



# Municipal Ethics for Highway Superintendents

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# Topics Covered Today

- Conflicts of Interest in Contracts
- Conflicts of Interest Generally
- Family
- Dual Office Holding
- Gifts
- Misc.



# Introduction

- Ethics refers to objective principles that define behavior as appropriate under the law
- Ethics laws act as both a sword and a shield designed “to protect the public from municipal contracts influenced by avaricious officers, [and] to protect innocent public officers from unwarranted assaults on their integrity”



# Ethics Sources

- General Municipal Law Article 18
  - Common Law
  - Local Ethics Code
  - Agency Opinions
  - Local Ethics Board
    - Other



# Conflict of Interest - Contracts



# Conflict of Interest - Contracts

- To determine if a prohibited conflict of interest exists with a contract look at:
  - (1) General Municipal Law Article 18
  - (2) Local Ethics Code
  - (3) Common Law



# Conflict of Interest - Contracts

Why start with GML Article 18?

Because if there is an Article 18 conflict of interest the town cannot enter into the contract

Recusal or delegating the task to someone else is insufficient to cure an Article 18 conflict of interest



# Conflict of Interest - Contracts

How to analyze a conflict of interest in contracts question

1. Does the potential conflict lie in a contract with the town?
2. If so, do you have an “interest” in the contract
3. If so, do you have “control” over the contract?
4. If “yes” to #1-3, do any statutory exceptions apply?
5. What does your local ethics code say?
6. Is there an “appearance of impropriety”?

GML  
18



# Conflict of Interest - Contracts GML 18

## Contract

Q1: Does the potential conflict lie in a contract with the town?

- Contract means:
  - claim
  - account
  - demand
  - agreement
- Written or oral
- Express or implied



# Conflict of Interest - Contracts GML 18 Contract

Under Highway Law § 142 (1) (a) the town board can authorize the highway superintendent to make purchases under a certain amount set by the board without prior board approval

These purchases are contracts!



# Conflict of Interest - Contracts GML 18

Is there a contract with the  
municipality?

- A town board member sells a life insurance policy to the highway superintendent; does GML Article 18 apply to this contract?



# Conflict of Interest - Contracts GML 18

Is there a contract with the municipality?

- Nope! The contract is between two people in their personal capacities, not in their official capacity; the contract is not with the town.

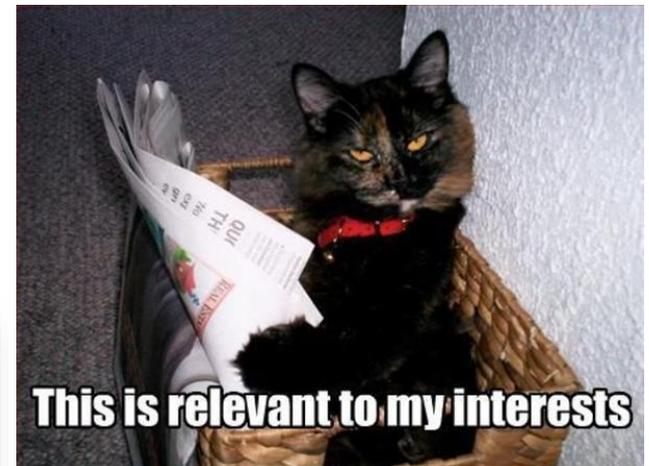


# Conflict of Interest - Contracts GML 18

## Interest

Q2: Do you have an “interest” in the contract?

“Interest” means a direct or indirect financial or material benefit received as a result of the contract



# Conflict of Interest - Contracts GML 18

## Interest

Under GML 18, you have an interest in the contracts of:

- your **spouse, minor children and dependents**
  - Exception for contracts of municipal employment
- a **firm, partnership or association** where you work or are a member
  - Exceptions to this listed under GML § 802
- a company where you are an **officer, director, employee or stockholder**
  - Exceptions to this listed under GML § 802



# Conflict of Interest - Contracts GML 18

## Interest

The highway department needs a new piece of equipment that costs \$5000, and the town board authorized the HS to make purchases of up to \$15,000 without board approval. Does the HS have an “interest” in...

