

IT'S IN THE CARDS: ETHICAL CONSIDERATIONS IN LAND USE FOR LAWYERS AND CLIENTS

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§ 6.01 Introduction

A recent article on the Vallejo Times Herald reported that where four of the five council members had a potential conflict of interest regarding the hiring of a consultant to help with the drafting of a zoning ordinance, and where the city attorney knew that action could not be taken pursuant to a vote of only one member, absent a statutory solution to this type of common occurrence in municipalities across the country, the answer was to draw cards.¹ By drawing cards from a deck shuffled by the city clerk, the two members who drew the highest value cards would be “excused” from their identified conflict of interest since

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¹ Sarah Rohrs, “Benicia Council Draws Cards to Determine Voters,” Vallejo Times Herald (August 3, 2006).

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the business before the board had to go on with a quorum eligible to vote.² The Fair Political Practices Commission in California approves of this method since it is random,³ and courts in other states such as New Jersey apply the “Rule of Necessity” to allow, and even require, board members who have conflicts of interest to vote when doing otherwise would result in the municipality’s inability to review and decide on an application.⁴ These solutions, while perhaps practical, do not address the public perception of ethical conduct in land use decisionmaking, nor do they further the concepts of public trust and integrity in government.

There are many players in the land use game. While each may be subject to a common set of ethical rules and standards set by statute, local law or common law, many of these players may be subject to rules and regulations set by their licensing or professional organizations.⁵ Understanding the ethical principles, laws, regulations, and guidance of all of the participants in the land use process is essential. For example, the conduct of attorneys, acting as such, is subject to the applicable Rules of Professional Conduct as well as state and local ethics rules when the attorney is acting in a governmental capacity providing advice and counsel to a land use decision making body. Other codes guide the conduct of architects,⁶ engineers,⁷ professional public managers,⁸ realtors,⁹ and others involved in the planning and zoning decision making arena. Professional planners who are members

² Id.

³ Id.

⁴ *Gunther v Planning Bd. of Borough of Bay Head*, 335 N.J. Super. 452, 762 A 2d 710 (Law Div. 2000).

⁵ For a general discussion see, Patricia E. Salkin, “Examining Land Use Planning and Zoning Ethics from a Planner’s Perspective: Lessons for All Stakeholders in the Real Estate Game,” 34 *Real Estate L.J.* 508 (Spring 2006).

⁶ <http://www.aia.org/SiteObjects/files/codeofethics.pdf> (site visited November 2006).

⁷ American Society of Civil Engineers Code of Ethics available at: <http://www.asce.org/inside/codeofethics.cfm> (site visited November 2006); National Society for Professional Engineers Code of Ethics available at: <http://www.nspe.org/ethics/eh1-code.asp> (site visited November 2006).

⁸ <http://www.icma.org/main/topic.asp?tpid=25&stid=118&hsid=1> (site visited November 2006).

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of the American Institute of Certified Planners (AICP) are subject to the recently amended AICP Code of Ethics.¹⁰

Allegations of conflicts of interest in land use decision making are routine. A monthly scan of newspapers from across the country consistently yields a wealth of scenarios where one or more of the players in the land use game has been accused of, or has disclosed, a conflict of interest. In addition, annual surveys of reported cases involving allegations of unethical conduct in land use decisionmaking are rich with examples of questionable conduct or behavior.¹¹ Effective lawyering in the land use game requires attorneys to be conversant with all dimensions of the critical ethical issues, legal and non-legal, that can arise in this context, to be able to develop a matrix or framework for not just monitoring ethics and professionalism of land use lawyers, but for being able to provide effective legal counsel to clients in this context.

§ 6.02 Statutory Approaches to Conflicts of Interest for Members of Planning and Zoning Boards**[1] Background**

Zoning or planning boards and commissions consist of residents of the community who are appointed to make decisions in the best interests of the community as a whole. At times, these decisions may be controversial, with large sums of money at stake, potential impacts on the environmental and public health concerns and general quality of

⁹ <http://www.realtor.org/mempolweb.nsf/pages/printable2006Code> (site visited November 2006).

¹⁰ <http://www.planning.org> (site visited November 2006).

