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LEGAL ETHICAL CONSIDERATIONS
FOR PLANNERS AND LAWYERS**

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CONFLICTS OF INTEREST AND OTHER LEGAL ETHICAL CONSIDERATIONS FOR PLANNERS AND LAWYERS

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Commentary

Conflicts of Interest and Other Legal Ethical Considerations for Planners and Lawyers

By Patricia E. Salkin

Introduction

AICP members are subject to the AICP Code of Ethics (updated in March 2005; the new code took effect on June 1, 2005; see www.planning.org/ethics/conduct.html for the current version) and APA members are asked to acknowledge, but are not mandated to follow, the Ethical Principles in Planning (adopted in 1992; see www.planning.org/ethics/ethics.html). In addition, other professionals involved in planning and zoning—including lawyers, engineers, and architects—are also governed by various national and state professional codes of conduct.

These codes are meant to standardize the practice in various professions and to ensure that the public and clients receive appropriate service as deemed acceptable and expected by each profession. When citizens believe that a professional is not acting in accordance with an ethical code of conduct, they may complain to the governing entity. These groups, including AICP, have procedures for investigating complaints and, where

appropriate, disciplining members. Courts typically do not have jurisdiction over professional discipline.

Courts are involved, however, in deciding myriad questions concerning conflicts of interest that arise in land use planning and decision making. These situations often involve members of planning or zoning boards or local legislative bodies. At times they focus on relationships that involve planners, lawyers, engineers, bankers, real estate agents, and others participating in cases before planning and zoning boards and commissions. These questions are not examined as matters of professional conduct, but are analyzed according to various state and local laws and regulations pertaining to government ethics. Many times there is no specific state statute or local law on point. The courts then resort to the common law, or case law, to determine whether a particular actor in the land use decision-making process is prohibited from discussing and/or voting on a matter before the board as a result of a conflict of interest.

Disqualifying conflicts of interest in the land use context may arise where a decision maker or policy maker could personally or financially benefit from the outcome of the decision, and where close family members might benefit financially or otherwise. Other types of situations that can pose questions of conflicts of interest arise where a member of the public or an applicant believes that a decision maker is biased due to personal associations, affiliations, or residency, or where a decision maker is alleged to have prejudged an application based upon statements made during a campaign or at other times prior to the final decision being rendered on the evidence.

This commentary explores some of the cases involving conflicts of interest from around the country to provide planners and land use attorneys with practical insights into how courts assess these conflicts within the context of planning and zoning. This is particularly important for planners and lawyers who

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Deprived of the use of automatic invalidation, the court searched the record but was unable to conclude that the chairman's conduct improperly influenced other members of the commission.

advise municipal boards since there is often no ethics officer at the local government level and no other place for these public servants to seek guidance on ethics issues. This can often put the professional planning staff and local government attorneys on the front line in ethics quagmires.

CONFLICTS OF INTEREST

Consultants

Consultants hired by municipalities and applicants are sometimes subject to conflicts allegations because of personal and familial relationships with one or more decision makers. In a recent situation, the alleged conflict arose out of a relationship between the consultant hired by a municipality and the applicant.

Property owners in Massachusetts challenged the approval of a special permit and site plan because, among other things, the traffic consultant hired by 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.¹

However, the Massachusetts Conflicts of Interest Law applies only to municipal employees.² The court reluctantly found that the law did not apply here, based on previous opinions of the state ethics commission holding that a consultant could not be considered an "employee" of a municipality.³ The court was constrained to apply the existing rulings of a state agency, and it yielded a decision that—although in other jurisdictions could be a clear conflict of interest—it was not a conflict in this case because a "consultant" was not covered under the applicable law.

Board Members and Board Chairs

When a board member, particularly the chair, is accused of conflicts of interest, the volunteers on the board may find themselves in a no-win situation. For

example, if the chair needs a variance to erect a deck or patio on her lot, she is not excused from the legal requirements just because she happens to be on the board. However, the public perception is often that other board members will pass favorably on applications involving their colleagues' property or on applications in which the board member or chair could be viewed as having a personal interest in the outcome.

