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Recent Developments in Land Use, Planning and Zoning Law

Litigating Ethics Issues in Land Use: 2000 Trends and Decisions

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I. Introduction

SINCE 1998, THIS ANNUAL SURVEY OF ETHICS issues in land-use planning and zoning provides municipal attorneys with a review of hot button litigation areas where the underlying issue involves a planning and zoning decision-making action and where applicable agencies, bodies, or commissions are issuing relevant opinions of interest to land-use lawyers.¹ Ethics issues are included here in the broadest sense, covering both actions and conduct that may violate local, state, or federal statutes or common law, as well as actions that, while not rising to the level of illegality, nonetheless raise issues of fundamental fairness and community values with respect to how each community expects the members of its planning and zoning boards and local legislative bodies to conduct themselves.

II. Conflicts of Interest

Issues of alleged conflicts of interest continue to dominate land-use litigation where ethics are concerned. Although municipal officials by and large are disclosing potential conflicts and recusing themselves from voting (whether or not they absolutely must do so), the appearance of impropriety remains due to collegiality with members of the boards on which they sit, as well as their name recognition and notoriety with

1. Prior annual surveys by the author may be found at: *Legal Ethics and Land-Use Planning*, 30 URB. LAW. 383 (1998); *1998 Survey of Ethics in Land-Use Planning*, 26 FORDHAM URB. L.J. 1393 (1999); *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).

other municipal officials. This leaves unhappy applicants and citizens alike suspicious of appearances of impropriety and unlevel playing fields. In recent years in most of the cases in which these allegations have been lodged the municipal official was found to not have violated a conflict of interest law. However, because so much money is at stake, and sometimes public health concerns are believed to be at issue, business people and citizens are more willing to make public allegations of conflicts of interest and to litigate them in the hopes of success on the merits.

A. *Familial Relationships*

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.² The board member did file a conflict of interest statement with the county and the state,³ and at the beginning of the public hearing on the proposed rezoning he made a public disclosure about his wife's property interest.⁴ Like some states, Indiana has a specific statutory provision dealing with conflicts of interest specific to zoning issues.⁵ At issue, was whether the board member had a direct or indirect financial interest in the "zoning matter," as this was the phrase used in the statute.⁶ The court found 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).⁷ The court declined to interpret "conflict of interest" more broadly in this case, reasoning that the rezoning action undertaken was a legislative action and not an administrative action, and that the "appearance of impropriety" standard is inappropriate in this context since, "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."⁸

2. *Perry-Worth Concerned Citizens v. Bd. of Comm'rs of Boone County*, 723 N.E.2d 457 (2000).

3. 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.*

4. *Id.*

5. *Id.* at 459 (citing 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 . . . body concerning a zoning matter in which the member has a direct or indirect financial interest.").

6. *Id.*

7. *Id.*

8. *Id.* at 460.

The Georgia Supreme Court determined that a city council member did not violate the conflict of interest provision in a state statute⁹ when a neighbor opposed a rezoning application by his sons for their adjacent property from residential to light manufacturing.¹⁰ 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 broader would be to disallow the private property owner to advocate for a rezoning on his own property.¹¹

In another case, a zoning commission member appeared before the commission in her personal capacity after having excused herself from voting, and leaving her seat at the commission table to move to another area in the room.¹² Here, the commission member was a relative of the applicant, an officer of the applicant's corporation, and a co-signer of the subject application.¹³ The Connecticut General Statutes provide, in pertinent part that,

[n]o 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.¹⁴

The court noted that the language in the statute did not specifically restrict commission members from representing themselves in applications before the agency.¹⁵

B. *Financial Gain*

Related to direct financial gain, conflicts of interest situations may arise due to geographic proximity of planning and zoning board members' property to the property subject to action before the board. The U.S. District Court for the Southern District of Ohio was faced with this issue when three of the four city council members casting votes against

9. See GA. CODE ANN. § 36-67A-2.

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

11. *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, he did not violate the statute."

12. Leshine. v. Planning and Zoning Comm'n of the Town of Guilford, No. CV 980413985, 2000 Conn. Super Ct. LEXIS 1278 (May 17, 2000).

13. *Id.*

14. *Id.* at *26. (citing CONN. GEN. STAT. § 8-11).

