# ARTICLE 18 OF NEW YORK'S GENERAL MUNICIPAL LAW: THE STATE CONFLICTS OF INTERST LAW FOR MUNICIPAL OFFICIALS

by
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***Editor's Note:*** *This article originally appeared in Albany Law Review, 1996, Vol. 59, No. 4, p. 1321.* 

***Author's Note:*** *This article remains current, as of October 2003, except for (a) a handful of additional cases, none of which changes the law; (b) an amendment to General Municipal Law § 802(2)(e), which raises from $100 to $750 the small contracts exemption from the prohibition of section 801; and (c) the addition of General Municipal Law § 802(1)(j), which exempts certain small purchases by rural municipalities from the prohibition of section 801. The recent cases include: Schulz v. Doetsch, 217 A.D.2d 861, 629 N.Y.S.2d 841 (3d Dep't 1995) (holding that section 801 does not prohibit the otherwise permissible payment of a municipal official's legal fees); West v. Grant, 243 A.D.2d 815, 662 N.Y.S.2d 863 (3d Dep't 1997) (removing from office pursuant to Pub. Off. Law § 36 a town supervisor whose wholly owned insurance business brokered the town's insurance coverage, resulting in the supervisor receiving commissions, where the supervisor had been convicted of a misdemeanor violation of Gen. Mun. Law §§ 801 and 805 as a result of his personal interest in the town's insurance business); DePaolo v. Town of Ithaca, 258 A.D.2d 68, 694 N.Y.S.2d 235 (3d Dep't 1999) ( noting that "violation of a specific section of [article 18] is not critical to a finding of an improper conflict of interest" but holding, inter alia, under Gen. Mun. Law § 802(1)(b), that vote by town board member, who was employed by applicant for zoning amendment, presented no conflict of interest since the board member's employment duties did not include the project at issue and the board member's remuneration was not directly affected by the project and further holding that, given the absence of any actual conflict or the significant appearance of one, applicant's failure to comply with the disclosure provisions of Gen. Mun. Law § 809 was not a defect requiring invalidation of the town board vote); Lake Anne Realty Corp. v. Planning Board of Town of Blooming Grove, 172 Misc. 2d 972, 660 N.Y.S.2d 641 (Sup. Ct., Orange County, 1997) (holding that prohibition in Gen. Mun. Law § 805-a(1)(c) of a*

*municipal officer or employee receiving compensation for services rendered in relation to matter before any municipal agency of which he or she is an officer or employee does not apply to an attorney for a town zoning board of appeals appearing before the ZBA on behalf of the town); People v. Lynch, 176 Misc. 2d 430, 674 N.Y.S.2d 894 (Rockland County Ct. 1998) (upholding, under Tuxedo, indictment of school board member for official misconduct, where defendant voted to approve the paid services of an insurance consultant and contracts with insurance providers and he benefited financially from the transaction); Byer v. Town of Poestenkill, 232 A.D.2d 851, 648 N.Y.S.2d 768 (3d Dep't 1996) (holding that town ethics board opinion that town board member had no conflict of interest that would prevent him from voting on a local law permitting residents to apply for gravel mining permits "is entitled to great weight" and holding that the possibility that the board member might apply for such a permit in the future did "not rise to the level of personal financial interest which has previously resulted in disqualification," citing Zagoreos and Tuxedo); Holbrook v. Rockland County, 260 A.D.2d 437, 687 N.Y.S.2d 722 (2d Dep't 1999) (upholding county "two hats" law barring county legislators from holding any other elected town or village office); Held v. Hall, __ Misc. 2d __, 741 N.Y.S.2d 648 (Sup. Ct., Westchester County, 2002) (holding that offices of county legislator and local police chief are incompatible as a matter of common law and county "two hats" law); Peterson v. Corbin, __ A.D.2d __, 713 N.Y.S.2d 361 (2d Dep't 2000) (holding that petitioner had failed to show a likelihood of success on his motion for a preliminary injunction enjoining, inter alia, a Nassau County legislator from voting on appointment of members to the Nassau County Regional OTB, where the legislator was a branch manager of the NYC OTB and a member of the union that represented employees of the Nassau OTB but held no policy-making position with the OTB and was not a member of the union's negotiating team and distinguishing Tuxedo and Zagoreos because there "the questioned official benefited directly and individually from the action that was taken" and "the conflicts of interest... were clear and obvious"); Holtzman v. Oliensis, 91 N.Y.2d 488, 673 N.Y.S.2d 23 (1998) (upholding city ethics board's imposition of fine under city's ethics law on former city comptroller for misuse of office and holding that "[a] City official is chargeable with knowledge of those business dealings that create a conflict of interest about which the official 'should have known'" (citation omitted)). See also Op. Atty. Gen. (inf.) 2000-2 (opining that a local legislative body has the statutory authority to prohibit a legislator from disclosing matters discussed in executive session); Op. Atty. Gen. (inf.) 2000-11 (stating that an independent contractor who defends the*

*town in real property tax certiorari proceedings should not serve as deputy supervisor); Op. Atty. Gen. (inf.) 2000-22 (addressing recusal by board member being sued by applicant before board in separate matter); Op. Atty. Gen. (inf.) 2002-9 (opining that village trustee owning property within village BID should recuse as to BID's annual budget); Op. Atty. Gen. (inf.) 2003-8 (stating that part-time assistant town attorney who represents one town board may, subject to certain conditions, appear before other town agencies).*

# ARTICLE 18 OF NEW YORK'S GENERAL MUNICIPAL LAW: THE STATE CONFLICTS OF INTEREST LAW FOR MUNICIPAL OFFICIALS*

*Mark Davies***

## INTRODUCTION

Article 18 of the New York State General Municipal Law sets forth the provisions regulating conflicts of interest for municipal officers and employees.[1] It applies to all municipalities in the state, except New York City.[2] "Municipality" is broadly defined to include not only counties, cities, towns, and villages, but a host of other local government entities as well, such as school districts, consolidated health districts, public libraries, and town and county improvement districts.[3] "Municipal officer or employee" is likewise broadly defined to include all officers and employees of the municipality,

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* In an effort to aid local and municipal practitioners in New York State, the *Albany Law Review* has included parallel citations to West's *New York Supplement Reporter* for New York Court of Appeals' decisions. For the same reason, the *Albany Law Review* has included regional designations for all local and appellate courts cited within this Article.

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[1] N.Y. GEN. MUN. LAW §§ 800-813 (McKinney 1986 & Supp. 1996). For convenience, this Article groups municipal officers and employees together under the rubric "officials." Some local ethics codes employ the phrase "public servants" to include both officers and employees. *See, e.g.*, NEW YORK CITY CHARTER § 2601(19) (Lenz & Riecker 1996).

[2] N.Y. GEN. MUN. LAW § 800(4) (McKinney 1986). The financial disclosure rules of Article 18 do, however, apply to New York City. N.Y. GEN. MUN. LAW § 810(1) (McKinney Supp. 1996).

[3] N.Y. GEN. MUN. LAW § 800(4) (McKinney 1986); *cf.* People v. Wendel, 455 N.Y.S.2d 322, 323 (Nassau County Ct. 1982) (applying the section 800(5) definition to a Nassau County ethics provision and finding that an assistant professor at Nassau Community College was a county employee because he was paid from county funds). In addition, "members, officers and employees" of industrial development agencies created pursuant to Article 18-A of the General Municipal Law are subject to Article 18. N.Y. GEN. MUN. LAW § 883 (McKinney Supp. 1996); *see* N.Y. PUB. AUTH. LAW § 1954-a (McKinney 1995) (making Article 18 applicable to "members, officers, and employees" of Troy Industrial Development Authority); *id.* § 2309 (making Article 18 applicable to "members, officers, and employees" of Auburn Industrial Development Authority).

whether paid or unpaid, including board and commission members, and officers and employees paid from county funds.[4]

The provisions of Article 18 fall into five areas:[5] (1) the prohibitions on interests in contracts with the municipality;[6] (2) miscellaneous provisions on conflicts of interest (e.g., gifts, and appearances before municipal agencies);[7] (3) administration (local ethics laws, local ethics boards);[8] (4) disclosure in certain land use applications;[9] and (5) annual financial disclosure.[10] The purpose of this Article is to outline the various provisions governing municipalities and to suggest practical applications of Article 18 to the daily operation of municipalities.

## I. PROHIBITED INTERESTS IN CONTRACTS

Government ethics laws do not regulate ethics per se but rather, as a general rule, regulate financial conflicts of interest, that is conflicts between a public official's private financial interests and public responsibilities. Article 18 covers "pecuniary and material interests rather than expressions of personal opinion."[11] For

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[4] N.Y. GEN. MUN. LAW § 800(5) (McKinney 1986). "No person shall be deemed to be a municipal officer or employee solely by reason of being a volunteer fireman or civil defense volunteer, except a fire chief or assistant fire chief." *Id.*; *cf. Wendel*, 455 N.Y.S.2d at 323 (finding, under parallel Nassau County Government Law provision, that a community college professor was a county employee because the source of his salary was county funds).

[5] Sections 800-804, 805, and 806-808 were originally enacted in 1964. *See* Act of Apr. 24, 1964, ch. 946, 1964 N.Y. Laws 2463. Sections 804-a, 805-a, and 809 were originally enacted in 1969 and 1970. *See* Act of May 21, 1969, ch. 646, 1969 N.Y. Laws 1820 (section 809); Act of May 20, 1970, ch. 1019, 1970 N.Y. Laws 3452 (section 805-a); Act of May 12, 1970, ch. 720, 1970 N.Y. Laws 2442 (section 804-a). Sections 810 through 813 were originally enacted in 1987. *See* Act of Aug. 7, 1987, ch. 813, 1987 N.Y. Laws 3022. Article 18 has been amended numerous times. *See, e.g.*, Act of July 12, 1983, ch. 440, 1983 N.Y. Laws 1881; Act of May 20, 1970, ch. 1019, 1970 N.Y. Laws 3452.

[6] N.Y. GEN. MUN. LAW §§ 801-805 (McKinney 1986). For a discussion of these provisions, see *infra* notes 11-91 and accompanying text.

[7] N.Y. GEN MUN. LAW §§ 805-a through 805-b (McKinney Supp. 1996). For a discussion of these provisions, see *infra* notes 92-114 and accompanying text.

