

GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL
GOVERNMENT LAW ONLINE

**ETHICAL CONSIDERATIONS IN LAND USE
DECISION MAKING: 2006 ANNUAL REVIEW OF
CASES AND OPINIONS**

SUMMER 2006



80 New Scotland Avenue
Albany, NY 12208
www.als.edu

GOVERNMENT LAW ONLINE publications are available at www.governmentlaw.org

"Ethical Considerations in Land Use Decision Making: 2006 Annual Review of Cases and Opinions"
by Patricia Salkin, published in Urban Lawyer, Volume 38, No. 3 (*Summer 2006*). © 2006 by the
American Bar Association. Reproduced with permission. All rights reserved. This information or any
portion thereof may not be copied or disseminated in any form or by any means or stored in an
electronic database or retrieval system without the express written consent of the American Bar
Association.

**ETHICAL CONSIDERATIONS IN LAND USE
DECISION MAKING: 2006 ANNUAL REVIEW OF
CASES AND OPINIONS**

**Patricia E. Salkin, Esq.
Associate Dean and Director,**

SUMMER 2006

These materials are copyright by Albany Law School (ALS) on behalf of its Government Law Center or ALS licensors and may not be reproduced in whole or in part in or on any media or used for any purpose without the express, prior written permission of Albany Law School or the licensor. Neither Albany Law School, the Government Law Center or any licensor is engaged in providing legal advice by making these materials available and the materials should, therefore, not be taken as providing legal advice.

All readers or users of these materials are further advised that the statutes, regulations and case law discussed or referred to in these materials are subject to and can change at any time and that these materials may not, in any event, be applicable to a specific situation under consideration. The information provided in these materials is for informational purposes only and is not intended to be, nor should it be considered to be, a substitute for legal advice rendered by a competent licensed attorney or other qualified professional. If you have any questions regarding the application of any information provided in these materials to a particular situation, you should consult a qualified attorney or seek advice from the government entity or agency responsible for administering the law applicable to the particular situation in question.

Recent Developments in Land Use, Planning and Zoning Law

Ethical Considerations in Land Use Decision Making: 2006 Annual Review of Cases and Opinions

Patricia E. Salkin*

I. Introduction

THE ANNUAL REVIEW OF ETHICS IN LAND USE CASES continues to monitor reported cases and opinions documenting allegations of unethical conduct involved in land use planning and zoning decision making. The majority of the reported cases once again deal with real and perceived conflicts of interest situations based in part on personal financial interests (e.g., investments in real estate), employment, personal relationships, and familial relationships. In addition, there were a number of reported cases addressing bias, prejudice, and bad faith on the part of decision makers. Compatibility of dual office holding was also the subject of a number of opinions from state attorneys general. The annual ethics update is 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 presented are naturally analyzed under relevant state laws, the general principles are, for the most part, instructive and the concepts are easily transferable from jurisdiction to jurisdiction.

II. Conflicts of Interest

Plaintiff-neighbor unsuccessfully appealed a decision of the zoning officer to the zoning board of adjustment, which had granted his neighbor a building permit when the application included a diagram that was not drawn to scale and omitted certain required information including the height of the buildings and the planned setbacks.¹ On appeal to the

*Patricia E. Salkin is Associate Dean and Director of the Government Law Center of Albany Law School.

1. *Sojka v. Zoning Bd. of Adjustment for Harlan*, No. 5-062/03-1227, 2005 Iowa App. LEXIS 331 (Iowa Ct. App. Apr. 28, 2005).

court, the plaintiff alleged that several board members had conflicts of interest in the matter.² Specifically, he alleged that one board member was the brother-in-law of the person who sold the property to the owners who had been granted the permit, and he claimed that this person might be required to subdivide the property and could still be required to do so.³ In addition, the plaintiff alleged that the board chair was involved with the sale of the property (since he had listed the property and a person from his agency sold it) and, that the chair's comments to other board members—that he knew the property did not need to be submitted to planning and zoning—could have tainted the opinion of other board members.⁴ In addition, plaintiff alleged that a third board member was biased because he made a disparaging comment about a prior interaction between the plaintiff and the board calling the former proceedings “gobbly goop.”⁵ The Iowa Court of Appeals upheld the trial court's determination that the issue of conflicts of interest in this case had not been properly preserved for review by the court since the plaintiff failed to raise the issue at any of the board hearings.⁶