¹¹ For example, see the following articles by the author: "Land Use Ethics Update 2005: Conflicts of Interest, Improper Conduct and Other Ethical Considerations," 28 Zoning & Planning Law Report 1 (March 2005); "A Woody Allen Movie, Show Me the Money and Other Ethical Considerations in Land Use Planning," 27 Zoning & Planning Law Report (March 2004); "Ethics Allegations in Land Use Continue to Fill the Court Dockets," 26 Zoning & Planning Law Report (April 2003); "Litigating Ethics Issues in Land Use: 2000 Trends and Decisions," 24 Zoning & Planning Law Report (April 2001); "Municipal Ethics Remain a Hot Topic in Litigation: a 1999 Survey of Issues in Ethics for Municipal Lawyers," 14 BYU J. Pub. L. 209 (2000); and "1998 Survey of Ethics in Land Use Planning," 22 Zoning and Planning Law Report (April 1999).

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life issues raised by community members. The mere fact that a board member resides in close proximity to the property that is the subject of an application before the board, that a board member has some personal or professional relationship with the applicant, or that a member of the board member's family may have some relationship to the applicant, can all lead to allegations of unethical conduct should the member participate in workshops, hearings, deliberations and/or voting on the application.

Recent news accounts reveal the following allegations of conflicts of interest involving land use planning decisions: in Alabama a suit was filed against a zoning board and its chairman, claiming that the chairman had a conflict of interest because he voted in a matter despite his membership in a church that was one of the parties in that same matter;¹² in Rhode Island, a recent ethics opinion determined that where a member of a zoning board is represented by an attorney in a personal matter, the board member must recuse himself from any matters before the board in which his personal attorney appears on behalf of an applicant;¹³ a recent application before a Massachusetts zoning board of appeals for a special use permit to expand a hospital emergency room drew allegations of unethical conduct after the district attorney's office ruled that two selectmen violated the state's Open Meetings Law when trying to resolve residents concerns and where certain appointing officials had close ties to principals running the hospital and the hospital foundation;¹⁴ and in another Rhode Island situation, a zoning board has delayed hearing a matter for more than a month because three members of the seven member zoning board informed the city solicitor for zoning issues that they had a potential conflict of interest and the law requires five participating members to make a decision.¹⁵

These only begin to scratch the surface of the daily challenges

¹² Birmingham News, June 21, 2006.

¹³ Rhode Island Lawyers Weekly Staff, "State Ethics Commission Case Summaries: October 23, 2006," R.I. Law Wkly (10/23/06), 2006 WLNR 18515367.

¹⁴ L.E. Campenella, "Zoning Board Members Deny Favoritism," Patriot Ledger at 9 (10/4/06), 2006 WLNR 18099304.

¹⁵ Staff, "2 Zoning Board Members Cite Conflict on Cullion Issue," Providence J. Bull. (10/5/06), 2006 WLNR 176268963.

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confronting land use lawyers who must advise clients about whether a conflict of interest exists. Clear rules articulated in state statutes are needed to guide appropriate analysis, yet less than half of the states have enacted laws to deal specifically with conflicts of interest on zoning or planning boards. While each state has adopted a state ethics law, in a majority of states, these laws cover only state-level employees. Typical municipal ethics laws in many states fail to specifically reference or cover the types of activities that may arise in the land use context, focusing instead on elected officials and employees. What follows is a summary of applicable statutes.

[2] Financial Conflicts of Interest

Financial conflicts of interest — where a board member or a member of their immediate family may personally benefit in a monetary sense — may be the most obvious example of situations in which a board member should not participate in discussions and action on the matter before the board. In New Jersey, “No member of the planning board shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest.”¹⁶ Determining exactly what would encompass a direct or indirect financial interest is left to the courts. A pair of cases arising out of New Jersey in 1998 presenting interesting facts regarding board members and their parents yielded opposite conclusions. In one situation, a board member voted on the siting of a shopping center to be located near where his elderly parents resided, and neighbors opposed to the project alleged the board member had a conflict of interest because if the shopping center were to be sited, the board member would not have to do the grocery shopping for his parents.¹⁷ The Court found no prohibited conflict of interest and noted that there was no evidence that the board member even did grocery shopping for his parents.¹⁸ Yet in another case involving an elderly parent, the court found a prohibited conflict of interest where a board member voted on a variance request that would impact his 83-year-old mother’s commercial interest in a strip mall based upon the “potential for psychological influences” because his

¹⁶ N.J.S.A. 40:55D-23(b).

