



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

**Digital Commons @ Touro Law
Center**

Scholarly Works

Faculty Scholarship

2010

No Protectable Property Interest in Making Land Use Decisions and Other Ethics in Land Use Issues 2009-2010

Patricia E. Salkin

Touro Law Center, psalkin@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Land Use Law Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

42 Urb. Law. 649 (2010)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

No Protectable Property Interest in Making Land Use Decisions and Other Ethics in Land Use Issues 2009-2010

Patricia E. Salkin*

QUESTIONS SURROUNDING THE ETHICAL CONDUCT of players in the land use game arise on a frequent basis. For example, recently in Rhode Island, a question arose as to whether or not a private attorney, hired by the zoning board, could be subjected to the code of ethics or the conflict of interest provision.¹ A new ethics law in North Hampton has left zoning board members unsure how to enforce the new rules.² In Tracey, California, a former planning commissioner has been accused of influence peddling in attempts to site a medicinal marijuana dispensary;³ and Orangeville, New York, residents are challenging a wind ordinance alleging conflicts of interest on the part of town officials.⁴ Meanwhile in Baltimore, the resignation of the mayor after failing to disclose gifts she received from a developer has led to calls for changes in the city ethics law;⁵ and in Chicago, with a former alderman serving time for a zoning shakedown and another one on the way to prison, calls are underway to amend zoning application forms to provide for disclosure of conflicts of interest.⁶ Further, municipalities, mindful of the challenges conflicts

*Patricia E. Salkin is Associate Dean and the Raymond & Ella Smith Distinguished Professor of Law at Albany Law School where she is also director of the Government Law Center.

1. See Tom Egan, *R.I.'s State Ethics Board Says Lawyer Not Limited by Code of Ethics*, R.I. LAW. WKLY., Dec. 14, 2009, available at 2009 WLNR 25371508.

2. See Shir Haberman, *New Ethics Policy Leads to Top Story of 2009: Major Changes Take Place in North Hampton this Year*, SEACOAST ONLINE, Jan. 1, 2010, <http://www.seacoastonline.com/articles/20100101-NEWS-1010350>.

3. See Jennie Rodriguez, *Medical Marijuana Dispensary Efforts Stumble in Tracy*, RECORDNET, Feb. 18, 2020, http://www.recordnet.com/apps/pbcs.dll/article?AID=/20100218/A_NEWS/2180323.

4. See Matt Surtel, *Orangeville Wind Lawsuit Detailed*, DAILY NEWS ONLINE, Feb. 11, 2010, <http://thedailynewsonline.com/> (search for "Orangeville lawsuit"; follow "Orangeville wind lawsuit detailed" hyperlink).

5. See Julie Scharper, *Rawlings-Blake Proposes Changes on City Ethics Board*, BALT. SUN, Jan. 21, 2010, available at <http://www.baltimoresun.com/news/maryland/baltimore-city/bal-md.ci.ethics21jan21.0,3711721.story>.

6. See Fran Spielman, *Ald. Donny Solis Overhauling City Zoning Applications*, CHI. SUN-TIMES, Feb. 10, 2010, available at <http://www.suntimes.com/news/cityhall/2038944,CST-NWS-ethics10.article>.

of interest present, including the inability to obtain a quorum,⁷ continue to adopt local laws for the appointment of alternate members to planning and zoning boards.⁸ These are just some examples of the dozens of news accounts that surface weekly in media outlets across the country where alleged conflicts of interest and other ethical improprieties are lodged in the land use decision making process.

I. Conflicts of Interest

Actual or perceived conflicts of interest in the land use decision making context may arise in a variety of situations.⁹ The most obvious conflict is where a decision maker has a direct personal financial interest in the outcome of the decision. Less clear are scenarios involving potential benefits to family and friends that may or may not be financial in nature (e.g., making it easier to access shopping or other quality of life considerations for family members). In addition, decisions that might impact other economic interests, such as property values, can present difficult questions. Over the last year, courts have discussed alleged conflicts issues resulting from membership in advocacy organizations,¹⁰ the holding of another government office,¹¹ and proximity of family member property to the subject property.¹² Recent decisions also addressed the appropriate role of alternate board members, who are typically called into service when a "regular" board member has a conflict of interest,¹³ and the appropriate conduct of board members in situations where they have an acknowledged conflict of interest.¹⁴ What follows is a discussion of these cases.

