- regulates lot sizes and dimensions, yard sizes and building coverage
- allows a review of the site layout of development projects
- allows a review of the architectural features of buildings
- allows a review of the aesthetics of sites

Does NOT

- allow review the layout of new parcels of land (new lot lines and roads)
- regulate the structural elements of buildings

SITE PLAN REVIEW OPTIONS

What aspects of a development project can be controlled by reviewing site plans?

- general arrangement of structures and facilities
- access to the site
- circulation patterns for vehicles and pedestrians
- parking and loading area layouts and location
- landscaping design and locations
- screening design and locations
- lighting of the structures and the general site
- drainage, water supply and sewage disposal facilities design, location and capacity
- control of soil erosion during and after construction
- architectural features

On what basis can projects be selected for review?

- certain types of uses (ex. campgrounds, mobile home parks, mines, junkyards, all nonresidential uses)
- location of the use (ex. fronting on State highways)
- certain features of land: wetlands, floodplains, steep slopes
- certain project sizes: x amount of square feet of building area
- any of the above based upon the area (zone) it is in

Who can conduct a site plan review? (see Review Board Options)

- municipal board--town or village board
- planning board
- zoning board of appeals
- other board

What kind of procedure can be used to review site plans?

- optional sketch plan conference possible
- optional hearing or waiver of hearing possible

TUG HILL COMMISSION TECHNICAL PAPER SERIES

TUG HILL COMMISSION
Dulles State Office Building, 317 Washington Street, Watertown, New York 13601
315-785-2380/2570 or 1-888-785-2380 Fax: 315-785-2574
Email: tughill@tughill.org Website: http://www.tughill.org

WHY PREPARE A COMPREHENSIVE PLAN?

The New York State zoning enabling legislation provides a definition of a comprehensive plan and a process for adopting one (Town Law Section 272-a and Village Law Section 7-722). Towns and villages would benefit from taking advantage of these statutes by preparing a formal comprehensive plan. Several reasons are outlined below.

The plan provides a process for citizen involvement in a shared vision for the future of the community.

The planning process provides an opportunity for a wide spectrum of the community to be involved with shaping the community's physical and economic future. Opportunities for involvement often come through public opinion surveys, public information meetings and hearings, and attendance at committee meetings. A planning process may also involve activities such as design charettes, which provide opportunities for more interactive involvement of key citizens with special expertise.

The plan provides a legal foundation for, and coordinates land use regulatory activities.

There are numerous discretionary decisions made by the local boards and officials during the zoning implementation and administration process. For example, the town or village board is responsible for rezonings and text amendments consistent with the overall vision which the law is carrying out; the planning board may be responsible for the administration of site plan reviews, special permits and subdivision reviews; the zoning board of appeals is responsible for variances and interpretations of the law. These discretionary decisions all require some knowledge of a greater vision of the community. A written comprehensive plan offers a way to coordinate these decisions amongst local boards and officials and ensure that they are in concert with a common vision for the community.

The plan coordinates capital projects carried out by the community.

The community owns and controls various physical infrastructure improvements. These may include roads; streets; sidewalks; street trees; utilities such as water, sewer and lighting; community buildings, parks, and other meeting places; and police, fire and other public safety facilities. A written plan provides a means of coordinating the construction, expansion, contraction, or decommissioning of these facilities in a coordinated fashion, taking into account the overall goals and vision of the community. A plan also aids a community in assessing the impacts of potential community facilities on development patterns and the local economy.

The plan positions the community advantageously for loans/grants.

There are many organizations that can provide loans and grants to communities for specific projects. The availability of these funds often depends on there being a larger scheme or vision into which the intended project is a part. A written comprehensive plan can often provide evidence that a particular project is part of a larger overall scheme, which is well thought out, in keeping with the overall vision of the community, and may involve other funding stages in the future.

The plan informs other agencies and levels of government of community desires.

The NY statutes require that all plans for capital projects of other governmental agencies take a local comprehensive plan into consideration. A written plan serves as notice to other levels of government and other governmental agencies what the community wants, needs, and expects of them.

The plan streamlines State Environmental Quality Review (SEQR).

A comprehensive plan may be designed to serve as a generic environmental impact statement. If done so, development projects which are in conformance with the comprehensive plan have no further need to comply with the SEQR process, speeding up development approvals.

The plan acts as tool for promoting an appropriate image of the community.

A well-prepared plan can act as a community marketing tool, encouraging appropriate private and public investment. By providing a positive current image and an optimistic vision, the plan can act as a catalyst for both local and outside resources to be marshaled to best benefit the future considered most desirable to the residents.

The plan can provide concrete strategies for implementation.

While a comprehensive plan provides an excellent vehicle to articulate a long-range vision of the future, there are numerous steps to be taken to get there. A plan can include strategies and programs to help achieve it. Such an element can set forth specific action items or tasks, their relative priority, the schedule for carrying them out, and the persons or organizations responsible for either carrying them out or tracking their progress.

The Tug Hill Commission *Technical and Issue Paper Series* are designed to help local officials and citizens in the Tug Hill region and other rural parts of New York State. The *Technical Paper Series* provides guidance on procedures based on questions frequently received by the Commission. The *Issue Paper Series* provides background on key issues facing the region without taking advocacy positions. Other papers in each series are available from the Tug Hill Commission at the address and phone number on the cover.

ELEMENTS OF A TYPICAL ZONING LAW

Introduction

Explains where the authority to adopt the law comes from. Gives official title. Explains purposes to be served by law. Explains what the law applies to. Repeals or supersedes conflicting laws.

Definitions

Gives meanings of words as they are used in the law. Gives definitions of specialized zoning terms.

Establishment of Zones

Lists zones that appear on zoning map. Incorporates map into law by reference. Explains how to interpret the zoning map.

Zone Regulations

Lists uses of the land allowed in each zone. Indicates what type of permit or review procedure is required for each use. List requirements for uses in each zone such as minimum lot sizes, road frontage, lot depth, yard sizes, and maximum heights of structures, lot coverage or floor area ratio. May explain requirements and application and review procedures for special "floating zones" such as planned development (PD) zones.

General Regulations

Explains requirements for various things regulated by the zoning law that apply to all zones, usually without needing special permits and approvals. Items often covered include signs, parking and loading, sewage disposal, surface water protection, mobile home construction and siting standards, recreational camping vehicles, antennas, flood hazard areas, junk vehicles, etc. If regulations are extensive, they are sometimes put in separate sections.

Special Permits/Site Plan Reviews

Explains authority to issue special permits and site plan reviews, what is covered by special permits and site plan reviews, and objectives of the review process. Establishes a board for permit review, and establishes review procedures for that board.

Special Permit/Site Plan Review Standards

Establishes general review criteria for special permits and site plan reviews. Includes such things as general provisions (relationship to comprehensive plan, availability of public facilities, etc.), access, screening, landscaping, buffering, drainage, and erosion controls.

Financial Guarantees for Public Improvements

Sets up a procedure that allows the municipality to require and hold a financial guarantee for public improvements during the construction of special permit projects or subdivision developments.

