

# **Ethics in Land Use: Guiding Principles for Attorneys and Land Use Board Members**

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## HOW TO ANALYZE AN ETHICS PROBLEM: RECOGNIZING COMMON LAW CONFLICTS OF INTEREST

By Steven G. Leventhal

In New York, most ethics problems can be analyzed by considering three questions: (1) does the conduct violate Article 18 of the New York General Municipal Law; (2) if not, does the conduct violate the local municipal code of ethics; and (3) if not, does the conduct seriously and substantially violate the spirit and intent of the law, and thus create a prohibited appearance of impropriety?

Article 18 of the New York General Municipal Law is the state law that establishes minimum standards of conduct for the officers and employees of all municipalities within the State, except the City of New York.<sup>1</sup> Among other things, Article 18 prohibits a municipal officer and employee from having a financial interest in most municipal contracts that he or she has the power to control individually or as a board member;<sup>2</sup> from accepting gifts or favors worth \$75.00 or more where it might appear that the gift was intended to reward or influence an official action;<sup>3</sup> from disclosing confidential government information;<sup>4</sup> from receiving payment in connection with any matter before his or her own agency;<sup>5</sup> and from receiving a contingency fee in connection with a matter before any agency of the municipality.<sup>6</sup>

Local municipalities are authorized by Article 18 to adopt their own codes of ethics.<sup>7</sup> A local ethics code may not permit conduct that is prohibited by Article 18. However, a local code may be stricter than Article 18; it may prohibit conduct that Article 18 would allow.<sup>8</sup> Local ethics codes typically fill gaps in the coverage of Article 18 by, among other things, closing the “revolving door” (post-employment contacts with the municipality), establishing rules for the wearing of “two hats” (the holding of two government positions, or moonlighting in the private sector)<sup>9</sup> and, in some cases, prohibiting “pay to play” practices and the political solicitation of subordinates, vendors and contractors.

Ethics regulations are not only designed to promote high standards of official conduct, they are also designed to foster public confidence in government. An appearance of impropriety undermines public confidence. Therefore, courts have found that government officials have an implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.<sup>10</sup> Organizing these precedents into a coherent set of principles is necessary in order to reconcile the equally important goals of fostering public confidence in government, and helping honest municipal officers and employees to avoid unintended ethics violations by providing them with the clear guidance of established standards of conduct.

### **What is a Prohibited Appearance of Impropriety?**

For lawyers engaged in the practice of law, the “appearance of impropriety” standard set forth in Rule 1.11(b)(2) of the NY Rules of Professional Conduct is applied only in the screening of former government lawyers who move from one employer to another. It is otherwise considered “too vague a standard to justify disciplinary measures or disqualification.” *Essex Eq.*

Holdings. v. Lehman Bros.,<sup>11</sup> Lovitch v. Lovitch,<sup>12</sup> (Absent actual prejudice, appearance of impropriety is not sufficient to disqualify an attorney), Christensen v. Christensen,<sup>13</sup> (“Appearance of impropriety” is insufficient to disqualify attorney, without actual prejudice to a party.)<sup>14</sup>

Professor Simon, in his commentary to R.P.C. Rule 1.11(b)(2) criticized the “appearance of impropriety” standard because it depends on what others might think:

The ‘appearance of impropriety’ standard is a highly abstract, catch-all formulation that gives courts virtually boundless discretion to disqualify former government lawyers if anything in the circumstances makes the court uncomfortable. Negating the appearance of impropriety can be a significant hurdle.... Of course, courts have sweeping inherent power to supervise lawyers who appear before them.... But in my view courts should not use the “appearance of impropriety” standard as a disciplinary standard, because a lawyer acting in good faith can easily misjudge what others *might think* about the lawyer’s conduct. Lawyers should not be subject to professional discipline for engaging in conduct that they sincerely think is proper but that some others might believe looks improper. The appearance of impropriety standard simply gives lawyers insufficient warning of the circumstances that will subject them to discipline. In rare situations the “appearance of impropriety” standard is appropriate as a basis for disqualification, because a court can presumably weigh all of the facts and circumstances. But even in disqualification matters, the appearance of impropriety should be construed narrowly and invoked sparingly, because construing it too broadly and using it too frequently would result in excessive disqualifications....”<sup>15</sup>

The application of the “appearance of impropriety” standard to judges is unique, based on the heightened standard of conduct for members of the judiciary. See, e.g. Matter of Ayres,<sup>16</sup> (Town judge removed for “lend[ing] the prestige of judicial office to advance the private interests of others”).

In drafting a local code of ethics that prohibits official conduct that would give rise to an appearance of impropriety, municipal attorneys should take care to avoid standards of conduct that may be declared unconstitutionally vague. The Second Department in People v Lanham,<sup>17</sup> stated that, in determining whether a statute is unconstitutionally vague:

[A] court must first determine whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden. Second, the court must determine whether the enactment provides officials with clear standards for enforcement so as to avoid resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Accordingly, a statute is unconstitutionally vague under the Due Process Clauses of the Federal and State Constitutions where it fails to give fair notice to the ordinary citizen that the prohibited conduct is illegal, and it lacks minimal legislative guidelines, thereby permitting arbitrary enforcement.

In People v. Golb,<sup>18</sup> the Court of Appeals struck down former Penal Law §240.30(1), which prohibited communicating “in a manner likely to cause annoyance or alarm”. The Court

observed that “the statute's vagueness is apparent because it is not clear what is meant by communication ‘in a manner likely to cause annoyance or alarm’ to another person” (citation and internal quotes omitted). In Matter of Patricia Ann Cottage Pub, Inc. v. Mermelstein,<sup>19</sup> a determination that the plaintiff violated Public Health Law §1399-o was vacated on the grounds of vagueness because the law required bar owners to “make a reasonable effort to prevent smoking, without providing any information as to what those reasonable efforts should be.”

