

# *Fordham Urban Law Journal*

---

*Volume 26, Number 5*

1998

*Article 3*

---

## 1998 Survey of Ethics in Land-Use Planning

Patricia E. Salkin\*

\*

Copyright ©1998 by the authors. *Fordham Urban Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ulj>

# 1998 Survey of Ethics in Land-Use Planning

Patricia E. Salkin

## **Abstract**

Beginning from the premise that 1998 saw an increase in the number of land-use ethics cases, this Article describes the issues and problems that relate to ethics in land-use cases by breaking them into four separate categories: conflicts of interest, compatibility of office, bias and prejudgment, and miscellaneous. The conflicts of interest section describes cases involving financial gain for oneself, a family member or a business associate. The compatibility of office section describes situations where a person holds multiple public offices and the conflicts in duty that might arise. The bias and prejudgment section describes situations where a person's predetermined position on a matter may disqualify individuals from making land-use decisions. Finally, the miscellaneous section deals with the issues of clients of governmental lawyers, the resignation of a local position as part of a state ethics agreement, and appearances by a governing body of a municipality before a zoning board.

**KEYWORDS:** land use, ethics, zoning

# 1998 SURVEY OF ETHICS IN LAND-USE PLANNING

*Patricia E. Salkin\**

## Introduction

The activities currently taking place in Washington, D.C. remind the American public of the importance of public sector ethics. From the appointment of an independent counsel to unprecedented decisions by the federal courts,<sup>1</sup> it is clear there is heightened media and citizen attention to questions related to ethics. Despite the sensationalism with which they are often handled, these scandals involving public officials actually help to open the door for greater governmental scrutiny and reform efforts.<sup>2</sup>

Meanwhile, what happens on the national scene clearly has implications for activities at the local government level, including situations surrounding land-use planning and zoning decision-making. This impact is evident by the increase in the number of land-use ethics cases reported in 1998.<sup>3</sup> When considering the range of ethics issues that may confront land-use lawyers,<sup>4</sup> it is no surprise that 1998 yielded a number of reported decisions and published opinions from across the country. The issues these opinions address can be divided into several major categories: 1) conflicts of interest, 2) compatibility of office, 3) bias and prejudice and 4) miscellaneous.

---

\* Associate Dean and Director, Government Law Center of Albany Law School.

1. See, e.g., *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 122 F.3d 910 (8<sup>th</sup> Cir. 1997).

2. See JOSEPH ZIMMERMAN, *CURBING UNETHICAL BEHAVIOR IN GOVERNMENT* (1994).

3. This author conducted a similar survey last year that included a review of all land-use ethics cases and opinions in the 1990s. See Patricia E. Salkin, *Legal Ethics and Land-Use Planning*, 30 *URB. LAW.* 383 (1998), reprinted in MATTHEW BENDER, *THE TWENTY-EIGHTH ANNUAL INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN* (1998).

4. Arising issues include questions of professional ethics under professional codes of responsibility, local and state ethics laws and judicial decrees that bear on the moral conduct of public sector attorneys. See *id.*

## II. Conflicts of Interest

The amount at stake, from both a financial standpoint and a quality of life perspective, when planning and zoning boards make land-use decisions places these actions under increased scrutiny, including an intensive search for possible violations of ethical standards.<sup>5</sup> Conflicts of interest cases most often arise where there is potential of financial gain for oneself, a family member or a business associate.

