

THE NEW JERSEY PLANNER

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Board Member Beware?

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The Far Reaching Scope of the Local Government Ethics Law's prohibition Against Members of Non-Advisory Boards and Commissions Acting on Behalf of Others before Municipal Boards, Commissions, Departments, or other Agencies.

Those who serve on a non-advisory municipal board or commission (*i.e.*, planning boards, zoning boards of adjustment, and historic preservation commissions) know that their actions are subject to the strictures of the Local Governmental Ethics Law ("LGEL"), *N.J.S.A. 40A:9-22.1 et seq.*, which establishes various ethical standards and other requirements that govern the conduct of local government officers and employees. The provision with which board members are likely the most familiar is *N.J.S.A. 40A:9-22.5d*, which bars a board member acting in any matter in which "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." Less often discussed, however, is *N.J.S.A. 40A:9-22.5h*, but it is one that board members and appointing authorities need to be aware of, because it can have a substantial impact on professionals (architects, engineers, attorneys) who serve on non-advisory boards and who also have clients in the municipality in which they serve.

N.J.S.A. 40A:9-22.5h ("subsection h") states that "[n]o local government officer or employee or business organization in which he has an interest shall represent any person or party other than the local government in connection with any cause, proceeding, application or other matter pending before any agency in the local government in which

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Mandatory

<u>Date</u>	<u>County</u>	<u>Location</u>
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May 6	Essex	Kessler Institute, West Orange

Experienced

<u>Date</u>	<u>County</u>	<u>Location</u>
May 6	Essex	Kessler Institute, West Orange

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he serves." At its most obvious, this provision means that an attorney who serves on the municipal zoning board of adjustment cannot then represent an applicant before that municipality's planning board. What might come as more of a surprise is that this provision would also bar an architect or contractor who serves on a zoning board from testifying for a client in front of the planning board, or even from applying for a building permit on behalf of a client.

In 1991, the New Jersey Attorney General ("AG") issued an opinion that addressed the scope of subsection h, specifically, "whether the prohibition of representation extends only to members of the legal profession or whether it also extends to other professionals such as a professional engineer or an architect." *Attorney General Opinion No. 91-0135* (Nov. 1, 1991). The Attorney General stated that

... the prohibition in the Local Government Ethics Law is broader than representation in proceedings before local government agencies. Also, prohibited are representation in any cause, application, or other matter pending before any agency in the local government.

THE NEW JERSEY PLANNER

THE NEW JERSEY PLANNING OFFICIALS

The statute does not merely prohibit representation in legal proceedings in which an attorney would be necessary to provide such representation. Indeed, it is not unusual for professionals, other than attorneys, to submit applications and documents to local government agencies on behalf of another for planning board approval, for zoning approval, for a construction permit, or for a variety of other local required approvals. ... Undoubtedly, there are other examples where a professional, other than an attorney, will act on behalf of the

applicant to submit an application to a local government agency, to resolve any questions or difficulties associated with the application, or to represent an individual in his dealing with local government officials.

The Attorney General concluded that "the prohibition of representation is not restricted to only members of the legal profession. Rather, it extends to local government officers and employees *who stand in the place of another* regarding any cause, proceeding, application, or another matter pending before any agency in the local government the officer or employee serves." (Emphasis added).

This opinion was followed by the Local Finance Board ("LFB") in 1994 in *Bleeker v. Local Finance Bd.*, 94 N.J.A.R.2d (CAF) 122, 1994 WL 702292 (Sept. 9, 1994), *aff'd*, *Bleeker v. Dep't of Community Affairs*, 96 N.J.A.R.2d (CAF) 107, 1996 WL 784183 (App. Div. Sept. 4, 1996). There, the LFB issued a finding that Bleeker - a member of the North Haledon Borough Council and the president of a construction company - violated subsection h because while he was a member of the Borough Council of North Haledon he represented a couple as a project manager for construction of their house before the North Haledon Borough engineer and construction official in matters related to the construction of their house. The Appellate Division affirmed the LFB's finding that in doing so, Bleeker violated subsection h. As described by the court, "Bleeker entered into a contract with the DiPianos which, in part, called for him to act in a representative capacity before borough inspectors. On three occasions, Bleeker addressed the municipal engineer on behalf of the DiPianos with regard to a disputed application. On the application, his name appeared as the 'Person in Charge of Operation.'" The court held that pursuant to the 1991 Attorney General opinion, "[t]hese activities constitute 'representation' contrary to N.J.S.A. 40A:9-22.5h."



