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LAND USE ETHICS UPDATE 2005: CONFLICTS OF INTEREST, IMPROPER CONDUCT AND OTHER ETHICAL CONSIDERATIONS

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LAND USE ETHICS UPDATE 2005: CONFLICTS OF INTEREST, IMPROPER CONDUCT AND OTHER ETHICAL CONSIDERATIONS

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MARCH 2005

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ZONING AND PLANNING LAW REPORT

Vol. 28, No. 3 March 2005

Land Use Ethics Update 2005: Conflicts of Interest, Improper Conduct and Other Ethical Considerations

Patricia E. Salkin[1]

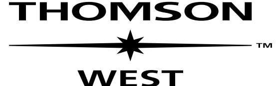
Introduction

The 2005 annual review of ethics in land use continues to monitor reported cases and opinions documenting allegations of unethical conduct involved in land use planning and zoning decisionmaking.[2] Conflicts of interest continues to be an area that garners significant attention particularly where there are familial a'nd personal relationships involved, and where there is a real or perceived personal financial interest for the government decisionmaker. A number of state attorneys general were called upon to render opinions with respect to dual-office holding, and this year's survey includes a review of more than a dozen opinions from the California Fair Political Practices Commission, demonstrating the difficulties in applying the Political Reform Act to the actions of planning and zoning commission members and other government officials involved in various aspects of land use law and policy decisionmaking. These annual ethics updates are designed to provide land use lawyers with fact patterns where ethics allegations are actually raised and the analysis that is used to determine whether the actions complained of constitute illegal and improper conduct. While the facts in each specific case are analyzed under relevant state laws, the general principles are, for the most part, instructive and the concepts are easily transferable from jurisdiction to jurisdiction.

Conflicts of Interest

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."[3] 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.[4] 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.[5]

In challenging the denial of two special use permits when the planning and zoning commission approved a special permit request by a different applicant for allegedly a similar use, the plaintiffs alleged that the commission chairman tainted the proceedings after he disqualified himself from the public hearings on the plaintiff's applications so that he could appear before the commission to speak in opposition to the requested permits and then he further instructed the commission that the arguments made by the applicant's attorney were not valid.[6] At oral argument, counsel for the plaintiffs failed to assert a violation of Connecticut General Statute and/or the identical provision in the Town's zoning regulations that would automatically invalidate the chairman's action in



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advocating a position contrary to that espoused by the applicant's counsel.[7] "Deprived of the use of automatic invalidation," the Court searched the record but was unable to conclude that the chairman's conduct improperly influenced other members of the commission.[8]

Although the planning board chairperson had hired the applicant to excavate real property at his home four months prior to his application before the board, and the applicant had hired another board member's son eight months earlier to work with him during the preceding summer, these relationships did not automatically require disqualification under New York State law, and rather called for a fact specific inquiry.[9] Further inquiry was warranted, however, where a third planning board member worked for a family-owned construction company that routinely rents trucking equipment to the applicant and also purchases gravel from the applicant.[10] Specifically, the Court said that a determination must be made regarding the corporate and/or financial relationship between the board member's construction company and whether or not the company would financially benefit from an approval of the applicant's request.[11]

Familial Relationships

A fifteen-year veteran of a New Jersey township planning board found his service ended by court order after he married a member of township council who cast the deciding vote in support of his reappointment to the planning board.[12] 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.[13] 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."[14] 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."[15] 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.[16]

Improper Conduct

Property owners in Connecticut challenged a resubdivision approval alleging, among other things, misconduct on the part of the planning commission chairperson.[17] They alleged that chairperson acted improperly by failing to wait until all of the commission members were present before taking a vote, and that she controlled the placement of an alternate member of the commission to replace a disqualified member.[18] The Court found no evidence in the record to support these allegations of misconduct and procedural irregularity, and noted that the chairperson, pursuant to the Commission's by-laws,[19] even recused herself from the public hearing and did not participate in the discussion based on a potential conflict on interest.[20]

The North Dakota Attorney General opined that the planning and zoning commission did not act improper in responding to a citizen record access request on December 4th as the commission complied with the request by mid-December.[21] Records must be released within a reasonable time, which under North Dakota law is measured in terms of a "few hours or days rather than several days or weeks."[22] Although it took a couple of weeks to comply with a request for nine separate records, the Attorney General found that the requested minutes were not yet prepared at the time of the request and that they were prepared in a timely fashion, that the county made appropriate inquiries to determine whether some of the requested records were available (including trying to verify from other departments of county government whether certain records existed – something they were not required to do), and that three days after the request was made, the citizen spoke with a secretary who advised him of the actions being taken in response to his request.[23] Based upon these findings, the Attorney General was satisfied that the commission provided the requested records and had an explanation of why certain records were not provided within a reasonable time.[24]

