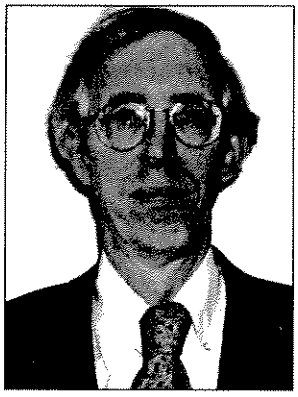
Article 18: A Conflicts of Interest Checklist for Municipal Officers and Employees

By Mark Davies



Article 18 of the New York State General Municipal Law sets forth certain baseline conflicts of interest standards that apply in every municipality in the State, except New York City, where only Article 18's financial disclosure requirements apply.[1] Article 18 has been harshly criticized over the years for its complexity, for its overinclusiveness in the prohibited interest provisions of section 801, for its lack of penalties, and for its enormous gaps. Proposals to address these significant problems, however, have repeatedly fallen on deaf ears in the State Legislature.[2] Municipalities, their officers, employees, and counsel, and those who appear before or do business with municipal agencies thus have no choice but to understand and comply with current Article 18, although municipalities may (and should) adopt an effective local conflicts of interest law or resolution, as the case may be.[3] This article accordingly presents a plain language checklist of the requirements of Article 18 that municipal attorneys may employ for their municipal clients.[4] Attorneys must also consult any local municipal ethics code and may wish to modify this checklist to reflect any additional requirements contained in any such local code.

At the outset, one should emphasize that Article 18 defines both "municipality" and "municipal officer or employee" broadly. "Municipality" includes not just political subdivisions (counties, cities, towns, and villages) but school districts, public libraries, BOCES, consolidated health districts, urban renewal agencies, town and county improvement districts, industrial development agencies, fire districts, and even the OTB, as well as many other agencies.[5] "Municipal officer or employee" includes all officers and employees of the municipality, *whether paid or unpaid*, with certain exceptions.[6]

(1) Prohibited Interest in a Contract with the Municipality

A municipal officer or employee may not have an interest in a contract with the municipality if he or she has any control over the contract, unless an exception applies.

Applicable sections: New York State General Municipal Law §§ 800–804, 805

Penalty for violation: misdemeanor; contract void and cannot be ratified

Elements of a violation:

(a) Does the matter involve a ***contract*** with the municipality?

A claim against the municipality is considered a contract with the municipality.

*Note: The officer or employee does **not** have to be a party to the contract.*

(b) Will the officer or employee ***receive a financial benefit*** as a result of that contract, or will his or her spouse or minor children or dependents or outside business or employer or a corporation in which the officer or employee owns stock receive such a benefit?

(c) Does the officer or employee have any ***control*** over the contract? That is, does the officer or employee, either as an individual official or as a member of a board, have the power or duty to negotiate, prepare, or approve the contract or approve payment under it or audit bills under it or appoint anyone who does?

Note: It does not matter if the officer or employee disqualifies ("recuses") himself or herself; the question is whether he or she has the power or duty to do any of those things.

(d) Do any of the ***exceptions*** in Gen. Mun. Law § 802 apply or is the contract an employment contract between the municipality and the officer or employee's spouse, minor child, or dependent?

The most common exceptions include: (1) having an interest that is prohibited solely because the municipal officer or employee works for a person or firm that has a municipal contract, where the officer or employee is only an officer or employee of the firm, has nothing to do with the contract at the firm, and will not have his or her compensation at the firm affected by

the contract; (2) having an interest in a contract between the municipality and a not-for-profit organization; (3) having an interest in an existing contract at the time the officer or employee joins the municipality (but this exception does not apply to the renewal of the contract); (4) having an interest in a contract where the interest arises solely from stockholdings and the officer or employee owns or controls less than 5 percent of the stock; (5) having an interest in municipal contracts where the total amount paid under the contracts is no more than $750 during the fiscal year.

- If the answer to questions (a), (b), and (c) is yes and if the answer to question (d) is no, then the interest is prohibited. Neither recusal nor public bidding will cure the violation.
- If the answer to questions (a) and (b) is yes, but the answer to question (c) is no, then the interest is not prohibited but the officer or employee must disclose it to the municipal legislative body.
- If the answer to questions (a), (b), and (c) is yes, but an exception applies, then the interest is not prohibited, but the officer or employee must disclose it to the municipal legislative body (unless the interest falls under General Municipal Law § 802(2)).

(2) Dual Employment

"Generally, one person may hold two offices simultaneously unless a constitutional or statutory prohibition bars concurrent holding of the positions, or unless the offices are incompatible."[7] Two offices are incompatible if one is subordinate to the other or if there is an inherent inconsistency between the two offices.[8]

Examples of statutory prohibitions on holding simultaneous offices: town board member and town ZBA member (Town Law § 267(3)); two city offices (Second Class Cities Law § 19); elective and appointive village offices (Village Law § 3-300(3)).

Examples of incompatible offices: town board member and secretary to town ZBA (1990 Op. Atty. Gen. (inf.) 1099); town ZBA clerk and assistant town building inspector (1964 Op. Atty. Gen. (inf.) Jan. 23); county planning commission chair and ZBA member of village within same county (Op. Atty. Gen. (inf.) 86-36); village trustee and member of village housing authority (1976 Op. Atty. Gen. (inf.) 198).

