

Ethical Considerations and Land Use Planning

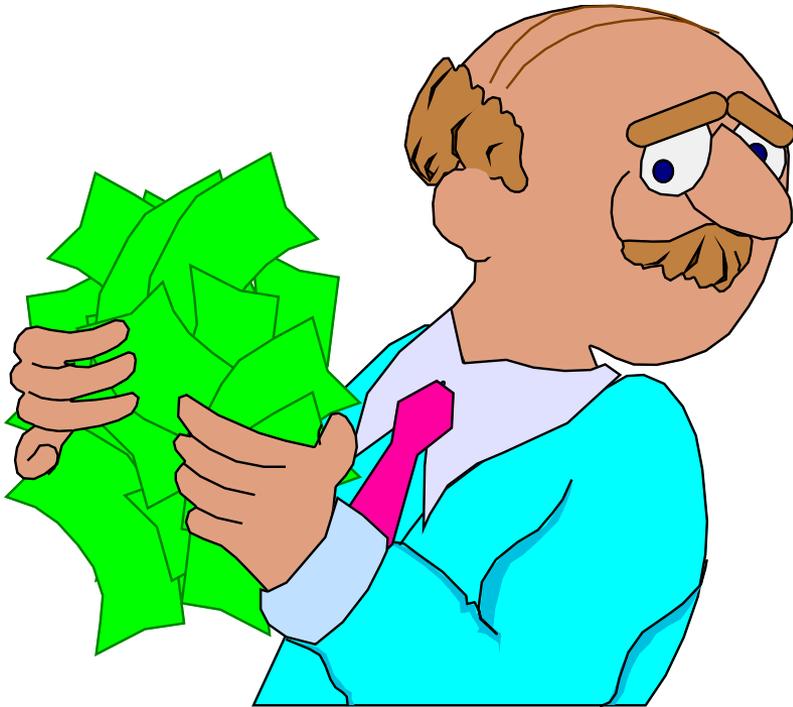
Ethics Issues Which Confront Players in the Land

Use Game

- Everyday Ethics
- Professionalism
Considerations
- Actions Subject to
state and local
codes/laws



Earning the Public Trust

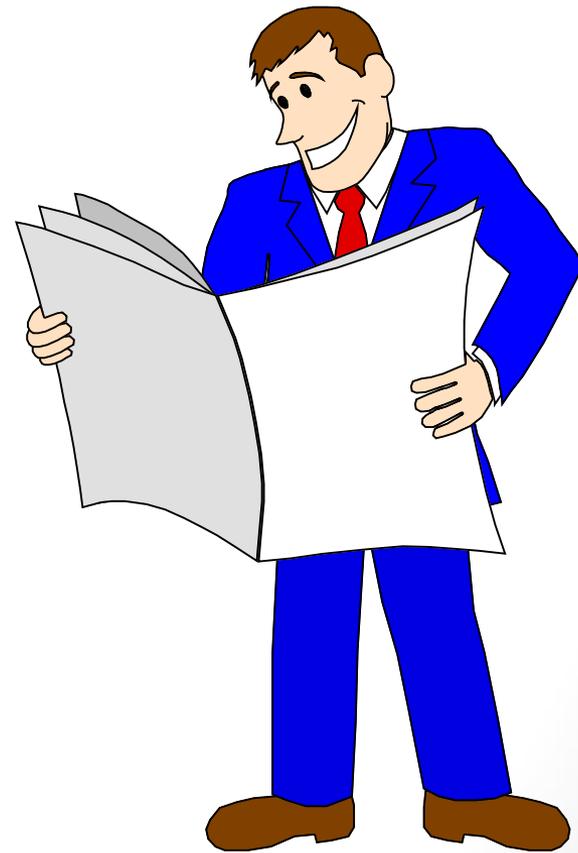


- Undermining the Public Purpose of Planning and Zoning
- Most Public Officials are Basically Good and Honest

The Bottom Line

Avoid the Headlines

Senator Cranston once commented how easy it is to make allegations of unethical conduct and how it is to defend against them