In a Connecticut case a planning and zoning commission chair was accused of tainting the proceedings because he owned a house within the proposed development area, and although he recused himself from the public hearing, the commission meetings, and the vote, he participated in the initial workshops on the application.⁷ In addition, the plaintiffs alleged that the chair “exhibited extreme hostility toward them,” and that he systematically attempted to inhibit development of the land.⁸ Under Connecticut statutes, “no member of any zoning commission or board and no member of any zoning board of appeals shall participate in the hearing or decision of the board or commission of which he is a member upon any matter which he is directly or indirectly interested in a personal or financial sense.”⁹ The court noted that Con-

2. *Id.* at 25.

3. *Id.* at 23.

4. *Id.* The court cited to IOWA CODE § 414.8 (2005), addressing membership on the board of adjustment, which provides, in part, “[A] majority of the members of the Board of Adjustment shall be persons representing the public at large and shall not be involved in the business of purchasing or selling real estate.”

5. *Id.*

6. *Id.* at 22–23. The court said, “After the extensive questioning Sojka made no objections to any of the Board members sitting on this case and he proceeded to present his claims. Sojka accepted the Board and cannot be heard to complain about it now.”

7. *Timber Trails Assocs. v. Planning and Zoning Comm'n of Sherman*, No. CV040351308S, 2005 Conn. Super. LEXIS 1488 (Conn. Super. May 20, 2005).

8. *Id.* at *10–11.

9. *Id.* at *11, *citing* CONN. GEN. STAT. § 8–11 (2006). In addition, the court noted that applicable statutes also state that, “No member of any planning commission shall participate in the hearing or decision of the commission of which he is a member upon

necticut courts have not adhered to a per se rule of invalidation where there is a conflict of interest, and that they look to determine whether any participation may have tainted the entire proceeding.¹⁰ The court was not convinced, based upon the evidence submitted, that the chair attempted to influence or sway other members of the commission.¹¹ Although plaintiffs alleged that an e-mail sent by the chair to another member of the commission was intended to influence a vote, the court found that the message in the e-mail, which asked other members not to speak with others about the project, simply reminded the commission to follow its already established procedural rules.¹² The court further determined that since the chair was not present to influence votes at commission meetings, and absent evidence demonstrating that his presence and participation at the preliminary workshops affected the ultimate granting of the zoning amendments, the plaintiffs failed to show material prejudice.¹³

A. *Conflicts Based on Employment*

The South Dakota Supreme Court held that the plaintiff was denied due process by a conflict of interest that was created when a city council member was employed by an applicant's competitor.¹⁴ In this case, a restaurant owner appealed to the city council to obtain a building permit and a renewal of his liquor license.¹⁵ One of the council members was a waitress at a competitor's restaurant, had received a letter from her employer urging denial of the license, and her employer specifically spoke with her about the application.¹⁶ The building inspector informed the council that denial of the permit was based on an incomplete and inadequate site plan.¹⁷ The city council unanimously voted to deny the liquor license renewal and the record indicated that the decision was made because "questions remained about the business plan" including whether the owner intended to employ exotic dancers.¹⁸

any matter in which he is directly or indirectly interested in a personal or financial sense." See CONN. GEN. STAT. § 8-21 (2006).

10. *Id.*

11. *Id.* Although the court did note that the plaintiffs did specifically plead facts alleging the chair had a personal or financial interest in the outcome of the vote.

12. *Timber Trails Assocs. v. Planning and Zoning Comm'n of Sherman*, No. CV040351308S, 2005 Conn. Super. LEXIS 1488 (Conn. Super. May 20, 2005).

13. *Id.* at *15.

14. *Hanig v. City of Winner*, 692 N.W.2d 202 (S.D. 2005).

15. *Id.* at 209.

16. *Id.* at 204.