Where the township supervisor appeared on two occasions before the board of zoning appeals to express his opposition, as supervisor, to the granting of requested variances, such conduct did not constitute an imposition of duress as a matter of law.[25] In reversing the trial court, the Michigan Court of Appeals noted that the supervisor was not acting in self-interest[26] but rather "maintained his fidelity to the township's citizens by commenting on the interests of the township…" and "…he did not encourage the board members to serve an interest other than that which they were bound to serve."[27]

As noted in last year's review of ethics cases, the Third Circuit now applies a new "shock the conscience" standard in lieu of the former improper motive standard when reviewing a claim of substantive due process.[28] In a recent Pennsylvania case, the plaintiff's alleged a violation of substance due process claiming that the municipality acted in concert to frustrate their efforts to subdivide their property by needlessly complicating and delaying their applications for permits in part, because they did not like the plaintiffs.[29] Specifically, the defendants believed that the plaintiff was a "'trouble making yuppie from over the mountain.'"[30] Although in viewing the facts most favorable to the plaintiffs, the Court concluded that "the Board may have acted with mixed motives; one related to a legitimate land use regulation purpose…, the other related to illegitimate personal animus. This alone is not enough to establish a violation of substantive due process."[31]

Bias, Prejudgment and Bad Faith

To make a showing of improper behavior or bad faith on the part of members of the Board of Adjustment when they denied the applicant's request for a conditional use permit to operate a sand and gravel excavation business, the Iowa Supreme Court allowed discovery to inquire into the mental processes of the Board of Adjustment members by asking other involved individuals whether there was communication with Board of Adjustment members and if so, what that communication was.[32] The applicant believed that the Board

acted illegally by making a decision based on undue and improper influence, and alleged, among other things that the director of planning, who had previously indicated support for their application, changed his view when he appeared before the board based upon a threat that he would be fired if he did not oppose it.[33] The Court commented that allowing for the requested discovery would at least provide the applicant with an "opportunity to establish preliminarily that Board of Adjustment members were indeed subject to improper influence that might have led to its decision."[34]

After twice being denied a variance by an Idaho planning and zoning commission, the county commission overturned the decision, granting the requested variance to allow the construction of a boathouse.[35] A member of the county commission, however, made statements that, combined with his actions, led the Court to conclude that he had impermissibly prejudged the application.[36] While noting that a county commissioner will not automatically be disqualified for taking a position, even in public, on a policy issue related to a dispute, in the absence of a showing that the commissioner is "'not capable of judging a particular controversy fairly on the basis of its own circumstances…,'" the Court concluded that the commissioner's statements about the pending variance foretold the results of the proceedings before the Board that were yet to take place.[37] In determining whether prehearing statements made by a decision maker are fatal to the validity of the zoning determination, the Court will look to see whether the decision maker: "(a) has made up his or her mind regarding the facts and will not listen to the evidence with an open mind, or (b) will not apply the existing law, or (c) has already made up his or her mind regarding the outcome of the hearing."[38] These statements, combined with pre-hearing ex-parte communications between the commissioner and the petitioner, and the fact that the commissioner went by himself to view the subject property, "reveal a lack of impartiality and denial of an opportunity for opponents to the variance to challenge or answer the ex parte evidence…and the unauthorized view…was not available to the entire Board or equally to the parties."[39]

Compatibility of Dual Office-Holding

The Louisiana Attorney General opined that a member of a Parkway Commission who was also a member of a parish school board had no prohibition on dual office-holding, yet another parish school board member could not simultaneously serve on the parish planning commission.[40] The Attorney General first reiterated that Louisiana statute provides that the parish, school board and any other unit of local government are considered to be separate political subdivisions.[41] Relying on two different statutory provisions, the Attorney General found that the school board member may serve on the Parkway Commission so long as the appointment is held on a part-time basis,[42] but that there is a specific statutory prohibition on planning commission members holding any other public office, including membership on the school board.[43] In another recent opinion, the Louisiana Attorney General opined that the same person may not simultaneously serve on a city zoning commission and city board of adjustment because the board of adjustment position is considered a public office, and state statute restricts members of zoning commissions from holding any other public office.[44]

A similar question was posed to the Arkansas Attorney General and under Arkansas law it is not per se impermissible for a city planning commissioner to simultaneously serve as a school board member.[45] Unlike Louisiana where a specific statutory prohibition exists, the Arkansas Attorney General opined that the incompatibility doctrine would not apply except in cases where the planning commission is called to act upon matters directly involving the school district, and in that situation, a simple recusal from participation on the matter would be appropriate.[46] Although it was noted that at times there are scheduling conflicts between planning commission meetings and school board meetings, the Attorney General acknowledged this as a source of "inconvenience and aggravation," but said that this did not amount to common law incompatibility that would disqualify members from dual service.[47]

