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Recent Developments in Land Use,
Planning and Zoning

Crime Doesn't Pay and Neither Do Conflicts of Interest in Land Use Decisionmaking

Patricia E. Salkin*

I. Introduction

IN CARBONDALE, COLORADO, COMMUNITY RESIDENTS HAVE BECOME SUSPICIOUS ABOUT CONFLICTS OF INTEREST where the Community Development Director, in his capacity as a private planning consultant, is part of the planning team for a 561-acre subdivision, and the town's contract attorney, through his private firm, is also working on the project.¹ Meanwhile, in Cascade County, Montana, a community group is urging the Planning Board to throw out a decision recommending the rezoning of 680 acres of farmland to a heavy industrial designation because one of the Board members is a president of First Interstate Bank, which lent money in connection with the project, and because another Board member who was home recovering from surgery was not permitted to vote via teleconference.² After a local news investigation discovered that a City Commissioner who is also the executive vice president of a bank had voted on zoning and development matters that benefited the bank and its clients, the Commissioner vowed to no longer vote on any issues that he knows would affect land owned by the bank or its clients.³ Also in the news this past year were accounts of local planning and zoning

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1. See John Stroud, *Carbondale Officials Accused of Conflict of Interest*, THE ASPEN TIMES, Mar. 13, 2008, available at <http://www.aspentimes.com/article/20080313/NEWS/580057177/-1/rss01>.

2. Karl Puckett, *Group: Planning Board Should Dismiss Highwood Rezoning Vote Because of Conflict of Interest, Absent Member*, GREAT FALLS TRIBUNE (Montana), Mar. 1, 2008, available at <http://www.greatfalls Tribune.com/apps/pbcs.dll/article?AID=/20080301/NEWS01/803010303>.

3. Tony Pipitone, *Apopka Commissioner Vows to Stop Voting on Matters That Could Profit His Bank*, WKMG-LOCAL 6 NEWS, Feb. 21, 2008, available at <http://www.local6.com/problemsolvers/15373713/detail.html>.

decision makers who were not immune from campaign finance reform issues that have recently swept the country.⁴

Situations like these show that ethical considerations play a central role in land use and zoning disputes in municipalities across the country. This 2008 annual review of ethics in land use cases addresses many of these issues, including conflicts of interest, prejudice and bias, appearances of impropriety, and dual office holding.⁵ These cases serve as a reminder to land use lawyers about the types of situations that may lead to allegations of unethical conduct, and also of the need to be vigilant about not only the ethical conduct of attorneys, but of all the players who possess authority and/or influence in the land use decisionmaking arena.

4. For example, a candidate for a seat on the Fairfax County Board of Supervisors has received \$35,000 in a series of campaign contributions from various companies with ties to the developer of a project expected to come before the board next year. The project review had already been delayed upon discovery of a campaign contribution to the current Chairman by one of the developer partners. In the County, applicants in land use cases have until ten days before a public hearing to file affidavits listing campaign contributions to board members. Although there was nothing illegal about the \$35,000 in contributions, it was pointed out that this constitutes about 20% of the total money raised. See Bill Turque, *Kingstowne Developer Gives \$35,000 to Fairfax Candidate*, WASH. POST, Nov. 3, 2007, at B01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/02/AR2007110201902.html>. In another battle in Carmel, Indiana accusations were made over perceived conflicts of interest in a vote on rezoning due to the fact that two board members received campaign contributions from developers who own land that is included in the rezoning request. The contributions are not banned by the state conflicts-of-interest statute; nonetheless, they play out in the court of public opinion through media accounts. See <http://www.indystar.com/apps/pbcs.dll/article?AID=/20071011/LOCAL0101/710110324/1015/LOCAL01>. At the end of 2007, the Ethics Board City of Philadelphia ruled that while zoning board members may make personal campaign contributions to others running for office, the board members are prohibited from running for office, endorsing political candidates, soliciting campaign contributions or getting involved in political campaigns in any way. See http://www.philly.com/philly/hp/news_update/10625777.html.

5. For previous years' reviews, see Patricia E. Salkin, *1998 Survey of Ethics in Land Use Planning*, 26 *FORDHAM URB. L.J.* 1393 (1999); Patricia E. Salkin, *Litigating Ethics Issues in Land Use: 2000 Trends and Decisions*, 33 *URB. LAW.* 687 (2001); Patricia E. Salkin, *Ethics Allegations in Land Use Continue to Fill the Court Dockets*, 27 *ZONING & PLAN. L. REP.*, 1 (April 2003); Patricia E. Salkin, *A Woody Allen Movie, Show Me the Money, and Other Ethical Considerations in Land Use Planning*, *ZONING & PLAN. L. REP.*, Vol. 27, No. 3 (March 2004); Patricia E. Salkin, *Land Use Ethics Update 2005: Conflicts of Interest, Improper Conduct and Other Ethical Considerations*, 28 *ZONING & PLAN. L. REP.*, 1 (March 2005); Patricia E. Salkin, *Back to Kindergarten: Pay Attention, Listen, and Play Fair with Others—Skills That Translate into Ethical Conduct in Planning and Zoning Decision Making—A Summary of Recent Cases and Decisions on Ethics in Land Use Law*, 37 *URB. LAW.* 573 (2005); Patricia E. Salkin, *Tips for Ethical Considerations in Land Use Decision-Making: No Gobbly Goop in the 2006 Annual Review of Cases and Opinions*, 29 *ZONING & PLAN. L. REP.*, 1 (May 2006).

II. Conflicts of Interest

Allegations of unethical conduct based upon conflicts of interest are the most common ethics lawsuits initiated in the land use context. Oftentimes, however, these lawsuits are not resolved in the plaintiff's favor, since absent violation of a regulation or statute, courts are unable to grant requested relief even where the court acknowledges that the subject conduct is inappropriate.⁶ Conflicts of interest may present themselves based upon a person's professional status. Typically, these conflicts occur when certain professionals involved in the land use field appear before local planning and zoning boards. Cases have focused on architects,⁷ bankers,⁸ planners,⁹ and attorneys.¹⁰ However, conflicts may

6. See, e.g., *Tuttle v. Planning Bd.*, 18 Mass. L. Rptr. 381 (Mass. 2004) (where the Massachusetts Supreme Judicial Court reluctantly determined that the State's Conflicts of Interest Law did not prevent a municipality from hiring a traffic consultant to advise, even though the consultant was simultaneously involved in a business relationship with the applicant for a project in a different state, and the consultant was also a partner with the applicant on the development at issue. The conflicts of interest laws did not apply because the statute only encompassed municipal employees and not to consultants.).

7. See, e.g., 2002 N.Y. Op. Att'y Gen. No. 8 (Mar. 4, 2002) (cautioning that architects who serve as members of design review boards, while not automatically disqualified from service, should recuse themselves from considering any matters involving their private firm).

8. For example, in *White v. Board of Com'rs*, 44 S.E.2d 45 (Ga. Ct. App. 2001), the court found that there was no prohibited conflict of interest where a member of the board of commissioners that voted to rezone land was also the vice president of the bank that had participated in the project financing. The court found the board member's personal financial interest to be too remote. See also *McCulloch v. N.Y. State Ethics Comm'n*, 285 A.D.2d 236 (N.Y. App. Div. 2001) (holding, under New York's Ethics Law, that a former senior planner for an executive branch state agency devoted to regional land use regulation was precluded from rendering services related to any matter on which the planner had worked or had a direct concern with).

