



For The Record

Planning and Zoning, Peddlers and Solicitors, and Public Officers: A Follow-up to NYCOM's 2013 Fall Training School

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One of the first things most local government officials and employees learn when they take office is that there is a LOT they need to learn as a municipal official or employee! Municipal budgeting, accounting, competitive bidding, the Freedom of Information Law, the Open Meetings Law, civil service, administering police and fire departments, administering water and sewer departments, emergency management, records retention, the procedure for adopting local laws, municipal ethics, and public officers law, are just some of the topics municipal officials and employees must know to effectively carry out their jobs and run their local governments. NYCOM's Annual Fall Training School offers over 55 sessions of training to city and village officials and employees on these and many other topics. Invariably, there are questions which presenters do not have an opportunity to respond to during the Conference. Consequently, city and village officials should take advantage of the numerous publications NYCOM has produced and made available to NYCOM members at www.nycom.org. In addition, below is a brief follow-up discussion of several questions that were raised at NYCOM's 2013 Annual Fall Training School.



Can the Same Individual Serve on a Planning Board and Zoning Board of Appeals?

If a city or village has adopted zoning, New York State Law requires the city or village to have a zoning board of appeals (ZBA)¹ for the purpose of "hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any [zoning] local law."²

In addition, cities and villages *may* create planning boards to handle other land use matters such as site plan and subdivisions approvals and special use permits. Cities and villages are not required to create planning boards, however, even if they establish procedures for approving site plans and subdivisions and issuing special use permits.³

Ironically, while local governments with zoning *must* have a ZBA, ZBAs are called in to service relatively infrequently compared to planning boards that are charged with approving site plans, subdivisions, and special use permits. As a result, it is not uncommon for a municipality to find its planning board busy handling numerous applications, while its ZBA is rarely called on to hear appeals or variance requests. In addition to dealing with this unbalanced workload between ZBAs and planning boards, many local governments struggle to find qualified individuals who are willing to serve as either a member of the ZBA or planning board.

One solution city and village officials seek for these problems is to appoint

the same individuals to serve on both the planning board and the ZBA. New York State Law is silent as to whether this is allowed. The Office of the Attorney General has opined, however, that "where local zoning regulations give the zoning board of appeals authority to review decisions made by the planning board, one person should not simultaneously hold the positions of planning board member and zoning board of appeals member."⁴ The basis for this conclusion by the Office of the Attorney General is the legal principle known as the prohibition against dual-office holding, also referred to as incompatibility of office.

Incompatibility of office is different from conflict of interest, although the terms are often incorrectly interchanged. The principle of compatibility of office prohibits an individual from holding certain municipal offices simultaneously. It is a court-made rule of law based upon public policy concerns and provides that offices and positions of employment are incompatible when either (a) they are constitutionally or statutorily prohibited, (b) one position is subordinate to the other, or (c) there is an inherent inconsistency between the two offices. The prohibition against dual-office holding can be stated as follows, "Incompatibility . . .

is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both."⁵

While the Office of the Attorney General has cautioned against the same individual serving as a member of a municipality's ZBA and planning board if the ZBA reviews planning board determinations, no New York State Law actually provides for the ZBA to review planning board determinations. To the contrary, determinations regarding site plan, subdivision, and special use permit applications are all, per state statute, subject to Article 78 review.⁶ Consequently, so long as a city or village does not establish such an appellate process, the same individual may serve on both a ZBA and planning board.

Instead of appointing the same individual to serve on a ZBA and planning board, another tack local officials can take to address this problem is to abolish the planning board and designate the ZBA as the entity having jurisdiction to approve site plans, subdivisions, special use permits, and any other land use approvals required by the municipality. State law actually expressly au-

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thorizes cities and villages to designate a public body other than a planning board to approve site plan and special use permits.⁷ While the relevant sections of State Law dealing with subdivision approval do not include the same express authorizing language, cities and village may, pursuant to Municipal Home Rule Law § (1)(ii)(c)(1) and General City Law § 19(1), and Municipal Home Rule Law § (1)(ii)(e)(3) respectively, authorize ZBAs to undertake subdivision approval. Moreover, in granting ZBAs' appellate jurisdiction over zoning matters, General City Law § 81-a(4) and Village Law § 7-712-a(4) expressly state that a city or village may, by local law, provide ZBAs with other duties, responsibilities, and powers.

Consequently, local officials who are faced with the challenge of finding enough qualified individuals to serve on the ZBA or planning board may wish to consider appointing the same individual to serve on both boards or abolishing the planning board and transferring its responsibilities to the ZBA. Of course, local officials should consider

all of the ramifications of such actions, including whether the ZBA would be overwhelmed with applications for site plan, subdivision, and special use permit approvals in addition to zoning appeals and variance requests.



