Conflicts of Interest: Municipal Officers and Employees The Fundamentals of Article 18 of the General Municipal Law

Introduction

Article 18 of the General Municipal Law (§ 800 et seq.) (article 18) is the principal State statute governing conflicts of interest on the part of municipal officers and employees. An understanding of article 18 is important because violations of the statute can result in civil and criminal sanctions, undermine public confidence in local government administration and damage reputations. Thus, the purpose of this document is to describe and explain the provisions of article 18.

History of Article 18

Article 18 was enacted in 1964,[1] in what can be described fairly as nothing less than an effort to bring order out of chaos. Prior to the enactment of article 18, conflicts of interest on the part of local government officials were governed by the common law, at least a dozen state statutes and several dozen city charter provisions (which to one degree or another codified the common law), and by a large number of administrative and judicial decisions interpreting both the common law and these various statutes and charter provisions.[2] Indeed, when enacting article 18, the Legislature found that "[e]xisting law is too complex, too inconsistent, too overgrown with exceptions …," and that "[b]asic concepts must be retained, but something more than recodification is needed."[3] The Legislature further noted that "[r]eal conflict must be rooted out, without condemning the inconsequential."[4]

Thus, the legislation enacting article 18 was an effort to clarify, harmonize and rationalize the law relating to conflicts of interest on the part of municipal officers and employees, but only as means of achieving a "trinity" of larger purposes: "to protect the public from municipal contracts influenced by avaricious officers, to protect innocent public officers from unwarranted assaults on their integrity and to encourage each community to adopt an appropriate code of ethics to supplement this chapter."[5] Consistent with these goals, the legislation was intended to be "the

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1 L 1964, ch 946.
2 See Municipal Officials and Conflicts of Interest: An Analysis of the State of the Law and a Proposed Statute, Department of Audit and Control, December 1, 1957.
3 L 1964, ch 946, § 1.
4 Id.
5 Id.

generic law in relation to conflicts of interest in municipal transactions, not to be superseded by local law of any municipality subject to its provisions."[6]

Scope and Structure

The phrase "conflict of interest" refers to a concept that has very broad application. It comes into play virtually any time an individual confronts some form of divided loyalty. Article 18, however, does not address every circumstance that might be characterized as a "conflict of interest." For example, article 18 does not address the issue of whether, or under what circumstances, a person may simultaneously hold more than one public position, commonly referred to as "incompatibility."[7]

In general, article 18 approaches conflicts of interest in two ways. It establishes state-wide rules dealing with a number of issues. It also provides broad authority, and in many cases a mandate, for the state-wide rules to be supplemented through the adoption of local codes of ethics.

The most important of the state-wide rules relate to the question of whether, and under what circumstances, a municipal officer or employee can do business with the municipality for which he or she serves.[8] The state-wide rules also address the solicitation and receipt of gifts, disclosure and use of confidential information, receipt of compensation for services in relation to matters before municipal agencies, disclosure in certain land use matters, and annual financial disclosure.[9]

Local codes of ethics are intended to provide standards of conduct with respect to matters that are not covered by the state-wide rules in article 18.[10] Every municipality is authorized or required to adopt its own code of ethics because the "diversity in size of and situations faced by different municipalities in the State, [makes it] inadvisable to formulate a comprehensive set of rules to apply to all municipalities which would be appropriate and workable in all cases."[11] Further, "[s]ufficient flexibility is provided so that each municipality can adapt its Code to its particular needs or circumstances."[12]

Application of Article 18

Article 18 applies to municipalities. The term "municipality" is defined very broadly to include most of the State's local government entities.[13] The term encompasses counties, cities (except

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6 Id.
7 See General Municipal Law § 801, referring to "any municipal officer or employee in one or more positions of public employment, the holding of which is not prohibited by law " (emphasis supplied); cf . e.g . People ex rel. Ryan v Green, 58 NY 295 (1874); 2006 Ops Atty Gen No. 2006-3, at 1015; compare Village Law § 3-300 (3); Town Law §§ 20 (4), 23 (1), 174 (4); County Law § 411.
8 See General Municipal Law §§ 801-805.
9 See General Municipal Law §§ 805-a, 809, 810-812.
10 See General Municipal Law § 806 (1).
11 Report of the Governor's Special Commission on Ethical Standards in Public Service, December 12, 1969, at 2.
12 Id. at 5.
13 See General Municipal Law § 800 (4).

the City of New York), towns and villages.[14] In addition to these general purpose units of local government, the definition also includes a wide array of other local government entities such as school districts, boards of cooperative educational services (BOCES), district corporations (e.g. fire districts),[15] industrial development agencies, urban renewal agencies, public libraries, town or county improvement districts, consolidated health districts, county vocational education and extension boards, certain joint water works systems, and other districts and joint services established for the purpose of carrying on, performing or financing one or more improvements or services intended to benefit the health, welfare, safety or convenience of the inhabitants of such governmental units or to benefit the real property within such units.[16] The State Comptroller's Office has also concluded that article 18 applies to a community college because the college is an agency of its local sponsor.[17]

Although the term "municipality" is defined to include industrial development agencies, the definition does not include other types of "public benefit corporations,"[18] many of which are commonly known as "public authorities." Consequently, except in the case of industrial development agencies, article 18 does not apply to a public benefit corporation or a public authority unless another statute renders it applicable.[19] In fact, most public benefit corporations and public authorities are not subject to article 18, but may be subject to separate conflict of interest provisions set forth in their enabling legislation.[20] For example, article 18 does not apply to public housing authorities,[21] but housing authorities are subject to a conflict of interest provision in the Public Housing Law.[22]

Article 18 also applies to municipal officers and employees. The term "municipal officer or employee" is defined as a paid or unpaid officer or employee of a municipality, including members of any administrative board, commission or other agency of the municipality.[23] In the case of a county, the definition includes any officer or employee paid from county funds.[24] A fire chief or assistant fire chief is also a "municipal officer or employee," but the definition does not include a person solely by reason of being a volunteer firefighter or civil defense volunteer.[25]

Prohibition on Interests in Contracts

Under certain circumstances, article 18 prohibits municipal officers and employees from having interests in contracts with the municipality for which they serve. More specifically, unless a statutory exception applies, a municipal officer or employee is prohibited from having an interest in a contract with the municipality for which he or she serves when the person has the power or