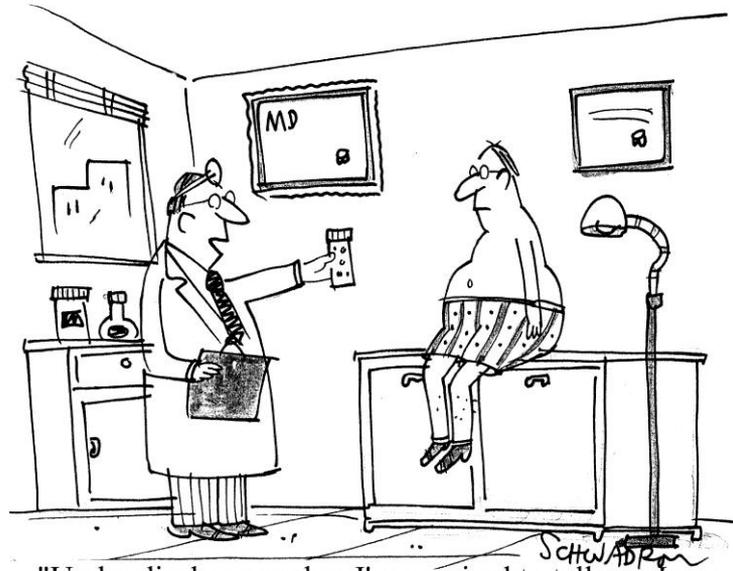
1. A store owned by the HS that sells the equipment?
2. A store owned by the adult son of the HS that sells the equipment?



# Conflict of Interest - Contracts GML 18

## Interest

1. Yes
2. Maybe



"Under disclosure rules, I'm required to tell you I own stock in the company whose drug I'm prescribing."



# Conflict of Interest – Contracts GML 18

## Control

Q3: Do you have “control” over the contract?

- Control means:
  - **Individually** or as a **board member**
  - **Negotiate, draft, authorize or approve** the contract OR
  - **Authorize payment** under a contract OR
  - **Audit bills or claims** under the contact OR
  - Appoint someone with any of these powers or duties



# Conflict of Interest – Contracts GML 18 Control

- The town is building a new town hall. Is there a “control” issue in a contract between the town and the HS’s spouse who owns a construction company?
- The HS is also a plumber; under GML Article 18 can he or she provide plumbing services to the town?



# Conflict of Interest – Contracts GML 18 Control

- No conflict. There's a contract with the town, the highway superintendent has an interest, but the highway super doesn't have control.
- No conflict. There's a contract with the town, the highway super has an interest but doesn't have control.



*"Yes, I am employee of the month again. And yes, I'm the one who chooses the employee of the month. And no, I don't see a conflict of interest."*



# Conflict of Interest – Contracts GML 18

## Exceptions

Q4: Does a statutory exception apply?

- GML § 802 contains a list of exceptions:
  - Pre-existing contracts – but no renewals
  - Stockholders under 5 percent
  - Contracts under \$750 annually
  - Contract with a membership corp or voluntary non-profit corp or association



# Conflict of Interest – Contracts GML 18 Exceptions

Officer employed by company but does not:

- Receive any payment from the contract
- Does not have any part in:
  - Procuring
  - Preparing
  - Performing contract



# Conflict of Interest – Contracts GML 18 Exceptions

- Example: A highway superintendent works at an auto parts store where the town does business. His duties as an employee do not include the procurement, preparation or performance of any of the town orders. He is paid a salary and does not receive compensation related to sales to the town.



# Conflicts of Interest - Contracts

- If you have a contract, interest, control, and no statutory exceptions apply, analysis ends
- There is a conflict of interest under General Municipal Law
- Contract prohibited!



# Conflicts of Interest - Contracts

- Competitive bidding and emergencies do not cure or excuse a GML conflict of interest!
- Recusal does not cure a GML conflict of interest!



# Conflicts of Interest - Contracts

- Effect of Violations:
  - Willful Violation
    - » Contract null and void
    - » Payment prohibited
  - Willful & Knowing Violation
    - » Misdemeanor



# Conflict of Interest - Contracts GML 18

## Interest

- If you have an interest in a contract or proposed contract, you must disclose it:
  - In public
  - Submitted in writing
  - Given to immediate supervisor and governing board
  - Suggested even if a statutory exception applies



# Conflict of Interest - Contracts

How to analyze a conflict of interest in contracts question

1. Is there a contract with the municipality?
2. If so, do you have an “interest” in the contract
3. If so, do you have “control” over the contract?
4. If “yes” to #1-3, do any statutory exceptions apply?
5. What does your local ethics code say?
6. Is there an “appearance of impropriety”?

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# Conflicts of Interest - Contracts

## Hypothetical #1:

The supervisor owns a flood service company. During a major storm the town hall starts to flood which, if it continues, will cause substantial damage. The supervisor's business is the only one around that can address the issue immediately.



