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**BACK TO KINDERGARTEN: PAY ATTENTION,
LISTEN, AND PLAY FAIR WITH OTHERS – SKILLS
THAT TRANSLATE INTO ETHICAL CONDUCT IN
PLANNING AND ZONING DECISION MAKING –
A SUMMARY OF RECENT CASES AND
DECISIONS ON ETHICS IN LAND USE LAW**

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Recent Developments in Land Use, Planning and Zoning Law
Back to Kindergarten: Pay Attention,
Listen, and Play Fair with Others—Skills
That Translate into Ethical Conduct in
Planning and Zoning Decision Making—
A Summary of Recent Cases and
Decisions on Ethics in Land Use Law

Patricia E. Salkin*

I. Introduction

THE 2005 ANNUAL REVIEW OF ETHICS IN LAND USE continues to monitor reported cases and opinions documenting allegations of unethical conduct involved in land use planning and zoning decision-making.¹ Conflicts of interest continues to be an area that garners significant attention, particularly when there are familial and personal relationships involved, and when there is a real or perceived personal financial interest for the government decision maker. Behavior of decision makers, such as failure to pay attention to presentations during a public meeting, can also present ethics problems. A number of state attorney generals were called upon to render opinions with respect to dual office holding, and this year's survey includes a review of more than a dozen opinions from the California Fair Political Practices Commission, demonstrating

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1. Previous annual surveys by the author may be found at: *A Woody Allen Movie, Show Me the Money and Other Ethical Consideration in Land Use Planning*, 27 ZONING & PLAN. L. REP. No. 3, 1 (Mar. 2004); *Ethics Allegations in Land Use Continue to Fill the Court Dockets*, 26 ZONING & PLAN. L. REP. No. 4, 1 (Apr. 2003); *Litigating Ethics Issues in Land Use: 2000 Trends and Decisions*, 24 ZONING & PLAN. L. REP. No. 4, 25 (Apr. 2001); *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); *1998 Survey of Ethics in Land Use Planning*, 22 ZONING & PLAN. L. REP. 33 (Apr. 1999).

the difficulties in applying the Political Reform Act to the actions of planning and zoning commission members and other government officials involved in various aspects of land use law and policy decision-making.² Lastly, in February 2005 the Second Circuit Court of Appeals handed down an important decision on government attorney-client confidentiality, and, although the facts are not in the land use context, this is a matter of critical importance for municipal attorneys, and so it is briefly discussed as a follow-up to prior reports on this subject.

These annual ethics updates are designed to provide land use lawyers with fact patterns in which ethics allegations are actually raised and the analysis that is used to determine whether the actions complained of constitute illegal and improper conduct. While the facts in each specific case are analyzed under relevant state laws, the general principles are, for the most part, instructive and the concepts are easily transferable from jurisdiction to jurisdiction.

II. Conflicts of Interest

A. Massachusetts

The Massachusetts Conflicts of Interest Law provides, among other things, that a conflict of interest exists when:

A municipal employee who participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has an arrangement concerning prospective employment, has a financial interest.³

In a recent case, property owners challenged the granting of a special permit and site plan approval to a developer because, among other things, the traffic consultant hired by the municipality to advise the municipality was simultaneously involved in a business relationship with the applicant for a project in a different state, and was also a partner with the applicant in the development at issue.⁴ The court reluctantly found that the State Conflicts of Interest Law did not apply based on previous opinions of the State Ethics Commission holding that a consultant could not be considered an “employee” of a municipality.⁵

2. See *infra* notes 73–77 and accompanying text.

3. MASS. GEN. LAWS ANN. ch. 268A, § 19 (West 2005).

4. *Tuttle v. Planning Bd.*, 18 Mass. L. Rptr. 381 (Mass. 2004).

5. *Id.* “The State Ethics Commission ‘has long recognized that a . . . contract between a [state or municipal government entity] and a corporation will not render the corporation a [government] employee.’” *Id.*

B. *Connecticut*

In challenging the denial of two special use permits when the planning and zoning commission approved a special permit request by a different applicant for allegedly a similar use, the plaintiffs alleged that the commission chair tainted the proceedings after he disqualified himself from the public hearings on the plaintiff's applications so that he could appear before the commission to speak in opposition to the requested permits, and that he then further instructed the commission that the arguments made by the applicant's attorney were not valid.⁶ At oral argument, counsel for the plaintiffs failed to assert a violation of the Connecticut General Statute and/or the identical provision in the town's zoning regulations that would automatically invalidate the chair's action in advocating a position contrary to that espoused by the applicant's counsel.⁷ "Deprived of the use of automatic invalidation," the court searched the record but was unable to conclude that the chair's conduct improperly influenced other members of the commission.⁸

C. *New York*

Although a planning board chair had hired the applicant to excavate real property at his home four months prior to his application before the board, and the applicant had hired another board member's son eight months earlier to work with him during the preceding summer, these relationships did not automatically require disqualification under New York State law, and rather called for a fact specific inquiry.⁹ Fur-

6. *Durham Agricultural Fair Ass'n, Inc. v. Durham Plan. and Zoning Comm'n*, No. CV010094560S, 2004 WL 1326253 (Conn. Super. Ct. May 27, 2004).

7. *Id.* See CONN. GEN. STAT. ANN. § 8-11 (West 2005). The statute provides that:

No member of any zoning commission or board and no member of any zoning board of appeals or of any municipal agency exercising the powers or any zoning commission or board of appeals, whether existing under the general statutes or under any special act, shall appear for or represent any person, firm, corporation or other entity in any matter pending before the planning or zoning commission or board or said board of appeals or any agency exercising the powers of any such commission or board in the same municipality, whether or not he is a member of the board or commission hearing such matter. . . .