15. *Id.* (citing R. FULLER, 9A CONNECTICUT PRACTICE SERIES: LAND USE LAW AND PRACTICE (1999) 47.3, at 441).

a proposed replatting (which had been previously approved by the planning commission) held leadership positions with a homeowner's association where several members of the association were in opposition to the approval and brought the matter before the city council.¹⁶ In a case dealing with procedural issues, the court refused to dismiss an allegation in the plaintiff's 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.¹⁷

Plaintiffs have also attempted to disqualify council members and board members based upon financial considerations tied to political campaigns. Such was the case arising in the City of Torrance, California, where petitioners requested the recusal of several council members from participating in an appeal of its conditional use permit application on the basis that all had received "significant campaign contributions" from entities owned by an individual with an interest in seeing the permit denied.¹⁸ Further, the complaint alleged that one of the council members had actually requested the appeal, and that this act constituted bias.¹⁹ In finding baseless the allegation that the impartiality of the decision makers was impermissibly tainted by the campaign contributions, the court found nothing in the record to indicate any connection between contributions received seventeen months earlier and an unproven contention that it was in the donor's best financial interests to oppose the application.²⁰

C. *Government Employees*

In an interesting federal government ethics case involving an Environmental Protection Agency (EPA) employee and his ability to act as a spokesperson for environmental groups, for which he is a member, in connection with the organizations' public comments on draft environ-

16. *McGuire v. Rice City of Moraine*, Ohio, 2000 U.S. Dist. LEXIS 6186 (S.D. Ohio, W. Div. Mar. 27, 2000).

17. *Id.* The complaint alleged that the three board members mounted a campaign on behalf of the homeowner's 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.

18. *Breakzone Billiards v. City of Torrance*, 97 Cal. Rptr. 2d 467, 477 (2000). All four members acknowledged receipt of the alleged campaign contributions, and each stated that this fact would not affect their consideration of, or vote on, the application.

19. *Id.* This council member responded that he had filed the appeal as a result of significant community concern, that he had not prejudged the matter, and that he would give the matter a fair hearing and make a decision based upon the facts and the law.

20. *Id.*

mental impact statements and land-use plans issued by federal agencies other than the EPA, the D.C. Circuit Court of Appeals ruled that such conduct does not violate the federal criminal conflict of interest statute.²¹

D. Miscellaneous

Opining on the enactment of a state statute that allows local legislative bodies to provide for the appointment of alternate members of planning and zoning boards in the narrow situation where a sitting board has a conflict of interest,²² the New York Attorney General stated that local governments may use their supersession powers to adopt a local law amending this section of the statute to expand conditions under which alternate members of planning and zoning boards spring into action.²³ Although local governments desire this flexibility, they must be careful to craft situations when it would be appropriate for alternates to fill in, and not simply allow for replacement board members when it makes it convenient for those vested with the full responsibility of membership on the board.²⁴ Furthermore, to avoid allegations of “member shopping” or picking alternates who may represent a particular point of view, municipalities should designate named alternates in advance, and in the case where there is more than one alternate, the local law should indicate whether the alternates will be called to serve on a rotating basis or whether alternate number one will always be called upon first.

Since money and time are tied up in lengthy planning and zoning decision-making processes, even where board members follow proper ethical protocols, the public may not always be content with the procedures. In one such case, at the conclusion of the testimony in the particular matter, the board’s solicitor announced that upon receipt of a copy of the transcript, he would forward an excerpt to the State Ethics Commission for an opinion regarding who may or may not decide this case, and once that opinion and all other legally required documentation is received, the board would meet to deliberate and decide the matter.²⁵ Although this was agreed to by all at the hearing, the petitioner later

21. *Van Ee v. EPA*, 202 F.3d 296 (D.C. Cir. 2000).

22. See N.Y. TOWN LAW § 271 (15) (McKinney 2000), N.Y. VILLAGE LAW § 7-18 (16) (McKinney 1995); and N.Y. GEN. CITY LAW § 27(16) (McKinney 2000).

23. Op. N.Y. Atty. Gen. 99-36 (1999).

24. For example, it would be appropriate for an alternate to be appointed when a board member is hospitalized or diagnosed with an illness that will take the member out of commission for several months. For board members who desire to take vacations or winters in warmer climates, or who need to miss periodic board meetings for personal business, it is less desirous to have alternates appointed to fill in at these missed meetings.

25. *Cossell v. Connellsville Township Bd. of Supervisors*, 747 A.2d 977 (Pa. 2000).

commenced an action alleging that since, under Pennsylvania law a decision had to be reached within forty-five days or it was in effect a denial, the court held that the solicitor's actions served to waive the forty-five day time limit, and thus there was no procedural error.²⁶

Occasionally the courts in California are called upon to make determinations regarding prohibited actions of local officials with respect to land-use and community development matters due to conflicts of interest under the state's 1974 Political Reform Act.²⁷ The Act, in relevant part provides, "No public official at any level of state or local government shall 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 he has a financial interest."²⁸ In one recent case, plaintiffs alleged that Oakland Mayor Jerry Brown was, under the aforementioned law, prohibited from participating in decisions concerning a redevelopment project that was to be located near three pieces of property owned by the mayor.²⁹ In overturning a decision of the Fair Political Practices Commission, the Court of Appeals, First Appellate District, held that the mayor's participation in the redevelopment was legally required under the Oakland City Charter, hence exempted from the general conflicts of interest rule quoted above.³⁰ Limiting its holding to the facts of the case, the court was persuaded by language in the city charter dealing with economic development (which the mayor is encouraged to undertake), which grants to the mayor the ability to propose redevelopment plans for the council's approval, and that elimination of this role due to the Political Reform Act would be "inconsistent with the system of municipal governance contemplated by the charter."³¹

