STATE OF NEW YORK

IN SEARCH OF A WISE LAW:

MUNICIPAL ETHICS REFORM

A Report of the

Temporary State Commission on Local Government Ethics

and

A Joint Proposal

of

The Temporary State Commission on Local Government Ethics
and the
The Local Government Advisory Board
consisting of representatives of
The Association of Towns of the State of New York,
The New York State Association of Counties,
and
The New York State Conference of Mayors
and Other Municipal Officials

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STATE OF NEW YORK
TEMPORARY STATE COMMISSION ON
LOCAL GOVERNMENT ETHICS

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Sometimes history does not merely repeat itself. Sometimes we can learn from the past and strike out in a new direction. The enclosed Bill is such an instance.

Charged by the 1987 Ethics in Government Act with proposing reforms of current ethics laws governing municipal officials, the Temporary State Commission on Local Government Ethics and the Local Government Advisory Board have together crafted a new law providing a uniform, statewide minimum ethical standard applicable to every municipal official in the State of New York.

The enclosed report and memorandum of support summarize the Commission's views of the need for that proposed law. While those views do not necessarily reflect the views of the Advisory Board, the enclosed Bill is the joint proposal of the Commission and the Advisory Board, consisting of representatives of the Association of Towns, the Association of Counties, and the Conference of Mayors.

Sensible, understandable, and enforceable, this new law will guide municipal officials and foster citizen confidence in local government.

The Commission and the Advisory Board call upon every municipal official and citizen in the State to support this historic endeavor.

Sincerely,

Henry Miller
Chairman of the Commission

Edwin L. Crawford
Advisory Board Member and
Executive Director, NYSAC

James P. Caruso
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INTRODUCTION

Good citizens deserve honest officials. Honest officials deserve wise laws to guide and protect them.

Entitled to municipal government that possesses integrity both in appearance and in fact, citizens rightfully demand ethical standards for their officials that are both enforceable and effective. So, too, officials rightfully require that their actions be regulated by legislation that is comprehensive and comprehensible, sensible and straightforward.

Yet the confusing patchwork of current state ethics law provides neither guidance to municipal officials nor reassurance to citizens. This report will, first, critique some of the deficiencies in that law and, second, summarize the Commission's recommendations for a new state ethics law to regulate the conduct of municipal officials.

The Commission's recommendations have been incorporated in a proposed Bill. **THIS BILL IS THE JOINT PROPOSAL OF THE COMMISSION AND THE LOCAL GOVERNMENT ADVISORY BOARD, CONSISTING OF REPRESENTATIVES OF THE ASSOCIATION OF TOWNS OF THE STATE OF NEW YORK, THE NEW YORK STATE ASSOCIATION OF COUNTIES, AND THE NEW YORK STATE CONFERENCE OF MAYORS AND OTHER MUNICIPAL OFFICIALS.** A copy of the Bill is set out in Appendix B to this report. A Memorandum in Support is set out in Appendix C.

DEFICIENCIES IN THE CURRENT ETHICS LAWS FOR MUNICIPAL OFFICIALS

As stated by a member of the Commission's Local Government Advisory Board, "Many important ethical matters are wholly untouched by current state law--leaving regulation on those matters to localities--resulting in what the Feerick Commission called 'a confusing and contradictory patchwork of unenforced and unenforceable ethics codes.' Even in those areas that are covered, the state law is often inadequate, offering many loopholes and exceptions."

Those deficiencies, which are legion, may be broken down into six areas:

- The lack of a state Code of Ethics for municipal officials;
- Gaps in the regulation of ethical improprieties;
- Reliance upon overly-intrusive annual financial disclosure statements;
- The lack of any effective enforcement mechanism;
- The failure to provide a range of penalties appropriate to ethical lapses; and
- The failure to impose appropriate penalties upon private citizens and businesses that induce officials to violate ethics laws.

Furthermore, New York State municipal ethics legislation as a whole not infrequently defies common sense and often presents to the public and its officials a law that is complex and unreadable, if not, in places, utterly opaque.** Each of these six areas is briefly discussed below.

1. The Lack of a Code of Ethics for Municipal Officials

Lawyers have a code of ethics. Doctors, nurses, real estate brokers, engineers, and many other professional groups have codes of ethics. Yet, in New York State, municipal officials, who make and enforce our local laws, have no state Code of Ethics to guide them. Certainly to that extent, New York State flounders in the backwater of ethics reform in this country.

Without a Code of Ethics--a straightforward, comprehensive statement identifying what they may and may not do--municipal officials faced with ethical dilemmas search in vain for counsel. The absence of any state or local body to interpret authoritatively the patchwork of current ethics laws compounds the frustration of honest officials seeking help with their ethics questions.

2. Gaps in the Regulation of Ethical Improprieties

a. <u>The Prohibition against Interests in Contract</u>

The basic prohibition in article 18 focuses upon the "interest" of an official--or his or her spouse, dependents, or business--in a contract with the municipality.*** That approach proves unacceptable for several reasons.

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* Hon. David N. Dinkins, Remarks to the Temporary State Commission on Local Government Ethics, October 25, 1990.