¹⁷ *Lincoln Heights Ass’n v Township of Cranford Planning Board*, 714 A.2d 995 (N.J. Super. Ct. Law Div. 1998).

¹⁸ *Id.*

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mother needed the income to subsist.¹⁹

The statute governing subdivision law in Texas provides in part that, “If a member of the municipal authority responsible for approving plats has a substantial interest in a subdivided tract, the member shall file, before a vote or decision regarding the approval of a plat for the tract, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter.”²⁰ While “substantial interest” is defined in statute as a person who: (1) has an equitable or legal ownership interest in the tract with a fair market value of \$2,500 or more; (2) acts as a developer of the tract; (3) owns 10 percent or more of the voting stock or shares of or owns either 10 percent or more or \$5,000 or more of the fair market value of a business entity that: (A) has an equitable or legal ownership interest in the tract with a fair market value of \$2,500 or more; or (B) acts as a developer of the tract; or (4) receives in a calendar year funds from a business entity described by Subdivision (3) that exceed 10 percent of the person’s gross income for the previous year,²¹ no guidance is provided as to what happens after the member is disqualified.

Similarly, an Indiana statute prohibits a member of a board of zoning appeals from participating in any proceeding where that member has a direct or indirect financial interest.²² An Idaho statute provides more detail, stating that a member or employee of a “governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business associate, or any other person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action.”²³ New Hampshire law goes a step further, providing that, “No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, or historic district commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a

¹⁹ *Care of Tenafty v Tenafty Zoning Bd. of Adjustment*, 704 A.2d 1032 (N.J. Super. Ct. App. Law Div. 1998).

²⁰ V.T.C.A. Local Government Code § 212.017.

²¹ *Id.*

²² *See* Indiana § 36-7-4-909.

²³ I.C. § 67-6506.

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judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.”²⁴ Moreover, the statute provides for a vote on the question of whether a member should be disqualified when uncertainty arises.²⁵

[a] Disclosure of Financial Conflicts of Interest

Kentucky requires disclosure of a financial conflict of interest. The statute provides that, “Any member of a planning commission who has any direct or indirect financial interest in the outcome of any question before the board shall disclose the nature of the interest and shall disqualify himself from voting on the question, and he shall not be counted for the purpose of a quorum.”²⁶ Virginia law not only requires members of zoning boards of appeal to disclose any business or financial relationship that the member may have in a given matter, it also requires the member to disclose a business or financial relationship that member has had within the 12-month period prior to such hearing.²⁷ This disclosure applies to relationships the member has had with the applicant in such case or with the title owner or lessee of the land that is the subject of the application.²⁸ A “business or financial

²⁴ N.H. Rev. Stat. § 673:14(I).

²⁵ N.H. Rev. Stat. § 673:14(II).

²⁶ KRS § 100.171(1).

²⁷ Va. Code Ann. § 15.2-852(A).

²⁸ Id. The language provides: “For the purpose of this subsection, “business or financial relationship” means any relationship (other than any ordinary customer or depositor relationship with a retail establishment, public utility or bank) such member, or any member of the member’s immediate household, either directly or by way of a partnership in which any of them is a partner, employee, agent or attorney, or through a partner of any of them, or through a corporation in which any of them is an officer, director, employee, agent or attorney or holds 10 percent or more of the outstanding bonds or shares of stock of a particular class, has, or has had within the 12-month period prior to such hearing, with the applicant in the case, or with the title owner, contract purchaser or lessee of the subject land, except, in the case of a condominium, with the title owner, contract purchaser, or lessee of 10% or more of the units in the condominium, or with any of the other persons above specified. For the purpose of this subsection “business or financial relationship” also means the receipt by the member, or by any person, firm, corporation or committee in his behalf from the applicant in the case or from the title owner, contract purchaser or lessee of the subject land, except,