Individuals going door-to-door within a community can be a major source of concern, giving rise to complaints from residents who are worried about potential criminal activity; obnoxious, rude, or pushy solicitors or peddlers; and people ringing their door bells late at night. Unfortunately, regulating door-to-door peddling, soliciting, can-

vassing, and advocacy to address these concerns is not easy. The First Amendment provides substantial protections to individuals going door-to-door to communicate their social, political, or religious ideas and positions.

The first step in effectively addressing the potential negative effects of unwanted door-to-door activity is understanding that door-to-door activity falls into two general categories: commercial and non-commercial speech.

Individuals engaging in non-commercial door-to-door activity are shrouded in the highest level of First Amendment protection. Whether they are evangelizing their religious faith or advocating for their political or social cause, such activities are strongly protected by the First Amendment, and any regulations of non-commercial speech will be closely scrutinized by the courts. Local governments may impose **reasonable** time restrictions on non-commercial door-to-door activity. For example, ordinances that prohibit door-to-door activity after 9:00 p.m. have been upheld.

However, ordinances that have prohibited door-to-door activity after 5:00 p.m. or prohibit such activity on the weekends have generally been struck down as being unreasonable time restrictions and therefore unconstitutional.⁸ Moreover, local governments cannot require licensing or permitting of individuals or groups canvassing solely to communicate their social, political, or religious ideas and positions.⁹

Note, however, that if a group is soliciting funds to further its non-commercial activities (i.e., donations for its religious, political, or social cause), local governments may impose a permitting requirement. The Supreme Court pointed out this distinction between non-commercial speech which involves solicitations and non-commercial speech which does not involve solicitations in Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton,

The text of the Village's ordinance prohibits "canvassers" from going on private property for the purpose of explaining or promoting any "cause," unless they receive a permit and the residents visited have not opted for a "no solicitation" sign. Had this provision been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village's interest in protecting the privacy of its residents and preventing fraud.¹⁰

Thus, local governments have more latitude in regulating door-to-door soliciting and commercial activity. However, because of the complexities involved in regulating First Amendment activity, municipal officials must use caution when establishing any regulations on any type of door-to-door activity. Moreover, the city or village attorney should always be consulted before adopting a regulation of door-to-door activity. It is not uncommon for local officials to run afoul of Constitutionally protected speech when implementing door-to-door permitting programs, either because they vest too much discretion in the permitting official, the regulation

treats speech differently because of its content, or because the regulation is overly broad. The result has been that "[f]or over 50 years, the [U.S. Supreme] Court has invalidated restrictions on door-to-door canvassing and pamphleteering." See Watchtower Bible & Tract Soc'y.

Because of the difficulties of drafting and administering a Constitutional door-to-door regulatory scheme, local officials may wish to consider an alternative approach to regulating or restricting door-to-door activities. Implementing a public service campaign to educate city or village residents about their rights when it comes to individuals coming door-to-door, including informing residents about their property rights and whom they should contact if door-to-door solicitors and salesman become overly aggressive or refuse to leave the property when told to do so, may serve as a better method of dealing with unwanted door-to-door activity.



One issue that came up in several sessions at Fall School and which is a frequent inquiry to NYCOM throughout the year is the question of whether a particular position is a public officer. Individuals can serve a local government in one of three ways: they can be public officers, employees, or independent contractors. Each type of service is governed by its own set of rules. Adding confusion to this issue, however, is that some public officers are employees whose employment is governed by civil service rules, while other public officers serve a term of office and are exempt under civil service rules.¹¹