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14 Id.
15 Town Law § 174 (7); cf. General Construction Law §§ 65 (b), 66 (1), (3).
16 See General Municipal Law § 800 (4); see also General Municipal Law § 883.
17 See e.g. 1987 Ops St Comp No. 87-75, at 111; cf. People v Wendel, 116 Misc 2d 91 (1982).
18 See General Municipal Law § 856 (2); compare General Construction Law §§ 65 (b), 66 (1), (4)
19 See e.g. Public Authorities Law §§ 1954-a, 2309.
20 See e.g. Public Authorities Law §§ 1120-q, 2046-p, 2658.
21 See e.g. 1997 Ops St Comp No. 97-11, at 20.
22 See Public Housing Law § 36; 1994 Ops St Comp No. 94-6, at 9.
23 See General Municipal Law § 800 (5).
24 Id.
25 Id.

duty – either individually or as a member of a board – to negotiate, prepare, authorize, or approve the contract; to authorize or approve payment under the contract; to audit bills or claims under the contract; or to appoint an officer or employee with any of those powers or duties.[26]

Therefore, in order for a municipal officer or employee to have a prohibited interest in a contract, four factors must be present. First, there must be a "contract" with the municipality. Second, the individual must have an "interest" in the contract. Third, the individual, in his or her official capacity, must have one or more of the powers or duties that can give rise to a prohibited interest. Finally, the situation must not fit within any of the statutory exceptions. If a municipal officer or employee has an interest in a contract, and does not have any of the powers or duties that could cause the interest to be prohibited, or if any of the statutory exceptions applies, then the interest is not prohibited, but in most cases must be disclosed.[27]

What is a "Contract"?

Article 18 defines a "contract" as including any "claim, account or demand against or agreement with a municipality, express or implied…."[28] Thus, almost any business relationship with a municipality will result in a contract. Examples of contracts include purchase agreements,[29] sale agreements,[30] leases,[31] construction agreements,[32] and service contracts.[33] Even a voucher can be a contract because it is a "claim, account or demand" against a municipality.[34] Under article 18, the definition of a "contract" also includes the designation of a depository of public funds, as well as the designation of an official newspaper or a newspaper for the publication of any notice, resolution, ordinance or other proceeding required or authorized by law.[35]

In some cases, the existence of a "contract" may not be obvious. The Court of Appeals has held that a town supervisor had a prohibited interest in a contract with his town when he acquired real property located in the town at a county tax sale.[36] In reaching this conclusion, the Court rejected the argument that there was no contract between the supervisor and his town noting that "[a]lthough on the surface this argument appears dispositive, there is much more to the matter."[37] The Court then went on to analyze the roles of both the town and county in the imposition and collection of the property taxes leading up to the tax sale. Based on that analysis, the Court concluded that "[i]n the greater scheme of things, the two municipalities have an overlap, if not identity, of interest" and "[t]he contract of sale, though in form concerning only

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26 General Municipal Law § 801 (1).
27 General Municipal Law § 803, discussed infra.
28 General Municipal Law § 800 (2).
29 See e.g. 1996 Ops St Comp No. 96-14, at 31.
30 See e.g. 1984 Ops St Comp No. 84-12, at 14.
31 See e.g. 1989 Ops St Comp No. 89-32, at 74.
32 See e.g. 1988 Ops St Comp No. 88-23, at 41.
33 See e.g. 1988 Ops St Comp No. 88-44, at 86.
34 See e.g. 1998 Ops St Comp No. 98-5, at 12.
35 General Municipal Law § 800 (2).
36 Rose v Eichhorst, 42 NY2d 92 (1977).
37 Id. at 94.

the county, by implication also involves the town, and as such is within the statutory contemplation."[38]

Another issue is whether issuance or granting of building permits, licenses, zoning changes, variances, site plan or subdivision approvals, and the like constitute "contracts" under article 18. The State Comptroller's Office has long expressed the view that these types of land use actions do not give rise to a "contract" within the meaning of article 18.[39] The most recent court case to consider the issue similarly concluded that the grant of a variance does not result in a "contract."[40] Moreover, at least one court apparently assumed, without expressly addressing the question, that subdivision approval was not a "contract."[41] Nonetheless, it should be noted that there is some precedent to the contrary. The first case to consider the issue held that issuance of a building permit resulted in a "contract."[42] Moreover, another court, without discussion, treated site plan and subdivision approvals as "contracts" and applied article 18.[43]

The State Comptroller's Office has also considered whether a variety of other types of transactions result in a "contract" within the meaning of article 18. The State Comptroller's Office has concluded that an agreement between two or more municipalities does not constitute a contract because, notwithstanding the literal language of the statute, the Legislature did not intend to include inter-municipal agreements within the definition of that term.[44] The State Comptroller's Office has also expressed the view that gifts to a municipality generally do not fall within the statutory definition of a contract because a gift is a voluntary transfer of property from one party to another without consideration.[45] In addition, the State Comptroller's Office has concluded that an appointment to a municipal office, by itself, does not give rise to a contract within the meaning of article 18.[46]

What is an "Interest" in a Contract?

The second factor that must be present in order for a municipal officer or employee to have a prohibited interest in a contract is that the individual must have an "interest" in the contract. Article 18 defines the term "interest" as "a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves."[47]

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38 Id. at 97, see also 1988 Ops St Comp No. 88-29, at 54, concerning the purchase of property by the village mayor from the village industrial development agency, the members of which are appointed by the village board of trustees.

39 See e.g. 1991 Ops St Comp No. 91-48, at 132; 1988 Ops St Comp No. 88-68, at 135; 1985 Ops St Comp No. 85-60, at 84; 1983 Ops St Comp No. 83-108, at 52

40 Friedhaber v Town Bd. of Town of Sheldon, 16 Misc 3d 1140[A], 2007 NY Slip Op 51772[U] (2007), affd 59 AD3d 1006 (4th Dept 2009)

41 Matter of Cahn v Planning Bd. of Town of Gardiner, 157 AD2d 252 (3rd Dept 1990).

42 People v Pinto, 88 Misc 2d 303 (1976).

43 Matter of DePaolo v Town of Ithaca, 258 AD2d 68 (3rd Dept 1999), lv denied 94 NY2d 751 (1999).

44 See e.g. 2001 Ops St Comp No. 2001-14, at 28.

45 2008 Ops St Comp No. 2008-1.

