Ethical Rules and Considerations in Zoning and Land Use Practice: Practical Applications

Joseph D. Picciotti
jpicciotti@harrisbeach.com
(585) 419-8629
99 Garnsey Road
Pittsford, New York 14534
www.harrisbeach.com
Application of Ethical Rules and Considerations to Zoning and Land Use Practice

This Presentation Analyzes the Applicable Ethical Rules in the Context of Land Use matters involving Municipal Bodies and Legislative Boards

- Zoning and land use practice includes legislative land use determinations made by municipal bodies (i.e., Village Boards and Town Boards), including, code amendments, zoning map amendments and comprehensive plans among others.

- Decisions by administrative boards are also encompassed by these ethical rules including those by Planning Boards, Zoning Boards of Appeals, Architectural Review Boards (including decisions such as site plan approval, variance approvals and the like).
Compliance with the Code of Professional Responsibility

- The Code of Professional Responsibility drafted by the American Bar Association in 1969 is the starting point for analysis of ethical rules and considerations, including in the Land Use context.


Members of Administrative Boards or Bodies, including Planning Boards and Zoning Boards of Appeals, as well as members of municipal bodies, including Village and Town Board members are ‘municipal officers’ under applicable law that proscribes certain conflicts of interest.

Conflicts of interest include potential personal financial interests in a contract before a government agency, as well as conflicts presented by the impact of familial or other relationships that could impact decision-making of persons sitting on governmental bodies.
Article 18 of the New York General Municipal Law prohibits municipal officers and employees from having an interest in any contract with a municipality if the municipal officer or employee has some control over the contract for such municipality. See New York General Municipal Law §§ 800(5); 801.

- The first inquiry to be satisfied to determine whether a proscribed conflict is presented: Is there is a ‘recognized contract’ with board at issue?
Identifying and Avoiding Conflicts of Interest
(continued)

- New York General Municipal Law also prohibits a municipal officer or employee from representing an applicant before the board or body upon which he or she sits (or is employed) or presenting before another such board within the same municipality with certain defined exceptions.

- The ramifications for a municipal officer or official participating in a prohibited contract before a municipal board or body can result in the nullification of the contract, and invalidation of the decision at issue as well as penalties for the municipal official.

- Persons who knowingly and intentionally violate New York General Municipal Law § 805-a(1)(c) (prescribing such conflicts) is subject to fine, suspension or removal from office. (New York General Municipal Law § 805-a(2).)
Courts have negated actions which though not a literal violation of the law, nevertheless in the court’s view, violated the spirit or intent of it and/or were inconsistent with public policy or otherwise suggest self-interest, partiality or economic impropriety.

Courts have refrained from negating board or legislative determinations (or taking other action) based on mere allegations of conflict of interest as long as such conflict is not specifically prohibited by New York General Municipal Law (or by an applicable local ethics law), and the public official discloses his or her interest in the matter before any proceedings concerning it, and does not participate in such proceedings.

Familial relationships may also present conflicts of interest, though a blood relationship alone has not been deemed sufficient to create a proscribed conflict.
Examples where Attorney General or other opinions have found potential conflicts violate Article 18 of the New York General Municipal Law include:

- Professionals, including architects who sit on zoning boards of appeals, may not represent an applicant before the planning board, because an appeal from a planning board decision would bring the same application before the board (ZBA) on which the architect sits.

- Developers and engineers may also be barred from sitting on municipal boards where their firms will be practicing before the same board (obviously) or other boards in the same municipality.

- A common conflict is when a lawyer is retained as special counsel for a municipality and he or she, or someone from their firm then seeks to represent a private client before another municipal board or agency in the same municipality.
Rule 1.7 of the Rules of Professional Conduct is implicated in the context of the special counsel whose firm practices before another board in the same municipality:

Prohibits a lawyer from representing a client if ‘a reasonable lawyer’ would conclude that either:

“[T]he representation will involve the lawyer in representing differing interests; or

“[T]here is a significant risk that the lawyer’s professional judgment will be adversely affected by the lawyer’s own financial, business, property or other interests.”

“Differing interests” include those that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest.”
The question is what constitutes an inconsistent or diverse interest that may adversely affect a lawyer’s loyalty or judgment.

- New York Bar Association opinions have provided guidance on this topic.

- In noting the importance that a careful analysis of the potential conflict of interest takes on in the government lawyer context for special counsel the New York State Bar Association has advised:

  “[T]he duty of undivided loyalty and the heightened danger of compromising confidences and secrets, coupled with the ‘special sensitivity’ required of lawyers for the public to ‘take particular care not to . . . accept any private employment which would tend to undermine public confidence in the integrity and efficiency of the legal system.’.”
The critical issue for the private lawyer acting as special counsel:

- Is he or she willing to zealously represent a private client when it might put him or her in conflict with the municipality for which he or she is acting as special counsel in another matter?