In Connecticut, after the planning and zoning commission denied two special use permits when it had approved another special use permit for an allegedly similar use, the plaintiffs alleged that the chairman of the commission had tainted the proceedings after he disqualified himself from the public hearing so that he could appear before the commission to speak in opposition to the

plaintiff's application. The chairman further instructed the commission that the arguments made by the applicant's attorney were not valid.⁴

At the public hearing, counsel for the plaintiff failed to assert a violation of a Connecticut General Statute or the identical provision in the town's zoning regulations that would automatically have invalidated the chairman's action in advocating a position contrary to that espoused by the applicant's counsel.⁵ Deprived of the use of automatic invalidation, the court searched the record but was unable to conclude that the chairman's conduct improperly influenced other members of the commission.⁶

In another Connecticut case, a decision of the zoning commission was challenged where a board member, who owned a campground across the street

MASSACHUSETTS CONFLICT OF INTEREST LAW, SECTION 19

Conduct of public officials and employees; municipal employees, relatives or associates; financial interest in particular matter.

- (a) Except as permitted by paragraph (b), 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 any arrangement concerning prospective employment, has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for no more than two years, or both.
- (b) It shall not be a violation of this section (1) if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee, or (2) if, in the case of an elected municipal official making demand bank deposits of municipal funds, said official first files, with the clerk of the city or town, a statement making full disclosure of such financial interest, or (3) if the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality.

1. *Tuttle v. Planning Board of the City of Leominster*, 18 Mass. L. Rptr. 381, 2004 WL 2550466 (Mass. Super.).

2. M.G.L.A. 268A, sec. 19.

3. *Id.* Citing to State Ethics Advisory Opinion EC-COI-89-6 (Feb. 8, 1989) ("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.").

4. *Durham Agric. Fair Ass'n, Inc. v. Durham Planning and Zoning Comm'n*, 2004 WL 1326253 (Conn. Super.).

5. *Id.* CONN. GEN. STAT. SEC. 8-11

provides, in part, "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 of 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. . . . " The court noted that when the chairman "essentially instructing the Commission that Attorney Corona's arguments were invalid . . . such conduct constituted 'participation' within the meaning of sec. 8-11,

which would invalidate the decision of the Commission." *Id.* at 4. 6. *Id.* 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 4.

The Indiana Court of Appeals found no disqualifying conflict of interest where a member of the county board of commissioners voted on an ordinance despite the fact that his spouse had an ownership interest in nearby property.

from a 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.⁷ In finding no conflict of interest since the board member withdrew, the court determined that nothing in state law prohibits members who do not participate in a matter from presenting their own views on the subject. A year later, a Connecticut court noted that it would not consider “naked assertions” without knowledge of any facts.⁸ The court found 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.

In a case in New York, the planning board chair had hired the applicant to do excavation work 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 state law, although they called for a fact-specific inquiry.⁹ Further inquiry was also warranted where a third planning board member worked for a family-owned construction company that routinely rents trucking equipment to and purchases gravel from the applicant. Specifically, the court said that a determination must be made regarding the cor-

porate and/or financial relationship between the applicant and the board member’s construction company, and whether or not the company would financially benefit from an approval of the applicant’s request.

Familial Relationships—Spouses

The Indiana Court of Appeals found no disqualifying conflict of interest where a member of the county board of commissioners voted on an ordinance despite the fact that his spouse had an ownership interest in nearby property.¹⁰ The board member did file a conflict-of-interest statement with the county and the state,¹¹ and at the beginning of the public hearing on the proposed rezoning, he made a public disclosure about his wife’s property interest.

