

It's All Relative

C. Gregory Dale, AICP

This column focuses on a particular aspect of conflicts of interest: how mixing family and planning commission can create ethical problems.

By way of background, the American Planning Association "Statement of Ethical Principles" addresses the issue of conflicts of interest. It provides that planners and planning commissioners:

"Make public disclosure of all 'personal interests' they may have regarding any decision to be made in the planning process in which they serve, or are requested to serve, as advisor or decision maker. ... Define 'personal interest' broadly to include any actual or potential benefits or advantages that they, a spouse, family member or person living in their household might directly or indirectly obtain from a planning decision. ... Abstain completely from direct or indirect participation as an advisor or decision maker in any matter in which they have a personal interest, and leave any chamber in which such a matter is under deliberation, unless their personal interest has been made a matter of public record; their employer, if any, has given approval; and the public official, public agency or court with jurisdiction to rule on ethics matters has expressly authorized their participation. ..."

The difficulty often lies in defining what is meant by "personal interest." One way this gets particularly difficult is when your role as a planning commissioner becomes involved with family relationships. Consider the following hypothetical scenarios:

Your wife's law firm represents an applicant. She has indicated to her law firm that she will have no involvement with this matter given your position on the planning commission. She is a partner in the firm. As a commissioner, what should you do?

Your cousin appears at a hearing to testify against a proposed development. He owns a home nearby, and has concerns about the design and possible traffic impacts of this project. As a commissioner, what should you do?

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There is a proposed major development that would be located between your house and the elementary school your daughter will attend next year. During the review of the project you would like to argue that a condition be attached requiring the developer to construct a sidewalk between the new development and the school so that schoolchildren can more safely walk to school. Since your daughter would benefit from this, is it unethical for you to advocate for this sidewalk?

Before addressing the scenarios individually let's consider some basics.

The underlying principle that must be protected is that everyone who appears before a planning commission – applicants, opponents, or simply interested individuals – has a right to unbiased decision-makers. The problem with conflicts of interest or other relationships that may bias a decision-maker is that they undermine the fundamental fairness of the process.

Many states have specific conflict of interest laws that apply to public officials (including planning commissioners) and these laws must be obeyed.  State Laws.

In my opinion, however, compliance with such laws does not necessarily mean you are free and clear of ethical issues. Many planning commissioners have lost credibility or damaged the integrity of their commission by thinking that as long as they act legally, they can behave however they wish. The fact is that the perception of impropriety and the perception of bias can be very damaging to the credibility of your commission, even when your actions do not violate the law.

Nothing creates the impression of bias more than family ties. Such situations must be handled with great care and sensitivity.

I suggest that you follow the same general approach in dealing with each of the above scenarios:

First, determine whether or not you have an actual conflict of interest – that is, whether your participation is barred by state law or local ordinance. If in doubt, consult your commission's or board's legal counsel. If you receive your agenda in advance (as you should!) you should be able to spot most potential conflict of interest situations before the meeting. If you do have an actual conflict of interest, the matter is simple. When the agenda item comes up during the meeting, request that you be excused (see discussion of how to excuse yourself below) and remove yourself from the process. You should physically leave the room during discussion of the matter so there is no doubt that you have removed yourself from the process.

If you do not have an actual conflict of interest, the next question is whether the circumstances create a bias on your part that would keep you from making an objective decision. If you feel that you cannot be objective due to the circumstances, you should disclose the nature

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of your concerns to the board and request that you be excused from the discussions. Note that I suggest that you let your fellow members make the decision. Technically, it is your decision, but in my opinion it makes for better public credibility if the other members decide.

But even if you believe you can act in a fair, objective, and unbiased manner, I still suggest that you disclose the family relationship to the board, express your opinion that you believe you can act in an unbiased way, and again let the board make the decision. If the board believes the public will perceive bias (in spite of your own belief) you should step aside and not participate.

Unfortunately, there is no clear, objective standard that can be applied to these "gray area" judgments. The best approach for the commission in making these determinations is to apply a "reasonable person" standard. In other words, would a reasonable person view these circumstances and come to the conclusion that there may be a perception of bias on the part of the commissioner?  *Planning for Conflicts.*

You should also recognize that what is "reasonable" may vary from community to community. In small communities (with perhaps only a five member commission) where large families have been around for generations, interrelationships are frequent and complex. If commission members were required to excuse themselves every time a relative came before them, business would never get done. In other communities the existence of a family relationship may be automatic reason to excuse oneself.

With this background, let us now return to the scenarios. In the first, an actual conflict of interest likely exists. The fact that your wife has an ownership interest in the law firm means that she (and you) may benefit materially from continued business by the applicant, even if she isn't the member of the firm who actually works for the applicant.

In the second scenario where your cousin is to testify, you probably do not have an actual conflict since you would

not materially benefit from the outcome. The question is whether you would be biased by your cousin's interest in the matter. Even if you believe you could be objective, I would recommend disclosing the family relationship; expressing your belief in your ability to remain objective, but then letting your fellow board members decide whether you should participate. In most communities, this scenario would not be perceived to be a problem.

The third scenario offers some different issues. Here there is not an issue of material gain – the issue is whether your concern about your child creates a bias on your part. Assuming that the advice is no legal conflict of interest exists (and it is hard to see how any conflict of interest law would apply), I do not see a particular problem in your participating as a decision-maker. After all, the purpose of the commission is to help protect the public health, safety, and welfare of the community, and your family is certainly part of that community. In fact, many issues you face as a commissioner will also affect you and your family. In this case, even the perception of bias would appear extremely remote.

These scenarios are only three of literally hundreds of possible situations you may face. My opinions are just that – opinions, and you may very well come to different conclusions in your community. Always remember to first make sure that you are acting in compliance with any conflict of interest laws. Keep in mind that the perception of bias can undermine your (and your commission's) integrity in the eyes of the public – and that nothing creates a climate of mistrust more than the perception that a public office is being used for the benefit of family. ♦

C. Gregory Dale is a Principal with the planning and zoning firm of McBride Dale Clarion in Cincinnati, Ohio. Dale manages planning projects and conducts training for planning officials throughout the country. He is also a former President of the Ohio Chapter of the American planning Association.



Planning for Conflicts

It makes sense for your commission to plan for the inevitable — and it is inevitable that conflict of interest and bias situations will regularly come up. It may benefit your commission to meet informally with your city or county attorney to discuss hypothetical situations and how to deal with them. A number of planning commissions also set out in their bylaws how they will deal with conflict and bias questions. Advance planning can avoid confusion and lengthy discussions during the meeting.

State Laws

A number of states have conflict of interest statutes that apply to public officials, including planning board members. These laws typically focus on direct financial benefits to the public official, members of his or her immediate family, and/or the business in which the official is employed. Typically, the financial interest involved must be "substantial" (variously defined in different states). But remember that ensuring your board's integrity in the eyes of the public may require going beyond state law requirements.