STATE OF MAINE

Inter-Departmental Memorandum Date March 16, 1973

To John L. Martin, Chairman Dept. Land Use Regulation Commis:

From E. Stephen Murray, Assistant ESM Dept. Attorney General

Subject Maine Land Use Regulation Commission; Conflicts of Interest.

I. Problem:

There has been considerable discussion of the issue of the law as to conflicts of interest and the statutory and actual membership of the Maine Land Use Regulation Commission (hereinafter sometimes called "L.U.R.C.") and how the law of conflicts of interest applies to decisions of L.U.R.C., if at all. This discussion has been of both a public and a private nature and has involved members of the citizenry, the press, conservation organizations, the regulated and L.U.R.C. Commissioners themselves.

As a result of this widespread discussion, former Attorney General James S. Erwin authorized me to research the issues and report the results to the L.U.R.C. Commissioners.

At the outset it should be noted that while the Legislature, the judiciary and the commentators all agree upon the acceptability of the principle that "no man can serve two masters", the application of that principle is more often difficult than not, and in most cases seems to be left to the honest discretion of those who might have a conflict of interest. This fact is evidenced by the frequently stated unwillingness of courts to set forth a specific rule, by the fact that there are few cases of gross violation of the principle, by the unwillingness or failure of legislature to set forth a rule, and finally by the ability of the courts to find their way around this easily-accepted but hard-to-apply principle.

II. Statutory Duties of L.U.R.C.:

L.U.R.C.'s jurisdiction extends to approximately one-half of the State encompassing that area defined as "unorganized and deorganized areas" (12 M.R.S.A. § 682.1), hereinafter called "the wildlands." The wildlands are, for the most part, owned by timber and paper companies, many of whom compete, directly or indirectly, with each other. 12 M.R.S.A. Chap. 206-A requires L.U.R.C. to (1) establish standards for zoning the wildlands; (2) establish uses permitted within each type of zone; (3) zone the wildlands; (4) act upon individual petitions to rezone areas in the wildlands; (5) act upon petitions to amend land use guidance standards in the various zones; (6) act upon applications to use zoned areas in a manner otherwise prohibited by the L.U.R.C. standards; (7) act upon applications to engage in or undertake virtually any land, air or water use

in the wildlands,[1] and (8) prepare a comprehensive plan for the wildlands.

III. Statutory Makeup of L.U.R.C.:

12 M.R.S.A. § 683 provides for a 7 member board consisting of 3 permanent members, (1) "the Commissioner of Parks and Recreation", (2) "the Forest Commissioner" and (3) "the State Planning Director" and 4 term members, each one of whom shall "represent" (4) "the public", (5) "conservation interests", (6) "forest products industry interests" and (7) "general landowner interests."

A quorum is 4 and no action can be taken by the Commissioners except upon the approval of 4 members.

The Commissioner of Parks and Recreation has jurisdiction, custody and control in, over and upon all state parks and memorials, some of which are located in the wildlands.[2]

The Forest Commissioner has supervision and control of all state-owned lands, not otherwise provided for, much of which is located in the wildlands.[3]

The State Planning Director is responsible for providing technical assistance to the executive, the legislature and others and to prepare State comprehensive plans.[4] He has no regulatory or proprietary powers.

While the statute, 12 M.R.S.A. § 683, states that the term members shall "represent" various interests, we must assume that it simply requires members to either be drawn from among those persons involved or identified with the various interests set forth or that the members simply be knowledgeable of the attributes, problems and desires of each identified interest group. As public officers each member is required to act in the public interest, as fiduciaries of that interest. To assume that the statute permits or requires each member to act only on behalf of the interest which he "represents" would be to assume a statutorily authorized or required failure of fundamental due process.

No case can be found which approves of a statutory authorization for a public official to act only on behalf of special interests, but cases can be found which do not get to the issue because the court held invalid the statute authorizing a board or commission consisting of special interests, or specifically found that there was no denial of due process because of the nature of the board or commission's powers or the statutory scheme for judicial review.

For example, in Miami Laundry Co. v. Florida Dry Cleaning & L. Board, 183 So. 759 (1938), the court upheld a statute

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1/ No permits are required to engage in forest product uses in areas zoned "management." 12 M.R.S.A. § 685-A.5.

2/ 12 M.R.S.A. § 602.

3/ 12 M.R.S.A. § 504.

4/ 5 M.R.S.A. § 3305

establishing a board of 7 members to regulate the cleaning, dyeing, pressing and laundry industries. Although the board consisted of 3 members from the cleaning industry, 3 members from the laundry industry and only one member from the public, the court stated:

> ". . . we do not understand the act to do more than require that 3 members of the board must have had experience in the laundry business and 3 members must have had experience in the cleaning business. In other words, all the act does is to prescribe certain qualifications for those appointed to it. . . " 183 So. at 764.

