Town of Carbondale
511 Colorado Avenue
Carbondale, CO 81623

AGENDA
BOARD OF ADJUSTMENT
THURSDAY, JANUARY 30, 2019
6:30 P.M. TOWN HALL

1. Call To Order

2. Roll Call

3. 6:30 P.M. – 6:40 P.M.
   Election of Chair and Vice-Chair

4. 6:40 P.M. – 7:40 P.M.
   Board of Adjustment Training……………………………………………...……..Attachment A

   a. Zoning Overview

   b. Legal Issues

5. 7:40 P.M. – 8:00 P.M.
   Scheduling For Upcoming Meetings

6. 8:00 P.M.
   Adjourn

*** Please note all times are approx.**

TOWN OF CARBONDALE
511 COLORADO AVENUE
CARBONDALE, CO 81623

Board of Adjustment Agenda Memorandum

Meeting Date: January 30, 2019

TITLE: New Board of Adjustment Training

SUBMITTING DEPARTMENT: Planning Department

ATTACHMENTS: UDC Section 2.8.4. Board of Adjustment
UDC Section 2.2. Summary Table of Procedures
Dahl – Advising Quasi-Judicial Judges
Broadwell – Conflicts and Ethics
Hamilton – Ethics/Recusal Issues

BACKGROUND

The Board of Trustees recently appointed seven new Board of Adjustment (BOA) members. The BOA is a quasi-judicial board which holds public hearings. It is important to make sure all of the new members receive training in advance of these meetings.

The new Board of Adjustment members are:

Jeff Dickinson
Mark Chain
Matthew Gworek
Meredith Bullock
Ann Gianinetti
April Spaulding (Alternate)
Russ Criswell (Alternate)

The first order of business will be to elect a Chair and a Vice-Chair from its membership.

At the meeting, Planning Staff will go through the following items:

- Introduction to the Planning Department
- 2013 Comprehensive Plan
- Brief Overview of the Unified Development Code (UDC)
- Land Use Application Processes

- Public Hearings

Mark Hamilton and Tarn Udall, the Town Attorneys, will also be present and will cover the following topics:

- Ex Parte Communication
- Disclosures
- Recusals
- Conflicts of Interest
- Bias
- Other
- Questions/Comments

It will be an informal meeting with plenty of opportunities for questions and comments.

Please let me know if you have any questions. My e-mail is jbuck@carbondaleco.net and my direct phone number is 970/510-1208.

Thanks!

Prepared By: Janet Buck, Planning Director

arrangement; wise and efficient expenditure of public funds; the promotion of energy conservation; the protection of environmentally sensitive areas; the adequate provision of public utilities, open space and other public requirements; provisions of this Code; and input from the staff, the applicant, and the general public.

C. Organization and Membership

1. The Planning and Zoning Commission shall consist of seven members and two alternate members appointed by the Board of Trustees. A total of two members, either alternates or full-voting members, may live outside the Town limits. The alternate members shall act in the absence of any regular member at the request of the chairman.

2. The term of office of the members of the Planning and Zoning Commission shall be four years. All terms of the members and alternates shall commence from the time of appointment by the Board of Trustees.

3. Vacancies occurring other than from the expiration of a board member's term shall be filled for the remainder of the unexpired term by the appointment of the Board of Trustees.

4. The Planning and Zoning Commission shall elect from its membership a chairman, a vice-chairman and such officers as it may deem necessary during the first commission meeting of each calendar year. The Director or a designated representative shall serve ex officio as secretary of the Commission, but shall have no vote.

5. Any member of the Planning and Zoning Commission may be removed by majority vote of the Board of Trustees, after public hearing for inefficiency, neglect of duty, or malfeasance in office. The Planning and Zoning Commission may request that the Board of Trustees remove members who fail to attend three consecutive meetings without excuse from the chairman of the Planning and Zoning Commission. If the Board of Trustees removes a member of the Commission, it shall file with the minutes of the hearing a written statement of the reasons for such removal.

6. The appointments of existing members and alternates to the Planning and Zoning Commission are hereby ratified, and such terms shall continue until a successor lawfully takes office, until the expiration of the terms ratified by this subsection, or until the member resigns or is removed.

2.8.4. BOARD OF ADJUSTMENT

A. Affirmation

The Board of Adjustment, heretofore created and existing by resolution of the Board of Trustees of the Town, is hereby affirmed.

B. Powers and Duties

1. The Board of Adjustment shall have the powers and duties set forth in Section 2.2, *Summary Table of Procedures*, to be carried out in accordance with the terms of this Code.

2. The Board shall not have the power to change the terms of this Code or to change the zone district map of the Town or to grant a variance that allows a use which is not permitted in the zone district in which such use will be located;

3. A majority vote from members of the Board shall be necessary to reverse any order, requirement, decision, or determination of any Town administrative official, or to decide in favor of the applicant any matter upon which it is required to pass, or to grant any application for a variance.

C. **Membership**

1. The Board shall have five members and up to two alternate members which shall be appointed by the Board of Trustees from applicants after such positions have been advertised. In addition, in the event that less than five persons, whether members or alternate members, are available to serve due to absence, conflict of interest, or otherwise, members of the Carbondale Planning and Zoning Commission shall be special alternate members of the Board of Adjustment to hear matters in such circumstances. Alternate members and special alternate members shall serve in the absence of a regular member at the request of the chairman so that to the greatest extent possible, all matters shall be heard and considered by five persons. No member of the board shall be a member of the Town board. All members shall be residents of the Town.
2. The term of office of members of the Board of Adjustment shall be four years.
3. Vacancies occurring on the Board other than from the expiration of a member's term shall be filled for the unexpired term in the same manner as the initial appointment.
4. The Board shall elect from its membership a chairman, and a vice-chairman and such officers as it may deem necessary at its first meeting during each calendar year. The Town shall provide the board with a secretary who shall keep and maintain the minutes of the board meetings.
5. Members of the Board of Adjustment may be removed by majority vote of the Board of Trustees, after public hearing for inefficiency, neglect of duty, or malfeasance in office. The Board of Adjustment may request that the Board of Trustees remove members who fail to attend three consecutive meetings without excuse from the chairman of the Board of Adjustment. If the Board of Trustees removes a member of the Board of Adjustment, it shall file with the minutes of the public hearing a written statement of the reasons for such removal.

2.8.5. TOWN ADMINISTRATION

A. **Town Manager**

See Title 2, Chapter 2.02.

B. **Planning Director**

1. There is established the office of the Planning Director (or Director). The Director shall be appointed by the Town Manager and shall be charged with the general responsibility for administering, interpreting, and enforcing this Unified Development Code.
2. The Director shall have the review and decision-making responsibilities set forth in Section 2.2, *Summary Table of Procedures*, to be carried out in accordance with the terms of this Code. In performing such responsibilities, the Director may delegate such duties to the Planning Department staff as the Director deems appropriate. The Director also shall have such additional powers and duties as may be set forth elsewhere in this Code and the Carbondale Municipal Code.

