Exploring Ethics and Conflicts of Interest for Town Officials, Including Planners

By:
Donald A. Young, Esq.
Boylan Code LLP
What is a Conflict of Interest for a Town Official?

Conflict of Interest ("COI") - When a public official’s public duties are unduly influenced by personal interests.

Personal interests meaningfully impede the accomplishment of one’s public duties.

Three Sources of Authority on Municipal COIs

- 1. Article 18 of the General Municipal Law ("GML"), entitled “Conflicts of Interest of Municipal Officers and Employees”;
- 2. The Common Law
  - This is complimented by Administrative Opinions – (NY State Comptroller, the NY Attorney General’s Office)
- 3. Local Ethics Code and Ethics Board.
Exploring Article 18 of the GML

Applies to - “Municipal Officers and Employees,” including both paid and unpaid employees and officers of a municipality.

i.e., Town Staff (CEOs, Planners); Elected non-board officials (Town Clerk); Public officials serving on boards (Town Board, Planning Board, Zoning Board)

Potential Complexities

“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. Furthermore, only limited case law exists to provide guidance in the area . . .”


Issues Addressed by GML 18:
- Conflicts related to Contracts;
- Other Miscellaneous COIs (i.e., Gifts)
- Ethics Board and Ethics Code
- Disclosure by an Applicant
- Annual Financial Disclosure
- Etc.
What about Planners that are not municipal employees (i.e., independent contractors)?

AICP Code of Ethics and Professional Conduct

First Key Example Provision:

- No assignment from client to publicly advocate on planning issue clearly adverse to position we advocated for within past 3 years, unless
  - 1. Determination in good faith no detriment, and
  - 2. Full written disclosure.
GML Article 18 – Prohibited Interests in Contracts

A primary focus of Article 18 is regarding conflicts that arise out of an interest, typically financial, in a contract with a municipality.

**GML 18 COI in a Contract:**

- **Contract** for approval;
- **Interest** that would yield a financial or other **Benefit** to a **Town Official/Employee** (“Town Official”)
- Said **Town Official** has some **Control** over the contract; and
- **No Exception** applies.

**Contract**: Broadly defined as “any claim, account, or demand against or agreement with a municipality.”

i.e., Typical, long-term written contracts, as well as purchases of **goods** or the provision and subsequent billing for one-time **services**, etc.
GML Article 18 – Prohibited Interests in Contracts

Contract → Interest/Benefit → Official with Control → No Exceptions

Interest - **Direct Benefit** (typically *financial*) to the municipal official or an **Indirect Benefit**, such as to the official’s business, family or employer.

i.e., direct benefit – Town to hire an Engineering Firm owned by TB member;

**Third Element = Beneficiary has Control.**

**Types of Control:**

- 1. Negotiate or Prepare the Contract;
- 2. Authorize or Approve the Contract, or to Approve Payment;
- 2. Audit Bills or Claims;
- 3. Appoint an officer or employee who has any of the powers or duties set forth in "1" or "2" above.
Note for Planners

We shall not perform work on a project for a client or employer if, in addition to the agreed upon compensation from the client or employer, there is a possibility for direct personal or financial gain to us, our family members or persons living in our household unless our client or employer, after full written disclosure from us, consents in writing to the arrangement.
GML Article 18 – Prohibited Interests in Contracts

Contract → Interest/Benefit → Official with Control → **No Exceptions**

An **Exception** may allow a Benefit which might otherwise cause an impermissible conflict of interest.

**Exception #1** – Benefit arises out of compensation of an officer or Employee employed by your Town.

**Exception #2** – Benefit arises out of allowable Private Employment.

Only Where:

- 1. Official’s compensation from the Business not directly affected by the subject contract; and
- 2. Official’s duties not directly related to the contract.
GML Article 18 – Recusal Requirements and Penalties

Contract ➔ Interest/Benefit ➔ Official with Control ➔ No Exceptions

If Conflict of Interest in Contract, then Contract is **Prohibited**. If COI otherwise, then:

1. Publically **Disclose**; and
2. Recuse (remainder of Board decides)

A Note on the Scope of Recusal: Recusal is not limited to simply refraining from a vote.

⇒ Town officer should remove himself from **deliberation** on the matter in addition to removal from the **actual** vote.

**Consequences:**

- Contract ➔ null, void and unenforceable.
- Possible misdemeanor!
Additional Prohibitions:

- Solicitation of a Gift,
- Acceptance of a Gift having a value of $75 or more,
- Disclosure of Confidential Information, and
- Accepting Bribes.