Id. The court noted that when the chair "essentially instructing the commission that Attorney Corona's arguments were invalid . . . such conduct constituted 'participation' within the meaning of § 8-11, which would invalidate the decision of the commission." *Durham*, 2004 WL 1326253 at *9.

8. *Durham*, 2004 WL 1326253 at *9. The court further noted that "There is a presumption that the Commission has acted with fair and proper motives, skill and judgment . . . and that public officers have done their duty until the contrary appears." *Id.* at *6.

9. *Heustis v. Ticonderoga Plan. Bd.*, 784 N.Y.S.2d 187 (N.Y. App. Div. 2004). The General Municipal Law provides, in part, that:

An officer or employee shall be deemed to have an interest in the applicant when

ther inquiry was warranted, however, when a third planning board member worked for a family-owned construction company that routinely rents trucking equipment to the applicant and purchases gravel from the applicant.¹⁰ Specifically, the court said that a determination must be made regarding the corporate and/or financial relationship between the board member's construction company and whether or not the company would financially benefit from an approval of the applicant's request.¹¹

III. Familial Relationships

A fifteen-year veteran of a New Jersey township planning board found his service ended by a court order after he married a member of the township council, who cast the deciding vote in support of his reappointment to the planning board.¹² After a three-to-two vote to reappoint the planning board member, the court determined that in casting the deciding vote for her husband's reappointment, the council member violated the state ethics law as this created at least a perception of a conflict of interest.¹³ Noting that a familial relationship does not always create a per se conflict, the court said that "when a family member's vote results in another family member obtaining a position in a government agency, as in the situation before us, a conflict is usually present."¹⁴ Although the council member asserted that her spouse was well qualified on the merits, the court said that although he may well have

he, his spouse, or their brothers, sisters, parents, children, grandchildren, or the spouse of any of them . . . (d) is a party to an agreement with such an applicant, express or implied, whereby he may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of such application, petition or request.

Id. (citing N.Y. GEN. MUN. L. § 809(2) (2005)). In addition, the town ethics law provides, in part, that board members "shall not invest or hold any investment directly or indirectly in any financial business, commercial or other private transaction, which creates a conflict with his official duties" or "render services for private interests when such employment or services creates a conflict with or impairs the proper discharge of his official duties." *Id.* at 188.

10. *Id.*

11. *Id.*

12. *Shapiro v. Mertz*, 845 A.2d 186 (N.J. 2004).

13. *Id.* at 189. N.J. STAT. ANN. § 40A:9-22.5d (West 2005). The statute provides:

No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

Id.

14. *Shapiro*, 845 A.2d at 54.

been an ideal candidate, “in the eyes of the public, the personal involvement . . . might reasonably be expected to impair her objectivity or independence of judgment.”¹⁵ Noting, too, that since the spouse cast the tie-breaking vote the matter did not “resound with political consensus,” the court concluded that “marriage is a direct personal involvement which might be reasonably expected to impair objectivity or independence of judgment within the meaning of” the statute.¹⁶

IV. Improper Conduct

A. California

The Los Angeles City Council held a public hearing on a recommendation of its Planning and Land Use Management Committee to reverse a decision of the zoning administrator that had granted an applicant’s requested modifications to previously imposed city conditions on the use of the subject property for an adult cabaret.¹⁷ The public hearing, which was videotaped and subsequently shown to the court on appeal of the council’s decision, revealed that at the start of the hearing: eight council members were not in their seats; four council members were talking to aides, eating and/or reviewing paperwork; about a minute into the presentation, one council member took a call on his cell phone; and, two council members who had been paying attention at the start of the hearing began a side conversation with each other.¹⁸ Another minute into the videotape, it was revealed that two other council members began a side conversation, and about three minutes into the presentation the applicant’s counsel stated that “it doesn’t appear that too many people are paying attention.”¹⁹ After this lack of interest, attention or focus was publicly noted, the member who was on his cell phone started a second cell phone conversation, and four other council members engaged in conversations, with one council member walking around the room talking to colleagues.²⁰ The court noted that due process requires that “he who decides must hear,”²¹ and that “[t]he inattentiveness of council members during the hearing prevented the council from satisfying that principle.”²² The court noted that in this matter,

15. *Id.* at 55.

16. *Id.* at 56.

17. *Lacy St. Hospitality Serv., Inc. v. City of Los Angeles*, 22 Cal. Rptr. 3d 805 (Cal. Ct. App. 2004).

18. *Id.* at 808.

19. *Id.*

20. *Id.*

21. *Id.* (quoting *Vollstedt v. City of Stockton*, 269 Cal. Rptr. 404, 405 (Cal. Ct. App. 1990)).

22. *Lacy St. Hospitality Serv.*, 22 Cal. Rptr. 3d at 809.

the council was sitting in a quasi-judicial role, and that, based upon their actions as demonstrated on the videotape, “the council cannot be said to have made a reasoned decision based upon hearing all of the evidence and argument . . . to which . . . [the applicant] was entitled as a matter of due process. . . .”²³

B. *Connecticut*

Property owners in Connecticut challenged a re-subdivision approval alleging, among other things, misconduct on the part of the planning commission chair.²⁴ They alleged that the chair acted improperly by failing to wait until all of the commission members were present before taking a vote, and that she controlled the placement of an alternate member of the commission to replace a disqualified member.²⁵ The court found no evidence in the record to support these allegations of misconduct and procedural irregularity, and noted that the chair, pursuant to the commission’s bylaws,²⁶ even recused herself from the public hearing and did not participate in the discussion based on a potential conflict of interest.²⁷