Like some other states, Indiana has a statutory provision dealing with conflicts of interest specific to zoning issues.¹² At issue was whether the board member had a direct or indirect financial interest in the “zoning matter,” the phrase used in the statute. The court concluded that the board member had no direct or indirect interest in the “zoning matter,” which the court defined as the rezoning of a piece of property that was not owned by the member’s spouse (her ownership interest was in nearby property, not the subject of the hearing). The court declined to interpret “conflict of interest” more broadly in this case, reasoning that the rezoning was a legislative, not an administrative, act and that the “appearance of impropriety” standard was inappropriate in this context. “In the legislative arena, there is no constitutional due process requirement of neutral decision makers. Instead, the

check on the process is the ballot box,” the court noted.¹³

Recently, a 15-year veteran of a New Jersey township planning board found his service ended by court order after he married a member of the township council who later cast the deciding vote in support of his reappointment to the planning board.¹⁴ After a 3 to 2 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 because this created at least a perception of a conflict of interest.¹⁵ 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.”¹⁶

Although the council member asserted that her spouse was well qualified on the merits, the court said that even though he may well have 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.”¹⁷ Noting also 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.¹⁸

Familial Relationship—Child

The Georgia Supreme Court determined that a city council member did not violate

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

8. Blinkoff v. Planning and Zoning Comm’n of the City of Torrington, 1999 WL 459585 (Conn. Super. Ct. 1999).

9. Heustis v. Town of Ticonderoga, 784 N.Y.S.2d 187 (A.D. 3rd Dept. 2004). The General Municipal Law provides in part, “An officer or employee shall be deemed to have an interest in the applicant when 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. sec. 809(2). 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. Perry-Worth Concerned Citizens v. Bd. of Comm’rs of Boone County, 723 N.E.2d 457 (2000).

11. The statement, filed with the Boone County Auditor’s Office, the State Board of Accounts, and the State Ethics Committee, disclosed that his spouse had a one-fifth ownership interest in farmland near the property proposed for rezoning. See, *Id.*

12. *Id.* Citing to IC 36-7-4-223(b) which provides: “A member of a . . . legislative body may not participate as a member of the . . . legislative body in a hearing or decision of that . . . bid concerning a zoning matter in which the member has a direct or indirect financial interest.”

13. *Id.* at 460.

14. Shapiro v. Mertz, 368 N.J. Super. 46, 845 A.2d 186 (N.J. Super. A.D., 2004).

15. *Id.* Specifically, N.J.S.A. 40A:9-22.5d provides that, “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.”

16. *Id.* at 54.

17. *Id.* at 55.

18. *Id.* at 56.

Neighbors opposed to the project alleged the board member had a conflict of interest because if the shopping center were to be built there, the board member would not have to do the grocery shopping for his parents.

the conflict-of-interest provision in state statute¹⁹ when a neighbor opposed his sons' rezoning application for their adjacent property from residential to light manufacturing.²⁰ The court found that the city council member complied with the law in his public role by properly disclosing his interest and disqualifying himself from voting in the matter, and that to read the language of the statute any more broadly would be to disallow the private property owner from advocating for a rezoning on his own property.²¹

Familial Relationship—Other Relatives

In another case, a zoning commission member appeared before the commission in her personal capacity after excusing herself from voting and leaving her seat at the commission table to move to another area in the room.²² Here, the commission member was a relative of the applicant, an officer of the applicant's corporation, and a cosigner of the subject application.

The Connecticut General Statutes provide, in pertinent part that,

"No member of any zoning commission . . . shall appear for or represent any person, firm, corporation or other entity in any matter pending before the planning or zoning commission. . . . No member of any zoning commission . . . 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."²³

The court noted that the language in the statute did not specifically restrict commission members from representing

themselves in applications before the agency.²⁴

Familial Relationship—Parents

A pair of cases arising out of New Jersey in 1998 presented interesting facts regarding board members and their parents, but yielded opposite conclusions. In one situation, a board member voted on the siting of a shopping center to be located near his elderly parents' home. Neighbors opposed to the project alleged the board member had a conflict of interest because if the shopping center were to be built there, the board member would not have to do the grocery shopping for his parents.²⁵ The court found no prohibited conflict of interest and noted that there was no evidence that the board member even did grocery shopping for his parents.