17. *Id.*

18. *Id.*

The court noted that due process requires a fair tribunal,¹⁹ and that in administrative hearings a determination must be made as to whether there was actual bias or an unacceptable risk of actual bias.²⁰ The plaintiff alleged that the council member had a prohibited conflict of interest, not just because her employer was pressuring her decision, but because she could be impacted financially if his business was successful and took away business from her current employer.²¹ Furthermore, plaintiff argued that since the council member received part of her income from tips, reduced patronage at her place of employment could result in a reduction of income.²² The court noted that “public policy demands that officials normally disqualify themselves when they have a business or personal interest in the subject on which they must vote, regardless of whether this interest creates an actual bias.”²³ Because she had an indirect pecuniary interest in the application, and this interest was different from the interests of the members of the general public, the council member should have been disqualified from voting on the application.²⁴

The court next turned to the question of whether the council member’s conflict of interest would invalidate the vote and result in a second hearing. In holding that the plaintiff was entitled to a new hearing, the court cited the fact that the council member had an indirect pecuniary interest and that she neither disclosed the conflict nor recognized that she needed to disqualify herself.²⁵ The court further noted that the failure of a council member to disclose a conflict prevents an applicant or

19. Hanig v. City of Winner, 692 N.W.2d 202, 205–06 (S.D. 2005). Citing to a previous decision, the court noted, “A fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well [as] to courts. Not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness.” Strain v. Rapid City Sch. Bd., 447 N.W.2d 332, 336 (S.D. 1989).

20. *Id.* at 206.

21. *Id.*

22. *Id.*

23. *Id.* at 207. Further, the court said that the determination as to whether something constitutes a disqualifying conflict of interest requires a fact specific inquiry and “If the circumstances show a likely capacity to tempt the official to depart from his duty, then the risk of actual bias is unacceptable and the conflict of interest is sufficient to disqualify the individual.”

24. Hanig v. City of Winner, 692 N.W.2d 202 (S.D. 2005). In this opinion, the court reviewed the laws of other jurisdictions including New Jersey, Minnesota, and Iowa to determine whether zoning board members or other quasi-judicial officers are subject to disqualification for a conflict of interest. Furthermore, the dissent argued that the council member’s financial interest was *de minimis*, and that he would not have disqualified her based on this, but noted that the direct contact from her employer was a different matter and that this should have been the basis for disqualification. *Id.*

25. *Id.* at 210.

petitioner from an opportunity to weigh the nature of the conflict and to determine whether to waive disqualification.²⁶ The court ordered a new hearing and vote “without the disqualified member’s participation and with full disclosure of any conflicts of the remaining members.”²⁷

In a recent conflict of interest based employment case, a federal district court in West Virginia reviewed the claims of the terminated town treasurer who had appeared before the town council on more than one occasion to speak out against a proposed zoning ordinance affecting his real estate interests.²⁸ Although the former treasurer alleged that his termination violated his First Amendment due process rights, the court determined that he was an employee at will so he had no property interest at stake that would necessitate a hearing before his termination.²⁹ The court did not take the opportunity to comment on the merits of the conflicts of interest claim.

B. *Advisory Board Member Conflicts*

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.³⁰ 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, thus tainting subsequent redevelopment plan determinations.³¹ The court noted, however, that both advisory committee members had recused themselves before the discussion of the agreement began, and that neither of the two members was present.³² 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 address conflicts of interest for advisory committee members.³³ Specifically, the court cited to Nev. Rev. Stat. § 281.4365, which provides, in part, that a “public officer” does not include “[a]ny member of a board, com-

26. *Id.*

27. *Id.* at 214. The dissent argued that a second hearing was not necessary since every other Council member voted to deny the application, and that “[t]hose votes were for valid reasons. . .” *Id.*

28. *Mitchell v. Town of Culpeper*, No. 3:04-CV-00096, 2005 WL 1902870 (W.D. Va. Aug. 10, 2005).

29. *Id.* at *2.

30. *Hantages v. City of Henderson*, 113 P.3d 848 (Nev. 2005).

31. *Id.* at 850.

32. *Id.* at 850–51.