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PUBLIC OFFICER SERVES A TERM OF OFFICE	PUBLIC OFFICER IS AN EMPLOYEE	EMPLOYEE IS NOT A PUBLIC OFFICER
Must Be a Citizen of the United States;	Must Be a Citizen of the United States;	Is Not Required to Be a Citizen of the United States;
Must Be at Least 18 Years Old;	Must Be at Least 18 Years Old;	Must Meet Minimum Age Requirements Under Labor Laws
Must Be a Resident of the City of Village, Unless the Residency Requirement is Extended for Appointed Officers; ¹⁴	Must Be a Resident of the City of Village, Unless the Residency Requirement is Extended for Appointed Officers; ¹⁵	Is Not Required to Reside in the Village Unless the Municipality Has Passed a Local Law Requiring Residency;
Is Entitled to the Salary as an Emolument of the Office;	Compensation is Set By Local Governing Board, Subject to State's Civil Service and Labor Laws and Any Applicable Labor Contract;	Compensation is Set By Local Governing Board, Subject to State's Civil Service and Labor Laws and Any Applicable Labor Contract;
Is Required to File an Oath of Office Within 30 Days of Appointment;	Is Required to File an Oath of Office Within 30 Days of Appointment;	Is Not Required to Take or File an Oath of Office;
Serves a Specific Term of Office (e.g., 1, 2 or 4 Year Term);	May Have an Employment Contract for a Specific Period or May Be Covered by Civil Service Law Regarding Termination of Service;	May Have an Employment Contract for a Specific Period or May Be Covered by Civil Service Law Regarding Termination of Service;
May Hold Over In Office After the Expiration of the Term of Office (Does Not Apply to Village Justice);	Hold Over In Office Is Inapplicable;	Hold Over In Office Is Inapplicable;
Vacancy of Office Occurs if One of the Events Identified in Public Officers Law § 30 Occurs; and	Vacancy of Office Occurs if One of the Events Identified in Public Officers Law § 30 Occurs; and	Is Not Subject to Public Officer's Law § 30; Serves Until Either Voluntarily or Involuntarily Separated From Service; and
Village Officials May Be Removed From Office During their Term Pursuant to Public Officers Law § 36, Unless a Local Law Providing for the Discipline of a Public Officer Has Been Adopted. Cities Check Your Charters.	Serves at the Pleasure of the Appointing Authority, Subject to the Protections Potentially Provided By Statute (i.e., Civil Service Law) or a Labor Contract.	Serves at the Pleasure of the Appointing Authority, Subject to the Protections Potentially Provided By Statute (i.e., Civil Service Law) or a Labor Contract.
<i>Examples include:</i> - Mayor - City Council Member - Village Trustee - Clerk - Treasurer - Deputy Clerk - Deputy Treasurer - Comptroller/Controller	<i>Examples include:</i> - Police Officer - Code Enforcement Officer - Building Inspector - Parking Enforcement Officer	<i>Examples include:</i> - DPW Laborer or Machine Equipment Operator - Clerical/Administrative Staff - Justice Court Clerk

To understand this issue fully, one must first understand how a public officer is defined. New York's courts have described public officers as those governmental positions whose duties involve the exercise of some sovereign power or powers of the municipality. Stated differently, "A position is a public office when it is created by law with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned and which is continuing in its nature and not occasional or intermittent."¹²

Even courts have had difficulty distinguishing between public officers and those employees who are not public officers.¹³ The table to the left compares the similarities and differences between (a) public officers who serve a term of office, (b) public officers who do not serve a term of office, and (c) employees who are not public officers.

Conclusion

The number of subjects local officials need to be versed in is much more than can be put in to one NYCOM *Municipal Bulletin* article or even an entire edition of the *Municipal Bulletin*, and that is why NYCOM has published the *Handbook for City Officials* and the *Handbook for Village Officials*, both of which are available to download for free to NYCOM members at www.nycom.org. However, city and village officials can greatly benefit from attending the live training sessions offered at NYCOM's many conferences. So mark your calendars for NYCOM's 2014 Annual Meeting May 4-6, 2014 at the Gideon Putnam Hotel in Saratoga Springs and the 2014 Fall Training School September 15-18, 2014 at the Crowne Plaza in Lake Placid. You can't afford not to attend.

Endnotes

1. Also sometimes referred to as a board of zoning appeals or BZA.
2. See *General City Law § 81-a and Village Law § 7-712-a*. See also *General City Law § 81-b and Village Law § 7-712-b*.
3. See *Attorney General Opinion No. 81-77*, p.216.
4. See *Attorney General Opinion No. 93-3*, p.1005.
5. *Ryan v. Green*, 58 N.Y. 295 (1874).
6. See *Village Law §§ 7-725-a(11), 7-725-b(9), 7-740, and General City Law §§ 27-a(11), 27-b(9), and 38*.
7. See *Village Law §§ 7-725-a(2) and 7-725-b(2), and General City Law §§ 27-a(2) and 27-b(2)*.
8. See *Ohio Citizen Action v. City of Mentor-On-The-Lake*, 272 F. Supp. 2d 671, 684 (N.D. Ohio 2003)
9. *People v. Gage*, 179 Misc. 638 (1942) pamphlets of Jehovah's Witnesses was not considered as goods, wares, or merchandise.
10. 536 U.S. 150, 165 (2002).
11. *Lifrak v. NYC Council*, 389 F. Sup. 2d 500 (S.D. N.Y. 2005).
12. *Smith v. Jansen*, 85 Misc. 2d 81, 83 (Sup. Ct. 1975).
13. *Ricket v. Mahan*, 919 NYS 2d 588 (3d Dept 2011).
14. See *Public Officers Law § 3 and Village Law § 3-300*.
15. See *Public Officers Law § 3 and Village Law § 3-300*.