Defining Ethics



- Conduct or Behavior
 - Bad Faith
 - Ex Parte Conversations
- Morals or Values
 - community standards
- Conflicts of Interest
 - Art. 18 GML
 - Financial/Contractual
 - Familial

Searching for Guidance



- State Ethics Laws
- Local Govt Ethics Laws
- Ethics Committees and Commissions
- Opinions of State Attorneys General and Comptrollers
- Other Professional Organizations, e.g., AICP and APA
- Office of the State Comptroller and NYS Department of State
 - Both offer on-line training

Some Disclaimers for Today's Presentation

- Analysis of individual ethical questions are fact specific and require intensive analysis to reach a conclusion – this is NOT the goal or purpose of this morning's session
- This session is designed to familiarize you with the relevant laws – each member

NYS Ethics Law

- NYS Joint Commission on Public Ethics– No jurisdiction over local ethics issues
- BUT interesting 1998 Disposition Agreement
 - State employee who was a member of a local planning board agreed to resign his seat on the board and pay \$8,500 fine for receiving compensation in his private engineering practice for appearing before State agencies.
 - **2015 Change in the Lobbying Law**
 - Trigger was for municipalities over 50,000 now it is over **5,000**
 - **Registration required**

General Municipal Law Article 18

- Not a Comprehensive Code of Ethics
- Deals Primarily with Conflicts of Interest Arising from Government Contracts
- General Rule:
 - No Local Government Officer or Official may have a financial interest in a contract with a municipality of which s/he is an officer or employee where s/he has the power to negotiate, authorize, approve the contract, audit claims under the contract, or appoint an officer or employee who has any of these powers

Exceptions to the General Rule

- Where an officer/employee has an interest in the contract “solely by reason of employment as an officer or employee: of a person, firm, corporation or association which has contracted with the municipality, such a contract is not in violation of sec. 801 if the remuneration of such employment will not be “directly affected as a result of such contract” and the employee’s duties with the private entity do not directly involve the procurement, preparation, or performance of any part of the contract. (sec. 801(1)(d))

More Exceptions

- Purchase of real property by the municipality is not a prohibited contract provided the purchase and the consideration thereof are approved by the order of the Supreme Court upon petition to the governing board of the municipality. (sec. 802(1)(d)).

Even More Exceptions

- Acquisition of real property by condemnation proceedings is also not a prohibited contract (802(1)(d)).
- A contract with a membership organization or other voluntary not-for-profit corporation is not a prohibited contract (802(1)(f))

Even More

- A contract is not prohibited if it is with a corporation, in which the municipal officer has an interest solely by reason of stockholding which is less than 5% of the outstanding stock of the corporation (802(2)(a))
- A contract is not prohibited if it's total consideration, when added together with all other contracts in which such a municipal employee has an interest do not exceed \$100.00 within the fiscal year. (802(2)(e)).

Disclosure Is Required

- Whether or not a contract is prohibited, a municipal officer/employee who acquires an interest in any actual or proposed contract with a municipality must disclose the nature and extent of such interest *in writing* to the governing body thereof. Such disclosure must be *made part of the official record*. Disclosure need not be made of contracts specifically exempted. (Sec. 803)

Gen. Mun. Law sec. 809

- “Every application, petition or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license or permit...shall state the name, residence and the nature and extent of the interest of any state officer or any office or employee of such municipality...in the person, partnership or association making such application, petition or request...***to the extent known to such applicant.***”

What Has the Comptroller Opined?

- Required disclosure in sec. 809 does not apply to a planning board member whose interest as a neighbor is adverse to the applicant (Op. 88-68; Op. 83-108)
- It is not a violation of the GML for the secretary of the planning board to be employed by a local engineering firm that regularly appears before the Board, but the secretary should publicly disclose the relationship each time the firm appears before the board (Op. 97-12)

What is a “Contract”?