** See, e.g., Gen. Mun. Law § 811(1)(a)(i).

*** Gen. Mun. Law §§ 800(3), 801.

First, to counter the overbreadth of such a prohibition, the provision requires two significant limitations and fifteen exceptions. As a result, many actions that should be prohibited are instead permitted.

The first limitation restricts the prohibition to those contracts that the official has "the power or duty to (a) negotiate, prepare, authorize or approve...or authorize or approve payment thereunder (b) audit bills or claims under the contract, or (c) appoint an officer or employee who has any of...[those] powers or duties...."* Thus, for example, the chair of a town zoning board could lobby with the town board to award a lucrative no-bid contract to the chair's company.

A significant exception provides that the prohibition shall not apply to a contract with a municipal official's business if the official's business-generated income will not be "directly affected" by the contract and if his or her duties of municipal employment do not directly involve the procurement, preparation, or performance of the contract. Therefore, a city council member could vote to award a contract to a company of which the member himself is president, so long as the member's salary as president "will not be directly affected as a result of such contract" and so long as the duties of the member "do not directly involve the procurement, preparation or performance of any part of such contract."**

The second limitation--the failure to include brothers, sisters, parents, and emancipated children in the definition of interest in a contract--would, for example, permit the chair of a village planning board to vote in favor of granting subdivision approval to his own son or daughter for a new shopping mall, an approval worth perhaps hundreds of thousands of dollars.

Section 802 of the General Municipal Law contains fifteen exceptions to the basic prohibition against an official having an interest in a contract with his or her municipality. One must question the wisdom behind a single ethics provision that requires fifteen exceptions.

Second, the prohibition sometimes produces draconian results that are clearly at odds with the interests of the municipality, particularly in smaller, rural communities having limited access to goods and services. For example, one such community, prohibited from contracting with the mayor's snowplowing business, was forced to obtain that service at a substantially higher price from a company many miles away. Such problems are exacerbated by the provision in section 804 that "[a]ny contract willfully entered into by or with a municipality in which there is an interest prohibited by...article [18] shall be null, void and wholly unenforceable." An ethics regulation invites evasion whenever it thus thwarts the legitimate interests of the community and undermines local businesses.

Third, the existence of an official's interest in a contract with his or her municipality is not inherently bad. Indeed, the community may prefer to contract locally; and the official may provide better goods and services than someone else, for less money. From the perspective of public perception, the evil lies not in the fact of the contract but in officials' using their official positions to obtain a financial benefit for themselves, their families, or their

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* Gen. Mun. Law § 801(1).

** Gen. Mun. Law § 802(1)(b).

businesses. If the contract is awarded with the community's full knowledge of the official's interest, in full compliance with any applicable bidding laws, and without any participation by the official in the award process, then the advantage of the contract to the municipality will almost certainly offset any negative perception resulting from the fact that an official has an interest in a municipal contract. Yet current ethics laws do not permit any such procedure.

Fourth, the focus upon interests in contracts, with the accompanying limitations and exceptions, has made article 18 difficult to understand and enforce. Furthermore, any ethics law that rigidly prohibits interests in contracts, rather than permitting such interests with appropriate disclosure and recusal, sends to officials and citizens alike the message that municipal officials are inherently suspect, a message that contradicts reality and undermines respect for government.

b. Use of Public Office for Private Gain

Inappropriately focusing upon interests in contracts, article 18 contains no general prohibition against the use of one's public office to obtain private financial gain. Yet such a prohibition lies at the core of an ethics law for municipal officials, as illustrated by the dictum that a public office is a public trust.

For example, citizens of one upstate community were disturbed when a county official, who had requested county clerk employees to process passport applications on a college campus, then took out an advertisement in the school newspaper (at his own expense) stating that his photography business would be available to take "official passport photos." In fairness to the official, one should note that his action is not prohibited by article 18; but it should be. While hardly a major scandal, that action aggravated the public's already jaundiced view of integrity in local government; and far worse improprieties go unaddressed because article 18 lacks such a prohibition against use of public office for private gain.

c. Appearances before Municipal Agencies

Article 18 prohibits a municipal official from "receiv[ing], or enter[ing] into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any municipal agency of which he is an officer, member or employee or of any municipal agency over which he has jurisdiction or to which he has the power to appoint any member, officer or employee...."*

While seemingly an appropriate and effective prohibition, the provision is, in fact, far too narrowly drafted to address the many potential conflicts which exist. For example, although that provision would prohibit a town zoning board member from being paid to appear on behalf of a private customer or client before the zoning board, it would not prohibit the town attorney from appearing before the zoning board on behalf of a private client nor would it prohibit the chair of the planning board, or even the code enforcement officer, from appearing before the zoning board.** Indeed, the provision would, for example, permit the chair of the zoning board to appear on behalf of a friend before the zoning board itself, so long as the chair does not charge for his services.

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* Gen. Mun. Law § 805-a(1)(c).

** Section 805-a(1)(d) prohibits compensation for appearances before other agencies of the municipality but only if the compensation is contingent upon any action by the agency. Furthermore, that prohibition "shall not prohibit the fixing at any time of fees based upon the reasonable value of the services rendered."

