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Legal Opinion 2011-005

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Mike Barton, OPG; Denise Alexander, OPG; Mary McCrea, OPG; Janet Rhoades, OPG; Tim Worley, OPG; Laval Means, OPG; Tom Zavitz, 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: April 1, 2011

RE: Inappropriate for City Elected Officials to Testify on Specific Land Use Project Proposals at Planning Board when Land Use Project is Going to City Council Public Hearing

FACTS:

Concern has been expressed concerning a city elected official testifying before the Planning Board with respect to a specific land use application proposal that will be going to city council public hearing. Once again it must be emphasized that evidence of city elected official pre-public hearing partiality, bias or prejudice with respect to a specific landowner zoning or subdivision application undermines the appearance of impartiality, objectivity and fairness as well as the basic due process rights of the landowner to a fair public hearing before the City Council. Such city elected official testimony at the planning board could disqualify the elected official from voting or invalidate the City Council's land use decision.

ISSUE(S):

Should City elected officials responsible for making a final decision on a specific land use application avoid pre City Council public hearing partiality, bias or prejudice through their actions such as submitting testimony either verbally or in writing to the City

County Planning Board and/or signing a petition supporting or opposing a specific land use zoning or subdivision application?

CONCLUSION(S):

City Council land use public hearings should have the appearance of impartiality, fairness and should be heard by objective city elected officials providing a fair public hearing. City Council members and the Mayor who are responsible for making final decisions with respect to specific land use subdivision and zoning applications should avoid pre City Council public hearing conduct or testimony that evidences partiality, bias or prejudice in favor of or against a specific land use zoning or subdivision application. City elected official violation of the legal principles of appearance of fairness, impartiality and objectivity by city elected officials could risk legal rulings against the city council and/or could invalidate a city elected official's ability to vote on the specific project if they have engaged in conduct that evidences a partiality, bias or prejudice with respect to the land use project.

LEGAL DISCUSSION:

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 partiality, bias, prejudice or closed mind with respect to a specific zoning and/or subdivision application. An appearance of fairness legal doctrine and objective procedural due process standard should be provided by city elected officials for specific land owner zoning and/or subdivision applications to ensure impartial, objective, unbiased decision making. Such objectivity is undermined by any city elected official actions or conduct indicating pre-decision-making partiality, bias or prejudice. Evidence of pre-decision-making partiality, 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 partiality, bias or prejudgment of the land use issues, elected City decision makers should not be submitting testimony at the Planning Board as well as should avoid signing petitions pertaining to any proposed zoning or subdivision land use project. 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, §32.17, pages 32-54 through 32-58 pertaining to the appearance of fairness legal doctrine states:

"**§32:17 Appearance of fairness doctrines**

Court decisions in a number of states have developed "appearance of fairness" doctrines that attempt to restrict and prohibit conflicts of interest and bias that may undermine public confidence in the integrity of the zoning decisionmaking process. These doctrines may be based on the state public policy, the spirit of statutory restrictions, the right to a statutorily required fair hearing or simply judicial interpretation of the special due process standards governing adjudicatory action. While these doctrines generally are not strictly applied to purely legislative action, they may well be applied in conflict situations to members of local legislative bodies when acting in a quasi-judicial or administrative capacity and when the action of the public official involved is not expressly prohibited by statute.

Early Connecticut court decisions established conflicts of interests principles governing disqualification of members of zoning bodies. Courts in that state have reaffirmed the principal "that public policy requires that members of such public boards cannot be permitted to place themselves in a position in which personal interest may conflict with public duty. The evil against which the policy is directed "lies not in influence improperly exercised but rather in the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured will always exist in the exercise of zoning power." It is "the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest.

In the New York case, Tuxedo Conservation and Taxpayers Ass'n v. Town Board, a "lame duck" town board amended local procedures under the state Environmental Quality Review Act in order to accelerate the environmental impact statement process and thereafter approved a special permit for a 200 million dollar, 3,900 unit "planned integrated development." All the while, it was known that one of the board members was an executive in the advertising agency which served the applicant developer and which stood to get the advertising account for the project. The board member in question cast the deciding vote.

Although the letter of the law did not apply (N.Y. Gen. Mun. Law §809 being limited to one who is an owner, employee or contingent contract holder with the applicant) the court overturned the approval, stating that while the anathema of the letter of the law may not apply to his action, the spirit of the law was definitely violated." The court indicated that not only must actual conflict be avoided, but also the possible appearance of

conflict. … For like Caesar's wife, a public official must be above suspicion."

In the New Jersey case Aldom v. Borough of Roseland, borough council proceedings concerning a rezoning were voided because one member had worked for 23 years for the company requesting the zoning change. . . .

Washington courts in a series of decisions have developed a rather strict "appearance of fairness" doctrine governing conflicts of interest and bias in zoning proceedings. As noted in a recent Washington court decision, the doctrine is aimed at preventing the appearance of fairness as well as the actual existence thereof:

. . .

The Supreme Court of Washington has noted that under this appearance of fairness doctrine, "public officers impressed with the duty of conducting a fair and impartial fact-finding hearing upon results significantly affecting individual property rights as well as community interests, must so far as practicable, consideration being given to the fact that they are not judicial officers, be open minded, objective, impartial and free of entangling influences or the taint thereof. . . . They must be capable of hearing the weak voices as well as the strong. To permit otherwise would impair the requisite public confidence in the integrity of the planning commission and its hearing procedures." The doctrine is applied by Washington courts to any administrative or quasi-judicial zoning proceeding (including site-specific rezoning) where a public hearing is required by statuted. (Emphasis added.)

. . .

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

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.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.) Also, see Keen v. Dane County Bd. of Supervisors, 269 Wis. 2d 488, 2004 WI App 26, 676 N.W.2d 154 (CT App 2003) (holding that letter of support for application created 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

> "State court "appearance of fairness" doctrines and the special due process standards governing adjudicatory zoning action have been held to require 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.
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> 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.)

There are no Montana Supreme Court decisions directly on point. 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 challenge that a town council member had a closed mind with respect to the land use proposal pending before the Ennis Town Council. The Montana Supreme Court stated 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.
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> 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.
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> 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, 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 land use public hearings should have the appearance of impartiality, fairness and should be heard by objective city elected officials providing a fair public hearing. City Council members and the Mayor who are responsible for making final decisions with respect to specific land use subdivision and zoning applications should avoid pre City Council public hearing conduct or testimony that evidences partiality, bias or prejudice in favor of or against a specific land use zoning or subdivision application. City elected official violation of the legal principles of appearance of fairness, impartiality and objectivity by city elected officials could risk legal rulings against the city council and/or could invalidate a city elected official's ability to vote on the specific project if they have engaged in conduct that evidences a partiality, bias or prejudice with respect to the land use project.

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/s/

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