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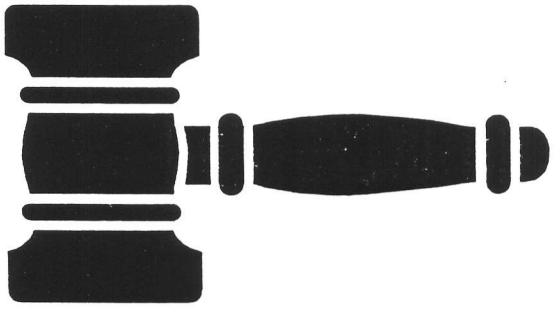

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TABLE OF CONTENTS

Page

EDITOR'S NOTES i
SUBJECT MATTER INDEX iii
DIGEST OF CASES 1

ADVISING BOARDS ON CONFLICTS OF INTEREST INVOLVING APPLICANTS' PROFESSIONAL.
By: Jonathan E. Drill 5

BOARD RESPONSES TO PROFESSIONAL CONFLICTS OF INTEREST: A REPLY TO DRILL.
By: Jay B. Bohn 22

POSTSCRIPT TO DRILL - BOHN DIALOG.
By: Michael A. Pane 35

NEWLY ADOPTED LEGISLATION.
By: Edward C. Eastman 36

NEW RESIDENTIAL CONSTRUCTION OFF-SITE DISCLOSURE ACT.
By: Debra S. Weisberg 37

UNPUBLISHED DECISION

U-1 Frank Cozzarelli, Jr. v. The Zoning Board of Adjustment of the Township of Belleville and Anthony Donadia.
Submitted by: William M. Cox 50

U-2 Adam and Milagros Alb et al. v. Zoning Board of Adjustment of Bridgewater Township et al.
Submitted by: William M. Cox 64

U-3 Howard F. Nichols and Julia Nichols et al. v. Board of Education of the Township of Wayne, Passaic County.
Submitted by: Stuart Koenig 68

NEED HELP? 77
WALTER WITTMAN WRITING COMPETITION 78
MEMBERSHIP INFORMATION 79
ADVERTISING RATES 80

ADVISING BOARDS ON CONFLICTS

By: Jonathan E. Drill*

It seems that now more than ever before objectors have been raising questions during the course of planning board and board of adjustment hearings as to whether an applicant's professional witness has a conflict and should be disqualified from participating in the application. I explore this issue in this article and conclude that a board has no authority to decide conflicts on the part of professionals or witnesses and, in any event, a board has no authority to bar a witness from testifying or a professional from participating by reason of an alleged conflict or violation of law.

The Municipal Land Use Law ("MLUL") expressly bars a board member from acting on any matters in which the member has a conflict of interest. *N.J.S.A.* 40:55D-23b and *N.J.S.A.* 40:55D-69 provide in relevant part that: "No member of the [planning board or board of adjustment] shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest." In the event a board member fails to recuse himself/herself from participating in a matter in which he/she has such a conflict, these provisions of the MLUL provide implicit authority for the board as a whole to determine that such member has a conflict and then vote to disqualify the member from participating in the matter due to the conflict.[1]

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[1]As is explained in this article below, I believe that boards have implied power to take certain actions not specifically provided for in the MLUL. As the MLUL expressly bars conflicts by way of direct or indirect personal or financial "interest," it can be implied that the board as a whole is authorized to vote to disqualify a member who refuses to recuse him or herself in a situation where he or she has a conflict of "interest."

Significantly, however, there are no similar statutory provisions governing applicants' professional (i.e. expert) witnesses. There is the requirement that a board, as a quasi-judicial body, ground its decisions on competent and credible proofs. *Hill Homeowners v. Passaic Zoning Board of Adjustment*, 129 N.J. Super. 170 (Law Div. 1974), aff'd on other grounds, 134 N.J. Super. 107 (App. Div. 1975). And, *N.J.S.A.* 40:55D-10e expressly permits a board to exclude irrelevant, immaterial or unduly repetitious evidence. Also, *N.J.S.A.* 40:55D-10d provides that all testimony relating to an application "shall be taken under oath or affirmation" and "the right of cross-examination shall be permitted."

These statutory and case law authorities permit a board to refuse to rely on testimony it believes is not competent based on the witness's knowledge and/or experience or not credible based on the witness's truthfulness and/or the context of the testimony. These authorities permit the board to bar testimony, however, *only if* it is irrelevant, immaterial, unduly repetitious,

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An interesting side issue arises from a similar conflict provision found in the Local Government Ethics Law. *N.J.S.A.* 40A:9-22.5d prohibits a board member from acting on any matter in which he "has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment." The word "involvement" in the Local Government Ethics Law has been construed as "broadening the areas of disqualification." *South Brunswick Assoc. v. Monroe Tp. Council*, 285 N.J. Super. 377, 384 (Law Div. 1994). See also, *Wyzkowski v. Rizas*, 132 N.J. 509, 523 (1993). Thus, instances could arise where a board member may not have a disqualifying conflict of "interest" under the MLUL but a disqualifying conflict of "involvement" under the Local Government Ethics Law.

Does the board have the authority to vote to disqualify a board member with a conflict of "involvement" who refuses to recuse him or herself? I think not. As there is no MLUL prohibition on a conflict of "involvement," no authority can be inferred from the MLUL to authorize a board to take such action. And, the only administrative agencies which have been granted statutory authority to deal with Local Government Ethics Law violations are a municipally created ethics board, a county ethics board or the Local Finance Board in the Department of Community Affairs pursuant to *N.J.S.A.* 40A:9-22.4. Thus, a planning board or board of adjustment has no authority under the Local Government Ethics Law to take any action to enforce its provisions. Of course, a court of law would have the power to deal with such issues in a lawsuit.

unsworn, or not subject to cross-examination.[2] See, *Seibert v. Dover Tp. Bd. Of Adj.*, 174 N.J. Super. 548, 553 (Law Div. 1980), where the court reversed a board decision because the board considered a petition which was not under oath and the signers of which were not present for cross-examination.

Moreover, while there is no New Jersey case so holding, it would appear that hearsay evidence is admissible in board hearings provided it is sworn and the proponent of the hearsay statement is subject to cross-examination.[3] This is similar to administrative law in New Jersey where the "usual rules of evidence barring hearsay" are not controlling, *Weston v. State*, 60 N.J. 36, 50 (1972), and hearsay evidence is admissible. In fact, N.J.A.C. 1:1-15.5 provides that hearsay evidence "shall be accorded whatever weight" the administrative law judge "deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability."