- Another question is whether the lawyer acting as special counsel, whose firm will also represent another applicant before a board in the same municipality, has unfair access to municipal officials thereby potentially compromising the public perception of the municipal approval process.
Lawyers (and firms) may be able to represent both clients even in the case of conflicts of interest under the following circumstances:

“Notwithstanding the existence of a concurrent conflict of interest under paragraph a), a lawyer may represent a client if:

[T]he lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each client;

[T]he representation is not prohibited by law;

[T]he representation does not involve assertion of a claim by one client against another client in the same litigation or other proceeding before a tribunal (represented by the same lawyer) ; and

Special Ethics Issues Faced by the Government Lawyer (continued)

- Obtaining informed consent which meets muster under the Rules of Professional Conduct requires:
  - Disclosure of the facts (and the context of them) giving rise to the conflict.
  - Any explanation necessary to inform the client of the pertinent advantages and disadvantages of the lawyer’s proposed concurrent representation of both clients in light of the conflict or potential conflict identified.
  - A discussion of the client’s options and alternatives.
  - In some circumstances it may be appropriate for the client or other person to seek advice of other counsel.
In analyzing whether a municipality can waive such a conflict, the court must determine whether a municipal board or body can provide informed consent, including confirming that the official purporting to act on behalf of such board or body is authorized and empowered to do so, and it also must insure the process by which the consent is given preserves the perception of the official maintaining the public’s trust.

- Determining whether the lawyer is representing “differing interests” that could arguably compromise his or her judgment is problematic.

- Positional conflicts also raise concerns, including representing one municipality on a substantive issue while at the same time counseling a private client which may oppose that issue against a different municipality or in a different forum.
How are the Rules of Professional Conduct implicated including Rules 1.6 and 1.7 (the ‘differing interests’ prohibition and the prohibition against the lawyer knowingly revealing confidential information or using such information to the disadvantage of a client or advantage of a third person).

Rule 1.9 is implicated which provides a lawyer representing a client in one matter in the past cannot represent another person in the same or substantially related matter in which the current client’s interests are materially adverse to the interests of the former client unless the former client gives informed consent.
The pertinent part of Rule 1.9 of the Rules of Professional Conduct prohibits a lawyer who formerly represented a client from representing another client in the same or substantially related matter in which the current representation is materially adverse to the interests of the former client, unless the former client gives informed consent.

- The critical provision in analyzing Rule 1.9 is whether a “substantially related matter” is presented.

- The pertinent analysis is: what constitutes “substantially related” and whether the interests are in fact substantially adverse.
Concerns Regarding *Ex Parte* Contacts with Municipal Officials

When and under what circumstances may a lawyer contact public officials or even consultants working with a municipality outside of the presence of that municipality (and its counsel)?

- The pertinent Rule of Conduct is Rule 4.2(a), referred to as the “no contact rule” which provides in pertinent part:
  
  “In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter unless the lawyer has prior consent of the other lawyer or is authorized to do so by law.”
Concerns Regarding *Ex Parte* Contacts with Municipal Officials (continued)

Courts and commentators have recognized that there are circumstances where it is permissible for municipal board members to be contacted by counsel for an applicant seeking approvals, including:

- An applicant’s in-house attorney may contact an individual planning board member because such contact is ‘authorized by law,’ and particularly is within the protection of the First Amendment (right to petition government).

- Communication with a planning board member is also allowed if the communication concerns pending SEQRA (state environmental quality review act), site plan and subdivision determinations with conditions.
Concerns Regarding *Ex Parte* Contacts with Municipal Officials (continued)

Additional authorized *ex parte* contacts under Rule 4.2 of the Professional Rules of Responsibility include communications with the represented party concerning matters that are outside the representation.
Concerns Regarding *Ex Parte* Contacts with Municipal Officials (continued)

The no contact rule applies where the lawyer has knowledge that the person with whom he or she propose to speak (contact) is represented, but the lawyer must take into account he relative likelihood that a party is represented. (Rule 4.2 Comment [8])
Concerns Regarding *ex parte* Contacts with Municipal Officials (continued)

- Further, determining who the client of a government lawyer is will inform the analysis that must be undertaken to determine whether *ex parte* contact is authorized.

- Another critical determination is who exactly is the client of a government lawyer? The answers may range from the responsible official him or herself, the government agency, the branch of government (executive or legislative), the government as a whole, or even the public.
Thank you