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City of Hudson Planning Board

Re: Colarusso "Demand" of Recusal of Member Gabrielle Hoffmann

Dear Chairperson Joyner and Members of the Planning Board:

The "demand" of applicant Colarusso that Planning Board Member Gabrielle Hoffmann recuse herself from participation in the Planning Board's consideration of the conditional use permit for Colarusso is another wild, baseless, and misleading attempt by the applicant to prevent the Planning Board from properly and lawfully exercising its lawful process and review. Recusal is not only not required in Ms. Hoffmann's case; it would be improper. The "demand" by Colarusso should be flatly rejected by Ms. Hoffmann and her decision should be fully supported by the Planning Board.

I have, since Colarusso attorney T.J. Ruane's letter was publicized, posted several brief comments about this on public forums but, consistent with my ongoing defense of the Planning Board's authority, I now submit to you this more extensive analysis and rebuttal of Mr. Ruane's and Colarusso's groundless demands.

The law in New York does not support recusal.

I have done an **extensive** survey of the reported cases in New York that have addressed claims for bias, conflict of interest, or recusal of Planning Board members (and also persons such as Zoning Board member or Town Board members when such boards were carrying out conditional use permit or other zoning reviews). ***In nearly every case*** in which recusal was found by the courts to be warranted, it was because the member at issue had a ***financial interest or a potential financial interest*** in a particular outcome. Few cases even consist of non-financial allegations of bias and of those, I found only two in which recusal was found by the courts to have been warranted without being based in a financial conflict of interest. Neither supports recusal with respect to Ms. Hoffmann. ***Of the cases with greatest similarity to Ms. Hoffmann's situation, all concluded that there was no basis for recusal***.

Attorney Ruane's citations.

The cases and authorities cited by attorney Ruane on behalf of Colarusso range from completely off the mark to easily distinguishable and substantially differentiated from the current matter and do not establish grounds for recusal of Ms. Hoffmann. To support his contention that recusal is called for, Mr. Ruane's letter refers to the following:

- *1990 N.Y. Op. Atty. Gen. (Inf.) 1068*.
    - This Opinion is, however, in regard to a planning board chairman who owns a steel company, which sells steel to the applicant developer seeking planning board approval of a construction project—a clear financial conflict of interest.
- *1984 N.Y. Op. Atty. Gen. (Inf.) 86*.
    - This one has nothing to do with the zoning/planning context. It involves the matter of an assessor who has a construction business and then, as assessor, places a valuation on the houses the assessor builds and sells.
- *Tuxedo Conservation and Taxpayers Association v. Town Board of the Town of Tuxedo*, *69 A.D.2d 320.*
    - The Court held that a town board's approval of $200 million proposed development could not stand where decisive vote was cast by board member who was a vice-president of advertising firm which handled the account of a corporation that owned the applicant developer. "[The developer] is a wholly owned subsidiary of [the company that is a client of the town board member's advertising firm]. It requires no feat of mental gymnastics to infer that if the application is approved, the agency will be a strong contender to obtain all the advertising contracts in the 200 million dollar project."

Two of these three matters are situations in which a board member stands to personally benefit ***financially*** as a result of approval of the project; in the third, the assessor would be in a position to inflate the value of the houses that he builds, for a direct personal financial benefit. None is relevant to Ms. Hoffmann's situation.

In regard to matters that were not direct financial conflicts of interest, the Colarusso letter also cites an Opinion, which Mr. Ruane distorts, and a case, both of which are easily distinguishable from the present matter.

- *1988 N.Y. Op. Atty. Gen. (Inf.) 115.*
    - Mr. Ruane's brief characterization of this Opinion leaves out the two most important distinguishing factors: 1) in a matter that is before both the planning board and the zoning board, the person, ***while reviewing the project as a member of one such board,*** *appears before the other board to oppose the project*, and 2) the person is a ***neighbor*** of the project whose property, the Opinion emphasizes, will likely be affected by the project in a way different from the general public. Indeed, the main point of the Opinion is that a *neighbor* who opposes a project is to be distinguished from other members of a board, who, it points out, may bring their own "general views and philosophies concerning land use" to their duties. Neither of these two factors central to this Opinion apply to Ms. Hoffmann.
- *Schweichler v. Village of Caledonia, 45 A.D.3d 1281, (4th Dep't, 2007).*
    - In this case, three members of a planning board "signed a petition in favor…of the project" and one wrote a letter to the mayor supporting the project and expressing her interest in moving into the development. These were clear and express declarations of their predetermined commitment to approve the project.

