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Town of Canandaigua Planning Board  
5440 Routes 5 & 20  
Canandaigua, NY 14424

**VIA ELECTRONIC MAIL**

Dear Planning Board Members,

As attorney for Angelo Licciardello (“Applicant”) regarding the Application for Preliminary Subdivision (CPN-22-012) (the “Application”) at 3535 State Route 364, Canandaigua, NY 14424 (the “Property”) currently before the Town of Canandaigua Planning Board (“Planning Board” or “Board”), I respectfully submit the following. The purpose of this letter is to record our objection to Board Member Mark Tolbert’s decision to participate in deliberations and public discussions concerning the Application during the previous Board Meeting, and request that he recuse himself from future deliberations and public discussions and abstain from voting on the present Application.

First and foremost, we have the utmost respect for Mr. Tolbert and believe that he is extremely knowledgeable, well-spoken, and diligent in his work. However, given his extensive history as the spokesperson for the neighbors across the street from the Property, we do not believe that he can make an impartial and unbiased determination with respect to the present Application.

At the outset of this Board’s review of “Canandaigua Shores,” Applicant’s first proposed housing development that was eventually whittled down to the present Application, there was significant opposition from the neighbors who lived across the street from the Property. The opposing neighbors did not attend every meeting, but one neighbor did attend every single meeting on their behalf. That neighbor was Mark Tolbert. In addition to advocating against the “Canandaigua Shores” project at public meetings, Mr. Tolbert also solicited signatures for a petition, distributed lawn signs containing the message “No Canandaigua Shores,” created and managed a webpage via Facebook to promote his opposition to the project, and solicited donations for these efforts through a “GoFundMe” page set up by his partner. Ultimately, Mr. Tolbert’s efforts were successful, and the Board denied the “Canandaigua Shores” application. It must also be noted that immediately following that decision, Mr. Tolbert approached Applicant, myself, and the project engineer

outside of the meeting room to ask whether Applicant had any interest in selling the Property, and expressed serious interest in purchasing it.

Now, Applicant has returned to the Planning Board with the present Application, a significantly pared down residential housing project reducing the number of proposed residential units by nearly 75% and opting for single-family housing rather than multi-family. Although the scope of the project has been reduced, we are still dealing with a residential development on the same property by the same Applicant. The most notable change in the present Application, however, involves Mr. Tolbert. Instead of opposing development of the Property as a concerned neighbor, he is now judging the present Application as a Member of the Planning Board. To our surprise, Mr. Tolbert did not recuse himself from participating in deliberation and public discussion of the Application and, to our knowledge, plans to vote on the Application. This is an error that unfairly prejudices Applicant.

“Resolution of questions of conflict of interest requires a case-by-case examination of the relevant facts and circumstances.” *Pittsford Canalside Props., LLC v Village of Pittsford*, 137 A.D.3d 1566, 1568, 29 N.Y.S.3d 709, 711 (4th Dep’t 2016) (*quoting Parker v Town of Gardiner Planning Bd.*, 184 A.D.2d 937, 938, 585 N.Y.S.2d 571, 572 (3d Dep’t 1992)). “It is not necessary that a specific provision of the General Municipal Law or local law be violated to find a conflict of interest.” *Titan Concrete, Inc. v Town of Kent*, 63 Misc.3d 564, 572, 94 N.Y.S.3d 817, 823 (Sup. Ct. Putnam Co. 2019) (*citing* 1998 Ops. Atty. Gen. No. 98-26 at n. 2, *Matter of Zagoreos v Conklin*, 109 A.D.2d 281, 287, 418 N.Y.S.2d 638 (2d Dep’t 1985)); *Matter of Conrad v Hinman*, 122 Misc. 2d 531, 534, 471 N.Y.S.2d 521, 524 (Sup. Ct. Onondaga Co. 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.**” *Titan Concrete, Inc.*, 63 Misc. 3d at 572, 585 N.Y.S.2d at 824 (*quoting* 2002 Ops Atty Gen No. 2002-9) [Emphasis Added].

Further, “[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.” *Titan*, 63 Misc.3d at 573, 585 N.Y.S.2d at 824 (*citing Dudley v Town Bd. of Town of Prattsburgh*, 22 Misc.3d 1128[A], 2009 N.Y. Slip Op 50317[U], \*4 (Sup. Ct. Steuben Co. 2009), *quoting Matter of Byer v Town of Poestenkill*, 232 A.D.2d 851, 852, 648 N.Y.S.2d 768, 771 [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.” *Titan*, 63 Misc.3d at 573, 585 N.Y.S.2d at 824 (*quoting* 2002 Ops. Atty. Gen. No. 2002-8; *citing* 1998 Ops Atty Gen No. 98-38; 1999 Ops Atty Gen No. 99-21 (“recusal requires the official in question to avoid ‘taking any actions with respect to that matter’”)).

The New York State Attorney General has stated “that members with conflicts of interests must recuse themselves from participating in any deliberations or votes concerning

the application creating the conflict.” *Richard S. Mayberry, Esq.*, 1995 N.Y. Op. Atty. Gen. (Inf.) 2, 1995 WL 112012 (1995). This is because a conflicted “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.” *Titan Concrete, Inc.*, 63 Misc.3d at 574 (*quoting Richard S. Mayberry, Esq.*, 1995 N.Y. Op. Atty. Gen. (Inf.) 2, 1995 WL 112012 (1995)).

In *Titan*, the Town Supervisor was found to have a conflict of interest because she belonged to a homeowner’s association that was challenging a proposed local law and failed to recuse herself from Town Board Meetings relating to the proposed local law. There, the Court found that her “engagement in discussions” made “her presence problematic,” and “[s]imply 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.’” 63 Misc.3d 564, at 574, 94 N.Y.S.3d at 825. Like Supervisor Fleming, Mr. Tolbert should not have participated in discussions and should have left the room, and his continued participation creates the impression that the neighbors have an “in” with the Board.

Although we believe that Mr. Tolbert should have recused himself from the first meeting, we are early enough in the review process that Applicant is comfortable to continue the present Application if Mr. Tolbert recuses himself going forward. For the foregoing reasons, Applicant respectfully requests that Mr. Tolbert recuse himself from taking any further action on the present Application. Please contact my office if you have any questions or would like to discuss this further.

Respectfully,

A handwritten signature in black ink, appearing to read "Salvatore Licciardello".

**Salvatore Licciardello, Esq.**

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