

WORKING RULES ON ETHICS
FOR ZONING BOARDS OF APPEALS

ETHICS CHECKLIST FOR ZONING BOARD MEMBERS

By

Mark Davies

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Working Rules on Ethics

for Zoning Boards of Appeals

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Part

Introduction

Zoning boards are considered to be "quasi-judicial" bodies. They are not courts, but they act somewhat like courts because they interpret the municipality's zoning law and apply it to particular cases. For that reason, the actions of the zoning board members must be above suspicion, particularly when the board is dealing with a controversial case.

So zoning board members, perhaps more than any other municipal officials, need clear ethics guidelines as to what they may and may not do. Unfortunately, few towns have a clear and complete code of ethics to guide their officials. And the state conflicts of interest provisions for municipal officials are a disgrace. They often

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Therefore, it appears that zoning regulations which seek to require the placement of mobile homes in subdivisions, parks or planned unit developments may still do so providing that the regulations are based upon legitimate objectives pursuant to the general welfare of the police powers. It also appears that such regulations can no longer be based on safety considerations that are covered by the HUD regulations or the Federal Housing Act. In addition, the restrictions on the placement of mobile homes cannot be so draconian as to be considered exclusionary. Finally, it would seem to be prudent for municipalities to reevaluate their ordinances in order to reflect the current status of mobile homes in view of current statutory and common law treatment of manufactured housing. ❖

make no sense. They contain enormous gaps - and so give officials little guidance. And they are almost unintelligible to non-lawyers.

This article will attempt to explain the requirements of the state conflicts of interest law as it affects zoning board members. But board members should be aware that their own town may have additional or stricter ethics requirements. For example, a town might prohibit certain town officials from accepting a gift of any size from someone doing business with the town, even though the state law might permit a gift up to \$75.00. So zoning board members should also check their town's local ethics law.

The state conflicts of interest law is found in article 18 of the New York State General Municipal Law (sections 800-813). Article 18 contains three areas of concern to zoning board members:

- (1) A prohibition on having an interest in a contract with the town (sections 800-805);
- (2) Certain disclosure requirements (sections 803 & 809)¹; and
- (3) Certain miscellaneous conflicts of interest rules (for example, on accepting gifts)(section 805-a).

Each of these areas is discussed below. At the end of this article is a checklist of common ethics questions

A. Interest in Contracts

The state's conflicts of interest law prohibits a town officer or employee from having an interest in a contract with the town if the officer or employee has some control over the contract. For example, a town zoning board could not hire one of its members as a stenographer for a ZBA hearing, but the town board

could hire a ZBA member to paint the town hall.

This rule against interests in contracts is complicated, tricky, and dangerous for town officials. In deciding whether the rule applies in a particular case, the town official has to answer four questions:

- (1) Is there a contract with the town?
- (2) Does the town official have an interest in the contract?
- (3) Does the town official have any control over the contract?
- (4) Do any of the various exceptions apply?

Each of these questions is discussed below. In addition, zoning board members should be aware of the penalties for violating this law. Lastly, they should be aware of restrictions on holding more than one town position (dual public employment). These topics are also discussed below.

(1) Is there a contract with the town?

The law's definition of "contract" is odd. It includes not only an agreement with the town, "express or implied", but also "any claim, account or demand" against the town. So a lawsuit against the town is a "contract" with the town.

The State Comptroller's Office has said that an application for a zoning change and the granting of that application is not a "contract."² It would seem that a zoning variance is not a contract either. But one court held that an application for a building permit, and the issuance of the permit, is a contract.³ (A building permit is a bit different from a zoning variance though, because a building permit does not involve much discretion.

A zoning variance does. So it makes sense to say that a building permit can be a "contract" but a zoning variance is not.) Also, an article 78 proceeding may be a contract since it is a "claim or demand."

Putting all this together, a zoning board member is allowed to apply for a zoning variance for his or her own property (for example, to build a deck that extends into the setback).

When zoning board members however, apply for a variance on their own property, they should "recuse" themselves - that is, they should not take part in the zoning board's discussion and should not vote on the variance. If possible, zoning board members asking for a variance on their own property should not appear before the zoning board in person, especially if there is any opposition to the variance. If they can, they should probably have someone else appear for them before the board (like an attorney, an architect, or a friend).