[8] N.Y. GEN MUN. LAW §§ 806-808 (McKinney 1986 & Supp. 1996). For a discussion of these provisions, see *infra* notes 115-54 and accompanying text.

[9] N.Y. GEN MUN. LAW § 809 (McKinney 1986). For a discussion of these provisions, see *infra* notes 155-68 and accompanying text.

[10] N.Y. GEN MUN. LAW §§ 810-813 (McKinney Supp. 1996). For a discussion of these provisions, see *infra* notes 169-72 and accompanying text.

[11] Webster Assocs. v. Town of Webster, 451 N.E.2d 189, 191, 464 N.Y.S.2d 431, 433 (1983) (discussing section 800(3)); *see* Center Square Ass'n v. Corning, 430 N.Y.S.2d 953, 958 (Sup. Ct., Albany County 1980) (finding no conflict of interest where chair of city's environmental quality review board was member of not-for-profit corporation seeking board approval for demolition permit and stating that "[w]hile this situation may create, in the minds of some,

example, many governmental ethics laws prohibit a public servant from engaging in certain outside employment or from taking any action as a public servant that would benefit the public servant personally.[12]

In addition, state and local ethics laws seek to protect against divided loyalties on the part of public officers and employees. For example, a public servant may be prohibited from engaging in activities in conflict with his or her official duties or from acting on a matter that would financially benefit a member of the official's immediate family or his or her outside employer.[13] Likewise, a public servant may be prohibited from accepting gifts or gratuities from someone doing business with the official's government employer.[14] Finally, governmental ethics laws may contain miscellaneous provisions aimed at protecting privacy or preserving public confidence in the integrity of the governmental hiring or decisionmaking process or maintaining a level playing field among vendors. These provisions may restrict the use or release of confidential information, participation in certain political activities, the ability to enter into financial relationships with a subordinate or superior, or revolving door employment.[15]

The focus of Article 18 lies almost entirely in prohibiting a municipal officer or employee from having an "interest" in contracts with his or her municipality if the officer or employee has some power or duty with respect to the contract.[16] This prohibition, which contains fifteen exceptions, including exceptions to the exceptions, is sufficiently complicated to puzzle experienced municipal attorneys; to a lay person, it is virtually unintelligible. In addition, this prohibition often seems senseless when applied to smaller communities.[17] Furthermore, only limited case law exists

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the appearance of impropriety or the granting of special consideration, the statute in question [section 809] does not prohibit this relationship and thus, is not a bar to the chairman continuing to act as such").

[12] *See, e.g.*, NEW YORK CITY CHARTER §§ 2604(a), b(1), (3), (6)-(8) (Lenz & Riecker 1996).

[13] *See, e.g., id.* §§ 2604(b)(1)-(3).

[14] *Id.* §§ 2604(b)(5), (13).

[15] *See, e.g., id.* §§ 2604(b)(4), (9)-(12), (14)-(15), (d).

[16] *See* N.Y. GEN. MUN. LAW § 801 (McKinney 1986). A similar restraint is placed on fiscal officers, who, under section 801, may not hold 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." *Id.* The terms "interest," "contract," "treasurer," "chief fiscal officer," "municipality," and "municipal officer or employee" are all defined by Article 18. *Id.* § 800.

[17] *See* Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 N.Y.L. SCH. L. REV. 177, 180-81 (1995) (explaining that this provision is unworkable in small communities and

to provide guidance in the area; instead one must consult the plethora of opinions issued by the Comptroller's Office and Attorney General's Office.[18]

When faced with an issue under section 801, the municipal attorney will need to engage in a five-step analysis, determining whether: (1) the individual is a "municipal officer or employee;"[19] (2) there is a "contract" with the municipality;[20] (3) the officer of employee has an "interest" in that contact;[21] (4) the officer or employee has the requisite power or duty under section 801; and (5) the officer or employee is covered by any of the exceptions in sections 801 or 802.[22] If elements one through four are all satisfied and none of the exceptions apply, then the contract is prohibited under section 801. If one or more of the exceptions apply, then the contract is not prohibited; disclosure, however, may be mandated under section 803, and recusal may be required under the common law or advisable as a matter of common sense.

### *A. "Municipal Officer or Employee"*

As noted above, "municipal officer or employee" includes both compensated and uncompensated officers and employees of the municipality, with certain statutory exceptions.[23] Indeed, in many

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that ethics laws need to be specifically tailored to the needs of particular community); Mark Davies, *Keeping the Faith: A Model Local Ethics Law—Content and Commentary*, 21 FORDHAM URB. L.J. 61, 81-83 (1993) (finding municipalities may incur higher costs in order to comply with this provision when officials own the only business in the town, thus requiring municipalities to do business elsewhere) [hereinafter *Keeping the Faith*]; State of New York Temporary State Commission on Local Government Ethics, *Final Report*, 21 FORDHAM URB. L.J. 1, 8-9 (1993) (discussing the Catch-22 created by the provision in small communities).

[18] *See* N.Y. GEN. MUN. LAW § 801 (McKinney 1986 & Supp. 1996) (containing annotations summarizing opinions of the Comptroller's Office and the Attorney General's Office).

[19] N.Y. GEN. MUN. LAW §§ 800(5), 801(1) (McKinney 1986).

[20] *Id.* §§ 800(2), 801(1).

[21] *Id.* §§ 800(3), 801(1).

[22] *Id.* §§ 801, 802.

[23] *Id.* § 800(5). That subdivision provides:

> "Municipal officer or employee" means an officer or employee of a municipality, whether paid or unpaid, including members of any administrative board, commission or other agency thereof and in the case of a county, shall be deemed to also include any officer or employee paid from county funds. No person shall be deemed to be a municipal officer or employee solely by reason of being a volunteer fireman or civil defense volunteer, except a fire chief or assistant fire chief.

*Id.* For a definition of "municipality," see *id.* § 800(4); see also *supra* notes 3-4 and accompanying text.

municipalities, unpaid officials, such as members of planning and zoning boards, wield the greatest power.

The question sometimes arises whether Article 18 generally, and section 801 specifically, applies to members of an ad hoc advisory board. As a rule of thumb, one may conclude that, if the board is not subject to the Open Meetings Law because it is not a public body, then its members are probably not "municipal officers or employees." Thus, one may argue that the members of an advisory board are not subject to Article 18 if the board exists at the discretion of the appointing authority merely to give advice, has no quorum requirement, lacks authority to implement its recommendations or to act on behalf of the municipality, and, further, lacks the authority to restrict the power of the municipality to act.[24] Under such circumstances, an advisory board does not perform a government function or exercise sovereign power.[25]

Another thorny question sometimes arises when an independent contractor with the municipality obtains another contract with the municipality. For example, in *Surdell v. City of Oswego*,[26] the city hired an insurance agency to draft specifications for the city's insurance needs for 1977 through 1979.[27] Based on those specifications, the city invited several agencies to make bids for the contract.[28] Two agencies responded, including the agency that had drafted the specifications and which was ultimately awarded the contract.[29] In a suit by the other agency to invalidate the contract

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[24] *See* Goodson Todman Enters. v. Town Bd., 542 N.Y.S.2d 373, 374 (App. Div. 2d Dep't) (finding a zoning commission was not subject to the Open Meetings Law because it did not exercise a governmental function since no quorum was required for board action and the committee was merely advisory and had no power to implement its advice), *appeal denied*, 547 N.E.2d 103, 547 N.Y.S.2d 848 (1989); Poughkeepsie Newspaper Div. of Gannett Satellite Info. Network v. Mayor's Intergovernmental Task Force on New York City Water Supply Needs, 537 N.Y.S.2d 582, 583-85 (App. Div. 2d Dep't 1989) (holding that Task Force members who gave advice, but had no power to implement recommendations, were not public officers to whom the Open Meetings Law applies).

[25] *See supra* note 24. For instance, section 2601(1) of the New York City Charter defines "advisory committee" as

> a committee, council, board or similar entity constituted to provide advice or recommendations to the city and having no authority to take a final action on behalf of the city or take any action which would have the effect of conditioning, limiting or requiring any final action by any other agency, or to take any action which is authorized by law.

NEW YORK CITY CHARTER § 2601(1) (Lenz & Riecker 1996).

[26] 399 N.Y.S.2d 173 (Sup. Ct., Oswego County 1977).

[27] *Id.* at 175.

[28] *Id.*

[29] *Id.*

as violative of section 801, the court concluded that the agency that drafted the specifications was not an "employee" of the city.[30] This problem should have been anticipated in the initial contract, which might have prohibited the agency from bidding on the insurance contract altogether or alternatively might have expressly permitted that bidding on certain terms and conditions designed to ensure that the specifications would not be tailored to the drafting agency and that the drafting agency could not trade on confidential city information. Contracts between municipalities and their counsel should contain similar provisions.[31]

### *B. "Contract" with the Municipality*

Section 801 prohibits a municipal officer or employee from having an interest in certain "contracts" with the municipality. "Contract" is broadly defined as

> any claim, account or demand against or agreement with a municipality, express or implied, and shall include 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.[32]

While a law suit against the municipality would therefore be a "contract" with the municipality, neither an application for, nor the granting of, a zoning variance or subdivision approval would seem to constitute a "contract."[33] However, at least one lower court has held that an application for and issuance of a building permit is a

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[30] *Id.* at 176.

[31] Village and town attorneys appointed by the town or village board are often municipal employees. This is certainly the case if they receive a W-2 or fringe benefits. *Cf.* People v. Wendel, 455 N.Y.S.2d 322, 323 (Nassau County Ct. 1982) (stating that a community college professor should be classified as a county employee under county law because his salary was paid with county funds). To avoid questions about the propriety of hiring the attorney's firm to perform additional services not covered by the annual compensation package, the board in appointing the attorney should clearly specify that the attorney also agrees to take on such additional work, for additional compensation, as mutually agreed upon by the attorney and the board.

[32] N.Y. GEN. MUN. LAW § 800(2) (McKinney 1986).