An “appearance of impropriety” standard will be unconstitutionally vague if it is not sufficiently definite to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden and it lacks minimal legislative guidelines, thereby permitting arbitrary enforcement. The Code of Ethics of the City of New York has a "catch-all" provision prohibiting interests that conflict with official duties but it is supplemented by cross-references to specific examples of the conduct that is forbidden. The City Conflicts of Interest Board is prohibited from imposing penalties for a violation of the code's "catch-all" provision "unless such violation involved conduct identified by rule of the board as prohibited by such paragraph".<sup>20</sup> The City Conflicts of Interest Board adopted a rule specifying certain such conduct.<sup>21</sup>

Of course, even in the absence of a disqualifying conflict of interest, a municipal officer or employee may nevertheless choose to recuse himself or herself to avoid taking an action that might later be criticized. Officers and employees should be mindful, however, that recusal is not a neutral act. It is the functional equivalent of a “nay” vote. *See*, General Construction Law § 41 (Quorum and majority):

Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, ... not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words “whole number” shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting.

### **How have Courts applied the Standard to Actions by Local Governments?**

Courts have invalidated municipal actions based on clear and obvious conflicts of interest that would undermine public confidence in government, even where no statute or local law was violated.

#### *1. Pecuniary Interests, Secondary Employment, Controversy.*

In Matter of Tuxedo Conservation & Taxpayers Assn. v. Town Bd. of Town of Tuxedo,<sup>22</sup> decided by the Second Department in 1979, the Town Board voted to approve a major development project on the eve of a change in the composition of the Board. The decisive vote in favor of approval was cast by a trustee who was Vice President of a public relations firm under contract to the developer’s parent company. The Court inferred that the Board’s approval of the development project would likely result in the public relations firm obtaining all of the

advertising contracts connected with the project. Despite the fact that the Board member's vote did not violate Article 18 of the New York General Municipal Law,<sup>23</sup> the Court annulled the Board's decision approving the development project.

The Tuxedo Court concluded that "while the anathema of the letter of the law may not apply to... [the Board member's] action, the spirit of the law was definitely violated. And since his vote decided the issue... [the Court deemed it] egregious error." The Court directed the Board member's attention to the "soaring rhetoric of Chief Judge Cardozo... '[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior.' Thus, [the Court concluded that] the question reduces itself into one of interest. Was... [the Board member's] vote prompted by the 'jingling of the guinea' or did he vote his conscience as a member of the Town Board? In view of the factual circumstances involved, the latter possibility strains credulity. For, like Caesar's wife, a public official must be above suspicion." Reviewing decisions of the courts of other states, the Tuxedo court concluded that "[a]n amalgam of those cases indicates that the test to be applied is not whether there is a conflict, but whether there might be.... 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."

Six years later, in Matter of Zagoreos v. Conklin,<sup>24</sup> the Second Department reaffirmed the principles announced in Tuxedo. There, a major, controversial development project was approved by votes of the Zoning Board of Appeals and the Town Board. At the ZBA, the decisive votes were cast by two Board members who were employed by the applicant. At the Town Board, the decisive vote was cast by a Board member who was employed by the applicant. As in Tuxedo, the Court annulled the decisions of the ZBA and the Town Board approving the development project despite the fact that the respective board members' votes did not violate Article 18 of the New York General Municipal Law.<sup>25</sup>

The Zagoreos Court noted that the employment of a board member by the applicant might not require disqualification in every instance. However, the failure of the board member-employees to disqualify themselves here was improper because the application was a matter of public controversy and their votes in the matter were likely to undermine "public confidence in the legitimacy of the proceedings and the integrity of the municipal government".

Further, the Zagoreos Court noted that the importance of the project to the applicant-employer was obvious, and that "equally so are those subtle but powerful psychological pressures the mere knowledge of that importance must inevitably place on any employee of the... [applicant-employer] who is in a position to either effectuate or frustrate the project and who is concerned for his or her future with the... [applicant-employer]. Any attempt to disregard these realities would be senseless for the public is certainly aware of them." The Court found that, even in the absence of any attempt by the applicant-employer to improperly influence the board member-employees, "human nature, being what it is... it is inconceivable that such considerations did not loom large in the minds of the three [board member-employees]. Under these circumstances, the likelihood that their employment by the... [applicant-employer] could have influenced their judgment is simply too great to ignore."<sup>26</sup>

Not every financial relationship between a board member and parties interested in a matter before the board give rise to a disqualifying conflict of interest. In Parker v. Town of Gardiner Planning Bd.,<sup>27</sup> the Third Department observed that:

Resolution of questions of conflict of interest requires a case-by-case examination of the relevant facts and circumstances and the mere fact of employment or similar financial interest does not mandate disqualification of the public official involved in every instance. In determining whether a disqualifying conflict exists, the *extent* of the interest at issue must be considered and where a substantial conflict is inevitable, the public official should not act. (Citation omitted; emphasis added).

In Parker, the Board Chairman was President of a local steel fabrication and supply company that sold products to a local construction firm owned by one of the applicant's principals. During the previous three years, the construction firm purchased between \$400.00 and \$3,000.00 in steel products from the Chairman's steel company. During the same period, the Chairman's steel company had annual gross sales of approximately \$2,000,000.00 to \$3,000,000.00. Based on these facts, the New York Attorney General concluded in an informal opinion letter that a conflict of interest existed and that the Chairman was required to recuse himself in the matter. However, the Town Board of Ethics reached a contrary conclusion, reasoning that the amount paid to the Chairman as a result of the purchases by the applicant's construction firm was insufficient to create a conflict of interest. The Parker Court concluded that the determination of the Town Board of Ethics was rational and entitled to considerable weight, and found that "[u]nder these circumstances ... the likelihood that such a *de minimis* interest would or did in fact influence... [the Chairman's] judgment and/or impair the discharge of his official duties... [was] little more than speculative." (Citations omitted).