In refusing to invalidate a statute providing for a state regulatory board of funeral directors and embalmers to consist of members of the industry, in State Board of Funeral Directors and Embalmers v. Cooksey, 4 S.2d 253 (1941), the court found its way around the knotty problems of due process and the constitutional requirements of a fair hearing by basing its decision on the fact that the board had no power to fix standards of conduct or prescribe or fix fees and charges or to establish rules of fair practice or in any way to regulate or dictate the conduct or the business of any funeral director or embalmer, but rather was authorized only to issue certificates of qualifications or licenses to those who met statutory requirements. While the court's decision here may be seen as a "distinction without a difference," the case does illustrate the fundamental assumption that regulatory boards consisting of members of the regulated are, at the least, troublesome and the courts will at times circumscribe the assumptions implicit in such statutes by narrowing the scope of their inquiry.

However, as illustrated in Johnson v. Michigan Milk Marketing Board, 295 Mich. 644, 295 N.W. 346 (1946)[1], some courts will not hesitate to reach the issue of fundamental fairness. In Johnson, a large milk distributor attacked the statutory makeup of the state milk commission which consisted of the Commissioner of Agriculture[2], 2 milk producers, 1 milk distributor and 1 consumer. The court forthrightly held that

> "The Board, as constituted under the statute, is of such a nature that Johnson was not, and would not have been, accorded that impartial hearing which satisfies the requirement of due process."[3] 295 N.W. at 353.

1/ criticized in 54 Harv. L. Rev., 872 (1941)

2/ The Commissioner of Agriculture also happened to be a milk producer.

3/ The dissent, citing Miami Laundry, supra, would not so hold on the basis that the board's functions were legislative and not administrative in nature.

While the court in Board of Supervisors of Elizabeth City County v. State Milk Commission, 191 Va. 1, 60 S.E.2d 35 (1950), upheld the makeup of a milk commission consisting of a producer, a distributor and a consumer in a case involving an attack on the commission's decision to fix the minimum price of milk in a certain marketing area, the court took pains to point out that unlike Johnson, here the appeal section of the statute guaranteed due process by providing for a full court review of the commission's decision.1/ In addition, by finding that the "technical problem of fixing milk prices is wisely left to an experienced and informed tribunal", the court seemed to be making a distinction between "legislative" and "quasi-judicial" decisions, discussed herein, infra.2/

In State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 254 P.2d 29 (1953), the court invalidated a state board setup to regulate dry cleaning plants which consisted of 1 member from the public, 2 owners of retail dry cleaning plants, 2 owners of wholesale dry cleaning plants and 2 owners of dry cleaning shops, on 3 b ases, one of which was that the makeup of the board violated the due process requirements of the Fifth Amendment to the United States Constitution.

Finally, Southeast Milk Sales Association Incorporated v. Swaringen, 290 F. Supp. 292 (1968) emphasized the fundamental basis of the Johnson case, supra. In Southeast, a person aggrieved by a decision of the commission had a right of appeal to be heard de novo and thus was entitled under the act to a full hearing with all rights of due process, whereas in Johnson, the board's findings were conclusive and review was limited to questions of law.3/

It should be noted that there are a number of cases holding that a board consisting in part or in whole of members of a profession to be regulated by the board is not unconstitutional per se. These decisions appear to be based upon the "rule of necessity."

1/ Court review of an L.U.R.C. decision in any matter upon which there was a hearing is confined to the record and the substantial evidence rule. 12 M.R.S.A. § 689.

2/ The so-called "milk commission cases" may all be distinguishable for reasons such as the common legislative assumption that milk requires extraordinary regulation because it is a commodity which is a necessity to the health and life of the citizenry and partakes of the nature of a public utility, or milk regulation requires expertise which lies only in the hands of the distributors and producers.

3/ See note 1, supra.

While the foregoing discussion does not have any direct inference upon the makeup of the L.U.R.C. and their discussion should not be seen as indicating an opinion on the writer's behalf that the makeup of the L.U.R.C. is constitutionally deficient, the cases cited are valuable to indicate that the L.U.R.C. makeup can be seen as troublesome unless it is assumed that L.U.R.C. members are required only to be knowledgeable in the fields of interest which the statute requires them "to represent."

IV. Present Membership of L.U.R.C.:

Aside from the 3 permanent members, L.U.R.C. consists of (1) an attorney who represents "conservation interests," (2) a professor who represents "the public", (3) an officer-employee of a corporation which has substantial holdings in the wildlands and which is in the timber and paper business as well as the "second-home" recreational business who "represents" "forest products industry interests", and (4) an officer-employee of a multi-disciplined corporation which has land holdings in the wildlands and which is involved in a variety of interests, including the "second-home" and recreational development industry, who represents "general landowner interests."[1/]

Whether or not, in a given situation, a conflict of interest is present, is dependent, in great part, upon the meaning of "interest" within the phrase "conflict of interest." The cases dealing with this issue appear to assume that "interest" in this context means something other than philosophical bent or opinion, that it involves a direct or indirect pecuniary interest, not necessarily capable of specific demonstration but on the other hand not solely within the realm of fanciful hypothesizing. This definition of interest is demonstrated in the cases cited herein, infra, as well as in the following two Maine cases.

Friend, Appellant from the decision of the Penobscot County Commissioners, 53 Me. 387 (1866) involved the appeal of one Friend of a decision of the county commissioners in laying out a road. Pursuant to the statutory procedure provided for in such cases, the county commissioners appointed "a committee of 3 disinterested persons", to wit, a committee, the majority of which were stockholders of the railroad corporation owning the fee of the land over which the road would run. In throwing out the decision and report of the committee, the court stated:

1/ It should be noted that the writer has no information of a personal nature about any of the present members which is relevant to this memorandum.