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 in a strip mall based upon the "potential for psychological influences" because his mother needed the income to subsist.²⁶

Conflicts of Interest—Memberships

People who volunteer to serve on planning and zoning boards are often also active volunteers in other community organizations and interests. Such was the case in Connecticut when two commission members, who were previously involved with the local Little League and a ball fields committee, were appointed to study the question of ball fields in the town, and to review a special use permit application for the construction and maintenance of a municipal outdoor recre-

ational facility that included a soccer field and two ball fields.²⁷

Residents in the town challenged the participation of these two board members in the hearing on the grounds that they had impermissible conflicts of interest under Connecticut law²⁸ because their previous activities in support of locating a site for the construction of new ball fields indicated a personal interest in the matter.²⁹ The true gravamen of the complaint, however, was that active participation by these two members would cause the other commissioners to "form prejudged conclusions as to their decision in this matter."³⁰

Noting that the outcome would have been the same even if these two commissioners had refrained from participating in the matter (since the special use permit would have passed nevertheless with the other votes), the court found no indication of prejudice or personal bias, nor a reflection in the record that the open-mindedness of the commissioners was imperiled. The court went on to state that:

"To hold otherwise would be to seriously limit the work of municipalities, who 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."³¹

In another case relating to a contested variance request over parking, a member of the zoning board of appeals revealed that he was a member of the neighborhood civic association when the plaintiff first applied for the special development

19. See, OCGA sec. 36-67A-2 which provides: A local government official who knew or reasonably should have known he or she: (1) has a property interest in any real property affected by a rezoning action which that official's local government will have the duty to consider; (2) has a financial interest in any business entity which has a property interest in any real property affected by a rezoning action which that official's local government will have the duty to consider; or (3) has a mem-

ber of the family having any interest described in paragraph (1) or (2) of this Code section shall immediately disclose the nature and extent of such interest, in writing, to the governing authority of the local government in which the local government official is a member. The local government official who has an interest as defined in paragraph (1) or (2) of this Code section shall disqualify himself from voting on the rezoning action. The disqualified local government official shall not take any other

action on behalf of himself or any other person to influence action on the application for rezoning. The disclosures provided for in this Code section shall be a public record and available for public inspection at any time during normal working hours.

20. *Little v. City of Lawrenceville*, 272 Ga. 340, 528 S.E.2d 515 (Ga. 2000).

21. *Id.* The court interpreted the phrase "not take any other action" to refer to the council member's duties in his public office. Since he disclosed and

recused himself from voting, that was all he could do. The court found that the steps taken to influence the rezoning of his property "were of a type normally and properly undertaken by any other private property owner and, therefore, did not violate the statute."

22. *Leshine v. Planning and Zoning Comm'n of the Town of Guilford*, 2000 WL 728811 (Conn. Super., 2000).

23. *Id.* citing CONN. GEN. STAT. 8-11.

24. *Id.* citing R. Fuller, 9A. CONNECTICUT PRACTICE SERIES: LAND USE LAW AND PRACTICE (1999) 47.3 p. 441.

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

26. *Care of Tenafly v. Tenafly Zoning Bd. of Adjustment*, 704 A.2d 1032 (N.J. Super. A.D., 1998).

27. *Brooks v. Planning and Zoning Comm'n of the Town of Haddam*, 2000 WL 177195 (Conn. Super. 2000).

28. Petitioners cited to CONN. GEN. STAT. 8-11: "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."

29. *Brooks, supra*, Note 27.

30. *Id.* at 4 citing to the plaintiff's trial brief, p. 13.

31. *Id.* at 5.

