Dealing with Bias and Conflicts of Interest

By Mark S. Dennison

Zoning officials must be mindful of ethical dilemmas and prevent improper influences from swaying their decision-making. A landowner applying for variances, special use permits, rezonings, and other local zoning approvals is entitled to a fair and impartial decision by the local zoning body. If an official has a personal bias or conflict of interest regarding any application, he or she should remove himself from the proceedings to ensure a decision free from any taint of bias.

This issue of Zoning News examines various types of ethical dilemmas faced by local zoning and planning officials and offers guidance on how to handle potential conflicts and improper influences during the decision-making process.

Bias and Conflicts of Interest

Although zoning ordinances and state enabling legislation provide standards and criteria for deciding variances and other types of applications, zoning decisions do not always turn on straightforward assessments of objective factors. Community pressures and outside interests often infiltrate the process and threaten an applicant’s right to an impartial decision. Unfortunately, the ad hoc, discretionary nature of many zoning decisions exposes them to potential abuse and unfairness.

Zoning officials are susceptible to community pressures, political influences, and personal bias because of the localized nature of zoning regulation. Zoning officials are generally appointed because of their close contact with the community, understanding of community needs, and interest in promoting the public welfare. But an official’s close association with the community increases the chance of bias or conflict of interest arising in regard to a particular zoning decision.

Quasi-Judicial vs. Quasi-Legislative Decisions

The distinction between quasi-judicial and quasi-legislative zoning actions can be especially important in challenges alleging zoning bias. Some courts will accord substantial deference to decisions labeled quasi-legislative, declining to question the motives for the zoning body’s decision, notwithstanding the possible presence of bias or conflict of interest.

For purposes of reviewing zoning decisions, this distinction arises predominantly in the context of rezonings. Courts universally agree that decisions on variances and special use permits, building permits, and the like are quasi-adjudicatory in nature and, therefore, subject to judicial review for evidence of zoning bias. On the other hand, most courts consider rezonings to be legislative in nature. The rezoning is presumed to be as valid as the enactment of the original ordinance, and the burden is on the challenger to overcome that presumption. The court will not invalidate the grant or denial of a rezoning on grounds of bias or conflict of interest—or for any other reason—unless the rezoning is clearly shown to be “arbitrary and capricious,” “an abuse of discretion,” “totally lacking in relationship to the public health, safety, and welfare,” or some variation on the highly deferential standard applied to legislative acts.

This legislative label may not settle the issue, however, because some courts will look beyond the legislative label to evaluate the type of rezoning action taken by the zoning body. [See, e.g., North Point Breeze Coalition v. Pittsburgh 60 Pa. Commw. 298, 431 A.2d 398 (1981) (when a governing body applies specific criteria to a single applicant and a single piece of property, the governing body is acting in its adjudicative capacity and not its legislative capacity).]

A minority of jurisdictions including Oregon, Washington, and Idaho make a distinction between comprehensive rezonings and piecemeal rezonings that affect single or small parcels of land. These courts characterize small parcel rezonings as quasi-judicial in nature. [See Fasano v. Board of County Commissioners, 264 Ore. 574, 507 P.2d 23 (1973).]

Impartiality Standards

The law governing bias and conflicts of interest in zoning decision-making has been refined through ongoing judicial analysis. A finding of zoning bias depends on individual facts and circumstances. If the evidence shows that a zoning decision was tainted, the usual remedy is for the court to invalidate the decision because the biased decision maker should have disqualified himself from participation. Courts have said that when a zoning official must disqualify himself because of bias or a conflict of interest, the disqualification is absolute and cannot be waived. [See, e.g., McVoy v. Board of Adjustment of the Township of Montclair, 213 N.J. Super. 109, 516 A.2d 634 (App. Div. 1986).]
A biased decision maker’s participation in the actual vote on a zoning application is not necessary for invalidation. A biased zoning official may disqualify herself from voting, and the court will still invalidate the decision if it finds that she participated in the proceedings or otherwise influenced the zoning body’s voting members. [See, for example, Szoke v. Zoning Board of Adjustment of the Borough of Monmouth Beach, 260 N.J. Super. 341, 616 A.2d 942 (App. Div. 1992); Manookian v. Blaine County, 112 Idaho 697, 735 P.2d 1008 (1987).]