> ". . . it is well settled that any interest, however small, is sufficient to render one who is required to act in a judicial capacity incompetent. (emphasis the court's) . . .
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> "It was decided in State v. Delesdernier, 2 Fairf., 473, that the owner of land over which a road was located was incompetent to act in laying out the same. The owner of stock in a corporation which owns the land is equally so." 53 Me. at 388.

Opinion of the Justices, 108 Me. 545, 82 A. 90 (1912) involved the validity of a printing contract awarded by the State to a corporation of which the Secretary of State was a stockholder and Treasurer. Even though the corporation was the lowest bidder in a competitive bidding process, and even though the Secretary of State had nothing to do with the award of the contract or the auditing or payment of the bills presented on account thereof, the court held the contract void.[1] The significance of the case lies in the court's statement that where a state officer is a stockholder and officer of a company, the "clear implication" is that his "financial interest in the company is an appreciable and substantial one." 108 Me. at 548.

V. General Principles of Conflicts of Interest:

The general principles applicable to the issue of conflicts of interest can best be understood by a review of some of the cases dealing with the issue and a reading of some of the commentators.

In 1610 the English courts held "no man shall be a judge in his own case." Bonham's Case, 8 Co., 113b., 118 a., 77 Eng. Rep. 646, 652 (K.B. 1610). This statement of the basic principle is the essence of the American cases dealing with the issue.

As previously pointed out, in 1866, the Maine court ruled that a stockholder in a corporation cannot perform his duty as a public official with regard to a matter involving the corporation without being guilty of a conflict of interest.[2]

In Selectmen of Andover v. Board of Comm's. of Oxford County, 86 Me. 185, 29 A. 982 (1893) the court applied the principle to a situation in which the lower court appointed a committee to submit a report concerning a dispute over the location of a road.

1/ The case involved a statute prohibiting a state official from being directly or indirectly interested in any State awarded contract.

2/ Friend, supra, page 5 .

One of the members of the committee was a large landowner in the town in which the road would not be located. While the court held that the rule of necessity would prevent disqualifying the landowner from serving on the committee, because if paying taxes were the test of disqualification, no citizen could act as a municipal officer, the case is noteworthy for what the court says about "interests."

> ". . . any direct interest, however small, will disqualify a judicial officer, 'for no man can lawfully sit as a judge' in his own case. An interest that disqualifies from judicial action may be small, but it must be an interest, direct, definite, and capable of demonstration; not remote, uncertain, contingent, or unsubstantial, or merely speculative and theoretic." 29 A. at 983.

In Lessieur v. Inhabitants of Rumford, 113 Me. 317 (1915), Lessieur made a contract with the local board of health, of which he was a member, to care for a smallpox patient. There was no statutory provision against such a contract and the court assumed that the substantive terms of the contract were equitable. Nevertheless, the court voided the contract and stated:

> ". . . if it clearly appears to be in violation of some well established rule of law, or that its tendency will be harmful to the interests of society, it is against the policy of the law to uphold and enforce it.
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> "It is well established as a general rule that one acting in a fiduciary relation to others is required to exercise perfect fidelity to his trust, and the law, to prevent the neglect of such fidelity, and to guard against any temptation to serve his own interests to the prejudice of his principles disables him from making any contract with himself binding on his principle. . . The test is not whether harm to the public welfare has in fact resulted from the contract, but whether its tendency is that such harm will result." 113 Me. at pages 319-320.
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> "One who stands to gain or lose personally by a decision either way is disqualified by reason of interest to participate in the exercise of judicial functions." 2 Davis Administrative Law Treatise § 12.03, p. 153.

Tuscan v. Smith, 130 Me. 36, 153 A. 289, 73 A.L.R. 1344 (1931) was a case involving a lease of a town building to a selectman's brother. The lease was held unlawful because of the selectman's interest therein as his brother's creditor. In the course of its decision, the court stated:

> "It is unnecessary to discourse on the duties of public officials. Their obligations as trustees for the public are established as a part of the common law, fixed by the habits and customs of the people. . . No definite rule can be given indicating the line of demarcation between that which is proper and that which is unlawful. In the words of this court in the case of Lessieur v. Inhabitants of Rumford (citation omitted) the question really is whether the town officer by reason of his interest is placed 'in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized and required him to act in the premises as an official'. . . "
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> "Gauged by the common and accepted standards defining the obligations of public officials, the lease. . . was unconstitutional and unlawful. To hold otherwise would be to repudiate the doctrine that he who holds public trust is in a position of public trust."1/

Hughes v. Black, 156 Me. 69 (1960), was an appeal from a decision by the lower court judge not to disqualify himself in an action in which the judge was an uncle of the plaintiff's attorney. The case is useful in its statement of the principles, thus:

> "A cardinal principle inherent in American jurisprudence is that no judge shall preside in a case in which he is not wholly free, disinterested, impartial, and independent, to the end that litigants may have a hearing or determination by an impartial tribunal. The law is justly zealous of the absolute disinterestedness of tribunals. Due process of law requires a hearing before an impartial and disinterested tribunal. Next in importance to the duty of rendering a righteous judgment is that

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1/ While the case involved a statute prohibiting conflict of interest as to cities, the court held it not applicable to this case because no city was involved. Thus the case went off on common law principles.