To determine whether two positions are compatible in the State of Ohio, a seven-question test is employed.[48] In reviewing these inquiries, the Attorney General opined that a person may serve simultaneously as a trustee of a township that has not adopted a limited home rule government and as a member of county rural zoning commission.[49] The Attorney General noted, among other things, that two positions serve different constituencies (e.g., the township's electorate and the board of county commissioners), they are not subordinate to each other (e.g., they operate independently of each other and neither supervises the other), and that there are no statutory prohibitions.[50] In discussing the potential for conflicts of interest between the two positions, the Attorney General distinguished these two positions from the positions of township trustee and county zoning inspector, which were found incompatible,[51] noting that a member of the county zoning rural commission is not responsible for enforcement.[52]

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Finding that a city building official is an "office" under Florida law, the Attorney General opined that the positions of city council member and city building official for the city are incompatible and in violation of the state constitution which provides that "No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein…"[53]

California Political Reform Act

Provisions of the California Political Reform Act[54] (hereinafter referred to as "Act") attracted significant attention from the land use community in 2004 as the California Political Practices Commission (hereinafter referred to as "Commission") issued more than a dozen advice letters responding to requests for interpretations of the Act as to various land use related actions. The Act provides, among other things, that public officials may not make, participate in making, or in any way attempt to use their official position to influence a governmental decision in which the official knows, or should reasonably know that they have a personal financial interest in that decision.[55] The analytical framework employed by the Commission to determine whether there is a prohibited conflict interest involves an eight step inquiry: 1) Whether the individual is a public official; 2) Whether the individual will be making, participating in, or influencing a governmental decision; 3) Whether the individual has a potentially disqualifying economic interest; 4) Whether the economic interest is directly or indirectly involved in the governmental decision; 5) Whether the effect of an economic interest is material; 6) Whether the economic interest is reasonably foreseeable; 7) Whether the "public generally" exception is applicable; and 8) Whether the exception for "legally required participation" is applicable.[56]

The Commission determined that a county planning commissioner, who is a hydrologist with specific knowledge and experience related to the county watersheds, may contract with the county to prepare a watershed management plan for some watersheds in the county that would be then be submitted to the planning commission for review, comment and possible recommendation before going to the board of supervisors for consideration and approval.[57] The Commission cautioned, however, that the Act prohibits the county commissioner from making, participating in making or influencing the decision on the contract to retain his services, and he may not participate in making, or influence the planning commission's consideration of the watershed plans he prepares where those decisions will have any financial effect upon him.[58] The commissioner may appear before the planning commission as the consultant to explain the plans and to answer questions if the decisions to be made are implementation decisions and they do not financially effect his compensation under the contract,[59] and he may participate in other county land use decisions so long as there are no other economic interests that will be affected by the decisions.[60] However, where an elected city council member was also the executive director of a local, non-profit housing development corporation, the Commission opined that it would be a prohibited conflict of interest for her to participate in a decision to adopt a proposed land use code provision that pertains to inclusionary zoning because she has an economic interest in her employer, who is indirectly involved in the decision, and there is a material nexus between the goals and mission of her employer and the inclusionary zoning policies of the city.[61]

The Commission opined that an assistant community development director and building official for he City would have a prohibited conflict of interest under the Act in obtaining necessary building permits for construction of a house on a vacant lot he owns, if he uses his official position to influence the decision regarding the issuance of the permits.[62] To avoid this, the official indicated he would recommend that the city use a third party review team instead of the city inspectors and plan check consultants he supervises, but the Commission stated, "By doing so, you would be 'using your official position to influence a government decision' within the meaning of the Act and subject yourself to the Act's conflict-of-interest provisions."[63] The Commission does note, however, that if the official appears before the city council or planning commission to represent himself as a member of the general public on a matter relating solely to his personal interest, he would not be making or participating in the making of a governmental decision.[64]

The Commission found no prohibited conflict of interest under the Act where a member of the planning commission was also a volunteer board member of a religious organization who would be appearing before the planning commission to request a conditional use permit since the commission member does not have an economic interest in the decision.[65] In response to another inquiry where a city council member is a commercial real estate broker, the Commission commented informally that persons, including business entities, who become sources of income for the council member, whether through commission or otherwise, of $500 or more, becomes an economic interest of the council member.[66] Therefore, the Commission stated that should the council member sell property in a historic redevelopment area, further inquiry would be needed, based upon the facts at the time, to determine whether the council member would be prohibited from participating in decisions of the city council regarding the redevelopment area.[67]