33. *Id.* at 851.

mission or other body whose function is advisory,” and that “public office” does not include an office held by “[a]ny member of a board, commission or other body whose function is advisory.”³⁴ The court found that committee members’ recusal from discussion and voting precludes an appearance of impropriety or unfairness.³⁵ 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.³⁶ 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.”³⁷

C. *Familial and Personal Relationships*

Plaintiffs challenged the village board of trustees’ decisions with respect to allowing the village historical society to locate its office in a residential district based in part on the fact that the spouse of a board member had represented the Winnetka Historical Society in the sale of the residential property in question, and received a commission as a result.³⁸ Noting that a spouse’s financial interest in a venture does not necessarily disqualify a decision maker,³⁹ an Illinois 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.”⁴⁰ Since the Historical Society did not apply for the permit and variance until after it had already purchased the property, the commission that the spouse received was not in any way contingent upon the granting of the requested relief.⁴¹ Furthermore, the court noted that the board member disclosed his wife’s involvement as

34. *Id.*

35. *Hantages v. City of Henderson*, 113 P.3d 848, 852 (Nev. 2005). The court also noted that the Commission considered the agreement multiple times without the influence of either member, and that “[t]he two commission members were not involved in any negotiations, discussion, or planning involving the OPA or business between the Redevelopment Agency and Commerce.”

36. *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.”

37. *Id.*

38. *Lapp v. Vill. of Winnetka*, 833 N.E.2d 983, 997 (Ill. App. Ct. 2005).

39. *Id.*

40. *Id.*

41. *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.

a real estate broker for the Society at a public meeting, and held that the plaintiff had simply failed to show any evidence that the council's determination was impacted by a conflict of interest.⁴²

In another case, plaintiffs opposed the granting of a variance to an automotive business allowing the business to establish a vehicle repair facility and alleged, among other things, that one of the board members had a close personal relationship with the owner of the automotive business and therefore should not have voted on the matter.⁴³ Specifically, the plaintiffs alleged that the board member had invited a principal of the applicant company to his own company's party, and that he had demonstrated during the zoning board hearing an "intimate and ongoing knowledge of the applicants' business."⁴⁴ While noting that the plaintiffs failed to adequately brief the conflict of interest issue,⁴⁵ the court stated that even if it were to address the board member's alleged conflict, "the plaintiffs have not demonstrated a bias or pre-determination that would have mandated . . . disqualification."⁴⁶ The court pointed out that bias requires evidence of financial or personal interest, and that in the present case, although the board member knew a principal of the applicant through a mutual friend, these two individuals never referred work to each other and the board member was never asked to advocate for the application.⁴⁷

D. *Bias, Prejudice, and Bad Faith*

A group of landowners challenged the adoption of a county growth management plan on a number of grounds, including an allegation that the county had acted in bad faith or on improper motive.⁴⁸ Specifically, the homeowners argued that the board was improperly influenced when two of the people who spoke against their position were a prominent local attorney and a member of the county planning commission.⁴⁹ In addition, they alleged that "the county paid inordinate attention to the concerns of property owners in a neighboring 'upscale residential subdivision.'" ⁵⁰ The court acknowledged that the general purpose of zon-

42. *Id.*

43. *Ten Marietta St., LLC v. Zoning Bd. of Appeals*, No. CV030475837S, 2005 Conn. Super. LEXIS 2740, at *1 (Conn. Super. Ct. Oct. 5, 2005).

44. *Id.* at *21–22.

45. *Id.* at *22. The court further noted that they are "not required to review issues that have been improperly presented to [it] through an adequate brief. . . ."

46. *Id.*

47. *Id.* at *23.

48. *See Laughter v. Bd. of County Comm'rs for Sweetwater County*, 110 P.3d 875 (Wyo. 2005).

49. *See id.*

50. *Id.* at 890.

ing is to “conserve and promote the public health, safety and welfare . . . ,”⁵¹ and that the protection of property values and preservation of neighborhood character are proper factors for consideration.⁵² The court stated that to determine whether there is a substantive due process violation, the standard is no longer one of “improper motive,” but, rather, whether the action is so arbitrary that it shocks the conscience.⁵³ The court found meritless the landowners’ allegations of bad faith and bias resulting from the participation of the local attorney and planning commission member, citing the fact that the zoning board member had recused herself from the commission proceedings and did not vote on the matter, and that there was no evidence of improper influence by the attorney.⁵⁴

