

Conflicts of Interest for
Municipal Officials
In New Jersey

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When deciding what to do in a given instance, remember that it is always a good idea to err on the side of caution when it comes to ethical questions. After all, as a local government official, your most valuable asset is your reputation.

Some of the requirements of the Local Government Ethics Law, set forth at N.J.S.A. 40A: 9-22.1 et seq., are relatively straightforward and easy to understand. Local public officials must file financial disclosure statements under N.J.S.A. 40A:9-22.6, and members of independent authorities cannot do business with or appear before those authorities for a year after they leave the body under N.J.S.A. 40A:9-22.5(b).

However, perhaps the central concept of this law, enacted in 1991 to restore and preserve the public trust in local government, is far less clear. Exactly what type of interest must an official have in a given issue to create a conflict sufficient to prevent him or her from participating in any decisions concerning the matter?

The statutes are clear that it need not be the official's own interest that is in conflict with his or her duty to the public. If a member of the official's immediate family, defined as a spouse or dependant child living in the same household, or a business in which he or she has at least a 10 percent interest, has such a conflict, that conflict is attributed to the official.

This conflicting interest can be either a financial or a personal interest. It must also be an interest that the official, or the official's family member or business, does not share with the general public. Beyond these parameters, however, the standards are less clear. In most cases, it is the "practical feel of the situation," on a case by case basis that will determine the existence of a conflict.

It is not necessary to prove that the special interest actually influenced the official's decision, as long as it creates a possible conflict. Therefore, in the case of *Gunther v. Planning Board of Borough of Bay Head*, 335 N.J. Super 452(L.2000), seven members of the planning board who were also members of a private yacht club contiguous to the applicant's marina property were found to be in conflict with respect to his development application creating eight residential lots with a marina on the property. There was no proof that the board members were not impartial, and in fact they

claimed that they could judge fairly. The court in this case noted that one member of the club had expressed the opinion that the applicant's parcel could be a valuable adjunct to yacht club property, and none of the seven members serving on the planning board denied that possibility in their certifications. Therefore, the court felt that the seven yacht club members on the planning board had a potential conflict that could taint their decision making.

Even when a valid objective reason exists for the decision, a special interest in the subject matter can taint a vote. In *Shapiro v. Mertz* (368 N.J. Super. 46, App. Div. 2004), a member of a municipal board of adjustment, with many years experience on the board and in the planning field, was up for reappointment. His wife had been elected recently to the five person governing body of the municipality. Only two other members of the governing body supported his reappointment, even though he was the candidate with the most experience. The new council member voted for her husband, justifying the action on the basis of his objective qualifications.

The Court found that, whatever the council member's true motivation in voting for her husband, it was a conflict of interest for her to participate in the vote. The court noted that the marriage relationship between a governing body member and the individual being considered for appointment by that body could clearly be perceived by the public as impairing the member's objectivity and independent judgment in voting on the appointment. The Court also pointed out that that its holding was not an unfair result under these facts because, despite all of the board candidate's planning experience, if the governing body had unanimously agreed that he was the best candidate for the position, his spouse's disqualification from voting would not have interfered with the appointment.

The court decisions on this subject have emphasized the fact-sensitive nature of each potential conflict situation. An official may have an interest in the subject matter and still vote on the issue if that interest is not sufficient to exert undue influence on his or her decision. In *Hughes v. Monmouth University*, Docket No. A-2227-06T2 (App.Div. 2007), a university located in the municipality had requested and obtained a number of variances from the board of adjustment for a new library building and parking lot on campus. The plaintiffs lived near the site of this planned new building and claimed that favoritism was shown to the university because several members of the board of adjustment were alumni of the school. The child of one of these alumni, furthermore, had received a merit-based tuition credit worth several thousand dollars from the institution. The plaintiffs asserted that the board members with these university connections should have recused themselves from the vote.

The Appellate Division ruled that recusal was not necessary under these facts, and the grant of the variances was proper. While being an alumnus of a university is clearly an "involvement" with the institution, said the court, in the case before it "...where the board members obtained their degrees many years ago, were not active alumni members, and did not substantially contribute to the University or otherwise evidence

any special attachment to the school, no reasonable person could conclude that such involvement..." would have improperly influenced their actions on the board of adjustment. Furthermore, the past award by the university of a merit-based tuition credit to a board member's child while that child was a student there was "...available to all similarly situated students" and therefore did not disqualify the parent/board member from voting. The court also noted that none of the board members or any member of their immediate families was currently a student at the university.

Several cases have dealt with the interaction of two sections of the law that deal with the appearance of a local agency member before that agency. N.J.S.A. 40A:9-22.5h says:

"No local government officer or employee or business organization in which he has an interest shall represent any person or party other than the local government...before any agency in the local government in which he serves". N.J.S.A. 40A:9-22.5k provides:

"Nothing shall prohibit any local government officer or employee, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests."