9. See, e.g., *Crozer v. Reichert*, 561 S.E.2d 120 (2002) (determining that more information was necessary to decide whether the assistant director of the county planning and zoning department acted appropriately in reviewing an application submitted by his superior, the department director).

10. There are a number of reported cases and opinions involving attorneys. For example, a recent attorney general opinion in New York addressed potential conflicts for a part-time assistant town attorney. In that case, 2003 N.Y. Op. Att'y Gen. No. 8 (July 21, 2003), the Attorney General opined that a part-time municipal attorney who solely represented the plumber examining board was not prohibited from representing private clients before other boards in the town. See also *A. Aiudi & Sons, LLC v. Plainville Planning and Zoning Comm'n*, 2000 Conn. Super. LEXIS 1173 (2000) (holding that no conflict existed where it was alleged that the town attorney had a conflict of interest because his law firm had represented three neighbors who were among those opposed to a proposed zone change but special counsel was appointed to represent the municipality); *Sammamish Cmty. Mun. Corp. v. City of Bellevue*, 27 P.3d 684 (Wash. Ct. App. 2001) (finding no conflict of interest where an attorney in the City of Bellevue Attorney's Office provided legal advice to the East Bellevue and Sammamish Community Councils and noting that "it is accepted practice for different attorneys within the same public

also occur due to relationships that individual board members have with applicants and/or with projects. At times, this can create havoc when a majority of the members of a board recuse themselves from participation and voting. For example, a recent news account from Aspen, Kentucky reported that all city council members, except the mayor, chose to excuse themselves from voting on critical land use applications, citing conflicts of interest.¹¹ Where these situations present clear roadblocks for required government decisionmaking, many states have relied on the "rule of necessity" to excuse the conflicts so that the business of government may take place.¹² As a result of situations such as these, more municipalities are enacting laws providing for the appointment of alternate members to planning and zoning boards in cases of conflicts of interest.¹³

What follows is a discussion of recent opinions focusing on allegations of conflicts of interest.

A. Attorneys' Conflicts of Interest

Attorney ethics are of critical importance in the land use game, not just in terms of the Rules of Professional Conduct, but also with respect to

office to represent different clients with conflicting or potentially conflicting interests so long as an effective screening exists within the office").

11. Carolyn Sackariason, *Aspen City Council in Conflict: Council Members Walk Away From Voting in Order to be Fair*, THE ASPEN TIMES, Feb. 19, 2008, available at <http://www.aspentimes.com/article/20080219/NEWS/790907970> (For one project, one council member cited a conflict because he reviewed and approved the project when he was a planning and zoning commissioner, and another council member felt conflicted because he was a longtime customer of the applicant's restaurant. On a second project involving a church, two council members recused themselves because one was a member of the church who contributed financially to the organization, and the other was a member of the same faith but of a different church.).

12. Such was the case in a recent opinion from the Rhode Island Ethics Commission. Minutes of the Open Session of the Rhode Island Ethics Commission (Feb. 12, 2008), available at <http://www2.sec.state.ri.us/omfiling/pdf/minutes/151/2008/10323.pdf> (Where three of the five members of the zoning board had a conflict of interest, and therefore there was no required quorum for the conduct of business, the State Ethics Commission invoked the rule of necessity to allow one of the conflicted board members to vote). In a municipality in California, where four of the five board members had a conflict, the city attorney advised the members to draw cards for the purpose of selecting two members needed to make a quorum. See Sarah Rohrs, *Benicia Council Draws Cards to Determine Voters*, VALLEJO TIMES HERALD, August 3, 2006.

13. Kathleen Barran, *Sennett OKs Zoning Changes*, THE CITIZEN, Mar. 7, 2008, available at http://www.auburnpub.com/articles/2008/03/07/latest_news/latestnews02.txt (Local Law No. 1 of the Town of Sennett, approved on March 6, 2008, allows for the use of alternate planning board and zoning board of appeals members where there are conflicts of interest, as well as when board members are absent because of illness or vacations). For a more detailed discussion of these issues see Patricia E. Salkin, *Planning for Conflicts of Interest in Land Use Decisionmaking: The Use of Alternate Members of Planning and Zoning Boards*, 31 REAL ESTATE L.J. 375 (2003).

avoiding the appearance of impropriety and ensuring compliance with state and municipal ethical codes and regulations. Sometimes the application of ethics codes can have chilling effects on attorneys in private practice. For example, provisions in professional codes of conduct that prohibit lawyers from representing clients who have an interest adverse to a former client can serve to prevent law firms who formerly represented municipalities on land use matters from representing future clients in front of land use boards.¹⁴ Sometimes the conflicts of interest allegations center around lawyers who also serve as local elected or appointed officials, and who, in their governmental capacities, occasionally cast votes against the interest of firm clients.¹⁵ Other times attorney conduct is challenged based on notions of undue influence, particularly where the lawyer is or was a municipal official in the jurisdiction where he or she is presently representing a client.¹⁶ Attorneys may also be criticized for community involvement where such activities create a real

14. In *Walden Fed. Sav. & Loan Ass'n v. Vill. of Walden*, 212 A.D.2d 718 (N.Y. App. Div. 1995), for example, a New York appellate court held, based upon prohibitions in the Code of Professional Responsibility, that since the law firm had represented the Village on various land use issues over the course of thirty years, six years after the firm last represented the Village it was prohibited from appearing before the Village Planning Board on behalf of a new client seeking a site plan review. *But see* *Nicholas v. Wilton Zoning Bd. of Appeals*, 30 Conn. L. Rptr. 386 (Conn. Super. Ct. 2001), where the court reached a different result after the Town sought to disqualify its former counsel who, twenty-six years after he represented the Town on the same matter, sought to represent the private individual before the Town. In this case, the court said that "the public's interest in the scrupulous administration of justice" would not be compromised and that the "plaintiff's interest in the free selection of the counsel of his choice outweighs the defendant's interest in protecting confidential information." *Id.*; *see also* *Fla. Country Clubs, Inc. v. Carlton Fields, Wards, Emmanuel, Smith & Cutler, P.A.*, 98 F. Supp. 2d 1356 (M.D. Fla. 2000) (involving a law firm that was the subject of alleged breach of fiduciary duty where the law firm possessed information from a former client who was presently involved with a real estate deal before a city for which the law firm was providing representation.).

15. *See, e.g., Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150 (Tex. 2004) (holding that there was no breach of fiduciary duty where a shareholder in a law firm who also served as a legislator on the city council voted in favor of an ordinance that adversely affected the interests of one of the firm's clients); *see also* *Carroll County Ethics Comm'n v. Lennon*, 703 A.2d 1338 (Md. Ct. Spec. App. 1998) (where an attorney-commissioner who represented clients before the county at first recused himself on the application and then two weeks later participated in a discussion on the matter, and then moved to approve the plan. These last two actions were found to constitute a violation of the county ethics law.).

