INTRODUCTION

Courts have traditionally reviewed zoning decisions for substantive correctness, applying in most instances the deferential arbitrary and capricious standard. In recent years, however, courts have increasingly reviewed zoning decisions for procedural correctness, such as the satisfaction of notice and hearing requirements. This reflects a growing recognition that in many instances the meaningful assurance for proper zoning decisions must come from procedural rather than substantive protections.

Central to any scheme of procedural safeguards is the need for an impartial decisionmaker. Although the process constitutionally due has been determined by a balancing test, courts and commentators have often recognized the essential role that impartial decisionmakers play in assuring procedural fairness. Biased decisionmakers not only threaten accurate decisions, but also undermine the legitimacy of governmental processes. Indeed, the efficacy of other safeguards are to a large extent contingent upon...
some degree of impartiality.\(^6\)

The need for impartial decisionmaking and the problems which attend its denial are particularly acute with regard to the zoning process. Not only are significant rights affected by land use decisions, but the localized nature of the decisions themselves makes them particularly vulnerable to problems of bias and conflicts of interest. Furthermore, the growing "dealmaking" perception of zoning practice, in which zoning decisions are often made in a very particularized and seemingly ad hoc manner,\(^7\) raises legitimacy concerns exacerbated by partial decisionmakers. Whatever the merit of such practices, they heighten the potential for personal abuse and undermine the perception of zoning legitimacy.

It is not surprising, therefore, that in recent years courts have begun to pay closer attention to problems of bias and conflicts of interest in zoning.\(^8\) Unlike requirements for notice and hearings which typically are provided for by statute, however, impartiality requirements find only a limited basis in statutory law. Therefore, in many instances courts have relied on the administrative nature of zoning decisions as an alternative ground for the provision of impartiality in zoning decisions.\(^9\)

Despite this growing concern with problems of bias and conflicts of interest, the regulation of impartiality in zoning is problematic in several respects. First, the highly localized nature of zoning decisionmaking results in a greater frequency of conflicts than are usually found in other forms of decisionmaking. Not only are zoning decisions made by boards or governing bodies drawn from the immediate area, but decisions frequently have a diffused impact. At a minimum, decisionmakers are often familiar with

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6. See, e.g., Redish and Marshall, supra note 5, at 492-93 (discussing different categories of bias that threaten accurate decisions).
9. See Buell v. City of Bremerton, 80 Wash. 2d 518, __, 495 P.2d 1358, 1362-63 (1972) (invalidating rezoning ordinance because chairman of planning commission had possible interest in rezoned property); Fasano v. Board of Comm'rs, 264 Or. 574, __, 507 P.2d 23, 30 (1973) (parties are entitled to hearing before a tribunal which has had no prehearing or ex parte contacts concerning zoning changes).
local issues and inevitably have biases regarding the development of land in their community.

A second and more significant problem in regulating bias and conflicts of interest in zoning is the dual adjudicative and political nature of the zoning process. This has frequently manifested itself in the legislative/adjudicative distinction, with the consequential refusal by courts to police rezoning decisions because of their perceived “legislative” nature. Beyond that, however, remains the basic concern of how to properly assess and accommodate the political dimensions of zoning decisions while still guarding against improper influences.

This article will attempt a comprehensive review of the issues involved in policing bias and conflicts of interests in zoning decisionmaking. Part one will briefly discuss the nature of zoning decisionmaking and the value of impartial decisionmakers. Part two will then examine various regulatory sources that might be used to regulate bias and conflicts of interest, focusing on both statutory and nonstatutory grounds. Thereafter, part three will examine the legislative/adjudicative distinction in zoning and argue that the traditional refusal to police conflicts by legislative bodies should be rejected in favor of an approach which allows policing of rezoning decisions.

Part four of the article will examine the difficult issue regarding the degree of impartiality that should be required. Recognizing that some bias is inevitable, it will suggest that the basic values served by impartiality, together with pragmatic restraints, govern regulation of bias and conflicts of interest. In addition, part four will examine specific types of bias and conflicts of interest in zoning, focusing on financial conflicts, associational conflicts, prejudgment and bias, ex parte contacts, and campaign contributions.

Finally, part five of the article will discuss enforcement procedures and remedies when conflicts arise. It will examine what action is required of zoning decisionmakers when an impermissible conflict exists and what judicial remedies should be available when a decision has been made in the face of an impermissible conflict.

10. See, e.g., Schauer v. City of Miami Beach, 112 So. 2d 838, 841 (Fla. 1959) (amending zoning ordinance is legislative function); Fiser v. City of Knoxville, 584 S.W.2d 659, 663 (Tenn. App. 1979) (enactment of municipal zoning ordinances are legislative exercises of police power); Anthony v. City of Kewanee, 79 Ill. App. 2d 243, 247, 223 N.E.2d 738, 740 (1967) (zoning and rezoning ordinances are legislative acts); D. MANDELMER, supra note 2, at 270-71.
I. ZONING AND THE IMPORTANCE OF IMPARTIALITY

A. THE ZONING PROCESS

Zoning is the primary means by which local governments regulate the use and development of land. Often viewed as an outgrowth of nuisance law, zoning was initially premised on the segregation of incompatible or conflicting land uses to enhance land enjoyment. This is most frequently accomplished by dividing a municipality into various districts with designated permitted and prohibited uses.

Similar to other regulatory schemes, zoning seeks a proper allocation of resources pursuant to a variety of means. This necessarily involves a balancing of both public and private interests; in particular, the interests of landowners as such and in their capacity as neighbors. In its most common form this involves placing reciprocal restrictions on land to maximize overall enjoyment.

The variety of techniques used to accomplish zoning's purposes has grown significantly over the years. Despite this growth in complexity, the vast majority of zoning decisions concern change considerations directed at specific parcels of land. Comprehensive zoning generally requires that local government initially place all land inside its borders within some use designation. Thus, most zoning decisions subsequent to the enactment of a comprehensive zoning ordinance involve proposals that current restrictions be changed or modified in some manner, usually for a limited area of land.

Zoning ordinances typically provide several basic mechanisms

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11. D. Mandelker, supra note 1, at § 1.1.
12. Id. at § 1.03.
13. Id.
14. The purposes or goals of zoning have been expressed in a number of ways. Underlying most of these approaches is the notion of a proper allocation of resources. See, e.g., D. Mandelker, The Zoning Dilemma 23-24 (1971) (zoning is necessary to prevent externalities which interfere with the land resource).
15. The notion of reciprocity is common to zoning; that is, restrictions are placed on all land in a district so that the burdens placed on a landowner by particular restrictions are partially offset by the benefits received by similar restrictions on neighboring land. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 139-40 (1978) (Rehnquist, J., dissenting).
16. The expanding nature of zoning devices in recent years has been well-documented. These have included techniques such as floating zones, overlay zones, forms of contract zoning, transferrable development rights, planned-unit developments, and cluster zoning. See generally R. Ellickson & D. Tarlock, supra note 7, at 253-69 (focusing on types of flexibility devices).
17. See R. Ellickson & D. Tarlock, supra note 7, at 59 (focus of zoning no longer "fixed advanced allocations" but rather case-by-case review); Rose, supra note 7, at 841 (attributing to critics the complaint that individual land decisions amount to "deals" with landowners and developers); C. Weaver & R. Babcock, supra note 3, at 253-69 (land use regulation allows change in response to specific proposals).
18. D. Mandelker, supra note 2, at § 1.03.
for changing or modifying a current restriction. First, ordinances usually provide for two forms of what have been traditionally considered administrative relief: variances and special-uses.\textsuperscript{19} In both instances the ordinance establishes criteria specifying under what circumstances the request will be granted. In the case of variances this usually requires a showing of both unusual circumstances and undue hardship.\textsuperscript{20} Special-uses, on the other hand, involve activities which potentially might present problems in a particular zone.\textsuperscript{21} The special-use device addresses this concern by establishing standards and conditions which must be met in order for a permit to issue, presumably to ensure compatibility with surrounding uses.\textsuperscript{22}

Contrasted to the variance and special-use techniques is the actual rezoning of the land in question. Unlike the variance and special-use decisions which are made pursuant to standards articulated in the ordinance, rezonings involve an actual amendment of the zoning map itself to effect the change.\textsuperscript{23} Although zoning enabling acts typically require that rezonings "be in accordance with a comprehensive plan," courts have not traditionally applied

\begin{itemize}
  \item \textsuperscript{19} A zoning variance has been defined as:
    
    \begin{quote}
      \textit{[a]n administrative authorization for property to be used in a manner departing from the literal requirements of a zoning ordinance. A variance may be granted where the requested use or structure is not contrary to the public interest, and where strict enforcement of the applicable regulations would result in unnecessary hardship.}
    \end{quote}

    \textsuperscript{7} P. Rohan, \textit{Zoning and Land Use Controls} \textsection 43.01[2] (1988). A special use, on the other hand, has been defined as "a form of administrative relief which allows a landowner to use his property in a manner permitted by the zoning ordinance provided he demonstrates compliance with all standards and criteria enumerated in the legislation." \textit{id.} at \textsection 44.01[2]. Therefore, the distinguishing characteristic between the two is that "special use" refers primarily to the type of use, whereas a variance is associated with the uniqueness of the given property. D. Hagman \& J. Juergensmeyer, \textit{Urban Planning \& Land Development Control Law} 183 (2d ed. 1986) [hereinafter D. Hagman].

  \item Both courts and commentators have traditionally viewed variances and special-use decisions as being administrative in nature. \textit{See, e.g.}, Pentagram Corp. v. City of Seattle, 28 Wash. App. 219, \textsection 622 P.2d 892, 895 (1981) (issuance of special use permit was administrative action even though done by city council); Note, Arnel Development Co. v. City of Costa Mesa: Rezoning by Initiative and Landowners' Due Process Rights, 70 Calif. L. Rev. 1107, 1116, n.59 (1982) (citing cases holding that amending of a zoning ordinance is a legislative act); Note, \textit{Instant Planning — Land Use Regulation by Initiative in California}, 61 S. Calif. L. Rev. 497, 504 (1988) (zoning variance labeled "administrative" or "adjudicatory"); Rosenberg, \textit{Referendum Zoning: Legal Doctrine and Practice}, 53 U. Cin. L. Rev. 381, 411 (1984) (variances, special exceptions and special use permits considered administrative or adjudicative acts). This is because both are guided by established criteria and are typically made by appointed administrative boards. \textit{7 P. Rohan, supra} note 18, at \textsection 51.01[3]; \textit{see D. Hagman, supra}, at 166-68 (describing administrative relief generally).


  \item \textit{See D. Hagman, supra} note 19, at 183-88.

  \item \textit{See id.} at 185-88 (discussing standards and conditions).

  \item \textit{id.} at 164-65.
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this requirement with rigor. Because rezonings affect a change in the ordinance itself, they are necessarily made by local governing bodies and have been traditionally viewed as legislative decisions. Despite these differences, commentators have noted that in many respects rezonings are interchangeable with the variance and special-use devices as a means of seeking zoning changes.

Early zoning theory contemplated that land use decisions would primarily occur through the initial allocation decisions with only minor adjustments through the use of variances, special-use permits, and rezoning. This model of zoning envisioned a planned, almost static land development in which most land uses would be zoned as of right. Although the above forms of relief were available, they were clearly intended to be used infrequently and in exceptional cases.

It is now widely recognized that current zoning practice little resembles this notion of planned development, but instead places an emphasis on flexibility and change through the use of variances, special-use permits, and rezoning. In particular, these devices are often used to delay concrete decisions as a response to an actual development proposal. For example, municipalities often subject numerous uses within a particular district to the special-use process, frequently providing only very generalized standards for issuance of a permit. This in effect provides municipalities with significant flexibility and discretion in responding to particu-
lar use proposals.31

Even more significant has been the increased use of rezonings to affect changes in a zoning scheme. This is partly attributable to the growth of downzoning techniques by which undeveloped property is initially heavily restricted with the clear intention of rezoning the property in response to specific development proposals.32 Under this approach rezoning decisions are basically used to make particularized decisions regarding the suitability of a proposed use and thus in effect administer land development on a case-by-case basis. This is often done in what has been described as a "dealmaking" context in which land is rezoned conditioned on concessions by the landowner.33

These current practices indicate the manner in which zoning decisionmaking has shifted from a planned to a more particularized, ad hoc response to development. This is partially attributable to the inadequacies of traditional planning theory in a fluid society.34 Static end-state zoning is necessarily speculative in nature and thus at best can only approximate possible development needs and patterns. By in effect delaying determinations of actual uses until concrete proposals are made, municipalities can assess the potential impact of uses in a concrete situation. Moreover, as suggested above, delayed and flexible decisionmaking also provides municipalities with significant leverage over potential development in order to obtain developer concessions.35

The primary problem that has confronted courts in recent years is how to properly control the particularized, ad hoc decisionmaking that currently characterizes the zoning process.36

31. But cf. D. HAGMAN, supra note 19, at 47 (suggesting that "flexibility" may be a euphemism for "ad hocery").

32. See NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 206-08 (1968)(abstracted in R. ELICKSON & D. TARLOCK, supra note 7, at 234-35)(discussing the "wait and see" approach); D. MANDELKER, supra note 103-04 (discussing ad hoc nature of zoning changes based on policy of "watchful waiting"); Krasnowiecki, supra note 29, at 753 (arguing that case by case approach is dictated by social and political realities).

33. R. ELICKSON & D. TARLOCK, supra note 7, at 234-38. Other commentators have also emphasized the "dealmaking" nature of current zoning practices. E.g., Rose, supra note 7, at 847.

34. D. MANDELKER, supra note 14, at 103-04 (concluding that managing change is the most pressing problem in zoning control); NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 206-08 (1968)(abstracted in R. ELICKSON & D. TARLOCK, supra note 7, at 234-35)(discussing why the "wait and see" approach has replaced self-executing regulations); C. WEAVER & R. BABCOCK, supra note 3, at 260 (identifying long-term comprehensive planning as a "virtual impossibility"); Rose, supra note 7, at 874-78 (discussing modern planning doctrine).

35. R. ELICKSON & D. TARLOCK, supra note 7, at 236.

Both courts and commentators have recognized that discretion is an inevitable and necessary part of zoning decisionmaking.\(^37\) Zoning decisions, no matter what their form, rarely turn on a straightforward assessment of objective facts; rather, they usually involve the careful balancing of competing concerns. As noted by Richard Babcock, “local zoning issues are a sui generis combination of policy, politics, fact and emotion.”\(^38\) This is most obvious with rezonings which typically lack guidelines other than comprehensive plans. Even special-use and variances decisions, because of the generalized nature of the standard used, often turn on perceptions of public welfare and a subtle balancing of concerns.\(^39\)

At the same time, courts and commentators have noted that the ad hoc, discretionary nature of such decisions makes them subject to substantial abuse and unfairness.\(^40\) This is troubling for several reasons. First, of course, is that uncontrolled decisions might interfere with a community’s land use goals and the proper allocation of resources. Although communities might pursue a variety of purposes through zoning, it is generally presumed these actions will seek to enhance the public welfare.\(^41\) Ad hoc, uncontrolled decisionmaking potentially interferes with broader public goals by allowing decisions to be based on personal gain.

Second, courts and commentators have increasingly come to recognize that piecemeal zoning changes, no matter what their form, in essence involve a balancing of rights between landowners and their neighbors.\(^42\) Current practices, in which concrete zoning decisions are delayed for specific proposals, create legitimate landowner expectations that reasonable opportunities for change


\(^{38}\) C. Weaver & R. Babcock, supra note 3, at 270-71.