### A. Personal Financial Gain

Several 1998 cases illustrate how individuals perceive the use of land-use decisionmaking to personally profit. For example, a California citizen challenged a zoning board's development decision, claiming that a board member owned real property in the vicinity of where the proposed project was to be located.<sup>6</sup> Although the court decided the case on procedural grounds — that the longer statute of limitations under the California Political Reform Act<sup>7</sup> did not apply to an appeal of a zoning decision — the litigation illustrates the type of ethics-related allegations that may be employed to overturn an unpopular decision.<sup>8</sup>

Similarly, a Connecticut appellate court upheld a challenge by abutting property owners to a zoning commission's decision to grant a permit allowing a skeet shooting range on a sporting club's property. The court rationalized that an *ex officio* member of the commission failed to disqualify himself from the proceedings.<sup>9</sup> Connecticut statutes specifically prohibit member participation on zoning boards when a direct or indirect conflict of interest exists, stating that "No member of any zoning commission or board . . . shall participate in the hearing or decision of the board or commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense."<sup>10</sup>

---

5. See Patricia E. Salkin, *Ethics and the Land-Use Lawyer*, 5 LAND-USE L. & ZONING DIG. 3 (1997).

6. See *Ching v. San Francisco Bd. of Permit Appeals*, 60 Cal. App. 4th 888 (Cal. Dist. Ct. App. 1998).

7. The Political Reform Act provides that, "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." CAL. GOV'T CODE § 87100 (West 1993).

8. See *Ching*, 60 Cal. App. 4th at 888.

9. See *Nazarko v. Conservation Comm'n*, 717 A.2d 850 (Conn. App. Ct. 1998).

10. CONN. GEN. STAT. § 8-11 (1989). With respect to conservation commissions, Connecticut legislation provides, in part, that: "[n]o member or alternate member of such board or commission shall participate in the hearing or decision of such board or

Although the relevant statute did not specifically mandate application to *ex officio* members of commissions, the court resolved the ambiguity in adopting the “more reasonable construction” of the statute and “repeatedly emphasized that “[n]eutrality and impartiality of members are essential to the fair and proper operation of . . . [zoning] authorities.’”<sup>11</sup> Further, while the *ex officio* member of the commission only attended two of the three hearings and did not participate in the voting, the court concluded his mere presence constituted a prohibited conflict of interest because he held a membership in the sporting club and owned the only gun shop in town.<sup>12</sup>

In another 1998 Connecticut case, a plaintiff, after being denied site plan approval by the zoning commission, argued the decision should be null and void based on alleged conflict of interest and predisposition of certain board members.<sup>13</sup> In this situation, a board member owned a campground across the street from the plaintiff’s proposed bituminous concrete manufacturing site. The member questioned the legality of the proposed use under the zoning code, initiated conversations regarding such with the town planner and the town attorney, procured an engineering firm to review the application and participated in one meeting. Despite these zealous efforts, the member later withdrew from the commission and did not personally participate in the hearing on the site plan application.<sup>14</sup> The court found nothing in the statute that prohibits a member not participating in a matter from presenting their own view on the subject.<sup>15</sup> Accordingly, the court concluded that

---

commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense.” *Id.* § 22(a)-42(c) (1995).

11. *Nazarko*, 717 A.2d at 852 (quoting *Fletcher v. Planning & Zoning Comm’n*, 264 A.2d 566, 571 (1969)).

12. *See id.* The court reiterated that “[t]he decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case.” *Id.* at 853 (citing *CONN. GEN. STAT. §§ 8-11, 8-21*). The court also noted “the appearance of impropriety created by a public official’s participation in a matter in which he has a pecuniary or personal interest in is sufficient to require disqualification . . .” *Id.* at 852. “Public policy requires that members of public boards cannot be permitted to place themselves in a position in which personal interest may conflict with public duty.” *Id.* at 853 (citing *Zeigler v. Thomaston*, 654 A.2d 392, 397 (Conn. Super. 1994)).

13. *See Phillips v. Town of Salem Planning & Zoning Comm’n*, No. 113120, 1998 WL 258332 (Conn. Super. Ct. 1998).

14. *See id.* at \*2. She was, however, represented by counsel at the hearing on the matter.