- NYS Comptroller has opined that applications for a zone change, applications to the planning board, and the granting of applications are NOT “contracts” under Art. 18 (Op. 83-114; Op. 91-98; Op.97-112)
- Application for a subdivision approval is Not a contract under Art. 18 (Op. 86-68)
- No contract where developer submitted plats for approval (Op. 65-327)

Contracts?

- Not a prohibited contractual C of I where ZBA Chairperson desired to sell his own land to a locality in a sell-purchase agreement (13 Op. St. Comp. 290, 1957)
- It could logically follow that a variance is not a contract (no legal authority on this, although scholars have written about it)

The State Comptroller's Ethics

Tutorial Asks:

- A village needs an environmental review for a park project. After competitive bidding, the contract was awarded to a firm whose primary stockholder (who owns 33% of the firm's stock) is one of the village trustees. The trustee did not participate in the village board's discussion and vote on the contract and will not perform any of the actual work under the contract.
- Does the trustee have a prohibited interest in the contract? Why or why not? If the trustee does not have a prohibited interest, are there any other issues with which the village should be concerned?

Another Comptroller Example

- A village trustee owns a food service business. Proposed zoning changes will broaden the rights of similar vendors and could negatively affect the business owned by the trustee.
- Does the village trustee have a prohibited interest in a contract? Why or why not? Are there any other issues with which the village should be concerned?

Other Actions Prohibited Under Article 18

- A municipal officer/employee may not accept or solicit or receive any gift having a value of \$75.00 under circumstances in which it could be reasonably inferred that the gift was intended to influence the official or could reasonably be expected to influence that official in the performance of official duties or was intended as a reward for any official action on the officer or employee's part. (805-a(1)(a)).

More Prohibitions

- An officer/employee may not disclose confidential information acquired in the course of official duties or use such information to further personal interest. (805-a(1)(b))
- A municipal officer may not receive compensation or enter into an agreement to receive compensation for services in relation to any matter before any agency of the municipality where his compensation is contingent upon the action of the agency.

The “Catch-All”

- The Attorney General has said that, “...a specific provision of the General Municipal Law need not be violated in order to find an improper conflict of interest.” (Inf. Op. 97-5; Inf. Op. 86-54).

Local Codes of Ethics

- Article 18 requires the governing body of every county, city, town village and school district to adopt a code of ethics, setting forth the guidance for its officers and employees. (sec. 806).

General Observations

- Courts will conduct a case-by-case determination in assessing whether there is a conflict of interest – often courts will look at the magnitude of the interest at issue
- Many allegations of unethical conduct are lodged at Board members, more often than not, when it gets to Court, absent a clear law on point, courts rarely find an illegal conflict

What Happens When A Member Has a Conflict?

- State Enabling Statutes Provide:
 - Legislative body of a city may establish alternate planning and zoning board member positions
 - For the purpose of substituting in the event a regular board member has a conflict of interest
 - Alternate members are to be appointed by the chief elected official or other duly authorized appointing authority
 - Chairperson of the planning board may designate an alternate to substitute where there is a conflict

Considerations for Alternate Members

- AG Op. 99-36 – may appoint alternates in situations other than a conflict
- How many? What order? At what point do they step in? Entire meeting or just a particular matter?
- Should alternates be required to attend every meeting?

General Guidance from the Comptroller

- “It is perhaps not unusual for a member of a municipal governing board to have strong personal feelings about a matter which requires board action because such matter may affect him in his capacity as a private citizen. If his prejudice or bias is such that he cannot truly objectively consider the merits of the case, both from the viewpoint of the applicant, and in light of what would best serve the welfare of the general public...voluntarily abstain from any participation...” Op. 78-14

The Attorney General Has Opined

- “Opposition to a proposed project by a neighbor should disqualify that individual from acting as a member of a zoning board of appeals or planning board with respect to the project.” (Op. 88-59)
- “Neighbors often act out of their own self-interests and concerns of their families..they may be incapable of measuring the merit of the application in light of overall public interest...they may be blinded in part by the overriding parochial concerns of neighbors.”(Id)

In Another AG Opinion...