26. *Id.*

27. See CAL. GOV'T CODE § 81000; see also *Ching v. San Francisco Bd. of Permit Appeals*, 70 Cal. Rptr. 2d 700 (Cal. Ct. App. 1998) (where a plaintiff tried to prevent a zoning board member from participating in a development decision since the board member owned real property in the vicinity of where the proposed project was to be located).

28. CAL. GOV'T CODE § 87100 (West 1993).

29. *Brown v. Fair Political Practices Comm'n*, 100 Cal. Rptr. 2d 606 (Cal. Ct. App. 2000).

30. *Id.* The Political Reform Act of 1974 contains the following exception:

Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made. The fact that an official's vote is needed to break a tie does not make his participation legally required for purposes of this section.

CAL. GOV'T CODE § 87101.

31. *Brown*, 100 Cal. Rptr. at 614. The court went on, however, to add that the mayor is not completely free to ignore the conflicts of interest rules, and that requesting an opinion from the Fair Political Practices Commission as well as complying with disclosure requirements were appropriate. *Id.*

The Political Reform Act was also discussed in *Breakzone v. City of Torrance* (discussed *supra*)³² whereby the court concluded,

a fair hearing is not precluded by the circumstance that an interested party makes campaign contributions to members of the agency which will adjudicate its claim, and does so more than 12 months prior to action by the members of that agency who receive those contributions. Rather, public policy strongly encourages the giving and receiving of campaign contributions. Such actions are constitutionally protected and do not automatically create an appearance of unfairness.³³

An appellate level court in New York noted its disapproval with the fact that a zoning board member with a personal interest in the matter fully participated in a public hearing on a request for a variance, even though the member had abstained from a vote on the matter.³⁴ The member resided next door to the subject property, and through participation in the hearing, the member examined the petitioner's president and witnesses in a manner that, "clearly reflected his opposition to the applications."³⁵

III. Bias

A. Prejudgment

Often members who volunteer to serve on planning and zoning boards are also active volunteers in other community organizations and interests. Such was the case in Connecticut where a special permit for the construction and maintenance of a municipal outdoor recreational facility that included a soccer field and two ball fields, when two commission members were previously involved with the local little league and a ball fields committee appointed to study the question of ball fields in the town.³⁶ Residents in the town challenged the participation of these two board members in the hearing and decision on the grounds that they had an impermissible conflict of interest under Connecticut law³⁷

32. *Breakzone*, 97 Cal. Rptr. 2d at 467.

33. *Id.* at 1229. The court went on to further find no violation of any penal laws with respect to bribery, and no violation of the statutory conflict of interest doctrine as there is no direct or indirect financial interest alleged with respect to the vote of the council members on the conditional use permit application.

34. *In re Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of the Town of Huntington*, 717 N.Y.S.2d 369 (2000).

35. *Id.* at 370.

36. *Brooks v. Planning and Zoning Comm'n of the Town of Haddam*, 2000 Conn. Super. LEXIS 244 (Feb. 1, 2000).

37. 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."

because their previous activities in support of locating a site for the construction of new ball fields indicated a personal interest in the matter.³⁸ 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.”³⁹ Noting that the outcome would have been the same even if these two commissioners had refrained from participating in the matter (since the application still would have passed counting 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.⁴⁰ The court went on to state that:

To hold otherwise would be to seriously limit the work of municipalities, who must rely on interested volunteers for much of their work. Such volunteers, by the very nature of their active involvement in their communities, are likely, from time to time, to have opinions about matters of public concern, which come before them.⁴¹

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 district permit, and that he knew that the neighborhood, at the time, did not want the facility.⁴² Due to seemingly negative statements made by the board member,⁴³ the plaintiff alleged, among other things, that he had “pre-determined the application before the commission and failed to exhibit the open mindedness and sense of fairness required of zoning officials.”⁴⁴ Absent evidence that the commission member actually formed an opinion prior to the hearing, the court found the allegation meritless, and stated that “zoning commission members are allowed to have an opinion concerning the proper development of their communities.”⁴⁵

38. *Brooks*, 2000 Conn. Super. LEXIS 244.

39. *Id.* at *11 (citing to the Plaintiff's Trial Brief, page 13).

40. *Id.*

41. *Id.* at *14.

