

Planning Ethics for the Public Sector: Beyond Gifts and Fruit Baskets

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Agenda

- Ethics and Conflicts of Interest for Municipal Officials and Employees
 - Requirements of the General Municipal Law (GML)
 - Ethics Requirements in Local Law
- Ethical Requirements for Professional Planners (AICP)
 - Required AICP Content
 - AICP Ethics Code Overview
- Focused Discussion
- Audience Discussion

Ethics and Conflicts of Interest for Municipal Officials and Employees:

Requirements of NYS General Municipal Law (GML)

General Municipal Law

■ § 801– Conflicts of Interest Prohibited

- 1) Cannot have an interest in any contract with the municipality when you have the power or duty to
 - a) Negotiate, prepare, authorize or approve the contract or authorize or approve payment under it
 - b) Audit bills or claims under the contract, or
 - c) Appoint an officer or employee who has any of the powers or duties set forth above
- “Interest” means a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as the result of a contract with the municipality which he serves.
- “Contract” means any:
 - claim, account or demand against or agreement with a municipality, express or implied
 - includes the designation of a depository of public funds and the designation of a newspaper
 - i.e., an official newspaper for the publication of any notice, resolution, ordinance
 - State Controller has held that an application for a zoning change or variance is NOT a contract, but the issuance of a building permit may be a contract

The Rules: Conflict Analysis

- § 801– Conflicts of Interest Prohibited
- “Contract” claim, account or demand against or agreement with a municipality, express or implied
 - State Controller has held that an application for a zoning change or variance is NOT a contract, but the issuance of a building permit may be a contract
- “Municipal officer or employee” means:
 - an officer or employee of a municipality
 - whether paid or unpaid,
 - including members of any administrative board, commission or other agency
 - or any officer or employee paid from county funds
 - Exceptions:
 - volunteer fireman civil defense volunteer,
 - BUT a fire chief or assistant fire chief is a “municipal officer”

The Rules: Conflict Analysis

- § 801– Conflicts of Interest Prohibited
- A municipal officer or employee is be *deemed* to have an interest in the contract of
 - a) His spouse, minor children and dependents, except employment contracts;
 - b) A firm, partnership or association of which he is a member or employee;
 - c) A corporation of which he is an officer, director or employee;
 - d) A corporation, any stock of which is owned or controlled directly or indirectly by the officer or employee

The Rules: Conflict Analysis

- § 802– Relevant Exceptions to the Rule
- Where an interest is prohibited solely because of your position with the municipality, an exception exists where
 1. Your pay as employee of the firm will not be directly affect by position; [and](#)
 2. Your duties as employee of the firm do not directly involve the procurement, preparation or performance of the contract
- Designating a newspaper for the publication of any notice, resolution, ordinance or other proceeding where such publication is required or authorized by law [§ 802 (1)(c)]
- A contract in which you have an interest, if the contract was entered into before you were elected or appointed, but no renewals of the contract [§ 802 (1)(h)]
- A contract with a corporation in which you are a stock holder so long as your interest in that corporation is less than 5% of the outstanding stock [§ 802 (2)(a)]
- A contract in which you have an interest if the total value does not exceed the \$750 in the fiscal year [§ 802 (2)(e)]

The Rules: Conflict Analysis

- § 802– Other Exceptions

- Sale of property to municipality?
 - Needs approval of the Supreme Court
- Acquisition of Real property by eminent domain
- A contract with a not-for-profit organization
- Where the member of the governing body or board is elected and serves without salary
- Purchases less than five thousand dollars in the aggregate in one fiscal year
- Purchases or public work is approved by resolution of the body or board by the affirmative vote of each member of the body or board except the interested member who shall abstain
- There are a total of 15 exceptions in § 802

The Rules: Conflict Analysis

- **Five-step analysis for determining whether a conflict exists:**

1. The individual is a "municipal officer or employee";
2. There is a "contract" with the municipality;
3. The officer or employee has an "interest" in that contact;
4. The officer or employee has the requisite power or duty under section 801; and
5. The officer or employee is covered by any of the exceptions in sections 801 or 802.