46 1998 Ops St Comp No. 1998-3, at 6.

47 General Municipal Law § 800 (3).

Whether a municipal officer or employee receives a benefit "as a result of" a municipal contract is a factual determination. For example, ordinarily, a municipal officer or employee who receives payment under a contract with his or her municipality would have an interest in the contract because the payment is a direct financial benefit resulting from the contract.[48] A municipal officer or employee, however, does not have to be a party to a contract in order to have an interest in the contract.[49] To illustrate, when a municipality contracts with a person who resides with a municipal officer or employee, and the proceeds from the contract are used to defray common household expenses, the municipal officer or employee would have an interest in the contract because he or she receives an indirect financial benefit as a result of the municipal contract.[50]

Under article 18, a municipal officer or employee is also "deemed" to have an interest in the contracts of certain individuals and business entities with which he or she has a relationship.[51] In these instances, the law presumes that a municipal officer or employee receives a benefit as a result of the contract. In other words, once it is established that there is a municipal contract with one of these individuals or business entities, the municipal officer or employee is considered to have an interest in the contract, without any separate or additional factual showing that the municipal officer or employee receives a benefit as a result of the contract.

A municipal officer or employee is deemed to have an interest in the contracts of his or her spouse, minor children and dependents, except their contracts of employment with the municipality.[52] Thus, for example, if the spouse of a municipal officer or employee is retained by the municipality as an independent contractor, the municipal officer or employee is deemed to have an interest in the contract.[53] On the other hand, if the spouse is hired by the municipality as a municipal employee, the municipal officer or employee is not deemed to have an interest in the spouse's employment contract with the municipality.[54]

A municipal officer or employee is not deemed to have an interest in the contracts of any person other than his or her spouse, minor children and dependents.[55] Thus, for example, a municipal officer or employee is not deemed to have an interest in the contracts of his or her parents,[56] siblings,[57] emancipated children[58] or other relatives.[59] Nonetheless, a municipal officer or employee would still have an interest in such a contract if, as a factual matter, he or she were to receive a direct or indirect pecuniary or material benefit as a result of the contract.[60]

Article 18 also deems a municipal officer or employee to have an interest in the contracts of certain business entities with which he or she is affiliated. In this regard, a municipal officer or

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48 See e.g. 2008 Ops St Comp No. 2008-2.
49 See e.g. 2004 Ops St Comp No. 2004-2, at 4.
50 See e.g. 1991 Ops St Comp No. 91-63, at 167.
51 General Municipal Law § 800 (3) (a)-(d).
52 General Municipal Law § 800 (3) (a).
53 See e.g. 1998 Ops St Comp No. 98-6, at 14.
54 See e.g. 1991 Ops St Comp No. 91-18, at 61; 1986 Ops St Comp No. 86-5, at 6.
55 See General Municipal Law § 800 (3) (a).
56 See e.g. 30 Ops St Comp No. 74-20 (1974).
57 See e.g. 1982 Ops St Comp No. 82-365, at 461.
58 See e.g. 1983 Ops St Comp No. 83-40, at 46.
59 See e.g. 1987 Ops St Comp No. 87-23, at 37 (father-in-law); 31 Ops St Comp No. 75-648 (1975) (brother-in-law)
60 See e.g. 1983 Ops St Comp No. 83-40, at 46, supra; see also 1991 Ops St Comp No. 91-63, at 167, supra.

employee is deemed to have an interest in the contracts of a firm, partnership or association of which he or she is a member or employee.[61] Thus, for example, a municipal attorney is deemed to have an interest in a contract between the municipality and the attorney's firm or partnership.[62] A municipal officer or employee is also deemed to have an interest in the contracts of a corporation of which he or she is an officer, director or employee, or directly or indirectly owns or controls any stock.[63] For this purpose, "indirect" ownership of stock includes beneficial ownership of stock held in a blind trust.[64]

Just because a municipal officer or employee has an interest in a contract does not necessarily mean that the interest is prohibited. In order for the interest to be prohibited, the municipal officer or employee must have certain powers or duties with respect to the contract, and the interest must not be covered by any other statutory exceptions.

What Powers and Duties Can Give Rise to a Prohibited Interest?

If a municipal officer or employee has an interest in a contract, the interest is not prohibited under article 18 unless a third factor is present – the individual must have certain official powers or duties with respect to the contract. Under article 18, an interest in a contract is prohibited only if the municipal officer or employee, either individually or as a member of a board, has the power or duty to: (1) negotiate, prepare, authorize or approve the contract; (2) authorize or approve payment under the contract; (3) audit bills or claims under the contract; or (4) appoint an officer or employee who has any of these powers or duties.[65] The enumeration of these powers and duties makes clear that the basic purpose of the statute is to prevent an individual from being able to influence the municipal procurement and payment processes from both sides of a transaction. Thus, in general, the powers and duties that can give rise to a prohibited interest in a contract do not include purely ministerial functions, such as executing a properly authorized contract or issuing a check to pay a properly audited and lawful claim.[66]

In most instances, a member of the governing board of a municipality will have at least one of the powers or duties that can give rise to a prohibited interest in a contract.[67] To confirm the existence of these powers and duties, or to determine whether any other municipal officer or employee has them, the State statute or local enactment which establishes the position should be reviewed. More often than not, the powers and duties of the position will be set forth in that statute or enactment. Other sources of relevant information may include written job descriptions and employment contracts, as well as an examination of the actual functions of the position.

It is also important to understand that if a municipal officer or employee has one or more of the powers or duties that can give rise to a prohibited interest in a contract, it is the existence of

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61 General Municipal Law § 800 (3) (b).
62 See e.g. 2000 Ops St Comp No. 2000-22, at 56.
63 General Municipal Law § 800 (3) (c), (d).
64 1980 Ops St Comp No. 80-151, at 38.
65 General Municipal Law § 801 (1) (a)-(c).
66 See 1991 Ops St Comp No. 91-8, at 18; compare 1986 Ops St Comp No. 86-7, at 11.
67 See e.g. County Law §§ 215 (3), 224, 369 (2), 625; Education Law §§ 1604 (31), 1709 (20-a), 1724, 2523 (2), 2525; Town Law §§ 20 (3) (b), (e), 64 (1)-(4), (6), 118, 176 (4-a), (9); Village Law §§ 4-412 (1), 5-524 (2).

these powers and duties, not whether they are exercised, that causes an interest in a contract to be prohibited.[68] As a result, recusal or abstention does not cure a prohibited interest in a contract.[69]

In summary, it is permissible for a municipal officer or employee to have an interest in a contract, if he or she does not possess any of the powers or duties that can cause the interest to be prohibited; however, in most cases that interest must be disclosed.[70] On the other hand, if the municipal officer or employee has any of these powers or duties, the interest in the contract is prohibited unless a statutory exception applies to the interest.

