

GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL  
**GOVERNMENT LAW ONLINE**

---

**LEGAL ETHICS AND LAND USE PLANNING**

**SPRING 1998**



80 New Scotland Avenue  
Albany, NY 12208

[www.als.edu](http://www.als.edu)

GOVERNMENT LAW ONLINE publications are available at [www.governmentlaw.org](http://www.governmentlaw.org)

*Reprinted from The Urban Lawyer, Volume 30, No. 2 (Spring 1998) with permission of the American Bar Association. The information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.*

# **LEGAL ETHICS AND LAND USE PLANNING**

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

**SPRING 1998**

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.

## LEGAL ETHICS AND LAND-USE PLANNING

Patricia E. Salkin

### I. Introduction

A LAWYER SITS AS A MEMBER of the planning board. May she step down to represent a client before the board and then return to her seat after the matter is presented and/or resolved? A lawyer in private practice who advised the zoning board for five years was recently replaced with another attorney when the new mayor took office. Can he now represent an applicant before that same board? A member of the planning board is also a local real estate agent for the largest realty company in the town. Is this an inherent conflict of interest? May she vote on proposed new housing developments when she is likely to earn a commission on any sale she makes within these developments? May members of zoning boards vote on matters involving their neighbors, friends, business associates, or anyone they know? What happens when the mayor or supervisor needs a variance from the zoning board--can she appear without an appearance of putting undue pressure on the board? How should they proceed? When is disclosure enough? When is recusal appropriate? When a full-time city attorney is assigned to review a matter pending before the planning and zoning boards and to advise them on appropriate action(s), who is the client of the city attorney? Does it make a difference if different offices and divisions within the government have different ideas on how to proceed? Careful consideration by land-use attorneys of appropriate actions when confronted with ethical dilemmas such as those raised above is critical. Unique circumstances are presented in the public sector arena because multi-million dollar decisions are made by planning and zoning boards, and partly because decisions affect the use of land in individual neighborhoods. This contributes to heightened awareness by applicants and the public of potential conflicts of interest and other ethical dilemmas. For attorneys, it is not enough to simply be conversant with the Code of Professional Responsibility **\*384** or the Rules of Professional Conduct. For those lawyers working in or interacting with the public sector arena, whether employed or retained by the government or representing a client before the government, additional codes of ethics at the state and local level are relevant to a land-use and zoning practice. This article provides an overview of some of the major issues raised when ethics meets land-use planning and zoning decision making.

### II. Earning the Public Trust

While the vast majority of public officials are honest, well-intentioned, good people, it is relatively easy for a simple oversight or lack of consideration of the potential outside appearance which may give rise to public scrutiny of their actions. The public expects and deserves the highest degree of ethical conduct when it comes to government decision making. Without this "public trust," our planning and zoning boards and local legislative bodies would not have the confidence and support of the people. This would undermine the public purpose behind local land-use decision making, and further complicate what may already be difficult and controversial situations.

#### A. Conflicting Ethics for People with Expertise

One aspect of earning the public trust is the appointment of knowledgeable and interested people to serve on land-use decision making boards. It is not uncommon to find planners who work in neighboring localities, architects, engineers, lawyers, realtors, and builders interested in serving in such a capacity. On one hand, their professional expertise is desirable. On the other hand, the public needs to be certain that these same people, whose earning potential may be tied to land-use planning and zoning decisions, avoid conflicts of interest, decision making out of self-dealing, and even the appearance of impropriety. While these may prove to be (un)intentional disincentives to service, there are thousands of people on boards and legislative bodies who earn a living in a field related to land-use decision making, and questions of ethics are constantly on the horizon

for them.

### III. Defining Ethics

Government officials, elected and appointed, and those who interact with government, are expected to conduct themselves in an ethical manner. Defining "ethical" may be a challenge.

#### A. Ethics as Conduct or Behavior

Ethics may be conduct or behavior relating to things such as ex parte communications among members of planning and zoning boards and applicants, [FN1] assurances given to applicants by individual board members prior to a public meeting, or the sharing of otherwise confidential information with those not a party to the issue at hand.

#### B. Ethics as Morals or Values

Ethics may also be defined as morals or values which include the ability to make determinations between right and wrong. One troublesome aspect of viewing ethical conduct in this regard is that the public will judge the extremes of right and wrong through community standards which may change from time to time and may differ from jurisdiction to jurisdiction. It becomes a subjective issue of what the community is willing to tolerate, and less of a self-inquiry by the official taking the action into what their own value system dictates.

#### C. Conflicts of Interest

Ethics may be more readily defined through conflicts of interest situations, particularly where there is potential for personal financial gain. Conflicts of interest situations may arise in dozens of scenarios including pecuniary interests in applications before a board, or employment opportunities and/or benefits for family members. Abuse of public office for personal gain is another area where work in the local land-use arena may present ethical problems. For example, an attorney or her clients may be knowledgeable about certain information regarding the potential purchase of property within the municipality. It would be unethical to quickly "buy up" the land in question in the hopes of turning a quick profit since, based upon "insider information," this land could be worth a premium in the near future. Although George Plunkett of Tammany Hall might refer to this as "honest graft," [FN2] today \*386 it would be analogous to laws protecting confidentiality and the prohibition of insider trading in the securities arena. More flagrant ethical issues, including bribery and influence peddling, can carry criminal penalties (and in fact are found within state penal laws rather than codes of ethics), while conflicts of interest matters may yield to lesser civil fines.