Table 2.2-1:
Summary Table of Carbondale Review Procedures
(shaded row = Public Hearing required)

Application Review Procedure (Does not include all application types)	Pre-Application Meeting M = Mandatory O = Optional	Staff Review	Planning and Zoning Commission	Board of Adjustment	Board of Trustees
		R = Review/Recommendation		D = Decision	
Amendments					
Amendment to the UDC	M	R	R		D
General Rezoning (Amendment to the Zoning Map)	M	R	R		D
Rezoning to a Planned Unit Development	M	R	R		D
Development Permits					
Conditional Use Permit	M	D			
Special Use Permit	M	R	D		
Administrative Site Plan Review	M	D			
Minor Site Plan Review	M	R	D		
Major Site Plan Review	M	R	R		D
Sign Permit	O	D			
Subdivision					
Subdivision Conceptual Plan	M	R	D		
Preliminary Plat	M	R	D		
Final Plat	O	R			D
Condominium Subdivision	M	R	D		
Subdivision Exemption	M	R	D		If de novo requested
Minor Plat Amendment	O	D			
Flexibility and Relief Procedures					
Variance	O	R		D	
Appeal (see Section 2.7.2.B for applicable appeal authority for various land use approvals)	O			D	D

Colorado County Attorneys Association
June 3, 2010

Creative Public Meeting Issues: Advising the Quasi-Judges

Gerald E. Dahl
Murray Dahl Kuechenmeister & Renaud LLP

OPEN MEETING REQUIREMENTS GENERALLY

1. Sec. 24-6-402(1)(a), C.R.S.:

    > (a) "Local public body" means any board, committee, commission, authority, or other advisory, policy-making, rule-making, or formally constituted body of any political subdivision of the state and any public or private entity to which a political subdivision, or an official thereof, has delegated a governmental decision-making function but does not include persons on the administrative staff of the local public body.

2. Sec. 24-6-402(1)(b), C.R.S.:

    > (b) "Meeting" means any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.

3. Sec. 24-6-402(2)(b), C.R.S.:

    > All meetings of a **quorum or three or more members** of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times.

4. Exception for "day-to-day oversight" by BOCC: Sec. 24-6-402(2)(f), C.R.S.

5. Adjourned or continued meetings

    - Is a continuation of the first meeting - not a new meeting
    - Cannot add new agenda items to the adjourned meeting without a new public notice
    - Procedure: move to continue the meeting or hearing to a date, time, and place certain.

6. Work sessions may be conducted regularly but cannot be used as a substitute for a regular meeting. *Bagby v. School District No. 1*, 528 P.2d 1299 (Colo. 1974); *Walsenberg Sand & Gravel Co. v. City Council of Walsenberg*, 160 P.3d 247 (Colo.App.2007)

7. Executive sessions

   - Two-thirds vote of the quorum required to convene
   - The topic and specific statutory citation must be publicly announced before the session begins, and identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized. Sec. 24-6-402(4)
   - Only the body can waive the executive session privilege, individual members may not. Sec. 24-6-402(2)(d.5)(11)(D); See also, *Kleitman v. Superior Court*, 74 Cal.App. 4th 324 (1999). (". . . statutes authorizing closed sessions and making records thereof 'confidential' would be rendered meaningless if an individual member could publicly disclose the information he or she received in confidence." at 334).

CHAIRING AND PARTICIPATING IN PUBLIC MEETINGS

1. Importance of strong chair or presiding officer

   - Sticks to the agenda
   - Focuses discussion on the topic
   - Reminds members of the time ("It is 9:00 p.m. and we are on item 2 of 10.")
   - Expedites discussion and action (example: "I'll entertain a motion on that" or "Is that a motion?")
   - Knows the art of suggesting when the time is right to act
   - Leads the meeting rather than simply attending it.

2. Leads by example:

   - Doesn't tell jokes or make unnecessary asides, or encourage others in doing so.
   - Doesn't repeat what has been said, unless it is to encourage discussion
   - Doesn't wait for someone else to speak up – asks if there's anything else; if not, entertains a motion.

3. Being ready to act is not the same thing as having nothing more to say: there is always more which can be said.

4. Recognizes when there is disagreement and knows when to suggest that more discussion won't change the outcome.

5. As participants in the meeting rather than as the chair, other members have the opportunity to exercise some of the same leadership roles.

CONDUCTING PUBLIC HEARINGS

Goal: That members and public attendees leave the hearing feeling that it was fair and that their views were heard and appreciated.

1. Important to explain the rules of conduct for the hearing at the outset
2. Some suggested rules:
   - Can require those wishing to speak to sign up
   - Ask each person to state their name and address for the record
   - Suggest speakers don't repeat prior testimony if they can state they agree with an earlier speaker; but understand that it will happen anyway.
   - "Mr. _________, I am sorry, but that topic is simply not before us tonight; we are only concerned with ___________; do you have anything else to say about ______________?"
3. Stick to your rules
4. Pay attention to the persons giving testimony.
5. Make sure that attendees at the public hearing know they have the right to speak
6. Thank all the speakers for appearing
7. Policy questions
   - Whether to permit submission of written materials after the hearing (will delay the decision)
   - Whether to (a) act at the end of the hearing; (b) continue the hearing to a date certain, or (c) continue for action only.

QUASI -JUDICIAL MATTERS

One of the greatest challenges facing local government attorneys is guiding elected and appointed decision making bodies when they act in a quasi-judicial capacity. Members of the board of county commissioners and planning commission are typically lay people. They have no judicial experience and often little government experience. Yet, they are expected to act with much of the dignity and formality of judges when conducting public hearings and deciding quasi-judicial matters.

Is the Action Quasi-Judicial?

The first task of the local government attorney is to determine whether the matter to be considered is quasi-judicial. If, instead, it is administrative or legislative, the due process and deliberative protections listed below will not apply. Quasi-judicial actions have these characteristics:

- a state or local law requiring that notice be given before the action is taken;
- a local or state law requiring that a hearing be conducted before the action is taken; and
- a state or local law directing that the action results from application of prescribed criteria to the individual facts of the case. *Baldauf v. Roberts*, 37 P.3d 483 (Colo.App. 2001)

Legislative matters affect large areas, multiple parcels of property and/or set broad policy directives. Examples include adopting an entire land use code or general amendment thereto, a comprehensive plan, or a general parking regulation. Quasi-judicial actions apply general rules to a specific interest, such as a zoning change affecting a single piece of property. Rezonings in Colorado are quasi-judicial, *Snyder v. City of Lakewood,* 542 P.2d 371 (Colo.1975) and constitute one of the largest categories of such actions considered by local government decision making bodies. Other examples include approval of subdivisions, historic preservation district permits, conditional and special use permits, and variances. *Van Huyson v. Board of Adjustment,* 550 P.2d 874 (Colo.App.1976); *Moschetti v. Board of Adjustment,* 574 P.2d 874 (Colo.App.1977).

The next task is to insure (to the degree within your control) that due process requirements have been and are met:

1. Notice as required by any state statute and applicable local regulations has been given;

2. An adequate right to present evidence and cross examine witnesses has been given; *LAPP v. Village of Winnetka,* 833 N.E.2d 283 (Illinois 2005).