Statutory Exceptions

If a municipal officer or employee has an interest in a contract, and the municipal officer or employee has one or more powers or duties which can give rise to a prohibited interest, the interest will not be prohibited unless a fourth factor is present – none of the statutory exceptions apply to the interest. There are seventeen statutory exceptions.[71] In general, the exceptions apply when a municipal officer or employee does not have a material financial stake in the transaction, or an opportunity to exert improper influence, or when the transaction is otherwise in the public interest; however, there are no statutory exceptions for contracts that are competitively bid,[72] contracts entered in emergency situations,[73] or for abstention and recusal.[74] The following is a discussion of the more frequently encountered statutory exceptions.[75]

Compensation and expenses

Article 18 provides in what is in effect a statutory exception for the payment of lawful compensation and necessary expenses of any municipal officer or employee in one or more positions of public employment, the holding of which is not prohibited by law.[76] Therefore, to the extent that an individual's compensation from municipal employment results in an interest in a contract, the interest is permissible.[77] Similarly, to the extent that an interest in a contract results from a municipal officer or employee submitting a voucher for reimbursement of actual and necessary expenses, the interest is permissible.

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68 See e.g. 1988 Ops St Comp No. 88-8, at 13.
69 See e.g. 2000 Ops St Comp No. 2000-7, at 20.
70 See General Municipal Law § 803, discussed infra.
71 General Municipal Law §§ 801 (last sentence), 802.
72 See e.g. 2000 Ops St Comp No. 2000-7, at 20, supra.
73 See e.g. 1988 Ops St Comp No. 88-23, at 41, supra.
74 See e.g. 2000 Ops St Comp No. 2000-7, at 20, supra.
75 The exceptions not discussed relate to designation of a newspaper for official publications, certain private sales of bonds and notes, employment of a school physician, certain contracts for public utility service, certain contracts for use of private rooms or employees and certain contracts in connection with a private industry council. See General Municipal Law §§ 802 (1) (c), (g), (i), (2) (b)-(d), (f)
76 General Municipal Law § 801.
77 See e.g. 2001 Ops St Comp. No. 2001-14, at 28, supra; compare 1998 Ops St Comp No. 1998-3, at 6, supra.

Duties and remuneration exception

Another commonly encountered statutory exception, sometimes referred to as the "duties and remuneration" exception, applies to contracts with a person, firm, corporation or association in which a municipal officer or employee has an interest which is prohibited solely by reason of employment as an officer or employee thereof, if the remuneration of the employment will not be directly affected as a result of the contract, and the duties of the employment do not directly involve the procurement, preparation or performance of any part of the contract.[78] Thus, this exception applies only if three conditions are met. First, the interest in the contract must be prohibited solely because of the individual's status as an officer or employee of the non-municipal employer.[79] Second, the individual's compensation from the non-municipal employer must not be directly affected as the result of the municipal contract. Third, the individual's duties for the non-municipal employer must not directly involve the procurement, preparation or performance of the municipal contract.

The duties and remuneration exception will not apply to an interest in a contract arising from any circumstance other than the individual's status as an "officer or employee" of the non-municipal employer. Therefore, the exception does not apply to interests arising from an individual's status as a corporate director[80] or stockholder.[81] Whether the individual's compensation from the non-municipal employer is directly affected as a result of the municipal contract is a question of fact.[82] For example, if a municipal officer or employee receives a commission on sales made to his or her municipality, the individual's compensation would be directly affected as a result of the municipal contract and the exception would not apply.[83] Similarly, whether the individual's duties for the non-municipal employer directly involve the procurement, preparation or performance of any part of the municipal contract is also a question of fact.[84]

Pre-existing contracts

There is also a statutory exception applicable to a contract in which a municipal officer or employee has an interest if the contract was entered prior to the time that the individual was elected or appointed to his or her municipal position.[85] The exception, however, does not apply to renewal contracts.[86] Thus, for example, the exception applies to a contract for the delivery of road salt between a town and a town board member entered into prior to the individual's election to office, but not to any renewal or subsequent contracts.[87] The exception also applies to a month-to-month tenancy commencing prior to a municipal officer's election because the tenancy is regarded as a continuing contract pre-dating the election.[88]

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78 General Municipal Law § 802 (1) (b)
79 Compare General Municipal Law § 800 (3) (b), (c).
80 See e.g. 1985 Ops St Comp No. 85-34, at 47.
81 See e.g. 2000 Ops St Comp No. 2000-7, at 20, supra.
82 See e.g. 1989 Ops St Comp No. 89-39, at 91.
83 See e.g. 2006 Ops St Comp No. 2006-11, at 29.
84 Id.
85 General Municipal Law § 802 (1) (h).
86 Id.
87 See 2008 Ops St Comp No. 2008-2, supra.
88 1980 Ops St Comp No. 80-250, at 68.

Minimal stockholdings

Another important statutory exception applies to contracts with a corporation in which a municipal officer or employee has an interest by reason of owning or controlling, either directly or indirectly, less than 5% of the corporation's outstanding stock.[89] The exception, however, does not apply to interests in such contracts arising from circumstances other than ownership or control of corporate stock, such as interests arising from an individual's status as a corporate officer, director or employee.[90]

Contracts with not-for-profits

There is also a frequently encountered statutory exception that applies to contracts with a membership corporation or other voluntary non-profit corporation or association including, but not limited to, a "rural electric cooperative."[91] For example, the Court of Appeals has held that the exception applies to a collective bargaining agreement between a municipality and a voluntary non-profit association representing the employees of the municipality.[92] The State Comptroller's Office has concluded that the exception applies to a contract for fire protection between a municipality and a volunteer fire company.[93]

