Exploring Standards of Ethical Conduct for Members of Planning Boards and Zoning Boards of Appeals: Article 18 of the GML & the Common Law

New York State Department of State

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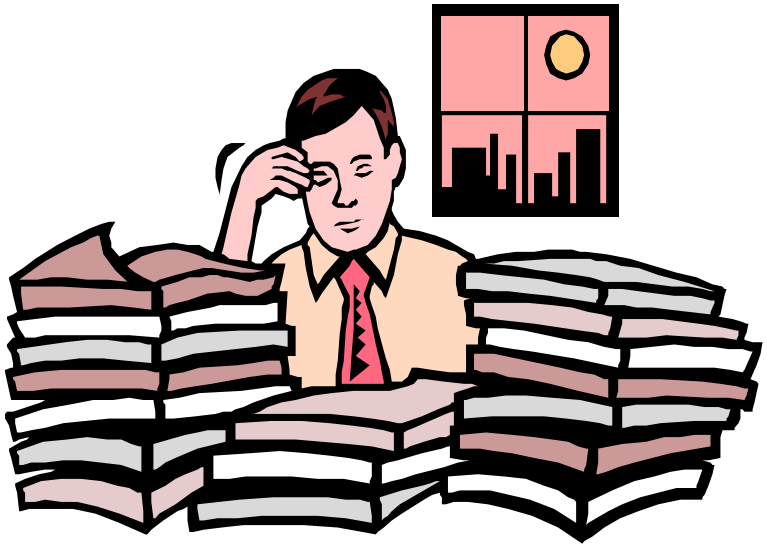
Overview

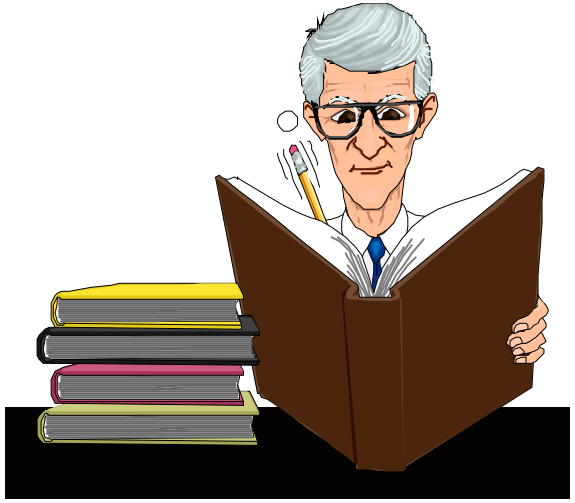
- Ethics Generally
  - Defining Ethics
  - Guidance – Primary Sources
- Article 18 of the General Municipal Law
  - Pinpointing Potential Conflicts
  - Disclosure Requirements
  - Public Official Actions Subject to Legal Code/Laws
- Common Law Conflicts
- Results of Interested Contracts
- Municipal Checklist

Defining Ethics



- Conduct or Behavior
  - Bad Faith
  - Ex Parte Conversations
- Morals or Values
  - Community Standards
- Conflicts of Interest
  - Financial/Contractual
  - Familial/Nepotism

Searching for Guidance



- Article 18 of the General Municipal Law
  - Local Code of Ethics
  - Local Board of Ethics
- Other State Statutes
- Case Law/ Common Law
- Opinions of New York State Attorney General and New York State Comptroller

General Municipal Law

Article 18

Purpose

- To protect the public from municipal contracts influenced by avaricious officers;
- To protect innocent public officers from unwarranted assaults on their integrity;
- Mandates that each community adopt an appropriate code of ethics to supplement Article 18.

