

Matter of Titan Concrete, Inc. v Town of Kent

2019 NY Slip Op 33910(U)

February 8, 2019

Supreme Court, Putnam County

Docket Number: 500108/2018

Judge: Victor G. Grossman

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To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM**

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In the Matter of the Application of

DECISION & ORDER

TITAN CONCRETE, INC. and KENT INVESTORS,
LLC,

Index No. 500108/2018

Petitioners,

Sequence Nos. 1-3
Motion Date: 8/22/18

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against -

TOWN OF KENT, THE TOWN BOARD OF THE
TOWN OF KENT, MAUREEN FLEMING, WILLIAM
HUESTIS, JAMIE McGLASSON, SCOTT CHIN and
PAUL DENBAUM, individually and in their official
capacities as members of the Town Board of the Town
of Kent, and WILLIAM WALTERS, in his official
capacity as the BUILDING INSPECTOR OF THE
TOWN OF KENT,

Respondents.

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GROSSMAN, J.S.C.

The following papers, numbered 1 to 177, were considered in connection with the following motions:

<u>PAPERS</u>	<u>NUMBERED</u>
<u>Seq. #1</u>	
Notice of Petition/Summons with Verified Petition & Complaint/Saccente Affidavit/Bretti Affidavit/Biblow Affirmation/Exhs. 1-42/Memorandum In Support	1-48
Verified Answer and Objections in Point of Law/Affirmation in Support of Objection in Point of Law and Motion to Dismiss the Petition-Complaint/Denbaum Affidavit/Exhs. A-Z/Exhs. AA-SS/Memorandum of Law	49-97
Reply to Respondents-Defendants' Counter-Statement of Facts/Exh. 1/Bretti	

Reply Affidavit/Exh. 1/Saccente Reply Affidavit/Exhs. 1-2/Biblow Reply Affirmation/Exh. 1/Stellakis Reply Affirmation/Memorandum of Law in Reply	98-108
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Seq. #2

Notice of Motion/Saccente Affidavit in Support of Motion to Substitute/ Exhs. 1-2	109-112
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Seq. #3

Notice of Motion to Dismiss/Affirmation in Support/Denbaum Affidavit/ Exhs. A-Z/Exhs. AA-SS/Memorandum in Support	113-161
Biblow Affirmation in Opposition/Exhs. 1-3/Bretti Affidavit in Opposition/ Exh. 1/Saccente Affidavit in Opposition/Exhs. 1-2/Memorandum of Law in Opposition	162-171
Reply to Respondents-Defendants' Counter-Statement of Facts/Exh. 1/Affirmation in Reply/Cappelli Affidavit/Exhs. TT-VV	172-177

On February 7, 2018, Petitioner-Plaintiffs Titan Concrete, Inc. ("Titan") and Kent Investors, LLC ("Kent Investors") (collectively "Plaintiffs") commenced a hybrid Article 78 proceeding, declaratory judgment action, injunctive relief action, and plenary action against Respondents-Defendants Town of Kent ("Town"); Town Board of the Town of Kent ("Town Board"); Town Supervisor Maureen Fleming ("Supervisor Fleming"); William Huestis ("Huestis"), Jamie McGlasson ("McGlasson"), Scott Chin ("Chin"), and Paul Denbaum ("Denbaum"), individually and collectively in their individual capacities as members of the Town Board; and William Walters, in his official capacity as the Building Inspector of the Town of Kent ("Building Inspector") (Town, Town Board, Town Board Members and Building Inspector, collectively "Defendants").

Titan operates a concrete batch plant, located on commercial property owned by Kent Investors at 301 Route 52, Carmel, New York in the Town of Kent ("Property"). Kent Investors, as owners, leases the plant to Titan (Petition/Complaint at ¶¶3-4). The concrete batch plant has

been in operation for 70 years pursuant to a use variance issued by the Town Zoning Board of Appeals in 1948 (Petition/Complaint at ¶3). According to Plaintiff, the variance runs with the land and still applies to the Property (Petition/Complaint at ¶¶3, 20). Kent Investors purchased the Property on January 20, 2016, and entered into a lease with Titan on September 21, 2016 (Petition/Complaint at ¶¶28-29). Titan and Kent Investors began to renovate and repair the concrete batch plant, which included buying various equipment and trucks, expending approximately \$2.2 million (Petition/Complaint at ¶31).

