

# Local Government Ethics: A Summary and Hypotheticals for Training Municipal Officials<sup>1</sup>

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New York State's standards of ethical conduct for municipal officials,<sup>2</sup> contained in Article 18 of the General Municipal Law and in relevant judicial decisions, present a complex and confusing array of rules for local government officers and employees, requiring careful training by municipal counsel. In the authors' experience, a discussion of hypothetical

situations provides the most effective training. This article sets out—in bullet point format—each of the relevant rules, followed by hypotheticals that municipal attorneys may employ to help explain those rules.<sup>3</sup>

## Prohibited Interests in Municipal Contracts

*Relevant Gen. Mun. Law Sections:* 800-805.

**Penalty for Violation:** The contract is void and cannot be ratified. A willful and knowing violation by an official is a misdemeanor.<sup>4</sup>

**Rule:** 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.

### *Elements of a Violation:*

- (1) **"Contract."** The matter must involve a contract with the municipality. "'Contract' means any claim, account or demand against or agreement with a municipality, express or implied...."<sup>5</sup> Note that the official does not have to be a party to the contract.

**Hypothetical:** When leaving a restaurant with her family one Saturday night, a village trustee is struck by a village sanitation truck. The trustee sues the village. The lawsuit is a "contract with the municipality."

**Hypothetical:** The village clerk requires an area variance to build a deck onto his home. In one instance, the Zoning Board of Appeals ("ZBA") grants the variance. In another instance, the ZBA refuses to grant the variance, and the village clerk brings an Article 78 proceeding against the ZBA. The variance is not a contract with the village. The Article 78 proceeding is.



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- (2) **"Interest."** The municipal officer or employee, or a person or firm associated with the officer or employee, must have an interest in the contract, that is, the officer or employee or associated person or firm must receive a financial benefit as a result of that contract.

"Interest" means 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.... [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.<sup>6</sup>

**Hypothetical:** A town board member's thirty-five-year-old son owns a small construction company, which the town hires to repair the porch on town hall. The town board member has no financial interest in the firm and no financial relationship with his son. The town board member votes to award the contract to his son. The town board member has no "interest" in the contract because neither he nor any of the associated persons cited in the law receives a "pecuniary or material benefit" as a result of the contract.

**Hypothetical:** A village mayor hires her husband as her secretary in village hall. The mayor is not deemed to have an interest in the employment contract between the village and the mayor's husband because employment contracts are excluded from the definition of "interest."

**Hypothetical:** A town solicits sealed bids for a major renovation of town hall. The wife of one of the bidders sits on the town board, but she completely recuses (disqualifies) herself from having anything to do with the project. The husband's firm proves to be the lowest bidder. The town board member is deemed to have an "interest" in that contract between her husband and the town, and the contract is prohibited even though the bids were sealed and she recused herself.

**Hypothetical:** A town board member in the Southern Tier is a partner in a firm that owns the only dump in the area for bulk items. The town contracts with the firm to pick up and dispose of such items for town residents. The town board member recuses himself from having anything to do with the contract, either on behalf of the town or on behalf of the firm, and forgoes all profit from the contract, assigning it to his partner. Despite recusing himself and forgoing any profit, the town board member is deemed to have an interest in the contract, and the contract is prohibited.

**Hypothetical:** Same facts as in the preceding example, except the firm is a corporation in which the town board member is an investor only—that is, he has no managerial or other responsibility—owning five percent of the stock of the corporation. Same result. The contract is prohibited.

- (3) **Control.** The municipal officer or employee must have some control over the contract. The interest in the contract is prohibited

[W]hen such 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<sup>7</sup>

Note that additional rules apply to chief fiscal officers, treasurers, and their deputies and employees.<sup>8</sup>

**Hypothetical:** A village trustee is a partner in an environmental engineering firm. The village planning board hires the firm to assist in reviewing a major proposed development. The village trustee recuses himself from any involvement in the matter, both on behalf of the village and on behalf of the firm, and assigns all profits from the matter to his partners. The village trustee has the requisite control over the contract because he is a member of the board that appoints the planning board members. As noted above, his recusal and forgoing of profits make no difference. The contract is prohibited.

- (4) **Exceptions.** In addition to contracts of employment, the law, in sections 802(1) and 802(2),

specifies sixteen exceptions to the prohibition on a municipal officer or employee having an interest in a contract with the municipality if he or she has any control over that contract.<sup>9</sup> The most common exceptions involve:

- 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;<sup>10</sup>
- Having an interest in a contract between the municipality and a not-for profit organization;<sup>11</sup>
- 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);<sup>12</sup>
- Having an interest in a contract where the interest arises solely from stockholdings and the officer or employee owns or controls, directly or indirectly, less than five percent of the stock;<sup>13</sup> and
- Having an interest in municipal contracts where the total amount paid under the contracts is no more than \$750 during the fiscal year.<sup>14</sup>

**Hypothetical:** A common council member is counsel to a local law firm. As counsel, he does not participate in the profits of the firm but receives a percentage of the billings from his clients. The city contracts with the law firm to provide certain legal services to the city. The common council member is not involved in the matter at the firm and receives no compensation as a result of the firm's work on the matter. His interest in the firm's contract with the city is not prohibited. Note that, if he were a partner in the firm, the exception would not apply and the contract would be prohibited.

**Hypothetical:** A city council member is the executive director of a non-profit social services agency, with which the city contracts. Although a portion of the city council member's salary as executive director will be paid by the city contract, his interest in that contract is not prohibited because the agency is a not-for-profit organization.

**Hypothetical:** The wife of an insurance agent who has an insurance contract with a town is elected to the town board. The town board member's interest in the town's insurance contract with her husband is grandfathered; however, the contract may not be renewed as long as she serves on the town board.

**Hypothetical:** A city IT director owns \$25,000 in Dell stock. He purchases for the city 100 Dell computers. His interest in the contract with Dell is not prohibited because he owns less than five percent of Dell's stock.

**Hypothetical:** A village trustee owns a stationery store from which the village makes occasional purchases, amounting to no more than \$500 in any one fiscal year. Because the total amount paid to the trustee's stationery store does not exceed \$750 in the fiscal year, her interest in the village's contracts with the store is not prohibited.