3. Any bias, prejudgment, conflict of interest, or *ex parte contact* problems have been resolved prior to the hearing and, if necessary, members of the body engaging those contacts have recused themselves;

4. An adequate record of the proceedings is made; and

5. The decision is supported by adequate findings.

Bias and Conflicts of Interest

Fortunately for the local government attorney, there is a presumption that quasi-judicial hearings are conducted impartially. *Soon Yee Scott v. City of Englewood*, 672 P.2d 2225 (Colo.App.1983); *Hadley v. Moffat County School District*, 681 P.2d 938 (Colo.1984). This presumption can be overcome by evidence of actual bias or conflict of

interest which creates an appearance of impropriety. *Stivens v. Price*, 71 F.3d 732 (9th Cir. 1995)

A charge of bias or conflict of interest is a difficult challenge. At the local level, particularly in small communities, it is common for members of the decision making body to personally know the applicant and the opponent and perhaps have pre-existing relationships with them. This does not by itself create a bias, prejudgment or conflict of interest sufficient to exclude that member from the decision. While it may be politically popular to bring the charge, the question is evaluated against the relevant statute and local regulations.

Standards of Conduct C.R.S. 24-18-101 *et. seq.*

The first step is to review any local regulation governing conflicts of interest. Next, look to state law. In 1988, the General Assembly enacted a comprehensive code of ethics for both state and local government officials, entitled "Standards of Conduct" (the "Act"). C.R.S. §§ 24-18-101 et seq. The Act establishes recommended guidelines as well as mandatory rules of conduct. The Act prohibits public officials or employees from:

- performing an official act [such as voting to approve] directly and substantially affecting a business to its economic benefit in which the official has a substantial financial interest or is engaged as counsel, consultant, representative or agent. C.R.S. §§ 24-18-108(2)(d); 24-18-109(1)(b).

The Act requires a member of the governing body having a "personal or private interest" in any matter proposed or pending before that body to disclose the interest, not vote thereon and also to refrain from attempting to influence the decisions of the other members. C.R.S. § 24-18-109(3)(a). The Act prohibits a local government official or employee from accepting a gift of substantial value or a substantial economic benefit which:

- would tend to improperly influence a reasonable personal to depart from faithful and impartial discharge of public duties; or

- which a reasonable person in the same position should know under the circumstances is primarily for the purpose of rewarding official action the official has taken. C.R.S. § 24-18-104(1)(b).

There are exceptions for campaign contributions, occasional nonpecuniary gifts of insignificant value, payment or reimbursement for travel expenses for attendance at a convention in which the official is participating, items of perishable or nonpermanent value including meals, lodging, travel expenses or tickets to sporting, recreational or cultural events. C.R.S. § 24-18-104(3).

Personal and Private Interests

A key phrase in the Act is "personal or private interest," likely taken from the Colorado constitutional provision applicable to members of the General Assembly. Colo. Const. Art. V, §43. To the extent the local government attorney can determine that a board member has a personal or private interest in the subject matter of the hearing, it may be necessary to advise the member to step down. Some examples of a personal or private interest that might require recusal include:

- A zoning matter in which the board member is or represents the applicant, or attempts to represent him or herself at the hearing.
- The board member owns or has an interest in a business which is making the application or which is a consultant to the applicant.
- The board member has financial dealings with the applicant.
- The board member has a financial interest in a business which is a competitor of the business making the application.
- The board member is a creditor of the business making the application.

It is helpful to also describe for our government clients what is not a "personal or private interest." Very often, opponents or proponents in a public hearing will accuse a board member of having a private interest or conflict simply because of his or her acquaintance with the applicant. The following are examples of relationships which, absent other factors, should not disqualify the board member from acting:

- member is related by blood or marriage to the applicant but has no financial connection or potential of experiencing financial gain or loss. Note: to the extent the blood or marriage relationship is immediate (husband and wife, father and son, etc.), the member should step down. Even though there may be no financial connection, the relationship is so close as to presume one exists, or at the least, to presume prejudgment or bias.
- member is the next door neighbor of applicant
- member and the applicant know each other, are friends, go to the same church, are members at the same club, play golf together, like each other, or dislike each other

It is important that these fact patterns lack the potential of personal financial gain or loss. They reflect the practical reality of life in a small community and should not, standing alone, prevent a board member from voting on an application. The Act focuses primarily on financial relationships in determining whether an impermissible personal or private financial interest exists.

Prejudgment

The truth is that elected officials as members of the community have opinions and prejudices and they bring these into the hearing room. As counsel to these quasi-judges, our task is not to convince them not to have opinions, but instead to simply have an open mind and above all, to refrain from expressing their opinions until the close of the hearing. The appearance of fairness is equally important as being unbiased.

Board members must exercise extreme caution in their activities and statements outside of the public hearing. While the case law is largely fact-specific, the best advice for the local government attorney to is not to participate in any public dialogue or discussion on the matter prior to the hearing. The fact that a committee of the town board of trustees investigated an application for a liquor license prior to the hearing and recommended against issuance of the license, combined with other facts, convinced the court that the applicant had been denied a fair and impartial hearing. *Booth v. Trustees of the Town of Silver Plume*, 474 P.2d 227 (Colo.1970). The Booth case is the poster child in Colorado for prejudgment.

Finally, it is important to bear in mind that local government officials are also policy makers who are called upon to express public policy positions. In fact, this activity is one of their most important obligations. The Colorado Supreme Court recognized this role in *Mountain States Telephone & Telegraph v. Public Utilities Commission,*763 P.2d 1020 (Colo. 1988) holding that a decision maker is not disqualified on due process grounds simply for having taken a position, even in public, on a policy issue related to a dispute, if there is no showing that the decision maker is incapable of judging a particular controversy fairly on the basis of its own circumstances. The real challenge for the local government attorney is helping elected officials do both their legislative and quasi-judicial jobs.

Ex parte Contacts

Ex parte contacts are communications between a board member and a party or member of the public that take place outside a noticed public hearing. These contacts deny due process to both applicants and opponents of the application because the other party is not present to hear and rebut statements made to the decision-maker. An *ex parte* contact may not necessarily result in invalidation of the ultimate decision. Nevertheless, the appearance of impropriety undermines the integrity of the governing body itself. Thus, the local government attorney should advise quasi-judicial decision-maker to avoid *ex parte* contacts in quasi-judicial matters.

Board members and constituents are accustomed to using private conversations to communicate public policy information. This is perfectly acceptable when the matter is legislative. However, this is not permitted in quasi-judicial matters, as it violates the due process rights of the applicant and opponent. Constituents are not expected to learn the distinction between legislative and quasi-judicial matters. Thus, counsel should stress the following points to board members:

- Problems Arising from Ex Parte Contacts. The consequence of engaging in *ex parte* contacts can invalidate the action of the body. *Ex parte* contacts can deny due process to the applicant and the opponents.

