

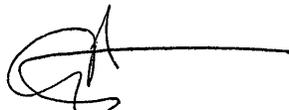
MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

MEMORANDUM

To: Mayor and Council of Princeton
via e-mail & hand-delivery

From: Edwin W. Schmierer, Esq.
Princeton Attorney



Date: April 3, 2013

Re: **Princeton Conflict of Interest Policy**

The Princeton Council will discuss at its meeting on April 8, 2013 adopting a Conflict of Interest Policy for the municipality. This policy would apply to members of the governing body, municipal staff and volunteers on the various Boards and Agencies.

If, after discussing the draft policy, the Council wishes to adopt it, I have prepared and attach hereto a proposed Resolution.

EWS:jv
attach.

cc: Robert W. Bruschi, Administrator (w/attach.) - *via e-mail*
Kathy Monzo, Assistant Administrator (w/attach.) - *via e-mail*
Linda S. McDermott, Clerk (w/attach.) - *via e-mail*
Robert V. Kiser, P.E., Princeton Engineer (w/attach.) - *via e-mail*
Brad Middlekauff, Esq. (w/attach.)

V:\USER\EDwin\PRTPW2013 Memo\Mayor & Council - Conflict of Interest Policy 040313.spd

PRINCETON MUNICIPALITY
CONFLICT OF INTEREST POLICY

(Approved by the Princeton Council on April 8, 2013)

PURPOSE

The purpose of this Conflict of Interest policy is to present a framework for addressing conflict of interest issues arising with respect to the Princeton municipality (“**Princeton**”) involving an elected official of Princeton (an “**Elected Official**”) or an employee of Princeton (an “**Employee**”).

As in any municipal government, conflicts of interest have arisen from time to time for Elected Officials and Employees of Princeton and will certainly arise in the future. This policy establishes a process for identifying, disclosing and addressing such conflicts so that, if a conflict of interest exists, decision-making can be performed by disinterested individuals.

This policy is intended to be complementary to the New Jersey Local Government Ethics Law, set forth at N.J.S.A. 40A: 9-22.1 et seq. It focuses on the actions of Elected Officials and Employees regarding potential decisions, agreements or relationships involving third parties and does not address other ethical issues that may overlap with conflict of interest issues, such as issues relating to the hiring or management of relatives, undertaking non-conflicted employment outside of the government, or the receipt of gifts, all of which are addressed in the Local Government Ethics Law. In the event of a conflict between this policy and the Local Government Ethics Law or any other relevant law (“**Applicable Law**”), the provisions of Applicable Law shall prevail.

GENERAL POLICY

Elected Officials and Employees are expected to make or participate in decisions and take actions in the course of their service or employment with Princeton based on the best interests of Princeton, and not based on financial or other personal gain unrelated to the best interests of Princeton. The procedure for dealing with conflicts of interest among such individuals is comprised of three steps:

1. Identification – identify conflicts of interest.
2. Disclosure – where a situation gives rise to a conflict of interest, disclose such conflict as described below.
3. Decision-making – once a conflict of interest has been identified and disclosed, apply procedures to provide for non- conflicted decision-making.

STEP ONE: IDENTIFICATION

The New Jersey Local Government Ethics Law provides that:

No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment .

For purposes of this policy, “immediate family” members include: an Elected Official’s or an Employee’s spouse, children, stepchildren and any other person sharing the same household with such Elected Official or Employee (other than a tenant or employee of such Elected Official or Employee).

As per the New Jersey Local Government Ethics Law, interests that could create a conflict of interest include not only financial interests. For example, if an individual has a direct affiliation with a not-for-profit organization or local citizens’ group, such affiliation could also create a conflict of interest.

New Jersey courts have indicated that the determination as to whether a conflict of interest exists is highly fact-specific and dependent on the circumstances¹. Furthermore, a conflicting interest does not require that the interest might actually influence the action of the individual, but only that the interest creates a potential for conflict.²

However, not all interests create a conflict of interest. The Supreme Court of New Jersey has noted,

Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said, ‘Universal distrust creates universal incompetence.’”³

Thus, when considering whether a conflict of interest exists, one commentator has noted, “An official may have an interest in the subject matter and still vote on the issue if that interest is not sufficient to exert undue influence on his or her decision”⁴.

¹ see Meyer v. MW Red Bank (2008)

² Ibid.