In the years since Tuxedo and Zagoreos were decided, the appellate courts of this state have consistently reaffirmed the vitality of the principle that a prohibited conflict of interest may exist in the absence of a statutory prohibition, and that a common law conflict of interest may justify the judicial invalidation of a municipal action. Moreover, the application of this principle has not been limited to cases involving conflicts based on pecuniary interests or economic improprieties. A prohibited conflict of interest may exist, and that conflict may justify judicial invalidation of a municipal action, where the voting members of a municipal board have manifested bias or have prejudged an application.

## *2. Bias, Prejudice, Expression of Opinion, Extent of Interest.*

In Matter of Schweichler v. Village of Caledonia,<sup>28</sup> three members of the Village Planning Board signed a petition in support of a developer's project and application for rezoning, and thus appeared to have impermissibly prejudged the application. In addition, the Planning Board's chairperson wrote a letter to the Mayor in support of the project and application for rezoning, stating that she "would really like to see new housing available to [her] should [she] decide to sell [her] home and move into something maintenance free". Despite the fact that the Planning Board's vote to approve the developer's site plan did not violate Article 18 of the New York General Municipal Law,<sup>29</sup> the Fourth Department concluded in Schweichler that the appearance of bias arising from the signatures of the three Planning Board members on the

petition in support of the project and application, and the actual bias of the Chairperson manifested by her letter to the Mayor expressing a personal interest in the project, justified annulment of the Planning Board's site plan approval.

In Segalla v. Planning Board,<sup>30</sup> a resident who, at public hearings, had opposed a zone change proposed by the owner of a gravel mining business, was appointed to fill a vacancy on the planning board and voted to approve a master plan that omitted the zone change. The Second Department Court held that because the alleged bias involved only personal opinion rather than any financial interest in the adoption of the master plan, there was no basis for setting aside the action of the planning board. Further, the speculation that the value of property owned by the planning board member might at some point in the future have been affected by the zone change was insufficient to disqualify a board member from voting, particularly where nearly every other property owner would be similarly affected.

In 1983, the Court of Appeals held in Webster Associates v. Webster,<sup>31</sup> that public statements by the newly elected chairman of the town board before and after his election, expressing support for a development project and criticism of a competing proposal, did not warrant nullification of the board's approval. The court found that:

The conflicts encompassed by article 18, however, involve pecuniary and material interests rather than expressions of personal opinion (see General Municipal Law, §800, subd 3). Indeed, *Tuxedo* involved a town board member who voted to approve construction of a housing project while he was an officer of the advertising agency employed by the developer's parent company. No such financial interest was alleged here. Moreover, Kent's statements allegedly indicating bias in favor of the Expressway Associates plan actually show more that he was upset at the hasty manner in which, during its final days in office, the prior town board approved Webster Associates' proposal. In addition, although Kent spoke in favor of the Expressway Associates plan, he also repeatedly stated that he would act in an objective manner and in the best interest of the town when passing on zoning matters as a member of the town board. The courts below were correct in concluding that plaintiffs failed to show any action on the part of Kent, individually, that would provide a basis for setting aside the action of the town board.

It is curious that the Webster court would cite Tuxedo in discussing the interests encompassed by Article 18, since Tuxedo did not involve conduct that violated the statute; Tuxedo is the seminal case for the proposition that courts may invalidate a municipal action based on a clear and obvious conflict of interest that would undermine public confidence in government, even where no statute or local law was violated. Nevertheless, candidates for public office and elected officials must be free to express their views on matters of public concern and, once elected, to vindicate their electoral mandate.

While mere personal opinion will generally not give rise to a disqualifying conflict of interest, municipal actions are, of course, subject to judicial review in a proceeding brought pursuant to CPLR Art. 78. A reviewing court may nullify a municipal determination that was

“arbitrary and capricious or an abuse of discretion”, or that was not supported by substantial evidence adduced at a legally required hearing.<sup>32</sup>

### 3. *Conflicts that are Clear and Obvious.*

In Peterson v. Corbin,<sup>33</sup> the Second Department Court reversed a ruling that a county legislator was disqualified from voting for the appointment of members to the corporate board of the county O.T.B. because his membership in the same bargaining unit that represented O.T.B. employees created an “appearance of impropriety”. The court distinguished Tuxedo and Zagoreos because, in those cases, “the questioned official benefited directly and individually from the action that was taken”, and “the conflicts of interest on the part of the public officials were clear and obvious”. In 2002, the Attorney General opined that only a “substantial, direct personal interest in the outcome” requires recusal.<sup>34</sup>

Citing Peterson, the Fourth Department in Friedhaber v. Town Bd. of Town of Sheldon,<sup>35</sup> affirmed a decision of the Appellate Term, First Department, that distinguished between the “clear and obvious” conflict that would have arisen from a vote to change the zoning status of particular properties owned by the voting Board members, and their permissible vote to change the zoning status of other properties in which they had no interest:<sup>36</sup>

Fontaine and Kehl disqualified themselves from voting on the actions pertaining to the clusters in which their properties are located. Petitioners assert that Fontaine and Kehl violated GML § 801 by voting to approve actions for the other clusters and by otherwise voting on matters involving the project.... Because Fontaine and Kehl will receive a "direct or indirect pecuniary or material benefit" only from the properties they own, and because the record reflects that each cluster can stand on its own as an independent project, the votes by Fontaine and Kehl as to the other clusters do not establish a prohibited conflict of interest. In any event, the record reflects that there was a sufficient number of votes to adopt each of the resolutions at issue even if Fontaine and Kehl had disqualified themselves from voting.... The only "clear and obvious" conflicts of interest were those possessed by Fontaine and Kehl and they appropriately disqualified themselves from the clusters in which they possessed an interest as defined under law. The other purported conflicts of interest alleged by the petitioners are not "clear and obvious" and are not the sort which should result in the Court's interference with legislative action. This Court will not inject itself into the legislative process without a "clear and obvious" conflict of interest and without statutory authority granted by the State legislature.... [(Internal citations omitted)].

