

**LETTER OPINION**  
**95-L-60**

March 9, 1995

Mr. Doug Mattson  
Ward County State's Attorney  
Ward County Courthouse  
Minot, ND 58701

Dear Mr. Mattson:

Thank you for your letter requesting clarification of the December 13, 1994, Attorney General's opinion addressed to you. You request clarification regarding the meaning of the appearance of impropriety doctrine.

In the December 13, 1994, opinion, I concluded:

If the court was presented with a case in which a commissioner had a financial interest in the legislative matter being voted upon, and there was no statute which could be interpreted as requiring the commissioner to vote rather than abstain, it is my opinion that the court would look to the appearance of impropriety doctrine to determine whether the commissioner could vote. The North Dakota Supreme Court may determine that a county commissioner who has a personal financial interest in a matter of a legislative nature before the county commission may not vote on that matter.

The appearance of impropriety doctrine has been applied by the North Dakota Supreme Court to determine whether a judge has acted in a manner that would give the appearance that the judge was not impartial in the judge's decisionmaking. See, e.g., Farm Credit Bank of St. Paul v. Brakke, 512 N.W.2d 718 (N.D. 1994), and Sargent County Bank v. Wentworth, 500 N.W.2d 862 (N.D. 1993). The North Dakota Code of Judicial Conduct provides that a judge is required to avoid impropriety and the appearance of impropriety in all of the judge's activities. Canon 2. The North Dakota Rules of Judicial Conduct require a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be

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questioned." Section 3E(1).

Because there is no North Dakota statute which would apply to prohibit a county commissioner from voting on a matter in which the county commissioner has a financial interest, it is my opinion that, if the matter was before the North Dakota Supreme Court, the court may determine that, similar to a judge, a county commissioner has a duty to refrain from making a decision on a matter in which the county commissioner has a personal financial interest. Thus, in the December 13, 1994, opinion, I concluded, "it is my opinion that the court would look to the appearance of impropriety doctrine to determine whether the commissioner could vote."

The factual situation at issue involves a county commission voting on a zoning ordinance. The North Dakota Supreme Court has determined that the enactment of zoning ordinances is legislative, as opposed to judicial, in nature. Shaw v. Burleigh County, 286 N.W.2d 792, 795 (N.D. 1979). In applying the appearance of impropriety doctrine to a legislative matter, I believe the North Dakota Supreme Court would take into account the type and degree of personal interest involved. The more the type of interest is unique to the county commissioner, and the more substantial the interest, the greater the likelihood of the North Dakota Supreme Court's determining that the interest involved raises a reasonable question as to the county commissioner's impartiality.

My opinion that the North Dakota Supreme court would apply the appearance of impropriety doctrine to local zoning decisions is supported by the recognition of potential bias in local decisions involving zoning:

[C]ertain 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.

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[T]he 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.

. . . .

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.

Mark Cores, "*Policing Bias and Conflicts of Interest in Zoning Decisionmaking*" 65 N.D.L.Rev. 161, 196, 197, 202 (1989).

Recognizing these concerns, it is likely the North Dakota Supreme Court would apply the "appearance of impropriety" doctrine, or some similar doctrine, to zoning decisions. See generally id. at 197-216 for discussion of guidelines and principles that apply to regulation of bias and conflicts of interest in local zoning decisions.

In conclusion, neither North Dakota statute nor North Dakota case law prohibits voting by a county commissioner who has a personal financial interest in a matter. However, it is my opinion that if the matter was before the North Dakota Supreme Court, the court would look to the appearance of impropriety doctrine to determine whether a county commissioner who has a personal financial interest in a matter of a legislative nature before the county commission may vote on that matter.

To avoid the whole issue of impropriety, it is advisable for your commissioner not to vote.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

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