(2) Does the town official have an interest in the contract?

A town official has an "interest" in a contract with the town if the official receives some financial benefit as a result of the contract. *The town official does not have to be a party to the contract.* For example, if the town board hires a firm to paint the town hall, and the firm subcontracts part of the job to the part-time deputy town clerk, that deputy clerk has an interest in the firm's contract with the town because the deputy clerk gets a financial benefit as a result of that contract (although it is not a prohibited interest).

Under the law, a town official is said to have an interest in:

- (a) Any contract of the official's spouse, minor children, or dependents;
- (b) Any contract of the official's outside business or employer; and
- (c) Any contract of a corporation in which the official owns or controls stock.

Suppose, for example, that a town board member is a part owner of a moving firm and that the town board contracts with that moving firm to move furniture out of the town hall. The town board member has an interest in that contract, *even if the board member receives no financial benefit as a result of that contract.*

In other words, a town official has an interest in a contract:

- (a) If the town official receives a financial benefit as a result of the contract (even if he or she is not a party to the contract); *or*
- (b) If the contract is with the town official's spouse, outside business or employer, or a corporation in which the official owns or controls stock (even if the official does not personally receive any financial benefit from the contract).

There is an exception to this rule. A town official does not have an interest in a contract just because his or her spouse, minor child, or dependent is employed by the town. This means that nepotism is allowed. For example, the town board could hire the spouse of a town board member. In fact, the town board member could even vote to hire is or her own spouse. But to avoid appearances of favoritism, a town official should recuse (disqualify) himself or herself from any involvement in the town's hiring of a relative of the official.

(3) Does the town official have any control over the contract?

Even if a town official has an interest in a contract with the town, that interest is illegal only if the official has some control over the contract. There are four kinds of control:

- (a) The official - either individually or as a member of a board - has the power or duty to negotiate, prepare, authorize, or approve the contract; *or*
- (b) The official - either individu-

ally or as a member of a board - has the power or duty to authorize or approve payment under the contract; *or*

(c) The official - either individually or as a member of a board - has the power or duty to audit bills or claims under the contract; *or*

(d) The official - either individually or as a member of a board - has the power or duty to appoint an officer or employee who has any of the powers or duties listed in paragraphs (a) through (c).

The official does not have to act on the matter. It is enough if he or she has the power or duty to act on the matter. For this reason, *a violation of law still occurs even if the official recuses (disqualifies) himself or herself from voting or acting on the matter.* So, too, *competitive bidding does not prevent a violation.*⁴

(4) Do any of the exceptions apply?

There are 15 exceptions to the rule on prohibited interests in contracts. They are listed in section 802 of the General Municipal Law. Some of these exceptions are rather rare. Some are quite common. The most common exceptions are the following:

(a) Outside employment.

If a town official's interest in a contract is illegal merely because the official is an officer or employee of the person or business that has the contract with the town, then the official may keep that interest, provided that (a) the pay the official receives from the employer is not affected by the contract (e.g., the official does not receive a commission or bonus as a result of the contract) and (b) the official's duties for the outside employer do not involve the contract. Note that the exception does not apply if the official is a director, partner, member, or stockholder of the outside employer.

(b) Non-profit organizations.

A town official's interest in a contract

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with the town is allowed if the contract is with a non-profit organization.

(c) Grandfathered contracts.

A town official's interest in a contract with the town is allowed if the contract was entered into before the official became an officer or employee of the town. But this exception does not apply to a renewal of the contract. For example, if someone is elected to the town board and at the time she is elected her husband has the town's insurance business, that contract is allowed. But the town cannot renew the insurance contract as long as the town board member remains in office.

(d) Stocks.

Where a town official's interest in a contract with the town is illegal because the official owns or controls stock in a corporation that has the contract, the interest is allowed if the stock is less than five per cent of the corporation's outstanding stock.

(e) Small contracts.

If the total money payable under all town contracts the official has an interest in is \$100 or less during the fiscal year, then the official's interest in the contract is allowed.

(5) What are the penalties for violating this law?

