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**A WOODY ALLEN MOVIE, SHOW ME THE
MONEY, AND OTHER ETHICAL
CONSIDERATIONS IN LAND USE PLANNING**

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ZONING AND PLANNING LAW REPORT



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A Woody Allen Movie, Show Me the Money, and Other Ethical Considerations in Land Use Planning

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Introduction

This article has become an annual survey of cases and opinions on ethics issues in land use planning and zoning. A review of the 2003 reported decisions continues to highlight areas where conflicts of interest arise based upon financial interests and personal relationships. Several cases and opinions involve attorney (mis)conduct, and other reported cases focus on board members, specifically examining whether or not a board member in a particular situation had an obligation to recuse himself or herself from taking action on a matter. In addition, there are a number of opinions that address the ethical dilemmas of one person holding two or more government positions that relate to land use planning and zoning. Other cases focus on allegations of bias, unethical motivation, and bad faith. These articles serve as good reminders of the ethical obligations of all of the participants in the planning and zoning game, as the bottom line is that government land use decisionmaking is subject to the public trust, and each policymaker and decision maker must help to ensure integrity in government.

Attorney Conduct

Every so often the conduct of an attorney involved in a land use matter becomes the focus of controversy. For example, situations have involved attorneys who also sit as members of planning and/or zoning boards,¹ attorneys who appear before boards and are married to a board member,² attorneys who used to represent a planning or zoning board and at a later date appear before the board,³ and attorneys who are visited by potential new clients after they "met" at a board meeting.⁴ A new twist on attorney conduct was demonstrated in a case involving a city attorney who represented the zoning board as a city employee, and then sued the same board as a private individual.⁵

Gerald Fabiano was appointed as an Assistant Corporation Counsel for the City of Boston in June 1994 and assigned to the Government Affairs Division. The Division represented the City's zoning board of appeals, and Fabiano was personally involved in two such representations. In the course of his employment by the City, some concerns were expressed about Fabiano's job perfor-

mance. Thereafter, in January 1998, Fabiano notified his supervisor that he had initiated a pro se action challenging a decision of the zoning board of appeals. Fabiano had an ownership interest in real estate that was located 100 feet from a restaurant that had just received a variance from the zoning board, allowing the restaurant to provide take-out services in addition to its already existing sit-down service. Fabiano believed that the variance would further diminish the supply of parking space in the mostly residential area. Fabiano's mother owned an interest in his property and also owned an abutting property. She joined his action and also represented herself in it. Fabiano had not become a record owner of the property until after the variance decision had been made, just prior to the running of the appeals period.

Fabiano's supervisor, upon learning of his pro se action, told him that his actions presented a conflict of interest and strongly advised him to retain separate counsel. There was conflicting evidence as to whether Fabiano told his supervisor that he was representing only himself, or himself and family members. Fabiano was ultimately fired for "failure to follow City policy with respect to written disclosure and prior written approval, and his inability and unwillingness to acknowledge the serious professional, ethical and practical problems created by his lawsuit." Furthermore, the Corporation Counsel stated that Fabiano should have consulted state statutes, the Board of Bar Overseers, the State Ethics Commission or any manager in the Corporation Counsel's Office before initiating his litigation. The Corporation Counsel asserted in the termination that this was just one more example of Fabiano's lack of judgment.

The City's guide on ethics laws for employees provided in part: "While you are a City employee, you may not act as agent or representative for anyone other than the City in connection with any matter involving the City." Two special cases were discussed in the guide: city employees could act as an agent for members of their immediate family provided that: "a. the matter is not within your official jurisdiction as a City employee; b. you have never personally participated in the matter while employed by the City; and c. you get prior, written permission from your appointing authority..." Furthermore, the guide provided that, "You are always allowed to represent yourself, and to state your personal points of view. *However, you should always make it clear that you are acting on your own behalf, and not acting in any official capacity.* You may even represent yourself before the City agency you work for (but remember that you may not take any type of official action on a matter that affects you). (Emphasis added.)