The Reach of Article 18

Gen. Mun. Law §§800 - 813

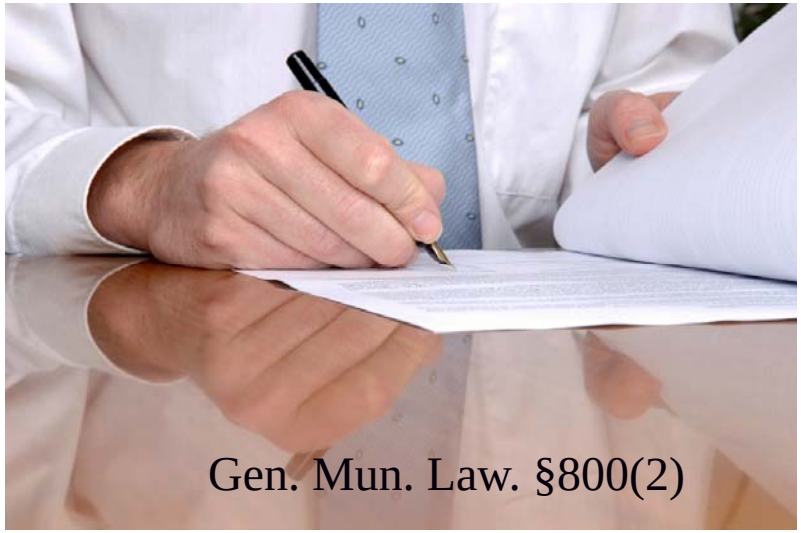
Regulates conflicts of interest by prohibiting municipal officers and employees from having an interest in any contract with the municipality over which they have control.

How to Identify a Potential Conflict of Interest:

General Municipal Law Article 18

Is your contract a “contract”?

Any claim, account or demand against or agreement with a municipality, express or implied.



Considered a "contract"

- Settlement of a lawsuit against a municipality.
  - NYS Comptroller Opinion No. 77-214; No. 81-295.
  - Note: A person in litigation against a municipality over a contract claim is not thereby disqualified from running for elected office. 1975 NY Op. Attorney General No. 272.
- An application for a permit
  - *People v. Pinto,* 88 Misc.2d 303 (Mt. Vernon City Ct. 1979);
  - *But see, Friedhaber v. Town Bd. of Town of Sheldon,* 851 N.Y.S.2d 58 (N.Y. Sup. 2007)(questioning *People v. Pinto)*.

Not a "contract"

- An application for a zoning variance
  - NYS Comptroller Opinion No. 83-114; No. 91-98; No. 97-112;
  - *Friedhaber v. Town Bd. of Town of Sheldon*, 851 N.Y.S.2d 58 (citing NY Op. Attorney General No. 74-106; NYS Comptroller Opinion No. 83-114; and stating that resolutions of the ZBA relating to variances were not within the definitions of contract as referred to in GML §800(2)).
- An application to a planning board
  - NYS Comptroller Opinion No. 91-48; No. 97-12.
- An application for subdivision approval
  - NYS Comptroller Opinion No. 88-68.
- An intermunicipal agreement
  - NYS Comptroller Opinion No. 01-14.

Does an “interest” exist?

Gen. Mun. Law. §800(3)

- Pecuniary or material benefit, direct or indirect, accruing to an officer or employee of a municipality.
- If you are an officer or employee of a municipality, you will be deemed to have an interest in a contract that is between your municipality and certain other individuals or entities.

GML §800(3): Interest Exceptions

- An employment contract that is between your municipality and your spouse, minor children or dependents
- Contracts between municipality and your adult children
- Contracts between municipality and a corporation of which you are neither:
  - A director,
  - An employee, nor
  - An owner of less that 5% of the outstanding stock.

Do you have "control" over the contract...?

- <u>Power or duty to:</u>
  - Negotiate, prepare, authorize or approve the contract or authorize or approve payment under the contract, or
  - Audit bills or claims under the contract, or
  - Appoint an officer or employee who has any of the powers or duties set forth above? *Gen. Mun. Law. §801.*

NYC Conflicts of Interest Board has established a method for determining whether a prohibited interest exists. The interactive program is located at http://www.nyc.gov/html/conflicts/Art18Municipality/art18_start.html.

