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# Is the Wheel Unbalanced? A Study of Bias on Zoning Boards

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## I. Introduction

IN JULY 2001, CARL AND MARY KAUFMAN<sup>1</sup> learned that a developer planned to convert the farmland behind their house into a golf course. The Kaufmans received a notice from the city proposing to rezone the parcel from A-2, Agricultural, to R-5, Planned Unit Development (PUD). The PUD plan included a fairway bordering the Kaufmans' backyard and a row of townhouses on the other side. Because the Kaufmans treasured their privacy, this was a significant blow, especially since the same developer, who had sold them their house just two years before, had assured them that the land directly behind their house was not suitable for development and that the remainder would most likely be developed as single-family residential.

The biggest issue for the Kaufmans, however, was the development's potential impact on a creek that ran through the developer's property, meandering just yards from the boundary of the Kaufmans' back lot. Bordered by mature trees and bushes, the creek area was full of wildlife and provided a scenic border for the Kaufmans' land. The golf course developer, however, planned to cut down all of the trees and "straighten" the creek, basically turning it into a drainage ditch, which would allow the golf course to make maximum use of the remaining land.

The proposed rezoning of the property first required review by the local Planning and Zoning Commission so the Kaufmans gathered their neighbors and assembled their arguments against the proposal. At the least, they argued, the city should require the developer to leave the

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1. The facts are taken from an actual case; the participants' names, however, have been changed.

creek and trees intact as a buffer. Their plea, however, fell on deaf ears. The Planning and Zoning Commission, made up of ten members, included many individuals who had an interest in the project, including an employee of the project developer, a real estate agent who had the listing for the development's residential area, a member of the country club whose golf course was part of the project, a local banker (also a country club member) who hoped to get some of the mortgage business, and the owner of the company who would be laying the sod for the golf course. Of these, only the real estate agent recused herself from voting on the matter. Not surprisingly, the commission recommended the project unanimously. In addition, the commission categorically refused to restrict the developer's ability to move the creek and cut down the trees; in fact, the commission imposed no conditions on approval.

While the Kaufmans' case may sound like an extreme case of the fox guarding the henhouse, there is a widespread perception that zoning boards are often biased.<sup>2</sup> The allegations of bias may be broken down into two types. First, there are conflicts of interest, in which a member of the zoning board will benefit directly from the decision or has an interest in or a relationship with one of the parties. Second, there is more systemic or institutional bias—that is, the perception that zoning boards are filled with individuals who have a built-in predilection in favor of development projects. Conversely, “normal citizens,” who might be more sympathetic to the complaints of the neighbors impacted by development, are left off of these boards in favor of business or professional types who benefit, either directly or indirectly, from development projects. Certain professions seem to invariably cause suspicion, including “architects, attorneys, developers, engineers, financiers (e.g., banking and mortgage lenders), realtors, and surveyors.”<sup>3</sup>

Zoning decisions typically involve large stakes—a lot of money for developers on one side and vital health, safety, and welfare concerns of neighboring residents on the other.<sup>4</sup> At the same time, the city itself has important interests in economic development and overall city plan-

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2. See, e.g., Jay Conley, *Residents Voice Concern Over Conflict of Interest; No Impropriety Charged*, THE ROANOKE TIMES & WORLD NEWS, Sept. 23, 2003, at B3, available at 2003 WL 59094998; Kamenka Robbins, *Residents in Subdivision Fight Rezoning: Opponents Say Chapman Has Conflict of Interest*, HATTIESBURG AM., Feb. 14, 2004, available at 2004 WL 60250303; Steve Lyttle, *Officials Deny Bias in Zoning Decisions: Selwyn Neighborhood Leaders Raise Issue at City Council Meeting*, CHARLOTTE OBSERVER, Mar. 30, 2003, at 10M, available at 2003 WL 17746542.

3. Patricia E. Salkin, *Ethics Allegations in Land Use Continue to Fill the Court Dockets*, ZONING & PLAN. REP., Apr. 2003, at 1.

4. PATRICIA E. SALKIN, AVOIDING ETHICS TRAPS IN LAND USE DECISIONMAKING 535, 537 (ALI-ABA Course of Study, Aug. 22–24, 2002).

ning. In this atmosphere, all local citizens will likely have some interest in the outcome, an interest that may be inevitable and perhaps even desirable. Nevertheless, at some point a generalized interest in the city's development becomes an undesirable bias, a predilection in favor of one side or the other.

Yet, impartial decision makers are a crucial component of the zoning process, not only to avoid unfairness in an individual case, but also to preserve the appearance of impartiality necessary for the legitimacy of the system.<sup>5</sup> As Professor Cordes noted, "the growing 'dealmaking' perception of zoning practice, in which zoning decisions are often made in a very particularized and seemingly ad hoc manner, raises legitimacy concerns exacerbated by partial decisionmakers."<sup>6</sup> The existence of systemic bias may, and indeed should, reduce the degree of deference afforded to the decisions of these boards by appellate bodies, including city councils and courts.

States and cities have made little attempt to limit bias on zoning boards. Some state laws restrict the makeup of the boards, but the limitations are extremely narrow.<sup>7</sup> Another approach is to enact a conflict of interest provision, which requires board members to refrain from participating in matters in which they have a direct or an indirect interest. While state laws regulating zoning board conflicts are rare, some cities have adopted such rules, of varying effectiveness. The vast majority of cities, however, operate without any explicit conflict regulations.

We wondered whether the lack of control over the make-up of zoning boards resulted in a bias in favor of development interests. Although there are indications that ethics allegations against zoning board members are increasing,<sup>8</sup> there is a paucity of data on the overall composition of zoning boards. Therefore, we conducted a survey to determine whether Iowa zoning boards fairly represent a cross-section of the community. We also attempted to determine whether, based on the occupations of zoning board members, one could discern a systemic slant toward development interests. We conclude that representational cross-sections vary widely by the size of the community. While small towns

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5. Mark W. Cordes, *Policing Bias and Conflicts of Interest in Zoning and Decisionmaking*, 65 N.D. L. REV. 161 (1989).

6. *Id.* at 162. See also Patricia E. Salkin, *Litigating Ethics Issues in Land Use: 2000 Trends and Decisions*, 33 URB. LAW. 687, 688 (2001).

7. For example, Iowa law states that the majority of the members of local Boards of Adjustment must consist of "persons representing the public at large and shall not be involved in the business of purchasing or selling real estate." IOWA CODE § 414.8 (2003). Planning and zoning commissions have no occupational restrictions in Iowa.

8. SALKIN, *supra* note 4, at 537.

have a fairly representative board makeup, blue-collar citizens are dramatically underrepresented in larger cities. In addition, although much depends on interpretation, we conclude that the majority of those sitting on zoning boards stand to benefit, either directly or indirectly, from development.

This article will first examine the legal controls on zoning board bias, including state statutes, local ordinances, and case law. We will then discuss the results of our survey of Iowa zoning board bias and compare the data to a similar occupational study from 1937. Finally, we will conclude with possible solutions to the potential direct and indirect bias problems we identify. In the end, we conclude that city councils should more carefully consider the occupational makeup of zoning boards in making appointments. We recommend, in fact, that state legislatures take a more active role in ensuring a broader representation. Finally, we believe that cities should adopt a clear rule regarding conflicts of interest to ensure that most forms of direct bias are eliminated.