- If elements one through four are all satisfied and none of the exceptions apply, then the contract is prohibited under section 801.

- If one or more of the exceptions apply, then the contract is not prohibited; disclosure, however, may be mandated under section 803, and recusal may be required under the common law or advisable as a matter of common sense.

The Rules: Disclosure of Interest

- § 803 – Disclosure of Interest
- If you or your spouse have or will have an interest in any actual or proposed contract, or agreement with the municipality, you must-
 - publicly disclose the nature and extent of such interest in writing to the governing body as soon you have the knowledge that interest.
 - The written disclosure must be made part of and set forth in the official record of the proceedings of that body.
- Unless... one of the § 802 exceptions we discussed apply.
 - But even then, to avoid the appearance of impropriety, it is better to prospectively disclose and acknowledge the exception(s) in § 802 rather than be on the defensive should someone challenge you

General Municipal Law

- § 806. Code of ethics. 1.

- a) The governing body of each county, city, town, village, school district and fire district ***shall*** and the governing body of any other municipality may by local law, ordinance or resolution ***adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them.*** ... Codes of ethics shall provide standards for officers and employees with respect to disclosure of interest in legislation before the local governing body, holding of investments in conflict with official duties, private employment in conflict with official duties, future employment and such other standards relating to the conduct of officers and employees as may be deemed advisable. Such codes may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited. Such codes may provide for the prohibition of conduct or disclosure of information and the classification of employees or officers.

Ethics and Conflicts of Interest for Municipal Officials and Employees:

Local Ethics Laws



Example of Local Code Provision: Future Employment

- No town officer or employee may ask for, pursue or accept a private post-government employment opportunity with any person or organization that has a matter requiring the exercise of discretion pending before the town officer or employee, either individually or as a member of a board, while the matter is pending or within a one year period following the final disposition of the matter.
- No town officer or employee, for a two year period after serving as a town officer or employee, may represent or render services to a private person or organization in connection with any matter involving the exercise of discretion before the town office, board, department, or comparable organizational unit for which he or she serves. Additionally, the organizational unit for which the former town employee served shall refuse to entertain the former employee if they seek to represent or render services to a private person or organization in connection with any matter involving discretion before that organizational unit for a two year period.
- No town officer or employee, at any time after serving as a town officer or employee, may represent or render services to a private person or organization in connection with any particular transaction in which he or she personally and substantially participated while serving as a town officer or employee. Additionally, the town, or organizational unit in which the town officer or employee served, shall refuse to entertain the former employee if they seek to represent or render services to a private person or organization in connection with any particular transaction in which he or she personally and substantially participated while serving as a town officer or employee.

Example of Local Code Provision: Confidential Information

- No town officer or employee who acquires confidential information in the course of exercising or performing his or her official powers or duties may disclose or use such information unless the disclosure or use is required by law or in the course of exercising or performing his or her official powers and duties.
- No town officer or employee who acquires confidential information in the course of exercising or performing his or her official powers or duties shall use that information to further their own business, professional, or political career, or that of a relative

Example of Local Code Provision: Confidential Information

- a) No town officer or employee shall solicit, accept or receive a gift in violation of § 805-a (1) (a) of the New York General Municipal Law as interpreted in this section.
- b) No town officer or employee may accept or receive any gift, or multiple gifts from the same donor, having an annual aggregate value of one hundred dollars or more when:
 - 1) the gift reasonably appears to be intended to influence the officer or employee in the exercise or performance of his or her official powers or duties;
 - 2) the gift could reasonably be expected to influence the officer or employee in the exercise or performance of his or her official powers or duties; or
 - 3) The gift is intended as a reward for any official action on the part of the officer or employee.
- c) For purposes of this section, a “gift” includes anything of value, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form. The value of a gift is the gift’s fair market value, determined by the retail cost of the item or a comparable item. The fair market value of a ticket entitling the holder to food, refreshments, entertainment, or any other benefit is the face value of the ticket, or the actual cost to the donor, whichever is greater. Determination of whether multiple gifts from a single donor exceed one hundred dollars must be made by adding together the value of all gifts received from the donor by an officer or employee during the twelve-month period preceding the receipt of the most recent gift.