THE NEW JERSEY PLANNING OFFICIALS

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Consistent with the court's decision in *Bleeker*, the Office of Administrative Law in 2002 found that Frank Raucci, a member of the Leonia Zoning Board of Adjustment who was also a local contractor, violated subsection 22.5h when he applied for and signed building permits on behalf of a private client and appeared before the Leonia Planning Board to speak for his client on a matter. See *Raucci v. Local Finance Bd.*, 2002 WL 833305 (N.J. Adm. Apr. 9, 2002). There, the Administrative Law Judge ("ALJ") concluded that

Raucci's activities ... fall within the ambit of N.J.S.A. 40A:9-22.5(h). Indeed, unlike *Bleeker* where the official was simply designated as the person in charge of the operation on a soil movement application signed and submitted by the homeowners, Raucci submitted and signed the permit application in issue as "agent" of the owner. Accordingly, Raucci was clearly "standing in the place" of his client with regard to a "cause, proceeding, application or other matter pending" before the municipal building department. Such action cannot reasonably be said to be devoid of representative aspects.¹

It is important to note that in *Raucci*, "nothing in the record suggest[ed] that Raucci attempted to utilize his position to obtain an unwarranted privilege or advantage for himself or his client[,]" and "the record [was] devoid of evidence that Raucci's integrity was in any way compromised and that his actions were other than an innocent oversight." This made no difference, however, to the question of whether he had violated subsection h (although it did result in the ALJ imposing the minimum \$100 fine for the violation).

¹ The LFB had also charged Raucci with violating subsection 22.5h by hand-delivering to the Construction Official a permit application signed by his clients, discussing that application with the Construction Official, and later collecting the permits from the Construction Official on behalf of his clients. The ALJ, however, found that there was insufficient evidence in the record to support the violation. Nevertheless, board and commission members should be cautious about discussing their clients' matters with municipal staff and officials.

What the above means is that individuals who serve on a non-advisory board or commission (planning board, zoning board, historic preservation commission) must be careful not to act on behalf of private clients before *any* municipal agency. This includes appearing on behalf of a client before any of the municipality's boards or commissions, not just the specific board or commission on which they serve; engaging with municipal staff on behalf of their clients; and signing and submitting permit applications on behalf of their clients. (Less clear is whether an architect board member could still prepare and sign architectural plans, as long as he or she did not act on behalf of the client).

Lastly, the proscriptions of subsection h do not apply to individuals who serve on purely advisory bodies. The LGEL also does not prohibit board and commission members "from making an inquiry for information on behalf of a constituent, if no fee, reward or other thing of value is promised to, given to or accepted by the officer or a member of his immediate family . . . in return therefor[,]" and it does not "prohibit any local government officer or employee, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests." N.J.S.A. 40A:9-22.5j and -22.5k.

N.J.S.A. 40A:9-22.5h can have a significant impact on the activities of architects, engineers, contractors, attorneys, and other professionals who serve on non-advisory boards and commissions, so it is important that both they and the municipal appointing authorities be familiar with its provisions. Board members with specific questions should consult their board attorney. They can also seek advice directly from the Local Finance Board: under the LGEL, any local government officer or employee can ask the LFB for an advisory opinion as whether a given activity would, in the LFB's opinion, constitute a violation of the Local Government Ethics. The LFB's advisory opinions are normally confidential (they can only be made public by a two-thirds vote of the entire LFB membership), and even public

THE NEW JERSEY
PLANNER
THE NEW JERSEY PLANNING OFFICIALS

advisory opinion are not to disclose the name of the individual who requested the opinion unless the board so directs. Insofar as the LFB is the body responsible for enforcing the LGEL, board members could be well served by asking the LFB for written guidance. ❧