> of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge.
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> "In any event, there has never been any doubt about the principle that no judge or tribunal should sit in any case in which he or it is directly or indirectly interested. The interest which is meant is a pecuniary one and such a pecuniary interest disqualifies a judge no matter how small it may be. . . ." 156 Me. at pages 73-74.

In Griggs v. Borough of Princeton, 33 N.J. 207, 162 A.2d 862 (1960), discussed infra page 17 , the court in vacating the vote of a municipal body because the employer of 2 of the 4 members of the body had an interest in the vote, the court, quoting Van Itallie v. Borough of Franklin Lakes[1], stated:

> "'. . . the decision as to whether a particular interest is sufficient to disqualify is necessarily . . . factual . . . and depends upon the circumstances of the particular case. . . . No definitive test can be devised.'" 162 A.2d at page 869.

The court went on to say:

> "The potential of psychological influences cannot be ignored. . . . We perceive the rule to be that the mere existence of a conflict, and not its actual effect, requires the official action to be invalidated." 162 A.2d at page 870.

In Buell v. City of Bremerton, 80 Wash.2d 518, 495 P.2d 1358 (1972), discussed infra page 20 , the court stated:

> "Members of commissions with the role of conducting fair and impartial fact finding hearings must, as far as practicable, be open-minded, objective, impartial, free of entangling influences and capable of hearing the weak voices as well as the strong. . . . It is important not only that justice be done but that it also appear to be done. . . ."

1/ 28 N.J. 258, 268, 146 A.2d 111, 116 (1958).

"The importance of the appearance of fairness has resulted in the recognition that it is necessary only to show an interest which might have influenced a member of the commission and not that it actually so affected him. . . . " 495 P.2d at pages 1361, 1362.

". . . the common law rule of disqualification applicable to judges extends to every tribunal exercising judicial or quasi-judicial functions." 1 Am. Jur.2d, Administrative Law, § 63 at page 859.1/

"A public officer owes an undivided duty to the public whom he serves, and is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interests of the public." 43 Am. Jur., Public Officers, § 266 at page 81.

"It has been recognized that whether in a particular case, a disqualifying interest exists, is a factual question governed by the circumstances of each case, so that a definitive rule is not possible (citations omitted). However, the courts have usually taken the view that it is necessary only to show the existence of an interest which might have influenced the officer and that the person objecting need not go further and show that the influence actually operated (citations omitted)." 10 A.L.R.3d at page 696.

The court in Aldom v. Roseland, 42 N.J. Super. 495, 127 A.2d 190 (1956) sets forth a good summary of the principles of conflicts of interest. In disqualifying a council vote on an amendment to a zoning ordinance because one of the councilmen was employed by a corporation which stood to benefit from the amendment, the court stated:

"A public office is a public trust. Borough councilmen, as fiduciaries and trustees of the public interest, must serve that interest with the highest fidelity. The law tolerates no

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1/ hereinafter cited as "1 Am. Jur.2d Ad. L.".

mingling of self interest it demands exclusive loyalty. . . The theory is that a public officer assumes the same fiduciary relationship toward the citizens of his community as a trustee bears to his cestui que trust. . . . They have the right to expect that in everything that appertains to their business or welfare, he will exercise his best judgment, unaffected and undiluted by anything which might inure to his own interest as an individual. . . . . " 127 A.2d at page 193.

"The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of particular importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interests conflict. Basically the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official. And in the determination of the issue, too much refinement should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect. Such an approach is recognition to the moral philosophy that next in importance to the duty of the officer to render a righteous judgment is that of doing it in such a manner as will beget no suspicion of the pureness and integrity of his action. . . .

. . . .

"The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case. . . . but in appraising the interest there is no essential difference between cases arising under prohibitory statutes and those necessitating application of the common law. And it may be noted as a factor that the validity of the officer's action does not rest upon proof of fraud, dishonesty, loss to the municipality or whether he was in fact influenced by his personal interest, or whether the contract or other type governmental step was desirable or undesirable from a public standpoint." 127 A.2d at page 194.

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> "The personal or private interest which disqualifies may be identified generally as one which is different from that which the public officer holds in common with members of the public." 127 A.2d at page 196.
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> "It was argued that establishment of the principle we are announcing would disservice the public interest because it might operate to influence substantial and civic minded citizens, who have outside business connections, against membership in an elective or appointive public agencies. That result is extremely doubtful. The rule disqualifies only where personal and public loyalties come into conflict. In those rare instances such high-minded persons undoubtedly will welcome the disqualification.
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> "It might be added that, as a matter of ethical practice under a statute. . . and quite apart from the obligations of the law, whenever a substantial question is raised as to the disinterestedness of one of several officials sitting on a matter, and the other officials can't take care of the case, it usually is just as well for the official in question to withdraw therefrom so that not the faintest shadow be cast on the integrity of the determination." 127 A.2d at page 197.

VI. The Rule of Necessity:

The so-called "rule of necessity" to the rule against conflicts of interest should be noted in passing, more for its existence than its direct relevance to L.U.R.C.