# Conflicts of Interest - Contracts

## Hypothetical #2:

A town board member owns a truck repair business. The town board has delegated purchasing authority to the highway super of up \$1000. Can the highway superintendent take a truck there for repairs that will cost \$500?



# Conflicts of Interest - Contracts

## Hypothetical #3:

The town is building a new town hall. The town board wants to contract with a construction company. The construction company has a separate contract with a steel supply company that is owned by the town supervisor. Is this prohibited by GML 18?



# Conflicts of Interest

## Questions to Ask

1. Is there a contract with the municipality?
2. If so, do you have an “interest” in the contract
3. If so, do you have any “control” over the contract
4. Do any statutory exceptions apply?
5. Does your local ethics code apply?
6. Is there an “appearance of impropriety”?



# Conflicts of Interest

## The Appearance of Impropriety

- “Government officials must maintain public confidence in the integrity of government. They must avoid even the appearance of impropriety.”
- “[T]he test to be applied is not whether there is a conflict, but whether there might be. It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest.”



# Conflicts of Interest

## The Appearance of Impropriety

“Appearance of Impropriety” applies to more than just conflicts of interest with contracts; it applies generally to the actions of public officials

- For example: A variance application is not a contract under GML 18; however, a ZBA member is subject to common law ethics standards (i.e. the appearance of impropriety).



# Conflict of Interest Appearance of Impropriety

Break down into 2 questions:

- Is the interest personal?
- Is the interest substantial?



# Conflict of Interest

- Is the interest personal?
  - A personal interest is not one that you share with the public generally
  - Example: A highway superintendent can approve a 284 agreement that includes repairs to the street he or she lives on. That is not a personal interest so long as they are not the only ones on the street; he or she shares it with all the other members of the street



# Conflict of Interest – Substantial Interest

- Is the interest substantial?
  - Planning board chair owned a steel supply company that contracted with applicant appearing before planning board. Contract amounted to .15 percent of his company's gross sales for the past two years. The neighbors argued that the chair should have recused himself.



# Conflict of Interest – Substantial Interest

- Substantial is not always a quantifiable term.
  - Example: The neighbor of the highway superintendent owns an auto parts store



# Conflict of Interest - Substantial

## De Paolo v Town of Ithaca, 258 AD2d 68 (1999)

Cornell University proposed project needed series of permits and applied to town board for rezoning. Court said no conflict with:

- town board member married to Cornell retiree receiving pension benefits from university
- town board member who was graduate student



# Conflict of Interest - Substantial

Ahearn v Zoning Bd. of Appeals of Town of Shawangunk, Ulster County, 158 AD2d 801 (3d Dept 1990)

Petitioner claimed conflict of interest on ZBA when granting special use permit because the wife of a ZBA board member taught piano to applicant's daughter and was given Christmas gift.

Court said the assertion amounted to “mere speculation.”



# Conflicts of Interest – Appearance of Impropriety

- The Attorney General advises officers to recuse themselves where there is an appearance of impropriety.
- Recuse in public and on the record
- Recusal prohibits you from discussions, deliberations and voting on the matter