In an administrative law setting, it would thus be extremely rare that an expert witness's qualifications are deemed insufficient for the expert to testify on the matter. 37 New Jersey

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[2]Some have suggested that *N.J.S.A.* 40:55D-8a could provide authority for a board to bar testimony in circumstances other than irrelevancy, immateriality, undue repetitiveness, or evidence which is unsworn or not subject to cross-examination. *N.J.S.A.* 40:55D-8a provides that "every municipal agency shall adopt and may amend reasonable rules and regulations not inconsistent with this act (the MLUL)." The short answer is that a board may not do through rulemaking what it cannot do under the MLUL. Any rule providing for exclusion of evidence in circumstances beyond what is expressly provided for in the MLUL would be inconsistent with the MLUL and, therefore, prohibited by the very terms of *N.J.S.A.* 40:55D-8a.

[3]See Rohan, Zoning and Land Use Controls §51.05[3] at 51-82 (1995) (hearsay evidence is generally admissible in zoning board hearings). It should be noted that the court in *Seibert* did not hold that consideration of the petition was improper because it was hearsay. The petition was improper to consider because it was not sworn and not subject to cross-examination, as required by the MLUL. Moreover, the admission of hearsay evidence would be consistent with the language in *N.J.S.A.* 40:55D-10e providing that the technical rules of evidence do not apply in a board hearing.

Practice §206 at 230. Rather, the expert's qualifications are to be considered in evaluating the testimony's weight. *Id.* This would appear to apply equally to a board of adjustment or planning board hearing.

Some board attorneys argue that, while a board has no express authority or case law authority to bar the testimony of a professional witness based upon the witness's having a conflict, the board should have inherent or implied authority to do so. They argue that it just does not seem right that a board is without the power to bar a witness with an obvious and undisputed conflict from testifying. As unjust as it might seem, that is the result, and for good reasons.

It is generally recognized that certain powers not expressly granted in the MLUL are inherently possessed by boards by reason of the fact that they are quasi-judicial bodies. Cox, New Jersey Zoning and Land Use Administration §4-4.1 at 59 (1995). For example, a planning board should have the inherent power to construe the provisions of an ordinance where necessary to decide a case before it although only the board of adjustment is statutorily authorized to interpret the ordinance pursuant to *N.J.S.A.* 40:55D-70b.

In a similar vein, boards have implied powers to do certain things in the absence of specific statutory authority, based on general statutory provisions which, while not directly on point, support the conclusion that a board should have power to take the actions. Anderson, American Law of Zoning §18.61 (3d ed.). For example, there is no statutory provision authorizing a board to attach conditions to any variance it may grant. The authority to impose conditions upon the grant of a variance may be implied or inferred, however, from the statutory mandate in *N.J.S.A.* 40:55D-70d that no variance be granted if it would cause substantial

detriment to the public good or substantial impairment of the intent and purpose of the zone plan and zoning ordinance as well as of the purposes of the MLUL embodied in *N.J.S.A.* 40:55D-2.[4]

Under the MLUL provisions at issue, however, it does not seem likely that a court would infer or determine that it is inherent that a board should bar the testimony of a professional witness based on the witness having a conflict. The MLUL is not general on the issue. It is quite specific, listing irrelevant, immaterial or unduly repetitious evidence as that which may be excluded. *N.J.S.A.* 40:55D-10e. And, as *N.J.S.A.* 40:55D-10d provides that all testimony must be taken under oath and that cross-examination is a right, it can be inferred from those statutory requirements that testimony which is not under oath or which is not subject to cross-examination may also be excluded. It does not appear, however, that the authority to exclude other evidence can be inferred from the statute or is inherent in the board's quasi-judicial nature, especially in light of the mandate in *N.J.S.A.* 40:55D-10e that the technical rules of evidence "shall not be applicable to the hearing."

As to the seeming injustice of a board being powerless to prevent a professional witness with an obvious and undisputed conflict from testifying, a board simply cannot right all wrongs which may become obvious to it during the course of a hearing. Boards were not created nor are they intended to deal with all issues which arise before them, no matter how obvious the issue may seem. There are many areas which are simply beyond the jurisdiction of a board.

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[4]As held in *Alperin v. Middletown Tp.*, 91 N.J. Super. 190, 196 (Ch. Div. 1966), a board is *required* to lay down adequate protective conditions where it appears proper to grant a variance but such protective measures are necessary to further the zoning objectives. See also *Eagle Group v. Hamilton Tp. Bd. Of Adj.*, 274 N.J. Super. 551, 564-65 (App. Div. 1994), requiring boards to consider imposition of conditions to lessen the negative impact of certain uses.

For example, in *Fischer v. Bedminster Tp.*, 5 N.J. 534 (1950), the court held that a board may not declare an ordinance arbitrary and unreasonable. Another example would be an application for a variance to use a lot for a specific purpose where it develops during the hearing that the lot is subject to a deed restriction which prohibits such use. Just as such restriction would in no way prohibit the board from granting the variance, the board's grant of a variance would in no way affect the validity or enforceability of the restriction. Cox, §28-3.4(a) at 454. Just as the board is without jurisdiction to lift the restriction, the board has no jurisdiction to even consider the restriction in determining whether or not to grant the variance.

Mr. Bohn argues in the immediately following article, *Board Responses to Conflicts: A Reply to Drill*, that a board does have the power to determine certain questions ordinarily outside its jurisdiction where necessary to a decision within its jurisdiction. Bohn cites *Desilets v. Clearview Regional Board of Education*, 137 N.J. 585, 594-97 (1994), for the proposition that administrative agencies have the power to determine even constitutional questions where necessary to a decision within their jurisdiction. Bohn states that *Fischer* does not mean that a board is bound to follow an obviously illegal ordinance provision, such as a provision purporting to allow a board of adjustment to grant a variance under *N.J.S.A.* 40:55D-70d with fewer than five affirmative votes. Bohn concludes that a board may have to resolve conflicting legal requirements and may indeed have to ignore an ordinance provision that conflicts with the MLUL or case law.

As set forth above, I believe that a board has inherent power to decide certain questions ordinarily outside its statutory charge when necessary to decide a case before it and within its statutory charge. Likewise, as stated by Cox §4-4.4 at 62, there is no reason that a board should not follow court decisions. I would even go so a step further than Cox and state that a board,

being a quasi-judicial body, not only inherently has such power but has a duty to follow the MLUL and respect court precedent. All of this, however, is beside the point.

