

LAURA CURRAN
COUNTY EXECUTIVE



COUNTY OF NASSAU
BOARD OF ETHICS
One West Street
Mineola, New York 11501-4820
516-571-3056

BOARD OF ETHICS

KENNETH L. GARTNER
CHAIR

JARED A. KASSCHAU
COUNTY ATTORNEY

CHRISTOPHER DEVANE
MEMBER

DANIEL PALMIERI
MEMBER

MICHAEL PERNICK
MEMBER

STEVEN G. LEVENTHAL
COUNSEL

NICHOLAS VEVANTE
SECRETARY

ADVISORY OPINION 104-19

The Deputy County Executive for Economic Development (the "DCE") inquires whether a prohibited conflict of interest would arise if she were to continue to concurrently serve as an uncompensated member of the Board of Directors of the Nassau County Land Bank

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:

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

Code of Ethics subdivision 4 (Recusal and Disclosure of Interest) provides, in pertinent part, that:

a. A County officer or employee, whether paid or unpaid, shall promptly recuse himself or herself from acting on any matter before the County in which he or she has (i) any direct or indirect financial or (ii) any other private interest that a reasonable person would perceive to compromise his or her ability to make impartial judgments or take discretionary actions in the best interest of the County.

Code of Ethics subdivision 5 (Disclosure of Confidential Information) provides that:

No officer or employee of the County, whether paid or unpaid shall disclose confidential information concerning the property, government or affairs of the County or any other confidential information of an official character obtained as a result of County employment except when disclosure is required by law or when such information is otherwise available to the public, nor shall he or she use such

information to advance the financial or other private interest of himself or herself or others.

Code of Ethics subdivision 12 (Exemptions) provides, 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, 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 participated in, or actively considered as a County officer or employee.

DISCUSSION

The Nassau County Land Bank was formed to address the still-lingering effects of the foreclosure crisis which has created pockets of blight in neighborhoods and communities in Nassau County. The Deputy County Executive provided the following thorough discussion of the Land Bank's mission and organization, and of her role as Deputy County Executive for Economic Development.

The Nassau County Land Bank

In 2011, the New York State Legislature enacted Article 16 of the Not-for-Profit Corporation Law which gives municipalities like Nassau County that enforce delinquent property taxes the authority to establish a "land bank." See Not-for-Profit Corporation Law ("N-PCL") §1603. The primary focus of a land bank is the "acquisition of real property that is tax delinquent, tax foreclosed, vacant, abandoned, and the use of tools authorized in [Article 16] to eliminate the harms and liabilities caused by such properties." N-PCL §1601.

The County Legislature created the Nassau County Land Bank Corporation by adopting Ordinance No. 87-2015. Section 2 of Ordinance No. 87-2015 provides that the "purpose of the Nassau County Land Bank Corporation is to direct funds to positive purposes that have the effect of decreasing the numbers of vacant, abandoned and tax-delinquent properties, revitalizing Nassau County communities and increasing the tax rolls to the benefit of all its citizens."

Section 3(b) of Ordinance No. 87-2015 provides that the Board of the Land Bank, whose

members serve three year terms, is composed of two *ex officio* members (the County Attorney and the Director of the Housing and Community Development or their designees) and five members appointed by the County Executive, one of her own selection, two on the recommendation of the Presiding Officer and two on the recommendation of the Minority Leader. Board members serve without compensation but are eligible to receive reimbursement for reasonable expenses incurred in performing Land Bank duties pursuant to N-PCL §1605(g).

The DCE was appointed to serve as a member of the Land Bank Board in February 2019. The other Board members are:

- 1) Siela Bynoe (Chair) (Appointee of the Minority Leader and County Legislator);
- 2) Clara Gillens Eromosele (Appointee of the Minority Leader and Executive Director of Roosevelt Community Revitalization Group);
- 3) Meredith Hughes (Appointee of Presiding Officer and Deputy Counsel to Majority Caucus of County Legislature);
- 4) Francis X. Moroney (Appointee of Presiding Officer and Senior Advisor to the Majority Caucus of the County Legislature);
- 5) Kennetha Pettus (Director of the Nassau County Office of Housing); and
- 6) Errol Williams (Designee of Nassau County Attorney, Jared A. Kasschau).

The fact that all but one of these appointees is a Nassau County officer or employee is unsurprising given that N-PCL §1605(c) specifically provides:

“Any public officer shall be eligible to serve as a board member and the acceptance of the appointment shall neither terminate nor impair such public office. For purposes of this section, “public officer shall mean a person who is elected to a municipal office. Any municipal employee or officer shall be eligible to serve as a board member.” (Emphasis added).