15. *See id.* at \*10 (citing *Massimo v. Planning Comm’n*, 564 A.2d 1075-76 (Conn. Super. Ct. 1989)).

although the board member had a direct personal, and possibly financial, conflict of interest, she did not violate the statutory provisions because she withdrew from the board on the matter.<sup>16</sup>

### B. Family Relationships

Cases from 1998 also show that the public is concerned that individuals use zoning decisionmaking to assist financial prospects of close family members. Two New Jersey cases involved alleged conflicts of interest based on familial relationships, yet the courts reached opposite conclusions based upon the facts therein. Both cases involved benefits of a proposed siting to a board member's elderly parents.<sup>17</sup> In one case, plaintiffs alleged that a board member could not remain impartial in considering a site application because he would personally benefit from the proposed supermarket construction. The alleged benefit was that the board member would no longer have to assist in or complete his parent's grocery shopping because the new supermarket would be located closer to where his elderly parents live. Furthermore, plaintiffs argued there was a conflict of interest because his parents signed a petition that was presented to the board in favor of the proposed store.<sup>18</sup> The board member argued that his parents did their own shopping and that he saw them briefly only once or twice a week. The court found no conflict of interest nor any appearance of impropriety, concluding that these facts did not indicate that the member was conflicted by desires of aiding himself or his parents on one hand and serving the needs of the Cranford community on the other.<sup>19</sup>

In a second case, the court invalidated the board's variance and site plan approval for a supermarket because a member's eighty-three year old mother owned a commercial enterprise within fifty feet of the proponent's property.<sup>20</sup> The ownership constituted a

---

16. See *id.* at \*11.

17. See *Lincoln Heights Ass'n v. Township of Cranford Planning Bd.*, 714 A.2d 995 (N.J. Super. Ct. Law Div. 1998); *Ex. rel. Tenaflly, Inc. v. Tenaflly Zoning Bd. of Adjustment*, 704 A.2d 1032 (N.J. Super. Ct. App. Div. 1998).

18. See *Lincoln Heights*, 714 A.2d at 998.

19. See *id.* The court stated:

Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office . . . . The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said, "Universal distrust creates universal incompetency."

*Id.* at 1001-02 (citing *Van Itallie v. Franklin Lakes*, 146 A.2d 111 (1958)).

20. See *Tenaflly*, 704 A.2d at 1032.

disqualifying conflict of interest. In relying on the Local Government Ethics Law,<sup>21</sup> the court found that "potential for psychological influences" existed because his mother needed the income derived from her property to subsist. In addition, the value of her property would definitely be influenced by the board's decision.<sup>22</sup> Although the supermarket applicant argued that this conflict of interest should not nullify the granted approvals based upon equity,<sup>23</sup> the court found no authority allowing them to ignore a conflict of interest based upon equitable factors.<sup>24</sup>

### C. Conflicts of Interest Based Upon Alleged Political Pressure

Political pressure may also be cited as a disqualifying conflict of interest. In one 1998 New Jersey case, the applicant alleged that all of the zoning board members had a conflict of interest when the township attorney appeared before them to oppose the application.<sup>25</sup> The alleged conflict, the applicant argued, was that zoning board members are appointed by the township council, who also directed the attorney to appear before the zoning board. The New Jersey court applied the four-part test articulated in *Wyzykowski v. Rizas*,<sup>26</sup> concluding that no conflict existed when the township at-

---

21. This statute reads:

No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

N.J. STAT. ANN. § 40A:9-22-5d (West 1991)

22. See *Tenaflly*, 704 A.2d at 1038.

23. See *id.* at 1039. A&P argued that the nullification remedy was harsh because 1) they were not made aware of the alleged conflict of interest until almost three weeks after they had been granted approval; 2) the Grand Union and other objectors had not raised the allegation of the conflict; 3) the issue was raised for the first time by Care in its appeal to the governing body; and 4) they (A&P) had already spent \$1.2 million in approval costs. See *id.*

24. See *id.* at 1040. The court concluded by stating,

Protecting the public interest in the integrity of the quasi-judicial process is the key. Applying estoppel when the objectors have made a timely challenge to the approvals diminishes that protection. The purpose of the conflict of interest statute is "prophylaxis against misconduct and its effect can be exerted fully only if it is applied without discrimination where applicable."

