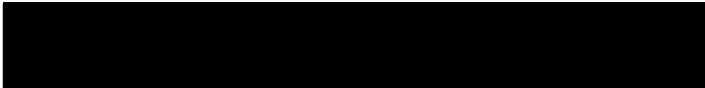




County of Nassau Inter-Departmental Memo

To:



From: Chris Leimone, Deputy County Attorney

Date: April 17, 2017

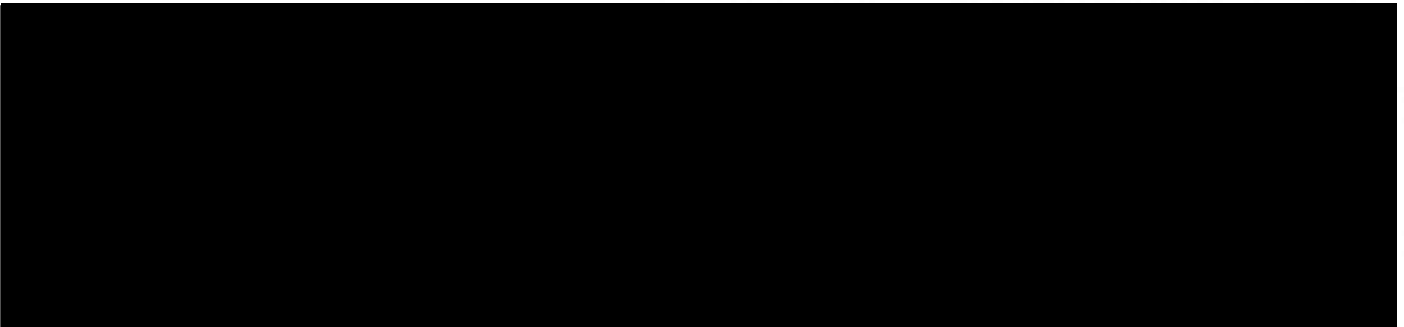
Subject: Ethics Opinion

ISSUE

You have requested that the Board of Ethics ("Board") opine as to whether you may serve as both the [REDACTED] Nassau County [REDACTED] and as a licensed real estate broker selling residential and commercial real estate.

Please note that this matter was heard by the Board and the Board concluded that no conflict exists. As such, I have prepared this opinion of counsel.

FACTUAL BACKGROUND



As an associate broker with a real estate company, you will be paid to sell residential and commercial real estate throughout New York State. You indicated that no County time or resources will be used to conduct this business.

ANALYSIS

In order to properly address your inquiry, it is necessary to analyze (1) New York General Municipal Law Article 18; (2) Nassau County Charter section 2218 (i.e. The Nassau County Code of Ethics); (3) the relevant case law and; (4) whether your potential dual roles would create a prohibited appearance of impropriety under common law principles.

New York General Municipal Law Article 18 establishes standards of ethical conduct that are mandatory for officers and employees in every municipality within the State of New York, with the exception of New York City.² Please be advised that all County officers and employees are subject to the provisions of Article 18. However, Article 18 does not regulate the outside employment of municipal officers and employees.

Municipalities in New York State are permitted by Article 18 to adopt their own codes of ethics.³ A local government's code of ethics cannot permit activity that is prohibited by Article 18; however, a local government's code of may be stricter than Article 18 (i.e. it can prohibit conduct that Article 18 permits).⁴

Nassau County's Code of Ethics ("Code") is codified in section 2218 of the Nassau County Charter ("Charter") and sets forth the specific ethical standards that apply to County employees. Similar to Article 18, there is no blanket prohibition against outside employment in section 2218. However, section 2218 does contain certain restrictions that can apply to outside employment. In that regard, section 2218, subdivision 2(a)(3) sets forth as follows:

No County officer or employee shall accept or retain other employment, engage in any business transaction, make or retain any investments, have any financial interest, or engage in other activities that directly or indirectly create a conflict with his or her official duties.

In order to determine whether a position of outside employment would create a conflict with the duties of a municipal officer or employee, it is necessary to analyze New York case law and opinions from the New York Attorney General.

First, there does not appear to be a statute prohibiting you from holding both positions. Under New York law, where there is no constitutional or statutory prohibition against holding dual-offices, one person may hold two offices simultaneously unless they are incompatible. 1989 N.Y. Op. Atty. Gen. (Inf.) 163. The leading case on compatibility of offices is People ex rel. Ryan v. Green, 58 N.Y. 295 (1874). In that case, the Court 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. In order to determine whether two positions are inherently inconsistent, one must analyze the duties of the two offices (i.e. auditor and the office of director of finance). 1989 N.Y. Op. Atty. Gen. (Inf.) 163. However, please be advised that even if the positions are compatible, a situation may arise where an employee has a conflict of interest created by the simultaneous holding of the two positions. Id. In such a situation, the conflict can be avoided if the employee recuses himself/herself from acting in the matter. Id. Pursuant to section 2218, subdivision 4, a written recusal must be filed with the Board setting forth the nature of the outside interest.

In the case at bar, the positions of [REDACTED] and associate real estate broker are not subordinate to one another. There is no overlap between the two positions and neither position requires oversight over the other. Additionally, the two positions are not inherently inconsistent. Your role as [REDACTED] primarily requires you to [REDACTED]. As a real estate broker, you will sell residential and commercial real estate in New York State. Accordingly, it is highly unlikely that your duties as [REDACTED] will interfere or conflict with your duties as a real estate broker.

Finally, a review is needed to determine if your potential dual roles would create a prohibited appearance of impropriety under common law principles. Courts have held that government employees/officials have an implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated. See, Zagoreos v. Conklin, 109 A.D.2d 281 (2d Dept. 1985); Tuxedo Conservation & Taxpayers Assoc. v. Town Bd. Of Tuxedo, 69 A.D.2d 320 (2d Dept. 1979). In other words, if a proposed action by a government official/employee has the potential to create an appearance of impropriety, said official/employee should abstain from acting.

Again, considering that it is unlikely that your duties as [REDACTED] will interfere or conflict with your duties as an associate real estate broker, that the positions are not subordinate to one another and that there is no overlap between the offices, it would be unreasonable to assume that generally holding both positions would create an appearance of impropriety.

Finally, although it is unlikely, a situation may arise where you have to seek approval from the Board or you have to recuse yourself from acting on a particular matter because of the conflict created by being both [REDACTED] and an associate real estate broker. If and when this occurs, you should seek guidance from the Board as to whether recusal, or some other form of action, is required. For your reference, examples of prohibited activity include, but are not necessarily limited to, conducting real estate business on County time; using County resources to perform said business and; using your position [REDACTED] as a way to recruit real estate clients. If you are uncertain as to the consequences of a particular action or activity, you should contact the Board for further direction.

CONCLUSION

Based on the facts presented and the applicable laws cited above, you are permitted to serve as both [REDACTED] and as an associate real estate broker.

In addition, although unlikely, if a situation arises where you believe recusal may be required due to your dual positions or you are uncertain as to whether recusal or some other form of action is required, you should contact the Board for further guidance.

¹ <https://www.nassaucountyny.gov> [REDACTED]

² N.Y. Gen. Mun. Law §800(4)

³ See N.Y. Gen Mun. Law §806

⁴ *Id.*