[33] *See* 1983 Op. N.Y. Comp. 114. Query whether an Article 78 proceeding seeking to overturn an adverse determination on such an application is a "contract" since it would appear to be a claim or demand against the municipality. *See* N.Y. CIV. PRAC. L. & R. § 7803 (McKinney 1994).

contract between the applicant and the municipality within the meaning of Article 18.[34]

One might attempt to distinguish between, on the one hand, building permits and special use permits, which arguably are subject to a "demand" once the applicant meets the underlying requirements, and, on the other hand, zoning variances and subdivision approvals, which require the exercise of discretion. Thus far, however, case law makes no such distinctions. To assume that all such applications constitute a contract with the municipality places the municipal attorney in the untenable position of, for example, advising zoning board members that they cannot apply for an area variance to add a deck on their own homes.

The common sense solution to this problem dictates that the official disclose and recuse himself or herself from acting on the matter and, whenever possible, communicate with the municipality on the matter only through a third person, such as an attorney, broker, or architect. Article 18 on its face, however, makes no provision for disclosure and recusal. Accordingly, the municipal attorney may feel it advisable to seek an opinion from the Attorney General.

Attorneys should also exercise care in determining whether an admitted contract is, in fact, with the municipality. For example, in *Rose v. Eichhorst*,[35] a town board member acquired property in his town at a county tax sale.[36] The board member argued that the contract was with the county, not with the town.[37] However, the Court of Appeals concluded, based on the interrelations between the town and the county in the tax collection process, that the contract involved the town because the town board proposed the town budget and thus initiated the collection of taxes.[38] Accordingly, the tax sale violated section 801.[39]

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[34] People v. Pinto, 387 N.Y.S.2d 385, 388 (Mt. Vernon City Ct. 1976).

[35] 365 N.E.2d 868, 396 N.Y.S.2d 837 (1977).

[36] *Rose*, 365 N.E.2d at 869, 396 N.Y.S.2d at 837.

[37] *Rose*, 365 N.E.2d at 870-71, 396 N.Y.S.2d at 839-40.

[38] *Rose*, 365 N.E.2d at 871-72, 396 N.Y.S.2d at 840.

[39] *Rose*, 365 N.E.2d at 872, 396 N.Y.S.2d at 840; *cf.* D.E.P. Resources, Inc. v. Village of Monroe, 516 N.Y.S.2d 953, 954 (App. Div. 2d Dep't 1987) (holding that, by merely bidding on a private parcel ordered sold by the village, the village inspector and engineer did not have an interest in any contract with the village). However, if he had in fact bought the property, then he would have had an interest in such a contract.

### C. *"Interest" in the Contract*

The prohibition in section 801 extends only to those contracts with the municipality in which the municipal officer or employee has an "interest," which is defined as "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."[40] To have an interest in a contract, the municipal officer or employee need not be a party to the contract, but need merely derive a pecuniary or material benefit from the contract.[41] Furthermore, officers and employees may be deemed to have an interest in the contracts of certain persons or entities with whom or with which the officer or employee is associated.[42] Such associations may be familial in nature (with an exception for relatives' employment contracts with the municipality served by the officer or employee) or may arise from a business relationship which the officer or employee has with a firm, partnership, association, or corporation, either as a member, employee, officer, director, or shareholder.[43] For example, a town attorney may have an interest in a contract his or her private client has with the municipality if the attorney receives a pecuniary or material benefit as a result of that contract.[44] Although these provisions appear extraordinarily broad, they are limited by the exclusions set forth in section 802.[45]

The exception for a relative's contract of employment means that Article 18 not only allows nepotism but even permits the municipal official to hire his or her own spouse.[46] Municipal attorneys should,

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[40] N.Y. GEN. MUN. LAW § 800(3) (McKinney 1986).

[41] *Id.*

[42] *Id.*

[43] *Id.* That subsection reads:

> [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 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.

*Id.*

[44] *See* 1968 Op. N.Y. Comp. 562 (stating that a town attorney has an interest in the affairs of a client who is dealing with the town).

[45] *See infra* notes 54-71 and accompanying text.

[46] *See, e.g.*, 1974 Inf. Op. N.Y. Att'y Gen. 303 (finding that a town board may hire the spouse of a board member as the clerk to one of the town's justices); 1967 Inf. Op. N.Y. Att'y Gen. 158 (opining that a sheriff may appoint his wife the matron of the county jail); *see supra*

however, encourage municipal officials to recuse themselves from participating in the hiring of a relative to avoid any appearances of impropriety, at least where the municipal official's action would affect not an entire class of municipal employees, but only the relative or a handful of employees.

### *D. Control over the Contract*

Even if a municipal official has an interest in a contract with the municipality, that interest is prohibited only if the official has the "power or duty" to exercise authority with respect to the contract.[47] The official need not in fact exercise that authority but need only possess the right to exercise it. For that reason, neither recusal nor competitive bidding will avoid a violation of section 801.[48] Absent the requisite control by the official over the contract, however, no violation of section 801 can occur.[49]

By its terms, section 801 does not "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."[50] However, the section does apply to the compatibility of public offices or positions—for example, whether a village trustee may also serve as a town building inspector. In order to determine whether particular positions are "incompatible," one must consider whether "there is a built-in right of the holder of one position to interfere with that of the other, as

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note 43 and accompanying text (discussing statutory language).

[47] N.Y. GEN. MUN. LAW § 801 (McKinney 1986). Section 801 states that an officer or employee has a prohibited interest in a municipal contract

> when [the] 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 . . . .

*Id.* For a discussion of the relevant statutory provisions and special provisions covering fiscal officers, see *supra* note 16 and accompanying text.

[48] *See, e.g.*, 1979 Inf. Op. N.Y. Att'y Gen. 231 (finding that the chairman of a commission in charge of awarding the contract had violated section 801 by ultimately awarding it to his wife, despite the fact that she was the highest bidder).

[49] *See, e.g.*, D.E.P. Resources, Inc. v. Village of Monroe, 516 N.Y.S.2d 953, 954 (App. Div. 2d Dep't 1987) (holding that a building inspector had no power or duty to "negotiate, prepare, authorize or approve, on behalf of the defendant village, the contract for the sale of real property upon which he was bidding"); Eberlin & Eberlin, P.C. v. County of Putnam, 440 N.Y.S.2d 722, 724 (App. Div. 2d Dep't 1981) (finding county planning consultant did not possess the requisite authority to have violated section 801).

[50] N.Y. GEN. MUN. LAW § 801 (McKinney 1986).

when the one is subordinate to, or subject to audit or review by, the second."[51] The New York State Attorney General has issued numerous opinions on compatibility of public office or position.[52]

### *E. Exceptions to Section 801*

If a municipal officer or employee has an interest in a contract with his or her municipality and exercises the requisite authority with respect to that contract as specified in section 801, then that interest is prohibited, unless the exception in section 801 itself or one of the fifteen exceptions enumerated in section 802 applies.[53] Of those exceptions, some are utilized more frequently than the others and are discussed below.[54]

One of the more commonly claimed exceptions comes into play when the official's interest in the contract is prohibited solely by reason of the official's employment as an officer or employee of the person, firm, corporation, or association that has the contract with

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[51] O'Malley v. Macejka, 378 N.E.2d 88, 90, 406 N.Y.S.2d 725, 727 (1978) (holding that the offices of town assessor and member of county board of representatives are compatible); *see* People *ex rel.* Ryan v. Green, 58 N.Y. 295, 304 (1874) (holding that the office of assemblyman is not incompatible with that of deputy clerk of the Court of Special Session of the City and County of New York); Dykeman v. Symonds, 388 N.Y.S.2d 422, 424 (App. Div. 4th Dep't 1976) (holding incompatible the positions of county legislator and county motor vehicle supervisor); 1979 Inf. Op. N.Y. Att'y Gen. 231 (finding positions of town supervisor and village clerk to be compatible since one does not necessarily interfere with the other).

[52] *See, e.g.*, N.Y. GEN. MUN. LAW § 801 (McKinney 1986) (summarizing these opinions in the annotations).

[53] *Id.* §§ 801-802. For purposes of criminal prosecutions under sections 801 and 805, one court has held that the reference in section 801 to section 802 is not an exception but a proviso, which need not be pled. People v. Raffa, 393 N.Y.S.2d 852, 855 (Nassau County Ct. 1976).

[54] Some of the less common exceptions include "[t]he designation of a bank or trust company as a depository, paying agent, registration agent or for investment of funds of a municipality [with certain exceptions and provisos]." N.Y. GEN. MUN. LAW § 802(1)(a) (McKinney 1986). Likewise, there is an exception for "[t]he designation of a newspaper . . . for the publication of any notice, resolution, ordinance [and the like]." *Id.* § 802(1)(c). Another exception covers "[t]he acquisition of real property or an interest [in real property], through condemnation proceedings according to law." *Id.* § 802(1)(e). There is an exception covering "[t]he sale of bonds and notes pursuant to [Local Finance Law § 60.10]." *Id.* § 802(1)(g). Another exception covers school physicians. *Id.* § 802(1)(i). There is an exception for "[a] contract for the furnishing of public utility services when the rates or charges therefor are fixed or regulated by the public service commission." *Id.* § 802(2)(b). Another exception covers the rental of property to be used in an official capacity. *Id.* § 802(2)(c). The payment of wages to a private employee of a public official is also excepted when the private employee "performs part time service in the official duties of the office." *Id.* § 802(2)(d). Finally, there is an exception for "[a] contract with a member of a private industry council" or his or her business or employer under certain circumstances. *Id.* § 802(2)(f).

the municipality.[55] This exception applies provided: (a) the official's compensation from the private employer is not contingent upon the contract between the private employer and the municipality;[56] and (b) the official's duties for the private employer "do not directly involve the procurement, preparation or performance of any part of [the employer's] contract" with the municipality.[57] If, however, the municipal officer or employee receives any money as a result of the contract with the municipality (e.g., as part of a year-end bonus), then the official's interest in that contract is prohibited.[58] Likewise, the exception does not apply if the prohibited interest also arises by reason of some other connection, such as stock ownership.[59] Furthermore, the exception applies only to an official who is an officer or employee of the outside employer; the exception does not cover a director, partner, member, or shareholder.