In Matter of Town of Mamakating v. Village of Bloomingburg,<sup>37</sup> two members of the three-member board of trustees rented homes from a company affiliated with the applicant's principal. The Third Department observed that “[i]n determining whether a disqualifying conflict exists, the extent of the interest at issue must be considered and, where a substantial conflict is inevitable, the public official should not act.” The court was not persuaded that a substantial conflict was inevitable or that annulment of the board's approval was warranted.



#### 4. *Campaign Contributions.*

In 2022, the Third Department held in Matter of Evans v. City of Saratoga Springs,<sup>38</sup> that the receipt of campaign contributions by members of the City Council did not give rise to a disqualifying conflict of interest in the adoption of amendments to the zoning code. The court concluded that

Finally, we are unpersuaded by petitioners' contention that members of the City Council were biased during the zoning amendment process and subject to a conflict of interest because they received campaign contributions from representatives of Saratoga Hospital. In determining whether a disqualifying conflict exists, the extent of the interest at issue must be considered and, where a substantial conflict is inevitable, the public official should not act. Although, under these circumstances, the receipt of campaign contributions may create an appearance of impropriety, we do not find that it gave rise to an instance where a substantial conflict is inevitable. Moreover, the campaign contributions do not amount to a violation of the City's Code of Ethics or the General Municipal Law, and petitioners do not argue otherwise. An actual violation of said statutes would speak more to a finding that a conflict is substantial and inevitable. Thus, Supreme Court properly found that there was no conflict of interest requiring annulment of the zoning map amendments.

(Internal quotes and citations omitted). Given the now well established principal that a disqualifying conflict of interest may arise even where the conduct would not violate any statute or local law, it is curious again that the Evans court would look to the City's Code of Ethics and the General Municipal Law to judge whether a conflict was substantial and inevitable.

#### 5. *Personal or Private Interests; Social Relationships.*

A common theme among many of the New York cases in which courts have declined to invalidate a municipal action based on the alleged conflicts of municipal officers and employees was the absence of a personal or private interest as distinguished from an interest shared by other members of the public generally.<sup>39</sup> In 1975, the Court of Appeals held in Town of N. Hempstead v. Village of N. Hills,<sup>40</sup> that Village Board members were not disqualified from voting on an amendment to the Zoning Code that would allow cluster zoning of properties that they owned, where most land in the Village was similarly affected, and the disqualification of the Board members would preclude all but a handful of property owners from voting in such matters.<sup>41</sup>

Not every personal or private relationship between a board member and parties interested in a matter before the board will give rise to a disqualifying conflict of interest. Generally, a mere social relationship between a board member and the applicant will not give rise to a disqualifying conflict of interest where the board member will derive no benefit from the approved application.<sup>42</sup> In Ahearn v. Zoning Bd. of Appeals,<sup>43</sup> the Third Department concluded that:

... petitioner has shown nothing more than that, as active members of their community, the Board members have a variety of political, social and financial interests which,

through innuendo and speculation, could be viewed as creating an opportunity for improper influence. For example, petitioner perceives a conflict of interest in the fact that the wife of one of the Board members teaches piano to the applicant's daughter and was given a Christmas gift for doing so. Petitioner also contends that since the applicant is a long-term member of the Board, other junior Board members might have viewed him as their leader and might have been influenced even though the applicant disqualified himself from any Board consideration of the application. Petitioner sees a similar conflict in the applicant's involvement in local politics, and in the fact that one of the Board members purchased homeowners' and automobile insurance from the applicant. Petitioner also contends that one of the Board members was improperly influenced since his mother-in-law voiced her criticism of opponents to the applicant's project. We are of the view that these claims, and others advanced by petitioner, do not rise above the type of speculation that would effectively make all but a handful of citizens ineligible to sit on the Board.

#### *6. Proximity to the Subject Premises.*

Proximity to the site of an application, standing alone, does not give rise to a conflict of interest or appearance of impropriety; there must be additional factors present to cause a conflict of interest. In Matter of Troy Sand & Gravel Co., Inc. v. Fleming,<sup>44</sup> the Third Department stated that neither a town board member's location near the subject property without evidence of financial gain or proprietary benefit, nor his opposition as a candidate for public office to a land use application, warranted setting aside the town board's denial of the application.

The location of real property owned by Fleming and his family near the site of the proposed quarry is an interest that Fleming has in common with many other citizens of the Town and, in our view, nothing in the record clearly demonstrates that he stood to gain any financial or other proprietary benefit from the Town Board's denial of Troy Sand's application that would necessitate annulling his vote or the determination. Further, Fleming's opposition to the proposed quarry as a candidate running for public office on that platform does not constitute a conflict of interest within the meaning of General Municipal Law § 801. Opposition to the project, without more, cannot constitute bias or a conflict of interest inasmuch as a contrary determination "would effectively make all but a handful of [the Town's] citizens ineligible to sit on the [Town] Board". Thus, because the alleged conflicts of interest and bias involve expressions of personal opinion, rather than any pecuniary or material interest in the denial of Troy Sand's application, we find that petitioners failed to establish a basis for setting aside the determination of the Town Board.