The rule of necessity is "an exception based upon necessity, to the rule of disqualification of an administrative officer. Disqualification will not be permitted to destroy the only tribunal with power in the premises." 1 Am. Jur.2d Ad. L. § 65 at page 862.

In Andover, supra, page 6 , the Maine Court applied this rule to prevent the disqualification on a board of a taxpayer in the Town of Andover, concerning a decision which could affect the Andover property taxes. The Court found that to apply the rule on conflicts of interest would result in no citizen being able to act as a municipal officer.

In Griggs, supra, page 9 , where the court disqualified 2 votes which were necessary for a quorum and thus the municipal body's action failed, and no action could thereafter be taken by the body upon the particular application, the court refused to apply the rule of necessity saying that there was no "stern" necessity and the municipal body could withhold action until the voters or the legislature remedied the disability.

Finally, there are a number of cases holding that a board consisting in part or in whole of members of a profession to be regulated by the board is not unconstitutional and does not present a conflict of interest. For example, see Kachian v. Optometry Examining Board, 44 Wis.2d 1, 170 N.W.2d 743 (1969) and People v. Murphy, 364 Mich. 363, 110 N.W.2d 805 (1961). Those decisions appear to rest on the rule of necessity. As pointed out in Kachian, at page 748, "If the indirect interest deriving from membership in the profession or occupation being regulated disqualifies an individual from serving on a regulatory board, the result would be dentists could not examine dentists, attorneys could not serve on bar examiner board, pharmacists could not give pharmacy examination. Would it be preferable, or even workable, to have dentists giving bar examinations and optometrists giving pharmacy tests? The gain in presumed purity would be matched by a loss in knowledge and experience in drafting and administering professional and occupational rules and regulations."

VII. The Distinction between Legislative and Quasi-Judicial Administrative Action:

In applying conflict of interest rules, courts have often made a distinction between legislative and quasi-judicial administrative actions. In other words, where an action taken by an administrative body was "legislative" in nature, the rules prohibiting conflicts of interest were held not to apply.1/ In State v. Board of Public Works of City of Camden, 29 A. 163 (N.J. 1894), the court set forth a good statement of the rule. The case concerned the validity of the vote of the Board of Public Works on a petition requesting permission to lay a street railway. The Board adopted an ordinance granting permission to the Camden Horse Railway Company to lay its tracks upon any street in the city. One of the members of the Board voting for the ordinance was a stockholder in the company. While the court found the Board action to be judicial in nature and thus applied the rule against conflict of interest,

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1/ See Griggs v. City of Elizabeth, 69 N.J.L. 190, 55 A. 248 (1903) and Van Gilder v. Board of Freeholders of Cape May, 83 N.J.L. 139, 83 A. 500 (1912).

the court did describe the distinction between judicial and legislative actions thus:

> "'The distinction' it was said, 'is between those ordinances which adopt a general system of policy, affecting all the inhabitants of the city or town, or all the property situated within corporate limits, directing the execution of their public duties, the burden of which is borne by all equally, and those which provide the making of a particular improvement affecting property in one locality, the cost of which is to be defrayed by specified individuals'. This general demarkation of the two orders of municipal acts was made with special reference to ordinances designed to accomplish improvements of the kind then before the court. In all cases, I think, a legislative act must be regarded as one which prescribes a general rule of conduct, while a judicial act is one which imposes burdens or confers privileges in specific cases, according to the finding of some person or body, whether the facts exist which make a general rule applicable to the specific case or according to the discretionary judgment of such person or board as to the propriety of imposing the burden or granting the privilege in the specified case. An ordinance prescribing the conditions upon which streets should be laid out or improved, and the procedure to be adopted in accomplishing these purposes, would, I suppose, be clearly legislative in character. An ordinance, however, laying out a particular street, or ordering it to be paved, would be judicial in its quality." 29 A. at page 165.

Stevens, ex rel. Kuberski v. Haussermann, 113 N.J.L. 162, 172 A. 738 (1934), was a case involving the seating of a councilman. The court, in deciding the issue of conflicts of interest, explained the distinction, in its mind, between legislative and judicial administrative actions. The court defined a legislative act as

> "One which prescribes a general rule of conduct, while a judicial act is one which imposes burdens or confers privileges in specific cases, according to the findings

> of some person or body, whether the facts exist which make a general rule applicable to the specific case, according to the discretionary judgment of such person or board as to the propriety of imposing the burden or granting the privilege in a specified case." 113 N.J.L. at page 168.

The court cited as an example of a legislative act, an ordinance fixing the qualifications of applicants for licenses to sell liquor and the general conditions upon which licenses should be granted, whereas the actual granting of a license was an administrative act of a judicial nature.

In Aldom v. Roseland, supra, page 10, where the court applied the rule against conflict of interest to the vote of a councilman who was an employee of a corporation which stood to benefit from the passage of the ordinance upon which the councilman voted, the court discussed the distinction between a legislative act and a judicial act.

> "The Borough argues further that the adoption of the ordinance was a legislative act which should not be interfered with by the judicial branch of the government 'unless tainted with fraud, or palpably not in the service of the public interest, or otherwise a clear perversion of power'. . . It is true that review of a purely legislative act of a local governing body is normally beyond the judicial orbit except in the instances stated. However, here the function is not exclusively legislative; it partook sufficiently of the quasi-judicial to warrant examination by the courts." 127 A.2d at page 194.

