

Village of Owego Board of Trustees Meeting

A regularly scheduled Village of Owego Mayor and Board of Trustees meeting was held on Monday, March 7, 2016 at 7:00 pm at 20 Elm Street, Owego, New York, 13827. The following people were in attendance:

Mayor:	Kevin Millar
Trustees:	Earl Hartman (arrived at 7:10 pm) Rob Manville Steve May Phoebe Morris Mike Phelps
Clerk-Treasurer:	Rod Marchewka
Village Attorney:	Robert McKertich
Police Chief:	Karen Vinti
WWTP Supt.:	Ron Horton
DPW Supt.:	Jeff Soules
Fire Chief:	Dan Gavin
Absent:	Trustee Ceccherelli

Pledge and invocation.

Insert "A" – Sign In Sheet

7:00 pm - Public Hearing - Local Law Amending the Zoning Code Regarding Sign Regulations in the Office Park District

Discussion on size of signs (6x6 or 5x5) at the Owego Gardens Apartments.

Public Comment:

None.

Public Hearing closed at 7:03 pm.

Motion by Trustee May, seconded by Trustee Morris, for Attorney McKertich to read the 11 SEQR Declarations. All answers to SEQR Declaration were "no"; therefore, a Negative Declaration. Roll Call Vote: Trustee Manville, Trustee May, Trustee Morris, Trustee Phelps, and Mayor Millar voted aye.

Motion Carried 5-0

Motion by Trustee Morris, seconded by Trustee May, to approve the following resolution:

**VILLAGE OF OWEGO
A RESOLUTION APPROVING LOCAL LAW NO. 2-2016**

At a regular meeting of the Village Board of the Village of Owego, held at the Village Board Room, 20 Elm Street, Owego, New York on the 7th day of March, 2016, the following resolution was offered and seconded:

WHEREAS, the Village of Owego scheduled a public hearing for March 7, 2016, for Local Law No. 2 of the Year 2016 entitled "A Local Law Amending the Zoning Code Regarding Sign Regulations in the Office Park District"; and

WHEREAS, notice of said public hearing was duly advertised in the official newspaper of the Village and posted on the Village Clerk's signboard; and

WHEREAS, said public hearing was duly held at the Village Board Room, 20 Elm Street, Owego, New York on the 7th day of March, 2016 at 7:00 p.m. and all parties in attendance were permitted an opportunity to speak on behalf of or in opposition to said proposed Local Law, or any part thereof; and

WHEREAS, the Village Planning Board the County Planning Board both reviewed the Local Law and recommended approval of the Law; and

WHEREAS, pursuant to Part 617 of the implementing regulations of the State Environmental Quality Review Act, it has been determined by the Village Board of the Village of Owego that adoption of the proposed Local Law constitutes an Unlisted Action, as defined under said regulations. The Village Board has considered the possible environmental impacts of the Local Law. The adoption of said Local Law will not have a significant adverse impact on the environment and the Village Board adopts a negative declaration with respect to the Local Law; and

WHEREAS, the Village Board, after due deliberation, finds it in the best interest of the Village to adopt said Local Law.

NOW, THEREFORE BE IT RESOLVED that, the Village Board hereby adopts said Local Law as Local Law No. 2-2016 entitled "A Local Law Amending the Zoning Code Regarding Sign Regulations in the Office Park District" a copy of which is attached hereto and made a part hereof; and

RESOLVED that the Village Clerk be and hereby is directed to enter said Local Law in the minutes of this meeting and to give due notice of the adoption of said Local Law to the Secretary of State; and

RESOLVED that this resolution will take effect immediately.

Roll Call Vote: Trustee Manville, Trustee May, Trustee Morris, Trustee Phelps, and Mayor Millar voted aye.

Motion Carried 5-0

Public Comment:

None.

Motion by Trustee May, seconded by Trustee Manville, to approve the Tent Revival in Marvin Park for September 8th thru 11th. All village fees will be waived. Roll Call Vote: Trustee Manville, Trustee May, Trustee Morris, Trustee Phelps, and Mayor Millar voted aye.