Example of Local Code Provision: Gifts

1. A gift to a town officer or employee is presumed to be intended
2. To influence the exercise or performance of his or her official powers or duties when the gift is from a private person or organization that seeks town action involving the exercise of discretion by or with the participation of the officer or employee.
3. As a reward for official action when the gift is from a private person or organization that has obtained town action involving the exercise of discretion by or with the participation of the officer or employee during the preceding twelve months.

The Rules: Consequences

- –Effect of violating of § 801 Rules?
 - § 804--Any contract willfully entered into by or with a municipality in which there is an interest prohibited by this article shall be null, void and wholly unenforceable
 - § 805—Any municipal officer or employee who willfully and knowingly violates the foregoing provisions of this article shall be guilty of a misdemeanor



The Rules: Other Prohibited Conduct

■ § 805-a— Certain Actions Prohibited

Cannot-

- a) Solicit, accept or receive any gift over \$75 in value, directly or indirectly, where:
 - 1) It could reasonably be inferred that the gift was intended to influence the receiver, or
 - Gift = money, loans, services, travel, hospitality, entertainment, thing or promise, or in any other form
 - 2) Could reasonably be expected to influence the receiver in the performance of his or her official duties or
 - 3) Was intended as a reward for any official action on his part;
- b) Disclose confidential information acquired in the course of your official duties or use such information to further personal interests

The Rules: Examples

Examples of Prohibited Actions

- Donations received by a municipal officer to pay legal fees incurred in pursuing a court proceeding against another city official are “gifts” subject to the restrictions of section 805-a ([NY Op. Attorney General No. 05-10](#)).
- A town planning board member who is also a geologist in the private sector may not be compensated or enter into an agreement to be compensated for soil borings on a project before the planning board ([NY Op. Attorney General No. 95-14](#)).

The Rules: Examples

Examples of Prohibited Actions

- The chair of the planning board, who is employed by a real estate company that would receive business if a subdivision application is approved, should not participate in the consideration of the application (NY Op. Attorney General No. 86-54).
- A licensed architect who sits on a zoning board should not represent persons making their initial application before the local building department (NY Op. Attorney General No. 94-51).
- A member of a city council must avoid circumstances which compromise his or her ability to make decisions solely in the public interest. If his or her employer are affected by matters before the council, recusal is the appropriate course of action. (NY Op. Attorney General No. 97-5)

The Rules: Examples

Examples of Prohibited Actions

- An architect who is member of a village design review commission need not resign but may recuse himself when his firm is involved in a project before the commission. The facts denote such occurrences are infrequent. ([NY Attorney General No 2002-8](#))
- A local legislative body by local code or in its code of ethics, has statutory authority to prohibit a legislator from disclosing matters discussed in executive session. ([NY Op Attorney General No. 2000-2](#))
- A planning board member is prohibited from receiving any compensation for engineering services performed in connection with a matter that comes before the board. Even if services are unpaid, recusal is warranted. ([NY Comptroller Opinion 90-28](#))

The Rules: Examples

Examples of Prohibited Actions

- When a planning board member's personal attorney appears before the board, he should disclose the attorney-client relationship and depending on the circumstances consider recusal. (NY Comptroller Opinion 91-48)
- A village board member who has a financial interest in a business that may be negatively affected by a zone change before the board should publicly disclose the interest and if the impact is not merely speculative and more than *de minimis*, should recuse himself. (NY Comptroller Opinion 97-9)