This article will use the term “zoning board” to mean either a board of zoning adjustment or a planning and zoning commission. Those two bodies, of course, have quite different powers and duties. The Board of Zoning Adjustment (BZA), sometimes called a Board of Zoning Appeals, may grant relief from the zoning laws, through the use of a variance, special exception, or special use permit. It may also reverse particular zoning determinations made by the zoning officer.<sup>9</sup> The Planning and Zoning Commission (P&Z), on the other hand, is responsible for developing the comprehensive plan for the city. In addition, the Commission initially recommends the particular zoning classifications for adoption by the city council; thereafter, any amendments to the zoning regulations or zoning map go through the Commission for its recommendation before final action by the council.<sup>10</sup> Both of these boards, however, are appointed by the city council or mayor and both face similar perceptions of bias in favor of development interests.

## II. Legal Controls Regarding Bias

The legal system has responded to the potential of zoning board bias in very limited ways. First, states have enacted general statutes relating

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9. See STANDARD STATE ZONING ENABLING ACT § 7 (1926), available at <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf> (last visited June 1, 2004); see, e.g., IOWA CODE § 414.7 (2003).

10. See STANDARD STATE ZONING ENABLING ACT § 5; see, e.g., IOWA CODE § 414.6 (2003).

to conflicts of interest, most commonly referring to public officials in general, and more rarely, regarding zoning officials in particular. While these statutes provide some guidance, they are generally too vague or too limited to reach most instances of direct bias, let alone the overall issue of institutional bias. Some municipalities have adopted their own conflict ordinances, but the majority of states have not. Moreover, most of the conflict ordinances reach only the most egregious conflicts. Finally, boards may look to court decisions that have interpreted the statutes and ordinances, or that have adopted common law conflict limitations. However, the decisions focus solely on direct conflicts, rather than institutional bias, and grant relief in only the most blatant cases of bias.<sup>11</sup> The cases do not provide a coherent guide for a zoning board member wishing to avoid impropriety.

This section examines these attempts to control zoning board bias and the limitations of each approach.<sup>12</sup> We use Iowa law as our primary example in order to illustrate the impact—or lack thereof—that the state’s legal controls have had on the composition of zoning boards.

#### A. *Statutes and Ordinances*

Legislative controls on zoning board bias take the form of state statutes or local ordinances. While general statutes on direct conflicts of interest are common, there are few statutes relating specifically to zoning boards, and the statutes are typically too generalized to be of great use. Some municipalities have ordinances relating to conflicts of interest, but many do not. Finally, legislative attempts to attack institutional bias are almost nonexistent.

Although a few states have specific conflict of interest provisions regulating zoning board members, most have only an ethics provision regulating public officials in general.<sup>13</sup> Most of these conflict of interest statutes “reflect the common-law principle that public officials should not participate in decisions in which they have a personal interest.”<sup>14</sup> State statutes prohibiting conflicts of interest typically fail to delineate what interests are disqualifying. For example, a statute may simply

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11. Other limitations on zoning decisions, such as requiring compliance with the comprehensive plan, or procedural reforms, also have had limited success. Cordes, *supra* note 5, at 169.

12. Professor Cordes has already made a comprehensive review of these legal tools for controlling bias. See Cordes, *supra* note 5, at 174–89. While we summarize these techniques and their shortcomings for the limited purpose of illuminating our data analysis, we recommend his article to the reader who desires a more complete survey of this area.

13. Cordes, *supra* note 5, at 174–76.

14. Cordes, *supra* note 5, at 175.

require disqualification when an official has a personal or financial interest, but provide no definition of these interests.<sup>15</sup> While there are some clear cases of direct financial interest, such as a developer whose project is before the board, the statutes do not specify whether a more remote interest—such as a real estate agent who hopes to sell lots in the new development—would also be disqualifying. Disqualification for “personal interest” is even harder to interpret. Perhaps being the brother-in-law of the developer would be a clear case, but what if you are a member of the country club that is making the application for rezoning?

Iowa, for example, has a general conflicts of interest statute for all public employees and for those who “serve” the state or its subdivisions.<sup>16</sup> The statute, however, does not define what interests present a conflict. The statute indicates only that the official must disclose the existence of a conflict and refrain from taking action—including voting or influencing the vote—that would create a benefit for the outside interest.<sup>17</sup> Under Iowa law, even if the conflicted official votes, the conflict will not void a city’s action, unless that official’s vote was crucial to the passage of the measure.<sup>18</sup> Thus, even if a conflict is proven, it will be difficult to actually overturn a board’s decision.

Iowa municipalities, by and large, have not clarified the situation by adopting more specific local ordinances. Our survey revealed that the majority of Iowa cities have no conflicts rule.<sup>19</sup> Those that do have a written rule use general terms to describe the disqualifying interests, such as a personal, financial, or familial relationship. Some cities indicated that they use, as a guide, another Iowa statute, which prohibits public officials from acquiring personal interests in urban renewal projects.<sup>20</sup> That statute sets out more specifically what constitutes a disqualifying interest: for example, ownership of 5 percent or less of a corporation’s stock is not deemed “ownership” for purposes of determining a financial interest.<sup>21</sup>

Note that all of these provisions deal with “direct” conflicts of interest, in which the individual is directly involved with the project at

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15. See, e.g., CONN. GEN. STAT. ANN. § 8–21 (West 2004); IND. CODE ANN. § 36–7–4–909 (West 1997).

16. IOWA CODE § 68B.2A (2003).

17. *Id.*

18. IOWA CODE § 362.6 (2003).

19. Seventy-one percent of Iowa cities with a population of over 1,000 do not have any written conflict of interest rule. See survey discussion, *infra* at Part III.B.4.

20. IOWA CODE § 403.16 (2003).

21. IOWA CODE § 403.16.5 (2003).

issue. Institutional bias, or the overall composition of local zoning boards, is not addressed. Iowa has one statute that addresses institutional bias by providing a minimal control on the composition of boards of adjustment: “A majority of the members of the board of adjustment shall be persons representing the public at large and shall not be involved in the business of purchasing or selling real estate.”<sup>22</sup> The Iowa Attorney General has interpreted the latter category broadly—to refer not only to realtors, but also to employees of companies that buy and sell real estate, if that employee is actively engaged in that part of the business or is generally in a position of influence in the business.<sup>23</sup> However, the Attorney General does not interpret the admonition that the majority of members must represent “the public at large” as requiring any kind of affirmative attempt to appoint a cross-section of occupations to the board. Rather, the Attorney General believes that phrase simply reinforces the limitation on those in the real estate business.<sup>24</sup>

This attempt to control who is appointed to zoning boards is rare. Some states restrict board appointment to residents<sup>25</sup> and a few require some kind of geographic distribution of board members.<sup>26</sup> States sometimes prohibit city officials or city employees from membership on the boards, or at least limit their number.<sup>27</sup> Further, Tennessee explicitly requires a degree of diversity on these boards. BZA members in those Tennessee counties having a metropolitan government are supposed to include at least two female members, as well as two from historically underrepresented racial groups.<sup>28</sup> Likewise, city planning commissions are to proportionally reflect the racial make-up of the municipality.<sup>29</sup>

Very few states, however, have any occupational restriction on board membership similar to Iowa’s real estate limitation. Michigan has a

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22. IOWA CODE § 414.8 (2003).