C. *North Dakota*

The North Dakota Attorney General opined that the planning and zoning commission did not act improperly in responding to a citizen record access request dated December 4, as the commission complied with the request by mid-December.²⁸ Records must be released within a reasonable time, which under North Dakota law is measured in terms of a “few hours or days rather than several days or weeks.”²⁹ Although it took a couple of weeks to comply with a request for nine separate records, the Attorney General found that the requested minutes were not yet prepared at the time of the request and were prepared in a timely fashion, that the county made appropriate inquiries to determine whether some of the requested records were available (including trying to verify from other departments of county government whether certain records existed—something they were not required to do), and that three days after the request was made the citizen spoke with a secretary who advised him of the actions being taken in response to his request.³⁰ Based

23. *Id.* See also Daniel J. Curtin, *Listen Up: Quasi-Judicial Hearings Require Attention*, SAN FRANCISCO DAILY J., Mar. 9, 2005, at 7.

24. *York v. New Milford Planning Comm’n*, No. CV040092379S, 2004 WL 2757650 (Conn. Super. Ct. Nov. 4, 2004).

25. *Id.* at *1.

26. *Id.*

27. *Id.* at *3.

28. *Op. N.D. Att’y Gen.*, 2004 WL 315821 (Feb. 17, 2004).

29. *Id.* at *2.

30. *Id.*

upon these findings, the Attorney General was satisfied that the commission provided the requested records and had an explanation of why certain records were not provided within a reasonable time.³¹

D. Michigan

When the township supervisor appeared on two occasions before the board of zoning appeals to express his opposition, as supervisor, to the granting of requested variances, such conduct did not constitute an imposition of duress as a matter of law.³² In reversing the trial court, the Michigan Court of Appeals noted that the supervisor was not acting in self-interest,³³ but rather “maintained his fidelity to the township’s citizens by commenting on the interests of the township . . .” and “. . . he did not encourage the board members to serve an interest other than that which they were bound to serve.”³⁴

E. Pennsylvania

As noted in last year’s review of ethics cases, the Third Circuit now applies a new “shock the conscience” standard in lieu of the former improper motive standard when reviewing a claim of substantive due process.³⁵ In a recent Pennsylvania case, the plaintiffs alleged a violation of substantive due process, claiming that the municipality acted in concert to frustrate their efforts to subdivide their property by needlessly complicating and delaying their applications for permits in part because they did not like the plaintiffs.³⁶ Specifically, the defendants believed that the plaintiff was a “trouble making yuppie from over the mountain.”³⁷ Although in viewing the facts most favorable to the plain-

31. *Id.* at *3.

32. *Dep’t of Trans. v. Township of Kochville*, 682 N.W.2d 553 (Mich. Ct. App. 2004).

33. This distinction was critical to distinguish two earlier cases in which municipal officials improperly appeared before boards because they had a personal pecuniary interest that conflicted with the fiduciary duty owed to the public. *See Barkey v. Nick*, 161 N.W.2d 445 (Mich. Ct. App. 1968); *Abrahamson v. Wendell*, 257 N.W.2d 613 (Mich. Ct. App. 1977).

34. *Dep’t of Transp.*, 682 N.W.2d at 405. One of the statements made by the supervisor addressed the issue of nonconforming signs when he said, in part, “I don’t believe it’s the township’s position that I don’t feel we should be increasing nonconformity, and that’s exactly what we’re doing. . . .” The other statement reflected the supervisor’s concern over a building setback being close to the road as the variance would remain with the property forever. *Id.* at 401.

35. *See Salkin, A Woody Allen Movie, Show Me the Money, and Other Ethical Considerations in Land Use Planning*, *supra* note 1, at 1.

36. *Corneal v. Jackson Township*, 313 F. Supp. 2d 457 (M.D. Pa. 2003). For a discussion of the “shock the conscience” standard in two other Pennsylvania land use cases, see *Blain v. Township of Radnor*, No. Civ. A. 02-CV-66842004, WL 1151727 (E.D. Pa. May 21, 2004), and *Levin v. Upper Makefield Township*, No. CIV.A. 99-CV-5313, 2003 WL 21652301 (E.D. Pa. Feb. 25, 2003).

37. *Corneal*, 313 F. Supp. 2d at 462.

tiffs, the court concluded that “the Board may have acted with mixed motives; one related to a legitimate land use regulation purpose . . . the other related to illegitimate personal animus. This alone is not enough to establish a violation of substantive due process.”³⁸

V. Bias, Prejudgment, and Bad Faith

A. Iowa

To make a showing of improper behavior or bad faith on the part of members of the Board of Adjustment when they denied the applicant’s request for a conditional use permit to operate a sand and gravel excavation business, the Iowa Supreme Court allowed discovery to inquire into the mental processes of the Board of Adjustment members by asking other involved individuals whether there was communication with Board of Adjustment members, and if so, what that communication was.³⁹ The applicant believed that the board acted illegally by making a decision based on undue and improper influence, and alleged, among other things, that the director of planning, who had previously indicated support for their application, changed his view when he appeared before the board based upon a threat that he would be fired if he did not oppose it.⁴⁰ The court commented that allowing for the requested discovery would at least provide the applicant with an “opportunity to establish preliminarily that Board of Adjustment members were indeed subject to improper influence that might have led to its decision.”⁴¹

B. Idaho

After twice being denied a variance by an Idaho planning and zoning commission, the county commission overturned the decision, granting the requested variance to allow the construction of a boathouse.⁴² A

38. *Id.* at 468. The court noted that the plaintiffs had also argued that the defendants acted out of personal gain as the property in question had once belonged to the grandfather of one of the defendants, and he had twice approached the plaintiffs about selling him the property. The court concluded that a reasonable jury could not conclude that this was enough of a motivating factor in the adoption of a moratorium, but that even if the one defendant had ill motives, this could not be transferred to the entire board. *Id.* at 468.