The issue is whether the board has authority to decide whether a professional witness has a conflict and, if so, whether the board can bar that witness from testifying. Not only is deciding whether a professional witness has a conflict of "interest" or "involvement" not necessary to the board's decision of the application, but prohibiting such witness from testifying goes far beyond the inherent power to decide questions which are ordinarily outside the board's statutory charge.

Bohn argues that a board derives authority to bar testimony of witnesses with conflicts from *N.J.S.A.* 40:55D-10g which, Bohn asserts, authorizes a board to make findings of fact and conclusions. I disagree. First, *N.J.S.A.* 40:55D-10g does not grant authority to a board to make factual findings and conclusions. The authority to find facts and make conclusions arises inherently from the board's quasi-judicial nature. What *N.J.S.A.* 40:55D-10g does is to impose an obligation on a board to include findings of fact and conclusions of law in a written resolution when it decides a case before it. If a board fails to adopt such a resolution, the statute provides that "any interested party may apply to the Superior Court in a summary manner for an order compelling the municipal agency to reduce its findings and conclusions to writing within a stated time . . . ."

It is too much of a stretch to convert the statutory imposition of adoption of a resolution with written findings and conclusions (intended to make for a better and judicially reviewable record)[5] to a statutory authorization to bar testimony for grounds other than as stated in the

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[5]See *Zilinsky v. Verona Bd. Of Adj.*, 105 N.J. 363, 372 (1987) (suggesting that the trial court remand the matter to the board for findings of fact and conclusions pursuant to *N.J.S.A.* 40:55D-10g); *Kaufmann v. Warren Tp. Planning Bd.*, 110 N.J. 557, 536 (1988) ("the key to sound municipal decision making is a clear statement of reasons for the grant or denial" of relief sought); *Pagano v. Edison Bd. Of Adj.*, 257 N.J. Super. 382, 392 (Law Div. 1992) (remand is

MLUL. Likewise, Mr. Bohn's reference to a planning board having authority to interpret an ordinance is not an example of direct statutory authority arising from *N.J.S.A.* 40:55D-10g. Rather, as set forth above, a planning board's authority in such a situation arises from the board's quasi-judicial nature.[6]

While a board is a quasi-judicial body and, as such, must act in a quasi-judicial manner, it is not a court and does not possess judicial powers. While a court has the power not only to decide a controversy in front of it but to bar the testimony of witnesses due to conflicts and other extraneous matters, see e.g. *Graham v. Gielchinsky*, 241 N.J. Super. 108, 112-14 (App. Div. 1990), aff'd, 126 N.J. 361 (1991), a board's powers are much more limited. Boards derive their powers directly from statutory authority, *Duffcon Concrete Products, Inc. v. Cresskill*, 1 N.J. 509, 515-16 (1949), which, in the case of boards of adjustment and planning boards, is the MLUL.

Quite simply then, even in the face of an undisputed conflict of interest, no statutory or other authority exists which authorizes a board to bar testimony of a professional witness based upon the witness's having a conflict. This is a circumstance with which the board has no power

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required where the board's resolution "does not reflect the deliberative and specific findings of fact necessary to sustain its conclusions").

[6]As set forth above in the article, I believe that a planning board has the inherent power to construe the meaning of the provisions of an ordinance where necessary to decide a case before it although only the board of adjustment is statutorily authorized to interpret the ordinance pursuant to *N.J.S.A.* 40:55D-70b. Because the MLUL grants the specific power to construe the zoning ordinance to the board of adjustment, however, once that board has exercised such power and rendered a decision (such as determining that jurisdiction to hear a particular matter is with the board of adjustment and not the planning board), that decision becomes final and binding on the zoning officer and other municipal enforcement officials, as well as the planning board. Cox §4.4-1 at 59. This answers in the affirmative Mr. Bohn's query as to whether a planning board is bound by an interpretation of the board of adjustment on the same issue.

to deal other than to bring the issue to the attention of the applicant and the witness and to advise both that they are proceeding at their own risk.

The witness' risk is that he/she will be in violation of the applicable State statute and/or code which regulates the practice of his/her profession. The applicant's risk is that any approval granted by a board under these circumstances could be subject to being overturned on the basis of the witness' conflict "tainting" the proceeding.

Examples of two laws which are applicable to professional engineers are cited in Cox, § 3-6 at 41-42. Cox cites a subsection of the regulations enacted by the State Board of Professional Engineers and Land Surveyors, N.J.A.C. 13:40-3.1(a)(4)(ii), which prohibits a professional engineer from participating in deliberations or actions of a governmental agency of which he is a member, advisor or employee with respect to services rendered in his private practice. Thus, an engineer who is doing work for a municipality or is under contract to do work for a municipality may be in violation of the regulations if he/she prepares plans and then testifies on behalf of an applicant before that municipality's planning board or board of adjustment as those actions could be deemed to be "participating in deliberations or actions" of these boards.

Similarly, the Local Government Ethics Law, cited by Cox (at 42), prohibits any local government officer or employee[7] from representing any party other than the local government

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[7]"Local government employee" is defined by *N.J.S.A.* 40A:9-22.3f as meaning "any person, whether compensated or not, whether part-time or full-time employed by or serving on a local government agency who is not a local government officer . . . ." A "local government officer" is defined by *N.J.S.A.* 40A:9-22.3g as meaning "any person, whether compensated or not, whether part-time or full-time: (1) elected to any office of a local government agency; (2) serving on a local government agency which has the authority to enact ordinances, approve development applications or grant zoning variances; (3) who is a member of an independent municipal, county or regional authority; or (4) who is a managerial executive or confidential employee of a local government agency . . . ."

in connection with any application pending before any agency in the local government in which he serves. See *N.J.S.A.* 40A:9-22.5(h). The engineer who prepares plans or testifies on behalf of the planning board or zoning board applicant may be in violation of the Local Government Ethics Law if those actions could be deemed to be "representing" the private applicant.

Violations of these regulations and this law can result in fines and/or disciplinary actions being taken against the professional by the State Board of Professional Engineers and Land Surveyors (in the case of the regulations) or the Local Finance Board in the Department of Community Affairs (in the case of the Ethics Law). Significantly, however, neither the regulations nor the Ethics Law authorizes a board of adjustment or planning board to take action against the witness. Additionally, while citing both laws, Cox does *not* state that a board of adjustment or planning board can bar a witness from testifying on the basis of violation of the laws. He merely notes the existence of the two laws and suggests "reference" be made to the regulations and that all board members "should be aware" of the Ethics Law.