\(^{39}\) For example, the Standard Zoning Enabling Act provides for variances when not “contrary to the public interest.” Standard Zoning Enabling Act § 7 (amended 1926).

\(^{40}\) Commentary critical of the current, ad hoc, piecemeal nature of zoning, with its potential for abuse, is voluminous. E.g., R. Babcock, The Zoning Game 7-16 (1966); Delogue, Local Land Use Controls: An Idea Whose Time Has Passed, 36 Me. L. Rev. 261 (1984); Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines As Land Use Controls, 40 U. Chi. L. Rev. 681 (1973). See also Krasnowiecki, supra note 29, at 718.

\(^{41}\) Furtherance of the public welfare is a minimum goal imposed by the restraints of substantive due process which has traditionally been held to require that zoning “be substantially related to the health, safety, morals and welfare.” Village of Euclid v. Amber Realty, 272 U.S. 365, 395 (1926).

\(^{42}\) E.g., Flemming v. City of Tacoma, 81 Wash. 2d 292, __, 502 P.2d 327, 331 (1972); 1 N. Williams, supra note 1, at § 1.01; Rose, supra note 7, at 841.
exist. At the same time, however, the granting of change alters pre-existing rights, often adversely affecting the interests of neighboring landowners. In this sense change decisions typically involve the balancing of competing and significant interests, making it particularly important that they be handled in a fair manner.

Judicial attempts at addressing these concerns have met with only limited success. Most notable have been calls for serious comprehensive plan consistency under which local comprehensive plans would act as an external control on piecemeal rezoning decisions. Under this approach, plans would set pre-existing standards to which future changes must conform, thus controlling local discretion. Although there has been some heightened interest in recent years, only a very few states actually require serious plan consistency. Moreover, zoning experts have increasingly come to recognize the limits of planning and that effective planning necessarily requires substantial flexibility upon implementation.

Partly for these reasons, courts and commentators have argued for procedural reforms as one way to address the concerns emanating from current practices. Recognizing the entrenchment of zoning flexibility and to some degree ad hoc decisionmaking, commentators have argued that more attention needs to be paid to the manner and process by which such decisions are made. Procedural safeguards not only would insure the pres-

43. City of East Lake v. Forest City Enters., Inc., 426 U.S. 668, 682 (1976)(Stevens, J., dissenting). See C. Weaver & R. Babcock, supra note 3, at 260. Landowner expectations for reasonable opportunities for change are a natural consequence of "wait and see" zoning practices which anticipate that concrete zoning decisions will occur in response to specific proposals.


45. See, e.g., Fasano v. Board of County Comm'rs, 264 Or. 574, __, 507 P.2d 23, 27 (1973)(plan adopted by planning commission and zoning ordinances are part of single, integrated procedure); Baker v. City of Milwaukee, 271 Or. 500, __, 533 P.2d 772, 777 (1975)(city has duty to conform zoning ordinances to comprehensive plan).

46. E.g., Cal. Gov't Code § 65567 (West 1983)(no building permits may be issued, no subdivision map approved, and no open-space zoning ordinance adopted unless consistent with local plan).

47. See, e.g., C. Weaver & R. Babcock, supra note 3, at 260-69; Rose, supra note 7, at 873-78 (arguing that a master plan cannot be the standard by which land use decisions are measured).

48. See, e.g., Scott v. City of Indian Wells, 6 Cal. 3d 541, __, 492 P.2d 1137, 1142, 99 Cal. Rptr. 745, 750 (1972)(requiring personal notice to owners of property adjacent to planned development); Chrobuck v. Snohomish County, 78 Wash. 2d 858, __, 480 P.2d 489, 496 (1971)(recognizing the right to cross-examination in zoning hearings); Kahn, supra note 3, at 1060 (concluding that courts should strictly enforce due process rights).

49. See, e.g., Tarlock, supra note 36, at 83-84 (approving the application of standard due process doctrines to zoning); see generally C. Weaver & R. Babcock, supra note 3, at 269-70 (discussing professionalization and procedural reform).
ence of full information before decisionmakers, but would also promote the legitimacy and acceptability of decisions by allowing participation of landowners in the decisionmaking process.

Essential to any procedural reform is the need for controls on the potential biases of zoning decisionmakers. Not only is the assurance of some impartiality a fundamental control in itself, but the efficacy of other procedural reforms are necessarily contingent on some degree of impartiality. At the same time, however, the unique nature of zoning decisions, in particular their quasi-political nature, makes an analysis of controlling zoning bias problematic. The next subsection of this article will briefly examine the particular importance of impartiality for zoning.

B. THE VALUE OF IMPARTIALITY IN ZONING

The problem of biased decisionmaking is not unique to zoning and can arise in almost any context. For this reason the threats posed by bias and conflicts of interest have frequently been examined, often in the context of procedural due process rights. Generally speaking, biased decisionmakers can be said to raise two related concerns. First and most fundamental is that the bias in question might distort or warp a decisionmaker’s judgment. Second, whether judgment is actually distorted or not, bias can create a perception of unfairness and thus erode confidence in the decisionmaking process.

The first concern, that biases might distort judgment, implicitly assumes that some results are preferable to others and that certain factors are inappropriate criteria in decisionmaking. In this sense the concern that judgment not be distorted might be broadly viewed as reflecting an “accuracy” interest since it reflects

50. As noted by Professor Redish, requirements of notice and hearings are of little significance if the decisionmaker ultimately ignores any information before it. Redish & Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 YALE L.J. 455, 476 (1986).

51. For a recent and excellent discussion of the rationales for controlling judicial bias, see Leubsdorf, Theories of Judging and Judge Disqualification, 62 N.Y.U. L. REV. 237 (1987).

52. Substantial commentary has been devoted to the values underlying the right to procedural due process. See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW 502-03 (1978); Mashaw, Administrative Due Process: The Quest for a Dignity Theory, 61 B.U.L. REV. 885 (1981); Michelman, Formal and Associational Aims in Procedural Due Process, in DUE PROCESS 126 (J. Pennock & J. Chapman eds. 1977).

53. Leubsdorf, supra note 51, at 240.

a desire that proper decisions be reached. This does not assume that clearly correct decisions can be identified; if that were the case, erroneous decisions could be easily corrected by review procedures. Rather, concern for distorted judgment weighs heaviest when desired results are not easily identifiable but assumed to exist nonetheless.

The notion of "desirable" or "improper" zoning decisions in part depends on their type. The administrative variance and special-use decisions contemplate changes under established, though often generalized, criteria. These procedures may require the decisionmaker to consider the "public welfare" and/or determine if "special circumstances" or "unnecessary hardship" exist. As such, the ordinance contemplates a proper result will be reached if the criteria are met. At the same time, however, such results are often not easily identifiable because of the nature of the criteria, and thus are subject to distorting influences.

The notion of "proper" rezoning decisions is necessarily different because of the lack of established criteria. Local governing bodies commonly have substantial discretion in responding to rezoning petitions. Nevertheless, their decisions are still premised on determining what is best for public welfare. Although this properly allows for various policy biases, it assumes that the public welfare will be more properly served by some substantive decisions than by others.

Importantly, current zoning practices also suggest an "accuracy" interest in properly resolving the competing interests of landowners and neighbors in rezoning decisions. As previously

55. The "accuracy interest" in zoning decisions is comparable to what commentators have described as instrumental or efficiency values supporting procedural due process rights in general. See, e.g., L. Tribe, supra note 52, at 503 (instrumental interest); Developments in the Law-Zoning, 91 Harv. L. Rev. 1427, 1505-07 (1978) (efficiency interest).
56. See Leubsdorf, supra note 51, at 249.
57. Id.
58. Section 7 of the Standard Zoning Enabling Act, which has been adopted by most states, provides for the granting of variances:

To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

Standard Zoning Enabling Act § 7 (amended 1926).
59. The traditional police power formulation for zoning is that zoning is invalid if it has "no substantial relation to the public health, safety, morals, or general welfare." Village of Euclid v. Amber Realty, 272 U.S. 365, 395 (1926). Section 1 of the Standard Zoning Enabling Act similarly provides that zoning is to be exercised "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community." Standard Zoning Enabling Act § 1 (amended 1926).
noted, current practices create expectations that opportunities for
change exist, while such change will usually adversely affect neigh-
bors' interests. Although local governments necessarily have sub-
stantial discretion in how they balance such competing interests,
both landowners and neighbors have a legitimate interest that the
right decisions be reached. At the same time, however, the sub-
stantial discretion given local governments and the subtleties of
balancing mean that "proper" results are not easily identified.

The second primary concern posed by problems of zoning
bias and conflicts of interest is an erosion of public confidence in
zoning decisions. In one sense this concern is derivative of the
above accuracy rationale since presumably confidence would be
eroded only to the extent that a particular bias is perceived as
improperly influencing a decision. Yet courts have commonly
viewed this as a separate concern because of the need to perceive
government institutions as legitimate. It might therefore be
broadly viewed as a "legitimacy" interest.

Concern about erosion of confidence in zoning is particularly
relevant to current practices. Not only does zoning affect impor-
tant interests in land, but the particularized nature of most deci-
sions intensifies the perceptions of unfairness that might occur.
Moreover, the perceived "dealmaking" characteristics of current
practices raises substantial concern. Although this approach has
potential advantages over a more static planning ideal, it exacer-
bates perceived problems of unfairness when dealmaking is used
for personal gain. The specter of unequal treatment, favoritism,
and discrimination all resound more loudly when decisions are
made on an ad hoc basis.

60. Courts have frequently recognized the need to maintain public confidence in
zoning as an important reason for policing problems of bias and conflicts of interest. See,
  e.g., Buell v. City of Bremerton, 80 Wash. 2d 518, __, 495 P.2d 1358, 1361 (1972); Low v.
  Town of Madison, 135 Conn. 1, __, 60 A.2d 774, 777 (1948); public office is public trust;

61. The "legitimacy" concern is arguably exacerbated by the lack of a coherent and
  recognized theory behind zoning practice. Various commentators in recent years have
  argued that the planning theory of zoning, long perceived as the theoretical justification for
  the practice, is no longer valid to explain and legitimize what zoning does. These
  commentators have noted that the current practice of particularized, responsive
decisionmaking cannot look to the older notion of planning, which was premised on long-
term decisionmaking. Some of these commentators have suggested that zoning in turn
should be radically modified or eliminated altogether. See generally Ellickson, supra note
  40; Delogue, supra note 40 (addressing why unsatisfactory land use control powers should
  be withdrawn from municipalities); Krasnowiecki, supra note 29 (arguing that zoning as it
  presently exists is a false concept and the system needs to be reformed); Kmiec,
  Rev. 28 (1981)(concluding that present zoning controls should be replaced by an alternative
  system allowing for private decisions). Other commentators, while recognizing that the
  traditional planning theory fails to support current zoning practices, have offered
The two primary concerns posed by biased decisionmakers — the potential for distorted judgment and the threat to institutional legitimacy — are thus highly relevant to current zoning practices. This does not mean that all forms of bias or interest should be avoided. Not only is that impossible, but the above accuracy and legitimacy concerns are only threatened by those influencing factors considered extraneous to proper decisionmaking. As will be discussed later, certain biases, such as those regarding community development, might be relevant criteria in decisionmaking. Yet to the extent some biases are inappropriate to decisions, most notably those flowing from personal interest, the current nature of zoning decisions makes it important that they be controlled.

II. LEGAL BASIS FOR REGULATING BIAS AND CONFLICTS OF INTEREST

The previous section demonstrates the substantial interests served by regulating bias and conflicts of interest in zoning. Unlike notice and hearing requirements, however, impartiality requirements find only a limited basis in statutory law. Moreover, courts, in reviewing conflict of interest challenges, frequently fail to articulate the precise basis on which the conflict is regulated. It is therefore important to examine the possible grounds for regulating bias and conflicts of interest in zoning.

There are several potential sources providing a basis for regulating bias and conflicts of interest in zoning decisions. First, of course, are the zoning ordinances themselves or other local ordinances. Such ordinances, in addition to providing substantive restrictions on property use, usually provide procedural safeguards for zoning changes. Although focusing primarily on notice and hearing requirements, ordinances often include conflict of interest provisions. Moreover, local ordinances might have general ethic provisions which bear on zoning decisions.

In the absence of local regulation courts have looked to several other sources as authority to police problems of bias and conflicts of interest in zoning. First, some states have statutory

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provisions which apply to zoning decisions. Although only a few explicitly relate to zoning, a number of states have more generalized provisions which would include within their reach zoning decisions. Importantly, these usually include rezoning decisions by local legislative bodies as well as decisions by appointed boards.

Second, in the absence of state statutes regulating conflicts, state courts have used a variety of means to control problems of bias, often looking to common law or administrative law principles to control self-interested decisionmaking. In doing so, courts have usually limited protections to what are considered quasi-judicial rather than legislative decisions. For this reason, variance and special-use decisions, considered administrative in nature, are typically subject to regulation while rezonings, considered legislative in nature, have not been. The next two subsections of this article will briefly review potential statutory and nonstatutory grounds for regulation.

A. STATUTORY PROVISIONS

1. Specific Zoning Regulations

Although state statutes regulate local officials in a variety of ways, only a few states have statutes which specifically address conflicts of interest in zoning decisions. These can be broken into two groups. First, three states—Indiana, New Jersey, and New Hampshire—have statutes which prohibit members of a planning commission or board of adjustment from participating in hearings in which they have a direct or indirect substantial interest. The statutory prohibitions are thus limited to what are traditionally considered adjudicative bodies.

Broader regulations of zoning conflicts are found in Virginia, New York, and Connecticut where legislative as well as adjudicative zoning decisions are specifically regulated. The most comprehensive of these statutes is Connecticut's where conflicts of

63. For a discussion of state statutes which apply to zoning decisions, see infra notes 68-77 and accompanying text.
64. For a discussion of state statutes which can be construed to apply to zoning decisions, see infra notes 84-94 and accompanying text.
65. For a discussion of judicially-imposed restrictions for controlling bias in zoning decisions, see infra notes 95-110 and accompanying text.
66. See infra notes 95-96 and accompanying text.
67. See infra notes 97-98, 103-04 and accompanying text.
68. See IND. CODE ANN. §§ 36-7-4-223, 36-7-4-909 (Burns 1989) (planning commission and board of adjustments); N.J. STAT. ANN. § 40-55D-23(b) (West Supp. 1988) (planning board); N.H. REV. STAT. ANN. § 673.14 (Supp. 1988) (zoning board of adjustment, building code board, planning board or historic district commission).
interest in zoning are regulated in some detail. The statute prohibits members of zoning bodies from representing persons of firms with business before the body and also from participating in any hearing or decision in which the member is directly or indirectly interested in a personal or financial sense. Although the statute itself is ambiguous regarding what decisions it applies to, Connecticut courts have applied it to any zoning decision, whether by a legislative or administrative body.

Although differing in the type of zoning decisions regulated, these specific zoning statutes generally reflect the common-law principle that public officials should not participate in decisions in which they have a personal interest. Courts have interpreted their scope as reaching both pecuniary and nonpecuniary conflicts. Even New York’s statute, which specifies four prohibited conflicts, has been interpreted by its courts as reflecting a principle which justifies regulation of nonspecified conflicts. In this sense, these statutes provide a significant basis for regulation of various types of bias and conflicts which pose a threat to impartial decisionmaking.