23. 1979 Iowa Op. Atty. Gen. No. 20 (Aug. 17, 1979), *available at* 1979 WL 21053.

24. *Id.* at \*2.

25. *See, e.g.*, ALA. CODE § 11–52–80 (2003) (board member must be resident and “qualified elector”); ARIZ. REV. STAT. § 11–807 (2001) (board member must be resident and taxpayer of district); COLO. REV. STAT. § 31–23–203 (2004) (planning commission members must be “bona fide residents” of municipality).

26. *See, e.g.*, 55 ILL. COMP. STAT. 5/5–12010 (1996) (county board of appeals members must represent different townships); KAN. STAT. ANN. § 12–744 (2001) (if city planning commission controls outside city limits, two members must reside in controlled area outside city limits).

27. *See, e.g.*, DEL. CODE ANN. tit. 22, § 322(d)(1) (1997); MINN. STAT. ANN. § 394.30 (West 2004) (one member of planning commission may be county officer or employee); N.Y. GENERAL CITY LAW § 81 (McKinney 2004); N.Y. TOWN LAW § 267 (McKinney 2004).

28. TENN. CODE ANN. § 13–7–205 (2004).

29. TENN. CODE ANN. § 13–4–101 (2004).

vague and presumably unenforceable requirement that planning commissions should “represent insofar as is possible different professions and occupations.”<sup>30</sup> Minnesota prohibits land developers from membership on county planning commissions.<sup>31</sup> Oregon has the most far-reaching restriction: no more than two members of a P&Z commission may “engage principally in the buying, selling or developing of real estate for profit.”<sup>32</sup> In addition, no more than two members may be engaged in the same kind of occupation.<sup>33</sup> As our survey shows, a law at least as strong as Oregon’s may be necessary to achieve the kind of occupational diversity we presumably desire on these boards.

### B. Case Law

With little statutory guidance as to what constitutes a conflict of interest on zoning boards, court decisions may help to flesh out the limits of permissible interests. Although fact patterns are diverse, courts clearly look for a strong financial or other personal advantage in the outcome of the matter. There are no common law restrictions regarding institutional bias, and even direct bias tests reach only the most egregious cases of conflict of interest. An early Iowa case described the prohibition on self-interest in vivid prose:

He was called upon to serve two masters; one with which his interest financially was bound up, the other, in which was involved his public duty as an officer of the city. He was bound, therefore, to serve both faithfully—the bank of which he was an officer and in which he was financially interested, and the city of which he was also an officer and servant. It is an old saying that a man cannot serve two masters. . . . A temptation would be offered . . . to disregard his public duty, and yield to the temptation of personal interest. It is this that the law guards against. . . . The law intends that these public officers should, like Caesar’s wife, be above suspicion and temptation.<sup>34</sup>

Despite this general admonition, Iowa courts require a significant level of personal interest before a conflict of interest will arise. In *Bluffs Development Co., Inc. v. Board of Adjustment of Pottawattamie County, Iowa*,<sup>35</sup> for example, an applicant who was denied a conditional use permit alleged conflicts of interest against four members of the board of adjustment.<sup>36</sup> One board member was employed by an insurance company which had customers who opposed the permit.<sup>37</sup> Another was

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30. MICH. COMP. LAWS ANN. § 125.33 (West 2004).

31. MINN. STAT. ANN. § 394.30 (West 2004).

32. OR. REV. STAT. § 227.030 (2001).

33. *Id.*

34. *James v. Hamburg*, 156 N.W. 394, 396–97 (Iowa 1916).

35. 499 N.W.2d 12 (Iowa 1993).

36. *Id.* at 12.

37. *Id.* at 16.



employed by a company whose board of directors included a vocal opponent of the permit.<sup>38</sup> A third board member made a public comment about denying the application before it was even presented to the board.<sup>39</sup> The fourth board member had a son, employed as a maintenance worker for the city, who opposed the permit.<sup>40</sup>

The court determined that these dealings were too remote to constitute a conflict of interest.<sup>41</sup> The court stated that its “conclusion might . . . have been different if a board member had a direct interest that would have been substantially enhanced or depreciated depending on the vote.”<sup>42</sup> Because there was no applicable statute on conflicts of interest in Iowa at the time, the court followed the common-law principle, which finds a conflict of interest if officials have “prejudged the case, [have] a personal or pecuniary interest, where [they are] related to an interested person . . . or where [they are] biased, prejudiced, or labor [ ] under a personal ill-will toward a party.”<sup>43</sup>

Although the court noted that there was “no mathematical way to quantify the interest necessary” to disqualify zoning board members, the interest must be “direct, definite, capable of demonstration, not remote, uncertain, contingent, unsubstantial, or merely speculative or theoretical.”<sup>44</sup> The court explained: “[t]he interest must be different from that which the quasi-judicial officer holds in common with members of the public. For example, a personal interest in the welfare of the community is not a disqualifying interest.”<sup>45</sup> Obviously this would exclude a claim of indirect occupational or institutional bias.

Other courts have similarly concluded that only direct interests constitute conflicts requiring disqualification. In *Blinkoff v. Planning Zoning Commission*,<sup>46</sup> the challenged commissioner was an electrical contractor and had previously worked on projects with the applicant.<sup>47</sup> The Connecticut court found no impermissible conflict because all previous

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38. *Id.* at 15–16.

39. *Id.* at 16.

40. *Bluffs Dev. Co.*, 156 N.W.2d at 16.

41. *Id.* at 17.

42. *Id.* (citing *Stahl v. Bd. of Supervisors*, 175 N.W. 772, 775 (Iowa 1920) (overturning board of supervisors’ decision to establish drainage district when supervisor who cast deciding vote was directly benefited financially)).

43. *Id.* at 15 (citing 1 AM. JUR. 2d *Administrative Law* § 64, at 860–61 (1962)) (alterations in original).

44. *Id.* (citation omitted).

45. *Bluffs Dev. Co.*, 156 N.W.2d at 15.

46. *Blinkoff v. Planning and Zoning Comm’n of City of Torrington*, No. CV 980078081S, 1999 WL 459585 (Conn. Super. Ct. June 23, 1999).

47. *Id.* at \*3.

jobs were the result of the contractor being the low bidder, rather than “a payoff for voting favorably on the application.”<sup>48</sup>

Even when there is an obvious interest, most courts find no violation when the member does not vote on the matter.<sup>49</sup> In another Connecticut case, a zoning commission member owned a campground adjacent to a proposed bituminous concrete manufacturing site.<sup>50</sup> The member did not vote on the matter, but she discussed it with the town planner and town attorney, questioned the legality of the proposal, and participated in a zoning commission meeting discussing the matter.<sup>51</sup> The court determined that there could be “no doubt” that the commission member “had a direct personal, and possibly financial, interest.”<sup>52</sup> Despite this, the court found no violation because she did not vote, even though the commissioner’s views influenced the other commission members.<sup>53</sup>

Despite the difficulty of proving a conflict, courts have found conflicts of interest where zoning board members have a close relationship with the applicant and would stand to benefit. For example, courts have found a conflict where the board member was: the applicant’s accountant and tax advisor;<sup>54</sup> an advertising agency executive who would get the advertising account for the project;<sup>55</sup> a lawyer for the applicant in legal matters ten years earlier;<sup>56</sup> a partner of the lawyer representing the applicants;<sup>57</sup> a realtor who shared an office with another realtor who represented an applicant;<sup>58</sup> and an employee at a bank that held an overdue loan that was part of a petition.<sup>59</sup>

Business dealings, however, do not always translate into conflicts of interest. No conflicts were found when: a board member had sold insurance to a petitioner;<sup>60</sup> a board member had previously served as a real estate broker on the land in issue;<sup>61</sup> a board member’s employer

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48. *Id.*

49. *See, e.g.*, *Phillips v. Town of Salem Planning & Zoning Comm’n*, No. 113120, 1998 WL 258332 (Conn. Super. Ct. May 12, 1998).

