

# **Ethics in Land Use Practice: 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 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.<sup>49</sup> 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>50</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>51</sup>

In Eastern Oaks Development, LLC v. Town of Clinton,<sup>52</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>53</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>54</sup>; mayor signing contract was ministerial act and, therefore, there is no prohibited conflict of interest.<sup>55</sup>; budgeting for uncollectible taxes is a ministerial act not subject to discretion.<sup>56</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>57</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>58</sup> The leading case on compatibility of public offices is People ex rel. Ryan v. Green.<sup>59</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>60</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>61</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>62</sup>

In some instances, even where delegation of decision-making authority is permissible, there may be limits on the discretion to select a delegee. 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>63</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>64</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>65</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>66</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 (2022 Ed., Thomson Reuters).

<sup>15</sup> *Id.* at 815.

<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> 2000 N.Y. Op. Att’y Gen. 1058.
- <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> See, e.g., *Tuxedo and Zagoreos*, *supra*.
- <sup>50</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>51</sup> 1995 Op. Atty. Gen. 2.
- <sup>52</sup> 76 A.D.3d 676 (2d Dept. 2010).
- <sup>53</sup> 114 Misc. 2d 8, 14 (Sup. Ct. Nassau Co. 1982).
- <sup>54</sup> 1979 N.Y. Comp. Lexis 217, Opinion No. 79-147.
- <sup>55</sup> 1982 N.Y. Comp. Lexis 416, Opinion No. 82-319.
- <sup>56</sup> 1982 N.Y. AG Lexis 110, Informal Opinion No. 82-1.
- <sup>57</sup> 46 F.3d 162 (2d Cir. 1995).
- <sup>58</sup> 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.) 14882 N.Y. Op. Atty. Gen (Inf.) 148.
- <sup>59</sup> 58 N.Y. 295 (1874).
- <sup>60</sup> 18 Misc. 3d 1129(A) (Clinton Co. 2008).
- <sup>61</sup> See, *Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976).
- <sup>62</sup> 2000 N.Y. Op. (Inf.) Att’y Gen. 22.
- <sup>63</sup> 29 A.D.3d 795 (2d Dept. 2006).
- <sup>64</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>65</sup> See, Gen. Const. Law §41.
- <sup>66</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).

Chapter 1  
Article 18: New York’s Conflict of Interest Law for Municipal Officials  
Mark Davies and Steven G. Leventhal

Article 18 of the New York General Municipal Law sets forth the basic conflicts of interest law for all officers and employees of every municipality in New York State outside New York City. In addition, various specific conflicts of interest provisions may be found scattered throughout the consolidated laws, as discussed in Chapter 2. Federal law – the Hatch Act – may restrict the political activities of certain New York municipal officials, as discussed in Chapter 4. The doctrine of compatibility of offices (dual employment) addresses the question of whether one public servant may hold two public offices, as discussed in Chapter 5. The common law provides additional conflicts of interest restrictions on municipal officials, either as independent provisions or as an expansion of Article 18, as discussed in Chapter 8. Finally, municipalities themselves may adopt local ethics laws or resolutions regulating the conduct of their own officers and employees, as discussed in Chapters 11 and 12. But the fountainhead for municipal conflicts of interest regulation remains Article 18, which this chapter addresses.<sup>1</sup> To assist municipal counsel in training their municipal clients in the sometime arcane complexities of this law, this chapter will also provide a number of examples illustrating the various substantive provisions of Article 18.

Article 18 – sections 800 through 812 of the General Municipal Law – may be divided into five areas:

- Prohibited interests (sections 800-805),
- Prohibited conduct (section 805-a and 805-b),
- Administration (sections 806-808),
- Applicant disclosure in land use matters (section 809), and
- Annual financial disclosure (sections 810-812).

Before turning to a discussion of those areas, one should first examine the genesis and adoption of Article 18.<sup>2</sup>

### **Genesis and Adoption of Article 18**

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<sup>1</sup> For a detailed discussion of the law surrounding Article 18, see Mark Davies, *Article 18 of New York’s General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*, 59 ALBANY LAW REVIEW 1321-1351 (1996) (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/art\\_18\\_article.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/art_18_article.pdf)).

<sup>2</sup> For a more detailed discussion of the legislative history of Article 18, see Ivy Chiu and Mark Davies, *The Legislative History of New York State’s Conflicts of Interest Law for Municipal Officials*, NYSBA MUNICIPAL LAWYER, Vol. 24, No. 3, Summer 2010, at 17 (available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=1797>).

New York State had a form of a municipal ethics law prior to 1964; but those ethics provisions were scattered throughout the County Law, Education Law, General City Law, General Municipal Law, Local Finance Law, Mental Hygiene Law, Penal Law, Second Class Cities Law, Social Welfare Law, Town Law, and Village Law, as well as in local laws, charters, ordinances, resolutions, rules, and regulations, often resulting in contradictions and confusing exceptions.<sup>3</sup> By consolidating and standardizing ethics regulations across the state, Article 18 sought to provide, in a uniform law, a single reference point for local officials and municipal attorneys on ethical conduct. It aimed “to protect the public from municipal contracts influenced by avaricious officers, to protect innocent public officers from unwarranted assaults on their integrity and to encourage each community to adopt an appropriate code of ethics to supplement” Article 18.<sup>4</sup> The legislature found that “[e]xisting law is too complex, too inconsistent, too overgrown with exceptions, for...a clarity of understanding to be possible.”<sup>5</sup> In seeking to provide clear guidance, Article 18 would assist municipal officers and employees in avoiding knowing or unknowing violations of the conflict of interest law; it would also override any existing conflicts of interest laws contradicting its provisions.

Assembly Bill No. 2807 (1964), enacting Article 18, was introduced at the request of the Department of Audit and Control. This reform was spearheaded by State Comptroller Arthur Levitt.<sup>6</sup> The bill was proposed in response to audits conducted by the State Comptroller, which revealed that, between 1961 and 1963, 274 public officers or employees had violated existing conflicts of interest laws and, in 1961, 63% of the counties, 41% of the cities, and 20% of the towns audited had conflicts of interest cases.<sup>7</sup> To prevent similar occurrences in the future, State Comptroller Arthur Levitt pressed the state legislature to adopt a uniform code of ethics. Indeed,

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<sup>3</sup> See 1964 N.Y. Laws ch. 946, § 17 (repealing provisions of the County Law, Education Law, General Municipal Law, Local Finance Law, Social Welfare Law, Town Law, and Village Law); NYS Dept. of Audit and Control, Report to the Governor on Legislation (April 2, 1964), Bill Jacket, 1964 N.Y. Laws ch. 946; Division of the Budget Report on A-2807 (April 20, 1964), Bill Jacket, 1964 N.Y. Laws ch. 946 (“This bill would eliminate conflicting statutes and consolidate into a single statute provisions relating to conflict of interest. At the present time, transactions permitted in one jurisdiction are illegal in another.”). Conflicts of interest provisions still exist in other titles of the consolidated laws but are far narrower in scope and primarily address the holding of dual offices, political activities, recusal, and removal from office. See Chapter 2; Mark Davies, *Non-Article 18 Conflicts of Interest Restrictions Governing Counties, Cities, Towns, and Villages under New York State Law*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 20, No. 1, Winter 2006, at 5 (available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=1813>).

<sup>4</sup> 1964 N.Y. Laws ch. 946, § 1. See also Division of the Budget Report on A-2807 (April 20, 1964), Bill Jacket, 1964 N.Y. Laws ch. 946 (“By specifically defining what constitutes a conflict and what does not, both the municipality and the employee would be protected”).

<sup>5</sup> 1964 N.Y. Laws ch. 946, § 1.

<sup>6</sup> See *Levitt Will Seek Revised State Aid*, N.Y. Times, Oct. 3, 1961; *Levitt Asks Eased Ethics Code for Nonsalaried Local Officials*, N.Y. Times, March 30, 1962; *New Ethics Law Urged by Levitt*, N.Y. Times, Dec. 9, 1963.

<sup>7</sup> See *Levitt Asks Eased Ethics Code for Nonsalaried Local Officials*, N.Y. Times, March 30, 1962; *Violations Found by Albany Audits*, N.Y. Times, May 11, 1963.

at the time, ethics was very much in the air. Attorney General Louis Lefkowitz based his 1961 campaign for New York City Mayor on ethics issues. The final end of Tammany Hall influence and the removal of Carmine De Sapio as Boss in 1961 undoubtedly provided a further impetus for ethics legislation.<sup>8</sup> Mr. Levitt's interest in the matter may have been influenced by his bruising primary battle in 1961 with Mayor Wagner for the Democratic nomination for Mayor, a campaign in which ethics arose as a major issue,<sup>9</sup> and a later push for a major ethics reform in the state legislature, an effort in which Levitt played a key role as a member of a special legislative ethics committee.<sup>10</sup> The Assembly bill garnered a broad range of supporters, including the New York State Conference of Mayors and the Association of Towns, although it was opposed by the State Education Department and the School Boards Association.<sup>11</sup>

As stated by the legislature, Article 18 sought "to define areas of conflicts of interest in municipal transactions, leaving to each community the expression of its own code of ethics."<sup>12</sup> The original approach of Article 18 was thus to regulate only municipal officials' interests in municipal contracts and to leave to local codes of ethics all other ethics restrictions. In short, Article 18, at its outset, did not intend to set forth a comprehensive code of ethics. The sharp critiques of Article 18 as a "disgracefully inadequate" code of ethics,<sup>13</sup> as discussed in the

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<sup>8</sup> See *'Village' Vote Big: Tammany Chief Loses His District Post by 6,165 to 4,745*, N.Y. Times, Sept. 8, 1961; *Brake on Tammany's Power*, N.Y. Times, Sept. 14, 1961; *De Sapio Says Good-By Today at Meeting with his Regulars*, N.Y. Times, Sept. 19, 1961; *Levitt Will Seek Revised State Aid*, N.Y. Times, Oct. 3, 1961; *Lefkowitz Faces Heavy Odds in Mayoralty Race: Despite His Successes with the Issue of Ethics He Still Must Develop Other Strong Points*, N.Y. Times, Oct. 8, 1961.

<sup>9</sup> See, e.g., *Gerosa Questions Wagner's Ethics on Home Expenses*, N.Y. Times, Aug. 23, 1961; *De Sapio Asserts State Questioned Mayor on Ethics*, N.Y. Times, Sept. 6, 1961; *Ethics Unit Clears Mayor, Asks Fund-Raising Curb*, N.Y. Times, Oct. 6, 1961; *Prendergast Calls Wagner an Ingrate over Fund-Raising*, N.Y. Times, Oct. 22, 1961.

<sup>10</sup> *New Ethics Code Is Sought in State for All Officials*, N.Y. Times, Oct. 5, 1963; *State A.D.A. Asks New Ethics Code*, N.Y. Times, Oct. 6, 1963; *New Ethics Plan Studied by State*, N.Y. Times, Oct. 12, 1963; *Levitt Named to Join Study of Ethics Code*, N.Y. Times, Dec. 7, 1963; *State Ethics Body to be Limited to 3*, N.Y. Times, Dec. 14, 1963; *State Ethics Unit Starts Hearings*, N.Y. Times, Jan. 23, 1964; *Obey Conscience Legislators Told*, N.Y. Times, Feb. 4, 1964; *Lawyers Debate Legislative Code*, N.Y. Times, Feb. 6, 1964; *Liberals Demand Stiff Ethics Code*, N.Y. Times, Feb. 8, 1964; *Puzzle in Ethics Battle*, N.Y. Times, Feb. 10, 1964; *City Ethics Body Gaining Stature*, N.Y. Times, Feb. 18, 1964; *Judge Opposes Code of Ethics Being Studied for Legislators*, Feb. 25, 1964; *Panel to Proposed State Ethics Board*, N.Y. Times, March 6, 1964; *Set a High Standard (editorial)*, N.Y. Times, March 6, 1964; *Panel on Ethics Offers New Code for Legislature*, N.Y. Times, March 9, 1964.

<sup>11</sup> See Bill Jacket, 1964 N.Y. Laws ch. 946.

<sup>12</sup> 1964 N.Y. Laws ch. 946, § 1.

<sup>13</sup> See generally Temporary State Commission on Local Government Ethics, *In Search of a Wise Law: Municipal Ethics Reform* (March 20, 1991) (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/In\\_Search\\_of\\_a\\_Wise\\_Law.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/In_Search_of_a_Wise_Law.pdf)); Mark Davies, *New Municipal Ethics Law Proposed*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 5, March/April 1991, at 1; *Final Report of the Temporary State*

Introduction to Chapter 11, rest upon Article 18 as it evolved, not upon Article 18 as it was originally intended and enacted in 1964.

### **Applicability of Article 18**

Article 18 applies to every “municipal officer or employee” in every “municipality” of the state outside New York City. “Municipal officer or employee” and “municipality” are both broadly defined. Thus, “municipality” includes every county, city, town, village, school district, consolidated health district, county vocational education and extension board, public library, board of cooperative educational services, urban renewal agency, joint water works system established 1927 N.Y. Laws ch. 654, town or county improvement district, district corporation, and any other district or a joint service established for the purpose of carrying on, performing, or financing one or more improvements or services intended to benefit the health, welfare, safety, or convenience of the inhabitants of such governmental units or to benefit the real property within such units, as well as any industrial development agency. But the definition expressly excludes New York City and any county, school district, or other public agency or facility within New York City.<sup>14</sup>

Similarly, “municipal officer or employee” includes every officer or employee of a municipality, *whether paid or unpaid*, including members of any administrative board, commission, or other agency of the municipality. In the case of a county, “municipal officer or employee” is deemed also to include any officer or employee paid from county funds. The definition expressly excludes volunteer firefighters and civil defense volunteers (except fire chiefs and assistant fire chief who are included), unless they are otherwise a municipal officer or employee.<sup>15</sup> So a village planning board member who is also a volunteer firefighter would be a municipal officer not because of service as a volunteer firefighter but because of service as a planning board member.

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*Commission on Local Government Ethics*, reproduced in part in 21 FORDHAM URBAN LAW JOURNAL 1 (1993) (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/temp\\_state\\_comm\\_lcl\\_govt\\_ethics\\_finl\\_rpt.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/temp_state_comm_lcl_govt_ethics_finl_rpt.pdf)); Henry G. Miller & Mark Davies, *Why We Need a New State Ethics Law for Municipal Officials*, FOOTNOTES (County Attorneys' Association of the State of New York), Vol. 4, No. 2, Winter 1996, at 5 (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/why\\_we\\_need\\_new\\_state\\_law\\_for\\_mun\\_offs.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/why_we_need_new_state_law_for_mun_offs.pdf)); Mark Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officers and Employees*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 19, No. 3, Summer 2005, at 10 (available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=1815>); Steven G. Leventhal, *Needed: A New Statewide Ethics Code for Municipalities*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 23, No. 4, Fall 2009, at 16 (available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=1799>); Mark Davies, *How Not to Draft an Ethics Law*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 24, No. 4, Fall 2010, at 13 (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/how\\_not\\_to\\_draft\\_an\\_ethics\\_law.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/how_not_to_draft_an_ethics_law.pdf)).

<sup>14</sup> Gen. Mun. Law § 800(4).

<sup>15</sup> Gen. Mun. Law § 800(5).

## Prohibited Interests (Sections 800-805)

The basic restriction of Article 18 consists of a prohibition on municipal officers and employees having an “interest” in a “contract” with their own municipality if the officer or employee has any control over that contract, unless an exception applies. The penalties for a violation are significant: the contract is void and cannot be ratified; and a willful and knowing violation by an official is a misdemeanor.<sup>16</sup> Disclosure of the interest may also be required, even if it is not prohibited.<sup>17</sup>

Specifically, section 801 provides that

Except as provided in section [802] of this chapter [the section on exceptions], (1) no municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer or employee, when such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder (b) audit bills or claims under the contract, or (c) appoint an officer or employee who has any of the powers or duties set forth above and (2) no chief fiscal officer, treasurer, or his deputy or employee, shall have an interest in a bank or trust company designated as a depository, paying agent, registration agent or for investment of funds of the municipality of which he is an officer or employee. The provisions of this section shall in no event be construed to preclude the payment of lawful compensation and necessary expenses of any municipal officer or employee in one or more positions of public employment, the holding of which is not prohibited by law.<sup>18</sup>

Therefore, a violation of this provision requires that four elements be met:

- (1) A “contract” with the municipality must exist;
- (2) The municipal officer or employee must have an “interest” in that contract;
- (3) The municipal officer or employee must have control over that contract; and
- (4) No exception applies.

Each of these elements, together with their attendant definitions and illustrative hypotheticals, are considered below.

### (1) “Contract”

For a violation of section 801 to occur, the matter must involve a contract with the municipality. “Contract” means any claim, account or demand against or agreement with a

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<sup>16</sup> Gen. Mun. Law §§ 804, 805.

<sup>17</sup> Gen. Mun. Law § 803.

<sup>18</sup> Gen. Mun. Law § 801.

municipality, express or implied . . . .”<sup>19</sup> The term “contract” is construed broadly.<sup>20</sup> A claim against the municipality is considered a contract with the municipality. *Note that the official does not have to be a party to the contract.*

*Hypothetical:* When leaving a restaurant with her family one Saturday night, a village trustee is struck by a village sanitation truck. The trustee sues the village. The lawsuit is a “contract” with the municipality.

*Hypothetical:* The village clerk requires an area variance to build a deck onto his home. In one instance, the Zoning Board of Appeals (“ZBA”) grants the variance. In another instance, the ZBA refuses to grant the variance, and the village clerk brings an Article 78 proceeding against the ZBA. The variance is not a contract with the village. The Article 78 proceeding is.

## (2) “Interest”

For a violation of section 801 to occur, the municipal officer or employee, or a person or firm associated with the officer or employee, must have an “interest” in the contract, that is, the officer or employee or associated person or firm must receive a financial benefit as a result of that contract. Specifically, “[i]nterest means a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves.”<sup>21</sup> Again, the municipal official need not be a party to the contract but need only obtain a pecuniary or material benefit, direct or indirect, as a result of the contract.

Furthermore, the municipal officer or employee is deemed to have an interest in a contract of an immediate family member and any entity with which the official is associated. Specifically,

For the purposes of this article a municipal officer or employee shall be deemed to have an interest in the contract of (a) his spouse, minor children and dependents, except a contract of employment with the municipality which such officer or employee serves, (b) a firm, partnership or association of which such

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<sup>19</sup> Gen. Mun. Law § 800(2). “Contract” also includes “the designation of a depository of public funds and the designation of a newspaper, including but not limited to an official newspaper, for the publication of any notice, resolution, ordinance, or other proceeding where such publication is required or authorized by law.” *Id.* However, as discussed later in this chapter, Gen. Mun. Law § 802(1)(c) provides that the provisions of section 801 shall not apply to “[t]he designation of a newspaper, including but not limited to an official newspaper, for the publication of any notice, resolution, ordinance or other proceeding where such publication is required or authorized by law.”

<sup>20</sup> In *Lexjac, LLC v. Beckerman*, No. 14-2864-CV, 2015 WL 3823999, 2015 U.S. App. LEXIS 10704 (2d Cir., June 22, 2015), the United States Court of Appeals for the Second Circuit held that a resolution by which a village gave up a valuable property interest in exchange for a trustee’s promise to maintain the property was a contract within the meaning of section 800(2).

<sup>21</sup> Gen. Mun. Law § 800(3).

officer or employee is a member or employee, (c) a corporation of which such officer or employee is an officer, director or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee.<sup>22</sup>

One should emphasize two points in this regard. First, the official is not deemed to have an interest in a contract of his or her adult children. Second, the official is not deemed to have an interest in a contract of employment of his or her spouse, dependent, or minor child with the municipality.

*Hypothetical:* A town board member's thirty-five-year-old son owns a small construction company, which the town hires to repair the porch on town hall. The town board member has no financial interest in the firm and no financial relationship with his son. The town board member votes to award the contract to his son. The town board member has no "interest" in the contract because neither he nor any of the associated persons cited in the law receives a "pecuniary or material benefit" as a result of the contract.

*Hypothetical:* A village mayor hires her husband as her secretary in village hall. The mayor is not deemed to have an interest in the employment contract between the village and the mayor's husband because employment contracts between the municipality and the spouse, minor child, and dependents of a municipal officer or employee are excluded from the definition of "interest."

*Hypothetical:* A town solicits sealed bids for a major renovation of town hall. The wife of one of the bidders sits on the town board, but she completely recuses (disqualifies) herself from having anything to do with the project. The husband's firm proves to be the lowest bidder. The town board member is deemed to have an "interest" in that contract between her husband and the town, and the contract is prohibited even though the bids were sealed and she recused herself.

*Hypothetical:* A town board member in the Southern Tier is a partner in a firm that owns the only dump in the area for bulk items. The town contracts with the firm to pick up and dispose of such items for town residents. The town board member recuses himself from having anything to do with the contract, either on behalf of the town or on behalf of the firm, and forgoes all profit from the contract, assigning it to his partner. Despite recusing himself and forgoing any profit, the town board member is deemed to have an interest in the contract, and the contract is prohibited.

*Hypothetical:* Same facts as in the preceding example, except the firm is a corporation in which the town board member is an investor only—that is, he has no managerial or other responsibility—owning five percent of the stock of the corporation. Same result. The contract is prohibited.

### **(3) Control**

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<sup>22</sup> Gen. Mun. Law § 800(3).

For a violation of section 801 to occur, the municipal officer or employee must have some control over the contract. The interest in the contract is prohibited

[W]hen such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder (b) audit bills or claims under the contract, or (c) appoint an officer or employee who has any of the powers or duties set forth above . . . .<sup>23</sup>

Accordingly, a violation does not require that the municipal officer or employee in fact exercise any control over the contract; the mere fact that he or she has the power to do so is sufficient.<sup>24</sup> Therefore, recusal, even if combined with sealed bids, will not avoid a violation.

