



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

BOARD OF ETHICS

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ADVISORY OPINION 102-20

A [REDACTED] requests an advisory opinion as to whether a prohibited conflict of interest would arise if he were to serve as a compensated board member for New York Community Bancorp, Inc. (NYCB).

GOVERNING AUTHORITY

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

a. ... [N]o County officer or employee whether paid or unpaid shall ...

(2) 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....

The Nassau County Code of Ethics provides at subdivision 4 (Recusal and Disclosure of Interest), 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 judgment or take discretionary actions in the best interest of the County.

b. Any County officer or employee who recuses himself or herself pursuant to paragraph (a) of this subdivision shall be required to disclose such recusal in writing to the Board [of Ethics] and the nature of his or her private interest....

Nassau 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.

Nassau County Code of Ethics subdivision 6 (Misuse of County resources) provides that:

No officer or employee of the County shall use the resources of the County in furtherance of his or her business, professional or political interests or activities, or in furtherance of the interests or activities of any outside entity other than pursuant to a County contract with such entity, without the approval of the head of his or her agency and the approval of the Board of Ethics upon a finding by the Board that such activity is in furtherance of the interests of the County.

DISCUSSION

The [REDACTED] is a retired partner of a "Big 4" accounting firm. He has been invited to serve as a compensated member of the Board of Directors of New York Community Bancorp, Inc. (NYCB).

NYCB is the largest thrift holding company in the nation and one of the leading thrift depositories in most of the markets they serve. NYCB is a leading producer of multi-family loans on non-luxury, rent-regulated apartment buildings in New York City. NYCB is not an underwriter of municipal securities. NYCB is a sponsor of the Nassau Veterans Memorial Coliseum, now branded "NYCB Live: Home of the Nassau Veterans Memorial Coliseum".

The NYCB Board of Directors meets approximately 12 times per year. Meetings are held in New York City. Meeting materials are distributed on the Friday preceding each meeting. The [REDACTED] anticipates that he will review the meeting materials over the weekend, and that his responsibilities as a board member will not place significant demands on his time.

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 [REDACTED] were to serve as a compensated board member for NYCB. The Board considered: (i) whether the secondary employment, 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 secondary employment, under the circumstances presented, would violate the Nassau County Code of Ethics, and (iii) whether the secondary employment, 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 secondary employment. Accordingly, under the circumstances presented, the secondary employment contemplated here would not violate Article 18 of the New York General Municipal Law.

2. Nassau County Code of Ethics

The Nassau County Code of Ethics also prohibits 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.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 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 member of the Board of Directors of NYCB. However, the [REDACTED] must recuse himself from participating in any matter involving NYCB or its interests, the Nassau County Veterans Memorial Coliseum, or their relationship, including but not limited to any audit of the relationship between NYCB and the Nassau Veterans Memorial Coliseum. In the event the [REDACTED] recusal is frequently and inevitably required, it may be an indication that the two positions are incompatible and, under those circumstances, the [REDACTED] should request further advice from the Board of Ethics.

The [REDACTED] must refrain from disclosing or making unauthorized use of confidential County information, and from using compensated County time or other County resources in connection with his secondary employment.

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the secondary 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

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).

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 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.

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 there is no inherent incompatibility between the duties of the [REDACTED] and those of a member of the Board of Directors of NYCB, there is no reason to conclude that the secondary employment, under the circumstances presented and subject to the conditions set forth herein, would tend to undermine public confidence in County government or create a prohibited appearance of impropriety under common law principles.

The [REDACTED] may neither disclose nor make personal use of confidential County information; and may not use compensated County time or other County resources in connection with his secondary employment activities.

CONCLUSION

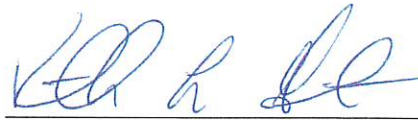
Based on the facts presented and subject to the conditions set forth herein, a prohibited conflict of interest would not arise if he were to serve as a compensated board member for New York Community Bancorp, Inc. (NYCB).

The [REDACTED] must recuse himself from participating in any matter involving NYCB or its interests, the Nassau County Veterans Memorial Coliseum, or their relationship, including but not limited to any audit of the relationship between NYCB and the Nassau Veterans Memorial Coliseum. The [REDACTED] must refrain from disclosing or making unauthorized use of confidential County information, and may not use compensated County time or other County resources in connection with his secondary employment.

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
February 24, 2019

A handwritten signature in blue ink, appearing to read 'K. L. Gartner', is written above a horizontal line.

Kenneth L. Gartner, Chair