In Matter of Tulip Gardens, Inc. v. Zoning Board of Appeals,<sup>45</sup> a 2009 trial court held that proximity of a board member to the applicant's property, standing alone, did not disqualify a ZBA member from voting on an application for a variance. In 2002, the Attorney General opined that a trustee who owned commercial property within a business improvement district was not necessarily disqualified from voting on the BID's budget, since other factors needed to be considered. "[R]ecusal has not been required where a board member's interest is merely similar

to that of other property owners.” Recusal would be required where a municipal officer or employee has a “substantial, direct personal interest in the outcome”.<sup>46</sup>

### 7. *Pending Litigation.*

Pending litigation against a municipal board or its members does not *ipso facto* require that the board members recuse themselves in a separate application by the plaintiff. In 1998, a corporation applied to the village board for a permit authorizing the operation of a restaurant in a shopping center. A conditional permit was issued, and the applicant filed an action in federal court under 42 U.S.C. § 1983 seeking compensatory and punitive damages based on certain of the conditions imposed by the village board. The applicant sued the village and five village trustees, four of whom remained on the board. When the restaurant opened in violation of the terms of the conditional permit, the village brought a separate action seeking a permanent injunction. While the action was pending, the plaintiff transferred adjacent property to a related entity having common principles. The related entity filed an application for a permit to develop the adjacent property. In a 2000 Informal Opinion<sup>47</sup>, the Attorney General advised that:

In municipalities experiencing extensive development, it is possible for developers to have actions pending that challenge a board’s land use decisions while continuing to make separate applications to that board for other developments.... Absent specific allegations to the contrary, each application is presumed to be made and considered on its own merits. We recognize, however, that in particular situations recusal may be appropriate. The relevant factors can be enumerated, but it is impossible to say in advance which will be decisive or how much weight each should be assigned. Among factors that may be considered here, in applying conflict of interest standards, are exposure of board members to personal liability; whether there is an appearance of impropriety that would erode public confidence in the integrity of government; and the judgments of board members as to whether they can act impartially. Under facts such as those presented here, where the board members have been sued in their personal capacities for compensatory and punitive damages, exposure to personal liability is a particular concern in determining whether recusal is appropriate. There is a greater potential for conflict where the personal financial interests of a board member are antithetical to those of an applicant appearing before the board member. Therefore, a consideration is whether the municipality has authorized defense of board members and indemnification... in civil actions related to acts or omissions occurring within the scope of a member’s duties....<sup>48</sup> Also relevant is the advice of the municipal attorney as to whether the litigation has merit. It may be apparent that an applicant’s action against board members in their personal capacities is frivolous or of little merit. Such a lawsuit should not necessitate that board members recuse themselves from hearing a subsequent application by the applicant who brought the pending lawsuit. Under these circumstances, recusal would not serve the public interest.

### **What is an Effective Recusal?**

All but one of the reported cases in New York that have invalidated municipal actions based on common law conflicts of interest involved decisive votes cast by conflicted members of

voting bodies. However, it should be noted that recusal involves more than the mere abstention from voting. A properly recused officer or employee will refrain from participating in the discussions, deliberations or vote in a matter.<sup>49</sup> The New York Attorney General has opined that:

The 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. Further, we believe that a board member with a conflict of interest should not sit with his or her fellow board members during the deliberations and action regarding the matter. The mere presence of the board member holds the potential of influencing fellow board members and additionally, having declared a conflict of interest, there would reasonably be an appearance of impropriety in the eyes of the public should the member sit on the board. Thus, it is our view that once a board member has declared that he or she has a conflict of interest in a particular matter before the board, that the board member should recuse himself or herself from any deliberations or voting with respect to that matter by absenting himself from the body during the time that the matter is before it.<sup>50</sup>

In Eastern Oaks Development, LLC v. Town of Clinton,<sup>51</sup> the Town Planning Board granted preliminary approval of a residential subdivision. The developer hired a member of the Town Board to construct a road meeting specifications required by the Town Engineer, and offered the road for dedication to the Town, together with a bond to ensure the repair of any damage to the road surface that might occur during construction. A dispute arose between the developer and the retained board member over his alleged failure to pay a subcontractor, and the board member was discharged. When the offer of dedication was considered by the Town Board, the Town Engineer recommended that the offer of dedication be declined until a sufficient number of homes were constructed. With the formerly retained board member recusing himself from the vote, the Town Board disapproved the dedication.

The developer challenged the decision in an Article 78 proceeding, alleging, among other things, that the Town Board made its decision in advance of the vote, and that the conflicted board member had recused himself from the official vote only to conceal his conflict of interest and efforts to undermine the subdivision project by influencing members of the Town Board to disapprove the road dedication. The Town moved to dismiss the petition for failure to state a cause of action. In affirming the trial court's denial of the motion to dismiss, the Second Department noted that the reason for the Town's disapproval of the road dedication was consistent with earlier statements by the Town Engineer. Nevertheless, the Court held that the allegation that the conflicted board member's dispute with the developer resulted in the Town Board's denial of the dedication would provide a basis for setting aside the Town Board's determination, even though the conflicted board member recused himself from the vote.

Accordingly, a municipal action that resulted from the influence or persuasion of a conflicted member of a voting body should also bear critical scrutiny and, where appropriate, may result in judicial invalidation, even where the conflicted member refrained from voting. Accordingly, a conflicted board member should not participate from the audience. A change of seating does not eliminate the conflict.

## **Ministerial Acts do not give rise to a Conflict of Interest**

Conflicts of interest are prohibited because they actually or potentially interfere with the judgment involved in the exercise of discretion. Many municipal actions involve no exercise of discretion and, therefore, are ministerial. In Blumberg v. North Hempstead,<sup>52</sup> the court stated that “[s]ite plan approval is a ministerial act which can be compelled by mandamus”. Other examples of ministerial acts are addressed in opinions of the Comptroller and the Attorney General: issuance of a check is a ministerial act not contemplated by General Municipal Law §801 (Conflicts of Interest Prohibited)<sup>53</sup>; mayor signing contract was ministerial act and, therefore, there is no prohibited conflict of interest.<sup>54</sup>; budgeting for uncollectible taxes is a ministerial act not subject to discretion.<sup>55</sup>

An action that is required by a statute does not involve the exercise of discretion and, therefore, is ministerial. In Walz v. Town of Smithtown,<sup>56</sup> the issuance of an excavation permit was a ministerial act and the highway superintendent had no discretion to deny the permit. The State Environmental Quality Review Act (“SEQRA”) recognizes the distinction between discretionary and ministerial acts – ministerial acts are not “actions” subject to SEQRA review. SEQRA Regulation 6 NYCRR § 617.2 defines a ministerial act for SEQRA purposes: “[m]inisterial act” means an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the act, such as the granting of a hunting or fishing license.

