



Neighborhoods and Neighbors First!

Via email To:
Supervisor Mahan
Town Board Members

January 3, 2019

To Whom it may Concern:

Tonight, the Town Board will be voting on a resolution to appoint Michael Bianchino to the Town of Colonie Planning Board. It is our understanding that Mr. Bianchino is currently employed as a Senior Engineer at Lansing Engineering. Lansing Engineering is a local professional civil engineering, landscape architecture, land planning and environmental consulting firm.

Please advise whether Mr. Bianchino and Lansing Engineering represent clients or have participated in any land use applications or other administrative applications before the Town of Colonie. **Article 18 of the NYS General Municipal Law prohibits a planning board member from receiving or agreeing to receive compensation for engineering services performed in connection with any matter before the planning board. (emphasis added)**

In addition, the NYS Board of Regents has promulgated regulations governing the professional conduct of design professionals, including engineers (see 8 NYCRR 29.3). **The regulations define "unprofessional conduct" to include "participating as a member, advisor or employee of a government body in those actions or deliberations which pertain to services provided by the practitioner or his or her organization for such governing body." (emphasis added)**

According to Town records, Mr. Bianchino now serves on the SEAMAB. Please advise whether the Town of Colonie Attorney's office or Town Ethics Board rendered a legal opinion prior to Mr. Bianchino's appointment in 2018, or prior to his consideration for the Planning Board post. The attached NYS Attorney General and NYS Comptroller opinions raise important legal issues regarding Mr. Bianchino's appointment to the SEAMAB and the Planning Board.

In the interest of good government, adherence to ethical standards, and avoiding the appearance of impropriety, we urge the Town Board to seek an opinion from the NYS Attorney General or NYS Comptroller prior to the appointment of Mr. Bianchino to the Town of Colonie Planning Board. We believe that these opinions would benefit the Town by establishing the necessary parameters and operating procedures for the Planning Board in the event Mr. Bianchino is appointed to the Planning Board.

Sincerely,
SAVE Colonie: A Partnership for Planning

cc.
Colonie Spotlight
Times Union
Daily Gazette

1989 N.Y. Op. Atty. Gen. (Inf.) 136 (N.Y.A.G.), 1989 WL 435060

Office of the Attorney General

State of New York
Informal Opinion No. 89-50
October 23, 1989

GENERAL MUNICIPAL LAW, §§ 806(1), 808.

*1 The chairman of the **planning board** should recuse himself from participating with respect to any projects in which he has **conflicts of interests**.

Herschel Greenbaum, Esq.
Village Attorney
Village of Buchanan
Municipal Building
Buchanan, New York 10511-1298

Dear Mr. Greenbaum:

You have asked whether under certain circumstances the chairman of your village's **planning board** has a **conflict of interests**.

You have indicated that the son of the chairman, who is a first year law student, made application for summer employment to a law firm that represents clients before the village's **planning board**. The law firm represents the developer of the three largest and most controversial projects in the village. The application by the son was made at a time when these substantial projects were before the **planning board** for review. Further, you have informed us that the chairman was aware of his son's application for employment and continued to act as a **member** of the **planning board** with respect to the aforementioned projects while the employment application was pending. You have informed us that the son is no longer being considered for employment by the law firm. You inquire whether the chairman's actions in continuing to participate as a **member** of the **planning board** with respect to these large projects, while his son was in the process of applying for employment with the law firm, created a **conflict of interests**. Further, you ask whether it is proper for the chairman to continue to participate with respect to these projects as a **member** of the **planning board**.

The development of ethics standards to define when employment or actions are in conflict with the official duties of a local government officer or employee has been left to the governing body of the municipality (General Municipal Law, § 806[1]). Municipalities are required to adopt a code of ethics, which must include these and other standards (ibid.).

A code may provide for the prohibition of conduct in violation of ethics standards (ibid.). Also, local governments are authorized to establish boards of ethics, which may render advisory opinions to local officers and employees concerning compliance with standards established by the code of ethics (id., § 808). Therefore, it is necessary that you review your local code of ethics to determine whether any provisions apply to the question at hand.

It is not necessary, however, that a specific provision of the General Municipal Law be violated in order to find a **conflict of interests** (Matter of Zagoreos v Conklin, 109 AD2d 281, 287 [2d Dept, 1985]; Matter of Conrad v Hinman, 122 Misc2d 531, 534 [SupCt, Onondaga Co, 1984]). The decisions of local boards have been set aside based upon a judicial finding of **conflicts of interests** of board **members** participating in the decisions (ibid.; Taxpayers' Association v Town Board, 69 AD2d 320 [2d Dept, 1979]).

Opinion 90-28

This opinion represents the views of the Office of the State Comptroller at the time it was rendered. The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.