#### D. Avoiding Headlines

The bottom line is that lawyers and their clients would prefer to avoid headlines in local newspapers which suggest allegations of unethical conduct. As Senator Alan Cranston professed during the Keating Five investigation, "It's easy to make an allegation of unethical conduct; it's hard to defend against such an allegation." [FN3] So often the allegation is reported and followed on the front pages, but news that months (and sometimes years) later the allegations were found unsubstantiated usually goes unreported.

### IV. Applicable Ethics Rules

There are a number of places where a land-use lawyer must search for guidance on ethical dilemmas arising in the land-use context.

#### A. The Code of Professional Responsibility

All lawyers adhere to the code of ethics adopted by the state court system in each jurisdiction. The Code of Professional Responsibility was initially promulgated by the American Bar Association (ABA) in 1969, and contains nine canons with myriad

disciplinary rules and ethical considerations. In 1983, the ABA adopted the Model Rules of Professional Conduct which contain commentary to the Rules. States have adopted one of the two models, and in many cases made changes to reflect jurisdictional concerns. Therefore, individual state laws governing attorney conduct need to be consulted for variation and caselaw interpretation.

#### B. State Ethics Laws

Every state has enacted a code of ethics or a code of conduct for public employees. While some states pay minimal attention to the issue of municipal ethics (where land-use planning and zoning decisions generally take place), other states have specific statutory provisions for local government officials.

#### **\*387** C. Local Government Ethics Laws

A number of states specifically authorize and/or mandate that local governments adopt their own codes of ethics. Some state statutes make specific reference to conflicts of interest in state and regional planning acts and laws. Attorneys who work for or in front of planning and zoning boards must be conversant with these rules as well as the more generally applicable rules of legal ethics, for a number of obvious reasons: (1) under a statutory or local law definition, if the lawyer represents the municipality or the board, she may be bound individually by the law; (2) lawyers counseling local entities or individuals therein must be familiar with special ethical considerations in the public sector; and (3) lawyers representing applicants before the boards need to know the applicable standards of ethical conduct to best serve the interests of their clients.

#### D. Ethics Committees and Commissions

In addition to the codes and local laws, there are special committees and commissions which may provide formal and informal opinions on professional and government ethics. These include committees of the American Bar Association, state bar associations, the Federal Bar Association, state ethics commissions or boards, and local government ethics boards. These opinions at the state and association levels may be available through online research databases, through subscription services, and in some cases, on the Internet. Opinions from local ethics committees may be more of a challenge to research.

#### E. State Attorneys General and Comptrollers

The state attorney general and comptroller may also offer formal and informal opinions to municipal officials and municipal attorneys on a wide variety of ethics issues including conflicts of interest and compatibility of dual office holding. These opinions are published, readily available online, and serve as a useful source of insight into the application and interpretation of constitutional, statutory, and common law ethics principles.

#### F. Other Professional Organizations

Finally, if your client is the municipality and you represent the professional planning staff, both the American Planning Association and the American Institute of Certified Planners have issued guidance documents on appropriate ethical conduct for planning. In addition, other professionals who may come into contact with the municipality with respect to a land-use matter may also be governed by a code of ethics from their professional association (e.g., architects, [\[FN4\]](#) engineers, [\[FN5\]](#) and realtors [\[FN6\]](#)).

#### V. Professional Ethics vs. Government Ethics

Determining the nature of a potential ethical issue is not often as easy as it appears. For example, attorneys may be functioning in more than one advisory role, and they may be subject to both professional and governmental ethical considerations. These standards may not always be in agreement with each other. What follows is a discussion on three areas of concern for the lawyer both as a professional and as an advisor to a municipality. The issues addressed below merely begin to uncover the ethical dilemmas which may confront the land-use practitioner.

## A. Attorney as a Professional

As noted in the introduction, the conduct of attorneys is governed by the code of professional responsibility adopted by each state.

### 1. CONFLICTS OF INTEREST

The Code of Professional Responsibility DR 5-105 prohibits attorneys from representing clients with differing interests. Sometimes, the municipal attorney finds herself in a conflict of interest situation. For example, when a town attorney discovers a conflict between the position of the town board and the town zoning board of appeals, each municipal body would be entitled to their own legal counsel. [\[FN7\]](#) In Kentucky, the Attorney General opined that it is a common law conflict of interest and incompatibility of office situation for an attorney to function as an independent contractor for a municipal planning and zoning board while at the same time serving as an assistant county attorney, where the municipalities are within the county. [\[FN8\]](#) It is not uncommon for attorneys or law firms to represent more than one and sometimes dozens of municipalities. At times this can also test ethical limits as at least one state ethics committee has opined that it is not improper per se for a lawyer to be both the town attorney and the village attorney for a village located with the town. [\[FN9\]](#)

#### a. Conflicts Between Clients

Other times, a conflict may arise when a municipal attorney is appointed on retainer, and a conflict arises between the position of a municipal client and another client. For example, it was held a violation of DR 5-105(A)(B) and (C) for a village attorney and his firm to represent the zoning board of appeals and at the same time appear as attorneys for an interest requesting relief from the ZBA. The same case held that it is also a conflict for the same attorney to file a petition challenging the determination of the board. [\[FN10\]](#) Similarly, the New York Attorney General opined that the counsel to a municipal water supply board may not represent a developer in applications for subdivision approval before the city planning and zoning commissions. [\[FN11\]](#)

