Ethics and the Municipal Legislator

By Noran J. Camp

Public officials and employees at all levels of government often face difficult ethical issues. Local legislators are no exception. Over the years, the laws of the State and many municipalities,[1] including New York City, have furthered the public policy that legislators and other government officials should not utilize their positions to advance their private interests. Indeed, as early as 1830, the laws of New York City prevented the Members of the Board of Aldermen from having any interests in contracts funded pursuant to local ordinances.[2] Now some local laws, and to a much lesser extent state laws, address comprehensively the conflicts of interest that local legislators and other municipal employees face.

This article touches upon some of the most common conflict of interest issues that local legislators face and the answers to these ethics questions for legislators—answers which are sometimes different from those that would apply to other municipal employees. In particular, this article examines how ethics laws guide local legislators when their official duties overlap with private interests, when they face decisions on what, if any, employment opportunities and business interests to pursue, on what gifts they may or may not receive, and how to avoid problems with misuse of municipal resources for political purposes, while accommodating the reality that most local legislatures are political bodies.

I. Ethics Laws Applicable to Municipal Legislators

The basic ethics laws applicable to municipal legislators in New York State are found in General Municipal Law §§ 800-813,[3] in the various ethics codes that may have been enacted by individual local governments, including the Advisory Opinions of local ethics boards,[4] and in the case law. The GML itself bars municipal officers and employees from, among other things, having "interests" in municipal contracts,[5] with numerous exceptions.[6] Case law and individual municipal ethics codes address issues such as conflicting or "dual" employments and post-employment restrictions. State or local campaign finance laws govern gifts to legislators' campaigns.

II. Guarding Against Decisions Based on Legislators' Personal Interests

Local legislators in New York State are often asked to vote on or take other official action on a wide variety of matters, ranging from budget and land use matters to tax issues and the enactment of local laws affecting businesses and communities. These legislators make decisions that have consequences for residents throughout their municipality—including their own interests. This would be the case, for example, in a vote on an across-the-board property tax. A legislator who is a property owner would be directly affected by this vote. Yet, these legislators would not face a conflict of interest because of the broad applicability of the measure.[7] Inevitably, however, there are also times when local legislators are in a position to take official action on a matter that more narrowly affects their own private financial or other interest. This would be the case, for example, for a legislator who owned land that was the subject of a narrow rezoning proposal pending before the legislature. Similarly, it would be the case for a legislator whose partner or spouse served on a board of directors of an organization funded by the municipality.

The ethics laws provide a range of guidance to legislators who face the question of what official action they may take when it could affect a narrow personal interest. The range of answers reflects the important yet competing interests at stake. On the one hand, there is a need to ensure that legislators act in furtherance only of their official duties. The laws must protect against the possibility that a legislator's action might be influenced by his or her own prospect of personal gain or loss. On the other hand, the laws must not produce a result that disenfranchises individuals or the entirety of the legislator's constituency.

Various court opinions, informal Attorney General Opinions[8] and local laws have arrived at different conclusions about the restrictions that should be imposed on local legislators with a narrow private interest in a matter. The opinions range from requiring legislators to recuse themselves completely from matters where the legislator has a specific private interest, to a requirement that the legislator simply disclose the private interest on the record.

For example, a New York Court found that a municipal legislator who had an interest in a firm that sought a permit to develop property should be disqualified from voting on that permit.[9] On the other hand, the mere fact that local legislators are employed by an entity with

business before the local legislature will not necessarily require their recusal, especially if their role as employees have nothing to do with the issue before the legislature, and their salaries will not be affected by action of the legislature.[10]

The courts have shown a willingness to look deep into a transaction to find a possible conflict. In *Rose v. Eichhorst*,[11] for example, the Court of Appeals found that the County's tax sale to a member of a Town Board located within the county, was voidable. The Court relied on the reality that the Town Board had the initial duty to pass the budget and collect the needed taxes for itself and for the County, while the County had the responsibility for collecting those taxes when they became delinquent, through the tax sale at issue, among other means.[12] Similarly, informal Opinions by the New York State Attorney General have favored recusal over disclosure in cases where a legislator's vote would affect his or her own personal financial interest in a direct way.[13]

In New York City, the ethics guidance, in appropriate cases, allows for a legislator to disclose his or her private interest and proceed with official legislative action. The New York City Charter recognizes that the power, and the duty, to participate in legislative matters are among the "essential functions they have been elected to perform."[14] Accordingly, the Charter recognizes that there are circumstances where a legislator has a permissible interest in an entity, but that a contemplated official action could directly affect that interest. Rather than adopting a blanket rule requiring a legislator to recuse—the Charter does require the blanket recusal of all other public servants in these circumstances—the Charter permits the legislator in such a case to participate in legislative activity provided that the legislator fully discloses his or her interest at the time he or she engages in it.[15]