If a town officer or employee "willfully and knowingly" violates the law against having a prohibited interest in a contract with the town, the official has committed a misdemeanor. The official may also be subject to disciplinary action, including removal from office. Moreover an official "willfully and knowingly" violates this law if the official knows the facts that make the interest prohibited. *The official does not have to know that his or her interest in the contract is illegal.* In addition, the contract, if willfully entered into, is "null, void and wholly unenforceable". The town cannot go through with the contract even if it wants to.⁵

Suppose, for example, that a town board member is a part owner of a local hardware store. The Highway Department buys a snowblower from

the hardware store. The town board member has a standing order with his partner that whenever any town employee buys anything for the town, the partner keeps 100% of the profit from the sale and also sends a notice to the board member and the town clerk that the sale was made.

It would seem that the town board member acted ethically, but in fact he violated the law and committed a misdemeanor. The snowblower sale was a contract. The town board member has an interest in that contract because the contract is with his hardware store, even though the board member receives no money from the sale. The exception for outside employment does not apply because the board member is an owner not an employee of the store. Since he knew these facts, he "willfully and knowingly" violated the law, and the sale is null and void.

Luckily for zoning board members, they do not have control over very many contracts. However, because the penalties for violation of this law are so serious, zoning board members must be aware of it. If they have any questions at all, they will need to ask their town attorney.

(6) What about dual public employment?

The law on prohibited interests in contracts also applies to something called "compatibility of public offices" - that is, to employment in two municipal positions, either two town positions or a town position and a position with another municipality. The New York State Town Law also has rules in this area.⁶

For example, a member of a town zoning board of appeals may also serve:

- (a) One the board of trustees of a village within the town; or
- (b) As town director of finance; or
- (c) As administrative assistant to the supervisor, provided that the town board does not make decisions subject to review by the zoning

board; or

- (d) As the town assessor; or
- (e) On the board of education; or
- (f) As the town superintendent of highways; or
- (g) As a member of the town police department; or
- (h) As a commissioner of the town water district; or
- (i) As the deputy town supervisor.

Also, the same person may serve as secretary to both the zoning and planning boards.⁸ However, a zoning board member should recuse (disqualify) himself or herself if any matter relating to his or her other municipal position comes before the zoning board. For example, a zoning board member who is also on the board of education should recuse himself or herself from participating in the discussions and vote if a matter involving school district property comes before the zoning board.

On the other hand, a member of a town zoning board of appeals may not serve:⁹

- (a) On the town board; or
- (b) On the town planning board, if local zoning regulations give the zoning board the power to review decisions of the planning board.

Also the secretary to the town zoning board may not at the same time be a member of the town board, and the clerk to the zoning board may not be the assistant town building inspector.¹⁰

The service of relatives on different town bodies usually presents no problem, unless a town ordinance or local law provides otherwise. For example, a person may serve on the zoning board even if his son or wife serves on the planning board.¹¹

It is sometimes hard to know whether two offices are compatible. The New York State Attorney General's office has published hun-

dreds of opinions in this area. Zoning board members with compatibility of office questions should contact that office (518-474-3429).

B. Disclosure

Apart from annual financial disclosure, which state law requires only in municipalities with a population of 50,000 or more, zoning board members face another kind of disclosure: disclosure of interests in contracts. In addition, applicants for approvals in land use matters must make certain disclosures.

(1) Disclosure of interests in contracts

If a town zoning board member has, will have, or later obtains an interest in an actual or proposed contract with the town, he or she must publicly disclose that interest under section 803 of the General Municipal Law, *even if the interest is not illegal*. (There are some exceptions to disclosure.) The zoning board member must make the disclosure in writing to the town board as soon as he knows he has or may have a possible interest in a contract with the town. The written disclosure becomes part of the town board's records.

Once the zoning board member has made the disclosure about a particular contract, he or she does not have to disclose any additional contracts with the same part for the rest of the fiscal year. Also, the law does not require that the board member recuse (disqualify) himself or herself in the matter, although often recusal is a good idea if it would otherwise appear that the board member was doing something improper.

If a zoning board member "willfully and knowingly" fails to disclose, the member commits a misdemeanor. It would seem that a "willful and knowing" violation occurs if the zoning board member knows that he or she has an interest in the contract, *even if the board member did not know that he or she was required to disclose that interest*.