Motion Carried 5-0

Motion by Trustee Morris, seconded by Mayor Millar, to approve the Village of Owego Board of Trustees Meeting Minutes of February 15, 2016 as submitted by the clerk-treasurer. Roll Call Vote: Trustee Manville, Trustee Morris, Trustee Phelps, and Mayor Millar voted aye. Trustee May abstained.

Motion Carried 4-0-1

7:10 pm Public Hearing – Change in Chapter 166

Motion by Trustee May, seconded by Trustee Morris, to reschedule this public hearing until Monday, March 21, 2016 in order to add additional changes and more details for the public hearing. Roll Call Vote: Trustee Manville, Trustee May, Trustee Morris, Trustee Phelps, and Mayor Millar voted aye.

Motion Carried 5-0

Motion by Trustee May, seconded by Trustee Morris, to approve amending the OPD budget by transferring as follows:

\$750.00	from A.2705 (gifts & donations)	to	A.3120.40.421 (drug enforcement)
\$1,142.00	from A.2680 (insurance recovery)	to	A.3120.40.560 (repairs)

Roll Call Vote: Trustee Hartman, Trustee Manville, Trustee May, Trustee Morris, Trustee Phelps, and Mayor Millar voted aye.

Motion Carried 6-0

- A Representative of the Historic Owego Marketplace will be attending the Village Board Meeting of March 21, 2016 to request permits for calendar events for 2016

Motion by Trustee May, seconded by Trustee Morris, to approve Payment of Bills for February as follows:

General Fund	-	\$211,802.63
Evergreen Cemetery	-	\$ 4,940.00
Sewer Fund	-	\$ 82,708.63
Sewer Plant Upgrade	-	\$ 28,168.10
General Fund - Pre-Paid	-	\$ 1,081.60
TOTAL		\$328,700.96

Roll Call Vote: Trustee Hartman, Trustee Manville, Trustee May, Trustee Morris, Trustee Phelps, and Mayor Millar voted aye.

Motion Carried 6-0

Department Head Reports:

DPW Supt. Soules --

- Village and NYSDOT have issued citations to Corey Relyea for clean-up of property by the old foundry.

MEMO

To: Village of Owego Mayor Kevin Millar and Village Board of Trustees

From: Superintendent of Public Works - Jeff Soules

Date: March 4, 2016

RE: DPW Activity Report

- Met with NYSEG re: street projects
- Final close out for Elevation Phase Two Grant
- Sent out termination letters to non-complaint Elevation Phase 1 homeowners
- Processing final close out for Non-substantially Damaged Grant
- Conference call FEMA – elevation phase 1
- Buy out phase 2 project extension received – eight homes have been demolished, one home on West Avenue still to be torn down
- Repair Fire Dept. window

VOOBM 3-7-2016

- Repairs at OPD & painting
- Erie Street pumps
- Limb clean up after thunderstorm
- Clean up Marvin Park
- Clean ditches
- Clear drains
- Trim trees
- Pick up shopping carts
- Salt streets, plow, clear sidewalks
- Code violations for residential refuse - ongoing
- Forever green property maintenance - ongoing
- Measure DSNY cut outs on going
- Repair DPW equipment
- Pot hole patching ongoing
- Brush and leaf pick up ongoing
- Planning, Zoning and Historic Preservation meetings scheduled

Any questions or concerns please call me.

WWTP. Supt. Horton –

Date: 3/4/16

To: Village Board of Trustee's

From: Ron Horton, Supt. WWTP

Re: Department update

1. Project meeting was held on February 23rd. Items discussed was setting a meeting in March to go over start up procedures. Start-up date for #3 & #4 basins is tentatively scheduled for mid to late April.
2. Work continues in both the headworks and #3 & #4 basins.
3. A meeting was held with the board on February 29th to discuss the septic receiving project. BCA went over the various options available, revenue options based on both the survey amounts the contractors provided and a conservative estimate, and funding options. BCA has provided the PowerPoint presentation for the board members. I believe it was sent as an attachment from the Clerk's office.
4. Bids for the Water St. pump station upgrade were opened on February 29th.
5. Began to clean Primary Digester for inspection and maintenance.

Date: 3/4/16

To: Rob Manville, Sewer Commissioner

From: Ron Horton, Supt. WWTP

Re: Water St. pump station bids

The bids for the upgrade to the Water St. pump station were opened on February 29th and we received 2 bid packages.