Bohn assumes in his article that witness testimony which is given in violation of the Local Government Ethics Law "taints" an approval thereby resulting in a reversal with a remand for a new hearing. Bohn then states that it would be ridiculous to suggest that absent a specific direction in the remand order the board could not preclude the witness from testifying again at the new hearing. Bohn's assumption is incorrect and his argument is misplaced.

First, while some Local Government Ethics Law violations may well result in a court holding that the proceeding was tainted, other violations may well result in a finding of no taint and a court affirmance of the board decision. Second, I have never suggested that absent specific direction in a reversal and remand order, the board could not bar a witness found by a court to have a disqualifying conflict from testifying. Quite the contrary, I have argued above that a

board, as a quasi-judicial body, must respect judicial decisions. If a court were to find a disqualifying conflict on the part of a witness and hold that the conflict tainted the approval necessitating reversal and remand, the board should and must follow the court decision despite the fact that the remand order might not contain a specific direction to that effect. My point is that, absent a court decision on the issue, a board has no business determining the matter. Quite simply, a board hearing is not the proper forum for the issue to be resolved and the board does not have the authority to decide it.

The essence of Bohn's argument is that it is not economically efficient for a board to have its hand tied and not be able to bar testimony which is given in obvious conflict situations. I agree that it is not economically efficient. I disagree however that economic efficiency provides authority for a board to act in an area outside its jurisdiction. The answer to the economic efficiency argument is legislative action specifically authorizing local planning and zoning boards to act in this area.

Under existing law, however, a board can do nothing more than caution the witness on the record of the possible existing violations of the regulations and/or law and warn him/her that he/she will be proceeding at his/her own risk. As stated above, the applicant's risk is that any approval granted by a board under these circumstances could be subject to being overturned on the basis of his/her witness' conflict "tainting" the proceeding. At the very least, the board should advise the applicant on the record of this risk. The board may want to consider going as far as advising the applicant that, in the event of such a challenge, the board will submit itself to the decision of the reviewing court and will not defend the approval.[8] It will then be left to

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[8]While there is no express rule directly on point for matters in the Law Division, *R.* 2:6-4(c) can be cited to support such an action. The rule permits the filing of a statement in lieu of a brief in the Appellate Division where an appeal is from a quasi-judicial decision of a named

the applicant to decide whether to take the risk and proceed with the witness or withdraw the witness.

The only case law reference to this sort of conflict issue of which the author is aware is an unpublished Law Division opinion in *deCamp v. Lacey Tp. Zoning Board of Adjustment*, Docket No. OCN-L-1786-94 (Serpentelli, A.J.S.C.) (decided April 13, 1995). In *deCamp* the court concluded that the denial of the plaintiff's continuance request to accommodate his expert witness' schedule was arbitrary, capricious and unreasonable and was not harmless error in the context of the case. Slip opinion at 39. As such, the court ordered a remand so that plaintiff could have the opportunity to present expert testimony concerning the application. *Id.* Defendant applicant argued that plaintiff's proposed expert witness could not testify before the board in any event because of an alleged conflict of interest under the Local Government Ethics Law. *Id.* at 40. (The witness had briefly been retained as an independent expert as to that application by the board, but the hearings began *de novo* after he was terminated.) The court ruled that since this issue had not been thoroughly briefed by all sides, the issue would not be decided at that time. *Id.* The court concluded its opinion, however, by stating that "the plaintiffs should be forewarned of the risks that they might face in attempting to utilize [the witness] as their expert." *Id.*

Because of the absence of authority in the MLUL, the Local Government Ethics Law, and case law on the issue of conflicts on the part of an applicant's professional witnesses, I believe that a board has no power regarding this issue other than to bring the issue to the

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respondent which represents to the court that the general public interest does not require its adversarial participation and the parties directly affected by its decision may be expected to adequately present the issues.

attention of the applicant and the witness and advise both that they are proceeding at their own risk.

This advice would also apply to situations involving the testimony of unlicensed planners, engineers or architects and to instances where planners, engineers or architects are licensed are licensed but in some state other than New Jersey. I believe that a board has no authority to disqualify the professional or to refuse to hear the application but certainly may consider the fact that the witness is not a licensed professional in New Jersey when determining the weight of the testimony. The board should caution such individuals that they may be violating the law by testifying and should warn the individual and the applicant that they are proceeding at their own risk.

Bohn's primary response to my conclusion in this regard is another economic efficiency argument. While recognizing that the standards for acceptance of a witness as an expert in a planning or zoning case is quite low, Bohn argues that the "easiest measure of basic competency to offer expert testimony is basic licensure" and that a board "should not be required to waste its time" entertaining testimony it knows it will disregard.

While I concede that it may be inefficient not to be able to bar unlicensed professional testimony, especially when a board subsequently decides that it will give the testimony no weight, that inefficiency does not give a board the authority to take actions not granted to it by law. *N.J.S.A.* 40:55D-10e authorizes a board to exclude irrelevant, immaterial or unduly repetitious evidence. *N.J.S.A.* 40:55D-10d authorizes "reasonable" limitations as to the time and number of witnesses. Until and unless the Legislature amends the MLUL or some other law in these regards, the extent of a board's ability to achieve economic efficiency through barring testimony is limited to situations where the evidence being introduced fits into one or more of

the statutory categories, i.e. the evidence is irrelevant, immaterial or unduly repetitious or the number of witnesses or the length of the hearing is becoming unreasonably large.[9] Again the answer to the economic efficiency argument is legislative action specifically authorizing a board to act in this area.

An interesting and somewhat related issue arises when a corporate, partnership or other business entity applicant (other than a sole proprietorship) appears at a hearing without an attorney and one of the applicant's principals or the applicant's engineer, architect or real estate expert states that he or she is representing the applicant. Opinion 13 of the Supreme Court Committee on the Unauthorized Practice of Law concludes that an appearance before a board of adjustment, a quasi-judicial body, constitutes the practice of law and the practice of law is limited to persons admitted to practice by the New Jersey Supreme Court and subject to the Court's rules. Rule 1:21-1, governing who may practice law, prohibits all "business entities" other than "sole proprietorships" from representing themselves. Rule 1:21-1(c). Thus, representation of an applicant before a board of adjustment by anyone other than an attorney (except for an individual representing him or herself as an individual or as a sole proprietor) constitutes the unauthorized practice of law and violates *N.J.S.A.* 2A:170-78 and 79, subjecting

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[9]In addressing inordinate delays and inefficiencies in the hearing of a *Mount Laurel* site plan application, the court held in *Morris County Fair Housing Council v. Boonton Tp.*, 220 N.J. Super. 388, 400 (Law Div. 1987), aff'd, 230 N.J. Super 345 (App. Div. 1989): "While cross examination needs to be more effectively controlled, it would not be appropriate to require a party to make some preliminary showing of a need for cross examination or to place an arbitrary limit on its length." The court did, however, order changes in some non-hearing aspects of the board's application process such as directing that the board's professionals and applicant's professionals meet informally prior to hearing dates to try to work out differences between them. *Id.* at 400-01. The point is that a board can take only those actions in the name of efficiency that are allowed by the MLUL.

the violator to conviction for a criminal offense. *Slimm v. Yates*, 236 N.J. Super. 558 (Law Div. 1989) (Haines, A.J.S.C.).