7. See, e.g., David Bolling, *Council to Decide Dance School's Permit Appeal*, SONOMA NEWS, Feb. 15, 2010, available at <http://www.sonomanews.com/articles/2010/02/15/news/doc4b79d75913c60812779039.txt> (describing board members expressing the need to recuse themselves because of relationships with the applicant).

8. See John Davis, *Hyde Park to Appoint Stand-ins for Boards*, POUGHKEEPSIE J., Feb. 15, 2010, available at 2010 WLNR 3237912.

9. See generally 4 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING, §§ 38:1-23 (5th ed. 2009) (Ethics in Land Use).

10. See *Million Bucks, Inc. v. Borough of Seaside Park Zoning Bd. of Adjustment*, No. L-1621-08, 2009 WL 3762702 (N.J. Super. Ct. App. Div. Nov. 10, 2009).

11. See *Lent v. Town of Deep River Planning & Zoning Comm'n*, No. MMX-CV074006983S, 2009 WL 1663035 (Conn. Super. Ct. May 22, 2009); *Harrington v. N.Y. State Adirondack Park Agency*, 876 N.Y.S.2d 605 (N.Y. Sup. Ct. 2009).

12. *Dooley v. Planning & Zoning Comm'n*, No. TTDCV084010759S, 2009 WL 2037965 (Conn. Super. Ct. June 16, 2009).

13. *Komondy v. Zoning Bd. of Appeals*, 48 Conn. L. Rptr. 389 (Conn. Super. Ct. 2009).

14. *Cockerham v. Town of Montville Zoning Bd. of Appeals*, No. CV-05-4003702, 2009 WL 3738630 (Conn. Super. Ct. Sept. 30, 2009).

A. *Conflicts Based on Membership in
Advocacy Organization*

Membership in a local organization that had advocated against the operation of an applicant's business created a disqualifying conflict of interest. Following the alleged operation of a nightclub in violation of borough ordinances, a zoning/code enforcement officer issued a cease and desist letter. The nightclub appealed to the zoning board of adjustment, calling for the disqualification of eight out of nine board members because their association with the Taxpayers Association of Seaside Park (TASP) undermined the nightclub's opportunity for an objective and fair appeal. For years prior to the issuance of the cease and desist letter, TASP had argued that the operation of the nightclub was a detriment to the community. The court noted a prior case holding that "[a] conflict of interest arises when the public official has an interest not shared in common with the other members of the public,"¹⁵ and that a specific example of a disqualifying interest is "when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies."¹⁶ The court said that "[w]hether a board member should be disqualified 'depends upon the circumstances of each case.' . . . [and] disqualification requires more than 'some remote and nebulous interest.'"¹⁷ The court determined that "mere membership" was more than a "remote and nebulous interest" because members of TASP enrolled and paid fees, and had actively petitioned against the nightclub since 2004, and "[a] perceived conflict of interest is as harmful to the public's confidence in its representatives as the actual existence of such conflict."¹⁸ Since a conflict of interest was found, the court concluded that the proceedings must start over once replacement members are chosen.

This case is interesting for a number of reasons including that it raises the need for alternate members of the zoning board, and that it does not address prior case law in New Jersey applying the "rule of necessity"

15. *Million Bucks*, 2009 WL 3762702, at *7 (quoting *Haggerty v. Red Bank Borough Zoning Bd. of Adjustment*, 897 A.2d 1094, 1101 (N.J. Super. Ct. App. Div. 2006) (internal quotation marks omitted)).

16. *Id.* (quoting *Haggerty*, 897 A.2d at 1101) (internal quotation marks omitted)).