Second, the sale of real property to the municipality may be exempt.[60] The provisions of section 801 do not apply to the purchase by a municipality of real property or an interest in real property, so long as the governing board of the municipality petitions and receives an order from the supreme court approving the purchase and the consideration for the purchase.[61]

Third, the provisions of section 801 do not apply to "[a] contract with a membership corporation or other voluntary non-profit corporation or association."[62] The Court of Appeals has applied this exception to a municipal union as well.[63] Thus, a municipal official may negotiate, in behalf of the municipality, a contract with a union even though the official's salary is tied to the eventual contract.[64]

Fourth, section 802 excepts grandfathered contracts; if the interest which would otherwise fall under section 801 is in a contract that

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[55] *Id.* § 802(1)(b).

[56] *Id.*

[57] *Id.* Note that the exception applies only where the interest is prohibited *solely* by reason of the official's employment as an officer or employee of the person, firm, corporation, or association. *Id.*

[58] *Id.*

[59] *See* People v. Speach, 374 N.Y.S.2d 210, 214 (App. Div. 4th Dep't 1975) (holding that the exception under section 802(2)(a) does not apply when stock ownership exceeds five percent of a corporation's outstanding stock).

[60] N.Y. GEN. MUN. LAW § 802(1)(d) (McKinney 1986).

[61] *Id.*

[62] *Id.* § 802(1)(f).

[63] Stettine v. County of Suffolk, 488 N.E.2d 75, 76-78, 497 N.Y.S.2d 329, 330-32 (1985).

[64] *Id.*

existed prior to the officer's or employee's assumption of official duties, then the contract is grandfathered and exempt.[65] However, by its terms, this exception does not allow a renewal of the grandfathered contract.[66] For example, if, at the time of the election of a town board member, her husband handles the town's insurance business, that business would not violate section 801; but the town could not renew the insurance contact once it expired.

Fifth, not all contracts are prohibited simply because the official owns stock in the contracting corporation. There is no prohibited conflict of interest if the stock owned or controlled, directly or indirectly, by the official is less than five per cent of the corporation's outstanding stock.[67]

Sixth, certain small contracts are also exempt.[68] A municipal officer or employee's interest in a contract is permitted, despite section 801, if the total consideration payable during a single fiscal year under any and all contracts in which the official has an interest does not exceed $100.[69]

Section 801 provides that it "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."[70] For example, where otherwise permitted by law, the furnishing of a defense by the municipality for its officials in a civil action is not precluded by section 801.[71]

### *F. Violations*

If the municipal official's interest in the contract falls within section 801, but not within any of the exceptions in section 802, then that interest is prohibited.[72] Any municipal officer or employee who "willfully and knowingly" violates section 801 is guilty of a misdemeanor[73] and may also be subject to disciplinary action,

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[65] N.Y. GEN. MUN. LAW § 802(1)(h) (McKinney 1986).
[66] *Id.*
[67] *Id.* § 802(2)(a).
[68] *Id.* § 802(2)(e).
[69] *Id.*
[70] *Id.* § 801.
[71] Bauernfeind v. Doetsch, 629 N.Y.S.2d 841, 842 (App. Div. 3d Dep't 1995).
[72] N.Y. GEN. MUN. LAW § 801 (McKinney 1986). Section 804-a specifically prohibits certain interests in the development or operation of real property in Nassau County. *Id.* § 804-a.
[73] *Id.* § 805.

including dismissal.[74] A willful and knowing violation occurs if the official knows the facts that make the interest a prohibited one; the official need not know that having the interest violates the law.[75] However, one lower court, interpreting a local county law similar to section 801, concluded that "[i]n criminal cases the term willful is generally construed to mean an act done with evil motive, bad purpose or corrupt design."[76]

In addition, the contract, if willfully entered into, is "null, void and wholly unenforceable."[77] This statutory nullification acts as "a bar to any waiver of the prohibited conflicts of interest through consent of the governing body or authority of the municipality."[78] Indeed, the municipality may be entitled to receive both restitution and the benefit of the contract.[79]

### *G. Disclosure*

Under section 803, a municipal officer or employee must publicly disclose the nature and extent of his or her prospective, existing, or subsequently acquired interest in any actual or proposed contract

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[74] *See* Hussey v. Petito, 267 N.Y.S.2d 244, 246 (App. Div. 2d Dep't), *aff'd*, 224 N.E.2d 337, 277 N.Y.S.2d 826 (1966), *cert. denied*, 386 U.S. 1031 (1967).

[75] People v. Speach, 374 N.Y.S.2d 210, 214 (App. Div. 4th Dep't 1975); *see also* N.Y. PENAL LAW § 15.20(2) (McKinney 1987) ("Effect of ignorance or mistake upon liability").

[76] People v. Wendel, 455 N.Y.S.2d 322, 323 (Nassau County Ct. 1982) (citations omitted).

[77] N.Y. GEN. MUN. LAW § 804 (McKinney 1986); *see* Rose v. Eichhorst, 365 N.E.2d 868, 872, 396 N.Y.S.2d 837, 840 (1977) (holding that conflict of interest exists when town board member acquires premises, located in town in which he serves, at county tax sale and, therefore, that sale was invalid); DeSantis v. City of Troy, 371 N.Y.S.2d 310, 315 (Sup. Ct., Rensselaer County 1975) (holding void a contract between city and city manager for manager to provide consultant services after his termination as manager where city manager alone had authority under city charter to retain consultants to the city); Spadanuta v. Incorporated Village of Rockville Centre, 239 N.Y.S.2d 598, 600 (Sup. Ct., Nassau County 1963), *modified on other grounds*, 248 N.Y.S.2d 405 (App. Div. 2d Dep't 1964), *aff'd*, 205 N.E.2d 525, 257 N.Y.S.2d 329 (1965) (voiding, under former Village Law section 332, a predecessor statute to section 801, a sale of property by mayor to village to widen street); County of Warren v. Levitt, 198 N.Y.S.2d 777, 779 (Sup. Ct., Albany County 1959) (upholding, under former County Law section 412, a predecessor statute to section 801, a State Comptroller's refusal to reimburse county for expenditures by county department of public welfare for drugs, medicines, and medical supplies purchased by welfare recipients from two pharmacists in the employ of the county); *cf.* Mulligan v. Lackey, 312 N.Y.S.2d 451, 452 (App. Div. 4th Dep't 1970) (noting prior invalidation of a contract awarded by an urban renewal agency to a company of which a member of the agency was an officer).

[78] Landau v. Percacciolo, 407 N.E.2d 412, 414, 429 N.Y.S.2d 566, 568 (1980).

[79] *See* Spadanuta v. Incorporated Village of Rockville Centre, 205 N.E.2d 525, 525, 257 N.Y.S.2d 329, 329-30 (1965) (Desmond, C.J., dissenting).

with the municipality.[80] This disclosure requirement applies even if the interest is not prohibited by section 801, either because the official has no authority with respect to the contract or because the interest falls within one of the exceptions in subdivision one of section 802, such as ownership of less than five percent of the stock in a corporation that is a party to the municipal contract.[81]

For example, in *Landau v. Percacciolo*,[82] the County of Putnam contracted to buy a fifty acre area of land to be used for garbage disposal and a solid waste recycling plant.[83] The broker involved in the sale was a part time county employee,[84] and neither the employee nor the seller disclosed the employee's interest in the contract.[85] The Court of Appeals upheld the county's subsequent rescission of the sale, stating:

> One who contracts with a municipality knowing that an employee of the governmental unit has an interest in the contract and that the employee has not disclosed that interest as required by section 803 of the General Municipal Law may not enforce performance of the agreement over the objection of the municipality.[86]

The Court of Appeals did "not consider or intimate any views as to what the result would have been if plaintiffs had had no knowledge of the statutory violation."[87] Thus, under *Landau*, a contract entered into in violation of the section 803 disclosure requirement is voidable by the municipality, at least where the vendor knows of the violation.[88]

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[80] N.Y. GEN. MUN. LAW § 803(1) (McKinney 1986); *see, e.g.*, West v. Grant, 633 N.Y.S.2d 674, 674-75 (App. Div. 3d Dep't 1995) (finding a valid cause of action regarding allegations of town supervisor's failure to disclose interest in town's insurance contracts).

[81] *See, e.g.*, 1989 Op. N.Y. Comp. 32 (holding that a county treasurer must disclose an interest in a corporation that has a contract with the county even though the interest may not be prohibited by section 801); 1986 Op. N.Y. Comp. 58 (holding that a school board member who is vice-president of a company with a school contract must disclose the interest even though the interest is not prohibited by section 801).

[82] 407 N.E.2d 412, 429 N.Y.S.2d 566 (1980).

[83] *Landau*, 407 N.E.2d at 413, 429 N.Y.S.2d at 567.

[84] *Id.*

[85] *Landau*, 407 N.E.2d at 414, 429 N.Y.S.2d at 567.

[86] *Landau*, 407 N.E.2d at 413, 429 N.Y.S.2d at 566.

[87] *Landau*, 407 N.E.2d at 415 n.3, 429 N.Y.S.2d at 568 n.3. It should also be noted that the nonmunicipal party to the contract was not only aware of the undisclosed interest of the municipal employee, but also actively participated in the nondisclosure. *Landau*, 407 N.E.2d at 415, 429 N.Y.S.2d at 568.

[88] If the employee had any authority over the contract, his interest would have violated section 801, making the contract not merely voidable but absolutely void and unenforceable, even by the municipality, under section 804. *Landau*, 407 N.E.2d at 415, 429 N.Y.S.2d at 568.

The disclosure must be made in writing to the governing body of the municipality as soon as the officer or employee has knowledge of the actual or prospective interest.[89] Additionally, this written disclosure must be placed, in its entirety, in the official record of the proceedings of the body.[90] Once a municipal officer or employee has given notice with respect to his or her interest in a contract, the employee need not make any additional disclosures as to any other contracts with the same party for the rest of the fiscal year.[91]

## II. MISCELLANEOUS CONFLICTS OF INTEREST PROVISIONS

Article 18 contains no code of ethics but only a hodgepodge of conflicts of interest provisions. In addition to prohibiting interests in certain contracts with the municipality,[92] Article 18 prohibits the solicitation and receipt of certain gifts; disclosure or use of confidential information; compensation for services rendered by an official in a matter before his or her own agency; and certain contingent compensation agreements.[93] However, the only penalty for an intentional violation of these provisions is a fine, suspension, or removal from office or employment "in the manner provided by law."[94]

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[89] N.Y. GEN. MUN. LAW § 803(1) (McKinney 1986).