There is no MLUL or case law authority allowing or directing a board to refuse to hear an application unless the applicant has an attorney present at the hearing to represent it.[10] The board's participation in such a hearing could, however, be viewed as the board aiding or abetting the unauthorized practice of law. In the absence of a board rule of procedure barring same[11] I believe that a board has no authority to refuse to hear such an application.

Absent a board rule of procedure, the most a board could do would be to caution the applicant and the non-attorney purporting to represent the applicant on the issue and warn them that they are proceeding at their own risk. As noted by the court in *Slimm v. Yates*, 236 N.J. Super. at 565, n. 3: "Unlawful practice of law is a high risk undertaking. It constitutes disorderly conduct. It would taint any planning board approvals obtained by Yates, thus raising questions as to their enforceability."[12] Warning the parties involved should also serve to insulate the board from any aiding or abetting type claim.

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[10]It should be noted that the former Zoning Enabling Act expressly permitted an applicant to be represented by an "agent." See Cox §27-2 at 425. The MLUL has no such provision.

[11]*N.J.S.A.* 40:55D-8a could provide authority and the means for a board to bar non-witnesses (professionals and otherwise) from participating in non-evidentiary matters by reason of violation of the law. As set forth in note 1 above, *N.J.S.A.* 40:55D-8a provides that "every municipal agency shall adopt and may amend reasonable rules and regulations not inconsistent with the act [the MLUL]." While a rule barring a witness from testifying due to a conflict would be inconsistent with the MLUL, a rule barring non-witnesses from appearing before the board to represent an applicant by reason of a violation of law (such as non-attorneys) would appear to be permissible.

[12]The offense of engaging in the unauthorized practice of law has recently been upgraded from a disorderly person's offense to a fourth degree crime under certain circumstances. See *N.J.S.A.* 2C:21-22.

This advise would also apply to conflicts involving non-witness professionals. One example would be an attorney appearing before a board in a situation where the applicant is the contract purchaser of property and it becomes obvious that the applicant's attorney also represents the contract seller in the underlying transaction. Although our Supreme Court has created a bright line rule prohibiting an attorney from representing both a buyer and seller in complex commercial real estate transactions, *Baldasarre v. Butler*, 132 N.J. 278, 295-96 (1993), a board is without authority to disqualify the attorney from appearing before it due to the conflict or to refuse to hear the application based on the conflict. Cox §27-2 at 426. In the absence of a board rule of procedure barring same, the board in this instance should caution the attorney of the appearance of the conflict and warn him or her that he or she will be proceeding at his or her own risk.

In summary, the MLUL authorizes a board to determine conflict of interest questions involving its members only and to bar testimony only if it is irrelevant, immaterial, unduly repetitious, unsworn or not subject to cross-examination. The MLUL makes no provisions for determining conflicts of interest or involvement or violations of law by professional witnesses, let alone disqualifying professional witnesses on those bases. The most a board can and should do is to bring the issues to the attention of the witness and the applicant and warn them that they are proceeding at their own risk.

As also set forth above, there is no direct MLUL or case law authority permitting a board to disqualify a non-witness participant or to refuse to hear a matter where a non-witness participant has a conflict or is in violation of law. As explained in note 11 supra, however, a board may be able to accomplish this result if it adopts a rule of procedure pursuant to *N.J.S.A.* 40:55D-8a dealing with the issue. Absent such a rule, however, the most a board could do is to caution the non-witness participant and the applicant and warn them that they are proceeding at their own risk.

BOARD RESPONSES TO CONFLICTS: A REPLY TO DRILL

By: Jay B. Bohn*

In the immediately preceding article, *Advising Boards on Conflicts*, Jonathan E. Drill reviews the statutory bases of the jurisdiction of planning boards and boards of adjustment[1] and concludes:

1.) A board may determine that one of its members has a conflict of interest under the Municipal Land Use Law with respect to a particular matter and may disqualify the member from acting on that matter, but may not do so with respect to a conflict of involvement under the Local Government Ethics Law.

2.) A board may not refuse to hear the testimony of an applicant's professional witness even when that professional's work for the applicant constitutes a conflict with the professional's duties to the municipality.

3.) A board may not refuse to hear the testimony of an applicant's professional witness based upon lack of licensure or other qualification of the professional.

4.) A board may not refuse to consider an application presented either by a non-attorney under circumstances under which doing so constitutes the unauthorized practice of law or by an attorney where doing so involves a conflict of interest on the part of the attorney.

5.) A board confronted with any of the latter three situations may only warn the applicant that proceeding is at the applicant's own risk and that the board will not defend an approval in the event of litigation.

I agree with the first part of Drill's first conclusion, but for reasons derived from the statutory scheme and decisional integrity, I disagree at least to an extent with Drill's final four conclusions. I believe that a board may determine a witness's competency and may preclude incompetent evidence and need not proceed to a decision which will be tainted by conflicts of

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[1]As used herein "board" refers to a municipal planning board or board of adjustment.

interest or the unauthorized practice of law. In short, I have a more robust view of the authority of a board.

1. Board Member Conflicts of Interest.

Drill first notes that board members are prohibited from acting in any matter in which they have a direct or indirect personal or financial interest.[2] *N.J.S.A.* 40:55D-23(b), -69. Therefore, Drill concludes that these statutory provisions authorize a board to determine that one of its members has a conflict of interest and to disqualify the member from participating in the matter. Drill distinguishes, however, conflicts of "involvement" under the Local Government Ethics Law, *N.J.S.A.* 40A:9-22.1 *et seq.* Given a situation where a board member has "involvement" under the Local Government Ethics Law but not "interest" under the MLUL, Drill would not permit the board to recuse the member.

