

TOWN LAW MANUAL

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**For Town Supervisors and Town Boards 2006 / TOWN LAW MANUAL / Chapter 4
TOWN BOARD MEETINGS / § 4-9. Attorney/Client privilege.**

§ 4-9. Attorney/Client privilege.

Matters made confidential by federal or state law are exempt from provisions of the Open Meetings Law. The attorney-client relationship is considered confidential under Civil Practice Law and Rules § 4503; thus, when attorney and client, which may include town attorney and town board, establish privilege of relationship, communications made pursuant to that relationship are confidential under state law and exempt from the Open Meetings Law. This privilege is, however, applicable only when the client (town board) seeks the professional, legal advice of the attorney acting in his or her capacity as an attorney (Comm. On Open Gov't. OML-AO-1225 and 1189). Thus, the board may meet privately with its attorney before or after a town board meeting for the express purpose of securing an opinion of law, legal services or assistance in a legal proceeding (Comm. on Open Gov't. OML-AO-1189).

**ASSOCIATION OF TOWNS OF THE STATE OF NEW YORK TOWN LAW MANUAL
For Town Supervisors and Town Boards 2006 / TOWN LAW MANUAL / Chapter 4
TOWN BOARD MEETINGS / § 4-10. Work sessions.**

§ 4-10. Work sessions.

The application of the Open Meetings Law to "work sessions," "workshops" or "agenda meetings" often creates some confusion. The statute does not contain any reference whatsoever to work sessions. It merely defines the term "meeting." The Court of Appeals has agreed with lower courts that the definition of "meeting" is broad enough to include a work session or workshop, etc. The important elements of a meeting are the convening of a majority of the members of the public body and the discussion of public business. Even if a vote is not taken at such work sessions, the Court considered them to be meetings and, consequently, open to the public. (Orange County Publications, Division of Ottawa Newspapers, Inc. v. Council of City of Newburgh, 60 A.D.2d 409, aff'd 45 N.Y.2d 947; Binghamton Press Co., Inc. v. Board of Ed. of City School Dist. of City of Binghamton, 67 A.D.2d 797)

**ASSOCIATION OF TOWNS OF THE STATE OF NEW YORK TOWN LAW MANUAL
For Town Supervisors and Town Boards 2006 / TOWN LAW MANUAL / Chapter 4
TOWN BOARD MEETINGS / § 4-11. Conducting a town board meeting or hearing.**

§ 4-11. Conducting a town board meeting or hearing.

A. **Board meetings.** Conducting a routine town board meeting -- as distinguished from conducting a public hearing -- is a most important local government function. To a supervisor and board keen to present a good image to the public, it is important to give

... a "work session" is, according to the law, a public meeting, subject to the rules applying to all public meetings.

careful thought to the conduct of these meetings. They provide the best opportunity for a supervisor and town board members to introduce themselves to their fellow townspeople. There is no magic formula to guarantee a successful meeting every time, but some ideas or hints can be suggested.

(1) Preparation and outside advice. Be prepared. This can be accomplished in several ways.

Have an agenda made out ahead of time. Do not include anything on the agenda for which all the facts and the law have not been obtained in advance. These are the two basic ingredients in any decision. Town board members and town officials should be used to assemble the facts. All the responsibility should not be assumed by the supervisor. He or she should appoint committees of the town board to make periodic written reports to the whole town board. The services of a competent lawyer should be obtained. General advice as to how to proceed on problem-solving can be sought from the Attorney General, the State Comptroller, the Secretary of State or from the Association of Towns. These agencies cannot be asked to prepare legal papers for individual town boards. If they did this, they, in effect, would be practicing law all over the state; but they can and do render opinions as to proper procedures on request from town officers. The Association of Towns will not give opinions to other than town officers. To give an opinion to any town resident would tend to undercut or bypass the town board. It sometimes gets a bit tricky when a town official does not agree with actions of other town officials. Also, if an inquiry is made to more than one of these agencies, this fact should be indicated. This will benefit the town and avoid any conflicting advice.

(2) Rules of procedure.

- (a) Every town board may adopt its own rules of procedure. This can be done formally or otherwise. Example rules of procedure can be obtained by contacting the Association offices. These rules should be made known to the public. The statutory provisions as to the legal procedures may not be altered. To avoid any uncertainty, it might be well to repeat in any rules of procedure what the Town Law § 63 mandates as to the running of a town board meeting. It provides:

The supervisor, when present, shall preside at the meetings of the town board. In the absence of the supervisor, the other members shall designate one of their members to act as temporary chairman. A majority of the board shall constitute a quorum for the transaction of business, but a lesser number may adjourn. The vote upon every question shall be taken by ayes and noes, and the names of the members present and their votes shall be entered in the minutes. Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board.

(b) No rules of procedure adopted by a town board can vary these provisions of law. This is one reason why a town may not adopt, carte blanche, Roberts' Rules of Parliamentary Procedure as the rules of procedure for a town board meeting.

