

**To:** New Jersey Law Revision Commission  
**From:** Samuel M. Silver, Deputy Director  
**Re:** *Mens Rea Required to Violate the Local Government Ethics Law*  
as discussed in *Mondsini v. Local Fin. Bd.*, 458 N.J. Super. 290 (App. Div. 2019).  
**Date:** December 07, 2020

## MEMORANDUM<sup>1</sup>

### Executive Summary

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.

### 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

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<sup>1</sup> Preliminary work on this project was performed by Nicholas Tharney as a pro bono volunteer with the NJLRC.

<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 (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>

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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>

## Conclusion

Staff seeks authorization to conduct additional research and outreach to ascertain whether it would be appropriate to modify N.J.S. 40A:9-22.5 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>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].

<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.*