Special Permit/Site Plan Review Provisions for Particular Uses

Establishes standards for specific special uses such as mobile home parks, campgrounds, major excavations, junkyards and/or repair facilities, retail gasoline outlets, home occupations, industrial uses, essential facilities, large product retail uses, bulk storage facilities, and multifamily dwellings.

Nonconformities

Establishes provisions for dealing with "grandfathered" lots, structures, or uses of the land that existed prior to the adoption or amendment of any provision of the law with which they do not conform.

Administration and Enforcement

Lists requirements for permits and certificates of occupancy. Establishes procedures for permit applications and enforcement of the law. Establishes permit fees, a zoning board of appeals, penalties for violations, and the date that the law takes effect. Usually includes supplemental information on how to amend the law. May include other miscellaneous information and/or regulations.

Somewhat Plain English Subdivision Review Process

1. Preliminary Discussions with Applicant

The applicant MAY attend informal sketch plan conferences with the board. It is important to record that the time clock has not started on the formal review, either by notes in the minutes, or a signed statement by the applicant. Some boards will not retain any materials offered by the applicant until the applicant has submitted a complete submission package including everything required by the subdivision law, to make it abundantly clear to the applicant that a formal review has not commenced.

2. Determination of Type of SEQR Action

The board must make a determination of what type of action the application is:

- Unlisted - requires only a short EAF. Board allowed to make its own independent SEQR determination, and a lead agency and coordinated review is not necessary.
- Type 1 - professional assistance with the SEQR process should be sought. Requires a long EAF, the designation of a lead agency, and a coordinated review.

3. Preliminary Acceptance of Application

The board should formally make a determination that the application package is complete EXCEPT FOR SEQR, and that anything not included is waived by the board. Consulting a technical checklist of submission requirements is helpful. *(Note: the time clock does not start until SEQR is completed.)*

4. Agricultural Data Statement

Where the location of the subdivision makes it necessary, the agricultural data statement must be sent to affected property owners.

5. County Referral

Where the location of the subdivision makes it necessary, and in counties with a county referral requirement (ex. Oneida County), the complete application must be referred to the county planning board. Only part 1 of the EAF is necessary to refer.

6. Completion of SEQR

Complete EAF – The board must review part 1 of the EAF which has been completed by the applicant, and then complete part 2 and part 3.

Determine significance of action – The board must make a determination of significance by motion or resolution. In almost all cases this will be a "negative declaration." If a "positive declaration" is made, the board should immediately consult professional assistance with the next steps in the SEQR process.

Filings – In the case of a negative declaration, the EAF and negative declaration document should be entered into the record of the board. In the rare case that the action is "type 1," then the positive or negative declaration must be sent to the ENB for publication.

(Note: the time clock will start when the board makes a negative declaration, or accepts a draft environmental impact statement.)

7. Referral to ZBA

Where the subdivision requires an area variance from the ZBA, the planning board, with the agreement of the applicant, may stop the clock and allow the applicant to apply for relief from the ZBA. The minutes should contain the agreement to stop the clock, and a clear statement of what specific circumstance will trigger its resumption. The ZBA must request a written recommendation from the planning board.

8. Notice of Hearing

The board must establish a hearing date by motion of the board. A notice of the hearing must be published in a newspaper in general circulation at least five days before the hearing. Where the location of the proposed subdivision requires, notice by mail or electronic transmission must be made to the clerk of adjacent municipalities at least ten days before the hearing.

9. Hearing

The hearing must be held within 62 days of a SEQR negative declaration or the acceptance of a completed environmental impact statement. The hearing may be held opened for up to 120 days. The board must act by motion to extend or close the hearing.

10. Action on Preliminary Plat

Within 62 days of the closing of the hearing, the board must act to approve with or without modifications or disapprove the preliminary plat. A resolution addressing county referral comments should accompany action of the board.

11. Certifications, Notifications and Filings

Applicant – A copy of decision resolution must be mailed to applicant.

Planning board clerk – The approved plat must be certified by the planning board clerk and filed within 5 business days. Resolution of action must be filed within 5 business days.

Municipal clerk – The resolution of decision must be filed within 5 business days with the municipal clerk.

12. Submission of Final Plat

Within 6 months of the approval of the preliminary plat, the final plat must be submitted for final approval or it may be revoked. The board should formally make a determination that the application package is complete, and that anything not included is waived by the board. Consulting a technical checklist of submission requirements is helpful. *(Note: the time clock starts upon accepting the application as complete.)*

13. Determination of Need for Second Hearing

The board must determine whether the submitted plat is substantially in compliance with the preliminary plat, and may waive the second hearing, if so. Otherwise, the board must establish a second hearing date

by motion of the board. A notice of the hearing must be published in a newspaper in general circulation at least five days before the hearing. Where the location of the proposed subdivision requires, notice by mail or electronic transmission must be made to the clerk of adjacent municipalities at least ten days before the hearing.

14. Hearing

If required, the hearing must be held within 62 days of the acceptance of a completed application. The hearing may be held opened for up to 120 days. The board must act by motion to extend or close the hearing.

15. Action on Final Plat

Within 62 days of the closing of the hearing, or within 62 days of the acceptance of a completed application where there has been no hearing, the board must act to approve, conditionally approve with or without modifications or disapprove the final plat.

16. Certifications, Notifications and Filings

Applicant – A copy of decision resolution must be mailed to applicant.

Planning board clerk – The approved or conditionally approved plat must be certified by the planning board clerk and filed within 5 business days. The resolution of action must be filed within 5 business days.

Municipal clerk – The resolution of decision must be filed within 5 business days with the municipal clerk

County planning board – Final action of any matter referred must be reported within 30 days to the county planning board, including any reasons for contrary action.

County clerk – The APPLICANT must file approved plat within 62 days of final approval with the county clerk.

17. Conditionally Approved Plat Signed When Complete

Plat must be signed within 180 days, with 90 day extensions possible, and filed with either planning board or municipal clerk (depending on who municipal board designates).

Note: Minor subdivisions omit steps 10-14.

Somewhat Plain English Site Plan/Special Permit Review Process

1. Preliminary Discussions with Applicant

The applicant MAY attend informal sketch plan conferences with the board. It is important to record that the time clock has not started on the formal review, either by notes in the minutes, or a signed statement by the applicant. Some boards will not retain any materials offered by the applicant until the applicant has submitted a complete submission package including everything required by the zoning law, to make it abundantly clear to the applicant that a formal review has not commenced.

2. Determination of Type of SEQR Action

The board must make a determination of what type of action the application is:

- Unlisted - requires only a short EAF. Board allowed to make its own independent SEQR determination, and a lead agency and coordinated review is not necessary.
- Type 1 - professional assistance with the SEQR process should be sought. Requires a long EAF, the designation of a lead agency, and a coordinated review.

