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## **Ethics in Land Use: Using Ethical Allegations as a Sword Rather Than a Shield**

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# Zoning and Land Use Planning

PATRICIA E. SALKIN\*

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## Ethics in Land Use: Using Ethical Allegations as a Sword Rather Than a Shield

### I. Introduction

Senator Alan Cranston, (one of the notorious “Keating Five” in the late 1980’s Savings and Loan crisis) commented it was so easy to make allegations of unethical conduct and so hard to defend

against them. This couldn’t be more true than when dealing with land use. Annually, I have the privilege of reviewing and analyzing for the American Bar Association’s State and Local Government Law Section all of the reported cases and opinions across the country that involve allegations of unethical conduct within the context of planning and zoning decisionmaking.<sup>1</sup> Each year there are approximately twelve to fifteen reported decisions and a number of opinions rendered by state attorneys general. In the vast majority of reported cases, the courts have been clear to distinguish between conduct that may not look good from an appearance perspective, but nonetheless, does not violate any federal or state statute nor a provision of

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<sup>1</sup>See, e.g., “A Woody Allen Movie, Show Me the Money, and Other Ethical Considerations in Land Use Planning,” Zoning and Planning Law Report (March 2004); “Ethics Allegations in Land Use Continue to Fill the Court Dockets,” Zoning and Planning Law Report (April 2003); “Litigating Ethics Issues in Land Use: 2000 Trends and Decisions,” 33 The Urban Lawyer 687 (Summer 2001) reprinted in Zoning and Planning Law Report, Vol. 24 No. 4 (April 2001); “Municipal Ethics Remain a Hot Topic in Litigation: A 1999 Survey of Issues in Ethics for Municipal Lawyers,” 14 BYU J. of Pub. L. 209 (2000); “1998 Survey of Ethics in Land Use Planning,” 26 Fordham Urb. L.J. 1393 (1999) reprinted in 22 Zoning & Planning Law Report 1 (April 1999); “Ethics and the Land Use Lawyer,” Land Use Law and Zoning Digest (May 1997); reprinted in 20 Zoning and Planning Law Report (September 1997).

a local ethics law.<sup>2</sup> Occasionally, conduct has arisen where a court could find no particular statute or law that was violated, but still determines that bad faith played a role in actions leading to the decision of the local planning or zoning board or of the legislative body. It has long been a belief that the party unhappy with the board's decision, and having no other legal recourse, may in certain circumstances look to find a prohibited conflict of interest or other ethics violation in the hopes of overturning an otherwise unfavorable decision.<sup>3</sup> The root of most of these less-than-honest ethics allegations rests in the motivation to protect investments in real estate. Although experience generally has proven that courts see right through these efforts, a recent lower court decision from New York's Hudson Valley should

raise concern of those who follow local government ethics. This column is devoted to one single lower court decision that disenfranchised citizens and thwarted an effort to implement a new comprehensive scheme to promote smart growth. Offered to the reader in story format, the moral of the story is "Beware, this could happen to you too."

On September 25, 2003, Dutchess County Supreme Court Judge James V. Brands handed down a harsh summary judgment decision preventing an elected Town Board member from voting on a proposed revised comprehensive plan, a draft of a generic environmental impact statement, a revised zoning law and a revised subdivision law for the Town of Hyde Park.<sup>4</sup> Judge Brands determined that the board member had a conflict of interest

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<sup>2</sup>Consult the cited articles for a review of each of the reported cases.

<sup>3</sup>See, Salkin, "Avoiding Ethics Traps in Land Use Decision-Making," *Municipal Lawyer* at 11 (March/April 2002). The article points out, "A growing body of case law and opinions from state attorneys general document a trend on the part of dissatisfied applicants and neighbors to lodge ethics allegations against members of planning and zoning boards. . . . The bad news is that municipalities are put in the position of costly defense litigation. In addition, the mere allegation of unethical conduct, the often negative headlines in the local paper, and the increasing fear on the part of volunteer board members that their reputations will be unwittingly dragged through the mud, has left many municipalities with a lack of civic interest in service on these boards. . . . Big money is at stake for some applicants; and public health, safety and welfare concerns are at stake for others who may simply disagree with the judgment of the members of . . . boards." *Id.*

<sup>4</sup>*Ciampaglione, et. al. v Russell Urban-Mead*, Index No: 1447/03 (2003).

based upon his employment with a local engineering firm that does a lot of work in the county and in the Town. This decision, it is claimed, was based in large part on the local ethics law adopted by the Town in 2001. This is discussed more fully below.