- Where a planning board member is a member of a neighborhood association that has not directly opposed an application before that board, but the President of the Association has submitted a letter outlining concerns and requesting a thorough review, the AG says it is a question of fact based upon all of the circumstances as to whether the member has or appears to have a disqualifying conflict of interest. (Op. 88-60)

Compatibility of Office

General Rule:

In the absence of a constitutional or statutory provision which prohibits dual office holding, one person may hold two offices simultaneously unless they are incompatible.



Common Law Rule on Compatibility of Offices

Two Offices are Incompatible:

- 1) If one is subordinate to the other (basically, you cannot be your own boss); or
- 2) If there is an inherent inconsistency between the two offices (this is more difficult to determine)

People ex. Rel. Ryan v Green (1874)

Check Other Statutory Provisions: for example

- Sec. 27 – Planning Board, creation and appointment
 - “No person who is a member of the legislative body of a city to which the provisions of this section are applicable, shall be eligible for membership on such planning board.”
- See, Gen. City Law sec. 81(2) for similar provision for zoning board of appeals members

General City Law sec. 27(12)

- “No person shall be disqualified from serving as a member of the city planning board by reason of serving as a member of a county planning board.”

Trends

- Trends from informal AG opinions is to find dual office holding incompatible where there is an appearance of impropriety
- You can always seek an opinion from the AG

Examples of Compatible Offices – From the AG

- Member of County Planning Board and City Building Inspector (Op. 89-57)
- Vice Chairperson of a Town Planning Board and Manager of a Town's Municipal Golf Course (Op. 86-67)
- Code Enforcement Officer and Planning Board Member (Op. 89-29)
- Town Planning Board Member and Town Justice (Op. 90-37)
- Town Planning Bd.member and Town Assessor (Op. 88-23)

Examples of Incompatible Offices - AG

- Member of the City ZBA and Commissioner of Planning for the City (Op. 91-39)
- Senior Typist in City Building Dept. and ZBA member (Op. 2000-7)
- Planning Board Member and ZBA Member (Op. 93-3)
- Secretary to the Town ZBA and Member of the Town Board (Op. 90-56)
- Member of Village Planning Board and Member of Village Historic Review Commission

Familial Relationships

- Cornell University was seeking approvals for a new cooling system, and in some way, most everyone on the board had a connection to the University. Cornell employed one board member and one board member's spouse. A 3rd board member was married to a Cornell retiree, and a fourth board member was a graduate student at Cornell. None were found to have a prohibited conflict of interest.

Take the Social Media Quiz: How Many of You

- Use Facebook?
- Tweet?
- Use LinkedIn?
- Blog?
- Participate in a Listserv?
- Have Pinterest?
- Post Videos to YouTube?
- Have a Google+ Account?



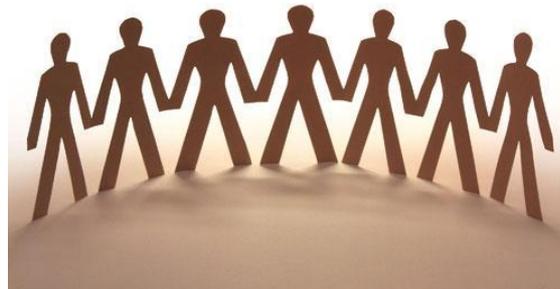
Legal and Ethical Issues

- First Amendment
- Open Meetings Law
- Freedom of Information Law
- Records Retention Laws
- Labor/Employment Law
- Copyright Issues
- ADA Accessibility
- Ethics/Conflicts



Suggestions

- Content of posts is part of the public domain
- Create guidelines for the usage of the site
- Consider whether the public should be allowed to post comments
- Use a combination of in person and internet based social networking sites to disseminate information and build networks.



Ethical Considerations for Quasi-judicial Bodies

- Zoning boards of appeal at times function in a quasi-judicial capacity in that they are vested with authority to be neutral decision makers in the planning process. Therefore, it is useful to consider local and state judicial advisory opinions as persuasive guidance as to how zoning board members should conduct themselves on social networking sites.