**Caveat:** The above provisions address only prohibited interests. They do not address prohibited conduct. Some local ethics codes prohibit a municipal officer or employee from taking an action that benefits himself or herself or an associated person or firm. The common law, discussed below, may also prohibit such self-dealing. Accordingly, recusal is often required, even if the contract is not otherwise prohibited.

**Special Note for Nassau County:** Certain prohibited interest restrictions apply to members of municipal governing boards in regard to real property in Nassau County.<sup>15</sup>

#### (5) Violations.

If the municipal officer or employee has an interest in a contract with the municipality and control over that contract, and no exception applies, then the interest is prohibited.<sup>16</sup> As stated above, the contract is void and cannot be ratified, and a willful and knowing violation by the official is a misdemeanor.<sup>17</sup>

If the municipal officer or employee has an interest in a contract with the municipality *but no* control over that contract, then interest is *not* prohibited but the official must disclose the interest, as discussed in the next section.<sup>18</sup>

If the municipal officer or employee has an interest in a contract with the municipality and control over that contract *but one of the exceptions set forth in General Municipal Law § 802(1) applies*, then interest is *not* prohibited but the official must disclose the interest, as discussed in the next section.<sup>19</sup>

If the municipal officer or employee has an interest in a contract with the municipality and control over that contract *but one of the exceptions set forth in General Municipal Law § 802(2) applies*,

then interest is *not* prohibited and the official need *not* disclose the interest.<sup>20</sup>

These rules may be summarized as follows:

Interest in Contract with Municipality	Control Over Contract	Exception Applies	Required Action
No	N/A	N/A	None—interest not prohibited
Yes	No	N/A	None—interest not prohibited
Yes	Yes	No	Interest prohibited
Yes	Yes	§ 802(1) exception	Interest not prohibited but disclosure required
Yes	Yes	§ 802(2) exception	Interest not prohibited and no disclosure required

#### (6) Penalties

If the official's interest in the municipal contract is prohibited, then the contract is "null, void and wholly unenforceable."<sup>21</sup> Furthermore, the official who has willfully and knowingly violated the prohibition has committed a misdemeanor.<sup>22</sup>

Neither sealed bids, nor the official's recusal, nor the forgoing of any financial benefit obtained as a result of the contract will cure the violation. Furthermore, the municipality may not ratify the void contract and waivers of the prohibited interest provision are not available, although—in certain instances—the rule of necessity may apply, as discussed below in the section on common law conflicts of interest.

#### Interests in Municipal Contracts: Disclosure

**Relevant Gen. Mun. Law Section:** 803.

**Penalty for Violation:** A willful and knowing violation by an official is a misdemeanor.<sup>23</sup>

**Rule:** In certain instances, a municipal officer or employee who has an interest in a contract with his or her municipality must disclose that interest.

#### When Disclosure is Required:

If a municipal officer or employee has, will have, or later acquires an interest in an actual or proposed contract, purchase agreement, lease agreement,

or other agreement, including oral agreements, with his or her municipality, he or she must publicly disclose the interest.<sup>24</sup>

If the spouse of a municipal officer or employee has, will have, or later acquires an interest in an actual or proposed contract, purchase agreement, lease agreement, or other agreement, including oral agreements, with the municipal officer or employee's municipality, the municipal officer or employee must publicly disclose the interest.<sup>25</sup>

Note that disclosure is required where the spouse of the official has an interest in the contract even where that interest is not imputed to the official (for example, where the spouse's partnership has an interest in the contract).<sup>26</sup> Further, a potential interest in a contract, or even a proposed contract, must be disclosed, even though the potential interest in a contract, or the actual interest in a proposed contract, is not prohibited.<sup>27</sup>

**Hypothetical:** A law firm, in which a village trustee is a partner, contracts with the village to provide legal services. The trustee's interest in the contract is prohibited, and the trustee must publicly disclose that interest.

**Hypothetical:** A law firm, in which a village trustee is an associate, contracts with the village to provide legal services. The trustee has nothing to do with the contract either on behalf of the village or the law firm, and her compensation from the law firm is not affected by the contract. The trustee's interest in the contract is not prohibited, but she must publicly disclose that interest.

**Hypothetical:** A corporation, a director of which is the husband of a village trustee, contracts with the village to supply computers. The husband's interest in the corporation is not imputed to the trustee (and therefore the trustee has no interest in the corporation's contract with the village), but the trustee must still publicly disclose her husband's interest.

**Hypothetical:** A town board member owns a law firm that will be merging with another law firm. That other law firm has bid on a town contract to provide legal services. The town board member must publicly disclose that future interest in the proposed contract with the town. If the contract is awarded to the law firm, the town board member will have a prohibited

interest in the contract after the merger, and he will be required to resign from the town board or from the law firm.

**What Disclosure is Required:** The municipal officer or employee "shall publicly disclose the nature and extent of such interest in writing..."<sup>28</sup>

**To Whom Disclosure Must Be Made:** The disclosure must be made to the official's immediate supervisor and to the governing body of the municipality. Written disclosure must be made and set forth in the official record of the proceedings of the body.<sup>29</sup>

**When Disclosure Must Be Made:** The disclosure must be made "as soon as [the official] has knowledge of such actual or perspective interest."<sup>30</sup>

**Exceptions:** Disclosure is not required where the interest falls within one of the exceptions in section 802(2) of the General Municipal Law.<sup>31</sup>

## Interests in Applicants in Land Use Matters: Applicant Disclosure

**Relevant Gen. Mun. Law Section:** 809.

**Penalty for Violation:** A knowing and intentional violation is a misdemeanor.<sup>32</sup>

**Rule:** Applicants in land use matters must disclose any interests of state and local municipal officials in the applicant.

