

----- Original Message -----

From: [Cathy Lawrence](#)

To: 'Miscione, Paul'; 'Cully, Herb'; jmessa@townofnewhartfordny.gov; dreynolds@townofnewhartfordny.gov; rlenart@townofnewhartfordny.gov; woodland@townofnewhartfordny.gov; atrevisani@townofnewhartfordny.gov

Cc: [Gail Wolanin Young](#)

Sent: Monday, July 27, 2020 3:55 PM

Subject: FW: Executive Orders on Public Hearings

Gentlemen:

I am forwarding a letter (see below) from Kristen O'Neill, the Executive Director of the Committee on Open Government. Public hearings must be held by using videoconferencing software that will allow the public to interact in real time remotely. Ms. O'Neill's email is self-explanatory.

I have also attached my last two blogs that make it quite clear that there are some ethics problems with members of the town board that cannot be remedied regarding the proposed development on Woods Highway. The noted violations are not only defined under Common Law, but they are also well-defined under the Town of New Hartford adopted Ethics Code.

I ask that you take the time to review both the letter from the Committee and Open Government and my blogs that contain referring links to all supporting documents.

Respectfully,

Catherine Lawrence

From: Oneill, Kristin (DOS) <Kristin.ONeill@dos.ny.gov>

Sent: Monday, July 27, 2020 3:11 PM

To: Cathy Lawrence <cathy@snsdolls.com>

Subject: RE: Executive Orders on Public Hearings

Good Afternoon Ms. Lawrence,

Section 103(d) of the Open Meetings Law requires that "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings." As you know, during the current public health emergency, Governor Cuomo has issued several executive orders with the goal of balancing public health and safety with the need for government to function effectively. Two of those executive orders play a role here. The first is 202.1 which suspends the Open Meetings Law "to the extent necessary to permit any public body to meet and take such actions authorized by the law without permitting in public in-person access to meetings and authorizing such meetings to be held remotely by conference call or similar service, provided that the public has the ability to view or listen to such proceeding..." The second is 202.15 which permits public hearings to "continue if the convening public body or official is able to hold the public hearing remotely, through use of telephone conference, video conference, and/or other similar service." While 202.15, required public hearings held in April and May to be postponed, it does not require, but does allow public hearings to be held remotely. Currently those two executive orders have been extended through August 5, 2020 (202.1) and August 6, 2020 (202.15).

In our view, if a public body is unable to "adequately accommodate members of the public who wish to attend" a hearing in-person, given the restrictions on in-person gatherings that are currently in place in your region, it should

continue to provide the public with the ability to view or listen to the proceeding (202.1) and afford the public the ability to provide testimony through remote means (202.15).

I hope this information proves useful. Stay well.

Kristin

Kristin O'Neill

Assistant Director, Committee on Open Government

New York State Department of State

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From: Cathy Lawrence <cathy@snsdollars.com>

Sent: Monday, July 27, 2020 1:33 PM

To: O'Neill, Kristin (DOS) <Kristin.ONeill@dos.ny.gov>

Subject: Executive Orders on Public Hearings

The Town of New Hartford, NY, 8635 Clinton Street, New Hartford, NY 13413 has been scheduling public hearings with no intent to employ the use of video conferencing which would allow anyone who wishes to take part in the upcoming hearings to interactively address the town board.

At the last town board meeting on Wednesday, July 22, 2020, Town Supervisor Paul Miscione spoke regarding an upcoming July 29, 2020 Public Hearing scheduled to "to continue consideration of the Conifer Group's application for a Residential Planned Development District (RPDD) that was received in August 2019" (a copy of the public hearing notice is attached).

He reiterated his intention to follow the guidelines on the public notice that limits the hearing to no more than 50 people. Actually, it would be fewer than 50 residents allowed because 10-12 town employees usually attend each town meeting plus there are other presenters that are scheduled to attend. Residents were told that if more than 50 people show up, they can stand in the hall and he would rotate them in as each person in the room had their time to speak.

Not only is July 29th possibly a contentious public hearing, but I have been contacted by older residents who wish to speak, but are not willing to take the risk of infection from COVID-19. It is my belief that Governor Cuomo Executive Orders 202.15; 202.39; and 202.49 do not allow scheduling of Public Hearings unless the town is capable of using teleconferencing to allow all residents to speak interactively.