The Rules: Disclosure in Applications

- § 809– Disclosure in Certain Applications
- Every application submitted for a variance, permit or other zoning and planning action must state the name, residence and the nature and extent of the interest in the applicant of
 - any state officer or
 - any officer or employee of such municipality or
 - of a municipality of which such municipality is a part,
- You are deemed to have an interest in the applicant when your spouse, or their brothers, sisters, parents, children, grandchildren, or the spouse of any of them
 - a) Is the applicant, or
 - b) Is an officer, director, partner or employee of the applicant, or
 - c) Owns or controls stock of a corporate applicant or is a member of a partnership or association applicant (5% or more) or
 - d) Is a party to an agreement with the applicant, where they receive any benefit that is dependent or contingent upon the favorable approval of the application
- A person who knowingly and intentionally violates this section shall be guilty of a misdemeanor.

Ethical Standards for Professional (AICP) Planners



Why Professional Planners Need to Talk About Ethics

- Citizens have a right to expect that planners (in the public or private sectors) will help **elevate governance**, not fall to its more base level.
- Planners have **ethical responsibilities** to their colleagues, their clients and their communities.
- AICP planners belong to the American Institute of Certified Planners, and **must practice in accordance with standards of practice**, including the AICP's Code of Ethics and Professional Conduct.
- Planners are guided by both existing local, and sometimes state, ethics provisions. But frequently none exist, and planners must **exercise common sense**.
- Ethics scenarios are rarely “cut and dried” and often contain a high level of nuance. **Ethics discussions help develop reasoning and reflection skills** that can be applied in everyday situations.

Required AICP Content

“Please Note: This session has been created to provide general education regarding the AICP Code of Ethics. Though examples, sample problems, and question and answer sessions are an important part of illustrating application of the code’s provisions, all certified planners should be aware that “Only the Ethics Officer is authorized to give formal advice on the propriety of a planner’s proposed conduct.” ([AICP Code of Ethics, Section C3](#)). If you have a specific question regarding a situation arising in your practice, you are encouraged to seek the opinion of the Ethics Officer.”

- 312-786-6360
- www.planning.org/ethics
- ethics@planning.org ([not to discuss specific situations](#))

Overview of AICP Code of Ethics

■ Aspirational Principles (Ideals)

“Primary Obligation is to Serve the Public Interest”

- Long-range and comprehensive thinking
- Social justice
- Fairness to all planning participants

“Diligent, Creative, Competent Performance”

- Work in pursuit of our client’s or employer’s Interest
- “Consistent with...faithful service to the public interest”

“Contribute to the Development of, and Respect for, Profession”

- Educate public about profession
- Share experience
- Contribute to professional development of students, young professionals

Overview of AICP Code of Ethics

- Rules of Conduct (Standards)
- Procedures for Obtaining Guidance
- Procedures for Investigating Complaints
- Disciplinary Actions

Highlights of the Rules of Conduct

- Provide adequate, timely, clear, accurate information
- Shall not publicly advocate a position adverse to a previously advocated position within three years without disclosure
- Need permission from employer to have a second planning job, even if not paid.
- Public employees/officials shall not receive any compensation or advantage that may be *perceived* as related to our service
- Shall not work for client/employer if there is a personal interest without consent of client
- Shall hold information confidential (e.g., clients, planning process)

Highlights of the Rules of Conduct

- Prohibit ex parte communications if prohibited by rules or custom
- Shall not misstate education or qualifications or misrepresent views of other professionals.
- Shall not accept work beyond professional competence or if we can't complete it on time needed by client
- Shall not use product of others to seek professional recognition intended for the producers of original work
- Shall not direct/coerce professionals to reach findings not supported by available evidence
- Must disclose interests or client/employer when participating in planning process

Advisory Opinions

- Any person can seek informal advice from AICP Ethics Officer
 - Via phone
 - Not binding, but considered in future investigations
- AICP members can seek formal opinion
 - In writing
 - Won't issue opinion if it concerns past conduct that might be subject of misconduct charge
 - Can use opinion as defense in future misconduct charge
- AICP Ethics Committee can issue advisory opinions without a formal request
 - Membership may provide input on those opinions
 - All such advisory opinions must be published to the entire membership
 - Member can request edits to opinion