A related problem involving conflicts of interest is that applicants and community members may believe that a decision maker has prejudged the application or has bias or animus towards some aspect of the project or someone connected with the project.

district permit, and that he knew that the neighborhood, at the time, did not want the facility.³²

Due to seemingly negative statements made by the board member,³³ the plaintiff alleged, among other things, that he had “predetermined the application before the commission and failed to exhibit the open mindedness and sense of fairness required of zoning officials.”³⁴ Absent evidence that the commission member actually formed an opinion prior to the hearing, the court found the allegation without merit, and stated, “Zoning commission members are allowed to have an opinion concerning the proper development of their communities.”³⁵

Plaintiffs in Florida sued the mayor of the city of Winter Springs over actions affecting a land development deal.³⁶ The mayor had long been a member of, and had served as an officer, director, and spokesperson for, a homeowners association that was opposed to the proposed development. Furthermore, having served as a city commissioner, and later as mayor for two terms, the facts reveal that since 1988 the homeowners association had supported the mayor in exchange for his unwavering commitment to the goals of the association. The gravamen of the complaint in this case alleged breach of agreement, invasion of privacy, and defamation, all of which were settled through mediation and therefore no longer the focus of the remaining court proceedings.

The U.S. District Court for the Southern District of Ohio was faced with this issue when three of the four city council members who cast votes against a proposed replatting (which had been pre-

viously approved by the planning commission) held leadership positions with a homeowners association where several residents of the development opposed the approval and brought the matter before the city council.³⁷ The court refused to dismiss an allegation in the plaintiffs’ complaint that the three board members could be guilty of tortious interference with a contract, since the plaintiffs could conceivably establish that these individuals were not acting in good faith when they voted against the replatting.³⁸

BIAS, PREJUDGMENT, AND BAD FAITH

A related problem involving conflicts of interest is that applicants and community members may believe that a decision maker has prejudged the application or has bias or animus towards some aspect of the project or someone connected with the project.

An Idaho planning and zoning commission twice denied a variance to build a boathouse, before the decision was overturned by the county commission.³⁹ A 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. 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.⁴⁰

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 mind regarding the facts and will not listen to the evidence with an open mind; (b) will not apply the existing law; or (c) has already made a decision regarding the outcome of the hearing. 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 to 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.”⁴¹

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 members of the board of adjustment by asking other involved individuals whether there was communication with board of adjustment members and, if so, what that communication was.⁴²

The applicant believed that the board acted illegally by making a decision based on undue and improper influence. He alleged, among other things, that the director of planning, who had previously indicated support for his 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.

32. Phillips v. Zoning Bd. of Appeals of the City of Hartford, 2000 WL 486949 (Conn. Super. 2000).

33. The board member indicated that he knew the area and that it was congested. He said he was concerned about “problems with lines and dangerous situations and there are a lot of kids in the area.” He further stated that he didn’t believe a variance was the answer to the plaintiff’s problems, saying, “I don’t care if your employees like it or they don’t like it or whether your doctors are prima donnas and

can’t walk through what they perceive as an unsafe neighborhood. The fact of the matter is you need irrespective of what we approve here, you need off-site remote parking for this facility because you have too damn many beds for the amount of parking you have.” *Id.*

34. Phillips, *supra*, Note 32.
35. *Id.* The court pointed out that the transcript revealed that the commission member “. . . was truly concerned with the traffic and safety issues raised by the application. These were concerns he was

entitled to have. They do not show him to be so biased as to violate the standards of fairness required of zoning officials.”

36. Florida Country Clubs, Inc. v. Carlton Fields, Ward, Emmanuel, Smith & Cutler, P.A., et. al., 98 F. Supp. 2d 1356 (M.D. Fla. 2000).

37. McGuire v. Rice City of Moraine, 2000 WL 988265 (S.D. Ohio, Western Div. 2000).

38. *Id.* The complaint alleged that the three board members mounted a campaign on behalf of the homeowners

association against the replatting of the property; that they sought to rally support on multiple occasions; that they solicited the property owners in the development to initiate an appeal; and that they refused to recuse themselves from voting when the issue came before them as members of the city council.

39. Eacret v. Booner County, 139 Idaho 780, 86 P.3d 494 (Idaho, 2004).

40. *Id.* at 785-86.

41. *Id.* at 787. 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.

42. Martin Marietta Materials, Inc., v. Dallas County, Iowa, 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, when [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 14 (Iowa, 1993).

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.”