Thus, under the New York City law, a legislator who has an interest in land proposed for a rezoning would be able to vote on the rezoning provided that he or she disclosed his or her interest on the record of the New York City Council and to the City's Conflicts of Interest Board at the time of his or her vote.[16] The New York City disclosure rule applies only to legislative activity, however, and not to other official action that a City Council Member might take, because the rule is intended to prevent voter disenfranchisement. The Council Member would not be allowed, for example, to use his or her official position to advance his or her own real estate development project before other municipal agencies or to lobby his or her colleagues in the City Council on the matter.

III. Outside Employment and Positions

Municipal legislators in New York State, because of their part-time status, have the possibility of maintaining outside employment or business interests. Conflict issues arise if legislators' outside employment or business interests relate to government business or otherwise intersect with their responsibilities as legislators. While there are many gray areas for legislators navigating outside employment, there are a number of clear rules for legislators to follow.

First, while no state statute absolutely forbids municipal legislators from working for another arm of municipal government, nevertheless, it is a violation of the state's common law for a person to hold two positions when one is subordinate to the other, or there is some other "inherent" conflict.[17] In addition, numerous state statutes prohibit the dual holding of specific municipal offices, such as a village trustee serving on the village's zoning board or planning board.[18]

Under the common law, it generally would be inappropriate for a local legislator to work for a local agency of the same municipality because of the relationship between the legislative and executive branches, and the authority that a legislator typically has over executive branch agencies and employees. In essence, the broad authority generally exercised by local legislatures over other municipal agencies would leave the legislator in the position of being his or her own boss. In *Dykeman v. Symonds*,[19] for example, a municipal employee was elected to her municipal legislature. The legislature, in turn, had authority over her salary as a municipal employee. The court accordingly required the employee to resign from her municipal post if she wished to serve as a municipal legislator and rejected her argument that she could simply recuse herself from matters relating to her municipal post.

The court determined that "the possibility of wrongdoing and the principle involved" were sufficient to bar her from holding both posts. But the court also made reference to the new legislator's "duty" to participate in the legislature's consideration of matters relating to her post. In other words, a local legislator cannot avoid a conflict of interest simply through routine recusal because the result would disadvantage the municipality and the legislator's constituents. The court further rejected the legislator's argument that making her choose between her municipal post and a seat in the local legislature would disenfranchise the voters of her district. The court made clear that this was a matter of choice, not disenfranchisement, and that "the choice lies with her."[20]

Second, a legislator may not use his or her official position or municipal resources to advance a matter related to his or her private business or employment. For example, a legislator may not call prospective clients using his or her official title, use his or her official stationary for private matters, or try to gain advantage for a client because of his or her official position.

Third, local legislators must be careful before engaging in any outside activities with entities that have busi-

ness dealings with the municipality. For example, a local legislator generally should not engage in private work that will eventually be reviewed by municipal employees over whom he or she has some authority.[21] And, in New York City, a local legislator must seek approval from the Conflicts of Interest Board before accepting a paid position with any organization that has a municipal contract or receives funding from the municipality.[22]

Fourth, legislators may not appear in their private capacity before municipal agencies. Since local legislators generally have some authority over all local agencies, such an appearance would essentially be an appearance before themselves, or before someone they have some authority over. For example, a legislator should not, as part of a compensated private law practice, represent a developer seeking approval from the local city planning agency, nor represent a parent in a family court action involving the local child welfare agency.[23] New York City has gone farther, and bars legislators from appearing as attorneys against the interest of the City regardless of whether they are paid or not.[24]

IV. Gifts to Legislators

New laws and rules severely restrict gifts to legislators by lobbyists and others doing business with municipal governments in the State.[25] The State bans gifts over $75 made by anyone to local legislators (and to all other public servants in the State), if a reasonable person could view the gift as being intended to influence the legislator, or as being a reward for official conduct.[26] A separate provision bans gifts over $75 to public servants if made by *lobbyists* regardless of whether the gift seems intended to influence or reward.[27] New York City now has the same gift structure, although the threshold is lower for non-lobbyist gifts ($50),[28] and the threshold is now zero ($0) in the case of lobbyists.[29] Also, New York City's lobbyist gift ban extends to the spouses, domestic partners and unemancipated children of the lobbyist.[30] Notwithstanding these prohibitions, there are a number of challenging gift questions for legislators.[31]

