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**COUNTY OF NASSAU
BOARD OF ETHICS**

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ADVISORY OPINION 112-18

The [REDACTED] requests an advisory opinion as to whether a prohibited conflict of interest would arise if he were to serve as an uncompensated board member or trustee for two not-for-profit entities, neither of which is funded by the County.

GOVERNING AUTHORITY

Nassau County Charter section 2218 (the "Code of Ethics") subdivision 2 (Conflicts of Interest Prohibited) provides, in pertinent part, that:

a. Except as provided in subdivision twelve of this section, no County officer or employee whether paid or unpaid, shall...

(1) Accept or retain other employment, engage in any business transactions, 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.

Nassau County Charter section 2218 (the "Code of Ethics") provides at subdivision 12

(Exemptions), in pertinent part, that:

c. ... [A] County officer or employee may be an officer, director or trustee of a membership corporation or other nonprofit corporation or association..., 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 [b]oard, 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 participated in, or actively considered as a County officer or employee.

DISCUSSION

██████████ wishes to continue his service to two not-for-profit entities as a board member and trustee, respectively. Neither position is compensated. One of the not for profit entities operates the ██████████ in the City of New York. The other operates and maintains ██████████ in the City of ██████████. Neither not for profit entity is funded by the County of Nassau.

In considering this inquiry, the Board of Ethics employed a three step analysis to determine whether, under the circumstance presented, a prohibited conflict of interest would arise if the ██████████ were to serve as an uncompensated board member and uncompensated trustee, respectively, of two not-for-profit entities, neither of which is funded by the County. The Board considered: (i) whether the proposed service as a board member or trustee of a not for profit entity, under the circumstances presented, would violate Article 18 of the New York General Municipal Law (Conflicts of Interest of Municipal Officers and Employees), (ii) whether the proposed service as a board member or trustee of a not for profit entity, under the circumstances presented, would violate the Nassau County Code of Ethics, and (iii) whether the proposed service as a board member or trustee of a not for profit entity, under the circumstances presented, would create a prohibited appearance of impropriety under common law principles.

1. N.Y. Gen. Mun. Law Article 18

Article 18 of the New York General Municipal Law establishes minimum standards of conduct for the officers and employees of all municipalities within the State of New York, other than New York City.¹ All officers and employees must comply, whether paid or unpaid, including members of boards and commissions. GML Article 18 does not regulate the secondary employment of municipal officers and employees. Accordingly, under the circumstances presented, the proposed service as a board member or trustee of a not for profit entity would not violate Article 18 of the New York General Municipal Law

2. Nassau County Code of Ethics

The Nassau County Code of Ethics prohibit a County officer or employee from engaging in secondary employment activities that conflict with his or her official duties. Long established common law principles and opinions of the New York Comptroller and 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.² The leading case on compatibility of offices is People ex rel. Ryan v. Green.³ In that case, the Court of Appeals held that two offices are incompatible if one is subordinate to the

¹ N.Y. Gen. Mun. Law §800(4).

² 1982 N.Y. Op. Atty. Gen (Inf.) 148.

³ 58 N.Y. 295 (1874).

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. 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 board member and trustee, respectively, of two not for profit entities, one of which operates the public hospitals in the City of New York, the other of which operates and maintains a park in the City of [REDACTED], and neither of which is funded by the County.

While there is no inherent incompatibility between the respective duties of the two positions, conflicts of interest may nevertheless arise from time to time. In the absence of a waiver from the Board of Ethics, the [REDACTED] must recuse himself from acting in his official capacity on any matter affecting the not for profit entities. He may not disclose or make unauthorized personal use of confidential County information; make unauthorized use of County resources including, without limitation, compensated County time; communicate on behalf of the not for profit entities with any County board, agency, officer or employee, unless authorized to do so by the Board of Ethics; or work on any matter on behalf of the not for profit entities in which he has participated in his capacity as a County employee.

If the [REDACTED] finds that he is frequently and inevitably required to recuse himself, that may be an indication that the position of secondary employment has become incompatible with his official duties and he should, under those circumstances, seek a further advisory opinion.

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the proposed service as a board member or trustee of a not for profit entity, under the circumstances presented, would violate the Nassau County Code of Ethics .

3. Common Law Principles

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. Therefore, courts have found that government 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.⁴

Where a contemplated action by an official might create an appearance of impropriety, the official should refrain from acting. Officials should be vigilant in avoiding real and apparent conflicts of interest. They should consider not only whether they believe that they can fairly judge a particular application or official matter, but also whether it may appear that they did not do so. Even a good faith and public spirited action by a conflicted public official could tend to undermine public confidence in government by confirming to a skeptical public that government serves to advance the private interests of public officials rather than to advance the public

⁴ See, e.g., Matter of Zagoreos v. Conklin, 109 A.D.2d 281 (2d Dept. 1985); Matter of Tuxedo Conservation & Taxpayer Assn. v. Town. Board of Town of Tuxedo, 69 A.D.2d 320 (2d Dept. 1979).

interest.

In considering whether a prohibited appearance of impropriety has arisen, the question is whether an officer or employee has engaged in or influenced decisive official action despite having a disqualifying conflict of interest that is clear and obvious, such as where the action is contrary to public policy, or raises the specter of self-interest or partiality. A prohibited appearance of impropriety should not be found where a conflict is speculative or immaterial.

Here, having determined that there is no inherent incompatibility between the duties of the [REDACTED] and those of a board member and trustee, respectively, of two not for profit entities, one of which operates the [REDACTED] in the City of New York, the other of which operates and maintains [REDACTED] in the City of [REDACTED] and neither of which is funded by the County, there is no reason to conclude that the proposed activities would undermine public confidence in County government.


Accordingly, based on the facts presented, and subject to the conditions set forth herein, the proposed service of [REDACTED] as a board member and trustee, respectively, of the two not for profit entities would not create a prohibited appearance of impropriety under common law principles.

CONCLUSION

Based on the facts presented, and subject to the conditions set forth herein, a prohibited conflict of interest would not arise if the [REDACTED] were to serve as an uncompensated board member or trustee for two not-for-profit entities, neither of which is funded by the County.

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
June 30, 2018


Kenneth L. Gartner, Chair