³ Wyzykowski v. Rizas (1993)

⁴ See Kole article, citing Hughes v. Monmouth University (2007)

In one recent case, a court opined that the standard to be applied when determining whether there is a conflict of interest for an elected official is whether a situation would lead a reasonably informed citizen to “expect that [the elected official’s] objectivity or independence of judgment” with respect to the decision before the governing body “would be impaired.”⁵

A broad definition of “conflict of interest” is set forth above. It is not possible to list all types of conflict of interest. Ultimately, it is the responsibility of each Elected Official and Employee to identify any situation of which he or she is aware that might be considered a conflict of interest, either with respect to (i) such Elected Official or Employee or (ii) any other Elected Official or Employee.

In the event an Elected Official or Employee is not sure if an actual or potential situation presents a conflict of interest, he or she should seek guidance from either (i) the duly appointed attorney for Princeton (the “**Princeton Attorney**”) or (ii) the New Jersey Local Finance Board in the Division of Local Government Services in the Department of Community Affairs (the “**Local Finance Board**”). In the event the Elected Official or Employee seeks guidance from the Princeton Attorney, the Princeton Attorney will provide such guidance consistent with Applicable Law and this policy, including the process set forth below under “Seeking Advice of Counsel or the Local Finance Board”. In the event the Elected Official or Employee seeks guidance from the Local Finance Board, the Local Finance Board will follow its own policies and procedures. If an Employee is seeking guidance pursuant to this paragraph, he or she should do so through the Princeton Administrator (the “**Administrator**”). When seeking guidance under this paragraph, the Elected Official or Employee shall describe all of the relevant facts and circumstances concerning the actual or potential conflict of interest to the Princeton Attorney or Local Finance Board, as applicable.

STEP TWO: DISCLOSURE

Elected Officials When an Elected Official identifies a conflict of interest pursuant to Step One above, he or she should promptly notify the Mayor, the Council President and the Princeton Attorney of such conflict of interest. The Mayor will, in turn, notify the Princeton Council of such conflict of interest or, if the Elected Official with the conflict of interest is the Mayor, the Council President will promptly notify the Princeton Council of such conflict of interest. It is recognized that sometimes an Elected Official may not realize that she or he has a conflict of interest on a given matter until such matter is actually before the Princeton Council. In all cases, an Elected Official shall provide notice of such conflict of interest as soon as she or he becomes aware of such conflict. Following disclosure of an Elected Official conflict of interest, decision-making will then occur as set forth below under “Step Three: Decision- Making”.

Employees When an Employee identifies a conflict of interest, he or she should follow the procedure set forth below:

⁵ See Mountain Hill, LLC v. Township Committee of Twp. Of Middletown (2008)

- If the Employee is an individual other than the Administrator, the Employee should promptly notify the Administrator in writing of such conflict of interest. The Administrator, in turn, will promptly notify the Princeton Council Personnel Committee (the “**Personnel Committee**”), the Princeton Attorney and, if applicable, the department head to whom such Employee ultimately reports, of such conflict of interest.
- If the Employee is the Administrator, he or she should promptly notify the Personnel Committee and the Princeton Attorney of such conflict of interest.

Following disclosure of an Employee conflict of interest, decision-making will then occur as set forth below under “Step Three: Decision-Making”.

General In all cases, the disclosure provided by the relevant Elected Official or Employee as described in this Step Two should indicate that a conflict of interest exists and indicate the entity or entities with respect to which the conflict of interest exists. Furthermore, in situations where a conflict of interest exists with respect to a given entity, conflicted Elected Officials and Employees should not recommend or introduce such other entity to other Elected Officials or Employees within the Princeton organization, or participate in discussions with other Princeton Elected Officials or Employees concerning such entity, without a clear disclosure to such other Elected Officials or Employees that a conflict of interest exists. In the event an Elected Official or Employee inadvertently fails to make a disclosure as required by this Step Two, but such Elected Official or Employee properly recuses herself or himself from all decision-making consistent with this policy and Applicable Law, such a technical violation of this Step Two shall not be deemed to be a general violation of this policy.

STEP THREE: DECISION-MAKING

Following appropriate disclosure as described above, decision-making with respect to matters involving a conflict of interest shall be handled as set forth below.

Decisions Requiring Elected Official Action

- If the proposed decision is of a nature that, in the absence of a conflict of interest, would require action by the Princeton Council, or one or more Elected Officials (including by a committee of Elected Officials, if applicable), the decision must be reviewed and approved by the Princeton Council or the Elected Officials (or by the applicable committee of Elected Officials, if applicable), following full disclosure about the facts and circumstances of the conflict of interest.

In each of the foregoing situations, the following rules shall apply:

- Any Elected Official conflicted by the decision shall abstain from voting on the matter.
- Approval of the decision must be obtained from a majority of disinterested Elected Officials on the Princeton Council or the applicable committee.

