DEPARTMENT OF ADMINISTRATIVE SERVICES

CITY OF CEDAR FALLS, IOWA
220 CLAY STREET
CEDAR FALLS, IOWA 50613
319-273-8600
FAX 319-268-5126

June 6, 2007

Hon. Jon T. Crews and City Council Persons
City of Cedar Falls, Iowa
220 Clay Street
Cedar Falls, IA 50613

Judith Cutler, Chair, and
Cedar Falls Planning & Zoning Commission Members
220 Clay Street
Cedar Falls, IA 50613

Re: Ex Parte Communications with City Council Members and Planning & Zoning Commission Members regarding Quasi-Judicial Proceedings

Dear Mayor Crews, Chair Cutler, and Members of the Cedar Falls City Council and Cedar Falls Planning & Zoning Commission:

I am writing to you to advise you of a recent Iowa Supreme Court decision which city legal staff believes will require a fundamental change in the way communications are received by members of the Cedar Falls City Council and Cedar Falls Planning & Zoning Commission from proponents and opponents of certain rezoning and other "quasi-judicial" proceedings that come before the City Council and the Planning & Zoning Commission. The import of this court decision is that you are advised not to engage in communications in verbal, written or e-mail form with persons seeking to support, oppose or otherwise communicate with you about proceedings that involve the exercise of your "quasi-judicial" decision-making authority.

On September 29, 2006, the Iowa Supreme Court decided the case of Sutton v. Dubuque City Council, ___ N.W.2d ___ (Iowa 2006). A copy of the decision is attached to this letter. The Sutton case points out that in Iowa, governmental boards, commissions and councils engage in two (2) different types of decision-making processes, as follows:

1. Legislative decision making; and

2. Quasi-judicial decision making.

A city council in Iowa engages in legislative decision-making when it considers and adopts ordinances of general application to all persons in that jurisdiction. This is the same type of decision-making that the Iowa Legislature and the United States Congress engage in when adopting laws of general application throughout the State of Iowa or the United States.

In contrast to legislative decision-making, courts of law engage in judicial decision-making, in ruling upon and deciding cases involving a small number of persons that have a specific dispute, case or controversy at issue that affects only those particular persons, as opposed to the public at large. When a court of law makes decision in such a dispute, case or controversy, it engages

in "judicial" decision-making, since it affects only the rights and responsibilities of those particular persons in the context of that case or controversy.

City councils (or boards of supervisors, and certain other boards and tribunals) are sometimes presented with proceedings which are "quasi-judicial" in nature, which means, partly judicial. A prime example of a "quasi-judicial" proceeding was the proceeding that came before the Dubuque, Iowa, City Council in Sutton v. Dubuque City Council. In that case, the Dubuque City Council was presented with a request to rezone a parcel of property from commercial recreation district to a planned unit development district. As is the case in most instances of rezoning requests, there was a party that petitioned for the rezoning request, that is, the particular landowner or prospective landowner that desired to have the property rezoned; proponents (persons in support of) the rezoning request; and opponents of the rezoning request. All of these parties typically make contacts with the decision makers, in the Sutton case, the members of the City Council.

What is important about the Sutton case is that the Iowa Supreme Court characterized the rezoning proceedings as "quasi-judicial" proceedings. The significance of this statement of the court is that a whole host of legal and constitutional requirements apply to quasi-judicial bodies (that is, bodies engaged in quasi-judicial decision-making), that do not apply to bodies that are engaged in legislative decision-making proceedings.

It needs to be pointed out that the specific holding in the Sutton case was somewhat narrow in scope. The Iowa Supreme Court decision in Sutton to the effect that a proceeding to rezone property is quasi-judicial in nature was important because it was the basis upon which the court ruled as to how and in what manner the Dubuque City Council decision could be challenged in court. By deciding that the rezoning proceeding was quasi-judicial in nature, the Iowa Supreme Court effectively ruled that the only way to challenge the Dubuque City Council decision was for an objector to file a petition for writ of certiorari within thirty (30) days of the date of the city council's decision. The parties appealing the decision of the Dubuque City Council in the Sutton case filed a challenge to the rezoning in a different kind of legal proceeding called a declaratory judgment action, and they filed the challenge more than thirty (30) days after the rezoning decision was made. Since the legal challenge came too late, it was dismissed, and the Dubuque City Council decision to rezone the property was affirmed.

The decision in Sutton v. Dubuque City Council is important because of the legal consequences of a rezoning proceeding being labeled as quasi-judicial in nature. Courts, including appeals courts in Iowa, have ruled that quasi-judicial proceedings require notice and an opportunity for parties to be heard, in the context of a proceeding in which the decision makers are exercising discretion in finding facts and applying the law thereto.

Courts have held that these so-called "due process" requirements (requirements imposed by the requirements of the United States and Iowa Constitutions regarding due process of law) mean that a certain formality must be followed in the decision-making process. These formalities include the following:

1. Notice to and an opportunity for hearing before the quasi-judicial body making the decision is required;

2. Information consisting of documentation, oral statements and other evidentiary material must be presented to the decision makers in a public forum;

3. Proponents, opponents and other interested persons who are present at the public hearing must be afforded an opportunity to be heard on and to present information to the decision makers; and

4. All evidentiary information is communicated to the decision makers in a controlled setting where everyone sees and hears the same information and has the same opportunity to rebut or challenge the evidence or arguments being presented.

The Iowa Supreme Court decided a case in 1993 in a somewhat analogous situation, namely, a decision by a board of adjustment on whether to grant a variance from a zoning ordinance. In Bluffs Development v. Board of Adjustment, 499 N.W.2d 12 (Iowa 1993), the Iowa Supreme Court ruled that a board of adjustment acted in a quasi-judicial manner in hearing and deciding upon a request for variance from a zoning ordinance.

In the Bluffs Development case, the Iowa Supreme Court was faced with a court challenge to the qualification of certain members of the board of adjustment to hear and decide upon the case for reasons involving personal interest, bias, prejudice or the like.

The Iowa Supreme Court ruled that individual members of a board of adjustment, acting in their quasi-judicial capacity, would be disqualified from participating in the case and voting on the request for variance in the following circumstances:

a. If the member of the board of adjustment has pre-judged the case;

b. If the member has a personal or pecuniary interest in the outcome of the case;

c. If the member is related to an interested person within the degree of consanguinity prohibited by law; or

d. If the board of adjustment member is biased, prejudiced, or labors under a personal ill will toward an interested person.

The Iowa Supreme Court ruled that the public is entitled to have board of adjustment members perform their duties free from any personal or pecuniary interest that might affect their judgment, and therefore members could be challenged and disqualified from participating in the decision-making process in these instances.

The Iowa Court of Appeals, an Iowa appellate court that is inferior to the Iowa Supreme Court, but which entertains appeals from the Iowa district or trial courts, has ruled that members of a board of adjustment may not engage in so-called "ex parte" communications, which are communications between a person that favors, opposes or is otherwise interested in the outcome of a particular matter that will come before the board of adjustment and a member of the board of adjustment, communicated in a one-on-one manner in private, and not in a public setting where all interested parties can hear the communication and have an opportunity to challenge it. See Rodine v. Zoning Board of Adjustment, 434 N.W.2d 124 (Iowa App. 1988).

No Iowa appeals court has ever ruled that a city council member or a planning and zoning commission member may not engage in ex parte communications. The Sutton v. Dubuque City Council case, together with decisions from other states, raise a very real concern that the legal effect of the Sutton case may be that members of city councils and boards of supervisors in Iowa, when engaged in "quasi-judicial" decision-making in cases such as rezoning requests, are prohibited from engaging in ex parte communications with members of the general public, whether that be the property owner requesting the rezoning, proponents of the rezoning request, opponents of the rezoning request, or other persons interested in the outcome of the proceeding.

The Sutton case led to the publication in February 2007 of an article in Cityscape magazine (published by the Iowa League of Cities), entitled, "Recent Court Case Decision Changes Rezoning Process." The article is written by Gary Taylor, an attorney with the Iowa State University Extension Office, Department of Community and Regional Planning. A copy of the Cityscape article is enclosed with this letter. Barry Lindahl, the Dubuque city attorney who participated in the Sutton case, assisted with the analysis of the Sutton case for purposes of the Cityscape article.

Mr. Taylor takes the position that as a result of the Sutton case, city councils will need to conduct rezoning hearings differently than the way they conduct other city actions. He concludes that the primary changes in practice that elected bodies will need to follow for rezoning matters are:

(1) No ex parte contacts outside the public hearing;

(2) Tighter, more "court-like" hearing procedures; and

(3) A written decision or a detailed set of minutes that includes adequate justifications for the decision.