CONFLICTS OF INTEREST -- Engineering Services (planning board member performing private engineering services for subdivisions)

ZONING AND PLANNING -- Planning Boards (propriety of board member providing private engineering services for subdivisions)

GENERAL MUNICIPAL LAW, §805-a(1)(c): A planning board member is prohibited from receiving or agreeing to receive compensation for engineering services performed in connection with any matter before the planning board. Although there is no statutory prohibition against a planning board member performing uncompensated work in connection with a matter before the board, the board member should not participate in the discussion or vote on any such matter.

You ask whether a planning board member who is also a professional engineer may, either with or without compensation, perform percolation tests and other design work for individuals in the community who are subdividing their property if the board member abstains from voting on the subdivision applications on which he has performed work as an engineer.

Article 18 of the General Municipal Law (§800 *et seq.*) contains the provisions of law which relate to conflicts of interest of municipal officers and employees. Pursuant to General Municipal Law, §800(3), a municipal officer or employee has an interest in any contract with his or her municipality if he or she receives a direct or indirect pecuniary or material benefit as a result of that contract. That interest is prohibited if the 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 approve payments thereunder; (b) audit bills or claims under the contract; or (c) appoint an officer or employee who has any such powers or duties (General Municipal Law, §801), and none of the exceptions contained in Article 18 are applicable (see General Municipal Law, §802).

The term "contract" for purposes of article 18 is defined to mean any claim, account or demand against or agreement with a municipality (General Municipal Law, §800[2]). Since it appears that the engineering work in this instance would be performed pursuant to contracts between the planning board member in his private capacity and individuals who are subdividing their property, and that the town would not be a party to those contracts, there appears to be no "contract" with the town for purposes of article 18 (see 24 Opns St Comp, 1968, p 561). Therefore, the board member's interest in the contracts would not be prohibited under section 801.

Besides prohibiting interests in contracts with municipalities, however, article 18 also prohibits certain other actions of municipal officers and employees. Paragraph (b) of subdivision (1) of section 805-a prohibits a municipal officer or employee from disclosing confidential information acquired in the course of his or her official duties or using such information to further his or her personal interests. Paragraph (c) of subdivision (1) of section 805-a provides that no municipal officer or employee shall:

receive, or enter into any agreement, express or implied,
for compensation for services to be rendered in relation to

any matter before any municipal agency of which he is an officer, member or employee or of any municipal agency over which he has jurisdiction or to which he has the power to appoint any member, officer or employee ...

In addition to any other penalties provided by law, any person who knowingly and intentionally violates section 805-a may be fined, suspended or removed from office or employment in the manner provided by law (General Municipal Law, §805-a[2]). Thus, General Municipal Law, §805-a(1)(c) prohibits a member of a municipal agency, such as a planning board, from receiving or agreeing to receive compensation for "services" in relation to "any matter before" the municipal agency for which he or she serves.

While the legislative history of section 805-a(1)(c) indicates that that this statutory provision was intended primarily to prohibit municipal officers and employees from "representing" clients for compensation before the agencies specified in the statute (see 1970 New York State Legislative Annual, pp 205, 539), it is well established that section 805-a(1)(c) prohibits a municipal officer or employee from being compensated for performing any "services" in his or her private capacity, in connection with any matter pending before his or her agency, regardless of whether the services involve a personal appearance before the agency (see, e.g., Keller v Morgan, 149 AD2d 801, 539 NYS2d 589; 1985 Opns St Comp No. 85-60, p 84; 1978 Opns St Comp Nos. 78-218 and 78-318, both unreported; 26 Opns St Comp, 1970, p 150). Further, since section 805-a(1)(c) applies to "any matter before" a municipal agency, irrespective of whether a municipal officer or employee participates in the discussion or vote on the matter, we have also concluded that a municipal officer or employee cannot overcome the statutory prohibition by abstaining from the discussion or vote on a particular matter (see Opn No. 78-318, supra; 26 Opns St Comp, 1970, supra; see also Dykeman v Symonds, 85 Misc 2d 289, 380 NYS2d 567, affd 54 AD2d 159, 388 NYS2d 422; also see Keller, supra, upholding a determination that, where a corporation in which a planning board member had a 25% interest contracted to perform work on a subdivision already before the board, and the board member did not disclose his interest in the corporation or disqualify himself, a "conflict of interest" existed when the board member participated in a decision on the subdivision even though he did not vote). Therefore, it is clear that a planning board member is prohibited from receiving or agreeing to receive compensation for engineering services to be rendered in connection with any application or other matter pending before the board.

With respect to whether a planning board member may receive or agree to receive compensation for engineering services to be rendered in relation to a matter which could, in the future, be submitted to the planning board, as noted, General Municipal Law, §805-a(1)(c) applies to services to be rendered in relation to any matter "before" the planning board. Because of the absence of any delimiting language in the statute, we have long interpreted section 805-a(1)(c) as prohibiting a municipal officer or employee from being paid for services rendered with respect to "matters which must be reviewed, passed upon, or otherwise brought to the attention of a municipal board or agency with which he has the statutory association", even if the services were rendered before the matter is formally submitted to the board or agency (26 Opns St Comp, 1970, supra, emphasis added). In this regard, we note that the applicability of section 805-a(1)(c) to such circumstances was recently raised, but not resolved in Cahn v Planning Board of the Town of Gardiner, 157 AD2d 252, _____ NYS2d _____.