39. *Martin Marietta Materials, Inc. v. Dallas County*, 675 N.W.2d 544 (Iowa 2004). In citing precedent, the court noted that since members of the Board of Adjustment serve a quasi-judicial function, board members are “disqualified or incompetent to sit in a proceeding in which [they have] prejudged the case, or in which [they have] a personal or pecuniary interest, where [they are] related to an interested person . . . or where [they are] biased, prejudiced, or labor . . . under a personal ill-will toward a party.” See *Bluffs Dev. Co. v. Bd. of Adjustment*, 499 N.W.2d 12, 15 (Iowa 1993).

40. *Martin Marietta Materials*, 675 N.W.2d at 552.

41. *Id.* at 554.

42. *Eacret v. Bonner County*, 86 P.3d 494 (Idaho 2004).

member of the county commission, however, made statements that, combined with his actions, led the court to conclude that he had impermissibly prejudged the application.⁴³ While noting that a county commissioner will not automatically be disqualified for taking a position, even in public, on a policy issue related to a dispute, in the absence of a showing that the commissioner is “not capable of judging a particular controversy fairly on the basis of its own circumstances,” the court concluded that the commissioner’s statements about the pending variance foretold the results of the proceedings before the board that were yet to take place.⁴⁴ In determining whether pre-hearing statements made by a decision maker are fatal to the validity of the zoning determination, the court will look to see whether the decision maker: “(a) has made up his or her mind regarding the facts and will not listen to the evidence with an open mind, or (b) will not apply the existing law, or (c) has already made up his or her mind regarding the outcome of the hearing.”⁴⁵ These statements, combined with pre-hearing *ex parte* communications between the commissioner and the petitioner, and the fact that the commissioner went by himself to view the subject property, “reveal a lack of impartiality and denial of an opportunity for opponents of the variance to challenge or answer the *ex parte* evidence . . . and the unauthorized view . . . was not available to the entire Board or equally to the parties.”⁴⁶

C. California

In advance of a planning commission meeting to hear an appeal of the city planning director’s approval of a proposed development project, a member of the planning commission authored (anonymously) an article in a newsletter of a neighborhood association (for which he was also the president) that stated that the matter on appeal involved land that was “an absolutely crucial habitat corridor.”⁴⁷ In addition, in his capacity as president of the association, the commissioner had invited an opponent of the project (a party in the matter) to speak before the association, and when he did so, the commissioner/president left the room.⁴⁸ At the subsequent hearing on the matter before the full com-

43. *Id.* at 501.

44. *Id.* at 499.

45. *Id.* at 499–500.

46. *Id.* at 501. The court noted that although the commissioner did disclose on the record that he had spoken to the petitioner a couple of times, he neither revealed the substance of the conversations nor the dates when they took place. Further, the court added that views of subject properties must be preceded by notice and the opportunity for the parties to be present to satisfy procedural due process. *Id.*

47. *NASHA L.L.C. v. City of Los Angeles*, 22 Cal. Rptr. 3d 772, 775 (Cal. Ct. App. 2004).

48. *Id.*

mission, the commissioner disclosed his role with the neighborhood association, indicated that information about the matter was contained in its newsletter, and stated that he had no contact with anyone involved in the matter and that therefore he would participate in the hearing since he felt he could make a fair and impartial decision.⁴⁹ This commissioner also made the motion at the conclusion of the hearing to overturn the decision of the planning director.⁵⁰ He never acknowledged at the time that he wrote the article that it had been more than simply informational, and that he did have contact with a party to the matter, although he did admit this after the vote and during the appeal.⁵¹ In noting that procedural due process was due to the applicant, as the commission was acting in a quasi-judicial nature, the court stated that those sitting in judgment must be reasonably impartial and noninvolved, and that there must be a showing of actual bias or the probability of actual bias to prevail in the administrative review context.⁵² In vacating the planning commission's decision, the court found that the newsletter article gave rise to an unacceptable probability of actual bias as it advocated a position against the project.⁵³

VI. Compatibility of Dual Office-Holding

A. Louisiana

The Louisiana Attorney General opined that a member of the Parkway Commission, who was also a member of a parish school board, had no prohibition on dual office-holding; yet, another parish school board member could not simultaneously serve on the parish planning commission.⁵⁴ The Attorney General first reiterated that a Louisiana statute provides that the parish, school board, and any other unit of local government are considered to be separate political subdivisions.⁵⁵ Relying on two different statutory provisions, the Attorney General found that

49. *Id.* at 776.

50. *Id.*

51. *Id.*

52. *NASHA*, 22 Cal. Rptr. 3d at 781. The court noted that:

It is recognized that "administrative decision makers are drawn from the community at large. Especially in a small town setting they are likely to have knowledge of and contact or dealings with parties to the proceeding. Holding them to the same standard as judges, without a showing of actual bias or the probability of actual bias, may discourage persons willing to serve and may deprive the administrative process of capable decisionmakers."

Id. at 780.