**When and What Disclosure is Required:** Applicants in land use matters before a municipality must disclose (1) 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 (that is, the person, partnership, or association making the application, petition, or request) and (2) the nature and extent of the official's interest, to the extent known to the applicant.<sup>33</sup>

**To Which Land Use Applications the Disclosure Requirement Applies:** The requirement applies to every 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.<sup>34</sup>

**Deemed Interests in Applicant:** An official is deemed to have an interest in the applicant when the official or his or her spouse, sibling, parent, child, grandchild, or the spouse of any of those family members is

- the applicant;



- an officer, director, partner, or employee of the applicant;
- legally or beneficially owns or controls stock of a corporate applicant or is a member of a partnership or association applicant; or
- a party to an agreement with such an applicant, express or implied, whereby he or she may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of the application, petition, or request.<sup>35</sup>

**Special Rule for Nassau County:** In Nassau County, the foregoing rules also apply to party officers.<sup>36</sup>

**Recusal:** Although Article 18 does not require recusal by an official interested in the applicant or the application, the common law does.<sup>37</sup>

**Hypothetical:** The wife of a social worker with the county Department of Social Services is an office assistant with a construction firm, which applies to the planning board of a village within the county for site plan approval. The application for site plan approval must disclose the name, residence, and county position of the social worker, unless the construction firm is unaware that the husband of its office assistant works for the county.

**Exception:** Ownership of less than five percent of the stock of a corporation whose stock is listed on the New York or American Stock Exchanges does not constitute an interest for the purposes of the applicant disclosure requirements.

## Prohibited Conduct: Introduction

In addition to prohibiting, and requiring disclosure of, certain interests in municipal contracts and applicants in land use matters, Article 18 also contains, in very anemic form, certain restrictions on conduct by municipal officials. These provisions, adopted in 1970, are set forth in section 805-a of the General Municipal Law.

## Gifts

**Relevant Gen. Mun. Law Section:** 805-a(1)(a).

**Penalty for Violation:** None, apart from disciplinary action (“fined, suspended or removed from office or employment in the manner provided by law”) for a knowing and intentional violation.<sup>38</sup>

**Rule:** A municipal officer or employee may not request nor accept a gift in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, where BOTH of the following conditions are present:

### Value of Gift:

The gift is worth seventy-five dollars or more (or, by implication, where multiple gifts are worth seventy-five dollars or more in the aggregate), and

### Circumstances of Gift:

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

**Exception:** A public officer authorized by law to solemnize a marriage may accept compensation having a value of \$100 or less for the solemnization of a marriage at a place other than the public officer’s normal public place of business, and at a time other than the public officer’s normal business hours.<sup>39</sup>

This rule has been criticized as not providing adequate guidance to municipal officers and employees as to the gifts that they may accept and those that are prohibited. In his article proposing a model code of ethics,<sup>40</sup> co-author Mark Davies recommended a clearer standard for adoption by local municipalities in their own codes of ethics. Professor Davies recommended that local municipalities prohibit officers and employees from *soliciting* gifts from a donor who has received or sought a benefit within the previous twenty-four months, and from *accepting* gifts from donors who the officer or employee knows or has reason to know has received or sought a benefit within the previous twenty-four months.<sup>41</sup> Because a local municipality cannot “opt out” of the minimum standards of conduct established by Article 18, a local ethics code may reduce or eliminate the monetary threshold for prohibited gifts, but may not raise the threshold to an amount greater than seventy-five dollars.<sup>42</sup>

Clarity of regulation is particularly important in areas where the standards of conduct in the public sector differ from those of the private sector, and where the unwary public officer or employee may unwittingly transgress. The regulation of gifts is a notable example of standards applicable in the public sector that differ markedly from the practices prevalent in the private sector. In the private sector, gifts are freely exchanged. The practice is so widely accepted that federal tax law recognizes business entertainment as an “ordinary and necessary” tax-deductible business expense.<sup>43</sup> However, the solicitation or acceptance of gifts and favors by government officers or employees tends to create an improper appearance at the least, and may be a corrupting influence. In some cases, this private sector norm may amount to a public sector crime.<sup>44</sup>

**Hypothetical:** A town board member and a local developer are long time personal friends. They and their spouses traditionally celebrate their birthdays together at an expensive local restaurant. The cost of dinner always exceeds the sum of seventy-five dollars per person. Each friend picks up the tab on the birthday of the other. Shortly after the board member's fiftieth birthday, the developer applies to the town board for approval of a major development project. The cost of the birthday celebration is a gift to the town board member. The value of the gift exceeds the threshold amount of seventy-five dollars. However, based on the longtime friendship and history of birthday celebrations, it would not be reasonable to infer that the gift was intended to influence the board member's official action; nor would it be reasonable to expect that the gift would have such an influence. For the same reasons, it would be unreasonable to conclude the gift was intended as a reward for a previous official action. General Municipal Law Section 805-a would not prohibit the gift.

**Hypothetical:** The president of a county funded not-for-profit organization invites the County Executive to attend its annual dinner dance. Tickets to the event are sold at a price that exceeds seventy-five dollars each. The County Executive attends, and presents the president with a citation recognizing the organization's charitable work. Complimentary attendance at the ceremonial event for an official purpose, and even consumption of food and beverages incidental to such attendance, would not constitute a prohibited gift to the County Executive. The County Executive may also send a representative to attend in her place.

**Hypothetical:** In the previous example, the president of the county-funded not-for-profit organization invites the County Executive to bring her spouse to the dinner dance, also as a guest of the organization. Complimentary attendance at the dinner dance by the County Executive's spouse would not serve any official purpose and it might reasonably be inferred that the gift was intended to influence or reward the County Executive in connection with the county funding of the organization. Therefore, the County Executive may not accept the invitation to bring her spouse to the dinner dance as a guest of the organization.

