

Best Practices Study:

Conflict of Interest Process of Minneapolis Development Related Boards and Commissions

Background - Minneapolis Development Related Boards and Commissions

Minneapolis City Planning Commission

The Minneapolis City Charter (“Charter”), Chapter 13, establishes and set forth the rules under which the Minneapolis City Planning Commission (“MCPC”) operates. The MCPC reviews and recommends re-development plans, including the City’s comprehensive development plan; reviews and recommends changes to the City’s zoning code; and reviews and recommends exceptions to the zoning code for private parties seeking to develop property. (Minneapolis Charter, Ch.13, § 2.) Applications for rezonings, street or alley vacations, Zoning Code text amendments, and comprehensive plan amendments are forwarded to the Zoning and Planning Committee of the City Council. (M.C.O. § 525.130(4) & § 525.180.) Decisions are final on all other MCPC business unless appealed to the City Council. (*Id.*)

The Charter requires the MCPC to have ten total members:

- The Mayor (or designee);
- A member of each of the following:
 - Hennepin County Commission Representative
 - City Council Representative
 - City Council Appointee
 - School Board
 - Park Board
- Four Minneapolis citizens appointed by the Mayor with the approval of the City Council.

(Minneapolis Charter, Ch. 13, § 1). The citizen members are selected using the City’s open appointment process. (M.C.O. § 14.180(e-m).) Historically, MCPC membership has included various planning professionals from the community.

The MCPC prohibits members from “participat[ing] in a decision process where a conflict of interests occurs as defined by the City’s Ethics In Government Code” (“Ethics Code”). (BYLAWS AND RULES OF PROCEDURE OF THE PLANNING COMMISSION, § 7.2.) Under § 7.2, members who have a conflict of interest

must disclose the conflict and act in accordance with the provisions in the Ethics Code. (*Id.*) The recusals per year due to potential conflict of interest of the MCPC's current members are depicted in the chart below:

Member	2012	2011	2010	2009	2008	2007	2006	2005
Schiff								
Tucker	2	2	5	3	3	1		
Motzenbecker	9	1	2		1	2	1	
Huynh	15	13	8	3	6	14	3	
Luepke-Pier	2			1				
Cohen	9							
Wielinski								
Mammen	2							
Kronzer	5							

Heritage Preservation Commission

Minneapolis City Ordinances § 599.120, pursuant to authority granted by Minnesota Statutes §§ 138.71 through 138.75 and § 471.193, establishes and sets forth the rules under which the Minneapolis Heritage Preservation Commission (“HPC”) operates. The HPC, relative to Minneapolis’ designated historic districts, has certain powers and duties, including:

- Providing special zoning conditions;
- Imposing regulations governing construction, alteration, demolition and use; and
- Adopting other measures appropriate for the preservation, protection and perpetuation of designated historic districts.

(MINN. STAT. § 138.74.) HPC decisions related to the designation of historic property and districts are forwarded to the City Council for final approval. All HPC land use decisions are final unless appealed to the City Council. (M.C.O. § 525.130(4) & § 599.190.)

Minneapolis Ordinances § 599.120 sets forth the HPC membership requirements and provides that the ten members of the commission should have, among other things, an interest, knowledge or expertise in historic preservation. (M.C.O. § 599.120(c).) By ordinance, the members are:

- The Mayor’s representative
- If available, at least 2 registered architects;
- If available, at least 1 licensed real estate agent or appraiser;
- If available, at least 1 resident or owner of a landmark or property in a historic district;
- If available, at least 1 member of the Hennepin County Historical Society.

(*id.*) With the exception of the Mayor’s representative, the citizen members are appointed by the City Council using the City’s open appointment process. (M.C.O. § 599.120(c) & § 14.180(e-m).) Historically, the appointment process has produced sufficient candidates of the various professional representatives.

HPC members cannot participate in deliberation or voting on matters in which they have a potential conflict of interest as defined by the Ethics Code. (BYLAWS OF THE HERITAGE PRESERVATION COMMISSION, § 4.9). Members found to have a potential conflict of interest must disclose information relating to the conflict. *Id.* Once a disclosure is made, “a member may provide factual information relating to a matter before the Commission, provided the action to be taken would not substantially affect the financial interests of the member, a person related to the member or an associated business.” *Id.* The recusals per year due to potential conflict of interest of the MCPC’s current members are depicted in the chart below:

Member	2012	2011	2010	2009	2008	2007	2006	2005	2004
Larsen	1	3	1	1	2				
Lackovic		1	2	1					
Mack			1		1				
Haecker									
Hunter Weir	1	1							
Lindberg		1							
Faucher	2								
Mack	5								
Jody Tableporter									

Zoning Board of Adjustment

Minneapolis City Ordinances § 525.110 establishes and sets forth the rules under which the Board of Adjustment (BOA) operates. The BOA has the power to grant variances from the zoning code, decide appeals from citizens regarding enforcement of the zoning code, and hear and decide applications for certificates of non-conforming use. (M.C.O. § 525.110(b).) All BOA decisions are final unless appealed to the City Council. (M.C.O. §§ 525.110(c) & 525.130(4).)

The BOA members are appointed by City Council using the City’s open appointments process and an advisory list submitted by the MCPC. The ordinance requires the BOA nine members be “geographically representative of community interests.” (M.C.O. § 525.110(b).)