Disciplinary Rule 9-101 provides in part, "1. A lawyer shall not represent a private client in connection with a matter in which he participated personally and substantially as a public officer or employee...." While most people would recognize this as a "revolving door" provision, the question remains as to what exactly "personal and substantial participation" means, and whether this precludes representation years down the road. At least one state has determined that it is unethical for an attorney for the town zoning board of appeals to represent a client in a private matter before the town board. [\[FN12\]](#) In one case, an attorney representing a borough in New Jersey began representation of a developer after the developer had already received final approval for his project. The attorney was retained to handle matters including mortgage financing. Although the attorney did not represent the planning board, the board of adjustment or the developer during the land-use approval process, the court nonetheless held that such dual representation was forbidden as contrary to the public interest. [\[FN13\]](#) The court noted that the very nature of the work of a developer involves a high degree of municipal interaction. The court stated:

[T]he likelihood of transactions with a municipality and the room for public misunderstanding are so great that a member of the bar should not represent a developer operating in a municipality in which the member of the bar is the municipal attorney or the holder of any other municipal office of apparent influence. [\[FN14\]](#)

#### b. Conflicts as Applicable to the Law Firm

Another dilemma is presented when a municipal attorney's private law firm wishes to represent a client before a municipal board. May the firm do so without causing a conflict of interest situation for the municipal lawyer? The answer may not be so clear-cut, and may depend upon: provisions in state and local government ethics laws; the Code of Professional Responsibility; a determination as to whether the municipality will hire

special outside counsel to offer advice on the matter; and an inquiry as to whether the municipal attorney will financially benefit from her firm's representation of the client before the municipality. [FN15]

In a recent New Hampshire case, the chair of a county commission was ordered disqualified from participation in a determination of public necessity prior to the initiation of eminent domain proceedings since the chair was a lawyer and his law partner was representing two of the landowners. [FN16] Since the chair had already participated in the proceeding, the court remanded the matter for a new proceeding. [FN17]

In Pennsylvania, an attorney may not represent a township in making amendments to their zoning code when a member of his law firm conducts the hearing and rules on objections. [FN18] The court warned, "All municipal adjudicative bodies must avoid unnecessary conflicts and commingling of incompatible functions whenever possible." [FN19] Since this procedure was susceptible to prejudice, it was prohibited.

In relying on an opinion of the Ethics Committee of the Mississippi State Bar, the Attorney General opined that it would be a violation of the Code of Professional Responsibility for a law firm to represent a client who is seeking to establish a facility in the city while the firm has been retained to assist the city attorney in the defense of an unrelated voting rights case against the city. [FN20]

#### B. Disclosure and Recusal

Determining when disclosure alone is enough or when recusal or withdrawal is the more appropriate course of action can also be a challenge. For example, may an attorney in private practice represent clients before a planning or zoning board where her spouse sits as a member? While one may assume that the ethics inquiry is a matter solely for the municipal official, does the attorney have an obligation to disclose the relationship to their client? Furthermore, does professionalism dictate that the lawyer attempt to ascertain whether her firm is being retained for the hearing in an effort to garner votes due to the marital status of a lawyer in the firm and a board member? In a recent opinion of the California Attorney General, it was opined that a city council may enter into a development agreement with a land developer when one of the council members is married to an attorney whose law firm represents that developer on other matters, so long as the council member discloses the interest to the council on the record, and the member does not participate in negotiating or voting upon the agreement. [FN21]

A Georgia court held that where the planning commissioner's son was a member of a law firm, even where the son had no direct involvement in the representation, the commissioner was prohibited from participating in the proceedings for the zoning application. [FN22] The court also referred to the local ethics code which prohibited a municipal officer from participating in a matter involving an interest of an immediate relative. [FN23] The court stated, "Public interest requires that Cobb County protect against improper influence or the appearance of improper influence...." [FN24] The court did not address the motives or the integrity of the lawyers involved; rather it focused on the conduct of the planning commissioner.

#### C. When the Government Is a Former Client

Revolving door provisions typically do two things: prohibit attorneys who go from the public sector into the private sector from appearing before the governmental body for which they worked for a set amount of time (usually one or two years); and impose a lifetime ban on appearances before a governmental agency on any specific matter worked on in the public sector. The lifetime ban, depending upon its interpretation, could prove problematic for law firms who serve as municipal attorneys on retainer. For example, if an attorney drafted a local subdivision law or ordinance fifteen years ago, and no longer represents the municipality, is the lawyer or her firm prohibited from ever representing an applicant for a subdivision approval? Unless the population represented by the local government is substantial, the majority of municipalities simply employ legal counsel on retainer from local law firms (as opposed to full-time salaried employees). The political nature of the job of municipal attorney means that from election year to election

year, the appointment of the local government attorney may also be up for grabs. Should municipal attorneys be prohibited from ever doing work in the jurisdiction which pertains to land-use laws that may have been drafted or written by them or their firms in the past? If this is so, it may have a chilling effect on the number of lawyers interested in municipal work.

The Code of Professional Responsibility in DR 5-108 specifically addresses conflicts of interest with respect to former clients. The Rule provides that, absent express consent upon full disclosure to a former client, a lawyer shall not, "1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client. 2. Use any confidences or secrets of the former client...." Recently, a New York appellate court, relying on DR 5-108, held that where a law firm had been retained by a municipality for approximately twenty-five years, first as counsel to the planning board and later as counsel to the village, and during that time it had been involved in the site plan law which was developed and in effect, it was precluded from representing a client before the planning board for a site plan review six years later. [FN25] The court found that given the long-standing prior representation of the village in matters which directly related to zoning and site plan review (including the fact that the law firm had drafted a recodification of the code), this was a, "... substantial related matter in which ... [petitioner's] ... interests are materially adverse to the interests of the former client." This case has a significant impact on practitioners who retain public sector clients, especially when their retainer agreement may be terminated at will and their prior work and advice may preclude any later representation in an area where they have built a practice concentration.