Adjudication of Complaints

- Any person can file a complaint against AICP member
 - Must be signed
 - Confidentiality not guaranteed
- Timelines for Review
 - AICP Ethics Officer makes written decision and imposes discipline
 - Decision is appealable by both parties
- Encourage investigations and 'settlements'
 - AICP Ethics Officer can negotiate settlement at any time in process
- Ethics Committee can continue investigations even if accused resigns AICP membership

Ethical Principles in Planning – Adopted by the APA Board

- **Serve the public interest** (accurate information, opportunity for all to participate, publicize information, protect natural resources, be aware of long-range consequences of actions)
- **Maintain high standards of integrity/proficiency** (independent judgement, disclose personal interests, seek no gifts/favors, maintain confidential information, do not participate as advisor or decision maker on project for which you previously advocated, do not misrepresent facts)
- **Improve planning competence** (professionalism, contribute time/effort to underserved groups, treat professionals fairly, maintain knowledge)



Employee Ownership & Public Service

Adapted from the 2018/19 AICP Ethics Cases of the Year



Employee Ownership & Public Service

- Patrick, AICP, is a professional planning consultant that lives in Geddesville, where his firm currently provides planning services through a contract, though Patrick does not work on Geddesville projects.
- Patrick has been offered a position on his town's Planning Board, based upon his technical knowledge and community involvement. Patrick is excited about serving his community.
- However, Patrick does not want leave his firm as he his a stockholder (owner) and needs his salary to help pay for his kids' college tuition.



Employee Ownership & Public Service

- Can/should Patrick accept the appointment?
- What are the implications for his firm's contract with the Town?
- Would anything be different if Patrick were elected to the Town Board?

Relevant AICP Code Provisions

- 4. Salaried employees need employer's permission to undertake outside planning work
- 14. Public officials – no special advantage not in public record and public interest
- 5. Public officials shall not accept compensation from private employer that may be perceived as related to public office/employment
- 19. Disclose interest of our employer

Relevant GML Provisions

- §805-a (1)(c). No municipal official or employee shall enter into an agreement for compensation for services in relation to any matter before any municipal agency of which he is an officer or employee
 - NYS Comptroller Opinion 96-3
- Check local Ethics Code



Social Media

Adapted from the 2017/18 AICP Ethics Cases of the Year





Social media and electronic communication

- Are emails and social media private?
- What information is subject to the Freedom of Information Law (FOIL)?
- How should email conversations among planners and decision makers be treated?

AICP Rules of Conduct

- #7. Protects client's confidential information
- #8. Restricts private communication with planning process participants.
- #9. Prohibits private conversations with "decision makers".



Social media and electronic communication

- Information on social media sites or other public Internet sites **ARE** public records and **ARE** subject to FOIL.
- Nothing is private when posted on the Internet.
- Anything posted on the Internet may be copied or recreated before you attempt to remove it – consider all information on the Internet **permanently** public.
- Be mindful when discussing new projects or proposed development activities with friends and family – information can be inadvertently leaked through social media.



Social Media

- Harland, a realtor, is one of five members of the Hudson Plan Commission.
- After a Commission meeting, he posts an item on his Facebook page about a development proposal and hopes to get reactions from Facebook “friends.”
- Included in the long thread of comments on Harland’s Facebook page are some from two of his fellow Commission members.
- Harland replies to these comments and a back-and-forth exchange ensues.
- Dan, AICP, the planning director of Hudson, sees the Facebook posts.



Social Media

- Dan should check state and local “Open Meetings” laws, since three Commission members, including himself, were commenting about a project outside of a public meeting
- Dan should check state and local “Freedom of Information” laws. Electronic communications can be considered “records” subject to FOIL.



- Is Facebook an adequate and appropriate forum for public engagement?
- Are there any potential problems—and advantages?