Such appearances invariably raise the specter of impropriety. Yet current article 18 fails to prohibit them.

d. Appearances by Officials' Businesses

Article 18 contains no general prohibition on the employer or business of a municipal official appearing before the official's board or agency or before other agencies of the municipality over which the official has control. Thus, for example, a mayor's law firm could appear on behalf of a private client before the city council, so long as the mayor receives no compensation from that representation.* Such appearances are devastating to the reputation of a municipal body, as citizens announce that "the fix is in."

e. Revolving Door

With the possible exception of the prohibition against disclosure of confidential information, article 18 provides no restrictions upon the activities of former municipal officials. Thus, a village planning board member may today vote to approve a major development and tomorrow go to work for the developer. He may even appear before the planning board on that very same project. The criminal prosecution of Lyn Nofziger demonstrates how seriously such revolving door activities are taken in the ethics laws of other jurisdictions.

f. Gifts

Article 18's restriction on municipal officials' acceptance of gifts frequently confuses officials and citizens alike. That restriction prohibits officials from soliciting or accepting any gift having a value of seventy-five dollars or more "under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his officials duties or was intended as a reward for any official action on his part...."**

Vague and difficult to apply, the quoted language provides the official with little guidance as to which gifts are permitted and which are not. Indeed, one lower court has held that language unconstitutionally vague.*** Yet acceptance of gifts is perhaps the most common ethical question faced by municipal officials and, from the public's perspective, one of the most volatile.

To prohibit acceptance of all gifts would be farcical, lest officials be held to have violated the law for accepting a slice of pizza or a two dollar pen. Moreover, such a restriction would prohibit officials from attending a holiday party (or perhaps would allow them to attend but not to eat or drink anything), thereby transforming municipal officials into pariahs and the law into a joke.

On the other hand, no basis exists for permitting an official ever to solicit a gift, of any size. Furthermore, apart from bribery statutes, the law contains no restrictions upon citizens or businesses offering gifts to officials. Yet private citizens and companies that do business with a municipality should have a stake in the municipality's officials complying with ethics laws.

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* See Gen. Mun. Law § 805-a(1)(c).

** Gen. Mun. Law § 805-a(1)(a).

*** People v. Moore, 85 Misc. 2d 4, 377 N.Y.S.2d 1005 (Fulton County Court 1975).

3. Reliance upon Overly-Intrusive Annual Financial Disclosure Statements

a. Transactional Disclosure

Disclosure in current law relies almost entirely on annual financial disclosure. That is wrong. Disclosure in an ethics law must focus not on annual disclosure but upon transactional disclosure, which occurs when officials are requested to take action upon a matter in which they have a financial interest. They must then publicly disclose that interest and, usually, recuse themselves from participating further in the matter. In the experience of the Commission, objections to this type of disclosure are rare. Yet current law requires transactional disclosure only of a prohibited interest in an actual or proposed contract with the municipality.*

b. Applicant Disclosure

By focusing almost exclusively upon annual financial disclosure, current law also robs our citizens and officials of a useful scheme for applicant disclosure, which may be viewed as the flip side of transactional disclosure. Applicant disclosure occurs when a citizen or company seeking some benefit from the municipality must reveal in its request the identity of any municipal officials who may financially benefit from the granting of the request and who might act on the matter, to the extent known to the applicant. For example, a company bidding on a contract with the municipality would identify on the bid documents the name of any municipal official who might financially benefit from the bid and who also might act on the bid, to the extent the bidder knows.

This useful device not only provides a check on transactional disclosure but serves to give applicants a stake in municipal officials complying with ethics regulations. Yet current law limits applicant disclosure to certain applications involving land use.**

c. The Purpose of Annual Disclosure

In substituting onerous annual financial disclosure for transactional disclosure and applicant disclosure, current law misapprehends the purpose of annual disclosure. That misapprehension results from a fundamental misconception of the purpose of ethics laws themselves.

Contrary to the belief of some, the purpose of municipal ethics laws is not to catch crooks. Ethics laws cannot prevent deliberately dishonest conduct. More importantly, little need exists in New York State to prevent or punish such conduct since the overwhelming majority of municipal officials are honest and zealous in performing their jobs.

Rather, the primary purpose of ethics laws is to set out guidelines for officials to aid them in avoiding conduct that will be perceived by the public as unethical. Only secondarily do ethics laws seek to punish unethical conduct.

Similarly, the purpose of annual disclosure is not to catch crooks or prevent unethical conduct. Rather, the purpose of annual disclosure is to alert the public and the municipal official himself or herself to where potential conflicts of interest may arise before they actually occur. For example, if the mayor of a village files an annual disclosure form stating that she

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* Gen. Mun. Law § 803.