Annual Disclosure Requirements:

Population of 50k+ → Must establish an annual financial disclosure system.

Smaller municipalities = Optional.
Note for Planners

We shall not, as public officials or employees, accept from anyone other than our public employer compensation, commission, rebate or other advantages that may be perceived as related to our public employment (i.e., no acceptance of gifts, bribes, or pay that may influence our decision or create a conflict of interest, etc.)

We shall not use the power of any office to seek or obtain special advantage that is not a matter of public knowledge or is not in the public interest (i.e., no bribes!)

We shall not . . . Engage in private communications with planning process participants in discussions related to a matter over which we have authority to make binding, final determinations if such communications are prohibited by law or by agency rules, procedures or custom (confidentiality . . .)
Land Use Disclosure:

- **Land Use Applications** include:
  Each **application, petition, or request** for a variance, amendment, change of zoning, approval of a plat, etc.

- **Applicant** to Disclose:
  - Name, Residence, **Interest** of any Official of the Municipality in Applicant.
  - **Interest** where Official or Relative:
    - Is the Applicant;
    - Is an officer, director, partner, or employee of the Applicant;
    - Is a member of a partnership or association of Applicant, or owns at least 5% of Applicant;
    - Is party to an agreement with Applicant which is beneficial and dependent on approval.
We shall not fail to disclose the interests of our client or employer when participating in the planning process. Nor shall we participate in an effort to conceal the true interests of our client or employer.
NY Common Law Can be said to be more strict in than GML Article 18.

NY Courts → *There need not be an actual violation of Article 18 in order to trigger an impermissible conflict of interest requiring recusal.*

Rather, a conflict of interest may arise via the **“appearance of impropriety.”**

### GML 18 vs. Common Law

<table>
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<tr>
<th>GML 18</th>
<th>Common Law</th>
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<tbody>
<tr>
<td>Contract</td>
<td>Any Matter (i.e., Site Plan, Subdivision)</td>
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<tr>
<td>Actual Interest</td>
<td>Mere Appearance of an Interest</td>
</tr>
<tr>
<td>Contract is Prohibited</td>
<td>Recusal Required</td>
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- GML requires a **contract and an actual interest** in that contract;
- In contrast, the Common Law requires only the **appearance** of an interest, financial or otherwise, in any form of municipal approval, **not limited to a contract**;

**Example:**
- A developer applies for** a site plan** approval; the developer has a financial interest in the project.
- Under Common Law, the developer’s financial interest in the project triggers a conflict of interest, requiring recusal; under GML Article 18, this would not be a conflict of interest.
Despite apparent broad scope of COIs in common law (i.e., appearance) . . .

- Courts → Each matter to be addressed on a case-by-case basis where the particular facts of the matter are closely examined.
- Must Examine the significance of any potential interest.
- No Bright Line Rule to determine “appearance of impropriety” – case-by-case.

Example # 1 [De Paolo v. Town of Ithaca, 258 A.D.2d 68 (3d Dept. 1999).]
- TB grants a rezone to Cornell in connection with campus-wide cooling facility;
- Lawsuit filed → COI requires annulment;
- Four of the TB members had various relationships with Cornell:
  - Current employee of Cornell;
  - Spouse of an employee @ Cornell.
  - Retiree receiving pension benefits;
  - Student with financial aid;

Conflict?

The Court held: ____________________
______________________________
______________________________
Since *no significant appearance of a Conflict of Interest, the votes would stand.*

Court noted that: Per GML Article 18, *private employment exception* applied to employee/spouse, because

- 1. neither employees’ compensation would be affected by the project and
- 2. neither employees’ duties were related to the project.

Cornell longer dictated the Pension Benefits – dictated by the Plan itself.

Financial Aid was provided by foundation unrelated to Cornell.
Example # 2 [Tuxedo Conservation & Taxpayers Assoc. v. Town Bd. of Tuxedo, 69 A.D.2d 320 (2d Dept. 1979).]

- Application to Town of Tuxedo to build a 3,900 residential Planned Unit Development;
- 1500 Acres;
- $200 Million;
- Application denied in 1975 and in 1976;
- In 1977, Town Board grants preliminary approval of the project in a 3 to 2 vote;
- Deciding Vote was in the affirmative by a Town Board member who was:

  The Vice-President of an Advertising Agency which represented the Parent Company of the Applicant.

Conflict?