In another bias case, plaintiffs appealed a zoning commission decision that granted variances necessary to construct a storage facility, alleging, among other things, that the commission failed to objectively review the zoning applications because the review process was tainted by the inappropriate intertwining of public and private interests.⁵⁵ Plaintiffs alleged that even if the commission members were not aware of their bias, they were so committed to seeing the project become a reality that they were simply incapable of being objective and independent.⁵⁶ Plaintiffs further noted that the town was a co-applicant with the developer, and alleged that the commission was just rubber stamping what the town and the developer had agreed upon,⁵⁷ and also alleged that the 400-page master agreement addressing, among other things, zoning issues, must have been agreed to long before the zoning applications were filed, evidencing further bias.⁵⁸ Lastly, the plaintiffs alleged that the municipality failed to follow certain statutory procedures, showing bias and predisposition to approve the applications.⁵⁹ The court noted

51. *Id.* at 891, citing WYO. STAT. ANN. § 18-5-105(a) (2003) and WYO. STAT. ANN. § 18-5-306(a)(vii) (2003).

52. *Id.*

53. *Id.*

54. *Id.* The court concluded, “In the absence of such showing, we will presume neither bad faith nor prejudice, and we have been directed to no evidence showing county conduct that ‘shocks the conscience.’”

55. *Sadler v. Town of W. Hartford*, Nos. CV044001119, CV0044002125, CV044001448, CV044001388, 2005 WL 1155106, at *6 (Conn. Super. Ct. Apr. 22, 2005).

56. *Id.* at *8.

57. *Id.* The opinion notes that one council member stated that typically the town administration would remain completely neutral, and that the town manager told the commission that there were some unsettled issues, but suggested that the commission may have to make a decision while there are still some points of disagreement.

58. *Id.*

59. *Id.*

that “[t]here is a presumption that administrative board members acting in an adjudicative capacity is not biased,” and to overcome this presumption, the plaintiff has the burden to demonstrate actual bias as opposed to the mere potential for bias unless the facts suggest that the probability of such bias is too high to be constitutionally tolerable.⁶⁰ In finding no evidence to support the allegations of bias or predetermination, the court noted just the opposite, that the record contained ample evidence that the municipal officials did not predetermine applications and that they repeatedly made comments at public meetings assuring people that they had open minds and that it was not a “done deal.”⁶¹

In a case before the Delaware Superior Court, plaintiffs appealed a determination by the board of adjustment denying their requests for a variance.⁶² They alleged, among other things, that the board abused its discretion when it failed to act as an impartial arbiter.⁶³ In agreeing with the plaintiffs, the court found that the board did overstep its role as neutral arbiter during two hearings, and noted that there was “some evidence that the Board strong-armed the attorney for the City into taking a position against the settlement.”⁶⁴ The court was frustrated that the board failed to keep a record of one of its hearings,⁶⁵ but refused to reverse the decision of the board solely on this ground.⁶⁶ However, in reversing the board’s decision, the court found that the evidence indicated that the board did not act impartially and in fact acted with impropriety.⁶⁷ In an effort to seek attorney’s fees, the plaintiffs brought

60. *Id.* at *9.

61. *Id.* at *10. The court further commented that although the mayor may have been in favor of the project, this did not prove any bias or predetermination on the part of the decision makers.

62. *Brittingham v. Bd. of Adjustment of Rehoboth Beach*, No. 03A-08-002, 2005 WL 170690 (Del. Super. Ct. Jan. 14, 2005).

63. *Id.* at *11–12.

64. *Id.* at *12.

65. *See id.* The court said, “It is impossible to determine exactly what happened during the April Hearing. There was no transcript on the record from it. It was during that hearing that the Board allegedly asked the City Solicitor to write a brief in opposition to the Brittingham’s position. In addition, it scolded him for the position he had earlier taken.”

66. *Id.* at *13. The court noted that in Delaware, “the Court does not have the freedom to remand the case in order to allow the Board to hold further hearings, to make specific fact findings or to reconstruct the record. . . . Reversal would be the Court’s only option.” (citation omitted).