- The Mayor, the Council President or the chair of the committee, as appropriate, may require that all conflicted Elected Officials either (i) leave the room or (ii) leave the dais, in each case, for that portion of the Princeton Council meeting or committee meeting during which any discussion on the matter, as well as any vote on the matter, occurs. In the event the Mayor, the Council President or the chair of the committee is conflicted, any Elected Official present may require that the conflicted Elected Official either (x) leave the room or (y) leave the dais, in each case, for that portion of the Princeton Council meeting or committee meeting during which any discussion on the matter, as well as any vote on the matter, occurs.

Decisions by Employees

- If the decision at issue is one to be made by an Employee (and not the Elected Officials) and the individual with the conflict of interest is the Administrator, then the final decision on such matter will be made by the Princeton Council, or such committee as the Princeton Council shall designate, following full disclosure to the Princeton Council (or applicable committee) of the facts and circumstances of the conflict.
- If the decision at issue is one to be made by an Employee other than the Administrator (and not the Elected Officials), then the final decision will be made by the Administrator, following consultation with the Princeton Attorney or the Local Finance Board.

Day-to-Day Interactions and Decision-Making in the Ordinary Course of Business

- Certain relationships that create a conflict of interest for a given Elected Official or Employee may involve day-to-day interactions and decision-making for Employees. If the day-to-day decision-making at issue is in the ordinary course of business, then such decision-making may be made by a non-conflicted Employee of Princeton, consistent with any decisions or actions that have been approved in accordance with this policy and consistent with standard decision-making procedures in Princeton. In the event such non-conflicted Employee needs guidance from a supervisor who is conflicted, the non-conflicted Employee should consult with the Princeton Attorney to determine an appropriate avenue for obtaining nonconflicted guidance and decision-making.

General

In all of the foregoing situations where a matter is brought to the Personnel Committee, if a member of the Personnel Committee is conflicted under this policy, and after disqualifying such member from participating in any action with respect to the conflicted transaction there are fewer than two disinterested members of the Personnel Committee, the Mayor shall either appoint an additional disinterested Elected Official to act in such conflicted member's place or shall refer the matter to the full Princeton Council for decision-making in accordance with this policy. In taking any action delegated to it pursuant to this policy, the Personnel Committee may seek the advice of other Elected Officials, Employees, Princeton Council committees or outside advisors, so long as the final act is taken by the members of the Personnel Committee.

In the event that the Princeton Council, the Personnel Committee or, consistent with this policy, the non-conflicted decision-maker is made aware of a conflict of interest after a decision has been made by a conflicted decision-maker, the Princeton Council, the Personnel Committee or the non-conflicted decision-maker, as applicable under this policy, will review the decision and, after consultation with the Princeton Attorney or the Local Finance Board, determine the appropriate course of action.

SPECIAL SITUATIONS

Set forth below is specific guidance for some potential areas of conflict of interest that require special attention.

Outside Employment, Business, Consulting, Advisory or Board Relationships

Elected Officials and Employees should inform the Personnel Committee about any employment, business, consulting, advisory or board (such as a board of directors) relationship that such Elected Official or Employee (or member of such Elected Official's or Employee's immediate family) has with an entity (including a not-for-profit entity or a citizens' group) that presents a potential conflict of interest situation. In furtherance of this policy, Princeton will periodically, but no less frequently than once per year, conduct an inquiry of Elected Officials and Employees to determine the status of their (and their immediate family members') employment, business, consulting, advisory or board relationships. It is understood that certain of the foregoing information may be reported by Elected Officials on their state financial disclosure statements; to the extent responsive to the foregoing requirement, and so as to minimize the reporting burden on Elected Officials, such individuals may cross-reference their state financial disclosure statements when providing the foregoing information.

Investments in Entities with whom Princeton Has a Business Arrangement

Elected Officials and Employees may occasionally find themselves in a position to invest in entities with whom Princeton has a business arrangement. Elected Officials and Employees presented with such opportunities should understand that a conflict of interest may occur in these circumstances. The following guidelines are intended to cover such circumstances:

- Disclosure Elected Officials, Employees and their immediate families may not knowingly invest in entities with whom Princeton has a business arrangement without disclosure as set forth above under "Step Two: Disclosure". In a similar vein, if Princeton enters into a business arrangement with an entity and an Elected Official or Employee is aware that he or she has a pre-existing investment in such entity, the Elected Official or Employee should promptly make such disclosure as set forth above under "Step Two: Disclosure".
- Mutual Funds Investments in diversified, publicly traded mutual funds are not subject to this conflict of interest policy.