- Ways to Avoid Personal Ex-Parte Contacts: If a board member is called or personally contacted by the applicant, a supporter, or opponent and the matter is identified, he or she should immediately state that, as a board member, it is improper to talk about the case outside of the hearing room. The board member should urge the person initiating such contact to bring his or her points of view and testimony to the public hearing. Finally, the board member should stress that by listening now, he or she might have to step down and not vote at the hearing. If all else fails, the member could explain, "The county attorney told me I had to hear all testimony only in the public hearing."

- Written Materials: Board members should be advised to make sure any materials they receive outside the hearing are given to staff to be copied and shared with everyone at the time of hearing. This rule extends to email correspondence as well.

- Dealing with ex parte contacts after the fact: If an *ex parte* contact occurs, the board member should: (1) promptly inform the attorney for the body; (2) disclose the contact to the body at the beginning of the hearing; and (3) describe its content as completely as possible. In an extreme case, the board member may be required to step down and not participate further.

The local government counsel should be prepared to define at what point a matter becomes quasi-judicial such that *ex parte* contacts are disallowed. It is asking too much to expect that a board member cannot talk with the owners of a property just because that owner is thinking of applying for PUD approval. A reliable, but not uniform rule, is to use the date a formal application is received in the planning department.

Avoiding Ex-Parte Contacts In Site Visits

Board members often are asked to visit the site of a land use application prior to the public hearing. Site visits are valuable in allowing the board to get a physical sense of the property involved in the application. The challenge is to prevent the body from having impermissible *ex-parte* contact with the applicant or members of the public during the visit. Here are some suggested guidelines:

- If the site visit does not need to take place in an organized fashion, and if access to the property is not an issue (for example, the property is a single lot on a public street and can be observed from the public street or otherwise easily accessed, without the necessity of having a applicant representative present to unlock gates, etc.), the members of the body can individually visit the site on their own at any time prior to the public meeting or hearing.

- Ideally, staff will have been able to visit the site with the applicant to learn about the layout, etc., such that the staff can adequately brief the body without the necessity of the applicant being in attendance. It is permissible to allow the applicant to stake building locations, etc., on the site prior to the visit such that it is easier for the members of the body to understand what the development involves.

- Site visits are open meetings under the Colorado Open Meetings Law if a quorum or three members, whichever is less, of the body is in attendance. C.R.S. § 24-6-402(2)(b).

- Publish or post the time and place of the meeting as for any other meeting, but emphasize that no testimony will be taken from any party.

- Avoid permitting the applicant or members of the public to answer "simple informational questions" such as where property boundaries lie, etc. The next step on this slippery slope is for the applicant to add his or her opinion. Instead, if there are questions of information, have board members ask the staff. Avoid asking the staff to "ask the applicant the following question." The public body may not use the staff as a "human telephone" to conduct what would otherwise be an *ex-parte* contact with the applicant or members of the public. **[citation]**

Disclosure and Recusal

In the event any of the above grounds for recusal exist (conflict of interest, prejudgment, bias or *ex-parte* contact), the obligation of the local government attorney is to advise the board member whether he or she should step down. If the conflict is minor or the board member refuses to step down, the attorney should at least make a record at the outset at the public hearing, by arranging to question the board member along the following lines:

- please describe the contact [or interest that you had with] the applicant, opponent, etc.
- do you believe that you can render a fair and impartial decision in this matter?

This exercise has the dual benefit of: (1) curing minor *ex-parte* contacts or claims of prejudgment, bias or conflict of interest by putting all of the board members, the applicant and the opponents on the same level of knowledge about what was said, and (2) to the extent the board member affirms that he or she can render an impartial decision, the statement must be given weight by the reviewing court. This on-the-record-dialogue is <u>not</u> adequate to remedy more serious *ex-parte* contacts or other evidence of bias, such as the applicant taking board member to lunch for a substantive discussion of the application. Similarly, this exercise cannot cure a clear conflict of interest that would require recusal under the statute or where the totality of the circumstances indicate that they cannot act impartially. For example, recusal would be appropriate where the board

member is a partner in the business or undertaking that is making the application to the decision-making body. Instead, it is designed to address the brief encounter in the grocery store, where, for example an opponent of a rezoning stops to express his or her opinion to the board member before the member is able to stop them and urge that they attend the meeting in person.

Here is a checklist of advice which the local government attorney should consider in advising the decision making board about serious *ex-parte* contacts, a conflict of interest, bias or prejudgment:

- Make sure disclosure <u>precedes</u> discussion on the matter.
- Establish the nature of the conflict, bias contact or prejudgment on the record.
- Disclose, don't vote, and don't influence others. C.R.S. § 24-18-109(3)(a).
- Probably the best way to insure that a recused board member who has stepped down does not influence other members of the body is to advise that board member to leave the room. In particular, it is not appropriate for the board member to remain in the room and vote. The temptation is simply too great for the board member to offer opinions "for information only," and to otherwise exercise the influence a board member has but should not use in this case.
- If the board member must vote, because his or her participation is necessary to achieve a quorum or otherwise enable the body to act, C.R.S. § 24-18-109(3)(b), the disclosing member must comply with the voluntary disclosure procedures of C.R.S. § 24-18-110 and make written disclosure prior to, not after taking action; to the clerk to the board C.R.S. § 24-18-110 and to the Secretary of State. C.R.S. §§ 24-18-110; 18-8-308(1).

The statute does not specify a particular format for this disclosure. Presumably a letter identifying the board member, the body, the member's interest, and the application would be sufficient.

- A potential consequence of failing to properly address bias, prejudgment or conflict of interest is invalidation of the action taken by the entire body. *Booth v. Silver Plume*, supra.

Findings & Decision

You have successfully guided your quasi-judges through the minefields of bias, prejudgment, conflict of interest and *ex-parte* contacts. The public hearing has been conducted. You have one final task: satisfying the C.R.C.P. 106(a)(4) standard: that competent evidence exists in the record to support the decision of the local governing body. *Save Park Co v. BOCC*, 990 P.2d 711 (Colo.App.1998), aff'd on other grounds, 990 P.2d 35 (Colo.1999). The case law is clear that this need not be a preponderance of the evidence presented; the reviewing court's role is simply to determine that adequate evidence supporting the local governing body's decision is present. *Bauer v. Wheat*

Ridge, 513 P.2d 203 (Colo.1973). While written findings are not required where the reviewing court can find the support somewhere in the record, *Sundance Hills Homeowners Assoc. v.* BOCC, 534 P.2d 1212 (Colo.1975); *Hudspeth v. BOCC*, 667 P.2d 775 (Colo.App.1983); *Fire House Car Wash v. Board of Adjustment*, 30 P.3d 262 (Colo.App.2001) chances of being upheld are materially increased if findings are adopted. If a local code or resolution requires written findings, failure to comply is grounds for reversal. *Bauer v. Wheat Ridge*, supra.

For cases which are controversial or which might otherwise be subject to challenge, the easiest approach is to provide written findings as a part of the board's hearing packet, in at least the form of alternative motions to approve or deny, "based upon the following, established in evidence presented at the hearing: [insert short list of items; always include 'for the reasons set forth in the staff report dated ___.']"