16. *See, e.g., In re Convery*, 765 A.2d 724 (N.J. 2001) (where the court reprimanded the lawyer, a former mayor who had also previously served as counsel to the board of adjustment, for attempting to use his political influence to pressure board members to grant a variance to his client. The court said: "Respondent, as an experienced attorney and ex-Counsel to the Edison Board of Adjustment, should have known that influencing two members of the zoning board, a quasi-judicial tribunal, through third parties . . . to vote to grant a variance for . . . respondent's client was highly improper.").

or perceived conflict of interest.¹⁷ Familial relationships between lawyers and board members have also been the subject of litigation.¹⁸ Many of these issues resurfaced over the last eighteen months with three cases focusing on the conduct of land use attorneys.

1. "OF COUNSEL" RELATED TO BOARD MEMBER

In a case of first impression in New Jersey, the Superior Court held that since the father of the Vice Chair of the Zoning Board of Adjustment had an "of counsel" relationship with the law firm that had represented an applicant a number of years ago, there was a disqualifying conflict-of-interest for the board member necessitating a recusal.¹⁹ Since the Vice Chair had not recused herself, the court held that the entire process was tainted and set aside the Board's decision.²⁰ The Board Chair had recused himself to avoid an appearance of conflict because he or his law partner represented one or both of the applicants a number of years earlier.²¹ As a result, the Vice Chair was designated as acting chair.²² The Vice Chair's father, a retired judge, served as "of counsel" to the same law firm as the Chair.²³

The superior court overturned the trial court's decision and found that the Vice Chair had a disqualifying conflict of interest. The trial court had found that there was no proof to the allegation that the application would benefit the Vice Chair or her father in any way.²⁴ The appellate court, however, said that the proper inquiry is whether there is a potential for conflict, not whether the conflicting interest actually influenced the action.²⁵ Noting that conflicts of interest issues are fact sensitive and

17. For example, recently a borough attorney in New Jersey tendered his resignation after serving as counsel to the zoning hearing board for almost twenty years based upon a "perceived conflict of interest" because he serves on the foundation board of an organization that provides scholarship funds for students attending a high school that had an application pending for a dormitory for foreign students. The attorney had not recused himself from the matter. Douglas B. Brill, *Council Sticks to Guns on Dormitory Appeal*, THE EXPRESS-TIMES, Mar. 4, 2008, available at <http://www.pennlive.com/news/express/index.ssf?/base/news-15/1204607136129460.xml&coll=2>.

18. See, e.g., 78 Op. Cal. Att'y Gen. 230 No. 95-110 (July 27, 1995) (concluding that the city council could enter into a development agreement with the developer despite the fact that one of the city council members was married to a lawyer whose firm represented the developer on unrelated matters).

19. *Haggerty v. Red Bank Borough Zoning Bd. of Adjustment*, 897 A.2d 1094 (2006).

20. *Id.* at 1099.

21. *Id.* at 1096.

22. *Id.*

23. *Id.*

24. *Haggerty*, 897 A.2d at 1100.

25. *Id.* at 1103.

depend upon the circumstances of each case, the court determined that “a person in an ‘of counsel’ relationship with a law firm has a sufficient stake in the financial viability of the firm as to impute to such individual any disqualification of the firm arising from client representation by partners or associates in the firm.”²⁶ The court was unpersuaded by the argument that the Vice Chair was an adult, living her life independent of her family and not relying on her father for financial support.²⁷

This outcome is surprising since in most situations an “of counsel” relationship is not one where the attorney has any financial stake in the business of the firm when he or she is not involved in the specific representation. In this case, the “of counsel” attorney had no involvement with the applicants or with the municipality. In other conflict of interest cases, where there is no financial interdependency between the parent and child (or other family member), and/or where there is no financial benefit to the other (such as where an inheritance could stand to increase as a result of a decision), the board member is usually not disqualified.

2. ATTORNEY DISQUALIFICATION

Relying on the West Virginia Rules of Professional Conduct, the West Virginia Supreme Court held that a lawyer and his firm were disqualified from representing an applicant before a zoning board since the lawyer had previously represented that board.²⁸ As a former assistant prosecuting attorney, between 2001 and 2004, J. Michael Cassell represented, advised, counseled, and litigated on behalf of the Zoning Board of Appeals with respect to a conditional use permit (CUP) sought by Thorn Hill, LLC.²⁹ In 2005, Cassell left the prosecuting attorney’s office and joined a private law firm that represented Thorn Hill before the Zoning Board. While at the firm, he assumed representation for Thorn Hill in one of the CUP matters before the Zoning Board that Cassell had worked on when he represented the board.³⁰ The Zoning Board then brought a motion to disqualify both Cassell and the law firm from representing Thorn Hill before the Board in this matter.³¹ The court concluded that Cassell had participated personally and substantially in connection

26. *Id.* at 1103.

27. *Id.*

28. *State ex rel. Jefferson County Bd. of Zoning Appeals v. Wilkes*, 655 S.E.2d 178 (W. Va. 2007).

29. *Id.* at 180–81.

30. *Id.* at 181.

31. *Id.* at 182.

with the two Thorn Hill permit applications in question when he was an attorney for the Zoning Board.³² As a result, the disqualifying language of Rule 1.11(a), which relates to successive government and private employment,³³ facially and literally applied to him and he was prohibited from representing Thorn Hill before the Zoning Board in connection with an application in which he participated personally and substantially as a public officer or employee.³⁴ The court noted that the Zoning Board had not consented to the Thorn Hill representation.³⁵

The court did not find persuasive Cassell's argument that each phase of the CUP process constituted a "separate matter," and that therefore he should not be disqualified from the current aspect of the process, which he did not participate in as the Board's attorney.³⁶ The court said that "neither common sense nor applicable legal authority support the contention that each stage in the consideration of a conditional use permit application is a separate and discrete 'matter.' Nor did it support the contention that the BZA may not bar its former lawyer from aiding an applicant in connection with an application about which the lawyer once advised the BZA."³⁷ The court agreed with the Zoning Board that "its former lawyer may not permissibly move from the closed chambers of the BZA to the law firm conference room-and then in that conference room advise his new client about the same application that he had worked on while representing the BZA."³⁸

32. *Id.* at 184.

33. The court explained that "the controlling principle of law . . . is the requirement set forth in Rule 1.11(a) that except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless: (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule." *State ex. rel. Jefferson County Bd. of Zoning Appeals*, 655 S.E.2d at 183-84.

34. *Id.* at 184-85. The West Virginia Court concluded that "all proceedings before a board of zoning appeals and other legal proceedings regarding an application for a conditional use permit are proceedings about the same "matter" for purposes of *West Virginia Rules of Professional Conduct*, Rule 1.11(a)." *Id.* at 188.

35. *Id.* at 184.

36. *Id.* at 187.

37. *Id.* at 185.