While I agree that a board may determine that one of its own members is disqualified from acting on a particular matter by *N.J.S.A.* 40:55D-23(b) & 69, I do not agree that such authority arises solely from the statutory prohibitions cited. Nothing in those sections (or any other part of the Municipal Land Use Law) expressly gives a board the power to judge the conflicts of interest of its members. That authority, if it exists, must rest on some other basis.

That authority comes from a board's power to act in the first place. The duty to make findings of fact and conclusions of law,[3] *N.J.S.A.* 40:55D-10(g), emphasizes that a board's

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[2]What constitutes a conflict of interest for a board member is beyond the scope of this article.

[3]Although boards are often described as *quasi*-judicial, their duty to make conclusions of law has not been the subject of much comment. Of course *N.J.S.A.* 40:55D-70(a) expressly authorizes a board of adjustment to interpret the zoning ordinance, but a planning board may well have to do so in connection with any application before it. Given the "one stop shopping" philosophy of the MLUL and the express direction that both planning boards and boards of adjustment make conclusions of law, an application where a difficult question is presented need

decisions must be guided by specific standards. A board exercising its powers under the MLUL with respect to an application of necessity at least implicitly determines whether it has the power to grant the relief requested and whether its jurisdiction has been properly invoked. It must also see that it renders its decision in accord with the required procedure.[4] Participation by a member ineligible by reason of conflict would taint the procedure.

There is also the reality that participation by an ineligible member would be grounds for reversal of the board's decision. Fundamentally implicit in the existence of standards for a board's decision, the requirement of factual findings and legal conclusions and the availability of judicial review is the expectation that a board will make decisions it believes to be legally defensible. I call this concept "decisional integrity." A decision which is bound to be reversed does not meet that test.

Because Drill believes that the source of the board's recusal power is the MLUL, it is entirely logical that he would deny a board the power to act if the disqualification arises from another source, such as the Local Government Ethics Law. In contrast, because I base a board's

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not first go to the board of adjustment for an interpretation and then to the planning board for a decision on the application.

Of course, a board's legal conclusion is reviewed de novo and is not entitled to any deference. *Urban v. Manasquan Planning Bd.*, 238 N.J. Super. 105, 111 (App. Div. 1990), aff'd, 124 N.J. 651 (1991). Query whether a planning board is bound by a prior interpretation of the board of adjustment on the same issue. If a board of adjustment decision is to be binding on a more general basis, the municipality should take the administrative steps necessary to see that board of adjustment interpretations are available to other boards, officials and the general public. Relatedly, to what extent are reported Law Division decisions binding on a municipal board? Does it make a difference whether the decision arises from the same county or vicinage?

[4]The same is true about any governmental actor, although a written explication of the decision-making process is not always required. A police officer seeing a car parked at an expired meter applies law to facts and issues a parking ticket. The action is presumptively valid. *Southern Burlington Cty NAACP v. Mount Laurel Tp.*, 92 N.J. 158, 305 (1983).

power in this instance on its power to act and need for decisional integrity (including the obligation to make legally defensible positions), I believe that boards may have this power even if the conflict is one of only "involvement" and not "interest." That case is strongest if participation in the decision by an involved member taints the decision the way participation by an interested member would. In absence of precedent, board attorneys will have to use their best professional judgment to answer this question. The case for a board's power to recuse its members for conflicts of involvement is less strong if such conflicts do not vitiate the board's decision. However, the member's participation in such a case is still improper (and sanctionable and cause for removal), so a respectable argument can be made that such participation would impugn the board's integrity.

Drill states that *Fischer v. Bedminster Tp.*, 5 N.J. 534, 542 (1950), stands for the proposition that a board may not declare a zoning ordinance arbitrary and unreasonable. *Fischer* does hold that a challenger of a zoning ordinance as arbitrary and unreasonable has no administrative remedy to exhaust. I do not believe, however, that *Fischer* means that a board is bound to follow an obviously illegal ordinance provision, such as a provision purporting to allow a board of adjustment to grant a variance under *N.J.S.A.* 40:55D-70(d) with fewer than five affirmative votes. Administrative agencies have the power to determine even constitutional questions where necessary to a decision within their jurisdiction. *Desilets v. Clearview Regional Board of Education*, 137 N.J. 585, 594-97 (1994). Thus in the course of a specific application a board may have to resolve conflicting legal requirements and may indeed have to ignore an ordinance provision that conflicts with the MLUL or other law.

Thus, as part of its duty to find facts and make conclusions of law in order to act upon an application, a board may find that one of its members is prohibited from acting on the

application and may rule accordingly.[5]

2. Witness Conflicts of Interest.

Drill then contrasts the absence of any MLUL provision respecting conflicts of interest on the part of an applicant's professional (i.e. expert) witnesses. *N.J.S.A.* 40:55D-12(e) only expressly permits a board to exclude evidence if it is irrelevant, immaterial or unduly repetitious and states that the technical rules of evidence do not apply. *N.J.S.A.* 40:55D-10(d) requires that testimony be taken under oath or affirmation and be subject to cross-examination. Drill thus concludes that evidence may only be excluded "*only if* it is irrelevant, immaterial, unduly repetitious, unsworn or not subject to cross-examination."

The statutory inapplicability of technical rules of evidence requires a brief foray into the broader field of the law of evidence generally to understand its context.

Codification of the New Jersey law of evidence was initiated by the enactment of the Evidence Act, 1960 (L. 1960, c. 52), which adopted definitions and rules relating to the scope of the rules and privileges and established a mechanism for the adoption of additional rules with joint participation of the Supreme Court and Legislature.[6] The rules relating to privileges were

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[5]No unusual questions arise if a board mistakenly does not preclude a member from participating; the normal rules relating to a member's acting in the case of a conflict would apply. But what if the board rules there is a conflict when none exists? Is it only the board member or does any applicant or objector have standing to challenge that action (and any resulting decision on an application)?

[6]The Supreme Court has twice used the authority provided by the Evidence Act to adopt comprehensive rules of evidence—the Evidence Rules in 1967 (which incorporated the statutory definition/scope and privilege rules) and the New Jersey Rules of Evidence in 1993 which superseded the definition and scope statutes.