A county planning commissioner asked the Commission whether income from his land surveying business received from an engineering consultant would prevent him from reviewing and approving projects related to a subdivision whose owners have hired the same engineering consultant.[68] The Commission concluded that to the extent that the decisions of the planning commission on the review and approval of projects related to the subdivision would have a reasonably foreseeable material financial effect on the engineering consultant, the commission member would be prohibited from participating in the decision.[69] The county commissioner also asked, in his capacity as a licensed land surveyor, whether he could represent a client before the county board of supervisors.[70] The Commission responded that he could represent clients before the county so long as: 1) he is not appearing before his own agency; 2) the agency he appears before is neither under the budgetary nor appointive control of his agency; and 3) he does not act or purport to act in an official capacity as member of his agency.[71] A town planning commissioner who is also

a professional urban designer may not, absent an exception, appear before the planning commission on behalf of a client nor may she contact planning commission staff on behalf of a client.[72] The commissioner's business partner may, however make these contacts without violating the Act.[73] Also, absent an exception, the commissioner may neither appear on behalf of a client before an agency that is appointed by the commission on which she serves or over which her commission has budgetary control, nor may she contact staff of that agency.[74] Again, her business partner does not have the same statutory restrictions.[75] The commissioner may appear before the town council on behalf of a client "so long as she does not act or purport to act on behalf of, or as the representative of, the planning commission to any member, officer, employee or consultant of the town council."[76] However, she may not contact town council staff on behalf of a client since the staff is shared with the planning commission on which she serves.[77]

A city planning commissioner who is a partner in a certified public accounting practice that leases office space within a specific plan area under consideration by the city planning commission, and whose accounting and tax clients own property within the specific plan area (and they pay the planning commissioner more than $500 as a partner in the practice), may not participate in the decision to recommend a comprehensive policy and regulatory document that encompasses this property.[78]

The Commission was also asked a series of questions regarding potential conflicts of interest for officials who owned property within 500 feet of the subject area under consideration. In one opinion the Commission commented that a community development director has a potential for a conflict of interest if he participates in decisions involving a revitalization strategy for the City's downtown area, including potential redevelopment of properties, where the property to be redeveloped is within 500 feet of property he owns.[79] In another opinion, a city mayor is presumed to have a conflict of interest by participating in the following decisions pertaining to property located within 500 feet of his residence: conversion of condominiums to a hotel, construction of a new motel, remodeling and expansion of a lounge, approval of a specific plan for the downtown area, making a building consistent with the plan, redevelopment and development of other properties, and approval of contracts with the city and owners of qualified historical properties to provide for the use, maintenance and restoration of the properties.[80] The mayor would have to rebut this presumption in accordance with the criteria contained in the Commission's regulations.[81] Similarly, where a planning commissioner owns his residence that is 200 feet from a project site to be considered by the commission, he is presumed to have a conflict of interest and cannot participate in the decision on the matter.[82] Further, with limited exception,[83] where this conflict occurs and the matter is to be discussed at a publicly noticed meeting, the commissioner must publicly disclose, on the record, his interest at the meeting prior to the discussion of the item, recuse himself from participation in the matter, and he must leave the room for the discussion and/or vote on the matter.[84] While he may be able to them speak as a member of the public on the matter to represent himself since it relates to his personal interests, he "must be careful to avoid giving the impression that he is speaking in the interest of any other individual or group, or that he is acting in any official capacity."[85] Where a city councilmember owned property more than 500 feet from property subject to review for certain city land use entitlements (e.g., site plan approval, subdivision approval, rezoning, etc.) and the subject property is owned by his future landlord, the Commission opined that the councilmember does not have a conflict of interest under the Act.[86] The Commission noted that the councilmember had no economic interest in the property owner other than a possible leasehold interest at fair market value.[87]

In seeking guidance from the Commission regarding the ability of a councilmember to participate in a decision regarding changes to the City's creek preservation ordinance since she owns property subject to the ordinance, and regarding whether a planning commissioner may participate in decisions regarding changes to the City's landmarks preservation ordinance since he owns property subject to the ordinance, the Commission opined that "absent an exception, the council member and the commissioner may only participate in the decision so long as there is no reasonably foreseeable material financial effect on their respective economic interests…"[88]

It is not a violation of the Act for the city attorney to render legal advice to the city council and staff regarding the negotiation, drafting, and hearing process for a project located more than 500 feet from his residence as it is presumed under the Commission's regulations that the project would not have an reasonably foreseeable material financial effect on his economic interests.[89]

Conclusion

Once again, the cases this year were overwhelmingly decided in favor of the municipal officials, meaning that the courts have found less often that alleged conduct actually rose to the level of being illegal. Just because the reported conduct was not found illegal, or it did not satisfy the "shock the conscience" standard, does not mean that all of the highlighted actions were ethical. The discussion in this article can be used as an effective education tool by land use attorneys who advise planning and zoning boards and other public agencies involved in planning and zoning decisionmaking. Since each of the scenarios is digested from actual cases and opinions decided in 2004, consider sharing these fact patterns with your boards and ask them what they believe the most appropriate ethical conduct would be and why. This exercise can be an informative and inviting method of providing subtle ethics training in a proactive manner for members of your board(s).