38. *State ex rel. Jefferson County Bd. of Zoning Appeals*, 655 S.E.2d at 187. In explaining the unique situation that may confront former government lawyers, the court cited *Allied Realty of St. Paul, Inc. v. Exchange National Bank*, 283 F. Supp. 464 (D.C. Minn. 1968), where it was explained that

[m]any a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department

3. CONFLICTS DON'T ALWAYS LEAD TO ATTORNEYS FEES

A recent unpublished case from New Jersey focused on whether the plaintiffs were entitled to attorneys fees under the theory that they acted as private attorneys general and that it would be unjust enrichment not to award the fees.³⁹ The plaintiffs also claimed that an “actual” conflict existed, although the court had found the attorney to have only an “apparent” conflict.⁴⁰

Attorney Lawrence Vastola represented a church that sought various approvals before the Planning Board.⁴¹ Although the Planning Board granted the approvals, the trial court vacated these decisions because Vastola had an “apparent conflict of interest” due to his also representing the Planning Board in an unrelated case during the same timeframe.⁴² The court did not award attorney fees because it determined that the Planning Board did not act in bad faith, and also because the plaintiffs had procedural defects in their fee applications.⁴³

B. *Conflicts Based Upon Financial Interest*

Most ethics laws are premised on preventing self-dealing on the part of government decision makers. The theory is that those in positions to

in which he was employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged. Certainly this is perfectly proper and ethical. Were it not so, it would be a distinct deterrent [sic] to lawyers ever to accept employment with the government. *This is distinguishable, however, from a situation where, in addition, a former government lawyer is employed and is expected to bring with him and into the proceedings a personal knowledge of a particular matter—for which the government paid him while he was learning it and for which now the client who employs him theoretically will not have to pay.*”

Id. at 186–87 (emphasis in original).

39. *Hewson v. Alliance Bible Church*, 2007 WL 120241 (N.J. Super. Ct. App. Div. Jan. 19, 2007).

40. *Id.* at *1.

41. *Id.* at *2.

42. The facts disclosed that Vastola came to represent the Planning Board in 1977 in one matter because the Board’s regular attorney had a conflict in the matter that prevented his involvement in the action. *Id.* at *2. The case was finally tried in 1998, but no decision was rendered because the judge, who was waiting for a decision in a related matter from the Supreme Court before deciding the case, died in 2001 without having issued a decision. *Id.* Although the “regular” Planning Board attorney resolved his conflict around 2001 and he apparently resumed representation of the board in that matter, neither he nor Vastola filed a substitution of counsel until May 2002. *Id.* Vastola began representing the church in February 2002, and the matter was before the Planning Board from April 2002 through a final resolution approving the project in August 2002. *Id.* Attorney Vastola represented to the court that his involvement with the earlier matter virtually ceased in August 2001, and it did not appear that Vastola was copied on any correspondence related to that matter during the time he was representing the church. *Id.*

43. *Id.* at *1.

make decisions in the best interests of the public should not be tempted to cast votes where they, or their family members, would personally and/or financially benefit from the act. Recently the Governor of Virginia signed a new law requiring members of the Loudoun County Board of Supervisors, Planning Commission, and Zoning Board of Appeals to state business and financial ties to applicants in zoning cases within the last twelve months.⁴⁴ The St. Charles Parish Council, however, declined to pass a measure that would have made people ineligible for appointment to the Parish Planning and Zoning Commission if they received \$5,000 in salary or contracts from the Parish.⁴⁵ Cases involving financial conflicts of interest are common and are frequently fact-intensive.⁴⁶

1. BOARD MEMBERS AS RESIDENTS OF THE MUNICIPALITY ALONE CREATE NO CONFLICT

In 1991, the Town of Mooresville, population 60, adopted its first comprehensive zoning ordinance.⁴⁷ In 2000, the zoning law was invalidated

44. Virginia Acts of Assembly, 2008 Session, Chapter 523 (2008), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=sb532&Submit2=Go>. The new law is effective July 1, 2008. The bill summary provides:

Requires each individual member of the Loudoun County board of supervisors, planning commission, and board of zoning appeals in any proceeding before each such body involving an application for a special exception or variance or involving an application for amendment of a zoning ordinance map, which does not constitute the adoption of a comprehensive zoning plan, an ordinance applicable throughout the locality, or an application filed by the board of supervisors that involves more than 10 parcels that are owned by different individuals, trusts, corporations, or other entities, to, prior to any hearing on the matter or at such hearing, make a full public disclosure of any business or financial relationship that such member has, or has had within the 12-month period prior to such hearing, (i) with the applicant in such case; (ii) with the title owner, contract purchaser, or lessee of the land that is the subject of the application, except, in the case of a condominium, with the title owner, contract purchaser, or lessee of 10 percent or more of the units in the condominium; (iii) if any of the foregoing is a trustee (other than a trustee under a corporate mortgage or deed of trust securing one or more issues of corporate mortgage bonds), with any trust beneficiary having an interest in such land; or (iv) with the agent, attorney, or real estate broker of any of the foregoing.

Id. Reportedly, the measure was limited to Loudoun County in an effort to get the measure passed, since applicability to the entire Commonwealth was likely to delay the measure. See Tom Nash, *Ethics Bills Meet Fate: Not All Loudoun-Inspired Ethics Bills Pass General Assembly*, CONNECTION NEWSPAPERS, Mar. 12, 2008, available at <http://www.connectionnewspapers.com/article.asp?article=94655&paper=67&cat=104>.

45. Matt Scallan, *Conflict-of-Interest Measure Rejected: St. Charles Council Unsure of Effects*, THE TIMES PICAYUNE (Mar. 11, 2008), available at http://www.nola.com/news/index.ssf/2008/03/conflictinterest_measure_rej.html.

46. See, e.g., *Heustis v. Ticonderoga Plan. Bd.*, 784 N.Y.S.2d 187 (N.Y. App. Div. 2004) (finding further inquiry to be necessary where a planning board member worked for a family-owned construction business that routinely rented trucking equipment to the applicant and bought gravel from the applicant).

47. *Peebles v. Mooresville Town Council*, No. 1060335, 2007 WL 2570509, at *1 (Ala. 2007).

because the Council adopted it without proper notice as required by law.⁴⁸ In 2002, the Town gave notice that it would consider the adoption of a new comprehensive zoning ordinance, and this time residents brought an action seeking to enjoin the Town Council from voting on the adoption of the proposed ordinance because all of the Council members owned land in the town and therefore had special financial interests in the proposed ordinance.⁴⁹ The trial court entered summary judgment for the municipal defendants.⁵⁰

With respect to the alleged conflicts of interest claims—that one member of the Town Council who voted for the zoning expressed interest in buying land and that the Mayor, who also voted to enact the ordinance was a real estate agent who sold properties that would be in competition with the plaintiffs' properties if those properties could be developed without the restrictions of the zoning ordinance—the court said that since the Town Council was exercising its legislative functions, the enactment of the zoning law was not subject to impeachment because of bad faith or improper motives.⁵¹ Further, the court noted that even if the officials had violated a statutory prohibition, the remedies under those statutes would not provide for invalidation of the zoning ordinance.⁵²

2. TOWN-GOWN RELATIONSHIPS

When colleges and universities need to appear before local boards to request various land use approvals, it is not uncommon for one or more

48. *Id.*

49. *Id.* In 2003, the Council did enact a new zoning ordinance, and those challenging the law filed an amendment to their earlier complaint arguing that: 1) the ordinance was invalid due to the small size of the town; 2) the Town officials who voted on the ordinance had a special financial interest in the ordinance; and 3) the Town Council failed to give proper notice. To cure possible notice defects of the 2003 ordinance, in 2005 the Town repealed the 2003 ordinance and enacted a new identical ordinance in compliance with the notice requirements. The plaintiffs again amended their complaint, arguing that the 2005 ordinance was improper because it was recommended by a zoning commission as opposed to a municipal planning commission. *Id.* In addressing their substantive claims, the Supreme Court of Alabama held that the State legislature has not placed any minimum size limitations on municipal corporations that may engage in zoning. *Id.* As to the last claim, that the Town improperly relied on a recommendation of a zoning commission rather than a planning commission, the Court determined that the local legislative body was empowered by statute to create both of these advisory committees if it so desired, and that such commissions are advisory only to that legislative body. The statutes neither require the establishment of these commissions, nor do they provide that one is preferable to the other. *Id.* at *6–8.