** Gen. Mun. Law § 809.

owns a piece of property on North Main Street, then when that area comes up for rezoning or for a municipal improvement, every citizen in the village and the mayor herself will be well aware that she has a potential conflict of interest. Annual disclosure thus provides a needed check on transactional disclosure and helps to defuse a potential conflict.

d. Deficiencies in Current Annual Disclosure Requirements

Properly understood and employed, annual disclosure serves an important function in an ethics law. Yet under current state law, only counties, cities, towns, and villages with populations of 50,000 or more--less than 5% of the local governments in the state--are required to have annual disclosure. Those municipalities were required to adopt their own form for annual financial disclosure by January 1 of this year. If they failed to do so, then they are subject to the form set forth in article 18.*

In all but the largest municipalities, that state statutory form unnecessarily intrudes upon the privacy of municipal officials, discouraging local government service. Unlike state government, local government at the highest levels is essentially a volunteer government. Legislative bodies, zoning boards of appeals, planning boards, architectural review boards, environmental advisory boards, and the like, are composed entirely of unpaid or minimally paid members. The mere burden of filling out a lengthy disclosure form may well drive good people out of service in those governments, at least in smaller communities. Yet the typed version of the state form is 21 pages long; and two-thirds of the cities, towns, and villages in New York State have populations less than 5,000.

Not only the length but the contents of the state annual financial disclosure form discourage municipal service, by requiring the compilation and valuation of extensive financial holdings, items that have little relevance to determining conflicts of interest at the local level. For example, the form requires the disclosure of securities worth over a $1,000 but not the address of the official's home.** Certainly in smaller municipalities, few conflicts of interest arise from stock holdings; many arise from land use, such as applications for variances or subdivision approval.

Finally, the categories of amount of the various assets the official reported on the state form must be redacted by the agency with which the statement is filed. Such a requirement imposes an enormous burden and makes little sense at the local level. Either the statements filed with a local ethics board must be redacted and photocopied by the board members themselves or the categories of amounts must be revealed to some other municipal official who is charged with that task, since few local ethics boards will have their own staff. Even this Commission has itself been unable to redact and photocopy the forms that have already been filed with it and has, instead, been forced to rely upon the generosity of its chairman's staff to provide that service. Hiring an individual simply to photocopy and redact forms appears unconscionable in this time of fiscal crisis.

Yet because disclosure forms are both more readily available at the local level than at the state level and more likely to be reviewed by local citizens and reporters, one may

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* Gen. Mun. Law §§ 811(2), 812(1)(a), 812(5).

** Gen. Mun. Law § 812(5), paragraphs 16 and 17.

anticipate that the volume of requests to review forms will be substantial. On the other hand, the requirement for categories of amounts makes little sense in a disclosure form for municipal officials, whose interests outside the municipality present little chance for conflict with their public duties.

Furthermore, at the local level, where strict oversight by a chain of command is neither possible nor desirable, ethical norms must largely be self-enforcing. Citizens of the community, local reporters, and the individual officials themselves all become the ethics watchdogs. Accordingly, public availability of the annual disclosure statement is essential; requiring an official to disclose any information that will not be publicly available is pointless.

In short, neither in scope nor in content does the state statutory annual financial disclosure form make sense for local governments. A far shorter, far simpler form is needed, one that contains no financial data at all.

4. The Lack of Effective Enforcement

The shocking truth about the enforcement of municipal ethics laws is this: there is no enforcement. No local agencies exist to enforce local ethics codes. The district attorney may prosecute an article 18 violation if it is criminal, but few prosecutions have been undertaken. The Comptroller's Office may write up a violation of article 18 in an audit. The Attorney General's Office and this Commission may issue advisory opinions on article 18, but apart from financial disclosure they are just that, advisory. A local ethics board may issue an advisory opinion that an official's action violates a local ethics code. Except in the limited area of financial disclosure, no real enforcement mechanisms exist. In other words, laws have been enacted with no means to enforce them.

5. The Lack of a Range of Penalties

A handful of ethics violations under article 18 are misdemeanors*; but, as noted above, few prosecutions occur. More importantly, rarely is an ethics violation criminal. Rarely should it be criminal.

Yet, aside from criminal penalties, there are few penalties that may be meted out under the current law. The options of civil forfeiture, damages, and debarment do not exist at all. Civil fines are only possible in the area of financial disclosure; and there the maximum fine is $10,000, far too high in the municipal context.** Rarely, therefore, may the punishment be made to fit the crime.

Ironically, it is the municipality that is penalized greatest under the current law, even though the municipality is not at fault. As noted above, article 18 makes "null, void and wholly unenforceable" any contract willfully entered into in violation of the "no interests" provision, even if that contract substantially benefits the community.

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* Gen. Mun. Law §§ 801, 803, 805, 809.

** Gen. Mun. Law § 813(13).

6. The Lack of Penalties for Inducing Officials to Violate Ethics Law

Current state law fails to give citizens and private businesses a stake in municipal officials complying with ethics laws. For example, hoping to keep a village's business, a bank might give a personal loan to the village treasurer at a below-market interest rate. Quite possibly, the official will lose his or her job as a result. Absent outright bribery, the bank will lose nothing.

Like the ancient Romans who threw innocents to the lions and then chastised the victims when they bled, current ethics laws grant banks and developers and bidders and vendors and every other business and private citizen virtual immunity to pressure municipal officials into committing unethical acts–and then punish the officials. Although most private citizens who do business with local governments are honest, the ability of a self-serving few to hammer at municipal officials weakens their capacity to remain above reproach and, even when they do, seriously undermines the public perception of integrity in local government. Among all the deficiencies in current ethics laws, this one perhaps ranks as the most troubling.