67. *Id.* The court said that the Board

did not play fairly when it required the Brittinghams to return for a second hearing, under the guise of tying up procedural loose ends, only to pull the rug out from them and rehear the case in a third hearing. It failed to follow its own rules, and then penalized the Brittinghams for a procedural oversight that was equally its own. Such sleights of hand suggest the sort of impropriety that undermine the public’s faith in the integrity of the public process.

a subsequent action alleging that the board members acted in bad faith.⁶⁸ The court noted that “[e]ven though the Board’s actions were not justified, this does not mean that the members had engaged in egregious conduct.”⁶⁹ The court held that the plaintiffs failed to prove bad faith, and that bad judgment alone is not equivalent to a sinister motive or dishonest purpose.⁷⁰

Where a former member of the township board of health displayed bias against the applicant and its applications, the New Jersey Superior Court determined that she was disqualified from official or indirect participation as a member of the township board of health and the township planning board from adjudicating any applications or participating in hearings regarding the applicant’s property.⁷¹ The court stated that she could not participate as a member of the board in hearings concerning the applications, nor could she vote on the applications.⁷² The court said she would not be precluded, however, from making determinations in her role on the township committee with respect to ordinances that may apply to the applicant’s property along with other properties in the township.⁷³

E. *Ex Parte Communications*

Plaintiffs sought to overturn a decision by the planning and zoning commission granting a site plan application that was based in part on information received and considered by the commission after the close of the public hearings.⁷⁴ The court noted that the determination as to whether an *ex parte* communication was received and, if so, whether any prejudice resulted, is one that is made on a case-by-case basis.⁷⁵ The plaintiff failed to adequately brief one of its two allegations of *ex parte* information, so the court dismissed that allegation deeming the issue abandoned.⁷⁶ As to the second claim, the court determined that it

68. *Brittingham v. Bd. of Adjustment of Rehoboth Beach*, No. 03A-08-002, 2005 WL 1653979 (Del. Super. Ct. Apr. 26, 2005).

69. *Id.* at *3.

70. *Id.*

71. *Lackland & Lackland v. Readington Twp.*, No. SOM-L-344-03, 2005 WL 3072364, at *2 (N.J. Super. Ct. Nov. 16, 2005).

72. *Id.*

73. *Id.* In addition, the court noted that it would “not preclude whatever rights she may have as a resident or taxpayer of Readington Township with respect to applications before the Board of Health or Planning Board.”

74. *Comm. to Save Guilford Shoreline, Inc. v. Guilford Planning and Zoning Comm’n*, No. CV030483939S, 2005 Conn. Super. LEXIS 922, at *48 (Conn. Super. Ct. Apr. 14, 2005). The plaintiffs alleged that “after the hearings closed, the commission improperly received hearsay information regarding the endangered species database and a copy of the standard lease.”

75. *Id.* at 49.

76. *Id.* at 49–50.

was an *ex parte* communication, but that there was no indication or suggestion that the commission considered or relied upon facts not already in the record of the administrative proceeding.⁷⁷ The court noted that “once an *ex parte* communication has been established, a presumption of prejudice is deemed to arise. . . .” The court must then determine whether the challenged action was based upon this information.⁷⁸ Based on its conclusion that the commission did not rely on the *ex parte* communication, and that the information in the document had previously been communicated to the commission, the court held that while the *ex parte* communication was improper, it did not prejudice the process.⁷⁹ In another allegation, the plaintiffs asserted that the commission abused its discretion by relying on its own expertise with respect to a technical flooding issue when one commission member expressed a belief based upon his understanding of floodwater dynamics.⁸⁰ The court found no evidence that the commission relied on those comments when it approved the site plan.⁸¹

III. Dual Office Holding

The Michigan Court of Appeals determined that the zoning board violated applicable state statutes by appointing one of its own members to the position of zoning administrator while the member still held office on the zoning board.⁸² In making the appointment the board based

77. *Id.*

78. *Id.* at *51.

79. *Comm. to Save Guilford Shoreline, Inc. v. Guilford Planning and Zoning Comm’n*, No. CV030483939S, 2005 Conn. Super. LEXIS 922, at *52. The court noted that the government sustained its burden of rebutting the presumption of prejudice in this case because there was “no indication or suggestion that the commission, in forming its conclusions, considered and/or relied upon facts not already in the record of the administrative proceeding.”

80. *Id.* at 53.

81. *Id.* The court noted that while a commission of all lay members may not rely entirely upon personal observations alone, the commission must consider the entire record and commissioners may comment on issues during deliberations.