(c) A town board meeting is an important legislative session, and it can no more be disrupted or invaded than can a session of the U.S. Congress or that of a State Legislature. On the other hand, town officers pride themselves that town government is the one government close to the people and available to them. When there is a long agenda and local citizens are in the audience, it may be wise to set the agenda aside and to ask these people if there is some matter they care to take up with the town board. The rules should only be strictly enforced if there appears to be an angry mob present and the board desires that things do not get out of hand.

(d) Any persons speaking to the town board with the consent of the supervisor should address their remarks to the town board, not to other members of the audience in the form of a debate. Also, no person has the right to demand an answer to a specific question from a member of the board. All such questions shall be directed to the supervisor, who may either answer them or refer the questions to the town attorney, if present, or to a town board member.

B. Public hearings.

(1) Good advanced planning is essential if an orderly hearing is to be held on matters such as the adoption of a local law or the town budget. If the subject matter is a "hot one," for instance a proposed moratorium local law, then informal, informational hearings in several areas about the town may be desirable, followed up with news releases in the local news media. Additionally, where a public hearing is to be held on some new, novel or very important topic, you might even consider conducting a rehearsal or "dry run" a few days ahead by those to be involved, just to be sure everybody, town board members included, knows exactly what is involved. At these rehearsals, pretend a full crowd is present and, as supervisor, ask the town clerk to read the notice of the hearing and the proof of posting and publication. Then explain the rules of procedure and ask the town attorney to stand and explain the legal impact of the proposal. The supervisor or the town comptroller should explain the fiscal or tax impact; if an engineering or other professional problem is involved, that should be explained. The use of slides, movies, charts and other visual aids at such hearings is often very helpful. Also, if the town, by virtue of law, must have as its official newspaper a weekly with somewhat limited distribution, then perhaps the notice of hearing should additionally be published in a paper with broader circulation. The law permits such additional publication as the town board considers necessary.

(2) A hearing should not be scheduled at an obviously inconvenient hour, like in the morning

or afternoon. Most townspeople work and the best time for such hearings is in the evening.

- (3) Some kind of study or report should be prepared by an expert in the subject matter of the hearing, which person can be present to testify in favor of the proposal. If the town board has received a petition asking the board to act on the subject matter of the hearing, then, by all means, the signers of the petition should be contacted and requested to attend the hearing and speak up. These techniques are suggested because often the only people who attend a town hearing are those "opposed." It is tough to approve a proposal when the only people who spoke on it at the hearing were those opposed.
- (4) When the hearing opens it is a good idea to have the notice of hearing read aloud by the town clerk, together with the proof of publication and posting. After that the supervisor, town attorney or other town officer or employee called upon by the supervisor should explain in layman's language what the proposal before the hearing is all about; and what the consequences will be if it is approved or not. After that, it is good practice to explain the ground rules of the hearing. These may, in part, be a review of any rules of procedure; but in this case, of course, the people present are expected to express opinions and ask questions. If it appears to be a controversial matter, it might be explained that the town board will not reach any decision at that meeting, but will listen to the testimony and take the matter under advisement, and then approve or disapprove the proposal at a subsequent meeting of the town board.
- (5) The supervisor and town board are cautioned against getting caught in the trap of a request for a show of hands, or vote, of those residents present on the matter. Such a vote is meaningless. On the other hand, it should be explained that the decision rests with the town board as the legislative body of the town, and that the town board seeks the help and advice of the town citizens.
- (6) Speakers from the floor.
 - (a) The supervisor should emphasize that anyone choosing to speak should address his or her remarks to the town board only. In this way, any debate between those "for" and those "against" the proposal should be avoided.
 - (b) It is also suggested that the supervisor advise that no person may speak a second time until everyone who wants to speak has spoken.
 - (c) If there is a big crowd present, the five-minute rule should be enforced strictly. Otherwise, it might be politic to be more lenient.
 - (d) An explanation should be given that the town board is there to listen, not necessarily

to express its own views or opinions.

- (e) Town board members should not feel required to debate with the audience questions like: "Why are you doing this now?" or "Why didn't you do it sooner?" These questions could be answered with a response such as: "This hearing is not being held to debate questions like that. We are here to listen to your opinion on the proposal before us tonight. We want your advice and help in coming to the proper conclusion on the matter concerning which the hearing has been called. If you are in favor of the proposal, simply tell us and give us your reasons why; and likewise, if you are against."

**ASSOCIATION OF TOWNS OF THE STATE OF NEW YORK TOWN LAW MANUAL
For Town Supervisors and Town Boards 2006 / TOWN LAW MANUAL / Chapter 4
TOWN BOARD MEETINGS / § 4-12. Tape recording meetings.**

§ 4-12. Tape recording meetings.

