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ZONING AND LAND USE PLANNING

Judges, Recusals, and Zoning Disputes: What the Ethics Opinions Say

By **Anthony S. Guardino**

The Advisory Committee on Judicial Ethics pvides ethics advice to New York judges, justices and quasi-judicial officials about their own conduct. Several recent opinions by the advisory committee have considered whether judges may hear cases involving or potentially related to zoning and land use matters, or whether they must recuse themselves. These opinions provide an interesting reminder of the kinds of property and development issues that can arise on the local level.

The Standard

The rules governing judicial conduct make it clear that, among other things, a judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act in a manner that promotes public confidence in the judiciary's integrity and impartiality (*see* 22 NYCRR 100.2(A)). The rules are clear, therefore, that a judge must disqualify in any proceeding in which "the judge's impartiality might reasonably be questioned" (22 NYCRR 100.3(E)(1)), including when the judge is an officer, director or trustee of a party (*see* 22 NYCRR 100.3(E)(1)(d)(ii)), has personal knowledge of disputed evidentiary facts concerning the proceeding (*see* 22 NYCRR 100.3(E)(1)(a)(ii)), has an interest that could be substantially affected by the proceeding (*see* 22 NYCRR 100.3(E)(1)(c)), or is likely to be a material witness in the proceeding (*see* 22 NYCRR 100.3(E)(1)(e)).

> Several recent opinions by the advisory committee have considered whether judges may hear cases involving or potentially related to zoning and land use matters, or whether they must recuse themselves.

These rules require, among other things, that a judge who is currently an officer, director or board member of an entity may not preside over any matters in which the entity is a party (*see, e.g.,* Advisory Committee Opinion 19-01). Several months ago, in Opinion 22-51, at https://nycourts.gov/legacyhtm/ip/judicialethics/opinions/22-51.htm, the advisory committee considered the effect of a judge's former service on a zoning board.

Recusal

The inquiring judge recently resigned from a town's zoning board before assuming full-time judicial office. The judge anticipated that there would be cases "where defendants/respondents are alleged to have not complied with the [zoning board's] decisions and have been issued summonses." The judge asked if recusal was necessary on those cases, or whether the judge could "hear them as [the judge] would if someone was alleged to have violated" a prior judicial order of the judge.

In its opinion, the advisory committee observed that it previously had indicated that a full-time judge who had served on the board of a public benefit corporation was disqualified, subject to remittal, "on all matters on which [the judge] was briefed or involved as a board member" (Opinion 19-01).

The advisory committee reasoned that when uncompensated service on

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a board resulted in knowledge about a specific matter in controversy, there was "an appearance" that the judge might have "personal knowledge of disputed evidentiary facts." Indeed, the advisory committee added, even if the judge did not, in fact, have such personal knowledge, the appearance of personal knowledge "might reasonably cause the judge's impartiality to be questioned." Even resignation from the corporation did not dispel an "appearance of impropriety" for matters in which the judge was briefed or had other involvement as a board member.

Applying those principles in Opinion 22-51, the advisory committee decided that where a defendant/respondent was alleged to have not complied with a town zoning board decision, and that underlying matter had come before the town zoning board during the judge's tenure on the board, "disqualification is required."

Significantly, the advisory committee added that on matters that had not come before the board during the judge's tenure and on which the judge had not been briefed as a member of the zoning board, the judge "may preside" if the judge believes that he or she can be "fair and impartial."

A Justice and Town Attorney

Early last year, the advisory committee issued Opinion 21-01, at https://nycourts.gov/legacyhtm/ip/judicialethics/opinions/21-01.htm, responding to a town justice who served as village attorney for an incorporated village that was wholly encompassed within the town where the justice presided. The justice learned that the village sought to abolish its independent court. As a result, the town court would hear all cases where the village was a party, including but not limited to, actions to enforce village zoning, parking, and other village local laws. The justice asked whether it was permissible to continue as town justice and also as village attorney, if the justice recused from all matters where the village was a party.

> Parties to a zoning dispute only rarely need to focus on the potential partiality of a judge hearing the matter. In the vast majority of cases where the issue does come up, judges handle conflicts with grace and professionalism.

In beginning its analysis, the advisory committee observed that a part-time judge may accept public employment in a municipal department or agency, provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties (*see* 22 NYCRR 100.6(B)(4)). The advisory committee also noted that a part-time judge, unlike a full-time judge, may practice law, albeit subject to certain limitations (*see* 22 NYCRR 100.4(G); 100.6(B)(1)-(3)). For example, a part-time judge must not practice law in the court on which the judge serves (*see* 22 NYCRR 100.6(B)(2)).