82. *Boyce v. Williams*, No. 252206, 2005 WL 1875561 (Mich. Ct. App. Aug. 9, 2005). The relevant statutory provisions are as follows: MICH. COMP. LAWS § 46.30a(1), which states: “A member of the county board of commissioners of any county shall not be eligible to receive, or shall not receive, an appointment from, or be employed by an officer, board, committee, or other authority of that county except as otherwise provided by law.” MICH. COMP. LAWS § 15.182 states, in part: “Except as provided in . . . [MICH. COMP. LAWS § 15.183], a public officer or public employee shall not hold 2 or more incompatible offices at the same time.” While MICH. COMP. LAWS § 15.183(4)(c) states that MICH. COMP. LAWS § 15.182 does not limit the authority of certain localities to make appointments, MICH. COMP. LAWS § 15.183(6) provides that “[t]his section does not allow or sanction activity constituting conflict of interest prohibited by the constitution or laws of this state.”

its reasoning on an opinion of the Attorney General, which had concluded that, under the facts presented there, the county commissioner could serve in both roles.⁸³ The crux of the allegation is that the county commissioner applied for the zoning administrator position while a member of the body responsible for making the hiring decision.⁸⁴ Although the commission member submitted his resignation to be effective before he assumed his new duties as zoning administrator, obviating an incompatibility in dual office holding, the court determined that a conflict of interest remained during the appointment process.⁸⁵

In a similar dual office situation in another state, the Attorney General for the State of Louisiana opined that a person may simultaneously serve as a member of a town council and a historic preservation committee.⁸⁶ The Attorney General pointed out that while state statute bars full- or part-time employment for the subdivision in which a council member holds elected office, the statute does not bar a councilperson from holding a part-time appointive office.⁸⁷ In another opinion, the Louisiana Attorney General advised that the statute did not bar a parish permit coordinator, which is a full-time position of employment, from also serving part-time as a zoning commissioner for a local town (an appointed position), which makes the person a public officer.⁸⁸ In a third opinion, the Louisiana Attorney General stated that state law did not prohibit a member of a community school board from serving part-time in an appointed capacity as a member of the same community's zoning commission.⁸⁹

The Attorney General of South Carolina opined that the state's constitutional bar against dual office-holding forbids a county planning commission member from serving as a city council member in that county.⁹⁰ The Attorney General determined that a planning and zoning coordinator holds an "office," which subjects that position to the prohibition against dual office-holding under the state constitution.⁹¹ The

83. *Id.*

84. *Id.*

85. *Id.*

86. La. Atty. Gen. Op. No. 05-0010 (2005). In addition, LA. REV. STAT. § 42:64(a)(1) permits local legislative bodies to appoint its members to "boards and commissions created by them and over which they exercise general powers . . ." and "[t]he historic preservation commission is such an entity."

87. *Id.*

88. La. Atty. Gen. Op. No. 05-0248 (2005).

89. La. Atty. Gen. Op. No. 05-0236 (2005).

90. 2005 WL 2250214 (S.C.A.G.). The South Carolina Constitution provides in part that "no person may hold two offices of honor or profit at the same time. . . ."

91. *Id.* at 1-2.

Attorney General of Alabama advised that while a city council person may not serve as an official on a planning and zoning commission,⁹² a public works supervisor may be validly appointed by a mayor to serve on a planning and zoning commission consistent with Alabama state statute.⁹³

IV. AICP Code of Ethics for Planners⁹⁴

Historically, codes of ethics have been developed for professional planners. Certain behavior in land use planning and zoning decision making may pose ethical challenges in the sense that conduct may amount to an illegal action based upon a state or local conflict of interest law or another regulation governing the actions or conduct of one of the many participants in the planning and zoning game. These scenarios are typically easy to spot and the “rules of the game” are generally known to the players. For example, as this article has demonstrated, decision makers should not act when they or members of their immediate families may stand to personally benefit from a vote or decision. Less known and understood, however, are the ethical codes of conduct that govern the professional conduct of certain players in the land use game including planners, engineers, architects, attorneys, and realtors. Each of these professions provides codes of conduct for their members who may be either licensed or certified by a governmental and/or professional organization. Some of the codes of conduct (or codes of ethics or professionalism) are mandatory and others are aspirational. They offer varying levels of enforcement and penalties. This section examines briefly the historical development of the code of ethics for professional planners who choose to apply for membership in the American Institute of Certified Planners (AICP), and it touches briefly upon the new AICP Code of Ethics that went into effect in 2005.