[90] *Id. Contra* D.E.P. Resources, Inc. v. Village of Monroe, 516 N.Y.S.2d 953, 954 (App. Div. 2d Dep't 1987) (stating that, if a village employee had a duty to disclose his potential interest in a contract with the village, the village employee's appearance at a public auction where he bid on private property being sold by the village served as a disclosure of his potential interest in a contract with the village). Note, however, that the statement in *D.E.P. Resources* is pure dictum since the village employee never in fact had any interest in a contract with the village, as he did not offer the highest bid, nor did he have any power or duty with respect to the contract; the case, which involved a lawsuit by the winning bidder against the village to recoup the increase in the purchase price caused by the village employee's bidding, should be limited to its facts.

[91] N.Y. GEN. MUN. LAW § 803(1) (McKinney 1986). Two points should made with respect to this disclosure. First, there is no statutory requirement that disclosure be accompanied by recusal. *Id.* Second, disclosure is not required in the case of an interest in a contract that falls within subdivision two of section 802. *Id.* § 803(2).

[92] *Id.* § 801.

[93] N.Y. GEN. MUN. LAW § 805-a(1) (McKinney Supp. 1996); *see id.* § 805-b (permitting certain public officers to receive gifts or benefits of $75 or less for performing marriages "other than [at] the officer's normal public place of business, during normal hours of business," which are defined for a town or village justice as "those hours only which are officially scheduled by the court for the performing of the judicial function").

[94] N.Y. GEN. MUN. LAW § 805-a(2) (McKinney 1986); *see* Binghamton Civil Serv. Forum v. City of Binghamton, 374 N.E.2d 380, 383, 403 N.Y.S.2d 482, 485 (1978). In *Binghamton Civil Service Forum*, the Court of Appeals held that a city was bound by an arbitrator's award, pursuant to a collective bargaining agreement, determining that no just cause existed to

### *A. Gifts*

Article 18 prohibits municipal officers or employees from directly or indirectly soliciting any gift, regardless of the gift's value.[95] It also prohibits the receipt of gifts worth seventy-five dollars or more under certain circumstances.[96] "Gifts" include not only money but also "services[s], loan[s], travel, entertainment, hospitality, thing[s] or promise[s], or in any other form."[97]

The circumstances under which receipt of a gift is prohibited are those "in which it could be reasonably be inferred that the gift was intended to influence [the officer or employee], 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."[98] So vague as to be held unconstitutional by one county court,[99] that language provides virtually no guidance to the municipal official as to which gifts are acceptable and which are not.

Furthermore, the gift provision does not state whether the seventy-five dollar limit applies to a single gift or to all gifts by a single donor during the year. Ten gifts worth fifty dollars each from a vendor to a municipal purchasing agent clearly subvert the integrity of the municipal contracting process. Yet, the gifts provision could be read to permit such gifts. Municipal attorneys would thus be well advised to counsel their clients to refuse gifts aggregating seventy-five dollars or more from any one donor within a twelve-month period if the donor is doing, has recently done, or is

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discharge a city employee who had admitted receiving unlawful gratuities, which was a violation of section 805-a(1)(a). *Binghamton Civil Serv. Forum*, 374 N.E.2d at 383, 403 N.Y.S.2d at 485. The court stated that the section "does not inflexibly mandate the discharge of an employee in violation of its proscriptions. There [is] no statutory bar to imposition of a lesser sanction than outright discharge." *Id.* (citation omitted); *see* Keller v. Morgan, 539 N.Y.S.2d 589, 591 (App. Div. 3d Dep't 1989) (upholding removal of town planning board member for violation of section 805-a(1)(c)).

[95] N.Y. GEN. MUN. LAW § 805-a(1)(a) McKinney Supp. 1996).

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] People v. Moore, 377 N.Y.S.2d 1005, 1008-09 (Fulton County Ct. 1975) (finding no "commonly accepted" guidelines to indicate when a gift is given in order to influence a decision); *cf.* Binghamton Civil Serv. Forum v. City of Binghamton, 374 N.E.2d 380, 383, 403 N.Y.S.2d 482, 485 (1978) (failing to question constitutionality of section 805-a(1)(a) when discussing arbitrability of disciplinary action taken against city employees who had admitted taking unlawful gratuity). *But see* Merrin v. Town of Kirkwood, 369 N.Y.S.2d 878, 881 (App. Div. 3d Dep't 1975) (upholding demotion of town employee for, among other things, violating town code of ethics provision that was virtually identical to section 805-a(1)(a)).

proposing to do business with the municipality, unless the gift is from a family member or a close personal friend and would be customary on a family or social occasion, such as a birthday or wedding.[100]

### *B. Confidential Information*

Article 18 also prohibits disclosure or use of confidential information.[101] That prohibition extends to all confidential information acquired by the official" in the course of his official duties."[102] The prohibition would cover disclosure of the information to anyone not entitled to it, whether or not the municipal officer or employee derives a benefit from the disclosure, as well as use of the information by the official "to further his personal interests," whether or not the official discloses the information to anyone else.[103] Case law provides no guidance on what constitutes "confidential information." However, the municipal attorney may assume, as a rule of thumb, that information is not confidential if its disclosure to the public would be permitted under the Freedom of Information Law,[104] the Personal Privacy Protection Law,[105] or the Open Meetings Law.[106]

### *C. Private Work on Matters Before an Official's Agency*

Article 18 prohibits a municipal officer or employee from being paid for working on a matter that is before the official's own agency or that is before an agency over which the official has jurisdiction or whose members, officers, or employees the official has the power to appoint.[107] The official may neither receive actual compensation for such work nor enter into an expressed or implied agreement to receive compensation.[108] For example, in *Keller v. Morgan*,[109] the

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[100] *Cf.* RULES OF THE CITY OF NEW YORK tit. 53, § 1-01(b) (Lenz & Riecker 1996) (restricting acceptance of certain gifts); NEW YORK CITY CHARTER § 2604(b)(5) (Lenz & Riecker 1996) (permitting acceptance of gifts "that are customary on family or social occasions from a family member or a close personal friend who the public servant knows is or intends to become engaged in business dealings with the City," provided that certain conditions are met).

[101] N.Y. GEN. MUN. LAW § 805-a(1)(b) (McKinney Supp. 1996).

[102] *Id.*

[103] *Id.*

[104] N.Y. PUB. OFF. LAW §§ 94-90 (McKinney 1988 & Supp. 1996).

[105] *Id.* §§ 91-99.

[106] N.Y. PUB. OFF. LAW §§ 100-111 (McKinney 1988).

[107] N.Y. GEN. MUN. LAW § 805-a(1)(c) (McKinney Supp. 1996).

[108] *Id.*

Third Department upheld the removal of a town planning board member who failed to disclose his interest in, and recuse himself from considering, an application for approval of a subdivision on which a company in which he had a twenty-five percent interest was performing work.[110]

Therefore, a village trustee could not work on a matter before the village's zoning board of appeals because as a trustee he or she has the power to appoint members of the zoning board. On the other hand, the chair of the zoning board could work on a matter before the planning board, or even appear before the planning board, provided that the matter is not before the zoning board. So, too, a planning board member could appear for free before his or her own planning board. Despite these rules, however, to avoid significant appearances of impropriety, municipal officials should not appear, even for free, before their own or a related agency.[111]

### *D. Contingent Compensation*

Finally, Article 18 prohibits a municipal officer or employee from being paid for working on a matter that is before *any* agency of the municipality if the official's compensation is contingent on the agency's action on the matter.[112] As with the foregoing provision, the official may neither receive actual compensation for such work nor enter into an expressed or implied agreement to receive compensation.[113] For example, a town zoning board member who is also a private attorney could not agree to work on a subdivision application to the town planning board if the attorney's fee depended upon the approval of the application, even if the application raised no zoning issues and even if the attorney would not appear before the planning board. However, this restriction may be avoided with relative ease since the contingent arrangement may be replaced "at any time" by a fee "based upon the reasonable value of the services rendered."[114]

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[109] 539 N.Y.S.2d 589 (App. Div. 3d Dep't 1989).

[110] *Id.* at 590-91; *cf.* Cahn v. Planning Bd., 557 N.Y.S.2d 488, 491 (App. Div. 3d Dep't 1990) (refusing to invalidate approval of preliminary subdivision plats by planning board where two members of board had provided professional services on the projects prior to the submission of the plans to the board and where both board members disclosed their interests and recused themselves from discussing or voting on the subdivisions).

[111] *See* Davies, *Keeping the Faith*, *supra* note 17, at 73-74.

[112] N.Y. GEN. MUN. LAW § 805-a(1)(d) (McKinney 1996).

[113] *Id.*

[114] *Id.*

## III. ADMINISTRATION

### *A. Local Codes of Ethics*

In addition to setting forth miscellaneous conflicts of interest provisions, Article 18 also mandates that the governing body of every county, city, town, village, and school district in the state promulgate a local code of ethics to guide the municipality's officers and employees.[115] Other types of municipalities, such as fire districts, public libraries, or county improvement districts, may, but need not, adopt such a local ethics code.[116]

Under Article 18, local codes of ethics must include standards for disclosure by the municipality's officers and employees of their interest in the legislation before the municipality's governing body;[117] investments by the municipality's officers and employees that conflict with their official duties;[118] private employment by municipal officials that conflicts with their official duties (moonlighting);[119] future employment (revolving door);[120] and disclosure of information (annual disclosure, transactional disclosure, applicant disclosure).[121]

The local ethics code may also include any other standards that the municipality's governing body deems "advisable."[122] For example, the municipality could prohibit municipal officials from soliciting political contributions from their subordinates or from holding political party office (a so-called "two-hats provision").[123] In general, the municipality may regulate or prohibit conduct that Article 18 does not regulate or prohibit but may not permit conduct that Article 18 prohibits.[124] For example, a local ethics code could prohibit municipal officials from accepting gifts of any amount from someone doing business with the municipality but could not raise

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[115] *Id.* § 806(1)(a).
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *See* Davies, *Keeping the Faith*, *supra* note 17, at 70-71, 75.
[124] *See* Zagoreos v. Conklin, 491 N.Y.S.2d 358, 363 (App. Div. 2d Dep't 1985) (noting that the Town of Stony Point has promulgated a code of ethics more stringent than Article 18 and striking down municipal action in violation of that code).

the gift threshold of Article 18 to $100. A local ethics code need not treat all municipal officers and employees the same.[125] For example, a "two-hats provision" could be made to apply only to department heads and members of boards and commissions.[126]

In fact, most counties, cities, towns, villages, and school districts have merely adopted as their local ethics code some version of Article 18. Few have enacted a code of ethics that provides a simple and comprehensive list of "do's and don't's" for their officers and employees. As a result, municipal officials lack guidance as to what they may and may not do, and consequently too often fall prey to accusations by self-proclaimed ethics "experts" of unspecified "unethical" conduct.[127] A strong code of ethics is a municipal employee's best friend.