2. General Conflict of Interest Provisions

Although few statutes specifically address zoning conflicts of interest issues, a number of states have more general statutes applicable to many zoning situations. Extreme instances of abuse potentially fall within various criminal actions such as bribery and
corruption,\textsuperscript{77} which certainly might arise in zoning situations.\textsuperscript{78} Similarly, most states provide for the removal of zoning officials in cases of malfeasance, nonfeasance, or for engaging in various other types of misconduct.\textsuperscript{79}

More relevant for most instances of bias and conflict of interest in zoning are various conflict of interest or government ethic provisions regulating the behavior of public officials. These provisions, often the result of relatively recent conflict of interest statutes, typically regulate local as well as state officials.\textsuperscript{80} Importantly, the ethics provisions extend to local legislative officials, an aspect of regulation with only limited recognition in the common law.\textsuperscript{81}

Although the ethics statutes vary considerably, they can be grouped into two broad categories. First are those statutes which prohibit specific types of conflicts which would not appear to apply to zoning decisions. Most notable in this regard are statutes which place prohibitions on local officials contracting to provide goods or services to their governments.\textsuperscript{82} Similar provisions also restrict

\textsuperscript{77} See, e.g., DEL. CODE ANN. tit. 11, § 1201 (1987)(person is guilty of bribery when he offers, confers, or agrees to offer a personal benefit upon a public servant); IOWA CODE ANN. § 722.1-2 (West 1979)(a person who offers, promises, or gives anything of value or benefit to a person engaged in a public capacity commits a felony).

\textsuperscript{78} Zoning is often viewed as an area of government ripe for potential corruption because of the significant financial impact of many zoning decisions and the low-paying or non-paying position of many zoning decisionmakers. Indeed, studies have indicated that substantial corruption often exists. See generally J. GARDINER & T. LYMAN, DECISIONS FOR SALE: CORRUPTION AND REFORM IN LAND-USE AND BUILDING REGULATION (1978); G. AMICK, THE AMERICAN WAY OF GRAFT 77-94 (1976).

\textsuperscript{79} See, e.g., ARIZ. REV. STAT. ANN. § 9-461.02 (1977)(stating planning commission creation, limitations and removal to be provided by local ordinance); COLO. REV. STAT. § 31-23-203(3)(1986)(directing means of zoning commission members’ removal for misconduct); DEL. CODE ANN. tit. 22, § 701 (1987)(stating planning commission members may be removed for cause after hearing by majority vote).

\textsuperscript{80} Cf. ALA. CODE § 36-25 (1977 & Supp. 1988)(code of ethics for all governmental officials and employees); N.Y. GEN. MUN. LAW §§ 800-809 (McKinney 1986)(prohibiting conflicts of interest of municipal officers and employees); N.Y. PUB. OFF. § 74 (McKinney 1988)(code of ethics for state officers and employees).

\textsuperscript{81} See, e.g., GA. CODE ANN. § 89-953 (Harrison 1987)(stating code of ethics for public officers and employees); MD. ANN. CODE art. 40, § 3-101 (1986)(regulating local officials and employees regarding conflict of interest).

\textsuperscript{82} About twenty-five states have some specific prohibition on local public officials contracting to provide services or goods to their respective governmental bodies. These in most instances would apply to elected and appointed officials. For examples of these prohibitions, see MISS. CONST., art. IV, § 109; ALA. CODE §§ 11-3-5 & 11-43-53 (1975)(local officials directly or indirectly involved in contracting for work or services shall be guilty of a misdemeanor); CAL. GOV’T CODE § 1090 (West 1980)(city officers shall not be financially interested in any contract made by them in their official capacity); ILL. ANN. STAT. ch. 24, § 3-14-4 (1988) & ch. 38, § 102-03 (Smith-Hurd 1988)(no municipal officer shall be interested in any contract when the expense is paid from the treasury or by any assessment levied by any ordinance); IOWA CODE ANN. § 362.5 (1976)(a city officer shall not have an interest in any contract to be furnished or performed for his city); KAN. STAT. ANN. § 75-4304 (1984)(no public officer shall participate in the making of a contract with any business in which he or she has a substantial interest); KY. REV. STAT. ANN. § 61.250 (Michie/Bobbs-
business transactions and other forms of association. Although such provisions place important restrictions on local officials, zoning decisions do not fit within the type of business activity contemplated by such statutes. Indeed, no precedent exists for extending such specific, business-related prohibitions to zoning decisions.

The second broad category of conflict of interest statutes are those with more general prohibitions on conflicts that should be read as applying to zoning decisions. Although once again varying considerably in the language used, at least nineteen states have statutes which prohibit local officials from acting on issues in which they or some associate are financially interested. Arizona has a

Merrill 1986)(no first-class city officers shall be interested in any contract with the city as principal or surety); MASS. GEN. LAWS ANN. ch. 268A, § 3 (West Supp. 1989)(local officials contracting to provide goods or services to their government shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both); MICH. COMP. LAWS ANN. § 46.30(3) (West 1987)(no member of the board of supervisors shall be interested in any contract or other business transaction with any county during the time for which he is elected); MINN. STAT. §§ 412.311, 382.18 (1988)(no county official shall be directly or indirectly interested in any contract, work, labor or business to which the county is a party); MO. ANN. STAT. § 105.458 (Vernon 1989)(no member of any governing body shall engage in business transactions or perform any service for any political subdivision for consideration); NEB. REV. STAT. §§ 49-14, 102, 103 (1984)(no public employee shall enter into a contract valued at two thousand dollars or more with a governmental body); NEV. REV. STAT. ANN. §§ 245.075, 268.384 (Michie Supp. 1987)(it is unlawful for any county officer to be interested in any contract made by him in the discharge of his official duties); N.H. REV. STAT. ANN. § 49-A:82 (1970)(no elective or appointive officer of the city shall take part in a decision concerning city business in which he has a financial interest); N.J. STAT. ANN. § 40:126-3 (West 1967)(all contracts in which a councilman shall be interested shall be null and void); N.D. CENT. CODE §§ 11-09-47, 40-13-05 (1985)(no local officer shall be interested in any contract to which the county is a party, either as principal, surety, or otherwise); PA. STAT. ANN. tit. 16, § 1806 (Purdon 1956)(no elected or appointed county officer shall be personally interested in any contract to which the county is a party); S.C. CODE ANN. § 5-7-130 (Law Co-op. 1976)(any municipal officer having a substantial financial interest in any business which contracts with the municipality shall refrain from participating in his capacity as city officer in matters related thereto); S.D. CODIFIED LAWS ANN. § 6-1-1 (1981)(it shall be unlawful for any local officer to be interested in any contract entered into by that county or municipality); TENN. CODE ANN. § 12-4-101 (1987)(local officials are prohibited from having any personal interest in any contract entered into with the municipality or county); WYO. STAT. § 16-6-118 (1982)(it is unlawful for any local officeholders to have a personal interest in any contract entered into with the city).

83. See, e.g., ALASKA STAT. § 29.20.010 (1986)(municipal officials may not participate in official actions in which they have a substantial financial interest); CAL. GOV'T CODE § 1126 (West 1980 & Supp. 1989)(local officers shall not engage in any activity for compensation which is in conflict with the responsibilities of their appointing power); MD. ANN. CODE, art. 40A, § 6-201(b) (1986 & Supp. 1988)(regulations applied to state officials regarding prevention of conflicts of financial interests also apply to local officials).

84. See ALA. CODE § 11-43-54 (1977)(prohibits councilmen from deciding issues where special financial interest exists); ALASKA STAT. § 29.20.010 (1986)(prohibits members of governing bodies and other officials from participating in decisions in which they have a substantial financial interest); ARIZ. REV. STAT. ANN. § 11-222 (1977)(supervisor cannot vote on a measure in which he or a family member is pecuniarily interested); Ark. STAT. ANN. § 21-8-304 (1987)(public officials or state employees cannot use office to advance personal interests except incidental); FLA. STAT. ANN. § 112.3143 (West 1982 & Supp. 1989)(requiring public officers to disclose interests within 15 days of vote); GA. CODE ANN. § 36-30-6 (Harrison 1987)(illegal for a council member to vote on any matter in which he/she is personally interested); IDAHO CODE § 67-65-06 (1980)(prohibits participation by
typical statute which provides that "[a] supervisor shall not vote upon any measure in which he, any member of his family or his partner is pecuniarily interested." Similarly, a Georgia statute provides that it is illegal for the member of a city council to vote on any matter in which he is personally interested.

The general regulatory nature of provisions such as these makes them clearly applicable to zoning decisions. Importantly, in all instances these provisions apply to decisions by legislative bodies, such as rezoning, which have often been viewed as immune from regulation. Indeed, many of these general conflict of interest prohibitions only specify governing bodies without specific language relating to appointed administrative bodies such as planning commissions or boards of adjustment. This in part might be explained by the presumption that the later are already governed under administrative law principles.

As of yet, relatively few cases have been generated pursuant to many of these statutes, and therefore, the precise scope of their regulation is uncertain. Generally, however, they are primarily concerned with financial or pecuniary interests in decision-making. Some statutes only prohibit the decisionmaker from

members of governing boards or committees in matters in which there is an economic interest by self or by relations; ME. REV. STAT. ANN. tit. 30, § 2251(1)(1978 & Supp. 1988)(municipal and county votes are voidable if any participating municipal, county or quasi-municipal official had a direct or indirect pecuniary interest); MD. ANN. CODE art. 40A, § 3-101 (1986)(prohibits public officials from participating in matters in which they have a conflict of interest); MO. ANN. STAT. § 105.462 (Vernon Supp. 1989)(prohibits members of local agencies from participating in decisions, including zoning, which may result in direct financial benefit); MONT. CODE ANN. § 2-2-125(b) (1987)(prohibits an officer or employee of local government from participating in official acts in which he has a direct and substantial financial interest); N.M. STAT. ANN. § 3-10-5 (1985)(any member of a governing board having any possible financial interest in any policy or decision is required to disclose matters); OR. REV. STAT. § 244.120(1)(a) (1987)(requiring elected public officials other than legislators to announce potential conflicts prior to acting thereon); R.I. GEN. LAWS § 36-14-7 (Supp. 1984)(an interest is in conflict with discharge of duties if official will derive a direct monetary gain or suffer a direct monetary loss by reason of his/her official action); S.C. CODE ANN. § 8-13-410 (Law. Co-op. 1986)(no municipal official or employee shall use his/her position for financial gain); WIS. STAT. ANN. § 19.46 (West 1986)(no public official shall take official action on any matter in which he/she has a substantial financial interest).

86. GA. CODE ANN. § 69-204 (Harrison 1976).
87. See, e.g., ARIZ. REV. STAT. ANN. § 11-222 (1987)(member of county board of supervisors cannot vote on measure in which he or his family is pecuniarily interested); GA. CODE ANN. § 69-204 (Harrison 1976)(illegal for council member to vote on any matter in which he/she is personally interested). In other instances the language of the statutes is more broadly written so as to apply to both elected and appointed officials. See, e.g., ALASKA STAT. § 29.20.010 (1986)(governing body members, and employees or officials other than members of the governing body, may not participate in official actions in which they have a financial interest); MD. ANN. CODE art. 40A, § 3-101 (1986)(regulates public officials).
88. The lack of case law dealing with the general ethics statutes is in part attributable to the relatively recent enactment of many of these conflict of interest statutes.
having substantial or direct financial interests,\(^8\) while others prohibit direct and indirect financial interests.\(^9\) Other statutes specifically include within their reach not only the decisionmaker's own financial interests, but also those of his family\(^1\) and in some cases business relationships.\(^2\) Finally, some statutes prohibit "personal" interests rather than or in addition to financial interests,\(^3\) or they merely prohibit "conflicts of interest."\(^4\)

B. LIMITATIONS ON QUASI-JUDICIAL DECISIONS

In the absence of statutory provisions, courts have still imposed impartiality requirements on decisions deemed administrative or quasi-judicial as opposed to legislative. For this reason members of zoning boards of adjustments or comparable lay bodies deciding variance and special-use requests have typically been held to standards of impartiality\(^5\) because of the perceived administrative nature of such decisions.\(^6\) Similarly, those courts viewing rezonings as adjudicative rather than legislative have also applied

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90. See ME. REV. STAT. ANN. tit. 30, § 2251(1) (1978 & Supp. 1988)(prohibits direct and indirect pecuniary interest); MO. ANN. STAT. § 105.462 (Vernon 1988)(prohibits participation by member where decision may result in direct financial gain or loss to him).

91. See ARIZ. REV. STAT. ANN. § 11-222 (1977)(member of board of county supervisors shall not vote upon any measure in which he, any member of his family or his partner, is pecuniarily interested); IDAHO CODE § 67-6506 (1980)(regulates the economic interest of members of the governing board, their relatives, employer, and employees).

92. See IDAHO CODE § 67-6506 (1980)(statute includes employers and employees of the decisionmaker within the category of persons who cannot participate when they have a financial interest).

93. See CONN. GEN. STAT. ANN. § 8-11 (West 1987)(prohibits participating when there is a direct or indirect, personal or financial interest); GA. CODE ANN. § 69-204 (Harrison Supp. 1988)(prohibits participation when it concerns a matter "in which [the decisionmaker is] personally interested").

94. See R.I. GEN. LAWS § 36-14-4 (1984)(prohibits participation when there is a "substantial conflict of interest").

95. See, e.g., Montgomery County Bd. of Appeals v. Walker, 228 Md. 574, __, 180 A.2d 865, 868 (1962)(presence of interested party on planning commission violated appearance of fairness doctrine); Kremer v. City of Plainfield, 101 N.J. Super. 346, __, 244 A.2d 335, 338 (1968)(zoning board of adjustment member whose nephew was partner in law firm representing applicant disqualified); Narrowsview Preservation Ass'n v. City of Tacoma, 84 Wash. 2d 416, __, 526 P.2d 897, 901 (1974)(appearance of fairness doctrine violated by vice chairman of planning commission who was employed by bank which held security on zoning petitioner's land). See generally P. ROHAN, supra note 19, at § 51.06[2].

96. See, e.g., State ex rel. McNary v. Hais, 670 S.W.2d 494, 496 (Mo. 1984)(County Council's issuance of conditional use permit is a quasi-judicial decision); Rogoff v. Tufariello, 106 N.J. Super. 303, __, 255 A.2d 781, 785 (1969)(board of adjustment hearing on variance request is quasi-judicial). See generally D. Hagman, supra note 19, at 166-68 (discussing administrative relief); D. MANDELKER, supra note 2, at § 6.66 (citing cases in which bias was alleged).
standards of impartiality.\(^9\) As will be discussed later, however, most courts have declined to extend such protections to rezonings because of their perceived legislative nature.\(^8\)

Although courts have consistently extended protection to administrative decisions, they have varied in their articulation of the grounds for the requirement and often fail to state the precise legal basis entirely. A close reading of the cases, however, suggests several potential rationales for imposing an impartiality requirement on quasi-judicial decisionmakers.

First, in some instances courts have relied on common-law constraints on public officials. The common law has long imposed a duty on local officials to avoid acting where private interests conflicted with public duties.\(^9\) This has most frequently been applied to transactions, such as contracts, between a local government and a public official in which there was an opportunity for personal gain.\(^10\) In prohibiting such actions, courts have at times characterized a public office as a public trust giving rise to a fiduciary relationship.

This common-law duty against conflicts of interest has been used on several occasions to police personal interests in zoning decisions. This has usually occurred with regard to decisions perceived as quasi-judicial in nature, such as variance decisions.\(^102\) Although the common-law prohibitions against conflicts of interest have typically not applied to rezonings because of their perceived

\(^9\) See, e.g., Flemming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327, 331-32 (1972); rezoning decision quasi-judicial requiring impartial decisionmaker.