**Hypothetical:** A village vendor makes the maximum contribution allowed by law to the campaign of the incumbent mayor. The amount of the contribution exceeds the sum of seventy-five dollars. Campaign contributions are not regulated by General Municipal Law Section 805-a, and therefore are not gifts for the purposes of that statute.<sup>45</sup> Rather, campaign contributions are subject to regulation under the New York Election Law.<sup>46</sup>

**Hypothetical:** A worker employed in the county parks department is responsible for coordinating special events at a county-owned nature preserve. The worker coordinates a film director's use of the facility for the filming of a movie scene. Several days later, two cases of wine are delivered to the worker's office together with a thank you note from the grateful film director. Each individual bottle of wine has a retail value of less than seventy-five dollars, but the cost of the two cases of wine exceeds that amount. The worker asks the county Board of Ethics whether the bottles may be divided among all of the workers at the facility, with each worker receiving only one bottle of wine. The Board of Ethics advises the worker that "re-gifting" the wine would not reduce the value of the original gift to the worker and, therefore, the gift of wine may not be accepted.

### **Bribery and Related Offenses (Penal Law Art. 200)**

New York's bribery statutes prohibit the offering or conferring of a "benefit" on a public servant pursuant to an agreement or understanding that his or her "vote, opinion, judgment, action, decision or exercise of discretion as a public servant" would be influenced.<sup>47</sup> For purposes of the Penal Law, "benefit" is defined as "any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary."<sup>48</sup> If the benefit is conferred as a reward for the official's actual violation of his or her duty, it may also constitute a felony.<sup>49</sup> The donor and the beneficiary are both subject to prosecution.<sup>50</sup> The sentencing range increases with the amount of the bribe and the gravity of the official's misconduct.<sup>51</sup>

In a bribery prosecution, the People must prove beyond a reasonable doubt that there was a corrupt purpose in making the offer or conferring the benefit.<sup>52</sup> Even in the absence of a corrupt purpose, a defendant may be convicted of the misdemeanor of "giving or receiving unlawful gratuities" where a benefit is offered to or conferred upon an official "for having engaged in official conduct" which the official was required or authorized to perform, and for which that official was not entitled to any additional compensation.<sup>53</sup> The New York Penal Law does not provide a safe harbor for gratuities having a value of less than any stated threshold. Simply put, there can be no "tipping" in government service.

**Hypothetical:** After two police officers complete an investigation, clearing the president of a trucking company of any wrongdoing in connection with a motor vehicle accident, the trucking company president gives them ten dollars, saying "Here, you fellows, buy

some coffee for all the homework you have done.” The gift could not have influenced the police investigation because it was given after the investigation was completed. Nevertheless, the company president was prosecuted and convicted of the crime of giving an unlawful gratuity. The court held that “there need not be a possibility or probability of preferential treatment to have a violation....” Instead, a prosecutor need only show that the donor’s “purpose in giving the gift was to give additional compensation, or a reward, gratuity or some other favor” for an official to act.<sup>54</sup>

## Confidential Information

**Relevant Gen. Mun. Law Section:** 805-a(1)(b).

**Penalty for Violation:** None, apart from disciplinary action (“fined, suspended or removed from office or employment in the manner provided by law”) for a knowing and intentional violation.<sup>55</sup>

**Rule:** A municipal officer or employee may not disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.

The term “confidential information” is not defined in the General Municipal Law, nor in the Public Officers Law, which contains a similar provision applicable to state employees.<sup>56</sup>

Private sector firms devote considerable resources to the protection of proprietary information, customer lists, formulas, and trade secrets. However, in the public sector, openness and transparency in government are viewed as a fundamental public policy, essential to keep government accountable and to foster public confidence in government. In New York, this fundamental public policy is expressed in the form of the Freedom of Information Law (FOIL), which makes most government records available for public inspection and copying, and the Open Meetings Law (OML), which makes most government meetings open to attendance by the public.<sup>57</sup>

In order to reconcile the ethical duty of confidentiality under GML § 805-a with the duty to disclose under FOIL and the OML, it is reasonable to conclude that the term “confidential information” has a different meaning for purposes of the GML than it does for purposes of FOIL and the OML; and that GML § 805-a would be violated if a municipal officer or employee made an unauthorized disclosure of information that satisfied either of the following two criteria:

**Mandatory Denial of Access:** Information that is prohibited from disclosure by Federal or state law; or

**Discretionary Denial of Access:** Information that the municipality has made a reasoned decision to withhold from public disclosure in the lawful exercise

of the discretion afforded to the municipality by FOIL or the OML.<sup>58</sup>

Under this approach, each discretionary denial of access would be subject to Article 78 review to determine whether the municipality abused its discretion.<sup>59</sup>

Generally, government information is presumptively subject to public disclosure.<sup>60</sup> However, that same information may be presumptively confidential if the custodian of the information is a former government attorney. Government attorneys must adhere not only to the standards of conduct applicable to their conduct as government officers or employees, they also must adhere to the standards of conduct applicable to attorneys engaged in the practice of law.

Rule 1.6 of The Rules of Professional Conduct<sup>61</sup> regulates the disclosure of confidential information by public and private sector attorneys. The Rule defines confidential information as information that is:

- Protected by the attorney-client privilege;
- Likely to be embarrassing or detrimental to the client if disclosed; or
- Information that the client has requested be kept confidential.

Rule 1.11 imposes additional ethical requirements for current and former government attorneys. This Rule defines “confidential government information” as “information that has been obtained under governmental authority and that, at the time the Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.”<sup>62</sup> A former government attorney is disqualified from representing a private client where the lawyer obtained confidential government information about an adverse party that could be used to the disadvantage of the adverse party.

**Hypothetical:** An inmate files a FOIL request seeking the entire personnel file of the arresting officer. Pursuant to N.Y. Civil Rights Law section 50-a, personnel records used to evaluate performance toward continued employment or promotion under the control of any police agency or department of the state or any political subdivision are confidential, and *may not* be disclosed without the express written consent of the police officer or a court order.<sup>63</sup> The responsible information officer must review the record to distinguish between information protected by the Civil Rights Law, and information that may be disclosed pursuant to FOIL.<sup>64</sup> Information that is not protected from disclosure may still fall within a FOIL exception, such as the exception for information the disclosure of which would result in an unwarranted invasion of personal privacy (such as the police officer’s residence address). Where an excep-



tion applies, the municipality *may* deny access to the information, subject to judicial review.