Note that additional rules apply to chief fiscal officers, treasurers, and their deputies and employees.<sup>25</sup>

*Hypothetical:* A village trustee is a partner in an environmental engineering firm. The village planning board hires the firm to assist in reviewing a major proposed development project. The village trustee recuses himself from any involvement in the matter, both on behalf of the village and on behalf of the firm, and assigns all profits from the matter to his partners. The village trustee has the requisite control over the contract because he is a member of the board that appoints the planning board members. As noted above, his recusal and forgoing of profits makes no difference. The contract is prohibited.

#### **(4) Exceptions**

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<sup>23</sup> Gen. Mun. Law § 801.

<sup>24</sup> See *Dykeman v. Symonds*, 85 Misc. 2d 289, 380 N.Y.S.2d 567 (Sup. Ct., Monroe County, 1976), *aff'd*, 54 A.D.2d 159, 388 N.Y.S.2d 422 (4th Dep't 1976).

<sup>25</sup> Gen. Mun. Law § 801(2) provides that “no chief fiscal officer, treasurer, or his deputy or employee, shall have an interest in a bank or trust company designated as a depository, paying agent, registration agent or for investment of funds of the municipality of which he is an officer or employee. The provisions of this section shall in no event be construed to preclude the payment of lawful compensation and necessary expenses of any municipal officer or employee in one or more positions of public employment, the holding of which is not prohibited by law.” “‘Chief fiscal officer’ means a comptroller, commissioner of finance, director of finance or other officer possessing similar powers and duties, except that in a school district the term shall not mean a member of the board of education or a trustee thereof.” Gen. Mun. Law § 800(1). “‘Treasurer’ means a county treasurer, city treasurer, town supervisor, village treasurer, school district treasurer, fire district treasurer, improvement district treasurer, president of a board of health of a consolidated health district, county vocational educational and extension board treasurer, treasurer of a board of cooperative educational services, public general hospital treasurer, or other officer possessing similar powers and duties.” Gen. Mun. Law § 800(6).

As discussed above, section 800(3)(a) excepts from the prohibition of section 800 contracts of employment between the public servant's municipality and his or her spouse, minor child, or dependents. Section 800 specifies sixteen additional exceptions. The most common exceptions involve:

- Having an interest that is prohibited solely because the municipal officer or employee works for a person or firm that has a municipal contract, where the municipal officer or employee is only an officer or employee (not an owner) of the firm, has nothing to do with the contract at the firm, and will not have his or her compensation or other remuneration at the firm affected by the contract;<sup>26</sup>
- Having an interest in a contract between the municipality and a not-for profit organization;<sup>27</sup>
- Having an interest in a municipal contract that already existed at the time the officer or employee was elected or appointed to a municipal position (but this exception does not apply to the renewal of the contract);<sup>28</sup>
- Having an interest in a contract where the interest arises solely from stockholdings and the officer or employee owns or controls, directly or indirectly, less than five percent of the stock;<sup>29</sup> and
- Having an interest in municipal contracts where the aggregate amount payable under the contracts is no more than \$750 during the fiscal year.<sup>30</sup>

Other, less common exceptions involve the designation of a bank or trust company for the municipality,<sup>31</sup> designation of a newspaper as the official newspaper for the municipality,<sup>32</sup>

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<sup>26</sup> Gen. Mun. Law § 802(1)(b) (“A contract with a person, firm, corporation or association in which a municipal officer or employee has an interest which is prohibited solely by reason of employment as an officer or employee thereof, if the remuneration of such employment will not be directly affected as a result of such contract and the duties of such employment do not directly involve the procurement, preparation or performance of any part of such contract”).

<sup>27</sup> Gen. Mun. Law § 802(1)(f) (“A contract with a membership corporation or other voluntary non-profit corporation or association including, but not limited to, rural electric cooperatives. For purposes of this paragraph, the term ‘rural electric cooperative’ shall have the same meaning as the term ‘cooperative’ as defined in subdivision (a) of section two of the rural electric cooperative law”).

<sup>28</sup> Gen. Mun. Law § 802(1)(h) (“A contract in which a municipal officer or employee has an interest if such contract was entered into prior to the time he was elected or appointed as such officer or employee, but this paragraph shall in no event authorize a renewal of any such contract”).

<sup>29</sup> Gen. Mun. Law § 802(2)(a) (“A contract with a corporation in which a municipal officer or employee has an interest by reason of stockholdings when less than five per centum of the outstanding stock of the corporation is owned or controlled directly or indirectly by such officer or employee”).

<sup>30</sup> Gen. Mun. Law § 802(2)(e) (“A contract in which a municipal officer or employee has an interest if the total consideration payable thereunder, when added to the aggregate amount of all consideration payable under contracts in which such person had an interest during the fiscal year, does not exceed the sum of seven hundred fifty dollars”).

purchase of real property by the municipality,<sup>33</sup> condemnation proceedings,<sup>34</sup> the sale of bonds and notes,<sup>35</sup> employment of school physicians,<sup>36</sup> certain purchases and public work by municipalities in counties with a population of 200,000 or less,<sup>37</sup> the furnishing of public utility services,<sup>38</sup> rental of rooms by a municipal official for official duties,<sup>39</sup> payment of private

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<sup>31</sup> Gen. Mun. Law § 802(1)(a) (“The designation of a bank or trust company as a depository, paying agent, registration agent or for investment of funds of a municipality except when the chief fiscal officer, treasurer, or his deputy or employee, has an interest in such bank or trust company; provided, however, that where designation of a bank or trust company outside the municipality would be required because of the foregoing restriction, a bank or trust company within the municipality may nevertheless be so designated”).

<sup>32</sup> Gen. Mun. Law § 802(1)(c) (“The designation of a newspaper, including but not limited to an official newspaper, for the publication of any notice, resolution, ordinance or other proceeding where such publication is required or authorized by law”).

<sup>33</sup> Gen. Mun. Law § 802(1)(d) (“The purchase by a municipality of real property or an interest therein, provided the purchase and the consideration therefor is approved by order of the supreme court upon petition of the governing board”).

<sup>34</sup> Gen. Mun. Law § 802(1)(e) (“The acquisition of real property or an interest therein, through condemnation proceedings according to law”).

<sup>35</sup> Gen. Mun. Law § 802(1)(g) (“The sale of bonds and notes pursuant to section 60.10 of the local finance law”).

<sup>36</sup> Gen. Mun. Law § 802(1)(i) (“Employment of a duly licensed physician as school physician for a school district upon authorization by a two-thirds vote of the board of education of such school district, notwithstanding the fact that such physician shall have an interest, as defined in section eight hundred one of this chapter, in such employment”).

<sup>37</sup> Gen. Mun. Law § 802(1)(j) (“Purchases or public work by a municipality, other than a county, located wholly or partly within a county with a population of two hundred thousand or less pursuant to a contract in which a member of the governing body or board has a prohibited interest, where: (1) the member of the governing body or board is elected and serves without salary; (2) the purchases, in the aggregate, are less than five thousand dollars in one fiscal year and the governing body or board has followed its procurement policies and procedures adopted in accordance with the provisions of section one hundred four-b of this chapter and the procurement process indicates that the contract is with the lowest dollar offer; (3) the contract for the purchases or public work is approved by resolution of the body or board by the affirmative vote of each member of the body or board except the interested member who shall abstain”).

<sup>38</sup> Gen. Mun. Law § 802(2)(b) (“A contract for the furnishing of public utility services when the rates or charges therefor are fixed or regulated by the public service commission”).

<sup>39</sup> Gen. Mun. Law § 802(2)(c) (“A contract for the payment of a reasonable rental of a room or rooms owned or leased by an officer or employee when the same are used in the performance of his official duties and are so designated as an office or chamber”).

employees of the official for part-time municipal service,<sup>40</sup> and municipal contracts with a member of a private industry council or the member's firm.<sup>41</sup>

*Hypothetical:* A common council member is counsel to a local law firm. He does not participate in the profits of the firm but receives a percentage of the billings from his clients. The city contracts with the law firm to provide certain legal services to the city. The common council member is not involved in the matter at the firm and receives no compensation as a result of the firm's work on the matter. His interest in the firm's contract with the city is not prohibited. Note that, if he were a partner in the firm, the exception would not apply and the contract would be prohibited.

*Hypothetical:* A city council member is the executive director of a non-profit social services agency, with which the city contracts. Although a portion of the city council member's salary as executive director will be paid by the city contract, his interest in that contract is not prohibited because the agency is a not-for-profit organization.

*Hypothetical:* The wife of an insurance agent who has an insurance contract with a town is elected to the town board. The town board member's interest in the town's insurance contract with her husband is grandfathered; however, the contract may not be renewed as long as she serves on the town board.

*Hypothetical:* A city IT director owns \$25,000 in Dell stock. He purchases for the city 100 Dell computers. His interest in the contract with Dell is not prohibited because he owns less than five percent of Dell's stock.

*Hypothetical:* A village trustee owns a stationary store from which the village makes occasional purchases, amounting to no more than \$500 in any one fiscal year. Because the total amount paid to the trustee's stationary store does not exceed \$750 in the fiscal year, her interest in the village's contracts with the store is not prohibited.

## **(5) Caveat**

The above provisions address only prohibited interests. They do not address prohibited conduct. Some local ethics codes prohibit a municipal officer or employee from taking an action that benefits himself or herself or an associated person or firm. The common law, discussed in Chapter 8, may also prohibit such self-dealing. Accordingly, recusal is often required, even if the contract is not otherwise prohibited.

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<sup>40</sup> Gen. Mun. Law § 802(2)(d) ("A contract for the payment of a portion of the compensation of a private employee of an officer when such employee performs part time service in the official duties of the office").

<sup>41</sup> Gen. Mun. Law § 802(2)(f) ("A contract with a member of a private industry council established in accordance with the federal job training partnership act [29 U.S.C. § 1501 et seq., repealed] or any firm, corporation or association in which such member holds an interest, provided the member discloses such interest to the council and the member does not vote on the contract").

## (6) Violations

The law in regard to violations of the prohibited interest prohibition in section 801 may be summarized as follows:

If the municipal officer or employee has an interest in a contract with the municipality and control over that contract, and no exception applies, then the interest is prohibited.<sup>42</sup> As discussed below, the contract is void and cannot be ratified, and a willful and knowing violation by the official is a misdemeanor.<sup>43</sup>

If the municipal officer or employee has an interest in a contract with the municipality *but no* control over that contract, then interest is *not* prohibited but the official must disclose the interest, as discussed in section (9) below.<sup>44</sup>

If the municipal officer or employee has an interest in a contract with the municipality and control over that contract *but one of the exceptions set forth in section 802(1) applies*, then the interest is *not* prohibited but the official must disclose the interest, as discussed in section (9).<sup>45</sup>

If the municipal officer or employee has an interest in a contract with the municipality and control over that contract *but one of the exceptions set forth in section 802(2) applies*, then the interest is *not* prohibited and the official need *not* disclose the interest.<sup>46</sup>

Summarizing these requirements in tabular form:

<b>Interest in Contract with Municipality</b>	<b>Control over Contract</b>	<b>Exception Applies</b>	<b>Required Action</b>
No	N/A	N/A	None – interest not prohibited
Yes	No	N/A	None – interest not prohibited
Yes	Yes	No	Interest prohibited
Yes	Yes	§ 802(1) exception	Interest not prohibited but disclosure required
Yes	Yes	§ 802(2)	Interest not prohibited and no

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<sup>42</sup> Gen. Mun. Law §§ 801, 802.

<sup>43</sup> Gen. Mun. Law §§ 804 (“Any contract willfully entered into by or with a municipality in which there is an interest prohibited by this article shall be null, void and wholly unenforceable”), 805 (“Any municipal officer or employee who willfully and knowingly violates the foregoing provisions of this article shall be guilty of a misdemeanor”).

<sup>44</sup> Gen. Mun. Law § 803(1).

<sup>45</sup> Gen. Mun. Law § 803(1).

<sup>46</sup> Gen. Mun. Law § 803(2). Of course, the official may decide to disclose the interest even though disclosure is not required.

		exception	disclosure required
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**(7) Penalties**

If the official’s interest in the municipal contract is prohibited, then the contract is “null, void and wholly unenforceable.”<sup>47</sup> Furthermore, an official who has willfully and knowingly violated the prohibition is guilty of a misdemeanor.<sup>48</sup>

Neither sealed bids, nor the official’s recusal, nor the forfeiture of any financial benefit obtained as a result of the contract will cure the violation. Furthermore, the municipality may not ratify the void contract and waivers of the prohibited interest provision are not available, although—in certain instances—the rule of necessity may apply, as discussed in Chapter 8.

**(8) Special Note for Nassau County**

Certain prohibited interest restrictions apply to members of municipal governing boards in regard to real property in Nassau County.<sup>49</sup> This section was added to Article 18 in 1970.<sup>50</sup>

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<sup>47</sup> Gen. Mun. Law § 804.

<sup>48</sup> Gen. Mun. Law § 805.

<sup>49</sup> See Gen. Mun. Law § 804-a, which provides:

No member of the governing board, of a municipality shall have any interest in the development or operation of any real property located within Nassau County and developed or operated by any membership corporation originally formed for purposes among which are the following:

1. to plan for, advise, recommend, promote and in all ways encourage, alone or in concert with public officials and bodies and interested local associations, the development and establishment of any lands in Nassau County publically [sic] owned with particular emphasis on industrial, business, commercial, residential and public uses, the augmentation [sic] of public revenues and furtherance of the public interest of the citizens of Nassau County;
2. to conduct studies to ascertain the needs of Nassau County as pertains to such publically<sup>1</sup> owned lands and supporting facilities and in Nassau County generally for the purpose of aiding the County of Nassau in attracting new business, commerce and industry to it and in encouraging the development and retention of business, commerce and industry;
3. to relieve and reduce unemployment, promote and provide for additional and maximum employment, better and maintain job opportunities and instruct or train individuals to improve or develop their capabilities for such jobs;
4. to implement and engage itself in plans of development of such publically<sup>1</sup> owned lands and other areas in connection with private companies and citizens and with public bodies and officials, and to participate in such operations, leaseholds, loans, ownerships with respect to land, buildings or public facilities or interest therein as may be lawful and desirable to effectuate its corporate purposes and the best interests of the people of Nassau County.

<sup>50</sup> 1970 N.Y. Laws ch. 720, § 1.

Since this section, 804-a, precedes section 805, a willful and knowing violation of this prohibition would constitute a misdemeanor.<sup>51</sup>

### **(9) Disclosure of Interests in Municipal Contracts**

In certain instances, a municipal officer or employee who has an interest in a contract with his or her municipality must disclose that interest. Specifically, if a municipal officer or employee has, will have, or later acquires an interest in an actual or proposed contract, purchase agreement, lease agreement, or other agreement, including an oral agreement, with his or her municipality, he or she must publicly disclose the interest.<sup>52</sup>

This disclosure requirement extends to the spouse, that is, if the spouse of a municipal officer or employee has, will have, or later acquires an interest in an actual or proposed contract, purchase agreement, lease agreement, or other agreement, including an oral agreement, with the municipal officer or employee's municipality, the municipal officer or employee must publicly disclose the interest.<sup>53</sup> Note that disclosure is required where the spouse of the official has an interest in the contract even where that interest is not imputed to the official (for example, where the spouse's partnership has an interest in the contract).<sup>54</sup> Further, a potential interest in a contract, or even a proposed contract, must be disclosed, even if the potential interest is not prohibited,<sup>55</sup> except that, as discussed in section (6) above, disclosure is not required where the interest in the contract falls within one of the exceptions set forth in section 802(2).<sup>56</sup>

The disclosure by the official under section 803 must be public, must be in writing, and must state the nature and extent of the interest. The disclosure must be made to the official's immediate supervisor and to the governing body of the municipality as soon as the official has knowledge of the actual or prospective interest. This disclosure must be made part of and set forth in the official record of the proceedings of the governing body.<sup>57</sup>

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<sup>51</sup> See Gen. Mun. Law § 805 ("Any municipal officer or employee who willfully and knowingly violates the foregoing provisions of this article shall be guilty of a misdemeanor").

<sup>52</sup> Gen. Mun. Law § 803(1) ("Any municipal officer or employee who has, will have, or later acquires an interest in or whose spouse has, will have, or later acquires an interest in any actual or proposed contract, purchase agreement, lease agreement or other agreement, including oral agreements, with the municipality of which he or she is an officer or employee, shall publicly disclose the nature and extent of such interest in writing to his or her immediate supervisor and to the governing body thereof as soon as he or she has knowledge of such actual or prospective interest. Such written disclosure shall be made part of and set forth in the official record of the proceedings of such body").

<sup>53</sup> Gen. Mun. Law § 803(1).

<sup>54</sup> Gen. Mun. Law § 803(1).

<sup>55</sup> Gen. Mun. Law § 803(1).

<sup>56</sup> Gen. Mun. Law § 803(2) ("Notwithstanding the provisions of subdivision one of this section, disclosure shall not be required in the case of an interest in a contract described in subdivision two of section eight hundred two hereof").

<sup>57</sup> Gen. Mun. Law § 803(1).

A willful and knowing violation of the disclosure requirements of section 803 is a misdemeanor.<sup>58</sup>

*Hypothetical:* A law firm, in which a village trustee is a partner, contracts with the village to provide legal services. The trustee's interest in the contract is prohibited, and the trustee must publicly disclose that interest.

*Hypothetical:* A law firm, in which a village trustee is an associate, contracts with the village to provide legal services. The trustee has nothing to do with the contract either on behalf of the village or the law firm, and her compensation from the law firm is not affected by the contract. The trustee's interest in the contract is not prohibited, but she must publicly disclose that interest.

*Hypothetical:* A corporation, in which the husband of a village trustee serves as a director, contracts with the village to supply computers. The husband's interest in the corporation is not imputed to the trustee (and therefore the trustee has no interest in the corporation's contract with the village), but the trustee must still publicly disclose her husband's interest.

*Hypothetical:* A town board member owns a law firm that will be merging with another law firm. That other law firm has bid on a town contract to provide legal services. The town board member must publicly disclose that future interest in the proposed contract with the town. If the contract is awarded to the law firm, the town board member will have a prohibited interest in the contract after the merger, and he will be required to resign from the town board or from the law firm.

## **(10) Criticisms of Section 801**

The prohibited interest provisions of section 801 raise substantial problems for municipalities around the state, particularly for smaller municipalities in rural areas; and for that reason, and others, section 801 elicited resounding criticism from the Temporary State Commission on Local Government Ethics, criticism that is worth quoting at length:

The basic prohibition in article 18 focuses upon the "interest" of an official - or his or her spouse, dependents, or business - in a contract with the municipality. [Gen. Mun. Law § 800(3), 801.] That approach proves unacceptable for several reasons.

First, to counter the overbreadth of such a prohibition, the provision requires two significant limitations and fifteen [now sixteen] exceptions. As a result, many actions that should be prohibited are instead permitted.

The first limitation restricts the prohibition to those contracts that the official has "the power or duty to (a) negotiate, prepare, authorize or approve...or authorize or approve payment thereunder (b) audit bills or

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<sup>58</sup> Gen. Mun. Law § 805 ("Any municipal officer or employee who willfully and knowingly violates the foregoing provisions of this article shall be guilty of a misdemeanor").

claims under the contract, or (c) appoint an officer or employee who has any of...[those] powers or duties...." [Gen. Mun. Law § 801(1).] Thus, for example, the chair of a town zoning board could lobby with the town board to award a lucrative no-bid contract to the chair's company.

A significant exception provides that the prohibition shall not apply to a contract with a municipal official's business if the official's business-generated income will not be "directly affected" by the contract and if his or her duties of municipal employment do not directly involve the procurement, preparation, or performance of the contract. Therefore, a city council member could vote to award a contract to a company of which the member himself is president, so long as the member's salary as president "will not be directly affected as a result of such contract" and so long as the duties of the member "do not directly involve the procurement, preparation or performance of any part of such contract." [Gen. Mun. Law § 802(1)(b).]

The second limitation - the failure to include brothers, sisters, parents, and emancipated children in the definition of interest in a contract - would, for example, permit the chair of a village planning board to vote in favor of granting subdivision approval to his own son or daughter for a new shopping mall, an approval worth perhaps hundreds of thousands of dollars.

Section 802 of the General Municipal Law contains fifteen [now sixteen] exceptions to the basic prohibition against an official having an interest in a contract with his or her municipality. One must question the wisdom behind a single ethics provision that requires fifteen [sixteen] exceptions.

Second, the prohibition sometimes produces draconian results that are clearly at odds with the interests of the municipality, particularly in smaller, rural communities having limited access to goods and services. For example, one such community, prohibited from contracting with the mayor's snowplowing business, was forced to obtain that service at a substantially higher price from a company many miles away....An ethics regulation invites evasion whenever it thus thwarts the legitimate interests of the community and undermines local businesses.

Third, the existence of an official's interest in a contract with his or her municipality is not inherently bad. Indeed, the community may prefer to contract locally; and the official may provide better goods and services than someone else, for less money. From the perspective of public perception, the evil lies not in the fact of the contract but in officials' using their official positions to obtain a financial benefit for themselves, their families, or their businesses. If the contract is awarded with the community's full knowledge of the official's interest, in full compliance with any applicable bidding laws, and without any participation by the official in the award process, then the advantage of the contract to the municipality will almost certainly offset any negative perception resulting from the fact that an official has an interest in a municipal contract. Yet current ethics laws do not permit any such procedure.