3. Preliminary Acceptance of Application

The board should formally make a determination that the application package is complete EXCEPT FOR SEQR, and that anything not included is waived by the board. Consulting a technical checklist of submission requirements is helpful. *(Note: the time clock does not start until SEQR is completed.)*

4. Agricultural Data Statement

Where the location of the site makes it necessary, the agricultural data statement must be sent to affected property owners.

5. Completion of SEQR

Complete EAF – The board must review part 1 of the EAF which has been completed by the applicant, and then complete part 2 and part 3.

Determine significance of action – The board must make a determination of significance by motion or resolution. In almost all cases this will be a "negative declaration." If a "positive declaration" is made, the board should immediately consult professional assistance with the next steps in the SEQR process.

Filings – In the case of a negative declaration, the EAF and negative declaration document should be entered into the record of the board. In the rare case that the action is "type 1," then the positive or negative declaration must be sent to the ENB for publication.

6. Acceptance of Complete Application

The board should make a formal motion to accept the application as complete upon making a negative declaration or accepting a draft environmental impact statement. *(Note: the time clock will start when*

the board accepts a completed application, including either a negative declaration, or a draft environmental impact statement.)

7. Referral to ZBA

Where the site plan requires an area variance from the ZBA, the planning board, with the agreement of the applicant, may stop the clock and allow the applicant to apply for relief from the ZBA. The minutes should contain the agreement to stop the clock, and a clear statement of what specific circumstance will trigger its resumption.

8. Notice of Hearing

The board must establish a hearing date by motion of the board. A notice of the hearing must be published in a newspaper in general circulation at least five days before the hearing. Where the location of the site requires, notice by mail or electronic transmission must be made to the clerk of adjacent municipalities at least ten days before the hearing. Notice must be mailed to the applicant ten days before the hearing.

9. County Referral

Where the location of the site makes it necessary, notice of the hearing and a full statement of the action must be referred to the county planning board at least ten days before a hearing is held. Only part 1 of the EAF is necessary to refer.

10. Hearing

The hearing must be held within 62 days of the acceptance of a completed application. The board must act by motion to close the hearing.

11. Action on Proposal

Within 62 days of the closing of the hearing, the board must act to approve, approve with modifications, or disapprove the site plan. A resolution addressing county referral comments should accompany final action of the board.

12. Notifications and Filings

Applicant – A copy of decision resolution must be mailed to applicant.

Municipal clerk – The resolution of decision must be filed within 5 business days with the municipal clerk.

County planning board – Final action of any matter referred must be reported within 30 days to the county planning board, including any reasons for contrary action.

Somewhat Plain English
Zoning Board of Appeals Process

1. Determination of Type of SEQR Action

The board must make a determination of what type of action the application is:

- Type 2 - exempt actions requiring no SEQR review.
- Unlisted - requires only a short EAF. Board allowed to make its own independent SEQR determination, and a lead agency and coordinated review is not necessary.
- Type 1 - professional assistance with the SEQR process should be sought. Requires a long EAF, the designation of a lead agency, and a coordinated review.

2. Preliminary Acceptance of Application

The board must accept applications which are submitted within 60 days of the filing of a determination by the zoning officer. The board should formally make a determination that the application package is complete EXCEPT FOR SEQR, and that anything not included is waived by the board. Consulting a technical checklist of submission requirements is helpful.

3. Agricultural Data Statement

Where the location of a use variance appeal makes it necessary, the agricultural data statement must be sent to affected property owners.

4. Request for Planning Board Recommendation

Where the application is for an area variance for lots within a subdivision being reviewed by the planning board, a request for a written recommendation from the planning board must be made.

5. Completion of SEQR

Complete EAF – If the action is not a "type 2" exempt action, the board must review part 1 of the EAF which has been completed by the applicant, and then complete part 2 and part 3.

Determine significance of action – The board must make a determination of significance by motion or resolution. In most cases this will be a "negative declaration." If a "positive declaration" is made, the board should immediately consult professional assistance with the next steps in the SEQR process.

Filings – In the case of a negative declaration, the EAF and negative declaration document should be entered into the record of the board. In the rare case that the action is "type 1," then the positive or negative declaration must be sent to the ENB for publication.

6. Acceptance of Complete Application

The board should make a formal motion to accept the application as complete upon making a negative declaration, accepting a draft environmental impact statement, or finding the application exempt from SEQR.

7. Notice of Hearing

The board must establish a hearing date by motion of the board. A notice of the hearing must be published in a newspaper of general circulation in the municipality at least five days before the hearing. Notice must be mailed to the parties at least five days before the hearing. Where the location of the appeal requires, notice must be given to the regional state parks commission at least five days before the hearing. Where the location of a use variance appeal requires, notice by mail or electronic transmission must be made to the clerk of adjacent municipalities at least ten days before the hearing.

8. County Referral

Where the location of a use or area variance appeal makes it necessary, notice of the hearing and a full statement of the action must be referred to the county planning board at least five days before the hearing. Only part 1 of the EAF is necessary to refer.

9. Hearing

The hearing must be held within a reasonable time of the acceptance of a completed application. The board must act by motion to close the hearing.

10. Action on Proposal

Within 62 days of the closing of the hearing, the board must decide upon the appeal. A resolution addressing county referral comments should accompany final action of the board.

11. Notifications and Filings

Applicant – A copy of decision must be mailed to applicant.

Municipal clerk – The decision must be filed within five business days with the municipal clerk.

County planning board – Final action of any matter referred must be reported within 30 days to the county planning board, including any reasons for contrary action.

Use Variance Criteria

The use of land in a manner or for a purpose which is otherwise not allowed or is prohibited by the zoning regulations.

The applicant shall demonstrate that for each and every permitted use for the particular district where the property is located,

- applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
- the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
- the requested variance, if granted, will not alter the essential character of the neighborhood; and
- the alleged hardship has not been self-created.

Grant the minimum variance deemed necessary and adequate to address the unnecessary hardship proven by the applicant, while preserving and protecting the character of the neighborhood and the health, safety and welfare of the community.

Area Variance Criteria

The use of land in a manner which is not allowed by the dimensional or topographical requirements of the zoning regulations.

Take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. Also consider whether:

- an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by granting the variance;
- the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than a variance;
- the requested variance is substantial;
- the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
- the alleged difficulty was self-created, which consideration shall be relevant to the decision, but shall not necessarily preclude granting the variance.

Grant the minimum variance deemed necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

Preparing an Environmental Impact Statement (EIS) - The draft EIS is a primary source of environmental information related to a proposed action. The EIS also serves as a means for public review and comment on the potential impacts of the action. After a draft EIS is submitted by the sponsor, the lead agency must determine that it is complete and adequate for public review. Once the draft EIS is deemed complete, a minimum of 30 days is required for public review and comment. A final EIS should be prepared within 45 days of any hearings or 60 days after filing the draft EIS. The final EIS must include: the draft EIS and any revisions/supplements; a summary of substantive comments received; and the lead agency's responses to the comments.

