

# Ethics in Land Use Practice

**8:15 – 9:45AM**      **Ethics Sessions**

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*Session 2 – JI-Lecture Hall*

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

**Steven G. Leventhal, Esq.,**

*Partner, Leventhal, Mullaney & Blinkoff, LLP*

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**LAND USE LAW CENTER  
ELIZABETH HAUB SCHOOL OF LAW  
PACE UNIVERSITY**

**WHITE PLAINS, DECEMBER 2023**

**HOW TO ANALYZE AN ETHICS PROBLEM:**

**NY GEN. MUN. LAW ART. 18**

**LOCAL CODES OF ETHICS**

**COMMON LAW CONFLICTS OF INTEREST**

**PRESENTED BY:**

**STEVEN G. LEVENTHAL, ESQ.  
LEVENTHAL, MULLANEY & BLINKOFF, LLP  
15 REMSEN AVENUE  
ROSLYN, NEW YORK 11576  
(516) 484-5440  
SLEVENTHAL@LCMBLAW.COM**

# HOW TO ANALYZE A GOVERNMENT ETHICS PROBLEM

- Start with NY General Municipal Law, Article 18
- Always Check Local Municipal Ethics Code
- No Statute Violated? Consider “Appearances”

**IF IN DOUBT, ASK BOARD OF ETHICS FOR FREE,  
CONFIDENTIAL ETHICS ADVICE**

# PROHIBITED INTERESTS IN MUNICIPAL CONTRACTS

## NY Gen. Mun. Law § 801

- Three elements:
  - Contract, Claim, Account or Demand
  - Direct or indirect pecuniary or material benefit to Town officer or employee
  - Power or duty, individually or as a board member, to approve contract or payment, to audit bills, or to hire or fire anyone who has that power or duty.

# PROHIBITED INTERESTS IN MUNICIPAL CONTRACTS

- Lexjac, LLC v. Inc. Vil. of Muttontown
  - What is a contract?
  - Is recusal a cure?
  - What is a willful violation?
  - What is a willful and knowing violation?
  - Can the violation be waived?

# PROHIBITED INTERESTS IN MUNICIPAL CONTRACTS

- Summary: Prohibited Interest in a County Contract
  - Contract + financial benefit + control = violation
    - Neither recusal nor public bidding will cure the violation
  - Contract + financial benefit (but no control) = no violation
    - But disclosure is required
  - Contract + financial benefit + control + exception = no violation
    - But recusal and disclosure are required

# COMPENSATION FOR MATTERS BEFORE OWN AGENCY

## NY Gen. Mun. Law § 805-a

- No municipal officer or employee
  - shall 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



# REQUESTING OR ACCEPTING GIFTS

## NY Gen. Mun. Law § 801

### Value of Gift:

The gift, alone or combined with other gifts from the same source within 12 months, is worth \$75.00 dollars or more,

### Circumstances of Gift:

It would appear that:

- the gift was intended to influence an official action;
- the gift could “reasonably be expected” to influence an official action; or
- the gift was intended as a reward for an official action.

# REQUESTING OR ACCEPTING GIFTS

A Town Board member and a local developer are long time personal friends. Every year, they and their spouses celebrate their birthdays together at an expensive local restaurant. Each friend picks up the tab on the birthday of the other. The cost of dinner always exceeds the sum of seventy-five dollars per person. Shortly before the board member's birthday, the developer applies to the Town Board for approval of a major development project. Is the cost of the birthday celebration a prohibited gift to the Town Board member?

# BRIBERY AND RELATED OFFENSES

- Bribery – A corrupt deal made in advance
- Unlawful Gratuities – No tipping allowed

# LOCAL CODES OF ETHICS

- Each town must adopt a code of ethics
- Topics:
  - Code of Conduct
  - Disclosure
  - Administration/Board of Ethics
- Typical clauses:
  - Private employment in conflict with duties
  - Post employment restrictions
  - Personal use of municipal resources
- Drafting tip: One Stop Shopping

# COMMON LAW CONFLICTS OF INTEREST

- No need for statutory violation. Courts have set aside board decisions where members with conflicts of interest have failed to recuse themselves and cast deciding votes.
- Matter of Tuxedo Conservation & Taxpayer Assn. v. Town Board of Town of Tuxedo
- Even where a conflicted official refrained from voting, that official's influence of other voting members would be a basis for invalidation.
- Eastern Oaks Development, LLC v. Town of Clinton

# UNCONSTITUTIONAL VAGUENESS

A statute is unconstitutionally vague under the Due Process Clauses of the Federal and State Constitutions when 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.

# CODE OF ETHICS – CITY OF NEW YORK

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 the violation involved conduct identified in a rule of the board as prohibited by the "catch-all" provision.

The City Conflicts of Interest Board adopted a rule specifying certain as violating the "catch-all" provision.

# COMMON LAW CONFLICTS OF INTEREST

- Common law conflicts should be clear and obvious; not petty or speculative.
- A disqualifying interest is one that is personal or private; not one that an official shares with all other citizens or property owners.



# PECUNIARY INTERESTS, SECONDARY EMPLOYMENT, CONTROVERSY

- 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 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.

