



## **NEW JERSEY LAW REVISION COMMISSION**

### **Final Report Regarding the Mens Rea Required to Violate the Local Government Ethics Law**

**May 20, 2021**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes to determine the law of the State.

Please send comments concerning this Report or direct any related inquiries, to:

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## **Project Summary<sup>1</sup>**

The Local Government Ethics Law (LGEL) was enacted to provide local government officials and employees with uniform, state-wide ethical guidance.<sup>2</sup> To further this objective, a code of ethics (the “Code”) was enacted within the LGEL.<sup>3</sup>

In *Mondsini v. Local Fin. Bd.*,<sup>4</sup> the Appellate Division considered whether the Executive Director of a regional sewerage authority, in the wake of an epic storm emergency caused by Super Storm Sandy, violated the LGEL section prohibiting the use of one’s official position to secure unwarranted privileges. N.J.S. 40A:9-22.5 does not clearly state whether a violation of the statute may be predicated on public perception of impropriety, or whether a violation requires proof that the public official intended to use their office for a specific purpose.

The Commission recommends modification of the statutory code of ethics for local government officers and employees under the jurisdiction of the Local Finance Board to make it clear that a violation of N.J.S. 40A:9-22.5 must be predicated upon proof that the public official intended to use the office to secure unwarranted privileges or advantages for him or herself.

### **Relevant Statute**

The code of ethics for local government officers and employees under jurisdiction of Local Finance Board, as set forth in N.J.S. 40A:9-22.5, provides, in relevant part:

Local government officers or employees under the jurisdiction of the Local Finance Board shall comply with the following provisions:

\* \* \*

c. No local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others;

\* \* \*

### **Background**

Joanne Mondsini assumed her role, Executive Director of the Rockaway Valley Regional Sewerage Authority (the Authority), the month before Super Storm Sandy struck New Jersey.<sup>5</sup> As a result of that storm, the Authority lost electrical power and was forced to maintain its operations through the use of diesel-powered generators.<sup>6</sup> If those generators stopped working, millions of

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<sup>1</sup> Preliminary work on this project was performed by pro bono volunteers with the NJLRC, Mark R. Mikhael and Nicholas Tharney.

<sup>2</sup> N.J. STAT. ANN. § 40A:9-22.1 *et seq.* (West 2020).

<sup>3</sup> See N.J. STAT. ANN. § 40A:9-22.5 (West 2020).

<sup>4</sup> *Mondsini v. Local Fin. Bd.*, 458 N.J. Super. 290 (App. Div. 2019).

<sup>5</sup> *Id.* at 294.

<sup>6</sup> *Id.*

gallons of untreated sewerage would have been discharged into the Rockaway River.<sup>7</sup>

To keep the generators running, Mondsini required a number of Authority employees to report to work during the storm.<sup>8</sup> As a result of the statewide gasoline shortage, she authorized several employees to fuel their personal vehicles using an Authority gasoline pump so that they could report to work.<sup>9</sup> She also asked a member of the Authority's Board of Commissioners to "commandeer a gas station... to supply gas to the Authority's essential personnel, and obtain food from restaurants that might be open to feed Authority personnel on site."<sup>10</sup> Unbeknownst to Mondsini, the Commissioner fueled two personal vehicles with the Authority's gasoline.<sup>11</sup> At the next Board meeting, Mondsini advised the Commissioners of the actions she had undertaken to avoid the potential crisis.<sup>12</sup>

Based on a complaint to local law enforcement by an unknown informant, the Local Finance Board (LFB) found that Mondsini violated subsection c. of N.J.S. 40A:9-22.5.<sup>13</sup> The LFB assessed, and simultaneously waived, a \$100 fine against Mondsini, who appealed the matter to the Office of Administrative Law as a contested case.<sup>14</sup>

The Administrative Law Judge concluded that Mondsini had not violated the LGEL.<sup>15</sup> He reasoned that "a violation of subsection c. requires the showing of intent."<sup>16</sup> Finding that Mondsini's "sole intent was to keep the plant up and running during a crisis... she acted prudently" and not to secure unwarranted privileges or advantages for herself or others.<sup>17</sup> Ultimately, the LFB reinstated the violation and penalty, but waived its enforcement.<sup>18</sup> Mondsini appealed the LFB's decision.<sup>19</sup>

### Analysis

The New Jersey Legislature has long recognized that the "vitality and stability of representative democracy depend upon the public's confidence in the integrity of its elected and appointed representatives" and that "[w]henever the public perceives a conflict between the private interests and the public duties of a government officer or employee, that confidence is imperiled."<sup>20</sup> The LGEL "demands that an officeholder discharge [his or her] duties with undivided loyalty."<sup>21</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 295.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 295.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 295-296.

<sup>15</sup> *Id.* at 296.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> N.J. STAT. ANN. § 40A:9-22.2 (West 2020). See *Grabowsky v. Twp. of Montclair*, 221 N.J. 536, 552 (2015).

<sup>21</sup> *Macdougall v. Weichert*, 144 N.J. 380, 401 (1996).