In Cahn, supra, the court was asked to invalidate planning board approval of two subdivisions, for among other reasons, because two of the board members provided engineering and legal services in connection with the subdivisions prior to submission to the planning board. The court refused to invalidate the approvals primarily because the two board members disclosed their interest and did not participate in either the discussion or vote on the subdivisions. The court also

stated that even if the board member's actions prior to the submissions violated section 805-a(1)(c), the violation was insufficient to compel the court to invalidate the planning board's actions. The court, however, did not decide whether the board members had violated General Municipal Law, §805-a.

In declining to decide whether General Municipal Law, §805-a(1)(c) had been violated, the Cahn court stated as follows:

... while a municipal officer may not receive compensation for services in relation to any matter before any agency of which he is a member (General Municipal Law §805-a[1][c]), or which would create a conflict of interest respecting his official duties (Municipal Code of Town of Gardiner §4.4[G]), whether these sections prohibit an officer from accepting employment which might create such problems in the future is less clear (compare 1985 Opns St Comp No. 85-60, at 84, with 26 Opns St Comp No. 1970 at 150).

Opn No. 85-60, supra, however, did not reflect a departure from the views expressed in 26 Opns St Comp No. 1970, supra, to the effect that section 805-a(1)(c) not only prohibits compensation for services rendered in connection with matters actually pending before a municipal agency, but also prohibits compensation for services rendered in anticipation of a matter being submitted to a municipal agency. Rather, in Opn No. 85-60, supra, we characterized section 805-a(1)(c) as applying to any matter "pending" before a municipal agency simply because the facts there only involved the representation of a client by a village attorney's law firm in connection with a matter actually pending before a village board. The applicability of section 805-a(1)(c) to services rendered in connection with a matter not yet actually pending before a municipal agency was not at issue. Therefore, since the court in Cahn did not decide whether there was a violation of section 805-a(1)(c), we continue to adhere to our interpretation of that provision as expressed in 26 Opns St Comp 1970, supra. Were the interpretation of section 805-a(1)(c) otherwise, a board member could avoid the prohibition of that provision by the simple expedient of purposely delaying submission of a matter which must be brought before a municipal agency until the services are rendered.

Although section 805-a prohibits a planning board member from being compensated for performing services under the aforementioned circumstances, it does not prohibit a planning board member from performing services without compensation (see Opn No. 78-218, supra). Nevertheless, the town's code of ethics should be examined to determine whether it contains any pertinent provisions. In this regard, we note that codes of ethics may contain provisions more restrictive than section 805-a and must include provisions relative to private employment in conflict with official duties (General Municipal Law, §806[1]).

In addition, we note that the Board of Regents has promulgated regulations relative to the professional conduct of design professionals, including engineers (8 NYCRR 29.3). Of potential relevance here is section 29.3(a)(8) of the regulations which provides that "unprofessional conduct" includes:

participating as a member, advisor or employee or a government body in those actions or deliberations which pertain to services provided by the practitioner or his or her organization for such governing body.

Since the State Education Department has jurisdiction to investigate and prosecute charges of professional misconduct (see Education Law, §6510; 8 NYCRR 17), it may be desirable to contact the Department with respect to the applicability of this provision.

Finally, we note that the courts of this State have held public officials to a high standard of conduct and, on occasion, have negated certain actions which, although not violating the literal provisions of article 18 of the General Municipal Law, violate the spirit and intent of the statute, are inconsistent with public policy, or suggest self-interest, partiality or economic impropriety (see e.g. Zagoreos v Conklin, 109 AD2d 281, 491 NYS2d 358; Matter of Tuxedo Conservation and Taxpayers Ass'n v Town Board of the Town of Tuxedo, 69 AD2d 320, 418 NYS2d 638; Conrad v Hinman, 122 Misc 2d 531, 471 NYS2d 521). Thus, even if the performance of the engineering services without compensation does not violate the letter of article 18 of the General Municipal Law or the town's code of ethics, or constitute unprofessional conduct, it is possible that, upon judicial review, it could be determined that the performance of such services impairs the board member's judgment or discretion in performing his official duties with respect to matters on which the board member has privately performed work (see 1984 Opns Atty Gen No. 1 84-3; see also Cahn, *supra*). Therefore, in our opinion, a planning board member should not participate in either the discussion or vote on any matter on which the board member has performed work in a private capacity, even though, because the work was performed without compensation, there is no violation of section 805-a.

August 6, 1990
Margaret McGowan, Esq., Town Attorney
Town of Otsego