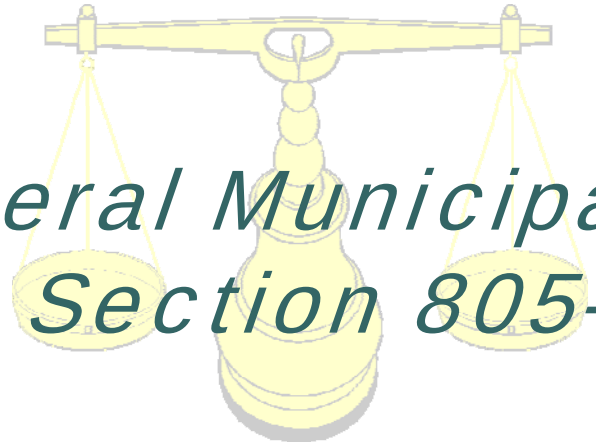
GML §801 Exception

- The payment of lawful compensation and necessary expenses of any municipal officer or employee in one or more positions of public employment once the holding of such position(s) is not prohibited.

Penalties for Violating GML §801

- "Any contract willfully entered into by or with a municipality in which there is an interest prohibited by [Article 18] shall be null, void and wholly unenforceable." *Gen. Mun. Law §804.*
- "Any municipal officer or employee who willfully and knowingly violates the foregoing provisions of [Article 18] shall be guilty of a misdemeanor." *Gen. Mun. Law §805.*

Other Prohibited Acts:



General Municipal Law Section 805-a

Gifts

- Solicitation or receipt of any gift either, directly or indirectly, under circumstances in which it could reasonably be inferred that the gift was intended to influence the solicitor or receiver or the gift could reasonably be expected to influence that solicitor or receiver in the performance of his or her official duties or was intended as a reward for official action.
  - Value of Gifts: Seventy-five (75) dollars or more;
    - Solicitation: Any type of solicitation, notwithstanding its value.
  - Gift forms: Money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form.
- ***Note***:
  - An individual who has solicited or received a gift in violation of this provision is unable to cure the violation through recusal.
  - Penalties will follow from such violation. *Gen. Mun. Law 805-a(2).*

Gen. Mun. Law. §805-a(1)(a)

Disclosure of Confidential Information

- You may not disclose any confidential information acquired during the course of performing official duties, or
- Use such confidential information to further personal interests. See, e.g., NYS Comptroller Opinion No. 78-774.
- Penalties will follow if violated. *Gen. Mun. Law 805-a(2).*

Gen. Mun. Law. §805-a(1)(b)

Compensation for Services: GML §805-a(1)(c)

- You may not receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any municipal agency of which you:
  - Are an officer, member, or employee, or
  - Have jurisdiction over the municipal agency, or
  - Have the power to appoint any member, officer or employee of the municipal agency.

Compensation for Services: GML §805-a(1)(d)

- You may not receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any agency of your municipality, whereby your compensation is to be dependent or contingent on action by your agency with respect to the matter.

GML §805-a Prohibited Actions: Examples

- A licensed architect who sits on a zoning board should not represent persons making their initial application before the local building department (NY Op. Attorney General No. 94-51);

- The chair of the planning board, who is employed by a real estate company that would receive business if a subdivision application is approved, should not participate in the consideration of the application (NY Op. Attorney General No. 86-54);

- A town planning board member who is also a geologist in the private sector may not be compensated or enter into an agreement to be compensated for soil borings on a project before the planning board (NY Op. Attorney General No. 95-14).

- **Note**: Prohibitions under Section 805-a must be evaluated on a case-by-case basis. For example, real estate agents are not always prohibited from voting on a matter before a planning board of which that agent is a member.

