

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 VEVAANTE
SECRETARY

ADVISORY OPINION 106-19

A Deputy County Attorney (the "DCA") inquires whether a prohibited conflict of interest would arise due to his ownership of an inactive limited liability company organized to conduct real estate brokerage services.

GOVERNING AUTHORITY

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

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

DISCUSSION

The DCA commenced his County employment on [REDACTED]. He is assigned to the [REDACTED]. In this inquiry, the DCA states that:

[REDACTED] I am the manager and sole member of [REDACTED] LLC, originally created to conduct real estate brokerage services. The company is presently not doing business (except that it is the holder of a current real estate broker's license), and I have no intention... [of] doing business through this company in the future. Even in the event that the company does become active in the future (which I would only do with the County's consent), to... avoid even the appearance of impropriety, the company would not do business in Nassau County...

ANALYSIS

The Board of Ethics employed a three step analysis to determine whether, under the circumstance presented, a prohibited conflict of interest would arise due to the ownership by the DCA of an inactive limited liability company that, prior to his appointment as a DCA, was created to provide compensated real estate brokerage services to private sector clients. The Board considered: (i) whether the ownership by the DCA of the inactive limited liability company, 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 ownership by the DCA of the inactive limited liability company, under the circumstances presented, would violate the Nassau County Code of Ethics, and (iii) whether the ownership by the DCA of the inactive limited liability company, 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 Article 18 does not regulate the secondary business activities of municipal officers and employees, except to the extent, not applicable here, that they give rise to a prohibited interest in a contract with the municipality served by the officer or employee, or involve compensation for services rendered in matters before the municipality.

Accordingly, ownership by the DCA of the inactive limited liability company, under the circumstances presented, would not violate Article 18 of the New York General Municipal Law.

2. Nassau County Code of Ethics

The Nassau County Code of Ethics prohibits a County officer or employee from having a business interest that directly or indirectly creates a 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. The same principles are useful in determining whether a business interest 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.³ The leading case on compatibility of offices is People ex rel. Ryan v. Green.⁴ 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 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).

³ 1982 N.Y. Op. Atty. Gen (Inf.) 148.

⁴ 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 DCA and those of the owner of an inactive limited liability company created to provide real estate brokerage services to public and private sector clients. In the future event the limited liability company is activated and utilized by the DCA to provide real estate brokerage services, the DCA must first obtain the approval of the County Attorney and, if he wishes, may seek further advice from this Board. In such event, the DCA has stated that he will not utilize the limited liability company to conduct business within the County.

Accordingly, ownership by the DCA of the inactive limited liability company, under the circumstances presented, 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.⁵

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 will 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.

Here because, absent approval by the County Attorney, the limited liability company will remain inactive during the DCA's period of employment and because, if activated, it will not conduct business within the County, it would not be reasonable to conclude that ownership by the DCA of the inactive limited liability company, under the circumstances presented, would create a prohibited appearance of impropriety under common law principles.

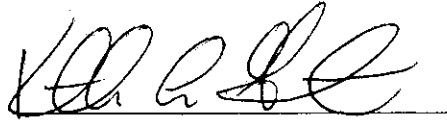
CONCLUSION

Based on the facts presented, a prohibited conflict of interest would not arise due to the DCA's ownership of an inactive limited liability company organized to conduct real estate brokerage services.

⁵ 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).

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
May 1, 2019

A handwritten signature in black ink, appearing to read 'K. L. Gartner', written over a horizontal line.

Kenneth L. Gartner, Chair