Likewise, the decision would be invalidated if the biased official voted, even though the zoning action would carry without the necessity of counting that vote. Further, courts may invalidate a zoning decision even when the biased official is only a member of an advisory board that makes findings and recommendations to the zoning body that ultimately makes the decision [see Buell v. City of Bremerton, 80 Wash. 2d 518, 495 P.2d 1358 (1972) (biased planning board member participated in recommendation to city council concerning zoning change)].

Courts have said that the self-interest of one official infects the action of the other members of the zoning body regardless of their disinterestedness. One court denounced a township supervisor’s appearance before the zoning board over which he had appointment powers as an imposition of duress on members of the decision-making body and a violation of basic due process. The supervisor appeared on behalf of a variance applicant. [Abrahamson v. Wendell 76 Mich. App. 278, 256 N.W.2d 613 (1977).]

Courts have developed a number of approaches and standards for evaluating problems of bias and conflicts in zoning decisions. These approaches vary by state and take particular factual circumstances into account. Courts have articulated several tests or standards for addressing zoning bias. Many courts may use a combination or variation of more than one approach.

**Actual Bias.** The actual bias standard is the most stringent test and distinguishes between situations where a clear benefit will be conferred on a zoning decision maker and instances when only a potential for benefit exists. Courts applying this approach require clear and tangible evidence of actual bias as opposed to the mere appearance of impropriety or the potential for partiality.

**Substantial Interest or Temptation.** Under this standard, an aggrieved landowner must show more than a mere appearance of unfairness but need not prove the existence of “actual” bias.

This standard is premised on the need to remove public officials from situations where a potential conflict of interest would have the capacity to tempt or improperly influence an official’s decision. Under this test, direct and substantial interests provide grounds for disqualifying an official from participation in a zoning decision, whereas indirect or remote interests do not. Thus, the focus centers on the probability that particular interests may affect the ultimate outcome of a zoning decision.

**Appearance of Unfairness.** Some courts, in weighing evidence of potential bias, will disqualify an official and invalidate the zoning body’s decisions if a mere appearance of unfairness exists. Courts using this looser standard, most notably those in the state of Washington, emphasize the need for public perceptions of fairness and confidence in the zoning process.

In virtually every zoning bias case, the courts will discuss the importance of the appearance of fairness in zoning decisions. Most courts will not, however, rely on it as a separate standard and will not hold that an appearance of unfairness alone suffices to invalidate a zoning decision. Instead, they will consider the appearance of fairness in combination with evidence of “actual bias” or “substantial interest or temptation.” In this sense, the threat to public confidence in the zoning process is viewed as coterminous with actual or potential conflicts and operates as an additional rationale for regulating bias.

**Types of Bias or Conflict of Interest**

In applying their various approaches to determining bias and conflicts of interest in zoning decisions, the courts will review evidence of several relevant factors. The various types of zoning bias and conflicts of interest can be grouped into fairly distinct categories, one or more of which determines every zoning bias case.

**Financial Influences.** Financial interests represent the most prevalent type of conflict. When zoning decision makers stand to benefit financially from ruling in a certain way on a zoning application, the zoning official’s failure to disqualify himself from participating in the decision clearly arouses an appearance of unfairness and may be evidence of actual bias or “substantial temptation,” which may provide sufficient justification for the court to invalidate the zoning decision. Zoning decisions tainted by financial influences especially undermine public confidence in the process because this type of bias creates a strong impression of local government corruption and dealmaking.

Courts have invalidated zoning decisions both in cases where a local official actually benefited and in situations where the decision maker could potentially benefit. Zoning decisions have been struck down when a zoning official stood to gain financially as a neighboring landowner, as an employee, as a business associate of an affected landowner, or as the seller or purchaser of property impacted by the zoning decision. The most obvious type of financial conflict arises when the zoning official’s own property will be affected financially by a proposed zoning change.

**Associational Interests.** This type of bias arises in situations where a zoning official’s impartiality may be compromised because she has a personal or business relationship with

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**State Zoning Bias Statutes**

**State Laws Regulating Zoning Conflicts of Interest**

Ala. Code § 11-43-54 (prohibits councilmen from deciding issues where special financial interest exists).