Disclosure Provisions:

General Municipal Law Article 18

Disclosure of Interests: Generally

Gen. Mun. Law. §803

- When a municipal officer or employee (or his or her spouse) has an interest in any actual or proposed contract with the municipality of which he or she is an officer or employee, he or she shall publicly disclose such interest in writing to (his or her immediate supervisor and to) the governing body as soon as he or she has knowledge of such actual or prospective interest.

A violation of Gen. Mun. Law §803 is a misdemeanor under Section 805.

GML §802 Exceptions: Disclosure Required

- The designation of a newspaper for publication of notices;
- The acquisition of real property or an interest therein, through condemnation proceedings according to law;
- A contract with a membership corporation or other voluntary non-profit corporation or association;
- Contracts entered into prior to becoming an officer or employee.

See Gen. Mun. Law §802 for more exceptions.

GML §802 Exceptions: No Disclosure Required

- A contract for the payment of reasonable rental of a room or rooms owned or leased by an officer or employee for official duties;
- A contract for the furnishing of public utility services when the rates or charges are fixed and regulated by the PSC;
- A contract for the payment of reasonable rental of a room or rooms owned or leased by an officer or employee for official duties;
- A contract for less than $750 per fiscal year (cumulative).

See Gen. Mun. Law §802 for more exceptions.

Disclosure: Planning & Zoning

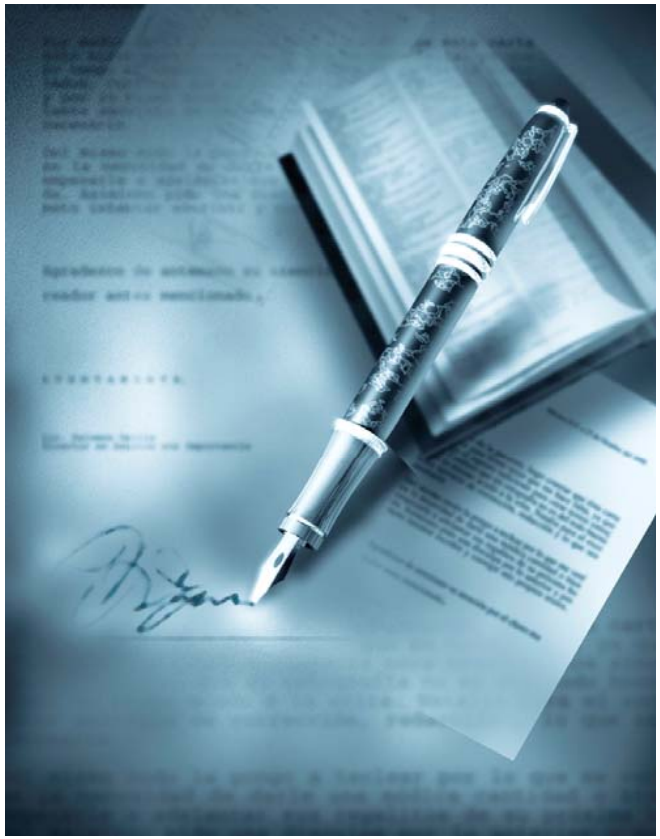
Applicants making petitions, or requests for variances, amendments, changes of zoning, plat approvals, plat exemptions or official map exemptions, licenses or permits relating to a municipality's planning and zoning regulations must disclose known certain interests.

Gen. Mun. Law. §809

Disclosure: P & Z (cont)

- The existence of certain familial relationships give rise to an interest that may require disclosure.
- In Nassau County, exceptions shall also apply to a party officer.
- Knowing and intentional violation of this section is a misdemeanor, a criminal remedy. *Gen. Mun. Law Section 809(5).*

Code of Ethics



Gen. Mun. Law. §806

- Each county, city, town, village, school district and fire district **must** adopt a code of ethics
- It may not be less restrictive than the provisions of Article 18, but can be stricter.
  - Must be consistent with provisions in your local codes

