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.[1] 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;[2] 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;[3] from disclosing confidential government information;[4] from receiving payment in connection with any matter before his or her own agency;[5] and from receiving a contingency fee in connection with a matter before any agency of the municipality.[6]

Local municipalities are authorized by Article 18 to adopt their own codes of ethics.[7] 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.[8] 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)[9] 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.[10]

In *Matter of Tuxedo Conservation & Taxpayers Assn. v. Town Bd. of Town of Tuxedo*,[11] decided by the Second Department in 1979, the Town Board voted to approve a major development project. The decisive vote was cast on the eve of a change in the composition of the Board 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,[12] 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 trustee'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 trustee'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*,[13] 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 trustee 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.[14]

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."[15]

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.

In *Matter of Schweichler v. Village of Caledonia*,[16] 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,[17] 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.

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.[18] In *Town of North Hempstead v. Village of North Hills*,[19] the Court of Appeals found 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.[20]

In *Friedhaber v. Town Bd. of Town of Sheldon*,[21] the Fourth Department adopted the reasoning, and affirmed a decision by 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.[22]

The Appellate Term noted that there were a sufficient number of votes to approve the change in zoning status even if the Board members had

disqualified themselves. Indeed, 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. 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.[23] 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.[24]

Accordingly, a municipal action that results from the influence or persuasion of a conflicted member of a voting body should also bear critical scrutiny and, where appropriate, judicial invalidation, even where the conflicted member refrained from voting.

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.[25] In *Ahearn v. Zoning Bd. of Appeals*,[26] 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.

Nor will 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.*,[27] 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 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. 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 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.[28] Such restraint should be exercised by the members of voting bodies, and in particular by legislators, because recusal and abstention by a member of a voting body has the same effect as a "nay" vote,[29] and, in the case of an elected legislator, also has the effect of disenfranchising voters.

The goal of prevention—and just plain fairness—requires 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.

Endnotes

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 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.
5. *Supra*, note 4.
6. *Id.*
7. *See* Gen. Mun. Law §806.
8. *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.
9. 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); s*ee also*, 1997 Op. Atty. Gen. 14.
10. *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).
11. 69 A.D.2d 320 (2d Dept. 1979).
12. 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.
13. 109 A.D.2d 281 (2d Dept. 1985).
14. 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.

15. *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).

16. 45 A.D.3d 1281 (4th Dept. 2007), *app. den.*, 10 N.Y.3d 703 (2008).

17. 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.

18. *See e.g., Tuxedo*, *supra*.

19. 38 N.Y.2d 334 (1975).

20. *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).

21. 16 Misc.3d 1140A (App. Term 1st Dept. 2007), *aff'd*, 59 A.D.3d 1006 (4th Dept. 2009).

22. *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.").

23. 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….").

24. 1995 Op. Atty. Gen. 2.

25. *See Karedes v. Vil. of Endicott*, 297 A.D.2d 413 (3d Dept. 2002); *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).

26. 158 A.D.2d 801 (3d Dept. 1990), *lv. den.*, 76 N.Y.2d 706 (1990).

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

28. 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.

29. *See* Gen. Const. Law §41.

Steven G. Leventhal is an attorney and certified public accountant. He is a partner in the Roslyn law firm of Leventhal and Sliney, LLP. Steve is the former chair of the Nassau County Board of Ethics. He currently serves as Village Attorney for the Village of Muttontown, and as counsel to several municipal boards.