With respect to ex parte contacts, Mr. Taylor is of the view that members of a governmental body performing a quasi-judicial function are prohibited from having ex parte communications with interested parties. He believes that such contacts could disqualify the elected official from involvement in the rezoning vote. He states that the Sutton case may be interpreted to mean that elected officials should not discuss the particulars of a rezoning case outside of the public hearing. This would prohibit discussions with rezoning applicants, objectors and members of the public. He states that some city attorneys also suggest that discussions with city staff, and site visits conducted by individual city council members, qualify as prohibited ex parte contacts. Mr. Taylor concludes that the Sutton decision means that city councils will need to conduct rezoning hearings differently than other matters.

Eleanor Dilkes, City Attorney for the City of Iowa City, Iowa, wrote a legal memorandum to the members of the Iowa City City Council dated March 16, 2007, a copy of which is enclosed. In her legal memorandum, Ms. Dilkes discusses the Sutton case, the Rodine case, and cases from other jurisdictions within the United States, and concludes that when a city council rezones property, the Sutton case requires that certain changes be made in order to assure that the rezoning proceedings grant due process to the participants (proponents and opponents alike) of the rezoning proceeding.

As you can see from her memorandum, one of these recommended changes involves ex parte communications with members of the city council. Ms. Dilkes does not agree with the position of some commentators, such as Mr. Taylor, author of the Cityscape article, that the Sutton case requires that city council members have no ex parte communications with proponents and opponents. However, Ms. Dilkes concludes that in order to assure that the requirements of due process are satisfied, a city council member who has had an ex parte communication concerning a rezoning proceeding must publicly disclose the identity of the person with whom he or she has communicated, and the substance of each communication. Such disclosure should occur at the public hearing. She is also of the view that a city council member may discuss the rezoning matter with a city staff member outside of the public hearing, but that a discussion with a staff member other than a city attorney must be disclosed as an ex parte communication.

Ms. Dilkes is also of the view that city council members in rezoning proceedings must be impartial decision makers in order to satisfy the requirements of due process. She believes that council members must keep an open mind until the conclusion of the public hearing. Statements by a council member that he or she has made up his or her mind before the public hearing will fail the due process requirements, and will subject the rezoning decision to challenge on the basis that the council member is thereby disqualified from voting on the matter.

Finally, Ms. Dilkes is of the view that staff presentations and questions for city staff should occur at the public hearing, not prior to the public hearing. According to Ms. Dilkes, having all presentations occur at the public hearing will assure the impartiality of the decision makers.

Barry Lindahl, the Dubuque City Attorney who participated in the Sutton case, agrees with Ms. Dilkes on the following points:

1. Most rezoning proceedings should be considered quasi-judicial in nature.

2. Due process in quasi-judicial rezoning proceedings includes at a minimum notice and an opportunity to be heard, and an impartial tribunal.

3. The Iowa Supreme Court has not decided the question of whether an impartial tribunal requirement means no ex parte communications with the city council members.

Mr. Lindahl sees potential problems with the positions taken in the legal memorandum of Ms. Dilkes. These include the following:

a. Will city council members make a sufficient disclosure of the ex parte communications at the public hearing to allow the other side to adequately respond?

b. Does allowing ex parte communications with city council members open the council members up to challenges as to their impartiality?

c. Allowing ex parte communications creates the appearance of impropriety, in other words, "back-room deals."

d. If a council member is allowed to visit the site with the developer, or attends a neighborhood meeting, would he/she truly remain impartial?

e. It is a safer approach to follow the no ex parte communications rule, rather than to allow ex parte communications and risk litigation.

The Cedar Falls city legal staff advises you that the following proceedings involving land use matters are properly characterized as being "quasi-judicial" in nature:

A. Any petition to rezone property in the city.

B. Any petition to amend the city's comprehensive plan (schematic land use map).

C. Any petition for site plan review of any kind.

D. For the Cedar Falls Board of Adjustment only, any petition for a variance or special exception from the requirements of the city's zoning ordinance.

The Cedar Falls city legal staff, after having reviewed the foregoing matters, advises members of the Cedar Falls City Council, the Mayor, and the chair and members of the Cedar Falls Planning & Zoning Commission, to adhere to the following guidelines with regard to all land use matters identified in Items A. through D. above:

I. If any outside party, whether a proponent or opponent of or any other person interested in a land use matter, communicates or attempts to communicate with you orally, either in person or by telephone, you should immediately interrupt the person and refuse to discuss the matter with that person. Tell the person you are prohibited from discussing the matter outside of a public hearing at which the request is being considered. You should encourage the person to attend the public hearing, and if they are unable to attend, to submit their comments to the Cedar Falls City Clerk in writing before the public hearing. **This means that you should not attend a meeting with the property owner, not attend neighborhood meetings organized by proponents or opponents, or make a site visit accompanied by a proponent, opponent or any other person who is interested in the land use matter.**

II. If such person communicates or attempts to communicate with you in writing, whether by e-mail, letter or otherwise regarding a land use matter, you should not read the communication, but instead forward it to the Cedar Falls City Clerk to be included in the public record of the hearing.

III. If despite your effort to avoid the communication, the person effectively communicates substantive information to you relating to the particular land use matter, you should advise the Cedar Falls City Clerk's office of the circumstances of the communication, including:

A. The name, address, telephone number or e-mail address of the person who contacted you;

B. The approximate date and time you received the communication;

C. The means by which the communication was made;

D. If the communication is in writing, forward the written communication to the city clerk;

E. If the communication is oral, prepare a summary of the basic substance of the communication, reduce it to writing and forward it to the city clerk.

IV. Do not pre-judge the case. Keep an open mind and do not form an opinion about the land use matter until after the public hearing has been closed and all communications from proponents, opponents and any other persons who are interested in the matter, and other city council members (or planning and zoning commission members), have been fully discussed. Then and only then should you make your determination as to whether to vote to approve or disapprove the request.

V. If in the course of ex parte communications you are asked to support or oppose a particular request relating to a land use matter, make it clear to the person that you will reserve judgment and keep an open mind until the conclusion of the public hearing and until after all interested parties have had full opportunity to present all of their views and information.

VI. A communication with members of the Cedar Falls city staff, whether that be a member of the city attorney's office or developmental services staff or other city staff relative to any land use matter, is not considered an ex parte communication. You are free to discuss the land use matter with city staff. The function of city staff is to conduct an investigation into the land use matter, collect relevant data, analyze the city ordinance and other applicable laws, and make a recommendation to you on the particular land use matter. Further, in some cases, because of legal risks that can be associated with land use matters, it is essential that city legal and other staff communicate with you about such legal risks in a confidential manner outside of the public hearing. However, to the extent you are requesting comment from city staff for the benefit of persons who will be present at the public hearing, then it is more appropriate to solicit those comments from city staff at the public hearing.

VII. If you have pre-judged the case, have a personal or pecuniary interest in the outcome of the particular matter, are closely related to an interested person, or are biased, prejudiced, or have a personal grudge against or bear any ill will toward an interested person relating to any land use matter, you should seriously consider disqualifying yourself from discussions and voting upon the land use matter at issue.

For further information regarding legal conflicts of interest and ethical conflicts of interest, which may or should call for your disqualification, as well as other considerations, please see my letter of September 8, 2006, to the Mayor and city council, and a copy of which is enclosed with this letter.

Advice to city council members and Planning and Zoning Commission members regarding ex parte communications and conflicts of interest is nothing new. Attached to this letter is a short article entitled, "Avoid 'Ex Parte' Contacts," an excerpt from "Welcome to the Commission! A Guide for New Members," prepared by the Planning Commissioners Journal. This helpful article confirms much of the advice and recommendations contained in this letter. Also attached is an excerpt from the November 1994 edition of the American Planning Association Zoning News, which contains an article by Mark S. Dennison entitled, "Dealing with Bias and Conflicts of Interest." It contains a discussion regarding matters such as quasi-judicial decisions; impartiality

standards; and types of bias or conflict of interest, including financial influences, associational interests, prejudice and bias, and ex parte contacts.

Both of these articles confirm the substance of the guidelines set forth in this letter, and underscore the fact that these are issues which are not new to the land use planning arena, and are not based solely upon the Iowa Supreme Court decision in Sutton.