A town board has the power and authority to control its own proceedings. The question of whether a member of the public attending an open meeting under the Open Meetings Law (Public Officers Law Article 7) may record it with a cassette recorder had been debated since enactment of such law in 1976. Administrative advisory opinions had concluded that a member of the public has the right to so tape-record (1980 Op. Atty. Gen. 145; Comm. on Open Gov't Op. Nos. 367 and 380 of 1979). A district court in Suffolk County came to the same conclusion. (*People v. Ystueta*, 99 Misc.2d 1105; see also *Feldman v. Town of Bethel*, 106 A.D.2d 695, in which it was held that a reporter had the right to record a town board meeting) The Appellate Division of the Second Department has agreed with the advisory opinions. The Appellate Division stated that a hand-held recording device "is not obtrusive" and does not disrupt from the meeting deliberations. The Court also found that the privilege of recording the meeting is in furtherance of the purposes of the Open Meetings Law. Consequently, the Court voided a school board's resolution which prohibited the use of a tape recorder at public meetings of the school board. (*Mitchell v. Bd. of Education of Garden City*, NYLJ 10/3/85) For towns this decision seems to settle the issue. Town Law § 63 authorizes a town board to adopt rules for its procedure. A town board also has the power to adopt a local law, not inconsistent with a general law, relating "to the transaction of its business." The *Mitchell* case, however, indicates that the power of the body to adopt rules for its operations does not extend to banning tape recorders. The Court said that the prohibition is considered "irrational." This decision should serve as a general guide against blanket prohibitions of use of tape or video recorders by persons attending a board meeting. In addition, the town board may not prohibit the use of video cameras at town board meetings. [*Peloquin v. Arsenault*, 162 Misc.2d 306 (1994, Sup.)] Although the town board cannot ban the use of video equipment at a town board meeting, the board could adopt reasonable rules regarding usage of video equipment so that the deliberative process is not disrupted (Comm. on Open Gov't OML-AO-1062).

§ 4-5. Public participation in town board meetings.

A. A town board meeting is a serious matter. The Open Meetings Law gives the public the right to attend town board meetings and to listen to town board deliberations. All interested persons have a right to attend public hearings of the town, participate freely and make inquiries relating to the purposes thereof. However, the public may not participate in the meeting except upon the invitation of the board and also, except in the case of public hearings called as required by law, for the consideration of special matters.

B. In connection with public participation in town board meetings, the New York State Comptroller has rendered the following Opinion which is of interest:

To what extent may residents of a town participate in meetings of the town board?

(1) A town board has the right to promulgate rules of procedure for the orderly conduct of its meetings and for the proper management of the business and affairs of the town (Town Law § 63).

The town board may invite and permit residents of the town to participate therein so long as such participation is orderly and constructive and does not interfere with the business and purpose of the meeting.

To carry out its purposes, the town board may prepare and circulate an agenda limiting the time and scope of the discussion by persons attending such meetings.

This Department has stated that 'in general, the public is free to attend regular town board meetings,' but does not have a right to speak at a town board meeting except as provided by board rules.³⁽⁵⁾ 'The town board may adopt rules and procedure limiting discussion of matters before the board.' (22 Op. St. Comp. No. 311, 1966)

(2) The term 'public hearing' has been variously discussed or defined as follows:

(a) '. . . A statutory direction that a notice of public hearing be published means that a fair and impartial hearing be held pursuant to such notice and that all interested parties attending the hearing be accorded an opportunity to be heard. . . .'

(b) 'Public hearing' means a right to appear and give evidence and the right to hear and examine witnesses . . . '

(c) 'Public hearing.' Any hearing open to the public, or any hearing, or such part thereof, as to which testimony or other evidence is made available or disseminated to the public by the agency.'

(d) 'Its very purpose [the public hearing] is to give the public an opportunity to express its views and to make inquiries in respect to budget matters, hence, the public may freely participate in such meetings.'

(From 69-405, Dept. of Audit and Control, 6/6/69)

- C. A fair and reasonable interpretation of the discussions and definitions of a "public hearing" creates a positive directive that the public attending a public hearing has the legal right to question the applicant, the petitioner or the proponent relating to the purpose of the public hearing.

**ASSOCIATION OF TOWNS OF THE STATE OF NEW YORK TOWN LAW MANUAL
For Town Supervisors and Town Boards 2006 / TOWN LAW MANUAL Chapter 4
TOWN BOARD MEETINGS / § 4-6. Executive sessions.**

§ 4-6. Executive sessions.