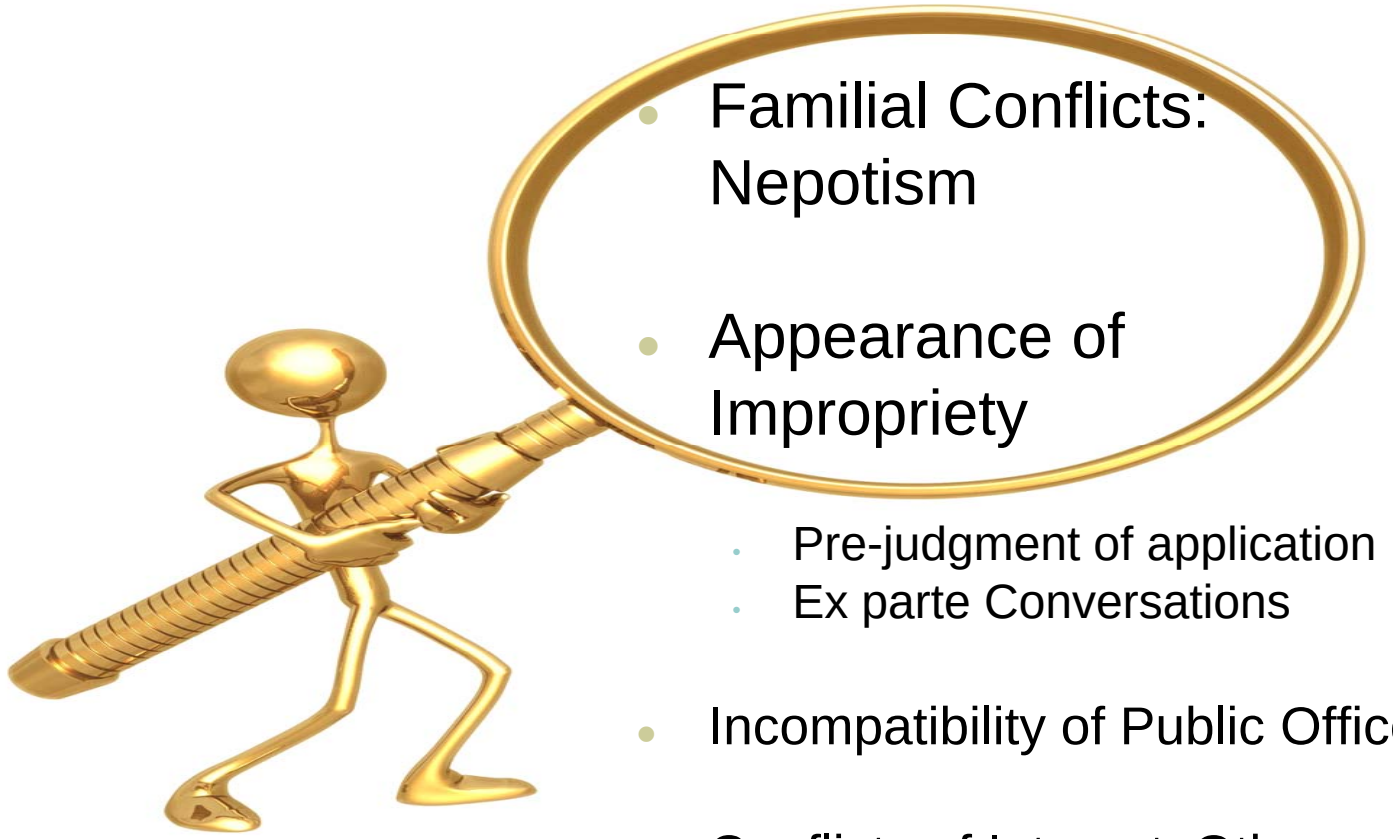
Board of Ethics

- Renders advisory opinions to officers and employees of the municipality
- Receives and investigates complaints filed by citizens.
- Consists of at least three members
- Must review and administer the financial disclosure law for the municipality.
- May receive filings of annual statements of financial disclosure;
- Optional Board.

