



# Ethics for Planning and Zoning

Sarah B. Brancatella

Legislative Director and Counsel

Association of Towns

# Topics Covered Today

- Common Law Conflicts of Interest
- Misc. GML Article 18 Provisions
- Family
- Dual Office Holding
- Conflicts of Interest in Contracts
- “Other”



# 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... 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



# P&Z Ethics

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

Always start with  
Article 18!



# P&Z Ethics

What's in GML Art 18?

- Conflicts of interest in contracts
- Gifts
- Compensation on matter before an agency
- Financial disclosure statements



# P&Z Ethics

- Lots of gaps in Article 18 – conflict of interest provisions only apply to contracts
- Land use applications are NOT contracts under GML 18
- Most ethical issues related to planning and zoning stem from common law



# Conflict of Interest

How to analyze a conflict-of-interest question

1. Does the potential conflict lie with 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 a common law conflict?

GML  
18





# Conflicts of Interest

**If there is no GML 18 conflict the analysis doesn't end**

## 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 a common law conflict?**



# Common Law Conflicts of Interest



# Conflicts of Interest – Common Law

“Government officials must maintain public confidence in the integrity of government. They must avoid even the appearance of impropriety.”

“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 – Common Law

Tuxedo Conservation & Taxpayers Ass'n v Town Bd. of  
Town of Tuxedo, 69 AD2d 320 (2d Dept 1979)

- Company A applied to build a controversial 4000 person residential unit
- TB delegated environmental impact hearings to PB but retained final authority over project.
- TB split 3-2 in favor of project but couldn't move forward until PB completed the hearings



# Conflicts of Interest – Common Law

Tuxedo Conservation & Taxpayers Ass'n v Town Bd. of  
Town of Tuxedo, 69 AD2d 320 (2d Dept 1979)

- Meanwhile, Nov. elections meant a shift in the board come January 3-2 AGAINST project
- TB adopted local law relieving PB of duty & finished up environmental impact hearings despite requests from DEC for more time
- December 28th TB approved project



# Conflicts of Interest – Common Law

Tuxedo Conservation & Taxpayers Ass'n v Town Bd. of Town of Tuxedo, 69 AD2d 320 (2d Dept 1979)

- Voting TBM was VP of advertising agency doing lots of business with applicant's parent company
- “It requires no feat of mental gymnastics to infer that if the application is approved, the agency will be a strong contender to obtain all the advertising contracts in the 200 million dollar project.”
- Court invalidated vote even though technically TB didn't violate any statutes; court said TBM violated INTENT of law by voting



# Conflicts of Interest – Common Law

Common law conflicts of interest principals apply to more than just conflicts with contracts; it applies to all actions of public officials and employees

- For example: A variance application is not a contract under GML 18; however, a ZBA member is subject to common law ethics standards



# Conflicts of Interest

Common Law Conflict of  
Interest

GML 18  
Conflict





# Conflict of Interest Appearance of Impropriety

To evaluate a common law conflict  
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** an interest that you share with the public generally



# Common Law Conflict of Interest

Troy Sand & Gravel Co., Inc. v Fleming, 156 AD3d 1295 (3d Dept 2017)

- TB maintained jurisdiction over special use permit application for gravel pit
- Mere fact that Supervisor owned property near pit didn't warrant nullifying vote
- “location of real property owned by [the Supervisor] and his family near the site of the proposed quarry is an interest that [the Supervisor] has in common with many other citizens of the Town”



# Common Law Conflict of Interest

Byer v Town of Poestenkill 232 AD2d 851 (1996)

- Another mining / gravel issue
- TBM voted on local law allowing mining in residential district
- TBM owned property in residential district that could be suitable for mining
- “every owner of property in a residentially zoned district is affected by this local law”



# Conflict of Interest – Substantial Interest

Is the interest substantial / more than speculative?

- Where a lot of grey exists
- Family
- Bias



# Conflict of Interest – Financial Interest as Substantial

Parker v Town of Gardiner 184 AD2d 937 (1992)

- PB chair owned steel supply company
- Steel supply company sometimes did business with entity appearing before planning board
- Over 2 year period business with applicant constituted .15% of PB company's revenue
- What about Town of Tuxedo case?



# Conflict of Interest – Substantial Interest

- Substantial is not always a quantifiable term.
  - Example: Neighbor of PB member applies for special use permit - appearance of impropriety warranting recusal depends on the circumstances
  - Relationships are scary



# 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:

- TBM married to Cornell retiree receiving pension benefits from university
- TBM who was Cornell 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 with board members because:

- wife of a ZBA board member taught piano to applicant's daughter and got a Christmas gift
- Also, the mother in law of the ZBA member had spoken out against the project.

Court said the assertion amounted to “mere speculation.”



# Conflict of Interest - Family

- Don't vote on stuff involving , that's a substantial relationship
- 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 recuse herself from discussions and voting 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.



# Conflict of Interest - Family

## I. Nepotism.

(1) Every public officer, and every municipal employee **related closer in degree, by blood or by marriage, than first cousin** to any persons seeking employment within any **department, section or function of the Town** shall **disclose such relationship** as provided for pursuant to the further provisions of this section.



# Conflict of Interest - Family

1. Linda is on the town board. Her husband Vincent applies to fill a vacancy on the zoning board of appeals. What should Linda do?
2. Carrie is on the town board. Her long term boyfriend Kent applies to be on the zoning board of appeals. What should Carrie do?



