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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.
from having a financial interest in most municipal contracts that he or she
rol individually or as a board member; [2] from accepting gifts or favors
worth $75.00 or more where it might appear that the gift was intended to re (f)-6.9 (dng gi)-2 (f)13 (t)-2 (s)9 (or

Holdings. v. Lehman Bros.,[11] Lovitch v. Lovitch,[12] (Absent actual prejudice, appearance of impropriety is not sufficient to disqualify an attorney), Christensen v. Christensen,[13] ("Appearance of impropri

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,[19] 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 [(ces)5 (t) ( )]T-2 (gu( )]

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 a

voting bodies. However, it should be noted that recusal involves more than the mere abstention from voting. A properly recused officer or employee will refrain from participating in the discussions, deliberations or vote in a matter.[49] 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.[50]

In Eastern Oaks Development, LLC v. Town of Clinton,[51] 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 sp in4meet

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,[52] 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)[53]; mayor signing a contract

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.[63] 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[64] 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.[65]

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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[1] 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.
[2] *See*, Gen. Mun. Law §§800-805.
[3] *See*, Gen. Mun. Law §805-a.
[4] *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 d

[42] *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*