For example, there are some gifts that are not considered to be gifts to the individual, but rather gifts to the municipality. Furthermore, because of their unique positions as community leaders or elected officials, legislators are expected to attend cultural, civic and other community events.[32] In New York City, the Conflicts of Interest Board has established by rule that elected legislators (indeed, all elected officials) may attend such events.[33]

V. Misuse of Municipal Resources for Campaign or Political Purposes

Legislatures are uniquely political bodies. Their members are there as a result of their civic and political activities. Thus, legislators as a general rule are free to engage in political activities, just like members of the public. When a legislator's work status is officially part-time, there is no legal concern over whether or not the legislator is engaging in political conduct during "work" hours because there would likely be no set working hours.[34]

Nevertheless, state laws prohibit a *state* legislator from using public resources for political activities.[35] This would include the use of government phones to make campaign-related telephone calls, and the use of government supplies and office space for campaign purposes. State law appears to have left the regulation of such activities by *municipal* legislators up to local ethics codes. The New York City code prohibits such conduct as is prohibited state legislators. It also bars local legislators even from *asking* (much less coercing or compelling) a subordinate to participate in a political campaign or to make a political contribution.[36] Additionally, legislative employees are barred from working on political campaigns unless they do so voluntarily and on their own time.

It is worth noting that a critical municipal resource is the time and effort of its employees. Legislators must be careful with this resource too, and cannot put it to work for a private purpose. New York City, for example, flatly bans the practice of assigning non-City work to City employees.[37]

VI. Conclusion

The vast majority of municipal elected officials work diligently to comply with state and local ethics laws and rules. Because these laws are often complex, it is the job of the municipal lawyer to advise legislators on how to avoid conflicts of interest and at the same time fulfill their legislative responsibilities. The rules governing conflicts of interest must balance the local government's interest in having safeguards against undue private influences with the interest of the public in having effective and complete representation, recognizing that legislators are also private citizens with private interests.

Endnotes

1. By "municipal," I am referring to all local governments within New York State, including counties, cities, towns, villages, school districts and the like, as defined at General Municipal Law § 800(4).
2. Laws of 1830, Chapter 22, Section 11, discussed in *Report of the Special Committee on Ethics and Standards, New York City Council* (Feb. 3, 1959), reproduced in *The Board of Ethics of the City of New York: Council Report – Code of Ethics and Related Laws*, at 14 (1963).
3. These provisions do not apply in New York City, GML § 800(4), where municipal officers and employees are governed by the ethics standards set out at Chapter 68 of the City's Charter.
4. GML § 806(1)(a) *requires* each county, city, town, village, school district and fire district to adopt a code of ethics to guide its officers and employees (and *permits* all other municipalities to do so).
5. GML § 801(1).

6. GML § 802. *See generally* Mark Davies, *Legal Developments: Article 18 of New York's General Municipal Law: The State Conflict of Interest Law for Municipal Officials*, 59 Alb. L. Rev. 1321 (1996).

7. *See, e.g., Town of North Hempstead v. Village of North Hills*, 38 N.Y.2d 334, 344, 379 N.Y.S.2d 792, 798 (1975) (ordinance that affects most village property owners does not require recusal of local legislators who are also property owners).

8. The New York State Attorney General's Office from time to time issues Opinions regarding the interpretation of these provisions. But since the AG's Office is not formally charged with interpreting the statute for municipal officers and employees, its Opinions in this area are considered "informal."

9. *See Tuxedo Conservation and Taxpayers Association v. Town Board*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep't 1979). Actually, in this case the legislator did not have an "interest" in the firm as defined by the GML, but the court found that his interest was enough to violate the "spirit" of the law.

10. *See DePaolo v. Town of Ithaca*, 258 A.D.2d 68, 694 N.Y.S.2d 235 (3d Dep't 1999).

11. 42 N.Y.2d 92, 396 N.Y.S.2d 837 (1977).

12. "The [Town Board member's] action, through his membership on the town board, in preparing the town budget and thus initiating the collection of the taxes, must be considered as part of the approval and authorization culminating in the county tax sale." *Rose v. Eichhorst*, 42 N.Y.2d 92, 396 N.Y.S.2d at 837, 840 (1977).

13. *See, e.g.*, Att'y Gen'l Opn. (Inf.) # 97-5 (in an appropriate case in which a city council member's "ability to make decisions solely in the public interest" is compromised, "recusal is the appropriate course of action").

14. *See* COIB Adv. Op. # 94-28 (revised).

15. *See* Charter § 2604(b)(1)(a).

16. *See* COIB Adv. Op. # 94-28 (revised).