In reaching a somewhat different conclusion, a Virginia court held that a law firm would not be disqualified from representing a client for a rezoning before the county where the firm employs a former county attorney who was involved in land-use matters during her employ as a county attorney. [FN26] The Court determined that there was no conflict with DR 5-105 [FN27] since the citizen taxpayers who brought the suit were not clients of the former county attorney, and her former client, the county, did not challenge the representation. Furthermore, the Court found that DR 9-101 which provides that, "a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee," did not apply in this case since there was no evidence that the former county attorney was involved in rulemaking or policymaking. [FN28]

## VI. The Attorney Public Official

It is common for attorneys to seek part-time public office while still maintaining a private law practice. This situation presents yet another layer of ethical dilemmas for the lawyer/public official and for members of the lawyer's firm.

The Arizona Supreme Court addressed conflicts in the Code of Professional Responsibility which on one hand encourages lawyers to engage in public service, but on the other hand contains numerous "oppressive restrictions" on such involvement. [FN29] The facts in the opinion under review were as follows:

Attorney P was elected to City B's city council, which is a part-time position. The City B council has the power to hire and fire the city court magistrates and the city attorney. The city attorney serves as the chief legal advisor to the council, the city manager, and all city departments, offices, agencies and represents the city in all legal proceedings. While the opinion addressed a number of potential representation scenarios for Attorney P and his firm, one question reviewed by the court was, "Are members of the firm prohibited from appearing before the various city boards, such as planning and zoning and the board of adjustment?" While the Committee on Professional Conduct answered this question in the affirmative, the court responded with a qualified "no." [FN30] The court cautioned that attorneys must exercise care to avoid the appearance of impropriety and stressed that when in doubt, the question should be resolved on the side of the stated ethical consideration. [FN31]

An opinion of the Florida Attorney General held that the state constitutional prohibition on dual office holding did not apply to an attorney who served as the chair of the county planning commission and who was hired during the same time to represent the county charter review commission. [FN32] The Attorney General based his opinion on the belief that the attorney's representation of the charter review commission constituted employment and not office holding. [FN33]

It is not uncommon for lawyer public officials to participate in government decision making and then, after the fact, be approached by a potential new client who happened to have appeared before the board to handle a matter. Where less than forty-eight hours after the city council voted on a zoning reclassification for certain land developers the developers then sought to retain a lawyer council member to represent them on matters including incorporation, the Washington Supreme Court held that under the "appearance of fairness" doctrine the attorney public official must decline the representation. [FN34]

#### VII. Identifying the Client of the Government Lawyer

Many of the ethical rules which govern a lawyer's conduct center on the lawyer's relationship with, and the duty owed to, the client. However, sometimes the public sector lawyer may have a difficult time in clearly identifying just who is the client. For example, does a corporation counsel for the city represent the people of the city, the mayor, the city council, the city departments and/or their commissioners/directors, or someone else? For government lawyers this is a unique and often unanswered ethical dilemma. While the jury is clearly out on this issue, the literature discusses four possible choices: (1) the client is the agency; (2) the client is a high ranking government official; (3) the client is the government as a whole; or (4) the client is the public. There is little guidance available to help resolve the question. For example, one ABA Opinion asserts that the duty of all government lawyers is to seek just results rather than the results desired by a client. [FN35] Several years ago the State of Hawaii adopted new rules of professional conduct and in the area of client confidentiality made it clear that a government lawyer's obligation is to be measured against the public interest and not that of an individual or agency. [FN36]

Some examples where client identification in matters involving land-use issues may be particularly troublesome include:

An attorney is on retainer for the Town. Part of her responsibilities require her to provide legal advice to the town board and to the planning board. On one particular issue the two boards don't agree on the appropriate course of action. Which one is her client? In one ethics committee opinion it was advised that when an action is constituted by the town board against the zoning board of appeals, an assistant town attorney must remain independent and may not act as counsel to the ZBA. [FN37]

A lawyer serves as village attorney. The zoning board is being sued for violating a civil rights law, and the chair of the ZBA is also named individually in the lawsuit. Can the attorney represent both the ZBA and the chair?

The mayor has asked the corporation counsel to check into the legality of a matter pending before the planning board. The mayor and the common council are at odds on the issue, and the planning board seems split as to the appropriate legal course of action. As the corporation counsel, who is the client? The mayor? The Common council? The Planning board?

Often, the bottom line answer to the question of client identification revolves around who has the power to hire and fire the attorney. Is it the mayor or is it the common council? There is sound rationale and justification for differing interests and clients within the government to have their own legal counsel, so when situations of conflicting desires and players emerge, the best course of action may be to suggest the hiring of special outside counsel.

#### VIII. The Attorney as Advisor to Municipal Officials

In addition to the layers of professional ethics issues which may confront a municipal attorney in her role as an attorney, there is a different set of ethics rules and laws

applicable to the lawyer's municipal clients.