Holding public hearings under SEQR is optional. Hearings are part of the review process for draft EIS's and cannot be held before the draft EIS and related documents are available for public review. SEQR hearings should be combined with hearings mandated by laws governing the particular action being proposed. If a SEQR hearing is held, the hearing record or summary becomes part of the final EIS.

SEQR findings are written by the lead agency and each of the involved agencies at the time they make their final decisions. Findings should directly relate the agency's decision to specific issues in the EIS, including the support for any conditions an agency may impose. Findings statements must be filed with all involved agencies and the project sponsor. A copy must be kept in the agencies' public files.

How does SEQR affect your agency?

If an agency is making a discretionary decision on a proposed action, it must carry out its responsibilities under SEQR. An agency may get assistance from but can not delegate its role to another agency or entity. For example, a town board cannot allow another board or agency that has no discretionary decision making role regarding the proposed action to act in its behalf.

Even though an involved agency may have little concern about a proposed action, it cannot make a final decision until either a Negative Declaration has been made or the EIS process has been completed. If a project is allowed to start without the benefit of a proper SEQR review, agencies are vulnerable to legal challenges. New York's court system has consistently ruled in favor of strong compliance with the provisions of SEQR.

Need more info?

Visit DEC's Website at www.dec.ny.gov. Select SEQR in the subject index. There you will find: details about SEQR and how it works; explanations of terms; a flowchart of the SEQR process; SEQR forms that can be downloaded and information about regulations and laws. The *Environmental Notice Bulletin* lists all SEOR notices filed with DEC. It is free on DEC's website at www.dec.ny.gov/enb/enb.html.

Contact the Division of Environmental Permits at the central and regional offices with specific questions or for written materials about SEQR procedures and requirements.

DEC Division of Environmental Permits
(ask for the Regional Permit Administrator)

Region 1 (Nassau, Suffolk counties)
Building 40, SUNY @ Stony Brook
Stony Brook, NY 11790-2356 (631) 444-0365

Region 2 (all of New York City)
One Hunters Point Plaza, 47-40 21st Street
Long Island City, NY 11101-5407 (718) 482-4997

Region 3 (Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, Westchester counties)
21 South Putt Corners Road
New Paltz, NY 12561-1696 (845) 256-3054

Region 4 (Albany, Columbia, Delaware, Greene, Montgomery, Otsego, Rensselaer, Schenectady, Schoharie counties)
1150 North Westcott Road
Schenectady, NY 12306-2014 (518) 357-2069

Region 5 (Clinton, Essex, Franklin, Fulton, Hamilton, Saratoga, Warren, Washington counties)
Route 86, PO Box 296
Ray Brook, NY 12977-0296 (518) 897-1234

Region 6 (Herkimer, Jefferson, Lewis, Oneida, St. Lawrence counties)
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Region 7 (Broome, Cayuga, Chenango, Cortland, Madison, Onondaga, Oswego, Tioga, Tompkins counties)
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Avon, NY 14414-9519 (585) 226-2466

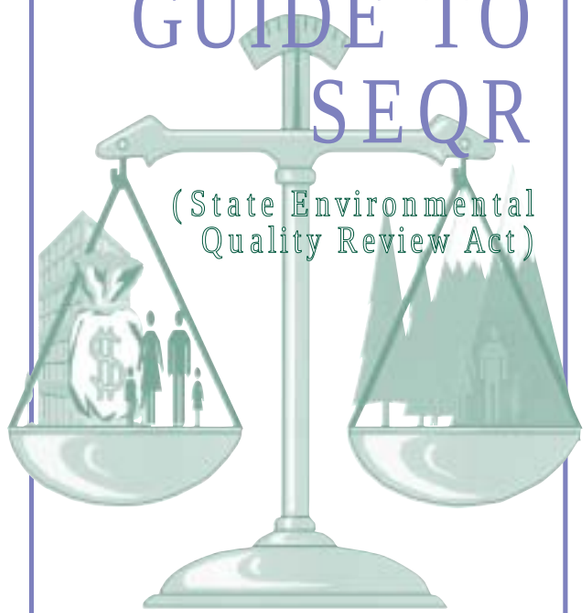
Region 9 (Allegany, Cattaraugus, Chautauqua, Erie, Niagara, Wyoming counties)
270 Michigan Avenue
Buffalo, NY 14203-2999 (716) 851-7165

Central Office, Environmental Permits
625 Broadway, 4th Floor
Albany, NY 12233-1750
(518) 402-9167

New York State
DEC

LOCAL OFFICIAL'S GUIDE TO SEQR

(State Environmental Quality Review Act)



New York State
Department of Environmental Conservation
Division of Environmental Permits

The Local Role in SEQR

New York's Environmental Quality Review (SEQR) Act requires every state and local agency in New York to give equal consideration to environmental protection, human and community resources and economic factors when considering proposed actions such as: adopting land use plans, sub-dividing land, building a housing development or roadway, filling wetlands or issuing a variance.

The SEQR process does not result in a permit. Instead, it provides a comprehensive assessment of proposed actions in order to avoid or reduce significant adverse environmental impacts while meeting the social and economic needs of a community. SEQR also provides opportunities for communication between local and state agencies, citizens and project sponsors.

All local agencies, boards, authorities, districts, commissions and governing bodies must comply with SEQR as must all state agencies, public benefit corporations, commissions and authorities. Before any agency makes a decision to approve, undertake or fund a private or public project, it must complete the SEQR assessment.

SEQR applies ... whenever an agency is making a discretionary decision on an action that may affect the environment. Actions have been categorized as Type I, Type II or Unlisted.

Type I actions require careful examination since they are more likely to have a significant impact. If more than one agency is involved in the review of a Type I action, a coordinated review is required and a lead agency must be established. A full Environmental Assessment Form (EAF) must be completed. Type I actions include:

- non-residential projects physically altering 10 or more acres of land;
- zoning changes affecting 25 or more acres of land;
- adopting land use plans (e.g., comprehensive plan).

For a full list of Type I actions see SEQR regulations, 6NYCRR Part 617.4.

Unlisted actions are those actions not included in any statewide or individual agency lists of Type I or Type II actions. Unlisted actions require a SEQR review since they range from minor zoning variances to complex construction activities that fall just below the threshold for Type I actions. At minimum, a short EAF must be completed. If more than one agency is involved in the review, a coordinated review is optional.

Not all actions require SEQR review ...

Type II actions are actions that DEC has determined will not have a significant adverse impact on the environment. Therefore, no further SEQR review is required. Type II actions include:

- constructing, expanding or granting area variances for a single 1,2 or 3 family dwelling;
- constructing or expanding a primary, non-residential structure with less than 4,000 sq. ft. of gross floor area;
- non-discretionary approvals, like building permits;
- interpreting existing codes, rules or regulations;
- minor maintenance and repair activities;
- construction of garages, fences, home swimming pools;
- routine permit/license renewals;
- granting a request for a single setback or lot line variance;
- agricultural practices including farm building construction.

For a full list of Type II actions see SEQR regulations, 6NYCRR Part 617.5.

Important steps in the SEQR process...

