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DECISIONMAKING**

Presentation

Rocky Mountain Land Use Institute

MARCH 8, 2002



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Avoiding Ethics Traps in Land Use Decisionmaking¹

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Introduction

A growing body of caselaw and opinions from state attorneys general document a trend on the part of dissatisfied applicants and neighbors to lodge ethics allegations against members of planning and zoning boards. The good news is that in the majority of litigated cases the actions of municipal officials have been deemed to have been legal (which is not always the same as ethical, but nonetheless permissible under the law). The bad news is that municipalities are put in the position of costly defense litigation. In addition, mere the allegations of unethical conduct, the often negative headlines in the local paper and the increasing fear on the part of volunteer board members that their reputations will be unwittingly dragged through the mud, has left many municipalities with a lack of civic interest for service on these boards, and the publicity tarnishes the delicate balance of public trust and integrity in government that those in the public service strive hard to maintain. The obvious question to be answered is why is there so much focus on ethics issues in the land use context. The answer is simple. Big money is at stake for some applicants and public health, safety and welfare concerns are at stake for others who may simply disagree with the judgment of the members of planning and zoning boards.

This article focuses on issues and strategies for counseling municipal clients on the subject of ethical considerations that arise in the land use planning and zoning decisionmaking process. It is limited to a discussion of conflicts of interest, and it does not cover the unique ethical considerations faced by both full-time and part-time municipal attorneys with respect to professional conduct and ethics under the Code of Professional Responsibility or Rules of Professional Conduct. The discussion is organized around the major sub topics in conflicts of interest that have been the subject of opinions over the last five years.

Applicable Ethics Laws and Rules

Focusing on the municipal official as opposed to attorney ethical conduct can lead to a frustrating research path when attempting to find precise answers to the question at hand. In some states, there are ethics codes

¹ This article will appear in the March/April 2002 issue of *Municipal Lawyer*, published by the International Municipal Lawyers Association (IMLA).

that apply specifically to municipal officials, and in a few situations there are specific provisions that deal with ethical issues in the planning and zoning arena. The local government ethics law must also be consulted, but beware that the types of ethics issues that arise in the land use context are rarely addressed in these laws. Sometimes there are specific provisions about conflicts of interest in the local zoning laws and ordinances. There may be applicable ethics committees and commissions that issue advisory opinions. At the state-level, more of these agencies are posting their opinions on-line, but at the municipal level research for precedential value may be more of a challenge. State attorneys general and comptrollers may provide opinions to municipal officials on matters involving ethics (specifically conflicts of interest and compatibility of dual office holding). Lastly, in analyzing any ethics situation that involves a licensed or certified professional, check for the possibility of applicable codes of ethics from these organizations (e.g., the American Institute of Architects, the American Institute of Certified Planners, the Society of Professional Engineers, the National Association of Realtors, etc.).

Conflicts of Interest

The most common ethics allegations revolve around real or perceived conflicts of interest. Conflicts of interest may be present where a board members could realize personal financial gain based upon a particular decision. Conflicts may also be present where a close blood relative of the land use decision-maker could be benefited by a vote or action of a board member. Such benefit could be in the form of financial remuneration from an individual or employer, and even present and future employment. Campaign promises and alleged bias resulting therefrom has also provided fertile grounds for allegations of unethical conduct. The discussion below briefly highlights some of the recent opinions in the area of conflicts of interest. For a more detailed discussion of these cases and opinions, as well as others, consult the references at the end of this article.

Personal Financial Gain

A decision of the zoning commission was challenged where a board member who owned a campground across the street from the proposed bituminous concrete manufacturing plant acted zealously in questioning the legality of the proposed use through conversations with the town planner, town attorney and an engineering firm, but withdrew from the commission and did not participate in the hearing on the site plan application.¹ In finding no conflict of interest since the board member withdrew, the court found nothing in state law that prohibits members not participating in a matter from presenting their own view on the subject.

In noting that the court would not consider “naked assertions” without

knowledge of any facts, there was no personal financial conflict of interest where a member of a planning and zoning commission served as an electrical contractor for several projects with the applicant and where each of these jobs was won through a competitive bidding process.²

Where plaintiffs alleged that council members and board members had a conflict of interest in considering a requested conditional use permit based upon political campaign contributions, the court found nothing in the record to indicate any connection between contributions received seventeen months earlier.³

Familial Relationships

Sometimes, geographic proximity to property that is the subject of action before the board is cause for public concern. For example, it was determined that a city council member did not violate the conflict of interest provision in the applicable state statute when a neighbor opposed a rezoning application by his sons for their adjacent property from residential to light manufacturing.⁴ The court found that the council member properly disclosed his interest and disqualified himself from voting in the matter.