50. *Id.* at \*8.

51. *Id.*

52. *Id.* at \*9.

53. *Id.* at \*10–11.

54. *Kloter v. Zoning Comm’n of the Vernon Fire Dist.*, 227 A.2d 563 (Conn. 1967).

55. *Tuxedo Conservation and Taxpayers Ass’n v. Town Bd. of the Town of Tuxedo*, 418 N.Y.S.2d 638 (1979).

56. *Chrobuck v. Snohomish County*, 480 P.2d 489 (Wash. 1971).

57. *Appeal of City of Keene*, 693 A.2d 412 (N.H. 1997).

58. *Josepheson v. Planning Bd. of Stamford*, 199 A.2d 690 (Conn. 1964).

59. *Narrowsview Pres. Ass’n v. Tacoma*, 526 P.2d 897 (Wash. 1974).

60. *Moody v. City of Univ. Park*, 278 S.W.2d 912 (Tex. Civ. App. 1955).

61. *Toutphoeus v. Joy*, 196 A.2d 250 (N.J. Super. Ct. App. Div. 1963).

was represented by the same law firm as the applicant;<sup>62</sup> an applicant was a customer at the bank where the board member was an officer;<sup>63</sup> and a board member who owned an implement dealership had previously sold two tillers and a tractor to the petitioner, and then sold him a new tractor after the petition was granted.<sup>64</sup> Thus, the line seems to be drawn at a specific, direct interest in the particular project at issue.

A broader test might result in an unacceptable number of conflicts, especially in smaller towns. It is perhaps inevitable that many people who are willing to donate time to these civic endeavors also have a strong interest in how the city develops. Moreover, in smaller towns, the web of overlapping interests can quickly become all-encompassing. As the New York Attorney General noted, a board member should not resign based only on his occupation as an architect whose projects sometimes come before the board.<sup>65</sup> The opinion explains: “[I]f resignation and not recusal was the appropriate remedy in every instance where a local official’s private endeavors raised a potential conflict of interest . . . local units of government would have difficulty finding qualified individuals to serve the public interest.”<sup>66</sup>

Nevertheless, the strict test for disqualification seems only to have added to the public’s suspicion of improper zoning decisions. As one court observed: “The evil 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.”<sup>67</sup>

### III. The Existence of Bias

Although anecdotal evidence of zoning board bias abounds, establishing the existence of bias empirically presents a challenge. In any individual case, proving the particular interests of board members would be time-consuming and ultimately may not reach every possible connection to the project at issue. Drafting a survey to capture these interests would be almost impossible.

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62. *Anderson v. Zoning Comm’n of City of Norwalk*, 253 A.2d 16 (Conn. 1968).

63. *Furtney v. Simsbury Zoning Comm’n*, 271 A.2d 319 (Conn. 1970).

64. *Fail v. LaPorte County Bd. of Zoning Appeals*, 355 N.E.2d 455 (Ind. Ct. App. 1976).

65. 2002 N.Y. OP. ATTY. GEN. 8, available at 2002 WL 437994.

66. *Id.* at \*4.

67. *Daly v. Town Plan & Zoning Comm’n of Fairfield*, 191 A.2d 250, 252 (Conn. 1963).

Therefore, we decided to focus primarily on the occupational composition of zoning boards. Our premise is that zoning boards should represent a good cross-section of the community in order to have the best chance of avoiding biased decisions. We also wanted to determine whether boards were “stacked” with those who, by occupation, were inordinately interested in development projects and therefore could be said to be inherently biased.

We surveyed every city in Iowa with a population over 1,000. We asked each city questions regarding the occupational composition of its BZA and of its P&Z. We also asked for information regarding the city’s conflict of interest rules and for any recent examples of conflicts that had arisen.

Interestingly, this type of survey has not been done frequently. We uncovered only one similar survey, conducted by Robert Walker in 1937. We decided to use his survey as our benchmark, of sorts, to compare whether the occupational composition of zoning boards has changed much since then. Part of our survey data, therefore, is arranged to provide an easy comparison with the Walker survey.

#### A. 1937 Walker Occupational Survey

In 1937, Robert Walker conducted an “Occupational Analysis of Thirty-One City Planning Commissions,” in conjunction with his book on the municipal planning function.<sup>68</sup> Walker surveyed 208 planning commission members in thirty-one of the larger cities of the United States to determine their occupations.<sup>69</sup> Walker’s survey came at a time when city planning was young—only about twenty years after New York City had enacted the nation’s first comprehensive zoning ordinance and only a decade after the Supreme Court had given its constitutional seal of approval to the idea.<sup>70</sup>

Even back then Walker was concerned that the boards were not representative of the public. He observed that “certain technical and professional groups have secured a definite hold upon the planning commissions.”<sup>71</sup> In fact, 79.4 percent of the membership of the commissions studied belonged to the technical and professional groups.<sup>72</sup>

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68. ROBERT A. WALKER, *THE PLANNING FUNCTION IN URBAN GOVERNMENT* 150 (2d ed. 1950).

69. *Id.* at 149–50.

70. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

71. WALKER, *supra* note 68, at 151.

72. *Id.* Walker included in these groups businessmen, realtors, lawyers, architects, and engineers. *Id.* at 150.

**Table 1:** Walker's 1937 Results

Businessmen	35.1%
Realtors	15.4%
Lawyers	11.1%
Architects	10.1%
Engineers	7.7%
Women	4.8%*
Newspaper publishers	2.4%
Doctors	1.9%
Labor	1.9%
College affiliation	1.0%
District W.P.A. director	0.5%
Vacancies	1.9%
Unknown	1.9%
Miscellaneous	4.3%

\*Two women were listed under their respective occupations rather than in the "women" category.