42. *Phillips v. Zoning Bd. of Appeals of the City of Hartford*, 2000 Conn. Super. LEXIS 949 (Apr. 3, 2000).

43. The board member indicated that he knew the area and that it was congested, that he was concerned about “problems with sight 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 darn many beds for the amount of parking you have.” *Id.* at *4.

44. *Phillips*, 2000 Conn. Super. LEXIS 949 at *7.

45. *Id.* at *11. The court pointed out that the transcript revealed that the commission member, “[w]as truly concerned with the traffic and safety issues raised by the

As testament to the reach of ethics litigation, plaintiffs in Florida sued the mayor of the City of Winter Springs over actions affecting a land development deal.⁴⁶ The mayor had long been a member of, and served as an officer, director, and spokesperson for a homeowner's association that was opposed to the proposed development.⁴⁷ Furthermore, having served as a city commissioner, and later as mayor for two terms, the facts reveal that since 1988 the homeowner's association had supported the mayor in exchange for his unwavering commitment to the goals of the association.⁴⁸ 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.⁴⁹

B. Good Faith, Fairness, and Public Agency Abuse

Since the U.S. Supreme Court handed down its decision in *Village of Willowbrook v. Olech*⁵⁰ last Term, holding that a class of one could bring an equal protection challenge, the number of cases where plaintiffs have alleged bad faith or failure to act in good faith is stunning.⁵¹

The appearance of fairness deserves discussion in any consideration of ethical conduct. The Connecticut Superior Court found a vote taken by the zoning commission to be improper after several members were absent from key meetings where the variance request was discussed, and although the hearings were taped, the remarks of the plaintiffs' counsel concerning plaintiffs' opposition to the application lasting about twenty-five minutes were deleted from the tape.⁵² In reversing the grant of the variance by the defendants, the court found the approval process deficient as a result of the votes of commission members who were not sufficiently acquainted with the substantial information given

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."

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

47. *Id.*

48. *Id.*

49. *Id.*

50. 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). For a good summary of the case, including its potential application, see Dwight H. Merriam, *Good and Evil in the Village of Willowbrook: The Story of the Olech Case*, 23 ZONING & PLAN. L. REP. no. 5 (2000).

51. While not intended to be an exhaustive list, the following are examples of recent cases: *Citizens Accord, Inc. v. Town of Rochester*, No. 98 CV 0715, 2000 U.S. Dist. LEXIS 4844 (N.D.N.Y. Apr. 18, 2000); *McGuire v. Rice City of Moraine, Ohio*, No. C-3-99-162000 U.S. Dist. LEXIS 6186 (S.D. Ohio Mar. 27, 2000), *Bryan v. City of Madison*, 213 F.3d 267 (5th Cir. Jun. 9, 2000).

52. *Scrivano v. Town of Cromwell Zoning Bd. of Appeals*, 2000 Conn. Super. LEXIS 1072 (Apr. 28, 2000).

at the public hearing when they were not present and the audiotape did not contain the full record of the hearing.⁵³

A recent provocative law review article suggests that public agencies that abuse their powers in the land-use law arena are contributing to the increase in litigation that is focusing on the "dark side" of land-use law (public agency abuse).⁵⁴ Acknowledging that the vast majority of public agencies act in good faith, the author argues that "the few public abusive agencies have greatly harmed the public perception as to the worthiness of public agencies to deal with the public interest in the built and natural environment."⁵⁵ Much of the unethical conduct displayed by members of planning and zoning boards and other players in the land-use control arena, whether or not such conduct rises to the level of illegal conduct, similarly contributes to the public perception of appearance of impropriety, conflicts of interest, and ulterior motives behind the decision making by these board members.

IV. Compatibility of Dual Office Holding

In determining whether the same person can simultaneously hold more than one public office for the same municipality, the reviewing court or opining entity will usually conduct an analysis to ascertain whether one public position is subordinate to the other or whether there is an inherent inconsistency between the two offices.⁵⁶ While seemingly simple in application, the results are not always predictable from jurisdiction to jurisdiction,⁵⁷ requiring thoughtful analysis based upon a review of existing precedent within a given state.⁵⁸ Some states, such as South

53. *Id.* at *7.

54. Rodney L. Cobb, *Land Use Law: Marred by Public Agency Abuse*, 3 WASH. U. J. OF L. & POL'Y 195 (2000).

55. *Id.* at 206.

