

# Enacting a Local Ethics Law—Part I: Code of Ethics

By Mark Davies

The State law governing municipal conflicts of interest, set forth in Article 18 of the General Municipal Law, is, in the words of the former Temporary State Commission on Local Government Ethics, "disgracefully inadequate." Article 18 contains huge gaps, makes no sense, provides little guidance to municipal officials or their attorneys, imposes a financial disclosure system that is charitably described as asinine, and, in the one area it does regulate—namely, the prohibition on a municipal official having an interest in certain contracts with his or her municipality—overregulates to such an extent that it turns honest officials into crooks. Widely supported proposals by the Commission, the State Bar, and many others to remedy this situation have fallen on deaf legislative ears for over 15 years.<sup>1</sup> Accordingly, municipalities are well-advised to enact an effective local ethics law. Indeed, Article 18 expressly permits a municipality to adopt a code of ethics that prohibits conduct permitted by Article 18, provided that the code does not permit any conduct prohibited by Article 18.<sup>2</sup> That is, a municipal ethics law must be more stringent, never less stringent, than Article 18—hardly a difficult task.



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## Purpose, Principles, and Precepts

It has often been said that an effective ethics law rests upon three pillars: a sensible, comprehensive, and comprehensible code of ethics; common sense disclosure; and effective administration, consisting of an independent local ethics board that provides quick answers to ethics questions, regulates disclosure, trains municipal officials in the requirements of the ethics law, and imposes fair and appropriate penalties for violations. All three pillars are essential; the removal of any one of them, such as the enforcement power of the ethics board, will topple the entire system.<sup>3</sup> This article will discuss the code of ethics. Part II, in the

next issue of the *Municipal Lawyer*, will address disclosure. Part III will review the requirements for effective administration.<sup>4</sup>

The purpose of the code of ethics, indeed of the entire ethics law, lies in promoting both the reality and the perception of integrity in municipal government by preventing unethical conduct before it occurs. Thus, the code of ethics must focus on prevention, not punishment, and must address not only the reality of conflicts of interest but also the appearance of such conflicts. Although called "ethics" codes, these codes in fact do not regulate ethics at all—in the sense of right and wrong or good and evil—but rather conflicts, usually financial conflicts, between the official's public duties and private interests, that is, divided loyalty.

Since the vast majority of municipal officials are honest and want to do the right thing, the code of ethics must seek to guide and protect honest public officials. An ethics law does not, will not, and cannot catch crooks. That is not its purpose.

The code of ethics must be understandable, comprehensive, and sensible and must be tailored to the particular municipality. A code is useless if it requires the official to routinely consult a lawyer in order to understand it. Therefore, rules should be bright line whenever possible, and definitions and exceptions to the ethics code should be set forth not in the code itself but in separate sections that limit but never expand the official's obligations under the code.

Some issues, such as gifts, moonlighting, and post-employment, must be addressed in every municipality's ethics code while other issues, such as prohibited ownership interests or the simultaneous holding of partisan and public offices, will be addressed in the ethics code only of those municipalities for which such issues have presented problems. Furthermore, the details of the provisions of the ethics code may differ somewhat from municipality to municipality. For example, a large municipality may bar former employees from appearing only before their agency for one year after leaving municipal service while a small municipality may impose a bar on appearances before any agency of the municipality during the first post-employment year.

Finally, the burden of complying with the code of ethics must not rest solely upon municipal officials. Private citizens, developers, contractors, applicants, and firms must have a stake in the municipal ethics law. If, for example, the code of ethics would prohibit the village treasurer from accepting a low-interest loan from a

bank seeking to do business with the village, then the bank should not with impunity be able to offer that loan. Inducement of an ethics violation must itself be a violation, even if the inducer is not a municipal official.