**Hypothetical:** In the previous example, the inmate's attorney requests the information through a discovery demand during the course of pending litigation. The inmate's counsel also demands production of any written advice given by the municipal attorney to the corrections department regarding its policy for conducting strip searches at the jail. A former staff attorney—now serving as outside counsel—represents the municipality in the case. The attorney must adhere to the statutory confidentiality imposed by the Civil Rights Law and, further, may not disclose privileged information without the consent of the municipality.<sup>65</sup>

Other examples of information protected by federal or state law include social security numbers, certain information concerning students, and patient health information.

### Compensation for Matters Before an Official's Own Agency

**Relevant Gen. Mun. Law Section:** 805-a(1)(c).

**Penalty for Violation:** None, apart from disciplinary action ("fined, suspended or removed from office or employment in the manner provided by law") for a knowing and intentional violation.<sup>66</sup>

**Rule:** A municipal officer or employee may not receive, or impliedly or expressly agree to receive, compensation for services rendered in relation to any matter before the official's own agency or an agency over which the official has jurisdiction or the power to appoint any official.

**Hypothetical:** A village resident asks a village trustee for help in a matter the resident has before the village planning board. The trustee tells the resident that, while the trustee cannot himself be involved in the matter, the resident may wish to call the trustee's law partner. The trustee also states that he will recuse (disqualify) himself from having anything to do with the matter should it appear before the village board. The trustee has reached an implied agreement with the resident to receive compensation, by way of the law firm, in relation to a matter pending before an agency the members of which the trustee has the power to appoint. The trustee's recusal will not cure the violation.

**Hypothetical:** A town zoning board of appeals hires its own separate counsel, who does not represent any other town agency. The counsel may appear before the planning board on behalf of a private client.

**Hypothetical:** A town zoning board of appeals hires its own separate counsel. The town attorney, who never represents the ZBA, may appear before the ZBA on behalf of a private client.

**Caveat:** The above provisions address prohibited representation only under the General Municipal Law. Some local ethics codes contain more extensive restrictions on a municipal official representing individuals in regard to matters before his or her municipality. In addition, the Rules of Professional Conduct governing the practice of law may prohibit representation that the General Municipal Law would allow.

### Contingency Fee Agreements

**Relevant Gen. Mun. Law Section:** 805-a(1)(c).

**Penalty for Violation:** None, apart from disciplinary action ("fined, suspended or removed from office or employment in the manner provided by law") for a knowing and intentional violation.<sup>67</sup>

**Rule:** A municipal officer or employee may not receive, or enter into an agreement to receive, compensation for services to be rendered in connection with a matter pending before any agency of the municipality, where the compensation is dependent upon the agency's action in the matter.<sup>68</sup> This rule does not prohibit the fixing at any time of fees based on the actual value of the services rendered.

**Caveat:** Some local ethics codes contain more extensive restrictions on a municipal official receiving compensation in connection with matters before his or her municipality.

**Hypothetical:** A deputy county clerk is knowledgeable about real estate matters, and agrees to act as the representative of an applicant seeking site plan approval from the County Planning Commission. The deputy clerk is confident that she will succeed in obtaining approval of the application. She agrees to forgo any compensation unless the application is approved and, in that case, to accept a fee equal to one percent of the property's appraised value. The deputy clerk may not enter into an agreement to accept compensation that is dependent on the Planning Commission's approval of the application. The deputy clerk may receive a fee based on the actual value of her services, unless such an arrangement is prohibited by the local code of ethics.

### Common Law Conflicts of Interest

Ethics regulations are not only designed to promote high standards of official conduct, they are also designed to foster public confidence in government. An appearance of impropriety undermines public confidence. Therefore, courts have found that government officials have an implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.<sup>69</sup>



Courts may set aside board decisions (and by implication, other municipal actions) where decision-making officials with conflicts of interest have failed to recuse themselves or where decision-making officials have been improperly influenced by a conflicted colleague. A disqualifying interest is one that is personal or private. It is not an interest that an official shares with all other citizens or property owners. A prohibited appearance of impropriety will not be found where the improper appearance is speculative or trivial.

In considering whether a prohibited appearance of impropriety has arisen, the question is whether an officer or employee has engaged in or influenced a decisive official action despite having a disqualifying conflict of interest that is clear and obvious, such as where the action is contrary to public policy, or raises the specter of self-interest or bias.

Where a contemplated action by an official might create an appearance of impropriety, the official should refrain from acting. Officials should be vigilant in avoiding real and apparent conflicts of interest. They should consider not only whether they believe that they can fairly judge a particular application or official matter but also whether it may appear that they did not do so. Even a good faith and public spirited action by a conflicted public official will tend to undermine public confidence in government by confirming to a skeptical public that government serves to advance the private interests of public officials rather than to advance the public interest.

At the same time, officials should be mindful of their obligation to discharge the duties of their offices and should recuse themselves only when the circumstances actually merit recusal.<sup>70</sup> Members of voting bodies, and elected legislators in particular, should exercise such restraint because recusal and abstention by a member of a voting body has the same effect as a “nay” vote,<sup>71</sup> and, in the case of an elected legislator, also has the effect of disenfranchising voters.

**Hypothetical:** On the eve of a change in its membership, the Town Board votes to approve a major development project. The decisive vote is cast by a trustee who is vice president of a public relations firm under contract to the developer’s parent company. Despite the fact that the Board member’s vote did not violate Article 18 of the New York General Municipal Law,<sup>72</sup> the court annulled the Board’s decision approving the development project due to the likelihood that the Board member’s vote was influenced by his personal interests rather than by the public interest.<sup>73</sup>

**Hypothetical:** A controversial development project is approved by votes of the Zoning Board of Appeals and the Town Board. At the ZBA, two Board members, who are employed by the applicant, cast the decisive votes. At the Town Board, a Board member who is

employed by the applicant casts the decisive vote. Despite the fact that the respective board members’ votes did not violate Article 18 of the New York General Municipal Law, the Court annulled the decisions of the ZBA and the Town Board approving the development project.<sup>74</sup>

The Court noted that the employment of a board member by the applicant might not require disqualification in every instance. However, the failure of the board member-employees to disqualify themselves here was improper because the application was a matter of public controversy and their votes in the matter were likely to undermine “public confidence in the legitimacy of the proceedings and the integrity of the municipal government.”