56. This common-law test from New York (*see People ex rel. Ryan v. Green*, 58 N.Y. 295, 1874 WL 11282 (Sept. 22, 1874)) articulates the general rule applied in other states. *See, e.g., Reilly v. Ozzard*, 33 N.J. 529, 166 A.2d 360 (1960), which articulates the test as follows: "Incompatibility is usually understood to mean a conflict or inconsistency in the functions of the office. It is found where in the established governmental scheme one office is subordinate to the other, or subject to its supervision or control, or the duties clash, inviting the incumbent to prefer one obligation to another." 33 N.J. at 543. *See also* Patricia E. Salkin, *1998 Survey of Ethics in Land-Use Planning*, 26 FORDHAM URB. L.J. 1393, at 1399-00 (1999), discussing recent land-use compatibility of office opinions from Arkansas, Connecticut, and New York.

57. *See, e.g.,* ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS AND PUBLIC OFFICIALS (Patricia E. Salkin, ed., ABA 1999) at 309-10, discussing opposite conclusions in New York and Illinois where the same individual desired to serve on a local and a regional planning/zoning board (New York: 89-36 Op. Att'y Gen; 90-56 Op. Att'y Gen; and Illinois: 1994 Ill. AG 94-008).

58. A 2000 addition to one New York planning and zoning law treatise inventories, for the first time, all of the New York opinions dealing with compatibility of office. The following offices, as cited in the treatise, have been determined to be compatible

Carolina, rely most often on state constitutional analysis with respect to this issue,⁵⁹ other states, such as Michigan, look to state statutes on point,⁶⁰ and the remaining states, such as New York, seek common law resolutions.⁶¹

There were several state attorney general opinions in 2000 dealing with land-use ethics centered on the subject of dual office holding. The South Carolina Attorney General opined that it is a violation of the state constitution for the same person to concurrently serve as a member of a county zoning appeals board and the local municipal election commission.⁶² The South Carolina Constitution provides in part that “no person may hold two offices of honor or profit at the same time. . . .”⁶³ Relying on previous opinions that have determined that members of zoning appeals boards are “officers”⁶⁴ and that members of municipal

in New York: member of county planning department and member of town board; member of county planning board and city building inspector; member of county planning board and member of town board; chairperson of town planning board and member of village board of trustees; vice chairperson of town planning board and manager of the town municipal golf course; chairperson of village zoning board of appeals and member of town board; town building inspector, zoning enforcement officer, and fire inspector; code enforcement officer and planning board member; town planning board member and town justice; town planning board member and town board member; member of a community development agency and member of a village planning or zoning board; village zoning officer, village justice, and town assessor; member of planning and/or zoning board and member of county and/or regional planning council; village mayor and chairperson of town zoning board of appeals; town planning board member and assistant building inspector; town planning board member and town assessor; town planning board member and county legislator; member of village zoning board and village police officer; director of county planning board and member of county economic development agency. The following offices have been found to be incompatible in New York: planning board member and zoning board member; administrative assistant to the town supervisor and member of the town zoning board of appeals; administrative assistant to the planning board and town board member; secretary to the town zoning board of appeals and member of the town board; member of the city zoning board of appeals and commissioner of planning for the city; town zoning and code enforcement officer and member of the town board; member of village planning board and member of village historic review commission; member of county planning commission and member of the county legislature; and employee of regional planning commission and village planning board member. See PATRICIA E. SALKIN, *NEW YORK ZONING LAW & PRACTICE* 31:07 (4th ed. 2000).

59. S.C. CONST. art. XVII, § 1A.

60. Incompatible Public Offices Act, 1978 Mich. Pub. Acts 566, MICH. COMP. LAWS § 15.181 *et seq.*, MICH. STAT. ANN. § 15.1120 (121) *et seq.*

61. *People ex rel. Ryan v. Green*, 58 N.Y. 295, 1874 WL 11282 (1874).

62. 2000 S.C. A.G. LEXIS 56 at *1 (June 8, 2000).

63. S.C. CONST. art. XVII, § 1A. The state constitution does provide for exceptions for officers in the militia, fire department members, constables, and notary publics, none of which applied in the present situation.

64. 2000 S.C. A.G. LEXIS 56 at 2 (June 8, 2000) (citing to *Ops. Att’y. Gen.* dated March 16, 1999 (City of North Myrtle Beach Zoning Appeals Board), January 27, 1976 (Georgetown County Zoning Appeals Board), and May 2, 1977 (City of Greenville Zoning Appeals Board)).

elections commissions are “officers,”⁶⁵ the Attorney General opined that there exists a constitutional prohibition for the same individual to simultaneously serve in both positions.⁶⁶

The Louisiana Attorney General opined that an elected school board member may not simultaneously serve on a municipal planning commission,⁶⁷ since state statute provides, “(1) All members of a commission, whether a parish or a municipal planning commission, shall serve without compensation and shall hold no other public office, except they may also serve as a member of any duly constituted regional planning commission of which their parish or municipality forms a part.”⁶⁸