## II. Background

At the time of his election to the Town Board on November 6, 2001, Russell Urban-Mead was employed as a senior hydro geologist/air project manager for an established engineering and consulting firm doing business, among other places, in the Hudson Valley, including within Dutchess County and the Town of Hyde Park. Mead campaigned for this seat on the town board on a land use reform platform (not surprising given the development pressures facing the Town and surrounding communities). The Town of Hyde Park has, for the last several years, been engaged in smart growth related studies, and had put forth a series of proposed changes in local land use laws to implement many of the recommendations from

these efforts. These proposed new laws were highly controversial, attracting active support and opposition from various segments of the community. The Judge, in his decision, acknowledged that Board Member Urban-Mead's vote in favor of the proposed new laws was "critical and indeed, perhaps pivotal."<sup>5</sup>

In the past, when Urban-Mead thought he had a conflict of interest, he would abstain from voting. For example, in a December of 2002 the Town board was voting on a building moratorium in the Town, and Urban-Mead voluntarily abstained from voting since his employer had a matter pending before the Town Planning Board that could have been affected by that vote.<sup>6</sup> Again, following proper "ethical protocol", in the Spring of 2003, Urban-Mead sought an opinion from the local Hyde Park Board of Ethics regarding allegations that had been made regarding his participation as a Town Board Member for votes on the sweeping new land use laws.<sup>7</sup> On May 20, 2003, the Town Ethics Board issued an advisory opinion finding no conflict of interest and no need for

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<sup>5</sup>Id.

<sup>6</sup>Id.

<sup>7</sup>Id.

Urban-Mead to recuse himself from voting on these matters.<sup>8</sup> Typically, the story would end here. When advising municipal officials about ethical and unethical conduct, I always stress the protection afforded by local ethics boards when they exist. My advice is as follows: When in doubt, ask the ethics board. If the board determines that the official should refrain from the conduct questioned, then simply refrain and it is over. When the board says there is no ethics violation, prudence dictates that the official is free to go forward and if later questioned by the media or a member of the public, the official has the letter/opinion from the ethics board “pre-clearing” the conduct under scrutiny. Although the questioning public still may not be happy, an opinion from a local ethics board typically ends further ethics inquiries. Not so in Hyde Park.

A group of large landowners opposed to the proposed new zoning and subdivision law

brought an action in Dutchess County Supreme Court to prevent Urban-Mead from voting on the land use issues alleging that his employment with an engineering firm, that did work in the Town, either for the Town or for clients who appeared before various agencies in the Town, prohibited his participation as an elected Town Board Member when it comes to matters involving important zoning issues.<sup>9</sup> These plaintiffs relied on the Town of Hyde Park’s local ethics law as the legal basis for their complaint alleging that Urban-Mead had a disqualifying conflict of interest or an appearance of the same. The plaintiffs also cited to a number of instances where it was alleged that the line between the Board member’s duties as a town official and allegiances to his business had become blurred.<sup>10</sup> Even if one or more of these additional allegations of unethical conduct were deemed to be inappropriate behavior, none should have

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<sup>8</sup>Id.

<sup>9</sup>Id.

<sup>10</sup>Id. Judge Brands recounts the following allegations regarding Urban-Mead’s conduct in his opinion:

1. In December 2002 he was called into a meeting at his employer’s office with developers who needed assistance with property in Hyde Park. It was understood that he was brought to the meeting as he was on the Town Board and could “. . . bring them up to date on what was happening with those back parcels.” (Defendant’s examination before trial page 129).

had bearing on the specific question at bar: whether a local elected legislator may vote on specific legislative matters currently before the Board the represent broad municipal public policy directions. By failing to stop the inquiry here, the Court opens Pandora's box to the question of whether a local legislator may be involved in any way in a private business or outside organization that could possibly have some interest in any matter that comes before that board. Generally, courts across the country have not gone this far.

### III. The Law

State statutes regulating conduct of municipal officials and

locally adopted ethics laws are the two primary sources of guidance for analyzing ethics allegations.

#### A. State Statutes

Like the majority of states, state law in New York provides little guidance for municipal officials on the subject of ethics. The most comprehensive coverage of municipal ethics is found in Article 18 of the General Municipal Law. The bulk of the subject matter in this Article, however, focuses on prohibited conflicts of interests based upon contractual relationships.<sup>11</sup> The law prohibits local officials from acting in matters involving contracts where there is a personal interest in that contract on the part

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2. Articles that the defendant has authored in a publication for the association of towns identify him as a councilman and additionally note his business affiliation.

