

Local Government Ethics Law

Opinions of the Office of the Attorney General

Subject: **Municipal Planning Board and Zoning Board Attorneys as "Local Government Officers" Pursuant to the Local Government Ethics Law**

The following is the full text of advice issued by the Office of the Attorney General and received by the Local Finance Board. The content is a verbatim reproduction of the document received by the Board. It has been reformatted to make it accessible to the public through the Board's web site.

November 1, 1991

Barry	Skokowski,	Sr.
Deputy		Commissioner
Department	of	Affairs
CN	Community	800
Trenton, New Jersey 08625-0800		

Re: 91-0133: Municipal Planning Board and Zoning Board Attorneys as "Local Government Officers" Pursuant to the Local Government Ethics Law

Dear Deputy Commissioner Skokowski:

You have requested advice as to whether an attorney who regularly advises a municipal planning board or a municipal zoning board of adjustment is a "local government officer" pursuant to the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq. For the below stated reasons you are advised that an attorney who is appointed to regularly advise a municipal planning board or a municipal zoning board of adjustment is a "local government officer" pursuant to the Local Government Ethics Law and therefore subject to its terms, particularly the requirement of filing a financial disclosure statement.

The Local Government Ethics Law was enacted on February 20, 1991 and became effective 90 days thereafter on May 21, 1991. L. 1991, c. 29-27. The purpose of the Act is to provide a Statewide method for governing the ethical conduct of local government officers and employees and requiring financial disclosure for local government officers. N.J.S.A. 40A:9-22.2(e). To effect this purpose the Legislature has established a Statewide Code of Ethics applicable to local government officers and employees. N.J.S.A. 40A:9-22.5. This Code of Ethics is

enforced by the Local Finance Board. N.J.S.A. 40A:9-22.4. However, a county or municipality may establish a county or municipal ethics board to enforce the code of ethics. N.J.S.A. 40A:9-22.13, N.J.S.A. 40A:9-22.19. A county or municipality ethics board may establish a local code of ethics. N.J.S.A. 40A:22-13, N.J.S.A. 40A:9-22.19. If the local code is not identical to the State code, it is subject to the approval of the Local Finance Board. N.J.S.A. 40A:9-22.13, N.J.S.A. 49A:9-22.19.

In addition to adhering to the ethical guidelines set forth in the law, a "local government officer" is required to file annually a financial disclosure statement, N.J.S.A. 40A:9-22.6, which contains information about his or her sources of income, certain business interests, and his or her real estate holdings in New Jersey. Ibid. (Initially financial disclosure statements are required to be filed by August 19, 1991, and thereafter annually by April 30. N.J.S.A. 40A:9-22.6). To be subject to the requirement of filing a financial disclosure statement, one must satisfy the test of being a local government officer of a local government agency. N.J.S.A. 40A:9-22.6. The term "local government officer" is defined as,

any person whether compensated or not, whether part-time or full-time: (1) elected to any office of a local government agency; (2) serving on a local government agency which has the authority to enact ordinances, approve development applications or grant zoning variances; (3) who is a member of an independent municipal, county or regional authority; or (4) who is a managerial executive or confidential employee of a local government agency, as defined in section 3 of the "New Jersey Employer-Employee Relations Act," P.L. 1941, c. 100 (C. 34:13A-3), but shall not mean any employee of a school district or member of a school board. [N.J.S.A. 40A:9-22.3(g)].

Thus, a variety of persons serving in a "local government agency" are included within the definition of "local government officer."

In contrast to the term "local government officer" is the term "local government employee." This latter term is defined as

"any person, whether compensated or not, whether part-time or full-time, employed by or serving on a local government agency who is not a local government officer, but shall not mean any employee of a school district." N.J.S.A. 40A:9-22.3(f).

A municipal planning board and a municipal zoning board of adjustment are "local government agencies" and the members of these boards are "local government officers." N.J.S.A. 40A:9-22.3(e), N.J.S.A. 40A:9-22.3(g); see also Attorney General Opinion No. 91-0093 (September 20, 1991). A planning board passes on development applications for

subdivision approval and it acts in a quasi-judicial capacity. N.J.S.A. 40:55D-25; Geiger v. Levco Rt. 46 Assoc., Ltd., 181 N.J. Super. 278, 281 (Law Div. 1981). A Zoning board of adjustment administers the local zoning plan and it also acts in a quasi-judicial capacity. N.J.S.A. 40A:55D-70; Robinson v. Bd. of Adjustments of Cape May, 131 N.J. Super. 236, 240 (Law Div. 1974). Further, local agencies which affect land use issues play an important role in the formulation of municipal land use planning. Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983). Both boards exercise independent judgment in carrying out their duties. Geiger v. Levco Rt. 46 Assoc., Ltd., supra; Robinson v. Bd. of Adjustments of Cape May, supra.