17. *Id.* (quoting *Van Itallie v. Borough of Franklin Lakes*, 146 A.2d 111 (N.J. 1958) (citations omitted)).

18. *Id.* (quoting *Barrett v. Union Twp. Comm'n*, 553 A.2d 62, 67 (N.J. Super. Ct. 1989)).

when more than a majority of the board membership is disqualified.¹⁹ Organizational memberships can be tricky. For example, the Montana Supreme Court concluded that there was no ethical violation where a county attorney served on the board of a non-profit organization that promotes sustainable development.²⁰

*B. No Conflict of Interest Based on
Government Employment*

Following a decision of the planning and zoning commission (PZC) that granted a special exemption application allowing co-defendant Haynes to excavate/quarry gravel on property owned by Incarnation, the PZC voted unanimously to approve the plan for an initial period of three years.²¹ Plaintiffs alleged that participation of Jonathan Kastner, the chairman of the PZC, was an illegal conflict of interest, because Kastner was a full-time employee of the town, and state law required cities to pass an ordinance specifically allowing municipal employees to serve on the board. The court found that Kastner did not have a personal interest in the PZC's vote, and plaintiffs had the burden of showing that Kastner had a personal bias or financial interest. The court noted that in a case pitting one property owner against another, the plaintiffs failed to show that Kastner would favor one over the other. Plaintiffs' assertion of bias was not supported with evidence. The plaintiffs also argued that Kastner's presence and participation in the public hearings invalidated the final decision. This argument failed because Kastner was in charge of the hearings, but his participation was not substantive and he did not advocate a position, ask substantive questions of those who testified, or attempt to influence the commission. Although he voiced a preference that the commission approve the application for an initial five years, the board only approved the application for three, and the court noted that this displayed how little influence he possessed. Finally, the Court noted that since all six members voted in favor, even if Kastner was disqualified, the overwhelming majority was still in favor.

In another case, property owners appealed the decision of Adirondack Park Agency's enforcement committee holding that a rock structure installed on property constituted a prohibited structure.²² They alleged

19. See *Gunthner v. Planning Bd.*, 762 A.2d 710 (N.J. Super. Ct. Law Div. 2000).

20. *Park County Concerned Citizens v. DePuy*, 190 P.3d 293 (Mont. 2008).

21. *Lent v. Town of Deep River Planning & Zoning Comm'n*, No. MMX-CV074006983S, 2009 WL 1663035 (Conn. Super. Ct. May 22, 2009).

22. *Harrington v. N.Y. State Adirondack Park Agency*, 876 N.Y.S.2d 605 (N.Y. Sup. Ct. 2009).

that the agency's attorney demonstrated bias in his interpretation and application of regulatory provisions. The court ruled that there were no specific factual allegations or proof of bias and the fact that the attorney's family members owned nearby property was not enough to demonstrate bias. The court held that the involvement of the Agency's attorney "in this enforcement proceeding did not constitute a conflict of interest arising from any personal bias."²³ Specifically, there was no proof or allegation that his participation in the administrative proceeding resulted in a biased decision, and an unfavorable decision alone does not substantiate claims of prejudice or bias.

Applicants commonly allege that government decision makers or others key to the land use process have competing interests in the outcome of an application or other decision. One recent case involved a county attorney's dual role in representing the board of county commissioners both in a quasi-judicial proceeding and as legal advisor during the deliberations,²⁴ and another dispute involved a town attorney counseling the zoning board and representing the town on the same matter.²⁵ These cases are especially important for the thousands of small municipalities who cannot afford separate legal counsel for their legislative bodies and all of their various boards, commissions, and departments. This costly expense does not, however, excuse the necessity for separate legal counsel when there are internal government conflicts of interest.

*C. Personal Interest in Outcome is Key Factor
to Finding Conflict*

Plaintiffs appealed the granting of a permit to extract gravel by the planning and zoning commission (PZC), alleging a conflict of interest because the mother and father-in-law of one of the PZC members had a connection to the property that adjoined the property in question.²⁶ The court did not find a conflict of interest because there was no evidence

23. *Id.* at 610.