## **Compatibility of Secondary Employment**

Long established common law principles and opinions of the New York Comptroller and Attorney General offer useful guidance in determining whether a position of outside employment would create a conflict with the official duties of a municipal officer or employee. In the absence of a specific constitutional or statutory prohibition, one person may simultaneously hold two positions unless they are incompatible.<sup>57</sup> The leading case on compatibility of public offices is People ex rel. Ryan v. Green.<sup>58</sup> In that case, the Court of Appeals held that two public offices are incompatible if one is subordinate to the other (i.e., you cannot be your own boss) or if there is an inherent inconsistency between the two offices. Although the Ryan case involved two public offices, the same principle applies to the compatibility of a public office and a position of private employment. To determine whether two positions are inherently inconsistent, it is necessary to analyze their respective duties. An obvious example of two offices with inconsistent duties is those of auditor and director of finance.

Even where there is no inherent incompatibility between the respective duties of the two positions and, therefore, both positions may be held by the same person, conflicts of interests may nevertheless arise from time to time. In that case, recusal will cure the conflict. However, if recusal is frequently and inevitably required, that may be an indication that the position of secondary employment is incompatible with the official duties of the officer or employee. Incompatibility cannot be cured by recusal because the duties of one position will prevent the conflicted officer or employee from discharging the duties of the other.

## **The Rule of Necessity**

The “rule of necessity” is derived from principles of judicial ethics. It will permit a conflicted officer or employee to act where the action is necessary, and where there is no one to whom the responsibility may be lawfully delegated. In Matter of Duquette v. Town of Peru Town Bd.,<sup>59</sup> the town board was the only body that could consider an application by three of its five members for a defense provided by the town pursuant to Public Officers Law §18. Without the participation of the three members, the board would be left without a quorum and unable to vote. The Court dismissed a claim that the board’s action in approving the application was tainted by the votes of the three interested members. Similarly, a vote by legislators to approve a budget that funds their own salaries would be permitted by the rule of necessity, since a municipality must have a budget, and there is no other body to which its approval may lawfully be delegated.

Article III, Section 1 of the New York Constitution vests the legislative power of the State in the Senate and the Assembly. Therefore, the Legislature cannot delegate its law-making functions to other bodies. However, there is no constitutional prohibition against the delegation of power to an agency or commission to administer the law as enacted by the Legislature, provided there are reasonable standards to govern the discretion exercised in the administration of the law. *See, Levine v. Whalen.*<sup>60</sup> The same principle of separation of powers will, in some cases, limit the ability of a local legislative body to delegate its decision-making authority. In a 2000 Informal Opinion, the Attorney General stated that determination of a development application was not a legislative act and, therefore, a village board of trustees could delegate consideration of such applications to an administrative board.<sup>61</sup>

In some instances, even where delegation of decision-making authority is permissible, there may be limits on the discretion to select a delegatee. For example, in disciplinary proceedings conducted under Civil Service § 75, the delegation of decision-making authority must be to a duly qualified individual authorized to act during the absence of the disqualified decision-maker, with no previously involvement in the proceeding or charges. *See, McComb v. Reasoner.*<sup>62</sup>

## **Applying Common Law Principles**

In summary, courts may set aside board decisions (and by implication, other municipal actions) where decision-making officials with conflicts of interest have failed to recuse themselves, or where decision-making officials have been improperly influenced by a conflicted colleague. A disqualifying interest is one that is personal or private. It is not an interest that an official shares with all other citizens or property owners. A prohibited appearance of impropriety will not be found where the improper appearances are speculative or trivial.

In considering whether a prohibited appearance of impropriety has arisen, the question is whether an officer or employee has engaged in or influenced decisive official action despite having a disqualifying conflict of interest that is clear and obvious, such as where the action is contrary to public policy, or raises the specter of self-interest or partiality.

Where a contemplated action by an official might create an appearance of impropriety, the official should refrain from acting. Officials should be vigilant in avoiding real and apparent conflicts of interest. They should consider not only whether they believe that they can fairly judge a particular application or official matter, but also whether it may appear that they did not do so. Even a good faith and public-spirited action by a conflicted public official will tend to undermine public confidence in government by confirming to a skeptical public that government serves to advance the private interests of public officials rather than to advance the public interest.

At the same time, officials should be mindful of their obligation to discharge the duties of their offices, and should recuse themselves only when the circumstances actually merit recusal.<sup>63</sup> Such restraint should be exercised by the members of voting bodies and, in particular, by legislators, because recusal or abstention by a member of a voting body has the same effect as a “nay” vote<sup>64</sup> and, in the case of an elected legislator, also has the effect of disenfranchising voters. In the rare case where the recusal of an officer or employee disqualified by a common law conflict of interest will leave the municipality without any authorized decision maker, the rule of necessity may permit the otherwise disqualified officer or employee to act notwithstanding the conflict of interest.<sup>65</sup>

The goal of prevention—and just plain fairness—require that officers and employees have clear advance knowledge of what conduct is prohibited. Discernable standards of conduct help dedicated municipal officers and employees to avoid unintended violations and unwarranted suspicion. These standards are derived from Article 18 of the New York General Municipal Law, local municipal codes of ethics, and from the application of common law principles.

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<sup>1</sup> For a helpful summary of Gen. Mun. Law Article 18, see Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officer and Employees*, NYSBA/MLRC Municipal Lawyer, Summer 2005, Vol. 19, No. 3, pp. 10-12.