50. *Id.* at *2.

51. *Id.* at *5–6.

52. *Peebles*, 2007 WL 2570509, at *6.

members of the board to have some connection to the institution of higher education. For example, a child may have attended the school, a spouse or other family may be employed by the school (especially since these are typically large institutions and are major employers in the community), and at times, a board member could even be taking classes at the school.⁵³

In *Hughes v. Monmouth University*, by a vote of five to one, the University obtained thirteen variances from the Borough Board of Adjustment to construct a large student dormitory in a low density residential zone.⁵⁴ Neighbors, opposed to the project, filed a complaint claiming that several board members should be disqualified because of financial or personal involvement with the University.⁵⁵

A number of applicable ethics laws exist in New Jersey. For example, the Municipal Land Use Law provides in part that “[n]o member of the board of adjustment shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest.”⁵⁶ The Local Government Ethics Law bars public officials from acting in any matter in which he or she “has a direct or indirect financial or personal involvement that might reasonably be expected to impair his or her objectivity or independence or judgment.”⁵⁷ This ethics law also covers immediate family members and business associates.⁵⁸

The appellate court affirmed the trial court’s decision holding that Board of Adjustment members did not have disqualifying conflicts because they participated in various university events, were alumni, or had children who had gone to the school.⁵⁹ Specifically, the court noted that although an alumnus of a University may have “involvement” with the school, “here, where the board members obtained their degrees many years ago, were not active alumni members and did not substantially

53. *De Paolo v. Town of Ithaca*, 258 A.D.2d 68 (N.Y. App. Div. 1999) (Holding that the connection of four board members to the applicant, Cornell University, did not create a prohibited conflict of interest where one board member and the spouse of another board member were employees of the University, one board member was a graduate student, and another board member was married to a retiree from the University. The Court was satisfied that none of these four board members had any direct or indirect interest, pecuniary or otherwise, in the school and their request for a permit to install a cooling system. Therefore, the Court concluded that there was no actual conflict of interest, nor an appearance thereof.).

54. *Hughes v. Monmouth Univ.*, 925 A.2d 741, 743 (N.J. Super. Ct. App. Div. 2007).

55. *Id.*

56. N.J. STAT. ANN. § 40:55D-69 (West 2007).

57. N.J. STAT. ANN. §§ 40A:9-22.5(d) (West 2007).

58. N.J. STAT. ANN. §§ 40A:9-22.5(a), (f) (West 2007).

59. *Hughes*, 925 A.2d at 743-44.

contribute to the University or otherwise evidence any special attachment to the school, no reasonable person could conclude that such involvement would have tempted them 'to depart from [their] sworn public duty.' ”⁶⁰

With respect to the allegation that one board member's child, who attended the University in the past, received a merit based scholarship from the school open to all similarly situated students, the court did not believe that this interfered with the Board member's impartial performance of their duties.⁶¹ Likewise, the fact that a Board member's child might in the future decide to attend the University, and the fact that a Board member's company won a public bid and performed some work for the University over ten years ago, are both “too remote to constitute conflicts.”⁶² The court noted that none of the Board members, nor any members of their families, are currently students at the University.⁶³

Although some Board members had participated in various University events in the past, such as attending sports games and concerts, the court said that none of these would be disqualifying activities as they could not “reasonably be expected to impair [the board member's] objectivity or independence of judgment.”⁶⁴ The court further commented that all of these “involvements” were open to the public.⁶⁵

The court also held that where one Board Member disqualified herself from voting because she had missed several meetings due to a family illness, she was not precluded from commenting on issues for which she was properly prepared as she was not disqualified “for cause.”⁶⁶ The court even noted that had she read the transcripts from the missed meetings, she could have voted.⁶⁷

3. BRIBERY—CRIME DOESN'T PAY

In an Eighth Circuit case, Minneapolis City Councilman Gary Zimmerman, who represented the sixth ward, was a member of the Council's Zoning and Planning Committee.⁶⁸ Having recently initiated unsuccessful litigation over a redistricting plan at a cost of approximately \$100,000 for himself and fourteen other plaintiffs, Zimmerman met real

60. *Id.* (citing *Care of Tenefly v. Borough of Tenefly, Inc.*, 704 A.2d 1032 (1998)).

61. *Id.* at 744.

62. *Id.*

63. *Id.*

64. *Hughes*, 925 A.2d at 743.

65. *Id.*

66. *Id.*

67. *Id.* (citing N.J. STAT. ANN. § 40:55D-10.2 (West 2007)).

68. *U.S. v. Zimmerman*, 509 F.3d 920 (8th Cir. 2007).

estate developer Gary Carlson who was planning a multimillion dollar mixed use project known as Chicago Commons.⁶⁹ Carlson knew his project faced community opposition and that it was located in an area adjacent to Zimmerman's ward.⁷⁰ Carlson met Zimmerman several times at City Hall but they never engaged in substantive conversation.⁷¹ The third time they met, however, at a groundbreaking ceremony, Zimmerman solicited Carlson for the \$100,000 he and his colleagues incurred in legal fees.⁷² Carlson offered to negotiate the fee on Zimmerman's behalf, to which Zimmerman suggested \$40,000 could make the matter go away.⁷³ When the two ran into each other again, Zimmerman asked Carlson whether he had given any thought to the matter, after which Carlson went to the FBI and began acting as a cooperating witness.⁷⁴

While wearing a wire, Carlson requested Zimmerman's help in lobbying the Planning Commission members before the upcoming vote on his rezoning application.⁷⁵ Zimmerman agreed and Carlson said that he would give Zimmerman some help and asked what he could do, to which Zimmerman replied "money, money, money" and asked for four or five thousand dollars as a demonstration of good faith.⁷⁶ Carlson proposed, "Okay. You give me your vote, get me that vote, and get me my help through there. I'll take care of you. Okay?" Zimmerman replied "Okay. You got it." Later Zimmerman spoke of the limit on campaign contributions of \$300 per person, and he suggested that Carlson donate in the names of his "cousins."⁷⁷

The next time they met, Carlson was wearing a recording device and a hidden camera. He handed Zimmerman \$5,000, and the conversation that followed focused on Carlson's rezoning issue and what could be done at the Planning and Zoning Committee in light of the Planning Commission's decision to recommend denial of the application.⁷⁸ Zimmerman suggested that Carlson use straw donors to make contributions to his campaign, further suggesting that Carlson pay them a little more to say the contributions came from them.⁷⁹ Carlson's application

69. *Id.* at 922.

70. *Id.*

71. *Id.* at 923.

72. *Id.*

73. *Zimmerman*, 509 F.3d at 923.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Zimmerman*, 509 F.3d at 923.