- A. **Defined.** Public Officers Law § 102(3) defines "executive session" to mean a portion of an open meeting during which the public may be excluded.
- B. **Procedure.** The town board must strictly comply with the statutory procedure in order to call a valid executive session. [Daily Gazette Co. v. Town of Cobleskill, 111 Misc.2d 303 (Sup. Ct. Schoharie Co. 1981)] The procedure to call an executive session is set forth in Public Officers Law § 105(1). It requires a town board member to make a motion to enter into executive session, which motion must be approved by a majority of the entire town board.
- C. **Items which can be discussed.** The courts have held that the town board motion to enter into executive session must identify with "particularity" the subject to be discussed. As one court stated: "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation.' This boilerplate recitation does not comply with the intent of the statute." [Daily Gazette Co., Inc. v. Town of Cobleskill, 111 Misc.2d 303 (Sup. Ct. Schoharie Co. (1981)] Only the following matters specified in Public Officers Law § 105 may be discussed and acted upon in an executive session:
- (1) A matter which will imperil the public safety if it is disclosed;
 - (2) A matter which may disclose the identity of a law enforcement agent or informer;
 - (3) Information with respect to investigation or prosecution of a criminal offense which would jeopardize effective law enforcement if disclosed;
 - (4) Discussions relating to proposed, pending or current litigation;
 - (5) Matters relating to collective negotiations under the Taylor Law;
 - (6) Medical, financial, credit or employment history of a particular person or corporation, or

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The Open Meetings Law applies to "public bodies." That term is defined to include entities consisting of two or more people that conduct public business and perform a governmental function for New York State, for an agency of the state, or for public corporations, such as cities, counties, towns, villages and school districts. Committees and subcommittees of these entities are also included within the definition. Consequently, city councils, town boards, village boards of trustees, school boards, commissions, legislative bodies, and committees and subcommittees consisting of members of those groups all fall within the framework of the Law.

How do I know if a meeting is going to be held?

The Law requires that notice of the time and place of all meetings be given prior to every meeting. If a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than 72 hours prior to the meeting. When a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Notice to the public must be accomplished by posting in one or more designated public locations.

I attended a meeting; and the public body closed the meeting to the public, citing "personnel matters." Is this legal?

The Law provides for closed or "executive" sessions under certain circumstances prescribed in the Law. It is noted that an executive session is not separate from an open meeting but rather is a portion of an open meeting during which the public may be excluded. The Law requires that a public body take several steps to close the meeting. First, a motion must be made during an open meeting to enter into executive session; second, the motion must identify the general area or areas of the subject or subjects to be considered; and third, the motion must be carried by a majority vote of the total membership of a public body.

Citing "personnel matters" is not a sufficient ground for going into an executive session. The motion to go into executive session should be more specific. For example, a motion could be made to enter into executive session to discuss "the employment history of a particular person." The person would not have to be identified.

It is important to point out that a public body cannot vote to appropriate public monies during a closed session. Therefore, although most public bodies (except school boards in most instances) may vote during a properly convened executive session, any vote to expend public monies must be taken in public.

The Law also states that an executive session can be attended by members of the public body and any other persons authorized by the public body.

Can I speak at a meeting?

The Law is silent with respect to public participation. While it has been advised that a public body does not have to allow the public to speak, many choose to permit public participation. In those instances, it has been advised that a public body must treat all persons in a like manner. For instance, the public body can adopt reasonable rules to ensure fairness; i.e., allowing those who want to speak a specific period of time to express their views.

I requested minutes of a town board meeting and was told that I could not have them until they were approved. Is this right?

No. The Law states that minutes of open meetings must be made available within two weeks of the meeting; minutes of executive sessions must be made available within one week of the executive session. It has been suggested that if the minutes have not been approved, they may be marked "draft," "unapproved," or "non-final" when they are disclosed.

This is found on the NYS Dept. of State website, Committee on Open Government, using the following URL:

<http://www.dos.state.ny.us/coog/openmeetinglawfaq.htm#speak>

Committee on Open Government

OPEN MEETINGS LAW

PUBLIC OFFICERS LAW, ARTICLE 7

OPEN MEETINGS LAW

Section 100. Legislative declaration.

101. Short title.

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105. Conduct of executive sessions.

106. Minutes

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108. Exemptions

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§100. Legislative declaration. It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.

§101. Short title. This article shall be known and may be cited as "Open Meetings Law".

§102. Definitions. As used in this article: 1. "Meeting" means the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body. 2. "Public body" means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body. 3. "Executive session" means that portion of a meeting not open to the general public.

§103. Open meetings and executive sessions. (a) Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section one hundred five of this article. (b) Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law. (c) A public body that uses videoconferencing to conduct its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates.

§104. Public notice. 1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting. 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto. 3. The public notice provided for by this section shall not be construed to require publication as a legal notice. 4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

§105. Conduct of executive sessions. 1. Upon a majority vote of its total membership, taken in an open meeting

pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys: a. matters which will imperil the public safety if disclosed; b. any matter which may disclose the identity of a law enforcement agent or informer; c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed; d. discussions regarding proposed, pending or current litigation; e. collective negotiations pursuant to article fourteen of the civil service law; f. the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation; g. the preparation, grading or administration of examinations; and h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof. 2. Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body.