This statutory mechanism has allowed the Supreme Court to prescribe codes of evidence without having to decide whether it has the independent power to do so under its constitutional authority over practice and procedure in the courts, N.J. Const. (1947), Art. VI, §2, ¶3. See *Busik v. Levine*, 63 N.J. 351, 367-68 (1973) (noting statutory arrangement obviated need to

applicable "in all cases and to all proceedings and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed." Rule 2(1); *N.J.S.A.* 2A:84A-16(1) (superseded). In a departure from then current practice, the other rules of evidence were also made applicable to formal hearings before administrative agencies, except pursuant to statute. Rule 2(3); *N.J.S.A.* 2A:84A-16(3) (superseded). The exception then swallowed the rule when the Legislature adopted the Administrative Procedure Act and made rules of evidence inapplicable to contested cases. *N.J.S.A.* 52:14B-10(a). It is my view that *N.J.S.A.* 40:55D-12(e) was intended to create the same exception for municipal hearings under the MLUL.[7] Since the rules of evidence are not co-extensive with the law of evidence, N.J.R.E. 102, the statutes eschewing technical rules of evidence do not mean that a board cannot apply general principles of the law of evidence.[8]

Drill refers to William M. Cox, N.J. Zoning and Land Use Administration 41-42 (1995), for two provisions of law said to prohibit conflicts of interest on the part of certain professional witnesses, those who happen to be members of or employed by the local government. Of the two

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decide whether rules of evidence were procedural or substantive); but c.f. *Jacober v. St. Peter's Medical Center*, 128 N.J. 475, 493-97 (1992) (adopting federal hearsay exception for learned treatises by judicial decision in advance of action on New Jersey Rules of Evidence).

Of course, if rules of evidence were deemed procedural and adopted solely by the Supreme Court, they would not apply to administrative agencies because the Supreme Court's constitutional authority extends only to procedure in the courts.

[7]The recent revision of the Rules of Evidence makes those rules (other than privileges) inapplicable to administrative agencies. N.J.R.E. 101(a)(3).

[8]The strong language relating to the scope of the privileges and the placement of the provision applying the balance of the rules to formal administrative hearings (to which *N.J.S.A.* 40:55D-12(e) was an exception) lead me to believe that the rules of privilege apply with full force in an administrative hearing.

cited limitations, however, one does not on its face prohibit testimony in a private capacity and the other postdates the MLUL.

The regulations of the State Board of Professional Engineers and Land Surveyors define as professional misconduct the participation by a licensee, while in the public service as a member, advisor or employee of a governmental agency, in the "deliberations or actions of such agency" with respect to services rendered by the licensee (or an associated firm or organization) in private practice. *N.J.A.C.* 13:40-3.1(a)(4)(ii). Because testimony is not participation in deliberations, the regulation does not preclude testimony on behalf of a private applicant. The rule only prohibits the licensee from being part of the deliberative process; it prohibits action in a public capacity, not a private one. A board may enforce the prohibition of this regulation under the same logic that it can preclude one of its members from acting in the case of a conflict of interest if the licensee is a board member and to the extent the licensee is "board personnel" the board must have the authority to recuse the licensee.

The Local Government Ethics Law clearly prohibits local government officers and employees from "representing"[9] a party other than the local government before any agency of the local government. *N.J.S.A.* 40A: 9-22.5(h). However, this law was adopted in 1991, some 15 years after the MLUL. If the Local Government Ethics Law is the only substantive basis for preclusion of testimony, it is not surprising that the MLUL does not specify a procedure therefor.

Thus, if prior to the adoption of the Local Government Ethics Law there was no prohibition against a municipally-retained professional's testifying on behalf of a private

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[9]Although the term is not defined in the Local Government Ethics Law, I assume for the purposes of this article that a professional witness "represents" an applicant as that law uses that term.

applicant as an expert, it is not surprising that there has been no case or statutory provision answering the question of how the board is to deal with the situation. This absence should not be interpreted as an intentional denial of authority.

Once again, a board faced with this situation is going to have to render conclusions of law. Why cannot a board "conclude" that the presentation of testimony by a professional who qualifies as a local government officer or employee is contrary to law? The board could also reasonable conclude that testimony by such a person would taint its decision. Assuming that the Legislature did not intend a board to grant an approval that must be reversed, it does not seem a stretch that upon concluding that testimony by a particular professional would be a violation of the Local Government Ethics Law, a board may preclude the testimony in order that its decision be sustainable.

Suppose that a board allows an assistant municipal engineer to testify on behalf of a private applicant and grants the requested approval. Further suppose that an objector files an action in lieu of prerogative writs to challenge the approval solely on the basis of the illegal engineering testimony. If the court determines that the testimony tainted the approval, it would reverse and (most likely) remand for a new hearing. It would be ridiculous to suggest that absent specific direction in the remand order the board could not preclude the same engineer (assuming continued municipal employment) from testifying again at the new hearing. What if the same situation arises in another case? Does the board have to go through the charade of granting an approval it knows from experience will be reversed? And if, as this article assumes, testimony in violation of the Local Government Ethics Law taints an approval, why does the board have

to wait to be burnt the first time?[10]

Or look at it from the other angle. Suppose the board precludes the illegal testimony and the applicant appeals. Is the reviewing court going to order the board to admit testimony when if it does so any approval will be reversed?

Accordingly, I believe that the adoption by a board of a rule of procedure under *N.J.S.A.* 40:55D-8(a) would not be inconsistent[11] with the MLUL and that even without such a rule, a board need not entertain testimony which violates the Local Government Ethics Law.[12]

3. Witness Competency.

The competency of a witness to testify is a different question from conflict of interest. It is common for professional witnesses, at least those testifying for the first time before a particular board, to provide a statement of their qualifications and for the board to be asked to accept the witness to give particularized professional testimony. While the standard for acceptance is not high, a board should not be required to waste its time listening to clearly

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[10]I read Drill to argue that until there is a published court ruling resolving the question of whether and to what extent a conflict of involvement under the Local Government Ethics Law invalidates a decision, a board cannot consider the question. I believe that boards not only have the power but the duty to resolve legal questions of first impression if necessary to their decisions. And, if a question of conflict is fairly raised, I also believe that that question must of necessity be resolved as part of the decision.

[11]The MLUL requires that boards adopt rules and regulations "not inconsistent with this act or with any applicable ordinance . . . ." Query whether there is a difference between "not inconsistent" and "consistent."

