

**MEMORANDUM
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TO: Max Best, Planning Director
CC: Colette Thompson, Borough Attorney
FROM: ~~Holly B. Montague~~, Deputy Borough Attorney
DATE: November 28, 2005
SUBJECT: Disqualification for bias of planning commissioner

QUESTION: Whether commissioners who have voted on an application as a member of a city planning and zoning process should recuse themselves from voting on the same quasi-judicial application when it is before the borough planning commission.

SHORT ANSWER: Yes; such conduct would subject the decision to challenge as a result of planning commission bias and may give rise to due process claims from parties that the hearing was not fair.

BACKGROUND: Pursuant to KPB 2.40.010 there must be a borough planning commissioner from each first class or home rule city. There is no requirement that the city representative also be a member of the city planning and zoning commission.¹ However, as a matter of practice commissioners representing the cities often also simultaneously serve on the city's planning and zoning commission. The question arises whether it is appropriate for those commissioners to vote on petitions before the borough planning commission when they have already cast a vote on the same application at the city planning and zoning level. While KPB Chapter 2.58 addresses conflicts-of-interest for borough officials, including planning commissioners, it does not address this separate issue of planning commission bias. As discussed below courts have grappled with this issue and generally do not regard favorably a commissioner voting where the commissioner has taken a definitive position regarding a particular application.

¹ Alaska Statutes Title 7, Boroughs, the 1962 precursor to the current AS Title 29, Municipalities, did require a planning commissioner from the cities' advisory planning commissions to sit on the borough planning commission. Former AS 7.15.340(A).

ANALYSIS: The integrity required of public officeholders demands that even an “appearance of impropriety” be avoided. Zoning decisions that are the result of prejudice will be invalidated under Alaska law.² The Planning Commission’s function in this vacation application is quasi-judicial or administrative in nature because it is applying adopted laws and policy to a particular application.³ When the planning commission acts in a quasi-judicial capacity, it is analogous to a judge who must fairly hear and weigh the evidence received and objectively apply the established standards to the facts of the case.⁴ Commissioners who have prejudged the facts of an individual case pending before it to the extent that they can no longer be impartial are biased, and their participation in decisions may invalidate the commission’s decision and violate the due process clause which requires fair hearings in proceedings affecting property rights.⁵

Not all prejudgment eliminates a commissioner’s ability to debate and decide land use issues. In fact, planning commissioners are expected to have preconceived notions regarding issues of law and policy and are often selected because of their familiarity with local conditions and concern regarding land use issues.⁶ A commissioner voicing an opinion regarding certain types of land uses does not necessarily mean that he will judge a particular application for that kind of land use without regard to the applicable standards. However, land use decisions are particularly prone to bias because commissioners are drawn from the immediate geographical area and because of the legislative, adjudicative, and political nature of the zoning process.⁷

The Alaska Supreme Court has not developed a specific test regarding planning commissioner bias based on prejudgment of the facts of a case; however, a number of other jurisdictions have addressed this issue. While the decisions vary in exactly what acts constitute disqualifying bias, the various tests are similarly stated, and generally do not fault a commissioner for merely having formed an opinion before considering all the evidence. “The decisive question ... must be whether [the commissioners] actually have made up their mind ... regardless of any argument that might have been advanced at the hearing.”⁸ A federal case addressing the administrative decision-making process states the test for disqualifying bias as “a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.”⁹ This case and several zoning cases indicate that the appearance of bias, rather than actual bias, disqualifies the commissioner.¹⁰

² *Griswold v. City of Homer*, 925 P.2d 1015 (Alaska 1996).

³ *Winegardner v. Greater Anchorage Area Borough*, 534 P.2d 541 (Alaska 1975).

⁴ Rathkopf, *The Law of Planning and Zoning*, Vol. 2, Sec. 32.18[5].

⁵ *Id.*

⁶ *Marris v. City of Cedarburg*, 498 NW2d 842 (Wis. 1993); *Cioffoletti v. Planning and Zoning Commission of the Town of Ridgefield*, 552 A.2d 796 (Conn. 1989).

⁷ *Marris*, at 847.

⁸ *Cioffoletti*, at 802. Citing *Furtney v. Simsbury Zoning Commission*, 271 A.2d 319, 323 (Conn. 1970), *Wagner v. Jackson County Board of Zoning Adjustment*, 857 S.W.2d 285, 289 (Mo. App. 1993). “A clear statement suggesting that a decision has already been reached, or prejudged, should suffice to invalidate a decision.” *Marris*, at 848.

⁹ *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. 1970).

¹⁰ *Prin v. Council of Municipality of Monroe*, 645 A.2d 450 (Pa. 1994); *Barbara Realty Company v. Zoning Board*

A strongly held philosophical or policy position is not generally bias, whereas prejudgment of the specific adjudicative facts at issue in a particular case is bias.¹¹ The types of acts which have been held to constitute disqualifying bias include making public statements or authoring letters regarding a particular case prior to the case coming before the commission.¹² A prior vote on the same application that is before the KPB planning commission constitutes prejudice, and not just a strong but more general opinion regarding policy.

CONCLUSION: If a commissioner has previously voted at the city level and declared on the record that his or her mind is still open, the commissioner's role in the borough process could still be challenged for bias. In order to avoid the appearance of bias and thereby retain public confidence in the integrity and impartiality of the planning commission process, it is recommended that the commissioners recuse themselves from the discussion and decision of petitions before the planning commission (or plat committee) where they have participated in the decision-making process regarding the same application at the city planning and zoning level.

of Review of City of Cranston, 128 A.2d 342 (R.I. 1957); *McVay v. Zoning Hearing Board of Bethlehem Borough*, 496 A.2d 1328 (Pa.1985).

¹¹ Rathkopf, *The Law of Planning and Zoning*, Vol. 2, Sec. 32.18.

¹² *Cinderella*, at 591; *Prin*, at 451-53; *Saks & Co. v. City of Beverly Hills*, 237 P.2d 32 (Cal.App. 1952); *Winslow v. Town of Holderness Planning Board*, 480 A.2d 114 (N.H. 1984); *McVay v. Zoning Hearing Board of New Bethlehem Borough*, 496 A.2d 1328 (Pa.1985).