Fourth, the focus upon interests in contracts, with the accompanying limitations and exceptions, has made article 18 difficult to understand and enforce. Furthermore, any ethics law that rigidly prohibits interests in contracts, rather than permitting such interests with appropriate disclosure and recusal, sends to officials and citizens alike the message that municipal officials are inherently suspect, a message that contradicts reality and undermines respect for government.<sup>59</sup>

Yet, efforts to amend Article 18 to correct these deficiencies have fallen on deaf legislative ears, despite widespread support from municipal associations, newspaper editorials, and bar groups.<sup>60</sup>

### **Prohibited Conduct (Sections 805-a and 805-b)**

In addition to prohibiting and requiring disclosure of certain *interests* in municipal contracts, Article 18 also contains, in very anemic form, certain restrictions on *conduct* by municipal officials. As discussed above, the 1964 Act contained no provisions at all on prohibited conduct, leaving such regulation to the individual municipality. In 1970, Article 18 was amended to add a new section 805-a prohibiting certain actions by municipal officials:

- the solicitation of certain gifts or acceptance of certain gifts worth \$25 or more, subsequently increased to \$75;
- disclosure or personal use of confidential municipal information;

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<sup>59</sup> Temporary State Commission on Local Government Ethics, *In Search of a Wise Law: Municipal Ethics Reform*, at 2-4 (March 20, 1991) (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/In\\_Search\\_of\\_a\\_Wise\\_Law.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/In_Search_of_a_Wise_Law.pdf)). See also Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 PACE L. REV. 243, 262-265 (1991) (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/ethics\\_govt\\_act-fd\\_provs.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/ethics_govt_act-fd_provs.pdf)).

<sup>60</sup> See *Final Report of the Temporary State Commission on Local Government Ethics*, reproduced in part in 21 FORDHAM URBAN LAW JOURNAL 1, 11-12 (1993) (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/temp\\_state\\_comm\\_lcl\\_govt\\_ethics\\_finl\\_rpt.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/temp_state_comm_lcl_govt_ethics_finl_rpt.pdf)); Mark Davies, *Enacting a Local Ethics Law – Part I: Code of Ethics*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 21, No. 3, Summer 2007, at 4 (available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=1809>); Steven G. Leventhal, *Needed: A New Statewide Ethics Code for Municipalities*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 23, No. 4, Fall 2009, at 16 (available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=1799>); Mark Davies, *How Not to Draft an Ethics Law*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 24, No. 4, Fall 2010, at 13 (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/how\\_not\\_to\\_draft\\_an\\_ethics\\_law.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/how_not_to_draft_an_ethics_law.pdf)). Comments by some critics of Article 18 that no one's life, liberty, or property is safe while the legislature is in session (Final Accounting in Estate of A.B., 1 Tucker 247, 249 (N.Y. Surr. 1866) (Tucker, Surr.)) prove not only mean-spirited but singularly unhelpful, for only the legislature can fix the mess that constitutes Article 18.

- compensated services in relation to any matter before the official’s own municipal agency or before a municipal agency over which the official has jurisdiction or to which the official has the power to appoint; and
- compensated services in relation to any matter before any municipal agency where the compensation is contingent on action taken by the agency, except that a fee based on the reasonable value of services rendered may be set at any time.<sup>61</sup>

Each of these provisions is considered below. Note, however, that a violation of section 805-a carries no remedy except disciplinary action, even for a violation that is knowing and intentional.<sup>62</sup>

**(1) Gifts (Section 805-a(1)(a))**

A municipal officer or employee may not request nor accept a gift in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form, where *both* of the following conditions are present:

*Value of Gift:*

The gift, if accepted, is worth seventy-five dollars or more (or, by implication, where multiple gifts are worth seventy-five dollars or more in the aggregate), and

*Circumstances of Gift:*

- It “might reasonably be inferred” that the gift was intended to influence an official action; or
- The gift could “reasonably be expected” to influence his or her official action; or
- The gift was intended as a reward for an official action.<sup>63</sup>

Note that the \$75 threshold applies only to the acceptance of gifts, not to the solicitation of gifts, the threshold for which is \$0.

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<sup>61</sup> 1970 N.Y. Laws ch. 1019, § 2, adding Gen. Mun. Law § 805-a, as amended by 1987 N.Y. Laws ch. 813, § 21.

<sup>62</sup> Gen. Mun. Law § 805-a(2) (“In addition to any penalty contained in any other provision of law, any person who shall knowingly and intentionally violate this section may be fined, suspended or removed from office or employment in the manner provided by law”).

<sup>63</sup> Gen. Mun. Law § 805-a(1)(a) (“No municipal officer or employee shall: a. directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part”).

*Exception:* A public officer authorized by law to solemnize a marriage may accept compensation having a value of \$100 or less for the solemnization of a marriage at a place other than the public officer's normal public place of business and at a time other than the public officer's normal business hours.<sup>64</sup>

The gift restriction in section 805-a(1) has been sharply criticized as not providing adequate guidance to municipal officers and employees as to the gifts that they may accept and those that are prohibited.<sup>65</sup> Indeed, one county court found the provision unconstitutionally vague.<sup>66</sup> Therefore, as discussed in Chapters 11 and 12, the municipality should adopt a local ethic code that provides a clear standard on the acceptance of gifts by its officials. (With few exceptions, *solicitation* of all gifts of any size should be prohibited because solicitation almost always involves an element of coercion.) Such a standard may prohibit gifts that section 805-a(1)(a) would allow (e.g., by reducing the \$75 threshold to *de minimis*) but may not permit gifts that that section would prohibit.<sup>67</sup> In addition, the local code should expressly state that multiple

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<sup>64</sup> Gen. Mun. Law § 805-b (“Notwithstanding any statute, law or rule to the contrary, no public officer listed in section eleven of the domestic relations law shall be prohibited from accepting any fee or compensation having a value of one hundred dollars or less, whether in the form of money, property, services or entertainment, for the solemnization of a marriage by such public officer at a time and place other than the public officer's normal public place of business, during normal hours of business. For the purpose of this section, a town or village judge's normal hours of business shall mean those hours only which are officially scheduled by the court for the performing of the judicial function”). *See also* Dom. Rel. Law § 11 (providing a detailed list of whom may solemnize a marriage). Section 805-b was added in 1983 and then permitted officials to accept gifts or benefits up to \$50 for performing marriages outside of normal business hours and place of business. The amount was increased to \$75 in 1990 and to \$100 in 2007, when “gift or benefit” was replaced with “fee or compensation.” 1983 N.Y. Laws ch. 433, § 1, adding Gen. Mun. Law § 805-b, amended by 1990 N.Y. Laws ch. 238, § 1, and 2007 N.Y. Laws ch. 536, § 1. According to the Senate Introducer's Memorandum in Support of the 2007 amendment, municipal officials performing marriages “are often requested to travel on occasion great distances and at great personal inconvenience to themselves to perform these valuable services.” For marriage ceremonies performed by a public officer at the public officer's normal public place of business, during normal hours of business, Dom. Rel. Law §11-c(3) provides that “[a] marriage officer may receive a salary or wage in an amount to be determined by the governing body of the municipality which appoints him or her. In the event that a marriage officer receives a salary or wage, he or she shall not receive any remuneration or consideration from any other source for performing his or her duties. In the event that a marriage officer does not receive a salary or wage, he or she may accept and keep up to seventy-five dollars for each marriage at which he or she officiates, paid by or on behalf of the persons married.”

<sup>65</sup> *See, e.g.*, Temporary State Commission on Local Government Ethics, *In Search of a Wise Law: Municipal Ethics Reform* (March 20, 1991), at 5 (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/In\\_Search\\_of\\_a\\_Wise\\_Law.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/In_Search_of_a_Wise_Law.pdf)).

<sup>66</sup> *People v. Moore*, 377 N.Y.S.2d 1005, 1008-1009 (Fulton County Ct. 1975).

<sup>67</sup> Gen. Mun. Law § 806(1)(a), discussed below.

gifts from the same or affiliated donors within a twelve-month period must be aggregated for purposes of meeting any maximum.

Clarity of regulation is particularly important in areas where the standards of conduct in the public sector differ from those of the private sector, and where the unwary public officer or employee may unwittingly transgress. The regulation of gifts is a notable example of standards applicable in the public sector that differ markedly from the practices prevalent in the private sector. In the private sector, gifts are freely exchanged. The practice is so widely accepted that federal tax law recognizes business entertainment as an “ordinary and necessary” tax-deductible business expense.<sup>68</sup> However, the solicitation or acceptance of gifts and favors by government officers or employees tends to create an improper appearance, at the least, and may be a corrupting influence. In some cases, this private sector norm may amount to a public sector crime.<sup>69</sup>

*Hypothetical:* A town board member and a local developer are long time personal friends. They and their spouses traditionally celebrate their birthdays together at an expensive local restaurant. The cost of dinner always exceeds the sum of seventy-five dollars per person. Each friend picks up the tab on the birthday of the other. Shortly after the board member’s fiftieth birthday, the developer applies to the town board for approval of a major development project. The cost of the birthday celebration is a gift to the town board member. The value of the gift exceeds the threshold amount of seventy-five dollars. However, based on the longtime friendship and history of birthday celebrations, it would not be reasonable to infer that the gift was intended to influence the board member’s official action; nor would it be reasonable to expect that the gift would have such an influence. For the same reasons, it would be unreasonable to conclude the gift was intended as a reward for a previous official action. General Municipal Law Section 805-a would not prohibit the gift.

*Hypothetical:* The president of a county-funded not-for-profit organization invites the County Executive to attend its annual dinner dance. Tickets to the event are sold at a price that exceeds seventy-five dollars each. The County Executive attends, and presents the president with a citation recognizing the organization’s charitable work. Complimentary attendance at the ceremonial event for an official purpose, and even consumption of food and beverages incidental to such attendance, would not constitute a prohibited gift to the County Executive. The County Executive may also send a representative to attend in her place.

*Hypothetical:* In the previous example, the president of the county-funded not-for-profit organization invites the County Executive to bring her spouse to the dinner dance, also as a guest of the organization. Complimentary attendance at the dinner dance by the County Executive’s spouse would not serve any official purpose, and it might reasonably be inferred that the gift was intended to influence or reward the County Executive in connection with the county funding of the organization. Therefore, the County Executive may not accept the invitation to bring her spouse to the dinner dance as a guest of the organization.

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<sup>68</sup> See 26 U.S.C. § 274 (providing that certain entertainment expenses shall not be tax deductible).

<sup>69</sup> See Penal Law §§ 200.00-200.56 (codifying crimes of bribery involving public servants).

*Hypothetical:* A village vendor makes the maximum contribution allowed by law to the campaign of the incumbent mayor. The amount of the contribution exceeds the sum of seventy-five dollars. Campaign contributions are not regulated by General Municipal Law Section 805-a, and therefore are not gifts for the purposes of that statute.<sup>70</sup> Rather, campaign contributions are subject to regulation under the New York Election Law.<sup>71</sup>

*Hypothetical:* A worker employed in the county parks department is responsible for coordinating special events at a county-owned nature preserve. The worker coordinates a film director's use of the facility for the filming of a movie scene. Several days later, four cases of wine are delivered to the worker's office together with a thank you note from the grateful film director. Each individual bottle of wine has a retail value of less than seventy-five dollars, but the cost of the two cases of wine exceeds that amount. The worker asks the county Board of Ethics whether the bottles may be divided among all of the workers at the facility, with each worker receiving only one bottle of wine. The Board of Ethics advises the worker that "re-gifting" the wine would not reduce the value of the original gift to the worker and, therefore, the gift of wine may not be accepted.

*Bribery and Related Offenses (Penal Law Art. 200)*

New York's bribery statutes prohibit the offering or conferring of a "benefit" on a public servant pursuant to an agreement or understanding that his or her "vote, opinion, judgment, action, decision or exercise of discretion as a public servant" would be influenced.<sup>72</sup> For purposes of the Penal Law, "benefit" is defined as "any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary."<sup>73</sup> If the benefit is conferred as a reward for the official's actual violation of his or her duty, it may also constitute a felony.<sup>74</sup> The donor and the beneficiary are both subject to prosecution.<sup>75</sup> The sentencing range increases with the amount of the bribe and the gravity of the official's misconduct.<sup>76</sup>

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<sup>70</sup> See *DiLucia v. Mandelker*, 68 N.Y.2d 844, 501 N.E.2d 32 (N.Y. 1986)(construing New York City Charter section 2604). See also 2005 N.Y. Op. (Inf.) Att'y Gen. 10.

<sup>71</sup> Elec. Law §§ 14-114, 14-116, 14-120, 14-130.

<sup>72</sup> See Penal Law §§ 200.00-200.56.

<sup>73</sup> See Penal Law § 10.00(17) ("Benefit" means any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.').

<sup>74</sup> See Penal Law §§ 200.00-200.56.

<sup>75</sup> Penal Law §§ 200.00-200.56. See generally Julia Davis, *Public Integrity Criminal Law for the Municipal Attorney*, NYSBA MUNICIPAL LAWYER, Vol. 25, No. 1, Winter 2011, at 17 (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/publ\\_integ\\_crimLaw.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/publ_integ_crimLaw.pdf)).

<sup>76</sup> Penal Law §§ 200.00-200.56.

In a bribery prosecution, the People must prove beyond a reasonable doubt that there was a corrupt purpose in making the offer or conferring the benefit.<sup>77</sup> Even in the absence of a corrupt purpose, a defendant may be convicted of the misdemeanor of “giving or receiving unlawful gratuities” where a benefit is offered to or conferred upon an official “for having engaged in official conduct” which the official was required or authorized to perform and for which that official was not entitled to any additional compensation.<sup>78</sup> The New York Penal Law does not provide a safe harbor for gratuities having a value of less than any stated threshold. Simply put, there can be no “tipping” in government service.<sup>79</sup>

*Hypothetical:* After two police officers complete an investigation, clearing the president of a trucking company of any wrongdoing in connection with a motor vehicle accident, the trucking company president gives them ten dollars, saying “here, you fellows, buy some coffee for all the homework you have done.” The gift could not have influenced the police investigation because it was given after the investigation was completed. Nevertheless, the company president was prosecuted and convicted of the crime of giving an unlawful gratuity. The court held that “there need not be a possibility or probability of preferential treatment to have a violation . . . .” Instead, a prosecutor need only show that the donor’s “purpose in giving the gift was to give additional compensation, or a reward, gratuity or some other favor” for an official to act.<sup>80</sup>

## **(2) Confidential Information (Section 805-a(1)(b))**

Section 805-a(1)(b) provides that

No municipal officer or employee shall: . . . b. disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests[.]<sup>81</sup>

The term “confidential information” is not defined in the General Municipal Law, nor in the Public Officers Law, which contains a similar provision applicable to state employees.<sup>82</sup>

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<sup>77</sup> Penal Law §§ 200.00-200.56.

<sup>78</sup> Penal Law § 200.30. *See also* Penal Law § 200.35 (“A public servant is guilty of receiving unlawful gratuities when he solicits, accepts or agrees to accept any benefit for having engaged in official conduct which he was required or authorized to perform, and for which he was not entitled to any special or additional compensation”).

<sup>79</sup> *See, e.g.*, N.Y.C. Charter § 2604(b)(13) for a municipal ethics provision prohibiting tipping (“No public servant shall receive compensation except from the city for performing any official duty or accept or receive any gratuity from any person whose interests may be affected by the public servant's official action”).

<sup>80</sup> *People v. La Pietra*, 64 Misc. 2d 807, 316 N.Y.S.2d 289 (Dist. Ct., Suffolk County, 1970), *aff'd*, 64 Misc.2d 810 316 N.Y.S.2d 292 (A.T., 2d Dep’t, 1970).

<sup>81</sup> Gen. Mun. Law § 805-a(1)(b).

<sup>82</sup> Pub. Off. Law § 74(3)(c).

Private sector firms devote considerable resources to the protection of proprietary information, customer lists, formulas, and trade secrets. However, in the public sector, openness and transparency in government are viewed as a fundamental public policy, essential to keep government accountable and to foster public confidence in government. In New York, this fundamental public policy is expressed in the form of the Freedom of Information Law (FOIL), which makes most government records available for public inspection and copying, and the Open Meetings Law (OML), which makes most government meetings open to attendance by the public.<sup>83</sup>

In order to reconcile the ethical duty of confidentiality under section 805-a with the duty to disclose under FOIL and the OML, it is reasonable to conclude that the term “confidential information” has a different meaning for purposes of section 805-a than it does for purposes of FOIL and the OML; and that section 805-a(1)(b) would be violated if a municipal officer or employee made an unauthorized disclosure of information that satisfied either of the following two criteria:

*Mandatory denial of access:* Information that is prohibited from disclosure by federal or state law; or

*Discretionary denial of access:* Information that the municipality has made a reasoned decision to withhold from public disclosure in the lawful exercise of the discretion afforded to the municipality by FOIL or the OML.<sup>84</sup>

Under this approach, each discretionary denial of access would be subject to Article 78 review to determine whether the municipality abused its discretion.<sup>85</sup>

Generally, government information is presumptively subject to public disclosure.<sup>86</sup> However, that same information may be presumptively confidential if the custodian of the information is a former government attorney. Government attorneys must adhere not only to the standards of conduct applicable to their conduct as government officers or employees, they also must adhere to the standards of conduct applicable to attorneys engaged in the practice of law.

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<sup>83</sup> See Pub. Off. Law §§ 84-90 (Freedom of Information Law) and §§ 100-111 (Open Meetings Law).

<sup>84</sup> See Steven G. Leventhal & Carol L. Van Scoyoc, *The Ethics of Transparency and the Transparency of Ethics: Reconciling the Ethical Duty of Confidentiality Under Article 18 of the GML With the Duty to Disclosure under FOIL and the OML*, NYSBA MUNICIPAL LAWYER, Winter/Spring 2013, Vol. 27, No. 1, at 54 (available at [http://www.nysba.org/Sections/Municipal/EthicsforMunicipalLawyers/EthicsforMunicipalLawyersAssets/the\\_Ethics\\_of\\_Transparency\\_and\\_the\\_Transparency\\_of\\_Ethics.html](http://www.nysba.org/Sections/Municipal/EthicsforMunicipalLawyers/EthicsforMunicipalLawyersAssets/the_Ethics_of_Transparency_and_the_Transparency_of_Ethics.html)).

<sup>85</sup> See *Washington Post Co. v. New York State Ins. Dept.*, 61 N.Y.2d 557, 463 N.E.2d 604 (1984).

<sup>86</sup> *Id.*

Rule 1.6 of The Rules of Professional Conduct<sup>87</sup> regulates the disclosure of confidential information by public and private sector attorneys. The Rule defines confidential information as information that is:

- Protected by the attorney-client privilege;
- Likely to be embarrassing or detrimental to the client if disclosed; or
- Information that the client has requested be kept confidential.

Rule 1.11 imposes additional ethical requirements for current and former government attorneys. This Rule defines “confidential government information” as “information that has been obtained under governmental authority and that, at the time the Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.”<sup>88</sup> A former government attorney is disqualified from representing a private client where the lawyer obtained confidential government information about an adverse party that could be used to the disadvantage of the adverse party.

*Hypothetical:* An inmate files a FOIL request seeking the entire personnel file of the arresting officer. Pursuant to N.Y. Civil Rights Law section 50-a, all personnel records used to evaluate performance toward continued employment or promotion under the control of any police agency or department of the state or any political subdivision are confidential and *may not* be disclosed without the express written consent of the police officer or a court order.<sup>89</sup> The responsible information officer must review the record to distinguish between information protected by the Civil Rights Law and information that may be disclosed pursuant to FOIL.<sup>90</sup> Information that is not protected from disclosure may still fall within a FOIL exception, such as the exception for information the disclosure of which would result in an unwarranted invasion of personal privacy (such as the police officer’s residence address). Where an exception applies, the municipality *may* deny access to the information, subject to judicial review.

*Hypothetical:* In the previous example, the inmate’s attorney requests the information through a discovery demand during the course of pending litigation. The inmate’s counsel also demands production of any written advice given by the municipal attorney to the corrections department regarding its policy for conducting strip searches at the jail. A former staff attorney—now serving as outside counsel—represents the municipality in the case. Absent a court order to the contrary, the attorney must adhere to the statutory confidentiality imposed by

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<sup>87</sup> 22 NYCRR § 1200.00, Rule 1.6.

<sup>88</sup> The municipality may claim not only the attorney-client privilege but also several privileges not available to a private citizen, such as the deliberative privilege and the executive privilege. For a more complete discussion of a municipal attorney’s obligations under Rule 1.11, *see* Roy D. Simon, *SIMON’S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED* (2014).

<sup>89</sup> Civ. Rights Law § 50-a.

<sup>90</sup> Civ. Rights Law § 50-a.

the Civil Rights Law and, further, may not disclose privileged information without the consent of the municipality.<sup>91</sup>

Other examples of information protected by federal or state law include social security numbers, certain information concerning students, and patient health information.

**(3) Compensation for Matters before an Official's Own Agency (Section 805-a(1)(c))**

Pursuant to section 805-a(1)(c),

No municipal officer or employee shall: ...c. 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 he is an officer, member or employee or of any municipal agency over which he has jurisdiction or to which he has the power to appoint any member, officer or employee[.]<sup>92</sup>

*Caveat:* Some local ethics codes impose more extensive restrictions on a municipal official representing individuals in matters before his or her municipality. In addition, the Rules of Professional Conduct governing the practice of law may prohibit engagements that the General Municipal Law would allow. Municipal attorneys are well-advised to consult those two sources of law.

*Hypothetical:* A village resident asks a village trustee for help in a matter the resident has before the village planning board. The trustee tells the resident that, while the trustee cannot himself be involved in the matter, the resident may wish to call the trustee's law partner. The trustee also recuses (disqualifies) himself from having anything to do with the matter should it appear before the village board. The trustee has reached an implied agreement with the resident to receive compensation, by way of the law firm, in relation to a matter pending before an agency the members of which the trustee has the power to appoint. The trustee's recusal does not cure the violation.

*Hypothetical:* A town zoning board of appeals hires its own separate counsel, who does not represent any other town agency. The counsel may appear before the planning board on behalf of a private client.

*Hypothetical:* A town zoning board of appeals hires its own separate counsel. The town attorney, who never represents the ZBA, may appear before the ZBA on behalf of a private client.

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<sup>91</sup> See Civ. Rights Law § 50-a. See also *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007) (holding that communications passing between a government attorney without policy-making authority and a public official were protected by the attorney-client privilege where the communications evaluated the legality of a policy and proposed policy alternatives because the communications were made for the predominant purpose of soliciting or rendering legal advice).

<sup>92</sup> Gen. Mun. Law § 805-a(1)(c).