(2) Disclosure in land use applications

Article 18 requires disclosure in certain land use applications. This disclosure is made by the *applicants*, not by the zoning board member. Specifically, the disclosure must be made in every application, petition, or request:

(a) For a variance, amendment, or change of zoning; or

(b) For approval of a plat or exemption from a plat or official map; or

(c) For a license or permit under the town's zoning or planning law or regulations.

The application, permit, or request must state, to the extent the applicant knows:

(a) The name and home address of any New York State officer, of any town officer or employee, and of any officer or employee of the county who has an interest in the applicant; and

(b) The nature and extent of the interest.

Under the law, town officers and employees are said to have an interest in the applicant if they or their spouses or their brothers or sisters or their parents or their children or their grandchildren or the spouse of any of them

(a) Is the applicant, or
(b) Works for the applicant, or
(c) Owns or controls stock of the applicant (with certain exceptions), or
(d) Is a member of a partnership or association applicant, or

(e) Has an agreement with the applicant to receive anything if the application is approved.

A "knowing and intentional" violation is a misdemeanor.

This law requires only disclosure by the applicant. It does not require disclosure by the zoning board member nor does it require the zoning

board member to recuse (disqualify) himself or herself from acting on the application. *Court decisions, however, do require recusal by the zoning board member*. So any time that either the zoning board member or a member of his or her family has a connection with an applicant before the zoning board, the member should disclose that fact and disqualify himself or herself from acting on the application if the connection falls into one of the above categories.

In addition, zoning board members should recuse themselves from acting on a matter if they have already spoken publicly about the matter. For example, if a zoning board member speaks out, as a neighbor, before the planning board on a particular case, the zoning board member should recuse himself or herself from considering that case if it later comes before the zoning board.¹²

On the other hand, zoning board members should not recuse themselves unless one of the above situations occurs, for two reasons. First, zoning board members are appointed to the board to review and decide cases, not to disqualify themselves. Second, since it takes a majority of all of the members of the board to act on a matter, a recusal is, in effect, a no vote since the recusal does not count toward approving the application. To avoid this problem, some towns have established alternate members of the zoning board, or appoint ad hoc members, who only act on a case if a regular zoning board member has a conflict of interest.¹³

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Part II of this article, 'An Ethics Checklist for Zoning Board Members' will appear in the May/June issue of *Talk of the Towns*.

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NOTES:

1. There are also annual financial disclosure requirements for towns having a population of 50,000 or more. These financial disclosure requirements are in sections 810-813 of the General Municipal Law but are not discussed in this article.
2. Opinion of the State Comptroller No. 83-114.
3. *People v. Pinto*, 88 Misc. 2d 303, 387 N.Y.S.2d 385 (Mt. Vernon City Ct. 1976).
4. 1979 Op Atty Gen (inf) 231.
5. See *Landau v. Percaccolo*, 50 N.Y.2d 430, 429 N.Y.S.2d 566 (1980).
6. Town Law Sections 20(1)(d), 20(4), 267(3), 271(3).
7. 1986 Op Atty Gen (inf) 131; 1988 Op Atty Gen (inf) 124; 1986 Op Atty Gen (inf) 53; 1986 Op Atty Gen (inf) 94; 1984 Op Atty Gen (inf) 172; 1988 Op Atty Gen (inf) 47; 23 Op State Compt 283 (1967); 1982 Op Atty Gen (inf) 100; 27 Op State Compt 24(1971).
8. 1990 Op Atty Gen (inf) 1135.
9. Town Law Section 267(3); 1990 Op Atty Gen (inf) 1099; 93 Op Atty Gen (inf) 1005.
10. 1990 Op Atty Gen (inf) 1099; 1964 Op Atty Gen (inf) Jan. 23.
11. 1993 Op Atty Gen (inf) 1062; 1988 Op Atty Gen (inf) 89.
12. See 1993 Op Atty Gen (inf) 1098; 1988 Op Atty Gen (inf) 115.
13. See 1982 Op Atty Gen (inf) 178; 1984 Op Atty Gen 150.

For a model local ethics law that contains a real code of ethics, see Mark Davies, *Keeping the Faith: A Model Local Ethics Law - Content and Commentary*, 21 Fordham Urb. L.J. 61 (1993).

An Ethics Checklist for Zoning Board Members

This is Part II of an article entitled "Working Rules on Ethics for Zoning Board Members" by Mark Davies, Executive Director/Counsel, NYC Conflicts of Interest Board. Part I appeared in the March/April 1996 issue of Talk of the Towns

Following is an ethics checklist for zoning board members. This checklist is not a substitute for reading the law. But it should prove helpful.