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relationship” is defined in detail in the statute.²⁹

Georgia law provides that local government officials, including planning and zoning board members, who knew or reasonably should have known they have a financial interest in any real property or business entity which has a property interest in any real property affected by a rezoning action which that official’s local government, or where a member of their family has such an interest, has a duty to disclose the nature and extent of the interest in writing to the governing authority of the local government in which the official is a member, and to disqualify himself or herself from voting on the matter.³⁰ In addition, the disqualified member is prohibited from taking any action to influence action on the application for rezoning.³¹

The Indiana Court of Appeals found no disqualifying conflict of interest where a member of the County Board of Commissioners voted on an ordinance despite the fact that his spouse had an ownership interest in nearby property.³² The Board member did file a conflict of interest statement with the County and the State,³³ and at the beginning of the public hearing on the proposed rezoning he made a public disclosure about his wife’s property interest.³⁴ Like some other states, Indiana has a specific statutory provision dealing with conflicts of interest specific to zoning issues.³⁵ At issue, was whether the Board

in the case of a condominium, with the title owner, contract purchaser, or lessee of 10% or more of the units in the condominium, or from any of the other persons above specified, during the 12-month period prior to the hearing in such case, of any gift or donation having a value of more than \$100, singularly or in the aggregate.”

²⁹ Virginia § 15.2-852(A).

³⁰ Ga. Code Ann. § 36-67A-2(2).

³¹ *Id.*

³² *Perry-Worth Concerned Citizens, et. al. v Bd. of Comm’rs of Boone County, et al.*, 723 N.E.2d 457 (2000).

³³ The Statement, filed with the Boone County Auditor’s Office, the State Board of Accounts, and the State Ethics Committee, disclosed that his spouse had a one-fifth ownership interest in farmland near the property proposed for rezoning. See, *Id.*

³⁴ *Perry-Worth Concerned Citizens, Supra*, Note 14.

³⁵ *Id.* Citing to IC 36-7-4-223(b) which provides: “A member of a . . . legislative body may not participate as a member of the . . . legislative body in a hearing or decision of that . . . bid concerning a zoning matter in which the member has a direct or indirect financial interest.”

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member had a direct or indirect financial interest in the “zoning matter” as this was the statutory phrase.³⁶ The Court found that the Board member had no direct or indirect interest in the “zoning matter” which the Court defined as the rezoning of a piece of property that was not owned by the member’s spouse (her ownership interest was in nearby property not the subject of the hearing).³⁷ The Court declined to interpret “conflict of interest” more broadly in this case, reasoning that the rezoning action undertaken was a legislative action and not an administrative action, and that the “appearance of impropriety” standard is inappropriate in this context since “In the legislative arena, there is no constitutional due process requirement of neutral decision makers. Instead, the check on the process is the ballot box.”³⁸

[b] Prohibitions from Serving on Boards

Typically, there are very few requirements regarding the qualifications for membership on planning and zoning boards or commissions. A resident of the community who is eligible to vote is all that is required. It is common for municipal officials to recruit individuals who have some knowledge or familiarity with various aspects of land development or real estate. Therefore, realtors, developers, architects, engineers, lawyers, planners and surveyors may be asked to serve on a local board. While individuals with these types of backgrounds may have training and insight that could help the board in its review of applications, it also presents opportunities for conflicts of interest particularly where these individuals work in the municipality where they reside. They may be involved directly or indirectly with particular projects subject to board review and approval, or they may appear in a professional capacity before the board on which they sit representing a client for compensation. States typically do not attempt to proscribe membership on these boards.

Although an Alabama statute generally prohibits citizens from serving on municipal regulatory boards that regulate a business with which the citizen is associated,³⁹ the law explicitly provides that,

³⁶ Id.

³⁷ Id.

³⁸ Id. at 460.

³⁹ Ala. Code 1975 § 36-25-9(a).

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“Nothing herein shall prohibit real estate brokers, agents, developers, appraisers, mortgage bankers, or other persons in the real estate field, or other state-licensed professionals, from serving on any planning boards or commissions, housing authorities, zoning board, zoning board of adjustment, code enforcement board, industrial board, utilities board, state board, or commission.”⁴⁰ Whether conflicts are present in these situations becomes a case-by-case determination often decided by the courts.