To further the purposes of the LGEL, the Legislature adopted a statutory code of ethics (the Code).<sup>22</sup>

The Code prohibits seven specific forms of conduct.<sup>23</sup> In *Mondsini*, the Appellate Division focused on whether or not the conduct prohibited in subsection c. of N.J.S. 40A:9-22.5 “requires a showing that the use or attempted use of one’s public position be for a specific purpose of securing an ‘unwarranted’ privilege or advantage for the officer or some other person.”<sup>24</sup> To ascertain the intent or purpose of the Legislature when it drafted subsection c., the Court reviewed the language of contemporaneously-enacted statutes.<sup>25</sup>

Within the Code, two subsections require that public officials act with a specific purpose before they may be found to have violated the public’s trust. A government official or employee is prohibited, pursuant to subsection f. of N.J.S. 40A:9-22.5, from soliciting or accepting things of value based upon an understanding that it was given or offered **for the purpose of** influencing the discharge of his or her duties.<sup>26</sup> In addition, subsection g. prohibits an official’s use of insider information “**for the purpose of**” securing financial gain.<sup>27</sup>

Unlike subsections f. and g., the words “for the purpose of” are not used in subsection c. of the Code. Instead, subsection c. prohibits the “use” or “attempted use” of one’s public office to secure unwarranted privileges or advantages.<sup>28</sup> The Appellate Division reasoned that “the Legislature’s decision to proscribe an official’s **attempted**, albeit unsuccessful, use of his or her office to secure unwarranted privileges or advantages” confirms that a violation of section c. requires proof that the public official intended to use their office for a specific purpose.<sup>29</sup>

Rejecting the argument that the public perception of impropriety can serve as the basis for a violation of subsection c., the *Mondsini* Court concluded that “a public official or employee only violates [subsection c.] if she uses or attempts to use her official position **with the intent** to secure unwarranted advantages or privileges for herself or another [emphasis added].”<sup>30</sup>

## Outreach

The Commission sought comments regarding this project from several knowledgeable individuals and organizations, including: the New Jersey Office of the Attorney General; the Department of Community Affairs, Local Finance Board; the New Jersey Association of Counties; the League of Municipalities; the New Jersey State Bar Association; the New Jersey Municipal

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<sup>22</sup> *Mondsini*, 458 N.J. Super. at 299.

<sup>23</sup> N.J. STAT. ANN. § 40A:9-22.5 at § (a) and §§ (c) through (h).

<sup>24</sup> *Mondsini*, 458 N.J. Super. at 299.

<sup>25</sup> *Id.* at 302.

<sup>26</sup> *Id.* [emphasis added]; N.J. STAT. ANN. § 40A:9-22.5 subsection (f).

<sup>27</sup> *Id.* [emphasis added].

<sup>28</sup> N.J. STAT. ANN. § 40A:9-22.5 at § (c),.

<sup>29</sup> *Mondsini*, 458 N.J. Super. at 305.

<sup>30</sup> *Id.*

Management Association; the New Jersey Institute of Local Government Attorneys; the Municipal Clerk’s Association of New Jersey; and several private practitioners.

*In Support*

“Although the Appellate Division has read the “intent standard” into subsection [c.] [of N.J.S. 40A:9-22.5,] the better course would be to remove any doubt and make the intent standard explicit.”<sup>31</sup> According to one responding stakeholder, there are a number of reasons why the intent standard “is [a] more realistic and workable than a standard based on potential public perception or even a negligence standard.”<sup>32</sup> These reasons are summarized below.

First, “a standard based on public perception, or even ‘potential’ public perception… would be a standard based on a public that likely would have incomplete or inaccurate information regarding the situation.”<sup>33</sup> In *Mondsini*, the “public perception” was that a board member was allowed to fuel his personal vehicle with RVRSA fuel.<sup>34</sup> The fact that the fueling of the vehicle was authorized as part of a strategy to avert catastrophic consequences is of no moment under the “public perception” standard. Such a standard would “cause… a government official to be judged not based on the factual situation… but on the public[’s] perception drawn from…” incomplete facts.<sup>35</sup>

Next, a standard based on public perception “invites undue hesitancy… among government officials” in critical situations.<sup>36</sup> Such a standard would require governmental officials to “consider how members of the public might “perceive” [their] actions” thereby limiting the actor’s ability to respond in a timely manner.<sup>37</sup> It is suggested that, “[a] governmental official who is required to evaluate every decision based on whether the public could ‘potentially perceive’ that an unwarranted benefit is granted, or risk being found to have engaged in unethical conduct … will hesitate to act even in the most critical of situations.”<sup>38</sup> Such reticence is not in the public interest.<sup>39</sup>

Furthermore, a standard that is not based on intent may lead to governmental officials being wrongfully being punished for acts that they did not commit.<sup>40</sup> In *Mondsini*, the Executive Director authorized a board member to use public fuel for a specific purpose.<sup>41</sup> Despite the board member having exceeded the scope of the permission granted by the Executive Director, under the “public perception” standard, the Executive Director would be deemed to have acted unethically.<sup>42</sup> Further, such a standard would allow “[d]isgruntled employees or political opponents [to] easily pursue

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<sup>31</sup> Letter from Stephen E. Trimboli, Esq., in his individual capacity, to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission \*4 (Mar. 26, 2021) (on file with the NJLRC).