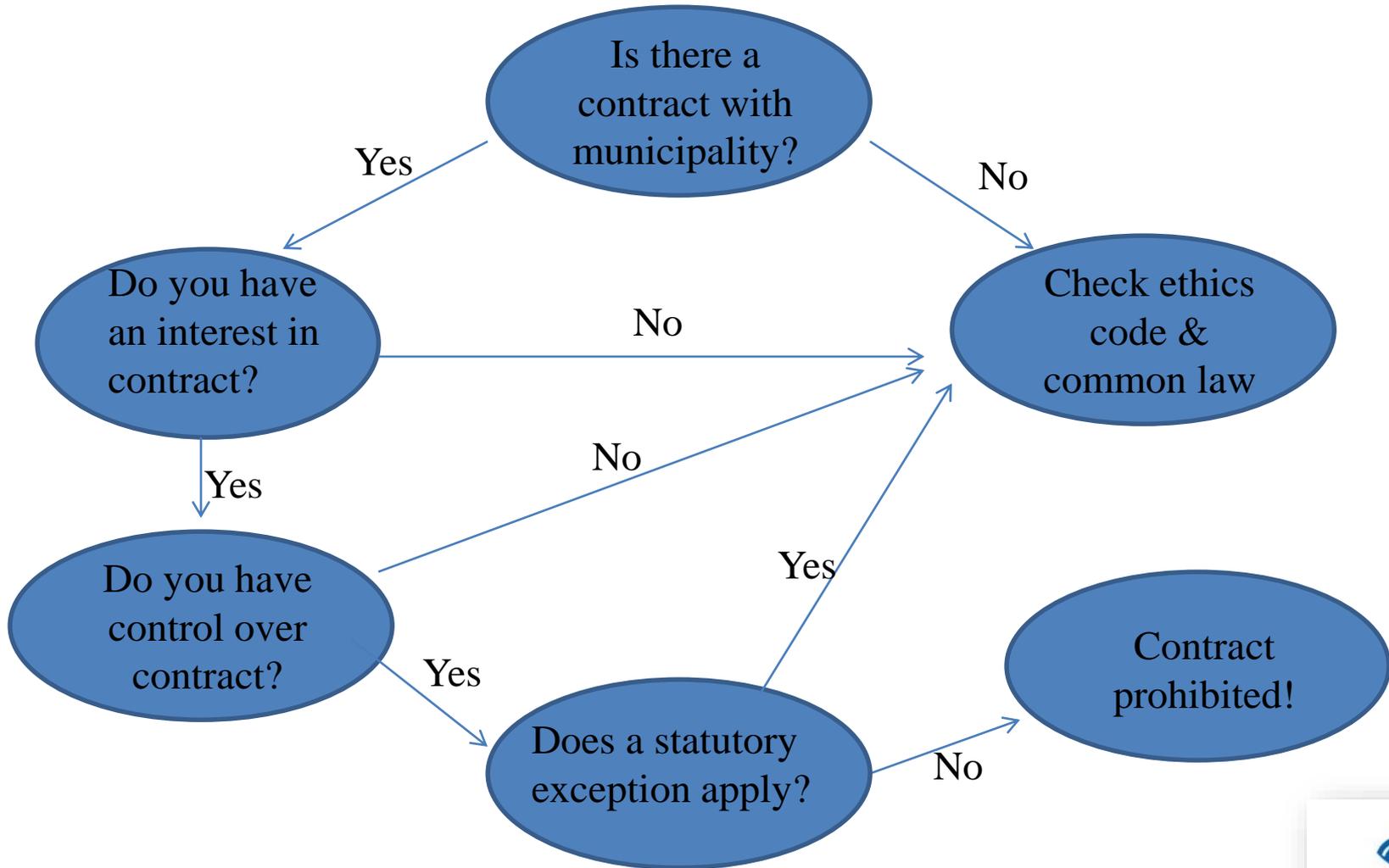


# Conflict of Interest

- Consequences of acting despite appearance of impropriety?
  - Litigation
  - Action voided



# Conflict of Interest



# Family

- No prohibition against members of the same family working for municipality
- General rule:
  - Officer should not participate in decisions concerning salary / terms and conditions of employment for other family members also employed by municipality



# Conflict of Interest - Family

- Example: Wife on town board, husband is highway superintendent.
  - Should not vote on the highway superintendent's salary
  - Can vote on and participate in discussions on general highway matters like equipment
  - Can vote to adopt highway budget as a whole.



# Dual Office Holding

- No general prohibition against holding two offices, but cannot hold two incompatible positions
- Positions are incompatible when:
  - Subordinate
  - Conflict of duties
  - Otherwise prohibited by law



# Dual Office Holding

- Subordinate position: Town board member working in highway department
- Conflict of Duties: Code enforcement officer sitting on ZBA
- Otherwise prohibited by law: Can't hold two elected offices.



# Dual Office Holding

- May overcome conflict by local law
  - Limited exception intended for smaller municipalities (1983 Ops Atty Gen [Inf] 1117 [1983])



# Gifts

- GML § 805-a
  - Solicit gifts or accept gifts more than \$75 that could reasonably be inferred to influence performing official duties
  - Can reduce amount in local ethics code
- Penalty – sanctions (fine, suspension, removal)
- Potential Misdemeanor (see Penal Law § 200.35)



# Ethics Code

- GML Article 18 not comprehensive
- Typical provisions in Local Ethics Code
  - Conflicts of interest prohibited
  - Recusal
  - Disclosure requirements
  - Gifts
  - Misuse of municipal resources
  - Prohibited appearance of impropriety



# Misc.

- Destroying or using town property for personal benefit or gain is a criminal offense
- Cannot disclose confidential information obtained through position or use that info for personal gain



Questions?

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