#### A. Conflicts of Interest

Addressing the issue of local conflicts of interest for elected and appointed officials can be a daunting task. The rule of thumb is, with public as well as professional legal ethics, to avoid even the appearance of impropriety. The public should be assured that local officials are able to exercise their best judgment free of any hint of self-interest, especially on issues such as controversial land-use permits. [\[FN38\]](#) The Attorney General of Arkansas has explained that the conflict of interest theory arises when "... an individual occupying a public position uses the trust imposed in him and the position he occupies to further his own personal gain." [\[FN39\]](#) The difficulty or challenge for lawyers giving advice to local official-clients is that a determination as to whether a conflict of interest exists is made on a case-by-case basis, and courts will look to the magnitude of the interest at issue. [\[FN40\]](#) So, for example, when a member of the planning board was appointed after he voiced public opposition to a proposed floating zone in a revision to the master plan, and subsequently has an opportunity to, and does officially vote for a plan which does not contain the floating zone, an allegation that he had a conflict of interest based upon his own financial interest is insufficient since his personal opinion cannot be equated with his financial interests. [\[FN41\]](#) And, when it was alleged that a member of a planning board had, at most, a .15 percent financial interest in the gross sales for two years for a company requesting subdivision approval from the board, this amount of interest was de minimus, and it would be speculative as to whether it would actually influence the board member's judgment. [\[FN42\]](#)

Some states have directly addressed the issue of conflicts of interest in their planning statutes. For example, Idaho encourages the creation of diverse planning and zoning boards. However, section 67-6506 provides:

A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action.

The provision further requires disclosure of any actual or potential interest in any proceeding, and makes violation of the section a misdemeanor. In applying this provision, a court recently held that where a member has an economic interest in the procedure or action, the section prohibits participation by that member, even if he or she will not vote. [\[FN43\]](#)

In Michigan, the failure of a zoning board member to disqualify himself or herself from a vote in which the member has a conflict of interest constitutes misconduct in office and is grounds for removal. [\[FN44\]](#) An opinion from the Attorney General's Office found that where a member of a township zoning board owns land within the township which is affected either directly or indirectly by a matter before the board, the member must disqualify himself or herself when the matter is considered. [\[FN45\]](#)

#### B. Compatibility of Office

The issue of compatibility of dual-office holding often arises in the land-use context. The question of whether one person may ethically be a member of two different planning or zoning boards in different municipalities is particularly troublesome. The reason for the dual office holding may be that there is simply a lack of citizen interest in sitting on one or both boards. It could also be a calculated decision by a municipality to appoint a planning or zoning board member to the county or regional planning board so that this person can offer insight into the decision making process in matters which first came before the local board. Whatever the motivation, the question is whether this presents a situation which triggers an ethical violation.

There is a split of opinion on the legality of such dual office holding. In 1991, after two fairly controversial Attorney General Opinions, [\[FN46\]](#) the New York State Legislature stated that members of planning boards and zoning boards may serve simultaneously as

members of a county or regional planning board. [FN47] On the other hand, the Illinois Attorney General recently opined that the positions of township trustee and county board member are incompatible because, among other things, the two units of government are authorized (not required) to contract with each other and to enter into intermunicipal agreements. Therefore, it would be difficult to adequately represent the interests of both municipalities when trying to bring about such cooperation. [FN48] This issue is particularly important today in light of continued efforts to stress the positive impacts of inter-jurisdictional and regional land-use planning activities.

As mentioned in the introduction, jurisdictions often seek people with professional and/or business familiarity with some of the complex and technical issues which may come before a planning or zoning board. Attracting this volunteer expertise, however, may prove costly to board members. For example, a recent opinion of the Attorney General in New York determined that a licensed architect who sits on a zoning board should not represent an applicant before the local building department since a potential denial of the permit would bring an appeal to the zoning board. [FN49] The Attorney General reasoned that disclosure and recusal was inappropriate in this situation since under New York's General Municipal Law § 805(a)(1)(c), "... a municipal officer or employee may not receive or enter into any matter for compensation for services to be rendered in relation to any matter before any municipal agency of which he or she is an officer, member or employee." The Attorney General opined that, "In representing applicants, the architect is creating the possibility of conflicts of interests, which are not unlikely to occur. A public official should not take actions which place him or herself in a position where recusal would likely be required."

Other positions found to be incompatible include: member of a village planning board and member of a historic review commission, [FN50] and member of a city zoning board of appeals and commissioner of city planning. [FN51] The following positions were, however, found to be compatible by the New York Attorney General: member of a town board and director of community development for a village partially located within the town, [FN52] assistant building inspector and member of the planning board, [FN53] deputy town attorney and member of a village zoning board of appeals for a village located within the town, [FN54] member of town zoning board of appeals and member of the board of assessment review, [FN55] and the positions of village trustee and member of the village planning board. [FN56]

#### IX. Develop an Ethics Check

While it is true that "sunshine is the best disinfectant," a seasoned land-use practitioner should be proactive and educate clients so that ethics allegations do not run rampant, resulting in loss of public confidence, diminished reputations, and added costs to a project. Ethics training should be a regular part of the attorney's work with the municipality. This can be done in a number of innovative ways which do not entail a lecture on what the Code of Ethics says public sector officials and employees can and cannot do. For example, counsel who regularly attend working meetings of a planning board or zoning may bring in a newspaper clipping of a situation involving an ethics violation from another jurisdiction and circulate it among board members along with a discussion of how that issue may be handled in your locality. Periodically, a brief ten question "ethics quiz" which contains short hypotheticals and three or four choices on how the reader would proceed if they were presented with the situation will be enough to keep a discussion going for an hour. Developing a sensitivity to situations in which the public may perceive a conflict of interest or some other ethical dilemma will go a long way in helping to avoid unintentional unethical conduct in the future.

