

CITY OF WEST DES MOINES, IOWA
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION

TO: West Des Moines Plan and Zoning Commission

FROM: Richard Scieszinski, City Attorney

DATE: October 21, 2022

RE: Conflicts of Interest and Voting

A question has arisen regarding what constitutes a conflict of interest and what is the procedure when a Plan and Zoning Commissioner abstains from voting, either due to a conflict of interest or otherwise.

The most important policy underlying conflict of interest provisions is to maintain public confidence in government. The two criteria which determine whether a conflict of interest exists are actions in which a private financial benefit is derived or actions which serve to undermine the credibility of and confidence in government.

Iowa Code 362.5 deals with conflicts of interest in which a private benefit is derived. It pertains to city officers regarding public contracts, which is defined as any claim, account, or demand against or agreement with the city, express or implied.

As an individual elected or appointed to a fixed term and exercising some portion of power of the City, a member of the West Des Moines Plan and Zoning Commission is a city officer and subject to this statute. Iowa Code 362.2(15). See also *Op. Atty. Gen. (Schwartz) 1969 WL 181670*; *Op. Atty. Gen. (Mincks) 1965 WL 15850*.

The statute prohibits a Plan and Zoning member from having an interest, direct or indirect, in any contract or job of work or material, or the profits of such a contract or services to be furnished or performed for the city of West Des Moines. If it is determined that a member has such an interest, the member has a conflict and must abstain from voting. However, the statute exempts the following:

- 1) contracts made by the city, upon competitive bid in writing, publicly noticed and opened;

- 2) contracts in which a Plan and Zoning member has an interest solely by reason of employment, or has a stock interest by reason of stockholdings of less than five percent¹ of the outstanding stock of the corporation, or both, if the contracts are made by competitive public bid in writing, (the competitive bid qualification does not apply to a contract for professional services not normally competitively bid); or
- 3) if the remuneration of employment will not be directly affected as a result of the contract and the duties of employment do not directly involve the procurement or preparation of any part of the contract; or
- 4) contracts in which the Plan and Zoning member has an interest if the contracts were made before the member was appointed. The member would, however, have a conflict of interest regarding renewal of the contracts; or
- 5) contracts not otherwise permitted by this statute, for the purchase of goods or services which benefit the Plan and Zoning member if the purchases benefitting the member do not exceed a cumulative total purchase price of six thousand dollars in a fiscal year.

In addition to the prohibitions of Iowa Code 362.5, the Iowa legislature also enacted Iowa Code 403.16. Due to the broad and sweeping authority delegated to municipalities under the urban renewal law, this statute is intended as an additional safeguard to prevent public officials from gaining personal advantage or benefit when an urban renewal project is being considered. This statute prohibits a Plan and Zoning member from voluntarily acquiring a personal interest, either directly or indirectly, in any urban renewal project, or in any property included or planned to be included in any urban renewal project, or in any contract or proposed contract in connection with an urban renewal project.

If the member presently owns or controls, or has owned or controlled within the preceding two years any interest as described above, whether direct or indirect, in any

¹ The language of the statute provides an exemption when “the member has a stock interest by reason of stockholdings when less than five percent of the outstanding stock of the corporation is owned or controlled directly or indirectly by the member or the spouse or immediate family of the member.” Iowa Code 362.5(e)(i).

property which the member knows is included or planned to be included in an urban renewal project, the member is required to immediately disclose this fact in writing, with the disclosure entered in the minutes, with the member prohibited from participating in any action affecting the property. Where the property acquisition is not voluntary, the Plan and Zoning member is required to immediately disclose the member's interest in writing, with the disclosure entered in the minutes.

On its face this statute, like Iowa Code 362.5, pertains to a financial or pecuniary benefit that may be derived by a Plan and Zoning member. However, the Iowa Supreme Court has held that this statute makes any interest of the member involving an urban renewal project, pecuniary or otherwise, sufficient to create a potential conflict and disqualify the member from voting. *John B. Wilson et al. v. Iowa City, Iowa et al.*, 165 N.W.2d 813 (Iowa 1969).