The approaches in South Carolina and Louisiana are stricter than many other states that employ an inquiry analysis to determine whether the two offices might, in reality, face a potential conflict. Relying on statute, the Michigan Attorney General opined that it is permissible for the same person to serve simultaneously as a member of a township planning commission and as a member of the county planning commission in the same county.⁶⁹ According to Michigan law, public offices are incompatible if the official is performing duties of any of the public offices held by that official that in turn results in any of the following with respect to those offices held: (1) the subordination of one public office to another; (2) the supervision of one public officer by another; and (3) a breach of duty of public office.⁷⁰ After analyzing the powers and duties of both offices under state law, the Attorney General concluded that neither office is subordinate to the other and that neither supervises the other.⁷¹ Turning to the third prong of the Michigan in-

65. *Id.* (citing Ops. Att’y. Gen. dated February 23, 1995 (City of Bishopville Election Commission), Sept. 12, 1990 (Florence County Election Commission), and July 24, 1980 (City of Greenville Election Commission)).

66. *Id.* Interestingly, the law in South Carolina contains a curative solution for times when this situation arises. When the individual assumes the second office that would create a prohibition, the law automatically assumes that the first office held has been vacated. The law further allows that individual to continue to perform the duties of the previously held office as a de facto officer until such time as a successor is duly selected. *See Walker v. Harris*, 170 S.C. 242 (1933); *Dove v. Kirkland*, 92 S.C. 313 (1912); *State v. Coleman*, 54 S.C. 282 (1898); *State v. Buttz*, 9 S.C. 156 (1877).

67. 2000 La. AG LEXIS 2 (Op. No. 99-367, Jan. 31, 2000).

68. *Id.* (citing, R.S. 33:103(C)).

69. 2000 Mich. AG LEXIS 22 (Op. No. 7060, Aug. 28, 2000).

70. *Id.*

71. *Id.* The Attorney General distinguished a previous opinion (OAG 1995-1996, No. 6837, Feb. 23, 1995) which concluded that a person may not simultaneously serve on a county planning commission and a township planning commission since under the facts in that situation, based upon how the township planning commission was created, their work was in fact subject to review and approval by the county planning commission. In the present case, the Attorney General determined that the acts of the township planning commission are not subject to “approval” by the county, “only

quiry, whether there would be a breach of duty of public office as a result of the dual office holding, the Attorney General found no violation since the role of the second body (the county) is merely advisory to the ultimate decision-making body (the township).⁷²

*A. Compatibility Analysis Proves More Challenging
for Government Lawyers*

The compatibility of dual office-holding analysis is further layered with complexity when the individual holding one of the offices is an attorney, as provisions in the relevant code of professional responsibility will apply. Such was the situation presented to the New Jersey Supreme Court upon review of a determination by the Advisory Committee on Professional Ethics regarding the compatibility of the offices of municipal attorney and clerk-administrator for the same municipality.⁷³ Although the New Jersey Legislature has provided that a municipal council may “appoint a municipal manager, an assessor, an auditor, a treasurer, a clerk and an attorney. One person may be appointed to two or more such offices except that the offices of municipal manager and auditor or assessor shall not be held by the same person,”⁷⁴ the court pointed out that the inquiry does not end with the statute when an attorney is involved since the resolution of an attorney’s ethical conduct is within the exclusive province of the Supreme Court.⁷⁵ Turning to the New Jersey Rules of Professional Conduct,⁷⁶ the court found an im-

review and recommendation,” and such recommendation could be overturned by a vote of the township commission.

72. *Id.* (citing OAG, 1999–2000, No. 7033, at 65 (Sept. 16, 1999)).

73. *In re Advisory Committee on Professional Ethics*, No. 18–98, 162 N.J. 497, 745 A.2d 497 (2000).

74. *Id.*, citing N.J. STAT. ANN. § 40:81–11.

75. *In re Advisory Committee on Professional Ethics*, 162 N.J. at 497 (citing *Pickett v. Harris*, 219 N.J. Super. 253, 530 A.2d 319 (App. Div. 1987), for the proposition that the resolution of the ethical propriety of an attorney’s conduct lies with the New Jersey Supreme Court.).

76. N.J. RULES OF PROF’L CONDUCT 1.7 provides in part:

- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after a full disclosure of the circumstances and consultation with the client, except that a public entity cannot consent to any such representation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages of the risks involved.
- (c) this shall not alter the effect of case law or ethics opinions to the effect that:
 - (1) in certain cases or categories of cases involving conflicts or apparent conflicts, consent to continued representation is immaterial, and,

permissible conflict of interest based upon the belief that, with the growing complexities faced by local governments, the position of municipal administrator has become more akin to a chief daily operating officer of the municipality.⁷⁷ As a result of the types of actions this administrator will handle, the court opines that the position will undoubtedly require legal counsel from time to time both in a proactive sense (prior to taking action) and in a defensive mode (subsequent to actions having been taken).⁷⁸ Since, according to this court, the client of the government lawyer is the municipal body as represented through its mayor, council, and other officials,⁷⁹ it reasoned that “[a]n attorney cannot reasonably be expected to give that body candid, objective advice concerning his own conduct as administrator . . . ,”⁸⁰ and that a “. . . municipality is poorly served by an attorney whose personal interests are potentially in conflict with those of his client.”⁸¹ Although a strong dissenting opinion suggests that the situations where conflict may arise are speculative,⁸² and that in those cases outside counsel could be appointed, the majority opinion concludes that with a sub-

