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# Conflict of Interest Training




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Brookings Historic Preservation  
Commission

May 14, 2020

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## Points to Ponder

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- When is it appropriate to recuse myself or abstain from a commission decision?
  - How is a conflict of interest defined?
  - What is ex parte communications?
  - How should I handle calls from an applicant or the public on a specific project that may come before the commission for a vote?
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City of Brookings Governance and Ends Policies - Appendix A

**City Council Code of Ethics**

Approved May 13, 2002

The mayor and council are responsible for making policy decisions for the community. The City Council provides vision, direction and leadership to the community and the organization. The City Council further represents the Brookings Community with other governmental entities and officials. In order to maintain and enhance public trust and confidence in our local government, to achieve equity and social justice, to affirm human dignity, and to better the quality of life for residents of Brookings the members of the City Council dedicate themselves to the stewardship of the public trust and therefore embrace the following ideals, seeking to:

- ❖ Uphold constitutional government and the laws of the city of Brookings;
- ❖ Conduct public and private life as to be an example for my fellow citizens;
- ❖ Be mindful of my neutrality and impartiality, rendering equal service to all and to extend the same treatment I wish to receive myself;
- ❖ Abstain from voting when a conflict of interest exists in accordance with the *Brookings City Charter, Section 7.01 (a) Conflicts of Interest* provision;
- ❖ Be tolerant, respectful and attentive. Avoid comments, body language or distracting activity that conveys a message of disrespect for the presentations from citizens, staff or colleagues;
- ❖ Maintain and respect the confidentiality of private and confidential information;
- ❖ Attend all regular and special meetings, including briefings, and public functions where my presence is expected;
- ❖ Be prepared by reading all documents pertaining to an issue in advance of the above mentioned meetings or event;
- ❖ Be an active and attentive participant;
- ❖ Be professional in both appearance and manner; and
- ❖ Read, comprehend and comply with local, state, and national governmental guidance, directives, regulations and ordinances pertaining to my position.

It is the policy of the City of Brookings to uphold, promote, and demand the highest standards of ethics from all its Council members. Brookings Council members shall maintain the utmost standards of personal integrity, truthfulness, honesty, and fairness in carrying out their public duties, avoid any improprieties in their roles as public servants including the appearance of impropriety, and never use their city position or powers for improper personal gain.

The code of ethical behavior will govern members of the City Council. City Council members are encouraged self-monitor their behavior and offer constructive recommendations to fellow Council members if necessary. As a member of the City Council, I accept these ideals and policy, and pledge to do in the interest and purposes for which our government has been established.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

# Section 7.01a – Conflicts of Interest

- Sec. 7.01.a - Conflicts of Interest; Board of Ethics.
- Conflicts of Interest. The use of public office for private gain is prohibited. The City Council shall implement this prohibition by ordinance. Regulations to this end shall include but not be limited to: acting in an official capacity on matters in which the official has a private financial interest clearly separate from that of the general public; the acceptance of gifts and other things of value; acting in a private capacity on matters dealt with as a public official, the use of confidential information; and appearances by city officials before other city agencies on behalf of private interests. The appearance of impropriety shall be avoided. Municipal officials shall be, at a minimum, restricted from conflict of interest to the same extent that state public officials are bound by state law; provided however, that the City Council may adopt an ordinance setting a stricter standard.




# Due Process Rights


- ▶ The United States Constitution states two rights that must be safeguarded during the decision making process
  - ▶ Equal Protection of the Law – The law must be applied fairly and equal to all persons in all circumstances
  - ▶ Due Process of the Law – Encourages objective decision making
    - ▶ Notice
    - ▶ Opportunity to be heard
    - ▶ Findings of Fact
    - ▶ No conflict of interest
    - ▶ Prompt decisions
    - ▶ Records of the proceedings



## Ex Parte Communication




Ex parte communication means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

- 
- ☐ An interested person outside the Commission Court (including such person's counsel); and
  - ☐ The Commissioner or Judge handling that proceeding.



## Hanson vs Minnehaha County

- ❖ Conditional use permit for Eastern Farmers Cooperative Agronomy Plant.
- ❖ Conditional use was for farm chemicals and anhydrous ammonia.
- ❖ Several worried neighbors testified at both the Planning and Zoning Commission and County Commission hearings.
- ❖ Staff and Planning Commission Recommended Approval



## Hanson vs Minnehaha County

- Neighboring property owner appealed Planning Commission Recommendation to County Commission (Hanson)
- Prior to County Commission hearing and decision County Commissioner, Dick Kelly, went on a site visit to the Worthing, SD Agronomy Plant owned by Eastern Farmers Cooperative (the applicant)
- Commissioners approved C.U. Permit by a 4-0 vote
- During hearing Commissioner Kelly disclosed his site visit and complemented the company on safety practices



# Worthing Agronomy Facility





## Commissioner Kelly's Site Visit

- Should Mr. Kelly have toured a facility owned by the applicant of a pending C.U. permit?
- Would the situation be different if he toured another facility not owned by the applicant?
- Is driving by the site and gathering general research acceptable?
- Should Mr. Kelly have recused himself at the meeting?
- Could Mr. Kelly's testimony about the 'adequate safety measures' influenced the decision of other Commissioners?
- Did the site visit and interaction with the applicant have the potential to influence Mr. Kelly's decision?