The first bid was from GP Jager. The amount bid was for \$25,795.00 and there were no exceptions to the bid.

The second bid was from Siewert Equipment. The bid amount was for \$34,869.00 and there were no exceptions to the bid.

A review of both bid packages showed that both companies had met the specifications as they were written. I would like to recommend that we accept the bid from GP Jager for \$25,795.00.

Ron

Motion by Trustee May, seconded by Trustee Manville, to approve the low bid submitted from GP Jager for upgrading the Water Street Pump Station in the amount of \$25,795.00. Roll Call Vote: Trustee Hartman, Trustee Manville, Trustee May, Trustee Morris, Trustee Phelps, and Mayor Millar voted aye.

Motion Carried 6-0

Fire Chief Gavin –

Report on fire at 388 Main Street, the Village of Owego did a good job as well as mutual aid from Campville & Tioga Central.

Discussion on residence requirement for fire chiefs. Should it be expanded to 5 miles or more? Attorney McKertich will draw up a Local Law for Review.

803 should be delivered by end of March.

Trustee Reports:

Trustee Hartman – I thought the fire department controversy was over. I would like both letters in the minutes. Insert “B” – Letter from Attorney Pinsky

Insert “C” – Letter from Attorney McKertich

Trustee Manville –

Discussed EDU’s, septic haulers, and need for a digester upgrade in 5 years. By expanding for sludge haulers it will defray cost of upgrade – may be able to get 0% bonds?

Clerk-Treasurer Marchewka –

We had a daunting apartment fire at 388 Main Street on Wednesday night.

I would like to thank tenants Deb Ward and her daughter Heather for calling 911, pounding and toting a ladder up to get a tenant off the roof (I did help her – she had it upside down).

The Owego Police Department, Sgt. Brett Kobylarz and Officer Matthew Simpson arrived within minutes. Officer Simpson kicked in a door and saved the life of a tenant that was asleep at the time. The Owego Fire Department, Campville Fire Department, and Tioga Center Fire Department arrived and should be commended. They looked young, well trained, and dedicated. As everyone rushes out of a burning building they rush in. Everyone should be thankful for firemen and women. They do a dangerous job and they do it well. Thanks to you all for a job well done.

VOOBM 3-7-2016

Public Comment:

Pat Cartwright – disagreed with Trustee Hartman on the mileage requirements and whether or not the fire chief was notified as reported by Trustee Hartman.

Jim Legursky – why pay Royal Ford if they blew up our sewer truck? On the fire chief distance mileage limit – is it road miles or satellite miles?

On Trustee Hartman voting on fire issues – I see no conflict there – it is no gain to him.

Rusty Fuller – on the distance for the fire chief –make sure we can have chiefs that are qualified.

Meeting adjourned at 7:50 pm.

"A"

MARCH 11 - 2017

SIGN IN

NAME

ADDRESS

Patrick CARTWRIGHT

5 ELM ST Oswego NY

Cyke Schulze

121 Templest " "

DAVE Woodhurn

25 ARMSTRONG PL Oswego

James Strub

72 West Ave Oswego

"B"

PINSKY
LAW GROUP, PLLC

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Bradley M. Pinsky, Esq.
David B. Garwood, Esq.

Nicole C. Brown, Paralegal
Sarah M. Pufky, Paralegal

February 3, 2016

Earl Hartman
440 North Avenue
Owego, New York 13827

Re: Allegation of conflict of interest

Dear Earl:

You have asked for our opinion regarding whether or not you, as a member of the Village Board for the Village of Owego, have a conflict of interest which would prevent you from voting on the resolutions relative to the formation of a joint fire district because you are also a member of the fire department in the Village of Owego. The vote would have been to approve the formation of a joint fire district subject to a mandatory referendum of the public. Our opinion is that there is no conflict of interest which would prevent you member from being involved in the vote to create a joint fire district. It is also important to note that your vote ultimately only determines whether a proposal to establish the joint fire district is presented to the residents at a mandatory referendum.