Many local government planning staffs provide the board with two options: the staff recommendation which includes reasons for the decision, and the non-recommended option which often includes no such reasons. If the board decides against the staff recommendation, this approach leaves the defending attorney without any documented reasons for that decision. Instead, encourage reasons for the non-recommended option as well as the recommended option to be in written form and available as a part of the motion. In serious cases, immediately after the decision, ask the decision making body to adopt a further motion directing that you prepare written findings and decision for its consideration at the next meeting.

Conclusion

Local government officials provide due process at the grass roots level. These quasi-judges need and will appreciate our help in giving dignity to the hearing.

CAUTIONARY TALES: SELECTED CASES OF INTEREST

<u>Hughes v. Monmouth University</u>, 925 A. 2d 741 (New Jersey 2007): ***Alumni of university not disqualified.***

Zoning board approved university site plan and variances for dormitory, tennis court, and parking lots. Neighboring residents appealed, claiming that several board members should have been disqualified for conflicts of interest, as they were alumni of the university and had participated in various university events (which are otherwise open to the public). The statute in question provided in part that "no member of the Board of adjustment shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest." The court found that none of the "intangible relations such as a friendship or being an alumnus of the same school" constituted disqualifying contacts because they could not "reasonably be expected to impair [the board member's] objectivity or independence of judgment."

<u>Schupak v. Zoning Board of Appeals of Town of Marbletown</u>, 31 A.D. 3d.1018 (New York, 2006): *It's still okay to be a realtor.*

In this appeal of a zoning board of appeals decision upholding the grant of a building permit, the court rejected the petitioner's claim that the board's determination should be annulled because one of the board members was employed by a real estate firm that had a business relationship with the applicant: "The mere fact of employment or similar financial interest does not mandate disqualification of the public official involved in every instance." The board member in question admitted that as an independently licensed real estate broker she had associations with a real estate agency that had listed properties for both the applicant and the petitioner, but she had no ownership interest in the real estate agency, received no salary or employee benefits from it, and had no direct dealings with either the petitioner or the applicant.

<u>Dowling Realty v City of Shawnee</u>, 83 P.3d 716 (Kansas 2004): *What not to do.*

The facts of this case contain an almost incredible wealth of cautionary tales: a member of the city's planning commission, Kevin Tubbesing, became the 55% owner of a company (Midwest), which in turn was the contract purchaser of a property. Midwest filed a development application for the property and its representatives proceeded to have conversations with each member of the planning commission prior to its public hearing on the application. The application was placed on the planning commission's consent agenda for the September 17, 2001, immediately after a controversial landfill project application. In a conversation with a city council member prior to the hearing, Tubbesing said, "that's my strategy, to put it on at the end of the meeting and they'll be tired and [it will] sail right through." At the hearing, Tubbesing did not step down from the commission bench until after the staff recommendation and opponent testimony. Tubbesing then stepped down and argued to the rest of the commission in favor of the application. Tubbesing did not identify himself for the record as a member of the commission nor did he disclose his 55% ownership in Midwest. On the transcript he stated only that he was "general managing member of Midwest" and "developer of the

project." While he did not vote on the application, he never left the room during any of the proceedings.

A member of the city council observed the September 2001 meeting and "was left with the impression that the approval of Midwest's proposal was *not exactly kosher*." The council member found it troubling that a commissioner would address his own deal and believed the process seemed "hurried up." The council had a "call-up" process for commission consent items and this was done. At trial, Tubbesing testified that prior to the Council hearing, he encouraged several council members and the mayor to support the project. A majority vote was required to send the application back to the commission. The council's motion to do so failed 4-to-4 because the mayor, who had recommended Tubbesing for his position on the commission, declined to vote.

The relevant Kansas statute provided that "any local government officer or employee who has not filed a disclosure of substantial interests shall, before acting upon any matter which will affect any business in which the officer or employee has a substantial interest, file a written report of the nature of the interest with the county election officer of the county in which it is located all or the largest geographical part of the officer's or the employee's governmental subdivision."

While the court recognized that subsequent to the filing of the application it was necessary and proper for Tubbesing to discuss the matter with the city's planning staff, Tubbesing should not have presented Midwest's site plan for approval. The court noted that "twice during his testimony before the commission, Tubbesing referred to the commissioners as 'we'." The court remanded the case to the trial court with directions to send it back to the commission to "redo the entire process since it was tainted from the very beginning. All future proceedings must be conducted without Tubbesing as long as he remains on the commission."

Things Tubbesing did wrong:

1. Engaged in *ex parte* contacts with commission members and council members before each hearing.
2. Failed to disclose his interest to the commission chair on the record at the outset of the hearing.
3. Failed to step down at the outset of the hearing and leave the room.
4. Presented the case on behalf of (his own) application to the commission.
5. Failed to make the required written disclosure of a substantial interest as required by the Kansas statute.
6. Clearly used his position on the commission to advocate for the project.
7. Possibly misused his relationship with the head of the city's planning department, although that individual had an independent obligation to ensure that the conflict of interest was timely disclosed.

<u>LAPP v. Village of Winnetka</u>, 833 N.E. 2d 983 (Illinois, 2005): ***Right to cross-examine.***

Citizens filed a complaint challenging village ordinance granting historical society a special use permit and zoning variance to use a single-family residence and garage as the permanent home for the society's offices. Among other claims, the citizens alleged a lack of due process in that "approval of both ordinances was infected by a conflict of interest on the part of a village trustee." The court distinguished its earlier decision in <u>Klaeren v. Village of Lisle</u>, 781 N.E. 2d 223 (Illinois 2002), holding that the council's hearings were procedurally defective where they denied the right to cross examine a witness. In <u>Klaeren</u>, the mayor declared at the beginning of the hearing that "This is a public hearing. It is not a debate. There will be no attempt at tonight's hearing to answer any question raised by the audience." Further, the mayor limited audience comments to two minutes each and cut off speakers as their time expired or warned others their time was about to expire. The court held in <u>Klaeren</u> that the particular situation there demanded more than what was afforded under the procedures set forth by the mayor during the joint hearing: "It would be a denial of due process not to afford interested parties the right to cross examine adverse witnesses". In <u>Lapp</u>, the village attorney announced at the beginning of the hearing that it was "quasi-judicial" in nature. The plaintiffs were permitted to cross examine applicant's witnesses at the ZBA meeting, and apparently did not make a similar request at the public hearing before the council.

<u>David Eacret v. Bonner County</u>, 86 P.3d 494 (Idaho, 2004): ***When in doubt, listen to your lawyer.***

Board of county commissioners voted 2 to 1 grant a variance for construction of a boathouse. The board reached exactly the opposite conclusion as the planning and zoning commission on each of the five standards applicable for a variance. The record disclosed that one commissioner, Mueller, indicated a personal interest in promoting a blanket variance to allow the people to build their boathouses "as everybody else in Bottle Bay has been doing for 50 years," and, alluding to the variance application, suggesting that "in the end he's going to get it approved and all he's doing is spending tons of dollars." The court noted that these comments "elicited an admonishment from the attorney for the board." The commissioner had also talked to the applicant prior to the hearing and had driven to the site of the boathouse.