*Id.* (quoting *Zell v. Borough of Roseland*, 125 A.2d 890 (App. Div. 1956)).

25. See *Paruszewski v. Township of Elsinboro*, 711 A.2d 273 (1998).

26. 626 A.2d 406 (1993). The following four circumstances will constitute a conflict of interest:

(1) "Direct pecuniary interests," when an official votes on a matter benefiting the official's own property or affording a direct financial gain; (2) "Indi-

torney appeared on behalf of the public, not himself, and when the township committee had no authority to review the decision of the zoning board.<sup>27</sup>

#### D. Conflicts of Interest for the Attorney/Public Official

Attorneys must also be careful to avoid conflicts of interest when they concurrently hold a public office and maintain a private law practice. A 1998 Maryland case illustrates one type of conflict that may arise when an attorney serves as a member of the county planning and zoning commission while representing clients on real estate matters in the county.<sup>28</sup> In this case, the attorney represented clients who had business before the county. During the course of the representation, the attorney-commissioner recused himself from the public proceedings when his client's request first came to the commission.<sup>29</sup> After the commission approved the initial request, the attorney-commissioner proceeded to represent his clients in the next phase of their land development project by preparing and filing an application with another public department, not the county commission. Two weeks later, the attorney-commissioner participated in a discussion at a county commission meeting regarding proposed amendments to his client's plans, moving and voting for the approval of the plan.<sup>30</sup> According to the court, it was the latter two acts that constituted a violation of the county ethics law. While the attorney argued that the application to another department did not violate the conflicts of interest provision in the local law,<sup>31</sup> the court held that these applications may sometimes

---

rect pecuniary interests," when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member; (3) "Direct personal interest," when an official votes on a matter that benefits a blood relative or a close friend in a non-financial way, but a matter of great importance . . . ; and (4) "Indirect Personal Interest," 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.

*Id.* (citing Michael A. Pane, *Conflict of Interest: Sometimes a Confusing Maze*, 2 N.J. MUNICIPALITIES 8-9 (March 1980)).

27. See *Paruszewski*, 711 A.2d at 273.

28. See *Carroll County Ethics Comm'n v. Lennon*, 703 A.2d 1338 (Md. Ct. Spec. App. 1998).

29. See *id.* at 1340. Specifically, the clients needed to extend water service to their property, an issue to be decided by the County Commission.

30. See *id.*

31. See *id.* at 1346. The relevant provision of the Carroll County Ethics Ordinance states that county officials and employees who are subject to this ordinance shall not: be employed by a business entity that; has or is negotiating a contract of more than \$3,500 with the County or is regulated by their agency; except as



be referred to the county commission for action, and while that was not the case in the present situation, the event's mere possibility was enough to satisfy the conflict of interest standard. The attorney's participation at the last county commission meeting also violated the ethics law because his clients were regulated by the commission of which their attorney was a member.<sup>32</sup>

### III. Compatibility of Office

Individuals must also be careful while concurrently holding public offices that affiliation with one office does not constitute a conflict with one's duties to the other. In 1998, the Arkansas Attorney General, among others, presented poignant commentary on potential problems with an individual's dual role.

#### A. Incompatible Offices

The Arkansas Attorney General opined that although nothing in state statutes specifically prohibited a member of a county quorum court from serving on the county planning board, the dual appointment should constitute an "incompatibility of office" as it would under the common law.<sup>33</sup> In reaching this conclusion, the Attorney General noted that the two positions are incompatible based upon their respective statutory powers and functions.<sup>34</sup>

#### B. Offices Found Compatible

In other 1998 commentary, the Arkansas Attorney General concluded that although there is no inherent conflict of interest for an acting city attorney to also serve as chairman of the city's zoning

---

exempted by this Commission pursuant to Section 6 of this ordinance[ ] . . .  
[or] hold any outside employment relationship that would impair  
impartiality.