If you at any time have a question about whether a particular proceeding that comes before the Cedar Falls Planning & Zoning Commission or Cedar Falls City Council is a "quasi-judicial" proceeding, or if you have any question about an ex parte communication, or a potential legal or ethical conflict of interest, you should always feel free to consult with any member of the city legal staff regarding your concerns. Communications with city legal staff are not ex parte communications whatsoever, and you should take full opportunity to discuss your concerns with the city legal staff about these legal questions.

If you have any questions about this letter, please contact me or any member of the city legal staff.

Very truly yours,

CITY OF CEDAR FALLS, IOWA

By Steven D. Moore
Steven D. Moore
City Attorney

SDM:sjl
Enclosures
C: Susan Staudt (with enclosures)
Richard McAlister (with enclosures)
John Page (with enclosures)

H

Sutton v. Dubuque City Council
Iowa,2006.
Only the Westlaw citation is currently available.
Supreme Court of Iowa.
S.A. **SUTTON** and Francine Banwarth, Appellants,
v.
DUBUQUE CITY COUNCIL and Royal Oaks Development Corp., Appellants.
S.A. **Sutton** and Francine Banwarth, Appellees,
v.
Dubuque City Council and Royal Oaks Development Corp., Appellants.
No. 04-1067, 04-1196.

Sept. 29, 2006.
Rehearing Denied Jan. 11, 2007.

Background: Objectors filed declaratory judgment action to overturn city's amended zoning ordinance that rezoned certain property from a commercial recreation district to a planned unit development (PUD) district with a residential district designation. After a bench trial, the District Court, **Dubuque** County, Lawrence H. Fautsch, J., entered judgment voiding the zoning ordinance amendment. City council and affected real estate developer appealed the judgment, and objectors separately appealed trial court's rejection of their other asserted grounds for voiding the amendment.

Holdings: The Supreme Court, Carter, J., held that:

(1) city council's amendment of zoning ordinance to effect the rezoning was a quasi-judicial action that was subject to review by certiorari, and

(2) certiorari was the objectors' exclusive remedy, such that their conflict-of-interest challenge to the rezoning decision could not be asserted in declaratory judgment action, receding from *Fox v. Polk County Bd. of Supervisors*, 569 N.W.2d 503.

Reversed on city's appeal; affirmed on objectors' appeal.

[1] **Zoning and Planning 414** 565

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k563 Nature and Form of Remedy
414k565 k. Certiorari. Most Cited Cases
City council's amendment of zoning ordinance, in order to rezone certain property from a commercial recreation district to a planned unit development (PUD) district with a residential district designation, was a quasi-judicial action that was subject to review by certiorari. I.C.A. Rule 1.1401.

[2] **Declaratory Judgment 118A** 41

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak41 k. Existence and Effect in General. Most Cited Cases
Certiorari was the exclusive remedy for objectors to assert conflict-of-interest challenge to validity of city council's quasi-judicial action in amending zoning ordinance to rezone certain property from a commercial recreation district to a planned unit development (PUD) district with a residential district designation, and thus such challenge could not be asserted in a declaratory judgment action; receding from *Fox v. Polk County Bd. of Supervisors*, 569 N.W.2d 503, I.C.A. Rule 1.1401.

David L. Hammer and Angela C. Simon of Hammer, Simon & Jensen, **Dubuque**, for S.A. **Sutton** and Francine Banwarth.
Barry A. Lindahl and James A. O'Brien, **Dubuque**, for **Dubuque** City Council.
Stephen J. Juergens of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., **Dubuque**, for Royal Oaks Development Corp.
CARTER, Justice.
*1 The city council of the City of **Dubuque**, in its representative capacity, and Royal Oaks

Development Corporation, an affected real estate developer, appeal from a judgment that voided an amendment to the zoning ordinances of the City of **Dubuque**.[N1] Because there is a community of interest between appellants, we will proceed as if the City were the only appealing party. The appellees are S.A. **Sutton** and Francine Banwarth, two objectors to the zoning change.

The basis for the district court's decision invalidating the rezoning action was that court's finding that the mayor of **Dubuque**, whose vote was necessary for passage of the challenged zoning change, had a disqualifying conflict of interest. **Sutton** and Banwarth had advanced other grounds for voiding the ordinance, and they appeal from the trial court's rejection of those assertions. Although separately docketed, the two appeals are considered together. The City urges that the mayor did not have a disqualifying conflict of interest, and it also seeks to overturn the judgment on the ground that the present action was barred by limitations. Because we agree with the latter claim, we reverse the judgment of the district court on the City's appeal. We affirm the district court's rulings on the issues raised in the objectors' appeal.

On May 8, 2003, the **Dubuque** City Council passed an ordinance amending the existing zoning code by reclassifying certain described property from a commercial recreation district to a planned unit development (PUD) district with a residential district designation, including a conceptual development plan. The ordinance was passed on a four-to-three vote, with the mayor voting yes.

Sutton and Banwarth initially challenged the rezoning decision with a petition for writ of certiorari pursuant to Iowa Rule of Civil Procedure 1.1401. That action was dismissed as untimely because it had not been brought within thirty days of the challenged action, as required by rule 1.1402(3). They later commenced the present action for declaratory judgment, seeking to overturn the challenged rezoning on multiple grounds. The City asserted plaintiffs' lack of standing and further asserted that their claims were barred by limitations because certiorari was the exclusive remedy and the time limitations for initiating a certiorari challenge had not been met. The district court rejected the City's standing and timeliness challenges. It rejected all of **Sutton's** and Banwarth's challenges to the ordinance except their contention involving a disqualifying conflict of interest. Following a trial on that issue, the district court found that the mayor, whose vote was decisive, had a disqualifying conflict of interest because of anticipated real estate commissions that he or his real estate agency might enjoy as a result of the project that was provided for in the PUD zoning plan.

I. *The City's Appeal.*

[1] The City contends that **Sutton's** and Banwarth's claims of illegality were required to be presented by certiorari and were barred by the time limit imposed in Iowa Rule of Civil Procedure 1.1402(3). Our decisions have recognized that certiorari may be a proper remedy for reviewing the legality of decisions made by city councils and county boards of supervisors in zoning matters. *Montgomery v. Bremer County Bd. of Supervisors*, 299 N.W.2d 687, 692 (Iowa 1980); *Smith v. City of Fort Dodge*, 160 N.W.2d 492, 495 (Iowa 1968). This recognition rests on the conclusion that the action being reviewed by certiorari is of a quasi-judicial nature. Although municipal zoning ordinarily involves the enactment of an ordinance, an action that on first blush appears to be legislative in nature, rezoning often takes on a quasi-judicial character by reason of the process by which it is carried out. We defined the nature of a quasi-judicial function in *Buechele v. Ray*, 219 N.W.2d 679 (Iowa 1974). We stated in that case that a quasi-judicial function is involved if the activity (1) involves proceedings in which notice and an opportunity to be heard are required, or (2) "a determination of rights of parties is made which requires the exercise of discretion in finding facts and applying the law thereto." *Buechele*, 219 N.W.2d at 681. Similar criteria were expressed in *Curtis v. Board of Supervisors*, 270 N.W.2d 447, 449 (Iowa 1978).

***2** The Washington Supreme Court has applied the following principles in determining whether zoning activities are quasi-judicial in character:

> Zoning decisions may be either administrative or legislative depending upon the nature of the act....
> ... [W]hen a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, or reclassifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change.

Fleming v. Tacoma, 81 Wash.2d 292, 502 P.2d 327, 331 (1972). The Washington court then set forth a helpful recital of the factors that will render rezoning decisions quasi-judicial in character. Those factors

include (1) rezoning ordinarily occurs in response to a citizen application followed by a statutorily mandated public hearing; (2) as a result of such applications, readily identifiable proponents and opponents weigh in on the process; and (3) the decision is localized in its application affecting a particular group of citizens more acutely than the public at large. *Id.* All of the factors identified by the Washington court in *Fleming* come into play in the present conflict, a circumstance that leads us to the conclusion that the action of the city council being challenged in the present case was quasi-judicial in character. As such, a challenge to the legality of the action taken was subject to review by certiorari.

[2] The quasi-judicial character of municipal rezoning is particularly evident in matters involving PUD zoning. The Florida appellate court in *Hirt v. Polk County Board of Commissioners*, 578 So.2d 415 (Fla.Ct.App.1991), discussed this distinction as follows:

[C]reating zoning districts and rezoning land are legislative actions, and ... trial courts are not permitted to sit as "super zoning boards" and overturn a board's legislative efforts....

....

The planned unit development concept varies from the traditional concept of zoning classifications. It permits a flexible approach to the regulation of land uses. Compliance must be measured against certain stated standards....

