



Appellate division ruling addresses two significant issues

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In a recent decision, the Appellate Division, 4th Department, addressed two significant issues: (a) the implication of a lead agency's failure to notify an involved agency of the SEQRA review, and (b) whether planning board members who sign a petition in favor of a zoning amendment to benefit a particular project have prejudged the application.

Failure to Notify Involved Agency

A lead agency has the obligation of notifying all involved agencies with respect to SEQRA proceedings. Involved agencies are defined as those with approval authority over a project. Despite this, it is not uncommon for a planning board acting as lead agency to neglect to notify other involved agencies of the SEQRA review. For example, in *In the Matter of Laurence Schweichler, D.D.S. v. Village of Caledonia*, the typical situation arose where the planning board acting as lead agency failed to notify the zoning board of appeals concerning the conduct of the SEQRA process. The court concluded that this failure did not require invalidation of the negative declaration. This is a significant holding because the lead agency is required to undertake a thorough and complete environmental review prior to any involved agency approving a project. A complete failure to even include an involved agency in the SEQRA process could lead to the conclusion that the environmental review, and hence the negative declaration resulting from it, were inadequate to satisfy the lead agency's obligation to fully evaluate the project's environmental impacts. This decision confirms that such a failure does not constitute a fatal defect requiring annulment of the negative declaration.

Bias arising from petition and letter to mayor

The court was less forgiving when it evaluated the second issue, whether the appearance of bias or actual bias were present and, if so, whether it required annulment of the grant of site plan approval. The facts were fairly straightforward. The developer first obtained a rezoning of its property, and then obtained site plan approval from the village of Caledonia planning board to construct a multifamily housing project on the rezoned property. An objector sought to annul the rezoning and the planning board's approval, asserting among other things that certain planning board members had impermissibly prejudged the application by signing a petition supporting the rezoning and the project. Further, the planning board chairperson was deemed to have prejudged the application by writing a letter to the mayor supporting the rezoning and the project, noting that she, "would really like to see new housing available to [her] should [she] decide to sell [her] home and move into something maintenance free."

The court found that, although the actions did not constitute a technical violation of the General Municipal Law, the three planning board members who signed the petition supporting the rezoning appeared to have impermissibly prejudged the application and the project. Additionally, the planning

board's chairperson had manifested actual bias when she wrote the letter to the mayor supporting the project. The court concluded that the appearance of bias and actual bias necessitated annulment of the planning board's approval. Thus, the court reversed the approval and remitted the matter to the planning board for purposes of conducting another site plan review, this time without the biased members' participation. The court pointed out that the planning board had the authority to appoint alternate members to replace the biased members.

While applicants should typically be pleased if a planning board member supports its application, the manifestation of that support outside of the context of a hearing could create an appearance of impropriety. That appearance could be sufficient to annul any approvals and require a rehearing with alternate board members who may view the application in a less favorable light, not to mention the additional costs and time involved in a rehearing. Express support of an application, such as the chairperson's letter to the mayor in *Schweichler*, demonstrates actual bias, particularly where the support is based on a desire for personal gain, and can result in the invalidation of any approval.

Although an applicant can do little to control the actions of board members, if the applicant becomes aware that any board member has expressed support for the application outside the context of the hearing process, the applicant should seek the recusal of any such members and request the appointment of alternate members to hear the application.

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