§106. Minutes. 1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon. 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter. 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session.

§107. Enforcement. 1. Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part. An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes. 2. In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party. 3. The statute of limitations in an article seventy-eight proceeding with respect to an action taken at executive session shall commence to run from the date the minutes of such executive session have been made available to the public.

§108. Exemptions. Nothing contained in this article shall be construed as extending the provisions hereof to: 1. judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals; 2. a. deliberations of political committees, conferences and caucuses. b. for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or of the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations; and 3. any matter made confidential by federal or state law.

§109. Committee on open government. The committee on open government, created by paragraph (a) of subdivision one of section eighty-nine of this chapter, shall issue advisory opinions from time to time as, in its discretion, may be required to inform public bodies and persons of the interpretations of the provisions of the open meetings law.

§110. Construction with other laws. 1. Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article. 2. Any provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby. 3. Notwithstanding any provision of this article to the contrary, a public body may adopt provisions less restrictive with respect to public access than this article.

§111. Severability. If any provision of this article or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction such judgment shall not affect or impair the validity of the other provisions of the article or the application thereof to other persons and circumstances. For further information, contact: Committee on Open Government, NYS Department of State, 41 State Street, Albany, NY 12231

NEW YORK STATE
GENERAL MUNICIPAL LAW
CHAPTER 24 OF THE CONSOLIDATED LAWS
ARTICLE 18--CONFLICTS OF INTEREST OF MUNICIPAL OFFICERS AND EMPLOYEES
SECTIONS 800 THROUGH 813

Current through Chapter 690 of the 2007 Legislative Session

§ 800. Definitions

When used in this article and unless otherwise expressly stated or unless the context otherwise requires:

1. "Chief fiscal officer" means a comptroller, commissioner of finance, director of finance or other officer possessing similar powers and duties, except that in a school district the term shall not mean a member of the board of education or a trustee thereof.

2. "Contract" means any claim, account or demand against or agreement with a municipality, express or implied, and shall include the designation of a depository of public funds and the designation of a newspaper, including but not limited to an official newspaper, for the publication of any notice, resolution, ordinance, or other proceeding where such publication is required or authorized by law.

3. "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 such officer or employee serves. For the purposes of this article a municipal officer or employee shall be deemed to have an interest in the contract of (a) his spouse, minor children and dependents, except a contract of employment with the municipality which such officer or employee serves, (b) a firm, partnership or association of which such officer or employee is a member or employee, (c) a corporation of which such officer or employee is an officer, director or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee.

4. "Municipality" means a county, city, town, village, school district, consolidated health district, county vocational education and extension board, public library, board of cooperative educational services, urban renewal agency, a joint water works system established pursuant to chapter six hundred fifty-four of the laws of nineteen hundred twenty-seven, or a town or county improvement district, district corporation, or other district or a joint service established for the purpose of carrying on, performing or financing one or more improvements or services intended to benefit the health, welfare, safety or convenience of the inhabitants of such governmental units or to benefit the real property within such units, an industrial development agency but shall have no application to a city having a population of one million or more or to a county, school district, or other public agency or facility therein.

5. "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 thereof and in the case of a county, shall be deemed to also include any officer or employee paid from county funds. No person shall be deemed to be a municipal officer or employee solely by reason of being a volunteer fireman or civil defense volunteer, except a fire chief or assistant fire chief.

6. "Treasurer" means a county treasurer, city treasurer, town supervisor, village treasurer, school district treasurer, fire district treasurer, improvement district treasurer, president of a board of health of a consolidated health district, county vocational educational and extension board treasurer, treasurer of a board of cooperative educational services, public general hospital treasurer, or other officer possessing similar powers and duties.

§ 801. Conflicts of interest prohibited

Except as provided in section eight hundred two of this chapter, (1) no municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer or employee, when such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder (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 and (2) no chief fiscal officer, treasurer, or his deputy or employee, shall have an interest in a bank or trust company designated as a depository, paying agent, registration agent or for investment of funds of the municipality of which he is an officer or employee. The provisions of this section shall in no event be construed to preclude the payment of lawful compensation and necessary expenses of any municipal officer or employee in one or more positions of public employment, the holding of which is not prohibited by law.