53. *Id.*

54. Op. La. Att'y Gen No. 04-0050, 2004 WL 799991 (Mar. 25, 2004).

55. *Id.* (citing LA. REV. STAT. ANN. § 42:62(9)).

the school board member may serve on the Parkway Commission so long as the appointment is held on a part-time basis,⁵⁶ but that there is a specific statutory prohibition on planning commission members holding any other public office, including membership on the school board.⁵⁷ In another recent opinion, the Louisiana Attorney General opined that the same person may not simultaneously serve on a city zoning commission and city board of adjustment because the board of adjustment position is considered a public office, and state statute restricts members of zoning commissions from holding any other public office.⁵⁸

B. Arkansas

A similar question was posed to the Arkansas Attorney General. Under Arkansas law it is not per se impermissible for a city planning commissioner to simultaneously serve as a school board member.⁵⁹ Unlike Louisiana, where a specific statutory prohibition exists, the Arkansas Attorney General opined that the incompatibility doctrine would not apply except in cases in which the planning commission is called to act upon matters directly involving the school district, and in that situation, a simple recusal from participation on the matter would be appropriate.⁶⁰ Although it was noted that at times there are scheduling conflicts between planning commission meetings and school board meetings, the Attorney General acknowledged this as a source of “in-

56. *Id.* (relying on LA. REV. STAT. ANN. § 42:63(D)). The statute provides:

No person holding an elective office in a political subdivision of this state shall at the same time hold another elective office or full-time appointive office in the government of this state or in the government of a political subdivision thereof. No such person shall hold at the same time employment in the government of this state, or in the same political subdivision in which he holds elective office. In addition, no sheriff, assessor, or clerk of court shall hold any office or employment under a parish governing authority or school board, not shall any member of any parish governing authority or school board hold any office or employment with any sheriff, assessor, or clerk of court.

LA. REV. STAT. ANN. § 42:63(D).

57. *Id.* (citing LA. REV. STAT. ANN. § 33:103 (C)(1)). The statute provides:

All members of a commission, whether a parish or municipal planning commission, shall serve without compensation, except as otherwise provided by this Paragraph or as otherwise provided by law, and shall hold no other public office, except they may also serve as members to any duly constituted regional commission of which their parish or municipality forms a part.

LA. REV. STAT. ANN. § 33:103 (C)(1).

58. Op. La. Att’y Gen. No. 09–0046, 2004 WL 799984 (Mar. 2, 2004).

59. Op. Ark. Att’y Gen. No. 2004–291, 2004 WL 2671455 (Nov. 29, 2004).

60. *Id.* The Attorney General also noted that since school board membership does not constitute a “municipal office or appointment,” a statutory provision requiring that at least two-thirds of the members of the planning commission may not hold other municipal offices or appointments would not apply here.

convenience and aggravation,” but said that this did not amount to common-law incompatibility that would disqualify members from dual service.⁶¹

C. Ohio

To determine whether two positions are compatible in the State of Ohio, a seven question test is employed.⁶² In reviewing these inquiries, the Ohio Attorney General opined that a person may serve simultaneously as a trustee of a township that has not adopted a limited home rule government, and as a member of the county rural zoning commission.⁶³ The Attorney General noted, among other things, that the two positions serve different constituencies (e.g., the township’s electorate and the board of county commissioners), that they are not subordinate to each other (i.e., they operate independently of each other and neither supervises the other), and that there are no statutory prohibitions.⁶⁴ In discussing the potential for conflicts of interest between the two positions, the Attorney General distinguished these two positions from the positions of township trustee and county zoning inspector, which were found incompatible,⁶⁵ noting that a member of the county zoning rural commission is not responsible for enforcement.⁶⁶

D. Florida

Finding that a city building official is an “office” under Florida law, the Florida Attorney General opined that the positions of city council mem-

61. *Id.*

62. Op. Ohio Att’y Gen No. 2004–015, 2004 WL 839674, at *1 (Apr. 15, 2004). The seven questions to ask are:

- 1) Is either of the positions a classified employment within the terms of R.C. 124.57?
- 2) Do the empowering statutes of either position limit employment in another public position or the holding of another public office?
- 3) Is one position subordinate to, or in any way a check upon, the other?
- 4) Is it physically possible for one person to discharge the duties of both positions?
- 5) Is there an impermissible conflict of interest between the two positions?
- 6) Are there local charter provisions, resolutions, or ordinances which are controlling?
- 7) Is there a federal, state, or local departmental regulation applicable?

Id.

63. *Id.*

64. *Id.* at *2–3.

65. *Id.* at *5 (relying on Op. Ohio Att’y Gen. No. 85–074, 1985 WL 204537, at *2 (Nov. 7, 1985)). “[T]he ability of the township trustee to initiate changes which modify the county zoning plan directly affects the duties of a county zoning inspector by modifying the area over which the zoning inspector has authority.” *Id.* at *2. The opinion also noted that it was possible that the county zoning inspector could be required to initiate legal action against the township for a violation or proposed violation of the county zoning plan. *Id.* at *3.

66. *Id.* at *8.

ber and city building official for the city are incompatible and in violation of the state constitution, which provides that “No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein. . . .”⁶⁷

VII. Government Attorney-Client Confidentiality

The spring 2003 issue of *The Urban Lawyer* contains an article discussing recent chilling decisions in federal courts, suggesting an erosion of the attorney-client privilege of confidentiality in the government context.⁶⁸ Two major cases arising from the independent counsel investigation of President and Mrs. Clinton, *In re Lindsey*⁶⁹ and *In re Grand Jury Subpoena Duces Tecum*,⁷⁰ suggest that there may be no duty of confidentiality, or at best, a very limited privilege, in certain public sector settings. In *Lindsey*, the circuit court of appeals did acknowledge that a government attorney-client relationship exists, but also broadly stated that there is an “obligation not to withhold relevant information acquired as a government attorney.”⁷¹ Although some government ethics pundits thought that these cases would be limited to situations involving the White House and federal grand jury investigations, the Seventh Circuit stated that state government lawyers may not exercise an attorney-client privilege in an effort to shield information from a grand jury.⁷² The attempt to use a federalism argument to distinguish the state actors in the Seventh Circuit case from the federal actors in the previous cases was unsuccessful.