#### (4) Contingency Fee Agreements (Section 805-a(1)(d))

Under section 805-a(1)(d),

No municipal officer or employee shall...d. 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 his municipality, whereby his compensation is to be dependent or contingent upon any action by such agency with respect to such matter, provided that this paragraph shall not prohibit the fixing at any time of fees based upon the reasonable value of the services rendered.<sup>93</sup>

This subdivision prohibits a municipal officer or employee from entering into a contingency fee agreement in relation to any matter before his or her municipality, although the prohibition includes an escape clause: the official may, *at any time*, convert the contingency fee into a fixed fee, presumably even after the contingency has occurred. That said, some local ethics codes impose more extensive restrictions on municipal officials receiving compensation in connection with matters before their respective municipality and may even prohibit them from making compensated appearances before any agency of the municipality.<sup>94</sup>

*Hypothetical:* A deputy county clerk is knowledgeable about real estate matters and agrees to act as the representative of an applicant seeking site plan approval from the County Planning Commission. The deputy clerk is confident that she will succeed in obtaining approval of the application. She agrees to forgo any compensation unless the application is approved and, in that case, to accept a fee equal to one percent of the property's appraised value. The deputy clerk may not enter into an agreement to accept compensation that is dependent on the Planning Commission's approval of the application. The deputy clerk may receive a fee based on the actual value of her services, unless such an arrangement is prohibited by the local code of ethics.

#### (5) Gaps in Section 805-a

As a code of ethics, section 805-a remains grossly deficient.<sup>95</sup> Indeed, it lacks some of the most basic provisions of such a code, such as prohibitions against misuse of office for private

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<sup>93</sup> Gen. Mun. Law § 805-a(1)(d).

<sup>94</sup> See, e.g., N.Y.C. Charter § 2604(b)(6).

<sup>95</sup> See Temporary State Commission on Local Government Ethics, *In Search of a Wise Law: Municipal Ethics Reform*, at 2-5 (March 20, 1991) (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/In\\_Search\\_of\\_a\\_Wise\\_Law.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/In_Search_of_a_Wise_Law.pdf)); *Final Report of the Temporary State Commission on Local Government Ethics*, reproduced in part in 21 FORDHAM URBAN LAW JOURNAL 1, 8-9 (1993) (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/temp\\_state\\_comm\\_lcl\\_govt\\_ethics\\_finl\\_rpt.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/temp_state_comm_lcl_govt_ethics_finl_rpt.pdf)); Mark Davies, *Enacting a Local Ethics Law – Part I: Code of Ethics*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 21, No. 3, Summer 2007, at 4 (available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=1809>); Steven G. Leventhal, *Needed: A New Statewide Ethics Code for Municipalities*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 23, No.

gain, misuse of government resources for non-government purposes, and post-employment “revolving door” activities of former officials. In addition, as noted above, the provisions regulating gifts, compensated appearances, and contingent compensation are inadequate. The Temporary State Commission gave these examples of conduct permitted by section 805-a that should not be allowed:

[C]itizens of one upstate community were disturbed when a county official, who had requested county clerk employees to process passport applications on a college campus, then took out an advertisement in the school newspaper (at his own expense) stating that his photography business would be available to take "official passport photos."... While hardly a major scandal, that action aggravated the public's already jaundiced view of integrity in local government; and far worse improprieties go unaddressed because article 18 lacks such a prohibition against use of public office for private gain....

[A]lthough [section 805-a(1)(c)] would prohibit a town zoning board member from being paid to appear on behalf of a private customer or client before the zoning board, it would *not* prohibit the town attorney from appearing before the zoning board on behalf of a private client nor would it prohibit the chair of the planning board, or even the code enforcement officer, from appearing before the zoning board. Indeed, the provision would, for example, permit the chair of the zoning board to appear on behalf of a friend before the zoning board itself, so long as the chair does not charge for his services.

Such appearances invariably raise the specter of impropriety. Yet current article 18 fails to prohibit them....

[A] mayor's law firm could appear on behalf of a private client before the city council, so long as the mayor receives no compensation from that representation. Such appearances are devastating to the reputation of a municipal body, as citizens announce that "the fix is in."...

Thus, a village planning board member may today vote to approve a major development and tomorrow go to work for the developer. He may even appear before the planning board on that very same project. The criminal prosecution of Lyn Nofziger demonstrates how seriously such revolving door activities are taken in the ethics laws of other jurisdictions.<sup>96</sup>

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4, Fall 2009, at 19-20 (available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=1799>); Mark Davies, *How Not to Draft an Ethics Law*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 24, No. 4, Fall 2010, at 14 (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/how\\_not\\_to\\_draft\\_an\\_ethics\\_law.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/how_not_to_draft_an_ethics_law.pdf)).

<sup>96</sup> Temporary State Commission on Local Government Ethics, *In Search of a Wise Law: Municipal Ethics Reform* (March 20, 1991), at 4-5 (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/In\\_Search\\_of\\_a\\_Wise\\_Law.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/In_Search_of_a_Wise_Law.pdf)). See also Mark Davies, *Keeping the Faith: A Model Local Ethics Law – Content and Commentary*, 21 FORD. URB. L. J. 61, 62-64 (1993) (available at

All of these deficiencies in section 805-a can, and must, be corrected by a local ethics code, as discussed in Chapters 11 and 12.

### **Administration (sections 806-808)**

Administration forms the third area covered by Article 18, namely local codes of ethics (sections 806 and 807) and boards of ethics (section 808).

#### **(1) Codes of Ethics (Sections 806 and 807)**

Section 806 mandates that every political subdivision (counties, cities, towns, and villages), as well as every school district and fire district, adopt a code of ethics “setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them.” In regard to fire districts, one should note that, although volunteer firefighters (except chiefs and assistant chiefs) are exempted from the provisions of Article 18, that is, from the prohibited interest provisions of sections 801-803 and the prohibited conduct provisions of section 805-a, they must be covered by a code of ethic adopted by the fire district.<sup>97</sup> Section 806 also expressly authorizes every other type of municipality to adopt such a code.<sup>98</sup>

As to the contents of the municipal code of ethics, section 806 states that the code

shall provide standards for officers and employees with respect to disclosure of interest in legislation before the local governing body, holding of investments in conflict with official duties, private employment in conflict with official duties, future employment and such other standards relating to the conduct of officers and employees as may be deemed advisable.... Such codes may provide for the prohibition of conduct or disclosure of information and the classification of employees or officers.<sup>99</sup>

Section 806(1)(b) provides that a local code of ethics may contain provisions requiring the filing of the annual statements of financial disclosure contemplated in sections 811 and 812, even

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[http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/keep\\_faith\\_model\\_loc\\_ethics\\_law.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/keep_faith_model_loc_ethics_law.pdf)).

<sup>97</sup> Gen. Mun. Law § 806(1)(a) (“Notwithstanding any other provision of this article to the contrary, a fire district code of ethics shall also apply to the volunteer members of the fire district fire department”).

<sup>98</sup> Gen. Mun. Law § 806(1)(a) (“The governing body of each county, city, town, village, school district and fire district shall and the governing body of any other municipality may by local law, ordinance or resolution adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them...”). As noted above, section 800(4) defines “municipality” broadly.

<sup>99</sup> Gen. Mun. Law § 806(1)(a).

where those sections do not otherwise require annual financial disclosure in the municipality.<sup>100</sup> The topic of annual disclosure, both mandatory and permissive, is considered below.

Section 806 does not limit a municipality from imposing other prohibitions. Indeed, it expressly provides that “[s]uch codes may regulate or prescribe conduct which is not expressly prohibited by this article [18] but may not authorize conduct otherwise prohibited.”<sup>101</sup> Thus, municipal codes of ethics may be more restrictive but never less restrictive than Article 18. In view of how anemic Article 18 is, apart from the prohibited conduct provision of section 801, a municipality may easily meet that standard.

Once adopted, the municipal code of ethics must be distributed by the municipality’s chief executive officer<sup>102</sup> and conspicuously posted in every public building under the municipality’s jurisdiction.<sup>103</sup> The failure to distribute or post the code, however, has no effect

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<sup>100</sup> Gen. Mun. Law §806(1)(b) (“Effective on and after January first, nineteen hundred ninety-one, such codes of political subdivisions, as defined in section eight hundred ten of this article, may contain provisions which require the filing of completed annual statements of financial disclosure with the appropriate body, as defined in section eight hundred ten of this article. Nothing herein shall be construed to restrict any political subdivision or any other municipality from requiring such a filing prior to January first, nineteen hundred ninety-one. Other than as required by subdivision two of section eight hundred eleven of this article, the governing body of any such political subdivision or other municipality may at any time subsequent to the effective date of this paragraph, adopt a local law, ordinance or resolution pursuant to subdivision one of section eight hundred eleven of this article and any such political subdivision or municipality, acting by its governing body, may take such other action as is authorized in such subdivision. Any political subdivision or other municipality to which all of the provisions of section eight hundred twelve of this article apply may elect to remove itself from the ambit of all (but not some) provisions of such section in the manner authorized in subdivision three of such section eight hundred twelve. In such event any such political subdivision or municipality shall be subject to certain conditions and limitations set forth in paragraphs (a), (b) and (c) of such subdivision three which shall include, but not be limited to, the promulgation of a form of an annual statement of financial disclosure described in subdivision one of such section eight hundred eleven.”).

<sup>101</sup> Gen. Mun. Law § 806(1)(a).

<sup>102</sup> Gen. Mun. Law § 806(2) (“The chief executive officer of a municipality adopting a code of ethics shall cause a copy thereof to be distributed to every officer and employee of his municipality”).

<sup>103</sup> Gen. Mun. Law § 807 (“The chief executive officer of each municipality shall cause a copy of sections eight hundred through eight hundred nine of this article to be kept posted in each public building under the jurisdiction of his or her municipality in a place conspicuous to its officers and employees”). “The fire district commissioners shall cause a copy of the fire district’s code of ethics to be posted publicly and conspicuously in each building under such district’s control.” Gen. Mun. Law § 806(2).

upon the duty of municipal officials to comply with it or upon the enforcement of its provisions.<sup>104</sup>

The model code of ethics promulgated by the Comptroller's Office in response to the 1970 enactment of section 805-a merely parroted Article 18 and is thus essentially useless in view of the gross deficiencies of section 805-a. Municipalities, therefore, are strongly urged to adopt a comprehensive code of ethics that fills in the gaps in that section. Chapters 11 and 12 address the adoption of such local ethics codes.

## **(2) Board of Ethics (Section 808)**

Article 18 does not require a municipality to establish an ethics board and, where no local ethics board is established, leaves to who knows whom the authoritative interpretation and enforcement of local ethics codes or even guidance as to the mandates of Article 18. Section 808 authorizes the governing body of any county to establish an ethics board and to appropriate moneys for its maintenance and personal services and further provides that governing body shall appoint the members of the board, except in the case of a county operating under an optional or alternative form of county government or county charter, in which case the members shall be appointed by the county executive or county manager, as the case may be, subject to confirmation by the governing body.<sup>105</sup>

Section 808 requires that such county ethics boards have at least three members, a majority of whom shall not be officers or employees of the county or of municipalities wholly or partially located within the county and at least one of whom shall be an elected or appointed officer or employee of the county or of a municipality located within the county.<sup>106</sup> Requiring a county official – or even an official of another municipality within the county – to serve on the ethics board is a singularly bad idea, as it severely undercuts both the reality and perception of the independence of the ethics board and deters county officers and employees from seeking advice from or filing complaints with the board, lest the county's mole on the board breach the confidence of the advice seeker or complainant. So, too, the requirement in section 808 that

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<sup>104</sup> Gen. Mun. Law §§ 806(2) (“Failure to distribute any such copy or failure of any officer or employee to receive such copy shall have no effect on the duty of compliance with such code, nor the enforcement of provisions thereof”) and 807 (“Failure to post any such copy shall have no effect on the duty of compliance with this article, nor with the enforcement of the provisions thereof”).

<sup>105</sup> Gen. Mun. Law § 808(1) (“The governing body of any county may establish a county board of ethics and appropriate moneys for maintenance and personal services in connection therewith. The members of such board of ethics shall be appointed by such governing body except in the case of a county operating under an optional or alternative form of county government or county charter, in which case the members shall be appointed by the county executive or county manager, as the case may be, subject to confirmation by such governing body.”).

<sup>106</sup> Gen. Mun. Law § 808(1) “Such board of ethics shall consist of at least three members, a majority of whom shall not be officers or employees of such county or municipalities wholly or partially located in such county and at least one of whom shall be an elected or appointed officer or employee of the county or a municipality located within such county”).

ethics board members serve at the pleasure of the appointing authority<sup>107</sup> virtually destroys the independence of the board, as its members' continued service depends upon towing the line with their appointing authority. In fact, however, as determined by the Attorney General and discussed in Chapter 11, the county ethics law may employ its home rule powers to prohibit any county official or an official of any municipality within the county from sitting on the county ethics board and to provide that board members shall serve for fixed terms and be removable only for cause after a due process hearing. The same home rule powers apply to the establishment of fixed terms. Arguments by the Comptroller's Office to the contrary on these matters, also as discussed in Chapter 11, are clearly erroneous. But the provision in section 808 that ethics board members shall receive no salary or compensation for their services as members of the board strengthens their independence and should be maintained.<sup>108</sup> Further, a board of ethics that is perceived as politically motivated will have no credibility. Therefore, an ethics board should be bi-partisan in composition.

Section 808 similarly authorizes the establishment and composition of ethics boards by the governing body of municipalities other than counties.<sup>109</sup>

County ethics boards, where they exist, render advice not only to the officers and employees of the county as to Article 18 and the county ethics code but also to the officers and employees of municipalities wholly or partly within the county as to Article 18 and the municipality's own ethics code. These advisory opinions may be rendered only upon a written request pursuant to rules adopted by the board, with the advice of the board's counsel or, if the board has no counsel, the county attorney.<sup>110</sup> That said, use of the county attorney, who more often than not has a tight relationship with the elective chief executive of the county, undermines the independence of the board and the perceived confidentiality of its proceedings. If the ethics

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<sup>107</sup> Gen. Mun. Law § 808(1) ("The members of such board... shall serve at the pleasure of the appointing authority").

<sup>108</sup> Gen. Mun. Law § 808(1) ("The members of such board shall receive no salary or compensation for their services as members of such board...").

<sup>109</sup> Gen. Mun. Law § 808(3) ("The governing body of any municipality other than a county may establish a local board of ethics and, where such governing body is so authorized, appropriate moneys for maintenance and personal services in connection therewith. A local board shall have all the powers and duties of and shall be governed by the same conditions as a county board of ethics, except that it shall act only with respect to officers and employees of the municipality that has established such board or of its agencies. The members of a local board shall be appointed by such person or body as may be designated by the governing body of the municipality to serve at the pleasure of the appointing authority and such board shall consist of at least three members, a majority of whom are not otherwise officers or employees of such municipality. Such board shall include at least one member who is an elected or appointed municipal officer or employee.").

<sup>110</sup> Gen. Mun. Law § 808(2) ("The board shall render advisory opinions to officers and employees of municipalities wholly or partly within the county with respect to this article and any code of ethics adopted pursuant hereto. Such advisory opinions shall be rendered pursuant to the written request of any such officer or employee under such rules and regulations as the board may prescribe and shall have the advice of counsel employed by the board, or if none, the county attorney.").

board requires the use of county staff, a *staff* attorney from the county attorney's office should be assigned to the board, under a confidentiality agreement that prohibits that attorney from disclosing any ethics board matters outside the board, except pursuant to court order, as discussed in Chapter 11. The county ethics board is also authorized to act as a resource for municipalities within the county that are adopting or amending their local ethics codes.<sup>111</sup>

The ethics board of a municipality other than a county may render advice only as to the municipality's own officers and employees.<sup>112</sup> Where a local municipality within a county has established its own ethics board, then the county ethics board may no longer act with respect to that municipality, except upon request of that local ethics board.<sup>113</sup>

The 1987 Ethics in Government Act, which enacted the annual financial disclosure provisions of sections 810-812, amended section 808 to require that, where a municipal board of ethics serves as the repository for completed annual statements of financial disclosure, the board shall file a statement with the municipal clerk that the board is the authorized repository for such statements.<sup>114</sup>

### **Applicant Disclosure in Land Use Matters (Section 809)**

Applicants in land use matters before a municipality must disclose any interest of a state or local official in the applicant. Specifically, such applicants must disclose (1) the name and residence of any state officer, any officer or employee of the respective municipality, and any officer or employee of any municipality of which that municipality is a part, who has an interest in the applicant (that is, the person, partnership, or association making the application, petition, or request) and (2) the nature and extent of the official's interest, to the extent known to the applicant. This disclosure requirement applies to every application, petition, or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license, or permit, pursuant to the provisions of any ordinance, local law, rule, or regulation constituting the zoning and planning regulations of a municipality.<sup>115</sup>

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<sup>111</sup> Gen. Mun. Law § 808(2) ("In addition, it [the county ethics board] may make recommendations with respect to the drafting and adoption of a code of ethics or amendments thereto upon the request of the governing body of any municipality in the county").

<sup>112</sup> Gen. Mun. Law § 808(3) (a non-county ethics board "shall act only with respect to officers and employees of the municipality that has established such board or of its agencies"). A municipality presumably may contract out its ethics board or establish a joint or regional ethics board with other municipalities. *See* Gen. Mun. Law §§ 119-m to 119-o.

<sup>113</sup> Gen. Mun. Law § 808(4) ("The county board of ethics shall not act with respect to the officers and employees of any municipality located within such county or agency thereof, where such municipality has established its own board of ethics, except that the local board may at its option refer matters to the county board").

<sup>114</sup> 1987 N.Y. Laws ch. 813, § 12, as codified at Gen. Mun. Law § 808(5), as amended by 2014 N.Y. Laws ch. 490, § 4 (deleting references to the Temporary State Commission on Local Government Ethics).

<sup>115</sup> Gen. Mun. Law § 809(1) ("Every application, petition or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license

For purposes of applicant disclosure in land use matters, an official is deemed to have an interest in the applicant when the official or his or her spouse, or the sibling, parent, child, or grandchild of the official or his or her spouse, or the spouse of any of those family members is

- the applicant;
- an officer, director, partner, or employee of the applicant;
- legally or beneficially owns or controls stock of a corporate applicant or is a member of a partnership or association applicant; or
- a party to an agreement with such an applicant, express or implied, whereby he or she may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of the application, petition, or request.<sup>116</sup>

In Nassau County, land use applicants are also required to disclose the name and residence of, and the nature and extent of any interest that, a party officer has in the applicant.<sup>117</sup>

*Exception:* “Ownership of less than five percent of the stock of a corporation whose stock is listed on the New York or American Stock Exchanges does not constitute an interest for the purposes of the applicant disclosure requirements.”<sup>118</sup>

*Recusal:* Although Article 18 does not require recusal by an official interested in the applicant or the application, the common law does.<sup>119</sup>

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or permit, pursuant to the provisions of any ordinance, local law, rule or regulation constituting the zoning and planning regulations of a municipality shall state the name, residence and the nature and extent of the interest of any state officer or any officer or employee of such municipality or of a municipality of which such municipality is a part, in the person, partnership or association making such application, petition or request (hereinafter called the applicant) to the extent known to such applicant”).

<sup>116</sup> Gen. Mun. Law § 809(2) (“For the purpose of this section an officer or employee shall be deemed to have an interest in the applicant when he, his spouse, or their brothers, sisters, parents, children, grandchildren, or the spouse of any of them (a) is the applicant, or (b) is an officer, director, partner or employee of the applicant, or (c) legally or beneficially owns or controls stock of a corporate applicant or is a member of a partnership or association applicant, or (d) is a party to an agreement with such an applicant, express or implied, whereby he may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of such application, petition or request”).

<sup>117</sup> Gen. Mun. Law § 809(3) (“In the county of Nassau the provisions of subdivisions one and two of this section shall also apply to a party officer. ‘Party officer’ shall mean any person holding any position or office, whether by election, appointment or otherwise, in any party as defined by subdivision four of section two of the election law [now Election Law § 1-104(5)]”).

<sup>118</sup> Gen. Mun. Law § 809(4).

<sup>119</sup> See, e.g., *Tuxedo Conservation & Taxpayers Ass’n v. Town Bd. of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep’t 1979) (invalidating a town board resolution approving a special permit where the decisive vote was cast by a board member who was a vice-president of an

*Penalty:* A knowing and intentional violation of this disclosure requirement in section 809 is a misdemeanor.<sup>120</sup>

*Hypothetical:* The wife of a social worker with the county Department of Social Services is an office assistant with a construction firm, which applies to the planning board of a village within the county for site plan approval. The application for site plan approval must disclose the name, residence, and county position of the social worker, unless the construction firm is unaware that the husband of its office assistant works for the county.

### **Annual Financial Disclosure (Sections 810-812)**

The annual financial disclosure provisions consume fully two-thirds of Article 18. The problems those provisions present are legion and well beyond the scope of this chapter,<sup>121</sup> as are the issues raised by the implementation of financial disclosure in municipalities. Instead, the reader is referred to Chapter 6 (on the disclosure requirements), Chapter 8 (on their administration), Chapter 11 (on the contents of a local ethics law, including financial disclosure provisions), and Chapter 12 (on the process for adopting such a local ethics law). This chapter will simply set forth a skeleton of the annual disclosure provisions in Article 18.

Every county, city, town, and village with a population of 50,000 or more, including New York City, must adopt a financial disclosure law, ordinance, or resolution. Failure to do so subjects the municipality to the state form and law set forth in section 812. Any other

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advertising firm which handled the account of the parent corporation of one of the developers); *Conrad v. Hinman*, 122 Misc.2d 531, 471 N.Y.S.2d 521 (Sup. Ct., Onondaga County, 1984) (holding invalid the grant of a variance by a town board where the board member who cast the tie-breaking vote was co-owner of the property). These matters are discussed in greater detail in Chapter 8 on common law conflicts of interest.

<sup>120</sup> Gen. Mun. Law § 809(5) (“A person who knowingly and intentionally violates this section shall be guilty of a misdemeanor”).