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2. Previous annual surveys by the author may be found at: "A Woody Allen Movie, Show Me the Money and Other Ethical Consideration in Land Use Planning," 27 Zoning and Planning Law Report No.3 (March 2004); "Ethics Allegations in Land Use Continue to Fill the Court Dockets," 26 Zoning and Planning Law

Report No. 4 (April 2003); "Litigating Ethics Issues in Land Use: 2000 Trends and Decisions," 24 Zoning and Planning Law Report No. 4 (April 2001); "Municipal Ethics Remain a Hot Topic in Litigation: A 1999 Survey of Issues in Ethics for Municipal Lawyers," 14 BYU J. of Pub. L. 209 (2000); and "1998 Survey of Ethics in Land Use Planning," 22 Zoning and Planning Law Report No. 4 (April 1999).

3. M.G.L.A. 268A sec. 19.
4. *Tuttle v Planning Board of the City of Leominster*, 18 Mass. L. Rptr. 381, 2004 WL 2550466 (Mass. Super.).
5. 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 municipal government entity] and a corporation will not render the corporation a '[government] employee.'").
6. *Durham Agricultural Fair Association, Inc. v Durham Planning and Zoning Comm'n*, 2004 WL 1326253 (Conn. Super.).
7. Id. Conn. Gen. Stat. sec. 8-11 provides, in part, "No member of any zoning commission or board and no member of any zoning board of appeals or of any municipal agency exercising the powers or any zoning commission or board of appeals, whether existing under the general statutes or under any special act, shall appear for or represent any person, firm, corporation or other entity in any matter pending before the planning or zoning commission or board or said board of appeals or any agency exercising the powers of any such commission or board in the same municipality, whether or not he is a member of the board or commission hearing such matter…" The Court noted that when the chairman "essentially instructing the Commission that Attorney Corona's arguments were invalid…such conduct constituted 'participation' within the meaning of sec. 8-11, which would invalidate the decision of the Commission." Id. at 9
8. Id. The Court further noted that "There is a presumption that the Commission has acted with fair and proper motives, skill and judgment…and that public officers have done their duty until the contrary appears." Id. at 6.
9. *Heustis v Town of Ticonderoga*, 784 N.Y.S.2d 187 (A.D. 3rd Dept. 2004). The General Municipal Law provides in part, "An officer or employee shall be deemed to have an interest in the applicant when he, his spouse, or their brothers, sisters, parents, children, grandchildren, or the spouse of any of them…(d) is a party to an agreement with such an applicant, express or implied, whereby he may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of such application, petition or request." Id. citing N.Y. Gen. Mun. L. sec. 809(2). In addition, the Town ethics law provides, in part, that board members "'shall not invest or hold any investment directly or indirectly in any financial business, commercial or other private transaction, which creates a conflict with his official duties'" or "'render services for private interests when such employment or services creates a conflict with or impairs the proper discharge of his official duties.'" Id. at 188.
10. Id.
11. Id.
12. *Shapiro v Mertz, et. al*., 368 N.J. Super. 46, 845 A.2d 186 (2004).
13. 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."
14. Id. at 54.
15. Id. at 55.
16. Id. at 56.
17. *York v New Milford Planning Comm'n*, 2004 WL 2757650 (Conn. Super.).
18. Id. at 1.