On October 14, 2016, the Building Inspector issued a Building Permit, which covered “[r]enovation and repair of old concrete batch plant. Upgrade interior of the building. Repair concrete floor. Install new electrical service. Replace control trailer with shed. Install Water tank” (Petition/Complaint at ¶32, Exh. 5). During the renovation process, the Building Inspector issued a stop work order after a stairway was damaged during construction (Petition/Complaint at ¶¶33-34). After confirmation that the building was capable of being repaired, on November 10, 2016, the Building Inspector issued a letter stating that the plant was a nonconforming use and that that nonconforming use had been terminated and lost because the plant had been destroyed (Petition/Complaint at ¶¶36-37). But, after the Town’s structural engineer agreed with Plaintiff’s structural engineer that the building was not destroyed and could be repaired, in a February 27, 2017 letter,¹ the Building Inspector withdrew his November 10, 2016 letter, changed his determination, and decided that the nonconforming use was terminated under Town Code §77-47(A)(4) because the use was discontinued for periods aggregating 18 months during a 24-month period (Petition/Complaint at ¶¶38-40, Exh. 7).

¹Apparently this letter was misdated as February 27, 2016.

After much discussion between the parties, on May 2, 2017, the Building Inspector issued a determination in which he admitted that while the 1948 Use Variance was still applicable to the Property, it was not “a use variance, but rather a variance from the conditions required to be met in order to conduct a manufacturing business in the particular district” (Petition/Complaint at ¶¶41-44, Exh. 10). However, on July 17, 2017, the Zoning Board of Appeals (ZBA) reversed the Building Inspector’s conclusion, finding that “the 1948 variance is a use variance, which runs with the land to benefit the current owner” (Petition/Complaint, Exh. 3 at 12). The ZBA also explicitly stated (Petition/Complaint, Exh. 3 at 10-12):

The determinations of the Building Inspector do not address the question of whether use variances, assuming the 1948 variance is a use variance, expire after abandonment, discontinuance, or failure to implement. This is not a relevant issue on the appeal, and the ZBA is not compelled to address this contention by interested persons. Even so, the ZBA is not persuaded that the circumstances at 301 Route 52 amount to abandonment or discontinuance. They certainly do not entail an initial failure to implement the 1948 variance.

It should not be overlooked that the Town of Kent has a pattern and practice of treating concrete manufacture at 301 Route 52 as a permitted use. The Town of Kent and its officials have never characterized the use as one permitted due to prior non-conformity.

* * *

The pattern and practice of the Town of Kent relative to 301 Route 52 is consistent with a recognition that the historic industrial and manufacturing use was both lawful and ran with the land. Nowhere does this pattern and practice indicate that the activity conducted on 301 Route 52 was a prior non-conforming use.

Neither the Town Board nor the Town Board Members challenged the ZBA Decision.

On August 1, 2017, at its public meeting, the Town Board enacted a resolution in which it “strongly recommend[ed]” to the ZBA that it exercise its right to hold a rehearing and rescind its Decision, and to do so before August 7, 2017 (Petition/Complaint at ¶49, Exhs. 14-15 at 65). At

the meeting, Supervisor Fleming revealed that she was a member of Hill & Dale Property Owners (“Hill & Dale”), a local homeowner association that neighbors the Property, but she did not recuse herself from any of the discussions at that time, and, in fact, led the strategic conversation of how to urge the ZBA to reconsider its Decision (Petition/Complaint, Exh. 14 at 21-63).

On August 21, 2017, the ZBA held a meeting (Petition/Complaint, Exh. 16). It was revealed at the start of the meeting that because two Article 78 petitions had been filed with respect to their Decision, it no longer had jurisdiction over the matter (Petition/Complaint, Exh. 16 at 3-8).²

On September 26, 2017, the Town Board held a work session (Petition/Complaint, Exh. 21). At the meeting, the following occurred (Petition/Complaint, Exh. 21 at 27-29):

DENBAUM: Okay. I have a proposed amendment to the zoning chapter of the town code, which would prohibit the production of concrete. I will read it in order to safeguard the health –

FLEMING: Oh, excuse me. Before you do – we had an earlier version in the backup materials that were sent out yesterday. So if anybody would like to follow along, I have placed copies of the newer version on the table up here. So if you want to come up, then you can read along.