In 1959, the American Institute of Planners (AIP) enacted an ethics code for its members. This code remained in effect until 1970. The code provisions were largely an attempt to regulate business practices such as advertising, no fee competition, and boycotting of clients who owed planners money. In 1970, a new code was adopted. This code, like the 1959 version, was aspirational, but it included rules of conduct. The revisions included provisions focusing on minority community in-

92. Ala. Atty. Gen. Op. No. 2005-101 (2005), at *6.

93. *Id.* at *7.

94. Patricia E. Salkin, *Zoning and Land Use Planning*, 34 REAL. EST. L.J. 508 (2006). This section of this article was published by the author in the *Real Estate Law Journal* (Spring 2006).

volvement, public participation, and addressing the disadvantaged in the planning process. That code remained in effect until 1978.

In October 1978, when the AIP consolidated with the American Society of Planning Officials, the AICP Code of Ethics and Professional Conduct was adopted. The purpose of the Code was to regulate the conduct of AICP members, to serve as a guide to members of the American Planning Association, and to inform members of the planning community and the public of the ethical standards to which they should expect professional planners to adhere. The design and format of the Code was influenced by the code of the National Association of Social Workers. The AICP Code was amended in 1991 and was supplemented by a statement of Ethical Principles in Planning that was adopted by the AICP in 1992. The original AICP Code resulted from a collaborative multi-year process of consideration by the AICP that included outreach to AICP leadership and to the general membership. According to those who drafted the Code, the principles enunciated in the Code were derived from both the general values of society and from the planning profession's special responsibility to serve the "public interest."

The AICP, as an organization, has historically placed great emphasis on the code as a cornerstone of the core values of the planning profession. The code of ethics is viewed as a critical component to the increased status of planning as a profession. In 2001, the AICP retained the Government Law Center of Albany Law School to engage in a lengthy assessment of the AICP Code of Ethics. This assessment, which consisted of a historical review of the ethics codes for the profession, an examination of the codes of ethics promulgated by other professions involved in planning and/or professions who serve the public interest, a survey of AICP leadership and members, interviews with AICP members who had been intimately involved with the Code of Ethics, a review of all filed ethics complaints as well as resulting investigations and outcomes, a review of published AICP ethics opinions, and a review of the existing Code for both legal issues (e.g., due process issues, clarity of provisions, etc.) and for organizational/policy issues. The assessment provided information used in the development of the current AICP Code of Ethics and Professional Conduct, adopted on March 19, 2005, and effective as of June 1, 2005.⁹⁵

Significant enhancements were made to the AICP Code of Ethics in 2005 to clarify certain provisions of the Code and to reorganize it for

95. A copy of the AICP Code of Ethics and Professional Conduct is also available at <http://www.planning.org/ethics/conduct.html> (last visited June 12, 2006).

better use. It also, for the first time, clearly states which provisions are aspirational, which provisions are enforceable, and it provides a clearer process for how allegations of Code violations will be investigated, prosecuted, and adjudicated. The first section of the Code contains the general aspirational principles, which may not be the subject of a misconduct charge but rather represent a social consciousness or a social contract with the public. While a number of these aspirational goals were contained in the 1992 Code, the way the former Code was organized made it unclear whether an AICP member could be the subject of a formal ethics investigation for failure to comply with seemingly undefined, aspirational goals, the compliance of which often depends upon the vantage points of the accuser(s) and actor(s).

Separating the aspirational standards from the enforceable standards is critical for individuals whose ongoing certification is dependent upon compliance with the Code's provisions. The 2005 Code contains a new section entitled "Rules of Conduct" which clearly states up front that members understand that the AICP will enforce compliance with these rules, and that failure to comply may result in sanctions, the ultimate being loss of certification. One gap in the Code is the absence of a definition section to provide further guidance to AICP members, the public, and the Institute. The Rules of Conduct contain twenty-five rules all beginning with the words "We shall not. . . ." The Rules can be categorized into conduct that is in essence illegal, conduct that is less than truthful, conduct that is not professional, and general conduct that would cause a lack of public confidence.

V. Conclusion

From a litigation standpoint, once again the cases this year were decided overwhelmingly in favor of municipal officials. While this does not necessarily mean that the alleged conduct was not unethical, it does indicate that certain actions that attract ethics allegations simply do not rise to the level of illegal conduct. As always, 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 decision making.

— |

| —

— |

| —