Walker explained why white collar groups were disproportionately represented:

The group classed as general businessmen, although drawn from a variety of occupations, represents preponderantly the executive and owner group. They reflect the origin of planning as a civic movement and the consequent reliance upon the prestige of men with status and income to obtain public support. . . . The disproportionate number of realtors is due primarily to their avowed special interest in zoning and consequent pressure for representation from local realty boards. The prevalence of lawyers is due also to zoning, which has provoked numerous legal problems and turned most commission meetings into courtlike hearings upon applications for zone changes. The architects and engineers are, of course, indicative of the prevailing view that planning is chiefly a matter of design and engineering.<sup>73</sup>

Walker saw several consequences of this occupational distribution.<sup>74</sup> First, he was concerned that the large percentage of upper-income businessmen caused the commissions to be too conservative.<sup>75</sup> He observed: "Their status is frequently such that they dislike public criticism and

73. WALKER, *supra* note 68, at 151.

74. *Id.*

75. *Id.* at 151–52.

fear loss of prestige through making specific recommendations on controversial issues.”<sup>76</sup> Second, he was concerned that the large percentage of realtors, architects, contractors, and engineers caused the commissions to focus on expansion and new construction, and did not reflect “the citizen point of view.”<sup>77</sup> Lastly, he was concerned that the commissions did not represent the population as a whole.<sup>78</sup> Much of his concern focused on the lack of blue-collar representation.<sup>79</sup> Walker concluded that “the claim that planning commissions are more objective than elected officials must be rejected.”<sup>80</sup>

Walker’s data shows a remarkable concentration of occupations on zoning commissions. Although he does not break down the class of “businessmen,” which would have been instructive, he does indicate that the majority of them were business owners or management rather than salesmen or clerks.<sup>81</sup> His survey is a rare critique of the institutional bias prevalent on zoning commissions in the early days of zoning. We wondered to what extent the situation had changed.

#### B. 2003 Iowa Survey

The purpose of our Iowa zoning board study was twofold. First, we attempted to discern whether the occupational make-up of zoning boards indicated a bias toward development. This involved an attempt to replicate the Walker study, to determine whether present-day Iowa zoning boards represent a good cross-section of the population in terms of class and occupation. In addition, we tried to identify “pro-developer” occupations to determine whether boards displayed an institutional bias in that direction.

Second, we asked specifically whether the municipality had any regulations dealing with conflicts of interest in zoning board decisions. We also asked the city to report on whether any such conflicts had arisen recently. The survey thus attempted to discern whether conflicts of interest were frequently a problem and whether cities were making any attempt to deal with the issue formally.

We sent the survey to all Iowa cities with populations above 1,000, on the assumption that towns with lower populations either did not have zoning or had so few people to serve on boards that the results

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76. *Id.* at 151.

77. *Id.* at 152–53 (quoting MORDECAI EZEKIEL, PROCEEDINGS OF THE CONFERENCE ON CITY PLANNING ADMINISTRATION, 12).

78. WALKER, *supra* note 68, at 153.

79. *Id.*

80. *Id.* at 155.

81. *Id.* at 150.

would be atypical. We received a very strong response: out of 274 surveys sent, 177 usable surveys were returned, for a response rate of 65 percent. We then conducted telephone follow-ups to fill in gaps or clarify confusing responses. We believe that many of the smaller towns not responding probably did not have a zoning ordinance.

**Table 2**

Surveys Sent	274
Surveys Returned	177 (65%)
No Boards	9
Municipalities with Boards	168
Population between 1,000–2,499	82
2,500–4,999	29
5,000–9,999	29
10,000–24,999	13
over 25,000	15

Unlike Walker's survey, our data is weighted toward smaller towns—66 percent of those responding had populations under 5,000 and 83 percent under 10,000. In contrast, Walker focused solely on large cities, possibly because zoning and planning were not yet prevalent in smaller municipalities at the time. In any event, the size of the city does affect the results, as discussed below.

Our data included a group of retired citizens that was larger than we anticipated, perhaps because retired people are willing and able to take on time-consuming public service positions. We debated whether to include them in our occupational survey. One could argue that once an individual is retired, the bias associated with his or her former position has been neutralized. If they are no longer in the construction business, for example, then they will not be influenced by the impact of a particular project on the industry. However, one could also argue, for three reasons, the bias remains. First, a lifetime spent in land development work surely influences the way someone thinks about these projects and that mode of thinking does not suddenly change at the retirement party. Second, it is possible that even retired persons retain their connections with others in the land development field, so that when they see a former colleague on the other side of the table, they are more likely to be sympathetic to that position. Finally, a retired plumber or contractor may still own part of the business and may still get some

benefit from continued growth. Therefore, we concluded that retired people are probably influenced, but perhaps less so than those actively engaged in the occupation. Thus, our tables of data include the numbers both with and without retired citizens.

A small number of board positions were vacant (less than 1 percent for BZA; less than 2 percent for P&Z). In addition, city officials listed “unknown” for a fair number of board members’ occupations (12 percent for BZA; about 9 percent for P&Z). A few individuals were listed simply as “on disability,” without an indication of what their usual occupations were. We excluded all of these groups from our calculation of percentages.

#### 1. OCCUPATIONS OF ZONING BOARD MEMBERS: WHITE-COLLAR BIAS

We first attempted to replicate the Walker survey, in order to determine whether boards continued to be skewed toward upper-income business owners, professionals, and executives, who Walker thought had a bias in favor of development. Table 3 shows the occupational classifications of those serving on city Boards of Zoning Adjustment. Table 4 is the same information, but excludes those who indicated they were retired. Tables 5 and 6 indicate the occupations of Planning and Zoning Commission members.

There is some discretion in deciding how to classify various occupations. We used the U.S. Department of Labor classification system.<sup>82</sup> While this does not match Walker’s classification scheme exactly, it is fairly similar.

**Table 3: Occupations of BZA Members  
by City Size (Percentages Including Retired)**

	Total	1,000– 2,499	2,500– 4,999	5,000– 9,999	10,000– 24,999	25,000+
Professional, Technical, and Managerial	53.99	40.98	57.69	63.97	69.84	74.29
Clerical and Sales	17.36	21.71	10.0	20.59	7.94	12.86
Service	6.61	8.26	8.46	2.94	6.35	2.86
Agricultural	3.99	3.98	6.15	4.41	3.17	0
Processing, Trades, and Labor	17.00	25.08	17.69	8.09	12.70	10.0

82. UNITED STATES DEPARTMENT OF LABOR DICTIONARY OF OCCUPATIONAL TITLES (4th ed. 1991), available at <http://www.oalj.dol.gov/libdot.htm>. (last visited June 3, 2004).



**Table 4:** Occupations of BZA Members  
by City Size (Percentages Not Including Retired)

	Total	1,000– 2,499	2,500– 4,999	5,000– 9,999	10,000– 24,999	25,000 +
Professional, Technical, and Managerial	55.45	41.39	59.62	66.67	69.81	76.92
Clerical and Sales	17.66	23.08	10.58	18.92	7.55	12.31
Service	7.43	9.52	8.65	3.60	7.55	3.08
Agricultural	2.48	1.47	4.81	3.60	3.77	0
Processing, Trades, and Labor	18.04	24.54	16.35	7.21	11.32	7.69

**Table 5:** Occupations of P&Z Members  
by City Size (Percentages Including Retired)

	Total	1,000– 2,499	2,500– 4,999	5,000– 9,999	10,000– 24,999	25,000 +
Professional, Technical, and Managerial	61.47	49.87	64.74	63.78	74.74	80.83
Clerical and Sales	15.70	16.62	13.87	21.94	12.63	7.50
Service	6.42	8.06	5.20	5.61	6.32	4.17
Agricultural	3.47	4.28	4.05	4.08	1.05	0.83
Processing, Trades, and Labor	12.95	21.59	12.14	4.59	5.26	6.67

**Table 6:** Occupations of P&Z Members  
by City Size (Percentages Not Including Retired)

	Total	1,000– 2,499	2,500– 4,999	5,000– 9,999	10,000– 24,999	25,000 +
Professional, Technical, and Managerial	61.80	48.49	66.90	65.88	72.94	79.82
Clerical and Sales	15.66	16.57	14.08	21.18	14.12	7.89
Service	6.64	9.04	4.23	5.29	7.06	4.39
Agricultural	3.08	3.92	3.52	3.53	1.18	0.88
Processing, Trades, and Labor	12.81	21.99	11.27	4.12	4.71	7.02

Using these tables, we can compare the general occupational makeup of Iowa zoning boards today with the occupational distribution reported by Walker in 1937. Walker reported that zoning boards then were dominated by business owners, professionals, and technical occupations; he found that almost 85 percent of board members came from these groups. Our survey found that there is a much better distribution now across occupations, at least in smaller towns.

