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CHITRA ANBALAGAN

TO: Hon. Carnell T. Foskey, County Attorney
FROM: Steven G. Leventhal
DATE: April 6, 2015
RE: Advisory Opinion [REDACTED]

I. Question Presented

A [REDACTED] employed in the [REDACTED]

Works inquires whether he may serve as an uncompensated member of the board of directors of a local not-for-profit corporation engaged in community renewal, primarily through acquiring, improving and leasing distressed residential properties.

II. Conclusion

Based on the facts presented and the conditions set forth herein, a prohibited conflict of interest would not exist if a [REDACTED] employed in the [REDACTED] [REDACTED] were to serve as an uncompensated member of a local not-for-profit [REDACTED]

corporation engaged in community renewal, primarily through acquiring, improving and leasing distressed residential properties.

III. Discussion

Nassau County Charter section 2218 (the "Code of Ethics") provides at subdivision 12 (Exemptions), in pertinent part, that:

- c. Notwithstanding the foregoing provisions of this section, a County officer or employee may be an officer, director or trustee of a membership corporation or other nonprofit corporation or association public authority, or public benefit corporation, or hold a policy making position with such entity, and participate in all activities and transactions of such entity, provided he or she receives no financial remuneration either directly or indirectly from such entity other than expenses actually and necessarily incurred in the performance of his or her duties. Any officer or employee receiving such remuneration for expenses shall, for each year in which such remuneration is received, be required to complete and file the financial disclosure statement promulgated pursuant to the provisions of §22-4.3 of the Administrative Code. A County officer or employee serving a membership corporation or other nonprofit corporation or association pursuant to this paragraph, other than in an ex-officio capacity, shall recuse himself or herself from acting, in his or her capacity as County officer or employee, on any matters directly affecting such entity, shall not use any confidential County information nor, without the approval of the Board [of Ethics], communicate with any County board, agency, officer or employee in furtherance of the interests of such corporation or entity nor work on any case, proceeding, application or particular matter which such person has been directly concerned with, personally participate in, or actively considered as a County officer or employee.

In considering this inquiry, I have employed a three step analysis to determine whether a prohibited conflict of interest would exist if a [REDACTED] employed in [REDACTED] [REDACTED] were to serve as an uncompensated member of the board of directors of a local not-for-profit corporation engaged in community renewal, primarily through acquiring, improving and leasing distressed residential properties. I considered: (i) whether the proposed service as an uncompensated member of the board of directors of a local not-for-profit corporation would violate New York General Municipal Law Article 18 (Conflicts of Interest of Municipal Officers and Employees), (ii) whether the proposed service as an

uncompensated member of the board of directors of a local not-for-profit corporation would violate the Nassau County Code of Ethics, and (iii) whether the proposed service as an uncompensated member of the board of directors of a local not-for-profit corporation would create a prohibited appearance of impropriety, or otherwise violate common law principles of local government ethics.

Article 18 of the General Municipal Law establishes standards of ethical conduct that are mandatory for officers and employees in every municipality within the State of New York, other than New York City.¹ All County officers and employees are subject to the provisions of N.Y. Gen. Mun. Law Article 18. However, the statute neither prohibits nor regulates the membership of municipal officers and employees on not-for-profit boards.

Article 18 expressly exempts contracts with membership corporations or other voluntary nonprofit corporations or associations from its ban on municipal contracts that confer benefits on municipal officers and employees who have control over such contracts. *See* N.Y. Gen. Mun. Law §802. Here, the not-for-profit corporation is newly organized, and has no contractual relationship with the County. Nevertheless, for the reason stated, such a contact would not be prohibited by Article 18.

Local municipalities are authorized by Article 18 to adopt their own codes of ethics.² A local ethics code may not permit conduct that is prohibited by Article 18. However, a local code may be stricter than Article 18; it may prohibit conduct that Article 18 would allow.³

Among other things, Nassau County Code of Ethics, subdivision 2 prohibits a County officer or employee from having a financial interest in any entity that has business or

¹ N.Y. Gen. Mun. Law §800(4).

² *See* N. Y. Gen. Mun. Law §806.