24. *Davenport Pastures, LP v. Morris County Bd. of County Comm'rs*, 194 P.3d 1201, 1206 (Kan. Ct. App. 2008) (finding no evidence in the record to suggest that the attorney's actions created an appearance of impropriety, and noting that the plaintiff never asked the attorney to withdraw from the proceedings or asked the county to retain separate counsel).

25. *Nergaard v. Town of Westport Island*, 973 A.2d 735, 742 (Me. 2009) (finding no conflict, concluding that the Maine Bar Rules did not prohibit representation in this case since the zoning board is a branch of the town and the attorney was simply doing his job as the town's legal representative, and the attorney was not acting in a quasi-judicial capacity).

26. *See Dooley v. Planning & Zoning Comm'n*, No. TTDCV084010759S, 2009 WL 2037965 (Conn. Super. Ct. June 16, 2009).

that the board member had any personal interest in the outcome of the permit application. The court distinguished this situation from another instance where a member of a board that had denied a variance had in-laws living in close proximity to the property in question and expressed opposition to the project in question. Here, the in-laws never expressed an opinion on the permit application.

*D. Alternate Board Members Who Are Not Needed to
Serve May Not Participate in Deliberations*

There is little case law on the use of alternate members on planning and zoning boards,²⁷ but a recent Connecticut trial court opinion sheds some interesting light on the topic. The court held that unneeded alternate members of the zoning board attending a public hearing should not participate in deliberations, but if they do the court must inquire into the impact of that participation on the votes of the legally seated board members.²⁸

Following the denial of a variance application by the zoning board, the plaintiff objected because an alternate member of the board, whose service as a board member was not needed, attended the hearing and participated in the board's deliberations in violation of a state statute that discusses membership on the board and the role of alternates. The trial court agreed, holding that state law allowed for the seating of alternate board members only when a regular board member is absent.²⁹ The Connecticut courts analogized the use of alternate board members to alternate jurors, who also may not participate in deliberations unless they have been seated. However, where an unseated alternate did participate in the deliberations, as occurred here, there must be an inquiry into whether that alternate's views had a profound effect on those deliberations. In this case, although the alternate member participated in the deliberations, the court concluded that overall, her comments "do not appear to echo a sentiment that was inconsistent with the sentiments raised by the other [board] members."³⁰ Therefore, the alternate's par-

27. For a summary of laws and issues relating to the appointment of alternate members of planning and zoning boards/commissions see Patricia E. Salkin, *Planning for Conflicts of Interest in Land Use Decisionmaking: The Use of Alternative Members of Planning and Zoning Boards*, 31 REAL EST. L.J. 375 (2003), and Patricia E. Salkin, *Providing for Alternate Members on Planning and Zoning Boards: Drafting Effective Local Laws*, 61 PLAN. & ENVT. L. 3 (2009).

28. *Komondy v. Zoning Bd. of Appeals*, No. MMXCV0740066285, 2009 WL 2962162 (Conn. Super. Ct. 2009).

29. *Id.* (citing CONN. GEN. STAT. § 8-5 (2001)).

30. *Id.* at *4.

icipation did not have a “profound” effect upon the voting members, and the decision was made by the five voting board members.

*E. Board Action Not Invalidated Where Conflict
Made Known and Board Member Made
Effort Not to Participate*

Plaintiff filed two separate appeals with the zoning board on the same day concerning two separate properties.³¹ The zoning enforcement officer (ZEO) issued a permit for the construction of a single family residence for one of the parcels that contained an expiration date if the work was not yet completed. The day following expiration, the ZEO renewed the permit. Plaintiff appealed the renewal of the permit and requested that all improvements be removed. The board denied the appeal because “it was the same zoning permit, which was just continued.”³² A potential conflict of interest was alleged because one board member was a real estate agent who represented the estate of the prior owner of the property. The plaintiff contacted the board member when he first noticed activity on the adjoining property and her daughter was a witness on a deed to the sale of both properties. State law prohibited board members from participating in decisions where the member had a personal or financial interest.³³ Here, the board member made every effort to avoid participation in proceedings. She either was not present, or recused herself from every meeting and did not take part in the discussion or in any votes. The plaintiff claimed that the board member participated in a meeting when the board voted to schedule the plaintiff’s third appeal for a public hearing. The plaintiff’s attorney was present at that meeting and did not raise any objections. The court stated:

When plaintiffs, with full knowledge of the apparent conflict, and the opportunity to observe what was taking place, elected not to raise the issue, it must be concluded that either [the board member] did not participate in the vote or that plaintiffs elected to waive any possible impropriety on a routine procedural matter.³⁴

Furthermore, the municipal charter requires a board member with any interest in a matter to disclose it in writing, and then the member is disqualified from participating in the matter. A knowing violation constitutes a ground for appeal and nullifies board action. The board member did not comply with the charter since the disclosure was never made

31. *Cockerham v. Town of Montville Zoning Bd. of Appeals*, No. CV-05-4003702, 2009 WL 3738630 (Conn. Super. Ct. Sept. 30, 2009).

32. *Id.* at *4.

33. *Id.* at *5 (CONN. GEN. STAT. § 8-11 (2001)).

34. *Id.* at *6.

in writing, but since the conflict was known to all parties and the board member made an effort to not participate, the court concluded that it would be an “improper exaltation of form over substance to invalidate the actions of the Board on the basis of any violation of the Charter.”³⁵

II. Miscellaneous Ethics Allegations

A. *No Ethical Violation in Meeting with Applicant Before Submission Nor Based on Supervisor's Comments to the Media*

Following zoning board approval of a conditional use permit in December 2005, for a 225,000 square foot Wal-Mart Supercenter and Tire Lube Express Store, neighbors challenged the vote because one board member was replaced before a written decision was issued.³⁶ Voiding the replacement board member's vote would result in a tie. The court upheld the board's decision, holding that the final decision of the board occurred at an earlier meeting, and not the date the written decision with findings of fact was issued. The court relied in part on the Commonwealth's Open Meetings Law, stating,

To hold that the January 23, 2006, written decision was the final decision of the Board would vitiate the Sunshine Act's requirement that all official action, such as votes, take place at a public meeting. Finding that the written decision of a governing body is the final decision would open the door to a governing body voting one way at the open meeting and then issuing a written final decision at odds with the vote.³⁷

Project opponents also alleged that the township supervisor should have recused himself from voting because he had met with Wal-Mart representatives regarding possible development of the property prior to submission of Wal-Mart's application for a conditional use, and he made statements to local newspapers that he believed that the development's road improvements would improve traffic conditions. In acknowledging that the supervisor and staff met with Wal-Mart three times before an application was submitted, the court found that state law only prohibits communications between the board and parties to a hearing only after commencement of the hearing. With respect to the supervisor's statements to local newspapers, the court said that this cannot necessarily be interpreted as support for the development. The supervisor “merely noted his belief that traffic conditions would improve if the property was developed. He did not state that the property should be

35. *Id.* at *7.

36. *In re Arnold*, 984 A.2d 1 (Pa. Commw. Ct. 2009).

37. *Id.* at 3.

developed, a statement which would have indicated prejudgment or a degree of actual bias.”³⁸

Statements in the media either as reported by a journalist or printed in writing by a decision maker in the land use process cause difficulties between First Amendment rights of government officials and the public perception that the decision maker will remain unbiased throughout the information gathering phases of application review. In a recent case involving a controversial quarry and rock crusher, the planning board chair was accused of bias for statements the newspaper attributed to him before the hearing because he allegedly “express[ed] disdain for the land use ethic of people ‘from away.’”³⁹ Although the board chair may have been predisposed to act, that did not equate to bias.