*Id.*

32. *See id.* at 1348.

33. The Attorney General stated that two positions are incompatible when "there is a conflict of interest" or "where one office is subordinate to the other." 98 Op. Ark. Att'y Gen. 226 (1998) (citing *Byrd v. State*, 402 S.W.2d 121 (1966)).

34. *See id.* The Attorney General points out that "A majority of the quorum court must approve creation of the planning board, and the quorum court must confirm appointments to the board." *Id.* In addition, "[m]embers of the planning board are subject to removal upon recommendation by the county judge and confirmation by the quorum court." *Id.* Additional statutory reasons were cited including the quorum court's authority to accept, modify or reject the board's recommendation or to initiate its own planning and zoning laws, and the procedures for adoption of the official plans. *See id.*

commission, the potential for incompatibility existed.<sup>35</sup> Finding no constitutional, statutory or common law prohibition against holding dual office, the Attorney General warned that if a conflict ever arose between the two positions, the attorney-chairman may have to recuse himself or herself from involvement in either role.<sup>36</sup>

Throughout 1998, officials from other states also presented similar opinions on this topic. For example, the New York Attorney General opined that the dual positions of planning board director and member of the county industrial development agency ("IDA") were compatible because one was not subordinate to the other, and after a review of the job description for planning board director and the functions of the IDA,<sup>37</sup> there appeared to be no conflict of duties.<sup>38</sup>

Case law from 1998 also presents evidence that holders of dual public offices are not always precluded from such service based upon incompatibility. In a Connecticut case brought by abutting property owners challenging the zoning commission's granting of subdivision approval, the plaintiffs claimed that one of the commission members held a salaried municipal office, thereby precluding his participation in the matter.<sup>39</sup> By statute, the zoning commission in Connecticut is to consist of five people who hold no salaried municipal office.<sup>40</sup> The presiding court, however, found that the commission member was not a salaried employee,<sup>41</sup> and held that because the subject applications were unanimously approved by all six voting members of the commission, his participation did not require the court to invalidate the subdivision approvals.<sup>42</sup>

---

35. *See id.* In analyzing the common law surrounding compatibility of office, the Attorney General concluded that the two positions at issue did not present a situation where one was subordinate to the other. *See id.*

36. *See id.* The Attorney General also noted, "In the event of a case-specific conflict . . . the city attorney should, as always, be cognizant of the various provisions of the *Model Rules of Professional Conduct* for attorneys, concerning conflicts of interest." *Id.*

37. *See* N.Y. GEN. MUN. LAW § 858 (McKinney 1986).

38. *See* 98 Inf. Op. N.Y. Att'y Gen. 45 (1998); N.Y. GEN. MUN. LAW § 856(4).

39. *See* *Smith v. Deep River Planning and Zoning Comm'n*, No. CIV.A.96-80581, 1998 WL 345399 (Conn. Super. Ct. 1998).

40. *See* CONN. GEN. STAT. § 8-19 (1989).

41. Oddly, the court stated, "Even if this court were to determine that he is, in fact, a salaried municipal officer, this court cannot conclude that his minimal participation constituted 'material prejudice . . .'" *Id.* at 4.

42. *See id.* The court stated "his presence and vote will not invalidate the result and further that a majority vote need not be invalidated where the interest of a member is general or of a minor character." *Id.* (quoting *Murach v. Planning & Zoning Comm'n*, 491 A.2d 1058 (1985)).