Fabiano sued the City in federal district court under 42 U.S.C.A. § 1983, alleging that his termination was in retaliation for the pro se lawsuit he had filed against the

zoning board of appeals, and that this was a violation of his First Amendment rights (specifically, the right of every citizen to petition the Government for redress of grievances). Relying on *Connick v Myers*,⁶ which held, "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior,"⁷ the district court determined that "even if this zoning appeal involved speech by a private citizen on an issue relating to public discourse, the city has the right to enforce reasonable conflict of interest rules under the *Connick* balancing test."⁸

In his pro se litigation challenging the zoning decision, Fabiano had appeared in court representing his interests, and his boss was in the courtroom defending the actions of the zoning board. The court observed that "the scenario of a supervisor and his subordinate at different counsel tables in Superior Court is at least worrisome, not to mention Woody-Allen like."⁹ Ultimately, in granting summary judgment for the City, the court concluded that it had to balance the limited First Amendment concern with the valid workplace concern of the Corporation Counsel, to wit, that Fabiano should have consulted with his supervisor before beginning his litigation, and that he should have sought to minimize any actual conflicts of interest or appearances thereof.

Part-Time Municipal Attorneys

The Attorney General of the State of New York opined that a part-time Assistant Town Attorney, who earned \$5,000 per year serving in the limited role of counsel to the Town Plumber Examining Board, could represent private clients before other town agencies "so long as compensation is fixed based upon the reasonable value of services rendered, rather than contingent upon any action by such agency regarding the matter, and so long as the individual facts of any such representation do not create an appearance of impropriety or violate common law conflict of interest standards."¹⁰ Although a state statute prohibits municipal officers or employees from receiving compensation for services to be rendered before a municipal agency of which he or she is an officer member or employee,¹¹ and a municipal officer is prohibited from receiving compensation or entering into an agreement for compensation for services to be rendered in relation to any matter before any agency of his municipality where compensation is set contingent on the outcome,¹² an attorney is not prohibited from fixing a fee based upon the reasonable value of services rendered.¹³ The Attorney General concluded that "As the attorney's duties to the Town Attorney's Office are limited to serving the

Plumber's Examining Board, we conclude that [the law] does not prohibit him from representing private clients before the planning or zoning boards or planning department...[H]owever, he could not represent private clients before those agencies on a contingency basis."¹⁴

The Attorney General was careful to point to other instances where it was opined that an appearance of impropriety would preclude attorneys and other professionals from representing private clients before municipalities they served. For example, a part-time counsel to the city board of water supply should not represent clients before the city's planning board and zoning board of appeals where local regulations required that when an applicant was granted planning and zoning approval they then needed to enter into an agreement with the water supply board; and an architect who serves on the village zoning board could not represent applicants before the board, nor in the early permit stage before the building department, since the zoning board could hear appeals from these decisions.¹⁵ Therefore, the Attorney General warned, "an appearance of impropriety could arise if the Plumbing Board attorney represents a private client in a town planning or zoning matter in which the town's interests are represented by the Town Attorney's Office[.]" since in such a circumstance, the Board Attorney would be litigating against a subordinate, "a situation that could threaten the public trust and impartiality of government decision making."¹⁶

The Opinion concludes with good, sound, practical advice: While the attorney is not statutorily prohibited from representing clients under the particular set of facts, "great sensitivity will be required to assure that a potential conflict of interest or appearance of impropriety does not arise. Individual representations should therefore be subject to a case-by-case review to assure against any current or possible future appearance of impropriety."¹⁷ In the area of government ethics, there are guidelines and statutes, but in general, they cannot cover every aspect of ethical situations that may arise in a planning and zoning context. The statutory and common-law rules, together the concept of promoting integrity in government, must always be used to critique individual fact patterns.

Show Me the Money

Last year, a planning commission in Pennsylvania was the subject of an ethics allegation when they voted on competing development applications based upon which applicant agreed to pay the "voluntary" development fee.¹⁸ In January 2003, the Third Circuit Court of Appeals considered a case with similar facts regarding the payment of voluntary fees.¹⁹ Specifically, United Artists Theatre Circuit, Inc. sought land development approval from the Township of Warrington to construct and operate a multiplex movie theater on land owned by United

Artists. At the same time, Regal Cinema was seeking approval to develop a movie theater, and the situation turned into a race to see who would get their approval first, since it was believed that the Township could not support two movie theaters. United Artists refused to pay a voluntary annual impact fee of \$100,000, but the developer for Regal Cinemas did agree to make the payments (the Township lacked the legal authority to require an impact fee in this case).