<sup>2</sup> See, Gen. Mun. Law §§800-805.

<sup>3</sup> See, Gen. Mun. Law §805-a.

<sup>4</sup> *Id.* N.B. The phrase “confidential information” is not defined in Gen. Mun. Law Article 18. Taken together, the Freedom of Information Law (Pub. Off. Law, art. 6) and the Open Meetings Law (Pub. Off. Law, art. 7) are a powerful legislative declaration that public policy disfavors government secrecy. See, Leventhal and Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential?* NYSBA/MLRC Municipal Lawyer, Spring 2004, Vol. 18, No. 2, pp. 22-24.

<sup>5</sup> *Supra*, n. 4.

<sup>6</sup> *Id.*

<sup>7</sup> See, Gen. Mun. Law §806.

<sup>8</sup> See, Davies, *Enacting a Local Ethics Law – Part I: Code of Ethics*, NYSBA/MLRC Municipal Lawyer, Summer 2007, Vol. 21, No. 3, pp. 4-8.

<sup>9</sup> In the absence of a constitutional or statutory prohibition, an official may hold two public offices, or a public office and a position of secondary employment, unless the duties of the two positions are incompatible, such as those of chief financial officer and auditor. See *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874); see also, *O’Malley v. Macejka*, 44 N.Y.2d 530 (535) (1978); 1997 Op. Atty. Gen. 14; 1982 N.Y. Op. Atty. Gen. (Inf.) 148.

<sup>10</sup> See, e.g., *Matter of Zagoreos v. Conklin*, 109 A.D.2d 281 (2d Dept. 1985); *Matter of Tuxedo Conservation & Taxpayer Assn. v. Town. Board of Town of Tuxedo*, 69 A.D.2d 320 (2d Dept. 1979).

<sup>11</sup> 29 Misc. 3d 371, 382 (Sup. Ct. N.Y. Co. 2010).

<sup>12</sup> 64 A.D. 3d 710, 711 (2d Dept. 2009).

<sup>13</sup> 55 A.D. 3d 1453 (4<sup>th</sup> Dept. 2008).

<sup>14</sup> Compare the vague standard of conduct imposed by R.P.C. 8.4 (Misconduct) – “A lawyer or law firm shall not: ... (h) engage in any other conduct that adversely reflects of the lawyer’s fitness as a lawyer.” The rule is not limited

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to misconduct related to the practice of law. As noted by Professor Simon, “Rule 8.4(h) is broad and vague. What does that mean? What kinds of conduct reflect adversely on the lawyer’s fitness specifically as a lawyer, as opposed to the lawyer’s fitness as a parent, sibling, citizen, spouse, or human being? ... Rule 8.4 is seldom the sole basis for disciplinary charges against a lawyer. Rather, it is usually an add-on to other charges. Typically, a court first finds a violation of some other section of the Rules and then finds that the violation of the other section reflects negatively on the lawyer’s fitness as a lawyer. When the courts do find a violation of Rule 8.4(h), the conduct tends to be egregious....” Simon’s New York Rules of Professional Conduct Annotated, Vol. 1, p. 2067 (2019 Ed., Thomson Reuters).

<sup>15</sup> *Id.* at 694-695.

<sup>16</sup> 30 N.Y.3d 59 (2017).

<sup>17</sup> 177 A.D.3d 637 (2d Dept. 2019), *citing* People v Stephens, 28 N.Y.3d 307 (2016).

<sup>18</sup> 23 N.Y. 3d 455, 466-467 (2014).

<sup>19</sup> 36 A.D. 3d 816, 819 (2d Dept. 2007).

<sup>20</sup> New York City Charter §2606(d).

<sup>21</sup> See, Rules of the City of New York, Title 53, §1-13.

<sup>22</sup> 69 A.D.2d 320 (2d Dept. 1979).

<sup>23</sup> The vote did not violate section 801 of the New York General Municipal Law (Conflicts of interest prohibited) because that section generally prohibits a municipal officer or employee from having an interest in a contract with the municipality where he or she has the power or duty to approve or otherwise control the contract but, in Tuxedo, there was no contract with the Town; and the vote did not violate section 809 of the New York General Municipal Law (Disclosure in certain applications) because that section only requires the disclosure of any interest of an officer or employee in a land use applicant-- it does not mandate recusal by the interested officer or employee.

<sup>24</sup> 109 A.D.2d 281 (2d Dept. 1985).

<sup>25</sup> As in Tuxedo, *supra*, the vote did not violate section 801 of the New York General Municipal Law (Conflicts of interest prohibited) because there was no contract with the Town; and the vote did not violate section 809 of the New York General Municipal Law (Disclosure in certain applications) because that section only requires disclosure of any interest of an officer or employee in a land use applicant.

<sup>26</sup> See also, Conrad v. Hinman, 122 Misc.2d 531 (Onondaga Co. 1984) (Trial court annulled a change from residential to commercial use granted by a Village Board of Trustees based on an “... inference of [an] actual or apparent economic impropriety...” where the decisive vote was cast by a Village Trustee who was co-owner of the subject property and was also an employee of the intended purchaser).

<sup>27</sup> 184 A.D.2d 937 (3d Dept. 1992), *lv. den.*, 80 N.Y.2d 761 (1992).

<sup>28</sup> 45 A.D.3d 1281 (4th Dept. 2007), *app. den.* 10 N.Y.3d 703 (2008).

<sup>29</sup> As in Tuxedo and Zagoreos, *supra*, the vote did not violate section 801 of the New York General Municipal Law (Conflicts of interest prohibited) because there was no contract with the Village; and the vote did not violate section 809 of the New York General Municipal Law (Disclosure in certain applications) because the Planning Board members did not have an interest in the applicant as defined in that section. Further, section 809 of the New York General Municipal Law only requires disclosure of any interest of an officer or employee in a land use applicant.

<sup>30</sup> 204 A.D. 2d 332 (2d Dept. 1994).