[3] Familial Conflicts of Interest

Some state statutes have addressed conflicts of interest based on familial interests in the zoning and planning area. Different statutory approaches are evident. For example, in Kentucky, all members of the planning commission are required to file a written, signed statement disclosing any personal or family commercial interests related to land use, new development supply, or new development construction, and members are prohibited from voting on an issue in which the member or member’s family has an interest.⁴¹ Furthermore, the statute provides that willful failure to either disclose such interest or voting where a familial interest is known, subjects the member to removal proceedings.⁴² Alabama’s statute is less specific, simply proscribing a member of any municipal board to vote or participate in any matter where the family member has any financial gain or interest.⁴³

Like a number of states, New Jersey statute simply prohibits any member of the planning board to act on any matter where he has, either directly or indirectly, any personal interest.⁴⁴ It is likely that family member interests would fall under this provision. Although not directly on point, yet instructive, in recent New Jersey case, a fifteen-year veteran of a New Jersey township planning board found his service ended by court order after he married a member of the township council who cast the deciding vote in support of his reappointment to

⁴⁰ Id.

⁴¹ KRS § 100.137(1).

⁴² Id.

⁴³ Ala. Code 1975 § 36-25-9(c).

⁴⁴ N.J. Stat. Ann. 40:55D-23(c).

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the planning board.⁴⁵ After a 3 to 2 vote to reappoint the planning board member, the Court determined that in casting the deciding vote for her husband's reappointment, the council member violated the State ethics law as this created at least a perception of a conflict of interest.⁴⁶ Noting that a familial relationship does not always create a per se conflict, the Court said that "when a family member's vote results in another family member obtaining a position in a government agency, as in the situation before us, a conflict is usually present."⁴⁷ Although the council member asserted that her spouse was well qualified on the merits, the Court said that although he may well have been an ideal candidate, "in the eyes of the public, the personal involvement . . . might reasonably be expected to impair her objectivity or independence of judgment."⁴⁸ Noting too that since the spouse cast the tie-breaking vote, the matter did not "resound with political consensus," the Court concluded that "marriage is a direct personal involvement which might be reasonably expected to impair objectivity or independence of judgment within the meaning of" the statute.⁴⁹

In another case, a zoning commission member appeared before the commission in her personal capacity after having excused herself from voting, and leaving her seat at the Commission table to move to another area in the room.⁵⁰ Here, the commission member was a relative of the applicant, an officer of the applicant's corporation, and a co-signer of the subject application.⁵¹ The Connecticut General Statutes provide, in pertinent part that, "no member of any zoning commission. . . shall appear for or represent any person, firm, corporation or other entity in any matter pending before the planning or

⁴⁵ *Shapiro v Mertz, et. al.*, 368 N.J. Super. 46, 845 A.2d 186 (2004).

⁴⁶ *Id.* Specifically, N.J.S.A. 40A:9-22.5d 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."

⁴⁷ *Id.* at 54.

⁴⁸ *Id.* at 55.

⁴⁹ *Id.* at 56.

⁵⁰ *Leshine, et al. v Planning and Zoning Commission of the Town of Guilford*, 2000 Conn. Super. LEXIS 1278 (2000).

⁵¹ *Id.*

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zoning commission. . .No member of any zoning commission. . .shall participate in the hearing or decision of the board or commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense.”⁵² The Court noted that the language in the statute did not specifically restrict commission members from representing themselves in applications before the agency.⁵³

In North Carolina, however, the board of adjustment statute provides that members of these boards “shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons’ constitutional rights to an impartial decision maker.”⁵⁴ The statute continues by describing impressible conflicts to include, among other things, “a close familial, business, or other associational relationship with an affected person. . .”⁵⁵

As noted previously, the Texas statute governing subdivision and property development provides that, “if a member of the municipal authority responsible for approving plats has a substantial interest in a subdivided tract, the member shall file, before a vote or decision regarding the approval of a plat for the tract, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter.”⁵⁶ The statute provides six situations where a “substantial interest” would exist, including where a member is related in the first degree by consanguinity or affinity to another person who has a substantial interest in the tract, as defined in the statute.⁵⁷ On June 30, 2006, a new law was enacted in Louisiana addressing conflicts of interests in zoning and planning matters.⁵⁸ It specifically prohibits zoning board members from voting on matters where those members, or members of their immediate family, have a “substantial economic

⁵² Id. Citing Conn. Gen. Stat. 8–11.