In February 2005, the Second Circuit reached an opposite conclusion after the counsel to former Connecticut Governor Rowland refused to testify before a grand jury about confidential communications she had with the governor and his staff for the purpose of providing legal advice.⁷³ Unlike the Seventh Circuit, the Second Circuit emphasized that

67. Op. Fla. Att’y Gen., 2004 WL 305765 (Feb. 13, 2004) (citation omitted).

68. See Patricia E. Salkin, *Beware: What You Say to Your [Government] Lawyer May Be Held Against You—The Erosion of Government Attorney-Client Confidentiality*, 35 URB. LAW. 283 (2003).

69. 158 F.3d 1263 (D.C. 1998).

70. 112 F.3d 910 (8th Cir. 1997).

71. For more discussion on these cases, see Paul Shechtman & Nathaniel Marmor, *Government Lawyer Confidentiality After Lindsay*, 1NYSBA GOV’T, L. & POL. J. 30 (Fall 1999); Norman Redlich & David Lurie, *Federal Governmental Attorney-Client Privilege Decisions May Prove Significant to All Government Lawyers*, in *ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS* (Patricia E. Salkin ed., 1999) (ABA publication).

72. *In re A Witness Before the Special Grand Jury 2000–2*, 288 F.3d 289 (7th Cir. 2002).

73. *United States v. Doe*, 399 F.3d 527 (2d Cir. 2005).

the *Lindsey* and *Grand Jury* cases involved communications by a *federal* executive, therefore involving statutes and considerations unrelated to the present case.⁷⁴ The Second Circuit rejected the government's argument that the public interest lies in disclosure in furtherance of the "truth seeking" mission of the grand jury and that, since the office of the governor serves the public, the counsel to the governor must yield her loyalty to the public, not to the governor. The court acknowledged that it is in the public interest for the grand jury to conduct a thorough investigation, but stated that "it is also in the public interest for high state officials to receive and act upon the best possible legal advice," citing to a Connecticut state statute that specifically provides for confidential communications between government lawyers and their clients.⁷⁵

The court continued, stating that "the traditional rationale for the privilege applies with special force in the government context," noting that government officials should be able "to seek out and receive fully informed legal advice" and that "upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business."⁷⁶ The court was further persuaded that for government attorneys to discharge their duties, they require "candid, unvarnished information from those employed by the office" they serve, and that absent a privilege, this goal would be threatened.⁷⁷

With the federal circuit courts now in clear controversy on this critically important issue for government lawyers, the stage has been set for a potential review by the U.S. Supreme Court to resolve this issue, and there is an opportunity that should not be missed by the American Bar Association (and the State & Local Government Law Section) to weigh in with guidance on this critically important public policy/professionalism challenge.

74. *Id.* at 533.

75. *Id.* at 534. The court further noted that:

if *state* prosecutors had sought to compel George to reveal the conversations at issue, there is little doubt that the conversations would be protected. The Connecticut legislature has enacted a statute specifically providing that "[i]n any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure."

Id.

76. *Id.*

77. *Id.* at 535.

VIII. California Political Reform Act

Provisions of the California Political Reform Act⁷⁸ (the Act) attracted significant attention from the land use community in 2004 as the California Political Practices Commission (the Commission) issued more than a dozen advice letters responding to requests for interpretations of the Act as to various land use related actions. The Act provides, among other things, that a public official may not “make, participate in making, or in any way attempt to use his official position to influence a governmental decision in which he knows, or has reason to know that he has a financial interest” in that decision.⁷⁹ The analytical framework employed by the Commission to determine whether there is a prohibited conflict interest involves an eight-step inquiry: (1) whether the individual is a public official; (2) whether the individual will be making, participating in, or influencing a governmental decision; (3) whether the individual has a potentially disqualifying economic interest; (4) whether the economic interest is directly or indirectly involved in the governmental decision; (5) whether the effect of an economic interest is material; (6) whether the economic interest is reasonably foreseeable; (7) whether the “public generally” exception is applicable; and (8) whether the exception for “legally required participation” is applicable.⁸⁰

The Commission determined that a county planning commissioner, who is a hydrologist with specific knowledge and experience related to the county watersheds, may contract with the county to prepare a watershed management plan for some watersheds in the county that would then be “submitted to the planning commission for review, comment, and possible recommendation before going to the board of supervisors for consideration and approval.”⁸¹ The Commission cautioned, however, that the Act prohibits the county commissioner from making, participating in making or influencing the decision on the contract to retain his services, and that he may not participate in making or influencing the planning commission’s consideration of the watershed plans that he prepares when those decisions will have any financial effect upon him.⁸² The commissioner may appear before the planning commission as the consultant to explain the plans and to answer questions

78. See CAL. GOV’T CODE §§ 81000–91014 (2005). See also CAL. CODE REGS. tit. 2 §§ 18109–18997 (2005).

79. See CAL. GOV’T CODE § 87100 (2005).

80. *Id.*

81. Cal. Fair Pol. Prac. Comm’n Advice, No. A-04–144, 2004 WL 1770429 (Aug. 5, 2004).

82. *Id.*

if the decisions to be made are implementation decisions and they do not financially effect his compensation under the contract.⁸³ In addition, he may participate in other county land use decisions so long as there are no other economic interests that will be affected by the decisions.⁸⁴

