

COPY

SUPREME COURT : STATE OF NEW YORK  
TRIAL/SPECIAL TERM PART : ORANGE COUNTY

Present: Hon. James D. Benson, Acting Justice

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In the Matter of the Application of

NED KOPALD, THOMAS W. BACHERT, JAMES J.  
McCORMACK and MARY C. McCORMACK,

Petitioners,

-against-

THE PLANNING BOARD OF THE TOWN OF HIGHLANDS  
and

THEODORE H. SHELDON and ELIZABETH H. SHELDON,

Respondents,

DECISION/ORDER

Index No. 5001, 1983

Motion Date: 10/31/83

Motion

Cal. Number 5

For an Order Pursuant to Article 78 of the  
Civil Practice Law and Rules annulling and  
reversing a Decision made by Respondent  
Planning Board granting Subdivision approval to  
Respondents Theodore and Elizabeth Sheldon.

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The following papers numbered 1 to 17 read on this  
petition by Petitioners Ned Kopald and Thomas W. Bachert pursuant  
to CPLR Article 78 for an order annulling and setting aside a  
decision of the Respondent Planning Board of the Town of  
Highlands made on July 21, 1983 granting subdivision approval to  
Respondents Theodore H. Sheldon and Elizabeth H. Sheldon:

Notice of Petition and Petition	1-2
Verified Answers	3-4
Replying Affidavits	5
Respondent's Memorandum of Law; Subdivision Regulations of the Highlands Falls Community; Chapter 30 (Zoning)	6-8
Exhibits, transcript	9-17

Upon the foregoing papers it is ordered that this  
petition is granted.

In this proceeding, petitioners challenge a decision of the Respondent Planning Board of the Town of Highlands granting subdivision approval to respondents Theodore H. Sheldon and Elizabeth H. Sheldon.

The transcript of the minutes of the June 16, 1983 meeting of the Planning Board discloses that three of five members were present, namely, Chairman Paul Sevik, Frank Fey and Loretta Burns. Discussion occurred concerning the Sheldon application to subdivide, with comments elicited from the public. At the conclusion of the colloquy, the three board members unanimously voted to close the public hearing "...and that the Board have an Executive Session to review and make a decision". (Transcript, p.5).

On July 21, 1983, the full Board met and excused themselves and met in Executive Session to review the Sheldon application. Upon completion, the regular meeting resumed, at which point the transcript of the minutes indicates that chairman Sevik announced that he would abstain from all voting on the Sheldon application as he had prepared the subdivision map for the applicants. (Transcript, p.1). This is the first instance on the record in which Mr. Sevik disclosed his business relationship with the Sheldons.

There are a number of factors which compel the Court to grant the relief petitioners seek. First and foremost is Mr. Sevik's relationship with the Sheldons and his position on the Planning Board. Even if he refrained from active participation in the deliberations over the application for subdivision approval, the fact that the survey map bore his name, making it obvious to the Planning Board as to whose work product was being submitted in support of the application, coupled with his presence at both meetings convened in part to consider the application which is now in dispute, strongly suggests advocacy of his own work. Such acts constitute impermissible conduct.

As owners of property within proximity of the subject premises, petitioners Kopald and Bachert are, as a matter of law, aggrieved persons upon whom Town Law Section 267(7) confers the right to seek judicial determination of the decision of the Respondent Planning Board of the Town of Highlands. Prudco Realty Corp. v. Palermo, 93 AD2d 837 (2nd Dept., 1983) and the authorities therein cited.

It was "egregious conduct" for the planning board chairman to participate in the vote to hold an executive session.

Matter of Tuxedo Conservation and Taxpayers Association et al. v. Town Board of Town of Tuxedo, 69 AD2d 320 (2nd Dept., 1979). Discounting his vote, the motion to retire into executive session was improper in that there was no quorum of the board at that point to enable such a vote to transpire.


The record further indicates that the respondent Planning Board did not comply with Article 7 (Open Meetings Law) of the Public Officers Law. The purpose of the executive session was not to discuss proposed, pending or current litigation, so as to cloak the session with the protection afforded by Public Officers Law, Section 100(1)(d). Instead, it was scheduled solely to discuss and decide the subdivision request by respondents Theodore and Elizabeth Sheldon (pp 5 and 7, transcript of minutes of June 16, 1983 meeting and p. 1 of transcript of minutes of July 21, 1983 meeting). There is also no indicia that the session was called for the purpose of discussing litigation strategy, an exception which permits barring the public. See Concerned Citizens v. Town Board of Yorktown, 83 AD2d 612 (2nd Dept., 1981).

The argument that the executive session was warranted because "potential" litigation was to be discussed is without merit. The Committee on Open Government, created by statute (Public Officers Law, Section 104), has consistently advised that "such a subject is not an appropriate topic for discussion in an executive session, for virtually any subject discussed by a public body could eventually be the topic of litigation". (Exhibits attached to Petitioners' Reply Affidavit).

There is absolutely no evidence before this Court that the Respondent Planning Board of the Town of Highlands identified "with particularity the pending, proposed or current litigation to be discussed during the executive session so as to justify its determination. Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 111 Misc.2d 303 (1981).

Lastly, the Court denies, with leave to reapply, Petitioners' request for costs and reasonable counsel fees pursuant to Public Officers Law, Section 89(4)(c). This relief was not requested in the Notice of Petition.

Dated: Poughkeepsie, New York  
February 24, 1984

  
A.J.S.C.

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