Conflicts of Interests:

The Common Law

Overview



- Familial Conflicts: Nepotism
- Appearance of Impropriety
  - Pre-judgment of application
  - Ex parte Conversations
- Incompatibility of Public Offices
- Conflicts of Interest: Other Considerations

Familial Conflicts: Nepotism

- State law does not prohibit persons from serving in the same governmental unit because they are related by consanguinity.
- Remember: Employment contracts between a municipality and certain family members of an officer or employee of that municipality is excluded from Section 800(3) of Article 18, definition of “interest”. The family members are:
  - **Spouse, or**
  - **Minor child(ren), or**
  - **Dependent(s).**

Nepotism (cont)

- Public officers still have the responsibility to exercise their official duties solely in the public interest. NY Op. Attorney General No. 96-17.
- Appearance of impropriety may control whether a family member ought to be disqualified from a specific deliberation.
- Other state statutes may be violated in cases involving preference based on family relationships.
  - People v. Haywood, 201 A.D.2d 871(4th Dept. 1994) (where in a prosecution pursuant to Penal Law Section 195.00(1) the court concluded that the defendant's actions violated the Town's Code of Ethics where the defendant Water Utilities Sup. permitted his son to use a hydraulic pallet cart owned by the Town at the son's place of business for 3 1/2 years.)

Familial Relationships

- A planning board is not necessarily infected with an alleged conflict of interest based on a claim that a competitor applicant was locally favored because the competitor was represented by the spouse of a council member, even where that council member made the motion to adopt zoning code amendments favorable to the competitor. *See Masi Management v. Town of Ogden, 180 Misc.2d 881 (Sup. Ct. Monroe County 1999).*

Familial Relationships (cont)

- Absent a prohibition in a local code of ethics, it has been suggested that it is not a conflict of interest for a person to be appointed to the planning board of a town where his/her parent currently serves as a member of the town zoning board of appeals. 1993 NY Op. Attorney General No. 37.
  - As a general rule, family members should recuse themselves from participating in matters affecting compensation and employment.

Appearance of Impropriety: Prejudgment

- In outward opposition or support of a project currently before a reviewing board.
- It suggests that the member is:
  - Bias - Unable to act impartially and keep an open mind;
  - Favoritism - Special consideration to one point of view over another.
- Distinguished from philosophical approach or personal opinions based on education and experience. 1988 NY Op. Attorney General No. 59.

Ex Parte Communication

- Communication with the reviewing board outside the presence of all sides to a matter.

- Ex parte communication is dangerous when the information is excluded from the record.
  - Rule of thumb: Immediately place on the record the substance of what was discussed, and
  - Be available to any interested side to a matter.

Compatibility of Office:

Statutes

and

The Common Law

General Rule

In the absence of a constitutional or statutory provision which prohibits dual office holding, one person may hold two offices simultaneously unless they are incompatible.

Statutory Incompatibility

- Planning Boards
  - Town Law § 271(3) – Member of town board ineligible for membership on town's planning board
  - Village Law § 7-718(3) – Member of board of trustees ineligible for membership on village's planning board.
  - General City Law § 27(3) – Member of city legislative body ineligible for membership on city's planning board.
- Zoning Boards of Appeals
  - Town Law §267(3) – Member of the town board ineligible for membership on town's zoning board of appeals.
  - Village Law § 7-712(3) – Member of board of trustees ineligible for membership on village's zoning board of appeals.
  - General City Law § 81(2) – Member of city legislative body ineligible for membership on city's zoning board of appeals.

Other Statutory Incompatibility

- County Law §411 - prohibits a county judge, family court judge, surrogate, district attorney, sheriff, county clerk or any other elective county officer from holding at the same time any other elective county or town office or the position of city supervisor;

- Village Law §3-300(3) - prohibits the holding of an elective and an appointive village office;

- Town Law §20(4) – prohibits holding more than one elective town office; and

- General City Law §3 – prohibits any member of the common council of the city from holding certain other paid city offices.