#### IV. Bias and Allegations of Prejudgment

Bias and prejudgment are issues that also may disqualify individuals from making land-use decisions. These allegations, however, are often difficult to prove. For example, a 1998 Connecticut court found that two zoning board members were not required to recuse themselves from participating in the plaintiff's appeal because the plaintiff failed to meet the burden of proving bias or prejudice on the part of the board members,<sup>43</sup> although one of the board members was a police officer who was responsible for having the plaintiff's car towed, and the other board member had erroneously instructed the plaintiff that a fee was required to appeal the orders of the zoning enforcement officer and further misinformed the plaintiff to post a sign on the property at issue, notifying the public of the appeal.<sup>44</sup> The court, however, found little or no opportunity for the board members to exercise any bias against the plaintiff. The court reasoned that both members had been subject to cross examination by the plaintiff, had plausible explanations for the contested meeting with the plaintiff and had little discretion in this matter.<sup>45</sup>

In another 1998 Connecticut case, where a board member questioned throughout the lengthy proceedings whether the proposed activities were permitted under the local regulations, the presiding court found these expressions did not rise to the level of bias or prejudgment necessitating disqualification.<sup>46</sup> The fact that a board member may have taken a tentative position on a matter does not prove predetermination of the subsequent questions nor commitment to denial of the application. Rather, the court urged future plaintiffs to produce more tangible evidence of bias, but found none here.<sup>47</sup>

---

43. *See* A & M Towing & Recovery, Inc. v. Zoning Bd. of Appeals, No.CIV.A.97-0568209, 1998 WL 516158 (Conn. Super. Ct. 1995) (citing *Rado v. Bd. of Education*, 583 A.2d 102 (1990)). The presumption of impartiality attaches to administrative determinations, and the burden is on the party seeking disqualification to prove otherwise.

44. *See id.* At various times during the pendency of the action before the zoning board, both board members had resolved to recuse themselves, but then later decided to participate in some of the proceedings.

45. *See id.*

46. "The law does not require that members of zoning commissions must have no opinion concerning the proposed development of their communities. It would be strange, indeed, if this were true." *Phillips v. Town of Salem Planning & Zoning Comm'n*, No. 113120, 1998 WL 258332 (Conn. Super. Ct. 1998) (quoting *Furtney v. Zoning Comm'n*, 271 A.2d 319, 323 (Conn. 1970).

47. *See id.*

Oftentimes, allegations of prejudgment arise when a pre-elected land-use official makes campaign statements that arguably reflect a position relevant to a subsequent application. In 1998, for example, where two planning board members actively supported a new supermarket for the township during their pre-application campaign as candidates for the township committee, the presiding court found insufficient evidence to indicate that the members prejudged the application before them, stating, “[e]xpression in support of a general proposition during a prior political campaign does not invalidate a subsequent decision by the campaigners acting in their official capacity as planning board members.”<sup>48</sup>

Comments made by officials also become ammunition for opponents of board actions in a 1998 New Mexico case concerning the siting of a shelter for abused and homeless youth. Opponents of the project challenged the decision of the city council to annex the tract of land and to establish special-use zoning for the property to allow for the proposed shelter. The opponents alleged, based on statements a member of the council made, that the member was biased in favor of youth issues such as these and that she prejudged the matter,<sup>49</sup> creating an appearance of impropriety and abolishing any chance for the petitioner to receive a fair and impartial hearing during the process.<sup>50</sup> Although the court noted Siesta Hill’s assertion that “a public officer sitting in a quasi-judicial capacity is normally disqualified if an objective observer would entertain reasonable questions about the judge’s impartiality,”<sup>51</sup> it believed the petitioner presented no evidence that the Councilor had prejudged the matter, finding that the statements were, in fact, made after the counselor heard the petitioner’s arguments.<sup>52</sup> In finding no conflict of interest and no appearance of impropriety, the court further stated that council members need not be so insu-

---

48. *Lincoln Heights Ass’n v. Township of Cranford Planning Bd.*, 714 A.2d 995, 1004 (1998).

49. *See Siesta Hills Neighborhood Ass’n v. City of Albuquerque*, 954 P.2d 102 (1998). The petitioner cited to comments made by the Councilor that the issue was “real cut-and-dried” and that she would “always vote in favor of youth issues.” In addition, the Councilor’s children had attended a seven-week program run by the agency requesting the zoning change. *See id.* at 108-09.