- Public Companies Investments representing not more than one percent (1%) of the total outstanding shares of a publicly held company are not subject to this conflict of interest policy.

Princeton University

Historically, and likely into the future, employees of Princeton University, or their immediate families, have become Elected Officials or Employees. As with other situations, there are no bright-line rules providing that such a situation would automatically create a conflict of interest for an Elected Official or an Employee. Rather, as noted above, under “Step One: Identification”, the determination of whether there is a conflict of interest is highly dependent on the particular facts and circumstances.

Given the complexities of making such a determination, if any Elected Official or Employee (or a member of her or his immediate family) is an employee of Princeton University (or any other institute of higher education located in Princeton), such Elected Official or Employee must seek guidance from the Princeton Attorney or the Local Finance Board as described in the last paragraph under “Step One: Identification” , above.

When rendering an opinion with respect to Princeton University pursuant to the framework below under “Seeking Advice of Counsel or the Local Finance Board”, the Princeton Attorney or the Local Finance Board, as applicable, shall determine whether a conflict of interest exists for a given Elected Official of Employee with respect to all matters concerning Princeton University or only with respect to a subset of matters concerning Princeton University .

Seeking Advice of Counsel or the Local Finance Board

Elected Officials and Employees should note that “if a municipal official seeks advice on a conflicts issue from the municipal attorney and certain conditions are met, such reliance can be a defense for the official against a claim of conflict.”⁶ These conditions are :

- The advice must be received prior to an action being taken ;
- The individual who offers the advice must possess authority or responsibility with regard to ethical issues;
- The individual seeking advice must make full disclosure of all pertinent facts and circumstances; and
- The individual must comply with the advice, including all the restrictions contained in it.

Accordingly, to the extent any Elected Official or Employee seeks advice from the Princeton Attorney pursuant to this policy :

⁶ As per Kole article, citing In re Zisa (2006)

- The Princeton Attorney shall issue a timely written opinion setting forth, at a minimum:
 - the pertinent facts and circumstances, as the Princeton Attorney understands them;
 - the Princeton Attorney's determination as to whether there is a conflict of interest for such Elected Official or Employee under this policy and Applicable Law and the rationale for such determination; and
 - if a conflict of interest does exist, any restrictions on such Elected Official or Employee as a result of such conflict of interest.
- If the Princeton Attorney determines that there is a conflict of interest, the Elected Official or Employee must comply with the foregoing restrictions.

To the extent any Elected Official or Employee seeks advice from the Local Finance Board pursuant to this policy, such Elected Official or Employee shall be bound by the determination of the Local Finance Board.

Presiding Over Proceedings

As one commentator has pointed out, "In one unreported Law Division case, the court held that the adoption of a zoning ordinance was invalid because the council president, who had a conflict, presided over the proceedings, even though he did not discuss or vote on the matter"⁷.

Accordingly, no Elected Official or Employee shall preside over a meeting (including a committee meeting) when such Elected Official or Employee has a conflict of interest.

Doctrine of Necessity

New Jersey conflicts of interest case law has established a "doctrine of necessity" principle that will "be invoked in those circumstances in which there is a pressing public need for action (that is, the matter cannot be laid aside until another date), there is no alternative forum which can grant the same relief and the body is unable to act without the members in conflict taking part."⁸ In the event the Princeton Attorney or the Local Finance Board opines that the doctrine of necessity principle applies, then the Elected Officials may act, consistent with such doctrine.

CONSEQUENCES OF VIOLATION

Violation of this policy by Elected Officials will be addressed consistent with Applicable Law. Violation of this policy by Employees could lead to disciplinary action, up to and including termination of employment.

⁷ As per Kole article, citing Beacon Hill Farm LLC v. Marlboro (2006)

⁸ Allen v. Toms River Regional Bd. of Educ. (1989)

REPORTS TO THE PRINCETON COUNCIL

The Princeton Attorney shall report to the Princeton Council at each meeting of the Princeton Council about any new conflicts of interest concerning any Elected Official, the Administrator or any department heads of Princeton that have arisen since the last report to the Princeton Council and how such conflicts were addressed in light of this policy.

PERIODIC REVIEW OF POLICY

From time-to-time, the Personnel Committee shall review this policy to insure conformity with Applicable Law and to consider whether any changes should be made to this policy in the best interests of Princeton. Following such review, if the Personnel Committee believes that any changes are appropriate, the Personnel Committee shall report such suggested changes to the Princeton Council.