



## NEW JERSEY LAW REVISION COMMISSION

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

**January 21, 2021**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **March 22, 2021**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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

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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.*

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

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

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<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).

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

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>

### Conclusion

The Commission is seeking input from knowledgeable individuals to assist in determining whether it would be appropriate to modify N.J.S. 40A:9-22.5 as shown in the Appendix on the following page to make it clear that governmental actors only violate subsection c. if they intentionally use or attempt to use their official position improperly pursuant to the decision of the Court in *Mondsini v. Local Fin. Bd.*

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<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].

<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.*

## 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 ~~striketrough~~), 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 proposed modifications in this option are based upon the decision of the Appellate Division in *Mondsini v. Local Fin. Bd.*, 458 N.J. Super. 290, 302 (App. Div. 2019) and parallel the “for the purpose” language found in subsections f. and g. of this statute.

## For Reference

[...] 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).