Further, it is my understanding that Executive Order 202.49 now extends the previous two orders until August 6, 2020 unless further extended by a subsequent Executive Order.

I would appreciate receiving an opinion on this matter.

Thank you.

Catherine Lawrence
Town of New Hartford, NY

New Hartford NY Online...

July 24, 2020

<https://newhartfordnyonline.blogspot.com/2020/07/to-recuse-or-not-recuse.html>

To Recuse or Not Recuse...



...that seems to be the question *du jour* that needs to be answered.

Let me shed some light on the subject since the town attorney seems be silent on the question thus far.

I have been blogging about some of the missteps of Miscione regarding the Conifer development on Woods Road.

Here is his latest misstep...during the public session of the Wednesday, July 22, 2010 town board meeting, Miscione stated that he now feels he DOES NOT have a conflict of interest and, therefore, he has no need to recuse himself from the vote; he plans on voting "yes" to allow the requested zoning change to pass with a majority vote.

Not so fast there, supervisor! Obviously, your town attorney has not fully apprised you of the implications of your profoundly foolish decision.

Let me explain...

...if you persist in changing your recusal vote status, you stand a chance of being removed from office. You have already violated the town's Ethics Policy when you recused yourself the first time because recusal means that you can no longer take part in any discussions and/or deliberations regarding the project. You continue to appear to be deeply involved in this project.

There are three (3) elements to deciding if a conflict of interest exists. An affirmative answer to any one of the three (3) elements makes it mandatory that you recuse yourself from the vote and deliberations.

First, does General Municipal Law 18 specifically address and restrict the situation at hand?

An online writing by the NYS Comptroller states:

"You may have heard of the phrase "conflict of interest." The phrase can apply in a variety of situations which all have one thing in common: an individual with divided loyalties, such as when a person has to act on behalf of the public in connection with a matter that affects his or her personal interests. Not all conflicts of interest, however, are prohibited by law."

General Municipal Law restricts interest in a contract with the town; however, General Municipal Law does not specifically address what exactly constitutes "a contract" and the courts have given differing opinions.

Rather than go through all the differing court opinions and boring everyone; we will move on to element number two (2)..

Does Common Law apply?

According to the [Cornell School of Law](#), Common Law is law that is derived from judicial decisions instead of from statutes.

Several online sources including the Association of Towns; NYS Attorney General opinions; and opinions of the NYS Comptroller; along with writings of several legal attorneys in the NYSBA's publication, [Municipal Lawyer](#), make it quite clear that the next step is a review of Common Law to decide if there is an issue.

There are several court cases I found online; however the most frequently cited is [Matter of Tuxedo Conservation & Taxpayers Assn. v. Town Bd. of Town of Tuxedo](#), which according to [How to Analyze an Ethics Problem: Recognizing Common Law Conflicts of Interest](#) by Steven G. Leventhal, NYSBA Municipal Lawyer | Spring 2011 | Vol. 25 | No. 2, Mr. Leventhal states, in part:

The Tuxedo Court concluded that “while the anathema of the letter of the law may not apply to... [the trustee’s] action, the spirit of the law was definitely violated. And since his vote decided the issue... [the Court] deemed it egregious error.” The Court directed the Board member’s attention to the soaring rhetoric of Chief Judge Cardozo...

‘[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.’ Thus, [the Court concluded that] the question reduces itself into one of interest. Was... [the trustee’s] vote prompted by the ‘jingling of the guinea’ or did he vote his conscience as a member of the Town Board? In view of the factual circumstances involved, the latter possibility strains credulity. For, like Caesar’s wife, a public official must be above suspicion.”

Also cited in Mr. Leventhal's article is the [Matter of Zagoreos v. Conklin](#), 13 the Second Department that several years later reaffirmed the principles announced in [Tuxedo](#).

There is no question that Miscione has been quite actively involved with the development of this area of town going back to his days as Ward 2 councilman and he still appears to be actively involved.

In a [February 25, 2018 article](#) that appeared in the Observer Dispatch (*about 2 months after Miscione took office as town supervisor*), Miscione is quoted as saying:

“We condensed a lot of it to C1 Commercial,” Miscione said of the area he would like to see developed. As an example, he noted how Seneca Turnpike used to be zoned for business before it was changed to commercial use. Miscione envisions development extending to Seneca Turnpike and beyond.”