However, when an elected city council member was also the executive director of a local, nonprofit housing development corporation, the Commission opined that it would be a prohibited conflict of interest for her to participate in a decision to adopt a proposed land use code provision that pertains to inclusionary zoning because she has an economic interest in her employer, who is indirectly involved in the decision, and there is a material nexus between the goals and mission of her employer and the inclusionary zoning policies of the city.⁸⁵

The Commission also opined that an “assistant community development director and building official for the City of Watsonville” would have a prohibited conflict of interest under the Act in obtaining necessary building permits for the construction of a house on a vacant lot he owns, if he uses his “official position to influence the decision regarding the issuance of the permits.”⁸⁶ To avoid this, the official indicated he would recommend that the city use a third-party review team instead of the city inspectors and plan check consultants he supervises. But the Commission stated, “[b]y doing so, you would be ‘using your official position to influence a government decision’ within the meaning of the Act and subject yourself to the Act’s conflict-of-interest provisions.”⁸⁷ The Commission did note, however, that if the official appears before the city council or planning commission to represent himself as a member of the general public on a matter relating solely to his personal interest, he would not be making or participating in the making of a governmental decision.⁸⁸

The Commission found no prohibited conflict of interest under the

83. *Id.* The court noted that:

In the case of nonimplementation decisions, the commissioner may appear in the same manner as any other member of the general public before his own agency in the course of its prescribed governmental function to represent his personal interests in a business entity wholly owned by the official or members of his or her immediate family.

Id.

84. *Id.*

85. Cal. Fair Pol. Prac. Comm’n Advice, No. A-04-166, 2004 WL 2168464 (Sept. 9, 2004).

86. Cal. Fair Pol. Prac. Comm’n Advice, No. I-04-175, 2004 WL 2075689 (Sept. 7, 2004).

87. *Id.*; see *Tuttle v. Planning Bd.*, 18 Mass. L. Rptr. 381 (Mass. Super. Ct. 2004).

88. Cal. Fair Pol. Prac. Comm’n Advice, No. I-04-175, 2004 WL 2075689 (citing to CAL. ADMIN. CODE tit. 2, § 18702 (2005)).

Act where a member of the planning commission was also a volunteer board member of a religious organization who would be appearing before the planning commission to request a conditional use permit since the commission member does not “have an economic interest in the decision.”⁸⁹ In response to another inquiry when a city council member is a commercial real estate broker, the Commission commented informally that persons, including business entities, who become sources of income for the council member, whether through commission or otherwise, of \$500 or more, becomes an economic interest of the council member.⁹⁰ Therefore, the Commission stated that should the council member sell property in a historic redevelopment area, further inquiry would be needed, based upon the facts at the time, to determine whether the council member would be prohibited from participating in decisions of the city council regarding the redevelopment area.⁹¹

A county planning commissioner asked the Commission whether income from his land surveying business received from an engineering consultant would prevent him from reviewing and approving projects related to a subdivision whose owners had hired the same engineering consultant.⁹² The Commission concluded that to the extent the decisions of the planning commission on the review and approval of projects related to the subdivision would have a “reasonably foreseeable material financial effect on the engineering consultant,” the commission member would be prohibited from participating in the decision.⁹³ The county commissioner also asked, in his capacity as a licensed land surveyor, whether he could represent a client before the county board of supervisors.⁹⁴ The Commission responded that he could represent clients before the county so long as: (1) he is not appearing before his own agency; (2) the agency he appears before is neither under the budgetary nor appointive control of his agency; and, (3) he does not act or purport to act in an official capacity as a member of his agency.⁹⁵

89. Cal. Fair Pol. Prac. Comm’n Advice, No. A-04-141, 2004 WL 1551337 (July 6, 2004). While the Commission did not directly address the question of whether the planning commission member should vote, they noted that the city attorney suggested that the commissioner recuse himself from participating in the discussion as well as the vote.

90. Cal. Fair Pol. Prac. Comm’n Advice, No. I-04-148, 2004 WL 1770430, at *2 (Aug. 3, 2004).

91. *Id.*

92. Cal. Fair Pol. Prac. Comm’n Advice, Nos. I-04-161 & I-04-162, 2004 WL 2086588, at *4 (Aug. 31, 2004).

93. *Id.*

94. *Id.*

95. *Id.*

A town planning commissioner who is also a professional urban designer may not, absent an exception, appear before the planning commission on behalf of a client or contact planning commission staff on behalf of a client.⁹⁶ The commissioner's business partner may, however make these contacts without violating the Act.⁹⁷ Also, absent an exception, the commissioner may neither appear on behalf of a client before an agency that is appointed by the commission on which she serves (or over which her commission has budgetary control), nor may she contact staff of that agency.⁹⁸ Again, her business partner does not have the same statutory restrictions.⁹⁹ The commissioner may appear before the town council on behalf of a client "so long as she does not act or purport to act on behalf of, or as the representative of, the planning commission to any member, officer, employee or consultant of the town council."¹⁰⁰ However, she may not contact town council staff on behalf of a client since the staff is shared with the planning commission on which she serves.¹⁰¹

A city planning commissioner who is a partner in a certified public accounting practice that leases office space within a specific plan area under consideration by the city planning commission, and whose accounting and tax clients own property within the specific plan area (and they pay the planning commissioner more than \$500 as a partner in the practice), may not participate in the decision to recommend a comprehensive policy and regulatory document that encompasses this property.¹⁰²

The Commission was also asked a series of questions regarding potential conflicts of interest for officials who owned property within 500 feet of the subject area under consideration. In one opinion, the Commission commented that a community development director has a potential for a conflict of interest if he participates in decisions involving

96. Cal. Fair Pol. Prac. Comm'n Advice, No. I-04-160, 2004 WL 1932811, at *1 (Aug. 17, 2004).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at *2.