**Hypothetical:** Three members of the Village Planning Board sign a petition in support of a developer’s project and application for rezoning. In addition, the Planning Board’s chairperson writes a letter to the Mayor in support of the project and application for rezoning, stating that she would really like to see new housing available to her should she decide to sell her home and move into something that would not require maintenance. Despite the fact that the Planning Board’s vote to approve the developer’s site plan did not violate Article 18 of the New York General Municipal Law, the court held that the appearance of bias arising from the signatures of the three Planning Board members on the petition in support of the project and application, and the actual bias of the Chairperson manifested by her letter to the Mayor expressing a personal interest in the project, justified annulment of the Planning Board’s site plan approval.<sup>75</sup>

**Hypothetical:** The Village Board of Trustees approves an amendment to the Zoning Code that would allow cluster zoning of properties owned by the board members. Most land in the Village is similarly affected, and the disqualification of the Board members would preclude all but a handful of property owners from voting in such matters. The board members were not precluded from voting on the zoning amendments. A common theme among many of the New York cases in which courts have declined to invalidate a municipal action based on the alleged conflicts of municipal officers and employees was the absence of a personal or private interest as distinguished from an interest shared by other members of the public generally.<sup>76</sup>

**Hypothetical:** In the previous example, the Board of Trustees votes to change the zoning status of only a handful of properties in the village, all of which are owned by members of the board. The court distinguished between the “clear and obvious” conflict that would arise from a vote to change the zoning status of particular properties owned by the voting Board members, and their permissible vote to change the

zoning status of other properties in which they had no interest.<sup>77</sup>

**Hypothetical:** The Town Planning Board grants preliminary approval of a residential subdivision. The developer hires a member of the Town Board to construct a road meeting specifications required by the Town Engineer, and offers the road for dedication to the Town, together with a bond to guarantee the repair of any damage to the road surface that might occur during construction. A dispute arises between the developer and the contractor/board member over his alleged failure to pay a subcontractor. When the Town Board considers the offer of dedication, the Town Engineer recommends that the offer of dedication be declined until a sufficient number of homes are constructed. With the contractor/board member recusing himself from the vote, the Town Board disapproves the dedication. The developer challenges the decision in an Article 78 proceeding, alleging, among other things, that the Town Board made its decision in advance of the vote and that the contractor/board member had recused himself from the official vote only to conceal his conflict of interest and efforts to undermine the subdivision project by influencing members of the Town Board to disapprove the road dedication. The Court held that the allegation that the contractor/board member's dispute with the developer resulted in the Town Board's denial of the dedication, if proved at trial, would provide a basis for setting aside the Town Board's determination, even though the conflicted Board member recused himself from the vote.<sup>78</sup>

Recusal involves more than the mere abstention from voting. A properly recused officer or employee will refrain from participating in the discussions, deliberations or vote in a matter.<sup>79</sup> The New York Attorney General has opined that:

The board member's participation in deliberations has the potential to influence other board members who will exercise a vote with respect to the matter in question. Further, we believe that a board member with a conflict of interest should not sit with his or her fellow board members during the deliberations and action regarding the matter. The mere presence of the board member holds the potential of influencing fellow board members and additionally, having declared a conflict of interest, there would reasonably be an appearance of impropriety in the eyes of the public should the member sit on the board. Thus, it is our view that once a board member has declared that he or she has a conflict of interest in a particular matter before the board,

that the board member should recuse himself or herself from any deliberations or voting with respect to that matter by absenting himself from the body during the time that the matter is before it.<sup>80</sup>

**Hypothetical:** The applicant is a long-term member of the board, but disqualifies himself from any Board consideration of a particular application. The wife of one of the board members teaches piano to the applicant's daughter and was given a Christmas gift for doing so. The applicant is active in local politics. One of the board members purchased homeowners' and automobile insurance from the applicant. The mother-in-law of a board member voiced her criticism of opponents to the applicant's project. The court concluded that these claims did not rise above the type of speculation that would effectively make all but a handful of citizens ineligible to sit on the Board.<sup>81</sup> Generally, a mere social relationship between a board member and the applicant will not give rise to a disqualifying conflict of interest where the board member will derive no benefit from the approved application.<sup>82</sup>

**Hypothetical:** A board chairman is president of a local steel fabrication and supply company that sells products to a local construction firm owned by one of the applicant's principals. During the previous three years, the construction firm purchased between \$400 and \$3,000 in steel products from the chairman's steel company. During the same period, the chairman's steel company had annual gross sales of approximately \$2,000,000 to \$3,000,000. Based on these facts, the New York Attorney General concluded in an informal opinion letter that a conflict of interest existed and that the chairman was required to recuse himself in the matter. However, the town board of ethics reached a contrary conclusion, reasoning that the amount paid to the chairman as a result of the purchases by the applicant's construction firm was insufficient to create a conflict of interest. The court found that the determination of the town board of ethics was rational and entitled to considerable weight and found that under the circumstances, the likelihood that such a de minimis interest would or did in fact influence the chairman's judgment or impair the discharge of his official duties was little more than speculative. The court concluded that the chairman was not required to recuse himself.

Not every financial relationship between a board member and parties interested in a matter before the board will give rise to a disqualifying conflict of interest. As the court observed:

Resolution of questions of conflict of interest requires a case-by-case examination of the relevant facts and circumstances and the mere fact of

employment or similar financial interest does not mandate disqualification of the public official involved in every instance. In determining whether a disqualifying conflict exists, the *extent* of the interest at issue must be considered and where a substantial conflict is inevitable, the public official should not act.<sup>83</sup>

We hope that this discussion of the ethics rules for municipal lawyers and accompanying hypotheticals has been informative. Education and training are vital components of an effective municipal ethics program. They provide helpful guidance to honest officers and employees in recognizing ethical issues when they arise, and in avoiding unintended missteps.