#### A. The Municipal Checklist

One method of heightening sensitivity among planning and zoning board members is the use of a simple checklist which can be reviewed annually at a board meeting. The checklist should include questions such as:

[1] Have you reviewed a copy of the state ethics law in the last year?

- [2] Have you reviewed a copy of the local ethics law in effect in the last year?
- [3] Does your business relate in any way to issues which may come before the board on which you sit?
- [4] Could your business potentially benefit or be harmed by a decision of the board on which you serve?
- [5] Are you or a member of your immediate family licensed or engaged in any of the following professions which may cause you, your firm, or a family member to appear before the board on which you serve:
- architect
  - attorney
  - builder, developer
  - engineer
  - land surveyor
  - mortgage broker/agent
  - realtor
  - subcontractor for work on new construction/remodeling
  - title insurance company
- [6] Do you hold investments in real estate within the municipality on whose board you serve?
- [7] Do you have stock or any other type of ownership interest (including a silent limited partnership) in any company or organization which may appear before the board on which you serve?
- [8] Are you related to, or in a business or professional relationship with, another municipal official on a different board or in an office where either position may review the decisions of the other?
- [9] Are you comfortable and conversant with the municipal/board policies on conflicts of interest, recusal from deliberations, and recusal from voting?
- [10] Do you know where to go to get answers to ethical questions in a timely fashion?

#### B. The Internal Firm Checklist

Private sector attorneys who work on retainer for municipalities or who once worked in or for the public sector should periodically review client lists to make certain that no conflicts exist, not just under the Code of Professional Responsibility, but also under state and local government ethics codes and opinions. [\[FN57\]](#) Furthermore, it is important to keep a close watch on opinions of the State Comptroller, the Attorney General, and state and local ethics boards and commissions. This watch oftentimes requires a special effort because the opinions are not ones which would regularly be reported in the local law journal, nor are they likely to come across a lawyer's desk in the mail. Perhaps the best method of keeping current is to call these offices and ask to be placed on their mailing lists for copies of opinions or press releases which summarize their opinions. [\[FN58\]](#)

#### C. Review Local Ethics Laws

A local government has a great deal of authority to develop and model a local ethics code to fit the municipality. Absent provisions on point, state ethics laws will be used to fill-in the gaps. For example, in one jurisdiction a person was appointed as a member of the town planning board and his father was already a member of the town zoning board. When asked for an opinion as to the ethics of this appointment, the attorney general stated that absent a prohibition in the local ethics law, such an appointment was not prohibited under state law. [\[FN59\]](#) This illustrates not only the ability of localities to enact local ethics laws, but also the need for municipalities to consider the kinds and types of actions to be addressed under such a law, especially since the circumstances covered may be unique to a particular locality. For example, if a jurisdiction is rural and has a small population base from which to attract interested volunteers to serve, it is often more likely than not that there will be business and familial relationships which could present conflicts of interest questions. It is also important to recognize that what may be considered clearly inappropriate conduct in a major urban or suburban city may be

considered acceptable with simple disclosure in a small rural town. Disclosure is another important key aspect of local ethics laws. While many jurisdictions tend to follow state law requirements of financial disclosure, this may be less relevant and more onerous for players in the land-use arena. Rather, it may be better to incorporate a provision requiring transactional disclosure. [FN60] The comprehensiveness of local ethics laws vary from jurisdiction to jurisdiction. A periodic review to make certain that provisions are clear and unambiguous is a good first step towards avoiding unnecessary ethics violations. Utilizing a focus group or working group of municipal officials who are subject to provisions of the law to ascertain whether they can understand provisions and determine appropriate courses of action when confronted with hypotheticals, is a good starting point. Second, a good brainstorming session to identify possible "what ifs" will help to make certain that guidance is provided for different scenarios. Third, consulting ethics laws from other localities within the state as well as other municipalities across the country (with the caveat of the need to be aware of any special requirements in a state statute) will help to develop a check list of the types of provisions most appropriate for your locality. Too often, a municipality enacts a local ethics law and then rarely, if ever, goes back to review its usefulness, believing that the job was already done.

#### D. Determine Whether Other Local Laws May Be Needed

There are some issues which may arise and which may not normally be the subject of a local ethics law. For example, one question which comes up with some degree of frequency is how many people can be permitted to disqualify themselves from voting due to a potential conflict of interest while still allowing the board to conduct its business on the matter at hand. For example, in one jurisdiction with a zoning board of seven people, five felt compelled to recuse themselves from the deliberations and voting when two members were employed by the applicant, one had a spouse employed by the applicant, and two members served on the board of directors for the applicant. Should the remaining two members make the decision? What if they did and it was a tie vote? One attorney general has suggested that local governments with home rule authority may simply enact a local law allowing for alternate members of the zoning board who can be summoned to duty when other members of the board seek recusal due to a conflict of interest. [FN61]

#### E. Technical Assistance

Finding sources of technical assistance for handling troublesome land-use ethics questions may not be difficult. In addition to the traditional state government agencies and commissions which may provide literature and opinions, check for publications and training opportunities with state municipal leagues, state and national professional organizations such as bar associations, [FN62] the American Planning Association (and its statewide chapters [FN63]), the International Municipal Lawyers Association (IMLA), and the Council on Government Ethics Laws. [FN64]

#### X. Conclusion

These issues are merely the beginning of much needed continued study and dialogue on the professional responsibility and government ethics questions which confront land-use practitioners on a daily basis. It is incumbent upon those of us who advise and interact with the public sector to be more conversant with the nuances of both professional and public sector ethics, and we must assert proactive leadership in ethics education to preserve and protect public trust and integrity in government.