<sup>121</sup> See, e.g., Temporary State Commission on Local Government Ethics, *In Search of a Wise Law: Municipal Ethics Reform* (March 20, 1991), at 7-8 (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/In\\_Search\\_of\\_a\\_Wise\\_Law.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/In_Search_of_a_Wise_Law.pdf)); *Final Report of the Temporary State Commission on Local Government Ethics*, reproduced in part in 21 FORDHAM URBAN LAW JOURNAL 1, 9-10 (1993) (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/temp\\_state\\_comm\\_lcl\\_govt\\_ethics\\_finl\\_rpt.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/temp_state_comm_lcl_govt_ethics_finl_rpt.pdf)); Mark Davies, *Keeping the Faith: A Model Local Ethics Law – Content and Commentary*, 21 FORD. URB. L. J. 61, 91-92 (1993) (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/keep\\_faith\\_model\\_loc\\_ethics\\_law.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/keep_faith_model_loc_ethics_law.pdf)); Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 PACE L. REV. 243, 263-264 (1991) (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/ethics\\_govt\\_act-fd\\_provs.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/ethics_govt_act-fd_provs.pdf)); Mark Davies, *Message from the Outgoing Chair*, NYSBA MUNICIPAL LAWYER, Vol. 29, No. 2, Spring/Summer 2015, at 42.

municipality (counties, cities, towns, and villages having populations of less than 50,000 and any other type of municipality) may, but need not, adopt a financial disclosure law.<sup>122</sup>

A municipality, whether or not subject to mandatory financial disclosure, may adopt its own financial disclosure form or may adopt the state form.<sup>123</sup> Although Article 18 does not specify the minimum requirements for a financial disclosure form adopted by a municipality, the Temporary State Commission – the only agency ever authorized to interpret and enforce the financial disclosure provisions of Article 18 – concluded that certain minimum requirements do exist, at least in municipalities for which financial disclosure is mandatory.<sup>124</sup>

In municipalities subject to section 812, four groups of officials must file financial disclosure statements:

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<sup>122</sup> Gen. Mun. Law §§ 810(1), 811. Special financial disclosure requirements exist for New York City. See Gen. Mun. Law § 811(1)(a-1) (“In a city with a population of one million or more, such local law, ordinance or resolution shall require, on two or more types of forms for annual statements of financial disclosure, disclosure of information that could reveal potential conflicts of interest as defined by chapter sixty-eight of the New York city charter.

(i) The disclosure required by such law, ordinance or resolution of such city shall, at a minimum, include information about any non-city employment or interests that may give rise to a conflict of interest, including, but not limited to, interests of the filer and his or her spouse or registered domestic partner, and unemancipated children, in: (A) real property located in such city, and (B) positions or business dealings with, financial interests in, or gifts from, any persons or firms or entities engaged in business dealings with such city.

(ii) In any such city, local elected officials and compensated local officers and employees, as defined in subdivisions two and three, respectively, of [section eight hundred ten](#) of this article, shall, at a minimum, disclose in addition to the information required by subparagraph (i) of this paragraph: (A) interests in a firm where the value of the interest is ten thousand dollars or more; (B) where the official, officer, or employee holds a policy-making position with such city, membership in the national or state committee of a political party or service as assembly district leader of a political party or service as the chair or as an officer of the county committee or county executive committee of a political party; (C) the names and positions of any spouse or registered domestic partner, child, stepchild, brother, sister, parent or stepparent holding a position with any such city; (D) each volunteer office or position held by the filer or his or her spouse or registered domestic partner with any not-for-profit organization engaged in business dealings with such city, except where the person volunteers only in a non-policymaking, non-administrative capacity; and (E) agreements between the filer and any person or firm or entity engaged in business dealings with such city for future payment to or employment of the filer.

(iii) For purposes of this paragraph, the term “firm” shall have the same meaning as set forth in subdivision eleven of section twenty-six hundred one of the New York city charter.”).

<sup>123</sup> Gen. Mun. Law § 811(1)(a), (e).

<sup>124</sup> See Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 PACE L. REV. 243, 249-251 (1991) (“FD Article”) (available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/ethics\\_govt\\_act-fd\\_provs.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/ethics_govt_act-fd_provs.pdf)).

- Local elected officials;
- Local officers and employees (department heads, their deputies and assistants, and policymakers);
- Local political party officials (the chairs of political parties in that municipality but only if they receive at least \$30,000 in compensation or expenses from party funds); and
- Candidates for local elected office.<sup>125</sup>

In municipalities not subject to section 812 (counties, cities, towns, and villages having populations of less than 50,000 and all other types of municipalities) that adopt their own financial disclosure requirements, three groups of officials must file:

- Local elected officials;
- Local officers and employees (department heads, their deputies and assistants, and policymakers);
- Those officers and employees whose duties involve the negotiation, authorization, or approval of any of the matters listed in the exemptions provision of former General Municipal Law section 813(9).<sup>126</sup>

The adoption of local financial disclosure laws, ordinances, and resolutions and the administration of a municipal annual disclosure system are discussed in greater detail in the chapters cited above.

## Conclusion

Woefully deficient, outmoded, and virtually untouched for almost a half century - apart from the enactment of the atrocious financial disclosure requirements - Article 18 remains, in the words of the Temporary State Commission, “disgracefully inadequate.” Yet the unwary official or land use applicant who violates its most basic (and unintelligible) provisions commits a crime, as a “willful and knowing” violation of section 801 (interest in contacts) or section 803 (disclosure of interest in contracts), or a “knowing and intentional” violation of section 809 (disclosure by land use applicants), is a misdemeanor, punishable by a criminal fine and imprisonment.<sup>127</sup> Moreover, for a violation to be willful, knowing, and intentional, the public

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<sup>125</sup> Gen. Mun. Law §§ 810(2), (3), (6), 812(1)(a). *See also* FD Article at 251.

<sup>126</sup> Gen. Mun. Law §§ 810(2), (3), 811(1)(a), former § 813(9)(k). *See also* FD Article at 252-253.

<sup>127</sup> Gen. Mun. Law § 805 (“Any municipal officer or employee who willfully and knowingly violates the foregoing provisions [including sections 801 and 803] of this article shall be guilty of a misdemeanor”), 809(5) (“A person who knowingly and intentionally violates this section shall be guilty of a misdemeanor”); Penal Law §§ 55.10(2)(b) (“Any offense defined outside this chapter which is declared by law to be a misdemeanor without specification of the classification thereof or of the sentence therefor shall be deemed a class A misdemeanor”), 70.15 (“A sentence of imprisonment for a class A misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed one year”), 80.05 (“A sentence

official or land use applicant need only know the facts that make the interest or nondisclosure prohibited; the public official or land use applicant need not know that the interest or nondisclosure violates the law.<sup>128</sup> Municipal attorneys *must* therefore understand Article 18 and train and counsel their municipal clients on how to comply with it in order to avoid inadvertent violations. In addition, counsel should strongly encourage the governing body of the municipality to adopt a local ethics law or resolution that provides a clear and comprehensive code of conduct, sensible disclosure requirements, and effective administration by an independent ethics board.<sup>129</sup> Chapters 11 and 12 cover these matters in depth.

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to pay a fine for a class A misdemeanor shall be a sentence to pay an amount, fixed by the court, not exceeding one thousand dollars”).

<sup>128</sup> *People v. Speech*, 49 A.D.2d 210, 214, 374 N.Y.S.2d 210, 214 (4<sup>th</sup> Dep’t 1975) (affirming conviction of former Syracuse Commissioner of Public Works for violating sections 801 and 803 and holding that “[i]n order to properly return a verdict of guilty on a criminal charge there is no need for the jury to find that the defendant knew that what he was doing was a violation of law” (citation omitted)). *See also* Penal Law § 15.20(2) (“A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense”).

<sup>129</sup> Compliance with a municipal ethics board’s advice protects an official not only from liability under the local ethics law but also from criminal liability under Article 18, as an official *is* relieved of criminal liability for conduct that the official mistakenly believes does not violate the law where that “mistaken belief is founded upon an official statement of the law contained in...an interpretation of the statute or law relating to the offense, officially made or issued by a public servant, agency or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law.” Penal Law § 15.20(2). This exemption provides yet another reason for a municipality to establish an independent local ethics board.

## 1 Am. Law. Zoning § 3A:12 (5th ed.)

American Law of Zoning | May 2024 Update  
Patricia E. Salkin

### Chapter 3A. Sunshine Acts: Open Meetings and Freedom of Information Laws \*

#### II. Open Meetings Laws

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## § 3A:12. Public participation at meetings

Open Meetings Laws are generally interpreted broadly to facilitate their intent that members of the public be fully informed of government decision-making, thereby allowing and encouraging the citizenry to participate in a more meaningful way.<sup>1</sup>

Although the spirit of Open Meetings Laws would appear to provide for public participation in the form of public comments, they do not necessarily require this.<sup>2</sup> While public comment is generally encouraged at open meetings,<sup>3</sup> the public usually does not have a right to speak unless the board allows it.<sup>4</sup> As Kentucky's Attorney General has noted:

While members of the public have the statutory right to attend all public meetings and to observe with their eyes and ears what transpires at those meetings, the Open Meetings Act does not grant those persons the right to participate in the meeting and address during the meeting the members of the public agency.<sup>5</sup>

Therefore, the public participation aspect of a number Open Meetings Statutes envisions the right of the public to access meetings and be present, not the right to speak.<sup>6</sup> To that end, public bodies may not conduct business at times or locations which make public participation virtually impossible.<sup>7</sup> Conversely, if a public body chooses to allow public comments at an open meeting, it cannot restrict the content of the speech without offending the First Amendment,<sup>8</sup> and may not “pick and choose between those views which may or may not be expressed.”<sup>9</sup>

The right of participation, however, is stronger at zoning hearings. As the Washington Supreme Court has held: “A public hearing ... [w]hen applied to zoning, [] means an opportunity for interested persons to appear and express their views regarding proposed zoning legislation.”<sup>10</sup> To this end, procedural due process requires interested citizens the opportunity to present testimony, affidavits and exhibits, although this right does not go so far as to give interested citizen's a right to an unlimited hearing with respect to zoning changes.<sup>11</sup> State statutes, therefore, may provide interested citizens have a strong case for participation during zoning and planning hearings, as zoning enabling statutes mandate a public hearing;<sup>12</sup> However, this does right of participation does not necessarily extend to the deliberative portions of zoning board of appeals meetings.<sup>13</sup>

The right to participate further extends to off-site meetings, including site visits, where although the public may not necessarily make comments, they are still allowed to be present and close enough to hear what the board is discussing.<sup>14</sup> Additionally, although there are generally no sound or decibel levels required for board members at open meetings,<sup>15</sup> the spirit of the law will likely not be satisfied, and a violation found, if a board member was whispering to prevent the public from hearing what they have to say.<sup>16</sup>

§ 3A:12. Public participation at meetings, 1 Am. Law. Zoning § 3A:12 (5th ed.)

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Public boards, however, may adopt reasonable rules and regulations to ensure the efficient and orderly conduct of those persons attending public meetings.<sup>17</sup> These regulations, provided they are viewpoint neutral, may include: limiting the amount of time an individual may address the board;<sup>18</sup> restricting public comment to residents or stakeholders of a proposed action;<sup>19</sup> restricting “caustic personal attacks” or “repetitious, slanderous, offensive, inflammatory, irrational, or amounting to personal attacks or interfering with” board officials,<sup>20</sup> restricting speakers' comments to the subject at hand,<sup>21</sup> and removing persons who are purposefully disruptive of an open meeting.<sup>22</sup> Rules adopted by boards must not discourage public comments.<sup>23</sup> Additionally, some courts have found that the greater the allowed participation of interested citizens in a hearing, the less likely it is that zoning and planning boards will face reversal.<sup>24</sup> Some states have adopted laws designating English as the official language to be used in government communications, including the conduct of public meetings, but provisions attempting to restrict government communications to English-only have been struck down as unconstitutional abridgments of free speech, equal protection, and the right to petition government.<sup>25</sup>

The plaintiff in *Potanovic v. Town of Stony Point*, George Potanovic, Jr., claimed that the Town Board violated his First Amendment free speech rights and his rights to access public meetings when the livestreams and archived meeting videos it posted on the Town's Facebook page ceased to include the public comment portion of Town Board meetings. For meetings held after October 2021, Potanovic claimed that people viewing live-streamed or archived meetings would see only a blank screen with no audio during the Town Board's public comments sessions. The District Court for the Southern District of New York dismissed Potanovic's First Amendment claim, concluding that Potanovic and other members of the public who attended Town Board meetings in person had no First Amendment right to have their public comments broadcasted and archived on the Town's Facebook page. “To be sure,” the court noted, “the activity of speaking at Town Board meetings, within the purpose for which the limited public forum was opened, is protected speech. However, plaintiff fails plausibly to allege the Policy restricted him from engaging in that activity.” The court also dismissed Potanovic's right of access claim, concluding that remote viewers have no First Amendment right to observe the public comment portion of Town Board meetings. As the court explained, Potanovic was not restricted from attending Town Board meetings in person and watching and/or participating in the public comment sessions held during those meetings. Moreover, “[Potanovic] could—and did—attend Town Board meetings in person after the Policy was adopted.” Finally, the court held that Potanovic failed to state any plausible equal protection claim because people who watched Town Board meetings remotely were not similarly situated to people who attended in-person. As the court explain: “At-home Facebook Live viewers cannot—and even before the Policy was adopted, could not—speak during the public input session. Remote viewers of archived meeting recordings also cannot participate, and necessarily are watching the meeting after it occurred. Thus, in-person attendees can participate and engage in Town Board meetings in a way remote viewers cannot. In addition, the court emphasized that even if plaintiff had plausibly alleged at-home viewers were sufficiently similar to in-person attendees, there are ample ‘reasonably conceivable state[s] of facts that could provide a rational basis’ for treating remote viewers differently. For example, the Town might believe citizens would be less likely to share sensitive concerns with the Board if they knew their comments would be posted on social media and could be easily disseminated beyond the community.”<sup>26</sup>

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### Footnotes

\* Special thanks to Daniel Gross, Esq., Fellow in Government Law & Policy at the Government Law Center of Albany Law School for contributing the July 2012 release of this chapter.

1 See, e.g., *Colorado: Shook v. Pitkin County Board of County Commissioners*, 2015 COA 84, 411 P.3d 158 (Colo. App. 2015) (holding that the property owner was entitled to court costs and attorney fees where his

§ 3A:12. Public participation at meetings, 1 Am. Law. Zoning § 3A:12 (5th ed.)

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request for records relating to a code violation on the property was improperly denied under the Colorado Open Records Act).

*Illinois:* 5 Ill. Comp. Stat. § 140/11(i).

*Georgia:* Ga. Code Ann. § 50-18-73(b).

*New York:* *Matter of 101CO, LLC v. New York State Department of Environmental Conservation*, 189 A.D.3d 1948, 139 N.Y.S.3d 658 (3d Dep't 2020) (“There is no dispute that petitioners' prior appeal to this Court formed part of their ‘case under the provisions of’ Public Officers Law ... and the expenses incurred to successfully prosecute it could therefore be included in the award of reasonable counsel fees and costs. Petitioners argue that Supreme Court abused its discretion by refusing to include any of those expenses in its award, and we agree. Supreme Court suggested that it would be ‘unduly punitive’ to include appellate counsel fees and costs in its award given that DEC had already disclosed all responsive, nonprivileged documents to petitioners. The goal of an award of counsel fees and costs under Public Officers Law § 89 (4) (c), however, is to deter ‘unreasonable delays and denials of access and thereby encourage every unit of government to make a good faith effort to comply with the requirements of FOIL.’”).

*Wisconsin:* Wis. Stat. § 19.37(2).

- 2 [Wyse v. Rupp](#), 1995 WL 547784 (Ohio Ct. App. 6th Dist. Fulton County 1995); 2007 N.D. Att'y Gen. Op. O-11.

See also [Kanahele v. Maui County Council](#), 130 Haw. 228, 307 P.3d 1174 (2013), as corrected, (Aug. 30, 2013) (concluding that the Sunshine Law allows multiple continuances of meetings without further public testimony because neither the statute itself nor opinions of the Office of Information Practices had ever specifically limited the number of continued meetings allowed, but cautioning that although there is no specific limitation, boards are still “constrained at all times by the spirit and purpose of the Sunshine Law” and boards should therefore consider permitting public oral testimony at continued meetings in cases where extensive deliberation is required).

- 3 Ariz. Att'y Gen. Op. 184-133 (1984) (“Basically, the public does not have the right, except in some specific instances, to address the board and speak at public meetings. However, as a matter of policy the board is often in a much better position when it listens to the public and lets concerns be aired as long as order can be maintained.”).

- 4 [Carpionato v. Cedar Crest Nursing Centre, Inc.](#), 1999 WL 191697, \*4 (R.I. Super. Ct. 1999) (“Neither the Code of the City of Cranston nor the Open Meetings Act grants the public the right to comment or participate in the Zoning Board's deliberations or vote on matters before the Zoning Board.”); [Minnesota State Bd. for Community Colleges v. Knight](#), 465 U.S. 271, 285, 104 S. Ct. 1058, 79 L. Ed. 2d 299, 15 Ed. Law Rep. 1050, 115 L.R.R.M. (BNA) 2785 (1984) (“However wise or practicable various levels of public participation in various kinds of policy decision may be, this Court has never held, and nothing in the Constitution suggest it should hold, that government must provide for such participation.... Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues.”); [Barnes v. City of New Haven](#), 140 Conn. 8, 98 A.2d 523 (1953); [DeSantis v. City of Jamestown](#), 193 Misc. 2d 197, 747 N.Y.S.2d 906, 908 (Sup 2002) (“The Open Meetings Law does not require that the public be given [an opportunity to debate]. It only requires that the proceedings of public bodies, like the City Council, be open to observation by the public.”); [Souder v. Health Partners, Inc.](#), 997 S.W.2d 140, 150 (Tenn. Ct. App. 1998); Ky. Op. Att'y Gen. OMD-135 (2009). But see 5 Ill. Comp. Stat. § 120/2.06(g) (“Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body.”).

- 5 Ky. Op. Att'y Gen. OMD-99 (1999).

§ 3A:12. Public participation at meetings, 1 Am. Law. Zoning § 3A:12 (5th ed.)

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6 2007 N.D. Att'y Gen. Op. O-11 quoting 2003 N.D. Att'y Gen. Op. O-07 (“the purpose of the open meetings law is to give members of the public access to meetings of the governing board of a public entity, but that access does not give members of the public the right to participate or speak at the public meeting”).

7 [Knox County v. Hammons](#), 129 S.W.3d 839 (Ky. 2004), as modified, (Mar. 19, 2004).

8 See, e.g.,

*Supreme Court:* [City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Commission](#), 429 U.S. 167, 175, 97 S. Ct. 421, 50 L. Ed. 2d 376, 93 L.R.R.M. (BNA) 2970, 79 Lab. Cas. (CCH) P 53869 (1976) (Brennan, J., concurring) (“But the First Amendment plays a crucially different role when, as here, a government body has either by its own decision or under statutory command, determined to open its decision-making processes to public view and participation. In such case, the state body has created a public forum dedicated to the expression of views by the general public. ‘Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.’”).

*Second Circuit:* [Endemann v. City of Oneida](#), New York, 2020 WL 1674255 (N.D. N.Y. 2020) (“Making all reasonable inferences in Plaintiffs' favor, as the Court must, it is reasonably likely that the Council had let other members of the public speak on a variety of issues before preventing Plaintiff Kyle Endemann from speaking. Additionally, it is worth noting that only after Plaintiff Endemann began to speak was the statement prohibiting discussion of 214 Driftwood Drive read. This alleged prohibition, however, would not have prohibited Plaintiff Kyle Endemann from voicing concern about the conduct of city officials, as was his intent. Such speech, which addresses public issues and political matters, could be considered the type that “lies at the heart of protected speech.” The Court finds Plaintiffs have plausibly alleged that Defendants City and Chamberlain selectively denied Plaintiff Kyle Endemann the opportunity to engage in protected speech after allowing speech of a similar genre.”).

*California:* [Preven v. City of Los Angeles](#), 32 Cal. App. 5th 925, 244 Cal. Rptr. 3d 364 (2d Dist. 2019) (“Appellant Eric Preven exercised his opportunity to address a meeting of the Los Angeles City Council's planning and land use management committee (PLUM). He was then denied the opportunity to address the full city council when it held a special meeting the next day to discuss, among other things, the recommendation arrived at by the PLUM committee .... Given the plain language of the statute, and its legislative history, we find the Brown Act does not permit limiting comment at special city council meetings based on comments at prior, distinct committee meetings. Preven adequately alleged a claim that he was improperly denied the opportunity to comment on the agenda item at a special meeting. Preven also adequately alleged a pattern of conduct by the City at special city council meetings in violation of the Brown Act. He therefore stated a claim in his amended petition for a writ of mandate and complaint for declaratory relief under the Brown Act.”).

*Delaware:* Del. Op. Att'y Gen. ID19 (2006) (explaining that “there is a nexus between the procedural requirements of the open meeting laws, and the First Amendment right of free speech” and while a public body is not required to allow citizens to comment at a public meeting, if it chooses to allow public comments it cannot discriminate on the basis of the content of that speech).

*Massachusetts:* [Barron v. Kolenda](#), 491 Mass. 408, 203 N.E.3d 1125 (2023) (“Here, the town expressly provided a place for public comment: the meeting of the board. The town also set the time, after the conclusion of the regular meeting, as was the town's right. Barron presented her grievances at the established time and place. The town nonetheless then sought to control the content of the public comment, which directly implicates and restricts the exercise of the art. 19 right of the people to request “redress of the wrongs done them, and of the grievances they suffer.” The content sought to be prohibited —discourteous, rude, disrespectful, or personal speech about government officials and governmental

§ 3A:12. Public participation at meetings, 1 Am. Law. Zoning § 3A:12 (5th ed.)

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actions—is clearly protected by art. 19, and thus the prohibition is impermissible. In sum, the town's civility code is contradicted by the letter and purpose of art. 19.”).