The Court held:
NY Common Law– Examining Significance of an Interest

Significant Appearance! Court:

“It requires no feat of mental gymnastics to infer that if the application is approved, the agency (of which the TB member is the VP) will be a strong contender to obtain all the advertising contracts in the 200 million dollar project.”

Additional Facts (which make this case more interesting):

- TB member affirmatively refused to disqualify himself – he knew there was a possible conflict involved;
- He submitted his question of conflict to the Ethics Board;
- Made approval vote before Ethics Board rendered its opinion . . .

Note ➔ Private Employment Exception to GML did not negate Common Law Appearance Conflict!
New York State Common Law Ethics – Final Thoughts

The Common Law builds upon and extends beyond Article 18:

- COI may arise even beyond an **actual financial interest** in a contract;
- May arise out of interests not related to a Contract (i.e., an approval of a Site Plan application);
- May arise out of an interest whether actual or **perceived**;
- Determination on Appearance of Impropriety requires that facts of each matter be examined on a case-by-case basis:
  - As a result, it is difficult to comfortably predict how a Court will rule.
  - Question often becomes whether interest is “**Significant.**”

If no definitive rules – how to decide? →
Refer to Ethics Board!
The Board of Ethics and the Code of Ethics

Each Town *may* establish a **Board of Ethics**:  
Duty - To *render* advisory opinions;  
At the request of *municipal officers*;  
Scope → 1) Article 18, 2) the Town Code of Ethics, or 3) other ethical issues that are within the scope of Article 18 (i.e., those that may arise under the *Common Law*).

Each Town *must* adopt a **Code of Ethics**;  
Must set forth "the standards of conduct reasonably expected" of Town’s officials and employees;  
Cannot be less restrictive than GML 18.
The Board of Ethics and the Code of Ethics

Topics for a Code of Ethics include (underline = required):
• Acting in the Public Interest
• Avoiding the Appearance of Impropriety
• Avoiding the Use of the Position for Personal or Private Gain
• Disclosure
• Recusal and Abstention
• Investments
• Private Employment
• Future Employment
• Interest in Contracts
• Nepotism
• Political Solicitations
• Confidential Information
• Gifts
• Posting and Distributing the Code of Ethics

Model Code of Ethics @ Comptroller - http://www.osc.state.ny.us/localgov/pubs/codeofethics.pdf
The Board of Ethics and the Code of Ethics

Primary Function of the Board of Ethics is to render Advisory Opinions at the request of Town Officials/Employees.

Problem: Courts → Cannot form definitive rules b/c each matter must be examined on a case-by-case basis.

Solution: The local Board of Ethics!

Courts on the Board of Ethics:

- Consistently hold that the most appropriate forum to examine the relevant facts and circumstances of a given ethics matter is the local Board of Ethics.
- *Courts often defer to the opinions rendered by local Boards of Ethics.*
- The opinion of the Board of Ethics is entitled to “Great Weight.”
Informal Advice – Ethics Officer:
- Oral, but Record of Advice Given
- Not binding on AICP

Formal Advice – Ethics Committee:
- Written description of facts and question
- Initial determination as to whether sufficient information
- 90 days to decide
- Acting in compliance with AO will act as defense to misconduct
- May publish opinion, but generally no identifying information
In re Parker, 184 AD2d 937 (3d Dept. 1992).

- **Facts:**
  - Town PB Chairperson is the President of a local steel company.
  - SubD App made wherein a Principal of the applicant had previously purchased steel from the Chairperson’s company on a number of occasions.
  - The PB, including the Chairperson, voted to approve the subdivision, and a challenge to that approval soon ensued.

- **Allegations:**
  - Chairperson has COI b/c the Principal of the applicant previously purchased steel from the Chairperson’s company.
  - An approval of the project might result in additional business to the Chairperson’s company.

- **Additional Facts:**
  - NY Attorney General found a COI.
  - Local Board of Ethics had rendered the opposite opinion, holding no COI because the purchases by the Principal were so minuscule.

**Conflict?**
The Board of Ethics and the Code of Ethics – Case Study

The Court ultimately agreed with the decision of the Ethics Board, holding that “the determination of the Town’s Board of Ethics is rational and entitled to considerable weight by this Court.”

Putting “In re Parker” into Perspective:

- Previous contractual financial relationship existed;
- Attorney General issued a decision finding COI on this very matter;
- Court nevertheless agrees with Town’s Ethics Board.

Lesson Learned and Conclusion:

A prudent municipal officer will seek the opinion of his Ethics Board before acting on a matter where there is any question of conflict of interest.