THE COMMISSION'S RECOMMENDATIONS

Having identified the deficiencies in current ethics laws for municipal officials, one can construct with little difficulty the proposals needed to remedy those defects. The problem lies not in drafting the law but in overcoming the inertia against reform.

Many may be heard to say: one should forget such reform; either an official is honest or not; and, in any event, ethical improprieties occur only in big cities. That assessment is wrong, on all counts.

One cannot forget reform of ethics laws because the public and the press, quite properly, will not allow it to be forgotten. Furthermore, while the vast majority of municipal officials are honest and zealous, being honest is not enough. Appearances and public perception play an enormously important role in the effectiveness of officials and the well-being of their communities.

Finally, ethical problems--certainly the perception of ethical problems--arise not just in New York City but in little hamlets and villages and towns across the state. In its short life, this Commission has received hundreds of complaints and inquiries about ethics problems, mostly from smaller communities.

On the other hand, ethics laws are not a glass bead game, an academic exercise, as the approach of some reformers would seem to intimate. The point of ethics laws lies not in filing forms or in prohibiting officials' activity merely for prohibition's sake. To the contrary, one must never divorce proposals for ethics law reform from their impact upon the lives and effectiveness of the officials themselves.

So, too, one must never forget that the point of ethics laws for municipal officials is to improve both the perception and the reality of integrity in local government and to encourage, not discourage, citizens from participating in that government. If an ethics law fails in those goals, it fails in everything.

Ever mindful of these admonitions and cognizant of the expertise available to it through its Local Government Advisory Board, the Commission, and that Board, have drafted a new state ethics law for municipal officials. For the first time in the history of the State of New York, a state body has linked arms with local government officials to craft an ethics law.

THIS BILL IS THE JOINT PROPOSAL OF THE COMMISSION AND ITS ADVISORY BOARD, CONSISTING OF REPRESENTATIVES OF THE ASSOCIATION OF TOWNS, THE ASSOCIATION OF COUNTIES, AND THE CONFERENCE OF MAYORS.

Had either the Commission or the Advisory Board acted alone, the Bill would undoubtedly have been different in some respects. Yet, negotiation and compromise have produced a more constructive proposal than any that could have been drafted by either body alone, stronger in its responsiveness to the needs of citizens and officials alike, stronger in its advancement of the goals of ethics reform. Indeed, forged in the fires of compromise, this historic Bill, if enacted, will serve our municipalities well for decades to come.

1. The Impact of the Bill on Current Article 18

The Bill would replace article 18 of the General Municipal Law in its entirety, including current section 804-a, which contains additional provisions applicable only to Nassau County. Those provisions are more logically included in a local ethics act, and Nassau County has no objection to their deletion from article 18.

2. The Specific Goals of the Bill

In drafting a new article 18, the Commission sought to meet five specific goals:

1. To craft a straightforward, common sense Code of Ethics that will guide municipal officials and help restore citizen confidence in local government.
2. To enact a state ethics law that fills the gaps in current law, as discussed above, while focusing not on prohibition but on transactional disclosure and recusal. Such a law will thereby proclaim to citizens and officials alike that local officials are honest and that they should be treated accordingly.
3. To create an annual disclosure form that demands disclosure of only that amount of information necessary to assure that citizens and officials alike are made aware of personal interests which may conflict with public duties. In most communities in the state, a two-page form will accomplish that goal. At least in smaller communities, every page beyond that is unnecessary and may well drive good people out of local government while gaining but a fraction of a percent in additional useful information.
4. To enact provisions that give private citizens and businesses a stake in officials complying with ethics laws, for example, by punishing the inducement of an ethics violation, by imposing applicant disclosure, and by creating a system of debarment.
5. To preserve municipal home rule by setting a statewide minimum standard for municipal officials while permitting municipalities to enact more stringent local ethics acts and by vesting primary enforcement of ethical norms not in the state but in local ethics boards. A state commission would thus act as a backup ethics board for those municipalities that do not desire or cannot afford their own; would provide education, training, and technical assistance; and would oversee local ethics boards. Such a state commission, however, would not have the power to overrule decisions of a local ethics board; such a power would reside only in the courts. Furthermore, the Bill does not impose mandates without money. Rather, the Bill makes local ethics boards entirely optional and requires of those ethics boards that are set up no more than is necessary to carry out their duties.

The provisions of the Bill, in light of these five goals, are discussed in section 5 below.

3. Readability of the Bill

An ethics law that cannot be understood, cannot be obeyed or enforced. The Commis-on therefore places heavy emphasis upon easily understandable organization, contents, and ord usage, particularly in those provisions that directly affect the activities of officials. An hics law must be user friendly. Otherwise, it fails in its essential purpose of providing uidance to officials and confidence to citizens.

4. Organization of the Bill

The Bill is divided into two parts. The first part (sections 800-810) contains the rovisions directly concerning the conduct of municipal officials. The second part (sections 11-838) contains the provisions for administering the act. Except for municipal attorneys id ethics board members, officials would not often have occasion to consult the second part; ie provisions of concern to officials are therefore grouped into the first ten sections of the new ticle 18.