## Due Process Ruling – Circuit Court

- In the Hanson case, the Court held that Commissioner Kelly's visit to the Agronomy Plant violated the Hanson's due process rights.
- Court found that Commissioner Kelly took in evidence outside of the record that was before the Commission.
- Commissioner Kelly also relied on that evidence in making his decision.
- The Court found that there was no personal motivation or bias, but instead, that Commissioner Kelly was just visiting the Agronomy Plant to learn.
- However, the Court found that the very appearance of complete fairness was not present because of the site visit and ex parte communication.
- Court ruled the three other Commissioners were not influenced by Commissioner Kelly and confirmed the approval decision was valid.
- Hanson appealed to SD Supreme Court.



## Appeal to Supreme Court

- Hanson claimed Commissioner Kelly's ex parte investigation before the Commissioners Meeting violated his right to due process
- Hanson claimed the Minnehaha County Zoning Ordinance (MCZO) does not have adequate criteria for a C.U. Permit
- Planning Commission's decision was arbitrary and capricious violating Hanson's due process
- Argued for a new hearing

# South Dakota Supreme Court

- Supreme Court upheld decision of County Commission and Circuit Court

## Site visit/Ex Parte Communication Question:

- Punted - wasn't necessary to rule on because they upheld the vote of the board

## Does disqualification or conflict of one member disqualify the vote:






- MCZO does not specify the approval is based on the total # of members of the Board (Outcome would have been the same without Kelly's vote)
- Contrary to Armstrong vs Turner County they ruled Kelly's potential bias did not create an unacceptable bias for the rest of the Board. (Kelly was only a commissioner / Van Howe was the commissioner serving on the Planning Commission that made the recommendation, then voted as a BOA member later.

## Arbitrary Decision Question:

- A jurisdiction does not have to have specific standards for each use, but has to have standards to review for conditional use permits. Those standards include both criteria in the zoning ordinance and criteria/policies in your Comprehensive Land Use Plan



# Biased Decision Making

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- ❖ “**Direct pecuniary interests**,” when an official votes on a matter benefiting the official's own property or affording a direct financial gain;
  - ❖ “**Indirect pecuniary interests**,” when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member;
  - ❖ “**Direct personal interest**,” when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman's mother being in the nursing home subject to the zoning issue;
  - ❖ “**Indirect Personal Interest**,” when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.
  - ❖ (Activist Role)

# Court Guidance:

## The Supreme Court on the Conflict of Interest Question:

- ▶ “We can glean... that officials [shall] disqualify themselves when they have a business or personal interest in the subject on which they must vote, regardless of whether this interest creates an actual bias.”
- ▶ “If the circumstances show a likely capacity to tempt the official to depart from his duty [to serve their government and the people, uninfluenced by adverse motives and interests], then the risk of actual bias is unacceptable and the conflict of interest is sufficient to disqualify the official.”
- ▶ The state supreme court quoted the Iowa Supreme Court with regard to “Quasi-Judicial Boards:”

Under the common law, officials exercising quasi-judicial powers [are] disqualified or incompetent to sit in a proceeding in which [they have] prejudged the case, or in which [they have] a personal or pecuniary interest, where [they are] related to an interested person within the degree prohibited by statute, or where [they are] biased, prejudiced, or labor [ ] under a personal ill-will toward a party.

## When can I vote?

The interest must be different from that which the quasi-judicial officer holds in common with members of the public.... In addition, such interest must be "direct, definite, capable of demonstration, not remote, uncertain, contingent, unsubstantial, or merely speculative or theoretical."









# Lessons Learned

- ❖ Ask yourself, staff, or City Attorney whether you run the risk of unacceptable bias based on the four types:
  - ❖ Direct pecuniary Interest
  - ❖ Indirect pecuniary Interest
  - ❖ Direct personal Interest
  - ❖ Indirect personal Interest
- ❖ Ask yourself if your conflict is different than other members of the common public would have.
- ❖ Disclose any potential conflict of interest before the hearing.
- ❖ Specify the number of votes necessary for approval and any absent or abstaining members prior to the hearing.
- ❖ Offer the applicant the opportunity to request the matter be acted upon, tabled or withdrawn with the knowledge of the potential conflict or difficulty in obtaining the number of required votes absent an abstaining member.





## Site Visits, Calls, Public Comment

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- Decline a site visit with the applicant unless it is advertised as a public meeting.
  - It is acceptable to drive by or walk by the site.
  - If an applicant calls, explain the decision making process needs to occur at the meeting.
  - Share any emails on a project with all commissioners and staff and provide a summary of any phone calls related to a specific project.
  - When a quorum is present outside of a meeting, be careful not to discuss pending projects.

# Questions