### *B. Distribution, Filing, Inspection, & Reports*

The responsibility for apprising municipal officers and employees of ethical standards falls upon the municipality's chief executive officer, who must ensure that copies of ethics standards are distributed and posted.[128] The failure to distribute or post, however, does not relieve an officer or employee of his or her duty to comply with the provisions of Article 18 and the local code of ethics, nor does such a failure prevent enforcement of Article 18 or the code.[129]

The duty of maintaining public records relating to ethics laws falls upon the municipal clerk.[130] The clerk's duties include the retention of a copy of each of the following for public inspection: (1) the local code of ethics, as amended;[131] (2) the municipal clerk' annual report to the state legislature stating whether the municipality has a code of ethics in effect as of the date the report is filed;[132] (3) a

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[125] *See* N.Y. GEN. MUN. LAW § 806(1)(a) (McKinney Supp. 1996) (permitting ethics codes to provide for "the classification of employees or officers").

[126] *See* NEW YORK CITY CHARTER § 2604(b)(15) (Lenz & Riecker 1996) (prohibiting elected officers and certain high level appointed officials from holding certain political party offices).

[127] *See* Davies, *Keeping the Faith, supra* note 17, at 62 (noting the inadequacies of ethical standards used in municipalities in New York State).

[128] N.Y. GEN. MUN. LAW § 807 (McKinney 1986) (requiring the conspicuous posting of Article 18 in every municipal building); *id.* § 806(2) (requiring distribution of local ethics codes to all municipal officers and employees).

[129] *Id.* §§ 806(2), 807.

[130] N.Y. GEN. MUN. LAW § 806(3) (McKinney Supp. 1996).

[131] *Id.* § 806(3)(a) (requiring that such a copy be available within 30 days of adoption).

[132] *Id.* § 806(3)(d) (requiring that the report be filed by February 15 each year). For example, the following would suffice: "As of the date set forth above, the [County, City, Town,

statement that a board of ethics has been established and a listing of its composition, if such a board has been established by the municipality;[133] and (4) the municipality's form for the annual financial disclosure statement, if any.[134] In addition, the clerk must keep on file, and make publicly available, one of the following statements with respect to annual financial disclosure: (1) that the municipality is not subject to mandatory annual financial disclosure because the municipality is not a county, city, town, or village having a population of 50,000 or more; (2) that the municipality, although subject to mandatory annual financial disclosure, has failed to adopt a form for an annual financial disclosure statement or to resolve to continue an authorized existing form and is thus subject to the provisions of section 812; or (3) that the municipality has adopted a form for an annual financial disclosure statement or resolved to continue an authorized existing form and the date of that adoption or resolution.[135]

### *C. Boards of Ethics*

Article 18 permits, but does not require, the establishment of local boards of ethics and provides for their composition and jurisdiction.[136] However, the Attorney General's office has concluded that municipalities' home rule powers permit them to vary those provisions by local law.[137] In particular, the municipality may establish an ethics board having members who are appointed for set terms and who are not otherwise officers or employees of the municipality; and the municipality may give that board full enforcement authority, including subpoena power and the power to levy civil fines.[138] Historically, ethics boards possessing only the

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Village, or School District] of _____ has [or does not have] in effect a code of ethics within the meaning of section 806 of the General Municipal Law."

[133] *Id.* § 806(3)(b).

[134] *Id.* § 806(3)(c).

[135] *Id.*

[136] *See* N.Y. GEN. MUN. LAW § 808(1) (McKinney 1986).

[137] 1991 Inf. Op. N.Y. Att'y Gen. 1136 (concluding that local governments may create local laws enabling their ethics board to hear and investigate complaints concerning ethics regulation violations and to impose penalties for any violations); 1986 Inf. Op. N.Y. Att'y Gen. 100 (holding city ethics boards need not follow section 808(3) explicitly and allowing a city to dispense with the mandate that one city officer or employee must be a board member).

[138] *See supra* note 137; *see* 1993 Inf. Op. N.Y. Att'y Gen. 1022 (stating that a local government, through local law, may enforce ethics regulations by imposing fines and initiating proceedings for equitable relief for violations); 1993 Inf. Op. N.Y. Att'y Gen. 1047 (holding that town justices, like town officers, are governed by local ethics regulations).

authority to issue advisory opinions have accomplished little. Accordingly, although the requirements in Article 18 for an ethics board are discussed below, those requirements should be varied by local law to establish an independent local ethics board having full investigatory and enforcement authority over a comprehensive local ethics code.

Article 18 provides that the governing body of a county may establish a county ethics board and may appropriate money for its maintenance and personal services.[139] If the county operates under an optional or alternative form of county government or under a county charter, the county executive or county manager appoints the ethics board's members, subject to confirmation by the county's governing body.[140] If the county does not operate under an optional or alternative form of county government or county charter, then the ethics board's members are appointed directly by the county's governing body.[141] The ethics board members serve at the pleasure of the appointing authority.[142] Although these methods of appointment are suitable, ethics board members should serve fixed terms to prevent the actual or perceived exercise of improper influence by the appointing authority.[143]

Article 18 further states that the county ethics board shall have at least three members, that a majority of the members shall not be county officers or employees (or officers or employees of any municipality located in whole or in part within the county), and that at least one member of the ethics board shall be such a county or municipal officer or employee.[144] However, to help ensure the perception and the reality of board's independence, the county ethics law should exclude any county or other local government officials from service on the ethics board. Having an elected or appointed municipal officer or employee on the ethics board inevitably creates the appearance of favoritism, undermining the board's effectiveness.[145]

Article 18 contemplates that a county ethics board will function solely as an advisory body, rendering advisory opinions to county

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[139] N.Y. GEN. MUN. LAW § 808(1) (McKinney 1986).

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *See* Davies, *Keeping the Faith*, *supra* note 17, at 106-08.

[144] N.Y. GEN. MUN. LAW § 808(1) (McKinney 1986) (providing also that county ethics board members shall serve without compensation).

[145] *See* Davies, *Keeping the Faith*, *supra* note 17, at 66, 106-08.

officials and to the officers and employees of municipalities within the county, upon written request.[146] However, the county ethics board may not render opinions to the officials of municipalities that have established their own local ethics board, unless the local ethics board refers the matter to the county board.[147] As noted above, ethics boards that possess no investigatory or enforcement authority have historically had little impact.

Article 18 expressly recognizes the authority of municipalities other than counties to establish their own local ethics boards.[148] Such a local ethics board has the same powers and duties as a county ethics board and is subject to the same conditions as set forth above.[149] There is one exception; the local ethics board "shall act only with respect to officers and employees of the municipality that has established such board or of its agencies."[150] The composition of a local board of ethics is essentially the same as a county ethics board.[151] Finally, if an ethics board, whether county or local, is the repository for annual statements of financial disclosure, the board must file a statement to that effect with the municipal clerk.[152]

A municipality is well advised to exercise its home rule powers to establish an independent ethics board with members having fixed terms and the power and duty to investigate violations of the local code of ethics, hold hearings, impose civil fines, issue advisory opinions, give advice on the code, and supervise proper ethics

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[146] N.Y. GEN. MUN. LAW § 808(2) (McKinney 1986) (providing that the advisory opinions shall be requested and rendered "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"). That section also empowers the county ethics board to provide recommendations, upon request, to the governing bodies of the municipalities within the county with respect to drafting and adopting local ethics codes or amendments to such codes. *Id.*

[147] *Id.* § 808(4).

[148] *See id.* § 808(3) (providing also that the municipality's governing body may, where authorized by law, appropriate money to maintain the board and for personal services for the board).

[149] *Id.*

[150] *Id.*

[151] *Id.* (providing that the local ethics board shall have its members appointed by the person or body designated by the municipality's governing body and shall have at least three members, at least one of whom is a municipal officer or employee, but a majority of whom are not officers or employees of the municipality; and that the ethics board members shall serve at the pleasure of the appointing authority).

[152] N.Y. GEN. MUN. LAW § 808(5) (McKinney Supp. 1996). It should be noted that the Temporary State Commission on Local Government Ethics, referenced in section 808, expired on December 31, 1992. *See* Act of Aug. 7, 1987, ch. 813, 1987 N.Y. Laws 3022, at 3068.

training for all officers and employees of the municipality.[153] Such a comprehensive ethics compliance program need not cost much, and the advantages of protecting public servants against unjustified attacks and in increasing public confidence in the integrity of municipal government can be substantial.[154]

## IV. DISCLOSURE IN LAND USE MATTERS

Article 18 requires that requests, applications, and petitions relating to land use disclose the interest of any state officers or municipal officers or employees in the applicant.[155] On its face, Article 18 does not, however, require recusal by the affected municipal officer or employee.[156] The request, application, or petition must set forth the name and residence of the official and the nature and extent of the official's interest in the applicant, "to the extent known to the applicant."[157] Article 18 appears, thus, to impose no duty upon the applicant to inquire as to the possible interests of officials in the applicant.

"Interest" is broadly defined.[158] The officer or employee is deemed to have an interest in the applicant: if the applicant is the officer or employee or is a family member of the officer or employee;[159] or if either the official or his or her family member holds a position with the applicant;[160] or if the official or his or her

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[153] *See* Davies, *Keeping the Faith, supra* note 17, at 106-13.

[154] *See id.* at 61-62 (arguing that appearances are as important as reality); *id.* at 110 (discussing minimal staffing requirements for ethics boards).