- An Article on this topic that might be helpful:
  Non-Article 18 Conflicts of Interest Restrictions Governing Counties, Cities, Towns, and Villages Under New York State Law by Mark Davies located at http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/ethics-muni-winter06.pdf.

No Statutory Incompatibility

County Planning Boards. GML §239-c(2)(c).

- No person shall be precluded from serving as a member of a county planning board, as appointed by the county legislative body pursuant to Section 239-c, because such member is an elected or appointed official of the county or a municipality.

Regional Planning Boards. GML §239-h(3)(c).

- No person shall be precluded from serving as a member of a regional planning council as appointed by a collaborating municipal legislative body pursuant to Section 239-h, because such member is an elected or appointed official of such municipality.

A member of either a county planning board or a regional planning board shall excuse himself or herself from any deliberation or vote relating to a matter or proposal before such board which is or has been the subject of a proposal, application or vote before the municipal board of which he or she is a member.

Common Law Incompatibility

- Incompatibility – When two offices or positions are "squarely at odds with one another," (*O'Malley v. Macejka, 44 N.Y.2d 530, 534 (N.Y. 1978)), i.e.,* if one is subordinate to the other or if there is an inherent inconsistency in the duties of the two positions *(People ex rel. Ryan v. Green,* 58 N.Y. 295 (1874)).)

Conflicts of Interest: Other Considerations

- *Zagoreos v. Conklin*, 109 A.D.2d 281 (2d Dept. 1985), although no specific provision of Article 18 was violated, perceived conflicts of interest under the common law existed and accordingly the vote by the ZBA was rightly set aside.

- Tuxedo v. Town Bd. of Town of Tuxedo, 69 A.D.2d 320, an officer of an advertising firm could not vote on a zoning application submitted by a subsidiary of one of his firm's clients despite the absence of any interest specifically forbidden by the provisions of Article 18.

Results of Interested Contracts

- Violations of Section 801:
  - Section 804 - Contracts void;
  - Section 805 - Knowing and willful violation a misdemeanor;
- Violations of Section 805-a
  - Section 805-a(2) - Knowing and intentional violations may result in fines, suspension, or removal from office or employment.
- Common Law Violations
  - Recusal
  - Contracts void

Appoint alternate members in the case of conflicts of interest.

Municipal Check List

Designed by the Government Law Center of Albany Law School

The Municipal Checklist

- Have you reviewed a copy of the state ethics law, Article 18, in the last year?
- Have you reviewed a copy of the local ethics law in the last year?
- Does your business relate in any way to issues which may come before the Board on which you sit?
- Could your business potentially benefit or be harmed by a decision of the board on which you serve?

The Municipal Checklist (cont)