A municipal planning board and a municipal Zoning board of adjustment may employ, contract, and fix the compensation of legal counsel. N.J.S.A. 40A:55D-24, N.J.S.A. 40A:55D-71. An attorney who regularly advises a planning board or zoning board is generally considered to hold an "office." Planning Bd. Tp. of West Milford v. Tp. Council of Tp. of West Milford, 123 N.J. Super. 135, 142 (Law Div. 1973); cf. Lehrhaupt v. Flynn, 140 N.J. Super. 250 (App. Div. 1976), affirmed 75 N.J. 459 (1978). Attorneys for planning boards and zoning boards generally exercise the same responsibilities that a municipal attorney exercises in his representation of the municipality. Monroe Tp. Bd. of Adjustment v. Mayor and Tp. Committee, 211 N.J. Super. 174 (App. Div. 1986). Indeed, in view of the independent judgment exercised by these boards, the municipal attorney is generally precluded from acting as counsel to the boards. Ibid., N.J.S.A. 40A:55D-24, N.J.S.A. 40A:55D-71. Thus, an attorney for a planning board or a zoning board serves a "local government agency" as an officer of the local government agency.

Having determined that an attorney for the planning board or zoning board of adjustment is a municipal officer and serves a local government agency, it is necessary to determine if that position puts the incumbent in the category of a person serving in local government deemed to be a "local government officer" for purposes of the Local Government Ethics Law. Included as "local government officers" are 1) elected local officials; 2) members of local bodies that have authority to enact ordinances, approve development applications, or grant zoning variances; and 3) members of independent local authorities. N.J.S.A. 40A:9-22.3(g). An attorney for a planning board or zoning board of adjustment is not within the scope of the first three classes of local government officers.

The fourth and last category of "local government officer" is a person "who is a managerial executive or confidential employee of a local government agency, as defined in section 3 of the 'New Jersey Employer-Employee Relations Act.' P.L. 1941, c. 100 (C.34:13A-3), but shall not mean any employee of a school district or member of a school district."

N.J.S.A. 40A:9-22.3(g)(4). As the Local Government Ethics Law makes specific reference to the definitions contained in the Employer-Employee Relations Act, it is necessary to examine the latter Act. The Employer-Employee Relations Act, N.J.S.A. 34:13-1 et seq., provides a mechanism for the resolution of labor disputes in the private and public section. N.J.S.A. 34:13A-2. The Act is administered by the State's Public Employment Relations Commissioner (PERC). N.J.S.A. 34:13A-5.2.

The Act defines "managerial executives" of a public employer as,

persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district. [N.J.S.A. 34:13A-3(f)].

"Confidential employees" of a public employer are defined as,

employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties. [N.J.S.A. 34:13A-3(g)].

The Legislature in using these terms, intended to identify as "local government officers" those individuals serving in local government who exercise a high level of authority and independent judgment which directly affects the policy and purposes of the agency and who have detailed knowledge of the agency's confidential labor relations matters. Attorney General Opinion No. 91-0093 (September 20, 1991). (The opinion examined in detail the terms managerial executive and confidential employee.") Previously, we determined that a municipal attorney, because of the nature of his duties, was per se a "managerial executive" and "confidential employee" and therefore, a "local government officer." Attorney General Opinion No. 91-0092 (September 30, 1991). We noted that while all municipal attorneys may not be persons who formulate management policies and who direct the effectuation of such policies, they, by the nature of their duties, participate in the formulation of policies for their respective municipality and we concluded that the office of municipal attorney should be deemed a "managerial executive." Ibid. We indicated that "policy makers" included not only persons who occupy traditional management executive positions, but also includes those in the legal profession who exercise discretion concerning issues of public importance. Ibid.; see also, Gregory v. Ashcroft, ___ U.S. ___, 111 S. Ct. 2395, 2404, 115 L. Ed. 2d 410, 427-428 (1991) (Judges were deemed to be policy makers). Similarly by the nature of his responsibilities, an attorney for a planning board

or a zoning board must exercise independent legal judgment and discretion affecting issues of public concern, albeit in the specialized area of land use, in the same manner that a municipal attorney does in his representation of the municipality. Further, an attorney who advises a public body "wields considerable power and influence by virtue of his ability and opportunity to interpret the law and advise on legal matters. The force of his influence is subtle and pervasive." Lafayette v. Bd. of Chosen Freeholders, 208 N.J. Super. 468, 474 (App. Div. 1986). Also, the determination that planning board and zoning board attorneys are "local government officers" is consistent with the intent of Senator Paul Contillo, the principal sponsor of the Local Government Ethics Law. Scarinci, Ethics Enforcement: A New Role for the Local Finance Board, Kraft & McManimon Municipal Bond News, p.2 (June 1991).

It should be noted that there may be circumstances when a planning board or zoning board engages counsel for a special, limited capacity (e.g., to handle a particular civil action or to provide specialized legal advice as to a particularly complex application). This type of representation is more akin to that of an "independent contractor" and, in our view, would not be subject to the new Ethics law. See Attorney General Opinion No. 91-0092 (September 20, 1991). However, where an attorney is appointed to regularly advise a planning board or zoning board, we believe that such attorney should be considered a "local government officer."

Having concluded that the attorney for a municipal planning board and municipal zoning board attorney are local government officers who work for a local government agency, you are advised that attorneys who are appointed to these positions are "local government officers" for purposes of the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq. and are subject to the requirements of the Law, in particular to the requirement of filing a financial disclosure statement.

Very truly yours,

ROBERT

J.

DEL

TUFO

ATTORNEY GENERAL

By: _____

John

J.

Chernoski

Senior Deputy Attorney General

JJC:im