

IMLA Conflicts of Interest Outline
September 11, 2017

I. Conflict of Interest Rules

A. Illustrative Applications in Land Use Context

1. Rezoning
2. Special use permits, variances
3. Administrative approvals

B. Source of Rules

1. Constitutional due process limits
2. Common law
3. General statutory provisions
4. Zoning specific statutory provisions
5. Ordinance limitations
6. Rules of procedure and codes of conduct
7. Professional standards

II. Distinctions for Legislative, Quasi-judicial, Administrative, Advisory Decisions

A. Legislative – Exception to rule against inquiry into motive

Ga. Code Ann. § 36-67A-2 (rezonings) --member must disclose personal, business, or family's ownership of property subject to rezoning, not vote, nor take any action to influence outcome

N. C. Gen. Stat. § 160A-381(d) -- legislative and advisory zoning decisions) -- abstain if outcome "is reasonably likely to have a direct, substantial, and readily identifiable financial impact on the member"

Proposed N.C. Gen. Stat. § 160D-1-9 (S. 419, 2017 N.C. Legislative Session) – specific conflict of interest rules for all local development regulation decisions, organized by type of board and type of decision

B. Quasi-judicial – due process considerations of impartiality

N. C. Gen. Stat. § 160A-388(e)(2) (quasi-judicial zoning decisions) -- member "shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision maker. Impermissible violations of due process include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter."

N.H. Rev. Stat. Ann. § 673:14 -- member of planning board or zoning board of adjustment shall not participate in deciding or sit upon the hearing of a quasi-judicial matter if the member "has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law."

Rev. Code Wash. § 42.366.010 – Appearance of fairness doctrine applies to quasi-judicial land use decisions, but not to legislative zoning decisions

C. Administrative

Families of Manito v. City of Spokane, 291 P.3d 930 (Wash. Ct. App. 2013) – Appearance of fairness doctrine does not apply to administrative zoning decision made without a hearing (here approval of a site plan for additional parking based on ordinance standard for calculation)

III. Application to Various Types of Conflicts

A. Financial

1. Pecuniary interest in outcome – direct/indirect, substantial/incidental

Cal. Gov. Code § 87100 – public official shall not in any way attempt to use position to influence a governmental decision in which the official knows or has reason to know of a financial interest; § 87103 – financial interest where it is reasonably foreseeable that decision will have a material financial effect on member or member’s immediate family

Conn. Gen. Stat. Ann. §8-11, § 8-21 -- zoning board member shall not participate in “any matter in which he is directly or indirectly interested in a personal or financial sense”

Ind. Code Ann. § 36-7-4-223 (plan commission and legislative body), § 36-7-4-909 (board of zoning appeals) -- member not participate if biased or has a “direct or indirect financial interest” in the outcome

Wyman v. Popham, 312 S.E.2d 795 (Ga. 1984) – Allegation that that board members had substantial business dealings with applicant for rezoning raises potential for fraud and corruption, which must be shown by preponderance of evidence

2. Gifts and favors -- distinguishing criminal bribery and pay-to-play from permissible gifts

B. Relationship with Parties

1. Business

Mt. Hill, L.L.C. v. Township Comm. of Tp. of Middletown, 958 A.2d 1 (N.J. Super. Ct. App. Div. 2008) -- mayor disqualified from voting because she owned a title company that performed title insurance work for developer when developer was acquiring land before submitting first of several applications for development permits; mayor had terminated business relationship four years earlier

Taylor v. Town of Wakefield, 959 A.2d 217 (N.H. 2008) -- mere fact that member of zoning board of adjustment was a former employee of former owner of lot involved in waiver request is not disqualifying

Best v. La Plata Planning Comm’n, 701 P.2d 91 (Colo. App. 1984) – Fact that board member’s former law firm represented developer does not create conflict of interest in a quasi-judicial decision

2. Family

Randolph v. City of Brigantine Plan. Bd., 963 A.2d 1224 (N.J. Super. Ct. App. Div. 2009) - Approval by city planning board of preliminary site plan application voided where chairwoman and owner of the engineering firm that employed engineer who reviewed the application for the city had been living together for ten years and

jointly owned a home; in the eyes of the public, relationship could reasonably be expected to impair her objectivity or independence