9 See, e.g.,

*First Circuit: Bonner-Lyons v. School Committee of City of Boston*, 480 F.2d 442 (1st Cir. 1973) (“it is well settled that once a forum is opened for the expression of views, regardless of how unusual the forum, under the dual mandate of the first amendment and the equal protection clause neither the government nor any private censor may pick and choose between those views which may or may not be expressed.”).

*Second Circuit: Cipolla-Dennis v. County of Tompkins*, 2022 WL 1237960 (2d Cir. 2022) (upholding a policy of the county legislature that required attendees at public meetings to sign a printed blue card before making public comments, and dismissing the plaintiff's challenge to the restriction printed on such blue cards that prohibited the discussion of personnel matters, because the policy didn't distinguish between laudatory and critical remarks and was therefore viewpoint neutral).

*Sixth Circuit: Pesek v. City of Brunswick*, 794 F. Supp. 768 (N.D. Ohio 1992) (“we conclude that Brunswick created a limited public forum by inviting citizen participation at its city council meeting on the evening of April 15, 1992. As such, the Council was prohibited from selectively denying Pesek his right to address the Council regarding a matter which was part of the agenda that night based solely upon his status as a government employee. To do so amounts to a content-based restriction and does not pass constitutional muster because it does not offer a compelling justification for the action taken, a justification which must be shown in order to meet the standard of strict judicial scrutiny.”).

*Delaware: Del. Op. Att'y Gen. 03-IB03* (2003) (“If a public body chooses to allow public participation in a meeting, however, then it must treat members of the public fairly and even-handedly . . . . All citizens of the State of Delaware have rights under FOIA, including the right to attend a public meeting. During a public comment period, a public body can distinguish between citizens and non-citizens. But a public body cannot derogate from FOIA by affording rights to a more restrictive group of citizens, such as the owners of property within a municipality.”).

10 *Smith v. Skagit County*, 75 Wash. 2d 715, 453 P.2d 832, 846 (1969) (holding modified by, *State v. Post*, 118 Wash. 2d 596, 826 P.2d 172 (1992)).

See also

*Rhode Island: Narragansett 2100, Inc. v. Town of Narragansett*, C.A. No. WC-2020-0353 (Superior Court 6/1/21) (agreeing with the plaintiffs that their statutory right to be heard pursuant to the Zoning Enabling Act was violated because the statute “clearly and unambiguously” required that “opportunity shall be given to all persons interested to be heard” and it was conceded that there were members of the public with their hands raised at the time the Town Council voted to close public comments).

11 *Jafay v. Board of County Com'rs of Boulder County*, 848 P.2d 892, 899 (Colo. 1993).

12 *Structure Bldg. Corp. v. Abella*, 377 N.J. Super. 467, 873 A.2d 601, 603 (App. Div. 2005) (“The right of homeowners to participate in hearings and oppose zoning applications that affect their property is recognized and encouraged by laws which require they be given notice and an opportunity to be heard—an opportunity to participate actively in the approval process.”). See also § 8:17.

13 *Yaro v. Board of Appeals of Newburyport*, 10 Mass. App. Ct. 587, 410 N.E.2d 725, 728–29 (1980).

14 *Noble v. Kootenai County ex rel. Kootenai County Bd. of Com'rs*, 148 Idaho 937, 231 P.3d 1034 (2010).

15 But see, *Ariz. Rev. Stat. Ann. § 38-431.01(A)* (“All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.”); *Neb. Rev. Stat. Ann. § 84-1412(7)* (“The public body shall, upon request, make a reasonable effort to

§ 3A:12. Public participation at meetings, 1 Am. Law. Zoning § 3A:12 (5th ed.)

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accommodate the public's right to hear the discussion and testimony presented at the meeting.”); Del. Op. Att’y Gen. IB13 (2004) (board members participating by telephone must be clearly audible to other board members and the public in attendance); R.I. Att’y Gen. Op. 15 (1999) (“Indeed, if a public body were to discuss the public's business in open session, but outside the hearing purview of the public, the requirements of the [Open Meetings Law] could easily be circumvented.”).

16 [WSDR, Inc. v. Ogle County](#), 100 Ill. App. 3d 1008, 56 Ill. Dec. 408, 427 N.E.2d 603, 605 (2d Dist. 1981) quoting 1933 Ill. Att’y Gen. Op. 246 (May 4, 1933) (“If the vote were taken by whispering in tones so low the attending citizen could not hear, how would he know what was being done.”).

17 [Jones v. Heyman](#), 888 F.2d 1328 (11th Cir. 1989) citing [City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Commission](#), 429 U.S. 167, 97 S. Ct. 421, 50 L. Ed. 2d 376, 93 L.R.R.M. (BNA) 2970, 79 Lab. Cas. (CCH) P 53869 (1976); 5 Ill. Comp. Stat. § 120/2.06(g); Vt. Stat. Ann. tit. 1, § 312(h); Nev. Att’y Gen. Op. 08 (2005).

18 See, e.g.,

*Eighth Circuit:* [Drake v. Stenehjem](#), 2023 WL 6049251 (D.N.D. 2023) (“Here, the policy at issue is content neutral and facially constitutional. It limits speakers to address agenda items and keep their time under five minutes. The presiding commissioner can extend the time if appropriate. If a speaker wishes to address a non-agenda item, it must be scheduled for another open meeting. The time the speaker will have to address that non-agenda item would be five minutes. Importantly, there are no content restrictions on what agenda items may be discussed and what a citizen may request to be discussed at a regular open meeting. The policy simply sets out rules governing how an individual may address the City Council at appropriate times without any reference to a specific type of prohibited speech. This is clearly content neutral and the policy is not unconstitutional on its face.”).

*Eleventh Circuit:* [Alimenti v. Town of Howey-in-the-hills, Florida](#), 2023 WL 2598662 (M.D. Fla. 2023) (“the meeting recordings do not substantiate Plaintiff's allegation that his First Amendment rights were infringed at the meetings on November 26, 2018 or January 14, 2019. On November 26, Plaintiff was permitted to speak on two separate occasions without being cut off, including one comment that lasted well over three minutes. The only aspect in which his speech was restricted was that he was denied the ability to speak a second time in the same comment session. Resolution 2013-010 does not contain any provision for multiple comments in the same session . . . . Moreover, there are non-viewpoint reasons to restrict members of the public from speaking twice during a public comment session, particularly when they have already exceeded the technical time limit.”).

*Florida:* Fla. Att’y Gen. Op. 2004-53 (2004) (“The courts of this state and this office have recognized the importance of public participation in open meetings. This office, however, has recognized the authority of a public body to adopt reasonable rules and policies to ensure the orderly conduct of a public meeting, including the orderly behavior of those attending. For example, this office determined that a rule limiting the amount of time an individual could address a board could be adopted, provided the time limit did not unreasonably restrict the public's right of access under the Government in the Sunshine Law.”).

*Michigan:* [Ostergren v. Schneider](#), 2023 WL 2144744 (Mich. Ct. App. 2023), appeal denied, 991 N.W.2d 572 (Mich. 2023) (“During the July 14 meeting, Schneider told Ostergren that, “as the chairman,” he was limiting the first public comment period to “agenda items only,” but Ostergren would have a chance to address the Board, unrestricted, during the second public comment period. Notably, Ostergren was not prevented from attending the meeting or speaking. Indeed, Ostergren spoke for more than a minute during the first public comment period and for more than five minutes during the second public comment period. This comports with the purpose of the OMA to allow public access. Although Ostergren did not like that he was asked to hold his general comments until the second public comment period, this does not equate to a violation of the OMA.”).

§ 3A:12. Public participation at meetings, 1 Am. Law. Zoning § 3A:12 (5th ed.)

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*Mississippi*: [City of Jackson v. Cunningham](#), 253 So. 2d 385 (Miss. 1971) (finding no denial of a fair hearing as to a rezoning issue where the city council limited each side to 15 minutes of oral arguments).

*New Mexico*: [Shook v. Governing Body of City of Santa Fe](#), 2023-NMCA-086, 538 P.3d 466 (N.M. Ct. App. 2023) (“Residents argue that two minutes was simply not enough time to satisfy due process requirements, and cite several cases that address time limits for public comment in administrative hearings. These cases, however, do not limit the constitutional analysis to a black-and-white acceptance or rejection of a particular time limitation, but instead, each court considered the time limitation within the context of the entire process and opportunity to be heard. Based on Residents’ authorities, we decline to consider the two-minute limitation in isolation or hold that the time limit alone violated due process.”).

*New York*: [Concerned Citizens Against Crossgates v. Town of Guilderland Zoning Bd. of Appeals](#), 91 A.D.2d 763, 458 N.Y.S.2d 13, 15 (3d Dep’t 1982) (“The mere fact that the zoning board finally determined that the hearings should be concluded, at a time when petitioners still wished to be heard on the matter, does not ipso facto constitute a violation of petitioners’ rights.”).

*Ohio*: [Ney v. Schley](#), 2021-Ohio-1848, 2021 WL 2182119 (Ohio Ct. App. 5th Dist. Muskingum County 2021) (“Appellant spoke for approximately one minute and thirty seconds. He discussed planned use development, but did not take up his entire three-minute allotment .... Accordingly, we find the trial court did not commit error in finding appellant was not entitled to a hearing pursuant to R.C. 2506.03(A)(2)(a).”).

*Washington*: [English Farm LLC v. City of Vancouver JII](#), 2023 WL 3194504 (Wash. Ct. App. Div. 2 2023) (“the Winery points to the fact that it was given three minutes to present at the last public hearing as evidence that its due process rights were violated. The Winery contrasts this with the approximately 40 minutes it says HP spent presenting its master plan. The Winery’s argument is misleading. The Winery and its lawyer and several aligned speakers each were given three minutes, which was allowed for any member of the public wishing to address the master plan at the public meeting .... Moreover, the record as a whole shows the City held a public comment period, multiple Planning Commission workshops, and two public hearings. The Winery submitted extensive comment, and the City and HP responded to the Winery’s questions and concerns through hearings, letters, and e-mails. The Winery does not show a due process violation.”).

19 [Rowe v. City of Cocoa, Fla.](#), 358 F.3d 800 (11th Cir. 2004) (A bona fide residency requirement, as we have here, does not restrict speech based on a speaker’s viewpoint but instead restricts speech at meetings on the bases of residency. ... To permit non-residents, those without a direct stake in the outcome of a City’s business, to ramble aimlessly at City Council meetings on topics not related to agenda items would be inefficient and would unreasonably usurp “the presiding officer the authority to regulate irrelevant debate ... at a public meeting.”) (citations omitted).

20 See, e.g.,

*Second Circuit*: [Arnold v. Ulatowski](#), 2012 WL 1142897 (N.D. N.Y. 2012) (dismissing plaintiff’s First Amendment claims against the town where he was not in attendance at the initial public meeting and waited until the second meeting was closed to speak against a zoning change; although the plaintiff’s speech was protected by the First Amendment, the hearing was a limited public forum and the town could have cut the plaintiff’s speech short due to his irrelevant personal attacks and the fact that he waited to speak until after board had moved to close the meeting).

*Ninth Circuit*: [Warden v. Walkup](#), 2020 WL 1694752 (D. Ariz. 2020) (“When the government designates a limited public forum for speech, as is the case of a city council meeting, it may apply restrictions to the time, place, and manner of speech so long as those restrictions ‘are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.’

§ 3A:12. Public participation at meetings, 1 Am. Law. Zoning § 3A:12 (5th ed.)

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Here, the manner/topic restriction of ‘no personal attacks’ was neutral and did not preclude the Plaintiff from presenting his opinion; it reasonably prohibited the manner of the presentation.”).

*Michigan: Holeton v. City of Livonia*, 328 Mich. App. 88, 935 N.W.2d 601 (2019) (upholding the city council’s “address-the-chair” rule, which required members of the public to direct their commentary to the chair, because it was “reasonably calculated to ensure the orderly participation of the community members who wished to express their views without targeting the content or their viewpoint. Accordingly, the rule was reasonable and consistent with the requirements of the First Amendment for limited public fora.”).

*Eleventh Circuit: Dayton v. Brechnitz*, 2021 WL 5163225 (M.D. Fla. 2021) (“Brechnitz did not clearly engage in unlawful viewpoint discrimination by simply telling Plaintiffs not to personally attack Councilmembers.”).

*Michigan: Berryman v. Mackey*, 327 Mich. App. 711, 935 N.W.2d 94 (2019) (finding that a personal protective order was improperly granted because the respondent’s conduct toward the mayor wasn’t “harassment” or “stalking,” rather respondent merely attended a public hearing and his “comments may have been critical of petitioner in his official capacity, but no one contends that they were inappropriate or otherwise constituted unconsented contact.”).

*Nevada: Nev. Attorney General File No. 06-037* (2006) (“in analyzing NRS 241.0353 in its entirety, and the definitions of ‘defamation’ and ‘privilege,’ it must be deduced that a person, at a public meeting, may publish defamatory comments without facing potential civil liability .... In this instance, however, NRS 241.0353 does not apply to the exclusion of Mr. Felton for willfully disrupting the meeting by making comments that amount to ‘irrelevant, repetitious, slanderous, offensive, inflammatory, irrational or amounting to personal attacks ...’ NRS 241.0353 provides Mr. Felton a privilege from civil liability for his comments, but NRS 241.0353 does not require a public body to tolerate comments that are disruptive during a meeting.”).

*New Mexico: Shook v. Governing Body of City of Santa Fe*, 2023-NMCA-086, 538 P.3d 466 (N.M. Ct. App. 2023) (“In the present case, the Governing Body reasonably tailored the public hearing to the circumstances before it and permitted Residents to rebut Developer’s presentation armed with information gathered from the earlier proceedings. By the time the members of the public testified before the Governing Body on the first day, Residents had attended at least three other presentations by Developer—the two ENN meetings and the Planning Commission meeting .... Though Residents did not have the opportunity to directly question Developer during the public hearing before the Governing Body, the Governing Body did receive the written public comment and oral public testimony from the Planning Commission, in which the public and Residents had numerous opportunities to learn about Developer’s plans and rebut Developer’s arguments. Those prior interactions between Developer and Residents also permitted Residents to formulate comments and testimony in the Governing Body proceedings that were responsive to Developer’s presentation. For this reason, we decline to hold that the limitations on Residents’ opportunity to cross-examine witnesses alone support a conclusion that the Governing Body afforded insufficient process.”).

21

See, e.g.,

*Supreme Court: City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175, 97 S. Ct. 421, 50 L. Ed. 2d 376, 93 L.R.R.M. (BNA) 2970, 79 Lab. Cas. (CCH) P 53869 (1976) (“Plainly, public bodies may confine their meetings to specified subject matter ....”).

*Second Circuit: Komatsu v. City of New York*, 2021 WL 256956 (S.D. N.Y. 2021) (holding that the plaintiff was unlikely to succeed on his First Amendment claims alleging that he was improperly excluded from making comments at a public meeting because he refused to disclose the topic he wanted to speak about on his registration form, and because the city’s requirement that participants disclose the subject of

§ 3A:12. Public participation at meetings, 1 Am. Law. Zoning § 3A:12 (5th ed.)

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their testimony was reasonable, it was intended to ensure that comments would be relevant to the purpose of the meeting, and it was also viewpoint neutral).

*Fourth Circuit:* [Judson v. Board of Supervisors of Mathews County, Virginia](#), 436 F. Supp. 3d 852 (E.D. Va. 2020), *aff'd*, 828 Fed. Appx. 180 (4th Cir. 2020) (the statements attributed to the Board and Commission indicate an intention to prohibit any discussion at the Public Hearing of oysters or the Oyster Floats Proposal, regardless of speaker's views on the Rezoning Request or the Oyster Floats Proposal, for the purpose of limiting the topics discussed at the Public Hearing to “land use and land use only.” . . . Plaintiff's factual allegations are insufficient to support a conclusion that the speech restrictions targeted “particular views taken by speakers on a subject,” rather than merely “confining [the] forum to the limited and legitimate purposes for which it was created.”).

*Stevens v. Town of Snow Hill, N.C.*, 2021 WL 2345353 (E.D. N.C. 2021) (“The October 14, 2019 meeting constituted a limited public forum . . . . The court assumes without deciding that Stevens engaged in protected speech by speaking at the meeting. Nonetheless, in the limited public forum, Snow Hill could restrict Stevens's speech to the relevant topic . . . . Stevens does not allege that she was interrupted due to her viewpoint. Rather, the Board cut off her speech because her speech did not relate to steps for preserving the building, and the Board had the prerogative to stop Stevens to maintain an orderly meeting.”).

22

See, e.g.,

*First Circuit:* [Keenan v. Town of Sullivan](#), 2023 WL 6377775 (D. Me. 2023) (“Here, Mr. Keenan has plausibly alleged that the Town restricted his speech because of his views. His complaint alleges resistance from Town officials for raising questions about financial decision-making, voting procedures, and moderating for Town meetings. These allegations create an inference that it was Mr. Keenan's opinions and perspectives on these topics that led to his ban from Town Hall, not his inability to keep to the topics permitted in the limited public forum. Mr. Keenan has also plausibly alleged that the Town's restriction—requesting the no-trespass notice and calling law enforcement when Mr. Keenan did appear at Town Hall—was not reasonable in light of the purpose served by the forum. At this stage of the case, I am not privy to why the Town barred Mr. Keenan from entering Town Hall for any purpose for an open-ended period of time. Although the Town hints at safety concerns, I am limited at the motion to dismiss stage to an assessment of the allegations, which I must accept as true . . . . Mr. Keenan has alleged an open-ended ban on his attendance at any event at Town Hall. And the Town does not yet have any facts in the record on what conduct by Mr. Keenan led to this ban. The Town has not shown that its rationale for exclusion meets the applicable standard. The Town's motion to dismiss Counts I & II is denied, insofar as Mr. Keenan seeks monetary relief for these claims.”).

*Second Circuit:* [Komatsu v. City of New York](#), 2021 WL 256956 (S.D. N.Y. 2021) (“Regarding the December 16, 2020 meeting, the City states that Komatsu properly registered, but had his camera turned off because he made an obscene gesture—i.e., that he raised his middle finger at the council members. The City states that he has engaged in obscene or disruptive behavior on several prior occasions, including when it was not his turn to speak. Komatsu clarifies that in addition to turning off his camera, the City also restricted his ability to unmute his microphone without permission from the meeting host, thus functionally prohibiting him from testifying. As a threshold matter, prohibiting someone from testifying at a public meeting because they have disrupted or otherwise interrupted the meeting is a “[r]easonable time, place and manner restriction[] on speech in limited public fora.” Such prohibitions pass constitutional muster so long as they are content-neutral, serve a significant government interest, and leave open alternative channels for expression . . . . The City's action of turning off Komatsu's camera and muting his microphone was therefore a reasonable restriction imposed to prevent his ability to further disrupt the meeting, and involved no impermissible viewpoint discrimination.”).

*Sixth Circuit:* [Amalgamated Transit Union v. Chattanooga Area Regional Transportation Authority](#), 431 F. Supp. 3d 961 (E.D. Tenn. 2020) (“CARTA identifies no evidence supporting its contention that Ms.

§ 3A:12. Public participation at meetings, 1 Am. Law. Zoning § 3A:12 (5th ed.)

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Smith's speech would have caused disruption or inefficiency during its meetings. Instead, CARTA calls on the Court to 'imagine the disruption and inefficiency that Ms. Smith's speech would have created during its meetings, and in doing so, it portrays its apprehensions about disruption and inefficiency as purely speculative.' Also, the fact that CARTA ultimately allowed Ms. Smith to speak at its meetings—multiple times, without any indication of unrest or disorder—belies its argument that a threat of disruption and inefficiency accompanied her speech, or that CARTA was unable to 'handle' her speech .... In sum, CARTA, under Pickering's balancing test, does not meet its burden of justifying its exclusion of Ms. Smith's speech from its public meetings.”).

*Ninth Circuit: Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995) (“Kindt argues that the Santa Monica Rent Control Board and its members may neither place unreasonable restrictions upon speakers nor enforce restrictions in a manner that is not content neutral. We agree. He also insists that he presented evidence that the Board violated those principles. With that we cannot agree because the record fails him. Nothing indicates that Kindt was prevented from speaking his mind on his chosen topics. Indeed, the Board's members regularly endured Kindt's philippics and, essentially, restrained him only when he abandoned all sense of decorum. That is not the stuff that First Amendment violations are made of.”); *Acosta v. City of Costa Mesa*, 718 F.3d 800 (9th Cir. 2013) (“Costa Mesa Municipal Code § 2-61 makes it a misdemeanor for members of the public who speak at City Council meetings to engage in ‘disorderly, insolent, or disruptive behavior.’ Benito Acosta (“Acosta”) was removed from the Costa Mesa City Council meeting for an alleged violation of the ordinance .... Because § 2-61 fails to limit proscribed activity to only actual disturbances, we reverse the district court's constitutionality ruling and find the statute facially invalid. Moreover, since the unconstitutional portions of the ordinance cannot be severed from the remainder of the section, we invalidate the entire section. Nevertheless, § 2-61 was constitutionally applied to Acosta, because the jury implicitly found that his behavior actually disrupted the Council meeting.”).

*Michigan: Cusumano v. Dunn*, 2020 WL 5079615 (Mich. Ct. App. 2020) (“The record reflects that the trial court granted defendant summary disposition based upon its incorrect conclusion that plaintiff's indecorum warranted his expulsion from the public meeting. The trial court essentially concluded that, as a matter of law, plaintiff breached the peace. The record below, however, does not support the trial court's conclusion. The facts of this case indicate that reasonable minds might differ on whether plaintiff committed a breach of the peace .... Further, although, under MCL 15.263(5), public bodies may establish and enforce recorded rules that limit public comment, such authority does not nullify MCL 15.263(6)'s prohibition against exclusion of any person from a public meeting except for a “breach of the peace” at the meeting.”).