## Endnotes

1. This article is based in part on the authors' prior articles about ethical conduct for municipal officials. See Mark Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officers and Employees*, 19 MUN. LAW. 10 (Summer 2005); see also Steven G. Leventhal, *How to Analyze an Ethics Problem: Recognizing Common Law Conflicts of Interest*, 25 MUN. LAW. 11 (Spring 2011).
2. 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, Boards of Cooperative Educational Services (BOCES), consolidated health districts, urban renewal agencies, town and county improvement districts, industrial development agencies, and fire districts, as well as many other agencies. See N.Y. GEN. MUN. LAW § 800(4) (McKinney 2014). Similarly, "municipal officer or employee" includes all officers and employees of the municipality, *whether paid or unpaid*, with certain exceptions. *Id.* § 800(5) (emphasis added).
3. This article does not address the administrative provisions of Article 18 contained in N.Y. GEN. MUN. LAW §§ 806-808. Nor does this article discuss the financial disclosure provisions set forth in N.Y. GEN. MUN. LAW §§ 810-813. For a discussion of these matters, see Mark Davies, *Enacting a Local Ethics Law—Part II: Disclosure*, 21 MUN. LAW. 8 (Fall 2007); see also Mark Davies, *Enacting a Local Ethics Law—Part III: Administration*, 22 MUN. LAW. 11 (Winter 2008); Mark Davies, *Local Ethics Laws: Model Administrative Provisions*, 22 MUN. LAW. 14 (Summer 2008); Steven G. Leventhal, *Running a Local Municipal Ethics Board*, 22 MUN. LAW. 9 (Fall 2008); Julia Davis, *Review of Annual Disclosure Reports*, 26 MUN. LAW. 19 (Summer 2012); Steven G. Leventhal & Carol L. Van Scoyoc, *The Ethics of Transparency and the Transparency of Ethics: Reconciling the Ethical Duty of Confidentiality Under Article 18 of the GML With the Duty to Disclosure under FOIL and the OML*, 27 MUN. LAW. 54 (Winter / Spring 2013). This article also does not address such standards of conduct as may be contained in the local code of ethics adopted by a particular municipality.
4. N.Y. GEN. MUN. LAW §§ 804, 805 (McKinney 2014).
5. *Id.* § 800(2).
6. *Id.* § 800(3).
7. *Id.* § 801.
8. *Id.* § 801(2). See also N.Y. GEN. MUN. L §§ 800(1), (6) (McKinney 2014) (defining the terms "chief fiscal officer" and "treasurer," respectively).
9. N.Y. GEN. MUN. LAW § 802 (McKinney 2009).
10. *Id.* § 802(1)(b).
11. *Id.* § 802(1)(f).
12. *Id.* § 802(1)(h).
13. *Id.* § 802(2)(a).
14. N.Y. GEN. MUN. LAW § 802(2)(e) (McKinney 2009).
15. See *id.* § 804-a (listing certain prohibited interest restrictions that apply to members of the governing board of a municipality in Nassau County).
16. *Id.* § 801.
17. N.Y. GEN. MUN. LAW §§ 804, 805 (McKinney 2014).
18. *Id.* (emphasis added).
19. *Id.* §§ 801, 803(1) (emphasis added).
20. N.Y. GEN. MUN. LAW §§ 801, 803(2) (McKinney 2005) (emphasis added).
21. *Id.* § 804.
22. *Id.* § 805.
23. *Id.*
24. *Id.* § 803(1).
25. N.Y. GEN. MUN. LAW § 803(1) (McKinney 2005).
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. N.Y. GEN. MUN. LAW § 803(1) (McKinney 2005).
31. *Id.* § 803(2).
32. N.Y. GEN. MUN. LAW § 809(5) (McKinney 2014).
33. *Id.* § 809(1).
34. *Id.*
35. *Id.* § 809(2).
36. *Id.* § 809(3). ("Party officer shall mean any person holding any position or office, whether by election, appointment or otherwise, in any party as defined by subdivision four of section two of the election law.").
37. See, e.g., *Tuxedo Conservation & Taxpayers Ass'n v. Town Bd. of Tuxedo*, 418 N.Y.S.2d 638 (2d Dep't 1979) (invalidating a town board resolution approving a special permit where the decisive vote was cast by a board member who was a vice-president of an advertising firm which handled the account of the parent corporation of one of the developers); *Conrad v. Hinman*, 471 N.Y.S.2d 521 (N.Y. Sup. Ct. 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). These matters are discussed in greater detail in the section on common law conflicts of interest, below.
38. N.Y. GEN. MUN. LAW § 805-a(2) (McKinney 2014).
39. N.Y. GEN. MUN. LAW § 805-b; see also N.Y. DOM. REL. LAW § 11 (McKinney 2011) (providing a detailed list of who may solemnize a marriage).
40. Mark Davies, *Keeping the Faith: A Model Local Ethics Law—Content and Commentary*, 21 FORDHAM URB. L.J. 61 (1993).
41. *Id.*
42. N.Y. GEN. MUN. LAW § 806 (McKinney 2006).
43. See 26 U.S.C.A. § 162 (West 2014) (allowing deduction of ordinary and necessary business expenses); see also 26 U.S.C.A. § 274 (West 2014) (limiting the deductibility of certain entertainment expenses).
44. See N.Y. PENAL LAW §§ 200.00-.56 (McKinney 2004) (codifying crimes of bribery involving public servants).
45. See *DiLucia v. Mandelker*, 501 N.E.2d 32 (N.Y. 1986) (construing New York City Charter section 2604); see also 2005 N.Y. Op. (Inf.) Att'y Gen. 10.