79. *Id.* at 923-24.

was subsequently denied by the Committee and the full Council, and Carlson asked Zimmerman what happened and referred to the \$5,000 he had given to him.⁸⁰ Zimmerman explained the reasons why there was strong opposition to the project.⁸¹

A month later, the two met again as Carlson wanted to develop another project, and Carlson asked for Zimmerman's help in getting the project through the City Council.⁸² Carlson gave Zimmerman \$1,200 in campaign contribution envelopes with the names of four donors, and indicated he has given them something extra so they would verify the contributions were made by them.⁸³ Two weeks later, Carlson went to Zimmerman's home and gave him \$1,000 in an unmarked campaign contribution envelope suggesting that the money was from people who wanted Zimmerman reelected and he told Zimmerman to write the names in himself. Carlson further stated, "That's for getting us the zoning there . . ." Zimmerman replied, "So . . . alright."⁸⁴ A week later, when Zimmerman thought he was going to meet Carlson, he was greeted by two FBI agents.⁸⁵

Zimmerman was indicted and later convicted of knowingly and corruptly soliciting something of value with intent to be influenced or rewarded in connection with the business of the government of the City of Minneapolis in violation of 18 U.S.C. § 666(a)(1)(B).⁸⁶ He was convicted on three of the four counts and sentenced by the district court to thirty months on each count, to be served consecutively.⁸⁷ The federal court of appeals upheld the convictions.⁸⁸

III. Appearance of Impropriety

A. *Voting on Applications*

There may appear to be an ethical problem when board members miss a meeting where an application is being reviewed, and then vote on the matter at a subsequent meeting.⁸⁹ The perception is that the board

80. *Id.* at 924.

81. *Id.*

82. *Id.*

83. *Zimmerman*, 509 F.3d at 924.

84. *Id.*

85. *Id.*

86. *Id.* at 924–25.

87. *Id.* at 926.

88. *Zimmerman*, 509 F.3d at 929.

89. See generally PATRICIA E. SALKIN, ANDERSON'S AMERICAN LAW OF ZONING § 22:46 (stating that "[a] litigant is entitled to a fair hearing before a quorum of the board of adjustment. A serious question is presented as to whether such a hearing has

members may not be as familiar with the application and knowledgeable about the discussion and comments made at the previous meeting. Such was the situation in a recent case decided by an Ohio Court of Appeals.⁹⁰

In *Erickson v. Put-In-Bay Township Zoning Board of Appeals*, two Zoning Board members missed an initial hearing on an application for a conditional use permit to operate a bed and breakfast, but were in attendance at the next meeting where the Board discussed and deliberated on the application prior to voting.⁹¹ The court found no evidence to support the appellants' allegation that the Board members failed to review or consider the evidence prior to voting on their application.⁹² The court noted that there is a presumption of regularity of proceedings before the Zoning Board, and to negate this, appellants must provide legally relevant evidence that a voting member did not give meaningful consideration to the evidence prior to voting on the application.⁹³ In this case, the appellants' offered nothing other than speculation.⁹⁴

When board members miss meetings where applications are discussed, in order to avoid the public perception that they may not be fully versed in the substance of what was discussed, upon returning to the application at a subsequent meeting, the board members should note for the record that although they may have missed some prior discussion, they have reviewed the file and/or record in advance of the current meeting. This will make it clear that the formerly absent member has given at least the same meaningful consideration to the application as his or her colleagues.

B. *Filling Vacancies as "Lame Ducks"*

Former House Speaker Tip O'Neill was known for saying, "all politics is local."⁹⁵ Nothing can better describe the environment of land use

been afforded if a member of the board who failed to attend part or all of the hearing casts a vote which is essential to the decision"); *see also* *Lacy St. Hospitality Serv., Inc. v. City of Los Angeles*, 22 Cal. Rptr. 3d 805 (Cal. Ct. App. 2004) (finding that the applicant did not receive a fair hearing where members of the city council were talking on cell phones, eating, having side conversations, and generally not paying attention during a public meeting).

90. *Erickson v. Put-In-Bay Twp. Zoning Bd. of Appeals*, No. OT-06-047, 2007 WL 2683534 (Ohio Ct. App. Sept. 14, 2007).

91. *Id.* at *1.

92. *Id.* at *2.

93. *Id.*

94. *Id.*

95. *See* Mario Cuomo, *The Last Liberal: Tip O'Neill Never Wavered in His Belief that Government Could Cure Social Ills*, N.Y. TIMES, Mar. 11, 2001, available at <http://www.nytimes.com/books/01/03/11/reviews/010311.11cuomot.html>.

decision making. In a lengthy dispute over a retail shopping center, leading to four separate lawsuits on various land use and environmental causes of action, the neighbors' last challenge in *Eadie v. Town Board of the Town of North Greenbush* involved, among other things, the propriety of a lame duck town board appointing two new members to the Planning Board at the last official meeting before a new legislative body took office.⁹⁶

The challenge against the siting of a more than 250,000 square foot planned retail shopping center on a 35-acre parcel focused on the authority of two Planning Board members to vote on the project. Specifically, during the application review phase, after a town-wide election but before the new Town Board was seated, the existing Board accepted the resignation of the Town Attorney and at the same December meeting, by a 3–2 vote, appointed the attorney and another individual to the Planning Board.⁹⁷ The next month, when the new Town Board leadership took over, they unsuccessfully sought to vacate the appointments of the new Planning Board members and to cancel the January Planning Board meeting.⁹⁸ At the request of the developer-applicants, the trial court issued a temporary restraining order which, among other things, ruled that the January meeting “be conducted as originally scheduled and the Town Planning Board remain comprised of the members thereof prior to the January . . . meeting [sic: of the Town Board].”⁹⁹ The Planning Board then met and approved the site plan application by a 5–1 vote.¹⁰⁰ Litigation followed challenging the approval of the application and alleging, among other things, that the votes of the new Planning Board members were a nullity because when the Town Board filled those positions in December, the positions had not been legally vacated, and further that the votes should be discounted due to conflict of interest issues or other alleged improprieties.¹⁰¹

The appeals court found no basis to invalidate the votes of the new board members, noting that since their participation was pursuant to a valid order of the trial court, their votes were cast under the “color of authority” of valid Planning Board members.¹⁰² Further, the court concluded that the petitioners had not established that the votes of the two

96. *Eadie v. Town Bd.*, 850 N.Y.S.2d 240 (N.Y. App. Div. 2008).

97. *Id.* at 242.

98. *Id.*

99. *Id.*

100. *Id.* at 242–43.

101. *Eadie*, 850 N.Y.S.2d at 243.

102. *Id.*

board members should be invalidated due to alleged conflicts of interest and improprieties.¹⁰³ Although both Planning Board members had previously expressed favorable views with respect to retail development in town, this did not amount to a conflict of interest.¹⁰⁴ The court commented that there was nothing in the record that clearly demonstrated that either Board member had a financial or other proprietary interest in the project.¹⁰⁵ After reviewing the other claims and requests for attorney fees from the two Board members, the court upheld the Board's approval.¹⁰⁶

IV. Bias or Prejudgment

Allegations of bias result from a variety of situations.¹⁰⁷ Suspicions of prejudgment have arisen in cases where board members were involved with community organizations that appeared before the board seeking land use approvals.¹⁰⁸

A. *Statements of Board Members* *Prior to Application Review*

In a recent New York case, three members of the Planning Board appeared to have impermissibly prejudged an application for a rezoning to enable the development of a multi-family housing project by signing a petition in favor of the rezoning and the intended project.¹⁰⁹ The Board Chairperson also wrote a letter to the Mayor supporting both the rezoning and the project, noting that she "would really like to see

103. *Id.* at 243–44.