[12]The conclusion here is limited to the Local Government Ethics Law because that appears to be the only substantive prohibition against a professional's action in a private capacity. A different question might be presented if the asserted conflict of interest were between two private clients.

incompetent testimony.[13] With typical engineering and planning testimony, the easiest measure of basic competency is no doubt whether or not the witness is licensed to practice those professions. Although a professional licensed in other state but not in New Jersey might well have the basic competence to offer such testimony, so doing would itself constitute illegal practice of the profession.[14]

Because the MLUL does not expressly give a board authority to preclude such unlicensed testimony, Drill concludes that a board must listen to the testimony, although the board can accord it no weight. The answer is not that a board should not be required to entertain testimony it knows it will disregard. An applicant should be entitled to make a record after all. It is difficult to imagine that a board would be able to prevent a witness from testifying because the witness is a well-known liar with no credibility.

An aspect of the concept of decisional integrity mentioned earlier is that a board should conduct its procedure in accordance with law. Testimony which constitutes the unauthorized practice of a profession is a violation of the law. Although a planning board or board of adjustment is not charged with enforcement of the various professional licensing laws, it need

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[13]Drill characterizes this position as an economic efficiency argument, but that is not my intention. I do not suggest that a board may refuse to entertain "inefficient" testimony, but where a witness is affirmatively prohibited by other law (such as those requiring licensure for the practice of certain professions) from giving the testimony, the board should not be compelled to hear it. If, as I assume, illegal testimony cannot be a proper factual foundation for board action (albeit for extrinsic policy reasons and not necessarily because of any substantive inadequacy of the particular testimony), the board will not be permitted to consider it in rendering a decision. It is in this context that I describe the entertainment of illegal testimony as a waste of time.

[14]This circumstance can be distinguished from at least some situations where expert testimony is offered in court and the giving of the testimony is not practice of the profession at issue. Thus, a physician giving expert testimony in a medical malpractice case need not be licensed in New Jersey. *Hudgins v. Serrano*, 186 N.J. Super. 465, 473-76 (App. Div. 1982).

not just sit back and allow such a law to be violated before it. Such inaction by a board may not rise to the level of aiding and abetting the unauthorized professional practice, but it does taint (although perhaps not to the point of invalidation) the board's own proceedings. Thus, to protect the integrity of its own process, a board should be able to prevent an unlicensed professional from violating an applicable licensing law in proceedings before it.

4. Attorneys.

Related but somewhat different questions are presented by two scenarios regarding legal representation for the applicant. Presentation of a board of adjustment or planning board application constitutes the practice of law and must be done by a duly licensed attorney, except in the case of an individual presenting his or her case pro se. *Slimm v. Yates*, 236 N.J. Super. 558, 561-63 (Ch. Div. 1989). Although not squarely so holding, *Slimm* strongly suggests that any approval secured by such unlawful representation would be tainted and unenforceable. 236 N.J. Super. at 565, n. 3.

What then is a board to do if faced with a business entity applicant where no attorney is present or an individual "represented" by a real estate broker or other non-attorney?

The attentive reader will readily guess that I maintain that the board can render a conclusion of law that such representation constitutes the unauthorized practice of law. A board could (and probably should) adopt a rule of procedure to cover the situation.[15] Even without a rule, a board should be able to avoid rendering a tainted decision.

A different situation might well be presented where the applicant is represented by an attorney who is in a conflict of interest situation. The requirement for legal representation at

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[15]As the MLUL is silent on the issue, a board rule tracking the Supreme Court's regulation of the practice of law should not be deemed inconsistent with the MLUL.

least represents a bright line rule; conflict of interest questions may not be so clear, and there are situations where an attorney can proceed notwithstanding a conflict.

To the extent an applicant's attorney is a local government officer or employee, then the board should be able to disqualify the attorney for the same reasons it could preclude such a person from testifying as an expert witness.

The more difficult question is presented where the conflict is between private clients. Here I agree with Drill that a board probably should take no action.[16] Although an attorney's proceeding in the face of a conflict of interest may be unethical or subject the attorney to potential liability for malpractice, it is not the unauthorized practice of law or otherwise illegal. Nor is it so clear that any approval in that situation would automatically be invalid.[17]

Thus, there is less need for a board to explore the issue to protect the integrity of its process and any conclusion of law respecting a private conflict would be more tangential to the main issue.

Therefore, although a board may insist that an applicant (other than an individual

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[16]Despite the MLUL's definition of "developer" as including any person with an enforceable proprietary interest in any land proposed to be included in the proposed development, *N.J.S.A.* 40:55D-4, some boards nevertheless require the owner to consent to the application. Cf. *Ric-Cic Co. v. Bassinder*, 252 N.J. Super. 334 (App. Div. 1991) (99 year lessee has standing to obtain development approval despite objection by owner). If the applicant is a contract purchaser, does an attorney different from those representing the parties in the underlying real estate transaction have to present the application on the theory that both sides are parties to the application?

[17]I am aware of no land use case where an approval was challenged on the basis of a private conflict of interest on the part of the applicant's attorney. In *Wolpaw v. General Accident Insurance Company*, 272 N.J. Super. 41 (App. Div. 1994), a law firm was assigned by the insurance carrier to represent multiple defendants in a personal injury case. When the verdict exceeded the policy limits, the clients sued the carrier and the law firm. Although the court had no difficulty finding a conflict of interest on the part of the law firm in proceeding with the multiple representation, there was no suggestion that the judgment obtained in the face of such representation was somehow vulnerable.

proceeding pro se) be represented by an attorney and may disqualify an attorney whose representation would violate the Local Government Ethics Law, it should not concern itself where the conflict is between the interests of private clients.

Conclusion.

In the course of considering applications for development, planning boards and boards of adjustment may be called upon to consider legal issues about the presentation of applications before them, such as the qualifications of, or conflict of interest on the part of, professional witnesses testifying before them. Although the MLUL might not expressly grant such boards the power to decide these issues, they must do so in order to render decisions that are integruous.

POSTSCRIPT TO DRILL - BOHN DIALOG

While I found the Drill - Bohn "Dialog" interesting and thought - provoking. I disagree with the one point on which they were in argument.

They both feel that a board may force a member to step aside if the board perceive that member has a conflict. I do not.

I believe that right has been preempted. See Traino v. McCoy, 187 N.J. Super. 638 (Law Div. 1982). Our Supreme Court has held that the Local Government Ethics Law (N.J.S.A. 40A:9-22.1 et seq.) now applies to Land Use issues. Wyzykowki v. Rizas, 132 N.J. 509 (1993). See also Case 20 in this issue.

Thus, in my view, the jurisdiction to deal with this issue lies exclusively with the Courts and the New Jersey Local Finance Board or a municipal ethics board, if there be one.

M.A.P