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Legal Opinion 2009-019

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Roger Millar; OPG Director; Mike Barton, OPG; Denise Alexander, OPG; Mary McCrea, OPG; Dave Loomis, OPG; Tom Zavaritz, OPG; Jen Gress, OPG; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Carla Krause, Engineering; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; Kelly Elam; Ellen Buchanan; Chris Behan; Donna Gaukler, Parks & Rec Director; Jackie Corday, Parks & Rec

CC: Legal Staff

FROM: Jim Nugent

DATE: November 17, 2009

RE: Violation of Appearance of Fairness Doctrine with Respect to Land Use Zoning and/or Subdivision Applications Based on Evidence of City Elected Official Pre-Public Hearing Bias or Prejudice Could Disqualify a City Elected Official's Participation

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FACTS:

During this year there have been expressions of concern/complaint pertaining to City Council members taking a position before the City County Planning Board on a pending specific landowner zoning and/or subdivision land use application that the City Council would later be hearing and deciding. Evidence of city elected official pre-public hearing bias or prejudice with respect to a specific landowner zoning or subdivision application undermines basic due process rights of the landowner to a fair hearing and could disqualify the elected official from voting or invalidate the City Council's land use decision.

ISSUE(S):

With respect to pending landowner land use subdivision or zoning applications, should City elected officials responsible for making a final decision on the application avoid pre City Council public hearing bias or prejudice through actions such as submitting testimony either verbally or in writing to the City County Planning Board and/or signing a petition supporting or opposing the specific land use zoning or subdivision application?

CONCLUSION(S):

City Council members and the Mayor who are responsible for making final decisions with respect to landowner land use subdivision and zoning applications should avoid pre City Council public hearing conduct that evidences bias or prejudice in favor of or against a specific land use zoning or subdivision application.

LEGAL DISCUSSION:

With respect to pending landowner zoning and/or subdivision land use applications, it is inappropriate for city elected officials to submit testimony to the City County Planning Board or otherwise engage in conduct prior to the City Council land use public hearing that indicates a bias, prejudice or closed mind with respect to a specific landowner land zoning and/or subdivision application.

The appearance of fairness doctrine and procedural due process standard that should be present for specific land owner land use zoning and/or subdivision applications to ensure unbiased decision making is undermined by any city elected official actions or conduct indicating pre-decision-making bias or prejudice. Evidence of pre-decision-making bias or prejudice by a City Council member/Mayor could disqualify the city elected official and/or invalidate the land use decision made by the City Council and/or Mayor.

In order to avoid potential disqualification of a city elected official or, invalidation of a City Council decision pertaining to a specific land use subdivision or zoning proposal or land use project, as well as to protect constitutional due process for interested parties, and avoid even the appearance of bias or prejudgment of the land use issues, elected City decision makers should avoid submitting testimony at the Planning Board as well as avoid signing petitions pertaining to the proposed zoning or subdivision. It is important for land use decision makers to avoid weakening public confidence or undermining a sense of security of individual property owner rights as well as to provide an impartial, fair public process with respect to land use decision making for specific subdivision and zoning applications.

Rathkopf's "The Law of Zoning and Planning" Ziegler, Volume 2, §32.18, page 32-60 provides in pertinent part:

> **"§32:18 Disqualifying prejudgment bias**
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> Appearance of fairness doctrines and the special due process standards governing adjudicatory zoning action often are held to require an unbiased decisionmaker. Impartiality in the form of prejudgment bias undermines the basic due process right to a fair hearing. In adjudicatory and quasi-judicial proceedings, a zoning decisionmaker, whether elected or appointed, functions in a role analogous to that of a judge who is required to fairly hear and weigh the evidence received and to objectively apply established standards for decision to the facts of the case."

The Rathkopf text goes on to indicate that courts focus their concern on factual circumstances involving evidence of actual prejudgment of the specific facts presented by the specific land use application. Rathkopf indicates at page 32-62 that a court's attention will focus "on the ultimate due process, standard, of whether zoning applicant has been denied a 'fair hearing' due to the 'prejudgment bias' of a decisionmaker who has closed his mind to fairly weighing the evidence."

Footnote 11 on page 32-63 identifies the following court cases from other states where a court had held that the "closed mind" of a zoning decisionmaker was evident during the course of the land use proceedings:

> Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480A.2d 114 (1984), wherein the court invalidated a zoning board's decision to waive subdivision regulations and grant subdivision approval where one of the board members who voted for approval had spoken in favor of the proposal at a public hearing before he became a board member. The court ruled that the board member had prejudiced the issue and should have disqualified himself. When a board member improperly fails to disqualify himself, the act of the board must be invalidated, because it is impossible to gauge the effect that member may have had on his colleagues.
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> Hornbury Tp. Bd. Of Sup'rs. v. W.D.D., Inc., 119 Pa. Commw. 74, 546 A.2d 1328 (1985) wherein the court held that the refusal of town supervisor to abstain from voting on approval of developer's application for variances when supervisor appeared before zoning hearing board with counsel to oppose variances was improper because of supervisor's bias.
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> McVay v. Zoning Hearing Bd. Of New Bethlehem Borough, 91 Pa. Commw. 287, 496 A.2d 1328 (1985), wherein the court held that the developer was denied due process when majority of members of zoning board who were appointed to consider conditional use permit for low income planned residential development had signed a petition opposing the original rezoning for the development.
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> Marris v. City of Cedarburg, 176 Wis. 2d 14, 498 N.W.2d 842 (1993) (chairperson's comments created an impermissibly high risk of bias). (Emphasis added.)