*B. Membership on Board is Not a Protectable
Property Interest When it
Comes to Removal*

Removal of members of planning and zoning boards is a delicate subject because most enabling statutes providing for the term appointment of these members either fail to address removal or simply provide that removal shall be “for cause.” Exactly what constitutes “cause” is vague. On the spectrum of possibilities, it seems appropriate to equate “cause” with failure to attend board meetings (and often times this requirement will appear in board by-laws). Beyond this objective measure, most other actions are subjective in nature, for example, conduct at meetings, opinions about certain issues or community goals (whether or not these goals are shared by the community through official documents such as a comprehensive plan), and votes cast on individual project applications. These latter types of actions often result in calls for removal based on disagreement of opinion and therefore performance. What follows is a recent discussion of whether the holder of an appointed position has a property interest in that volunteer post. The opinion does not address appropriate grounds for removal, leaving that discussion for another day.

Closson was appointed to the planning and zoning commission in 1997 and in 2005 he was elected by the commission to serve as chairman.⁴⁰ He was reelected as chairman in 2006 and 2007, and in 2007 he was reappointed by the Board of Selectmen to the commission. In 2008,

38. *Id.* at 9.

39. *Lane Constr. Corp. v. Town of Wash.*, 942 A.2d 1202, 1211 (Me. 2008).

40. *Closson v. Board of Selectmen*, No. 3:08-cv-01031 (VLB), 2009 WL 1538138 (D. Conn. June 1, 2009).

the Board of Selectmen sent Closson a letter informing him that the board intended to remove him for cause citing various alleged failures to amend the plan of conservation and development. The board held a hearing on the removal, and Closson presented evidence in his defense and argued that his performance was satisfactory. Two weeks later, the board voted to remove Closson, and a week later he filed a lawsuit in state court alleging due process violation. The suit was removed to federal court.

On a motion to dismiss, the town argued that Closson had no property interest in a voluntary, appointed, unpaid position as a commission member, and that he did receive due process regarding his removal. The federal district court concluded that Closson did have a property interest in the appointed position, citing Connecticut state case law holding that an appointed fire marshal who received \$70 per month and could only be removed for cause had a continuing property interest in the appointment. Under the town charter, Closson could only be removed for cause. The court said, "it seems unlikely that Closson's position as an unpaid, rather than minimally paid, appointee would change the Connecticut Supreme Court's determination that such positions are property under Connecticut law."⁴¹ The court then considered whether Closson's property interest rose to the level of a federally protected interest. While the Second Circuit had held that municipal board members do not enjoy federal constitutional protections of their positions,⁴² Closson argued that his position was appointed and not elected and therefore a different standard applied. The federal district court, however, concluded that there is no federal due process protection for an unpaid, volunteer position on a municipal board, whether elected or appointed.

C. Planner's Conflict of Interest Does Not Require

Submission of New Application

Plaintiffs appealed the grant of a preliminary major subdivision alleging, among other things, that the township planner had a conflict of interest because the initial environmental impact statement (EIS) was prepared by the planner prior to her appointment as planner.⁴³ After being informed that the 12.46-acre tract contained wetlands of intermediate resource value, the developer revised his subdivision plan to

41. *Id.* at *2.

42. *See Velez v. Levy*, 401 F.3d 75 (2d Cir. 2005).

43. *Klug v. Bridgewater Twp. Planning Bd.*, 968 A.2d 1230 (N.J. Super. Ct. App. Div. 2009).

request eight lots instead of nine. The now appointed township planner attended hearings on the application but did not participate, and her written input did not address the merits of the application.⁴⁴ The board approved the application.

The trial court vacated, stating that the board's discretion was limited because the plan did not require any variance or waiver, but that the planner's involvement constituted a potential conflict of interest. The court ordered remand without consideration of the EIS or a memo written by the planner. On remand, a newly constituted board retained a special planner, who reported that no waivers or variances were needed, obtained a new EIS, and approved the application subject to conditions. The trial court upheld the approval and the appeals court affirmed, holding that the board considered ample evidence and that the approval was not arbitrary. The prior decision vacating the approval did not require that the developer file a new application. The court said that there was no doubt that the township planner had a conflict of interest, and that the inquiry before the court concerns the appropriate remedy. The court declined to require a complete "do over" of the application review, because they have flexibility in fashioning remedies under the Local Government Ethics Law. Noting that in this case there was no direct financial conflict or direct participation in consideration of the application, and that a newly constituted board (all members except for one were new and had not ruled on the previous application) found the new EIS (which the township planner was not involved with) was credible, the appeals court concluded that the decision below maintained the integrity of the process.