[S]ince the Board was called upon to review an interpretation and application of an ordinance ... and the ordinance was not challenged per se, the Board's decision was "clearly quasi-judicial."

Hirt, 578 So.2d at 417 (citations omitted) (emphasis added).[FN2] The paramount issue for our consideration is whether the availability of certiorari review precluded **Sutton** and Banwarth from raising their challenge to the rezoning in a declaratory judgment action filed after the time for seeking certiorari review had expired. For reasons that we will discuss, we hold that it did.

The argument that the City urges in support of its timeliness challenge to the present action received sympathetic consideration from the district court. That court's reaction to this timeliness challenge was as follows:

***3** It is hard to understand why a litigant should be able to use a procedure of general application (declaratory judgment) as an alternative to a procedure specifically designed for challenging the legality of actions of governmental bodies (certiorari) and thereby avoid the time limit on certiorari actions. This path vitiates the 30-day time limit created by I.R.C.P. 1.1402(3) and defeats the public policy considerations noted in *Sergeant Bluff-Luton [School District v. City Council of Sioux City*, 605 N.W.2d 294 (Iowa 2000)], favoring prompt resolution of challenges to city decisions. Nevertheless, the Supreme Court specifically said in *Fox [v. Polk County Bd. of Supervisors*, 569 N.W.2d 503 (Iowa 1997)], that certiorari is not an exclusive remedy and that declaratory judgment can also be used to raise legality issues.

The City urges on this appeal that the same policy considerations discussed by the district court should convince us to apply the short statute of limitations provided for certiorari actions. **Sutton** and Banwarth urge the affirmance of the district court's ruling on this issue based on our recognition in *Fox* and in *Bormann v. Kossuth County Board of Supervisors*, 584 N.W.2d 309, 313 (Iowa 1998), that a declaratory judgment is an alternative procedure for challenging the illegality of municipal zoning. We are satisfied that our decisions in *Fox* and *Bormann* do not control the present dispute.

The dispute in *Fox* involved a petition in four counts. Counts I and III were requests for certiorari review of county board of supervisors zoning decisions. Counts II and IV were actions for declaratory judgment. Count IV challenged various aspects of the zoning decision. Count II asserted that the zoning constituted a taking without compensation. The district court dismissed Counts II and IV on the ground that certiorari was the exclusive remedy to raise the matters plaintiff sought to litigate. On the certiorari counts, the district court ruled in favor of the county board. We affirmed the latter ruling on appeal. With regard to the declaratory judgment counts, we stated that the declaratory judgment procedure was an alternative means of raising the challenges advanced in both Counts II and IV. We held, however, that the claim of Count IV duplicated the claims presented in the certiorari counts and should meet a similar fate. We remanded Count II, the taking claim, for further proceedings in the district court.

Our treatment of the taking claim in *Fox* is consistent with our treatment of a similar claim in *Bormann* in which we allowed a taking claim to proceed by declaratory judgment. The rationale for that determination in both *Fox* and *Bormann* is that the taking claims involved an unlawful application of the ordinance to a particular property owner and not an illegal act in connection with the enacting of the

ordinance. We do not retreat from our treatment of the taking clause issues in *Fox* and *Bormann*. We do retreat, however, from our conclusion in *Fox* that Count IV, which duplicated the illegality challenges raised in the certiorari counts, could be asserted by means of a declaratory judgment action.

*4 Although the existence of another remedy does not ordinarily preclude a court from granting declaratory relief, we have refused to apply that principle when there is another adequate remedy provided by law that is intended to be exclusive. *City of Des Moines v. Des Moines Police Bargaining Unit Ass'n*, 360 N.W.2d 729, 730-31 (Iowa 1985). We have applied this principle with respect to review of administrative agency action. We are convinced that a similar exclusivity of remedy should exist as to the review of decisions of city councils or county boards of supervisors acting in a quasi-judicial capacity when the claimant alleges illegality of the action taken. We clearly stated that this was the case in *Lewis Investments, Inc. v. City of Iowa City*, 703 N.W.2d 180, 185 (Iowa 2005). We also applied this principle in an analogous context in *Sergeant Bluff-Luton School District v. City Council of Sioux City*, 605 N.W.2d 294 (Iowa 2000).

In *Sergeant Bluff-Luton*, the district court concluded that the inclusion of certain property in an urban renewal project was illegal and that, consequently, a tax levy based on such inclusion was also illegal. The district court sustained a writ of certiorari and also granted a declaratory judgment that the tax levy was a nullity. On appeal, we found that the certiorari action had not been filed in a timely manner and ordered that action be dismissed. With regard to the school district's request for declaratory judgment we stated:

[W]e conclude that the district court erred in deciding that the taxes levied were illegal. This is because the legality of the taxes levied does not exist independent from the city's 1994 decision to include Virginia Meadows in the urban renewal project, which is the alleged illegal action that is the subject of the school district's certiorari petition....

... [T]here are important public policy reasons for limiting the time during which a party can challenge city decisions and resulting regular tax levies. City officials must be able to prepare budgets and levy taxes for an appropriate time period, based upon established figures and past decisions, without the threat of later challenges to the legality of such decisions that are made after [the statutory limit for bringing certiorari actions has] run.

Sergeant Bluff-Luton, 605 N.W.2d at 298. Equally important policy considerations militate in favor of a short period of limitations in challenging rezoning based on some claim of illegality in the enactment of the ordinance. We hold that certiorari was the proper and exclusive remedy for asserting **Sutton's** and Banwarth's conflict-of-interest challenge to the PUD zoning. As a result of this conclusion, we need not consider other challenges raised by the City to the district court's decision.

II. *The Appeal by Sutton and Banwarth.*

In their appeal, **Sutton** and Banwarth assert that the district court erred in rejecting other challenges that they made to the PUD rezoning. In these challenges they assert that the rezoning process (1) involved a violation of the open meetings law, (2) served to unlawfully interfere with a publicly dedicated park, (3) failed to comply with ordinance requirements for off-street parking, (4) was contrary to the city's comprehensive plan, and (5) was the result of arbitrary and capricious action in its passage.

*5 Rather than determine whether any of these claims could be brought by means other than certiorari, we have reviewed each claim on the merits and are satisfied that the district court's ruling on each of these issues was correct.

Based on the conclusions we have reached in Division I of this opinion, we hold that **Sutton's** and Banwarth's action in the district court was untimely and must be dismissed on that ground.

REVERSED ON CITY'S APPEAL; AFFIRMED ON OBJECTORS' APPEAL.

FN1. It was determined by pretrial ruling that this action, in legal effect, is against the City, rather than council members.

FN2. A leading authority on zoning law describes planned unit development zoning as a process that "allows [a] municipality to control the development of individual tracts of land by specifying the permissible form of development in accordance with the city's PUD ordinance.... The planned unit development process provides more flexibility to municipalities than does traditional Euclidean zoning." 2 R. Anderson, *American Law of Zoning 3d* §

> 11.12 (1986). Approval of such zoning requires a finding that the proposed development qualifies under the provisions of the ordinance authorizing PUD zoning.

Iowa,2006.
Sutton v. Dubuque City Council
--- N.W.2d ----, 2006 WL 4454001 (Iowa)

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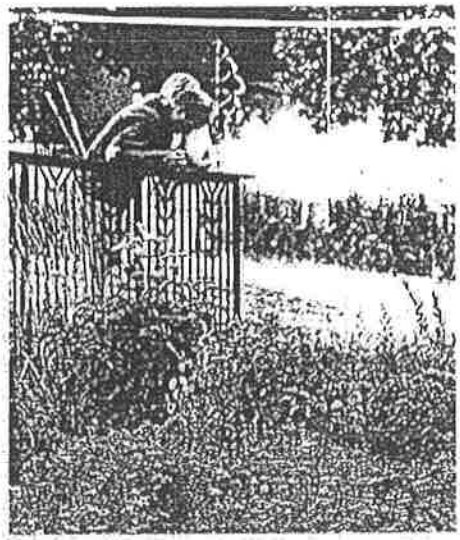
Recent court case decision changes rezoning process

by Gary Taylor, J.D., ISU Extension, Department of Community & Regional Planning

In September 2006 the Iowa Supreme Court decided *Sutton v. Dubuque City Council*; a case that could significantly affect the process by which city councils and county boards of supervisors make decisions on rezoning applications in the future. This article summarizes the case and provides some suggestions to bring the practices of these elected bodies in line with the Supreme Court's ruling. Cities should share this information with their city attorney and zoning officials.