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- (2) in certain cases or situations creating an appearance of impropriety rather than an actual conflict, multiple representation is not permissible, that is, in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients.

77. *In re Advisory Committee on Professional Ethics*, 162 N.J. at 503.

78. *Id.* The court details a list of responsibilities that a municipal administrator might be expected to handle including:

[a]rrange for the purchase of materials, supplies and equipment, to administer contracts necessary for the operation and maintenance of city services, to ensure the efficient use of all property owned by the city, to take care that all franchises are faithfully observed, to recommend such measures as are necessary for the health, safety or welfare of the community, to investigate, examine or inquire into the affairs or operation of any department, bureau, or office of the municipality, to interpret collective negotiation agreements and to give advice to boards, committees, agencies, departments or officials of the municipality.

79. Precisely identifying who is the client of the government lawyer is an issue that still remains debated in law reviews and government ethics publications. While some states, such as Hawaii, attempt to articulate this in their Code of Professional Responsibility, *see* HAWAII PROF'L CONDUCT RULE 1.6 (making it clear that a government lawyer's obligation is to be measured against the public interest and not that of an individual agency), scholars argue whether the client is the agency, the chief elected official of the particular government, the hiring entity or individual, the government as a whole, or the public interest at large. *See* Jeffrey Rosenthal, *Who Is the Client of the Government Lawyer?*, in *ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS* 13-27 (ABA 1999).

80. *In re Advisory Committee on Professional Ethics*, 162 N.J. at 502.

81. *Id.* (citing, *In re Opinion No. 662*, 133 N.J. at 29-30).

82. *Id.*; *see* dissenting opinion of J. Stein, 162 N.J. 497 at 505-15.

stantial likelihood that outside counsel would be frequently needed, reliance on this would both increase the cost of legal services to the public and deprive the public client of representation by the attorney first selected by it.⁸³

A case arising out of Fairbanks, Alaska, demonstrates the awkward situations within which attorney members of planning and zoning boards and local legislative bodies may find themselves.⁸⁴ Petitioners alleged that participation in a rezoning and Board of Adjustment hearing by an attorney member of the borough assembly amounted to a denial of their due process rights, as they argued that “fundamental fairness and professional ethics” required the member to refrain from participating in the process.⁸⁵ Without getting into the merits of the allegation (centered on the business clients of the attorney), the court stated that the failure of the plaintiffs and their lawyer to object to the member’s participation at the time that the relevant decisions were made and votes were taken effectively waived the right to raise the objection on appeal.⁸⁶

B. *Conduct by Municipal Attorneys*

Part-time municipal attorneys are reminded to be cautious about their involvement in municipal representations where there could be potential conflicts with prior clients and prior clients of the law firm (whether or not represented in the past by the municipal attorney). In one recent case, the town planner asked the planning and zoning commission whether the town attorney should participate in a proceeding or whether special counsel should be appointed when information was shared that the town attorney’s law firm had represented three of the neighbors who were opposed to the proposed zoning change (although the prior representations were unrelated to the immediate request) and that the attorney’s law firm held a mortgage on properties adjacent to the pro-

83. *In re Advisory Committee on Professional Ethics*, 162 N.J. at 505 (also citing to *In re Opinion No. 415*, 81 N.J. at 322).

84. *Balough v. Fairbanks North Star Borough*, 995 P.2d 245 (Alaska 2000).

85. *Id.* at 268.

86. *Id.* However, it is worth reporting that at the first Borough Assembly regarding the matter, the attorney-assembly member told the Chair,

“I think I might have to declare a conflict of interest because I represent several of the parties in this area and I feel that I should abstain. Not necessarily with regard to this, but I represent at least three of the people and I think it would be more appropriate [to abstain].” The Chair asked [Therrien] whether she had ever represented them on issues or matters relating to the rezoning. Upon [Therrien’s] negative reply, the Chair stated that he “[did not] find that [Therrien had] a conflict of interest.”