Rathkopf "The Law of Zoning and Planning" Ziegler goes on to state in Section 32.19, page 32-66 and 32-67:

> **§32:19 Prejudice or partiality – Generally**
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> "State court "appearance of fairness" doctrines and the special due process standards governing adjudicatory zoning action have been held to requrie disqualification of a decisionmaker where prejudice or partiality in regard to a zoning application is found to exist. Disqualifying prejudice or partiality has been

found to exist on the basis of family or employment relationships or other associational ties. Also, prejudice has been found where a person who possesses the power of appointment over members of a zoning board appears before that board on behalf of or in opposition to an applicant. ...

Where disqualifying prejudice or partiality is alleged, courts in many cases have noted that the relationship in question need not be shown to have actually tainted or influenced the decision. In a number of cases courts have stated that the test is whether a decisionmaker's personal interest stemming from the relationship might reasonably conflict with his official duty to decide impartially and thus weaken public confidence in the proper exercise of the zoning power." (Emphasis added.)

Rathkopf's "The Law of Zoning and Planning" Ziegler addresses remedies and sanctions §32.28, pages 32-88 and 32-89 in part as follows:

§32:28 Remedies and sanctions

"If a conflict or fairness violation is proved by opponents on appeal; the usual judicial remedy will be invalidation of the challenged zoning decision and remand for reconsideration, sometimes with procedures or terms of participation specified which will insure fairness, e.g., prohibiting the participation of conflicted members. In some cases, the prejudicial and determinative effect of a conflict of interest will be clear: as where, for example, a conflicted board member casts the deciding vote in granting or denying an approval. On the other hand, the taint is less clear where the conflicted member's vote was not necessary to the board's approval or denial, or where the approval involved is only preliminary or advisory. Yet further subtle questions as to the presence or absence of tainting effect can arise where the conflicted member has, for example, participated in a debate but refrained from voting.

Some state courts take the approach that participation in deliberation and/or voting by a member who should have been disqualified vitiates the entire proceeding, even though votes of other members would have sustained the result. This approach is usually premised on the theory that one member's self-interest may effect or influence the votes of other board members. Other courts have upheld board action, regardless of a tainted member's participation, so long as there was the required number of votes without counting the vote of the disqualified member. (Emphasis added.)

The Montana Supreme Court in Madison River R.V. LTD v. Town of Ennis, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098, 2000 Mont. LEXIS 13 in part had before it a legal issue challenge that a town council member had a closed mind with respect to the land use proposal that was pending before the Ennis Town Council. The Montana Supreme Court stated as follows in paragraphs 15-18 of its decision:

To prevail on a claim of prejudice or bias against an administrative decision maker, a petitioner must show that the decision maker had an "irrevocably closed" mind on the subject under investigation or adjudication. **See Federal Trade Commission v. Cement Institute** (1948), 333 U.S. 683, 701, 92 L. Ed. 1010, 1034, 68 S. Ct. 793, 803. In **FTC**, the Court upheld a ruling that members of the Federal Trade Commission, who entertained views as a result of their prior ex parte investigations that a cement pricing system was the equivalent of price fixing in violation of the Sherman Act, were not thereby disqualified from presiding in an unfair trade proceeding concerning the cement pricing system.

Here, the District Court thoroughly reviewed the transcript of the hearings before the Planning Board and determined that nothing Kensinger said indicated that his mind was irrevocably closed on the subject of the proposed subdivision. The court noted that at the first Planning Board meeting, Kensinger stated he had "uncertainties" about the project. He "questioned" whether the Town sewer system could support the proposed 73-vehicle recreational vehicle park, whether the developer would pay for problems he guaranteed would never occur, and whether the subdivision could ultimately result in a higher tax burden for the people of Ennis. The District Court stated, "While Commissioner Kensinger did express doubts about the subdivision's effects on Ennis, these expressions of uncertainty are evidence that his mind was anything but irrevocably made up on the subject."

R.V. also claims that Kensinger may have had a financial interest in the denial of its application. It has attached to its brief a copy of a letter from a Bozeman, Montana, attorney addressed to its own attorney. The letter stated that the Bozeman attorney had been retained by "a group of individuals who are interested in making an offer to purchase the river property," and inquired as to R.V.'s interest in such an offer. A handwritten note at the bottom indicated that a copy of the letter had been sent to Kensinger. However, the writer of the handwritten note is not identified and nothing in the letter or the handwritten note states or implies that Kensinger is a member of the group interested in purchasing the property. Thus, R.V. has not supported its contention that Kensinger had a financial interest in the denial of its application.

We agree with the District Court that Kensinger's statements do not indicate that he had an irrevocably closed mind on the subject of the park application. R.V. has not established in any other way that Kensinger had an irrevocably closed mind on the subject. We affirm the District Court's determination that the Town Council was not required to disqualify Kensinger from voting and the court's decision not to vacate the Town Council's decision because of its failure to disqualify Kensinger. (Emphasis added.)

There was no evidence in the public record that the town council member had previously taken a position either for or against, thereby indicating a closed mind. Therefore, in the specific factual circumstances that existed in Madison River R.V. LTD v. Town of Ennis lawsuit,

Plaintiff did not adequately establish that the town council member had a closed mind. Therefore, the courts would not disqualify the town council member from voting, nor would the courts invalidate the town council's decision.

CONCLUSION(S):

City Council members and the Mayor who are responsible for making final decisions with respect to landowner land use subdivision and zoning applications should avoid pre City Council public hearing conduct that evidences bias or prejudice in favor of or against a specific land use zoning or subdivision application.

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JN:jw