19. Id. Citing the Commission's by-laws: "the commission encourages members to err on the conservative side and refrain from any action in which their participation might give the perception of a conflict of interest." at 2.
20. Id.
21. 2004 N.D. Op. Atty. Gen. 0-05, 2004 WL 315821(N.D.A.G.) (February 17, 2004).
22. Id.
23. Id.
24. Id.
25. *Department of Transportation v Township of Kochville*, 261 Mich. App. 399, 682 N.W.2d 553 (2004).
26. This distinction was critical to distinguish two earlier cases where municipal officials improperly appeared before boards because they had a personal pecuniary interest that conflicted with the fiduciary duty owed to the public. See, *Barkey v Nick*, 11 Mich. App. 381, 161 N.W.2d 445 (1968) and *Abrahamson v Wendell* (on rehearing), 76 Mich. App. 278, 257 N.W.2d 613 (1977).
27. Id. at 405. One of the statements made by the supervisor addressed the issue of nonconforming signs where he said, in part, "And I don't believe it's the township's position that-I don't feel we should be increasing nonconformity, and that's exactly what we're doing…" The other statement reflected the supervisor's concern over a building setback being close to the road as the variance would remain with the property forever.
28. See, Patricia E. Salkin, "A Woody Allen Movie, Show Me the Money, and Other Ethical Considerations in land Use Planning," 27 Zoning and Planning Law Report No. 3 (March 2004), discussing *United Artists Theatre Circuit, Inc. v Township of Warrington*, 316 F.3d 392 (3d Cir. 2003).
29. *Corneal v Jackson Township*, WL 790315 (M.D. Pa. 2003), aff'd 94 Fed. Appx. 76 (3rd Cir. 2004). For a discussion of the "shock the conscience standard in two other Pennsylvania land use cases, see *Blain v Township of Radnor*, 2004 WL 1151727 (E.D. Pa 2004); and *Levin v Upper Makefield Township*, 2003 WL 21652301 (E.D. Pa.. 2003), aff'd 2004 WL 449189 (3d Cir. 2004).
30. Id. at 462.
31. Id. at 468. The court noted that the plaintiffs had also argued that the defendants acted out of personal gain as the property in question had once belonged to the grandfather of one of the defendants and he had twice approached the plaintiffs about selling him the property. The Court concluded that a reasonable jury could not conclude that this enough was a motivating factor in the adoption of a moratorium, but that even if the one defendant had ill motives, this could not be transferred to the entire board. Id. at 468.
32. *Martin Marietta Materials, Inc., et. al. v Dallas County, Iowa*, 675 N.W.2d 544 (Sup. Ct., Iowa) (2004). In citing precedent, the Court noted that since members of the board of adjustment serve a quasi-judicial function, board members are "'disqualified or incompetent to sit in a proceeding in which [they have] prejudged the case, or in which [they have] a personal or pecuniary interest, when [they are] related to an interested person….,or where [they are] biased, prejudiced, or labor [ ] under a personal ill-will toward a party.'" See, *Bluffs Dev. Co. v Bd. of Adjustment*, 499 N.W.2d 14 (Iowa 1993).
33. Id.
34. Id.
35. *Eacret v Berg, et. al.,* 86 P.3d 494 (Sup. Ct. Idaho) (2004).
36. Id.
37. Id. at 785-86.
38. Id.
39. Id. at 787. The Court noted that although the commissioner did disclose on the record that he had spoken to the petitioner a couple of times, he neither revealed the substance of the conversations nor the dates when they took place. Further, the Court added that views of subject properties must be preceded by notice and the opportunity for the parties to be present to satisfy procedural due process.