NY GML Art. 18

- “Appearance of Impropriety”
 - Facebook friends?
 - LinkedIn connection?
 - Google Circle?

Ethical Considerations for Planners

- Certified planners, who are members of the American Institute of Certified Planners (AICP), must subscribe to that certifying entity's code of ethics.
- A primary ethical responsibility for professional planners is to build "better, more inclusive communities."
- Social networking may help this goal, but this help may be limited, as many groups of people have statistically been shown to not utilize the internet. This could amount to social injustice.



Similar dilemmas can be seen in the AICP Rules of Conduct themselves...

- Rule 1 requires planners to provide “adequate, timely, clear, and accurate information on planning issues.”
 - This Rule can be read to mean that planners have an obligation not to post misinformation on social networking sites.
- Rule 7 of the AICP Code protects client confidences from being exposed by planners.
 - Therefore, certified planners must be careful not to inadvertently share confidential information when discussing specific projects on a social networking site.



AICP Rules of Conduct – Rule 8

- Rule 8 of the AICP Code states that planners “shall not, as public officials or employees, engage in private communications with planning process participants if the discussions relate to a matter over which we have authority to make a binding, final determination if such private communications are prohibited by law or by agency rules, procedures, or custom.”
 - Certified planners must be careful not to use social media to hold private conversations with planning process participants.

AICP Rules of Conduct – Rule 11

- Rule 11 of the AICP Code provides that planners may not “solicit prospective clients or employment through the use of false or misleading claims, harassment, or duress.”
 - Certified planners should proceed with caution about what they post on social networking sites relating to their professional employment and work.

AICP Rules of Conduct – Rule 19

- Rule 19 of the AICP Code prohibits the failure to disclose the interests of the planner's client or employer when participating in the planning process and also prohibits participation in an effort to conceal the true interests of a client or employer.
 - Certified planners should be mindful of the need to self-identify and to identify who their clients are when they post information and comments to social media sites.

Impropriety



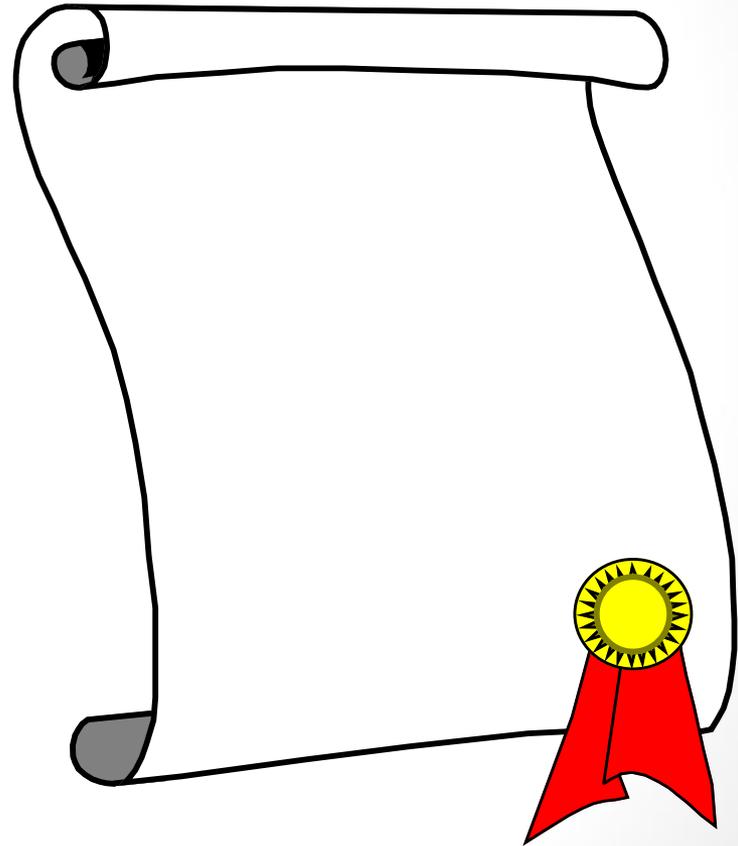
- Integrity in the system must be maintained, and the use of social networking does not change this.
- Listing “friends” that are attorneys, witnesses, or parties to the matter can be an issue, as it could cause impressions of impropriety to other judges, such as that the judge might favor one attorney over another in his/her court.
- Similarly, zoning boards should not be able to favor one party over another in a matter because of their personal relationship through social networking, as they have a duty of impartiality to their constituents.