# Conflict of Interest - Substantial Biases / Personal Opinions

- Municipal official may comment on applications as a citizen
- HOWEVER there may be perceived or actual conflicts when they sit on the board reviewing that application
- Land use applications should be made on the record before them – quasi judicial function



# Conflict of Interest - Substantial Biases / Personal Opinions

Schweichler v Vil. of Caledonia, 45 AD3d 1281 (2007)

Court found an appearance of bias by 2 village PB members and actual bias by one

- 2 village PB members signed petition supporting project
- 1 village PB signed petition and wrote to Mayor supporting the new project and why she personally supported the project



# Common Law Conflict of Interest

Byer v Town of Poestenkill 232 AD2d 851 (1996)

- Before becoming TBM, individual got permit to mine part of his property
- Before becoming TBM spoke out against a local law prohibiting gravel mining in residential areas
- After getting elected to the board, voted on local law **ALLOWING** mining on residential property
- No conflict, to find otherwise would have “a chilling effect on a candidate’s ability to express an opinion on an important election issue”





# Conflict of Interest - Substantial Biases / Personal Opinions

Segalla v Town of Amenia, 204 AD2d 332 (1994)

- Another gravel pit
- Individual spoke out against the project at a public hearing
- Later on appointed to fill a vacancy on planning board
- Voted to approve master plan that eliminated gravel pit
- “Alleged bias only involved personal opinion rather than financial interest”



# Conflict of Interest - Substantial

- In general, courts will find if there is a financial or material benefit involved for a public officer or for one of their family members (but see Town of Gardiner)
- Where there is the appearance of a problem, but the court believes objectivity is possible the court will not insist on recusal



# Conflicts of Interest – Appearance of Impropriety / Common Law

- 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



# Recusal

- Recusal v Abstention
  - Recusal more than abstaining
  - Disengage from the entire process
  - Disclose conflict
- Has functional equivalent of “nay” vote



# Conflict of Interest

- Consequences of acting despite appearance of impropriety?
  - Litigation
  - Action voided
  - Getting kicked off the board



# 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)



# Land Use Applications

## General Municipal Law § 809

- Must disclose if an officer or employee has an interest in a land use application and the nature and extent of interest



# Compensation on Matters Before an Agency

Municipal officials may not receive compensation for matters before their board / agency

- PB member who is an architect prohibited from working on application going before the board
- Uncompensated work warrants recusing





# Compensation on Matters Before an Agency

Keller v Morgan, 149 AD2d 801 (3d Dept 1989)

- Chairperson of Planning Board held 25% interest in company doing work on subdivision that was subject of PB's review
- Neither applicant or PB member disclosed this fact
- Town Board removed PB member from office
- PB member said it wasn't supported by substantial evidence



# Compensation on Matters Before an Agency

Keller v Morgan, 149 AD2d 801 (3d Dept 1989)

- Court said even though PB chair seemingly unaware of conflict, he should have known
- removal was appropriate



# 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 town offices.



# Dual Office Holding

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



# Conflict of Interest - Contracts GML 18

## Contract

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

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



# Conflict of Interest - Contracts GML 18

Is there a contract with the municipality?

- A town board member hires a planning board member as their architect on a home reconstruction project; is this contract prohibited by GML Article 18?



# 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 town wants to build a new town hall.  
Could the following contracts be covered by  
GML Art 18?:

1. A construction company owned by supervisor?
2. A construction company owned by adult son of supervisor?



# 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 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
  - **Authorize payment** under a contract
  - **Audit bills or claims** under the contact
  - **Appoint someone** with any of these powers or duties



# Conflict of Interest – Contracts GML 18 Control

- The town is building a new town hall. Does GML Article 18 apply to a contract between the town and the town clerk's spouse who owns a construction company?
- The town assessor is also a plumber; does GML Article 18 prohibit the town from contracting with the assessor for plumbing services?



# 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 town board member works at an auto parts store where the town highway department purchases items. 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

Municipal contract + interest + control = GML  
Article 18 conflict of interest

**An Article 18 conflict of interest**  
**means the municipality cannot enter**  
**the contract**

Recusal does not cure a GML conflict of  
interest!



# Conflicts of Interest - Contracts

- Competitive bidding **does not cure** or excuse a GML conflict of interest!
- Emergencies **do not cure** or excuse a GML conflict of interest!



# Conflicts of Interest - Contracts

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. Is this contract prohibited by GML Article 18?



# Conflicts of Interest - Contracts

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



# Conflicts of Interest - Contracts

## Hypothetical #1:

The town has a contract with Steve to deliver salt to the highway department that runs from October 1, 2017 - May 1, 2018. Steve is elected to the town board in November 2017. What are the obligations under GML Article 18?



# Conflicts of Interest - Contracts

## Hypothetical #2:

The town is celebrating its bicentennial and wants to commission an artist to create posters for the celebration. The total cost of the project would be \$700. The wife of a town board member is a well loved local artist who would do a great job. Can the town hire the wife of the town board member?



# Conflicts of Interest - Contracts

## Hypothetical #3:

The town solicits bids on a new truck, the lowest responsible bid is from a dealership owned by Griffin, the husband of town board member Matilda. Can the town purchase this truck?



# Conflicts of Interest - Contracts

## Hypothetical #4:

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?





# 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.

- Potential criminal offenses
  - Official misconduct
  - Destruction of municipal property
- Employment policies



Questions?

Association of Towns  
150 State St  
Albany, NY  
(518)465-7933