[155] N.Y. GEN. MUN. LAW § 809(1) (McKinney 1986). That section states:

> [e]very 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 shall state [certain information relating to] 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 . . . .

*Id.* In Nassau County, these provisions also apply to a party officer, defined as "any person holding any position or office, whether by election, appointment or otherwise, in any party as defined by . . . the election law." *Id.* § 809(3); N.Y. ELEC. LAW § 1-104(5) (McKinney 1978).

[156] *But see* text accompanying note 166.

[157] N.Y. GEN. MUN. LAW § 809(1) (McKinney 1986).

[158] *See id.* § 809(2). In Nassau County, this subdivision also applies to a party officer. *See supra* note 155.

[159] N.Y. GEN. MUN. LAW § 809(2) (McKinney 1986) (deeming the officer or employee to have an interest in the applicant if the applicant is the officer's or employee's spouse, brother, sister, parent, child, or grandchild or the spouse of any of those relatives).

[160] *Id.* § 809(2)(b)-(c) (deeming the officer or employee to have an interest in the applicant where either the officer or employee or his or her family member is an officer, director,

family member owns or controls stock in the applicant;[161] if the official or his or her family member would receive a benefit from the applicant if the application was approved.[162] A knowing and intentional violation of these disclosure provisions is a misdemeanor.[163]

Failure to comply with section 809 may result in the invalidation of the municipal action on the matter, at least if the interested municipal official takes any official action on it.[164] Mere nondisclosure alone, however, may be insufficient to invalidate the municipal action, at least if disclosure is thereafter made prior to the municipality taking the action on the application, petition, or request.[165]

Although section 809 requires only disclosure, not recusal, courts have extended the section to mandate recusal as well, even by classes of individuals not encompassed within the section. For example, in *Tuxedo Conservation & Taxpayers Ass'n v. Town Board of Tuxedo*,[166] the Second Department, relying on section 809, invalidated a town board resolution approving a special permit where the decisive vote was cast by a board member who was a vice-

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partner, or employee of the applicant or is a member of a partnership or association applicant).

[161] *Id.* § 809(2)(c) (deeming the officer or employee to have an interest in the applicant where the officer or employee or his or her family member "legally or beneficially owns or controls stock of a corporate applicant"). However, ownership of less than five percent of the stock of a corporation listed on the New York Stock Exchange or the American Stock Exchange does not constitute an interest. *Id.* § 809(4).

[162] *Id.* § 809(2)(d) (deeming the officer or employee to have an interest in the applicant where either the officer or employee or his or her family member "is a party to an agreement with such an applicant, expressed 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").

[163] *Id.* § 809(5).

[164] *See* Tuxedo Conservation & Taxpayers Ass'n v. Town Bd., 418 N.Y.S.2d 638, 640-42 (App. Div. 2d Dep't 1979); Conrad v. Hinman, 471 N.Y.S.2d 521, 523-24 (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). For a discussion of the *Tuxedo Conservation* case, see *infra* note 166-68, 175 and accompanying text.

[165] *See* Zagoreos v. Conklin, 491 N.Y.S.2d 358, 362-63 (App. Div. 2d Dep't 1985) (holding, in dictum, that the failure of an applicant for a variance to disclose in the application the interests of municipal employees who were also employees of the applicant was not fatal because, although not disclosed in the variance application, these interests were disclosed before the vote on the variance); *cf.* Glen Head-Glenwood Landing Civic Council v. Town of Oyster Bay, 438 N.Y.S.2d 715, 724 (Sup. Ct., Nassau County 1981) (finding that the failure to file an affidavit containing the required disclosure within 48 hours of a change in ownership was not enough to nullify the application because changes could be made until the actual issuance of a certificate of occupancy), *aff'd*, 453 N.Y.S.2d 732 (App. Div. 2d Dep't 1982).

[166] 418 N.Y.S.2d 638 (App. Div. 2d Dep't 1979).

president of an advertising firm which handled the account of the parent corporation of one of the developers.[167] It would appear, however, that the interest in these types of cases must be a pecuniary one.[168] These cases should properly be viewed as decisions under the common law, rather than under Article 18.

## V. ANNUAL STATEMENTS OF FINANCIAL DISCLOSURE

Article 18, as amended by the 1987 Ethics in Government Act, imposed onerous annual financial disclosure requirements on certain officers and employees of counties, cities, towns, and villages having populations of 50,000 or more.[169] A 1993 amendment to section 810 stated that for the purposes of annual financial disclosure "[m]embers, officers and employees of . . . industrial development agenc[ies] and authorit[ies] shall be deemed officers or employees of the county, city, village or town for whose benefit such agency or authority is established."[170] In addition, any other municipality may, but need not, establish a financial disclosure scheme.[171] A full discussion of the complicated and confusing financial disclosure provisions of Article 18 lies beyond the scope of this Article.[172]

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[167] *Id.* 639-42.

[168] *See* Center Square Ass'n v. Corning, 430 N.Y.S.2d 953, 958 (Sup. Ct., Albany County 1980) (finding no conflict of interest where chair of environmental quality review board was member of not-for-profit corporation applying to board for approval of demolition and distinguishing the case from *Tuxedo Conservation* because in that case the respondent had a pecuniary interest which was not present in this case).

[169] Act of Aug. 7, 1987, ch. 813, 1987 N.Y. Laws 3022, at 3028 (codified as amended at N.Y. GEN. MUN. LAW §§ 805-a, 806, 808, 810-813 (McKinney Supp. 1996)). Section 813 expired December 31, 1992, but remains relevant because the powers of the Temporary State Commission set forth in that section have devolved upon the local ethics boards or governing bodies, as the case may be. *See* Act of Aug. 7, 1987, ch. 813, 1987 N.Y. Laws 3022, at 3075 (codified as amended in N.Y. GEN MUN. LAW § 813 (McKinney Supp. 1996)).

[170] Act of July 21, 1993, ch. 356, 1993 N.Y. Laws 903, at 903-04 (codified in N.Y. GEN. MUN. LAW § 810(3) (McKinney Supp. 1996)) (defining "local officer or employee").

[171] N.Y. GEN. MUN. LAW § 811(1)(a) (McKinney Supp. 1996).

[172] For a comprehensive treatment of these provisions, see Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 PACE L. REV. 243 (1991); see also 1995 Inf. Op. N.Y. Att'y Gen. 1034 (concluding that private industry council members are not employees of a municipality as their duties may transcend a sole municipality and could even encompass the entire state, thus exempting them from financial disclosure requirements under Article 18); 1994 Inf. Op. N.Y. Att'y Gen. 1023 (finding community college trustees, who represented two counties, county officers who are subject to the financial requirements of the two regions); 1993 Inf. Op. N.Y. Att'y Gen. 1047 (concluding that a town may require town justices and town court employees to file financial disclosure reports with the town).

## VI. COMMON LAW, CONSTITUTIONAL, STATUTORY, & AGENCY RESTRICTIONS

The common law has long placed certain ethical restrictions on municipal officers and employees; in particular, it prohibits contracts between a municipal officer and the municipality.[173] As discussed above, courts have extended Article 18 to prohibit municipal officials from acting on matters in which they have a pecuniary interest. Failure to disclose and recuse in those instances may result in the invalidation of the municipal action.[174] The Court of Appeals has held that "[p]ublic policy forbids the sustaining of municipal action founded upon the vote of a member of the municipal governing body in any matter before it which directly or immediately affects him individually."[175]

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[173] *See, e.g.*, Clarke v. Town of Russia, 28 N.E.2d 833, 834-35 (N.Y. 1940) (declaring an employment contract between the town and an employee, who was also a member of the town board, void in view of the common law which did not recognize a contract between a municipality and its officers); Smith v. City of Albany, 61 N.Y. 444, 445-46 (1875) (invalidating a contract that a councilman made with the city to provide horses and carriages for a Fourth of July celebration, upon the theory that it was void as against public policy); People *ex rel.* Schenectady Illuminating Co. v. Board of Supervisors, 151 N.Y.S. 1012, 1013-14 (App. Div. 3d Dep't 1915) (declaring a contract between a lighting company and a county board of supervisors void, although there was no fraud or undue influence alleged, because a member of the board was also a stockholder and an officer of the lighting company).

[174] Tuxedo Conservation & Taxpayers Ass'n v. Town Bd., 408 N.Y.S.2d 668 (Sup. Ct., Orange County 1978), *aff'd*, 418 N.Y.S.2d 638 (App. Div. 2d Dep't 1979). In *Tuxedo Conservation*, the court stated:

> Clearly, this statutory list [in section 809] was meant to set forth only those situations in which there is a *conclusive presumption* of a conflicting interest. It is recognized that because of the myriad possibilities of disqualifying conflicting interests in quasi-judicial matters, disqualification should be a factual issue governed by the circumstances of each case and that a definitive rule cannot be formulated.

*Id.* at 673 (citation omitted) (emphasis in original); *see* Zagoreos v. Conklin, 491 N.Y.S.2d 358, 363 (App. Div. 2d Dep't 1985) ("It is not necessary, however, that a specific provision of the General Municipal Law be violated before there can be an improper conflict of interest."); *cf.* Cahn v. Planning Bd., 557 N.Y.S.2d 488, 491 (App. Div. 3d Dep't 1990) (sustaining approval of a subdivision plat by a town planning board where two members of the planning board provided professional services to the subject property owner, but disclosed their interests and refrained from voting); J.J. Carroll, Inc. v. Waldbauer, 219 N.Y.S.2d 436, 437-38 (Sup. Ct., Suffolk County 1961) (holding that, under former Village Law section 332, which precluded a village officer from acting in any matter or proceeding involving the acquisition of real property then owned by him for a public improvement, condemnation resolutions by the village board where an interested board member was absent when the matter was considered should be sustained), *aff'd*, 238 N.Y.S.2d 510 (App. Div. 2d Dep't 1963).