In *Jock v. Shire Realty*, 295 N.J. Super. 67(App.Div.1996), one of the members of the Board of Adjustment owned the controlling share of a corporation that was seeking several bulk variances for property it owned. The member appeared before the board to testify in support of the grant of these variances, and then voted for these variances as a board member. The court ruled that the grant of the variances was invalid because the testimony of the board member presented a possible conflict of interest.

In *Murtagh v. Borough of Park Ridge*, unreported (App. Div. 2006), 2006 WL 1541930, however, the Court found no conflict when a board member appeared before the board to object to the grant of a variance. The member lived within 200 feet of the property involved. The court explained that, under these facts, only the board member could explain the particular nature of his objection as a neighboring property owner. Furthermore, the board member/objector had recused himself from the vote on the variance, and he was supporting adherence to the zoning code, not requesting a deviation from it.

In one unreported Law Division case, the court held that the adoption of a zoning ordinance was invalid because the council president, who had a conflict, presided over the proceedings, even though he did not discuss or vote on the matter. (*Beacon Hill Farm, LLC. v. Marlboro*, unreported 2006, 2006 WL 1161361). Furthermore, in a recent unreported Appellate Division case, *Newmark v. Mendham* (A-4857-05T1, 2007), the court held that recusal and absence from deliberations was still not enough to avoid the taint of conflict where the nonparticipating board member was the architect who prepared the plans for the subdivision and variance application submitted.

An important issue for municipal officials seeking guidance on conflict matters was the subject of *In re Zisa*, 385 N.J. Super. 188 (App.Div. 2006). The court in this case found that, if a municipal official seeks advice on a conflicts issue from the municipal attorney, and certain conditions are met, such reliance can be a defense for the official against a claim of conflict. In so ruling, the Court reversed the Local Finance Board's holding on this subject.

The Court stated that while it was in agreement with the Board that the advice of counsel is not an absolute defense to violation of the Local Government Ethics Law, it was reasonable for the mayor to rely on such advice in this case. The Board's decision was based on the absence of a written notation or opinion setting forth the attorney's advice and on the mayor's status as a long time public official. The court did not find these factors persuasive.

Instead, the Court looked to the Opinion of the Executive Commission on Ethical Standards, *In re Howard*, 93 N.J.A.R. 2d (Vol. 5A) 1, *aff'd as modified*, 94 N.J.A.R. 2d (Vol. 5A) 1 (App. Div. 1994). It held that there were four requirements for reliance on the opinion of counsel defense. They were: 1) that the advice was received prior to the action taken 2) that the individual who offered the advice possessed authority or responsibility with regard to ethical issues 3) that the individual seeking advice made full disclosure of all pertinent facts and circumstances and 4) that the individual complied with the advice, including all the restrictions contained in it. The Court found that the advice given to the mayor by the municipal attorney in this case met all of these requirements, and that therefore the mayor had the right to rely on the advice of counsel.

Sometimes, however, one or more officials with conflicts must vote anyway under the "doctrine of necessity." This doctrine applies to those situations where conflicts of interest of the members of a public body must be overlooked to permit that body to act. In the case of *Allen v. the Toms River Regional Board of Education*, 233 NJ Super. 642 (App. Div. 1989), the Court considered this doctrine in the context of the certification of a defeated school district budget. Four of five governing body members had conflicts because their spouses were employed by the school district. The Court found that the conflicts should be overlooked so that the governing body could have a quorum and act.

In making this decision, the Court stated that the doctrine of necessity "will be invoked in those circumstances in which there is a pressing public need for action (that is, the matter cannot be laid aside until another date), there is no alternate forum which can grant the same relief and the body is unable to act without the members in conflict taking part." The Court noted that, in the case of a defeated school budget, review can take place before the Commissioner of Education, but doing so deprives the public of "additional participation before the governing body and board of education in reshaping the budget..." Therefore, the Court found that invoking this doctrine was appropriate in such a situation.

Similarly, in the case of *Gunther v. Planning Board of Borough of Bay Head, supra.*, the Court found that, even though seven members of the Board had conflicts of interest in the matter before it, they must participate and vote because of the doctrine of necessity. Without these seven members, the board would not have a quorum and could not act, and therefore the conflicts would not invalidate the board's action.

While the Courts have given some guidance in the years since the Local Government Ethics Law went into effect, a slight twist in the facts can produce a different result. What should you do if you are unsure about whether a conflict exists in a particular situation? As with all legal issues, you should, of course, check with your municipal attorney. If you are still not certain, you can request an advisory opinion from the state Local Finance Board. These opinions are available to municipal officials who want to know if a proposed action of theirs would be a conflict of interest.

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