§ 802. Exceptions

The provisions of section eight hundred one of this chapter shall not apply to:

1. a. The designation of a bank or trust company as a depository, paying agent, registration agent or for investment of funds of a municipality except when the chief fiscal officer, treasurer or his deputy or employee, has an interest in such bank or trust company; provided, however, that where designation of a bank or trust company outside the municipality would be required because of the foregoing restriction, a bank or trust company within the municipality may nevertheless be so designated;

b. A contract with a person, firm, corporation or association in which a municipal officer or employee has an interest which is prohibited solely by reason of employment as an officer or employee thereof, if the remuneration of such employment will not be directly affected as a result of such contract and the duties of such employment do not directly involve the procurement, preparation or performance of any part of such contract;

c. The designation of a newspaper, including but not limited to an official newspaper, for the publication of any notice, resolution, ordinance or other proceeding where such publication is required or authorized by law;

d. The purchase by a municipality of real property or an interest therein, provided the purchase and the consideration therefor is approved by order of the supreme court upon petition of the governing board;

e. The acquisition of real property or an interest therein, through condemnation proceedings according to law;

f. A contract with a membership corporation or other voluntary non-profit corporation or association;

g. The sale of bonds and notes pursuant to section 60.10 of the local finance law;

h. A contract in which a municipal officer or employee has an interest if such contract was entered into prior to the time he was elected or appointed as such officer or employee, but this paragraph shall in no event authorize a renewal of any such contract;

i. Employment of a duly licensed physician as school physician for a school district upon authorization by a two-thirds vote of the board of education of such school district, notwithstanding the fact that such physician shall have an interest, as defined in section eight hundred one of this chapter, in such employment.

j. Purchases or public work by a municipality, other than a county, located wholly or partly within a county with a population of two hundred thousand or less pursuant to a contract in which a member of the governing body or board has a prohibited interest, where:

(1) the member of the governing body or board is elected and serves without salary;

(2) the purchases, in the aggregate, are less than five thousand dollars in one fiscal year and the governing body or board has followed its procurement policies and procedures adopted in accordance with the provisions of section one hundred four-b of this chapter and the procurement process indicates that the contract is with the lowest dollar offer;

(3) the contract for the 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.

2. a. A contract with a corporation in which a municipal officer or employee has an interest by reason of stockholdings when less than five per centum of the outstanding stock of the corporation is owned or controlled directly or indirectly by such officer or employee;

b. A contract for the furnishing of public utility services when the rates or charges therefor are fixed or regulated by the public service commission;

c. A contract for the payment of a reasonable rental of a room or rooms owned or leased by an officer or employee when the same are used in the performance of his official duties and are so designated as an office or chamber;

d. A contract for the payment of a portion of the compensation of a private employee of an officer when such employee performs part time service in the official duties of the office;

e. A contract in which a municipal officer or employee has an interest in the total consideration payable thereunder, when added to the aggregate amount of all consideration payable under contracts in which such person had an interest during the fiscal year, does not exceed the sum of seven hundred fifty dollars.

f. A contract with a member of a private industry council established in accordance with the federal job training partnership act [FN1] or any firm, corporation or association in which such member holds an interest, provided the member discloses such interest to the council and the member does not vote on the contract.

[FN1: 29 USC § 1501, et seq.]

§ 803. Disclosure of interest

1. Any municipal officer or employee who has, will have, or later acquires an interest in or whose spouse has, will have, or later acquires an interest in any actual or proposed contract, purchase agreement, lease agreement or other agreement, including oral agreements, with the municipality of which he or she is an officer or employee, shall publicly disclose the nature and extent of such interest in writing to his or her immediate supervisor and to the governing body thereof as soon as he or she has knowledge of such actual or prospective interest. Such written disclosure shall be made part of and set forth in the official record of the proceedings of such body.

2. Notwithstanding the provisions of subdivision one of this section, disclosure shall not be required in the case of an interest in a contract described in subdivision two of section eight hundred two hereof.

§ 804. Contracts void

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.

§ 804-a. Certain interests prohibited

No member of the governing board, of a municipality shall have any interest in the development or operation of any real property located within Nassau County and developed or operated by any membership corporation originally formed for purposes among which are the following:

1. to plan for, advise, recommend, promote and in all ways encourage, alone or in concert with public officials and bodies and interested local associations, the development and establishment of any lands in Nassau County publically owned with particular emphasis on industrial, business, commercial, residential and public uses, the augmentation [FN1] of public revenues and furtherance of the public interest of the citizens of Nassau County;

2. to conduct studies to ascertain the needs of Nassau County as pertains to such publically owned lands and supporting facilities and in Nassau County generally for the purpose of aiding the County of Nassau in attracting new business, commerce and industry to it and in encouraging the development and retention of business, commerce and industry;

3. to relieve and reduce unemployment, promote and provide for additional and maximum employment, better and maintain job opportunities and instruct or train individuals to improve or develop their capabilities for such jobs;

4. to implement and engage itself in plans of development of such publically owned lands and other areas in connection with private companies and citizens and with public bodies and officials, and to participate in such operations, leaseholds, loans, ownerships with respect to land, buildings or public facilities of interest therein as may be lawful and desirable to effectuate its corporate purposes and the best interests of the people of Nassau County.

[FN1: so in original]

§ 805. Violations

Any municipal officer or employee who willfully and knowingly violates the foregoing provisions of this article shall be guilty of a misdemeanor.