Laborers, for example, comprised less than 2 percent of the board members in Walker's survey, while laborers make up 17 percent of the BZA members and 13 percent of the P&Z members in our survey. Overall, Walker found that 85 percent of board members came from the professional, technical and managerial class, while we found that only 54 percent of BZA members and 55 percent of P&Z members were in that group. Nevertheless, the "white collar" group is still overrepresented on zoning boards. Although professional/technical/managerial occupations are the largest group in the general population, they still make up only 33.6 percent of occupations nationwide and 31.3 percent in Iowa.<sup>83</sup> Thus, this "white-collar" group's share of membership on zoning boards is approximately 74 percent higher than the group's representation in the population.

Moreover, the tilt toward white-collar occupations is more pronounced in larger cities than smaller ones. While the professional/technical/managerial group makes up only 41 percent of board members in the smallest towns, that number climbs steadily until it reaches about 75 percent in cities over 25,000. This progression probably stems from greater populations of white-collar workers in larger cities, as well as the almost total absence of agricultural workers. Because the Walker survey focused solely on large cities, our data actually illustrates that the occupational distribution has not changed dramatically from 1937. In Planning and Zoning Commissions in cities over 25,000, for example, our survey showed that 80 percent of the members are still drawn from the professional, technical, and managerial professions.

Thus, while we can conclude that zoning boards in very small towns are fairly representative of a cross-section of society, there is still a pronounced bias toward the professional/technical/managerial class in our cities. This may be due, at least in part, to the greater willingness of that class to serve on public bodies—they may be used to speaking

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83. PETER FRONCZEK & PATRICIA JOHNSON, U.S. DEP'T OF COMMERCE, OCCUPATIONS 2000 1-2, 8 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-25.pdf> (last visited June 3, 2004).

in public and more comfortable making publicly scrutinized decisions, for example, than those in the labor or clerical categories. They may have more connections with city officials and therefore be more likely to come to mind when appointments are made. The overrepresentation of the professional class on these boards is no different, after all, than their overrepresentation in state legislatures or in the U.S. Congress.

Although a general goal of cross-sectional representation is desirable, one may question whether the broad classifications drawn by Walker really say much about possible zoning board bias. There are bank presidents, for example, who lead the conservation movement in Iowa. There are attorneys who represent the Sierra Club. And conversely, there are factory workers who are fiercely pro-development. Therefore, we attempt, in the second part of the survey, to reach beyond general occupational classifications to identify potential pro-development bias.

## 2. OCCUPATIONS OF ZONING BOARD MEMBERS: INSTITUTIONAL PRO-DEVELOPMENT BIAS

We next attempted to quantify board members whose occupations may have a “pro-development” influence on their zoning decisions. For example, realtors could be naturally predisposed to favor development projects, not only because they may directly benefit by selling some of the property, but also because they want to remain on good terms with developers. Lenders will favor development to generate more loans and will also want to maintain favorable relations with development interests. In addition, numerous construction-related occupations can be safely said to favor development.

Nevertheless, deciding which occupations to identify as “pro-development” turned out to be a thorny task, and certainly many of the occupations are difficult to classify. Some occupations are closely associated with development projects, of course. Developers, realtors, architects, construction company employees, abstractors, appraisers, contractors, engineers, electricians, and plumbers are all likely to see a direct impact on their occupational livelihoods from increased development. Attorneys in Iowa do title opinions, and in small towns this is often a large part of their income. In addition, attorneys feel pressure to stay on good terms with developers and related entities who may be potential clients. In Tables 7 and 8, we call these occupations “direct influence” positions, i.e., jobs that are likely to be directly impacted by zoning decisions.

Other occupations are likely to be indirectly impacted by increased development. For example, retail store owners would naturally be pro-

growth, tending to believe that greater populations would benefit their businesses. Certain professionals like accountants and insurance agents might feel the same. The inclusion of these individuals could be criticized, in that arguably almost everyone eventually will indirectly benefit from a city's economic growth. However, it is easier to imagine a hardware store owner or an owner of a concrete plant being predisposed toward development than an elementary schoolteacher, a farmer, or a factory worker.

Nevertheless, subjective judgment inevitably enters into the classification of these occupations, particularly at the margins. Undoubtedly others who listed seemingly unbiased occupations, such as "homemaker" or "unemployed," actually have deep biases because they are married to a developer, for example, or one of their children is involved in the building industry. Or, in the opposite direction, an architect may do only commercial projects in a nearby big city and have no bias at all with respect to local residential developments. Although one might be able to identify those nuances in an individual case, they are impossible to discern in a survey such as this.

With those caveats, Tables 7 and 8 illustrate that a significant percentage of zoning board members arguably have an occupational bias in favor of development.<sup>84</sup> However, direct influence positions account for only about 30 percent of P&Z members. Even adding in those who may be indirectly biased in favor of development brings the total up to only about half. BZA members exhibit even less influence. About 54 percent of BZA members had no identifiable occupational bias, about 30 percent had direct-influence occupations, and 16 percent had indirect occupational bias.

On the one hand, one could suggest that having around half of board members with a direct or indirect bias toward development hardly constitutes a balanced wheel. Why wouldn't we strive for having all board members unbiased? Certainly the degree of pro-development bias identified counts as a heavy thumb on the scale of these land use decisions. On the other hand, those citizens who hold development-related jobs are entitled to representation on the boards just like anyone else. Although certain pro-development professions continue to be disproportionately represented, it may be difficult to achieve much more balance.

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84. The complete survey data listing the individual occupations and how they were classified can be found at <http://facstaff.law.drake.edu/jerry.anderson/zoningresearch.html>.

**Table 7:** Planning and Zoning Commissions Pro-Development Bias

Type of Influence	Representative Occupations	Percentage
DIRECT	Architects, abstractors, attorneys, realtors	30% w/o retired: 32%
INDIRECT	Business owners, accountants, insurance agents	20% w/o retired: 20%
NO BIAS	Clerical, factory workers, teachers	50% w/o retired: 48%

**Table 8:** Board of Zoning Adjustment Pro-Development Bias

Type of Influence	Representative Occupations	Percentage
DIRECT	Architects, abstractors, attorneys, realtors	30% w/o retired: 32%
INDIRECT	Business owners, accountants, insurance agents	16% w/o retired: 17%
NO BIAS	Clerical, factory workers, teachers	54% w/o retired: 51%

Thus, we conclude that, while some individual boards may be tilted toward development interests, overall the data suggests that there is only partial bias in that direction. While our survey found, for the P&Z group, 42 contractors out of 1,033 occupations listed, we also found 73 teachers. While there were some attorneys (20), architects (11), and abstractors (5), there were many more secretaries (40), and salespeople (50). For the BZA group, out of 764 listed occupations, there were more teachers (51), secretaries (40) and salespeople (51) than attorneys (20) or architects (3). There were 44 contractors, which, though significant, is only about 6 percent of the total.