40. La. Atty. Gen. Op. No. 04-0050, 2004 WL 799991 (La. A.G.) (March 25, 2004).
41. Id. Citing to La. R.S. 42:62(9).
42. Id. Relying on La. R.S. 42:63(D) which provides: "No person holding an elective office in a political subdivision of this state shall at the same time hold another elective office or full-time appointive office in the government of this state or in the government of a political subdivision thereof. No such person shall hold at the same time employment in the government of this state, or in the same political subdivision in which he holds elective office. In addition, no sheriff, assessor, or clerk of court shall hold any office or employment under a parish governing authority or school board, not shall any member of any parish governing authority or school board hold any office or employment with any sheriff, assessor, or clerk of court."
43. Id. citing to La. R.S. 33:103(C)(1) which provides, "All members of a commission, whether a parish or municipal planning commission, shall serve without compensation, except as otherwise provided by this Paragraph or as otherwise provided by law, and shall hold no other public office, except they may also serve as members to any duly constituted regional commission of which their parish or municipality forms a part."
44. La. Atty. Gen. Op. No. 09-0046, 2004 WL 799984 (La. A.G.)(March 2, 2004).
45. Ark. Op. Atty. Gen. No. 2004-291, 2004 WL 2671455 (Ark. A.G.)(November 29, 2004).
46. Id. The Attorney General also noted that since school board membership does not constitute a "municipal office or appointment," a statutory provision requiring that at least 2/3 of the members of the planning commission may not hold other municipal office or appointment would not apply here.
47. Id.
48. 2004 Ohio Op. Atty. Gen. No. 2004-015 (April 15, 2004); 2004 WL 839674 (Ohio A.G.). The 7 questions to ask are: "1) Is either of the positions a classified employment within the terms of R.C. 124.57? 2) Do the empowering statutes of either position limit employment in another public position or the holding of another public office? 3) Is one position subordinate to, or in any way a check upon, the other? 4) Is it physically possible for one person to discharge the duties of both positions? 5) Is there an impermissible conflict of interest between the two positions? 6) Are there local charter provisions, resolutions, or ordinances which are controlling? 7) Is there a federal, state, or local departmental regulation applicable?
49. Id.
50. Id.
51. See, 1985 Op. Ohio Att'y Gen. No. 85-074 which reasoned that "the ability of the township trustee to initiate changes which modify the county zoning plan directly affects the duties of a county zoning inspector by modifying the area over which the zoning inspector has authority." The Opinion also noted that it was possible that the county zoning inspector could be required to initiate legal action against the township for a violation or proposed violation of the county zoning plan. Id.
52. Id.
53. Fla. A.G.O. 2004-07, 2004 WL 305765 (Fla. A.G.)(February 13, 2004).
54. See, Ca. Gov't Code secs. 81000-91014. See also, Commission regulations at Ca. Code of Regulations, Title 2, sections 18109-18997.
55. See, Ca. Gov't Code sec. 87100.
56. Id.
57. Ca. FPPC, Adv. A-04-144, 2004 WL 1770429 (Cal. Fair Pol. Prac.Comm.)(August 5, 2004).
58. Id.
59. Id. Noting that "In the case of nonimplementation decisions, the commissioner may appear in the same manner as any other member of the general public before his own agency in the course of its prescribed governmental function to represent his personal interests in a business entity wholly owned by the official or members of his or her immediate family."
60. Id.
61. Ca. FPPC Adv., A-04-166, 2004 WL 2168464 (Cal. Fair. Pol. Prac. Comm.)(September 9, 2004).
62. Ca. FPPC Adv., I-04-175, 2004 WL 2075689 (Cal. Fair Pol. Prac. Comm.)(September 7, 2004).
63. Id. See, Fn 3.
64. Id. Citing to Cal. Admin. Code tit. 2, sec. 18702.
65. Ca FPPC Adv. A-04-141, 2004 WL 1551337(Cal. Fair Pol. Prac. Comm) (July 6, 2004). While the Commission did not directly address the question of whether the planning commission member should vote, they noted that the city attorney suggested that the commissioner recuse himself from participating in the discussion as well as the vote.
66. Ca. FPPC Adv. I-04-148, 2004 WL 1770430 (Cal. Fair. Pol. Prac. Comm)(August 3, 2004).
67. Id.
68. Ca. FPPC Adv. I-04-161 and I-04-162, 2004 WL 2086588 (Cal. Fair Pol. Prac. Comm.)(August 31, 2004).
69. Id.
70. Id.
71. Id.
72. Ca. FPPC Adv. I-04-160, 2004 WL 1932811 (Cal. Fair. Pol. Prac. Comm.) (August 17, 2004).
73. Id.
74. Id.
75. Id.
76. Id.
77. Id.
78. Ca. FPPC Adv. A-03-260, 2004 WL 113131 (Cal. Fair. Pol. Prac. Comm.) (January 15, 2004). The Commission also noted that, "regardless of whether it is reasonably foreseeable that your business or clients will experience a material financial effect as a result of the decision, it is presumed that your economic interest in your lease will experience such an effect…unless this presumption is rebutted, you are disqualified from participating in the decision."
79. Ca. FPPC Adv. I-04-087, 2004 WL 1202929 (Cal. Fair. Pol. Prac. Comm.) (May 19, 2004). The Commission noted, however, that more information would be needed to determine specifically whether the governmental decision would have a reasonably foreseeable material financial effect on his economic interest.
80. Ca. FPPC Adv. A-04-033, 2004 WL 837543 (Cal. Fair. Pol. Prac. Comm.) (April 9, 2004).
81. Id. See, Regulation 18705.2(a)(2)(A)-(E).
82. Ca. FPPC Adv. A-04-077, 2004 WL 837563 (Cal. Fair. Pol. Prac. Comm.) (April 13, 2004).
83. Pursuant to Regulation 87105(a)(3) dealing with uncontested matters and Regulation 18702.4(b) dealing with speaking as a member of the public, these exceptions could apply in certain cases.
84. Ca. FPPC Adv. A-04-077, 2004 WL 837563 (Cal. Fair. Pol. Prac. Comm.) (April 13, 2004).
85. Id.
86. Ca. FPPC Adv. A-04-037, 2004 WL 837547 (Cal. Fair. Pol. Prac. Comm.) (April 9, 2004).
87. Id.
88. Ca. FPPC Adv. A-04-178, 2004 WL 2075692 (Cal. Fair. Pol. Prac. Comm). (September 8, 2004).
89. Ca. FPPC Adv. A-04-019, 2004 WL 419928 (Cal. Fair. Pol. Prac. Comm.) (March 2, 2004). The Commission also opined that the attorney could therefore advise the council at public hearings regarding modifications to the land use entitlements for a project phase that is a little over a mile from his home.