Commissioner Mueller commented in his opening remarks that he believed that "if the planning commission had known all the facts they would have given us a recommendation to pass this." The court affirmed the district court's decision remanding the matter back to the board for a new decision, concluding that the district court properly held that commissioner Mueller's comments and *ex parte* contacts violated plaintiffs' due process rights. The court held that any view of a parcel of property in question must be preceded by notice and opportunity to be present to the parties in order to satisfy procedural due process concerns and that Mueller's comments "not only created an appearance of impropriety but also underscored the likelihood that he could not fairly decide the issue in the case." The totality of these factors support the trial court's

conclusion "that Mueller's mind was irrevocably closed on the subject of the setback variance."

CONFLICTS OF INTEREST IN SMALL COMMUNITIES

Presented at the 70th Annual Conference of the
Colorado Municipal League

by

David W. Broadwell

In nearly eight years as City Attorney in Glenwood Springs, I was probably asked more often about "conflict of interest" than any other legal principle. This was due in part to the fact that I served a series of highly conscientious City Councils who cared enough to ask. Also, concern about conflicts seems almost inevitable in a smaller city where the web of personal, social and financial inter-relationships seems to be so intricate and far-reaching. When everybody knows everybody, the shadow of conflict lurks everywhere. Most importantly, however, the concern seems to stem from the fact that the charge of "conflict of interest" is so easily and often gratuitously made. This epithet often becomes just one more clod of mud which is slung in the tumultuous arena of local politics.

Conflict of interest is frequently on the program at conferences such as this, has been the subject of a number of fine articles, and occasionally shows up in Colorado court cases. Ironically, though, the types of conflict which are typically discussed and addressed in the law are usually related to the hard core, clear-cut, no-brainer forms of abuse of public office: Self-dealing! Bribery! Corrupt influences! Rarely have I ever needed to advise a councilmember to avoid these transgressions. Who wouldn't feel a twinge of conscience before voting to award himself a contract with public money? Most public officials understand the impropriety of such actions on a gut level and don't need an attorney to tell them when to bow out.

As a friendly reminder, however, and in keeping with a long line of previous commentators I will recite the high points:

A) C.R.S. 31-4-404, 24-18-109 and 24-18-201 <u>et seq.</u> lay down the guidelines for disclosing a conflict of interest and non-participation in any official decision

which would implicate the personal and private interest of a local government official. These statutes are especially applicable to situations where a contract, disbursement or other form of financial gain may be involved.

B) C.R.S. 24-18-101 et seq. provides a "Code of Ethics" for all public officials. This statute sets up non-binding "ethical principles" to guide local government officials, as well as local government "rules of conduct" at section 24-18-109. Unfortunately, the statute does not clearly spell out the penalties, remedies, or other consequences which might arise from violations of the law. Again, this statute most clearly proscribes improper financial transactions on the part of the official.

C) Berkeley Metropolitan District v. Poland, 705 P.2d 1004 (Colo. App. 1985) is one of several cases which articulate the common law rule against self-dealing by government officials. This case is especially notable for holding that any tainted contract is void and is not binding on the local government entity.

D) C.R.S. 18-8-301 et seq. provides a range of criminal penalties against bribery and corrupt influences, including a specific provision at section 18-8-308 making it a misdemeanor for any public official to fail to disclose a conflict of interest.

E) C.R.S. 18-8-401, et seq. provides criminal sanctions for "abuse of public office" in its many forms, including various offenses which may fall within the rubric of conflict of interest.

F) Many municipalities have adopted their own local codes and ordinances to define and address conflicts of interest. Therefore, the first step for any local government official who has a question is to check local laws and consult with your own attorney.

In light of all of the foregoing legal guidance, it is truly remarkable that so many questions on conflicts have no clear-cut answers. Instead, many of the concerns which arise hover around the fuzzy boundaries of the law. Here is a sampling of some of the typical questions which I have had occasion to address (slightly exaggerated for dramatic effect):

1. I'M A BUSINESSMAN. I WANT TO REPEAL ALL OF OUR ORDINANCES WHICH ARE TOUGH ON BUSINESS. IS THIS A CONFLICT OF INTEREST?

This question focuses on one of the most popular misconceptions about conflict of interest. A political opponent may allege that a councilmember has a conflict just because the councilmember brings certain predispositions with him when it comes time to make a legislative decision. While it may be true that the official's philosophy and prejudices might be seen as a "conflict" in some dictionary sense of the word, these factors do not rise to the level of a conflict of interest which would disqualify the official from voting.

It is simply not illegal to have a political philosophy which is born of your own life experiences, and to allow this philosophy to shape your decision-making as a public official.

When adopting laws of general applicability, it usually matters not that the official may incidentally benefit from the enactment as a member of the general public. Conflict of interest, in the technical legal sense, only exists when the official stands to gain some direct personal advantage from the decision.

2. EVERYBODY ATTENDING THE PUBLIC HEARING IS A FRIEND OF MINE. WE ALREADY GOT TOGETHER AND AGREED WE'RE MAD AS HECK ABOUT THIS PROPOSAL. CAN I VOTE ON THE QUESTION?

This scenario presents a couple of related issues. Try as you might, you are unlikely to find any law which would require an official to excuse himself if he ran the risk of compromising his social relationships. We know intuitively, however, that there is something

wrong with this scenario. It draws us into the realm of two concepts which are related to but even more ambiguous than conflict of interest, namely "appearance of impropriety" and "fundamental fairness."

"Appearance of impropriety" is a term which a court may use to adminster a well-placed slap to the wrists. "Fundamental fairness," on the other hand, is the very essence of due process. Especially when a council or board is engaged in quasi-judicial decision-making, it is essential that each member remain as open-minded and neutral as possible until all the evidence is in. Even if there is not a conflict of interest, per se, a decision which is tainted by too much pre-judgment is subject to judicial reversal.

In the interest of due process, the councilman in this scenario should refrain from voting and should distance himself from the decision-making process. (See: Booth v. Town of Silver Plume, 474 P.2d 227 (Colo. App. 1970). For a stock example of "appearance of impropriety" see: Soon Yee Scott v. City of Englewood, 672 P.2d 225 (Colo. App. 1983).

3. I LIVE RIGHT NEXT DOOR TO A PROPERTY WHICH IS PROPOSED FOR REZONING. AM I PREVENTED FROM VOTING?

Rezoning and other types of site-specific land use decisions are considered to be quasi-judicial, and therefore they require serious consideration of due process and fundamental fairness as explained above. How close is too close when it comes to land use decisions? Although there is no clear-cut answer to this question, in Glenwood Springs we used a 200-foot rule. Since our own code required that notice be mailed to all owners within 200 feet of the subject property, this implied that neighbors so close to the property must have some special interest in the outcome of the decision which was different in kind from that of the general public.

In this example, I would advise the official to excuse himself from the vote. Again, even if there is no conflict of interest, per se, the fairness and objectivity of the decision must be preserved.