There is no statutory conflict

In the absence of a constitutional or statutory prohibition against dual office holding, one person may hold two offices simultaneously unless they are incompatible. Two offices are incompatible if one is subordinate to the other or there is an inherent inconsistency between the two offices. See, *O'Malley v. Macejka*, 44 N.Y.2d 530, 535 (1978); *People ex rel. Ryan v. Green*, 58 N.Y. 295, 304-05 (1874); *Matter of Dupras v. County of Clinton*, 213 A.D.2d 952, 953 (3d Dept 1995).

There is no statute which prohibits the member of a village board from voting on whether to form a joint fire district, simply because the board member is on the village board which may vote to form the district. Moreover, the fire company itself is not a party to the formation of the fire district and has no vote in the formation of the fire district. Instead, the fire company is simply under the control of whatever municipal entity in which the fire company's main headquarters is located. Not for-Profit Corporation Law § 1402; *Sawyer v. Town of Lewis*, 11 A.D.3d 938, 782 N.Y.S.2d 318 (4th Dept. 2004).

New York's highest Court, the Court of Appeals, has held that there is only one prohibition set forth in Article 18 of the General Municipal Law. That prohibition is found in GML §801 and it provides:

no municipal officer or employee shall have an interest in a contract with his municipality if he has the power or duty to negotiate or to approve the contract or payments thereunder, to audit bills or claims under the contract, or to appoint an officer or employee with any such authority.

Landau v. Peracciolo, 50 N.Y.2d 430, 434, 429 N.Y.S.2d 566, 568 (1980). If such a conflict was to exist, and the Village was to enter into a prohibited contract, GML §804 would work as a statutory nullification of the contract to protect the taxpayers of the village. *Id.*

There is no actual conflict of interest

No actual conflict of interest exists because the fire company is not a party to the issue of the creation of a joint fire district. You, a Village Board member, do not sit on both sides of the issue, because the fire company has no vote on the matter. The only entities which vote of the formation of the joint fire district are the two Town Boards and the Village Board. The fire company is under the control of whatever municipal entity the fire company is located within, but does not have a vote in the formation.

By voting to approve the creation of a joint fire district, subject to a mandatory referendum of the residents, you are not entering into a contract with the Village. As a firefighter in a not-for-profit fire company you do not gain a direct or indirect pecuniary or material benefit through a contractual relationship simply by voting on the creation of the joint fire district. The fact that the Village will subsequently transfer apparatus and equipment, and possibly money, to the new fire district does not provide you with a direct or indirect pecuniary or material benefit as a firefighter who would be serving in the fire district fire department.

There is no personal liability if you vote on the question

It is clear that there is no contract involved between the Village of Owego and any entity owned or control or through which you, as a Village Trustee, obtain pecuniary interest. This issue, the vote to approve the creation of a joint fire district subject to the approval of the residents, is not a contract which results in pecuniary gain to you as a firefighter and Trustee. There is no personal liability when a sitting board member votes, in this type of instance, as there is no personal business contract (General Municipal Law §801). In the event that an actual conflict is alleged, any potential lawsuit is against the Village Board to nullify a prohibited contract, not a personal lawsuit against you, as a Trustee.

We understand that the Village Attorney suggested or warned that you could potentially be guilty of a misdemeanor offense if you voted on this issue. The potential for criminal liability exists only where a municipal official knowingly violates the conflict prohibition by entering into contractual relations between the municipality and a company through which he gains a direct or indirect pecuniary or material benefit (GML §805). There is simply no basis to allege you could be guilty of a criminal offense.

We also understand that you may have been referred to an informal opinion of the New York State Attorney General, 1996 N.Y. Op. (Inf.) Att'y Gen. 21, in which the Attorney General opined that there

could be the appearance of impropriety if a Village Board member and firefighter was involved in approving a fire department budget. The facts of this matter, participating in the approval of the creation of a separate municipal entity, are not at all similar to the facts pertinent to the Village of Marcellus informal opinion.

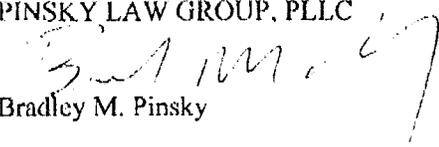
We are so confident in our position and in our belief that the Village Attorney is seriously in error, that we offer the following: should you, as Village Trustee, be sued personally, and should such defense not be covered or provided by the village, this law firm will guarantee that we will provide a defense of the matter without charge.