§ 805-a. Certain action prohibited

1. No municipal officer or employee shall: a. directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part;

b. disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests;

c. receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any municipal agency of which he is an officer, member or employee or of any municipal agency over which he has jurisdiction or to which he has the power to appoint any member, officer or employee; or

d. receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any agency of his municipality, whereby his compensation is to be dependent or contingent upon any action by such agency with respect to such matter, provided that this paragraph shall not prohibit the fixing at any time of fees based upon the reasonable value of the services rendered.

2. In addition to any penalty contained in any other provision of law, any person who shall knowingly and intentionally violate this section may be fined, suspended or removed from office or employment in the manner provided by law.

§ 805-b. Solemnization of marriages

Notwithstanding any statute, law or rule to the contrary, no public officer listed in section eleven of the domestic relations law shall be prohibited from accepting any fee or compensation having a value of one hundred dollars or less, whether in the form of money, property, services or entertainment, for the solemnization of a marriage by such public officer at a time and place other than the public officer's normal public place of business, during normal hours of business. For the purpose of this section, a town or village judge's normal hours of business shall mean those hours only which are officially scheduled by the court for the performing of the judicial function.

§ 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. Notwithstanding any other provision of this article to the contrary, a fire district code of ethics shall also apply to the volunteer members of the first district fire department. 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.

(b) Effective on and after January first, nineteen hundred ninety-one, such codes of political subdivisions, as defined in section eight hundred ten of this article, may contain provisions which require the filing of completed annual statements of financial disclosure with the appropriate body, as defined in section eight hundred ten of this article. Nothing herein shall be construed to restrict any political subdivision or any other municipality from requiring such a filing prior to January first, nineteen hundred ninety-one. Other than as required by subdivision two of section eight hundred eleven of this article, the governing body of any such political subdivision or other municipality may at any time subsequent to the effective date of this paragraph, adopt a local law, ordinance or resolution pursuant to subdivision one of section eight

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW
YORK

Informal Opinion No. 92-31

1992 N.Y. Op. (Inf.) Att'y Gen. 31; 1992 N.Y. AG LEXIS 33

May 14, 1992

SYLLABUS:

[*1]

GENERAL MUNICIPAL LAW §§ 806, 808.

A town board member employed by a firm that does extensive land development in town should recuse himself from participating in deliberations on legislation and appointments wherein he has or appears to have a conflict of interests.

REQUESTBY:

JAMES D. COLE, Assistant Attorney General in Charge of Opinions

OPINION:

Stephen A. Pechenik, Esq.
Town Attorney
Town of Pittstown
41 Second Street
Troy, NY 12180

You have asked whether a newly appointed town board member should excuse himself from voting on or participating in discussions concerning proposed land use regulations and appointments to various land use regulatory positions such as the planning board and the zoning board of appeals.

You have set forth the facts in this matter. The town board member was appointed to fill a vacancy on that board. He is employed in the private sector as a project manager for a development company which buys and sells land in the town and which currently owns large amounts of land in the town. The company develops land and currently has several applications for subdivision approval before the town planning board. The question is whether, in light of the town board member's [*2] private sector interests, it is proper for him to vote on land use legislation and appointments to land use regulatory positions such as the planning board and zoning board of appeals.

The development of ethics standards to define when private employment and activities are in conflict with the official duties of a local government officer or employee has been left to the governing body of the municipality. *General Municipal Law § 806(1)*. Governing bodies of a county, city, town, village and school district are required to adopt codes of ethics, which must include these and other standards. *Ibid*. A code of ethics may provide for the prohibition of

conduct in violation of ethics standards. Ibid. Local governments are authorized to establish boards of ethics, which may render advisory opinions to local officers and employees concerning compliance with standards established by a code of ethics. Id., § 808. Thus, we suggest that you review your local code of ethics to determine if any of its provisions apply to the facts at hand.

Assuming, as you have indicated, that the development company does extensive land development in [*3] the town resulting in substantial applications before the planning board and zoning board of appeals, we believe it is prudent that the town board member recuse himself from participating in appointments to the planning board and zoning board of appeals. Also, he should recuse himself from deliberations on land use regulations which will affect his employer's interests. Governmental officers, in exercising the public trust, must avoid circumstances which compromise their ability to make impartial judgments solely in the public interest. Op Atty Gen (Inf) No. 90-57. Even the appearance of impropriety must be avoided in order to maintain public confidence in government. Ibid. In our view, the board member's employment as project manager for the development company compromises his impartial judgment or at least creates in the eyes of the public an appearance of impropriety.

The courts have recognized a disqualifying conflict of interests resulting from a board member's employment with a firm likely to receive business if an application before the board is approved. *Taxpayers' Association v Town Board*, 69 AD2d 320 (2d Dept 1979); see also, *Matter of Zagoreos v Conklin*, [*4] 109 AD2d 281, 287 (2d Dept 1985). There are "subtle but powerful psychological pressures" placed on an employee in these situations. *Matter of Zagoreos*, 109 AD2d at 288. Similarly, we believe that the town board member should refrain from participating in legislative decisions in which his firm has or may have a financial interest. The appointment of planning board and zoning board of appeals members gives rise to similar concerns. Participation in these appointments by this town board member, whose private employer will make substantial applications before the planning board and zoning board of appeals, compromises the integrity of those boards.