50. *See id.* at 108.

51. *Id.* at 109 (quoting *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 888 P.2d 475, 486 (1994)).

52. *See id.* The Court also noted that members of administrative tribunals are entitled to hold views on policy matters, even if they may be relevant to the case before the board. *See id.*

lated from their community to the point that they must be detached from every issue that comes before them.<sup>53</sup>

## V. Miscellaneous

Several miscellaneous issues arose relating to land-use ethical situations in 1998.

### A. Who is the Client of the Government Lawyer?

Determining "who is the client" of a government lawyer is not an easy task.<sup>54</sup> Often, one may conclude that the client is the body that retains the attorney, and it is to this body where the duties owed by a lawyer to his/her client attach. Therefore, it is no surprise to see bitter battles between executive and legislative branches of local government who desire their own independent legal counsel.<sup>55</sup>

A 1998 Pennsylvania court clarified that a zoning board itself, not the borough solicitor, has the statutory authority to retain legal counsel for the board.<sup>56</sup> The court stated:

[t]he fact that counsel for a zoning board must be an attorney other than a municipal solicitor underscores the importance of permitting the board to select and employ its own legal representation. Very often, conflict-of-interest considerations arise where the governing authority of the municipality and the zon-

---

53. *See id.*

54. *See* REPORT OF THE D.C. BAR SPECIAL COMMITTEE ON GOVERNMENT LAWYERS (1988); Schnapper, *Legal Ethics and the Government Lawyer*, 32 REC. 649; Fed. Bar Ass'n Prof'l Ethics Comm. Op. 73-1, 32 FED. B.J. 71 (1973).

55. The disputes arise when the chief elected official claims that the corporation counsel or municipal attorney represent the municipality as a whole, obviating the need for the legislative branch to retain their own counsel. This argument is further polarized and made to be political when the counsel is hired and fired by the chief elected official, not by the legislative body, and further, where the legislative body needs executive budget approval to retain their own counsel.

56. *See* Zoning Hearing Bd. v. City Council, 720 A.2d 166 (1998). The court easily distinguished this case from *Borough of Blawnox Council v. Olszewski*, 477 A.2d 1322 (1984), finding that *Blawnox* involved board members retaining unauthorized independent counsel for their own personal goals, and hence was an ultra vires act. *See id.* at 167. Furthermore, the court relied on the Pennsylvania Municipal Planning Code that provides, in part:

the governing body shall make provision in its budget and appropriate funds for the operation of the zoning hearing board . . . . The zoning hearing board may employ or contract for and fix the compensation of legal counsel, as the need arises. The legal counsel shall be an attorney other than the municipal solicitor.

PA. STAT. ANN. tit. 53 § 10617.3 (West 1997).

ing board, have a different opinion, and the municipality is forced to appeal the zoning board's decision.<sup>57</sup>

Planning and zoning boards in rural municipalities often face the greatest hardship in securing legal representation from a fiscal perspective. In 1998, although the Ohio Attorney General was mindful of, and sympathetic to, this circumstance,<sup>58</sup> she commented that a county prosecuting attorney may not provide official representation to a township board of zoning appeals.<sup>59</sup> Reasoning that there was no statutory duty for the county prosecutor to perform this function, the Attorney General said that the prosecutor may not assume the task voluntarily, "thereby devoting public resources to a function not delegated to the prosecutor by statute."<sup>60</sup> The "conflict of interest" issue was raised in the context that the prosecuting attorney could be called upon to serve as counsel in a matter where a legal duty of representation exists that could conflict with a representation assumed for a board that is, in fact, not empowered to call upon the attorney for representation.<sup>61</sup>

### B. Resignation of Local Position As Part of State Ethics Agreement

An interesting agreement was reached between the New York State Ethics Commission and a state employee in 1998 that required the employee to resign his seat on a local planning board, in addition to paying a fine, for receiving compensation in a private engineering practice and appearing on behalf of clients before state agencies.<sup>62</sup> The agreement raises a unique question because the State Ethics Commission's jurisdiction is limited to state employees and activities relating to their state employment. Although the re-

---

57. *Zoning Hearing Board*, 720 A.2d at 168.