WARNING: THIS CHECKLIST DEALS ONLY WITH STATE LAW. MAKE SURE YOU ALSO CHECK YOUR TOWN'S ETHICS CODE.

(1) Interest in Contracts

WARNING: VIOLATING THIS LAW IS A MISDEMEANOR.

(a) Does the case before the zoning board involve any contract with the town, including any claim against the town? **NOTE: YOU DO NOT HAVE TO BE A PARTY TO THE CONTRACT.**

(b) If so, will you receive any financial benefit as a result of that contract or will your spouse or outside business or employer or a corporation you own stock in receive a financial benefit as a result of the contract?

(c) If so, do you have any control over the contract - that is, either as an individual or as a member of the board, do you have the power to negotiate, prepare, or approve the contract or approve payment under it or audit bills under it or appoint anyone who does? **NOTE: IT DOES NOT MATTER IF YOU DISQUALIFY YOURSELF; THE QUESTION IS IF YOU HAVE THE POWER OR DUTY TO DO ANY OF THOSE THINGS.**

(d) If so, do any of the exceptions in General Municipal Law section 802 apply or is the contract an employment contract between the town

and your spouse, minor child or dependent?

If the answer to questions (a) through (c) is yes and no exceptions apply, then the interest is prohibited. You *must* give up the interest or resign from the zoning board.

If the answer to questions (a) and (b) is yes but the answer to question (c) is no, you do not have a prohibited interest, but you must disclose the interest.

If the answer to questions (a) through (c) is yes but an exception applies, you do not have a prohibited interest, but you must disclose the interest, unless it falls under General Municipal Law, §802(2).

(2) Dual Employment

Before you accept a second position with the town (in addition to your position as a zoning board member) - or before you accept a position

with another municipality while you are still a town zoning board member - check with your town attorney or the New York State Attorney General's Office (518-474-3429) to make sure you are allowed to hold both positions.

(3) Miscellaneous Ethics Requirements

(a) Do not ask for anyone for a gift if they have, or have recently had, any dealings with the zoning board.

(b) Do not accept a gift (or gifts) worth \$75 or more from someone if they have, or have recently had, any dealings with the zoning board. This includes free tickets and meals.

(c) Do not disclose confidential information that you received as part of your town duties.

(d) Do not use any confidential information for your own interests.

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(e) Do not make any agreement (or take anything of value) in connection with any matter before the zoning board (e.g., you cannot be hired as a contractor on a development when the development is before the zoning board).

(f) Do not make any agreement (or take anything of value) in connection with any matter before *any* agency of the town if your pay depends on the outcome of the matter (e.g., do not agree that you will get paid as a real estate broker on a sale only if the planning board approves the plat; instead, either tie your commission to some other event not involving the town or fix your fee based on the reasonable value of your services).

(4) Recusal (disqualification)

You should recuse (disqualify) yourself from acting on an application

before the zoning board in the following cases:

(a) If you are the applicant;

(b) If the applicant is your spouse, parent, child, brother, sister, grandchild, or the spouse of any of those people (e.g., your sister's husband);

(c) If you or any of those relatives works for, owns part of, or owns stock in the applicant;

(d) If you or any of those relatives has any agreement with the applicant to receive anything if the application is approved (e.g., your brother gets a finder's fee if the application is approved);

(e) If you have already spoken out publicly on the matter (e.g., opposed it as a citizen before the planning board);

(f) If the applicant is your client.

Not only must you recuse yourself as a zoning board member, but

you also should not speak by or against the application as a private citizen. If you have a financial relationship with the applicant but do not work for, own, or have stock in the applicant (for example, the applicant is your customer), you should disclose that fact. Whether you should recuse yourself will depend on the facts. If in doubt, recuse.

NOTE: If you violate these requirements, it is possible that you could be disciplined (that is, removed from office) but only if you knew the facts (e.g., that your brother works for the applicant). It is possible that a court will void the zoning board's action. No other penalties exist.

WARNING: AGAIN, CHECK YOUR TOWN'S CODE OF ETHICS FOR ADDITIONAL OR STRICTER PROVISIONS.