*Roger Towers v. Superior Court*, 2021 WL 2534533 (E.D. Cal. 2021) (dismissing a habeas petition claiming that the petitioner's civil restraining order violated his free speech and due process rights, because regardless of whether or not he made any “true threats” at county planning board meetings and whether or not he was being retaliated against for lawsuits he had filed against the county all of his claims attacked only the civil restraining order and not the judgment for which he was on probation, and because he was not “in custody” as a result of the civil restraining order he could not challenge its validity in a habeas proceeding but rather he could only raise his free speech and due process claims in a civil rights action under 42 U.S.C. § 1983).

*Minnesota: Becker v. Murillo*, 2020 WL 1910204 (Minn. Ct. App. 2020) (affirming the issuance of a harassment restraining order against Murillo, who made veiled threats toward Becker under the guise of “lobbying” him with respect to an affordable housing project and then directly threatened Becker after he voted against the project's approval by the city council, because Murillo's actions were objectively unreasonable conduct and were unwanted and intrusive, and Becker's response in fearing for his safety was objectively reasonable).

§ 3A:12. Public participation at meetings, 1 Am. Law. Zoning § 3A:12 (5th ed.)

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24

See, e.g.,

*Fourth Circuit*: [Judson v. Board of Supervisors of Mathews County, Virginia](#), 436 F. Supp. 3d 852 (E.D. Va. 2020), *aff'd*, 828 Fed. Appx. 180 (4th Cir. 2020) (“The fact that numerous members of the public were permitted to speak against the Rezoning Request strongly indicates that the Board and Commission did not engage in viewpoint discrimination, particularly if, as Plaintiff alleged, the chair of the Board knew at the beginning of the Public Hearing which members of the public planned to speak and that all of them wished to speak against the Rezoning Request.”).

25

See, e.g.,

*Tenth Circuit*: see also [Reyes v. Jensen](#), 2021 WL 2069699 (10th Cir. 2021) (dismissing Reyes' claims under the Americans with Disabilities Act (“ADA”) that he was unable to speak at the planning commission's hearing, because, *inter alia*, his inability to speak English did not qualify as a “disability” under the ADA).

*Alaska*: [Alaskans for a Common Language, Inc. v. Kritz](#), 170 P.3d 183 (Alaska 2007) (“Because a portion of the Official English Initiative — the first sentence of AS 44.12.320 — violates the federal and Alaska constitutional rights to free speech and to petition the government, we hold that the Official English Initiative is unconstitutional as enacted. Because, however, the unconstitutional provision is severable from the initiative, and the remainder of the section is capable of a constitutional construction, we uphold the constitutionality of the second sentence of AS 44.12.320.”).

*Arizona*: [Ruiz v. Hull](#), 191 Ariz. 441, 957 P.2d 984 (1998) (“This opinion addresses the constitutionality of Article XXVIII of the Arizona Constitution (the “Amendment”), which was adopted in 1988 and which provides, *inter alia*, that English is the official language of the State of Arizona and that the state and its political subdivisions — including all government officials and employees performing government business — must ‘act’ only in English. We hold that the Amendment violates the First Amendment to the United States Constitution because it adversely impacts the constitutional rights of non-English-speaking persons with regard to their obtaining access to their government and limits the political speech of elected officials and public employees. We also hold that the Amendment violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it unduly burdens core First Amendment rights of a specific class without materially advancing a legitimate state interest.”).

*Oklahoma*: [In re Initiative Petition No. 366](#), 2002 OK 21 (stating that twenty-two states have laws designating English as the official language of the governmental entity but noting that these statutes “are non-prohibitive, brief, and symbolic” and holding that the proposed ballot initiative, which sought to restrict all governmental communications to English-only, would have violated constitutional free speech and petition protections; “By restricting all governmental communications to the English language, section B seeks to prevent citizens of limited English proficiency from effectively communicating with government officials and from receiving, when available, vital information about government. This restriction is prohibited by both [sections 3 and 22 of article 2 of the Oklahoma Constitution](#) .... It is difficult to envision a situation where these protections are more necessary than in communications between government officials, whether electees or employees, and citizens.”).

26

[Potanovic v. Town of Stony Point](#), 2023 WL 199488 (S.D. N.Y. 2023).

#### 4 Am. Law. Zoning § 38:14 (5th ed.)

American Law of Zoning | May 2024 Update  
Patricia E. Salkin

#### Chapter 38. Ethical Considerations\*

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## § 38:14. Prejudgment

In their capacity as fact-finders and impartial decision-makers, board members must be objective and consider all of the evidence presented before reaching a final decision. When board members prejudge a matter, however, the proceedings can no longer be said to be fair and unbiased, and the courts in such cases may hold that the board members had disqualifying interests and should have recused themselves.

A California court overturned the denial of a permit application due to bias and prejudgment in the 2015 case *Woody's Group, Inc. v. City of Newport Beach*. One of the council members had already voiced “strong opposition” to Woody's application, and after it was approved by the planning commission the council member sent a “notice of appeal” attempting to appeal the decision the council. As the court explained, however, “You cannot be a judge in your own case.” Despite the council member's self-serving statement in a speech to the council that “I have no bias in this situation,” it was also apparent to the court that he had in fact taken “a position against the project” his based on the content of his speech, which was pre-written, as well as his earlier “notice of appeal.”<sup>1</sup> A Wisconsin court similarly held that a board member impermissibly prejudged a development application where, prior to the hearing, she had signed a petition that was strongly opposed to the development. As the court observed: “We can reasonably infer that by signing the document, Swannell meant to express her agreement with the document's contents. Thus, the petition was a clear statement by Swannell indicating that she had considered Ogden's proposal, and had strongly decided that it should be rejected. Given such clear evidence of prejudgment, we must conclude that Ogden's right to an impartial decision-maker has been violated.” Even though the board member eventually abstained from voting on the application, the court found that the fact that she did not recuse herself prior to the start of the hearing created an impermissibly high risk of bias and “a perception of unfairness” that threatened to “erode confidence in the decision-making process.”<sup>2</sup>

It can be difficult to prove prejudgment, however. The courts frequently reaffirm that local legislators and board members, as members of the community, are entitled to hold opinions about local issues and to discuss their positions on these issues with constituents and members of the public.<sup>3</sup> The courts also are also reluctant to read into equivocal or ambiguous statements that do not clearly portray the decision-makers as having predetermined how they intended to rule on a given matter.<sup>4</sup> Rather, a petitioner must be able to prove that the decision-maker's mind was “irrevocably closed” in order to prevail on a claim of prejudgment.<sup>5</sup> In *Webster Associates v. Webster*, for example, the New York Court of Appeals declined find any prejudgment where the new chairman of the town board had made public statements both before and after his election that were critical of the Webster Associates development proposal. As the court explained, the chairman's statements were actually more critical of the manner in which the prior town board had handled the proposal, and despite his allegedly disapproving statements regarding the project, “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.”<sup>6</sup>

The fact that a land use board has previously reviewed an application and reached a determination does not, without more, establish prejudgment. As a Hawaii court explained, it is therefore entirely appropriate for a remanded application to be returned to the same judge or adjudicative board for further proceedings. There is no basis to grant a request for the recusal of board members who voted against the matter on the first review; “rather, when an agency decision-maker expresses a position on

§ 38:14. Prejudgment, 4 Am. Law. Zoning § 38:14 (5th ed.)

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an issue as a function of carrying out his statutory obligations, due process does not require the decision-maker's recusal in a subsequent proceeding on the same issue.”<sup>7</sup>

Additional cases involving prejudgment are collected below.<sup>8</sup>

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**Footnotes**

- \* The 2022 updated chapter was prepared by Amy Lavine, Esq.
- 1 [Woody's Group, Inc. v. City of Newport Beach](#), 233 Cal. App. 4th 1012 (2015).
- 2 [Ogden Dev. Group v. Buchel](#), 216 Wis. 2d 113 (1997).
- 3 See, e.g.,
- California*: [Petrovich Development Co., LLC v. City of Sacramento](#), 48 Cal. App. 5th 963 (2020) (“Councilmember Schenirer's statement quoted in the letter ... that a gas station does not fit in the development as originally proposed, did not disqualify him from voting on the issue. The decision on siting a gas station in Curtis Park Village was plainly a matter of concern for members of the local community. “A councilman has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance.””).
- New York*: [Byer v. Town of Poestenkill](#), 232 A.D.2d 851 (NY App Div 3d Dept 1996) (“Although Hammond opposed Local Law No. 1 and addressed the issue of gravel mining during his 1993 campaign, his statement of personal opinion does not constitute a basis for finding a conflict of interest. Indeed, any other conclusion would necessarily have a chilling effect upon a candidate's ability to express an opinion on important issues during an election campaign or to advocate changes in the law once elected. Certainly, the disclosure by candidates for public office of their opinions on controversial topics is to be encouraged, not penalized.”); [Matter of Pittsford Canalside Props., LLC v Village of Pittsford](#), 137 AD3d 1566 (NY App Div 4th Dept 2016) (“Here, both Galusha and Mayor Corby had expressed opposition to the Project before and after their elections, and prior to voting on the challenged resolutions. They were not disqualified from participating in the deliberations or voting on those resolutions, however, inasmuch as their “alleged bias involved only expressions of personal opinion” that did not constitute a basis for finding a conflict of interest. Indeed, we agree with respondents that the expression of opinion by Galusha and Mayor Corby on matters of public concern “is to be encouraged, not penalized.””); [Matter of Troy Sand & Gravel Co., Inc. v Fleming](#), 156 AD3d 1295 (NY App Div 3d Dept 2017) (“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.”).
- South Dakota*: [Miles v. Spink Cnty. Bd. of Adjustment](#), 2022 SD 15 (3/16/22) (“Considering the rural population of Spink County, communications with opponents to a resolution are bound to occur and do not rise to the level of a serious risk of actual bias. Jeff acknowledged that he is friends with most of the

§ 38:14. Prejudgment, 4 Am. Law. Zoning § 38:14 (5th ed.)

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opponents of the CAFO and leased land to one, but his knowledge of, and friendship with, community members opposing the CAFO is insufficient to establish a serious risk of actual bias.”).

*Wisconsin: Gage Inc., LLP v. Vill. of Sister Bay*, 2011 WI App 121 (2011) (“Even assuming, arguendo, the truthfulness of Gage’s representations, there was no impermissible risk of bias. Bhirdo recused herself during the public meetings addressing Gage’s request. Bhirdo did not vote on the permit request. We see no reason why Bhirdo could not voice her objections to the project in her personal capacity as a concerned citizen affected by the proposed development. Gage does not produce any evidence that the remaining plan commission or village board members were anything less than impartial. The board’s decision is accorded a presumption of honesty and integrity.”).

4 See, e.g.,

*Delaware: Rapp v. New Castle County Bd. of Adjustment*, 2022 WL 1684278 (Del. Super. 5/26/22) (“The remaining due process claims allege that the Rapps were denied a fair and meaningful proceeding by an impartial and disinterested tribunal. They argue that because the Board Chairman stated, “[w]e are the Community” during the proceeding, the Board was asserting a vested interest in the outcome of the hearing. The Rapps read too much into this comment .... The record demonstrates that the Board acted in a neutral manner when deliberating and deciding the application. The Rapps’ complaints concerning the Board’s conduct are not supported by any evidence in the record, nor does the record support their assertion that the Chairman exerted undue influence over other Board members. The Board properly weighed evidence presented to it and reached a conclusion based on that evidence under the appropriate legal standard.”).

*Kansas: McPherson Landfill, Inc. v. Board of County Com’rs of Shawnee County*, 274 Kan. 303 (2002) (“There was no indication that Commissioners Ensley and Meier failed to keep an open mind or failed to consider all the evidence. While Commissioner Meier sent a letter suggesting his opposition to the application, he asked a number of questions, which suggested he might be persuaded to support the application if certain facts were established. Further, in the case of Commissioner Ensley, while his statements indicated stronger opposition to the application, he testified in his deposition that he reserves final judgment for the hearing because of the potential that new evidence might surface. Based upon all the circumstances, we conclude that there was no prejudgment in this case.”).

*New Mexico: Siesta Hills Neighborhood Ass’n v. City of Albuquerque*, 124 N.M. 670 (1998) (declining to find prejudgment where a board member seemed to favor granting a special use permit for a youth shelter, despite the petitioner referring to her statements that the issue was “real cut-and-dried” and she would “always vote in favor of such youth issues,” because the board member made those statements after hearing the petitioner’s arguments, and in any case, she was entitled to have and express personal views on policy issues such as youth services).

*Tennessee: Precision Homes, Inc. v. Metro. Gov’t of Nashville*, 2019 WL 2395946 (Tenn. App. 6/6/19) (“In context, Ms. Grimes’s statements indicate that she had not yet decided how she was going to vote. At the time of the above statement, she thought that Precision had met the criteria of the ordinance ... but she was still gathering information and had not yet made up her mind. Although the Committee discussion after Ms. Grimes’s comments did not pertain to the points she raised, there was additional discussion about adding a condition and Ms. Grimes had time to consider her vote; when it was time to vote, she voted against approving the variance.”).

5 See, e.g.,

*Kansas: McPherson Landfill, Inc. v. Board of County Com’rs of Shawnee County*, 274 Kan. 303, 49 P.3d 522, 533 (2002) (“There was no indication that Commissioners Ensley and Meier failed to keep an open mind or failed to consider all the evidence. While Commissioner Meier sent a letter suggesting his opposition to the application, he asked a number of questions, which suggested he might be persuaded to support the application if certain facts were established. Further, in the case of Commissioner Ensley,

§ 38:14. Prejudgment, 4 Am. Law. Zoning § 38:14 (5th ed.)

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while his statements indicated stronger opposition to the application, he testified in his deposition that he reserves final judgment for the hearing because of the potential that new evidence might surface. Based upon all the circumstances, we conclude that there was no prejudgment in this case.”); [Tri-County Concerned Citizens, Inc. v. Bd. of County Comm'rs](#), 32 Kan. App. 2d 1168 (2004) (“We have concluded that the evidence does not demonstrate that any of the commissioners exhibited an “irrevocably closed mind” on the issue before the Board. Although the commissioners' actions may not have proven politically popular, the evidence is insufficient to ascribe fatal prejudgment to any commissioner or to the Board's proceedings.”).

*Missouri:* [Wagner v. Jackson Cty. Bd. of Zon. Adj.](#), 857 S.W.2d 285 (Mo. App. 1993) (“familiarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decisionmaker, in the absence of a showing that the decisionmaker is not capable of judging a particular controversy fairly on the basis of its own circumstances.”).

*Montana:* [Madison River R.V. Ltd. v. Town of Ennis](#), 2000 MT 15 (2000) (holding that to prevail on a claim of prejudgment or bias, a petitioner must show that the decisionmaker has an “irrevocably closed” mind” on the subject of adjudication).

6 [Webster Associates v. Webster](#), 59 NY2d 220 (1983).

7 [Keep the N. Shore Country v. Bd. of Land & Natural Res.](#), 150 Haw 486 (2/22/22).

8 See, e.g.,

*California:* [Sullivan Equity Partners, LLC v. City of Los Angeles](#), 2022 WL 2815451 (Cal. App. 2d Dist. 2022), unpublished/noncitable (“Putting aside the email exchange with Molnar, we find insufficient evidence to support Sullivan's claim that Lorenzen committed to revoking its permits prior to the BSS hearing. The early emails among Lorenzen, James, and Kracov demonstrate that the City began its investigation after the neighbor group alleged that trees had been removed without a permit, and the subsequent emails confirm that the inspection revealed the removal of three unpermitted trees. None of these facts were in dispute, and they do not establish any commitment by Lorenzen or James to revoke Sullivan's permits as punishment for the tree removals. Indeed, Lorenzen's email to James with the results of the investigation lays out multiple options and does not suggest any preferred outcome.”).

*Connecticut:* [Taylor v. Planning and Zoning Commission of Town of Westport](#), 218 Conn. App. 616, 293 A.3d 357 (2023), certification denied, 346 Conn. 1022, 293 A.3d 897 (2023) (“Our conclusion that the commission deprived the plaintiff of his right to fundamental fairness is further supported by the commission's discussion of the plaintiff's application at the deliberation hearings that followed .... Despite these concerns [from some board members], other members disagreed with the notion that the application had been handled unfairly. Rather than focusing solely on the purported incompleteness of the current application to support their position, the commission members justified the closing of the hearing by stating that the plaintiff “stomped on the staff,” “gave the staff holy hell,” “was egregious,” “was confrontational,” and that “on the day of the application [Fedor] threw a bunch of crap at [them] that was crap.” Furthermore, the members commented on the plaintiff's previous applications, stating repeatedly that they were a “shit show,” and “horrible.” Accordingly, even a deferential review of the commission's actions leads us to conclude that the plaintiff did not receive a dispassionate consideration of his application or that the commission's decision was made reasonably and fairly after a full hearing at which the plaintiff was allowed to address the dispute over whether his application was complete.”).

*Indiana:* [Lockerbie Glove Factory Town Home Owners Association, Inc. v. Indianapolis Historic Preservation Commission](#), 106 N.E.3d 482 (Ind. Ct. App. 2018) (“Commissioner White's statement that he used to be on the Athenaeum board and suggesting, based on his experience, that Jacobs should consult an expert regarding potential noise issues with the project, does not demonstrate actual bias in favor

§ 38:14. Prejudgment, 4 Am. Law. Zoning § 38:14 (5th ed.)

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of the project, and the Remonstrators' bald assertion that his statement shows 'presumed bias' does not make it so.”).

*New York:* [Decarr v. Zoning Bd. of Appeals for Town of Verona](#), 154 A.D.3d 1311, 62 N.Y.S.3d 244 (4th Dep't 2017) (“Petitioners further contend that respondent Martin Schaub, as Chairman of the ZBA, predetermined the outcome of the application. We reject that contention. The comments attributed to Schaub, as contained in the record on appeal, constitute merely ‘a predisposition on questions of law’ related to the limited power of the ZBA to deny a public utility's application, as opposed to a ‘prejudgment of specific facts at issue in [the] adjudicatory proceeding.’”); [Bruckel v Town of Conesus](#), 2022 NY Slip Op 00580 (NY App Div 4th Dept 1/28/22) (“In these hybrid CPLR article 78 proceedings and actions for declaratory judgment and money damages, respondent-defendant Carl Myers Enterprises, Inc. (CME) appeals from a judgment that, inter alia, annulled a building permit obtained by CME and annulled a decision by a local planning board. The judgment is supported by a 19-page written decision drafted by counsel for petitioners-plaintiffs (petitioners), with only three minor modifications made by Supreme Court. We agree with CME that the court erred in adopting, almost verbatim, the proposed decision drafted by petitioners' counsel as the final determination in this case. “When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions”. Even assuming, arguendo, that CME could or should have objected to the court's error, we would exercise our discretion to correct that error notwithstanding CME's failure to object.”).

*South Dakota:* [Holborn v. Deuel County Board of Adjustment](#), 2021 SD 6, 955 N.W.2d 363 (S.D. 2021) (“SDCL 6-1-21 cannot be read to prohibit public officials involved in quasi-judicial proceedings from speaking on, or even advocating generally for or against matters of public interest in their communities. However, concerns under SDCL 6-1-21 may exist when an official publicly voices support or opposition on an issue expected to come before the official. In those instances, the standard for disqualification in SDCL 6-1-21 requires that the statements or actions of the official objectively demonstrate an unacceptable risk that the official is unable to fairly consider and decide the particular issue. Here, Kanengieter's prior advocacy for wind energy in Deuel County, and his prior opposition to more stringent ordinance requirements for [wind energy systems], are insufficient to rebut the presumption of objectivity under SDCL 6-1-21.”).

*Tennessee:* [Fiser v. City of Knoxville](#), 584 S.W.2d 659 (Tenn. Ct. App. 1979) (finding that recusal of the city council members was unnecessary despite allegations that prior to the hearing they had made statements or commitments for personal or political reasons to vote against the rezoning petition).

*Washington:* [City of Seattle v. Kaseburg](#), 3 Wash. App. 2d 1002, 2018 WL 1472713 (Div. 1 2018), published at, 13 Wash. App. 2d 322, 467 P.3d 115 (Div. 1 2018) (“the Appellants contend that the council members ‘pre-decided’ to condemn the Property when they signed the June 2015 letter to the mayor and that such a decision constitutes a ‘final action’ ... As a preliminary matter, the council members' decision to support the possibility of condemnation—or ‘pre-deciding’ as the Appellants characterize it—could not possibly constitute a ‘final action to authorize the condemnation.’ This is so because the condemnation was not authorized until the Ordinance was adopted ... It is entirely unremarkable that the council members would individually or collectively support condemnation at some point in time prior to setting a public hearing on the adoption of the Ordinance.”).

*Wisconsin:* [Kivley v. City of Milwaukee](#), 2000 WI App 31 (2000) (“The circuit court observed that the common council heard argument from both sides before deciding to proceed with the revocation. The circuit court also stated that D'Amato had a right to act as both the complainant and the prosecutor, as long as he recused himself from the substantive votes. In deciding against the Kivleys, the court asserted, “this was not obviously a greased proceeding whereby the outcome was already determined before it got started.” We agree, and we adopt the circuit court's reasoned analysis. Like the circuit court, we also reject the Kivleys' argument that D'Amato's conduct was sufficiently egregious to “overcome the presumption of honesty and integrity that would ordinarily be applied to this case.”).

**§ 38:14. Prejudgment, 4 Am. Law. Zoning § 38:14 (5th ed.)**

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## 4 Am. Law. Zoning § 38:15 (5th ed.)