We note that the decisions of local boards have been set aside based upon judicial findings of conflicts of interests. *Zagoreos* and *Taxpayers*, *supra*.

Thus, it is our view that the town board member should recuse himself in the foregoing situations.

The Attorney General renders formal opinions only to officers and departments of State government. This perforce is an informal and unofficial expression of the views of this office.

Legal Topics:

For related research and practice materials, see the following legal topics:

Governments Courts Judges Governments Local Governments Finance Real Property Law Zoning & Land Use Ordinances

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December 27, 2007

Carl J. Madonna, Esq.
10 Oak Street
Plattsburgh, NY 12901

Re: Town of Burke/Wind Energy Facilities Law

Dear Attorney Madonna:

We represent Ken and Janet Tacy, long-time residents of the Town of Burke. The Tacys are concerned about the proposed adoption of a Wind Energy Facilities Law in the Town of Burke.

We briefly discussed with you the Town Board's intent to adopt a Local Law. We also spoke with representatives of the Association of Towns regarding situations in which Town Boards may be unable to act, due to conflicts of interest.

When discussing this matter in the abstract, it was presumed that Town Board Members did not have a direct pecuniary interest in the legislation upon which they would be acting. You suggested that the Town Board would pass the zoning provisions necessary to allow placement of wind towers in the Town, but that the ultimate decision on applications would be deferred to the Zoning Board of Appeals (ZBA). You indicated that the ZBA Members, with one possible exception, would not have conflicts of interest.

Further investigation reveals that two Town Board Members who would be voting on the proposed Wind Energy Facilities Law have a direct (as opposed to potential) pecuniary interest in the placement of wind towers. Town Board member Arnold Lobdell is a party to an Option and Lease Agreement with Jericho Rise Wind Farm, LLC. This Option and Lease Agreement is referenced in a Subordination, Non-Disturbance and Attornment Agreement entered into between Community Bank NA, Jericho Rise Wind Farm LLC and Arnold, Trudy and James Lobdell. Further, Town Board member David Vincent has entered into an Easement Agreement with Noble Chateaugay Windpark, LLC.

In light of the existence of these agreements, there is nothing hypothetical or speculative about these Town Board Members' interests in bringing wind towers to the

Carl J. Madonna, Esq.
Re: Town of Burke/Wind Energy Facilities Law
December 27, 2007
Page 2 of 2

Town of Burke. Both of these Town Board Members stand to benefit financially by allowing wind towers in the Town of Burke and have a direct interest in where such towers are located. In light of such direct conflicts of interest, we believe it is mandatory that these two Town Board Members recuse themselves and take no further part in any action related to wind energy facilities. For your information, we enclose a copy of the Attorney General's Opinion, Informal Opinion # 92-31, which is closely on-point. We officially request that Town Board Members Lobdell and Vincent recuse themselves. It is our understanding that the remaining three Town Board Members have no direct pecuniary interest in the siting of wind towers and ask that you confirm this fact.

Finally, it is our understanding, based upon review of public records, that several ZBA Members have similar conflicts of interest and we anticipate that any such ZBA Member who has a direct financial interest in the siting of wind towers will recuse himself or herself from participation in any related matters.

We are sending a copy of this letter to the Town Clerk with the request that it be made part of the official record of the Town Board's deliberation in this matter. Thank you for your attention to this matter. We wish you a happy and healthy new year.

Very truly yours,

MILLER, MANNIX, SCHACHNER & HAFNER, LLC



Cathi L. Radner

CLR/wp
Enclosure
cc: Town of Burke Town Clerk
Mr. and Mrs. Ken Tacy

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December 27, 2007

Yvonne Spinner, Town Clerk
Town of Burke Town Hall
842 Depot Street
Burke, NY 12917

Re: Freedom of Information Law Request

Dear Ms. Spinner:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, we hereby request a copy of the Code of Ethics of the Town of Burke. We will promptly remit payment of any charge associated with this request. If the fee for copying the document requested will exceed Ten Dollars (\$10), please advise.

As you know, the Freedom of Information Law requires that an agency respond to the request within five (5) business days of receipt of the request. Therefore, we would appreciate a prompt response and look forward to hearing from you shortly.

If, for any reason, any portion of our request is denied, please inform us in writing of the reasons for the denial and provide the name and address of the person to whom an appeal should be directed.

Very truly yours,
MILLER, MANNIX, SCHACHNER & HAFNER, LLC



Cathi L. Radner

CLR/wp
cc: Ken and Janet Tracy
Carl J. Madonna, Esq.