<sup>31</sup> 59 N.Y.2d 220 (1983).

<sup>32</sup> See, Civil Practice Law and Rules § 7803.

<sup>33</sup> 275 A.D. 2d 35, 38 (2d Dept. 2000).

<sup>34</sup> N.Y. AG Lexis 5, 2002 N.Y. Op. (Inf.) Att’y Gen. 9.

<sup>35</sup> 16 Misc.3d 1140A (App. Term 1st Dept. 2007), *aff’d* 59 A.D.3d 1006 (4th Dept. 2009).

<sup>36</sup> See also, Peterson v. Corbin, 275 A.D.2d 35 (2d Dept. 2000) (noting that “... in both Tuxedo and Zagoreos, the conflicts of interest on the part of the public officials were clear and obvious.”).

<sup>37</sup> 174 A.D.3d 1175 (3d Dept. 2019).

<sup>38</sup> 202 A.D.3d 1318 (3d Dept. 2022).

<sup>39</sup> See e.g., Tuxedo, *supra*.

<sup>40</sup> 38 N.Y.2d 334 (1975).

<sup>41</sup> See also, Byer v. Town of Poestenkill, 232 A.D.2d 851 (3d Dept. 1996) (Town Board member not disqualified from voting on changes to zoning code that affected all property owners equally); Segalla v. Planning Board of the Town of Amenia, 204 A.D.2d 332 (2d Dept. 1992) (Planning Board member not disqualified from voting to approve master plan that affected nearly every property in the Town equally).



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<sup>42</sup> See, *Rosenfeld v. Zoning Bd. of Appeals*, 6 A.D.3d 450 (2d Dept. 2004); *Karedes v. Vil. of Endicott*, 297 A.D.2d 413 (3d Dept. 2002); *De Paolo v. Town of Ithaca*, 258 A.D.2d 68 (3d Dept. 1999); see also, *Matter of Lucas v. Board of Appeals of Vil. of Mamaroneck*, 14 Misc.3d 1214A (Westchester co. 2007), *aff'd* 57 A.D.2d 784 (2d Dept. 2008) (applying the “arbitrary and capricious” standard for proceeding under NY CPLR Article 78).

<sup>43</sup> 158 A.D.2d 801 (3d Dept. 1990), *lv. den.*, 76 N.Y.2d 706 (1990).

<sup>44</sup> 156 A.D.3d 1295 (3d Dept. 2017).

<sup>45</sup> 2009 N.Y. Misc. Lexis 6437 (Sup. Ct. Nassau Co. 2009), 2009 N.Y. Slip Op. 33159(U).

<sup>46</sup> 2002 N.Y. Op. (Inf.) Att’y Gen. 9.

<sup>47</sup> *Id.*

<sup>48</sup> The Attorney General has opined that a local law may authorize defense and indemnification in an action for punitive damages. See, e.g. Op. Atty. Gen (Inf) No. 93-22. However, courts have held otherwise. “[P]unitive damages may be assessed against a municipal employee who engages in intentional wrongdoing in excess of the scope of his official duties. Under such circumstances, the employee will not be entitled to indemnification (Public Officers Law § 18 [4] [b], [c]), but, rather, will be personally liable for any punitive damages assessed against him.” *Rosen & Bardunias v. County of Westchester*, 158 A.D. 2d 679, 681 (2d Dept.), *app. denied*, 76 N.Y. 2d 703 (1990), *cert. denied*, 498 U.S. 1086 (1991).

<sup>49</sup> 1995 Op. Atty. Gen 2; see also, *Cahn v. Planning Bd. of the Town of Gardiner*, 157 A.D.2d 252 (3d Dept. 1990) (Planning Board members “...not only immediately disclosed their interests, but of critical importance, they abstained from any discussion or voting regarding the subdivisions....”).

<sup>50</sup> 1995 Op. Atty. Gen. 2.

<sup>51</sup> 76 A.D.3d 676 (2d Dept. 2010).

<sup>52</sup> 114 Misc. 2d 8, 14 (Sup. Ct. Nassau Co. 1982).

<sup>53</sup> 1979 N.Y. Comp. Lexis 217, Opinion No. 79-147.

<sup>54</sup> 1982 N.Y. Comp. Lexis 416, Opinion No. 82-319.

<sup>55</sup> 1982 N.Y. AG Lexis 110, Informal Opinion No. 82-1.

<sup>56</sup> 46 F.3d 162 (2d Cir. 1995).

<sup>57</sup> See *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874); 19 see also, *O’Malley v. Macejka*, 44 N.Y.2d 530 (535) (1978); 1997 Op. Atty. Gen. 14; 1982 N.Y. Op. Atty. Gen (Inf.) 14882 N.Y. Op. Atty. Gen (Inf.) 148.

<sup>58</sup> 58 N.Y. 295 (1874).

<sup>59</sup> 18 Misc. 3d 1129(A) (Clinton Co. 2008).

<sup>60</sup> See, *Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976).

<sup>61</sup> 2000 N.Y. Op. (Inf.) Att’y Gen. 22.

<sup>62</sup> 29 A.D.3d 795 (2d Dept. 2006).

<sup>63</sup> For a helpful discussion of the principles applicable to recusal and abstention, see, Steinman, *Recusal and Abstention from Voting: Guiding Principles*, NYSBA/MLRC Municipal Lawyer, Winter 2008, Vol. 22. No. 1, pp. 17-19.

<sup>64</sup> See, Gen. Const. Law §41.

<sup>65</sup> See *Matter of Correia v Incorporated Vil. of Northport*, 12 A.D.3d 599 (2d Dept. 2004); *Matter of Wayering v County of St. Lawrence*, 154 A.D. 2d 824 (3d Dept.1989); see generally *Matter of General Motors Corp.--Delco Prods. Div. v Rosa*, 82 N.Y.2d 183 (1993).