While the distinction made between legislative and judicial activities is considered by the courts, the writer would suggest that "the fact that for purposes of review, the preceding is regarded as legislative in nature, it does not prevent a court from enforcing the right to an impartial tribunal." 1 Am.Jur.2d Adm.L. § 63 at page 860.

VIII. Conflicts of Interest Arising from an Employee, Officer or Stockholder Relationship:

While the discussion as to the general rule as to conflicts of interest would seemingly answer the question of the conflict of interest status of an employee, officer or stockholder of a corporation, there are cases which specifically rule on such status.

In Pyatt v. Mayor and Council of Dunellen, 9 N.J. 548, 89 A.2d 1 (1952), citizens brought suit against the Mayor and Council to have two ordinances relating to traffic upon certain streets thrown out. The court held the ordinances were voidable and set them aside because out of four of the Councilmen voting in favor of the ordinances, two were disqualified by reason of private interest. The ordinances here were passed at the request of Art Color Tint Co. and would have had the effect of allowing it to expand its plant. The Council vote was four in favor, two against, with two of the affirmative votes cast by employees of Art Color Tint. The court stated:

> "The process calling for the exercise of discretion by the governing body according to the weight of conflicting public considerations is judicial in quality. Therefore the ordinances are voidable if any one of the councilmen who participated as quasi-judges was at the time disqualified by reason of private interest at variance with the impartial performance of his public duty . . . It is an ancient principle of Anglo American justice that 'no man shall be judge in his own cause. . . ' citing Bonham's case, supra, page 6 ." 89 A.2d at page 4.

While the court found it unnecessary to state a general rule, because one of the two Councilmen-employees had, for the record, admitted his personal interest, the court did state

> "However, it is most doubtful that participation by a councilman in a municipal action of particular benefit to his employer can be proper in any case."

In Aldom v. Roseland, supra, page 10 , the court voided the vote of a Councilman who was in the employ of a corporation which stood to benefit from the passage of an ordinance for the reason that he had such personal or private interest as to disqualify him from acting in regard to such ordinance.

> "A public office is a public trust. . . The law tolerates no mingling of self-interest. It demands exclusive loyalty. . . . ." 127 A.2d at page 193.

> "The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of particular importance. . . Basically the question is whether the officer by reasn of a personal

> interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official." 127 A.2d at page 194.
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> "The personal or private interest which disqualifies may be identified generally as one which is different from that which the public officer holds in common with members of the public." 127 A.2d at page 196.

Finally, in Mills v. Town Plan and Zoning Commission of the Town of Windsor, 144 Conn. 493, 134 A.2d 250 (1957), the court ruled that the Commission's action in denying an application to rezone a residential area for industrial use was invalid because some of the Commission members had a disqualifying conflict of interest. In that case, one of the Commission members had previously acted as a "dummy" in purchasing land proposed for industrial use on behalf of a stockholder of a corporation which was interested in developing a regional shopping center near the plaintiff's property. Another Commission member had discussed the matter of reducing the size of the plaintiff's shopping center with the town planner so that it would not injure a nearby shopping center in which he was interested. The court stated:

> "Anything which tends to weaken public confidence and to undermine the sense of security of individual rights which a citizen is entitled to feel is against public policy. . . public policy cannot tolerate these proceedings." 134 A.2d at page 253.

It is clear from the general principles of conflicts of interest set forth in pages 6 through 12, supra, and the foregoing cited cases that the interest of an employee, officer or stockholder of a corporation in that corporation is sufficient to disqualify him from acting in a public capacity upon any matter which could benefit or harm the corporation.1/

IX. Conflict of Interest Rule as Applied to Zoning:

Whether or not the rule as to conflicts of interest applies to zoning-type decisions is primarily a function of whether or not the court recognizes the distinction between legislative and judicial-type administrative actions and if so, how they apply that distinction to the particular zoning-type decision.

1/ See also Griggs v. Borough of Princeton, supra, page 9, concerning the invalidity of votes of public officials who were employees of Princeton University who stood to benefit from certain decisions made by the Board of which those public officials were members.

In State v. Board of Public Works of City of Camden, supra, page 13, the court found that the grant of a petition to the Camden Horse Railway Company to lay its tracks on any street in the city was a judicial-type administrative action. The court said:

> "An ordinance prescribing the conditions upon which streets should be laid out or improved, and the procedure to be adopted in accomplishing these purposes, would, I suppose, be clearly legislative in character. An ordinance, however, for laying out a particular street, or ordering it to be paved, would be judicial in its quality." 29 A. at page 165.

In Mills v. Town Plan and Zoning Commission of the Town of Windsor, supra, page 17, the rezoning of a residential area for industrial use was held to be a judicial-type administrative action. The court stated:-

> "The modification of zoning regulations partakes of the nature of a legislative proceeding; nevertheless, it is not legislative in the broad sense; on the contrary, the power emanates from a specific grant and the manner of its exercise is limited. The mode of exercising the power thus expressly granted must be reasonable. The exercise of power of that nature, whether it be denominated legislative or quasi-judicial, should command the highest public confidence, since zoning restrictions limit a person's use of his real estate in the interest of the general public good. Anything which tends to weaken public confidence and to undermine the sense of security of individual rights which a citizen is entitled to feel is against public policy. . . public policy cannot tolerate these proceedings." 134 A.2d at page 253.