*D. Failure of Board Members to File Financial
Disclosure and Oath of Office Statements
Did Not Void Denial of Special Exception*

Following the denial of a request for a special exception for construction of ninety-two single family homes, applicants appealed.⁴⁵ Pending a remand from the Pennsylvania Supreme Court to determine if the matter should be reopened because of newly discovered evidence (the deposition testimony of a board member alleging that other board members adopted an unwritten policy whereby they sought to deny appellants' special exception application by improperly imposing requirements

44. *Id.*

45. *Quest Land Dev. Group v. Twp. of Lower Heidelberg*, 971 A.2d 540 (Pa. Commw. Ct. 2009).

upon the appellants), the applicant filed the present lawsuit, claiming that three members of the board were in violation of the Public Official and Employee Ethics Act.⁴⁶ The Ethics Act requires board members to file a statement of financial interest, which must be filed before a public official is permitted to take an oath of office. The complaint alleged that the board members had failed to file statements of financial interest and failed to take and file the required oath of office. The township asserted that these requirements were merely ministerial and that lack of compliance did not negate the decisions rendered. Further, the township argued that the board members acted as “de facto” officials and that under the de facto officer doctrine, their actions should be upheld. The appeals court explained that in Pennsylvania:

Under the *de facto* doctrine, the official acts of one who acts under the color of title to an office are to be given the same effect as those of a *de jure* official. The acts of de facto officials that are performed under the color of title are valid with regard to the public, even if their election or appointment was irregular or illegal.⁴⁷

In affirming the decision below, the appeals court noted that the alleged violations did not touch on constitutional rights, such as notice or due process. Further, the appropriate remedy for alleged failure to file matter is a *quo warranto* proceeding, not a collateral challenge as here. The court concluded that the board members acted as “de facto” officials and their actions were valid despite the irregularity.

*E. Deposition of Board Member Allowed When There
is Personal Interest in the Outcome of Matter
Before Board*

In determining whether a deposition of a board member should be allowed, a Connecticut court found that one consideration is whether a board member had a personal interest in the outcome of a matter before the board.⁴⁸ The court recognized that it is extremely hard to prove bias, but “the mere fact that there may be difficulties of proof at trial do not justify barring a litigant from having the ability to raise the issue which is often dependant on discovery procedures by ruling out discovery.”⁴⁹ Furthermore, “there is a need to have this deposition to assure that citizen litigants, in matters important to their lives and businesses, are al-

46. *Id.* at 542-43 (citing 65 PA. CONS. STAT. § 1104 (2009)).

47. *Id.* at 544 (quoting *Ucheomumu v. County of Allegheny*, 729 A.2d 132, 135 (Pa. Commw. Ct. 1999)).

48. *Caruso v. Meriden Zoning Bd. of Appeals*, Nos. CV084033705, CV084033587, 2009 WL 2453834 (Conn. Super. Ct. July 14, 2009).

49. *Id.* at *1.

lowed to explore the possibility of bias where there is a reasonable need to make the inquiry.”⁵⁰

This case is interesting when compared to a recent California case holding that applicants cannot take depositions to prove prejudice.⁵¹ That court held that a “disappointed” applicant could not take depositions of commission members or staff to learn what information outside of the record the commissioners had when they denied the application.