Reading that article definitely gives a town resident the impression that, as a six-year councilman for the Town of New Hartford, Miscione was deeply involved in formalizing the town's updated Comprehensive Plan specifically regarding the Seneca Turnpike/Middlesettlement Road area of town; the Comprehensive Plan was adopted by the board in July 2014.

According to town assessment records, on January 12, 2016, Sen Woo, a LLC registered to Paul Miscione, purchased the vacant parcel at the corner of Woods Highway and Seneca Turnpike. Nine (9) months later, in October 2016, Miscione Realty, LLC purchased property at 8275 Seneca Turnpike, three doors down from the corner his LLC purchased earlier in 2016. Both parcels abut the property that is currently the subject of the zone change request now being considered by the town board for the Conifer development.

Representatives of Conifer have publicly stated that the 20 acres remaining after the proposed parcel split for the new development is officially completed will be developed by “someone else”.

Since the 20 acres clearly abut Miscione's property, public perception can easily conclude that given the proximity of Miscione's properties to the 20 acres and Miscione's continued involvement with the project even after publicly recusing himself from the vote at the February 5th town board meeting, Miscione could reasonably be perceived as the “someone else” that plans to develop the 20 acres giving him a definite interest in the Conifer development.

Also, as real estate developer/broker, the public could easily surmise that Miscione might be the real estate broker for

properties in that area giving him a financial benefit. Plus, as a realtor/broker, Miscione would have an unfair advantage over other residents in knowing when/if the remaining 20 acres or other properties in the area are listed for sale.

The NYS Attorney General writes in his Informal Opinion 2002-9:

"In resolving conflict of interest questions, one fundamental principle predominates: a public official must avoid circumstances that compromise his or her ability to make impartial decisions solely in the public interest. See Matter of Tuxedo Conservation & Taxpayers Ass'n v. Town Bd.; 69 A.D. 2d 320 (2d Dep't 1979); Op. Atty. Gen. (Inf.) No. 97-5; Op. Atty. Gen. (Inf.) No. 88.60 Even the appearance of impropriety should be avoided to maintain public confidence in government. Op. Atty. Gen. (Inf.) No. 9-5.

"Tuxedo made clear that recusal is required if the facts show that a board member's interest in a matter under review "is a personal or private one, not such an interest as he has in common with all other citizens or owners of property."

Miscione's assertion that he has no conflict of interest would more than likely fail under Common Law.

Last of the three (3) elements to consider:

What does the Town of New Hartford Ethics Code adopted by the Town Board 6-17-1970 by L.L. No. 3-1970 say?

The town's code says, among other things:

"§ 10-2. Applicability of other provisions. The standards, prohibited acts and procedures established herein are in addition to any prohibited acts, conflicts of interest provisions or procedures prescribed by statute of the State of New York and also in addition to common law rules and judicial decisions relating to the conduct of town officers to the extent that the same are more severe in their application than this chapter."

The town code clearly identifies the town's desire to conform to "common law rules and judicial decisions"... "to the extent that they are more severe in their application than this chapter." In other words, Common Law and judicial decisions are to be taken into consideration.

Town Code further states:

§ 10-4. Conflicts of interest. No town employee shall have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature which is in substantial conflict with the proper discharge of his duties in the public interest.

AND...

C. No town employee shall use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

D. No town employee shall engage in any transaction as representative or agent of the town with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.

E. A town employee shall not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties or that he is affected by the kinship, rank, position or influence of any party or person.

F. Each town employee shall abstain from making personal investments in enterprises which he has reason to believe may be directly involved in decisions to be made by him or which will otherwise create substantial conflict between his duty in the public interest and his private interest.

Here is the entire [Ethics Code for the Town of New Hartford](#).

Miscione and Cully should also take note that the last section of the town code, § 10-8 (A) Administration of provisions, leaves no wiggle room for saying, "I didn't know".

The town's Ethics Law also requires the posting of this code "*conspicuously in each public building under the jurisdiction of the town. Failure to so post this chapter shall have no effect on the duty of compliance herewith, nor the enforcement provisions hereof*"; and

"the Town Supervisor shall cause a copy thereof to be distributed to every town employee of this town."