\(^8\) See, e.g., Schauer v. City of Miami Beach, 112 So. 2d 838, 840 (Fla. 1959); motivation behind a councilman's vote is not a subject for judicial inquiry; Anthony v. City of Kewanee, 79 Ill. App. 2d 243, 223 N.E.2d 738, 740 (1967); fact that council acted from motives of self-interest did not invalidate rezoning ordinance; Fiser v. City of Knoxville, 584 S.W.2d 659, 663 (Tenn. App. 1979); refusal of city council zoning decision not necessary despite personal or political interest of members; Blankenship v. City of Richmond, 188 Va. 97, 49 S.E.2d 321, 323 (1948); council member who does not act impartially is answerable to voters, not the courts. See also D. MANDELKER, supra note 2, at § 6.66 (courts generally do not apply bias and conflict of interest standards to zoning decisions by local legislative bodies).


\(^10\) See, e.g., Smith v. City of Albany, 61 N.Y. 444, 446 (1875); payment to person, who was member of city council which approved payment, for services rendered declared void and against public policy; Blankenship v. City of Richmond, 188 Va. 97, 99, 49 S.E.2d 321, 323 (1948); noting in dictum common-law principle prohibiting municipal official from contracting with municipality for personal gain.

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legislative nature, a few courts have extended prohibition to rezoning decisions. Several have done this by characterizing small-scale rezonings as quasi-judicial rather than legislative acts, and thus subject to the common-law prohibitions. At least one court, however, has held that even if rezonings are labeled quasi-legislative, the common-law prohibitions should still apply because of the important policy concerns implicated.

A second basis used by courts to impose impartiality requirements are due process constraints implicit in statutory requirements for notice and hearings for quasi-judicial decisions. Two of the leading state courts in terms of requiring impartial decisionmakers, Washington and Oregon, have both found such a requirement implicit in the statutory hearing requirement. In *Chrobuck v. Snohomish County* the Washington Supreme Court held that implicit in the statutory requirement of a quasi-judicial hearing is that decisionmakers be impartial and avoid the appearance of unfairness. Similarly, the Oregon Supreme Court in *Fasano v. Washington County Commissioners* found implicit in statutory hearing requirements certain adjudicatory safeguards, including the right to an impartial decisionmaker.

Such an inference of impartial decisionmakers from a statutory scheme is logical based upon the importance of impartiality in fulfilling the purposes behind notice and hearing requirements. As suggested earlier, the efficacy of such requirements are necessarily contingent on a decisionmaker’s willingness to consider relevant information and opinions presented at the hearing. Thus,

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106. 78 Wash. 2d 858, 480 P.2d 489 (1971).
107. *Chrobuck v. Snohomish County*, 78 Wash. 2d 858, __, 480 P.2d 489, 496 (1971). *See Wash. Rev. Code Ann. § 36.70.040* (1964) (planning commission shall conduct such hearings as are required by chapter 36.70). Although the court’s holding in *Chrobuck* might be construed as being constitutionally based, the Washington Supreme Court has since clearly stated that its requirement of impartial decisionmakers for quasi-judicial hearings is that decisionmakers be impartial and avoid the appearance of unfairness.
109. *Fasano v. Washington County Com’rs*, 264 Or. 574, __, 507 P.2d 23, 30 (1973). *See Or. Rev. Stat. § 215.060* (notice and hearing provision) (1987). The court in *Fasano* itself did not clearly articulate the precise basis for the imposition of due process safeguards flowing from quasi-judicial zoning decisions. In subsequent decisions, however, the Oregon Supreme Court clarified its holding in *Fasano* and stated that the due process safeguards, including an impartial decisionmaker, were not constitutionally based but instead were implied by the Oregon statutory scheme. 1000 *Friends of Oregon v. Wasco County Court*, 304 Or. 76, __, 742 P.2d 39, 42 (1987); *Neuberger v. City of Portland*, 288 Or. 155, __, 603 P.2d 771, 774 (1979).
imposing suitable fairness requirements is a reasonable statutory interpretation, at least where the hearing is viewed as quasi-judicial.

Finally, some courts have alluded to the "due process" or "procedural" requirements of administrative or quasi-judicial decisions, suggesting a possible constitutional basis. The United States Supreme Court typically determines what process is due through a balancing test in which a court must consider three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

However, the Court has consistently held that the provision of a fair and impartial decisionmaker is also a basic requirement of due process. The Court has applied this not only in judicial settings, but also in quasi-judicial administrative contexts.

Despite the established right to impartial decisionmakers as a constitutional due process right, courts have rarely examined the applicability of federal due process protections to zoning decisions. At least since 1972 the Supreme Court has given a somewhat technical rather than a broad-based interpretation to due process, premising any protections upon there having first been established the deprivation of a property interest. This means that not every government decision adversely affecting an individual triggers due process, but only those touching upon one of the specific listed rights. Moreover, in defining property rights the Court has


115. See Board of Regents v. Roth, 408 U.S. 564, 571 (1972)(initial inquiry is whether there is deprivation of liberty or property interest). See generally Monaghan, Of "Liberty" and "Property", 62 CORNELL L. REV. 405 (1977)(examining the content of the concepts of liberty and property).
consistently noted that the Constitution itself does not create property interests, but instead they must stem from independent sources such as state law.\footnote{116} Thus, only those interests created by the state itself suffice to trigger procedural due process protection.

At first glance this technical approach to what interests trigger due process protection might not appear to pose a problem with zoning decisions because of the long recognized "property" nature of interests in land.\footnote{117} Indeed, the historical recognition of land as the quintessential property might explain the relatively little case analysis of whether zoning affects property interests for purposes of due process. Yet zoning does not eliminate or deprive the underlying interest in real property; rather, it regulates the use of land. Thus, the core property nature of the land being regulated does not necessarily mean that any zoning decision affecting such land constitutes a deprivation of "property."

The Court's current approach to due process analysis was established in the companion cases of \textit{Board of Regents v. Roth}\footnote{118} and \textit{Perry v. Sindermann}\footnote{119} in 1972. The Court had previously extended procedural due process protection to such newly recognized property interests as an entitlement to welfare benefits and a driver's license.\footnote{120} In \textit{Roth}, however, the Court set an important limitation on future recognitions. Premising its discussion on the fact that only those interests qualifying as "liberty or property" are entitled to due process protection,\footnote{121} the Court stressed that property interests are not created by the constitution but "by existing rules or understandings that stem from an independent source such as state law. . . ."\footnote{122} In \textit{Roth} the plaintiff, David Roth, accepted a teaching position at a state university for a fixed term of
one academic year.\textsuperscript{123} Roth completed the term but was informed that his appointment would not be renewed.\textsuperscript{124} Since Roth did not have tenure,\textsuperscript{125} no reason was given for the decision and there was no opportunity for him to challenge it in a hearing.\textsuperscript{126} Roth subsequently brought an action in a federal court, alleging that the lack of a hearing in this context constituted a deprivation of his right to procedural due process.\textsuperscript{127}

The Court noted that the terms of Roth's appointment expressly limited the term of his employment to one year and did not provide for any right of renewal.\textsuperscript{128} In addition, the Court stressed that there were no state statutes or university rules or policies which would create an interest or expectation in reemployment.\textsuperscript{129} Therefore, since there was no property interest in reemployment in this context,\textsuperscript{130} the Court held that Roth was not deprived of his due process rights by not being granted a hearing.\textsuperscript{131}

In Perry, however, the Court found a "property" interest in continuing employment. The claimant in Perry suffered a similar lack of express rights under his contract, but established that there was a type of "de facto" tenure program at the school.\textsuperscript{132} This provided a sufficient basis for a claim to entitlement, based on mutual understandings and expectations, to constitute a property interest.\textsuperscript{133}

Roth and Perry established the Court's current approach which premises due process analysis on a technical definition of property.\textsuperscript{134} Although recognizing that no easy formula for prop-

\begin{itemize}
  \item \textsuperscript{123} Id. at 566.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Id. at 567-68.
  \item \textsuperscript{127} Id. at 568-69.
  \item \textsuperscript{128} Id. at 578.
  \item \textsuperscript{129} Id.
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} Id. at 579.
  \item \textsuperscript{132} Perry v. Sindermann, 408 U.S. 593, 600, 602 (1972).
  \item \textsuperscript{133} Id. at 601-02.
  \item \textsuperscript{134} Some commentators have suggested that prior to Roth and Perry the Court employed a broad-based definition of "life, liberty, and property" as "embracing all interests valued by sensible men," and thus viewed the technical approach of Roth as representing a sharp break with the past. See J. ELY, DEMOCRACY AND DISTRUST 19 (1980)(criticizing the Court's liberty or property interest analysis as making the Court look "silly"); Monaghan, supra note 113, at 409 (the "life, liberty or property" clause of the fourteenth amendment does not embrace the full range of state conduct which seriously impacts upon individual interests). This characterization has in turn been challenged by others. See, e.g., Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry, 71 CALIF. L. REV. 146 (1983).\end{itemize}
The Court focused on the concept of "entitlement," stating that property interests are those to which one has a "legitimate claim of entitlement." The Court noted that this entitlement is a creation of the state and can arise from either express rules or mutual understanding, or from custom as in Perry. Conversely, abstract needs or desires and unilateral expectations fail to create property interests.

The triggering of due process protection in zoning therefore requires recognition of an entitlement which is adversely affected by the zoning decision. Although the underlying interest in the land itself qualifies as a property interest, as previously noted zoning cannot be viewed as a deprivation of that traditional form of property. Instead, a due process analysis needs to focus on what extent recognized entitlements would be removed by zoning. This, of course, should turn on the particular decision being made and the nature of the affected interest.

The clearest case for a deprivation of a recognized property interest concerns a landowner's interest when a zoning decision, such as a rezoning, will make the land use designation more restrictive, thereby eliminating previous use rights. For example, where land previously zoned commercial is rezoned residential, thus eliminating the more intensive and often more desirable commercial use, there seems to be a clear deprivation of a property entitlement. Although the fee simple interest remains, the landowner's right to develop and use the property for commercial purposes clearly meets the entitlement standard under Roth and Perry. Both the explicit provisions of the zoning ordinance and the understanding of the parties indicate an entitlement deserving due process protection.

135. Perry, 408 U.S. at 601 ("'property' interests for procedural due process are not limited by a few rigid, technical forms").
136. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry, 408 U.S. at 601.
137. Roth, 408 U.S. at 577; Perry, 408 U.S. at 601-02. The Court in Roth emphasized the need not to undermine reliance upon mutual understandings as a means of creating a property interest. Roth, 408 U.S. at 577. Subsequent to its decisions in Roth and Perry the court has continued to focus on state created entitlements based on rules and understandings as creating property interests. See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)(the dimensions of property interests stemming from state law are defined by the constitution); Leis v. Flynt, 439 U.S. 438, 441 (1979)(federal constitution does not create property interests but rather extends procedural safeguards concerning interests stemming from independent sources); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978)(federal law will determine whether an individual has a "legitimate claim of entitlement" based upon "an independent-source such as state law").
138. See Perry, 408 U.S. at 602 (an unwritten "common law" in a particular university may create the equivalent of tenure).
139. Roth, 408 U.S. at 577.
140. The particular property interest at stake can be characterized in several different
A more problematic analysis is presented when a landowner seeks a zoning change through a variance, special-use permit, or rezoning to a less restrictive use. Such changes might be perceived as increasing or enhancing his use possibilities. Although the right to seek these various changes might be established by ordinance or custom, the lack of a present right to the required use might be viewed as a lack of interest. As such, in each of these contexts an adverse decision arguably does not deprive an owner of a property interest, but instead is simply a denial of additional interests.

This position finds some support in a footnote in *City of Eastlake v. Forest City Enterprises*[^141] in which the United States Supreme Court examined whether a zoning ordinance which subjected all rezonings to approval by referendum violated due process.[^142] The Court upheld the ordinance, apparently assuming due process rights were implicated, but found that the referendum process could not be characterized as an improper delegation of power.[^143] The Court suggested in a footnote, however, that a property right might not even exist when a rezoning is sought:

> The situation presented in this case is not one of a zoning action denigrating the use or depreciating the value of land; instead, it involves an effort to change a reasonable zoning restriction. No existing rights are being impaired; new use rights are being sought from the City Council. Thus, this case involves an owner’s seeking approval of a new use free from the restrictions attached to the land when acquired.[^144]

It might thus be argued that only zoning decisions removing or restricting existing rights, rather than changing or increasing rights, trigger due process interests on the part of a landowner.

[^143]: Id. at 675-76. In upholding the referendum procedure, the Court characterized it as not involving a delegation of power but instead as a reservation of power. *Id.* at 675.
[^144]: Id. at 679 n.13.
Despite this analysis, however, a state court might find a property interest to exist in several ways. First, the focus of the Roth line of cases has been on “entitlements” created by explicit rules or mutual understandings.\textsuperscript{145} A primary reason for this “entitlement” approach is to protect claims upon which people rely and which should not be arbitrarily undermined.\textsuperscript{146} This suggests that at times statutory definitions of eligibility can themselves constitute a granted entitlement for due process purposes in order to protect a claimant’s reliance interest.\textsuperscript{147} This would be particularly relevant with regard to zoning, where land purchases are often made on the reliance that zoning mechanisms are available for seeking change. Mechanisms such as variances, special-use permits, and rezonings provide a purchaser assurance that under appropriate circumstances and conditions a zoning change will be forthcoming. The statutory definitions and mutual understandings upon which changes are based, together with the reasonable and substantial investment-backed reliance which they invoke, should be viewed as creating entitlements amounting to protected property under a due process analysis.\textsuperscript{148}

A second and related reason for recognizing property interests in zoning change mechanisms is based on the common law origins of property interests. Prior to the enactment of zoning regulations, the common law recognized property interests in landowners, generally allowing any use which did not constitute a nuisance.\textsuperscript{149} The enactment of zoning ordinances therefore did not create new interests as in the case of the “new property,” but instead regulated and limited preexisting property uses. Part of this regulation and limitation were explicit provisions allowing for use changes under appropriate circumstances so as to effectuate the overall purposes of the ordinances and to mitigate harsh

\textsuperscript{145} See, e.g., Board of Regents v. Roth, 408 U.S. 564, 577 (1972)(property interests are defined by existing rules or understandings that secure certain benefits and support claims of entitlement to those benefits); Perry v. Sindermann, 408 U.S. 593, 601 (1972)(property interests exist where rules or mutually explicit understandings support claims of entitlement to a benefit).

\textsuperscript{146} Roth, 408 U.S. at 577.

\textsuperscript{147} Commentators have rejected any “present enjoyment” requirement on the grounds that it would lead to unfair results and might encourage delay of initial benefits. 2 R. ROTUNDA, J. NOWAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW 236-37 (1986) [hereinafter R. ROTUNDA] (the requirement of present enjoyment offers no procedural safeguard against arbitrary action); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 690 (1988)(denial of procedural safeguards to a new applicant is inconsistent with due process protection).

\textsuperscript{148} See Developments in the Law-Zoning, supra note 140, at 1515-23 (identifying four types of property entitlements deserving procedural due process protection); see also Kahn, supra note 3, at 1018-20.

\textsuperscript{149} See generally R. ELLICKSON & D. TARLOCK, supra note 7, at 39.
results. From this historical perspective, therefore, mechanisms for zoning change, such as variances and rezonings, can be viewed as important rights retained by landowners when property was first zoned.