American Law of Zoning | May 2024 Update  
Patricia E. Salkin

### Chapter 38. Ethical Considerations \*

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# § 38:15. Bias

In addition to conflicts of interest based on particular personal and financial interests, decision-makers can also be disqualified if they are biased, impartial, or unduly influenced against a party.<sup>1</sup> Commenting on this type of catch-all ethics allegation, a Wisconsin court observed that “zoning decisions are particularly vulnerable to bias due to the localized nature of the decisions and the fact that zoning committee members are drawn from the immediate area. Bias can distort judgment and lead to decisions not founded on facts or rational analysis. Board members should recuse themselves when there is actual bias or even an impermissibly high risk of bias ... When a board prejudices the facts or the application of law, the property owner's right to an impartial decision maker is violated.”<sup>2</sup>

Many bias allegations are dismissed due to being “speculative.”<sup>3</sup> Moreover, local boards and legislative bodies are presumed to operate fairly, and a party seeking to prove bias carries a difficult burden of proof.<sup>4</sup> The test was described by the South Dakota Supreme Court as follows: “The standard for disqualification in a regulatory or rule-making proceeding ‘is that the official should be disqualified only when there has been a clear and convincing showing the official has an unalterably closed mind on matters critical to the disposition of the proceeding.’ The due process standard for disqualification in a quasi-judicial proceeding is that an official ‘must be disinterested and free from bias or predisposition of the outcome and the ‘very appearance of complete fairness’ must be present .... Determining disqualifying interest does not involve hyper-technical analysis. The interest must be ‘different from the interest of members of the general public.’ If the interest is different, then the question is whether a reasonably-minded citizen would conclude that the official's interest or relationship creates a potential to influence the official's impartiality.”<sup>5</sup> An Illinois case provided a similar formulation of the standard: “Review of a claim of bias on part of an administrative agency or official begins with the presumption that administrative officials are objective and capable of fairly judging an issue. Bias by an administrative agency may be shown only if a disinterested observer would conclude that the agency, or its members, had adjudged the facts and law of the case before the matter was heard.”<sup>6</sup>

Bias can manifest itself in many different ways, but allegations are often based on a board member's statements that either impugn a party or display favoritism.<sup>7</sup> For example, the Vermont Supreme Court held that a bias claim was well-founded where the evidence showed that the chairman of the development review board had called the project opponents “a bunch of elitists with nothing invested in the community” who were only “devoted to their personal ideals rather than to the realities of growth.”<sup>8</sup> On the other hand, “isolated comments about hamburger restaurants” and the use of an unprofessional email signature by the board's attorney were not enough to establish bias in a New Jersey case decided in 2020. Although the court did not “condone” this behavior, it simply did not reflect any favoritism or unfairness by the board.<sup>9</sup>

In other cases, the public nature of statements made by board members (not necessarily the content of those statements) may create an appearance of impropriety requiring disqualification.<sup>10</sup> For instance, a New York court found an actionable appearance of impropriety in a case where three board members had signed a petition in favor of granting the rezoning and the board chairman had written a letter to the mayor also in support of the application. Although none of the board members’

§ 38:15. Bias, 4 Am. Law. Zoning § 38:15 (5th ed.)

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statements amounted to violations of the conflict of interests statute, the court nonetheless concluded that the appearance of bias required annulment of the planning board's site plan approval and remand for further review.<sup>11</sup>

Bias claims have occasionally been raised in cases where the proposed development is being funded by the local government, but the courts tend to rule in favor of the local government in these cases.<sup>12</sup> An Oregon court, for example, rejected a challenge claiming that a city council was effectively the “sponsor” of a project since it had previously approved funding for it. The petitioners, the court said, ignored “the truism that city councils perform many functions, some of which are inevitably related to others. To the extent that the argument requires comment, Al Smith provided the answer by his observation that the only cure for the evils of democracy is more democracy.”<sup>13</sup> A Connecticut court similarly held: “When the zoning commission acts to propose an amendment formulated by the commission, all of its members could be said to be similarly biased as sponsors of the proposal and, therefore, disqualified from voting on it. Such an inconceivable consequence compels the conclusion that sponsorship of a legislative proposal is not the kind of personal interest the statute was intended to preclude.”<sup>14</sup> The plaintiffs in an Eleventh Circuit case argued that their code violations could not be prosecuted without raising an unconstitutional risk of bias and violating their rights to due process because “because the City's budget heavily relies on fines and fees, and this reliance could encourage the judge, prosecutor, and law enforcement agents—all paid by the City—to over-zealously enforce the law.” The court disagreed, however, because “the importance of fines and fees to a city's budget does not make its procedures for imposing fines and fees unconstitutional.”<sup>15</sup>

Additional cases involving bias allegations are collected below.<sup>16</sup>

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### Footnotes

\* The 2022 updated chapter was prepared by Amy Lavine, Esq.

1 See, e.g.,

*Iowa*: [Martin Marietta Materials, Inc. v. Dallas County](#), 675 NW2d 544 (Iowa 2004) (“When such bodies pass on the issuance of a permit, like the one here, they act in a quasi-judicial capacity. In such circumstances, board members are “disqualified or incompetent to sit in a proceeding in which [they have] prejudged the case, or in which [they have] a personal or pecuniary interest, where [they are] related to an interested person . . . , or where [they are] biased, prejudiced, or labor[] under a personal ill-will toward a party.”).

*Kentucky*: [Hilltop Basic Res., Inc. v. County of Boone](#), 180 SW3d 464 (Ky 2005) (“decision makers are not free to be biased or prejudicial when performing nonjudicial functions. To the contrary, any bias or prejudicial conduct which demonstrates “malice, fraud, or corruption” is expressly prohibited as arbitrary.”).

*New Mexico*: [Siesta Hills Neighborhood Ass'n v. City of Albuquerque](#), 124 N.M. 670 (1998) (“a public officer sitting in a quasi-judicial capacity is normally disqualified if an objective observer would entertain reasonable questions about the judge's impartiality”).

2 [Staege v. Town of Norway](#), 2008 WI App 64 (2008).

3 See, e.g.,

§ 38:15. Bias, 4 Am. Law. Zoning § 38:15 (5th ed.)

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*Maryland: Terry v. Cty. Council of George's Cty.*, 2019 WL 3453242 (Md. App. 7/31/21) (“That Mr. Turner, as a councilmember for the City of Bowie, voted to support the special exception application indicates nothing other than that he believed granting the application was in the best interests of the City. This is an expression of a viewpoint as to an “issue[] of law or policy” that is not disqualifying.” It does not, in our view disqualify him from participating in the Council's subsequent decision. Because there is absolutely no evidence that he was biased or that he or any family member had any personal interest in the project, there is no basis for us to conclude that his participation in the Council's decision-making process tainted the result.”).

4 See, e.g.,

*Iowa: Martin Marietta Materials, Inc. v. Dallas County*, 675 NW2d 544 (Iowa 2004) (“There is a “presumption of regularity that attaches to the decisions of administrative agencies” that protects them against inquiry into how they reach their decisions based upon mere suspicion. However, that presumption may be overcome by a “strong showing of bad faith or improper behavior” that will allow such an inquiry.”).

*North Carolina: Berger v. New Hanover County Bd. of Comm'rs*, 2013 NCBC 45 (“It is true that fact-finder bias may be shown by proof of a “prejudgment of adjudicative facts.” But proof of such bias requires much more than innuendo or inference. Rather, there is a “heavy burden” required to prove bias and the necessity to “overcome a presumption of honesty and integrity in those serving as adjudicators.””).

*Vermont: In re JLD Props. of St. Albans, LLC*, 2011 VT 87 (2011) (“only in “the most extreme of cases” is disqualification for bias constitutionally required”).

5 *Armstrong v. Turner County Bd. of Adjustment*, 2009 SD 81 (2009).

6 *Kimball Dawson, LLC v. City of Chicago Dep't of Zoning*, 369 Ill. App. 3d 780 (2006).

7 See, e.g.,

*Eighth Circuit: Mensie v. Little Rock*, 917 F.3d 685 (8th Cir. 2/28/19) (“We find no basis for Mensie's argument that the City relied on racist “code words” by crediting neighbors' concerns about the possibility of decreased property values and increased crime as a result of Mensie's salon .... Here, the record indicates her neighbors' opposition was based not on Mensie's mere “presence,” as Mensie argues, but rather on the commercial nature of her proposal. Even if concerns about increased crime in this context could be considered racial code words, nothing indicates the City itself was improperly motivated by this concern or by Mensie's race.”).

*Connecticut: Pirozzilo v. Berlin Inland Wetlands and Water Courses Com'n*, 32 Conn. L. Rptr. 103, 2002 WL 1009705 (Conn. Super. Ct. 2002) (finding that the board was biased where, in reviewing an application from an Italian-American person, a board member referred to Italian people as “wopsided”).

*New Jersey: World Wheat Foundation, Inc. v. Planning Board of Township of Saddle Brook*, 2017 WL 3081779 (N.J. Super. Ct. App. Div. 2017) (“Plaintiff contends that the Board, and Chamberlain in particular, exhibited racial bias against plaintiff because it is a Korean organization .... Chamberlain testified as to why she made the complained-of comments. First, the comments had nothing to do with either plaintiff or the church being of Korean heritage. Rather, Chamberlain used that identifier simply to distinguish it from three other churches located on the same road as the Korean church .... Accordingly, there were legitimate reasons for this discussion and it is clear that racial bias played no part in the denial of plaintiff's application. Similarly, the concerns about terrorism and other violent concerns were reflective of a perceived rise in the number of such incidents in schools in particular. Plaintiff's argument on this point simply lacks merit.”).

§ 38:15. Bias, 4 Am. Law. Zoning § 38:15 (5th ed.)

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*Virginia: Theologis v. Weiler*, 76 Va. App. 596, 883 S.E.2d 241 (2023) (“The complaint here alleges that Theologis is a Virginia lawyer and that he owns a real estate company that manages three rental properties owned by clients who live in Fieldstone. Although none of the defendants’ statements mentioned those jobs, Theologis claims that their statements injured his reputation in those occupations by implying that he was professionally unfit. Those allegations do not supply ‘sufficient innuendo to imply defamatory meaning.’ ... While the defendants’ statements criticize Theologis’s performance as an association officer and director, they do not impugn his integrity as a lawyer or private-property manager, let alone mention those occupations.”).

*Wisconsin: Marris v. Cedarburg*, 176 Wis. 2d 14 (1993) (finding an impermissibly high risk of bias where the chairman made comments comparing the applicant to Leona Helmsley, who was then being prosecuted for tax evasion).

8 *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, 30 A.3d 641 (Vt. 2011).

9 *Sadowe v. Northeast*, 2020 WL 5229204 (N.J. Super. Unpub. 9/2/20).

See also

*Maine: Lane Const. Corp. v. Town of Washington*, 2008 ME 45, 942 A.2d 1202 (Me. 2008)(finding that the chairman’s comments in an unrelated letter to the editor and his statements made after the hearing concluded simply weren’t enough evidence to prove that he was biased or that he’d acted “from a standpoint of predisposition.”).

*New Hampshire: New Hampshire Alpha of SAE Trust v. Town of Hanover*, 172 N.H. 69, 207 A.3d 219, 366 Ed. Law Rep. 849 (2019) (“The mere fact the ZBA member requested that the college, an abutter, be notified of the decision does not, in and of itself, establish a bias; and SAE has not cited any authority supporting a contrary conclusion.”).

*Rhode Island: Green Dev., LLC v. Town of Exeter Zoning Bd. of Review*, C. A. No. WC-2018-0519 (R.I. Super. 4/20/20) (“The Court believes that Mr. DiGregorio’s “no solar” comment was taken out of context ... It is therefore clear to the Court that Mr. DiGregorio does not display an improper bias against solar projects. Mr. DiGregorio simply does not believe it is appropriate to place industrial uses in rural/residential zones unless they are harmonious with the Comprehensive Plan and Zoning Ordinances.”).

10 See, e.g.,

*California: Nasha L.L.C. v. City of Los Angeles*, 125 Cal. App. 4th 470, 22 Cal. Rptr. 3d 772, 775, 35 Env’tl. L. Rep. 20007 (2d Dist. 2004) (vacating the planning commission’s decision based on an anonymous newsletter written by the chairman, since the article gave rise to an unacceptable probability of actual bias as it advocated a position against the project).

*New Mexico: Board of County Com’rs of County of Bernalillo v. Benavidez*, 2013-NMCA-015, 292 P.3d 482 (N.M. Ct. App. 2012) (“Commissioner De La Cruz’s op-ed announced and explained his support, generally and specifically, for the matter under consideration by the Board on which he served—Santolina and its future development. His comments were published just two days prior to hearings which culminated in the Board’s approval of the zone map amendment by a 3-2 vote, with Commissioner De La Cruz in the majority .... While a commissioner’s ‘prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not, without more, a disqualification[,]’ where, as here, a commissioner’s statements concern the very proposal or action pending review before the commission, such a statement may be disqualifying .... We hold, therefore, that the district court did not err in reversing the Board’s approval of the zone map amendment, and in ultimately remanding consideration of the zone map amendment’s approval to the Board for further proceedings.”).

§ 38:15. Bias, 4 Am. Law. Zoning § 38:15 (5th ed.)

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11 [Schweichler v. Village of Caledonia](#), 45 A.D.3d 1281, 1283–1284, 845 N.Y.S.2d 901 (4th Dep't 2007), leave to appeal denied, 10 N.Y.3d 703, 854 N.Y.S.2d 103, 883 N.E.2d 1010 (2008).

12 See, e.g.,

*Third Circuit: Thornbury Noble, Ltd. v. Thornbury Twp.*, 112 Fed. Appx. 185 (3d Cir 2004) (“Noble makes much of the District Court's observation that the actions of the Board were not undertaken for personal gain. Contrary to Noble's contention, the District Court did not conclude that only actions that personally benefit the Board members would meet the shock the conscience test. Instead, the District Court's observation suggested, correctly so, that soliciting a \$600,000 contribution to line the pockets of the Board members is an act different from soliciting a \$600,000 contribution to secure open space. Since the contribution was expressly to pursue a legitimate town goal, neither the Board's motives nor their actions were improper.”).

*New Hampshire: Appeal of Committee to Save Upper Androscoggin*, 124 NH 17 (1983) (“The plaintiffs' contention that the board was impermissibly tainted by a conflict of interest because it had a financial interest in the monies which may ultimately be generated by the Pontook project is similarly lacking in merit. The fact that monies generated by the Pontook project would benefit the State by providing income to repair dams under the supervision of the water resources board, hardly constitutes a substantial, direct and personal pecuniary interest which might serve to influence improperly the board's decision to grant or deny the Company a permit.”); *Prue v. City of Portsmouth*, 2008 WL 11258725 (NH 1/15/08) (“Here, the record supports the trial court's finding that the city council had no conflict of interest. That the development at issue was a public-private partnership “hardly constitutes a substantial, direct and personal pecuniary interest which might serve to influence improperly” the city council's decision to adopt the amendments.”).

13 [Beck v. City of Tillamook](#), 113 Ore. App. 660 (1992).

14 [EBC Realty, LLC v. Zoning Commission of Danbury](#), 2019 WL 2137321 (Conn. Super. Ct. 2019).

15 [Brucker v. City of Doraville](#), 2022 WL 2277661 (11th Cir 6/24/22).

16 See, e.g.,

*Third Circuit: Pompey Coal Company v. Borough of Jessup*, 2023 WL 3260534 (M.D. Pa. 2023) (“The zoning ordinance and map ultimately adopted by the Borough Council was proposed by its consultant and preliminarily approved by the council before Pompey Coal is alleged to have first engaged in any protected speech. Pompey Coal argues that the Borough Council ‘streamlined’ the process as well, but that purportedly expedited part of the process likewise predated the first plausibly alleged protected speech by Pompey Coal in September 2018. Thus, the plaintiff has failed to plausibly allege a causal link between the constitutionally protected speech it has identified and the alleged retaliatory action by the Borough Council. Accordingly, Count I of the second amended complaint, asserting a § 1983 First Amendment retaliation claim, will be dismissed for failure to state a claim upon which relief can be granted.”).

*Delaware: Brittingham v. Board of Adjustment of City of Rehoboth Beach*, 2005 WL 170690 (Del. Super. Ct. 2005) (holding that the board “did not play fairly when it required the Brittinghams to return for a second hearing, under the guise of typing up procedural loose ends, only to pull the rug out from them and rehear the case in a third hearing. It failed to follow its own rules, and then penalized the Brittinghams for a procedural oversight that was equally its own. Such sleights of hand suggest the sort of impropriety that undermine the public's faith in the integrity of the public process.”).

*Iowa: Martin Marietta Materials, Inc. v. Dallas County*, 675 N.W.2d 544 (Iowa 2004) (allowing discovery to inquire into the mental processes and alleged bias of the board members by asking other involved

§ 38:15. Bias, 4 Am. Law. Zoning § 38:15 (5th ed.)

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individuals whether there was communication with board members and if so, what that communications were).

*Kansas*: [Cook Tex. Props., LLC v. City of Coffeyville](#), 239 P.3d 114 (Kan. App. Unpub. 2010) (“Cook’s argument is not persuasive. No evidence exists to support a finding of bias or unfairness in the Commission’s decision . . . . Cook has failed to identify any other event at the hearing that would justify labeling it as “circus-like.” Nor has Cook presented any legitimate reason why Schneider’s later interruption or the subsequent requirement that Rathbun be sworn had any effect adverse to Cook on the Commission’s decision. Finally, each member of the Commission explained their rationale for their vote. All cited the condition of the building, including the oil contamination now trapped within the cinderblocks of the structure, as a reason for upholding the hearing officer’s demolition order. Not one of the commissioners relied upon Schneider’s testimony in making their decision. Simply put, we see no evidence of bias or prejudice here. We affirm the ruling of the district court upholding the demolition order.”).

*Maryland*: [Brandywine Senior Living at Potomac LLC v. Paul](#), 237 Md. App. 195, 184 A.3d 48 (2018) (“Our review of the record as a whole leads us to conclude that the hearing examiner did not impermissibly align himself with Brandywine by suggesting and permitting the amendments to the conditional use application, thereby depriving the Pauls of due process.”).

*Massachusetts*: [Mastrangelo v. City of Amesbury](#), 102 Mass. App. Ct. 1115, 209 N.E.3d 63 (2023) (“The mayor’s decision to not enter a host community agreement (HCA) on behalf of the city with CKR and instead request that the plaintiffs first obtain a special permit from the planning board was a discretionary act . . . . The plaintiffs did not submit any admissible evidence that the mayor harbored any personal hostility or ill will toward the plaintiffs. Also absent from the summary judgment record is evidence that the mayor’s decision was motivated by revenge, or a “spiteful, malignant purpose, unrelated to [a] legitimate [municipal] interest”. Nor has the plaintiff offered evidence to support an inference of bad faith. The plaintiffs’ theory that the mayor held them to a different standard because of their economic empowerment (EE) status rests more on conjecture and speculation than rational inferences of probabilities from established facts where, as here, there was opposition to the application, and the mayor simply asked that the planning board review the application. At bottom, there is insufficient evidence on this record to justify a trial on whether the mayor acted in bad faith, with malice, or corruptly.”).

*Michigan*: [Charter Twp. of Ypsilanti v. Cole](#), 2022 WL 1591469 (Mich. App. 5/19/22) (“Even when viewing the evidence in a light most favorable to the Coles, the property’s enforcement history and the timing of the current action in relation to Mr. Cole’s release from prison amounts to mere speculation regarding the Township’s alleged improper motive, which is insufficient to survive summary disposition. Given the lack of supporting evidence, any amendment adding a substantive due process claim would be futile.”).

*New Hampshire*: [Bayson Properties, Inc. v. City of Lebanon](#), 150 N.H. 167 (2003) (holding that a party “claiming bias on the part of a planning board member must raise that issue before the board at the earliest possible time . . . . Waiting until after eleven hours of hearings held over three months to raise a concern about alleged bias of board members does not fulfill the plaintiffs’ obligation to raise the issue at the earliest possible time.”).

*New Jersey*: [The Ridge At Back Brook, LLC v. East Amwell Township Planning Board](#), 2021 WL 3043319 (N.J. Super. Ct. App. Div. 2021) (affirming the trial court’s decision that Wolfe’s recusal was required since the record established that Wolfe’s conduct and statements about the plaintiff and his helistop gave the appearance of a deeply held personal bias that likely had the capacity to affect his faithful and impartial review).

[DiMarco v. Zoning Board of Adjustment of Borough of Edgewater](#), 2023 WL 3991102 (N.J. Super. Ct. App. Div. 2023) (finding that the chairman’s comments, although suggestive of some intolerance

§ 38:15. Bias, 4 Am. Law. Zoning § 38:15 (5th ed.)

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regarding the alleged harm that would be caused by the project on those outside the municipality, were insufficient to demonstrate any impermissible bias).

*New York*: [Singer v. de Blasio](#), 215 A.D.3d 440, 187 N.Y.S.3d 599 (1st Dep't 2023) (finding that the plaintiffs' allegations that the Department of Buildings' delays in approving their lease and its denial of their permit were the result of political corruption and improper influence were speculative and lacked specificity).

*North Carolina*: [Dellinger v. Lincoln Cty.](#), 266 N.C. App. 275 (2019) (“Petitioners clearly demonstrated Permenter's bias based upon his actively opposing this specific conditional use application and appeal in the past, committing money to the cause of preventing them from obtaining the conditional use permit, and openly communicating his opposition to others. Permenter's bias is not based upon his general discussion of or attitude toward solar farms or conditional use permits, but his position, contributions, and activities involving the grant or denial of this conditional use permit for Petitioner's proposed solar farm. Permenter's activities and positions proved he had a “commitment” to “decide the case in a particular way” or had a “financial interest in the outcome of the matter,” mandating recusal .... Permenter's bias and commitment to deny Petitioners' request for a conditional use permit is sufficient basis to reverse and remand.”).

*Wisconsin*: [CFS, LLC v. Bayfield County Bd. of Adjustment](#), 2013 WI App 105 (2013) (“CFS further asserts that the Board was not impartial because it emphasized CFS's past wetland violations “while wholly disregarding the evidence.” An applicant for a conditional use permit is entitled to a fair and impartial hearing, rights that are violated when there is bias or unfairness in fact, or when the risk of bias is impermissibly high. We have already concluded that the CFS's history of noncompliance was a relevant consideration, and that substantial evidence supported the Board's findings on criterion numbers three and five. Accordingly, we reject CFS's claim that the Board “went out of its way to make findings against CFS absent even the flimsiest shred of evidence to support them.” Moreover, CFS has not even attempted to show that any Board member prejudged its application or had an impermissible conflict of interest.”).