For that reason, the Bill contains two definitions sections, which cross-reference each ther. The first definitions section (section 803) contains definitions necessary for officials to nderstand the first ten sections of the new article 18. The second definitions section (section 11) contains the lengthy and complex definitions governing the scope of article 18 generally nd, in particular, spelling out which municipalities and officials are subject to the article. arely will an individual official not know whether he or she is subject to article 18. Including ngthy definitions relating to that determination in the officials' portion of the article ierefore would only engender confusion.

The article opens with the single most important provision in the entire law: a Code f Ethics for municipal officials (section 800). Since that Code can only be understood in light f the exclusions from it, those exclusions are set forth immediately following the Code (section 01). To emphasize that private citizens and businesses now have a stake in the enforcement f the Code of Ethics, the section prohibiting them from inducing an official to violate the Code ollows (section 802). Only then do the definitions appear, as they have been carefully crafted o impose no additional duties on officials (section 803).

Sections 804 through 806 set out additional duties (appearances by outside employers nd businesses of municipal officials, annual disclosure, and applicant disclosure), followed y the penalties provisions (voidable contracts, penalties, debarment, and injunctive relief) sections 807 through 810).

After the definitions relating to administrative issues and the procedural provisions overning disclosure statements (sections 811 through 813), the article sets out the require-ients for local ethics boards (sections 814 through 821) and the commission (sections 822 hrough 823). The specific duties and responsibilities of ethics boards and the commission are ddressed next (sections 824 through 832). Finally, the article sets out various provisions that lo not fall within the previous categories, including local ethics acts, local government gencies serving more than one municipality, the municipal advisory board, public inspection if records, miscellaneous provisions, and distribution and posting of the statute (sections 833 hrough 838).

5. The Provisions of the Bill

a. Code of Ethics (section 800).

For the first time in the history of New York State, this Bill, if enacted, would provide municipal officials with a minimum, uniform, statewide Code of Ethics, applicable to every officer and employee of every municipality in the state.

(1) The Basic Prohibition; Recusal; Transactional Disclosure (subdivisions 1, 2, and 11).

In contrast to current law, the basic prohibition in this Code focuses not on an "interest in a contract" but on using one's public office for private gain--for oneself, one's relative, one's employer or business, one's customer or client, or even for a major campaign contributor. In such a situation, the official may neither take action (such as voting to award a contract to a mayor's campaign contributor) nor fail to take action (such as failing to cite one's outside employer for a zoning violation).

Rather, the official would disclose the conflict (transactional disclosure), notify his or her superior, if any, and recuse himself or herself from acting further in the matter. Thus, a village could contract with the mayor's company for snowplowing services, provided that the mayor disclosed his interest and refrained from participating in the matter in any manner whatsoever.

Certain actions are excluded from the prohibition--indeed, from the entire Code of Ethics - including actions specifically authorized by state or federal law, ministerial acts, receipt of municipal services or benefits generally available to residents in the municipality, and representation of constituents by elected officials without compensation in matters of public advocacy. (Section 801(1), (2), (6), (7).)

(2) Gifts (subdivision 3).

The gifts provision is simple and straightforward. An official may never solicit a gift, of any value, from any person who has ever received or sought a financial benefit from the municipality. An official may not accept a gift from any person who the official knows or has reason to know has received or sought a financial benefit from the municipality within the previous 24 months.

The official is thus protected from inadvertently violating the law by accepting a gift from a company that the official could not have known did business with the municipality. In addition, exclusions exist for awards from charitable organizations, for gifts from parents, spouses, and children, for gifts having an aggregate value of $75 or less during a year, and for gifts accepted on behalf of the municipality and turned over to the municipality. Thus, for example, the mayor of a city may accept a gift from the mayor of a sister city, provided that the gift is turned over to the municipality itself. The Bill also preserves the current exemption for payments for performing weddings. (Section 801(3)-(5).)

(3) Representation and Appearance (subdivisions 4 and 5).

The Bill prohibits an official from representing any other person before the municipality, from appearing on behalf of any other person before the municipality, and from representing any other person in any matter against the interests of the municipality. Again, certain exclusions apply, including appearances and representation authorized by state or federal

law, receipt of municipal services or benefits generally available to residents in the municipality, and representation of constituents by elected officials without compensation in matters of public advocacy. (Section 801(1), (6),and (7).)

(4) Confidential Information (subdivision 6).

This provision is a clarification of existing law. Such information may be disclosed to the extent expressly permitted by state or federal statute. (Section 801(1).)

(5) Political Solicitation (subdivision 7).

For the first time, this Bill would prohibit a municipal official from directly or indirectly soliciting a subordinate, other than a political appointee, to make a political contribution or to participate in an election campaign. (See definition of "subordinate" in section 803(16).) Henceforth, putting the squeeze on non-political appointees will not be tolerated.

The Commission also discussed extending that prohibition to solicitation of contributions from vendors. However, it was determined that such a restriction properly belongs in the election law and should not single out municipal officials.

(6) Revolving Door (subdivision 8).