Realtors were tremendously over-represented in Walker's 1937 survey, taking up over 15 percent of zoning board slots. Because of their obvious self-interest in promoting development projects and retaining influence with developers, this degree of representation indicated undue influence. While realtors still make up a significant group, their representation has dwindled dramatically. Our survey found only 49 realtors out of 1,033 P&Z members, comprising only 5 percent, and 27

realtors out of 764 BZA members, about 3.5 percent. Although Iowa law does limit the appointment of realtors to boards of adjustment, the law itself does not present much of a barrier, as it would be a rare board that approaches the statutory threshold.<sup>85</sup> Nevertheless, the law's existence may make city officials more aware of this potential bias when they appoint board members.

### 3. APPOINTMENT RULES SURVEY

Our survey also asked if there were any restrictions regarding who could be appointed to the zoning boards. Most cities require only that the member be a resident of the city. In fact, 69 percent of cities responding have no restrictions other than residency. Approximately 2 percent have only a restatement of the Iowa Code's limitation on the appointment of those involved in buying or selling real estate. The other 29 percent have an additional requirement that the member cannot be a city employee and/or an elected city official.

Bias in the zoning process could be limited by rules that encourage the appointment of a broader cross-section of the community. A provision requiring city officials to make appointments based on representation of the entire community would, of course, be difficult to enforce. But perhaps broadening the real estate agent rule to include any person involved in real estate development or construction would result in more diverse boards. Even if the law itself does not result in too many changes, it might raise awareness among city officials of the need for diverse representation.

### 4. CONFLICT OF INTEREST RULES SURVEY

Our survey asked municipalities for information on any conflict of interest rules that would apply to zoning board members. In addition, we asked them to describe any conflict of interest situations that had arisen in the last five years.

Remarkably, 120 municipalities out of 168 responding, or 71 percent, had no written rule regarding conflicts of interest. Although many of these are the smaller towns, eight out of fifteen cities with over 25,000 residents had no written conflict rule. Nevertheless, the absence of a written rule does not preclude an unwritten policy or practice of abstention for conflicts. Many municipalities with no written conflicts rule also reported that members had recused themselves in direct interest situations.

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85. See Iowa Code § 414.8 (2003) ("A majority of the members of the board of adjustment . . . shall not be involved in the business of purchasing or selling real estate.").

In those municipalities with written rules, the provisions varied widely. Some rules required disclosure of the conflict, but not necessarily abstention; some allowed participation in discussion, but abstention from voting; some required abstention for “conflicts of interest” without any definition of what would constitute a conflict. The most specific conflict provision seemed to be in the City of Eagle Grove, population 3,712:

It is the policy of the city that no elected or appointed official or city employee, or the spouse, or minor child of an elected or appointed official or city employee, or a firm of which the elected or appointed official of the city is a partner or a corporation of which the elected or appointed official or the city employee holds ten (10) percent or more of the stocks either directly or indirectly, shall have any personal material interest or outside affiliation which would likely produce a conflict between their self-interest and proper performance of the elected or appointed official’s or employee’s duties. No knowledge gained by any elected or appointed official or employee in their role as such shall be used in such a manner as to cause a conflict between their personal interest and the city’s interest. All elected or appointed officials or employees shall conduct their personal affairs so as to avoid any conduct that may adversely affect or appear to affect the judgment of the elected or appointed official or employee.<sup>86</sup>

The largest city in the survey, Des Moines, with a population around 200,000, had a relatively formal conflict of interest rule:

- (a) No member of any administrative or advisory board, committee, commission or agency shall vote or participate in the discussion before the body or any subcommittee of the body on any issue in which the member has a direct financial interest or an interest as defined in sections 2–740 [dealing with city procurement contracts] and 94–3 [dealing with public improvement contracts] and as described in this section. No member of any administrative or advisory board, committee, commission or agency shall participate in selection or in the award or administration of a contract if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when any of the following persons has a financial or other interest in the firm or contractor selected for award:
  - (1) The board, committee, commission or agency member;
  - (2) Any member of his or her immediate family;
  - (3) His or her partner;
  - (4) Any organization which employs or is about to employ any of the persons mentioned in subsections (a)(1) through (3) of this section.
- (b) No board, committee, commission or agency member shall solicit or accept gratuities, favors, money, rebates or anything of monetary value from contractors, potential contractors or parties to subagreements.
- (c) Except as otherwise specifically provided in this Code, no two members of any administrative or advisory board, committee, commission or agency shall be employees of the same person, firm, company, partnership or other employing entity. For purposes of this section the owner or proprietor of a firm, company

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86. CITY OF EAGLE GROVE, EAGLE GROVE EMPLOYEE HANDBOOK, 6.10 Conflict of Interest. The handbook goes on to set forth specifics for personal financial interests and outside affiliations.

or other employing entity and each partner in a partnership and the spouse of each owner or proprietor or partner shall be considered an employee of the firm, company, partnership or other employing entity. This subsection shall not disqualify any member of a board, committee, commission or agency serving upon the effective date of this section.

- (d) Any member who violates this section may be subject to disciplinary action by the appointing authority, including removal from office.
- (e) The conflict of interest provisions in sections 2-740 and 94-3 shall also apply to all members of any administrative or advisory board, committee, commission or agency.
- (f) Exceptions under federal law. To the extent allowed by applicable federal law or regulation, the city council may permit exceptions to conflicts of interest under this section which do not constitute a violation of applicable provisions of state law. The grant of such exceptions shall be specifically conditioned upon approval by the appropriate federal agency.<sup>87</sup>

Despite the length of this rule, it still does not give much guidance on what constitutes a direct financial or personal interest.

Although most cities have no written rule, the survey revealed a wide variety of situations in which board members had recused themselves because of a conflict. In some cases, the disqualifying interest was clear and direct: the member was asking for the variance, or represented the applicant as a lawyer or realtor. In other cases, the interest was based on membership in a group: for example, the board member belonged to the church requesting a variance, or sat on the board of directors of the hospital or utility asking for a zoning change. In one case, the employee of the developer was recused. Other kinds of involvement in the project resulted in recusals: in three cases, bankers on projects they were financing; in one, an architect who worked on the project; and in two cases, contractors who stood to gain from the project. In several cases, a board member's family relations caused the recusal. In only one case did a city report that a recusal was caused because the member lived near the project site.

#### IV. Solutions

##### A. *Direct Bias: Adopt Broad Conflict of Interest Rule*

Conflict of interest situations identified by cities covered a broad range. The most common category was "direct involvement in project." Examples included the architect who worked on the building for which a variance was sought, the attorney who represented the applicant for rezoning, or the contractor who was hired to construct the building in-

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87. DES MOINES MUN. CODE § 2-1054, available at <http://livepublish.municode.com/11/lpext.dll?f=templates&fn = main-j.htm&vid = 13242> (last visited June 6, 2004).



volved in the site plan approval. Thus, there is no question that a conflict of interest provision must include abstention for decisions that could directly affect the financial interests of the board member. These interests should include family members who stand to benefit from the decision as well. In addition, employees of a company or members of an organization (such as a church or social group) that is seeking, supporting, or objecting to the board action should recuse themselves.