In Aldom v. Roseland, supra, page 10, the court invalidated an ordinance amending a zoning ordinance which amendment would have established five use districts, the most open being light industrial consisting of about 275 acres. The ordinance amendment would have included approximately 13% of the total land area in the Town of Roseland. The court held that this administrative action was not exclusively legislative, and applied the rule against conflict of interest to an employee of a corporation which would benefit from the amendment.

Hochberg v. Borough of Freehold, 40 N.J.S. 276, 123 A.2d 46 (1956), involved an amendment to a zoning ordinance by a planning board which included among its members a party who operated a "horseman's kitchen" at a racetrack. The amendment to the zoning ordinance would have rezoned a portion of the land and thus allowed the racetrack to enlarge its facilities. The court held that the vote was in violation of the common law rule against conflict of interest.

S. & L. Associates, Inc. v. Township of Washington, 61 N.J.S. 312, 160 A.2d 635 (1960), was an action contesting the validity of a zoning ordinance. A planning board with authority to study the zoning of areas of the township as yet unzoned and authority to make recommendations to the municipal officers held a hearing on a plan which included among its recommendations the recommendation that plaintiffs' land be zoned industrial. At the hearing, land owned by one Guerin and land owned by one Hemmings were proposed to be zoned industrial. Both Guerin and Hemmings were members of the planning board. After the hearing, the planning board voted to remove the plaintiffs' land from that area to be designated industrial. Thereafter, the plaintiffs petitioned the board to have its land zoned industrial, and the petition was unanimously rejected. The plaintiffs argued that the ordinance should be set aside because it was tainted by the self-interest of the officials who participated in the preparation and adoption of the ordinance with the result that they could not discharge their duties in a completely impartial manner.

After citing Aldom v. Roseland, supra, page 10, for the proposition that "a public officer has the duty of serving the public with undivided loyalty, uninfluenced in his official acts by any private interest or motive whatsoever. . . ", the court stated:

> "In considering whether the participation of Guerin and Hemmings in the proceedings leading to the ordinance under attack invalidated it, a distinction should be drawn between the decision to place their own properties in the industrial zone and the decision to exclude plaintiffs' track therefrom. If only the former were implicated, the conclusion to condemn the ordinance on grounds of self-interest would be questionable. It is to be emphasized that original zoning was being effectuated. Of necessity, this involved giving every parcel of property in the municipality a zoning status it never had before. . .

> "We need not decide whether, without more, the placement of the Guerin and Hemmings properties in the industrial zone would of itself have been fatal to the ordinance on the grounds of conflict of interest. However, insofar as the exclusion of plaintiffs' property from the industrial zone is concerned, we conclude that their participation did involve invidious self-interest, calling for disqualification of the resulting official action. Once it was officially decided that the Guerin and Hemmings parcels were to be zoned industrial, those individuals had a natural economic state in the exclusion of a track like plaintiffs' from that category." 160 A.2d at page 646.

> "We conclude that since the participation of Guerin and Hemmings in the action of the planning board affected or may have affected the recommendation of that body in a material respect, the recommendation must be set aside . . . upon any future consideration of a zoning ordinance by the planning board, Guerin and Hemmings should refrain from participation in its deliberations or recommendations." 160 A.2d at page 647.

Finally, in Buell v. City of Bremerton, supra, page 9 , the court overturned the rezoning of a 5-acre parcel from residential to commercial on the basis of conflict of interest on the part of the chairman who presided over the hearing which was held on the matter. The rezoning was challenged, and overturned, on the basis that the chairman of the planning board was indirectly benefitting from the rezoning; i.e., he owned adjoining property and there was a possibility that the value of his property would increase as a result of the rezoning. The court stated:

> "The appearance of fairness doctrine has received recent emphasis in our decisions regarding zoning. Basic to this is our recognition that restrictions on the free and unhampered use of property imposed by planning and zoning compel the highest public confidence in governmental processes bringing about such action. Members of commissions with the role of conducting fair and impartial factfinding hearings must, as far as practicable, be open-minded, objective, impartial, free of

> entangling influences and capable of hearing the weak voices as well as the strong. . . It is important not only that justice be done but that it also appear to be done. . . " 495 P.2d at page 1361.
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> . . . .
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> "These by-laws (by-laws of the planning board which prohibited participation by one to whom some benefit may come) give recognition to existing law relating to the right to challenge a member of an administrative tribunal exercising judicial or quasi-judicial functions. . . At least three types of bias have been recognized as grounds for disqualification of persons performing quasi-judicial functions. These are prejudgment concerning issues of fact about parties in a particular case, particularly evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy; and . . . an interest whereby one stands to gain or lose by a decision either way." 495 P.2d at page 1362.