This analysis suggests that parties to a zoning decision might have an entitlement in particular zoning changes based both upon explicit statutory criteria, as in the case of variances and special-use permits, and mutual understandings. This, of course, does not mean that such changes must be granted whenever requested by landowners; the underlying facts substantiating such changes must be established.\textsuperscript{150} Yet the historical origins of land interests and the reliance-based expectations created by zoning change mechanisms both demonstrate a cognizable property interest for due process purposes. Therefore, the affected landowner arguably has a property interest both when the state attempts to restrict existing uses and when the landowner himself requests zoning changes pursuant to existing zoning procedures.

The above analysis suggests that current federal due process law is problematic, at least with some zoning decisions, but nevertheless might provide another basis for imposition of impartiality requirements. As noted above, however, courts have consistently held that recognition of a zoning decision as quasi-judicial encompasses the right to some degree of impartiality; whether based on common law, statutory interpretation, or constitutional grounds.\textsuperscript{151} For this reason impartiality requirements have been consistently imposed on the variance and special-use decisions because of their perceived quasi-judicial nature.\textsuperscript{152} Conversely, courts have traditionally declined to control bias in rezonings because of their perceived legislative nature.\textsuperscript{153} The next section

\textsuperscript{150} The Supreme Court has noted that the constitution does not protect only rights of undisputed ownership but also extends to instances where the right to an entitlement is disputed. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12 (1978).

\textsuperscript{151} See, e.g., Fasano v. Board of County Comm'rs, 264 Or. 574, 368 P.2d 23, 30 (1963) (quasi-judicial zone hearing requires impartial decisionmaker). See also Comment, Zoning Amendments — The Product of Judicial or Quasi-Judicial Action, 33 Ohio St. L.J. 130, 140 (1972).

\textsuperscript{152} See, e.g., Rogoff v. Tufariello, 106 N.J. Super. 303, 255 A.2d 781, 784 (1969) (board of adjustment is an independent administrative body which acts in a quasi-judicial capacity and provides expert discretion and judgment); Abrahamson v. Wendell, 76 Mich. App. 275, 256 N.W.2d 613, 615 (1977). See generally 7 P. ROHAN, supra note 19, at § 49.02[7] (zoning board members may be disqualified if they have a bias or a conflict of interest).

\textsuperscript{153} See, e.g., Smith v. County Bd. of Madison County, 86 Ill. App. 3d 708, 408 N.E.2d 452, 459 (1980) (because of separation of powers doctrine, courts are generally without power to inquire into motives behind zoning ordinances); Meyers v. City of Baton Rouge, 185 So.2d 278, 286 (La. Ct. App. 1966) (same); Webster Assocs. v. Town of Webster, 112 Misc.2d 396, 447 N.Y.S.2d 401, 408 (1981) (town supervisor who spoke in favor of
III. CONTROLLING BIAS AND CONFLICTS OF INTERESTS IN REZONINGS

A major limitation on policing bias and conflicts of interest in the zoning process has been the traditional refusal of many courts to extend the requirement of an impartial decisionmaking to rezoning decisions. Although a growing number of conflict of interests statutes extend to rezoning decisions, in the absence of such statutory provisions courts have often refused to extend either common law or due process protections to rezonings because of their perceived legislative nature. As a result, courts have commonly applied the general rule that due process rights, including the right to an impartial decisionmaker, do not attach to legislative decisions.

This general refusal to scrutinize legislative decisions for problems of bias and conflicts of interest reflects several related principles. First is that due process protections generally do not attach to legislative acts, in part because of pragmatic limitations and in part because of the view that the legislative process itself provides sufficient protection when large numbers of people rezoning did not taint proceedings so as to create biased tribunal); see generally R. ANDERSON, supra note 3, at § 4.19. But see Flemming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327, 331-32 (1972) (finding rezoning decision permeated with appearance of unfairness where city councilman who voted in favor of rezoning was employed 48 hours later by the successful applicants).

154. See, e.g., Fiser v. City of Knoxville, 584 S.W.2d 659 (Tenn. App. 1979) (rezoning legislative act not requiring impartial decisionmaker).

155. See supra notes 84 to 87 and accompanying text.

156. See, e.g., Wait v. City of Scottsdale, 127 Ariz. 107, 618 P.2d 601, 602 (1980) (decision to rezone is legislative so court may not inquire into motives of city council).

157. See, e.g., Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla. 1959) (councilman who would realize $600,000 gain by reason of zoning ordinance amendment not disqualified from voting in favor of plan, because amending zoning ordinance was legislative function); Fiser v. City of Knoxville, 584 S.W.2d 659 (Tenn. App. 1979) (city council members were not required to excuse themselves from consideration of a zoning petition despite prior statements to vote against petition for personal or political reasons, because enacting zoning ordinances is exercise of legislative police power); Blankenship v. City of Richmond, 188 Va. 97, 49 S.E.2d 321 (1948) (court refused to find zoning ordinance void because, although the city council member who procured its passage profited from being able to erect a filling station in the zoned area, council was acting in a legislative capacity). See also D. MANDELKER, supra note 2, at 270-71; R. ANDERSON, supra note 3, at § 4.19 (rule well established that the motives of individual legislators cannot be examined to determine either the validity of a legislative act or its meaning if legislative body acted within the scope of its authority).

158. See, e.g., Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) ("Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption.").
are affected.\textsuperscript{159} Second, courts have often alluded to separation of power concerns in declining to police legislative bias, noting that legislative bodies are typically concerned with policy formulation and that the judiciary should therefore not inquire into "legislative motives."\textsuperscript{160}

Although these rationales for declining to scrutinize legislative bias might make sense in other contexts, they are misplaced with regard to most rezonings and should be rejected for several related reasons. First, as suggested by a significant minority of states, small scale rezonings more closely resemble quasi-judicial rather than legislative acts and thus should be treated as such. Second, and more fundamentally, courts should not rely upon the quasi-judicial/legislative distinction as a rigid label, but should instead analyze the concerns raised in rezoning decisions from a more functional analysis. In this regard, courts can legitimately scrutinize problems of bias and conflicts of interest in rezoning decisions. The next two subsections of this article will address each of these rationales.

A. REZONING AS QUASI-JUDICIAL ACTS

Although a majority of jurisdictions still regard rezoning decisions as legislative,\textsuperscript{161} a growing minority of states,\textsuperscript{162} supported by

\textsuperscript{159} The concept of legislative due process has several themes. First is that since legislative acts typically affect large numbers of people, those affected by such decisions typically have recourse through the electoral process. Second, legislative decisionmaking typically must go through a deliberative and protracted process, which includes logrolling, because no faction can control proceedings and thus must compromise with others. See Rose, supra note 7, at 853-55 (constituency of sufficient size and variety precludes a "faction" from imposing its will at the expense of others). See also Michelman, Political Markets and Community Self-Determination, 53 IND. L.J. 145, 173-77 (1977-78) (protracted legislative action necessary to build majority to enact ordinance).


\textsuperscript{162} States that have adopted the view that rezoning decisions are quasi-judicial, at least for some purposes, are: Colorado (Synder v. Lakewood, 189 Colo. 421, 542 P.2d 371, 373, 374 (1975)(distinguishing between enactment of a comprehensive rezoning ordinance and amendment of zoning code)); Hawaii (Town v. Land Use Comm'n, 55 Haw.
substantial academic commentary, now view small-scale rezonings as quasi-judicial and thus subject to basic due process requirements. The leading case reflecting this trend is *Fasano v. Washington County* in which the Oregon Supreme Court held that the rezoning of 32 acres of land was a quasi-judicial act which required, among other things, provision of procedural safeguards such as impartial decisionmakers. In reaching this conclusion, the court emphasized the limited number of parties involved, the small size of the affected parcel, and the pre-existing standards established by the county’s comprehensive plan.

The basic approach of *Fasano*, which focused on the specificity rather than the form of a decision, is admittedly problematic in several respects. First is the inevitable problem of line-drawing as to the number of the affected parties and the size of the affected land. Second is its emphasis on the comprehensive plan as establishing standards to which rezonings must conform. Not only do most states not require the same type of plan consistency as did

538, __, 524 P.2d 84, 94 (1974)(adoption of district boundaries)); Idaho (Cooper v. Board of County Comm’rs, 101 Idaho 407, __, 614 P.2d 947, 949, 950 (1980)(distinguishing between zoning which regulated general policy from zoning addressing use of special property)); Kansas (Golden v. City of Overland Park, 224 Kan. 591, __, 584 P.2d 130, 135 (1978)(distinguishing enactment of a comprehensive plan from planning for a specific tract of land)); Kentucky (Kaelin v. City of Louisville, 643 S.W.2d 590, 592 (Ky. 1982)(trial-type adjudicatory hearing on a zoning change)); Maryland (Hyson v. Montgomery County Council, 242 Md. 55, __, 217 A.2d 578, 584 (1966)(when council considered adjudicatory facts it was performing quasi-judicially)); Montana (Little v. Board of County Comm’rs, 631 P.2d 1282, 1288 (Mont. 1981)(selection by the county commissioners of a specific tract of land for special zoning consideration is quasi-judicial)); Nevada (Forman v. Eagle Thrifty Drugs and Markets, 516 P.2d 1234, 1237 (Nev. 1973)(when statutes require notice and hearing zoning action becomes quasi-judicial)); Oregon (Fasano v. Board of County Comm’rs, 264 Or. 574, __, 507 P.2d 23, 26 (1973)(distinguishing between ordinances laying down general policies from those which determine whether a specific use is permissible for a specific piece of property)); Washington (Flemming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327, 331 (1972)(process by which zoning decisions dealing with amendment of the code or reclassification of land are made, basically adjudicatory)).


164. 264 Or. 574, 507 P.2d 23 (1973).


166. *Id.* at __, 507 P.2d at 26-27.

the court in Fasano, but the ability of a comprehensive plan to set policy standards to be subsequently applied has been seriously questioned.

Notwithstanding these limitations, Fasano's treatment of small-scale rezonings as quasi-judicial rather than legislative, at least for purposes of procedural safeguards, is compelling. Although various approaches are used to distinguish adjudicative and legislative acts, they most frequently emphasize the number of affected parties as a primary concern. Indeed, the classic rationale for the legislative/adjudicative distinction is that stated by the United States Supreme Court in Bi-Metallic Investment Co. v. State Board of Equalization, where Justice Holmes stated:

Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rules.

In this respect the particularized nature of small-scale rezonings indicates their quasi-judicial nature. Although even small-scale rezonings might raise policy concerns relevant to large numbers, their primary impact is on the landowner and surrounding neighbors. Not only is some degree of due process relevant in such situations, but the limited number of affected parties does in fact limit the effective use of electoral recourse as suggested by Justice Holmes.

168. Although state zoning statutes require that zoning decisions be made "in accordance with a comprehensive plan," courts have generally interpreted this as not requiring close conformity to the plan. See, e.g., Holmgren v. City of Lincoln, 199 Neb. 178, 256 N.W.2d 686, 689 (1977) (ordinance which changed zoning from a single-family district to a multiple dwelling district did not violate legislation mandating a comprehensive plan).


170. 239 U.S. 441 (1915).

171. Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (an order to increase taxable valuation of property did not violate taxpayers due process rights even though taxpayers were not given the opportunity to speak before the order was made).

Moreover, although small-scale rezonings might involve policy decisions, they also inevitably involve site specific fact determinations. In this sense they resemble "adjudicative facts."¹⁷³ Whereas legislative facts are those relating to general policy, adjudicative facts relate to specific situations and people.¹⁷⁴ Rezoning decisions, although in part legitimately turning on community biases regarding land development, also call for determinations of the suitability of land uses regarding a specific parcel of land.¹⁷⁵

For these reasons a number of courts have recognized the quasi-judicial nature of small-scale rezonings, at least for due process purposes.¹⁷⁶ Importantly, these have not necessarily been premised on the comprehensive plan as establishing pre-existing standards, but instead have been premised upon the view that the particularized nature of the decision requires some form of due process.¹⁷⁷ Indeed, several courts have suggested that although rezoning might be considered legislative for some purposes, it should be considered quasi-judicial for purposes of providing an impartial decisionmaker.¹⁷⁸

B. A FUNCTIONAL ANALYSIS

The willingness of some courts to consider rezonings as quasi-judicial for purposes of due process reflects the notion that courts should be free to apply a more functional approach to the rezoning issue. That is, instead of being held to a rigid quasi-judi-

¹⁷⁴. Id.
¹⁷⁷. See, e.g., Cooper, 101 Idaho at __, 614 P. 2d at 949-51; Flemming v. City of Tacoma, 81 Wash. 2d 292, __, 502 P.2d 327, 331 (1972).
cial/legislative distinction, courts should assess the propriety of applying doctrines based upon the particular characteristics involved. Such an approach is justified by the unique nature of both rezoning decisions and of local legislative bodies themselves.

This willingness to treat rezonings as less than fully legislative, despite the legislative label, is in fact already reflected in various aspects of zoning law. First is the near universal statutory requirement of notice and hearings for rezoning decisions. Such requirements are not necessarily inconsistent with a legislative label, but in fact reflect the belief that the decisionmaking process should be structured in such a way as to gather information and allow affected parties an opportunity to be heard.

Furthermore, state courts themselves, though espousing the legislative label for rezonings, have often made them subject to controls not entirely consistent with such a characterization. For example, although legislative acts are ordinarily overturned only if "arbitrary and capricious," courts have often applied the "spot zoning" doctrine to more closely scrutinize and control small-scale rezonings. The scrutiny often applied by courts in such situations is implicitly contrary to the deference normally given legislative decisions, yet has been used to control the rezoning process.

Finally, as noted above, state courts in several instances have taken a selective approach to applying the quasi-judicial label to rezonings. Several states have applied it to rezonings by initiative or referendum, but not for judicial review. Similarly, courts have applied it for general purposes of due process rights but not necessarily for judicial review.

This demonstrates that despite the traditional view of rezon-

179. Almost all zoning enabling statutes set requirements for notice and hearings for rezoning decisions. See, e.g., MINN. STAT. ANN. § 462.357 (West 1989) (no zoning amendment shall be adopted until a public hearing has been held and notice of hearing has been published in city's official newspaper); CONN. GEN. STAT. § 8-3A (West 1988) (notice of time and place of hearing must be published as legal advertisement at least twice before hearing). See generally P. ROHAN, supra note 19, at § 51.03.


181. See, e.g., Fritts v. City of Ashlund, 348 S.W.2d 712, 713 (Ky. 1961) (the only proper consideration in establishing light industry zone is whether particular area should be set aside for that purpose); Linden Methodist Episcopal Church v. City of Linden, 113 N.J.L. 188, 173 A. 593, 595 (1934) (attempts to rezone single small lot should receive close scrutiny). See generally D. MANDELKER, supra note 2, at § 6.23.


ings as legislative decisions, courts have been willing to fashion particularized doctrines in order to control perceived problems with the process. Such an approach can be justified for two reasons. First is the essentially adjudicative nature of most rezoning decisions. Whatever label is attached to the decision, its particularized nature largely involves a balancing of the rights of landowners and neighbors. As such, this raises substantial fairness concerns distinct from traditional legislative decisions, thus necessitating a more deliberative process.  