AG recently agreed → “In that many of these matters are questions of judgment, a body of individuals, namely the board of ethics, is the appropriate fact finder and provider of guidance.”
Case Studies - Competitors

- Case law on the issue of dealing with matters related to a Competitor of a Town Official is sparse;
- Where a Town Official is the Principal of company that is a direct Competitor of an Applicant, there could be a strong argument for the Appearance of Impropriety – thus, prudent action may be Recusal;
- However, where Town Official is something less than the Principal of a Direct Competitor, the answer is less clear;
- Example – AG has held that Principals of Local contracting companies may not serve as CEOs because CEO may be compelled to inspect the work of his Competitor’s Company;
- Example 2 – AG has suggested that a Town Engineer should avoid doing private (non-Town) work in Town (Engineer could be tempted to disapprove work of Competitor in Town);

Conclusion – Since case law on this issue is sparse, most prudent course of action is to request opinion from Board of Ethics;
Case Studies – Adoption of Local Legislation

Issue: Town Board approves Local Legislation which has some direct effect on a Town Board member.

Example – Town of Poestenkill

- TB of Poestenkill approves LL which allows R property owners to mine gravel on property;
- Legal challenge ensues – TB member owns R property suitable for mining → COI;
- Court →
  - “Since every owner of property in a residentially owned district is affected by Local Law No. 2, petitioners’ argument would make all but a handful of property owners in the [Town] ineligible to sit on the board in such matters.”
  - Disqualifying interest must be a personal or private one, not one shared in common with a significant portion of similarly situated citizens.

Rule: Where Town Official votes to approve a LL that benefits not only him, but also a significant portion of similarly situated citizens, and where no other personal benefit would accrue, generally no COI.
Conclusion – Summary Ethics Analysis

1. Examine **GML 18** to ensure no COI arising out of **Contract** . . .
   Contract → Interest/Benefit → Official With Control → No Exceptions;

2. Examine **Additional Provisions of GML 18** to ensure no other miscellaneous COIs
   (such as the acceptance of a gift);

3. Analysis as to whether COI arises out of local **Code of Ethics**;

   3. **Common Law analysis** to determine whether there may be an **Actual Non-Contractual Interest** that raises an impermissible conflict (i.e., a personal benefit to the municipal official arising out of a subdivision approval);

4. Consider whether there is an **Appearance of Impropriety, as addressed in Common Law**;

5. Where potential COI is identified per Common Law, analysis as to whether it is **Substantial/Significant**;

6. Where there is any question or uncertainty as to the answers to any of the above, the most prudent course of action would be **referral of the conflict of interest issue to the Ethics Board for an Advisory Opinion on the matter.**
Thank You! Questions?

Donald A. Young, Esq.
Boylan Code, LLP
Culver Road Armory
145 Culver Road Suite 100
Rochester, New York
14620
585 232 5300

www.boylancode.com
Donald A. Young, Esq., a Partner with Boylan Code, practices primarily in the Municipal Law and Land Use groups, but also practices in the Firm’s Litigation and Real Estate groups. He regularly advises on complex land use and municipal issues, often working with public officials and staff, technical consultants such as engineers and real estate developers. In addition, he has become a popular presenter around the State of New York.

Mr. Young has experience in a wide variety of areas dealing with land use, including, for example, advising on SEQR in relation to a variety of complex developments, counseling on rezoning applications and special permits, addressing site plan and subdivision issues, advising on variance issues, and addressing code enforcement matters.

Furthermore, he has drafted, revised and implemented a wide range of legislation, including zoning ordinances, refuse regulations, wind turbine regulations, sign regulations, solar regulations and moratoria. He has also implemented and assists with managing sewer, water and drainage districts.

Mr. Young has advised local legislative bodies, such as Town Boards, on a variety of municipal issues, including capital acquisition and financing, implementation of planned development districts, open meetings law and ethics. He also represents various Planning Boards and Zoning Boards of Appeals. He serves as legal counsel to a variety of municipalities in New York.

Mr. Young has shared his knowledge and experience in articles published in the Daily Record, the Rochester Business Journal and the Association of Towns Talk of the Towns. Furthermore, Mr. Young is an accomplished speaker, presenting on behalf of the Association of Towns at a variety of summer schools, as well as a numerous annual conferences on behalf of the Association in New York City. Mr. Young has also spoken on numerous occasions on behalf of the New York Planning Federation. In addition, Mr. Young has spoken on behalf of the National Business Institute, and has spoken to and offered training to public officials at various town halls around New York.