- *Titan Concrete, Inc. v. Town of Kent, 94 N.Y.S.3d 817, (Sup. Ct., Putnam Cty., 2019).*
    - Mr. Ruane cites this for the proposition that a recused person should not participate in the proceedings. Of note, the person at issue in the case had recused herself because she was party to a lawsuit against the applicant and the project and the town's zoning board.

There is a blindingly obvious difference between having made an express commitment to an outcome in a matter—litigating or going on the record opposing the granting of a permit or calling for the approval of a project—and pointing to obvious factors that should be carefully considered in the review process. No case or opinion suggests that a person, like Ms. Hoffmann, who urges that certain factors of a proposed project are important and must be carefully considered, needs to recuse herself from the process.

The remainder of the authorities cited by Attorney Ruane address the point that recusal is not limited merely to not voting on the final decision, but also prohibits participation in the process. This point is, however, entirely irrelevant in the absence of a demonstrated requirement to recuse.

In sum, even looking only at Mr. Ruane's cherry-picked cases and opinions, there is not a convincing or on-point argument that Ms. Hoffmann should recuse herself. When reviewing a much more extensive body of New York cases, it becomes overwhelmingly clear that recusal is not called for here.

New York case law is consistent and overwhelming in finding that the kind of statement made by Ms. Hoffmann does not warrant recusal.

I have searched the database of New York case law, searching for "planning board", "zoning board," "bias," "recusal" and similar terms and read through over 100 cases that contained such terms. Most had no relevance to Ms. Hoffmann's situation. Relevant to Ms. Hoffmann's case, and other than Mr. Ruane's off-target examples addressed above, when cases involve allegations of bias *other than direct financial conflict of interest*, I have found ***no cases*** in which courts find recusal to be warranted. Here are some of the cases where recusal was found ***not*** to be warranted:

- *Segalla v. Planning Bd. of Town of Amenia*, 204 A.D.2d 332, (2nd Dep't, 1994): The Town of Amenia was considering a first draft of its revised zoning Master Plan, which, at the urging of the petitioner (who owns a gravel mining business), included a "floating" industrial/mining zone. "**At public hearings, Robert Jones, a resident of the Town, argued strongly against such a zone.** ***Subsequently, Jones was appointed to fill a vacancy on the Planning Board and voted to approve the final Master Plan, from which the draft provision in favor of the floating zone had been eliminated.*** **The petitioner contends that Jones' vote should not have been allowed as he had a conflict of interests,** that the board vote was thereby tainted, and that the adoption of the Master Plan by that vote is, therefore, invalid. **We disagree**. The record does not support the petitioner's allegation that Jones' opposition to the floating zone is based on his financial interest. **Because the alleged bias involved only personal opinion rather than**

any financial interest in the adoption of the Master Plan, there is no basis for setting aside the Planning Board's action.