Thorne v. Zoning Comm'n of Town of Old Saybrook, 423 A.2d 861 (Conn. 1979) –

Improper for board member to participate in consideration of rezoning from commercial to residential where property affected was adjacent to homes of his parents and sister and member had previously expressed opposition to commercial uses in area

3. Associational

Hughes v. Monmouth Univ., 925 A.2d 741 (N.J. Super. Ct. App. Div. 2007) – Members of zoning board reviewing site plan did not have conflict of interest based on alumni status or children attending university, as none were active in University activities or held position with University

Grabowsky v. Township of Montclair, 115 A.3d 815 (N.J. 2015) -- When a church or other organization owns property within 200 feet of a site that is the subject of a zoning application, public officials who currently serve in substantive leadership positions in the organization, or who will imminently assume such positions, are disqualified

IV. Related Conflict and Ethics Issues

A. Bias – predisposition, distinguished from ideological leanings

Campbell v. City of Statesville, No. COA16-101, 2016 WL 5746408 (N.C. Ct. App. Oct. 4, 2016) -- council member who formerly led neighborhood opposition to project cannot participate in consideration of SUP for truck stop

Commonwealth v. Veon, 150 A.3d 435 (Pa. 2016) --Intangible political gain could not constitute private pecuniary gain

Breakstone Billiards v. City of Torrance, 81 Cal. App. 4th 1205 (Cal. Ct. App. 2000) –_fact that city council members hearing CUP received campaign contributions from applicant's landlord more than 12 months earlier not a conflict

B. Improper use of position – inside knowledge, undue influence

65 Pa. Stat. and Consol. Stat. Ann. § 1103 -- prohibition of solicitation or receipt of gifts and loans to influence decision, contingent employment, contracts, one year waiting period for representation, abstention from voting

C. Secondary employment, dual representation

Walden Federal Savings and Loan Assoc. v. Village of Walden, 212 A.2d 718 (N.Y. App. Div. 1995) – Where law firm drafted code provisions on site plan review, firm precluded from representing client in suit challenging the ordinance six years later given it is reasonable to infer it gained some confidential information in its initial representation

V. Actual vs. Apparent Conflict

Daly v. Town Plan Comm'n, 191 A.2d 250 (Conn. 1963) – avoid even appearance of conflict to protect public confidence in integrity of zoning decisions

Haggerty v. Red Bank Borough Zoning Bd. of Adjustment, 897 A.2d 1094 (N.J. Super. Ct. App. Div. 2006) – key issue is potential for conflict, not actual conflict

Tuxedo Conservation and Taxpayers Ass'n v. Town Bd. of Town of Tuxedo, 408 N.Y.S.2d 668 (N.Y. App. Div. 1979) – apparent conflict where board member employed by advertising company that had applicant's parent company for a client

Buell v. City of Bremerton, 495 P.2d 1358 (Wash. 1972) – necessary that planning commission members be “open-minded, objective, impartial, free of entangling influences” both in fact and in appearance

VI. Remedies

A. Disclosure

N.Y. Gen. Mun. Law § 809 --mandates that applications for many development approvals disclose public officials and their family members who have an interest in the project

Va. Code Ann. § 15.2-852 -- mandates board member disclose “any business or financial relationship which such member has, or has had within the 12-month period prior to such hearing,” with the applicant, land owner, agent, attorney or real estate agent.

Ga. Code Ann. § 36-67A-3 – Applicant for rezoning must disclose campaign contributions of \$250 or more in previous two years

B. Abstention from voting

Lewis v. Benton Cnty, 436 S.W.3d 181 (Ark. Ct. App. 2014) – permissible for planning board member to abstain from voting but then offer testimony against permit as neighboring witness

C. Recusal from any participation

Idaho Code Ann. § 67-6506 – member of governing board, planning commission, or zoning commission with economic interest in outcome must disclose interest and not participate in deliberations or vote

Or. Rev. Stat. Ann. § 244.120 – If official has actual conflict, announce it and not participate, except if “any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.”