Determining Significance - The agency conducting the SEQR review must determine if a proposed action may or will not have significant adverse impacts on the environment. Impacts must be evaluated for both severity and importance. During this evaluation, the agency must consider all components or phases of the proposed action (the "whole action").

Determinations of significance must be based on information provided by the project sponsor in an EAF, other supporting documents and comments from any involved agencies and the public.

Determinations can be:

- A Negative Declaration (Neg Dec) when an agency determines that a proposed action will not result in significant adverse environmental impacts.

An agency's Neg Dec must show, in writing, the reasons why the identified environmental impacts will not be significant. Therefore, an Environmental Impact Statement (EIS) is not required. A Conditioned Negative Declaration (CND) is a type of Neg Dec that can be issued for certain Unlisted actions. A CND allows an agency to impose specific conditions, outside of its routine jurisdiction, to minimize identified impacts. For example, a Planning Board could impose a condition requiring an additional turning lane to improve traffic flow. A CND is subject to a 30-day public comment period.

- A Positive Declaration (Pos Dec) when the lead agency determines that there may be one or more significant adverse environmental impacts from a proposed action. An EIS must be prepared.

Scoping - is not a requirement of SEQR. However, this useful process identifies the topics that should be covered by the EIS, including significant adverse environmental impacts of a proposed project and alternatives that could avoid or minimize these impacts. As a result, the draft EIS is concise, accurate and focused on the significant issues.

If an agency decides to scope, it must involve community members. The scoping process starts when the project sponsor files a draft scope with the lead agency. The lead agency circulates the draft scope and solicits public involvement. An agency can also decide to hold a public scoping meeting. A final written scope of issues must be completed within 60 calendar days of receiving the draft scope.

Working Rules on Ethics

For Zoning Boards of Appeals

By Mark Davies,
Executive Director/Counsel,
NYC Conflicts of Interest Board

Part I

Introduction

Zoning Boards are considered to be "quasi-judicial" bodies. They are not courts, but they act somewhat like courts because they interpret the municipality's zoning law and apply it to particular cases. For that reason, the actions of the zoning board members must be above suspicion, particularly when the board is dealing with a controversial case.

So zoning board members, perhaps more than any other municipal officials, need clear ethics guidelines as to what they may and may not do. Unfortunately, few towns have a clear and complete code of ethics to guide their officials. And the state conflicts of interest provisions for municipal officials are a disgrace. They often make no sense. They contain enormous gaps – and so give officials little guidance. And they are almost unintelligible to non-lawyers.

This article will attempt to explain the requirements of the state conflicts of interest law as it affects zoning board members. But board members should be aware that their own town may have additional or stricter ethics requirements. For example, a town might prohibit certain town officials from accepting a gift of any size from someone doing business with the town, even though the state law might permit a gift up to $75. So zoning board members should also check their town's local ethics law.

The state conflicts of interest law is found in article 18 of the New York State General Municipal Law (sections 800-813). Article 18 contains three areas of concern to zoning board members:

(1) A prohibition on having an interest in a contract with the town (sections 800-805);
(2) Certain disclosure requirements (sections 803 & 809)[1]; and
(3) Certain miscellaneous conflicts of interest rules (for example, on accepting gifts) (section 805-a).

Each of these areas is discussed below. At the end of this article is a checklist of common ethics questions.

A. Interest in Contracts

The state's conflicts of interest law prohibits a town officer or employee from having an interest in a contract with the town if the officer or employee has some control over the contract. For example, a town zoning board could not hire one of its members as a stenographer for a ZBA hearing, but the town board could hire a ZBA member to paint the town hall.

This rule against interests in contracts is complicated, tricky, and dangerous for town officials. In deciding whether the rule applies in a particular case, the town official has to answer four questions:

(1) Is there a contract with the town?
(2) Does the town official have an interest in the contract?
(3) Does the town official have any control over the contract?
(4) Do any of the various exceptions apply?

Each of these questions is discussed below. In addition, zoning board members should be aware of the penalties for violating this law. Lastly, they should be aware of restrictions on holding more than one town position (dual public employment). These topics are also discussed below.

(1) Is there a contract with the town?

The law's definition of "contract" is odd. It includes not only an agreement with the town, "express or implied," but also "any claim, account or demand" against the town. So a lawsuit against the town is a "contract" with the town.

The State Comptroller's Office has said that an application for a zoning change and the granting of that application is not a "contract."[2] It would seem that a zoning variance is not a contract either. But one court held that an application for a building permit, and the issuance of the permit, is a contract.[3] (A building permit is a bit different from a zoning variance though, because a building permit does not involve much discretion. A zoning variance does. So it makes sense to say that a building permit can be a "contract" but a zoning variance is not.) Also, an article 78 proceeding maybe a contract since it is a "claim or demand."

Putting all this together, a zoning board member is allowed to apply for a zoning variance for his or her own property (for example, to build a deck that extends into the setback). When zoning board members, however, apply for a variance on their own property, they should "recuse" themselves – that is, they should not take part in the zoning board's discussion and should not vote on the variance. If possible, zoning board members asking for a variance on their own property should not appear before the zoning board in person, especially if there is any opposition to the variance. If they can, they should probably have someone else appear for them

NOTES:
1. There are also annual financial disclosure requirements for towns having a population of 50,000 or more. These financial disclosure requirements are in section 810-813 of the General Municipal Law but are not discussed in this article.
2. Opinion of the State Comptroller No. 83-114.
3. People v. planto, 88 Misc. 2d 303, 387 N.Y.S.2d 385 (Mt. Vernon City Ct. 1976).
4. 1979 Op Atty Gen (inf) 231.
5. See Landau v. Percacciolo, 50 N.Y.2d 430, 429, N.Y.S.2d 566 (1980).
6. Town Law Sections 20(1)(d), 20(4), 267(3), 271(3).
7. 1986 Op Atty Gen (ing) 131; 1988 Op Atty Gen (inf) 124; 1986 Op Atty Gen (inf) 53; 1986 Op Atty Gen (inf) 94; 1984 Op Atty Gen (inf) 172; 1988 Op Atty Gen (inf) 47; 23 Op State Compt 283 (1967); 1982 Op Atty Gen (inf) 100; 27 Op State Compt 24 (1971).
8. 1990 Op Atty Gen (inf) 1135.
9. Town Law Section 267(3); 1990 Op Atty Gen (inf) 1099; 93 Op Atty Gen (inf) 1005.
10. 1990 Op Atty Gen (inf) 1099; 1964 Op Atty Gen (inf) Jan. 23.
11. 1993 Op Atty Gen (inf) 1062; 1988 Op Atty Gen (inf) 89

before the board (like an attorney, an architect, or a friend).

(2) Does the town official have an interest in the contract?

A town official has an "interest" in a contract with the town if the official receives some financial benefit as a result of the contract. *The town official does not have to be a party to the contract*. For example, if the town board hires a firm to paint the town hall, and the firm subcontract part of the job to the part-time deputy town clerk, that deputy clerk has an interest in the firm's contract with the town because the deputy clerk gets a financial benefit as a result of that contract (although it is not a prohibited interest).