Small value contracts

Another statutory exception applies to a contract in which a municipal officer or employee has an interest if the total consideration payable under the contract, when added to the total amount of all consideration payable under contracts in which the individual had an interest during the fiscal year, does not exceed $750.[94] One example of when this exception might apply is when a municipality makes small purchases from a local hardware store owned by a municipal officer or employee.[95]

Rural municipality exception

There is also a statutory exception, sometimes referred to as the "rural municipalities" exception, which applies only to purchase and public work contracts of municipalities (other than counties) that are located wholly or partly within a county with a population of two hundred thousand or less.[96] The exception only applies when a member of the governing body or board has a prohibited interest and when the following other conditions are met: (1) the individual must be elected; (2) the individual must serve without salary; (3) the contracts, in the aggregate, must be less than $5,000 during the fiscal year; (4) the governing body or board must follow its procurement policies and procedures adopted pursuant to section 104-b of the General Municipal Law; (5) the procurement process must indicate that the contract is with the lowest

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89 General Municipal Law § 802 (2) (a); compare General Municipal Law § 800 (3) (d).
90 1988 Ops St Comp No. 88-75, at 143.
91 General Municipal Law § 802 (1) (f), as amended by L 2009, ch 249.
92 Stettine v County of Suffolk, 66 NY2d 354 (1985).
93 See e.g. 1986 Ops St Comp No. 86-78, at 124.
94 General Municipal Law § 802 (2) (e).
95 See 1996 Ops St Comp No. 96-14, at 31, supra.
96 General Municipal Law § 802 (1) (j).

dollar offeror; and (6) the contract must be approved by resolution of the governing body or board by the affirmative vote of each member of the body or board except the interested member who must abstain.[97]

Real property

There are two statutory exceptions relating to the purchase and acquisition of real property by a municipality. Both involve judicial proceedings.

One of these statutory exceptions applies to the acquisition of real property through condemnation proceedings.[98] The other applies to the purchase by a municipality of real property or an interest therein, but only if the purchase and the consideration provided by the municipality are approved by order of the Supreme Court upon petition of the municipality's governing board.[99] Thus, for example, if a town negotiates a contract to purchase a leasehold interest from the town supervisor, the exception would apply, and the town supervisor would not have a prohibited interest in the contract, if the purchase and the purchase price are approved by a State Supreme Court Justice.[100] The exception, however, does not apply to sales of municipal real property.

Designation of a bank or trust company

There is also a statutory exception that applies specifically to the designation of a bank or trust company as a depository, paying agent, registration agent or for the investment of funds.[101] This exception would apply, for example, where a school district designates as a depository a bank for which a member of the board of education serves as an officer and employee.[102] The exception, discussed below, however, does not always apply when the chief fiscal officer, treasurer, or his or her staff has an interest in a bank or trust company so designated.

To recapitulate, if (1) there is a "contract" with the municipality, (2) the municipal officer or employee has an "interest" in the contract, (3) the individual has one or more of the powers and duties that can cause the interest to be prohibited, and (4) none of the statutory exceptions apply, then the interest is prohibited. Alternatively, if any of the statutory exceptions apply to the interest, then the interest is not prohibited, but in most cases must be disclosed.[103]

Additional Prohibition for Chief Fiscal Officers, Treasurers and their Staff

Article 18 contains an additional prohibition applicable only to municipal chief fiscal officers, treasurers and their deputies and employees.[104] For this purpose, the term "chief fiscal officer" is

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97 Id.
98 General Municipal Law § 802 (1) (e).
99 General Municipal Law § 802 (1) (d).
100 See e.g. 1989 Ops St Comp No. 89-32, at 74, supra.
101 General Municipal Law § 802 (1) (a).
102 See 33 Ops St Comp No. 77-504, at 106 (1977).
103 See General Municipal Law § 803, discussed infra.
104 General Municipal Law § 801 (2).

defined as a comptroller, commissioner of finance, director of finance or other officer possessing similar powers and duties, but does not include a member of a board of education or trustee in a school district.[105] The term "treasurer" means the treasurer of a county, city, village, school district, fire district, BOCES, county vocational and extension board and public general hospital, a town supervisor, the president of a board of health of a consolidated health district, and any other officer possessing similar powers and duties.[106]

Unless a statutory exception applies, no chief fiscal officer, treasurer, or his deputy or employee may have an interest in a bank or trust company designated as a depository, paying agent, registration agent or for investment of funds of the municipality of which he in an officer or employee.[107] Therefore, for example, when a town supervisor is a director and stockholder of a bank designated as a depository of town funds, the supervisor's interests in the bank are prohibited, unless a statutory exception applies to each of the interests.[108]

As previously discussed, article 18 contains a statutory exception that applies specifically to the designation of a bank or trust company as a depository, paying agent, registration agent or for the investment of funds.[109] This exception, however, does not apply to a chief fiscal officer, treasurer or their deputies or employees unless the municipality would otherwise be required to designate a bank or trust company located outside the municipality.[110] For example, in the event there is only one bank or trust company within the municipality, the exception would apply.[111] In that case, any interest in the bank or trust company on the part of the chief fiscal officer, treasurer or their deputies or employees would not be prohibited. If, however, there is more than one bank or trust company located within the municipality, this exception would not apply.[112] In such case, any interest in the bank on the part of the chief fiscal officer, treasurer or his or her staff would be prohibited unless some other exception applied to the interest.[113]

Disclosure of Interests in Contracts

With certain limited exceptions, article 18 requires municipal officers and employees to disclose interests in contracts with the municipality for which they serve.[114] As a rule, if a municipal officer or employee, or his or her spouse, has, will have, or later acquires an interest in any actual or proposed contract, purchase agreement, lease agreement or other agreement (including oral agreements), the municipal officer or employee must disclose the nature and extent of the interest in writing.[115] The disclosure must be made as soon as the municipal officer or employee becomes aware of the actual or prospective interest.[116] The disclosure must be made publicly to

[105] General Municipal Law § 800 (1).
[106] General Municipal Law § 800 (6).
[107] General Municipal Law § 801 (2).
[108] See 1989 Ops St Comp No. 89-4, at 10.
[109] General Municipal Law § 802 (1) (a).
[110] Id.
[111] Cf. 1992 Ops St Comp No. 92-54, at 129.
[112] See e.g. 1989 Ops St Comp No. 89-4, at 10, supra
[113] Id.
[114] General Municipal Law § 803.
[115] General Municipal Law § 803 (1).
[116] Id.