If you have questions you may call me.

Very truly yours,

PINSKY LAW GROUP, PLLC

BY:


Bradley M. Pinsky

"C"



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February 29, 2016

Via Email and 1st Class Mail

Trustee Earl Hartman
178 Main Street
Owego, New York 13827

Re: Conflict of Interest

Dear Earl:

I have reviewed the correspondence from Bradley Pinsky to you dated February 3, 2016 regarding your decision to recuse yourself from voting on a Resolution at the January 6, 2016 joint board meeting. The Resolution would have, among other things, created a new Owego-Tioga Joint Fire District and abolished the Village of Owego Fire Department. In his letter, Mr. Pinsky states that there is no conflict of interest that prevented you from voting on these matters.

There are two parts to any conflict of interest analysis: (1) whether there is a statutory conflict of interest; and (2) whether there is a non-statutory conflict of interest (i.e. "appearance of impropriety"). Mr. Pinsky's letter is deeply flawed in that it ignores the second half of the analysis. As set forth below, the non-statutory conflict of interest analysis includes well-established legal principles limiting when a village trustee who is a member of a volunteer village fire department can vote on issues related to the fire department.

Statutory Conflict of Interest

First, the analysis begins by determining whether voting on the Resolution violates Article 18 of the General Municipal Law, which is the statute that governs conflicts of interest for municipal officials. Mr. Pinsky's letter provides a rambling and jumbled analysis of the statute as he alternates between issues of "conflicts of interest" and "compatibility of office." But, ultimately, Mr. Pinsky's conclusion is the same as mine.

General Municipal Law §801 prohibits municipal officers from having an interest in municipal contracts when such official has the authority to approve the contract. The Resolution at

issue at the January 6, 2016 meeting did not, in my opinion, invoke an interest in a contract that would trigger a statutory conflict of interest.

Non-Statutory Conflict of Interest ("Appearance of Impropriety")

Even when there is no statutory conflict of interest, you must still consider whether your participation in a vote amounts to a non-statutory conflict of interest. Courts have long held that "[i]t is not necessary...that a specific provision of the General Municipal Law be violated before there can be an improper conflict of interest." *Zagoreos v. Conklin*, 109 A.D.2d 281, 287, (2nd Dept. 1985). The decisions of local boards have been set aside based upon judicial (not statutory) findings of conflicts of interest of board members. *Tuxedo Conservation and Taxpayers Association v. Town Board of Tuxedo*, 69 A.D.2d 320, 324 (2nd Dept. 1979). Public officials should avoid circumstances which compromise their ability to make impartial judgments solely in the public interest. 1991 *Op Atty Gen (Inf)* 1122. Even the "appearance of impropriety" should be avoided in order to maintain public confidence in government. *Id.*

Fortunately, your circumstance is not unique. The Attorney General has a long history of opinions that address whether there exists an "appearance of impropriety" when a village trustee who is a volunteer member of a village fire department can vote on issues involving the fire department. In light of the controversy surrounding this issue, I have summarized these Attorney General Opinions (I also provided you copies of the Opinions prior to January 6, 2016):

1. Attorney General Opinion 98-26: In Opinion 98-26, the Attorney General addressed if the mayor and trustee of the Village of Liberty may vote on whether to sell village property to a joint fire district. Both individuals were volunteer members of the fire department and the mayor served as its treasurer.

After analyzing the issue, the Attorney General concluded: "It appears under these circumstances that there is at least an appearance of impropriety." (Emphasis added). Therefore, the Attorney General recommended that the matter be referred to the local Board of Ethics.

It is important to note that the resolution at issue in the Village of Liberty involved the sale of assets to a joint fire district. In the Village of Owego, the plan was to give millions of dollars of assets to the joint fire district, including cash, real property, vehicles, equipment, and other assets. While there may be good justification for doing so, that does not impact whether an "appearance of impropriety" arises as a result of your participation in such a vote.