Under the law, a town official is said to have an interest in:

(a) Any contract of the official's spouse, minor children, or dependents;

(b) Any contract of the official's outside business or employer; and

(c) Any contract of a corporation in which the official owns or controls stock.

Suppose, for example, that a town board member is a part owner of a moving firm and that the town board contracts with that moving firm to move furniture out of the town hall. The town board member has an interest in that contract, *even if the board member receives no financial benefit as a result of that contract*.

In other words, a town official has an interest in a contract:

(a) If the town official receives a financial benefit as a result of the contract (even if he or she is not a party to the contract); *or*

(b) If the contract is with the town official's spouse, outside business or employer, or a corporation in which the official owns or controls stock (even if the official does not personally receive any financial benefit from the contract).

There is an exception to this rule. A town official does not have an interest in a contract just because his or her spouse, minor child, or dependent is employed by the town. This means that nepotism is allowed. For example, the town board could hire the spouse of a town board member. In fact, the town board member could even vote to hire his or her own spouse. But to avoid appearances of favoritism, a town official should recuse (disquality) himself or herself from any involvement in the town's hiring of a relative of the official.

(3) Does the town official have any control over the contract?

Even if a town official has an interest in a contract with the town, that interest is illegal only if the official has some control over the contract. There are four kinds of control:

(a) The official – either individually or as a member of a board - has the power or duty to negotiate, prepare, authorize, or approve the contract; or

(b) The official – either individually or as a member of a board – has the power or duty to authorize or disapprove payment under the contract; or

(c) The official – either individually or as a member of a board – has the power or duty to audit bills or claims under the contract; or

(d) The official – either individually or as a member of a board – has the power or duty to appoint an officer or employee who has any of the powers or duties listed in paragraphs (a) through (c).

The official does not have to act on the matter. It is enough if he or she has the power or duty to act on the matter. For this reason, *a violation of law still ocurs even if the official recuses (disqualifies) himself or herself from voting or acting on the matter*. So, too, competitive bidding does not prevent a violation.[4]

(4) Do any of the exceptions apply?

There are 15 exceptions to the rule on prohibited interests in contracts. They are listed in section 802 of the General Municipal Law. Some of these exceptions are rather rare. Some are quite common. The most common exceptions are the following:

(a) Outside employment.

If a town official's interest in a contract is illegal merely because the official is an officer or employee of the person or business that has the contract with the town, then the official may keep that interest, provided that (a) the pay the official receives from the employer is not affected by the contract (e.g., the official does not receive a commission or bonus as a result of the contract) and (b) the official's duties for the outside employer do not involve the contract. Note that the exception does not apply if the official is a director, partner, member, or stockholder of the outside employer.

(b) Non-profit organizations.

A town official's interest in a contract with the town is allowed if the contract is with a non-profit organization.

(c) Grandfathered contracts.

A town official's interest in a contract with the town is allowed if the contract was entered into before the official became an officer or employee of the town. But this exception does not apply to a renewal of the contract. For example, if someone is elected to the town board and at the time she is elected her husband has the town's insurance business, that contract is allowed. But the town cannot renew the insurance contract as long as the town board member remains in office.

(d) Stocks.

Where a town official's interest in a contract with the town is illegal because the official owns or controls stock in a corporation that has the contract, the interest is allowed if the stock is less than five percent of the corporation's outstanding stock.

(e) Small contracts.

If the total money payable under all town contracts the official has an interest in is $100 or less during the fiscal year, then the official's interest in the contract is allowed.

(5) What are the penalties for violating this law:

If a town officer or employee "willfully and knowingly" violates the law against having a prohibited interest in a contract with the town, the official has committed a misdemeanor. The official may also be subject to disciplinary action, including removal from office. Moreover an official "willfully and knowingly" violates this law if the official knows the facts that make the interest prohibited. *The official does not have to know that his or her interest in the contract is illegal*. In addition, the contract, if willfully entered into, is "null, void, and wholly unenforceable". The town cannot go through with the contract even if it wants to.[5]

Suppose, for example, that a town board member is a part owner of a local hardware store. The highway Department buys a

snowblower from the hardware store. The town board member has a standing order with his partner that whenever any town employee buys anything for the town, the partner keeps 100% of the profit from the sale and also send s a notice to the board member and the town clerk that the sale was made.

It would seem that the town board member acted ethically, but in fact he violated the law and committed a misdemeanor. The snowblower sale was a contract. The town board member has an interest in that contract because the contract is with his hardware store, even though the board member receives no money from the sale. The exception for outside employment does not apply because the board member is an owner not an employee of the store. Since he knew these facts, he "willfully and knowingly" violated the law, and the sale is null and void.

Luckily for zoning board member, they do not have control over very many contracts. However, because the penalties for violation of this law are so serious, zoning board members must be aware of it. If they have any questions at all, they will need to ask their town attorney.

(6) What about dual public employment?

The law on prohibited interests in contracts also applies to something called "compatibility of public offices" – that is, to employment in two municipal positions, either two town positions or a town position and a position with another municipality. The New York State Town Law also has rules in this area.[6]

For example, a member of a town zoning board of appeals may also serve:

(a) One the board of trustees of a village within the town; or

(b) As town director of finance; or

(c) As administrative assistant to the supervisor, provided that the town board does not make decisions subject to review by the zoning board; or

(d) As the town assessor; or

(e) On the board of education; or

(f) As the town superintendent of highways; or

(g) As a member of the town police department; or

(h) As a commissioner of the town water district; or

(i) As the deputy town supervisor.[7]

Also, the same person may serve as secretary to both the zoning and planning boards.[8] However, a ongoing board member should recuse (disqualify) himself or herself if any matter relating to his or her other municipal position comes before the zoning board. For example, a zoning board member who is also on the board of education should recuse himself or herself from participating in the discussions and vote if a matter involving school districts property comes before the zoning board.

On the other hand, a member of a town zoning board of appeals may not serve:[9]

(a) On the town board; or

(b) On the town planning board, if local zoning regulations give the zoning board the power to review decisions of the planning board.

Also, the secretary to the town zoning board may not at the same time be a member of the town board, and the clerk to the zoning board may not be the assistant town building inspector.[10]

The service of relatives on different town bodies usually presents no problem, unless a town ordinance or local law provides otherwise. For example, a person may serve on the zoning board even if his son or wife serves on the planning board.[11]

It is sometimes hard to know whether two offices are compatible. The New York State Attorney General's office has published hundreds of opinions in this area. Zoning board members with compatibility of office questions should contact that office (518-474-3429).

B. Disclosure

Apart from annual financial disclosure, which state law requires only in municipalities with a population of 50,000 or more, zoning board members face another kind of disclosure: disclosure of interests in contracts. In addition, applicants for approvals in land use matters must make certain disclosures.

