

TOWN OF FALMOUTH – TOWN COUNCIL
Background Information and Considerations
for Developing a Conflict of Interest Policy

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I. THE LEGAL FRAMEWORK: GENERAL AUTHORITY TO ADOPT A POLICY

Any municipality may define what constitutes a conflict of interest by adopting a provision in a local ordinance, charter or policy. State law specifically allows municipal officers, in their discretion, to “adopt an ethics policy governing the conduct of elected and appointed municipal officials.” 30-A M.R.S. § 2605(7).

II. LEGAL CONFLICTS OF INTEREST: STATUTE AND CASES

How does the current Maine statute and related case law inform us regarding conflict of interest policies? What types of conflicts are addressed therein and what aren't?

Maine's conflict of interest law governing municipal officials describes three kinds of situations where official participation is prohibited:

- A. Business Interest (Direct or Indirect Pecuniary Interest). A business interest conflict occurs when an official (i) is an officer, director, partner, associate, employee or stockholder of a business or other economic entity and (ii) directly or indirectly owns at least 10% of stock or interest in the business or other economic entity. The official must make a full disclosure, abstain from voting, negotiation and the awarding of any contract, and must not attempt to influence the decision. 30-A M.R.S. § 2605(4).
- B. Personal Financial Interest. A personal financial conflict occurs when an official "by reason of his interest, is placed in a situation of temptation to serve his own personal pecuniary interest to the prejudice of the interests of those for whom the law authorized and required him to act." *Esieur v. Inhabitants of Rumford*, 113 Me. 317 (1915), cited in *Tuscan v. Smith*, 130 Me. 36 (1931).
- C. Appearance of Conflict. Officials must also attempt to avoid the *appearance* of a conflict of interest by disclosure or by abstention. 30-A M.R.S. § 2605(6).

What precedents exist regarding conflicts of interest policies?

Maine courts have rarely addressed questions involving these statutory conflicts of interest. In the few cases where courts have discussed and interpreted the state law on conflicts, the courts have reaffirmed that the above-listed legal conflicts of interest are prohibited. Maine courts have, however, established by case law that public officials are bound by the following additional obligations and duties:

- D. Incompatibility of Office. Incompatibility of office is present where two public offices, by virtue

of their conflicting duties, cannot be held by the same person. For example, an official cannot simultaneously serve as the town clerk and a selectman. *See, e.g., Tuscan v. Smith*, 130 Me. 36 (1931); *Esieur v. Inhabitants of Rumford*, 113 Me. 317 (1915).

- E. Off-Limits Appointments. Prohibited appointments include those paid positions off-limits to those who created them or who increased their compensation. For example, an official who raised the police chief’s salary cannot then apply for the job.
- F. Bias. Bias occurs when an official cannot make a fair or impartial decision because of prejudice or the existence of a family relationship. Title 1 M.R.S. § 71(6) provides a narrow definition of bias requiring disqualification based on the existence of a family relationship. The existence of bias also implicates due process of law concerns. For example, when an official’s sister has applied for the town manager’s job, the official cannot vote on the decision as to whether or not to hire her.

III. CONSIDERATIONS IN DEVELOPING A CONFLICT OF INTEREST POLICY

In the development of a conflict of interest policy regarding the Falmouth Town Council, what potential pitfalls should be avoided?

First and foremost, any conflict of interest policy may not be at odds with existing statutory and case law, as discussed above. A municipal board may, however, adopt a policy that goes beyond state law. Certain aspects of such “beyond-the-basics” policies can sometimes present legal issues, but many of the considerations and pitfalls are policy-based.

To spotlight the legal issues and some of the policy-based considerations and potential pitfalls of developing a conflict of interest policy, we surveyed several existing conflict of interest policies from other Maine municipalities, case law, and related guidance documents. Although we have not undertaken an exhaustive review of municipal conflict of interest policies, this document is structured around specific topics that appear to be commonly addressed or considered for inclusion in such policies. These common elements can be thought of as falling into two broad categories—procedural considerations and substantive considerations. How the Town Council ultimately decides to treat the procedural questions will likely implicate many of the Council’s decisions on the substantive issues. For this reason, it is often helpful to focus on the procedural issues first.