* * *

DENBAUM: Okay. So, in order to safeguard the health, safety, and welfare of the residents of the Town of Kent it is necessary to prohibit certain uses, which by their very nature in which they are conducted have

²Only one of these Article 78 matters remains pending before the undersigned, entitled Hill & Dale Property Owners, et al v. Town of Kent (Putnam County Index No. 603/2017). The other Article 78 matter was disposed by Decision & Order, on July 2, 2018, by the Hon. Janet Malone, J.S.C. Matter of the Application of John Vetri, et al v. Town of Kent, et al, Putnam County Index No. 598/2017. Both matters were addressed in that Decision & Order, which is now on appeal in the Appellate Division, Second Department. The appeal was perfected on February 1, 2019.

the potential to significantly impact the environment, pose a risk to human health and safety, or disserve or interfere with the reasonable community expectations regarding odors, noise, light, traffic, and water quality.

Prohibition in any use district except for the industrial office commercial district, which is the one located near Ludingtonville Road, the production of concrete, the operation of concrete products, plant, or the manufacture in any form of concrete is hereby expressly prohibited.

Any individual or business that is lawfully engaged in the production of concrete, the operation of a concrete products plant, or the manufacture in any form of concrete in any district except for that IOC district in the Town of Kent upon the effective date of this subsection shall become engaged in a legal nonconforming use that shall terminate by amortization no later than * * * two years immediately following the effective date of this subsection.

This is my proposal. I believe it would benefit the town, the residents of the town, and I hope I have the town board support on this.

FLEMING: Discussion?

(Applause)

The Town Board then engaged in a discussion with each other and members of the audience (Petition/Complaint, Exh. 21 at 29-47). During the discussion, Supervisor Fleming announced she was recusing herself because she is a “dues paying member” of Hill & Dale, which filed an Article 78 against the ZBA (Petition/Complaint, Exh. 21 at 32). Supervisor Fleming stated that “I have been advised by counsel that it makes sense at this point for me to recuse myself. So I will be abstaining. I hope people understand the reason for that. But since I’m a plaintiff, I think it would be untoward for me to – Do we want – If the board is good, we can have comments from the public” (Petition/Complaint, Exh. 21 at 32). In response to a

question from an audience member with respect to the status of the ZBA, Supervisor Fleming explained this “is a very hotbed issue. I mean, I live in a community that has filed an Article 78,” and this matter affects two communities and the town as a whole, and reminded the community that the ZBA members who resigned in September 2017 (apparently in response to this conflict), are deserving of the respect of the community as they were volunteers, but then engaged in a conversation about her actions as a Supervisor changing some of the laws to ensure meetings were open to the public, and the Town Board’s actions, with respect to the ZBA’s controversial decision (Petition/Complaint, Exh. 21 at 35-42).

When it came time to vote on the proposed Local Law, Denbaum moved, and Supervisor Fleming seconded, to add it to the agenda (Petition/Complaint, Exh. 21 at 64). The record reveals the “group” stated “aye” (Petition/Complaint, Exh. 21 at 64), and it was passed unanimously without any recusal or abstention by Supervisor Fleming (Petition/Complaint, Exh. 21 at 64, Exh. 22 at 5).

Denbaum then moved to refer the draft of the subject Local Law to the Planning Board pursuant to the requirements of Chapter 77 of the Kent Town Code, with Supervisor Fleming seconding the motion (Petition/Complaint, Exh. 21 at 64). The “group” voted “aye” (Petition/Complaint, Exh. 21 at 61), and the Town Board unanimously carried the motion (Petition/Complaint, Exh. 22 at 5). The Town Board then voted to conduct a public hearing on this proposed amendment on October 10, 2017 at 7 p.m., with Supervisor Fleming abstaining “[f]or reasons that I previously stated in that I am a member of Hill and Dale Property Owners, Inc., which is currently in litigation with the ZBA” (Petition/Complaint, Exh. 21 at 64-66, Exh. 22).

On October 5, 2017, Titan sent a letter to the Town Board, opposing the proposed Local Law and requesting that the letter be made part of the administrative record of the public hearing (Petition/Complaint, Exh. 23). Titan argued, inter alia, that this proposed Local Law is illegal, specifically targeted at Plaintiffs, and the two-year amortization period is unreasonable (Petition/Complaint, Exh. 23).

On October 10, 2017, the Town Board unanimously adjourned the public notice and hearing of the proposed Local Law to November 14, 2017 (Petition/Complaint, Exh. 24 at 1-2). No copy of the transcript of this meeting was provided with the motions to see what, if anything, Supervisor Fleming stated on the record.