Ala. Code § 36-25 (code of ethics for all governmental officials and employees).

Alaska Stat. § 29.20.010 (prohibits having a “substantial financial interest”).

Ariz. Rev. Stat. Ann. §1-222 (member of board of county supervisors shall not vote upon any measure in which he, any member of his family or his partner is pecuniary interested).

Ark. Stat. A § 21-8-304 (public officials or state employees cannot use office to advance personal interests except incidental).

Conn. Gen. Stat. Ann. § 8-11 (prohibits participating when there is a direct or indirect, personal or financial interest).


Ga. Code Ann. § 36-30-6 (illegal for a council member to vote on any matter in which he/she is personally interested).

Ga. Code Ann. § 69-204 (prohibits participation when it concerns a matter "in which [the decision maker is] personally interested").
someone who will be affected by the decision. Although this relationship may not involve a financial conflict of interest, courts recognize that the associational interest may just as improperly bias the zoning official’s decision.

Although the evidence is generally circumstantial that a zoning official’s familial, business, or other relationship actually has caused a biased decision, an appearance of unfairness is usually evident. Courts applying this standard will invalidate decisions when an associational interest raises the specter of impropriety.

As with other types of potential conflicts of interest, the courts must weigh the evidence to determine whether the associational conflict is great enough to justify invalidating the zoning decision. They will generally examine the nature of both the association and the underlying interest to determine whether it warrants invalidation. Generally, the underlying interest has a greater impact on the court’s determination of the issue of impartiality, but a close personal relationship may indicate just as strong a propensity toward bias.

Close family relationships are usually subject to greater judicial scrutiny. More distant familial relationships are generally tolerated, although the nature of the underlying interest may justify invalidating the zoning decision.

The potential for bias also may exist because of a zoning official’s relationship to various community organizations, although the nature of the underlying interest is usually the determining factor. For instance, courts have found that mere membership in a church that has an interest in proceedings before the zoning body is not enough to warrant invalidating a zoning decision without evidence of actual bias.

Prejudice and Bias. This category is generally based on statements made by a zoning official that reflect a prejudgment of the merits of a particular zoning application. If the landowner can prove that the zoning decision maker was somehow predisposed to decide his application in a certain way, a court may choose to invalidate the decision. However, a zoning official’s particular political view or general opinion on a given issue will generally not suffice to show bias.

Courts recognize that public officials have opinions like everyone else and inevitably hold certain political views related to their public office. In fact, zoning officials are typically chosen to serve in their official capacity because they are expected to represent certain views about local land-use planning and development. For instance, a zoning official may have campaigned for office on a pro- or antidevelopment stance. The courts tolerate this type of opinion because it is part of the political process. Moreover, official opinions concerning land development generally represent community values and preferences that may implicate important public welfare concerns.

Only when the opinion rises to a level of personal or self-interest or shows prejudgment of a specific situation is the right to an impartial decision violated. This might occur if a zoning official made statements prior to or outside of the ordinary decision-making process that indicated a strong presentiment about the decision. Whether a particular statement would be strong enough evidence of bias is a fact-based determination for the courts. In one case, a Rhode Island court found sufficient evidence of bias when a zoning board member told opponents of a variance application prior to the hearing that “we are going to shove it down your throat.” [Barbara Reality Co. v. Zoning Board 128 A.2d 342, 343 (R.I. 1957).]

Ex Parte Contacts. Proof of ex parte contacts may also show that a zoning decision was tainted by bias, although the courts may tolerate this as a part of the political process. Ex parte contacts — discussions of a topic outside official proceedings—frequently occur through lobbying efforts by various interest groups seeking to influence the decisions of public officials. In the context of quasi-legislative decisions, such as rezonings, the courts are especially reluctant to scrutinize ex parte lobbying efforts because of the separation of powers and First Amendment rights to influence the political process. However, when ex parte contacts are present in the context of quasi-judicial zoning decisions, such as variances and special use permits, courts will be more receptive to challenges on grounds of zoning bias.