(3) Miscellaneous Ethics Requirements

Applicable sections: New York State General Municipal Law §§ 805-a, 805-b

Penalty for violation: disciplinary action

Prohibitions:

(a) *Requesting gifts.* An officer or employee may not request a gift where it might appear that the gift was intended to reward or influence him or her in performing his or her official duties.

(b) *Accepting gifts.* An officer or employee may not accept a gift (or gifts) worth $75 or more where it might appear that the gift was intended to reward or influence him or her in performing his or her official duties.

(c) *Disclosing confidential information.* An officer or employee may not disclose confidential information that he or she acquired in the course of his or her official duties.

(d) *Using confidential information.* An officer or employee may not use confidential information to further his or her personal interests.

(e) *Matters before your agency.* An officer or employee may not be paid (or make an agreement to be paid) in connection with any matter before his or her agency or an agency over which he or she has jurisdiction, or an agency to which he or she has the power to appoint someone.

(f) *Contingent fees.* An officer or employee may not be paid (or make an agreement to be paid) in connection with any matter before any agency of the municipality where the payment depends on action by the agency with respect to the matter (but a fee based on the reasonable value of the services performed can be fixed at any time).

(4) Disclosure

(a) *Disclosure of interests in contracts (New York State General Municipal Law § 803).* See Item (1) above.

(b) *Disclosure in land use applications (New York State General Municipal Law § 809).* Applicants in land use matters must disclose (i) the name and residence of State

officers, officers and employees of the municipality, and officers and employees of any municipality of which the municipality is a part, who have an interest in the applicant and (ii) the nature and extent of the interest. Officials are deemed to have an interest in the applicant if they or a family member is the applicant, works for the applicant, has stock in the applicant, is a member of a partnership or association applicant, or has an agreement with the applicant to receive anything if the application is approved. A "knowing and intentional" violation is a misdemeanor. By common law, the interested municipal official must recuse.

(c) *Annual financial disclosure (New York State General Municipal Law §§ 810–813).* Certain officials must file annual financial disclosure reports.[9]

Endnotes

1. N.Y. Gen. Mun. Law §§ 800(4) (excluding New York City from the definition of "municipality" for Article 18 purposes), 810(1) (defining "political subdivision" for financial disclosure purposes to include New York City).
2. *See* Henry G. Miller & Mark Davies, *Why We Need a New State Ethics Law for Municipal Officials*, Footnotes, Winter 1996, at 5 (County Lawyers' Association of the State of New York); *Final Report of the Temporary State Commission on Local Government Ethics*, 21 Fordham Urban Law Journal 1 (1993); Mark Davies, *New Municipal Ethics Law Proposed*, 5 Municipal Lawyer, March/April 1991, at 1.
3. In regard to adopting a local conflicts of interest law or resolution, see Mark Davies, *Addressing Municipal Ethics: Adopting Local Ethics Laws*, Chapter 5 in Ethics in Government—The Public Trust: A Two-Way Street (NYSBA 2002); Mark Davies, *Empowering County Ethics Boards*, Footnotes, Spring 1999, at 11 (County Lawyers' Association of the State of New York); Mark Davies, *Keeping the Faith: A Model Local Ethics Law - Content and Commentary*, 21 Fordham Urban Law Journal 61 (1993); Mark Davies, *Considering Ethics at the Local Government Level*, Chapter 7 in Ethical Standards in the Public Sector (American Bar Association 1999); Mark Davies, *Ethics in Government and the Issue of Conflicts of Interest*, Chapter 7 in Government Ethics and Law Enforcement: Toward Global Guidelines (Praeger 2000).
4. *See also* Mark Davies, *Article 18 of New York's General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*, 59 Albany Law Review 1321 (1996) (a comprehensive review of Article 18 that remains up to date); Mark Davies, *Ethics Laws for Municipal Officials Outside New York City*, in 1 NYSBA Government, Law and Policy Journal, Fall 1999, at 44; Steven G. Leventhal, *Running a Local Municipal Ethics Board: Tips for Drafting Advisory Opinions*, Talk of the Towns & Topics, May/June 2004; Mark Davies, *Working Rules on Ethics for Zoning Boards of Appeals*, Talk of the Towns & Topics, March/April 1996, at 28 and *An Ethics Checklist for Zoning Board Members*, Talk of the Towns & Topics, May/June 1996, at 23. Since 2003 the *Municipal Lawyer* has published a regular column on municipal conflicts of interest, including columns on, for example, compatibility of office, inspectors general, enforcement, New York City's conflicts of interest law, establishment of a conflicts of interest training program, and ethical considerations for town attorneys.
5. N.Y. Gen. Mun. Law § 800(4).
6. N.Y. Gen. Mun. Law § 800(5); N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 603(9).
7. Op. Atty. Gen. (Inf.) No. 2002-11 (citation omitted.)
8. *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874); *see* James D. Cole, *Compatibility of Office*, 18 Municipal Lawyer, Summer 2004, at 19.
9. Mark Davies, *The 1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Change*, 11 Pace Law Review 243 (1991) (the Financial Disclosure Law, as interpreted by the former State agency responsible for administering it); Mark Davies, *New Financial Disclosure Law Becomes Effective January First*, CityLaw, January/February 2004, at 1 (review of changes to New York City's financial disclosure law, including discussion of Article 18's financial disclosure requirements).

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