Under N-PCL §1608(c), a land bank is authorized to purchase real property and may accept transfers of real property from a municipality on such terms and conditions and according to such procedures as determined by the municipality. The Nassau County Land Bank’s “Policy and Guidelines for Acquisition of Real Property” provide that the primary focus of the Land Bank is “the acquisition of real property that is tax delinquent, tax foreclosed, vacant or abandoned within the jurisdictional boundary of Nassau County.”

N-PCL §1614 governs “conflicts of interest” for land banks and provides that no member of a land bank board or employee can acquire any interest in real property of the land bank or any real property to be acquired by the land bank or to be acquired from the land bank. In addition, board members and employees are barred from having any interest in a contract for materials or services to be used by a land bank. Land banks also are authorized to adopt supplemental ethical guidelines and the Nassau County Land Bank has in fact adopted its own Code of Ethics which is available on the Land Bank’s website.

Under the Land Bank’s Code of Ethics, “Directors and employees must recuse themselves from deliberations, votes, or internal discussion on matters relating to any organization, entity or individual where their impartiality in the deliberation or vote might be reasonably questioned, and are prohibited from attempting to influence other board members or employees in the deliberation and voting on the matter.”

Finally, N-PCL §1610 governs financing of land bank operations. Under N-PCL §1610(a), a land bank may receive funding through grants and loans from the municipality that established it, from other municipalities, from the State of New York, from the federal government and from other public and private sources. One potential source of funding for the Land Bank comes from the HOME Investment Partnership Program (“HOME”) and Community Development Block Grant (“CDBG”) program. As further described below, both grant programs are administered at the County level by the Office of Community Development and the Director of that Office reports to the Deputy County Executive for Economic Development. The DCE has already recused herself both as a member of the Board of the Land Bank and as a Deputy County Executive from participating in discussions or decisions about any such grant applications made by the Land Bank to the County.

The Role of the Deputy County Executive for Economic Development

The Deputy County Executive provides leadership on behalf of the County Executive’s Office for various County programs relating to economic development. One part of her portfolio includes working with the Director of the Office of Community Development (“OCD”), Kevin Crean, who oversees the HOME and CDBG grant programs.

The Community Development Block Grant (CDBG) Program is a U.S. Department of Housing and Urban Development (HUD) federal funded program that provides funding for housing and community development. OCD receives a direct allocation of funds from HUD annually that it uses to provide grants for decent housing, suitable living environments and expanded economic opportunities; principally for low-and-moderate-income persons.

Approximately 80% of the County’s CDBG funds are distributed to participating local municipalities to undertake programs based on local community needs. Projects include, but are not limited to, large scale neighborhood revitalization projects, infrastructure improvements, parks and playground enhancements, code enforcement, public service initiatives, and providing accessibility for the physically challenged. Grant funds are also allocated to rehabilitate eligible homes including but not limited to physically challenged and senior citizen households making them accessible, energy efficient, and lead paint safe. CDBG funds are also used to support economic development initiatives including Brownfield revitalization, the Empire Zone program, the Grow Nassau SBA 7A loan program, and micro enterprise loan programs. Furthermore, CDBG funds are used to support anti-poverty and housing initiatives providing much needed service dollars to nonprofit organizations. One of the non-profit corporations that potentially could apply for such funds is the Nassau County Land Bank.

OCD also oversees the County’s participation in the HOME program, another HUD funded initiative to states and localities. The HOME program funds a wide range of activities that build, buy, and/or rehabilitate homes to provide decent and affordable housing, particularly housing for low and moderate income households for rent or homeownership. It is the largest Federal block grant to States and local governments designed exclusively to create affordable housing for families.

In general, HUD allocates HOME program funds by formula among eligible state and local governments to strengthen public-private partnerships and to expand the supply of decent, safe, sanitary, and affordable housing, with primary attention to rental housing, for very low-income and low-income families. Generally, HOME funds must be matched by nonfederal

resources. State and local governments that become participating jurisdictions may use HOME funds to carry out multi-year housing strategies through acquisition, rehabilitation, and new construction of housing, and tenant-based rental assistance. Participating jurisdictions may provide assistance in several eligible forms, including loans, advances, equity investments, interest subsidies, and other forms of investment that HUD approves. As the administrator of the HOME program for Nassau County, OCD is expected to receive an application for HOME grant funds from the Land Bank.

The DCE will continue to recuse herself from participating in any decisions about CDBG or HOME grant applications by the Land Bank both as a Land Bank Board member and as a Deputy County Executive.

In addition, the Community Development Corporation of Long Island (CDC-LI) has applied for County funding in connection with a Land Bank project. CDC-LI is a regional not-for-profit organization serving Nassau, Suffolk and Kings Counties in a variety of programs and services involving housing and community development. The DCE has recused herself in the matter, and another County employee will be designated to handle the review and approval of the CDC-LI funding application.