A second reason for more closely scrutinizing rezoning decisions concerns the nature of local legislative bodies themselves. The normal deference to legislative decisionmaking processes is premised on a model of government in which undue influence in decisionmaking is mitigated by the inability of any one interest group to dominate. This model, based on national and state legislatures, envisions logrolling and coalition building as a necessary part of the legislative process. Further, this necessarily involves a protracted process resulting in the forced deliberation of issues; benefits insured in other contexts by trial-like procedures. These features of legislative action are often viewed as a type of "legislative due process."

Commentators have frequently noted that local governing bodies often lack these features. They are frequently smaller in size and of a more homogeneous character and thus are not forced to pursue the more compromising and deliberative process indicative of "higher" legislative bodies. This makes them more susceptible to the undue influence of personal conflicts since the process itself is less likely to insulate against the taint of bias upon the ultimate decision.

This distinct nature of local government itself reinforces the need for policing conflicts of interest in zoning decisions. The


185. See Rose, supra note 7, at 854-55(the clash of multiple interests prevents hasty legislative decisions); cf. Michelman, supra note 159, at 148 (there are no public interests, but only a chain of particular interests).

186. See Michelman, supra note 159, at 173 (coalition and logrolling theory explain how majoritarian governments can serve individual interests).

187. See H. PITKIN, THE CONCEPT OF REPRESENTATION 195-96 (1967)(discussing liberalism's view that time will allow the "voice of reason to prevail over immediate selfish gain").

188. See Rose, supra note 7, at 855-57 (discussing problem of lack of multiple interests in small governing bodies).

189. Id. at 855-56.
potential lack of a deliberative, compromising process makes ultimate decisions more vulnerable to individual prejudices. Further, local governmental processes arguably lack the legitimacy bestowed by more deliberative processes, a concern exacerbated by legislators acting out of self-interest. This is particularly true with regard to current zoning practices, which, because of their often apparent ad hoc nature, lack a sense of legitimacy.

The above analysis suggests several reasons why courts have and should fashion particularized solutions to perceived problems with small-scale rezonings. This is particularly justified with regard to problems of conflicts of interest on the part of local legislators. Not only is the policing of such interests administratively feasible, but the problems posed by self-interested decisions are especially significant to rezonings because of the lack of electoral recourse and the frequent perception of "dealmaking."

Treating small-scale rezonings as quasi-judicial and thus subject to review for bias and conflicts of interests does not mean that courts should ignore the concurrent political nature of such decisions. Local legislators are politically elected officials who must serve a variety of functions. An elected official who advocates particular views on community development and land use in his policymaking role need not abandon them when deciding a particularized rezoning. At the same time, however, certain biases, most notably those flowing from personal and unique interests, have nothing to do with representative decisionmaking and threaten accuracy and legitimacy concerns. Courts should therefore shape the contours of regulation to permit the legitimate representative function of local legislators but control biases which do not serve that function.

The next section of this article will examine the scope of regulation, looking first at general guidelines and then at several categories of more specific problems.

190. As will be discussed in section IV, the serious regulation of bias and conflicts of interest will impose some cost on the zoning process by elimination of some otherwise qualified decisionmakers. Assuming sensitivity to the need for representative decisionmaking, the prohibition of particular biases is realistic. This can be contrasted to instances of legislation applicable to a large number of people, in which providing an opportunity to be heard is impracticable. See Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915)(where rule of conduct applies to many people, it is impractical for everyone to have a voice in its adoption).

191. City of Fairfield v. Superior Court, 14 Cal. 3d 768, __, 537 P.2d 375, 382-83, 122 Cal. Rptr. 543, 550-51 (1975)(councilmen's role as legislator, administrator and quasi-judicial officer allows information from outside sources to enter into decisionmaking process); 1000 Friends of Oregon v. Wasco County Court, 304 Or. 76, __, 742 P.2d 39, 43 (1987)(elected board member need not avoid appearance of interest when switching from policymaking role to adjudicatory role).
IV. EXAMINING THE SCOPE OF REGULATION

A. GENERAL GUIDELINES

Despite the important interests served by controlling bias and conflicts of interest in zoning decisions, it is inevitable that some bias and conflicts of interest will exist and therefore they must be tolerated to some extent. Everyone brings from his background beliefs and attitudes which influence decisions, and in localized decisionmaking like zoning it is likely that decisionmakers themselves will to some extent be affected by zoning decisions. To attempt to remove all problems of bias is neither prudent nor realistic. Moreover, attempts at regulating bias and conflicts of interest might at times conflict with other values, such as the need for representative decisionmaking, stability in government, and sensitivity to the community consensus regarding land policy.

For these reasons, courts must engage in some linedrawing when regulating problems of bias and conflicts of interest. Any attempt at regulation should, of course, seek to further the accuracy and legitimacy interests supporting the impartiality requirement. Thus, the tolerability of particular conflicts should in part turn on the degree to which they pose a threat to zoning legitimacy and accuracy. In particular, this should mean policing bias so as to guard against the likelihood a conflict will improperly influence a decision and to further insure that decisions appear to be fair and proper.

At the same time, however, courts should recognize two limitations on regulation. First is recognition of the pragmatic limits to regulation. Martin Redish has suggested that the degree of bias we should be willing to tolerate in adjudicatory settings should be limited by our ability to avoid it. This is particularly significant with regard to zoning where decisions frequently impact to some degree on large numbers of people.

Moreover, overly stringent regulation potentially restricts the pool of qualified decisionmakers and destabilizes the zoning process. This is especially true in smaller communities where the possibility of family, business, and financial associations is much


193. Redish & Marshall, supra note 192, at 492 (slight potential bias should be removed if it is not extremely burdensome to do so).
greater.\textsuperscript{194} Indeed, some state conflict of interest statutes specifically recognize that the public interest will suffer by enacting too stringent of standards which would deprive government of qualified decisionmakers.\textsuperscript{195} Thus, the need to ensure accurate decisions and legitimate processes must to some extent be tempered by pragmatic limits on regulation and recognition of the costs attendant to regulation.

The second important limitation on regulation is recognition of the political dimensions of zoning practice. Although this article has argued that the political dimensions of zoning should not act as a barrier to regulation, at the same time they should be recognized in regulating biases. This is important not only for pragmatic reasons, but because the legitimacy of the zoning system itself requires that zoning decisionmaking be responsive to community concerns and ideals. This responsiveness manifests itself most clearly with regard to rezoning decisions where the elected status of decisionmakers places them in a representative capacity which is relevant to their decisions.\textsuperscript{196}

Courts have articulated a variety of approaches in addressing problems of bias and conflicts of interest in zoning and have sought to balance the above concerns. These have varied not only according to particular jurisdictions, but also with regard to the particular problem addressed. Generally speaking, however, courts have articulated three general tests or standards in regulating bias in zoning decisionmaking.

First, some courts have stated that a clear showing of actual, as opposed to apparent, bias is required before a decision will be invalidated. This approach distinguishes between instances where a decision will clearly benefit a decisionmaker and those in which only a potential for benefit exists. For example, in \textit{1000 Friends of Oregon v. Wasco County Court}\textsuperscript{197} the Oregon Supreme Court

\begin{itemize}
  \item \textsuperscript{194} See R. Ellickson & D. Tarlock, \textit{supra} note 7, at 291-92.
  \item \textsuperscript{195} See \textit{Fla. Stat. Ann.} \textsection 112.311 (West 1982)(it is essential that government attract the people best qualified to serve); \textit{Me. Rev. Stat. Ann.} tit. 1, \textsection 1011 (1979)("the public interest will suffer if unduly stringent requirements deprive government 'of the services of all but princes and paupers.'"); \textit{N.J. Stat. Ann.} \textsection 52:13D-12(c)(1986)(because public officials should have certain interests in government decisions, their conduct should not be unduly circumscribed).
  \item \textsuperscript{196} See \textit{City of Fairchild v. Superior Court}, 14 Cal. 3d 768, __, 537 P.2d 375, 382-83, 122 Cal. Rptr. 543, 550-51 (1975)(candidate's campaign statements do not disqualify him from voting on the matter when it comes before him after his election); \textit{1000 Friends of Oregon v. Wasco County Court}, 304 Or. 76, __, 742 P.2d 39, 43 (1987)(unpaid, popularly elected boards do not sufficiently resemble courts so as to warrant imposing disqualification rules upon them); \textit{Tarlock, supra} note 36, at 86 (members of zoning boards are often elected because of their opinion).
  \item \textsuperscript{197} 304 Or. 76, 742 P.2d 39 (1987).
\end{itemize}
held that a past business relationship between a county commissioner and proponents of a land use change did not invalidate the decision since there was not a clear showing of bias. This approach therefore is concerned primarily with substantive results as opposed to mere appearances.

A second standard frequently articulated by courts is the "potential temptation to the average man" standard. This test has often been used to distinguish between direct and substantial interests, which are subject to regulation, and remote interests which are not. The focus of this analysis, therefore, is on the strength of particular interests and the likelihood that they may affect the ultimate outcome of a decision. This has been applied not only to instances where a decisionmaker is associated in some manner with an interested party, but in any situation where there is a potential conflict.

Finally, a third standard used by courts is an "appearance of fairness" test. In some instances courts have emphasized concerns about public perceptions of fairness and confidence in zoning in combination with other standards, such as the "possible temptation" test. In this sense the threat to confidence in zoning is viewed as more or less coterminous with the likelihood that a particular interest will affect a decision and operates as an additional rationale for regulating bias.

199. Id. at __, 742 P.2d at 46 (rejecting the "appearance of fairness" standard).
202. See, e.g., Zagoreos, 109 A.D.2d at __, 491 N.Y.S.2d at 362-63 (test is not whether there is a conflict, but whether there might be).
203. See, e.g., Dana-Robbin Corp., 166 Conn. at __, 348 A.2d at 563-64 (member of planning commission who owned stock in family corporation which owned property which might be affected by vote had an interest in outcome which was too speculative to require disqualification); Low v. Town of Madison, 135 Conn. 1, __, 60 A.2d 774, 778 (1948) (member of zoning commission could not vote on wife's application for zoning change); Fail v. LaPorte County Board, 171 Ind. App. 192, __, 355 N.E.2d 455, 458 (1976) (court may find a conflict of interest if the situation is reasonably calculated to weaken public confidence in the zoning authority); Tuxedo Conservation & Taxpayers Ass'n v. Town Board, 96 Misc. 2d 1, __, 408 N.Y.S.2d 668, 672 (1978) (where there was a possible appearance of impropriety, councilman should have disqualified himself); Barbara Realty Co. v. Zoning Bd., 85 R.I. 152, __, 128 A.2d 342, 344 (1957) (member of zoning board should not say or do anything which would raise an inference of bias).
At times, however, the "appearance of fairness" test has been a separate standard suggesting a higher degree of scrutiny of potential biases and conflicting interests. This is most clearly seen in Washington case law where courts have applied an "appearance of fairness" standard quite stringently.\textsuperscript{204} The Washington courts have used this standard not only to strike down direct personal interests,\textsuperscript{205} but also to invalidate decisions involving more tenuous associational relationships and instances of prejudgment. For example, in \textit{Chrobuck v. Snohomish County}\textsuperscript{206} the Washington Supreme Court struck down a rezoning in part because of ex parte lobbying contacts the petitioner had with a commissioner, which included a business trip to Los Angeles paid for by the petitioner.\textsuperscript{207} In addition, the court also stressed that prior to being assigned to the commission, another commissioner had represented the petitioner in legal matters.\textsuperscript{208} From these circumstances, as well as others not pertinent to this discussion, the court stated that the cumulative effect created an impermissible appearance of unfairness.\textsuperscript{209} Therefore, the rezoning was invalidated.\textsuperscript{210}

As applied in this manner, the "appearance of fairness" test places a substantial emphasis on maintaining confidence in the zoning system. Such an approach is justified for two reasons. First, since actual bias is difficult to discern, an emphasis on appearance helps to ensure accuracy concerns. Second, and more importantly, the current nature of zoning decisionmaking creates important interests on the part of both landowners and neighbors that necessitate a fair deliberation of zoning decisions. Thus, it would

\textsuperscript{204} See Buell v. Bremerton, 80 Wash. 2d 518, _, 495 P.2d 1358, 1361-62 (1972)(appearance of fairness doctrine requires only a showing of interest which might influence a member, not a showing that the interest actually did); Flemming v. City of Tacoma, 81 Wash. 2d 292, _, 502 P.2d 327, 331 (1972)(not only must hearings appear fair, but the motives of the person's conducting the hearings must be above reproach); Chrobuck v. Snohomish County, 78 Wash. 2d 858, _, 480 P.2d 489, 496 (1971)(public officers have duty to be fair, open-minded, objective, and impartial to avoid appearance of unfairness); Smith v. Skagit County, 75 Wash. 2d 715, _, 453 P.2d 832, 842 (1969)(public hearings must be both fairly undertaken and appear to be done with the purpose to ascertain the wiser legislative course). See generally Phillips, \textit{The Appearance of Fairness Doctrine}, 20 URB. L. ANN. 75 (1980). See also Gailey & Strom, \textit{Conflicts of Interest on the Part of Zoning Decisionmakers}, in \textit{1983 ZONING \& PLANNING LAW HANDBOOK} 97, 110-16 (1983).

\textsuperscript{205} See Buell v. Bremerton, 80 Wash. 2d 518, _, 495 P.2d 1358, 1362 (1972)(commission member experiencing conflict should publicly declare interest and abstain from voting).

\textsuperscript{206} 78 Wash. 2d 858, 480 P.2d 489 (1971).

\textsuperscript{207} Chrobuck v. Snohomish County, 78 Wash. 2d 858, _, 480 P.2d 489, 494, 496 (1971).

\textsuperscript{208} \textit{Id.} at _, 480 P.2d at 496.

\textsuperscript{209} \textit{Id.} at _, 480 P.2d at 496.

\textsuperscript{210} \textit{Id.} at _, 480 P.2d at 495-96.
seem that an approach which is concerned with public perceptions of this process is particularly appropriate today.

At the same time, however, an emphasis on "appearance of fairness" needs to recognize the distinct nature of zoning decision-making. As noted above, the regulation of bias and conflicting interests potentially imposes costs on a community in terms of available qualified decisionmakers. Further, "fairness" needs to be interpreted in terms of the nature of the decisions, which are quasi-judicial rather than fully judicial. Legitimate zoning decisions mean not only deliberative decisionmaking, but also ones which are representational at times. For these reasons an "appearance of fairness" standard should not be read as prohibiting natural contacts between decisionmakers and interested parties nor the natural policy biases brought to the process, which overreaction might occur if the Washington approach is taken to an extreme.

The need to ensure accurate and legitimate zoning decisions must therefore be balanced with the pragmatic limits to regulation and sensitivity to policy concerns. In many instances such a delicate balancing must ultimately turn on the unique facts of each case. The particular nature of the interest or bias, however, is also important in analyzing the scope of regulation. The next section will therefore more closely examine five common problem areas of potential bias often encountered in zoning decisions: financial interests, associational interests, prejudgment and bias, ex parte contacts, and receipt of campaign contributions.

B. SPECIFIC PROBLEMS OF BIAS AND CONFLICTS OF INTEREST

1. Financial Conflicts

Probably the clearest and most frequent type of impermissible conflicting interests are financial conflicts. The common law's prohibitions were most frequently directed against financial interests, as are many of the conflict of interest statutes in force today. Similarly, constitutional due process analysis in invalidat-

211. E.g., Atherton v. Concord, 109 N.H. 164, 245 A.2d 387, 388 (1968)(conflict exists if administrative official votes on matter in which he has direct personal or pecuniary interests).