RECENT DEVELOPMENTS

U.S. Supreme Court May Revisit Agins Takings Test in Gas Station Rent Control Case

Ever since the U.S. Supreme Court decided Agins v. City of Tiburon, 447 U.S. 255 (1980), there have been questions about what the Court meant when it stated that a regulation may constitute a taking if it does not substantially advance legitimate state interests. Twenty-five years later, the Court will be presented with an opportunity to clarify its language in a case on its current docket, Lingle v. Chevron U.S.A. Inc., 363 F.3d 846 (9th Cir), cert. granted, 125 S.Ct. 314 (2004).

The Lingle case involves a law enacted by the state of Hawaii to limit the rent that oil companies may charge dealerships. The intended purpose of the law is to protect the existence of independent dealerships, thereby insuring a level of competition that will benefit consumers. Chevron initially attacked the statute in federal court by asserting due process, taking, and equal protection claims. It voluntarily dismissed the due process and equal protection claims after a federal district court found in its favor on the taking claim. The district court was affirmed by the Ninth Circuit, which held, under Agins, that the statute failed to substantial advance legitimate state interests.

The district court and the Ninth Circuit read Agins to require a higher level of scrutiny than the deferential rational-basis standard of review. At trial, expert testimony was presented by both sides, but the district court found that Chevron's economic expert was more persuasive. This finding was upheld by the Ninth Circuit.

There are at least two major issues that may be resolved when the case is decided by the Supreme Court. First, does the Court still want there to be a "substantial advancement" inquiry under the takings clause, or should all questions of this type be addressed under the due process clause? Second, if there is a "substantial advancement" inquiry under the takings clause, what level of scrutiny is appropriate?

NOTED IN BRIEF

A county board of supervisors had standing to challenge a variance granted by the board of zoning appeals. Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 604 S.E.2d 7 (Va. 2004). The BZA granted the variance to a landowner who sought to subdivide his property into two lots, and to construct a house on each lot. The board of supervisors filed a petition for a writ of certiorari to challenge the BZA decision. The Supreme Court of Virginia held that the board of supervisors was an "aggrieved person" within the statutory meaning. "[A] board of supervisors has a strong interest in the proper and uniform application of its zoning ordinances. . . . [I]mproper decisions of a board of zoning appeals can impede the uniform and proper application of zoning ordinances and the grant of improper variances can undermine and even destroy the very goals that the zoning classifications were enacted to achieve. . . . If the local governing body does not have [authority to ensure compliance with its zoning ordinance], that body's legislative acts could be effectively nullified by a BZA, and the governing body would be powerless to take action to require compliance with its own ordinances. Moreover, a holding that would preclude a board of supervisors from seeking judicial review of a decision of a board of zoning appeals would enable a board of zoning appeals to exercise power arbitrarily. Certainly, the General Assembly did not contemplate such an untenable result." 604 S.E.2d at 9. The court cited similar holdings by the courts of Alabama, Idaho, Nevada and Rhode Island.

On the merits, the Supreme Court of Virginia held that the BZA had erred in granting the variance because the landowner failed to demonstrate undue hardship. "We have recently stated that a board of zoning appeals has authority to grant variances only to avoid an unconstitutional result." 604 S.E.2d at 12, citing Cochran v. Fairfax County Board of Zoning Appeals, 267 Va. 756, 764, 594 S.E.2d 571, 576 (2004). In this case, the court found that the landowner did not meet that standard. "He has enjoyed the use of his home since 1964. He seeks a variance so that he can demolish the current structure on his property, subdivide his property into two lots, and erect new residential structures on each lot. His inability to subdivide his property does not constitute a hardship under the facts of this case. The effect of the zoning ordinance does not interfere 'with all reasonable beneficial uses of the property, taken as a whole.'" 604 S.E.2d at 12, quoting Cochran, 267 Va. at 766, 594 S.E.2d at 577-8.

A developer which entered into contracts to purchase two parcels of land, but which subsequently conveyed its interest in both tracts, was not aggrieved by the county's refusal to rezone the two tracts, and therefore did not have standing to bring an action seeking declaratory and injunctive relief. Braddock v. Board of Supervisors of Loudoun County, 268 Va. 420, 601 S.E.2d 552 (2004). As a matter of first impression, the Supreme Court of Virginia held that granting standing to the developer "would lead to the anomalous result that the relief Braddock sought would encompass property it did not own, thereby profoundly affecting the interests of a neighboring landowner who might be opposed to Braddock's proposed rezoning. Having divested itself of any interest in the Scogno parcel before filing suit, Braddock had no right to file suit on behalf of its new owner, to force its new owner into litigation, or to embrace the new owner's property within Braddock's proposed development." 268 Va. at 425, 601 S.E.2d at 554. The court concluded, "Braddock was not injuriously affected by the Board's refusal to rezone the Scogno parcel and had no standing to litigate that issue. . . . [N]either Braddock's interest in the Hutchinson parcel nor its agency relationship with the true owners conferred such standing upon it." 268 Va. at 426, 601 S.E.2d at 554-5.

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