At the November 14, 2017 meeting, the Town Board opened the public hearing on the proposed Local Law (Petition/Complaint, Exh. 25 at 3-4). Town Attorney Nancy Tagliafierro indicated that the Town Board will be adding language to permit an applicant to request an extension of time for the amortization period (Petition/Complaint, Exh. 25 at 4-5). The public then commented on the proposed Local Law (Petition/Complaint, Exh. 25 at 5-39), as well as Plaintiffs' counsel (Petition/Complaint, Exh. 25 at 9-24, Exh. 28-29). Supervisor Fleming responded to some of the allegations Plaintiffs' counsel made, defending the Town Board's actions and calling offense to counsel's allegation that the public meetings incited members of the public to damage Plaintiffs' property (Petition/Complaint, Exh. 25 at 22-23). The Town Board adjourned the public hearing until November 28, 2017, but permitted written submissions in the interim (Petition/Complaint, Exh. 25 at 39). Supervisor Fleming voted on the motion to open and to adjourn the public meeting on this issue (Petition/Complaint, Exh. 27 at 1, 5).

At the November 28, 2017 meeting, after Supervisor Fleming re-opened the public

hearing on the Local Law, the Town Board indicated there was an amendment to the proposed Local Law related to extensions of the amortization period, and it intended on keeping the meeting open until at least then next meeting for further comments (Petition/Complaint, Exh. 31 at 2-5). Tagliaferro indicated that the Town Board was going to make “all of the referrals again” related to the proposed amendment (Petition/Complaint, Exh. 31 at 5-6). Charlotte Biblow, Titan’s counsel, asked, inter alia, if the Town Board had received a response from the Planning Board related to the original proposed law, to which Tagliaferro responded that it did not, but it was not required under the Town Code (Petition/Complaint, Exh. 31 at 6-9). The following colloquy also occurred related to the scope of Supervisor Fleming’s recusal (Petition/Complaint, Exh. 31 at 8-9):

BIBLOW: Okay. The other question I have is for you, Ms. Fleming. As I recall, when we started this process back in October, you recused yourself from this discussion of this local law. I notice that you were the one who made the motion to open up the public hearing. Are you continuing to recuse yourself, or have you changed your mind on that?

FLEMING: I’m recusing myself from the vote. But I can make a motion to open a public hearing.

BIBLOW: Are you also recusing yourself from any discussions on the law? I’m just trying to figure out the scope of your recusal.

Tagliaferro interjected and stated that this was the public comment period of the meeting, to which Biblow responded that she “was just curious as to, you know, the scope of [Supervisor Fleming’s] recusal” (Petition/Complaint, Exh. 31 at 9). Public comments were then taken, and the matter was adjourned until December 5, 2017 (Petition/Complaint, Exh. 31 at 10-24). The minutes reflect that Supervisor Fleming moved to and participated in the vote to open the public

hearing session on the amendment (Petition/Complaint, Exh. 34 at 1). She also voted to adjourn the public hearing (Petition/Complaint, Exh. 34 at 3).

On December 5, 2017, the Town Board took public comments again, including ones from Titan's counsel (Petition/Complaint, Exh. 38 at 9-26, 125). In response to Titan's question related to Supervisor Fleming's recusal – specifically “from the discussions or any motions related to the revised proposed law” – Tagliaferro stated “[s]he's recusing herself from voting on the local law” (Petition/Complaint, Exh. 38 at 15). The Town Board referred the revised proposed law to Town Planning Board on November 29, 2017, the SEQRA negative assessment was done by Tagliaferro, and the proposed law was referred to the County Planning Board, as well as the adjoining municipalities (Petition/Complaint, Exh. 38 at 12-13). At the same meeting, the Town Board voted, with Supervisor Fleming abstaining, to adopt the negative declaration, which determined that the adoption of the Local Law will not have a significant adverse impact on the environment (Petition/Complaint, Exh. 38 at 109-11, Exh. 39 at 4-5). The Town Board also voted, with Supervisor Fleming abstaining, to declare Kent Investor's protest petition void because it lacked the statutorily required signatures (Petition/Complaint, Exh. 38 at 121-22, Exh. 39 at 7). The matter was adjourned until December 19, 2017 (Petition/Complaint, Exh. 38 at 27), a vote in which it appears Supervisor Fleming participated (Petition/Complaint, Exh. 38 at 26-27).

Then, on December 19, 2017, the Town Board, after hearing further public comment and closing the public hearing, voted to adopt Local Law No. 4 (Petition/Complaint, Exh. 41 at 44-48, Exh. 42), with Supervisor Fleming abstaining (Petition/Complaint, Exh. 41 at 48, Exh. 42 at 2).