Another category of conflict problems identified in the survey is the other side of the coin: neighbors who might be adversely affected by granting a variance or rezoning. In some instances, for example, board members lived adjacent to the property in question and therefore would be directly impacted by the decision. The conflict of interest provision should provide that property owners or relatives of property owners directly impacted by the board's decision should abstain.

We encourage municipalities to avoid any ambiguity about conflicts of interest by adopting a formal rule setting out the parameters of objectionable conflicting interests. Smaller towns, however, might want a narrower conflict rule. For example, sixty of the eighty-two towns surveyed with populations under 2,500 indicated they had no written conflict rule. In a town that size, everyone knows everyone else, and many of the issues that arise before the board of zoning adjustment will affect board members or their relatives at least indirectly. If every possible interest, no matter how remote, were grounds for recusal, there might be no one left on the board to make the decisions in many cases. This difficulty was pointed out by the Connecticut Superior Court: "Local governments, therefore, would be seriously handicapped if any conceivable interest, no matter how remote and speculative, would require the disqualification of a zoning official. Such a policy 'would not only discourage but might even prevent capable men and women from serving as members of the various zoning authorities. . . .'"<sup>88</sup> In smaller towns, therefore, board members may interpret the conflicts rule more narrowly than members in larger cities where conflicting interests arise less frequently.

### B. *Indirect Bias*

In larger cities in Iowa, members of white-collar occupations are significantly overrepresented on zoning boards. In addition, many occupations with either a direct or indirect bias in favor of development are overrepresented. Although overall only about half of zoning board

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88. *Goyette v. Lebanon Planning and Zoning Comm'n*, No. 112654, 1999 WL 49156, at \*6 (Conn. Super. Ct. Jan. 21, 1999) (citing *Cioffoletti v. Planning and Zoning Comm'n*, 552 A.2d 796 (Conn. 1989)).

members have a direct or indirect pro-development interest, there is a significant potential for any one zoning board to be overpopulated with pro-development interests.

Because members of pro-development occupations may be the most interested and available potential board members, the possibility of institutional bias will persist unless two things happen. First, mayors and city councils who appoint board members must be aware of the need to appoint a broad cross-section of the community to zoning boards. They should be cognizant of the danger of appointing too many of those who may be directly or indirectly pro-development. As Walker admonished, the point of view of the "ordinary citizen" should not be forgotten or overshadowed.

But we may not wish to rely solely on the good intentions of appointment authorities. They may themselves have a pro-development bias and, after all, it is a lot more work to convince an "ordinary citizen" to join the board when you have a ready, willing, and able real estate agent eager to serve. Therefore, we believe that legislation focusing on the occupational composition of zoning boards should be enacted. The statute could, for example, prohibit appointing more than one-third of a board from those whose occupations are identified as directly pro-development: not only real estate agents, but also lenders, appraisers, contractors, construction company employees, and real estate lawyers. While it is important and valuable to have the expertise and experience of these persons on the board, there is an unfortunate tendency for those occupations to be over-represented, thereby unbalancing the wheel in favor of development interests.

In addition, many municipalities have not adopted conflict of interest rules to eliminate the more egregious forms of bias. While unwritten norms may cure many of these problems, cities should adopt clear, written policies defining when recusal is appropriate, to guide zoning board members. The policy should be broad enough to encompass indirect conflicts as well as direct interests in the outcome.<sup>89</sup> In addition, the municipality should consider a training program for zoning board members, to advise them on potential conflicts and the need to avoid impropriety.<sup>90</sup>

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89. The New Hampshire statute defines a disqualifying interest in a broad manner that seems to encapsulate the distinction nicely. A BZA member is disqualified if the member "has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens." N.H. REV. STAT. ANN. § 673.14 (2003).

90. Patricia E. Salkin, *Litigating Ethics Issues in Land Use: 2000 Trends and Decisions*, 33 URB. LAW. 687, 703 (2001) (suggesting zoning board training).

Unless and until these problems are resolved, courts should be aware of the potential for bias in zoning board decisions. The deference due to these bodies should be duly tempered by the knowledge that the wheel is not always balanced. This awareness should lead to stricter scrutiny in cases where the board is composed primarily of those who will benefit, even indirectly, from a development proposal.

### C. *Independent Decision Makers*

As the above discussion reveals, eliminating every interest, direct and indirect, from a zoning decision may be impossible, especially in smaller towns. Even developers from other towns sometimes complain that local developers get breaks that they do not. Given local politics, perhaps bias is an inevitable part of zoning decisions.

One way to truly eliminate bias would be to take the decision out of local hands. The farther one gets from the local milieu, the more objective the decision will be. A regional board or commission could be appointed, at least for some of the functions most susceptible to bias. This board could act either as an appellate body, or even as the primary decision maker, if its jurisdiction were narrow enough to not be over-worked.

Britain, for example, places much of its authority for planning at the national level. The central government, for example, determines the need to plan for additional housing in each district and delineates areas in which development will be prohibited.<sup>91</sup> Primary responsibility for “planning permission,” which has much in common with our system of variances or zoning amendments, rests with district councils, a level akin to our counties, at least somewhat removed from local politics.<sup>92</sup>

Municipalities, of course, have a strong claim to continuing to have local affairs decided by local citizens. Removing all bias may mean that decisions would be made without regard to local politics, but also without regard to local priorities. Nevertheless, if further empirical evidence suggests that bias is pervasive on zoning boards, the regional zoning board alternative would undoubtedly bring more objective results.

## V. Conclusion

Zoning board decisions affect countless citizens in profound ways every day. The power to change a zone from residential to commercial

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91. See JOHN ALDER, *DEVELOPMENT CONTROL* 99–100 (1979). The central government, for example, designates “Areas of Outstanding National Beauty,” which have strict controls on development.

92. *Id.*

or even industrial use can mean that your peaceful neighborhood may become a nightmare. A variance granted can mean increased traffic, more noise, light pollution, or obnoxious odors. Every decision a zoning board makes affects the daily lives of the city's people—what they see or hear, where they have to drive, where they can walk, how they live.

We should pay more attention to these boards, to ensure that each citizen who comes before them has confidence that the slate is clean and that his or her complaints or concerns will be heard and fairly weighed. City officials should take care to make appointments that reflect a broad cross-section of views and occupations, to ensure that development interests do not dominate the boards and that the “average citizen,” as Walker put it, has a fair chance of being heard.

Until boards become more balanced, courts should be aware that boards are typically weighted toward white-collar interests and that there is some development bias on most boards. In reviewing decisions of these boards, the courts should ensure that their review takes into account the local politics inherent in these cases.

Finally, states should require cities to enact a conflict of interest provision that gives board members clear guidance as to the limits of permissible interest. At least in larger cities, where conflicts are less frequent, the provision should be broad in scope, to cover direct and indirect bias situations. When in doubt, board members should recuse themselves, to ensure that boards regain the public's confidence that the wheel is indeed balanced.