[FN1]. The Florida Attorney General advises that although in Florida such communication does not violate a statute, where a county commissioner engaged in an ex parte communication regarding a rezoning, prudence would dictate that the conversation be disclosed on the record to allow any aggrieved party the opportunity for rebuttal. Op. Fla. Atty. Gen. 94-91. The issue of what constitutes an ex parte communication may vary. For

example, may an applicant ask a commissioner or other local official for an answer to a question which may amount to nothing more than technical assistance? In some communities the answer would be no problem, in other communities the commission might agree to a meeting with the applicant as a full commission for the purpose of providing technical assistance and discussing issues.

[FN2]. RIORDAN, PLUNKETT OF TAMMANY HALL (1905).

[FN3]. Richard L. Berke, Four Senators Deny Doing Favors for Keating in Exchange for Cash, N.Y. TIMES, Nov. 17, 1990, at A1.

[FN4]. The American Institute of Architects, which represents 55,000 architects, planners, landscape architects, engineers, and others, issued a Code of Ethics and Professional Conduct in 1992 with a revised Code in 1993, which is currently in effect.

[FN5]. The American Association of Engineering Societies represents over 500,000 engineers and in 1984 issued a Model Guide for Professional Conduct. In 1993, the Board of Governors approved "Public Policy Perspectives and Position: Engineering, Employment & Practice: Ethics." The National Society for Professional Engineers represents 75,000 engineers and in 1993 issued a revised Code of Ethics for Engineers.

[FN6]. The National Association of Realtors represents approximately 787,000 realtors. A revised Code of Ethics and Standard of Practice was adopted in January 1994.

[FN7]. See Commco, Inc. v. Stanley P. Amelin, 62 N.Y.2d 260, 476 N.Y.S.2d 775 (1984).

[FN8]. 93 Op. Ky. Att'y. Gen. 33.

[FN9]. See N.Y.S. Committee on Professional Ethics 77-468 (1977).

[FN10]. In re Thomas F. English, Jr., 587 N.Y.S.2d 34 (N.Y. App. Div. 1992).

[FN11]. 92 Op. NY Att'y. Gen. 92-54 (Sept. 2, 1992). The Attorney General relied on N.Y. Gen. Mun. Law § 805-a(c) which prohibits, "a municipal officer or employee from receiving or entering into any agreement for compensation for services to be rendered in relation to any matter before a municipal agency which he serves as an officer, member or employee."

[FN12]. NYS Committee on Professional Conduct 73-292 (1973).

[FN13]. In re Edward J. Dolan, An Attorney, 384 A.2d 1076 (N.J. 1978).

[FN14]. Id. at 1078-79.

[FN15]. See, e.g., 1985 N.Y. Compt. 85-60, where the Comptroller pointed out, among other things, that the Code of Professional Responsibility must be consulted.

[FN16]. Appeal of the City of Keane, 693 A.2d 412 (N.H. 1997).

[FN17]. Id. The court, in citing New Hampshire Rule of Professional Conduct 1.9, stated that each lawyer in the firm is presumed to share the loyalties owed to each client of the firm. The court based its determination of disqualification on the fact that the association between the chair and the law firm may influence the chair's judgment.

[FN18]. Sultanik v. Board of Supervisors of Worcester Township, 488 A.2d 1197 (Pa. Commw. Ct. 1985).

[FN19]. *Id.* at 219.

[FN20]. *Op. Miss. Att'y. Gen.* 128 (1981). The Attorney General relies on Opinion 26 of the Ethics Committee of the Mississippi State Bar (Nov. 15, 1974).

[FN21]. *78 Op. Cal. Att'y. Gen.* 95-110 (July 27, 1995).

[FN22]. *Dick v. Williams*, 215 Ga. App. 629, 452 S.E.2d 172 (1994). In this case, the commissioner's son was a partner in the firm, and although it was his partner who served as the attorney for the applicants, and the partners kept a separate checking account for the transactions arising out of the representation, the court held that a law firm could not restructure their practice for the purpose of representing a client which they would otherwise have to decline to represent. While the lawyers tried to argue that for this case they were operating separately (as solo practitioners), DR 2-102(B)(3) prohibits a law firm from simultaneously operating under more than one name.

[FN23]. *Id.* Section 3-20-37(a) provides, It shall be a violation of this code of ethics for any officer to participate directly or indirectly through decision, approval, disapproval, recommendation or in any other manner upon the following: (1) Any proceeding, application, vote, request for ruling, claim, controversy, contract or any other matter involving an immediate relative or any interest of an immediate relative of the officer.

[FN24]. *Id.*, citing Cobb County Ethics Code § 3-20-32.

[FN25]. *Walden Federal v. Village of Walden*, No. 2364/94 (N.Y. A.D.2d Dep't 1994).

[FN26]. *Kay F. Sterrett v. Loudoun County Board of Supervisors*, 22 Va. Cir. 148 (1990).

[FN27]. *Id.*, citing DR 5-105. Refusing to Accept Continued Employment if the Interests of Another Client May Impede the Professional Judgment of the Lawyer.... (D) A lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure. (E) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or her firm may accept or continue such employment.