the individual's immediate supervisor, and to the governing body of the municipality, which must include the disclosure in the official record of its proceedings.[117]

Disclosure, however, is not required with respect to an interest in a contract described in section 802 (2) of the General Municipal Law.[118] For example, disclosure is not required where a municipal officer's or employee's interest in a contract results from ownership of less than 5% of the outstanding stock of a corporation which contracts with the municipality,[119] or where a municipal officer or employee has an interest in a contract, but the total amount paid under the contract(s) during the course of a fiscal year does not exceed $750.[120]

The Court of Appeals has held that a knowing failure to disclose a contractual interest in violation of article 18 is grounds for a municipality to refuse to perform the contract.[121] On the other hand, in several instances, courts have excused a failure to disclose when a municipal officer or employee's interest in a contract was otherwise a matter of public knowledge.[122]

Violations

Article 18 provides that any contract willfully entered into by or with a municipality in which there is an interest prohibited by article 18 is null, void and wholly unenforceable.[123] The Court of Appeals has referred to this provision as "[working] a statutory nullification, thereby providing for municipal taxpayers the protection of a bar to any waiver of the prohibited conflicts of interest through consent of the governing body or authority of the municipality."[124]

Article 18 also provides that any municipal officer or employee who willfully and knowingly violates the previously discussed provisions of article 18 is guilty of a misdemeanor.[125] A conviction can serve as a basis for removal from office.[126]

Other Prohibited Conduct

In addition to prohibiting interests in contracts under certain circumstances, article 18 prohibits municipal officers and employees from engaging in several other types of conduct. The other types of conduct prohibited by article 18 relate to soliciting and receiving gifts, the disclosure and use of confidential information, and the performance of compensated services for private clients in relation to matters before municipal agencies.[127] Knowing and intentional violations of

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[117] Id.
[118] General Municipal Law § 803 (2).
[119] See e.g. 1994 Ops St Comp No. 94-16, at 28.
[120] See e.g. 1998 Ops St Comp No. 98-6, at 14, supra.
[121] See Landau v Percacciolo, 50 NY2d 430 (1980).
[122] See Stettine v County of Suffolk, 105 AD2d 109 (2nd Dept 1984); affd 66 NY2d 354 (1985); cf. D.E.P. Resources v Village of Monroe, 131 AD2d 719 (2nd Dept 1987).
[123] General Municipal Law § 804.
[124] Landau v Percacciolo, 50 NY2d 430, 434 (1980), supra; but see Rose v Eichhorst, 42 NY2d 92, 98 (1977), supra.
[125] General Municipal Law § 805.
[126] See Matter of West v Grant, 243 AD2d 815 (3rd Dept 1997).
[127] General Municipal Law § 805-a (1).

these provisions are punishable by fine, suspension or removal from office or employment in the manner provided by law.[128]

Gifts

Article 18 flatly prohibits a municipal officer or employee from, directly or indirectly, soliciting a gift.[129] The statute also prohibits a municipal officer or employee, either directly or indirectly, from accepting or receiving any gift having a value of $75 or more under circumstances in which it can be reasonably inferred that the gift was intended to, or can be reasonably be expected to, influence him or her in the performance of official duties, or that the gift is intended as a reward for official action.[130]

Under article 18, a gift can take virtually any form -- money, service, loan, travel, entertainment, hospitality, or any other thing or promise.[131] To illustrate, donations to pay a municipal officer's legal fees constitute gifts when the donations are made to defray the costs of litigation brought by the municipal officer in his or her individual capacity, rather than in his or her official capacity, even when the litigation is brought against another municipal official. [132]

In order for a municipal officer or employee to violate the statute, he or she must accept or receive a gift having a value of at least $75 "under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties …."[133] The quoted language was held by a county court to be unconstitutionally vague for purposes of a criminal prosecution.[134] Several years later, however, an Appellate Division decision sustained the imposition of criminal sanctions on a State employee on the basis of identical language in section 73 (5) of the Public Officers Law, but the court in that case did not specifically consider the constitutionality of the statute there at issue.[135] More recently, another Appellate Division decision sustained civil sanctions imposed under section 73 (5) of the Public Officers Law, although the court in that case did not specifically address the constitutionality of the statute.[136]

Notwithstanding any statute, law or rule to the contrary, article 18 expressly permits a public officer to accept a gift or benefit having a value of $100 or less for solemnizing a marriage at a time or place other than the public officer's normal public place of business, during normal hours of business.[137] For this purpose, a town or village justice's normal hours of business are the hours officially scheduled by the court for the performance of the judicial function.[138]

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[128] General Municipal Law § 805-a (2).
[129] General Municipal Law § 805-a (1) (a).
[130] Id.
[131] Id.
[132] 2005 Ops Atty Gen No. 2005-10, at 1036.
[133] General Municipal Law § 805-a (1) (a).
[134] People v Moore, 85 Misc 2d 4 (Fulton County Ct 1975).
[135] People v Zambuto, 73 AD2d 828 (4th Dept 1979).
[136] Matter of Rubenfeld v New York State Ethics Commn., 43 AD3d 1195 (3rd Dept 2007).
[137] General Municipal Law § 805-b.
[138] Id.

Confidential information

Article 18 prohibits a municipal officer or employee from disclosing confidential information acquired in the course of his or her official duties.[139] The statute also prohibits a municipal officer or employee from using confidential information to further his or her personal interests.[140]

Compensated services before municipal agencies

Article 18 prohibits a municipal officer or employee from receiving, or entering 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 or she is an officer, member or employee, or of any municipal agency over which he or she has jurisdiction, or to which he or she has the power to appoint any member, officer or employee.[141] Thus, for example, the statute prohibits a town attorney from performing compensated services for private clients in relation to any matter before any town agency for which he or she serves as attorney.[142] Article 18 may also prohibit a town attorney's law firm from performing such services, depending on whether the attorney would share in the compensation earned by the firm from the rendition of the services.[143]

The primary purpose of this provision is to prohibit municipal officers and employees from being paid to represent private clients before municipal agencies on which they serve, or over which they exercise jurisdiction or appointment power.[144] The statute, however, bars a municipal officer or employee from performing compensated services for private clients in connection with a matter pending before such an agency, even if the services do not involve a personal appearance before the agency.[145] Moreover, although it is clear that the statute applies to compensated services for private clients rendered in connection with applications and other matters actually pending before a municipal agency, the statute also prohibits compensated services rendered with respect to matters which must be reviewed, passed upon or otherwise brought to the attention of a municipal agency, even if the services are rendered before the matter is formally submitted to the agency.[146]