Procedural considerations focus on how conflicts of interest should be identified and, if conflicts exist, the process for addressing how those conflicts should be resolved. For example:

- To whom should the policy apply;
- Who decides whether a conflict of interest exists;
- Once a conflict is deemed to exist, what are the effects on a board member’s participation in any given matter; and
- If a conflict is deemed to exist after a conflicted board member has already participated in the matter, what are the consequences on the board member and on the decision in any given matter.

Substantive considerations generally revolve around the question of what is a conflict of interest—that is, what topics or categories of scenarios should a conflict of interest policy address. Common substantive topics in conflict of interest policies that we reviewed include:

- Pecuniary interests beyond state law requirements;
- The appearance or perception of conflicts of interest;
- Employment relationships between the governmental body and board members and their family or friends;
- Gifts, gratuities and favors;
- Disclosing confidential information;
- Representing third party interests; and
- The use of town property or public resources by board members.

Each of these topics is discussed in greater detail next. Sample language for many of these topics is available upon request.

IV. PROCEDURAL CONSIDERATIONS

A. APPLICABILITY TO SOME OR ALL MUNICIPAL OFFICIALS AND EMPLOYEES

Of the municipal conflict of interest policies we reviewed, most apply only to members of the Town Council or Board of Selectmen. Some municipalities also apply the same policy to all elected and appointed members of municipal boards, committees and commissions, while other municipalities have separate policies for various boards. Some municipalities also apply conflict of interest policies to employees, although these are usually standalone documents and are often tied to employees' contractual obligations.

As discussed in Part IV.B, below, different municipal officials often have varied roles and responsibilities. These differences often implicate not only the substantive issues but also the methods of identifying and resolving conflicts of interest. For example, some municipal boards, such as a board of appeals, are required by statute to follow a majority voting procedure for deciding whether a conflict of interest exists sufficient to disqualify a member from voting. *See* 30-A M.R.S. § 2691(2)(C). Consequently, broad application of a single conflict of interest policy—particularly if that policy goes beyond state law and does not distinguish between types of municipal officers—must be reviewed carefully to avoid legal and/or policy pitfalls.

B. APPLICABILITY TO PUBLIC OFFICIALS ENGAGED IN ADMINISTRATIVE / LEGISLATIVE ACTIONS vs. JUDICIAL / QUASI-JUDICIAL ACTIONS

With regard to non-profits, does the law view the actions of paid employees different from the actions of unpaid volunteers in leadership positions when either are also elected town officials who may be voting on a matter impacting their non-profit organization?

If a councilor is also an employee of the school, how does the law address his/her ability to vote on matters affecting the school budget, such as approving it for referendum?

How does current law (statute and case law) address conflicts of interest regarding land use policy, zoning changes, etc.?

There appear to be few hard and fast rules from case law with respect to how a public official's employment position or other leadership positions—whether paid or not—affect the official's public duties and when such positions may create a conflict of interest. However, the

distinction between when public officials act in an administrative or legislative capacity, as opposed to when they act in a judicial or quasi-judicial capacity, would appear to provide a logical and reasonable basis for different treatment when determining whether a conflict of interest requiring disqualification may exist.

One rationale for imposing a less restrictive conflict of interest standard on public officials who serve in an administrative or legislative capacity is that legislative action may be highly visible and widely felt, and hence the appropriate remedy can be had at the polls. In such instances, preconceived notions about principles of law or predisposed views about certain public policies are not necessarily disqualifying—so long as there is no obvious financial conflict of interest. Therefore, courts are generally reluctant to interfere with legislative decisions governing zoning on the grounds that a conflict of interest may exist. *See, e.g., 8A McQuillin Mun. Corp. § 25:234.* By contrast, when a public official is sitting in a judicial or quasi-judicial capacity, prejudging issues of fact in a particular matter raises due process concerns and therefore may cause the public official to be disqualified from any action on a particular matter.