<sup>32</sup> *Id.* at \*2.

<sup>33</sup> *Id.* at \*2.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at \*3.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* See *Mondsini*, 458 N.J. Super. at 295 and discussion *supra* at 3.

<sup>42</sup> See Trimboli, *supra* note 31 at \*3.

ethics charges against disfavored government officials or political opponents by alleging that the officials engaged in conduct that could be perceived as granting unwarranted benefits.”<sup>43</sup>

Finally, it was suggested that neither a negligence standard nor a public perceptions standard is appropriate in this context.<sup>44</sup> A negligence standard is used to hold tortfeasors financially liable for harm caused by honest mistakes and misjudgments.<sup>45</sup> By contrast, ethics statutes exist to “prevent and punish unethical conduct, not to make injured parties whole.”<sup>46</sup> Such a standard is inappropriate in instances where a government official makes an honest mistake in good faith.<sup>47</sup> Similarly, the public perception standard is readily applied to situations involving conflicts of interest which are “readily identifiable situations in which it is reasonable to conclude that a government official’s loyalties would be divided,” unlike instances involving unwarranted benefits which are evaluated after the completion of the act.<sup>48</sup>

### *In Opposition*

The Local Finance Board (“Board”) responded to Commission outreach and stated that “revising N.J.S.[ ] 40A:9-22.5(c) is improper at this time.”<sup>49</sup> The Board recognized that the proposed modifications “would make Section 22.5(c) more consistent with other provisions of the Local Government Ethics Law... that require some form of intent...” but said that “such changes would undercut the intended meaning of the law.”<sup>50</sup> The Board suggested that “[h]ad the Legislature intended to require intent in the manner discussed in *Mondsini*, it would have included the language of Sections 22.5(f) and (g) in Section 22.5(c).”<sup>51</sup>

Although the *Mondsini* decision is a published decision issued by the Superior Court, Appellate Division, the Board “does not believe that it is necessary or appropriate to modify a statute on the basis of a single decision, particularly when that decision is only from the Appellate Division and not the Supreme Court.”<sup>52</sup> Further, the Board stated that “until the Supreme Court decides the issue, the statute remains subject to a different interpretation by another Appellate panel or the Supreme Court.”<sup>53</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 4.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Letter from Jacquelyn A. Suárez, Chair, Local Finance Board, to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission \*1 (Apr. 26, 2021) (on file with the NJLRC).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* Compare *But see Mondsini*, 458 N.J. Super. at 304-305 and discussion *supra* at 4 (“the Legislature’s decision to proscribe an official’s attempted, albeit unsuccessful, use of his or her office to secure unwarranted privileges or advantages” confirms that a violation of section c. requires proof that the public official intended to use their office for a specific purpose.”)

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 2.

The Board also expressed concern that “[a] change in the law based upon the ruling in *Mondsini* could result in local government officials being more inclined to take prohibited action under the guise of necessity.”<sup>54</sup>

### **Conclusion**

Subsection c. of the N.J.S. 40A:9-22.5 does not set forth the standard the Local Finance Board or a reviewing court must use to determine whether a government official has violated the Local Government Ethics.

The Appendix that follows sets forth a proposed modification of subsection c. of N.J.S. 40A:9-22.5 to make it clear that a violation of this subsection requires proof that the public official intended to use his public office to secure unwarranted privileges or advantages for himself or others.

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<sup>54</sup> See Suárez, *supra* note 49 at \*2 (citing *Fazen v. Local Fin. Bd.*, No. CFB 01750-19 at \*16 (Feb. 22, 2021) in which the Administrative Law Judge found no exigent circumstances permitting a mayor to issue 30 free parking permits to a school without a legally required vote by the Borough Council despite the fact that school was going to start before the meeting took place).

## Appendix

The relevant text of N.J.S. 40A:9-22.5, including proposed modifications (proposed additions are show with underscore, and proposed deletions with ~~strikethrough~~), follows:

\* \* \*

c. No local government officer or employee shall use or attempt to use his, or her, official position ~~for the purpose of to secure~~ securing unwarranted privileges or advantages for himself, herself, or others;...

\* \* \*

### Comments

The Commission considered a proposed modification to the language based upon the decision of the Appellate Division in *Mondsini v. Local Fin. Bd.*, 458 N.J. Super. 290, 302 (App. Div. 2019). Ultimately, the Commission chose to parallel the “for the purpose” language found in subsections f. and g. of this statute.

#### **For Reference – subsections f. and g. of N.J.S. 40A:9-22.5**

\* \* \*

f. No local government officer or employee, member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered **for the purpose of influencing him**, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the local government officer has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the local government officer in the discharge of his official duties....

g. No local government officer or employee shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, **for the purpose of securing financial gain for himself**, any member of his immediate family, or any business organization with which he is associated.... [emphasis added].

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