X. Legal Effects of Conflicts of Interest:

The courts have gone both ways in determining the legal effects of conflicts of interest. That is, some courts have ruled that the conflict of interest merely voids the vote of the member or members of the administrative body who has the conflict of interest, while other courts have ruled that the conflict affects the total vote of the administrative body and thus the administrative body's action is void. The great weight of authority appears to be that a conflict of interest effects the total vote of the administrative body.

> "Participation in a determination by one disqualified member of a tribunal affects the action of the whole body. It is generally held that if a disqualified member of an administrative agency participates in the hearing and determination, it makes the decision void or voidable at the instance of the party aggrieved who has made timely protest, even though his presence was not required to constitute a quorum, or a majority of the board could

> have acted legally without him (citations omitted).
>
> "A determination made or participated in by a disqualified officer is merely voidable where only the common-law rule as to disqualification is violated (citations omitted) and the proceeding is reviewable (citations omitted)." 1 Am. Jur.2d Ad.L. § 69.

In Pyatt v. Mayor and Council of Donnellan, supra, page 16, the court set aside ordinances promulgated by a 6-man council which voted 4 to 2 in favor of the ordinance. Only one of the four councilmen voting in favor of the ordinances was specifically disqualified by reason of private interest.

In Stevens ex rel. Kuberski v. Haussermann, supra, page 14, the court set aside the vote of a 6-member council. Only four out of the six councilmen voted on the matter and all voted in favor of accepting the resignation of one of the council members. The resigning member was one of the four voting in favor of acceptance. In setting aside the vote, the court stated:

> "And it is likewise a firmly established rule that it is immaterial that the result reached is not produced by a vote of the disqualified member. 'The infection of the interested person spreads, so that the action of the whole body is voidable.' . . . This is the general rule. . . It is supported by the two-fold reason, viz.,: the participation of the disqualified member in the discussion may have influenced the opinion of the other members; and, secondly, such participation may cast suspicion on the impartiality of the decision." 172 A. at page 741.

In Aldom v. Roseland, supra, page 10, the court set aside a zoning ordinance for which a councilman with a conflict of interest voted in favor, despite the fact that there were sufficient affirmative votes to pass the ordinance without the participation of the councilman with the conflict. The court stated:

> "A quasi-judicial action of a municipal body is rendered voidable by the voting participation of a member thereof who is at the time subject to a direct or indirect private interest which is at variance with the impartial performance of his public duty." 127 A.2d at page 193.

The court further stated:

> "The fact that the measure had sufficient affirmative votes to pass without his participation did not save it from being voided. . . 'The infection of the concurrence of the interested person spreads, so that the action of the whole body is voidable.'" 127 A.2d at page 197.

In Buell v. City of Bremerton, supra, page 9 , the court set aside a rezoning amendment, saying:

> "The fact that the action carried without the necessity of counting his (the chairman who had a conflict) vote is not determinative. The self-interest of one member of the planning commission infects the action of the other members of the commission regardless of their disinterestedness." 495 P.2d at page 1362.

Thus, it would appear that caution would dictate acceptance of the principle that the vote of an administrative body which includes a single member with a conflict of interest whose vote is unnecessary to the end result, affects and voids the total vote. Likewise, caution would dictate that a member of an administrative body with a conflict of interest should not participate in any hearing upon the matter.

Finally, as pointed out in the cases, it would seem that caution dictates that a member of an administrative body with a conflict of interest not even participate in discussion of the matter concerning which he has a conflict.

XI. Conclusions:

While no definitive rule can be set forth, because of the possibility that actions and decisions of the Land Use Regulation Commission could, in the proper forum, when attacked by the proper parties, be set aside as a result of conflicts of interest on behalf of the L.U.R.C. Commissioners, I would recommend to the Commission the following conclusions to be drawn from the foregoing discussion:

1. The rule as to conflict of interest does not apply to situations where the Commission is adopting standards for determining zone boundaries and standards for uses within zones, all of which are intended to apply throughout the wildlands, because this function is legislative in nature.

2. The owner or the employee, officer or stockholder of a corporation which is the owner of land within any particular area to be zoned should not participate in the discussion, hearing or vote on the actual zoning of that land. This does not mean, of course, that the owner of the land cannot make his views known through the proper process by way of public hearing or written materials which are public information to be submitted to the Commission in accordance with the Commission rules;

3. The permanent members of the Commission should not be considered to have a conflict of interest with regard to matters relating to their duties provided for in their other official positions. However, good sense might dictate that they refrain from participating in discussions, hearings and votes on such matters;

4. "Interests" in the term "conflicts of interest" should be held by the Commission to include situations not only in which the member himself or the corporation of which the member is an employee, officer or stockholder, stands to benefit, directly or indirectly, from an administrative decision of the Commission, but should also be held to include situations in which the member or the interested corporation could, directly or indirectly, stand to be harmed. An example of this latter situation is where a competing corporation is applying for a subdivision permit in such a location that the development would detract from or harm a real or planned development of the corporation; and

5. That "quite apart from the obligations of the law, whenever a substantial question is raised as to the disinterestedness of one" of the Land Use Regulation Commissioners, the Commissioner in question should "withdraw therefrom so that not the faintest shadow be cast on the integrity of the determination."

Initially, the Commissioner himself who may have a conflict of interest must be the one to determine whether the rule applies. In case of any question on a matter of conflict of interest, this office would be pleased to render its opinion.

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