(1) Disclosure of interests in contracts

If a town zoning board member has, will have, or later obtains an nterest in an actual or proposed contract with the town, he or she must publicly disclose that interest under section 803 of the General Municipal Law, *even if the interest is not illegal*. (There are some exceptions to disclosure.) The zoning board member must make the disclosure in writing to the town board as soon as he knows he has or may have a possible interest in a contract with the town. The written disclosure becomes part of the town board's records.

Once the zoning board member has made the disclosure about a particular contract, he or she does not have to disclose any additional contracts with the same part for the rest of the fiscal year. Also, the law does not require that the board member recuse (disqualify) himself or herself in the matter, although often recusal is a good idea if it would otherwise appear that the board member was doing something improper.

If a zoning board member "willfully and knowingly" fails to disclose, the member commits a misdemeanor. It would seem that a "willful and knowing" violation occurs if the zoning board member knows that he or she has an interest in the contract, *even if the board member did not know that he or she was required to disclose that interest*.

(2) Disclosure in land use applications

Article 18 requires disclosure in certain land use applications. This disclosure is made by the *applications*, not by the zoning board member. Specifically, the disclosure must be made in every application, petition, or request:

(a) For a variance, amendment or change of zoning; or

(b) For approval of aplat or exemption from a plat or official map; or

(c) For a license or permit under the town's zoning or planning law or regulations.

The application, permit, or request must state, to the extent the applicant knows:

(a) The name and home address of any New York State Officer, of any town officer or employee, and of any officer or employee

of the county who has an interest in the applicant; and

(b) The nature and extent of the interest.

Under the law, town officers and employees are said to have an interest in the applicant if they or their spouses or their brothers or sisters or their parents or their children or their grandchildren or the spouse of any of them.

(a) Is the applicant, or

(b) Works for the applicant, or

(c) Owns or controls stock of the applicant (with certain exceptions), or

(d) Is a member of a partnership or association applicant, or

(e) Has an agreement with the applicant to receive anything if the application is approved.

A "knowing and intentional" violation is a misdemeanor.

This law requires only disclosure by the applicant. It does not require disclosure by the zoning board member nor does it require the zoning board member to recuse (disqualify) himself or herself from acting on the application. *Court decisions, however, do require recusal by the zoning board member*. So any time that either the zoning board member or a member of his or her family has a connection with an applicant before the zoning board, the member should disclose that fact and disqualify himself or herself from acting on the application if the connection falls into one of the above categories.

In addition, zoning board members should recuse themselves from acting on a matter if they have already spoken publicly about the matter. For example, if a zoning board member speaks out, as a neighbor, before the planning board on a particular case, the zoning board member should recuse himself or herself from considering that case if it later comes before the zoning board.[12]

On the other hand, zoning board members should not recuse themselves unless one of the above situations occurs, for two reasons. First, zoning board members are appointed to the board to review and decide cases, not to disqualify themselves. Second, since it takes a majority of all of the members of the board to act on a matter, a recusal is, in effect, a no vote since the recusal does not count toward approving the application. To avoid this problem, some towns have established alternate members of the zoning board, or appoint ad hoc members, who only act on a case if a regular zoning board member has a conflict of interest.[13]

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From NYPF Planning News – November – December 1981
By Joel H. Sachs, Esq.

Ten Commandments for Members of Zoning Board of Appeals and Planning Boards

As zoning, planning and land use moves ahead into the 1980's, the responsibilities of members of zoning boards and planning boards are becoming greater. New challenges must be faced. The demands on board members, in terms of time and effort, are increasing. In short, the job is not an easy one. Therefore, it is extremely important that members of zoning boards and planning boards try to be as effective as possible in carrying out their duties. For this reason I have devised a set of Ten Commandments which may be useful in guiding your conduct as you continue to serve as a member of your local zoning or planning board. Although adherence to these Ten Commandments may not make you a perfect zoning board or planning board member, obedience to such commandments will at least make you a more effective member.

Before discussing the commandments it is important to set forth why it is important for each and every member of a zoning board or planning board to act in a proper manner. I submit that there are at least three reasons: 1. Each member of a zoning board or planning board in the State of New York is required to take an oath of office in which he swears to faithfully carry out his duties. Therefore, each member has both a legal and a moral obligation t do the best he can; 2. If members of zoning boards and planning boards do not act properly, the courts of the state are certain to overturn the decisions of the boards. When examining the decisions of courts of the State of New York which have reversed decisions of zoning boards and planning boards in Article 78 proceedings, by far the major class of cases in which courts have reversed decisions of zoning boards or planning boards do not relate to the merits of the decision, but rather relate to certain procedural errors or improper conduct by a board or one of its members. 3. In the past few years, due to several decisions by the United States Supreme Court, members of zoning boards and planning boards and/or the municipality may, in limited instances, be held personally liable for damages as a result of certain wrongful conduct. This spectre of monetary liability should in itself be a very compelling reason for members of zoning boards and planning boards to properly carry out their duties. With these preliminary thoughts in mind we now turn to the Ten Commandments themselves:

I. Show Up—Attendance of members at zoning board and planning board meetings is extremely important. Under applicable state law, members of zoning boards and planning boards can be removed from office "for cause and after public hearing". In a recent ruling the Comptroller of the State of New York has indicated that continual absenteeism of members of such boards might constitute neglect of duty and subject them to removal. See 80 State Compt. Op. 749.

II. Own Up—Here we are concerned with compatability of office and conflicts of interest. Compatability is a relatively easy concept to understand. Under the law, there are certain public or private positions which are inherently incompatable with being a member of a zoning board or planning board. (See generally, Incompatability of Office, Legal Memorandum No. 4, prepared by the Department of State Division of Le-

gal Services.) For instance, it is inherently incompatable for a building inspector to be a member of a zoning board of appeals. In any event, if there is any possible incompatability of office, it is best for members of planning boards and zoning boards to check with state officials before assuming any other public offices in the municipality in which they serve.

In the past a number of questions have arisen whether it is improper for a local real estate broker, a local developer or a local contractor to serve on a planning board or zoning board. The answer is that there is nothing improper as long as a conflict of interest is not created. Pursuant to Section 800 of the General Municipal Law a conflict of interest exists when an individual has a direct or indirect property or pecuniary interest with either the applicant or the property in question. Absent this "interest", there is no conflict. However, the "appearance of conflict" may be as important, if not more important, than an actual conflict of interest. If given the totality of the circumstances, members of the public perceive that there may be a conflict of interest by a member of a zoning board or a planning board sitting in on a particular case, it might be well for the member to disqualify himself. These matters must be handled on a case basis.

Conversely, just because one is a member of a zoning board or a planning board does not serve to give that person any less rights in a municipality than a non-member. Thus there is nothing improper about a member of a zoning board filing an application for a variance or planning board member seeking to subdivide his property. Of course, in such situations the member should disclose his interest and not participate in either the discussions or deliberations leading up to the board's vote.