## Required Provisions of the Code of Ethics

With these principles and precepts in mind, one may consider the contents of the code of ethics.<sup>5</sup> Every ethics code should contain certain provisions, including:

- A general prohibition on the use of municipal office for private gain (misuse of office)

(1) A municipal officer or employee shall not use his or her official position or office, or take or fail to take any action, in a manner which he or she knows or has reason to know may result in a personal financial benefit for any of the following persons:

- (a) the municipal officer or employee;
- (b) his or her outside employer or business;
- (c) a member of his or her household;
- (d) a customer or client;
- (e) a relative;

(f) a person or entity with which the municipal officer or employee has had a financial relationship within the previous twelve months;

(g) any person or entity from which the municipal officer or employee has received a gift, or any goods or services for less than fair market value, during the previous twelve months; or

(h) a person from whom the municipal officer or employee has received election campaign contributions of more than one thousand dollars in the aggregate during the previous twenty-four months.

- Recusal

(2) A municipal officer or employee shall promptly recuse himself or herself from acting on a matter before the municipality when acting on the matter, or failing to act on the matter, may financially benefit any of the persons listed in subdivision one of this section.<sup>6</sup>

- Misuse of municipal resources

(3) A municipal officer or employee shall not use municipal letterhead, personnel, equipment, supplies, or resources for a non-governmental purpose nor engage in personal or private activi-

ties during times when he or she is required to work for the municipality.

- Gifts

(4) A municipal officer or employee shall not solicit a gift from any person who has received or sought a financial benefit from the municipality, nor accept a gift from any person who the municipal officer or employee knows or has reason to know has received or sought a financial benefit from the municipality within the previous twenty-four months.

- Gratuities (tips)

(5) A municipal officer or employee shall not request or accept anything from any person or entity other than the municipality for doing his or her municipal job.

- Representation

(6) A municipal officer or employee shall not represent any person or entity in any matter that person or entity has that is before the municipality nor represent any person or entity in any matter that involves the municipality.

- Appearances

(7) A municipal officer or employee shall not appear before any agency of the municipality, except on his or her own behalf or on behalf of the municipality.

- Confidential information

(8) A municipal officer or employee shall not disclose confidential information or use it for any non-municipal purpose, even after leaving municipal service.

- Political solicitation of subordinates

(9) A municipal officer or employee shall not knowingly request or knowingly authorize anyone else to request any subordinate of the officer or employee to participate in an election campaign or contribute to a political committee.

- Future employment

(10) A municipal officer or employee shall not seek or obtain any non-municipal employment with any person or entity her or she is dealing with in his or her municipal job.

- Revolving door

(11) For one year after leaving municipal service, a former municipal officer or employee shall not communicate with his or her former municipal

agency, except on his or her own behalf, and shall never accept anything of value to work on any particular matter that he or she personally and substantially worked on while in municipal service.

- Inducement of others

(12) A municipal officer or employee shall not induce or aid another officer or employee of the municipality to violate any of the provisions of this code of ethics.

Note that the foregoing provisions completely subsume the provisions of Gen. Mun. Law § 805-a, which, unlike sections 800-803 (discussed below), may thus safely be ignored; in any event, a violation of section 805-a carries no penalty, other than disciplinary action.

## Optional Provisions of the Code of Ethics

Whether the code of ethics should contain additional provisions—and, if so, which ones—will depend on the needs and ethical history of the particular municipality. Such additional provisions might address:

- Prohibited outside positions

(13) A municipal officer or employee shall not be a paid attorney, agent, broker, employee, officer, director, trustee, or consultant for any person or entity that is doing business or seeking to do business with the municipality or that is seeking a license, permit, grant, or benefit from the municipality.

- Prohibited ownership interests

(14) A municipal officer or employee shall not own any part of a business or entity that is doing business or seeking to do business with the municipality or that is seeking a license, permit, grant, or benefit from the municipality nor shall the municipal officer's or employee's spouse nor shall any of his or her children who are less than 18 years old.

- Lawyers and experts

(15) A municipal officer or employee shall not be a lawyer or expert against the municipality's interests in any lawsuit.