After many months of submissions of plans and studies to the Township, United Artists alleged that the Township's ultimate refusal to support its proposal had been motivated by Regal Cinema's agreement to pay the impact fee. To back up this claim, United Artists alleged that it had taken 14 months to receive preliminary approval (and that Regal had received this approval in one month), and that the Board had tabled its vote on United Artists' application for final approval on three occasions, each time inquiring as to whether United Artists would be willing to pay the \$100,000 fee. In the end, although both applicants had their proposals approved, only the Regal Cinema project was completed. United Artists brought suit alleging a substantive due process claim consisting of improper motive in the delay of their approval in favor of the applicant, who had essentially agreed to pay an illegal fee.

In articulating a new standard of review based upon the 1998 U.S. Supreme Court case of *Sacramento v Lewis*,²⁰ the Third Circuit acknowledged that the Supreme Court had in that case overturned the line of cases in the Third Circuit that had held that a municipal land use decision violates substantive due process if it is made for a

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reason unrelated to the merits, or with an improper motive.²¹ The *Lewis* decision required application of a “shocks the conscience” standard, thus bringing the Third Circuit into line with other courts.²² The court noted that it has been observed that every appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority.²³ Finally, the court stated, “Land-use decisions are matters of local concern and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with ‘improper motives.’”²⁴

Conflicts of Interest

A member of the Guilford (CT) Planning and Zoning Commission recused himself from the proceedings before the Commission involving his wife’s application to remove a nonconforming dwelling and replace it with a conforming residential structure.²⁵ (Because of the proximity of the property to Long Island Sound, it was subject to a state coastal management act and coastal site plan review.) The member left the room when the matter was discussed. Counsel for a nearby landowner appeared at the public hearing concerning the application and told the members of the commission that they should recuse themselves from the proceedings if they would be influenced by the fact that the spouse of the applicant was a member of the commission. After the application was approved, the nearby landowner appealed the decision in the Superior Court, contending that the applicant’s lot had failed to comply with zoning regulations and that a variance was required.

Rejecting the landowner’s claim that the commission members harbored bias against him and that they had a personal interest in the proceeding, the court found that the landowner offered no evidence to support such allegations. The court noted that there was no evidence of financial dealings between any commissioner and the applicant or her spouse; no evidence that any commission member would personally profit in any way from the decision; no claim that a commission member owned land that would be impacted by the decision; and no claim of improper ex parte communications between the spouse of the applicant and any other commission member. The court stated that “in order to show predisposition, a party must do more than cast indiscriminate aspersions. Actual bias, not simply potential bias, must be shown.”²⁶ The court confirmed that the commission member-spouse had acted in an appropriate and ethical fashion by disclosing the conflict prior to the hearing and then leaving the room, and warned that “[s]uch baseless attacks can only promote a cynicism which has the unintended consequence of discouraging public service, and volunteer participation in municipal government.”²⁷

After being denied a variance from the zoning board of appeals by one vote, the applicant appealed, alleging that the zoning board chairman should have disqualified himself when a person with whom he had a personal relationship appeared before the board at the public hearing in opposition to the variance.²⁸ The relevant statute provided in part that “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 in which he is directly or indirectly interested in a personal or financial sense.” While it was not alleged that the chairman had a financial interest in the matter, because his next-door neighbor who had appeared before the board in opposition to the variance, the applicant alleged that because of his relationship with his neighbor, the chairman had a personal interest in the variance. Although the chairman testified that he had lived next door to these neighbors since 1979, he denied that there was a personal relationship, and stated that they never had meals or cookouts together and that he never attended any theatrical or sporting event with them (nor did he ever receive an invitation to attend such with them). He admitted that they attended the same church and that he and wife had gone to the wake when his neighbor’s mother died, and he stated that although they had been neighbors for a long time, they had visited each others’ houses only once, around the time the neighbor moved in, and on each occasion the visit had been for less than 45 minutes.

The court concluded that the facts and circumstances did not establish that the chairman, because of a “tangential” relationship with his neighbors, might have had a personal interest in the outcome of the variance application, and the fact that they were neighbors did not itself rise to the level of an appearance of impropriety. The court found no other evidence of a relationship between the chairman and his neighbor to allow a finding that the chairman had a personal interest in the matter, and commented that although it was difficult to determine when the applicant had first learned that the chairmen lived next door to a person opposed to the variance, “certainly if this fact were known at the time of the hearing and [the applicant] considered that a conflict of interest existed, this claim should have been raised at that time.”²⁹