Relevant AICP Code Provisions

- “Strive to give citizens (including those who lack formal organization or influence) full, clear, and accurate information on planning issues.”
- Principle #1e: “Participation should be broad enough to include those who lack formal organization or influence.”
- Principle #1h: “We shall deal fairly with all participants in the planning process.”

Relevant NYS Provisions

- Public Officers Law §§100-111
 - Notice of Meetings
 - Open Meetings
- Public Officers Law §§ 84-90
- Freedom of Information Law (FOIL)



Personal Interests

Adapted from the 2018/19 AICP Ethics Cases of the Year



Personal Interests

- Catherine, AICP, is a member of her Village's Planning Board. She would like to purchase a strip of land next to her personal residence from the property owner. The purpose would be to create a buffer to the neighbor's proposed redevelopment.
- She offers to assist the property owner with their rezoning application, as full or partial payment for the buffer strip.
- When the owner refuses to sell, Catherine decides to testify—as a private citizen—against the proposed rezoning application.
- In her testimony, she cites the negative impact of the proposed commercial use on her property.
- The neighbor objects that Catherine has used her professional knowledge and status as a professional planner and Planning Board member to further her personal interests.



Personal Interests

- Has Catherine called into question her professional / public objectivity by testifying, as a planner, in support of her personal interests?
- Has Catherine blurred the roles of private citizen, board member, and professional planner in a public forum?

Relevant AICP Code Provisions

- Principle 1.e – People directly affected should have opportunity for meaningful impact
- 7. Shall not use information gained in a professional relationship that client/employer has requested be held inviolate or that we should recognize as confidential because it could embarrass or harm client/employer
- 14. Public sector – no special advantage not in public record and public interest
- 25. No deliberate or reckless “wrongful act”, that reflects adversely on our professional fitness

Relevant GML Provisions

- Check local Ethics Code
- Recusal from any discussion or vote by Planning Board on recommendations to Village Board



Public to Private Sector

Adapted from the 2018/19 AICP Ethics Cases of the Year





Public to Private Sector

- Jane, AICP, retired six months ago as a Planning Board member with the City of Jacobsville.
- A developer, whose projects Jane formerly reviewed on the Planning Board, asks her to work for him on a proposed mixed use project in Jacobsville.





Public to Private Sector

- Should Jane accept the job?
- What up-front and/or on-going steps should Jane take to avoid adverse ethical considerations?

Relevant AICP / APA Provisions & Principles

- Principle 2.c – Avoid (appearance) of conflict
- Principle 3.a – Protect integrity of profession
- 3. Shall not publicly advocate a position adverse to one publicly advocated for a previous client/employer within three years unless it will not cause detriment and we disclose conflict to current employer
- 7. Shall not use information gained in a professional relationship that client/employer has requested be held inviolate or that we should recognize as confidential because it could embarrass or harm client/employer.

Relevant GML Provisions

- Check local Ethics Code



Special Treatment

Adapted from the 2017/18 AICP Ethics Cases of the Year





Special Treatment

- Susan, AICP, is a Zoning Board member for Wurster. A home owner requests a special-use permit to repair cars in his existing garage, located in a single-family neighborhood.
- Despite opposition, Susan votes to approve the permit, with limits on the number of cars on the premises and on nearby streets.
- Shortly thereafter, Susan asks the garage owner if she can store an antique car she owns in the garage and pay a monthly storage fee.





Special Treatment

- Despite paying the garage owner, has Susan received a ‘special advantage’?

Relevant AICP Code Provisions

- Principle 1c. Interrelatedness of decisions
- 5. Public officials shall not receive any advantage that may be perceived as related to our public office.
- 14. Public officials shall not seek a special advantage that is not a matter or public knowledge or it not in public interest.

Relevant GML Provisions

- Check local Ethics Code.



“By far the greatest and most admirable form of wisdom is that needed to plan and beautify cities and human communities.”
- *Socrates*

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