The advisory committee then cited to a prior opinion (Opinion 98-51) that decided that a town justice cannot serve as village attorney for a village within the same town where the village attorney would be required to appear regularly before the town court. In this case, the advisory committee continued, it appeared that elimination of the village court would result in the town court assuming responsibility for all actions emanating out of the village that were handled by the village attorney; therefore, the justice could not also remain as village attorney.

The advisory committee found that exceptions that it had previously recognized did not seem to apply here. For example, it previously decided that a part-time town justice could also serve as village attorney where it was represented "that the village attorney appeared in town court on one occasion in the past three years" (Opinion 97-24), given the "extremely limited prospect of conflict." There was no indication of such a limit in Opinion 21-01.

As another example, the advisory committee previously advised that a town justice could serve as village attorney for a village within the town where the judge's agreement with the village was that the justice would not be involved in any court appearances (Opinion 07-60). That was not the situation in Opinion 21-01.

The advisory committee in Opinion 21-01 also decided that the town justice could not continue in both positions simply by recusing on all village cases, explaining that recusal as a judge was not a solution to the conflict because it would "improperly give precedence to [the judge's] extrajudicial duties." The "volume of village cases" would result in excessive disqualifications, according to the advisory committee and, therefore,

the justice could "not recuse from all village cases in order to retain both positions."

A Part-Time Justice

Several months ago, a part-time justice employed in a managerial capacity by a forest products equipment manufacturer asked the advisory committee whether it was permissible to personally provide input to another town in the same county that was soliciting public comment on its zoning laws, which prohibited commercial sawmill operations.

The advisory committee recognized that the inquiring justice had a "clear personal interest" in the zoning dispute, given that the justice's livelihood might be negatively affected if the justice's employer had to close operations.

Nevertheless, the advisory committee noted that it had previously determined that a part-time judge could write a letter to the editor concerning a school construction project that would affect the judge as "a taxpayer, homeowner, and perhaps even as a parent or family member of a student" (Opinion 08-33), and that part-time judges could express their views on the repeal of specific provisions of a state statute "solely as a private citizen whose personal interests (i.e., their personal safety) will be affected" (Opinions 13-189/14-02).

The advisory committee then answered that a part-time justice could respond to another town's request for public input on its zoning laws, when a proposed change would have an impact on the justice's outside employment. In so doing, the advisory committee added, the justice "must not use judicial stationery nor otherwise reference" his or her judicial title or status. The justice's contributions to the discussion, whether oral or in writing, should be civil and dignified, the advisory committee concluded. *See* Opinion 22-44, at https://nycourts.gov/legacyhtm/ip/judicialethics/opinions/22-44.htm.

The Neighbor

The issues in Opinion 22-42, at https://nycourts.gov/legacyhtm/ip/judicialethics/opinions/22-42.htm, reached the advisory committee after a full-time judge retained an architect to apply for a variance from the local town zoning board of appeals for construction at the judge's residence. The architect contacted the judge's neighbor, a practicing attorney in a law firm that regularly appeared before the judge's court, and learned that the attorney did not object to the variance. The judge asked the advisory committee if the judge had to disclose or recuse on matters involving the attorney neighbor and, if so, whether this was required for the entire law firm.

The advisory committee reasoned that although the judge's application for an area variance was both ongoing and non-ministerial, it involved a single, discrete application and the neighbor apparently had no objection to it. Provided that the application remained non-controversial between the judge and the neighbor, the advisory committee concluded that the judge's impartiality could not "reasonably be questioned" on this basis when the attorney neighbor or other members of the law firm appeared before the judge (22 NYCRR 100.3(E)(1)).

Accordingly, it said, the judge need not make any disclosure and need not offer to recuse in any matters involving the neighbor's law firm, whether or not the neighbor was involved in the matter.

Conversely, the advisory committee concluded, if the variance application resulted in controversy between the judge and the neighbor, "we expect the judge will need to disclose and disqualify, subject to remittal (*see* 22 NYCRR 100.3(F); Opinion 21-22(A) (setting forth the remittal process)).

Conclusion

Parties to a zoning dispute only rarely need to focus on the potential partiality of a judge hearing the matter. In the vast majority of cases where the issue does come up, judges handle conflicts with grace and professionalism. The occasional advisory committee opinions addressing issues that may arise in this area provide helpful guidance in those rare instances when the rules themselves need clarification.

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