Central Gardens of North Iowa, Clear Lake

The Case

The Dubuque city council voted to rezone a parcel of property from a commercial recreation district to a planned unit development (PUD) district on a four-to-three vote. The PUD rezoning allowed the property owner to construct a condominium project on property adjacent to a city park. Plaintiffs, who claimed that the condominium would affect their use and enjoyment of the park, challenged the rezoning decision in court on numerous grounds.

Much of the case revolved around whether plaintiffs followed the procedure appropriate for appealing rezoning decisions. The city of Dubuque contended that plaintiffs' claims were barred because they filed the wrong type of action, a declaratory judgment, with the district court. The Iowa Supreme Court concluded that a different type of action, called certiorari, was appropriate for challenging the legality of decisions made by city councils and county supervisors in zoning matters if "the action being reviewed by certiorari is of a quasi-judicial nature."

This decision led to the question of significance for future zoning practice: Is a rezoning a quasi-judicial action? The Iowa Supreme Court concluded that rezonings are, in fact, quasi-judicial actions. The Court cited a Washington State Supreme Court opinion that set forth factors that make rezonings quasi-judicial:

> *"Those factors include (1) rezoning ordinarily occurs in response to a citizen application followed by a statutorily mandated public hearing; (2) as a result of such applications, readily identifiable proponents and opponents weigh in on the process; and (3) the decision is localized in its application affecting a particular group of citizens more acutely than the public at large."*

The Court's decision means that city councils will need to conduct rezoning hearings differently than the way they conduct other city actions, such as adopting resolutions, budgets, and general health, safety and welfare ordinances.

The Iowa Supreme Court, and the courts in many other states, have insisted that quasi-judicial proceedings are subject to more rigorous procedural safeguards because their results directly affect the property rights of particular citizens. By way of example, the decisions made by zoning boards of adjustment – variances, special exceptions, and appeals – are all quasi-judicial actions, and the rules of procedure followed by boards of adjustment reflect these safeguards. The primary changes in practice that elected bodies will need to follow for rezoning matters are (1) no ex parte contacts outside the hearing, (2) tighter, more "court-like" hearing procedures, and (3) a written decision or a detailed set of minutes that includes adequate justifications for the decision.

Ex parte contacts. Citizens expect to be able to discuss public matters with their elected representatives, and expect the elected representatives to be responsive to those discussions. However, in quasi-judicial actions many such discussions fall under the definition of ex parte contacts. The Iowa Supreme Court has stated that an ex parte communication occurs when a board member communicates, directly or indirectly, in connection with a matter before the board, with any person or party, except upon notice and opportunity for all parties to participate. Members of a governmental body performing a quasi-judicial function are prohibited from having ex parte communi-

ations with interested parties. Such contacts could disqualify the elected official from involvement in the rezoning vote. Insofar as *Sutton* holds that rezonings are quasi-judicial proceedings, it may be interpreted to mean that elected officials should not discuss the particulars of a rezoning case outside the public hearing. This would prohibit discussions with rezoning applicants, objectors and members of the public. Some city attorneys also suggest that discussions with city staff and site visits conducted by individual city council members qualify as prohibited ex parte contacts.

"Court-like" procedures. The term quasi-judicial literally means "court-like." Zoning boards of adjustment follow, or should follow, quasi-judicial procedures by ensuring that all sides to an issue are provided an opportunity to speak and keeping an official record of the proceedings, including testimony and exhibits. Rezoning decisions cannot be based on material that is not contained within the record. After *Sutton*, the city council cannot rely on some fact or opinion that was not presented in testimony or evidence at the rezoning hearing.

Written decision. A written decision or a detailed set of minutes ensures that decisions are not based on material that is not contained within the record. It should reflect that a deliberative process was used by the council in reaching its conclusion. The written decision must contain a statement of the facts, derived from the record, that support the council's conclusion. For example, a critical element in deciding whether a rezoning is appropriate is whether the new zoning classification is consistent with the community's comprehensive plan. The statement of facts in the decision, therefore, should bring out the facts in the record that support the consistency between the plan and the new zoning. The written decision should also clearly state whether the rezoning is being approved or denied; a simple fact that sometimes gets overlooked at the conclusion of a long hearing.

The *Sutton* decision means that city councils will need to conduct rezoning hearings differently than other matters. To understand the procedural safeguards that may now be expected from elected officials acting on rezoning applications, look at your board of adjustment's rules of procedure. Of course, city council members should first and foremost consult with their municipal attorney to work through the implications of the Sutton case.

Barry Lindahl, Dubuque City Attorney, assisted with the analysis of the Sutton case for this article.

DATE: 3/16/2007

TO: City Council

FROM: Eleanor Dilkes, City Attorney

RE: Rezonings, Due Process And Ex Parte Communication

INTRODUCTION / ISSUE

In Sutton v. Dubuque City Council, Slip Op. No. 85/04-1067 (September 29, 2006) the Iowa Supreme Court held that the Dubuque City Council's rezoning of a parcel of property from a commercial recreation district to a planned unit development (PUD) district was a "quasi-judicial" as opposed to legislative proceeding. The issue in Sutton was the nature of the proceeding one must use to challenge a zoning decision. However, the court's characterization of the rezoning as "quasi-judicial" has prompted an examination of the extent to which the due process requirements that apply to quasi-judicial bodies (e.g. Board of Adjustment) apply to a legislative body like the City Council when it is making a rezoning decision that is quasi-judicial in nature.

CONCLUSION

Due process requirements apply to quasi-judicial proceedings and generally not to legislative proceedings. In Sutton, the court explained that zoning decisions can be either legislative or quasi judicial in nature: "When a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, or reclassifying land thereunder, the same body, in effect makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change." Slip Op. p.5 (quoting Fleming v. Tacoma, 81 Wash. 2d 292, 299, 502 P. 2d 327, 331 (1972)). Under the standards set forth in the Sutton case, the majority of zoning decisions made by the Iowa City City Council are quasi- judicial in nature. With respect to these decisions, I advise that the following changes be made in order to assure that the participants are afforded due process:

1. Ex parte communications. In the light of the differences between quasi-judicial bodies and legislative bodies making quasi-judicial decisions, I do not agree with the position of some commentators that the Sutton case requires that Council members have no ex parte communications. (See, e.g. "Recent court case decision changes rezoning process", February 2007.) However, in order to assure due process, a Council member who has had an ex parte communication concerning the rezoning must disclose the identity of the person(s) with whom he or she has communicated and the substance of each communication. Such disclosure should occur at the public hearing. If a communication occurs after the public hearing it should be disclosed the next time the item is on the Council's agenda. A Council member may discuss the rezoning with a staff member outside the public forum but a discussion with a staff member other than a city attorney must be disclosed as an ex parte communication.

2. Impartial decisionmakers. Council members must remain impartial. An impartial decisionmaker is a critical component of due process. Council members must keep an open mind. Statements by council members indicating that they have made up their mind before they vote are not acceptable and will subject the rezoning to challenge.

3. Staff presentations. Staff presentations and questions for staff should occur at the public hearing, not at the work session. A staff presentation made at the work session is on the record, and therefore, is not ex parte. However, other interested parties are not able to participate at the work session. Having all presentations and responses thereto at the public hearing will help assure the impartiality of the decsionmakers.

DISCUSSION

Example of Ex Parte Communications. "Ex parte" means: "Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested." Black's Law Dictionary (1999 7th ed.)

Assume the council's agenda includes the consideration of an ordinance to rezone a particular city block owned by John Doe. The following are examples of ex parte communications:

1. John Doe calls Council member A and tells him why the rezoning is a good idea.
2. Neighboring property owner Jane Smith calls Council member B and tells her the rezoning is a bad idea.
3. Council member C talks to Planner A to find out why Planner A thinks the rezoning is a good idea or a bad idea.

Although it is not always clear if the matter before Council is legislative/administrative in nature or quasi-judicial, the distinction is constitutionally significant because the due process clause applies to quasi-judicial matters. Key principles underlying procedural due process are notice, opportunity to be heard, and an impartial decision maker. Matthews v. Eldridge, 424 U.S. 319, 333 (1976).

In Sutton, the Iowa Supreme Court listed three (3) factors that must be considered in determining whether a zoning decision is quasi-judicial:

> "Those factors include (1) rezoning ordinarily occurs in response to a citizen application followed by a statutorily mandated public hearing; (2) as a result of such applications, readily identifiable proponents and opponents weigh in on the process; and (3) the decision is localized in its application affecting a particular group of citizens more acutely than the public at large."