The DCE is not aware of any other matters concerning the Land Bank over which she might exercise any decision making authority or over which she might have any control or substantial influence as a Deputy County Executive, but if any such matters become apparent, she will recuse herself from participating in them both as a Land Bank Board member and as a Deputy County Executive.

Analysis

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 Deputy County Executive for Economic Development were to continue to concurrently serve as an uncompensated member of the Board of Directors of the Nassau County Land Bank. The Board considered: (i) whether holding the dual offices, 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 holding the dual offices, under the circumstances presented, would violate the Nassau County Code of Ethics, and (iii) whether holding the dual offices, 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.² However, GML Article 18 does not regulate

¹ N.Y. Gen. Mun. Law §800(4).

² Volunteer firefighters and civil defense volunteers, other than fire chiefs and assistant fire chiefs, are not "officers" or "employees" within the meaning of GML Article 18. N.Y. Gen. Mun. Law §800(5).

dual office holding. Accordingly, under the circumstances presented, the dual office holding contemplated here would not violate Article 18 of the New York General Municipal Law

GML §801 provides in pertinent part that:

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...

A municipal officer or employee will be deemed to have an interest in a contract of a firm, partnership, association or corporation of which the officer or employee is a director.³ However, even where an officer or employee in a position of control over a municipal contract has an actual or constructive interest, the contract will not be prohibited by GML §801 if it falls within the exceptions set forth in GML §802. Those exceptions include, among others, contracts with not-for-profit corporations.⁴ Accordingly, the CDC-LI funding contract would not be prohibited by GML §801

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.⁵ The leading case on compatibility of offices is *People ex rel. Ryan v. Green*.⁶ 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. 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 Deputy County Executive for Economic Development and those of a member of the Land Bank Board. Although a potential source of funding for the Land Bank comes from the HOME Investment Partnership Program and Community Development Block Grant program, both of which are administered at the County level by the Office of Community Development, the Director of which reports to the

³ N.Y. Gen. Mun. Law §800(3).

⁴ *Id.*

⁵ 1982 N.Y. Op. Atty. Gen (Inf.) 148.

⁶ 58 N.Y. 295 (1874).

Deputy County Executive for Economic Development, experience indicates that the matters necessitating recusal by the DCE have been infrequent. Moreover, the statutory design contemplates that the members of the Land Bank Board, all of whom are County officers or their designees, serve as County representatives for the purpose of advancing the interests of the County and its residents. Further, N-PCL §1605(c) precludes any inference that the duties of a member of the Land Bank Board is inherently incompatible with the duties of the Deputy County Executive for Economic Development:

“Any public officer shall be eligible to serve as a board member and the acceptance of the appointment shall neither terminate nor impair such public office. For purposes of this section, “public officer shall mean a person who is elected to a municipal office. Any municipal employee or officer shall be eligible to serve as a board member.” (Emphasis added).

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 DCE must continue to recuse herself from acting in her official capacity on any matter affecting the Land Bank. She may not disclose or make unauthorized personal use of confidential County information; or communicate on behalf of the Land Bank with any County board, agency, officer or employee, unless authorized to do so by the Board of Ethics. Any reimbursement received by the DCE for expenses that she may incur in performing Land Bank duties must be reported on her annual statement of financial disclosure.

If the DCE finds that she is frequently and inevitably required to recuse herself, that may be an indication that the position of secondary employment has become incompatible with her official duties and she should, under those circumstances, seek a further advisory opinion.

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the dual office holding contemplated here would not 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.⁷

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 interest.

⁷ 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).

In considering whether a prohibited appearance of impropriety has arisen, the question is whether an officer or employee has engaged in or influenced a 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 concluded for the reasons set forth above that serving as a member of the Land Bank Board would not involve duties that are inherently incompatible with the official duties of the DCE, and noting that the DCE is designated to serve on the Land Bank Board as County representatives for the purpose of advancing the interests of the County and its residents, a reasonable person would not conclude that the DCE's concurrent service as a member of the Land Bank Board would tend to undermine public confidence in County government or create a prohibited appearance of impropriety under common law principles, particularly in view of the separate duties owed by members of the Land Bank Board to avoid conflicts of interest pursuant to the Land Bank Code of Ethics.

The DCE receives no compensation as a member of the Land Bank Board, and would derive no personal benefit from the county administration of grant to the Land Bank. Because the appointees to the Land Bank Board designated by the County Executive, the Presiding Officer, and the Minority Leader serve as County representatives for the purpose of advancing the interests of the County and its residents, the DCE is unlikely to have divided loyalties in her dual service as DCE and as a member of Land Bank Board.

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the concurrent service of the DCE as a member of the Land Bank Board 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 Deputy County Executive for Economic Development were to continue to concurrently serve as an uncompensated member of the Board of Directors of the Nassau County Land Bank

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
May 1, 2019


Kenneth L. Gartner, Chair