³ *Id.*

professional dealings with the County, or from accepting or retaining other employment, or engaging in other activities that directly or indirectly create a conflict with his or her official duties. For reasons that will follow, there is no indication here that the proposed service as a member of the board of directors of a local not-for-profit corporation would create a conflict of interest with [REDACTED] official duties. Nevertheless, the Nassau County Code of Ethics expressly provides in subdivision 12 (Exemptions), that a County officer or employee may be a director of a nonprofit corporation, provided he or she receives no financial remuneration either directly or indirectly from such entity other than expenses actually and necessarily incurred in the performance of his or her duties.

Ethics regulations are not only designed to promote high standards of official conduct, they are also designed to foster public confidence in government. An appearance of impropriety undermines public confidence. Long established common law principles and opinions of the New York Attorney General offer useful guidance in determining whether a position of outside employment would create a conflict with the official duties of a municipal office or employee.

In the absence of a specific constitutional or statutory prohibition, one person may simultaneously hold a public office and a position of outside employment unless they are incompatible. 1982 N.Y. Op. Atty. Gen (Inf.) 148. The leading case on compatibility of offices is People ex rel. Ryan v. Green, 58 N.Y. 295 (1874). In that case, the Court of Appeals held that two offices are incompatible if one is subordinate to the other (*i.e.*, you cannot be your own boss) or if there is an inherent inconsistency between the two offices. Although the Ryan case involved two public offices, the same principle applies to the compatibility of a public office and a position of employment. *See* 1982 N.Y. Op. Atty. Gen (Inf.) 148. To determine whether two positions are inherently inconsistent, it is necessary to analyze their respective duties. An

obvious example of two offices with inconsistent duties is those of auditor and director of finance. *Id.*

Here, there is no inherent incompatibility between the duties of the [REDACTED] and those of a member of the board of directors of a local not-for-profit corporation engaged in community renewal, primarily through acquiring, improving and leasing distressed residential properties. The Civil Service Class Specification for [REDACTED] provides, generally, that a person employed in that title:

[REDACTED]

The Civil Service Class Specification further provides that a person employed as a

[REDACTED]

Among other duties, the [REDACTED]

[REDACTED]



The [redacted] has been invited to be a member of the board of directors of a newly organized⁴ charitable and educational not-for-profit corporation serving the Greater Uniondale Area. The corporate by-laws provide that the board of directors shall be composed of representatives from various specified segments of the community, with one seat on the board designated for a member to represent “agencies [redacted] [redacted] core area interest”. The [redacted] has been invited to fill this seat.

The purpose and mission of the not-for-profit corporation, as set forth in the corporate by-laws, include “community renewal, revitalization, integration and community empowerment.” The not-for-profit corporation utilizes cooperative models of leadership and ownership to develop sustainably affordable properties for the benefit of local community stabilization, well-being and improvement with an emphasis on stabilizing homeownership and economic opportunity. According to a director of the not-for-profit corporation, these purposes are typically accomplished by the acquisition of title to distressed residential properties, improvement of the properties and leasing of the improved properties to qualifying members of the public.

Based on the foregoing, it is reasonable to conclude that the duties of [redacted] and those of director of the not-for-profit are complimentary and not inherently incompatible,

⁴ The not-for-profit corporation was incorporated on June 10, 2010 but, according to the March 7, 2014 letter of its President, is still in the process of developing its full board of directors.

and that no prohibited appearance of impropriety would arise from the proposed service on the not-for-profit board of directors.

IV. Conditions to be Observed While Serving on Not-For-Profit Board

Even where the duties of two positions are compatible, a conflict of interest may nevertheless arise from time to time. In such an event, a County officer or employee must promptly recuse himself or herself from acting in the matter, and must file with the Board of Ethics a written notice of recusal stating the nature of the private interest, pursuant to Nassau County Code of Ethics, subdivision 4. Here, the [REDACTED] must recuse himself from acting, in his or her capacity as County employee, on any matter directly affecting the not-for-profit corporation.

Further, reimbursement of expenses made by the not-for-profit corporation to the [REDACTED] must be disclosed on an annual statement of financial disclosure filed with the Board of Ethics pursuant to §22-4.3 of the Administrative Code.

In his activities as a member of not-for-profit board of directors, the [REDACTED] may not: (i) use or disclose any confidential County information, (ii) communicate with any County board, agency, officer or employee on behalf of the not-for-profit corporation without first obtaining a waiver from the Board of Ethics, or (iii) work on any application or particular matter that he handled or otherwise participated in as a County officer or employee without first obtaining a waiver from the Board of Ethics.