Local Government Ethics

Suggestions for a Few Nips & Tucks

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Editor's note: *Ms. Hadinger is the 2009 recipient of the Michael A. Pane Award, which is presented to a professional working in local government who has exemplified the highest standards of ethics and whose work has significantly enhanced the integrity of local government.*

In recent years, when the topic of government reform has arisen, much energy has been devoted to the issue of "pay-to-play." Whether that energy has resulted in truly meaningful reform will likely remain the subject of debate. This debate will no doubt be further fueled by the U.S. Supreme Court's January ruling in *Citizens United v. Federal Elections Committee*, 588 U.S. ___, 2010 WL 183856 (2010) striking down certain federal restrictions on the ability of corporations and unions to make campaign contributions as violative of the First Amendment.

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In the meantime, while the debate over "pay-to-play" persists, there are elements of law regarding the ethical conduct of local government officials that merit attention. Although for some, these elements may not be as weighty as "pay-to-play," they involve practical and sometimes troubling issues. These issues are readily susceptible to statutory reform and/or clarification.

Disqualification for Reasons of Consanguinity There is no dearth of law governing ethical conduct for local government officials in New Jersey. The common law is voluminous. Among many others, and federal enactments aside, state statutory enactments include: The New Jersey Code of Criminal Justice, N.J.S.A. 2C, the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., the Faulkner Act, N.J.S.A. 40:69A-1 et seq., and the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq. This vast body of law, however, is not altogether consistent and can be confusing. One particular area of confusion is that dealing with disqualifying interests due to familial relationships.

In *Kremer v. Plainfield*, 101 N.J.Super. 344 (Law Div. 1968), the court invalidated a zoning board's action because a member of the board was an uncle of the attorney for the applicant. Later in *Haggerty v. Red Bank Borough*, 385 N.J.Super. 501 (App.Div. 2006), the actions of a zoning board were invalidated due to the participation of the presiding board member whose father served in an "of counsel" capacity in the law firm representing the applicant. Even more recently, applying principles of conflict of interest in a new factual context, a court held that the live-in relationship between the planning board chairwoman and the owner of the board's engineering firm was sufficient to disqualify the chairwoman from applications reviewed by the board's engineer (an employee of the firm). Although these decisions arise out the quasi-judicial actions of development board members, and quasi-judicial actions versus legislative ones may properly be viewed differently (see, e.g. *New Jersey Practice, Pane*, '9.8), in the legislative arena courts have reached similar conclusions. For example, in *Barrett v. Union Township Committee, 230 N.J.Super*. 195 (App.Div. 1989), a zoning ordinance permitting the construction of a continuing care facility was invalidated because the mother of one of the governing body members who supported the ordinance resided in a nursing home adjacent to the subject tract. The rezoned property and nursing home were owned by the same person. The court observed, "[w]hile we do not mean to impugn the integrity of [the] Councilman…and while it is far from certain that [the] Councilman…was in any way influenced by a consideration of the effect that his vote could have on the care his mother was receiving at [the nursing home], this situation presented a potential for psychological influence that cannot be ignored." Id. at 204-205.

Yet, the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., adopted in 1991, imposes a less restrictive standard for familial relationships. The Act contains several proscriptions for local government officers and employees against conduct with members of their immediate families. For example, "[n]o local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment." N.J.S.A. 40A:9-22.5d. The seemingly looser standard set by the Local Government Ethics Law evolves from its definition of "member of immediate family," which is "the spouse or dependent child of a local government officer or employee residing in the same household." Query whether Barrett, which predates the Local Government Ethics Law, would have been decided differently as the councilman's mother was not residing in his household when he voted to support the change in zoning.

If the Legislature were interested in addressing this anomaly, it could look to the N.J. Court Rules, 1969 and their treatment of judicial consanguinity for guidance, which is seemingly in greater keeping with the common law. Specifically, R.1:12-1 provides, in part, that the "judge of any court shall be disqualified…and shall not sit in any matter, if the judge (a) is by blood or marriage[1] the second cousin or is more closely related to any party to the action; (b) is by blood or marriage the first cousin of or is more closely related to any attorney in the action. This proscription shall extend to the partners, employers, employees or office associates of any such attorney except where the Chief Justice for good cause otherwise permits…"

Disclosure Forms & Membership in Organizations At times, a local government official's membership in an organization can represent a disqualifying interest. For example, in *Marlboro Manor, Inc. v. Montclair Township*, 187 N.J.Super. 389 (App.Div.1982), the court invalidated the action of the Montclair Township Council in denying a liquor license transfer because two members of the Council who participated in the decision were also members of a church that actively protested the transfer of the license.

Individuals who are considered "local government officials" under the Local Government Ethics Law are required to annually file a financial disclosure statement specifying sources of income, honorariums and gifts, real property owned in New Jersey, and the names of business organizations in which the local government officer or member of his immediate family has an interest. Local government officials do not, however, have to disclose their active involvement in locally-based organizations, such as houses of worship, YM/WCAs, volunteer fire and rescue squads, or fraternal or service organizations, e.g., respectively, an Elks club or Rotary International club.

Unless the public official recuses him/herself, discovering such interests can be difficult. Thus, supplementing the disclosure statement to include disclosure of affiliations with locally-based, non-profit organizations is another step the Legislature could consider to address this issue. Though some elected officials and volunteer board members could understandably dimly view such a requirement as yet one more imposition on them or a further invasion of their privacy, an alternative view is that disclosing such information actually helps to protect them against groundless attacks and rumormongers. Notably, Hunterdon County already has a policy requiring freeholders and constitutional officers to annually disclose the non-profit and community service organizations for which they serve as members of the board or as standing or advisory committee members.

Post Public Service Obligations At present, the Local Government Ethics Law places restrictions on the post-service conduct of members of independent local authorities. Among those restrictions is a one-year prohibition against a former authority member representing, appearing for or negotiating on behalf of any other party before the authority. N.J.S.A. 40A:9-22.5b.

No similar restriction is placed upon other appointed, non-elected officials, such as planning and zoning board members. Thus, the moment a land use board member's term has concluded, she or he may be free to work for the very developers appearing before—and in some instances—suing the board. Similarly, the board's former professional staff, such as the engineer, attorney and planner, may be hired by developers appearing before the board. A "cooling off" period between the time members and staff of quasi-judicial boards step down and the time they may appear before those boards, particularly with respect to matters that were pending during their tenure as board members, should be considered.

In addition, the proscription in the Local Government Ethics Law against using information not generally available to the public for the purpose of securing financial gain for himself, N.J.S.A. 40A:9-22.5g, is, on its face, only applicable to sitting local government officers and employees, rather than ex-officers and ex-employees. While surely all would agree that the post-public service disclosure of confidential information is highly unethical, New Jersey statutes should be amended to also make it clearly illegal.

Despite the headlines, unquestionably the vast majority of local government officials and employees regularly conduct the business of government free from personal and pecuniary interests that could affect their judgment. Sadly, because of the actions of a minority, the public generally does not see its local officials and employees in the same light. Understanding that the debate over "pay-to-play" in public contracting will rage on, in the meantime, by clarifying, enhancing and actually implementing certain standards applicable to local government officials as described above, perhaps a small step will be taken to restore the public's confidence in the good work of New Jersey's dedicated local public servants. Sure, these ideas don't amount to a wholesale reforming facelift, but a few nips and tucks here and there never hurt. ▲

1 The term "a marriage" would also include civil unions. N.J.S.A. 37:1-33.