212. See, e.g., ARIZ. REV. STAT. ANN. § 11-222 (1977)(a supervisor shall not vote on a measure in which his family or his partner is pecuniarily interested); IDAHO CODE § 67-6506 (1980)(member or employee of zoning board or commission shall not participate when he, his employer, partner, associate or specified relative has an economic interest in the action).
ing a decision has often focused on and emphasized the pecuniary nature of the alleged personal interest.\footnote{213}{See, e.g., Aetna Life Insurance Co. v. Lavoie, 54 U.S. 813, 821-22 (1986) (violation of fourteenth amendment to subject person to judgment of court when judge has a pecuniary interest in outcome); Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (denial of due process where mayor who was responsible for village’s finances presided at trial and assessed traffic fines); Turney v. Ohio, 273 U.S. 510, 523 (1927) (denial of due process when judge is paid for service only when he convicts defendants).}

For these reasons courts have generally been sensitive to financial conflicts in zoning decisions and have declared them invalid in a number of situations. This has been based not only on specific pecuniary prohibitions, but also on more general statutory prohibitions and on constitutional grounds. On this basis courts have struck down land use decisions where a participating decisionmaker might financially benefit as a neighboring landowner,\footnote{214}{See Buell v. City of Bremerton, 80 Wash. 2d 518, 495 P.2d 1358, 1362-63 (1972) (self-interest of one commissioner invalidated zoning whether or not his vote was necessary to enact zoning).} an employee\footnote{215}{See Smith v. City of Shelbyville, 462 N.E.2d 1052, 1053, 1057 (Ind. Ct. App. 1984) (on remand trial court shall hear issue of conflict of interest on part of councilmen with ties to parties seeking a vacation of an alley); Aldom v. Borough of Roseland, 42 N.J. Super. 495, 127 A.2d 190, 196-97 (1956) (participation by a councilman who is also an employee of an interested party voids the zoning decision); Zagoreos v. Conklin, 109 A.D.2d 281, 151 N.Y.S.2d 358, 362 (1987) (perceived conflict of interest where decisive votes were cast by board members who were employees of an interested party).} or business associate of an affected landowner,\footnote{216}{See Tuxedo Conservation & Taxpayers Ass’n v. Town Bd., 96 Misc. 2d 1, 408 N.Y.S.2d 668, 673 (1978), aff’d, 418 N.Y.S.2d 638, 639-40 (1978) (board member should have disqualified self where business connections with applicant caused appearance of unfair hearing); Kloter v. Zoning Commission, 26 Conn. Supp. 495, 227 A.2d 563, 566-67 (1967) (member of zoning commission for whom applicant was accountant and advisor should have disqualified self).} or would otherwise financially benefit.\footnote{217}{See Piggott v. Borough of Hopewell, 22 N.J. Super. 106, 91 A.2d 667, 669 (1952) (council person sold property to variance applicant); Daly v. Town Plan & Zoning Comm’n, 150 Conn. 495, 191 A.2d 250, 251 (1963) (member of zoning commission was the president of the association which sold land to the applicant for a zoning variance).}

Societal intolerance for financial conflicts is easy to understand. They clearly interfere with the ability to make accurate decisions by preventing an objective assessment of data. Similarly, the legitimacy of zoning decisions is threatened by financial conflicts which tend to suggest the ultimate crassness and corruption. Decisionmaking for personal gain gives the appearance of votes being bought and sold which strongly undermines the legitimacy of any system. Moreover, because financial interests are for the most part unique to individuals, such interests should be feasible to police.

Despite the consistent recognition that financial conflicts of interest violate impartiality standards, courts have frequently stated that difficult questions arise regarding the degree of interest
necessary to constitute a violation of due process. In the constitutional arena, the Supreme Court has stressed that while "a direct, personal, substantial, pecuniary interest" is subject to regulation, speculative and remote interests are not. State zoning decisions have similarly distinguished between substantial interests which are subject to regulation and remote interests which are not.

Although striking the balance in this way is justified, it is important to recognize the variety of situations in which a zoning decisionmaker might be tempted by financial gain. The most obvious situation arises where the decisionmaker’s own property is the subject of a zoning change. Depending on the nature of the change, the decisionmaker as landowner potentially will be financially benefitted or harmed, either of which involves a clear pecuniary interest. Similarly, financial interests will often arise because of a decisionmaker’s status as a neighbor of affected land.

Substantial pecuniary interests might arise in several other contexts in addition to affected land values. Most significant in this regard are instances where the decisionmaker is in an employment or business relationship with a zoning applicant. Although the decisionmaker might not realize an immediate financial benefit, there might be substantial pressure to decide a particular way to ensure the relationship continues with its attendant financial rewards. Moreover, the substantial legitimacy concerns raised in such circumstances also justify regulation. For these reasons courts have properly invalidated decisions where a clear business relationship existed or where the decisionmaker was employed by an interested party.

Although courts have thus primarily focused on the substantiality of pecuniary interests when assessing impartiality, a second

219. See, e.g., Moody v. University Park, 278 S.W.2d 912, 919 (Tex. Ct. App. 1955) (fact that one member of board of adjustment was third or fourth cousin of president of applicant did not constitute substantial interest); Copple v. City of Lincoln, 205 Neb. 152, 274 N.W.2d 520, 528 (1979) (councilman’s interest as partner in partnership owning land approved for rezoning was not an immediate and direct pecuniary interest).
220. See, e.g., Schauer v. Miami Beach, 112 So. 2d 838, 841 (Fla. 1959) (councilman would realize $600,000 gain by rezoning of neighboring land); Buell v. City of Bremerton, 80 Wash. 2d 518, 491 P.2d 1358, 1362 (1972) (chairman of planning commission had conflict of interest in zoning ordinance because his property appreciated as a result of the ordinance).
222. See Aldom, 42 N.J. Super. at 127 A.2d at 196-97 (councilman was employee of interested party); Zagoreos, 109 A.D.2d at 358, 362 (board member was employee of interested party).
factor upon which regulation should turn is how unique or common the interest is. This is relevant for two reasons. First are pragmatism concerns. The more widely held a particular interest, the more difficult and costly it is to remove. Second, the more widely held an interest, the more it is arguably representative of community interests and thus relevant to the decisions.

For these reasons, therefore, even substantial interests are tolerable where they might be viewed as incidental to a person’s status as a community member rather than viewed as a unique interest. This is perhaps most relevant to interests which result from ownership of neighboring land. Where the decisionmaker lives in close proximity to the land in question, the interest is probably unique enough to justify regulation, even if it is shared with similarly situated neighbors. Conversely, where the interest is one that will affect a large number of people to the same degree as it affects the decisionmaker, the conflicting interest should be more tolerable. Regulation is more difficult in such situations, where the interest arguably represents a community rather than a personal interest, and thus is properly incorporated into decisionmaking.

2. Associational Conflicts

A second source of conflicts of interest in zoning decisionmaking are associations or relationships that a decisionmaker might have with parties involved in or affected by a zoning decision. The types of associations that might create conflicts are obviously quite diverse, but most commonly involve familial, business, or community relationships. Common to these various relationships, however, is the concern that a decisionmaker’s relationship with an interested party will improperly affect the ultimate decision, thus calling into question the accuracy of decisions and undermining the legitimacy of the system.

223. See, e.g., Thorne v. Zoning Commission, 178 Conn. 198, 423 A.2d 861 (1979)(parents and sister of commissioner owned adjacent property); Low v. Town of Madison, 135 Conn. 1, 60 A.2d 774 (1948)(spouse’s application for rezoning); Kremer v. City of Plainfield, 101 N.J. Super. 346, 244 A.2d 335 (1968)(member’s nephew was senior partner of law firm representing applicant); Moody v. University Park, 278 S.W.2d 912 (Tex. Civ. App. 1955)(board member was third or fourth cousin of president of applicant corporation).


Although language in opinions has occasionally suggested that concerns about bias and conflicts of interest should be limited to pecuniary conflicts,\textsuperscript{226} it seems clear that regulation should extend to nonpecuniary interests under either common law or constitutional standards. Not only have courts readily regulated nonpecuniary conflicts which clearly posed a threat to decisions,\textsuperscript{227} but the various tests used to address problems of bias and conflict of interest all strongly indicate that regulation should extend to nonpecuniary interests.\textsuperscript{228} There is little doubt that a close association or relationship with an interested party will often have a greater impact on a decision than many pecuniary interests. Relationships and associations thereby pose a threat to accuracy.\textsuperscript{229} Similarly, participation in a decision involving a close association will be perceived as tainted and thus lacking the "appearance of fairness" which is essential to a proper decisionmaking process.

Any attempt at assessing the propriety of associational conflicts should take into account both the nature of the relationship or association itself and the nature of the underlying interest. In this regard a greater concern for regulation generally exists when the decisionmaker's association is with an affected landowner rather than with affected neighbors. Not only will the underlying benefit or harm usually be less with neighbors than landowners, but pragmatic limitations exist because of the increased likelihood of associations with neighbors of land. For this reason the same type of association should often be more acceptable when it is with a neighbor as opposed to when it is with a landowner.

\textsuperscript{226} See, e.g., Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986).


\textsuperscript{229} As Professor Redish has noted in a different context: "A judge is likely to be more concerned with giving his brother-in-law a break than with securing $5.00 for a traffic conviction. Similarly, the temptation to get revenge against a party that the judge dislikes may be as alluring as pecuniary gain." Redish & Marshall, \textit{supra} note 192, at 501.
This does not mean that any association with neighbors is permissible. Certainly a close relationship with a neighbor who has a substantial interest in a decision should be closely examined. For example, in *Thorne v. Zoning Commission*\(^{230}\) the chairman of the zoning commission voted in favor of rezoning the plaintiff's land from business to residential when the chairman's parents and sister owned adjacent land which was also zoned residential.\(^{231}\) The court correctly found an impermissible conflict of interest since the chairman's close relationship with the neighboring parties substantially affected or would likely affect his vote.\(^{232}\)

The second factor is the nature of the association or relationship itself. Close family relationships clearly raise the most concern and should usually lead to disqualification. In this regard courts have invalidated decisions where a decisionmaker's spouse is an affected landowner\(^{233}\) and where a planning commissioner's nephew was a partner in the firm representing an applicant for a zoning change.\(^{234}\) Moreover, courts have invalidated participation on zoning boards either because another family member served on the same board\(^{235}\) or on a board having review authority.\(^{236}\)

At the same time courts have been willing to permit some familial associations, usually of a more attenuated nature. These have included situations where a decisionmaker was a third or fourth cousin of an applicant\(^{237}\) and where the chairman of the zoning board was the uncle, by marriage, of the attorneys of the applicant for a variance.\(^{238}\) In several instances, however, courts have arguably tolerated familial associations which would raise substantial legitimacy concerns. For example, in *Van Itallie v. Franklin Lakes*\(^{239}\) the New Jersey Supreme Court allowed participation by a councilman even though his father had a property interest that would be benefitted by the decision.\(^{240}\)

Potential associational conflicts posed by community relationships are in many ways more difficult to assess. Although even informal associations can potentially affect a decision, pragmatic limits to regulation exist, particularly in smaller communities

\(^{232}\) *Id.* at __, 423 A.2d at 864-65.
\(^{233}\) *Low v. Madison*, 135 Conn. 1, __, 60 A.2d 774, 778 (1948).
where the potential for some relationship is significant. Further, to some extent zoning decisionmakers should be encouraged to have a good understanding of their community and be actively involved in civic and community affairs. To scrutinize closely all associations is therefore neither realistic nor desirable in that boards and legislative bodies will hopefully consist of people actively involved with and knowledgeable of their communities.

For these reasons courts should invalidate decisions only where a strong and unique relationship exists between the decisionmaker and applicant. One clear instance of this would be where a decisionmaker is a member of a community group or organization, such as a church, which is the applicant for a zoning change. In such instances the organization's interest can be fairly implied to the decisionmaker.

3. Bias and Prejudgment

As discussed in the introduction to this section, a general distinction should be made in regulating zoning impartiality between bias based on opinion and bias based on self-interest. Although bias based on opinion will often affect zoning decisions, it is necessarily tolerated for two reasons. First, some opinion is inevitable, especially where decisionmakers are drawn from a local area. Second, opinions regarding land development, as opposed to personal interest, play an important role in zoning decisions by reflecting community values regarding land development.

This need to respect opinion is most apparent with regard to rezonings where bias regarding land development can be viewed as an appropriate function of the political process. Such bias is often reflected in campaign statements where an official might campaign for office on a pro- or anti-development stance. In such situations, the bias should be viewed as reflecting public as well as personal preference regarding land allocation. Thus, a city councilperson's campaigning against construction of more apartments should not disqualify this person from later voting on a spe-

241. See Zell v. Borough of Roseland, 42 N.J. Super. 75, __, 125 A.2d 890, 893-94 (1956)(member of planning board approving zoning change was also member of church which benefited from the rezoning).

242. See, e.g., Wollen v. Borough of Ft. Lee, 27 N.J. 408, __, 142 A.2d 881, 890 (1956)(amendment of zoning ordinance was not void where officials had publicly announced before election that they would vote in favor of this type of rezoning); City of Farmers Branch v. Hawnco, Inc., 435 S.W.2d 288, 292 (Tex. Civ. App. 1968)(campaign statements opposing apartment construction did not disqualify the officials from participating in action on apartment zoning change).
cific proposal to rezone from apartment to residential.\textsuperscript{243}

This analysis is also relevant, though to a lesser extent, to the traditional administrative variance and special-use decisions. Decisionmakers will inevitably have some bias regarding land development which will likely affect a decision. Moreover, opinion on land use serves to reflect community values and preferences regarding land development. For these reasons the inevitable predispositions that members of lay boards might have to particular decisions generally should be tolerated.\textsuperscript{244}

When predisposition on an issue becomes prejudgment, however, the right to an impartial decisionmaker is arguably violated.\textsuperscript{245} This would usually occur where a member of the board has indicated a strong bias regarding a particular decision prior to or outside the normal decisionmaking process. Since variance and special-use decisions are made pursuant to established criteria, interested parties have a right to a decision on that basis. Prejudgment in such an instance therefore interferes with both accuracy and legitimacy concerns.

Determining what type of statements would establish such predisposition must turn on specific facts; not every statement should suffice but only those demonstrating a strong prejudgment. For example, a decisionmaker's suggesting predisposition toward or against particular uses should not invalidate a decision. On the other hand, clear statements suggesting that a decision has already been reached, or prejudged, should suffice to invalidate a decision.\textsuperscript{246}

4. Ex Parte Contacts

Ex parte communications between zoning decisionmakers and private parties present a particularly difficult issue for courts.\textsuperscript{247} Such contacts arguably distort substantive decisions by

\textsuperscript{243} Hawnco, Inc., 435 S.W.2d at 292.
\textsuperscript{244} Furtney v. Simsbury Zoning Comm'n, 159 Conn. 585, __, 271 A.2d 319, 323 (1970) (zoning commissioners not prohibited from having opinions about community development); General Cinema Corp. v. Foley, 60 A.D.2d 856, __, 401 N.Y.S.2d 249, 250 (1978) (decisionmaker not disqualified even though he had previously expressed bias against the type of use in question).
\textsuperscript{245} Furtney, 159 Conn. at __, 271 A.2d at 323 (decisive issue is whether decisionmaker had already made up mind before hearing).
\textsuperscript{246} See Barbara Realty Co. v. Zoning Board, 85 R.I. 152, __, 128 A.2d 342, 343 (1957) (member of a zoning board was disqualified when he told opponents of the variance before the hearing that "we are going to shove it down your throat").
not allowing other parties a chance to respond to presented views. More significantly, they can reinforce public perceptions that zoning boards are subject to special influence. This is particularly problematic because of the ad hoc, dealmaking practices that characterize current zoning.