17. *See* Att'y Gen. Op. (Inf.) # 2002-21, citing *O'Malley v. Macejka*, 44 N.Y.2d 530, 406 N.Y.S.2d 725 (1978).

18. Village Law §§ 7-712(3), 7-718(3). *See generally* Mark Davies, *Non-Article 18 Conflicts of Interest Restrictions Governing Counties, Cities, Towns, and Villages Under New York State Law*, NYSBA/MLRC Municipal Lawyer, Winter 2006, at 5.

19. 54 A.D.2d 159, 388 N.Y.S.2d 422 (4th Dep't 1976).

20. Some municipalities, including New York City, take care of this problem by flatly prohibiting legislators from holding posts in any municipal agencies. *See* NYC Charter § 23; *see also Held v. Hall*, 190 Misc. 2d 444, 737 N.Y.S.2d 829 (Sup. Ct. Westchester Cty. 2002).

21. *See, e.g.*, Att'y Gen'l Op. (Inf.) # 98-30 (June 29, 1998) ("conflict of interest arises when a [county supervisor], acting in his private capacity, installs septic systems for private individuals and the systems are subject to review by county employees").

22. *See* NYC Charter § 2604(a)(1)(b) & 2604(e) (COIB waiver).

23. *See* GML § 805-a(1)(c) (municipal officer shall not, for compensation, enter into an agreement to render services in relation to any matter before a municipal agency over which he has jurisdiction).

24. NYC Charter § 2604(b)(7). Other such appearances (that is, not in a legal representation), are barred only if they are compensated. NYC Charter § 2604(b)(6).

25. The U.S. Congress and other government entities are also moving to update their conflicts of interest laws and rules, especially in regard to lobbyists and those having business dealings with the governmental body, including bans on so-called "pay to play" practices. *See, e.g.*, H. Res. 6 (Jan. 5, 2007) (adopting new ethics rules for the U.S. House of Representatives); Senate Bill No. 1 entitled "Legislative Transparency and Accountability Act of 2007 (January 18, 2007) (by a vote of 96 to 2, the Senate passed a bill addressing lobbyist gifts and participation in legislators' travel, post-employment restrictions and other matters); Conn. Pub. Act 05-5 (prohibiting "pay to play" practices, among other reforms). And, on January 24, 2007, New York State's new Governor, together with the leaders of both legislative houses, announced that they would pass sweeping ethics legislation to address lobbyist gifts, nepotism, political hiring, solicitation of political contributions, revolving door practices, and other matters.

26. *See* GML § 805-a(1)(a).

27. Legislative Law § 1-m.

28. NYC Charter § 2604(b)(5); COIB Rule 1-01(a).

29. NYC Admin. Code § 3-225 (effective Dec. 10, 2006).

30. NYC Admin. Code §§ 3-213(c)(1) & 3-225.

31. Also, while the burden of compliance with the general gift bans lies with the legislators (no public servant shall receive the gift), the burden of compliance with the lobbying gift ban lies with the lobbyists (no lobbyist shall offer or give the gift).

32. *Cf.* State Ethics Commission Advisory Opinion # 94-16. The State's Public Officers Law bans gifts to state officials, but it is virtually identical in wording to the GML gift ban to municipal officials. This Opinion acknowledges that it would be appropriate for a statewide elected official "to attend a function or event in his or her official capacity sponsored by any person or organization."

33. COIB Rule § 1-01(g) ("a public servant who is an elected official or a member of the elected official's staff authorized by the elected official may attend a function given by an organization composed of representatives of business, labor, professions, news media or organizations of a civic, charitable or community nature, when invited by the sponsoring organization").

34. This is not to say that a legislator who misses important votes or hearings to engage in campaign activities is not neglecting his or her official duties, but the consequences of such activity generally is left to be meted out at the polls.

35. *See* Public Officers Law § 74.

36. *See* NYC Charter § 2604(b)(9)(b) (political activity), and (11)(c) (political contributions).

37. NYC Charter § 1118 ("No officer or employee of the city . . . shall detail or cause any officer or employee of the city . . . to do or perform any service or work outside of the public office, work or employment of such officer or employee"). Similarly, Charter § 2604(b)(2) and (3) and COIB Rule 1-13(b) prohibit the use of City resources for private purposes. *See In re Reid*, COIB Case No. 2002-188 (July 18, 2002) (finding such misuse of city workers to be a violation of NYC Charter § 2604(b)(2) and (3)). *See also* N.Y. Const. art. VIII, § 1 (prohibiting counties, cities, towns, villages, and school districts from giving or loaning any money or property to or in aid of any individual or private corporation, association, or undertaking).

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