Idaho Code § 67-6501 (prohibits participation by members of governing boards or committees in matters in which there is an economic interest by self or by relations).
Idaho Code § 67-6506 (regulates the economic interest of members of the governing board, their relatives, employer, and employees).
Ind. Code Ann. §§ 36-7-4-223, 36-7-4-909 (regulating planning commission and board of adjustment conflicts).
Md. Ann. Code art. 40A, § 3-101 (prohibits public officials from participating in matters in which they have a conflict of interest).
Mo. Ann. Stat. § 105.462 (prohibits participation by member where decision may result in direct financial gain or loss to him).
Mont. Code Ann. § 2-2-125(b) (prohibits an officer or employee of local government from participating in official acts in which he has a direct and substantial financial interest).

N.M. Stat. Ann. § 3-10-5 (any member of a governing board having any possible financial interest in any policy or decision is required to disclose matters).
N.Y. Gen. Mun. Law §§ 800-809 (prohibiting conflicts of interest of municipal officers and employees).
Ore. Rev. Stat. § 244.120(1)(a) (requiring elected public officials other than legislators to announce potential conflicts prior to acting thereon).
R.I. Gen. Laws § 36-14 (prohibits participation when there is a substantial conflict of interest”).
S.C. Code Ann. § 8-13-410 (no municipal official or employee shall use his/her position for financial gain).
Wis. Stat. Ann. § 19.46 (no public official shall take official action on any matter in which he/she has a substantial financial interest).
Courts that apply the “appearance of unfairness” standard of impartiality are the most likely to consider ex parte contacts as evidence of partiality in zoning decisions. In one case, a Washington court declared that ex parte communications, "however innocent they might be . . . tend to create suspicion, generate misinterpretation, and cast a pall of partiality, impropriety, conflict of interest, or prejudgment over the proceedings to which they relate. . . ." [Chrobuck v. Snohomish County, 78 Wash. 2d 858, 480 P.2d 489 (1971)].

State Conflict-of-Interest Statutes
A few state statutes specifically regulate bias and conflicts of interest in zoning decisions. Three states — Indiana, New Jersey, and New Hampshire — have statutes that prohibit members of a planning commission or zoning board of adjustment from participating in hearings in which they have a direct or indirect substantial interest. These statutory prohibitions are limited to partiality by zoning bodies that function in an adjudicative capacity.

A few other states, such as Virginia, New York, and Connecticut, have broader regulations that require impartiality by zoning decision makers who act in either a legislative or adjudicative capacity. Connecticut’s statute has the most comprehensive scheme. For example, it prohibits zoning officials from participating in any hearing or decision in which they have either a direct or indirect personal or financial interest.

Several other states have general governmental ethics and conflict-of-interest statutes that provide a basis for regulating various types of bias and conflicts by public officials. At least 19 have statutes that prohibit participation by local officials in decisions in which they or a particular associate have a financial interest. Relatively few cases have been decided under these statutes, however, so the precise scope of their application in the context of zoning bias is uncertain.

In the Public Interest
Zoning officials should make every conceivable effort to protect the integrity of the zoning and land-use planning process through impartial decision making. Biased decisions not only undermine public confidence in the local zoning body but are more susceptible to unwanted and costly court challenges.

Big Box Retail in the Big Apple?
The New York City planning department wants to give big retailers the key to the city — and much of the small business community is preparing to change the lock if it does. Seeking to reverse the city’s significant decline in retail sales and employment, the department is proposing to change the zoning of manufacturing and industrial districts to encourage specialized discount retailers and warehouse stores. The 20,000 acres targeted include abandoned and underused industrial land in every borough but Manhattan.

Current zoning allows only 10,000 square feet for food, department, and clothing stores and an array of other retail uses within areas zoned for light and heavy manufacturing. Large retail stores seeking to locate in these districts must apply for a special permit, which can take years. The proposal would allow any retail development up to 100,000 square feet to be permitted as-of-right on wide streets. Others would need a special permit from the planning commission. The planning department argues that making it easier for discount stores to locate in abandoned industrial areas will promote investment in new retail developments, generate employment opportunities, and increase sales and property tax revenues.

But many small storekeepers oppose the plan, claiming it creates an unfair playing field. Should Mayor Rudolph Giuliani support it, the city planning commission would then review it. A state-mandated environmental impact study and approval by both the borough presidents and community boards would follow before it could go to the city council. Kevin J. Krizek