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.”

Based upon statements made by a council member that could suggest she 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.⁴³ In finding no conflict of interest or appearance of impropriety, the court noted that council members need not be insulated from their community to the point that they must be detached from everything that comes before them.

In another case, two planning board members actively supported the pre-application for a new supermarket in town when they were candidates for a 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.”⁴⁴

IMPROPER CONDUCT

Property owners in Connecticut challenged a resubdivision approval alleging, among other things, misconduct on the part of the planning commission chairperson.⁴⁵ They alleged that the chairperson 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. The court found no evidence in the record to support these allegations of misconduct and procedural irregularity, and noted that the chairperson, pursuant to the commission’s bylaws,⁴⁶ recused herself from the public hearing and did not participate in the discussion based on a potential conflict of interest.

The North Dakota attorney general opined that the planning and zoning commission did not act improperly in responding to a citizen’s request for access to records on December 4 as the commission complied with the request by mid-December.⁴⁷ 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.” Although it took a couple of weeks to comply with a request for nine separate records, the attorney general found that while the requested minutes were not yet prepared at the time of the request, they were prepared in a timely fashion; 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. Based 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.

Where a township supervisor appeared on two occasions before the board of zon-

ing appeals to express his opposition, as supervisor, to granting certain requested variances, such conduct did not constitute an imposition of duress as a matter of law.⁴⁸ In reversing the trial court, the Michigan Court of Appeals noted that the supervisor was not acting in self-interest⁴⁹ 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.”⁵⁰

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.⁵¹ Specifically, the defendants believed that the plaintiff was a “troublemaking yuppie from over the mountain.”⁵² 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.”⁵³

CONCLUSION

These cases represent a national sampling of recent litigation involving questions of ethics when decisions are made in land use planning and zoning. They are good case studies for planners to bring before their boards. Lawyers should take the lead to discuss these situations with members of decision-making boards so they learn to apply state and local laws, regulations, and case law appropriately. Players in the land use game must continuously earn and maintain the public trust.

43. *Siesta Hills Neighborhood Ass’n v. City of Albuquerque*, 954 P.2d 102 (N.M., 1998).

44. *Lincoln Heights Ass’n v. Township of Cranford Planning Bd.*, 714 A.2d 995 (N.J. Super L., 1998).

45. *York v. New Milford Planning Comm’n*, 2004 WL 2757650 (Conn. Super.).

46. *Id.* Citing the commission’s bylaws: “The commission encourages members to err on the conservative side and refrain from any action in

which their participation might give the perception of a conflict of interest.” at 2.

47. 2004 N.D. Op. Atty. Gen. 0-05, 2004 WL 315821(N.D.A.G.) (February 17, 2004).

48. *Dep’t of Transp. v. Township of Kochville*, 261 Mich. App. 399, 682 N.W.2d 553 (Mich. App., 2004).

49. This distinction was critical to distinguish two earlier cases where 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*, 11 Mich. App. 381, 161 N.W.2d 445 (1968) and *Abrahamson v. Wendell* (on rehearing), 76 Mich. App. 278, 257 N.W.2d 613 (1977).

50. *Id.* at 405. One of the statements made by the supervisor addressed the issue of nonconforming signs where he said, in part, “And I

don’t believe it’s the township’s position that I don’t feel we should be increasing non-conformity, 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.

51. *Cornel v. Jackson Township*, 313 F. Supp. 2d 457 (M.D. Pa. 2003), *aff’d* 94 Fed. Appx. 76 3rd Cir. 2004).

For a discussion of the “shock the conscience” standard in two other Pennsylvania land use cases, see *Blain v. Township of Radnor*, 2004 WL 1151727 (E.D. Pa. 2004); and *Levin v. Upper Makefield Township*, 2003 WL 21652301 (E.D. Pa. 2003), *aff’d* 2004 WL 449189 (3rd Cir. 2004).

52. *Id.* at 462.

53. *Id.* at 468. The court noted that the plaintiffs had also argued that the defen-

dants 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 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.