⁵³ Id. Citing R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice (1999) 47.3 p. 441.

⁵⁴ N.C.G.S.A. § 160A-388(e1).

⁵⁵ Id.

⁵⁶ V.T.C.A. Local Government Code 212.017(d).

⁵⁷ Id. at 212.017(c).

⁵⁸ LA HB 1239, Act No. 798.

interest” in the outcome.⁵⁹

In Illinois, where there is no statute on point, plaintiffs sought to reverse the Village Board of Trustees’ decisions with respect to permitting the Village Historical Society to locate the Society’s office in a residential district based in part on the fact that the spouse of a board member had represented the society in the sale of the residential property in question, and received a commission as a result.⁶⁰ Noting that a spouse’s financial interest in a venture does not necessarily disqualify a decision maker,⁶¹ the Appellate Court found no evidence that the Board Member’s vote to approve the special use permit and zoning variance “was influenced or tainted by his wife receiving the commission.”⁶² Since the Historical Society did not apply for the permit and variance until after they had already purchased the property, the Court stated that in this instance, the commission that the spouse received was not in any way contingent upon the granting of the requested relief.⁶³ Furthermore, the Court noted that the Trustee disclosed his wife’s involvement as a real estate broker for the Society at a public meeting, and that the Plaintiff had simply failed to show any evidence that the Council’s determination was impacted by a conflict of interest.⁶⁴

[4] Statutory Procedures Where a Conflict Exists

As noted above, in a number of states, statutes prohibit board members from participating in the review of an application where a conflict of interest exists. A number of states, however, go a step further and provide either a statewide process, or local authority, for the appointment of alternate members of planning and zoning boards where sitting members must recuse themselves due to a conflict.⁶⁵ In

⁵⁹ LA HB 1239, Act No. 798; R.S. 42:1112.

⁶⁰ *Lapp v Village of Winnetka*, 359 Ill. App. 3d 152, 833 N.E.2d 983 (2005).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* Although likely not relevant, the Court did note that the real estate broker donated \$7,000 of her \$12,000 commission to the Historical Society before the matter was voted on by the Village Council.

⁶⁴ *Id.*

⁶⁵ For a detailed discussion of these laws, see Patricia E. Salkin, “Planning for

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addition, some states attempt to set forth procedures for disqualification of member. For example, in Minnesota, “Any question of whether a particular issue involves a conflict of interest sufficient to disqualify a regular board member from voting thereon shall be decided by majority vote of all regular board members except the member who is being challenged.”⁶⁶

§ 6.03 Problems with Relying on Statutes

Reliance solely on state ethics statutes to govern the conduct of members of planning and zoning boards can be problematic. Precisely because so many of these laws are not enacted with local land use decision makers in mind, they fail to cover the types of situations that confront the clients of land use lawyers. As a result, courts are often left frustrated. For example, the Massachusetts Conflicts of Interest Law provides among other things, that a conflict of interest exists where “A municipal employee who participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has an arrangement concerning prospective employment, has a financial interest.”⁶⁷ In a recent case, property owners challenged the granting of a special permit and site plan approval to a developer because, among other things, the traffic consultant hired by the municipality to advise the municipality was simultaneously involved in a business relationship with the applicant for a project in a different state, and was also a partner with the applicant in the development at issue.⁶⁸ The Court reluctantly found that the State Conflicts of Interest Law did not apply based on previous opinions of the State Ethics Commission holding that a consultant could not be considered an “employee” of a municipality.⁶⁹ Similarly,

Conflicts of Interest in Land Use Decisionmaking: The Use of Alternate Members of Planning and Zoning Boards,” 31 Real Estate L.J. 375 (2003).

⁶⁶ M.S.A. § 394.27.