3. At association of town meetings with potential clients he is identified both as a councilman and again with his business by nametags that combine both.

4. The defendant's website for the Town of Hyde Park prominently identifies his employer, the work that they do and his professional capacity including working with large capital budgets, managing staff and the like.

5. At the time of the proposed moratorium on subdivisions within the Town of Hyde Park, he took the initiative of contacting a principal involved with a subdivision to discuss how the moratorium would affect his project (Defendant's examination before trial, page 100).

6. During the defendant's tenure on the town Board of the Town of Hyde Park the recreation committee which the defendant serve on recommended to the Town Board that defendant's firm be hired to prepare a recreation master plan. In voting for this it was his belief that he could do so as the plan itself was being approved, not payment. (Resolution 2:24-17 2003).

<sup>11</sup>See, N.Y. Gen. Mun. Law Art. 18 (McKinneys 1999).

of the official or a member of his/her immediate family.<sup>12</sup> The law further provides a process for disclosure, recusal and discusses the adoption of local ethics laws as well as the creation of local ethics boards.<sup>13</sup> There is no specific mention of ethical considerations in state statute dealing with members of planning boards, zoning boards or local legislative bodies in the land use arena, except for a provision in the Town Law and Village Law allowing for the appointment of alternate members of planning and zoning board (note: not legislative bodies) in cases of board member conflict of interest.<sup>14</sup> There is scant case law in New York on the subject of conflicts of interest in land use decisionmaking.<sup>15</sup> Even Judge Brands acknowledged, “At the outset it should be noted that there is very little guidance from the higher courts in our state relating to an application such as the instant one before

this court.”<sup>16</sup> Since there was no contract before the Board to approve, and the adoption of a new zoning regime of municipal-wide applicability could hardly be classified as a “contract,” there is no prohibition in state statute for the Board Member’s actions. Should state statute prohibit participation under these circumstances, then all engineers, architects, realtors, bankers, title searchers, insurance agents and similar professions might be ill-suited to serve on local legislative bodies. This is a harsh and perhaps unintended result, but a reality nonetheless under the rationale put forth in the Judge’s decision.

#### **B. Locally Adopted Ethics Laws**

Municipalities in New York and in other states may use their home rule powers and/or the authority granted in various state enabling acts to adopt and enforce locally developed codes of ethics to further guide

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<sup>12</sup>N.Y. Gen. Mun. Law § 801 (McKinneys 1999).

<sup>13</sup>N.Y. Gen. Mun. Law § 806 (McKinneys 1999).

<sup>14</sup>For a national survey of state statutes addressing appointment of alternate board members in cases of conflicts of interest and other matters, see, “Planning for Conflicts of Interest in Land Use Decisionmaking: The Use of Alternate Members of Planning and Zoning Boards,” 31 Real Estate L. J. 375 (Spring 2003).

<sup>15</sup>See, New York Zoning Law and Practice, 4th ed. Chap. 31 (West 1999).

<sup>16</sup>Ciampaglione, et. al. v Russell Urban-Mead, Index No: 1447/03 (2003).

the conduct of municipal officials.

Pursuant to § 806 of the General Municipal Law, the Town of Hyde Park adopted their local ethics law in 2001.<sup>17</sup> That law states, in part:

No town officer . . . shall participate in any matter that comes

Before the Town Board that would result in financial or other benefits to him or her . . . outside employers, business associates, clients . . . [i]n the event that such matter comes before the Town, the officer . . . shall promptly recuse himself or herself in accordance with Section 11-7B of this Code of Ethics.

The plaintiffs alleged that Urban-Mead was prohibited under this section of the local law from participating in the votes on the land use reforms. Again, the irony here is that it was well known that based on Urban-Mead's land use reform platform, he was expected to vote in favor of the proposed changes. Such an action might more appropriately be viewed as an action against his employer's interests since the potential clearly existed that overall there would be less intense development in the Town. In any

event, there was no specific contract or development application being discussed, what was on the table was a purely legislative determination regarding future land policy direction for the Town as a whole. The plaintiffs, however, attempted to strengthen their stance by alleging more than half a dozen instances where in their opinion Urban-Mead had an alleged conflict or the appearance of a conflict based upon his employment.

#### IV. The Decision

Unable to rely on a particular state statute, Judge Brands noted that although the plaintiffs could not prove that Urban-Mead would personally reap any financial benefit from a vote on the issues before the Board, "There need not be any interest specifically forbidden by the General Municipal Law nor is the test whether there is a conflict but whether there might in fact be. (emphasis added) [citation omitted] As noted by our courts . . . [a] public official must be beyond suspicion."<sup>18</sup> Concluding that Urban-Mead must recuse him-

<sup>17</sup>Id.