Despite these concerns, it would seem that some ex parte communication is a natural and even necessary part of zoning decisionmaking. Rezonings, despite their quasi-judicial character, are nevertheless decided by local elected officials who are naturally and appropriately in contact with their constituents.\textsuperscript{248} To the extent that such decisions will often reflect policy concerns as well as factual determinations, it is natural that contacts occur. Not only should this not distort substantive decisions, but indeed such contacts might reflect a "democratic accuracy" ideal important to substantive correctness.

Similar concerns, though to a lesser degree, arguably also exist with respect to variance and special-use decisions made by appointed lay boards. Although such decisions are made pursuant to established criteria, there is little doubt that sensitivity to local concerns plays a role in decisionmaking because of the potential impact change has on neighboring land. Further, the primary expertise that such boards have is arguably in their capacity as representatives of community concerns.\textsuperscript{249} In this respect they not only reflect their own natural biases, but it is not inappropriate to listen to community concerns.

For these reasons ex parte communications should not be prohibited but rather regulated through disclosure requirements. In most instances such disclosure requirements should provide a sufficient basis for a response from interested parties.\textsuperscript{250} In this respect, both technical discussions and more general constituent concerns can be revealed at zoning hearings.

5. Campaign Contributions

A final and particularly difficult issue in regulating bias in zoning is the receipt of campaign contributions by a decisionmaker who must later decide an issue affecting the contributor. Although

\textsuperscript{248} See Westside Hilltop Survival Committee v. King County, 96 Wash. 2d 171, \_\_, 634 P.2d 862, 866 (1981)(legislators and their constituents advocate legislation which is an integral part of representative government at every level).
\textsuperscript{249} See Rose, supra note 7, at 860.
\textsuperscript{250} See Barton Contracting Co. v. City of Afton, 268 N.W.2d 712, 715-16 (Minn. 1978)(technical information provided zoning officials in prior proposal made part of record in present case so as to provide party with opportunity to respond).
this might occur under various scenarios, it most frequently involves political support from pro-development groups and individuals, such as developers, who subsequently seek zoning changes. Participation by decisionmakers in such situations raises serious fairness concerns, primarily because of the perception that favorable decisions can be bought.

Despite the substantial legitimacy concerns raised by participation under these circumstances, regulation is very difficult because of the political and first amendment implications of candidate support. Political support in general, and campaign contributions in particular, are important avenues for political participation designed to establish community preference. Further, campaign contributions are a form of political expression within the contours of the first amendment. The Supreme Court has recognized the first amendment implications of contributions on several occasions, noting that they "serve as a general expression of support for candidates" and that they also are a form of protected political association.

The first amendment nature of campaign contributions, however, does not insulate them from reasonable regulation. This was established in Buckley v. Valeo where the Court upheld the constitutionality of the Federal Election Campaign Act and its limitation of a $1,000 contribution by an individual contributor to a particular candidate. Although the Court recognized the first amendment nature of contributions, it stated that limiting the amount of a contribution would entail "only a marginal restriction" on speech. Importantly, the Court noted that avoiding the perception of undue influence was of sufficient importance to justify placing a reasonable limitation on expenditures, stating: "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical... if confidence in the system of representative government is not to be eroded to a disastrous extent.'"

This concern for confidence in our governmental system

256. Id. at 21-22.
257. Id. at 20.
258. Id. at 26, 27.
which forms the basis for regulation in *Buckley* is clearly applicable to the zoning context. The appearance of and potential for a large contributor gaining undue influence over a local elected official is at least as great, if not greater, than it is in federal elections. Further, the unique nature of zoning decisions, where the recipient of campaign funds might participate in the granting of a substantial benefit specifically directed to a contributor, creates a far greater appearance of quid pro quo than normally occurs in politics.

For these reasons some regulation of campaign contributions to local officials is not only permissible but necessary. At a minimum this should include placing limits on contributions in local elections. As interpreted by the Court in *Buckley*, such a form of regulation imposes only a marginal restriction on first amendment exercise while at least partially offsetting the potential for and appearance of improper influence. Indeed, most states now have disclosure requirements and contribution limitations applicable to local officials.

A more difficult question is whether the problems posed by campaign contributions also justify the disqualification of decisionmakers from decisions involving contributors to their campaign. The limited number of decisions addressing this issue have consistently held that the receipt of campaign contributions does not create conflicts of interest justifying disqualification. Perhaps the leading decision in this regard is *Woodland Hills Residents Association, Inc. v. City Council* in which a developer, who needed subdivision approval from the city council, gave more than $9,000 in campaign contributions through himself and various business associates to a majority of the council members who voted to approve the subdivision. The California Supreme Court held that the contributions did not create an impermissible conflict of interest, specifically emphasizing that "[r]epresentative govern-

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259. The fewer number of contributors at the local level and the subsequently less amount of money raised suggest that a contribution will have greater impact and thus potentially more influence than a comparable contribution at the federal level.


264. *Id. at __*, 609 P.2d at 1032, 164 Cal. Rptr. at 258. Although it stressed first amendment concerns, the court first noted that the receipt of campaign contributions were not grounds for disqualification under California's Political Reform Act, which specifically
ment would be thwarted by depriving certain classes of voters (i.e., developers, builders, engineers, and attorneys who are related in some fashion to developers) of the constitutional right to participate in the electoral process." 265

The concern expressed by the court in Woodland Hills touches upon the primary problem with disqualification for contributions. Unlike limitations on contributions which only have a marginal effect on expression as noted in Buckley, disqualification of the decisionmaker potentially has a substantial effect. Presumably the impetus for most campaign contributions is the politically compatible views of the contributor and recipient on land use issues; thus, those decisionmakers who have received contributions are those most likely to be sympathetic to the contributor without regard to the contribution. But if recipients of contributions are disqualified, there is a strong disincentive for citizens to financially support local legislators for fear of losing the votes of those officials most sympathetic to their position.

For similar reasons it is also often difficult to assume in such situations that favorable decisions are the result of impermissible influences on the decision itself rather than merely a reflection of the official’s political biases which induced the contribution in the first place. Legitimacy concerns are therefore less threatened when there is a perception that favorable votes are a legitimate and predictable part of the democratic system. Further, to the extent that much zoning is inherently political and responsive to public preference, the use of campaign contributions is a legitimate means of establishing preferences. Again, disqualification in such a situation potentially precludes those most likely to seek zoning requests from helping to establish the policies by which those requests will be decided.

For these reasons disqualification for campaign contributions is problematic and should be avoided. The problem of campaign contributions influencing votes and undermining zoning legitimacy should instead be addressed through secondary means, such as placing limits on contributions and implementing disclosure requirements. Although such indirect forms of regulation will only partially alleviate the concerns in this area, they represent

provided only for disclosure of such interests. Id. at __, 609 P.2d at 1032, 164 Cal. Rptr. at 259; Political Reform Act of 1974, CAL. GOV’T CODE § 84105 (1987)(requiring disclosure of contributions of $5,000 or more).

265. Id. at __, 609 P.2d at 1033, 164 Cal. Rptr. at 260.
the best balance of the political, legitimacy, and accuracy issues raised.

Such indirect regulations should take two forms. First, statutory limits can and should be placed on contributors in local elections. Although it is unclear from *Buckley* how far such limits can go, the significantly greater legitimacy concerns raised by contributions in local elections suggested that limitations substantially below $1,000 should be permissible.

Second, campaign contributions should be made subject to disclosure requirements. Almost all states now have campaign disclosure requirements which apply to local campaigns. Additionally, however, local officials should be required to disclose the receipt of campaign contributions at the time of decisions involving contributions as an alternative to disqualification. Requiring disclosure in such a manner would be similar to disclosure of ex parte contacts and would have an important restraining effect on the affected decisionmakers and lend some appearance of propriety. It also allows some recourse through the electoral process which, if at times overrated, provides another form of indirect regulation.

V. REMEDIES AND ENFORCEMENT

This article has so far examined the need for regulating zoning conflicts of interest, possible grounds for such regulation, and the specific types of conflicts that might occur. In doing so it has occasionally alluded to judicial remedies for conflicts, which have been primarily disqualification of decisionmakers. It is important, however, to more closely examine the consequences of an impermissible conflict of interest, both with regard to appropriate action by the decisionmaker and also in terms of judicial review of decisions involving bias and conflicts of interest.

266. Although the Court in *Buckley* upheld the validity of a $1,000 limit on contributions in federal elections, it also seemed to suggest by its discussion of the first amendment status of contributions that a complete ban or unreasonable limitation would be impermissible. *Buckley*, 424 U.S. at 24.


268. But see *Life of the Land, Inc. v. City Council*, 61 Haw. 390, ___ 606 P.2d 866, 901-02 (1980)($400 campaign contribution was not a conflict of interest requiring disclosure under conflict of interest laws).

269. See *Westside Hilltop Survival Committee v. King County*, 96 Wash. 2d 171, ___, 634 P.2d 862, 866 (1981)(political process may sanction councilmen who had ex parte contact with rezoning applicant).
The initial issue for determination is what action is required of a decisionmaker with a conflict of interest. State statutes regulating conflicts of interest take several approaches, although usually dividing into two general groups. First are those statutes which require disclosure of the conflict but not disqualification. An example is New York’s municipal code which, in identifying specific conflicts of interests, provides only that the decisionmaker practice full disclosure.\(^{270}\) The rationale behind such disclosure provisions would appear to be that public knowledge of the conflict will have a restraining effect on the decisionmaker sufficient to ensure a fair result. Further, the openness of such disclosure supports legitimacy by avoiding the specter of secret deals and corruption.

The second and more common provision is to prohibit participation when a conflict of interest exists.\(^{271}\) The rationales behind this are obvious. Although disclosure has some restraining effect, a significant conflict might still affect the substantive outcome of a decision. More importantly, perceptions of fairness and legitimacy are only partly addressed by disclosure.

For these reasons disqualification rather than disclosure is the preferable approach. Although in some instances disclosure might adequately address the need for impartiality, in many instances it will only be partially effective. The inconvenience of adjusting to the disqualification of a decisionmaker is not so great as to justify the threat to accuracy and legitimacy posed by the requirement of mere disclosure.

Beyond determining what effect a conflict of interest should have on a particular decisionmaker is what judicial remedies should be available when a zoning decision in fact involved an improper conflict of interest. In those instances in which the biased decisionmaker casts a dispositive vote, courts have consistently invalidated the decision.\(^{272}\) This seems appropriate in that both accuracy and legitimacy concerns are clearly threatened

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271. Most statutes do not expressly mention disqualification but instead prohibit participation in decisionmaking when certain conflicts exist. See, e.g., ALA. CODE § 11-43-54 (1977) ("no councilmen shall be entitled to vote on any question in which he, his employer or employee has a special financial interest."); ARIZ. REV. STAT. ANN. § 11-222 (1977) ("A supervisor shall not vote upon any matter in which he, any member of his family or his partner is pecuniarily interested"). Prohibiting participation means, of course, that the decisionmaker must disqualify him or herself.
when a decision appears to turn on the vote of a self-interested decisionmaker.

A more difficult issue is whether the participation of a conflicting member whose vote was not determinative to a decision should also result in invalidation. This might occur in two general situations. First is where the tainted vote was numerically unnecessary for the decision. Courts have evenly split on this issue, with a slight majority favoring invalidation.\(^{273}\) Courts refusing to invalidate such decisions have primarily reasoned that even without the tainted vote the decision would have occurred anyway and therefore invalidation is improper.\(^{274}\) In this sense the threat to accuracy and legitimacy concerns is arguably de minimus when the particular vote is apparently not crucial to a decision. In particular, legitimacy concerns are less threatened when a decision appears inevitable. As a result, the administrative burden of invalidating and remanding a decision outweighs any threat to substantive results and perceptions of fairness.

Despite these distinctions, several strong reasons exist for invalidating decisions even when a tainted decisionmaker’s vote was numerically unnecessary for the decision. First, courts invalidating such decisions have noted that collegial decisionmaking ideally involves the exchange of ideas and views, often with the intent of persuading toward a particular position.\(^{5}\) The actual contribution of any particular decisionmaker cannot be measured with precision, but frequently extends significantly beyond the actual vote cast.\(^{275}\) For this reason, a significant threat to accuracy

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\(^{274}\) See Anderson v. City of Parsons, 209 Kan. 337, __, 496 P.2d 1333, 1337 (1972)(where required majority existed without disqualified member’s vote, result is not invalidated).

\(^{275}\) See Daly, 150 Conn. at __, 191 A.2d at 252 (zoning decision invalidated by participation of interested member of commission); Wilson, 165 N.W.2d at 819-20 (vote cast in violation of conflict of interest statute, even if immaterial to outcome, vitiates the proceeding).

\(^{276}\) Illustrative of this are the facts surrounding the Supreme Court’s recent decision in Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986). Although Lavoie involved a 5-4 decision and therefore a clearly decisive vote, several opinions of concurring U.S. Supreme
can exist even when a particular vote was numerically unnecessary for the decision.

For similar reasons legitimacy concerns also exist even when a vote is numerically unnecessary. Although legitimacy concerns are less substantial in such circumstances, the perception of collegial decisionmaking and the potential influence of a tainted decisionmaker on others would violate "appearance of fairness" standards. Thus, for both accuracy and legitimacy reasons the better view is that even when a vote is numerically unnecessary for a decision courts should still invalidate it.

A second instance in which a tainted vote might not appear dispositive to a decision and thus is arguably tolerable is when the decisionmaker is on an advisory board which makes only a recommendation to the actual decisionmaking authority. This often occurs with zoning and planning commissions which initially hold hearings on zoning amendments and then make a recommendation to the local legislative body which in turn makes the determinative decision. If the tainted decisionmaker is only a member of a recommending rather than the final decisionmaking body, the improper bias is arguably not relevant to the final decision.

Despite this distinction, most courts addressing this issue still invalidate the decision on the grounds that the recommendation is closely tied to the final decision. This result is clearly appropriate in that such preliminary hearings and recommendations are designed to play an important and integral role in the decision-making process. In many instances such preliminary decisions are the sole source of a hearing, and thus those decisionmakers play a crucial role in the interpretation and assessment of information. Moreover, the perceived nexus between recommendation and ultimate decision is such as to substantially threaten the legitimacy of the final decision.

CONCLUSION

Bias and to some degree personal interests are an inevitable part of any decisionmaking process, including zoning. Yet the ad

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Court justices argued that the posture and history of the case indicated that the biased judge below had initially written a dissenting opinion which persuaded at least one other member of the lower court to change his position. *Id.* at 832 (Blackman, J., concurring).

hoc, discretionary nature characterizing current zoning practices makes the control of bias and conflicts of interest particularly important. Not only are accurate zoning decisions necessarily contingent upon the control of improper influences, but the emphasis on dealmaking raises legitimacy concerns exacerbated by biased decisionmakers.

This article has examined various grounds for regulating problems of bias and conflicts of interest in zoning. In doing so it has suggested that regulation extend to rezoning decisions, even absent statutory grounds, because of its essentially quasi-judicial nature and because of the unique nature of local governments.

The actual scope of regulation, however, must balance several concerns. Importantly, the basic concerns for accurate and legitimate decisions must be tempered by the pragmatic limits of regulation and sensitivity to the political dimensions of zoning.