Article 18 also prohibits a municipal officer or employee from receiving, or entering into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any agency of his or her municipality, whereby his or her compensation is to be dependent or contingent upon any action by the agency with respect to the matter.[147] This provision, however, does not bar fees based upon the reasonable value of the services rendered.[148]

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[139] General Municipal Law § 805-a (1) (b).
[140] Id.
[141] General Municipal Law § 805-a (1) (c).
[142] 2000 Ops St Comp No. 2000-22, at 56, supra; see also Matter of Lake Anne Realty Corp. v Planning Bd. of Town of Blooming Grove, 172 Misc 2d 972 (Sup Ct, Orange County 1997).
[143] Id.
[144] See e.g. 1990 Ops St Comp No. 90-28, at 65.
[145] Id.
[146] Id.
[147] General Municipal Law § 805-a (1) (d).
[148] Id.

Disclosure of Interests in Certain Land Use Matters

Article 18 imposes a disclosure requirement in connection with every application, petition or request for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license or permit submitted pursuant to any ordinance, local law, rule or regulation constituting the zoning and planning regulations of a municipality.[149] Every such application, petition or request must state the name, residence, and nature and extent of any interest in the applicant held by any state officer, or any officer or employee of the municipality, or any officer or employee of a municipality of which such municipality is a part, to the extent known by the applicant.[150]

Unlike the previously mentioned provisions of article 18 which require municipal officers and employees to disclose interests in contracts, the obligation to disclose interests in land use matters is imposed on the applicant seeking official action.[151] Moreover, the circumstances under which a municipal officer or employee is deemed to have an interest in an applicant are broader than the circumstances under which a municipal officer or employee is deemed to have an interest in a contract.[152] For example, a municipal officer or employee is deemed to have an interest in an applicant when the applicant is a parent, sibling or grandchild, but is not deemed to have an interest in the contracts of a parent, sibling or grandchild.[153] A knowing and intentional failure to comply with the statute is a misdemeanor.[154]

Local Codes of Ethics

In addition to providing state-wide rules relating to conflicts of interest on the part of municipal officers and employees, article 18 also provides for supplementation of the state-wide rules through the adoption of local codes of ethics. The statute requires the governing body of each county, city, town, village, school district and fire district to adopt a code of ethics setting forth standards of conduct reasonably expected of their officers and employees and, in the case of a fire district, the volunteer members of its fire department.[155] Article 18 authorizes other municipalities to adopt a code of ethics, but does not require them to do so.[156] The State Comptroller's Office has prepared a model code of ethics for municipalities, other than fire districts, and a separate model code for fire districts, both of which are available on the State Comptroller's website.[157]

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149 General Municipal Law § 809.
150 General Municipal Law § 809 (1).
151 See General Municipal Law § 809 (1); compare General Municipal Law § 803 (1).
152 See General Municipal Law § 809 (2), (3); compare General Municipal Law § 800 (3).
153 Id.
154 General Municipal Law § 809 (5).
155 General Municipal Law § 806 (1) (a).
156 Id.
157 See Office of State Comptroller, Model Code of Ethics for Local Governments, available at https://www.osc.ny.gov/files/local-government/publications/docs/code-ethics-local-governments.docx; Model Code of Ethics for Fire Districts, available at https://www.osc.ny.gov/files/local-government/publications/docs/code-ethics-local-governments.docx.

Article 18 requires a code of ethics to address certain issues: disclosure of interests in legislation before the local governing body; holding of investments in conflict with official duties; private employment in conflict with official duties; and future employment.[158] A code of ethics may also include such other standards relating to the conduct of officers and employees as may be deemed advisable.[159] A code of ethics may regulate or prescribe conduct which is not expressly prohibited by article 18, and may also provide for the prohibition of conduct or disclosure of information and the classification of employees or officers.[160] Thus, for example, a code of ethics may require town board members to abstain from voting on resolutions fixing the salaries of relatives,[161] and may prohibit town officers, employees and board members from holding office in a political party. [162]

A code of ethics, however, may not authorize conduct otherwise prohibited by article 18.[163] Thus, a code of ethics, for example, can not render permissible an interest in a contract that is prohibited by article 18. Moreover, because a code of ethics may not be inconsistent with article 18, a code of ethics may not prohibit conduct expressly permitted by article 18.[164] To illustrate, a code of ethics may not negate a statutory exception that renders an interest in a contract permissible.[165]

Article 18 requires the chief executive officer of a municipality adopting a code of ethics to cause a copy of the code to be distributed to every officer and employee of his or her municipality.[166] A failure to distribute a code of ethics, or the failure of a municipal officer or employee to receive a copy of the code, however, does not affect the duty to comply with the code or the code's enforceability.[167]

Boards of Ethics

Article 18 authorizes counties and other municipalities to establish a board of ethics and to fund the operations of the board.[168] The functions of a board of ethics are to provide advisory opinions to municipal officers and employees with respect to the provisions of article 18 and local codes of ethics,[169] to provide recommendations with respect to the drafting and adoption of codes of ethics and amendments thereto,[170] and to administer a municipality's system of annual

[158] General Municipal Law § 806 (1) (a).
[159] Id.
[160] Id.
[161] 2000 Ops St Comp No. 2000-12, at 33; but see Appeal of Behuniak, 30 Ed Dept Rep 236 (Decision No. 12,447).
[162] Belle v Town Bd. of Town of Onondaga, 61 AD2d 352 (4th Dept 1978).
[163] General Municipal Law § 806 (1) (a).
[164] 1992 Ops St Comp No. 92-30, at 78.
[165] Id.
[166] General Municipal Law § 806 (2).
[167] Id.
[168] General Municipal Law § 808 (1), (3).
[169] See General Municipal Law § 808 (2)
[170] Id.

financial disclosure.[171] The State Comptroller's Office has concluded that these functions may not be supplemented by local law.[172]