- Purchase of office

(16) A municipal officer or employee shall not give or promise to give anything of value to any person or entity for being elected or appointed to municipal service or for receiving a promotion or raise.

- Coercive political solicitation

(17) A municipal officer or employee shall not use his or her municipal position to make threats or promises for the purpose of trying to get anyone to do any political activity or make a political contribution.

- Political solicitation of vendors, contractors, and licensees

(18) A municipal officer or employee shall not ask any person or entity that does or intends to do business with the municipality or that has or is seeking a license, permit, grant, or benefit from the municipality or that has done business with the municipality during the previous twelve months to make any political contribution or engage in any political activity.

- Political party positions

(19) A municipal officer or employee holding any of the following positions shall not hold a political party office: [specify positions].

- Political activity by high-level appointed officials

(20) A municipal officer or employee holding any of the following positions shall not directly or indirectly ask anyone to contribute to the political campaign of a municipal officer or employee running for any elective office or to the political campaign of anyone running for elective municipal office: [specify positions].

- Superior-subordinate relationships

(21) A municipal officer or employee shall not have any business or financial dealings with a subordinate or superior.

- Solicitation of subordinates

(22) A municipal officer or employee shall not knowingly request or knowingly authorize anyone else to request any subordinate of the officer or employee to purchase anything from, or give or contribute anything to, any person or organization, including any not-for-profit organization.

- Revolving door for high-level officials

(23) For one year after leaving municipal service, a municipal officer or employee holding any of the following positions shall not communicate with any agency of the municipality, except on his or her own behalf: [specify positions].

- Avoidance of conflicts

(24) A municipal officer or employee shall not knowingly acquire, solicit, negotiate for, or accept any interest, employment, or thing that would result in a violation of this code of ethics.

- Improper conduct (appearance of impropriety)

(25) A municipal officer or employee shall not take any action or have any position or interest that, as defined by rule of the ethics board, conflicts with his or her municipal duties.

## Prohibited Interests, Definitions, Exclusions

The ethics law must also specify, in a separate section, the requirements of General Municipal Law §§ 800-802, which prohibit interests in certain contracts with the municipality. Failure to include the requirements of those sections in the ethics law will require municipal officials to consult two separate bodies of law for their ethical obligations and will set them up for inadvertent violations. Also, as noted, definitions and exclusions from the code of ethics should be set forth in separate sections, not in the code of ethics itself, and should narrow, but never expand, the obligations of the code. Thus, if an official consults only the ethics code but fails to examine the definitions or exclusions, the official may believe that conduct is impermissible when in fact it is allowed but will never believe that conduct is permitted when it is in fact prohibited. Model provisions for the prohibited interests in contracts, definitions, and exclusions may be found in the Model Law article by this author.<sup>7</sup>

## Regulation of Private Citizens and Entities

Finally, as discussed above, private citizens, developers, contractors, applicants, and firms must have a stake in the municipal ethics law. For that reason, two additional sections should be added after the code of ethics, one prohibiting anyone from inducing a municipal official to violate the code and one prohibiting appearances, in a representational capacity, by the outside employer or business of a municipal official before his or her own agency. For example, the law firm of which a zoning board member is an associate should not be permitted to appear on behalf of a private client before the zoning board, although it could, of course, appear on its own behalf. Thus,

- Inducement of a violation of the code of ethics

*No person, whether or not a municipal officer or employee, shall induce or attempt to induce a municipal officer or employee to violate any provision of the code of ethics.*

- Appearances of outside employers and businesses of municipal officers and employees

*(1) Except as provided in subdivision 3 of this section, the outside employer or business of a municipal officer or employee shall not appear before the particular agency in which the municipal officer or employee serves or by which he or she is employed.*

*(2) Except as provided in subdivision 3 of this section, the outside employer or business of a municipal officer or employee shall not appear before any other agency of the municipality if the officer or employee has the authority to appoint any officer, employee, or member of the agency or to review, approve, audit, or authorize any budget, bill, payment, or claim of the agency.*

*(3) Nothing in this section shall be construed to prohibit the outside employer or business of a municipal officer or employee from*

- (a) Appearing on its own behalf, or on behalf of the municipality, before a municipal agency; or*
- (b) Seeking or obtaining a ministerial act; or*
- (c) Receiving a municipal service or benefit, or using a municipal facility, which is generally available to the public.*

## Conclusion

The code of ethics provides the heart and soul of a local ethics law. Carefully crafting an ethics code tailored to the particular municipality will, in the long run, more than prove worth the effort.