[175] Baker v. Marley, 170 N.E.2d 900, 901, 208 N.Y.S.2d 449, 450 (1960) (citation omitted) (quoting Pyatt v. Mayor of Dunellen, 89 A.2d 1, 5 (N.J. 1952)) (construing former Village Law

Despite the intent of Article 18 to replace ethics provisions scattered throughout the consolidated laws with a single law, conflicts of interest restrictions continue to exist in other statutes.[176] In particular, the New York State Constitution prohibits counties, cities, towns, villages, and school districts from giving or loaning any money or property to or in aid of any individual or private corporation, association, or undertaking.[177] For example, a municipality may not expend public funds to improve and maintain a private road.[178]

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section 332 as prohibiting an officer from acting in an official capacity with respect to the property that he or she owned); *cf.* Spadanuta v. Incorporated Village of Rockville Centre, 230 N.Y.S.2d 69, 70-71 (App. Div. 2d Dep't 1962) (finding village mayor had no conflict of interest under former Village Law section 332 where he owned real property contiguous to area selected by village for urban renewal), *aff'd*, 188 N.E.2d 266, 237 N.Y.S.2d 1002 (1963); Benincasa v. Incorporated Village of Rockville Centre, 215 N.Y.S.2d 575, 576-77 (Sup. Ct., Nassau County 1961) (declaring that although village officer's land was contiguous to area being developed, his interest was one that was shared by all citizens of the village and that there was no conflict).

[176] *See, e.g.*, N.Y. CIV. SERV. LAW § 107 (McKinney 1983) (forbidding hiring and retention decisions to be made on the basis of political associations and prohibiting public officers from improperly influencing the vote of any citizen); N.Y. COUNTY LAW § 411 (McKinney 1991) (stating that no elective county officer may hold any other elective county or town office concurrently); N.Y. GEN. CITY LAW § 3 (McKinney 1989) (prohibiting certain elected officials from holding more than one position at a time) (construed in Girard v. City of Glens Falls, 577 N.Y.S.2d 496, 498-99 (App. Div. 3d Dep't 1991)); N.Y. GEN. MUN. LAW §§ 208-d, 239-b, 553(4), 856(4) (McKinney 1986) (allowing police officers to maintain part-time employment elsewhere under certain circumstances; permitting members of municipal boards to serve as members of county or regional planning boards but requiring recusal in certain instances; and stating that appointed members of urban renewal leagues or industrial development agencies can simultaneously be officials or employees of the municipality); N.Y. SECOND CLASS CITIES LAW § 19 (McKinney 1994) (maintaining that no person shall hold more than one city office simultaneously); N.Y. TOWN LAW §§ 20(1)(d), 20(4), 271(3) (McKinney 1987) (prohibiting certain town justices from serving on town board; prohibiting the simultaneous holding of two elective town offices or a town board member serving as town comptroller; and prohibiting town board members from serving on town planning board); N.Y. VILLAGE LAW §§ 3-300(3), 3-300(4), 7-718(3) (McKinney 1996) (restricting the simultaneous holding of elective and appointive village offices; restricting village officers in holding other public offices; and prohibiting village trustees from serving on the village planning board).

[177] N.Y. CONST. art. VIII, § 1; *see* N.Y. GEN. MUN. LAW § 51 (McKinney 1986) (allowing taxpayer actions against "all officers, agents, commissioners and other persons acting . . . on behalf of any county, town, village or municipal corporation . . . to prevent any illegal official act on the part of any such officers . . . or to prevent waste or injury to, or to restore and make good, any property, funds or estate of [the municipality]"). "Municipal corporation" means a county, city, town, or village. *Id.* § 2.

[178] 1992 Inf. Op. N.Y. Att'y Gen. 1063 (determining that using public funds for improvements and upkeep of private roads would be an unconstitutional gift, but that municipalities may nonetheless achieve the same end by requiring private owners to maintain their roads).

In addition, the Public Officers Law provides for removal of certain municipal officials. Specifically, the governor may remove from office a county treasurer, a county superintendent of the poor, a county register, a coroner, the chief executive officer of a city, and the chief of police of a city.[179] Likewise, the supreme court may remove from office "any town, village, improvement district, or fire district officer, except a justice of the peace," upon application to the appellate division by any resident of the municipality or by the district attorney of the county in which the municipality lies.[180] Indeed, public officers appointed for fixed statutory terms may be removed before the expiration of their term only by a proceeding under this provision.[181] Most courts are hesitant to remove from office a municipal official or employee "for acts not involving 'allegations of self-dealing, corrupt activities, conflict of interest, moral turpitude, intentional wrongdoing or violation of a public trust.'"[182] The usual acts for which a court will remove a public official include "misappropriation of public funds, gross dereliction of duty, or a pattern of misconduct and abuse of authority."[183] For example, in *West v. Grant*,[184] the Third Department held that a town supervisor's alleged interest in the town's insurance contracts would, if proven, constitute a violation of section 803(1) and, thus, the petition seeking his removal stated a cause of action.[185]

Official misconduct is also regulated by the Penal Law.[186]

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[179] N.Y. PUB. OFF. LAW § 33 (McKinney 1988); *see* N.Y. ALT. COUNTY GOV'T LAW § 154 (McKinney 1993) (covering removal of county presidents, county managers, and appointive county executives).

[180] N.Y. PUB. OFF. LAW § 36 (McKinney 1988). Although a proceeding under section 36 is quasi-criminal, the standard of proof required to be met by petitioners is a preponderance of the evidence. *In re* Baker, 386 N.Y.S.2d 313, 317 (Sup. Ct., Warren County 1976).

[181] 1988 Op. N.Y. Comp. 99 (concluding that a commissioner serving as a public officer for a fixed term may be removed pursuant only to section 36 of the Public Officers Law). By its terms, section 36 applies only to public officers. *See* N.Y. PUB. OFF. LAW § 2 (McKinney 1988) (defining "local officer"); 1983 Inf. Op. N.Y. Att'y Gen. 186 (reviewing the indicia of public office as opposed to public employment).

[182] Feldberg v. Friedland, 633 N.Y.S.2d 847, 848 (App. Div. 3d Dep't 1995) (quoting Deats v. Carpenter, 403 N.Y.S.2d 128 (App. Div. 3d Dep't 1978)) (holding that allegations of racial references by village mayor and request by mayor to village police chief to give job to mayor's son were insufficient to state a cause of action under section 36).

[183] *Id.*

[184] 633 N.Y.S.2d 674 (App. Div. 3d Dep't 1995).

[185] *Id.* at 674-75.

[186] *See, e.g.*, N.Y. PENAL LAW §§ 195.00 (official misconduct), 195.20 (Defrauding the government), 200.00-200.05 (bribery), 200.10-200.15 (acceptance of bribes), 200.20-200.22 (rewarding official misconduct), 200.25-200.27 (receiving reward for official misconduct), 200.30 (giving unlawful gratuities), 200.35 (receiving unlawful gratuities), 200.40-200.50 (bribe giving

Moreover, virtually all counties, cities, towns, villages, and school districts have adopted a local ethics code, as permitted by section 806.[187] While in most instances that "code" merely parrots Article 18, it sometimes contains additional ethics restrictions.[188] Finally, individual agencies within the government entity may establish their own conflicts of interest rules, consistent with federal, state, and local law.[189]

## CONCLUSION

Characterized by the Temporary State Commission on Local Government Ethics as "disgracefully inadequate," Article 18 offers an entirely unsatisfactory approach to conflicts of interest, with the result that municipal officials lack the ethical guidance they so desperately need. Supported by the New York State Association of Counties, Association of Towns, and Conference of Mayors, and by a broad array of municipal officials and civic groups, local municipal associations, the Municipal Law Section of the New York State Bar Association, the Retail Council, and newspaper editorials throughout the state, the Temporary Commission issued clarion calls to revamp this scheme. Those calls fell on deaf legislative ears.[190] However,

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and bribe receiving) (McKinney 1988).

[187] N.Y. GEN. MUN. LAW § 806(1)(a) (McKinney Supp. 1996).

[188] *See, e.g.*, Belle v. Town Bd., 402 N.Y.S.2d 677, 680-81 (App. Div. 4th Dep't 1978). In *Belle*, the Fourth Department upheld the Town of Onondaga Code of Ethics article ii, section 3(k) which prohibited officers and employees of a town from being political committeemen or committeewomen or the chair or vice-chair of a political party. *Id.* at 681. *Belle* also upheld the removal of zoning board members for a violation of that provision. *Id.*; *see also* Golden v. Clark, 564 N.E.2d 611, 618, 563 N.Y.S.2d 1, 8 (1990) (upholding the constitutionality of New York City's "two-hats provision" in NEW YORK CITY CHARTER § 2604(b)(15) (Lenz & Riecker 1996)); Girard v. City of Glens Falls, 577 N.Y.S.2d 496, 498-99 (App. Div. 3d Dep't 1991) (holding a plaintiff liable under section 801 and the Glenns Falls City Charter section 6.16); Zagoreos v. Conklin, 491 N.Y.S.2d 358, 363 (App. Div. 2d Dep't 1985) (holding the Town of Stony Point Code of Ethics valid even though the Town Code was more stringent than section 801); People v. Wendel, 455 N.Y.S.2d 322, 323-24 (Nassau County Ct. 1982) (holding that Nassau County Government Law section 2202, which prohibited county employees from engaging in transactions as officers of a corporation involved in the sale or lease of county real estate, was not superseded by section 801).

[189] *See, e.g.*, Syracuse Police Benevolent Ass'n v. Young, 593 N.Y.S.2d 718, 720-28 (Sup. Ct., Onondaga County 1992) (holding that section 208-d does not completely preempt the right of a city police chief to promulgate rules and regulations relating to off-duty employment of police officers).

[190] *See* Henry G. Miller & Mark Davies, *Why We Need a New State Ethics Law for Municipal Officials*, FOOTNOTES, Winter 1996, at 5 (noting that the bill containing the Commission's proposals has not been passed by the Legislature); State of New York Temporary State Commission on Local Government Ethics, *supra* note 17, at 11-12 (stating

municipalities themselves may, under their home rule powers, adopt their own local ethics laws—and are well advised to do so.[191]

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that although the commission's proposals received overwhelming support during legislative committee hearings, the recommendations were not enacted into law); *cf.* Mark Davies, *The Public Administrative Law Context of Ethics Requirements for West German and American Public Officials: A Comparative Analysis*, 18 GA. J. INT'L & COMP. L. 319, 321-24 (1988) (reviewing the problems that the United States Congress experienced in the 1980s when it attempted to pass ethics legislation).

[191] *See* Davies, *Keeping the Faith, supra* note 17, at 62.