104. *Id.* at 243.

105. *Id.* at 243–44.

106. *Eadie*, 850 N.Y.S.2d at 245.

107. *See, e.g.,* NASHA, LLC v. City of Los Angeles, 22 Cal. Rptr. 3d 772 (Cal. Ct. App. 2004) (finding impermissible bias where a commissioner wrote a newsletter article advocating a position against the proposed project); *Eacret v. Bonner County*, 86 P.3d 494 (Idaho 2004) (holding that a board commissioner was not impartial where he made pre-hearing statements concerning the application, had pre-hearing, ex parte communications with the petitioner and visited the subject property by himself; these actions "reveal[ed] a lack of impartiality and denial of an opportunity for opponents of the variance to challenge or answer the ex parte evidence . . . and the unauthorized view . . . was not available to the entire Board or equally to the parties").

108. For example, in *Brooks v. Planning and Zoning Comm'n of the Town of Had-dam*, 200 Conn. Super. LEXIS 244 (2000), the court held that two members of the planning and zoning commission who were also involved with the Little League and the ball fields committee did not have a prohibited conflict of interest when reviewing an application for a special use permit for the construction and maintenance of a municipal recreational facility that would include playing fields.

109. *Schweichler v. Village of Caledonia*, 45 A.D.3d 1281, 1283–84 (N.Y. App. Div. 2007).

new housing available to [her] should [she] decide to sell [her] home and move into something maintenance free[.]”¹¹⁰ A New York appellate court concluded that this constituted the appearance of bias and actual bias, requiring annulment of the Planning Board’s site plan approval.¹¹¹ The court noted that although the actions did not technically violate the General Municipal Law sections dealing with conflicts of interest for municipal officials, the actions nonetheless warranted annulment of the decision.¹¹² The court also noted that the Village Law permits the appointment of alternate members to a planning board where a conflict of interest is present.¹¹³ However, the court did not make clear whether the village had adopted a local law authorizing the appointment of such alternate members.

As to the second issue, the court agreed with the petitioner that the site plan did not comply with the Village Code, and that the court below erred in concluding that the Board’s interpretation of the setback requirements of the ordinance had a rational basis and was supported by substantial evidence since the court merely relied on a letter to the Planning Board from the Code Enforcement Officer, which stated in a conclusory manner simply that “the applicant has produced a plan that will meet all of the zoning requirements.”¹¹⁴ The court found the record to be devoid of any actual measurements, and found that the Board made no attempt to explain how the measurements on the preliminary site plan approval map were in compliance with the zoning laws, and the approval was therefore required to be annulled on this ground as well.¹¹⁵

B. Conduct of Board Member

The Ohio Supreme Court determined that because the required statutory procedure was not followed for the placement of a zoning referendum on the ballot, the Board of Elections abused its discretion when it placed the initiative on the ballot for March 2008. Therefore, the court granted a writ of prohibition to remove the initiative from the ballot.¹¹⁶

Following a controversial amendment to the zoning resolution establishing guidelines for the siting of wind turbine generator facilities and anemometer towers in the township, a group of citizens opposed to

110. *Id.* at 1284.

111. *Id.*

112. *Id.* at 1283–84.

113. *Id.* at 1285.

114. *Schweichler*, 45 A.D.3d at 1284.

115. *Id.*

116. *State ex rel. Stoll v. Logan County Bd. of Elections*, 117 Ohio St. 3d 76 (2008).

the amendment circulated a petition to place a zoning referendum on the resolution at the March 2008 primary election.¹¹⁷ The state statute requires that a petition be filed with the Board of Township Trustees within 30 days after the adoption of the amendment.¹¹⁸ The amendment was adopted on September 19, 2007, and petitioners chose to deliver the petition to the private residence of one member of the Board of Trustees, who had also signed the petition.¹¹⁹ The petition had a blank line for the township fiscal officer to note when the petition was filed, but the petition was not filed with him nor was it otherwise physically presented to or filed with the Board of Trustees.¹²⁰ The Board member kept the petition at his house until legal counsel advised him to file it with the Board of Elections, which he did on October 26, 2007.¹²¹ The Board of Trustees never authorized the delivery of the petition to the Board of Elections, nor did they ever review or certify the petition at any public meeting.¹²²

A group of realtors filed a written protest with the Board of Elections against the referendum petition, claiming, among other things, that the petition was never filed with the Board of Trustees as required by state law.¹²³ In January 2008, the Board of Elections held a hearing and denied the protest and certified the referendum to the ballot for March 4, 2008.¹²⁴ On expedited appeal to the Ohio Supreme Court, the court concluded that the Board of Elections abused its authority because, although there was no evidence of fraud or corruption, the Board disregarded the applicable law which required that the petition be filed with the Board of Township Trustees.¹²⁵ The court noted that the petition was not submitted to a township fiscal officer or other record custodian and was not placed into the official township record when it was delivered to the personal residence of one Board member.¹²⁶ Further, state statute requires that the petition be filed with “the secretary of the board of elections or with any other public office,” and a personal residence, said the court, is not a public office.¹²⁷ Additionally, the court determined

117. *Id.* at 76.

118. *Id.*

119. *Id.*

120. *Id.*

121. *State ex rel. Stoll*, 117 Ohio St. 3d at 76.

122. *Id.* at 76–77.

123. *Id.* at 78.

124. *Id.* at 78.

125. *Id.* at 80–83.

126. *State ex rel. Stoll*, 117 Ohio St. 3d at 81.

127. *Id.* at 81–82.

that the Board of Township Trustees never certified to the Board of Elections that the petition was valid on its face, as required by state law.¹²⁸ “A single member of the board of township trustees does not constitute a board . . . and cannot act as the board.”¹²⁹

The court also noted that the filing at a personal residence with a trustee who had signed the petition and thus had an interest in the matter should not have been condoned by the Board of Elections.¹³⁰ The court said that “[a]s long as a petition is located in a private residence, the board’s construction would deprive electors and other interested persons of an initial opportunity to inspect the petition to determine whether it complies with applicable legal requirements.”¹³¹

C. *Ethnic Slurs*

Ethics problems arise when board members make comments that at worst can be construed as discriminatory, and at best can provide evidence of lack of impartiality. Sometimes these comments manifest themselves in the form of ethnic slurs uttered by members of local boards about applicants.¹³²

In a recent case, the plaintiff, a developer born in Italy, proposed to develop a five-acre parcel into fourteen single-family homes.¹³³ During negotiations with the municipality, the plaintiff had conversations with an Alderman regarding the naming of the street within the subdivision. It was suggested by the Alderman that nonprofit organizations be allowed to bid on the rights to name the street.¹³⁴ No official action was taken on the street naming, but the subdivision was approved subject to final engineering approval.¹³⁵ Following further discussions over the naming of the street, the plaintiff alleged that his project was being delayed because of discriminatory acts. Specifically, the plaintiff alleged

128. *Id.* at 84.

129. *Id.*

130. *Id.* at 82.

131. *State ex rel. Stoll*, 117 Ohio St. 3d at 82.