Under article 18, the power to establish a county board of ethics is vested in the governing body of the county.[173] The county governing body also appoints the members of the board of ethics, unless the county operates under an optional or alternative form of county government or county charter, in which case the members are appointed by the county executive or county manager, as the case may be, subject to confirmation by the governing body.[174] A county board of ethics must consist of at least three members, the majority of whom may not be officers or employees of the county or any municipality within the county, but at least one member must be an officer or employee of the county or a municipality within the county.[175] Members of a board of ethics receive no salary or compensation for their service on the board, and serve at the pleasure of the appointing authority.[176]

A county board of ethics may render advisory opinions to the officers and employees of any municipality wholly or partly within the county, but only upon the written request of a municipal officer or employee under such rules and regulations as the board may prescribe.[177] In performing this function the board may obtain advice from counsel employed by the board, or if none, from the county attorney.[178] A county board of ethics may make recommendations with respect to codes of ethics, but only upon the request of the governing body of a municipality in the county.[179]

The governing body of a municipality other than a county may also establish a local board of ethics.[180] In such case, the local board of ethics has the same powers and duties, and is governed by the same conditions as a county board of ethics, except that the local board may act only with respect to the officers and employees of the municipality that established the local board.[181] Where a municipality has established a local board of ethics, the county board of ethics may not act with respect to the officers and employees of that municipality, unless the local board has referred a matter to the county board.[182]

Annual Financial Disclosure

Article 18 requires "political subdivisions," defined as counties, cities, towns and villages with a population of 50,000 or more, to impose on certain individuals an obligation to file an annual

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171 See General Municipal Law §§ 810 (9) (a), 811 (d), 812 (1) (c), (3) (a); L 1987, ch 813, § 26 (b)
172 See e.g. 30 Ops St Comp No. 74-1119 (1974); but see 1991 Ops Atty Gen No. 91-68, at 1135.
173 General Municipal Law § 808 (1).
174 Id.
175 Id., see also 1981 Ops St Comp No. 81-216, at 230; but see 1986 Ops Atty Gen No. 86-44, at 1065.
176 General Municipal Law § 808 (1).
177 General Municipal Law § 808 (2), (4); but see 1991 Ops Atty Gen No. 91-68, at 1135, supra.
178 General Municipal Law § 808 (2).
179 Id.
180 General Municipal Law § 808 (3).
181 Id.
182 General Municipal Law § 808 (4).

financial disclosure statement.[183] Other municipalities are authorized to adopt an annual financial disclosure system, but are not required to do so.[184]

Under article 18, political subdivisions have broad discretion to design their own annual financial disclosure form and filing system.[185] If a political subdivision fails to promulgate its own form, it must utilize a form and filing system prescribed by article 18.[186] Other municipalities may either design their own form and filing system or use the statutorily prescribed form and filing system.[187]

Article 18 also requires political subdivisions and other municipalities that promulgate their own annual financial disclosure form to identify by name of office, or by title or classification, those individuals who must file the disclosure form.[188] The former Temporary State Commission on Local Government Ethics,[189] which had various functions with respect to annual financial disclosure, concluded that these jurisdictions, as minimum, must require the disclosure form to be filed by "local elected officials," "local officers and employees," and those officers and employees whose duties involve the negotiation, authorization or approval of certain matters (e.g. negotiation of contracts).[190] Counties, cities, towns and villages also have the option of requiring annual financial disclosure from "local political party officials."[191] Political subdivisions and other municipalities that utilize the statutorily prescribed disclosure form and filing system must require the form to be filed by "local elected officials," "local officers and employees," each "local political party official," and each candidate for "local elected official."[192]

Currently, annual financial disclosure forms must be filed with a political subdivision's or other municipality's board of ethics or, if the jurisdiction does not have a board of ethics, with the governing body of the jurisdiction.[193] Where a political subdivision or other municipality promulgates its own annual disclosure form and requires the form to be filed with its board of ethics, the jurisdiction, by local enactment, must provide the board of ethics with appropriate authority to enforce the filing requirement.[194] In all other cases, the power to enforce the filing requirement is provided by State statute.[195]

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[183] See General Municipal Law §§ 810 (1), 811 (1) (a), (2), 812 (1) (a), (2).
[184] General Municipal Law §§ 811 (1) (a), 812 (2).
[185] General Municipal Law § 811 (1) (a).
[186] General Municipal Law §§ 811 (2), 812.
[187] General Municipal Law §§ 811 (1) (a), (e), 812 (2).
[188] General Municipal Law § 811 (1) (a).
[189] See General Municipal Law § 813; L 1987, ch 813, § 26 (b).
[190] 1987 Ethics in Government Act: Financial Disclosure Provisions for Local Government Officials, Temporary State Commission on Local Government Ethics, at 9 (September 1990); see also General Municipal Law §§ 810 (2), (3), 813 (9) (k) (i)-(iv).
[191] General Municipal Law § 811 (1) (b); see also General Municipal Law § 810 (6).
[192] General Municipal Law § 812 (1) (a); see also General Municipal Law § 810 (2), (3), (6).
[193] General Municipal Law §§ 811 (1) (d), 812 (1) (c); L 1987, ch 813, § 26 (b).
[194] General Municipal Law § 811 (1) (d).
[195] See General Municipal Law §§ 811 (1) (d), 812 (6); L 1987, ch 813, § 26 (b); see also General Municipal Law § 813 (10), (11), (13).

Posting of Statute

Article 18 requires the chief executive officer of every municipality to cause a copy of sections eight hundred through eight hundred nine of the General Municipal Law to be kept posted in each public building under the jurisdiction of his or her municipality, in a place conspicuous to its officers and employees.[196] This posting requirement encompasses all of the provisions of article 18 except those relating to annual financial disclosure and the former temporary state commission on local government ethics. To facilitate compliance with the posting requirement, the State Comptroller's Office has prepared a poster of these sections and is available on the State Comptroller's website.[197] A failure to comply with this posting requirement, however, does not affect the duty to comply with article 18 or the statute's enforceability.[198]

Please feel free to contact the Division of Legal Services at (518) 474-5586 should you have legal questions.

April 1, 2010

[196] General Municipal Law § 807.

[197] See Office of State Comptroller, New York State General Municipal Law, Sections 800-809: Conflicts of Interest of Municipal Officers and Employees (Part 1 and 2), available at https://www.osc.ny.gov/files/local-government/publications/pdf/gmlposter.pdf

[198] General Municipal Law § 807.