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## Endnotes

1. See Temporary State Commission on Local Government Ethics, *In Search of a Wise Law: Municipal Ethics Reform* (March 20, 1991); Mark Davies, *New Municipal Ethics Law Proposed*, 5 MUNICIPAL LAWYER, March/April 1991, at 1; Mark Davies, *Final Report of the Temporary State Commission on Local Government Ethics*, 21 FORDHAM URBAN LAW JOURNAL 1-60 (1993); Henry G. Miller & Mark Davies, *Why We Need a New State Ethics Law for Municipal Officials*, FOOTNOTE 5, County Attorneys' Association of the State of New York (Winter 1996). See also Mark Davies, *Article 18 of New York's General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*, 59 ALBANY LAW REVIEW 1321-1351 (1996); Mark Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officers and Employees*, MUNICIPAL LAWYER, Summer 2005, at 10. All of the foregoing publications are available at <http://www.nyc.gov/ethics>, then "Publications," and then "Directory of Materials for Municipal Ethics Boards in New York State."
2. Gen. Mun. Law § 806(1).
3. See Mark Davies, *Ethics in Government and the Issue of Conflicts of Interest*, Chapter 7 in GOVERNMENT ETHICS AND LAW ENFORCEMENT: TOWARD GLOBAL GUIDELINES 97-122 (Praeger 2000); Mark Davies, *Considering Ethics at the Local Government Level*, Chapter 7 in ETHICAL STANDARDS IN THE PUBLIC SECTOR 127-155 (American Bar Association 1999).

4. A comprehensive discussion of the process of adopting a local ethics law in New York State may be found in Mark Davies, *Addressing Municipal Ethics: Adopting Local Ethics Laws*, Chapter 5 in *ETHICS IN GOVERNMENT—THE PUBLIC TRUST: A TWO-WAY STREET* (NYSBA 2002), available from the New York State Bar Association. See also Mark Davies, *Keeping the Faith: A Model Local Ethics Law—Content and Commentary*, 21 *FORDHAM URBAN LAW JOURNAL* 61-126 (1993) ("Model Law"); Mark Davies, *Empowering County Ethics Boards*, FOOTNOTE 11, County Attorneys' Association of the State of New York (Spring 1999), both articles available online at the link set forth in note 1, *supra*.
5. A commentary on each of these provisions may be found in the materials set forth in notes 1 and 3, *supra*, as well as in Mark Davies, *A Practical Approach to Establishing and Maintaining a Values-Based Conflicts of Interest Compliance System* (presented to the IV Global Forum on Fighting Corruption, Brasilia, June 2005), available at <http://www.nyc.gov/ethics>, then "International."
6. Transactional disclosure should be addressed in a separate section and will be discussed in Part II of this article. See also Model Law, *supra*, note 4, at 77-78 (§ 101).
7. See Model Law, *supra*, note 4, at 78-88 (§§ 102, 104, 105). In view of the applicability of the lobbying law to local governments (see, e.g., Leg. Law §§ 1-c(c), (k), (l)(v), (m), (n), (q)-(u), 1-m), consideration should be given to defining gifts by reference to Leg. Law § 1-c(j) and excluding gifts that are excluded in that section. In addition, "electronic correspondence" (fax and emails) should be added to the definition of "appear." If a definition of "particular matter" is desired, the definition set forth in New York City Charter § 2601(17) should suffice.

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