Where a zoning commission member appeared before the commission in her personal capacity after having excused herself from voting, and leaving her seat at the commission table to move to another area in the room so that she could advocate on behalf of a relative applicant where she was a co-applicant as an officer of applicant's corporation, the court noted that nothing in state statute prohibited such action.⁵

A board member who voted on the siting of a shopping center to be located near where his elderly parents resided did not present a conflict interest because he allegedly had an interest in not having to shop for his parents.⁶ Yet in another case involving an elderly parent, the court found a prohibited conflict of interest where a board member voted on a variance request that would impact his 83-year old mother's commercial interest based upon the "potential for psychological influences" because his mother needed the income to subsist.⁷

One court determined that a planning board itself is not necessarily infected with an alleged conflict of interest based upon a claim that a competitor applicant was locally favored because the competitor was represented by the spouse of a council member.⁸

No familial conflict of interest was found where two of the board members had family members who were connected in some way to the applicant University - one board member's spouse was employed by the University (but not in any way connected to the application before the Board) and another was spouse of a retiree who received pension benefits.⁹

Political Pressure, Campaign Promises, Bias and Prejudgment

An alleged conflict of interest based upon political pressure was lodged by an applicant arguing that zoning board members were subject to undue political pressure when the township attorney appeared before them to oppose the application since the zoning board members are appointed by the township council who had directed the township attorney to appear before the board.¹⁰ No conflict was found since the attorney appeared on behalf of the public, not himself, and since the township council had no authority to review the decision of the zoning board.¹¹

Based upon statements made by a councilwoman that could suggest the member favored youth issues, opponents challenged the decision of the city council to site a youth shelter on the grounds that this member was biased and had prejudged the matter, creating an appearance of impropriety and abolishing any chance of receiving a fair and impartial hearing on the matter.¹² In finding no conflict of interest or appearance of impropriety, the court noted that council members need not be so insulated from their community to the point that they must be detached from everything that comes before them.

Where two commission members participated in a hearing and decision regarding special permits for an outdoor soccer field after having been involved with little league ball fields committee to study the question of ball fields in town, the court said that this alone would not cause other commissioners to form prejudged conclusions as to their decisions in the matter.¹³ The court stated, "To hold otherwise would be to seriously limit the work of municipalities, who must rely on interested volunteers for much of their work. Such volunteers, by the very nature of their active involvement in their communities, are likely, from time to time, to have opinions about matters of public concern, which come before them."¹⁴

In another case, two planning board members actively supported a new supermarket in town during their pre-application when they were candidates for township committee. Finding insufficient evidence that they prejudged the application, the court stated, "[e]xpression in support of a general proposition during a prior political campaign does not invalidate a subsequent decision by campaigners acting in their official capacity as planning board members."¹⁵

The Land Use Ethics Checklist

To preserve the public trust, municipal attorneys have an obligation to proactively address and discuss ethics issues with municipal officials for the purposes of avoiding potential pitfalls in the future. Since few people are excited about the prospect of sitting through an evening lecture on the topic of ethics, municipal attorneys must be creative in their preventive law strategy. There are a number of subtle ways in which this training can take place. For example, bring in newspaper clippings from neighboring jurisdictions about

ethics allegations and pass them around periodically with an “fyi” note. When interesting land use ethics cases are decided from other jurisdictions, bring in case summaries detailing the facts to remind board members about how the public may perceive their conduct. Periodically distribute a short ethics quiz based upon hypothetical fact patterns that offer several choices for solutions. Use this as a way to brainstorm with the board members on how they might handle the particular situation.

Another preventive law ethics technique is the planning and zoning checklist. Annually, ask board members (this could and should include members of local legislative bodies as well) to complete the following ten question checklist which can be varied to meet the needs of your municipality/region:

1. Have you reviewed a copy of the state ethics law in effect during the last 12 months?

2. Have you reviewed a copy of local ethics law in effect during the last 12 months?

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 from 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 engage 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 interest) 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?

While answers to these questions may not trigger an immediate ethical dilemma, they put the individual board members as well as the municipal attorney on notice of areas where potential situations could require sound counseling for appropriate ethical and legal conduct.

For more information see:

Salkin, "Legal Ethics and Land-Use Planning," 30 *The Urban Lawyer* 383 (1998).
Salkin, "1998 Survey of Ethics in Land-Use Planning," 26 *Fordham Urb. L.J.* 1393 (1999).

Salkin, ed., *Ethical Standards in the Public Sector* (ABA Press 1999).

Salkin, "Municipal Ethics Remain a Hot Topic in Litigation: A 1999 Survey of Issues in Ethics for Municipal Lawyers," 14 *BYU J. Pub. L.* 209 (2000).

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Endnotes

1. *Phillips v Town of Salem Planning & Zoning Comm'n*, 1998 WL 258332 (Conn. Super. Ct. 1998).

2. *Blinkoff v Planning and Zoning Commission*, 1999 WL 559585 (Conn. Super. Ct. 1999).

3. *Breakzone Billiards v City of Torrance*, 97 Cal. Rptr.2d 467 (2000).

4. *Little v City of Lawrenceville*, 528 S.E.2d 515 (Ga. 2000).

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

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

7. *Ex. rel. Tenafly v Tenafly Zoning Board of Adjustment*, 704 A.2d 1032 (N.J. Super. Ct. App. Div. 1998).

8. *Masi Management, Inc. v Town of Odgen*, 691 N.Y.S.2d 706 (N.Y. Sup. Ct. 1999).

9. *DePaolo v Town of Ithaca*, 694 N.Y.S.2d 235 (1999).

10. *Paruszewski v Township of Elsinboro*, 711 A.2d 273 (1998).

11.*Id.*

12.*Siesta Hills Neighborhood Ass'n v City of Albuquerque*, 954 P.2d 102 (1998).

13.*Brooks v Planning and Zoning Commission of the Town of Haddam*, 2000 Conn. Super. LEXIS 244 (2000).

14.*Id.*

15.*Lincoln Heights Ass'n v Township of Cranford Planning Bd.*, 714 A.2d 995, 1004 (1998).