- *Eadie v Town Bd. of Town of North Greenbush*, 47 A.D.3d 1021, (3rd Dep't, 2008): "we conclude that petitioners did not establish that the votes of Clemente and Reid should be invalidated due to claimed conflicts of interest or related improprieties. As noted by Supreme Court, **the fact that both Clemente and Reid previously expressed favorable views with respect to retail development in the Town does not constitute a basis for discounting their votes due to conflicts of interest.** Furthermore, in our view, nothing in the record clearly demonstrates that either individual stood to gain any financial or other proprietary benefit from the Planning Board's consideration of the VRS project that would mandate annulling their votes."
- *Troy Sand & Gravel Co., Inc. v. Fleming, 156 A.D.3d 1295*, (3rd Dep't, 2017): "because the alleged conflicts of interest and bias involve expressions of personal opinion, rather than any pecuniary or material interest in the denial of Troy Sand's application, we find that petitioners failed to establish a basis for setting aside the determination."
- *Laird v. Town of Montezuma*, 191 A.D.2d 986, (4th Dep't, 1993) repeats the point: "Further, because the alleged bias involved only expressions of personal opinion rather than any financial interest in the rezoning, there is no basis for setting aside the action of the Town Board."
- *Pittsford Canalside Properties, LLC v. Village of Pittsford, 137 A.D.3d 1566, (4th Dep't, 2016)*: both Galusha and Mayor Corby had expressed opposition to the Project before and after their elections, and prior to voting on the challenged resolutions. They were not disqualified from participating in the deliberations or voting on those resolutions, however, inasmuch as their "alleged bias involved only expressions of personal opinion" that did not constitute a basis for finding a conflict of interest."
- *Iskalo 5000 Main LLC v. Town of Amherst Indus. Development Agency*, 147 A.D.3d 1414 (4th Dep't 2017): The Court rejected a claim calling for an IDA Board member's recusal, stating "we reject it as without merit. At most, petitioners established that the Board member may have made 'expressions of personal opinion ... on matters of public concern,' which are insufficient to constitute a basis for finding a conflict of interest," (*citing to Pittsford Canalside, above.)*
- *Webster Associates v. Town of Webster, 59 N.Y.2d 220 (Court of Appeals, 1983):* New York's highest Court rejected the argument to invalidate participation of an official who had spoken against an applicant's application, and the Court also expressly distinguished between the financial conflicts in Tuxedo Conservation and Taxpayers Association (which required recusal) and the opinion statements in Webster (which do not require recusal).
- *There are others, consistent with the above.*

To summarize, the cases on recusal can be categorized into three types:

- Where there is an actual or potential ***financial benefit*** to the member in due to the board determination.
    - This is the situation underlying nearly all cases in which recusal was required.

- Where there may be no financial interest of the board member implicated in the matter, but the board member has ***taken substantial action*** in ***clear, express, and unequivocal efforts to achieve approval or denial*** of a project that the person is reviewing.
    - This is the situation that characterizes the few cases in which there is a non-financial basis for recusal.
- Where a board member has ***expressed views*** related to the project, particularly with respect to ***issues affecting the public*** generally.
    - This situation, which is Ms. Hoffmann's, does not warrant recusal.

Conflict of interest.

The essential purpose of conflict of interest and bias principles is to ensure that a public official is guided by the **public interest** only. Recusal is therefore appropriate when a member's *personal* interests (usually financial) are different from the general public interest. As several cases note, board members bring their own perspectives, life experiences, and policy priorities to their board roles, and this is both acceptable and desirable—obtaining and benefiting from multiple viewpoints is why boards are composed of multiple members. Ms. Hoffmann's letter is plainly a statement of widely recognized—and obvious—public concerns and does nothing more than emphasize the need for the board to give thorough consideration to those public concerns. There is no impermissible conflict or bias in such a viewpoint.

Recusal is not optional.

Recusal—as opposed to abstention—is an action that is required when there is an irresolvable conflict of interest. Inherent in recusal is an acknowledgment and admission of an impermissible conflict. In the absence of such a conflict, there is no basis for recusal and it would be improper to "admit" to a conflict that does not, in fact, exist.

The Planning Board's obligation is to issue a determination on the merits of the matter that comports with the requirements and limitations of the zoning code and is rationally based on the information in the record, within the parameters of discretion granted by the zoning code—and nothing else. (It is crucial for the Board to recognize that the law imposes both limitations as to what it may do as well as obligations as to what it must do.) Speculation about a potential lawsuit has no place in the Planning Board's consideration of the matter. The Board should not act, or fail to act, or modify its determinations, out of fear of a challenge by either proponents or opponents of the application, which would be a corruption of the process.

To do its job properly, the Planning Board needs the participation of all its members and their perspectives. Ms. Hoffmann should not recuse, and the Board should fully support her.

Sincerely,

Kenneth J. Dow