Bias

Bias and racial discrimination were claimed by the owner of an automobile body shop against the Town of Kent (CT), its planning and zoning commission, and the individual members of the commission based on certain conditions imposed on a zoning permit for the operation of the shop.³⁰ The property on which the shop was to be operated was located within a rural residential zone and on a designated scenic highway. It contained two build-

ings: a single-family residence and a 2,584-square foot nonconforming cement building that had been used over the years to house various commercial businesses, including a boat repair shop, a welding shop, a woodworking shop, a kerosene heater business, and a fiberglass fabrication shop. In 1996, the shop owner contracted to buy the property on the condition that the Planning and Zoning Commission grant a permit to allow him to operate his shop on the property.³¹ After opposition from neighbors, the property owner, with the shop owner's permission, suggested four conditions that the Planning and Zoning Commission could put on the permit to address the neighbors' concerns, but following a hearing, the permit was denied on the ground that the proposed change would be an expansion of a nonconforming use.

The shop owner then acquired a leasehold interest in the property, and in 1997 he again sought a change in the nonconforming use to permit the operation of his auto body shop, this time suggesting additional conditions that the Commission could impose to address community concerns. Following a public hearing where there was a mixed reaction to the proposed change in use, the Commission held a special meeting where it discussed conditions that could be imposed on a permit. The permit was ultimately granted with ten conditions imposed. The shop owner raised objections to five of the conditions, having to do with (1) hours and days of operation; (2) a requirement that the owner reside at the property for the duration of the use; (3) a requirement that no more than seven vehicles associated with the business be parked externally, with no more than four vehicles parked on the existing blacktop; (4) submission and approval of a landscaping plan to be implemented within 90 days of the issuance of the permit; and (5) a limit of two employees. The shop owner offered alternative language, but nonetheless went through with the purchase of the property, and obtained his permit with the original ten conditions still attached.

The shop owner then sued, alleging among other things that his constitutional rights had been violated by selective treatment based on his race (African-American), and that the Commission desired to inhibit him from gainfully pursuing his vocation, amounting to a malicious and bad faith intent to injure him.³² He based his claim of treatment based upon race on the demeanor of the commissioners, an alleged lack of respect towards him during the hearings, and remarks that commissioners made during the hearings. Furthermore, he relied on comments from other members of the community that suggested that the Commission's decision had been racially motivated. However, the court found no evidence of racial bias; if any bias existed at all, said the court, it was a bias against an auto body shop being located on a state scenic road. The one remark that the plaintiff considered to be racially derogatory was, "Well, they could park down the street, you know,

they could fly in, you know, and jump in the car, they could bus them in." The plaintiff alleged that the reference to busing was racially derogatory because of the historical context of busing as a tool to achieve desegregation. The court, however, in reviewing the transcript of the hearing, found that the remark had been made in the context of a discussion on the number of cars that would be allowed to park at the body shop and the number of employees at the shop, with nothing to suggest any racial overtone. The court concluded further that although it did not necessarily agree with all of the conditions imposed, it would not act as a zoning board, and granted summary judgment to the defense.

Unfairness/Improper Motives

Oftentimes, allegations of unfairness are brought through suits claiming improper motive on the part of the land use decisionmakers. Such was the allegation where the Keystone Outdoor Advertising Company applied to the West Whiteland Township (Pennsylvania) zoning commission for a variance to erect a billboard on a tract of land it had leased.³³ Keystone had leased the land with the intent of erecting the billboard, but the billboard it intended to put up was in violation of the Township's zoning ordinance that prohibited billboards that were not accessory to on-site users, and it also exceeded the size limitations of a Township zoning ordinance. Keystone applied for a variance to allow it to erect the sign despite the ordinance and, alternatively, it argued that the ordinance prohibiting non-accessory billboards was unconstitutional. After a series of lengthy hearings on the matter, and prior to a final decision, the Township supervisors adopted a resolution to condemn the tract of land for use as a public park. Keystone sued in federal court under § 1983, arguing that the condemnation was not for a public purpose, and also that the condemnation had been in bad faith and that the municipal officials had acted with improper motives to prevent the use of the property for a billboard, thereby allowing to stand their allegedly unconstitutional billboard ordinance. Summary judgment was entered against Keystone. On appeal, as Keystone's claim was in effect one of substantive due process, the Third Circuit noted that "the standard to be applied in a substantive due process claim arising from a land use decision is no longer that of 'improper motive' but instead whether the government's actions 'shock the conscience.'"³⁴ In finding that Keystone had failed to meet its burden of proof, the court agreed with the district court that there was "no hint of private gain or any other suspect motivation" on the part of the Township" and that Keystone had failed to meet even the less stringent standard of showing "improper motive" on the part of the Township, let alone demonstrating actions that would "shock the conscience."³⁵