[FN28]. *Id.* Although the court noted that the former county attorney was involved in land-use matters as part of her public service, it determined that she was not privy to any confidential information concerning the matter at hand. These facts lead the court to conclude that she did not accept private employment for any "matter" in which she had substantial responsibility as a county attorney.

[FN29]. In re Ethics Opinion No. 74-28, 533 P.2d 1154 (Ariz. 1975). This case, brought by the League of Arizona Cities, involved a review of an opinion of the Committee on Rules of Professional Conduct of the State Bar of Arizona.

[FN30]. *Id.* The court stated that firm members could appear before city boards and commissions if:  
1) the attorney public official refrains from discussing any matters handled by the firm with the members of the board or commission or with employees of the city or members of the city council, 2) there is a separation of accounts so that the attorney public official in no way shares in the fees or other remuneration received by the firm for such

appearances, and 3) the attorney public official avoids participation in the selection of members of boards or commissions before which his firm regularly appears.

[FN31]. Id. The court also noted that these ethical guidelines apply not just to the attorney public official, but to each member of the firm who may have any dealings with the city.

[FN32]. Op. Fla. Atty. Gen. 94-88 (1994). The Attorney General declined to comment as to whether this situation violates the state code of ethics for public officers and employees.

[FN33]. Id.

[FN34]. Fleming v. City of Tacoma, 502 P.2d 327 (Wash. 1972). The court said that although there was no evidence that the lawyer was retained by the developers prior to the vote on the rezoning, the "appearance of conflict of interest is so strong that ... those who oppose the zoning will never, never believe that somehow this wasn't kind of wired before the final vote was taken."

[FN35]. ABA Opinion 342, Nov. 24, 1975.

[FN36]. See Hawaii Code of Professional Conduct Rule 1.6.

[FN37]. N.Y.S. Committee on Professional Ethics, Formal Op. 79-501.

[FN38]. Byer v. Town of Poestenkill, 648 N.Y.S.2d 768 (N.Y. App. Div. 1996).

[FN39]. Op. Ark. Att'y. Gen. 93-446 (Feb. 3, 1994), citing City of Coral Gables v. Weksler, 164 So. 2d 260, 263 (Fla. App. 1964).

[FN40]. See Byer, 648 N.Y.S.2d at 768; also, Parker v. Town of Gardiner Planning Board, 585 N.Y.S.2d 571 (N.Y. App. Div. 1992).

[FN41]. In re John Segalla v. Planning Board of the Town of Amenia, 611 N.Y.S.2d 287 (N.Y. 1994).

[FN42]. See Parker, 585 N.Y.S.2d at 571.

[FN43]. Sprenger, Grubb & Assoc. v. City of Hailey, 903 P.2d 741 (Idaho 1995).

[FN44]. Mich. Stat. Ann. § 5.2963(18)(4).

[FN45]. 1979-1980 Mich. Op. Att'y. Gen. No. 5774 (Sept. 8, 1980).

[FN46]. Op. N.Y. Att'y. Gen. 89-36 (1989), and Op. N.Y. Atty. Gen. 90- 56 (1990).

[FN47]. See N.Y. Gen. Mun. Law § 239-b (McKinneys 1997).

[FN48]. Op. Ill. Att'y. Gen. 94-008 (Mar. 24, 1994).

[FN49]. Op. N.Y. Att'y. Gen. 94-51 (Dec. 20, 1994).

[FN50]. Op. N.Y. Att'y. Gen. 89-70.

[FN51]. Op. N.Y. Att'y. Gen. Inf. 91-39.

[FN52]. Op. N.Y. Att'y. Gen. 85-79. The Attorney General cautioned, however, that a conflict could exist if both the village and the town applied for federal and/or state community block grants.

[FN53]. Op. N.Y. Att'y. Gen. 86-9.

[FN54]. Op. N.Y. Att'y. Gen. Inf. 79-155.

[FN55]. Op. N.Y. Att'y. Gen. Inf. 95-9.

[FN56]. Op. N.Y. Att'y. Gen. 89-32.

[FN57]. This internal check should go beyond the individual municipal attorney's clients, but should include the entire firm client list.

[FN58]. Today, many of these opinions are becoming readily available for free on websites from government agencies. The only downside of relying on the information from the website is that while it may provide current and recent opinions, the sites rarely provide users with an archive of older opinions which may be on point and should be researched elsewhere to make certain that you have conducted a thorough review of a particular issue at hand.

[FN59]. Op. N.Y. Atty. Gen. 93-37 (June 8, 1993).

[FN60]. Transactional disclosure would require an official to disclose whether he or she has an interest in the underlying transaction before them or the board on which they sit.

[FN61]. 1985 Inf. Op. Atty. Gen (N.Y.) No. 85-55.

[FN62]. For example, at the national level, membership in the American Bar Association provides access to the State and Local Government Law Section which regularly provides ethics education for municipal attorneys, as well as to the Government and Public Sector Lawyer's Division which features a regular ethics column in its newsletter and offers continuing legal education programs on government ethics.

[FN63]. The American Planning Association is co-located with the American Institute of Certified Planners (AICP). AICP has adopted a code of ethics for its members (who are professional planners--as opposed to lay people who sit as volunteer members of local boards) which may be instructive in that it raises a number of critical issues for consideration.

[FN64]. This group, also known as COGEL, is the national umbrella organization for federal, state, and local ethics, election, and open meetings/FOIL agencies. They publish a bi-monthly newsletter called The Guardian which provides updates on what is happening with respect to legislation, regulations, and caselaw in jurisdictions across the country. It is a membership organization and interested lawyers may join as associates.