<sup>18</sup>Id., citing to *Matter of Tuxedo Conservation and Taxpayers Association v Town Board of Town of Tuxedo*, 69 A.D. 2d 320, 324, 418 N.Y.S.2d 638 (2d Dept.1979).

self from any further involvement with these particular matters, the Court noted, “Whether conspicuously or not, the co-mingling of business and legislative interests to date has resulted in a Darwinian hybrid where it is difficult to discern where the legislative responsibilities separate from his business responsibilities.”

### **V. The Impact of the Decision**

The impact of this trial court decision can be viewed in several perspectives. First, and perhaps most severe: The residents of a municipality were denied the representation/vote of an elected official whose term of office was ending three months later. Although an appeal is being filed in this matter, there is significant doubt as to whether the Appellate Division can be persuaded to get past a mootness argument (e.g., the vote would not have passed without Urban-Mead’s support, and since he is no longer on the Board because he voluntarily chose not to run for reelection, remanding the matter is unlikely to result in “what might have been”). The lesson here: a controversial land use policy can be halted by examining perceived conflicts of interest issues based on employment and perhaps association,

and alleging a simple “appearance of impropriety” can strip an elected official of the right to vote.

Second, and somewhat less alarming, is the acknowledgement that, at least for now, this is the law only in Dutchess County. This means the decision is at best persuasive in other county trial courts, but following it is not mandatory. However, what the appellate court has to say and how they choose to procedurally handle the appeal can have more widespread binding authority throughout a region of New York that is known for its litigious stance on land use and zoning matters.

Third, this case is the “poster child” for the need for state legislatures to once again focus on the subject of local government ethics. For example, Article 18 of the General Municipal Law does not provide adequate guidance to local officials and citizens on acceptable and unacceptable ethical conduct. To make matters worse, the state legislature in New York allowed the law establishing a Temporary State Commission on Local Government Ethics to lapse, leaving virtually no statewide ethics technical assistance to tens of thousands of municipal officials who confront these chal-

lenges on a daily basis. A State Ethics Commission could be given jurisdiction over local government ethics, the Department of State or other state-level department of community affairs could be specifically charged with providing this type of technical assistance, or a new state office/commission could be established. Whichever of these three options seem most viable, each will require a modest financial commitment from the legislature to ensure proper service for all local governments in each of the states. New York is not alone in the manner in which local government ethics are handled.

Perhaps the most troubling impact of the decision in this case is that Urban-Mead's constituents were disenfranchised on a very important issue without a clear finding by the Court of any actual conflict of interest on the part of Urban-Mead. In fact, played out the way the vote might have gone, Urban-Mead had allegedly been an outspoken advocate for the new laws which would have curtailed development in the Town, an action that could more appropriately be viewed as a vote against his employer's

interests, not a vote that would yield any personal financial benefits to him. This case is sounding loud alarms for those who watch closely judicial intervention in legislative affairs.

The Poughkeepsie Journal Editorial Board has called for a further review of this lower court decision, stating that it should not be allowed to stand.<sup>19</sup> The editorial sums up the situation well. "Brands' decision provides a dangerous precedent for municipalities across New York. Now, anytime somebody doesn't like what's going on in local government, they can try to arrange a vote to their liking simply by going to court and alleging an appearance of conflict against a certain official."<sup>20</sup>

Ironically, Judge Brands later recused himself from further involvement in this case after discovering that his stepson was employed by one of the plaintiffs.<sup>21</sup>

### Conclusion

This case is the classic wake-up call to start paying attention to local government ethics particularly as they relate to officials involved in planning and zoning decisionmaking.

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<sup>19</sup>Poughkeepsie Journal, p. 6A (10/5/2003).

<sup>20</sup>Id.

<sup>21</sup>Id.

Public policy dictates more restraint on judicial intervention in legislative matters under the facts presented in the current scenario. Although this particular board member may wish to have his name “cleared” by further defending his attempted actions, the unfortunate fact remains that a Judge prevented a vote from taking place and now it is too late to go back to authorize that action. Perhaps a more prudent course may have been to allow the vote while the board member was still in office, and then to determine whether the vote could stand or whether it should be voided. At least there would have been a vote on the record. Absent that scenario, this case is no longer about reforming the land use laws in Hyde Park, but rather about the broader statewide and national public policy considerations raised herein.