In another case, a city Board of Zoning Appeals voted unanimously to send a favorable recommendation to the City Council to grant a variance for the operation of a 60-bed, for-profit residential treatment facility by the Behavioral Institute of Indiana.³⁶ The City Council voted 5-1 to deny the variance, and the Institute sought judicial review of the decision. Among the many issues raised was an allegation that the presence of one particular council member violated the plaintiff's due process rights to an unbiased and impartial fact finder. This allegation was based on the facts that (1) a representative of the public school district testified at the public hearing in opposition to the granting of the variance; (2) one council member worked as a non-tenured, non-contractual, media paraprofessional in the public schools; and (3) her spouse worked as director of public security for the public schools. Further, it was reported that the school district superintendent had contacted the council member twice, once on the day before the council meeting, and that the principal of the school where she worked had talked to her about the importance of denying the variance. Although the court found no evidence that these contacts had influenced her, it concluded that in light of her "strong connection to the Public Schools and the Schools' blatant attempt to influence her decision, the only appropriate decision that she could have made regarding the land use variance petition, consistent with the Institute's due process rights, would have been to recuse herself."³⁷

Can't Get Enough of Local Land Use Planning

It's not uncommon to hear that municipalities, particularly in rural areas, have a difficult time recruiting volunteers to serve on local planning and zoning boards. Sometimes, municipalities find individuals who can't get enough of local land use planning, and they put together a mix of paid employment and volunteerism in the field, or they find multiple related boards in the region where they may serve. At times, these positions may give rise to a conflict of interest. State Attorneys General had several opportunities to opine on these scenarios in 2003.

The Attorney General of the State of Alabama determined that a member of a town planning commission could also serve as a member of the county water, sewer, and fire protection authority.³⁸ Under an Alabama statute, members of the planning commission were prohibited from holding other municipal offices, except that one planning commission member could be a member of the zoning board of adjustment. The Attorney General noted that members of the county authority do not hold municipal office. Alabama law also prohibits members of the board of directors of the county water, sewer, and fire protection authority from also serving as an officer of the state or of any county or municipality. The Attorney General further opined that a planning com-

missioner is not a municipal officer, because under Alabama law the terms "public office" and "office of profit" are synonymous, and that a position or an office is one of "profit" if: (1) the office holder exercises some part of the sovereign power of the State, and (2) compensation is to be received for the performance of the duties of the office. Since the planning commission member was not entitled to compensation for services, the position was neither an office of profit nor a public office, and therefore the planning commissioner was not an officer of the municipality and could also serve on the water, sewer, and fire protection authority.

The Ohio Attorney General opined that a person could serve simultaneously as a township trustee and a member of the county planning commission, "provided that as a township trustee and planning commission member he does not participate in any deliberations, discussions, negotiations, or votes concerning matters in which he has a conflict of interest that is prohibited by applicable statutes[.]"³⁹ In the same opinion, the Attorney General concluded that one person could serve simultaneously as a member of the township board of zoning appeals and as a member of the county planning commission. Ohio employs a seven-question analysis to determine whether two government offices are compatible,⁴⁰ and after a long opinion applying the facts to each element of the test, the Attorney General found no conflicts per se.

The New York Attorney General was asked to determine whether an individual could be appointed as a member of a county planning board, where the individual was also serving as a member of the town planning board in the same county, was also employed as a Director of Development of one village in the county, and was also a building inspector/zoning code enforcement officer for another village located in the same county.⁴¹ Concluding that the positions were not per se statutorily or constitutionally impermissible, the Attorney General noted that, "as a member of the county planning board, the individual would be statutorily required to recuse him- or herself from voting on any matter referred not only from the town on whose planning board the individual serves, but also from the village where the individual serves as a building inspector/zoning code enforcement officer."⁴² This, said the Attorney General, should be taken into consideration when the county legislative body appoints members to the county planning board, since there were likely to be numerous situations in which this board member would have to recuse himself or herself, given the number of different, yet related, hats worn.⁴³

NOTES

1. See, e.g., *Carroll County Ethics Com'n v. Lennon*, 119 Md. App. 49, 703 A.2d 1338 (1998).

2. See, e.g., 78 Ops. Cal. Atty. Gen. 95-110 (July 27, 1995), 1995 WL 447989.

3. See, e.g., *Walden Federal Sav. and Loan Ass'n v. Village of Walden*, 212 A.D.2d 718, 622 N.Y.S.2d 796 (2d Dep't 1995).