58. The Ohio Attorney General stated specifically:

You have stated that requiring the local boards of zoning appeals to hire outside counsel when a decision is appealed to common pleas court could present a financial hardship . . . . While we are sympathetic to your expressed concerns, this is a matter that cannot be resolved by means of an Attorney General opinion but, instead, must be addressed directly by the General Assembly.

98 Op. Ohio Att'y Gen. 025 (1998).

59. *See id.*

60. *Id.* Members of planning and zoning boards are not township officers since they are elected and not appointed. *See id.* (citing OHIO CONST. art. X, § 2). Also, Ohio county prosecuting attorneys are under a duty to provide representation to township officers. *See id.* (citing 92 Op. Ohio Att'y Gen. 080 (1992)).

61. *See* 98 Op. Ohio Att'y Gen. 025.

62. *See In re Cukrovany* (Disposition Agreement Jan. 20, 1998) (on file with New York State Ethics Comm'n, Albany, N.Y.).

signing individual was employed by the State Department of Environmental Conservation, it is not apparent from the discussion in the published agreement why the State Ethics Commission or the Department should be concerned with his membership on a local planning board. The situation begs the question whether state employees working for agencies involved in some aspect of the land-use planning or regulatory process should serve on local planning and zoning boards at all.

### **C. Appearances by a Governing Body of a Municipality Before a Zoning Board**

Generally, members of planning and zoning boards are appointed by either the chief elected official of a municipality, by a local legislative body or by a combination thereof. Therefore, applicants before the zoning board may believe that the municipal legislative body or the chief elected official is exerting undue influence or pressure over the zoning board with respect to a particular application. The suspicion of influence is especially strong where the municipal attorney appears before the zoning board to oppose an application on behalf of the local government. Such was the case in a 1998 New Jersey decision in which the applicant sought a certification that his airstrip was a valid non-conforming use.<sup>63</sup> The township committee directed the town attorney to appear before the zoning board to oppose the application and to present evidence that the use was *not* a valid pre-existing, non-conforming use.<sup>64</sup> The presiding court concluded that the governing body had standing to oppose the application and that the appearance before the zoning board did not present a reversible conflict of interest. The court reasoned that the governing body had no power to review the zoning board's determination, that a professional planner engaged by the township had concluded that the proposed use would be contrary to the public interest and a detriment to the township and that, in appropriate cases, the appearance of the township's attorney on behalf of the municipality, "provides a means by which the

---

63. See *Paruszkewski v. Township of Elsinboro*, 711 A.2d 273 (1998).

64. See *id.* at 275. The court noted that the Municipal Land-Use Law provides direct authority in at least two situations for a township to appear before a zoning board: 1) when the development of municipal property is at issue; and 2) when an application involves land situated within 200 feet of municipally owned land. See N.J. STAT. ANN. § 40:55D-12 (West 1998).

public interest is represented in proceedings of substantial public importance.”<sup>65</sup>

### Conclusion

The foregoing cases illustrate that legal and municipal ethics in land-use planning continue to play a pivotal role in challenges to land-use decision-making. The examples provided also serve to remind municipal attorneys of the critical need for the continued education of municipal officials and the municipal bar concerning these important ethical considerations. It is the continued education, as well as stringent regulation by the judicial system with respect to occurrences of conflict of interest, incompatibility of office and bias, that will ensure land-use officials are faithfully serving their communities (and not themselves) when making zoning and planning decisions.

---

65. *Id.* at 279 (quoting *Township of Berkeley Heights v. Bd. Of Adjustment*, 365 A.2d 237, 238 (1976)).