⁶⁷ M.G.L.A. 268A . § 19.

⁶⁸ *Tuttle v Planning Board of the City of Leominster*, 18 Mass. L. Rptr. 381, 2004 WL 2550466 (Mass. Super.).

⁶⁹ *Id.* Citing to State Ethics Advisory Opinion EC-COI-89-6 (Feb. 8, 1989) (“The State Ethics Commission ‘has long recognized that a . . . contract between a [state or

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the South Carolina Ethics Commission recently held that a decision by a mayor to break a tie-vote on a zoning change to approve a condominium project where he was a member of a team of realtors involved with the possible sale of property near the project, did not violate the state ethics rules.⁷⁰

While ruling that a petition challenging a planning board's designation of an area as "blighted" for the purposes of redevelopment was time-barred, the Nevada Supreme Court used the occasion to discuss the effects of a conflict of interest on members of advisory commissions.⁷¹ In this case, the plaintiff alleged that two members of Henderson Redevelopment Agency Advisory Committee had a direct interest in the Owner Participation Agreement that was adopted by the Advisory Committee, which, he further alleged, tainted subsequent redevelopment plan determinations.⁷² The Court noted, however, that both of these Advisory Committee members recused themselves before the discussion of the Agreement began, and during the public meeting to vote on the Agreement, neither of the two members was present.⁷³ Furthermore, the Court stated that even if the two members had participated, that action would not have tainted the voting, because Nevada statutes do not cover conflicts of interest for advisory committee members.⁷⁴ Specifically, the Court cited to Nevada Revised Statute 281.4365 which provides in part that a "public officer" does not include "Any member of a board, commission or other body whose function is advisory," and that "public office" does not include an office held by "Any member of a board, commission or other body whose function is Advisory."⁷⁵ The Court found that Committee Members' recusal from discussion and voting precludes an appearance of

municipal government entity] and a corporation will not render the corporation a '[government] employee.'").

⁷⁰ Kelly Marshall Fuller, "Georgetown: Mayor's Relation to condos Clarifies: Wilson was on Team Eyeing Sale of Nearby Property, letter says," Myrtle Beach Sun News at A1 (10/26/06), 2006 WLNR 18562600.

⁷¹ *Hantages v City of Henderson*, 113 P.3d 848 (Ne. Sup. Ct. 2005).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

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impropriety or unfairness.⁷⁶ The Court also relied on the fact that the Advisory Committee has no power other than to make a recommendation to the Redevelopment Agency regarding that Agency's final approval.⁷⁷ In noting that citizen participation in advisory committees should be encouraged (even where a likelihood exists for potential conflicts of interest), the Court determined that "by expressing a conflict and recusing himself or herself from any decision making, voting, or discussion, an advisory committee member avoids the appearance of impropriety."⁷⁸

§ 6.04 Conclusion

In addition to minding professional ethical obligations under the Rules of Professional Conduct, attorneys may be charged with providing sound ethics advice to members of local land use decision making and advisory bodies. The unique challenge with this responsibility results from a lack of detailed statutory guidance in most states, inadequate local ethics laws that speak to the situations that present themselves in the land use context, and a history of common law where judges often find themselves unable to take meaningful action where a conflict may be present in the absence of statutory authority identifying the conduct as specifically prohibited or illegal. Despite the absence of clear legal guidance, attorneys who work with the public sector must ensure that client actions are held to higher standards to promote and uphold the public trust. Where standards such as the "appearance of impropriety" may not always be enough to classify a particular action as illegal or prohibited, lawyers must counsel municipal clients that conduct does not need to be illegal for it to be unethical. Ultimately, the consequence of potential front page media attention resulting from actions can be an effective preventive measure from inappropriate, yet perfectly "legal" action.

⁷⁶ Id. The Court also noted that the Commission considered the Agreement multiple times without the influence of either member, and that ". . .the two commission members were not involved in any negotiations, discussion, or planning involving the OPA or business between the Redevelopment Agency and Commerce."

⁷⁷ Id. The Court specifically noted, "We do not reach the effect of a conflict of interest of a board member on a board that has final approval authority."

⁷⁸ Id.