III. Count Up—Numbers play a very important role with zoning boards and planning boards. The Town Law and the Village Law allow zoning boards and planning boards to have three or five members (villages) or five or seven members (towns). These numbers may be increased at the discretion of the local legislative body. However, the number of members of such a board may not be reduced to force incumbents out of office. Further, it is not proper to reduce the membership of a board *de facto* from not filling existing vacancies. Finally a town board cannot abolish the planning board and appoint a new one several months later. This is an obvious subterfuge.

While we are talking about the numbers of individuals who may serve on zoning boards and planning boards, it is worth reviewing the position of chairman. The chairman who serves as a full fledged member of the board is appointed by the legislative body of the municipality, and not by the board itself. The only exception to this rule is that although the chairman of planning boards in towns and villages may be appointed by the local legislative body, upon the failure of local legislative body to act, the planning board itself may elect its own chairman.

Turning to the issue of voting, in order for a zoning board or a planning board to act, an absolute majority is necessary. In other words if a particular matter is before a five member board and there are two yes votes, one no vote, with two abstentions, the matter does not pass since three votes were needed for an absolute majority. The majority necessary for the passage of a resolution is the same even if there is a vacancy on the board.

The question often arises as to whether a member can vote on a particular matter if he is not present at the public hearing. The courts have indicated that it is appropriate for such a member to vote if he has knowledge of what went on at the hearing and is thoroughly familiar with the record before he casts his vote. However, caution is in order.

IV. Bone Up—In the same manner in which students prepare for their examinations, a member of a zoning board or planning board should prepare for the next meeting. Members should be aware of the exact nature of each application coming before the board. Is it an application for an area variance, a use variance, a special permit, a site plan or a subdivision approval? It is incredible to find the number of members of boards who are unaware of the exact nature of the application pending before them. Speaking of applications, almost all boards require the applicant to fill out a written form. These applications should be read prior to the start of the public hearing. Finally, it is important that each board member know the applicable standards contained in the state law or his municipality's local zoning regulations. An application to a zoning or a planning board should be granted or denied based upon whether the applicant has met the standards set forth in the law.

V. Listen Up—Probably the most important public function of a planning board or zoning board is the conducting of a public hearing. This is the arena wherein all the facts should be brought to light concerning all aspects of the application. In order to properly conduct a public hearing, several guidelines are in order:

A. The board should adopt written rules of procedure setting forth in detail the rules under which the public hearings will be conducted.

B. The board should meet as often as necessary so as to have an uncrowded calendar. It is unfair to the members of the board, to the applicants and to members of the public to have to sit in a meeting room for 5 or 6 hours while a board races through a crowded calendar. Since calendars are heavier in certain months than in other months, it may be necessary to meet several times in one month, but less times in ligher months. In the end it all evens out.

C. It is important to have adequate space in the meeting room so that all interested members of the public may appear and be heard. In this regard, a number of planning boards and zoning boards unfortunately hold their meetings in close quarters at town hall or village hall because another meeting may be taking place in the same building at the same time. This should be avoided. In this regard, it should be mentioned that it is not proper to require an applicant to pay the rental costs for a public hall, or for a stenographer to take the minutes of a hearing or to pay the legal fees of an attorney advising the board.

D. As far as the hearing itself is concerned, the rules of evidence do not apply and the hearing is to be conducted on an informal basis. However, it is important that the hearing be a fair one. One court has defined the test of a fair public hearing as "whether a fair minded person in attendance at all meetings on the issue, could in good conscious, say that everyone had been heard who in all fairness should have been heard and that the zoning authority gave reasonable consideration to what each person stated". *Smith v. Skaget County*, 453 P.2d 832.

E. Board members should not be swayed in their vote by the number of people attending the hearing. We know that on any controversial matter, those people in the community who have a particular point of view are the ones that show up. Although a zoning or planning board member may have a particular point of view

before a hearing begins, it is important to be objective and open minded. Often times during the course of the hearing, matters may be brought out which may cause the board member to reach a different conclusion than he otherwise would have.

F. Unfortunately, a small percentage of zoning and planning board members carry out their duties as if they had a particular axe to grind. For some, serving on a zoning or planning board becomes nothing more than an "ego trip" in which they relish the opportunity to heap verbal abuse upon those appearing before the board. Not only is such conduct improper, but may also lead to damaging lawsuits in which the member may find himself the object of judicial approbation.

In conclusion, if there is one word to sum up how a board should behave during the course of the public hearing, that word is "fairly". A board after a public hearing may come down with a decision that is a good one or a bad one. However, it should always come down with a decision that is fair to the applicant and other interested parties. This can only be done if the hearing itself has been a fair one.

VI. Open Up—Much has been written and said in the past few years concerning compliance with both the Freedom of Information Law and the Open Meetings Law of the State of New York. Suffice to say that all meetings of planning boards and zoning boards, including deliberations, should be open to the public. Further, adequate public notice must be given of all public meetings and hearings of zoning boards and planning boards. In the past several years there have been a number of successful legal challenges to actions taken by municipal boards based upon a failure to comply with the "Sunshine Laws". Don't let this happen to your board.

VII. Study Up.—Aside from the information ascertained at a public hearing, there are other means by which a zoning board or planning board member can learn more about a particular project so as to enable him to make a more intelligent decision. For instance, a site visit can be made by members of the board. However, the fact that such site visit is made must be disclosed in the board's record. In addition, a zoning or planning board can retain an architect, engineer or other professional expert in order to give additional input to the board.

The question often arises as to whether a board member can utilize his personal knowledge in arriving at a decision. The answer is that it is proper to use one's personal knowledge, in other words, information not received at the public hearing, as long as the board member discloses such knowledge in the record. Further, board members should endeavor to keep notes or some form of written record of each application which comes before them. In this way, after the hearing is closed, they will have something to which they can refer in order to refresh their recollection before reaching a determination and writing a decision.

VIII. Write Up—The written decision of the board is the culmination of all that has preceded it. Here, the most important thing to remember is that it is imperative for the decision of the board to contain specific findings. It is improper for a board merely to restate the terms of the law or ordinance in its decision and thereafter proceed to either grant or deny the application. Numerous decisions of boards have been overturned for failure to make the required findings. Further, great care must be taken in the writing of the decision itself. It is incumbent upon every board member to carefully review the draft findings which are usually prepared by one member of the board. All relevant issues should be addressed.

IX. Give Up—At times, as a result of an Article 78 proceeding, determinations of zoning or planning boards are reversed by courts and remanded back to the board with specific directions. Amazingly, there are a number of boards around the state who feel that they need not adhere to any such judicial decree. Their attitude seems to be that since they denied a particular application for a variance or a site plan, no judge is going to tell them what to do. Not only is this attitude wrong, but it can lead to holding a member of a board in judicial contempt and may also subject the member to monetary damages. In other words, if a board is directed by a court to take certain action, don't fight it, do it.

X. Don't Give Up—Being a member of a zoning or planning board is not an easy task. At times there is a good deal of frustration, criticism and abuse. However, it is important to remember that you were chosen as a representative of your community to carry out highly important responsibilities. Although your responsibilities are grave, you, as a member of a zoning board or planning board, are performing a most valuable public service to your community. Don't give up.

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