This provision is simple to understand and enforce: upon leaving municipal service, an official, for one year, may not appear before any agency of the municipality or be paid for working on any matter that is before the municipality. However, as to particular matters upon which the official worked while in municipal service, the bar would be permanent. One year is sufficiently long for the vast majority of municipalities; those that need a longer period may adopt it as part of a local ethics act.

A municipal official may, of course, appear on his or her own behalf. For example, a former zoning board member could appear before the zoning board to request a variance for his or her own property. In addition, the prohibition would not apply to officials who performed only ministerial acts while in municipal service. (Section 801(8).)

(7) Avoidance of Conflicts (subdivision 9).

Most ethics codes around the country prohibit an official from knowingly acquiring a conflict of interest. This provision merely enacts such a prohibition for municipal officials in New York State.

(8) Inducement of Others (subdivision 10).

The Bill would prohibit a municipal official from inducing or aiding another municipal official to violate the Code of Ethics. For example, if a town board member and a member of the town zoning board own a certain piece of property, the town board member could not ask the zoning board member to vote for a variance for the property.

b. Inducement of Violation (section 802).

This section extends to private citizens and businesses the prohibition against inducement of violations and is the first part of the triumvirate of provisions intended to give private citizens a stake in officials' complying with ethics laws. No one, whether or not a municipal official, should be permitted to induce a municipal official to violate the Code of Ethics.

c. Definitions (section 803).

Definitions are kept to a minimum and do not impose any additional obligations, or create any additional exemptions, beyond those contained in the clear language of the Code

of Ethics and the exemptions section. Burying duties or exemptions in the definitions makes an ethics law virtually unusable for a lay person. As noted above, definitions relating to the scope of the article as a whole are set out in the administrative provisions of the article (section 811). Those other definitions are of little interest to most officials and, if included here, would serve only to confuse.

d. Appearances by Officials' Firms (section 804).

Prohibiting an official's outside firm or business from appearing before any agency of the municipality would effectively ban many professionals from serving on municipal boards. Furthermore, the concerns of citizens in appearances by officials' firms before the municipality are met by a prohibition of such appearances before those agencies of the municipality over which the official has some influence--namely, the official's own agency (subdivision 1) and any agency in which the official exercises authority (subdivision 2). In any event, an official's outside firm should be allowed to appear on its own behalf or on behalf of the municipality, to seek a ministerial action, or to receive the same benefits available to anyone else in the community (subdivision 3).

e. Annual Disclosure (section 805).

The Bill requires annual disclosure only by elected officials, department heads (and those authorized to act on their behalf), policymakers, and those officials who negotiate, authorize, or approve contracts, leases, real property sales, regulations, and the like.

Most importantly, annual disclosure would only consist of:

(1) the real estate in the municipality (and within one mile of the boundary of the municipality) in which the official and his or her immediate family have a financial interest; and

(2) the sources (not the amounts) of the official's, and his or her spouse's, outside earned income. The resulting form would not exceed two pages and could be completed by most officials in less than ten minutes. Furthermore, virtually all of the information would be public knowledge in the community, at least in small communities, although it may not be available in one place. No financial data whatsoever is required.

A Sample Annual Disclosure Form based on this provision is set out in Appendix A to this report. A municipality would be free to enact a more extensive disclosure form if the municipality so desired.

For the rare instance where even a simple annual disclosure form might be too invasive, the Bill provides for waivers by the commission (section 828). In addition, to protect the official who is unable to obtain the required information from a spouse or relative, the annual disclosure section contains a good faith efforts provision (section 805(5)).

f. Applicant Disclosure (section 806).

As the second part of the triumvirate of provisions aimed at giving private citizens and companies a stake in officials complying with ethics laws, this section requires anyone requesting a financial benefit from the municipality to disclose the names of any municipal officials who might financially benefit from acting on the request. For example, an applicant for a zoning variance would be required to list the names of any zoning board members or code enforcement officers who might financially benefit from the application.

g. Voidable Contracts (section 807).

If a contract is entered into with the municipality in violation of the Code of Ethics or the restriction on appearances by an official's outside firm, the municipality's governing body should have the authority to ratify that contract, for despite the conflict of interest, the contract may benefit the community. However, the ratification should in no way affect the imposition of penalties for the violation. This ratification provision will obviate the necessity of municipalities seeking waivers, except in rare instances.

h. Penalties (section 808).

This section sets out a broad range of penalties for violations of article 18, including disciplinary action, civil fines (a maximum of $1,500 is ample), damages, and, where the violation was intentional or knowing, civil forfeiture and criminal penalties. In the exceptionally rare instance where a municipal official intentionally or knowingly violates the ethic law in order to obtain a substantial financial benefit, the violation should be a felony. Section 827 sets out the procedures by which penalties are assessed. It should be emphasized that the Bill in no way restricts the authority of district attorneys to prosecute criminal violations of article 18 or of any other law (section 827(7)).

i. Debarment (section 809).