D. Invalidation of action taken – always or if vote dispositive

VII. Education

A. Board Members

UNC SOG eLearning module on conflicts of interest: click [here](#) (available free 9/11/17 to 9/29/17) (<http://bit.ly/icma-coi>)

Ada County, Idaho complaint form re board conflict:

<https://adacounty.id.gov/Portals/0/DVS/Admin/Doc/Conflict%20of%20Interest%20Complaint%20Form.pdf>

B. Parties

C. Public

References

Note: Click **bolded items** for link to texts

Statutes

Cal. Gov. Code **§§ 87100, 87103**
Conn. Gen. Stat. Ann. **§8-11**, § 8-21
Ga. Code Ann. **§ 36-67A-2**
Idaho Code **§ 67-6506**
Ind. Code Ann. **§ 36-7-4-223**
Ky. Rev. Stat. **§ 100.171** (planning commission); **§ 100.221** (board of adjustment)
N.C. Gen. Stat. **§ 160A-381(d)**
N.C. Gen. Stat. **§ 160A-388(e)(2)**
N.C. Gen. Stat. **§ 160D-1-9 (proposed, S. 419, 2017)**
N.J. Stat. Ann. **§ 40:55D-69** (board of adjustment)
N.H. Rev. Stat. Ann. **§ 673:14**
Or. Rev. Stat. Ann. **§ 244.120(2)**
65 Pa. Stat. and Consol. Stat. Ann. **§ 1103**
Va. Code Ann. **§ 15.2-852**
Rev. Code Wash. **§ 42.366.010**

Cases

Best v. La Plata Planning Comm'n, 701 P.2d 91 (Colo. App. 1984)
Breakstone Billiards v. City of Torrance, 81 Cal. App. 4th 1205 (Ca. Ct. App. 2000)
Buell v. City of Bremerton, 495 P.2d 1358 (Wash. 1972)
Campbell v. City of Statesville, No. COA16-101, 2016 WL 5746408 (N.C. Ct. App., Oct. 4, 2016), *rev. denied*, 795 S.E.2d 874 (N.C. 2017)
Commonwealth v. Veon, 150 A.3d 435 (Pa. 2016)
Daly v. Town Plan Comm'n, 191 A.2d 250 (Conn. 1963)
Families of Manito v. City of Spokane, 291 P.3d 930 (Wash. Ct. App. 2013)
Grabowsky v. Township of Montclair, 115 A.3d 815 (N.J. 2015)
Haggerty v. Red Bank Borough Zoning Bd. of Adjustment, 897 A.2d 1094 (N.J. Super. Ct. App. Div. 2006)
Hughes v. Monmouth Univ., 925 A.2d 741 (N.J. Super. Ct. App. Div. 2007)
Lewis v. Benton Cnty., 436 S.W.3d 181 (Ark. Ct. App. 2014)
Mt. Hill, L.L.C. v. Township Comm. of Tp. of Middletown, 958 A.2d 1 (N.J. Super. Ct. App. Div. 2008)
Randolph v. City of Brigantine Plan. Bd., 963 A.2d 1224 (N.J. Super. Ct. App. Div. 2009)
Taylor v. Town of Wakefield, 959 A.2d 217 (N.H. 2008)
Thorne v. Zoning Comm'n of Town of Old Saybrook, 423 A.2d 861 (Conn. 1979)
Tuxedo Conservation and Taxpayers Ass'n v. Town Bd. of Town of Tuxedo, 408 N.Y.S.2d 668 (N.Y. App. Div. 1979)
Walden Federal Savings and Loan Assoc. v. Village of Walden, 212 A.2d 718 (N.Y. App. Div. 1995)

Wyman v. Popham, 312 S.E.2d 795 (Ga. 1984)

Secondary Sources

Code of Ethics, American Institute of Certified Planners (2016)

Cordes, Mark W., *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D.L. Rev. 161 (1989)

Dyas, Eric, *Conflicts of Interest in Planning and Zoning Cases*, 17 J. Legal Prof. 219 (1992)

Salkin, Patricia & Bailey Ince, *It's a "Criming Shame": Moving from Land Use Ethics to Criminalization of Behavior Leading to Permits and Other Zoning Related Acts*, 46 Urb. Law. 249 (2014)

Salkin, Patricia E., *Further Developments in Land Use Ethics*, 47 Urb. Law. 739 (2015)