Slip Op. at p.5

Most of the zoning decisions the City Council makes are "quasi-judicial" because they involve a citizen application of a localized nature that is supported by some and opposed by others. Exceptions to this would be comprehensive amendments to the comprehensive plan or zoning code.

The Iowa Court of Appeals has concluded that a Board of Adjustment must not engage in ex parte communications with interested parties, see Rodine v. Zoning Board of Adjustment of Polk County, 434 N.W. 2d 124 (Iowa Ct. App. 1988). However, the appellate courts in Iowa have not considered whether ex parte communication by city councils and boards of supervisors in quasi-judicial matters violates the Constitution. Other state courts that have considered the issue generally have not issued a complete prohibition, but rather, have looked to whether the ex parte information was disclosed such that all parties had an opportunity to address it and whether the decision maker was predisposed to a decision.

In a case before the Idaho Supreme Court, a limited partnership filed an application with the Boise City Historic Preservation Commission for a certificate of appropriateness to demolish a warehouse building. Idaho Historic Preservation Council, Inc., v. City Council of Boise, 134 Idaho 651, 8 P.3d 646 (2000). After the Commission denied the application, the limited partnership appealed to the city council. At the hearing before the city council, certain members of the city council stated that they had received numerous telephone calls concerning the issue but did not identify who contacted them and did not state what was said. The city council approved the certificate of appropriateness, and an appeal ensued. The Court found that the due process clause was violated for the following reasons:

> The members of the City Council who accepted phone calls failed to disclose the name and other identifying information[FN2] of the callers, and also failed to reveal the nature of the conversation, making it impossible for the Commission to effectively respond to the arguments that the callers may have advanced. *See Tierney*, 536 P.2d at 443. While the district court found that it "[did] not appear that any of these telephone contacts improperly influenced any ultimate opinion given by the individual [City] Council members," there was no evidence to support this conclusion because of the City Council's failure to sufficiently identify the callers and provide a general description of what they said in favor of or in opposition to the destruction of the Foster Building. We hold, therefore, that the receipt of phone calls in this case, without more specific disclosure, violated procedural due process.
>
> Id. at 655-656, 650-651.

As explained by the Idaho Supreme Court in another case, Eacret v. Bonner County, 139 Idaho 780, 787, 86 P.3d 494, 501 (2004), "[t]he purpose of the disclosure requirement is to afford opposing parties with an opportunity to rebut the substance of any *ex parte* communications."

Most recently, the Idaho Supreme Court wrote that:

> [W]e recognize that due process "entitles a person to an impartial and disinterested tribunal[,]" but we require a showing of actual bias before disqualifying a decision maker even when a litigant maintains a decision maker has deprived the proceedings of the appearance of fairness. *Davisco Foods Int'l, Inc.*, 141 Idaho at 791, 118 P.3d at 123.

Cowan v. Board of Commissioners of Fremont County, 143 Idaho 501, 512, 148 P.3d 1247, 1260 (2006).

In a case from Oregon, Neuberger v. City of Portland, 288 Or. 585, 607 P.2d 722 (1980), opponents challenged a decision by the Portland City Council to change the zone of a parcel of undeveloped land based, in part, on council members' ex parte communication. The Oregon Supreme Court wrote that the "issue is not whether there were any ex parte contacts, but whether the evidence shows that the tribunal or its members were biased." Id. at 590, 1260.

Thus, when a city council discloses the information and remains an unbiased decision maker, both the Idaho and the Oregon Supreme Courts have found that the fundamental principles of the due process clause are met. See also, McPherson Landfill, Inc. v. Board of County Com'rs of Shawnee County, 274 Kan. 303, 322, 49 P.3d 522, 534 (2002) ("With respect to the ex parte communications, it should be noted that the parties must be informed of the evidence submitted

for consideration and must be provided an opportunity to respond and rebut the evidence."); Sandy Beach Defense Fund v. City Council of City and County of Honolulu, 70 Haw 361, 378, 773 P.2d 250, 261 (1989) ("Due process is not a fixed concept requiring a specific procedural course in every situation. .... The full rights of due process present in a court of law, including presentation of witnesses and cross-examination, do not automatically attach to a quasi-judicial hearing."); and County of Lancaster, S.C. v. Mecklenburg County, N.C., 334 N.C. 496, 511, 434 S.E.2d 604, 614 (1993) (" Due process requires an impartial decision maker.... A fixed opinion that is not susceptible to change may well constitute impermissible bias, as will undisclosed *ex parte* communication or a close familial or business relationship with an applicant.). But see Massey v. City of Charlotte, 2000 WL 33915844, *8 n. 3 (N.C.Super. 2000) ("When quasi-judicial procedures are invoked, ex parte communication is prohibited.").

Additionally, courts have recognized that a council member engaging in ex parte communication is different than a district court judge doing so because councilors are elected officials with constituents. In Hougham v. Lexington-Fayette Urban County Government, 29 S.W.3d 370, 374 (Ky.App.1999), the Kentucky Court of Appeals explains why elected officials are not held to the same standard as judges:

> We agree with the trial court that members of council do not live in a vacuum nor are they required to. They are elected officials who represent the community and will be subjected from time to time to contact from constituents concerning issues, upon which they must ultimately decide. The mere fact that they are exposed to various information from competing groups does not make it impossible for them to serve and vote. Mere contact with neighborhood groups, letters from constituents, information gathered from staff, etc. does not, by itself, constitute "improper *ex parte* contact." If this were the case, seldom could an elected official make an informed decision without being accused of improper *ex parte* conduct.....
>
> This decision does not hold the City Council to a standard of judicial disinterestedness. As explained above, members of the City Council are free to take phone calls from concerned citizens and listen to their opinions and arguments prior to a quasi-judicial proceeding. In order to satisfy due process, however, the identity of the callers must be disclosed, as well as a general description of what each caller said....

A Florida court also acknowledged this political reality when it stated:

> [W]e recognize the reality that [county] commissioners are elected officials in which capacity they may unavoidably be the recipients of unsolicited ex parte communications regarding quasi-judicial matters they are to decide. The occurrence of such a communication in a quasi-judicial proceeding does not mandate automatic reversal. Jennings v. Dade County, 589 So.2d 1337, 1341 (Fla.App. 3 Dist. 1991).

Finally, in Sutton the Iowa Supreme Court relied heavily on the opinion of the Washington Supreme Court in Fleming v. City of Tacoma. In that case the Washington Supreme Court held that the appearance of fairness doctrine applied to all hearings conducted by municipal legislative bodies aimed at amending existing zoning codes or reclassifying land thereunder. It is notable that the fairness doctrine, which has since been codified in Washington, does not completely

prohibit ex parte communication, but rather, requires disclosure of the communication at the hearing. Wash. Rev. Code Section 42.36.060.

Cc: Steve Atkins, City Manager
Dale Helling, Assistant City Manager
Marian Karr, City Clerk
Karin Franklin, Director of Planning & Community Development
Sarah Holecek, First Assistant City Attorney
Mitch Behr, Assistant City Attorney
Sue Dulek, Assistant City Attorney
Eric Goers, Assistant City Attorney

DEPARTMENT OF ADMINISTRATIVE SERVICES

CITY OF CEDAR FALLS, IOWA
220 CLAY STREET
CEDAR FALLS, IOWA 50613
319-273-8600
FAX 319-268-5126

September 8, 2006

Hon. Jon T. Crews and City Council Persons
City of Cedar Falls, Iowa
220 Clay Street
Cedar Falls, IA 50613

Re: Conflicts of Interest

Dear Mayor Crews and City Council Persons:

I have been requested to furnish advice to assist the council members in determining when they have a conflict of interest in connection with a matter that comes before the city council for a vote, and when the council members should and should not disqualify themselves from participating in discussions of and a vote on a particular issue.

Conflicts of interest can be divided into two (2) separate categories:

1. A conflict of interest from a legal standpoint; and

2. A conflict of interest from an ethical standpoint.

Legal Conflicts of Interest

There are several different legal precedents that explain whether a city council member has a conflict of interest from a legal standpoint.

1. Iowa Code Section 362.5 prohibits a city officer from having an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for that officer's city.

2. Section 68B.2(A)(1) provides that a city council member shall not engage in any outside employment or activity which is in conflict with that member's official duties and responsibilities.