# PECUNIARY INTERESTS, SECONDARY EMPLOYMENT, CONTROVERSY

- A board member is president of a company that sells products to a firm owned by one of the applicant. During the previous three years, the board member's company had annual gross sales of \$2,000,000 to \$3,000,000; and the firm purchased between \$400 and \$3,000 in products from the company.

# BIAS, PREJUDICE, EXPRESSION OF OPINION

- Three members of the town planning board sign a petition in support of a developer's project and application for rezoning.
- 
- In a letter to the supervisor, the chairperson supports the project and zoning application, and states that she would like to see new housing available in the event she decides to sell her house and move into something that would not require maintenance.

# BIAS, PREJUDICE, EXPRESSION OF OPINION

- At a public hearing, a resident spoke in opposition to a zone change proposed by the owner of a gravel mining business. After the hearing, the resident was appointed to fill a vacancy on the planning board, and voted to approve a master plan that omitted the zone change.
- (cont.)

# BIAS, PREJUDICE, EXPRESSION OF OPINION

- 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.

# BIAS, PREJUDICE, EXPRESSION OF OPINION

- 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.
- 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.

# BIAS, PREJUDICE, EXPRESSION OF OPINION

- 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

# CLEAR AND OBVIOUS CONFLICTS

- A county legislator was not disqualified from voting for the appointment of members to the corporate board of the county O.T.B., based on his membership in the same bargaining unit that represented O.T.B.
- The court distinguished cases where “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”.
- Attorney General: Only a “substantial, direct personal interest in the outcome” requires recusal.



# CLEAR AND OBVIOUS CONFLICTS?

- The town board approved an amendment to the zoning code to allow cluster zoning of particular properties owned by two board members who recused themselves.
- In another case, most land in the town is affected similarly by a proposed zoning change. The disqualification of the board members would preclude all but a handful of property owners from voting in such matters.

# CLEAR AND OBVIOUS CONFLICTS?

- Two members of the three-member board of trustees rented homes from a company affiliated with the applicant's principal.
- 
- The court was not persuaded that a substantial conflict was inevitable or that annulment of the board's approval was warranted.
- 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.

# CAMPAIGN CONTRIBUTIONS

- The receipt of campaign contributions by members of the City Council from representatives of an affected land owner did not give rise to a disqualifying conflict of interest in the adoption of amendments to the zoning code.
- “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.”

## PERSONAL OR PRIVATE INTERESTS, SOCIAL RELATIONSHIPS

- 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.

# PERSONAL OR PRIVATE INTERESTS, SOCIAL RELATIONSHIPS

- The applicant is a long-term member of the board. The wife of one of the board members teaches piano to the applicant's daughter and was given a Christmas gift for doing so. The applicant is active in local politics. One of the board members purchased homeowners' and automobile insurance from the applicant. The mother-in-law of a board member voiced her criticism of opponents to the applicant's project.
- Court: "... [P]etitioner 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."

# PROXIMITY TO THE 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.
- A town board member's location near the subject property without evidence of financial gain or proprietary benefit did not warrant setting aside the town board's denial of the application.
- 
- Attorney General: 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

# 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.

Among factors that may be considered 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. Also relevant is the advice of the municipal attorney as to whether the litigation has merit.

# WHAT IS AN EFFECTIVE RECUSAL?

- 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.
- A homeowner applies to the Town Zoning Board for approval to partition her property and build a second house. The Chairman of the Zoning Board lives next door. He believes that a second house will reduce the value of his home. He and his spouse collect signatures on a petition opposed to the application. When the Zoning Board meets to consider the request, he recuses himself, takes a seat in the front row with his attorney, who speaks against the application. The application is denied.



# MINISTERIAL ACTS

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.

Examples of ministerial acts:

- mayor signing an approved contract
- an action required by statute
- issuance of a building permit

# COMPATIBILITY OF SECONDARY EMPLOYMENT

- In the absence of a specific constitutional or statutory prohibition, one person may simultaneously hold two positions unless they are incompatible.
- 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.

# COMPATIBILITY OF SECONDARY EMPLOYMENT

- Even where there is no 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 frequent and inevitable 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.

# RULE OF NECESSITY

The Rule of Necessity allows an interested decision maker to act if and only if the matter cannot otherwise be decided.

Example: Town Board members budgeting for payment of their own salaries.

# APPLYING COMMON LAW PRINCIPLES

Where a contemplated action by an official might create an appearance of impropriety, the official should refrain from acting. 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 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.

# APPLYING COMMON LAW PRINCIPLES

- 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. 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 and, in the case of an elected legislator, also has the effect of disenfranchising voters.

# APPLYING COMMON LAW PRINCIPLES

- 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.

# WHO IS THE CLIENT OF A MUNICIPAL LAWYER?

- NY Rules of Professional Conduct
- Rule 1.13 Organization as Client
  - When the interests of the municipality differ from those of an officer or employee, the lawyer must explain that they represent the municipality, and not the officer or employee.



# MUNICIPAL ATTORNEY-CLIENT PRIVILEGE

- In re Lindsay (D.C. Cir.)

...Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, politics, or why a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussion with his Vice President or Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from other quarters.

# MUNICIPAL ATTORNEY-CLIENT PRIVILEGE

- U.S. v. Doe (2d Cir.)
- We believe that, if anything, the traditional rationale for the privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice.

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