132. *See, e.g., Pirozzilo v. Berlin Inland Wetlands & Water Courses Comm’n*, 32 Conn. L. Rptr. 103 (Conn. Super. Ct. 2002). In *Pirozzilo*, an applicant’s engineer said to the Commission about his client: “[h]e has all these kinds of interesting ideas, being an Italian, I guess the Italians like gardens; I like gardens too.” A member of the Commission then engaged in the following dialogue with the engineer: “[s]ome Italians are wopsided.” The engineer replied “Lopsided?” and the commissioner said “Wopsided.” The engineer replied: “Wopsided, yes, O.K. got you.” The court found that the exchange indicated a lack of impartiality.

133. *Rante v. City of Wood Dale*, No. 05-C-2584, 2008 WL 345603, at *1 (N.D. Ill. Feb. 5, 2008).

134. *Id.*

135. *Id.*

that the Alderman stated, “[w]hy can’t we quit with all these Italians,” although the plaintiff acknowledged the comment was made in a joking tone.¹³⁶ The plaintiff, who desired to name the street after himself, also alleged that the Alderman told him that to name the street “‘Rante Circle’ was ‘too much Italian.’”¹³⁷

The court reviewed the videotape of the meeting and did not observe anyone make such a comment, nor any other comment that demonstrated an anti-Italian bias.¹³⁸ In fact, the court noted that “several comments were made concerning the ‘nice Italian theme’ of the subdivision.”¹³⁹ The court concluded that there was no evidence to support the allegation of discrimination based on national origin.¹⁴⁰ Furthermore, the court noted that under Illinois law, authority rests with the municipality to name streets and that the Alderman’s objection to the plaintiff naming the street after himself was not a violation of the law.¹⁴¹

V. Dual Office Holding

A number of states have constitutional or statutory prohibitions of dual office holding. For example, in Florida the state constitution provides that:

No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state. No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.¹⁴²

Laws like this one are designed to preclude an individual from simultaneously holding more than one public office. In other states, there are no constitutional prohibitions, but there may be statutory prohibitions that pertain to specific offices and/or there may be common-law prohibitions that typically focus on prohibiting public employees from holding two or more public positions where one is subservient to the other.¹⁴³

136. *Id.* at *2.

137. *Id.*

138. *Rante*, 2008 WL 345603, at *2.

139. *Id.*

140. *Id.* at *4.

141. *Id.*

142. FLA. CONST. art. II, § 5(a).

143. *See, e.g.*, La. Op. Att’y Gen. No. 04-0050, 2004 WL 799991 (Mar. 25, 2004) (involving a Louisiana statute that provides that the parish, school board, and any other unit of local government are considered to be separate political subdivisions and finding that a school board member could serve on the Parkway Commission so long as the

A. *Two or More Appointed Offices*

In Florida, the Attorney General was asked whether a building code administrator or inspector may also serve as a commissioner for a county special district.¹⁴⁴ In reviewing the applicable law to determine whether a particular position is an “office” or an employment, the Attorney General examined prior case law and its own opinions. Although the Attorney General said that a city building official, a Code Enforcement Board member, a Board of Adjustment board member and a member of a municipal Building Board of Appeals were “offices” for purposes of constitutional application, the Attorney General opined that this analysis was not required here because the state constitutional prohibition on dual office holding refers only to state, county or municipal offices, and it does not refer to special district offices.¹⁴⁵

The Palm Beach, Florida Town Council voted in February 2008 to adopt a policy providing that advisory board members may only serve on one board at a time.¹⁴⁶ The policy was precipitated after a member of the Code Enforcement Board announced that he planned to remain on that board while accepting an appointment to the Planning and Zoning Commission.¹⁴⁷ The town attorney did point to the constitutional prohibition in the state regarding dual service, but noted that there is an exception where one of the boards is entirely advisory, such as the zoning board in this town.¹⁴⁸

B. *Elected Offices*

Following the filing of an application to subdivide their property and prior to a hearing, the South Carolina property owners involved in a

appointment was on a part-time basis, but that a school board member could not serve simultaneously on the planning commission); Ark. Op. Att’y Gen. No. 2004-291, 2004 WL 2671455 (Nov. 29, 2004) (finding that the incompatibility doctrine would not automatically bar a planning board member from also serving as a school board member); Ohio Op. Att’y Gen. No. 2004-015, 2004 WL 839674 (Apr. 15, 2004) (reciting a seven-question test used to determine whether offices are incompatible and finding that a person may serve simultaneously as a trustee of a township that has not adopted a limited home rule government and as a member of the county rural zoning commission). *See generally* Anderson’s American Law of Zoning, §§ 19:18, 23:20 (discussing various rules prohibiting zoning board members and planning board members from holding incompatible offices).

144. Fla. Op. Att’y Gen. No. AGO 2008-06, 2008 WL 366608, at *1 (Feb. 8, 2008).

145. *Id.* at *2.

146. William Kelly, *Palm Beach Town Council Tells Martin Klein to Choose Between Zoning, Code Boards*, PALM BEACH DAILY NEWS, Feb. 27, 2008, available at <http://www.palmbeachdailynews.com/news/content/news/klein0227.html>.

147. *Id.*

148. *Id.*

recent case requested that a member of the City Planning Commission who had recently been elected to the state legislature in a special election recuse herself from the proceeding.¹⁴⁹ The Commission member refused the request and, following the hearing, the seven-member Commission voted unanimously to disapprove the subdivision application.¹⁵⁰ The applicants argued that the Commission member was required to recuse herself pursuant to constitutional and statutory provisions prohibiting dual office holding, and that therefore the decision should be reversed.¹⁵¹

The South Carolina Supreme Court disagreed.¹⁵² The applicable law provides that “[n]o member of a planning commission may hold an elected public office in the municipality or county from which appointed.”¹⁵³ The state constitution also prohibits dual office holding.¹⁵⁴ In the present case, while the Commission member had been elected to the state legislature, she had not yet taken an oath of office by the time of the hearing on the subdivision application.¹⁵⁵ The Legislative Ethics Committee had issued an advisory letter to the member indicating that since there were no statutory or constitutional provisions specifying when the winner of a special election begins their term of office, her term would not begin until she took the oath of office.¹⁵⁶ The South Carolina Supreme Court agreed with this opinion.¹⁵⁷ Further, the court noted that even if it were to conclude that the Planning Commissioner was holding an elective office, the fact that she participated in the hearing and the vote would not make the vote automatically void, and her participation would not violate the applicants’ due process.¹⁵⁸ Specifically, the court said that applicants could not prove that they were prejudiced by her participation since even without her vote, there were six other votes opposing the application.¹⁵⁹ The court also dismissed the appellants’ procedural due process claims as well as their takings claims.¹⁶⁰

149. *Kurschner v. City of Camden Planning Comm’n*, 656 S.E.2d 346, 348 (S.C. 2008).

150. *Id.* at 348.

151. *Id.* at 349.

152. *Id.*

153. *Id.* (citing S.C. CODE ANN. § 6-29-350(B) (2004)).

154. *Kurschner*, 656 S.E.2d at 349 (citing S.C. CONST. art. III, § 24, art. VI, § 3).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Kurschner*, 656 S.E.2d at 349.

160. *Id.* at 349–52.

VI. Conclusion

With no shortage of reported cases and opinions honing in on issues related to the ethical conduct of players in the land use game, and a dearth of newspaper accounts reporting on real or perceived conflicts of interest in land use decision making, land use attorneys are well advised to not only continue to conduct ethics checks on their own behavior, but to take the lead in educating and advising their clients about the importance of preserving the public trust in the land development process.