Mr. Pinsky may argue that there would have been subsequent votes to transfer those assets to the joint fire district and you could have recused yourself from those future votes. That would be improper. When you must recuse yourself from a vote, the recusal prohibits you from discussing, deliberating, and voting on the matter in its entirety. Picking and choosing which votes to recuse yourself from would have been inconsistent with the conflict of interest analysis.

2. Attorney General Opinion 94-31: In Opinion 94-31, the Attorney General was asked whether the mayor and trustee in the Village of Camillus may participate in matters relating to

financing and purchases for the fire department. The mayor was an inactive volunteer who had an honorary lifetime membership in the department and the trustee was a volunteer member on inactive status.

The Attorney General found that “[t]he mayor and trustee, although in inactive status in the village fire department, continue to have the opportunity to participate in department social functions and undoubtedly have close relationships with the volunteer firefighters. In our view, this relationship necessitates that they recuse themselves from acting on village fire department matters.” (Emphasis added).

Note that the Attorney General found a requirement for recusal even for inactive members of the department. While I do not doubt that you have only the best interests of the Village in mind (as I have personally witnessed for years), you are an active member of the department and the Resolution addressed several issues critical to the department’s function, including the transfer of assets/debt, use of the Sweet Fund, and the transfer of personnel. Under these circumstances, it is difficult to see how recusal would apply to the mayor and trustee of Camillus, but not to you.

3. Attorney General Opinion 91-21: In Opinion 91-21, the Attorney General addressed whether two trustees for the Village of Corinth who are active members of the fire department may vote on a proposal for a service award program. The Attorney General opined that the trustees cannot participate on the matter because they may have a personal financial interest.

I agree that you do not have a personal financial interest in the creation of the joint fire district or the abolition of the Village fire department. But notice that (contrary to Mr. Pinsky’s advice) the fact that the service award program would be submitted to the voters for approval was not a mitigating factor allowing them to vote on the resolution.

4. Attorney General Opinion 96-21: In Opinion 96-21, the Attorney General was questioned by the Village of Marcellus whether a member of the board of trustees may serve as a volunteer member of the village fire department and as vice president of the Marcellus Fire Department, Inc.

The Attorney General found that the trustee could hold the dual positions. However, he went on to explain that “the trustee should recuse himself from deliberating and voting on the budget for the fire department. Participation would, in our opinion, create at least an appearance of impropriety. The fire department budget can be voted upon separately, so that the subject trustee can participate in the approval of the village’s budget.”

If a trustee cannot vote on a fire department budget, how can he vote on abolishing the department and transferring its entire budget to a separate entity?

February 29, 2016

Conclusion

Based upon these well-established Attorney General Opinions, I am very confident that you made a prudent decision to recuse yourself from the January 6, 2016 vote. Your status as a trustee and a volunteer firefighter creates exactly the type of circumstance that the Attorney General has long-held gives rise to a potential "appearance of impropriety" when acting on fire department-related matters.

It is also worth noting that if you voted on the January 6, 2016 Resolution and it was later found by a court that you should have recused yourself, the result would likely be that the court would annul the Resolution. *Tuxedo Conservation and Taxpayers Association v. Town Board of Tuxedo*, 69 A.D.2d 320, 324 (2nd Dept. 1979). The Village and the fire department, therefore, would need to start the process anew. That is not in your best interest.

This is especially true since there exists a well-worn path around the conflict of interest issue. Many villages across the State have amended their local codes of ethics to allow trustees who are volunteer members of fire departments to vote on fire department issues. Indeed, the very existence of these laws is additional proof that a conflict exists in your situation. Rather than simply ignoring the Attorney General Opinions, the appropriate strategy would have been to amend the Village's ethics code. As I previously stated, I would be happy to draft a law amending the ethics code, if that is the desire of the Village Board. Why someone would advise you to ignore this simple solution and risk additional legal fees is beyond my comprehension.

Ultimately, neither Mr. Pinsky nor I can tell you whether and/or how to vote on any particular issue. You must consider the information provided and use your own best judgment. Please do not hesitate to contact me if you have any questions.

Sincerely,

COUGHLIN & GERHART, LLP

By


Robert H. McKertich
Partner

RHM/emh

cc: Mayor Kevin Millar (By e-mail)
Board of Trustees (By e-mail)