I trust that the both the Town Supervisor and the town's Personnel Dept. has already seen to it that the town conforms to this section of the town's Ethics code.

As with Common Law, Miscione's assertion that he does not have a conflict of interest would fail under the town's own Ethics Code.

New Hartford NY Online...

July 25, 2020

<https://newhartfordnyonline.blogspot.com/2020/07/perception.html>

Perception...



After the public hearing on February 5, 2020, it was reported that New Hartford Town Supervisor Paul Miscione recused himself from the vote stating that "he owns property in the area" so he couldn't vote to break the tie.

Actually, there is no such thing as a tie vote at the board table...you either have a majority of affirmative votes; or you don't. It is called a failure to adopt by a majority vote.

Hopefully, Miscione is smart enough to now understand that he clearly does have a conflict of interest/ethics problem which requires that he not take part in any further discussions held either at the board table or elsewhere behind closed doors and he cannot take part in or cast a vote for or against the proposal during the scheduled Wednesday, July 29, 2020 Public Hearing without risking an Ethics complaint being filed.

Messa and Woodland voted "nay" for the first vote held in February...

Messa was quoted in a February 6, 2020 WKTV article:

"Board member Messa says it might not be a bad idea to press pause on certain forms of development"

"It's another situation where we're building more apartments. I just think that we might be overdeveloping, if you will, and we're gonna reduce the number of greenspace that we have in our town," said Messa.

Messa, who is the Ward 1 councilman covering, in particular the Chadwicks area, knows all too well the problems residents in his part of town have had with ongoing stormwater issues.

Will he change his vote to give Miscione the majority vote he is looking for or will he continue to think about the stress and heartbreak his own constituents have experienced with their stormwater problems from over-development and broken promises of developers?

What will Richard do?

After listening to many residents in his Ward who are opposed to the Conifer development because of ongoing water

concerns on and near their property, Richard Woodland, the councilman for the Seneca Turnpike/Woods Highway area, said he voted “no” at the February town board meeting because he wanted to support the stormwater concerns of his constituents who live in the trajectory of the stormwater particularly during heavy rainstorms.

Will Councilman Woodland, a long-time friend of Paul Miscione now put the concerns of his constituents aside and vote “yes” to help his buddy get what he wants...further development along the Seneca Turnpike/Woods Highway corridor plus the "want" for Utica water for those landowners who have been unable to sell their vacant lots even after the last time they successfully teamed up with Larry Adler to change the zoning in that part of town?

Hopefully, Councilman Woodland will give this question a lot of thought lest he also find himself in the middle of an ethics, or possibly worse, issue.

Woodland’s problem is not so much a definite ethics problem right now; it is more the appearance of a conflict of interest and a possible shirking of his duties to the people who elected him as their voice at the board table.

As I said in a previous blog, Miscione Realty LLC purchased 8275 Seneca Turnpike in October 2016. That is true. However, what I didn’t tell you is in October 2019, shortly after Conifer made their second presentation to the town board in September 2019, Miscione Realty LLC sold 8275 Seneca Turnpike to Councilman Richard Woodland and Jeannette M. Marleau.

No big deal?

Maybe, except...the mortgage was obtained from [Tampa 1 Realty, LLC](#), an LLC registered in Naples, Florida on January 25, 2016 under the name of Paul Miscione with his New Hartford address using a Florida name and address as the registering agent.

Oneida County records show that the return name and address for both the sale of the property at 8275 Seneca Turnpike and the mortgage for that location is: Calli, Calli & Cully Law Offices 510 Bleecker Street Utica NY.

As Councilman Woodland casts his vote after the board closes the public portion of the Pubic Hearing scheduled for July 29, 2020, he should keep in mind a concluding quote from the [Tuxedo](#) court case mentioned in my previous blog:

“[a]n amalgam of those cases indicates that the test to be applied is not whether there is a conflict, but whether there might be.... It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest.”

A changed vote by Councilman Woodland from his previous “no” vote cast to support his constituents to a “yes” vote would most certainly give rise for New Hartford residents and taxpayers to question the motives behind Councilman Woodland’s changed vote.

Are votes on development projects in the Town of New Hartford, NY negotiable? We'll see..the integrity of the entire town board and town attorney might very well be in question.

Perception is everything, my friends!