46. N.Y. ELEC. LAW § 14-114, -116, -120, -130 (McKinney 2014).
47. See *supra* note 44.
48. See N.Y. PENAL LAW § 10.00(17) (McKinney 2013) (“‘Benefit’ means any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.”).
49. See *supra* note 44.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* § 200.30; see also N.Y. PENAL LAW § 200.35 (McKinney 2014) (“A public servant is guilty of receiving unlawful gratuities when he solicits, accepts or agrees to accept any benefit for having engaged in official conduct which he was required or authorized to perform, and for which he was not entitled to any special or additional compensation.”).
54. *People v. La Pietra*, 316 N.Y.S.2d 289 (N.Y. Sup. Ct. 1970), *aff’d*, 316 N.Y.S.2d 292 (2d Dep’t 1970).
55. N.Y. GEN. MUN. LAW § 805-a(1)(b) (McKinney 2007).
56. N.Y. PUB. OFF. LAW § 74 (McKinney 2010).
57. See N.Y. PUB. OFF. LAW §§ 84-90 (McKinney 2014) (Freedom of Information Law); see also N.Y. PUB. OFF. LAW §§ 100-11 (Open Meetings Law).
58. See Steven G. Leventhal & Carol L. Van Scoyoc, *The Ethics of Transparency and the Transparency of Ethics: Reconciling the Ethical Duty of Confidentiality Under Article 18 of the GML With the Duty to Disclosure under FOIL and the OML*, 27 MUN. LAW. 54, 59 (Winter/Spring 2013).
59. See *Washington Post Co. v. New York State Ins. Dept.*, 463 N.E.2d 604 (N.Y. 1984).
60. *Id.*
61. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.00, Rule 1.6 (2014).
62. A municipality may claim not only the attorney-client privilege, but also several privileges not available to a private citizen, such as the deliberative privilege and the executive privilege. For a more complete discussion of a municipal attorney’s obligations under Rule 1.11, see ROY D. SIMON, SIMON’S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED (2014 ed.).
63. N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2011).
64. *Id.*
65. See *supra* note 56. See also *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007) (holding that communications passing between a government attorney without policy-making authority and a public official were protected by the attorney-client privilege where the communications evaluated the legality of a policy and proposed policy alternatives because the communications were made for the predominant purpose of soliciting or rendering legal advice).
66. N.Y. GEN. MUN. LAW § 805-a(1)(c) (McKinney 2014).
67. *Id.*
68. N.Y. GEN. MUN. LAW § 805-a (McKinney 2014).
69. See, e.g., *Zagoreos v. Conklin*, 491 N.Y.S.2d 358 (2d Dep’t 1985); *Tuxedo*, 418 N.Y.S.2d at 640.
70. For a helpful discussion of the principles applicable to recusal and abstention, see Lester D. Steinman, *Recusal and Abstention from Voting: Guiding Principles*, 22 MUN. LAW. 17-19 (Winter 2008).
71. N.Y. GEN. CONSTR. LAW § 41 (McKinney 2000).
72. The vote did not violate section 801 of the New York General Municipal Law because that section generally prohibits a municipal officer or employee from having an interest in a contract with the municipality where he or she has the power or duty to approve or otherwise control the contract. But here, there was no contract with the Town and the vote did not violate section 809 of the New York General Municipal Law because that section only requires the disclosure of any interest of an officer or employee in a land use applicant—it does not mandate recusal by the interested officer or employee.
73. *Tuxedo*, 418 N.Y.S.2d at 640.
74. *Zagoreos*, 491 N.Y.S.2d at 363. As in *Tuxedo*, *supra*, the vote did not violate section 801 of the New York General Municipal Law because there was no contract with the Town. Nor did the vote violate section 809 of the New York General Municipal Law because that section only requires disclosure of any interest of an officer or employee in a land use applicant. *Id.*
75. *Schweichler v. Vill. of Caledonia*, 845 N.Y.S.2d 901 (4th Dep’t 2007). As in *Tuxedo* and *Zagoreos*, *supra*, the vote did not violate section 801 of the New York General Municipal Law because there was no contract with the Village. Nor did the vote violate section 809 of the New York General Municipal Law because the Planning Board members did not have an interest in the applicant as defined in that section. *Id.* Further, section 809 of the New York General Municipal Law only requires disclosure of any interest of an officer or employee in a land use applicant. See N.Y. GEN. MUN. LAW § 809(1) (McKinney 2014).
76. *Town of N. Hempstead v. Vill. of N. Hills*, 342 N.E.2d 566 (N.Y. 1975). See *Byer v. Town of Poestenkill*, 648 N.Y.S.2d 768 (3d Dep’t 1996) (holding that a town board member was not disqualified from voting on changes to zoning code that affected all property owners equally); see also *Segalla v. Planning Board of Amenia*, 611 N.Y.S.2d 287 (2d Dep’t 1992) (holding that a planning board member was not disqualified from voting to approve master plan that affected nearly every property in the Town equally).
77. *Friedhaber v. Town Bd. of Sheldon*, 851 N.Y.S.2d 58 (N.Y. Sup. Ct. 2007), *aff’d*, 872 N.Y.S.2d 361 (4th Dep’t 2009). See also *Peterson v. Corbin*, 713 N.Y.S.2d 361, 364 (2d Dep’t 2000) (“[I]n both *Tuxedo* and *Zagoreos*, the conflicts of interest on the part of the public officials were clear and obvious.”).
78. *Eastern Oaks Dev., LLC v. Town of Clinton*, 906 N.Y.S.2d 611 (2d Dep’t 2010).
79. 1995 Op. (Inf.) Atty. Gen. 2; see also *Cahn v. Planning Bd. of Gardiner*, 557 N.Y.S.2d 488, 491 (3d Dep’t 1990) (“[The Planning Board members] not only immediately disclosed their interests, but of critical importance, they abstained from any discussion or voting regarding the subdivisions.”) (citations omitted).
80. 1995 Op. (Inf.) Atty. Gen. 2.
81. See *Ahearn v. Zoning Bd. of Appeals*, 551 N.Y.S.2d 392 (3d Dep’t 1990); *Karedes v. Vill. of Endicott*, 746 N.Y.S.2d 96 (3d Dep’t 2002); see also *Lucas v. Bd. of Appeals*, No. 06-10960, 2007 WL 62691, at \*7 (N.Y. Sup. Ct. Jan. 9, 2007), *aff’d*, 870 N.Y.S.2d 78 (2d Dep’t 2008) (applying the arbitrary and capricious standard for proceedings under Article 78).
82. *Ahearn*, 551 N.Y.S.2d at 394.
83. *Id.* at 572-73.

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