It Happens...

- What should you do if an applicant before the Board is your Facebook friend?
- What should you do if you are “Linkedin” with an applicant?
- What should you do if you received a friend request or a Linkedin request after the board meeting where the person’s application was heard?
- What should you do if an applicant posts on your FB page?
- What should you do if an applicant sends you a private message via Linkedin or FB?
- What should you do where people are blogging about an application before your board?

Proactive Strategies to Ensure Ethical Conduct

Develop an Ethics Check



The Municipal Checklist

- Have you reviewed a copy of the state ethics law in the last year?
- Have you reviewed a copy of the local ethics law in the last year?
- Does your business relate in any way to issues which may come before the Board on which you sit?
- Could your business potentially benefit or be harmed by a decision of the board on which you serve?

The Municipal Checklist (cont)

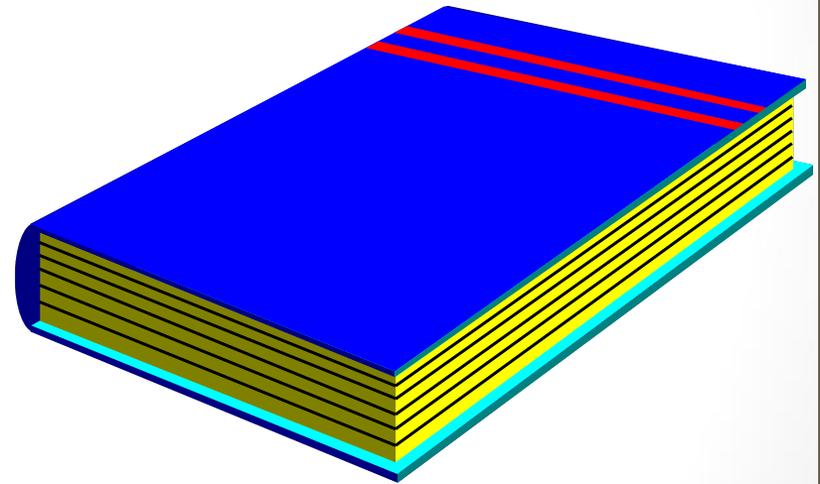
- Are you or a member of your immediate family licensed or engaged in any of the following professions which may cause you, your firm or family member to appear before the board on which you serve:
 - Architect
 - Attorney
 - Builder, Developer
 - Engineer
 - Land Surveyor
 - Mortgage Broker/Agent
 - Realtor
 - Subcontractor for Work on New Construction/
Remodeling
 - Title Insurance Company

The Municipal Checklist (cont)

- Do you hold investments in real estate within the municipality on whose board you serve?
- Do you have stock or any other type of ownership interest (including a silent limited partnership) in any company or organization which may appear before the board on which you serve?
- Are you related to or in business or professional relationship with, another municipal official on a different board or in an office where either position may review the decisions of the other?

The Municipal Checklist (cont)

- Are you comfortable and conversant with the municipal/board policies on conflicts of interest, recusal from deliberations, and recusal from voting?
- Do you know where to go to get answers to ethical questions in a timely fashion?



Keeping Current

- The Internet
- Mailing Lists
- Organizations



Periodically Review the Local Ethics Laws/Rules



- Revise if Necessary
- Determine Comprehensiveness
- Are Other Local Laws Needed?

The Public Trust and the Public Interest Is In Our Hands