*F. Prudent Precautions by Government Officials
Avoided Prejudice in Pending Lawsuit*

Plaintiff, a principal of a development company that obtained the right to acquire land and develop residences, was scheduled to meet with the town’s Board of Selectmen to extend the town’s sewer system to the land being developed.⁵² The meeting was delayed when it was learned that the plaintiff had a pending lawsuit against a police officer. The board then met with the plaintiff and rejected his request by a 5-0 vote. Plaintiff alleged that the board rejected the sewer extension in retaliation for the lawsuit. Following filing of the suit, plaintiff requested a meeting with the town’s Director of Planning and Zoning. On the advice of counsel, the director notified plaintiff that all communication would have to be done in writing. Plaintiff then filed a second suit alleging that the town’s official refusal to meet with him was “a retaliatory deprivation of his First Amendment right to petition the government and a violation of his Fourteenth Amendment equal protection rights.”⁵³

The trial court dismissed the first lawsuit and the Fourteenth Amendment claim. The jury found in plaintiff’s favor on the First Amendment claim and awarded \$1 in damages. The defendant filed a Rule 50 motion, and the court granted it stating that “the plaintiff’s evidence did not reasonably support a verdict in his favor.”⁵⁴ The appellate court affirmed, noting that the plaintiff had no business with the town nor did he have specific business with the town that warranted a meeting. While the First Amendment prohibits retaliation against an individual who exercises his right to sue the government, a government official is not expected “to behave with a litigation adversary exactly as they would

50. *Id.*

51. *See San Joaquin Local Agency Formation Comm’n v. Superior Court*, 76 Cal. Rptr. 3d 93 (Cal. Ct. App. 2008).

52. *Tuccio v. Marconi*, 589 F.3d 538, 539 (2d Cir. 2009).

53. *Id.* at 540.

54. *Id.*

if the person were not a litigation adversary.”⁵⁵ The court found that the town officials’ precautions were reasonable and prudent to avoid prejudice in the pending suit, especially when the plaintiff suffered no harm. Furthermore, the floodgates of litigation would open if government officials that take such prudent precautions were open to a subsequent suit for unconstitutional retaliation.

*G. Tangential Relationship without Bias, Prejudice or
Prejudgment is Insufficient to Warrant Recusal*

The county zoning administrator granted a zoning permit for the construction of a proposed wind energy facility.⁵⁶ An objector appealed to the zoning hearing board (ZHB) claiming that the application contained twenty-eight deficiencies, and the ZHB dismissed the appeal.⁵⁷ The objector appealed, claiming that the application was deficient and that his due process rights were violated because the same law firm represented the county and the applicant. The court found that “a tangential relationship between a tribunal member and the litigation, without evidence of bias, prejudice, capricious disbelief or prejudgment, is insufficient to warrant recusal.”⁵⁸ The ZHB, not the County Commissioners, reviewed the grant of a permit to the applicant, and since the applicant’s attorney did not represent the ZHB, no conflict existed.

*H. Dual-Office Holding—Planning and Zoning
Commission Member and Membership on
School Board are Compatible Offices*

The Mississippi Attorney General opined that the same person may hold positions on the board of trustees of a public school district and on the planning and zoning commission.⁵⁹ The Attorney General noted that the same person can hold two appointed board positions within the same branch of government; a state constitutional prohibition of dual office-holding applies to service in two different *branches*. Prior opinions have determined that a school board member serves in the executive branch of government, and the Attorney General opined that the planning and zoning commission also serves the executive branch.

55. *Id.* at 541.

56. *Piccolella v. Lycoming County Zoning Hearing Bd.*, 984 A.2d 1046, 1049 (Pa. Commw. Ct. 2009).

57. *Id.*

58. *Id.* at 1057.

59. *See Op. Att’y Gen. No. 2009-00435*, 2009 WL 2517302 (Miss. A.G. July 31, 2009).

Therefore, there is no separation of powers problem with the same person holding both offices. Lastly, state law provided that no municipal employee can be appointed to the board of trustees.⁶⁰ Because the Attorney General opined that members of municipal planning and zoning commissions are not municipal employees, that state prohibition does not apply and the two positions are compatible.

60. *Id.* at *2 (citing MISS. CODE ANN. § 25-1-53 (West 1994)).