The Court has held that the potential for such a conflict is dependent upon the individual facts and circumstances. As an example, it stated that when a public official is committed to give loyalty and dedication to both the official's public office and the official's private employer, and those two interests possibly conflict, the official "is faced with pressure and choices to which no public servant should be unnecessarily exposed." Id. at 823. The Court stated that if the official's private employer would be a beneficiary of the urban renewal project, the official has a conflict of interest between the official's public duty and the official's loyalty to his private employer. The Court stated that in such a case, the provisions of Iowa Code 403.16 take precedence over the exemptions provided by Iowa Code 362.5 and the commission member must abstain from voting due to a conflict of interest.

Therefore, in determining if a conflict of interest exists due to a member deriving a financial or pecuniary benefit, the prohibitions and exemptions of Iowa Code 362.5 apply. However, if the member is voting on an issue involving an urban renewal project, additional consideration must be given to any interest a member has in the project, including but not limited to past, present or anticipated future property ownership, current employment with an entity having an interest in the project, or interest or potential interest in a contract or contracts related to or deriving benefit from the project. These considerations are not subject to the exemptions of Iowa Code 362.5.

In all circumstances the general intent of any conflict of interest provision is to prevent, directly or indirectly, a public official from profiting due to their relationship with the city. It is generally improper or illegal for a public official to vote on any question in which the official is personally interested or where the official's personal rights will be affected.

The second criteria in determining if a conflict of interest exists is when an action taken by a public official is inconsistent with the public good or serves to undermine public confidence, even when no statute specifically prohibits the action. Unlike a conflict of interest which can be identified and addressed by statute, it is often within the sole purview of the public official to determine if the official has a non-statutory conflict of interest. In making such a determination, consideration is often given to, among other things, the ability of the official to fairly and objectively consider the issue, the potentially conflicting loyalties of the official regarding the issue, and the potential appearance of impropriety created if the official votes on the issue.

These types of issues are often referred to as ethical conflicts of interest as opposed to statutory, or legal conflicts of interest.

The West Des Moines Plan and Zoning Commission Rules of Procedure address two types of voting abstentions. Rule of Procedure 4.1.2, which addresses *Abstentions Due to Conflicts of Interest*, states:

If it is determined by any member of the Plan and Zoning Commission that he or she has a conflict of interest on an agenda item, said member shall so declare the nature of their conflict prior to commencement of discussion of the agenda item. Upon declaration of their conflict of interest they shall excuse themselves from the dais. They shall have the right to address the Commission from the floor. Abstentions due to conflicts of interest shall not count as votes for the purpose of determining whether there has been an affirmative vote of a majority of the members present but shall be counted for the purpose of determining whether a quorum is present. The vote of member(s) who abstain due to conflict of interest shall be registered as an abstention.

This rule requires a Plan and Zoning member to declare a conflict of interest and abstain from voting if the member's interest in the action to be taken meets the criteria set forth in Iowa Code 362.5 or Iowa Code 403.16. In such a situation the Plan and Zoning member has a legal conflict of interest requiring abstention.

Although not prohibited by statute, a Plan and Zoning member may also declare an ethical conflict of interest if the member articulates the reasons creating the conflict, thereby requiring abstention.

As required by the Rules of Procedure, in either situation the member must declare the nature of the conflict prior to commencement of discussion of the item and excuse themselves from the dais, with the member's vote subsequently registered as an abstention.

Rule of Procedure 4.1.7, which addresses *Passing on a Vote/Abstention Not Due to a Conflict of Interest*, states:

Any member of the Plan and Zoning Commission who has not declared a conflict of interest but casts a "pass" vote or abstains from voting shall have that vote registered as a no vote.

This rule allows a member to participate in discussion of the item but to subsequently abstain from voting, with no requirement that a reason be given for the abstention. Any vote for which a member abstains without declaring a conflict of interest is registered as a "no" vote. This rule applies to any member who is unable to declare a conflict of interest but who chooses to abstain from voting.