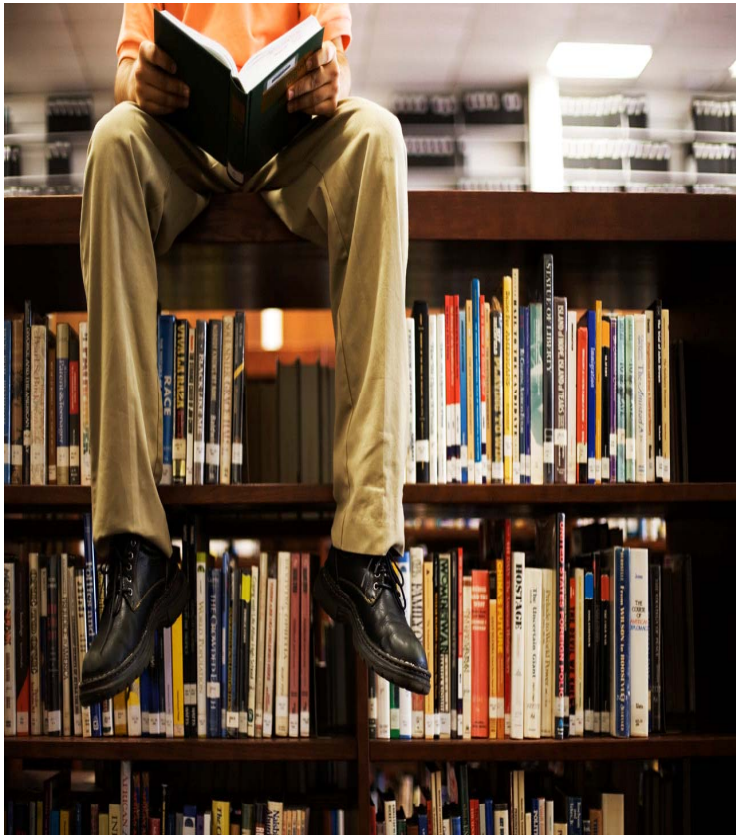
- Are you or a member of your immediate family licensed or engaged in any of the following professions which may cause you, your firm or family member to appear before the board on which you serve:
  - Architect
  - Attorney
  - Builder, Developer
  - Engineer
  - Land Surveyor
  - Mortgage Broker/Agent
  - Realtor
  - Subcontractor for Work on New Construction/ Remodeling
  - Title Insurance Company

The Municipal Checklist (cont)

- Do you hold investments in real estate within the municipality on whose board you serve?
- Do you have stock or any other type of ownership interest (including a silent limited partnership) in any company or organization which may appear before the board on which you serve?
- Are you related to or in business or professional relationship with, another municipal official on a different board or in an office where either position may review the decisions of the other?

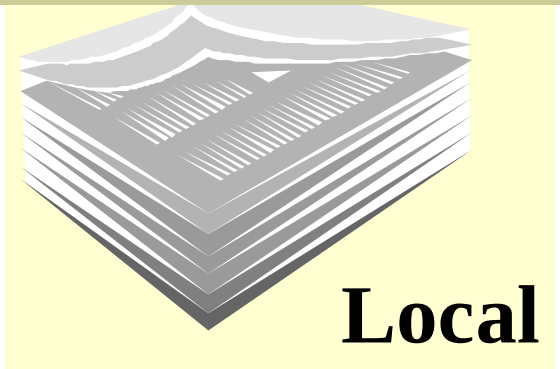
The Municipal Checklist (cont)

- Are you comfortable and conversant with the municipal/board policies on conflicts of interest, recusal from deliberations, and recusal from voting?
- Do you know where to go to get answers to ethical questions in a timely fashion?



The Bottom Line:

Avoid the Headlines



Collaboration

Designed for members of planning boards and zoning boards of appeals by the Department of State in collaboration with Patricia E. Salkin of the Government Law Center of Albany Law School and Mark Davies of the New York City Conflicts of Interest Board.

Resources

- Various publications by Mark Davies including "*Working Rules on Ethics for Zoning Boards of Appeals: Ethics Checklist for Zoning Board Members,"* located at http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/wrking_rules_ethics_zoning_bds_appls.pdf.

- Various publications by Patricia E. Salkin, Raymond & Ella Smith Distinguished Professor of Law and Associate Dean and Director of the Government Law Center of Albany Law School including "*Conflicts of Interest and Other Legal Ethical Considerations for Planners and Lawyers*," located at http://ssrn.com/author=83276.

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For successful completion in 2014 of the 1-HOUR video tutorial:

"Exploring Standards of Ethical Conduct for Members of Planning Boards and Zoning Boards of Appeals: Article 18 of the GML & the Common Law"

Print this page and return to your Governing Board

The governing board of each municipality must pass a resolution to determine what training is eligible to meet the requirements of the New York State law. For more information, please see Annual Training for Planning and Zoning Board of Appeals Members at the Department of State's website: www.dos.ny.gov/lg/lut/index.html

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