4. MY SPOUSE IS EMPLOYED BY THE LOW BIDDER ON THIS PROJECT. AM I PROHIBITED FROM VOTING ON THE CONTRACT?

Returning to a more mainstream example of conflict of interest, we visit the subject of nepotism. Once again, this is a problem which is more likely to arise in a small community, especially since we now live in an age when wives are as likely to be involved in business and politics as their husbands. Unfortunately, the various statutes which govern conflict of interest do not directly address the issue of nepotism and provide no clear definition of the degree of familial entanglement which will give rise to a charge of official misconduct. Instead, as in Glenwood Springs, the issue is most often handled in local ordinances, bylaws and policies which typically provide that if you're conferring illicit benefits on your immediate family, it's as bad as conferring illicit benefits on yourself.

Where immediate family members are involved, the conservative approach is to acknowledge a conflict of interest and step aside. To the extent the statutes prohibit voting on a matter of "personal or private interest," and to the extent the family is seen as a integrated economic unit, a court would likely frown on an official action to benefit your own family.

5. I AM A MEMBER OF THE LOCAL ARTS COUNCIL, A NON-PROFIT GROUP WHICH IS SEEKING ASSISTANCE FROM THE CITY. CAN I VOTE ON THIS REQUEST?

Obviously, many small town councilmembers build their reputation on community involvement. It is not uncommon for an official to hold public office while being active in a half dozen different civic organizations. It is also typical that such organizations will work together with the municipality on a wide variety of community projects. Perhaps the most notable example is the friendly relationship between city councils and chambers of commerce in many towns and cities.

In rendering advice in these situations, I tended to take a fairly lenient attitude. In most cases, it seems extremely speculative to charge that an official is receiving a direct, personal

benefit when the city is working together with a non-profit group on some legitimate project. Unless there is some tangible proof that the councilmember will benefit individually, especially in terms of a financial benefit, I say he or she can actively participate and vote on the decision.

6. CAN I BE BOTH ON THE CITY COUNCIL AND A CITY EMPLOYEE?

Again, this is a problem which is more likely to arise in smaller communities where there is a limited talent pool and, not surprisingly, an even more limited pool of people with a particular affinity for public service. When it comes time to recruit candidates or, even tougher, volunteers for boards and commissions, municipal employees will sometimes be the only ones interested in these positions. While simultaneous holding of elected and paid positions is frowned upon in many jurisdictions, there is no statewide law against it in Colorado. In fact, there is a specific statute which makes it unlawful for any employer, including municipalities, to forbid or prevent its employees from engaging in politics or running for any public office. C.R.S. 8-2-108.

It should be emphasized, however, that simultaneous paid and elective office-holding involves any number of practical complications which may give rise to charges of conflict of interest. How can any councilmember who also happens to be an employee fairly vote on his own salary, or the budget for his own department, or even the budget for the whole town? And if the official has to excuse himself from these sorts of decisions, can he truly fulfill the duties of his elective office? Beware of the specific prohibitions of C.R.S. 31-4-404: "During the time for which he has been elected or for one year thereafter, no member of the governing body of a city or town shall be appointed to any municipal office which is created or the emoluments of which are increased during the term for which he has been elected..." Finally be cognizant that the Municipal Election Code prohibits anyone from holding two elective municipal offices simultaneously, C.R.S. 31-10-301.

7. CAN I BE BOTH ON THE CITY COUNCIL AND A PUBLIC OFFICIAL WITH ANOTHER GOVERNMENT ENTITY?

In recent years, two boardmembers of the town of New Castle were employees of the City of Glenwood Springs and a third was employed in the county assessor's office. Between the county, cities and towns, and the wide range of special districts, not to mention state and federal agencies, it is not uncommon to find officers and employees whose loyalties are divided between two or more masters. However, multiple office-holding across jurisdictional lines does not, in and of itself, constitute a conflict of interest. Instead, if you are ever in this situation, you may be confronted with a conflict on a situational basis. For example, if you are a city councilmember and also happen to be employed by a local water district, you would be ill-advised to vote on an intergovernmental agreement which would confer some benefit on the district.

8. EVEN THOUGH I'M PROHIBITED FROM VOTING DUE TO A CONFLICT OF INTEREST, I WANT TO GO TO THE PODIUM AND ADDRESS COUNCIL "AS A CITIZEN." CAN I DO THIS?

Resist the temptation. **DON'T DO IT!** While your major obligations are disclosure and non-participation in voting, most conflict of interest laws go on to provide that the official must also "refrain from attempting to influence the vote" of the other members of the governing body. In many local ordinances like the one in Glenwood Springs, this obligation is even more explicit, flatly prohibiting a disqualified councilmember from having any discussion with or appearances before the council. To do otherwise would make a mockery of the law. It is pure fiction to suggest that a councilmember, addressing his own council from the podium, would have no more influence than a regular citizen. If a conflict of interest is worth disqualification from voting, it is undoubtedly worth total withdrawal from the decision-making process.

9. <u>ALTHOUGH I DON'T HAVE A SPECIFIC CONFLICT OF INTEREST ON THIS QUESTION, I FEEL REALLY UNCOMFORTABLE VOTING ON IT. CAN I JUST ABSTAIN?</u>

A question like this is most likely to arise in the midst of a bitter controversy when the entire town has mobilized itself into armed camps and you see your friends, associates and customers lined up on both sides of the issue. The natural instinct is to duck for cover under these circumstances. Sometimes, a councilmember may want to grasp at "conflict of interest" as a pretense for avoiding a difficult vote. To do so, however, would probably constitute an abrogation of the councilmember's responsibility as an elected official.

Many local charters and ordinances contain an affirmative obligation that each member present at a meeting <u>must</u> vote unless he or she is disqualified by a conflict of interest. These laws often codify the common law rule that, if a member is supposed to vote but refuses, then his vote will be counted in the affirmative.

In summary, the fiduciary duties and legal responsibilities which apply to elected officials cut both ways. Certainly, it is important for a conflicted public official to excuse himself when appropriate, but it is equally important for the official to do his duty and make the hard decisions when the situation requires it.

10. <u>IF I GET IN TROUBLE FOR VIOLATING A CONFLICT OF INTEREST LAW, WILL YOU DEFEND ME?</u>

No, I will sulk because you didn't consult with me earlier. Consultation with your city attorney, early and often, is the best way to prevent conflict of interest problems. Perhaps more than any other form of potential controversy, this is the area in which an ounce of prevention can save a pound of your flesh. It is essential, however, for the elected official to be proactive, to understand that any conflict of interest law requires self-policing, and to be forthcoming with disclosure to the city attorney and fellow councilmembers whenever in doubt.

Once the city attorney is apprised of your questions, he can help you work through the maze of state and local conflict laws. Many local conflict ordinances expressly define the role of the city attorney, for example requiring the city attorney to render a written opinion upon request. (The Secretary of State is also authorized to issue advisory opinions to local government officials under C.R.S. 24-18-111.)