4. See, e.g., *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972).

5. *Fabiano v. Hopkins*, 245 F. Supp. 2d 305 (D. Mass. 2003), *aff'd*, 352 F.3d 447 (1st Cir. 2003).

6. *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708, 1 I.E.R. Cas. (BNA) 178 (1983).

7. *Id.*, 461 U.S. at 147.

8. *Fabiano*, 245 F. Supp. 2d at 310.

9. *Id.* at 311.

10. 2003 N.Y. Op. Atty. Gen. No. 8, 2003 WL 21734505 (N.Y.A.G.).

11. See N.Y. Gen. Mun. Law § 805-a(1)(c).

12. See N.Y. Gen. Mun. Law § 805-a(1)(d).

13. 2003 N.Y. Op. Atty. Gen. No. 8, 2003 WL 21734505 (N.Y.A.G.).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Thornbury Noble, Ltd. v. Thornbury Tp.*, 2002 WL 442827 (E.D. Pa. 2002).

19. *United Artists Theatre Circuit, Inc. v. Township of Warrington, PA*, 316 F.3d 392 (3d Cir. 2003).

20. *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

21. *United Artists*, 316 F.3d at 400.

22. *Id.* The court cited to *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992); and *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991).

23. *United Artists*, 316 F.3d at 402.

24. *Id.*

25. *Guerrera v. Guilford Planning & Zoning Com'n*, 2003 WL 352871 (Conn. Super. Ct. 2003).

26. *Id.* at *7.

27. *Id.* at *8.

28. *Murphy v. Zoning Bd. of Appeals Town of Stonington*, 2003 WL 22040692 (Conn. Super. Ct. 2003).

29. *Id.* at *5.

30. *Zeigler v. Town of Kent*, 258 F. Supp. 2d 49 (D. Conn. 2003).

31. Specifically, the owner asked that Planning and Zoning Commission change the prior nonconforming use from "Manufacture of fiberglass, models and sculptural materials" to "Auto Body Shop."

32. The owner added that it was not economically feasible

for him to operate the auto body shop with the conditions attached.

33. *Keystone Outdoor Advertising Co., Inc. v. West Whiteland Township*, 64 Fed. Appx. 333 (3d Cir. 2003).

34. *Id.* at 335, citing to *United Artists Theatre Circuit, Inc. v. Township of Warrington, PA*, 316 F.3d 392 (3d Cir. 2003); and *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

35. *Keystone*, 64 Fed. Appx. at 335.

36. *City of Hobart Common Council v. Behavioral Institute of Indiana, LLC*, 785 N.E.2d 238 (Ind. Ct. App. 2003).

37. *Id.* at 253-54.

38. Ala. Op. Atty. Gen. No. 2003-163, 2003 WL 21414779.

39. 2003 Ohio Op. Atty. Gen. 2003-041, 2003 WL 23021860 (Ohio A.G.).

40. The following seven questions are to be analyzed: (1) Is either of the positions a classified employment within the terms of R.C. 124.57? (2) Do the empowering statutes of either position limit employment in another public position or the holding of another public office? (3) Is one position subordinate to, or any way a check upon, the other? (4) Is it physically possible for one person to discharge the duties of both positions? (5) Is there an impermissible conflict of interest between the two positions? (6) Are there local charter provisions, resolutions, or ordinances which are controlling? (7) Is there a federal, state, or local departmental regulation applicable?" *Id.*, citing to 2003 Op. Atty. Gen. No. 2003-010 at 2-69 and 2-70.

41. 2003 N.Y. Op. Atty. Gen. (Inf.) 1008, 2003 N.Y. Op. Atty. Gen. No. 3, 2003 WL 1154597 (N.Y.A.G.).

42. *Id.*

43. *Id.* The Attorney General added, "We have previously concluded that where the holding of multiple offices leads to frequent recusals, an individual should not hold all of the offices." *Id.*, citing Op. Atty. Gen. (Inf.) No. 02-11; Op. N.Y. Atty. Gen. (Inf.) No. 84-34.