As a threshold matter, Plaintiffs are seeking to substitute Kent Investors II, LLC as successor-in-interest to, and in place and instead of, Kent Investors, LLC (seq. #2). According to Plaintiff, on June 8, 2018, Kent Investors II, LLC purchased from Kent Investors, LLC, the subject property herein (Saccante Affidavit at ¶3, Exh. 1). As part of that transaction, Kent Investors, LLC assigned its claims in this proceeding to Kent Investors II, LLC (Saccante Affidavit at ¶4, Exh. 2). Defendants do not oppose this substitution, the Court finds the substitution proper (see CPLR §1018), and the motion is granted and the caption is amended accordingly.³

Next, the Court must address Plaintiffs' argument that "[th]e enactment of the Local Law is void because Supervisor Fleming had an admitted conflict of interest, stated on the record that she was recusing herself from participating in the matter, was reminded and was well-aware of her conflict of interest and, yet, continued to participate in the public hearing for the Local Law. She also voted on several motions concerning the proposed Local Law" (Memorandum of Law at 16-17). Plaintiffs maintain that these violations of her recusal "tainted" the enactment of the Local Law (Memorandum of Law at 17). The Court agrees.

"Resolution of questions of conflict of interest requires a case-by-case examination of the relevant facts and circumstances." Matter of Pittsford Canalside Props., LLC v. Village of Pittsford, 137 A.D.3d 1566, 1567-1568 (4th Dept. 2016), quoting Matter of Parker v. Town of Gardiner Planning Bd., 184 A.D.2d 937, 938 (3d Dept.), lv. denied 80 N.Y.2d 761 (1992). It is not necessary that a specific provision of the General Municipal or local law be violated to find a conflict of interests. See Elissa Y. Killian, Esq., 1998 N.Y. Op. Atty. Gen. (Inf.) 1063

³The Court will continue to refer to Kent Investors II, LLC as Kent Investors.

(N.Y.A.G.), 1998 WL 388603 at n 2, citing Matter of Zagoreos v. Conklin, 109 A.D.2d 281, 287 (2d Dept. 1985); Matter of Conrad v. Hinman, 122 Misc.2d 531, 534 (Sup.Ct. [Onondaga] 1984). “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.” Jerome J. Levenberg, Esq., 2002 N.Y. Op. Atty. Gen. (Inf.) 1028 (N.Y.A.G.), 2002 WL 437992 (2002). “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.” Tuxedo Conservation & Taxpayers Assn v. Town Bd. of Town of Tuxedo, 69 A.D.2d 320, 325 (2d Dept. 1979), quoting Mills v. Town Plan & Zoning Commission of the Town of Windsor, 144 Conn. 493, 134 A.2d 250, 253 (1957). And, “[i]t is critical that the public be assured that their officials are free to exercise their best judgment without any hint of self-interest or partiality, especially if a matter under consideration is particularly controversial.” Dudley v. Town Bd. of Town of Prattsburgh, 22 Misc.3d 1128(A) (Sup.Ct. [Steuben] February 26, 2009), quoting Matter of Byer v. Town of Poestenkill, 232 A.D.2d 851, 852 (3d Dept. 1996). “Thus, where a public official is uncertain about whether he should undertake a particular action due to an actual or potential conflict, he must recuse himself entirely from the matter in question unless he procures an advisory opinion from a local ethics board that concludes otherwise.” Linda Riley, Esq., 2002 N.Y. Op. Atty. Gen. (Inf.) 1024 (N.Y.A.G.), 2002 WL 437994 (2002), citing Dennis V. Tobolski, Esq., 1998 N.Y. Op. Atty. Gen. (Inf.) 1087 (N.Y.A.G.), 1998 WL 643364 (1998) (emphasis added); see also David A. Menken, Esq., 1999 N.Y. Op. Atty. Gen. (Inf.) 1052 (N.Y.A.G.), 1999 WL 626048 (1999) (recusal requires the official in question to avoid “taking any actions with respect to that matter”).

Here, Supervisor Fleming was a member of the homeowner association suing, in another, but related, action, not only Plaintiffs, but also the Town's Zoning Board. Supervisor Fleming arguably has a personal interest in the outcome of this litigation, not just as a member of the general public, but also as a plaintiff in the related litigation – a fact that she publicly acknowledged (Petition/Complaint, Exh. 21 at 32). These facts differ from those in Matter of Pittsford, supra. In Pittsford, a member of the village's board of trustees and the mayor were found to not have conflicts of interest that would have disqualified them from participating in deliberations and determinations concerning the SEQRA review of a proposed mix-use development in the village, despite their expressed opposition to the project before and after their elections and prior to voting on the resolution because their "alleged bias involved only expressions of personal opinion that did not constitute a basis for finding a conflict of interest." Id.