101. Cal. Fair Pol. Prac. Comm'n Advice, No. I-04-160, 2004 WL 1932811, at *2.

102. Cal. Fair Pol. Prac. Comm'n Advice, No. A-03-260, 2004 WL 113131 (Jan. 15, 2004). The Commission also noted that:

regardless of whether it is reasonably foreseeable that your business or clients will experience a material financial effect as a result of the decision, it is presumed that your economic interest in your lease will experience such an effect . . . unless this presumption is rebutted, you are disqualified from participating in the decision.

Id.

a revitalization strategy for the city's downtown area, including potential redevelopment of properties, when the property to be redeveloped is within 500 feet of property he owns.¹⁰³

In another opinion, a city mayor is presumed to have a conflict of interest by participating in the following decisions pertaining to property located within 500 feet of his residence: conversion of condominiums to a hotel, construction of a new motel, remodeling and expansion of a lounge, approval of a specific plan for the downtown area, making a building consistent with the plan, redevelopment and development of other properties, and approval of contracts with the city and owners of qualified historical properties to provide for the use, maintenance, and restoration of the properties.¹⁰⁴ The mayor would have to rebut this presumption in accordance with the criteria contained in the Commission's regulations.¹⁰⁵ Similarly, when a planning commissioner owns a residence that is 200 feet from a project site to be considered by the commission, he is presumed to have a conflict of interest and cannot participate in the decision on the matter.¹⁰⁶ Further, with limited exceptions,¹⁰⁷ when this conflict occurs and the matter is to be discussed at a publicly noticed meeting, the commissioner must publicly disclose, on the record, his interest at the meeting prior to the discussion of the item, recuse himself from participation in the matter, and he must leave the room for the discussion and/or vote on the matter.¹⁰⁸ While he may be able to speak to them as a member of the public to represent himself since it relates to his personal interests, he "must be careful to avoid giving the impression that he is speaking in the interest of any other individual or group, or that he is acting in any official capacity."¹⁰⁹

When a city councilmember owned property more than 500 feet from property subject to review for certain city land use entitlements (e.g.,

103. Cal. Fair Pol. Prac. Comm'n Advice, No. I-04-087, 2004 WL 1202929 (May 19, 2004). The Commission noted, however, that more information would be needed to determine specifically whether the governmental decision would have a reasonably foreseeable material financial effect on his economic interest.

104. Cal. Fair Pol. Prac. Comm'n Advice, No. A-04-033, 2004 WL 837543, at *2-3 (Apr. 9, 2004).

105. *Id.*

106. Cal. Fair Pol. Prac. Comm'n Advice, No. A-04-077, 2004 WL 837563, at *1 (Apr. 13, 2004).

107. *Id.* at *2. Pursuant to Regulation 87105(a)(3), dealing with uncontested matters, and Regulation 18702.4(b), dealing with speaking as a member of the public, these exceptions could apply in certain cases.

108. Cal. Fair Pol. Prac. Comm'n Advice, No. A-04-077, 2004 WL 837563, at *1 (Apr. 13, 2004).

109. *Id.*

site plan approval, subdivision approval, rezoning, etc.) and the subject property is owned by his future landlord, the Commission opined that the councilmember does not have a conflict of interest under the Act.¹¹⁰ The Commission noted that the councilmember had no economic interest in the property owner other than a possible leasehold interest at fair market value.¹¹¹

In seeking guidance from the Commission regarding the ability of a councilmember to participate in a decision regarding changes to the city's creek preservation ordinance since she owned property subject to the ordinance, and regarding whether a planning commissioner may participate in decisions regarding changes to the city's landmarks preservation ordinance since he owned property subject to the ordinance, the Commission opined that "absent an exception, the council member and the commissioner may only participate in the decision so long as there is no reasonably foreseeable material financial effect on their respective economic interests. . . ."¹¹²

It is not a violation of the Act for the city attorney to render legal advice to the city council and staff regarding the negotiation, drafting, and hearing process for a project located more than 500 feet from his residence, as it is presumed under the Commission's regulations that the project would not have a reasonably foreseeable material financial effect on his economic interests.¹¹³

IX. Conclusion

Once again, the cases this year were overwhelmingly decided in favor of the municipal officials, meaning that the courts have found less often that alleged conduct actually rose to the level of being illegal. Just because the reported conduct was not found illegal, or it did not satisfy the "shock the conscience" standard, does not mean that all of the highlighted actions were ethical. The discussion in this article can be used as an effective education tool by land use attorneys who advise planning and zoning boards and other public agencies involved in plan-

110. Cal. Fair Pol. Prac. Comm'n Advice, No. A-04-037, 2004 WL 837547, at *1 (Apr. 9, 2004).

111. *Id.*

112. Cal. Fair Pol. Prac. Comm'n Advice, No. A-04-178, 2004 WL 2075692, at *1 (Sept. 8, 2004).

113. Cal. Fair Pol. Prac. Comm'n Advice, No. A-04-019, 2004 WL 419928, at *1 (Mar. 2, 2004). The Commission also opined that the attorney could therefore advise the council at public hearings regarding modifications to the land use entitlements for a project phase that is a little over a mile from his home.

ning and zoning decision-making. Since each of the scenarios is digested from actual cases and opinions decided in 2004, consider sharing these fact patterns with your boards and ask them what they believe the most appropriate ethical conduct would be and why. This exercise can be an informative and inviting method of providing subtle ethics training in a proactive manner for members of your board(s).

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