posed zone change.⁸⁷ Although the commission originally decided that the matter should be referred to the town attorney anyway, they subsequently changed their minds, allowing the town attorney to appoint special counsel to render a decision on the proposed plan of development.⁸⁸ The plaintiff argued that the participation by the town attorney, "... created an appearance of impropriety which requires the court to void the decision of the commission denying the zoning change."⁸⁹ While the court agreed that town attorneys must not have a conflict of interest with their clients when issuing rulings to town boards or commissions, the court said that where administrative officials are involved, as here, the standards for disqualification do not rise to the same level as those for judicial disqualification.⁹⁰ The court found that the likelihood of a direct conflict by the town attorney became remote when special counsel was appointed, and that even though the town attorney included his own opinion to the commission on the matter with the letter he sent appointing special counsel, this did not rise to the level of a direct conflict of interest for the town attorney since special counsel had now entered the case (and presumably would reach his own independent conclusions).⁹¹ Although the court found no impropriety in this matter, it is easy to see how the public appearance of the actions, in particular the fact that the town attorney appointed special counsel and that the town attorney released an opinion in the matter and shared it with special counsel, fail to foster a sense of trust and integrity in the legal profession. Although it is true that each attorney will reach his or her own conclusion after thoughtful consideration of the law and the facts, the anecdotal appearance remains that special counsel is susceptible to some form of influence by the appointing entity and information conveyed with the appointment letter.

A Florida law firm was the target of an ethics allegation where the plaintiffs argued a breach of fiduciary duty based upon information the law firm possessed from a former client who was now involved in a

87. *Aiudi & Sons, LLC v. Plainville Planning and Zoning Comm'n*, 2000 Conn. Super. LEXIS 1173 (2000).

88. *Id.*

89. *Id.* In this case, the vote was 4-3 in favor of granting the application. It was denied because, under Connecticut law, a fifth vote was needed for approval.

90. *Id.* The court went on to recite the rule: "To overcome the presumption of impartiality that attends administrative determinations, a plaintiff must demonstrate either actual bias or the existence of circumstances indicating 'a probability of . . . bias too high to be constitutionally tolerable. . . ." (citing *Petrowski v. Norwich Free Acad.*, 199 Conn. 231, 506 A.2d 139 (1986); and *Transp. Gen., Inc. v. Dep't of Ins.*, 236 Conn. 75, 76, 670 A.2d 1302 (1996)).

91. *Id.*

real estate deal before a city for which the law firm was providing legal representation.⁹² The complaint was ultimately dismissed on procedural grounds, with the court opining that the complaint alleged nothing more than that the law firm acted as an attorney for the city, and that the allegations did not rise to the level of a 42 U.S.C. § 1983 claim.⁹³ Again, although the alleged actions by the attorney were insufficient to form the basis of municipal liability and conspiracy claims, the fact remains that the cost of defense of these suits, both in terms of dollars and in terms of reputation, can be quite substantial.

An allegation of the appearance of bias and unfairness was lodged against a city attorney when he allegedly became an advocate on behalf of a conditional use permit appeal and against the application when he took “a leading role in arguing against the application.”⁹⁴ The court found this allegation, along with the others lodged against the mayor and the city council, baseless, as there was nothing in the record to support such allegations.⁹⁵

V. Conclusion

Ethics allegations continue to be made liberally in courts across the country. Although, as evidenced by the cases discussed in this article, more often than not the allegations are dismissed by the courts, the fact remains that litigation over these issues are not going away, and that these cases are costly both in terms of dollars and cents and with respect to the reputation of those vested with upholding the public trust. Routine training and education programs on ethics for those involved with planning and zoning decision making could help to raise the consciousness of these individuals and make everyone aware of appearances, perceptions, and prohibited conduct. Land-use attorneys are critical allies in the education and training of their public sector clients and must accept responsibility for more proactive initiatives in this regard. The increasing interest in land-use law reform across the country⁹⁶ provides

92. *Florida Country Clubs, Inc. v. Carlton Fields, Wards, Emmanuel, Smith & Cutler, P.A.*, 98 F. Supp. 2d 1356 (M.D. Fla. 2000).

93. *Id.* The specific allegations made by the plaintiffs included: that the law firm failed to recognize a conflict of interest in their representation of the city; that they failed to withdraw from their representation of the city; that they violated various Florida Bar Rules of Professional Conduct; and that in a related matter, they appealed an order of disqualification and failed to withdraw as counsel during the pendency of the appeal.

94. *Breakzone*, 97 Cal. Rptr. 2d 467at 495.

95. *Id.*

96. *See Reform Proposals by the Thousand*, in *PLANNING COMMUNITIES FOR THE 21ST CENTURY* (Dec. 1999), noting that in 1999 there were approximately 1,000 land-use related bills introduced in state legislatures across the country.

fertile ground for land-use planning and zoning advocates to pursue state legislative proposals providing for mandatory training of planning and zoning board members, and legislation addressing specific ethics issues likely to arise in the context of land-use decision making.