On the other hand, if the official blithely refuses to disclose his conflicts and acts in violation of some law, especially a criminal law, he will probably be forced to fend for himself. Since illegal acts are outside the scope of his official duties, the city or town will be unlikely to defend him. Furthermore, and perhaps most chillingly, the municipality's liability insurance would be unlikely to cover him. Thus, a municipal official who insists on playing the maverick will find it to be a very lonely role indeed.

11. WILD CARD QUESTION: EVEN THOUGH I HAVE A CONFLICT OF INTEREST, I WANT TO VOTE AGAINST MY OWN INTEREST. CAN I VOTE?

This is the kind of question that makes a city attorney roll his eyes, shut his eyes, or both. Read literally, most conflict of interest laws state that, once it is established you have a conflict, you simply don't participate in the decision at all. But if you were to participate in order to vote to your own detriment, how could you be accused of violating the spirit of the law? A conservative approach would dictate total non-participation.

MEMORANDUM

TO: Mayor and Board of Trustees, Town of Carbondale
FROM: Mark E. Hamilton, Esq., Town Attorney
RE: Ethics/Recusal Issues
DATE: May 14, 2013

The Board of Trustees has asked for a work session concerning when a member of the Board of Trustees should be subject to recusal. Jan Shute, City Attorney for Glenwood Springs, has agreed to join in a discussion on May 21, 2013 at 7:30 p.m.

By way of background, I am attaching for your review two memos that address these issues, including *Advising Quasi-Judges: Bias, Conflicts of Interest, Prejudgment and Ex Parte Contacts* by Gerald A. Dahl (Colorado Lawyer March 2004), and *Conflicts of Interest in Small Communities by David W. Broadwell, Esq.* (presented at the 70th Annual Conference of the Colorado Municipal League). As I know your questions include situations wherein a trustee lives within 300 feet of a property that is the subject of a development application, I would draw your attention to Section 3 on page 4 of the Broadwell memo.

In addition to the topics addressed in the attached materials, I would propose the following outline for discussion:

1. Quasi-judicial matters.

   a. What are they? (land use, licensing matters, etc., not legislation/policy)

   b. What rules pertain?

      (1) procedural due process

         -notice
         -adequate rights to present and challenge evidence
         -avoid *ex parte* contact
         -impartial hearings (i.e. no bias or prejudgment)

      (2) what to do if ex parte contact occurs

         -inform town attorney
         -disclose contact to the board
         -step down if bias or contact was so lengthy that it cannot be quickly described

      (3) bias/prejudgment

         -presumption that hearings are impartial

-presumption can be overcome by a plaintiff in a lawsuit if evidence of:

-actual bias
-conflict of interest that creates an appearance of impropriety

-board members therefore must exercise extreme caution in their activities and statements outside of public hearings—generally, board members should not participate in any public dialogue or discussion on a quasi-judicial matter prior to hearing on the matter

(4) specific examples

-casual contact (e.g. grocery store)

-site visits (individual or group considerations)

-attending P&Z meetings

-no disqualification for having taken a policy position on a related issue if there is no showing that the board member is incapable of judging a particular controversy fairly

2. Conflicts of interest.

a. State Statutes include Standards of Conduct.

(1) C.R.S. §§ 24-18-108(2)(d) and -109(2)(b) provide that public officials are prohibited by statute from performing an official act [such as voting to approve] directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative or agent.

(2) Pursuant to C.R.S. § 24-18-109(3)(a), when a member of a board has a "personal or private interest" in any pending matter, that board member must:

-disclose

-not vote

-refrain from attempting to influence the decisions of other board members (e.g. leave the room)

(3) Gifts
(C.R.S. § 24-18-104 and Art. XXIX, Sec. 3, of Colorado Constitution)

-cannot accept gift of substantial value or economic benefit from a person who is at the same time providing goods or services to the town

-the following are not gifts of substantial value:

-reported campaign contributions

-unsolicited items of trivial value (less than $53.00)

-food or beverages at a program before whom the recipient will speak as part of a scheduled program

-reasonable travel expenses paid by a non profit organization or other government

b. Carbondale's Home Rule Charter Section 1-13.

"Neither the Mayor nor any Trustee shall vote or participate in discussion or deliberation *on any question in which he or she has a substantial* personal or *financial interest*, direct *or indirect*, including an interest held through a spouse or family member, other than the common public interest, or on any question concerning his or her own conduct. In the event the Mayor or any Trustee has such an interest, he or she shall declare such interest. Whether or not such a declaration is made, *the remaining Trustees may determine by a majority vote whether said interest does in fact constitute a conflict of interest."*

This language mandates that a trustee shall not vote or participate when he or she has conflict of interest, whether direct or indirect, but does not define what actually constitutes a conflict. Rather, except in instances where there is a voluntary recusal, the other members of the board of trustees are authorized to determine whether any particular scenario in fact constitutes an impermissible conflict. As such, while a reviewing court might defer to the board's conflict determination, it is also possible that a judge would reverse the board's decision.

c. Since the Home Rule Charter does not define "substantial indirect financial interest," we have to look to other jurisdictions for guidance. National legal treatises on this issue identify the difficulty in defining conflicts of interest and urge a case-by-case analysis. One such authority indicates that, ". . . statutes [and ordinances] provide little guidance . . . However, a definitive rule which preordains what specifically is or is not a conflict of interest would seem impossible to formulate. There are so many possible conflicting interests in zoning matters that a decision whether an interest is improper often is one that must be based on the factual circumstances of each particular case." Zeigler, RATHKOPF'S THE LAW OF ZONING & PLANNING (4th ed.), Ch. 32. § 16. "The more indirect or distant the tie, the less likely a [trustee] will be disqualified. . ..

Business associations may suggest conflict of interest [but] more distant associations do not taint a [board member] . . .. Actions and statements showing a bias or antagonism in the matter . . . can be relevant." Kmiec, Douglas W., ZONING AND PLANNING DESKBOOK (2nd ed.) Ch. 4, § 4:5, p. 1-2; *see also* McQuillin Mun. Corp. § 25.218.20 (3rd ed.).

d. Practical applications:

(1) acquaintance/friendship is not a conflict.

(2) family relationships:

-immediate relationships (husband/wife or father/son) warrants recusal
-uncles, aunts, etc. do not (so long as no financial connection)

(3) business relationships:

-is there a potential financial gain or loss to the board member?

-representation (e.g. lawyer, surveyor, architect, planner)
-ownership interest in business applicant/opponent?
-have other financial dealings with the applicant/opponent?
-have a financial interest in a competitor?
-are a creditor of an applicant/opponent?

3. Recusal procedures:

a. Discuss issue with town attorney.

b. If alleged conflict, bias, or ex parte contact is minor, of if board member refuses to step down, board member should:

(1) describe contact or interest he/she had with the applicant, opponent or other party; and

(2) state on the record why he or she can render a impartial decision.

c. In cases of alleged direct or indirect conflicts (principally financial connections) financial conflicts), the Board of Trustees may entertain a vote to disqualify the affected board member pursuant to the Home Rule Charter.

4. Consider changes to local ethics provisions/procedures?

a. Glenwood examples?