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February 13, 2009

Town Board
Town of Milan
20 Wilcox Circle
Milan, NY 12571

Re: Recusal of Board Members

Dear **Supervisor Barrett** and Members of the Board:

You have inquired if a Board member should recuse **him/herself** where **his/her** spouse has a matter before the Board.

Conflicts of interest are governed by Article 18 of the General Municipal Law and by the Town's own Ethics Law, which is codified at Chapter 29 of the Town Code. It is not necessary that a specific provision of the General Municipal Law be violated in order to **find** a conflict of interest. Zagoreos v. Conklin, 109 A.D.2d 281 (2nd Dept., 1985); Op. Atty. Gen. 90-38. Furthermore, while Chapter 29 similarly does not address the question directly before the Board, as a general rule, public officials should avoid circumstances that compromise their ability to make impartial judgments solely in the public interest. The test to be applied is not whether there **is** a conflict, but whether there **might** be. Tuxedo Conservation and Taxpayers Associations v. Town Board of the Town of Tuxedo, 69 A.D. 2nd 320 (2nd Dept., 1979). 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. Id.

There are a number of leading cases analyzing situations where a prohibited conflict of interest may not necessarily exist, but where there may be an appearance of impropriety warranting recusal and abstention. "Indeed, in order to maintain public confidence in the integrity of government, public **officials** must avoid even the appearance of impropriety." OD. Atty. Gen. 2002-8; Matter of Tuxedo, supra. It 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



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consideration is particularly controversial." Matter of Bver v. Town of Poestenkill, 232 A.D.2d 851 (3rd Dept., 1996.) Therefore, if a public official is uncertain if **he/she** should consider a particular matter due to an actual or potential conflict, **he/she** must recuse **himself/herself** entirely from the matter in question. That said, since the Town has established a Town Board of Ethics in §29-7, the individual could seek an advisory opinion from the Ethics Board as to the necessity to recuse.

There are also cases which state that the member with the conflict should not only abstain from deliberation and voting, but should in fact, remove themselves from the body, and not be present, during the debate so that no one can suggest that person has attempted to influence the outcome by their presence. 95-2 Op. Atty. Gen.; 99-21 Op. Atty. Gen.

Any participation by an individual with a conflict of interest or appearance of impropriety exposes both the individual and the Town to potentially drastic consequences, including the possibility that a Resolution or Local Law may be overturned by a court as a result of such member's participation. The decisions of local boards have been set aside based upon a judicial finding of conflicts of interest of board members participating in the decisions. Op. Atty. Gen. 90-38.

In the specific matter before the Board, where a close family member, such as a spouse, of a Board member has a matter before the Board, the Board member should recuse **him/herself from** deliberations and voting on such issue in order to avoid any appearance of impropriety.

I hope that I have been of assistance. Should you have any further questions, please do not hesitate to contact the undersigned.

Very truly yours,

Gellert & Klein, PC

By:


Pamela Richardson