3. Iowa law provides that city councils, when acting in a quasi-judicial manner with powers, functions and duties that involve fact-finding and exercise of discretion, must be disinterested and free from prejudice when voting on matters coming before the city council. There are four (4) types of proceedings in which city council members, when exercising quasi-judicial powers, are disqualified from participating:

   a. A proceeding in which the city council member has prejudged the case;

   b. A proceeding in which the council member has a personal or pecuniary interest;

c. A proceeding where the council member is related to an interested person within the degree of consanguinity prohibited by statute; or

d. A proceeding where the council member is biased, prejudiced, or labors under a personal ill will toward a party.

These four (4) areas constitute the so-called common-law rule of disqualification. The reasoning behind this rule is that the public is entitled to have their representatives perform their duties free from any personal or pecuniary interest that might affect their judgment. Bluffs Development v. Board of Adjustment, 499 N.W.2d 12 (Iowa 1993).

There is no mathematical way to quantify the interest necessary to taint the process and disqualify the council member from acting on matters coming before them. However, courts have developed standards to describe what that interest includes. They are as follows:

A. The interest must be different from that which the council member holds in common with members of the general public. For example, a personal interest in the welfare of the community is not a disqualifying interest.

B. The interest must be "direct, definite, capable of demonstration, not remote, uncertain, contingent, unsubstantial, or merely speculative or theoretical."

C. These standards must be applied based upon practicality. Local governments would be seriously handicapped if any conceivable interest, no matter how remote and speculative, would require the disqualification of a city council member. Such a policy would not only discourage but might even prevent capable persons from serving as members of city councils.

D. The standards for disqualification of a city council member do not rise to the same level as the standard for disqualification of judges. The reasons are that city council members' decisions are normally subject to judicial review; city council members often have other employment or associations in the community they serve and it would be difficult to find competent people willing to serve on city councils if any connection with such other agencies, however remotely related to matters they are called upon to decide, were deemed to disqualify them.

E. Business dealings and family relationships with parties to the matter before the city council are, standing alone, nothing more than a remote, and therefore non-disqualifying, interest.

F. If a city council member has a direct interest in a matter that would be substantially enhanced or depreciated depending upon the vote, that would disqualify the council member.

For a legal conflict of interest to exist, there must be some direct personal or financial interest that can be demonstrated between the vote of the council member and his or her personal, family or business situation. Absent that, there is no legal conflict of interest.

Ethical Conflicts of Interest

An analysis of legal conflicts of interest does not end the inquiry. Instead, city council members need to be sensitive to the perception that will be created in the minds of the members of the general public if a council member participates in and votes upon a matter that could be perceived as involving a conflict of interest. In this regard, it has been said that the appearance of a conflict of interest should be avoided to the same extent as an actual conflict of interest, because of the negative impact a perceived conflict of interest can have on the public confidence in the workings of local government and the fairness of the proceedings.

The 2004 Edition of the *Municipal Policy Leaders' Handbook, a Guide for Iowa Mayors and Council Members*, has been published by the Institute of Public Affairs at the University of Iowa in cooperation with the Iowa League of Cities. This Handbook discusses ethics for municipal officials. The Handbook states in part as follows:

> "We all know that public figures, especially governmental officials, are expected to be above reproach. In fact, most residents would admit that they expect governmental officials to live by a set of standards that they would not adhere to themselves. Nevertheless, this double standard is a fact of life and something you must deal with every day because of your position. In reality, the public's concern for ethical conduct should not place a heavy burden on you. In fact, you should be honored that your residents place such a high level of trust in you.
>
> The most problematic aspect of acting ethically is, perhaps, deciding what is ethical in the first place. For public officials, ethics may simply be defined as "upholding the public trust". You were elected to perform your job in a professional manner and to ensure the fair and equitable delivery of services to your residents. Anything that violates this public trust can be considered unethical behavior. In a nutshell, if an activity or action prevents you from making fair and impartial decisions or results in some form of favoritism in the delivery of service, it should be viewed as unethical.
>
> In order to guide you through your tenure as a city official, you need to have a set of ethical guideposts. There are at least three different places you should look when creating your own ethical guideposts as a city official. First, the Iowa Legislature has passed state laws that set the state legal boundaries for city officials on what is ethical and what is not. Second, your city may have ordinances or express policies that further define the limits of ethical conduct specifically for officials within your city's government. Finally, over time, you have acquired your own personal sense of ethics that help you determine right from wrong."

The Handbook goes on to explain that the City of Urbandale, Iowa, has adopted a conflict of interest statement for all employees. After discussing various aspects of this statement, the Handbook goes on to conclude as follows:

"Unfortunately, ethical dilemmas do not disappear even if your city council adopts a code of ethics or a conflict of interest statement. For this reason, you must develop and rely on your own personal code of ethics. This code does not have to be overly complex. In many cases your code of ethics may simply involve the application of common sense to an ethical problem. For example, you may want to ask yourself: "How would this look on the front page of the local newspaper?" each time you make a decision."

Other Considerations

A city council member has a fine line to walk in attempting to determine whether to disqualify himself or herself from participating in discussions regarding, and making a vote upon, a matter which involves or could involve a conflict of interest. On the one hand, Iowa Code Section 362.6 provides that a statement of a city council member that he or she declines to vote by reason of conflict of interest is conclusive, and must be entered of record. In other words, if you decide you have a conflict of interest, no one can challenge that decision or argue with you about whether you have a conflict of interest. The problem here is that it might become tempting for a council member to declare that he or she has a conflict of interest in a particular matter, just in order to avoid having to take a position on a matter which is controversial. Clearly, Iowa law is not designed to encourage a city council member from disqualifying himself or herself from a vote just to avoid taking a position in a controversial issue.

On the other hand, Iowa Code Section 362.6 states that a measure that a council member votes on is not invalid by reason of that council member having a conflict of interest, unless the vote of the council member was decisive to passage of the measure. This means that even if a council member has a conflict of interest and votes on a matter, if his or her vote was not the deciding vote to the passage of the measure, it does not invalidate the action taken by the city council. The problem is that this might tend to encourage a city council member to vote on a matter when he or she has an actual conflict of interest, with the council member taking the position that his or her vote was not decisive to passage or defeat of the measure. The problem with this approach is that it tends to reduce the confidence of the public in the integrity of the process of local governmental decision-making. Therefore, a city council member must weigh both of these concerns, neither unduly disqualifying himself or herself from a vote when there is no actual conflict of interest, nor refusing to disqualify himself or herself when an actual conflict of interest exists but his or her vote might not be decisive to passage or non-passage of the matter. This requires a council member to be sensitive to both considerations, weigh each decision on its merits, and evaluate carefully whether the council member has a conflict of interest or not.

It is obviously not possible to reduce to writing in one legal opinion any definitive guidance that clearly delineates for city council members when a member does and does not have a conflict of interest. Each separate situation is unique to its own facts and circumstances, and depends upon a careful analysis of the personal or financial interest which the council member may have, whether it is significant, and whether it forms a basis for disqualifying the council member from participating in and voting on the matter. Essentially, it is a case-by-case analysis, and there is room for differing opinions among different persons.

Even more difficult is to provide guidance on when a council member has an ethical conflict of interest, as opposed to a legal conflict of interest. Each person may approach ethical matters in a different manner, with one person being more strict in his or her approach than another person. This makes it almost impossible to furnish definitive guidance in one written statement.

For example, if a city council member is a member of a board or commission of an organization that does business with the city, and a matter comes before the city council involving that organization's request for funds or a request by it to enter into a contract or other business dealings with the city, that council member may not personally benefit from the decision and may feel that he or she may participate in a discussion of and vote on the matter, since the council member will not derive any personal or financial benefit from the decision. From a legal conflict of interest standpoint, this may be true. But from an ethical conflict of interest standpoint, members of the general public may view that council member's participation in and vote on the matter as violating the public trust or constituting unethical behavior, if the council member's involvement with the organization prevents the council member from making a fair and impartial decision or results in some form of favoritism to that organization.

Another example might be where a city council member votes on entering into a contract with an organization or business that employs a council member's close family member. If an award of funds or approval of a contract financially benefits the close family member, it might be considered to indirectly benefit the council member who is related to that family member and who may be benefited financially by the contract. This type of situation presents a clearer case of a legal conflict of interest, as well as an ethical conflict of interest, and probably should be avoided.

Each council member needs to be sensitive to conflicts of interest, both legal and ethical, and take reasonable action to avoid being placed in a position that could be viewed by the general public as involving unethical behavior.