Debarment is the third part of the triumvirate of provisions giving private citizens and businesses a stake in municipal officials complying with ethics laws. Simply stated, debarment provides that anyone who intentionally or knowingly violates any provision of article 18, including a private business that induces a municipal official to violate the Code of Ethics, may be prohibited from doing business with any state or local governmental entity in the State of New York for a period not to exceed three years. That penalty would be imposed by the supreme court in a special proceeding initiated by the municipality, its ethics board, or the commission (section 827(5)).

j. Injunctive Relief (section 810).

If an ethics board or the commission fails for six months to act on a sworn complaint alleging a violation of article 18, the complainant could bring a special proceeding to enjoin the alleged violation, to compel compliance with article 18, or to declare whether a violation has occurred.

k. Administrative Provisions (sections 811 through 838).

These provisions fulfill the basic goals set forth above and are discussed seriatim below.

(1) Additional Definitions (section 811). To simplify the bewildering array of municipalities in New York State, the Bill groups them into five categories for purposes of article 18: counties, cities, towns, villages, and something called "municipal local agencies."

Any agency, one or more of the members of the governing body of which is appointed by an officer, board, or agency of a county, city, town, or village would be deemed, for purposes of article 18 only, a part of that county, city, town, or village (section 811(2)). A separate provision governs the treatment of agencies falling under the jurisdiction of more than one county, city, town, or village (section 834).

Any agency, none of the members of the governing body of which is appointed by an officer, board, or agency of a county, city, town, or village would be deemed, for purposes of article 18, as a separate and distinct municipality (known as a "municipal local agency"),

entitled to establish its own ethics board and enact its own local ethics act. (Sections 811(4)-(5), 814(1), 833(1).)

(2) Ethics Boards (sections 814 through 832).

Any municipality, as defined above, may establish a local ethics board (section 814(1)). A municipality could also employ the provisions of article 5-G of the General Municipal Law to establish a joint ethics board with another municipality or to contract out its ethics board (section 814(2)). However, all ethics boards would be as non-political as possible (see sections 815 through 816).

A municipality may select the number of members of its ethics board - three, five, seven, or nine - but terms of office would be set at three years and would be staggered (sections 814(1)-(2), 816(3)). If for a period of 90 days an ethics board were unable to act because of vacancies or inability to obtain a majority vote on a matter, the commission could step in until the problem is resolved (section 820(1)-(2)). An ethics board or the governing body of the municipality could also refer a matter to the commission (section 820(3)).

An ethics board could only act with respect to officials of the municipality but in that municipality would have virtually all of the powers and duties of the commission, except the power to grant waivers from article 18 and the power to investigate the ethics board's own members or staff (sections 821, 825(3), 826, and 828). Those powers and duties include, for example, the power to review disclosure statements; to investigate, on complaint or on its own initiative, possible violations of the ethics laws; to subpoena witnesses and documents and conduct hearings; to recommend disciplinary action and assess penalties; to issue advisory opinions on the municipality's local ethics act; and to provide training, assistance, and education to municipal officials on ethics laws (sections 821, 824, 825, 827, 829, 831).

If a municipality has no ethics board, the commission would act as that municipality's ethics board (section 814(3)). In addition, the commission would, for example, oversee each ethics board's implementation of article 18 and the local ethics act (if any); grant waivers from article 18; issue advisory opinions on article 18; and provide technical assistance, training, education, model local ethics acts, and model regulations for ethics boards and municipalities (sections 820, 823, 826, 828, 829, and 831).

In short, article 18 would be administered primarily at the local level by local ethics boards.

(3) Local Ethics Acts (section 833).

Every municipality that has established an ethics board would be authorized to adopt a local ethics act, which could be more stringent, but not less stringent, than article 18. Current local ethics codes would cease to have any force and effect 180 days after the effective date of the Bill, unless brought into compliance with the Bill.

(4) Municipal Advisory Board (section 835).*

The Local Government Advisory Board has been enormously effective in assisting the Commission in understanding the concerns of local government and in providing much needed expertise in municipal law. That body should be made permanent, but enlarged to include representation of the governing bodies of the other major local government, school boards. Accordingly, the Bill would enlarge the Advisory Board by four members appointed by the governor upon the nomination of the New York State School Boards Association.

* Section 834 regulates local government agencies that serve more than one municipality. Section 836 addresses public inspection of the records of ethics boards and the commission. Section 837 contains various miscellaneous provisions, and section 838 mandates the distribution and posting of the appropriate provisions of article 18.

CONCLUSION

Sometimes government works. In 1987 the Governor and the Legislature established the Temporary State Commission on Local Government Ethics and its Local Government Advisory Board, which is composed of municipal officials appointed upon the nomination of the Conference of Mayors, the Associations of Counties, and the Association of Towns. That law mandated that the Commission propose revisions to current state ethics laws for municipal officials.

The framework created by the Governor and the Legislature has now borne fruit. For the first time in the history of the State, a state agency and representatives of local government have sat down together to draft a comprehensive and common sense ethics law for municipal officials, a law that is not imposed upon local officials but arises from them, a law that has both teeth and heart.

Jointly proposed by the Commission, the Advisory Board, and the three municipal associations, this Bill now offers to this state the opportunity to enact a law that will guide honest officials and reassure citizens of the integrity of their local government. It is among the best municipal ethics laws in the nation.

The opportunity is here. The time has come.