NOTED IN BRIEF

In a § 1983 action, the owners of a vehicle-towing business alleged that they were subjected to zoning citations and warnings in retaliation for the exercise of their First Amendment rights. *Rasche v. Village of Beecher*, 336 F.3d 588 (7th Cir. 2003). Specifically, the owners argued that they had received the citations and warnings, for alleged violations of zoning provisions relating to signs and inoperable vehicles, because they had spoken out against two village bond proposals. However, the Seventh Circuit rejected their claims against the village and its president. The court found that the record did not support a determination either that the village president had caused or participated in a constitutional deprivation, or that the village president's actions had been motivated by the plain-

tiffs' constitutional speech. Regarding the village itself, the court found that the plaintiffs failed to establish that the deprivation of constitutional rights was caused by a "municipal policy or custom." *Id.* at 597.

A developer did not state a valid procedural due process claim when it challenged a building moratorium imposed on its property. *75 Acres, LLC v. Miami-Dade County, Fla.*, 338 F.3d 1288 (11th Cir. 2003). A criminal information had been filed by the Florida State Attorney charging a member of the zoning appeals board with accepting illegal compensation as consideration for votes he cast to rezone the property when it was owned by a prior owner. Under the county code, the filing of the criminal charges automatically required the county manager to issue an administrative order prohibiting the issuance of building permits for the property. The Eleventh Circuit held that the automatic imposition of the administrative building moratorium under the code, without any discretion on the part of the county manager, was a legislative (as opposed to adjudicative) act that did not require the county to afford individual procedural due process protections to affected property owners. "The County concluded, in its legislative judgment, that building permits should not be issued on real property after the propriety of that property's zoning classification has been called into question by criminal allegations of bribery or fraud. . . . Because [the developer] does not seek to, and could not, challenge the State Attorney's decision to file a criminal information, and because the County has exercised its legislative judgment in deciding that building permits should not be issued on property implicated in zoning fraud, we conclude that the State Attorney's act of filing a criminal information is best characterized as a legislatively-defined condition precedent that does not transform the imposition of a moratorium under [the code] from a legislative act to an adjudicative act." *Id.* at 1296, 1298. The court added, "Having failed to take advantage of the mechanisms of democratic government when [the county code provision] was enacted, [the developer] cannot now complain that the alleged deprivation of property occasioned by the automatic moratorium provision . . . was the result of a denial of procedural due process." *Id.* at 1298.

Residents who had petitioned to incorporate their community as a new municipality unsuccessfully challenged an Arizona statute that prohibited incorporation unless all existing municipalities of 5,000 or more inhabitants within six mile of the community's boundaries

gave their prior consent. *Green v. City of Tucson*, 340 F.3d 891 (9th Cir. 2003). The Ninth Circuit agreed with the petitioning residents that Arizona had created a right to vote on incorporation, and that such a right was protected by the Equal Protection Clause. However, the court found that there was a rational basis for requiring the consent of nearby municipalities for the legitimate purposes of "regulating the establishment of new municipalities and . . . protecting the interests of existing ones." *Id.* at 893. Moreover, the Ninth Circuit refused to apply strict scrutiny to the statute because it did not involve a suspect classification, and it did not discriminate among voters within the community seeking to incorporate. The court found that the statute "admittedly draws geographical distinctions between those unincorporated communities that are near existing municipalities and those that are not, but we decline to extend strict scrutiny to this type of voting regulation." *Id.*

A developer failed to establish that a stop work order on construction of an apartment building gave rise to a "class of one" equal protection claim. *3883 Connecticut LLC v. District of Columbia*, 336 F.3d 1068 (D.C. Cir. 2003). The developer did not make a sufficient showing of two essential elements for such a claim: (1) disparate treatment of similarly situated parties; and (2) lack of a rational basis. The stop work order had been issued by the District of Columbia on the grounds that inaccurate information had been contained in the developer's Environmental Impact Screening Form. The developer ultimately submitted a revised form, obtained a rescission of the stop work order, and sued for damages resulting from the four-month delay the order had caused. The developer asserted that the stop work order had been based on the expectation that an environmental impact statement (EIS) would be required for the project, although ultimately none was required. The developer asserted that the District had never before required an EIS for an apartment building project. But that showing, said the court, said nothing about what requirements the District had imposed upon other projects before ultimately determining that no EIS was required, which was the developer's situation. Nor did that showing suggest that the District had targeted the developer without a legitimate reason. Although the developer claimed that the District had subjected its project to a more probing analysis than others because of local opposition, the court stated that there is nothing unusual or untoward in local government officials' responsiveness to public opinion.

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