These judicial distinctions can serve as helpful guidance in determining whether a conflict of interest exists.

Administrative or Legislative Actions

Most Town Council actions fall into the administrative and legislative categories. For example, zoning changes are generally deemed legislative actions because they tend to affect broad swaths of land within a municipality, rather than a single parcel or ownership type. Thus, for example, Town Councilors are usually not disqualified from voting on a town-wide zoning change merely because they own land that will be affected by the zoning decision, or even because they may have campaigned or made public comments in support of or in opposition to the proposed zoning change prior to the vote. Short of any bias or prejudicial conduct which demonstrates malice, fraud or corruption—and especially if the pecuniary benefits to a public official involved in the legislative action are hypothetical, speculative or far removed—a court would likely be reluctant to upset such a decision on conflict of interest grounds.

Judicial or Quasi-Judicial Actions

Some Town Council actions fall into the quasi-judicial category. For example, if the Town Council is considering an application for a victualers or food service establishment license, and the Council holds a public hearing on the application, it is acting in a quasi-judicial capacity in regard to a particular parcel of land. In such a case, the due process standards of impartiality may be significantly higher than when the Council acts in a legislative capacity.

Although the mere presence of a disqualified official may not necessarily deprive a party of a fair hearing, such officials are usually prohibited not only from voting but from participating in any way in the decision. In some, though not all, cases, a board decision may be overturned, particularly if the disqualified member is perceived to have influenced the vote, even though the vote of the disqualified member does not decide the outcome. Unfortunately, there is no mathematical way to quantify the interest necessary to taint the process of a quasi-judicial decision. These are intensively fact-specific inquiries. But, in making these determinations, courts typically ask whether the average person in the affected official's position would likely be neutral, whether there is an unconstitutional potential for bias, and whether the interest of the official is different from that which he or she holds in common with the public. *See, e.g., 8A McQuillin Mun. Corp. § 25:234.*

C. APPLICABILITY TO EMPLOYERS, FAMILY AND FRIENDS

How is “family” typically defined when extending policy to family members? Is “family” addressed at all in the current law?

Conflict of interest policies may be limited to apply solely to the municipal officials themselves, or may be expanded to address conflicts between personal interests of family members and sometimes even personal friends. We also reviewed conflict of interest policies that apply to situations where a board member’s employer has an interest in the outcome of a particular board decision—especially if the decision is quasi-judicial in nature.

Maine’s conflict of interest statute does not define the term “family.” In most conflict of interest policies we reviewed, however, “family” is typically defined to include the spouse, domestic partner, parent, child, spouse of child, brother, sister, and spouse or domestic partner of brother or sister. Sometimes, “family” is defined to also include cousins and grandparents. Personal friends are usually undefined, and it is left to the affected official to determine whether a matter involving a friend or acquaintance rises to a conflict of interest.

In deciding how broadly its conflict of interest policy should reach, the Town Council may want to consider the potential impacts of adopting a policy, for example, that applies to extended family members or personal friends. A conflict of interest that is overly broad in scope could lead to a variety of unintended or undesirable consequences such as unnecessarily constraining a councilor’s activities or interests in other aspects of his or her life, preventing otherwise qualified persons from being hired by a municipality, or even creating difficulty in filling vacant board or council seats or maintaining a quorum. In addition, board or council members may not know or may have difficulty determining blood or marital relations to comply with conflict of interest policies that reference remote degrees of relatives. Finally, policies that extend conflict of interest rules to family may not give room for board or council members to take into consideration any individualized aspects of their relationships and how those relationships in fact affect their ability to carry out their duty to the public. These are all public policy, rather than legal, considerations for the Town Council to weigh.