One course of concern is city council members sitting on boards of directors of public or private organizations that have dealings from time to time with the City of Cedar Falls, or council members taking leadership roles in organizations that do business with the City of Cedar Falls. One possible solution might be for the Cedar Falls City Council to adopt a written policy that prohibits members of the city council from serving on the board of directors of such public or private organizations, in order to avoid a situation where the council member is forced to choose between disqualifying himself or herself to avoid the appearance of a conflict of interest, or being pressured by the organization to stay involved and use his or her influence in attempting to affect the decision of the city council in connection with the matter. Prohibiting city council members from serving on such boards or commissions could prevent the city council member from being placed in a position of having to choose between these two countervailing considerations. The policy could be one that prohibits all city council members from serving on any boards of directors of outside public or private organizations, or could be limited to prohibiting council members from membership on organizations that transact business with the city. This latter type of policy would call for resignation of the council member from the outside board or commission at such time as the matter with the outside organization comes before the city council.

In conclusion, I would encourage each city council member to attempt to take a practical, common sense approach to concerns of potential conflicts of interest, attempting to avoid both legal and ethical conflicts of interest, and to take action to disqualify yourselves when your participation in discussions and a vote on a particular matter could be viewed as preventing you from making a fair and impartial decision, or which could be viewed as involving some form of favoritism to a particular organization. Putting yourself in the shoes of the person in the opposite situation from you might help you decide when it is appropriate to step down. At the same time, you should not disqualify yourself just because a controversial decision comes before you.

I realize that the guidance contained in this letter is not definitive, and does not answer all questions that might be posed in each of your minds in every possible situation. But I trust that it has been of some guidance in assisting you dealing with conflicts of interest.

Very truly yours,

CITY OF CEDAR FALLS, IOWA

By: Steven D Moore

Steven D. Moore
City Attorney

SDM/sjl

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APA

Dealing with Bias and Conflicts of Interest

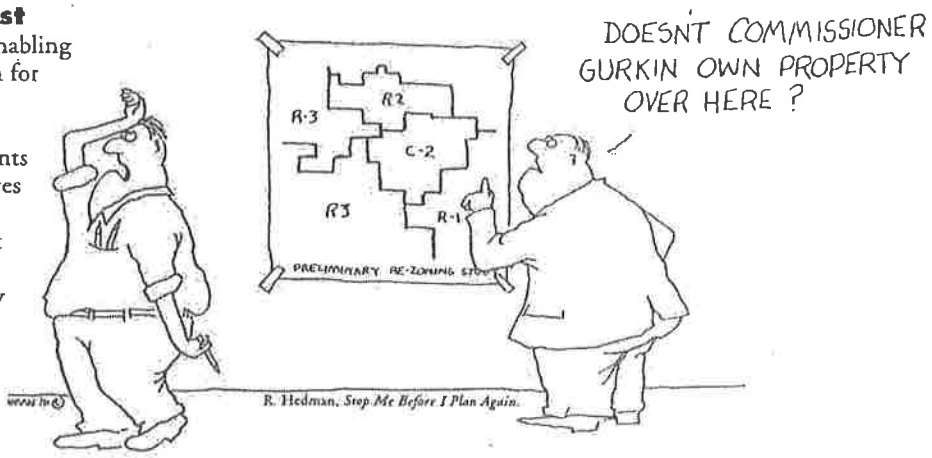
By Mark S. Dennison

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 aspect of the application, he 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 lesser 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

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. § 11-222 (member of board of county supervisors shall not vote upon any measure in which he, any member of his family, or his partner is pecuniarily interested).
- Ark. Stat. Ann. § 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).
- Fla. Stat. Ann. § 112.3143 (requiring public officers to disclose interests within 15 days of vote).
- 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").

Mark Dennison is an attorney and author who practices environmental, land-use, and zoning law in Ridgewood, New Jersey.

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 Realty 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.

Ga. Code Ann. § 89-953 (stating code of ethics for public officers and employees).

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).

Me. Rev. Stat. Ann. tit. 30, § 2251(1) (prohibits direct and indirect pecuniary 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.H. Rev. Stat. Ann. § 673:14 (regulating zoning board of adjustment, building code board, planning board, or historic district commission conflicts of interest).

N.J. Stat. Ann. § 40-55D-23(b) (regulating planning board conflicts of 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 § 36-14-4 (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).

Va. Code Ann. § 2.1-639.1 (state and local government conflict-of-interest act).

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*

ZONING Reports

Montgomery County Open Space Preservation: Program Recommendations

Open Space Preservation Task Force, Montgomery County Courthouse, Norristown, PA 19404. September 14, 1993. 60 pp. Free.

Late last year, Montgomery County in suburban Philadelphia approved a 10-year, $100 million program for open space acquisition. This document details the rationale behind the program as developed by the task force assigned by the county board to study the issue.

Modeling Future Development on the Design Characteristics of Maryland's Traditional Settlements

Maryland Office of Planning (in cooperation with the School of Architecture, University of Maryland), 301 W. Preston St., Room 1101, Baltimore, MD 21201. August 1994. 112 pp. $2.

Neotraditional and cluster designs for rural and suburban communities have been attracting increased attention in recent years as planners seek new solutions to the problem of urban sprawl. This effort, the result of a university research seminar on small town paradigms, examines a series of traditional Maryland communities and concludes with alternative models for zoning ordinance language to facilitate traditional design. The appendices include sample provisions of local comprehensive plans and zoning ordinances from existing communities.

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Welcome to the Commission!

A Guide for New Members

Prepared by the PLANNING COMMISSIONERS JOURNAL

They jump into the middle of their neighbor's business, staying up late at night to attend meetings, attempting to play Solomon. If they had any sense, they'd be at home playing cards. ... Around City Hall they're accorded the title of "planning commissioner." Whether it's an honor or a burden depends on what you are able to make of it.

TIP #6 FOR NEW COMMISSIONERS

AVOID "EX-PARTE" CONTACTS

"Bending Your Ear"

Consider the following scenario: you are approached by a developer who is considering acquiring a large parcel for development into a major retail facility. He asks if he can "bend your ear" a bit, and gain an understanding of how you might view a zone change on this property to permit the facility. Since he has not yet purchased the property, he requests that you keep his inquiry confidential so as not to inflate the asking price for the property. In the interest of wanting to be helpful, you agree. During the conversation, you indicate your belief that the zone change is a good idea.

... The first mistake made by the planning commissioner in our scenario was to agree to meet with the developer. This meeting would be considered an "ex-parte" contact, meaning that it occurred outside the public realm. ...

The literal meaning of the term "ex-parte" is "one-sided." This, of course, suggests that when you engage in an ex-parte contact, you are engaging in a one-sided discussion, without providing the other side an opportunity to respond and state their case.

Obviously, commissioners can and do have outside contacts with many members of the community, including developers. While such contacts are often appropriate, a line must be drawn when they involve matters which the commission is likely to act on in its capacity as a review body (e.g., when reviewing development proposals or rezoning requests). Moreover, the fact a contact occurs on a matter that is not yet formally before the commission does not eliminate the problem.

The second mistake was to accept something as confidential information. Planning commissioners are, in fact, public officials. Any public official, including those serving on commissions, should as a general rule consider information provided them to be public information. (Note: I do not mean to include information that the commission, as a body, is legally authorized to treat as confidential -- such as discussion of pending litigation or personnel matters).

If information you obtained through a confidential discussion ends up having relevance to a public matter before the commission, you will have an ethical obligation to disclose it.

The situation described above is different than a situation where you have knowledge about a particular property or development from previous experience through non-confidential sources. As a member of a community you often have relationships or contacts that reveal relevant information. Certainly this cannot be avoided and presents no particular problem as long as you disclose that information for public consideration.

The third, and final, mistake made by the "helpful" commissioner in our hypothetical situation was to give an opinion about the merits of the possible rezoning. A commissioner's credibility is undermined by announcing a position on a matter before the public hearing occurs. Moreover, prejudging matters harms the credibility of the commission as a whole by raising doubts about the integrity of the decision-making process.

From, "Bending Your Ear," by Greg Dale (PCJ #24)

Politely, Say "No"

Don't discuss a case privately and as a single member of a body with an applicant or objector prior to the filing and prior to the hearing if it can be politely avoided.

In the event that it is not avoidable, and many times it is not, be very non-committal, ... explain that you are only one member of the body, that you have not had an opportunity to study the matter thoroughly, that you have not seen the staff recommendation, and that you have no way of knowing what opposition there may develop or what will occur at the public hearing.

Be certain that the person concerned understands that you cannot commit yourself in any manner, except to assure him that he may expect a fair and impartial hearing.

From, "The Riggins Rules, #6" by Fred Riggins (PCJ #13)