Furthermore, Supervisor Fleming's asserted recusal from any voting on this issue was insufficient. In fact, she conflated recusal with abstention – two very different actions. Supervisor Fleming presided over the meetings and remained present during every discussion about this issue, contrary to her stated recusal. The New York State Attorney General has stated specifically that a "board member's participation in deliberations has the potential to influence other board members who will exercise a vote with respect to the matter in question. Further, * * * a board member with a conflict of interests should not sit with his or her fellow board members during the deliberations and action regarding the matter. The mere presence of the board member holds the potential of influencing fellow board members and additionally, having declared a conflict of interests, there would reasonably be an appearance of impropriety in the

eyes of the public should the member sit on the board.” Richard S. Mayberry, Esq., 1995 N.Y. Op. Atty. Gen. (Inf.) 2 (N.Y.A.G.), 1995 WL 112012 (1995).

While Supervisor Fleming announced she was recusing herself from any voting regarding the matter, it was her presence at the meeting, as well as her engagement in discussions with the public about the issue, that makes her presence problematic. She admitted to having many conversations with community members about this issue and their concerns. She was vague about with whom she spoke, and it is unclear if she relayed the substance of those conversations to her fellow Board members while in executive session or outside of the public meeting. There is an appearance, or the threat of an appearance, that she proverbially “drove the bus” when it came to enacting the subject Local Law.

In addition, despite Supervisor Fleming’s assertion that she basically only handled the administrative aspects of her role as Supervisor during the meetings and did not participate in the hearings and the voting on substantive applications, the record refutes this. She engaged the public about the proposed law during the public comment section of the meetings. She voted on aspects of the Local Law, including referring it to the Planning Board and adding it to the agenda for discussion. Even if these actions were considered procedural or ministerial, the better course would have been to defer to the Deputy Supervisor, or another Town Board member. Her mere presence, in front of her neighbors and the public, where it was well known that her homeowner association’s lawsuit was pending, could have influenced her fellow Town Board members. And even if it did not, it had the appearance of doing so. See Verner M. Ingram, Esq., 1988 N.Y. Op. Atty. Gen. (Inf.) 115 (N.Y.A.G.), 1988 WL 410580 (1988) (opposition of a neighbor to a proposed building project should disqualify that individual as a member of a village planning

board or zoning board of appeals from hearing and determining an application on behalf of the project). Simply put, her continued presence gave her neighbors the impression that they had an “in” with the Town Board, and Plaintiffs with the belief that they “didn’t stand a chance”.

Furthermore, Supervisor Fleming attended a number of executive sessions in which “current litigation” was discussed. This Court cannot ascertain whether that included Hill & Dale’s litigation and whether she remained silent during any of those discussions, or excused herself from it. However, based on the information before the Court, she moved to adjourn the meetings into and out of executive session (Petition/Complaint, Exhs. 22, 24, 27, 34, 39), leading the Court to conclude, without any evidence to the contrary, that she likely remained in those confidential meetings, and possibly participated in discussions about this particular litigation. And most importantly, her presence in those meetings, even if she remained silent, could have influenced her colleagues.

Finally, there is no evidence before the Court that she sought an opinion from a local board of ethics. See Linda Reily, Esq., 2002 N.Y. Op. Atty. Gen. (Inf.) 1024 (N.Y.A.G.), supra.

Accordingly, in light of the fact that Supervisor Fleming did not properly and completely recuse herself from any discussion with respect to Local Law No. 4, the Court finds that the entire process was tainted, rendering Local Law No. 4 invalid.

Based upon the foregoing, that this Court is declaring Local Law No. 4 a nullity, all other claims and substantive arguments are not yet ripe, and therefore, the Court declines to reach them, and it is hereby

ORDERED that Petitioners’ motion to substitute Kent Investors II, LLC as successor-in-interest to and in place and instead of Kent Investors, LLC (seq. #2), is granted, and the caption is

amended accordingly; and it is further

ORDERED that Plaintiffs' Petition (seq. #1) is granted to the extent stated herein, Local Law No. 4 is deemed invalid, and all remaining claims for relief are denied; and it is further

ORDERED that Defendants' motion (seq. #3) is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
February 8, 2019


HON. VICTOR G. GROSSMAN, J.S.C.

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