D. POLICY IMPLEMENTATION

Some conflict of interest policies require that the policy be reviewed as part of new board member orientation, and that all board members sign a statement acknowledging receipt and understanding of the policy. This implementation tool is especially useful if the expression of the standards of conduct expected of officials is intended to be self-enforcing because it puts the affected officials on notice.

E. THE PROCESS FOR DETERMINING WHETHER A CONFLICT EXISTS

Most of the conflict of interest policies we reviewed leave it to public officials with a potential conflict to determine whether the official indeed has a conflict, as opposed to giving the final say to the board or council by vote. Other policies we reviewed cause the question to be presented to and resolved by a vote of the entire board or by a separate local ethics board. For example, one policy we reviewed includes procedures for allowing members of the public to raise potential conflicts of interest before a separately constituted local ethics committee which investigates the complaint, holds a hearing, and makes a final determination.

F. EFFECTS OF CONFLICTS ON PARTICIPATION AND VOTING, EFFECTS OF CONFLICTS ON TOWN COUNCIL ACTIONS

What are the legal considerations associated with the disclosure/recusal process?

Generally, conflict of interest policies require that the conflicted official disclose the conflict and recuse him or herself from the affected matter. In the case of a clear conflict of interest where the board or council is acting in a quasi-judicial capacity, the board member should make a disclosure of the conflict on the record and then abstain from participating further, discussing and voting on the matter. Where a business interest conflict exists under 30-A M.R.S. § 2605(4) (*i.e.*, a 10% owner of stock in the business), the official with the conflict must make full disclosure of his/her interest before any action is taken and abstain from voting; otherwise, the vote of the body is voidable. *Id.* § 2605(2), (4). In general, a conflicted official should avoid conducting him or herself in a manner that could be seen as exerting his or her personal influence over a matter involving the conflict.

In cases where it may not be clear that a conflict of interest exists but the board member's private interests are implicated in some way, the board member should at the very least disclose the nature of the private interest and, depending on the facts, possibly abstain from voting on the matter. In some cases, this will be necessary in order to avoid the "appearance of" a conflict. In unclear cases, the issue can sometimes be addressed through disclosure by the implicated official followed by a waiver of any objection by the party affected by the alleged conflict. In general, however, a waiver of objection by the affected party will not cure a situation involving action by an official with a clear conflict of interest as defined by statute or common law. *See* McQuillin Mun. Corp. § 25:234; *see also* 30-A M.R.S. § 2605(1) (finding the vote of a body voidable when an official votes on a question in which that official has a direct or indirect pecuniary interest).

In situations where it is determined after-the-fact that a conflict existed but the conflicted official did not recuse him or herself, the vote or transaction involving the conflicted official is not necessarily automatically void. If a public official has a business interest conflict under 30-A M.R.S. § 2605(4) (*i.e.*, a 10% owner of stock in the business), the vote of the body is "voidable" if the conflicted official voted on the question, and the statute provides explicitly for court relief to "restrain proceedings" on the application of 10 residents of the municipality. 30-A M.R.S. § 2605(1), (3). Beyond the situation covered by the statute, however, a court could find the vote or decision to be void or invalid depending on the specific facts and circumstances at issue. For example, a court could invalidate the vote of a public body if it determined that the body was acting in a judicial or quasi-judicial capacity, the decision was arbitrary and tainted by a member's bias, or otherwise violated a party's due process rights.

V. SUBSTANTIVE CONSIDERATIONS

A. FINANCIAL INTERESTS BEYOND STATE LAW REQUIREMENTS

Although state law prohibits an officer who owns 10% of stock or interest in a business from engaging in board-related matters involving that business, some conflict of interest policies may go beyond state law limits by prohibiting or restricting any agreements or business relationships involving the board and officials or family members of officials, where the

financial interest of the affected official is much less direct than the 10% stock ownership test provided by the statute. How broadly to define the nature of the financial interest that would amount to a conflict of interest requiring abstention/disqualification is largely a public policy matter rather than a legal matter. In discussing this issue, the Council may find it helpful to keep in mind the statute’s admonition to avoid “the appearance of a conflict of interest by disclosure or by abstention.” 30-A M.R.S. § 2605(6). A number of policies that we reviewed caution public officials to avoid even the appearance of a conflict by at least disclosing the situation; however, these policies do not further define the standard for an appearance of a conflict of interest.

B. EMPLOYMENT RELATIONSHIPS

Conflict of interest policies may prohibit or restrict employment relationships between officials or family members of officials and the government entity represented by the Town Council. For example, some policies explicitly prohibit a public official or employee of a municipality from using their official position to advocate for, hire or otherwise promote the employment of a member of the official’s family. Strict employment prohibitions, however, can result in exclusion of Town Councilors from Council actions or may prevent otherwise qualified persons from being hired by a municipality or joining a volunteer board. The scope and reach of employment prohibitions depends in large part on how “family” is defined, as discussed in Section IV.C above.

C. GIFTS, GRATUITIES AND FAVORS

Many ethics policies include restrictions concerning the receipt of gifts, gratuities, and favors by public officials. The primary concern here is whether the acceptance of gifts, favors or promises would compromise the official’s independence of judgment or action, or give the appearance of such compromise. Some policies addressing restrictions on gifts specifically allow gifts of *de minimis* market value, such as holiday gift baskets shared amongst employees or advertisement items such as mugs, hats, T-shirts marked with a company logo.

D. CONFIDENTIAL INFORMATION

Some policies explicitly prohibit public officials from disclosing confidential information acquired by them in the course of their official duties to further their personal interests.

E. REPRESENTING THIRD PARTY INTERESTS

Some conflict of interest policies may prohibit public officials from representing the interests of third parties or appearing on behalf of third parties before any Town board. If the Council is interested in including this type of prohibition in its ethics policy, it should be careful not to prohibit any Council member from representing his or her own personal interest or personal point of view – or the interest of immediate family members – before any town board on any item.

F. USE OF TOWN PROPERTY OR PUBLIC RESOURCES

Ethics policies may prohibit public officials from using government property for personal use. This would include town staff time, equipment, supplies or other municipal facilities. Exceptions are usually made for incidental personal use of government e-mail accounts and phones.

VI. OTHER CONSIDERATIONS

Does your law firm have a conflict of interest draft policy or template that could be useful to the Falmouth Town Council?

Many municipalities define conflicts of interest to broadly encompass a statement of ethical principles by which officials strive to conduct themselves, and may or may not include specific examples in order to help clarify what is or is not a conflict. Common examples include:

- Personal investments in, or possible financial gain from, businesses that contract with the Town;
- Doing business with the Town;
- Family members or friends who work for a business that contracts with the Town;
- Endorsing or recommending a business while acting in an official capacity;
- Participating in matters that directly (or indirectly) benefit the board member or his employee, his friends, or family;
- Representing a client before the Town;
- Nepotism in hiring; and
- Holding two elected offices, or dual employment.

By way of example, the Town of Kennebunkport generally prohibits the creation of actual and apparent conflicts, and provides examples of conflicts of interest. The City of Bangor generally prohibits the participation in deliberation and vote and requires disclosure, where a board member or immediate family member has a financial or special interest. Conflicts of interest are determined by board vote or referral to the City Board of Ethics. The Town of York has set a general standard that board members must avoid any situation that may give rise to an actual or perceived conflict, and defines conflict of interest broadly as a “conflict between a person’s private interests and public obligations.” Conflicts of interest are determined by majority board vote.

There are many sample conflict of interest policies that the Town Council may find useful as additional guidance. We would be happy to share such policies with the Council after some preliminary decisions are made about the approach the Council would like to pursue.