According to BOA Bylaws, members cannot “participate in deliberating or voting on a matter at a meeting of the Board in which that member has a financial or other personal interest.” (BYLAWS OF THE BOARD OF ADJUSTMENT, § 4.9.) Once a member discovers he or she has a conflict of interest, it must be disclosed “in accordance with these Bylaws.” (*Id.*) Like the HPC, the BOA Bylaws permit a member’s provision of “factual information relating to a matter before the Board, provided the action to be taken would not substantially affect the financial interests of the member, a person related to the member or an associated business” after disclosure of the conflict. (*Id.*) The recusals per year due to potential conflict of interest of the MCPC’s current members are depicted in the chart below:

Member	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999
Finlayson		1		1				1	1					
Ditzler							4	1						
Perry														
Sandberg														
Cahill														
Nutt														
Ogiba														
Thompson														
Meier	1													

About the Best Practices Study

WHY WAS THE STUDY CONDUCTED?

The Ethics Code Preamble reinforces the significance public trust and confidence play in government affairs, observing for example that “the people must have confidence and trust in the integrity of their city government” and “the code of ethics is designed to promote high ethical standards and conduct, and to foster a healthy ethical culture throughout city government.” (M.C.O. § 15.10.)

In Spring 2012, the Ethical Practice Board (“Board”) became aware of various comments from citizens and members at development related board and commission (“Development Boards”) meetings about members’ personal professional involvement in various agenda items. In addition, the Board received an ethics complaint alleging violation of the conflict of interest provisions of the Ethics Code due to a Planning Commissioner’s professional appearance before the MCPC when the Commissioner had a financial interest in the agenda item and had recused himself from official participation. This was the first complaint of this nature since the Ethics Code’s 2003 adoption. Under the current Ethics Code’s conflict of interest provisions, no ethics violation occurred and the subject was so advised. The Board

became concerned that the personal appearances of Development Board members before their own board or commission could erode public confidence in the work of these Development Boards.

After a briefing by the Ethics Officer, Mayor R.T. Rybak concurred in the concerns of the Board. The Mayor and the Board jointly directed the Ethics Officer to conduct a survey of best practices in an effort to identify proposed changes to the Ethics Code and/or the Development Boards by-laws and operating procedures to reduce the number of situations in which the actions of members with potential conflicts of interest give rise to appearances of impropriety.

HOW WAS THE STUDY CONDUCTED?

The information included in this report was collected through web-based research and individual survey responses from 13 select communities. A mix of cities was selected to reflect a spectrum of experiences by looking at cities of similar size as well as cities with established ethics programs. Cities included are:

Atlanta, Georgia
Austin, Texas
Chicago, Illinois
Cleveland, Ohio
Denver, Colorado
Honolulu, Hawaii
Indianapolis, Indiana
Oakland, California
Portland, Oregon
Saint Paul, Minnesota
Seattle, Washington
Tulsa, Oklahoma
Wichita, Kansas

Information was also obtained from the relevant professional organizations:

American Planning Association's Professional Institute in conjunction with the American Institute of Certified Planners
National Alliance of Preservation Commissions

WHAT AREAS WERE CONSIDERED AND WHY?

Two main areas of development boards were examined:

- The structure, membership and the powers and duties
- The conflict of interest disclosure and recusal procedures

The structure and powers and duties of the various development boards were examined so as to determine if any correlation existed between the powers and duties of a board and the applicable conflict of interest disclosure and recusal requirements. At the request of the MCPC executive committee and the MCPC Committee of the Whole, additional questions about term limits, and the role of the governing body and its elected officials were included.

The conflict of interest definition and disclosure and recusal requirements were examined to determine if there are consistencies across these development related boards that would support a best practices finding for disclosure and recusal requirements.

Key Findings

Structure of Development Boards

There are numerous ways to address planning, development and zoning in a city. No clear structural pattern was detected related to city size for the cities studied. The powers and duties of the various development boards ranged from purely advisory to final decision making authority with judicial system appeals.

On the 39 surveyed boards and commissions:

- Development related professionals serve or potentially could serve;
- 3 have elected officials serving: (1 requires the Mayor and council members, 1 requires the Mayor or designee and a County Commissioner and 1 requires a council member); and
- Just over 50% have term limits;

For additional information about the structure and powers and duties of the development related boards surveyed, please see Exhibit A.

Conflict of Interest Disclosure and Recusal Requirements

In the communities studied, no ordinances or statutes prevented development related professionals from serving on development related boards and commissions. Development related professionals could be found on nearly all the surveyed development boards and were generally required on all preservation commissions. When members are professionally interested in the board or commission's business, their business interests are more likely to become agenda items before their board or commission than a member whose profession is unrelated to the work of the board or commission. In other words, by having professional members, there is a built-in potential for conflicts of interest due to their financial interests.

All the surveyed development related boards and commissions have definitions for conflict of interest. The breadth of the conflict of interest definitions varies greatly but all include financial interest as a type of interest giving rise to a potential conflict requiring recusal. Some conflict of interest definitions include personal and relationship interests as also giving rise to a potential conflict requiring recusal. Additionally, no discernible connection was observed between a development board's powers and duties and either its conflict of interest definition or its process for handling conflicts.

Every surveyed development related board or commission requires disclosure of a financial interest and abstention from deliberations and voting. Most development boards prohibit a member with a financial interest from addressing the development board in a professional capacity when the member has recused him or herself due to a financial interest. No ordinance or statute requiring a member to leave the room upon recusal was located but most development related boards or commissions surveyed either have a policy requiring leaving the room or the ethics officer, board or commission strongly recommends leaving the room. The following is an executive summary of the conflict of interest data collected:

Summary of Selected Conflict of Interest Procedures

City	Abstain from Deliberations & Voting	Addressing Board / Commission in a Professional Capacity Prohibited	Leave the Room Policy or Rule of Procedure
Atlanta	X	X	X*
Austin	X	X	
Chicago	X	X	X
Cleveland	X	X	
Denver	X		X
Honolulu	X	X	X
Indianapolis	X	X	X
Oakland	X	X	X
Portland	X	X	X
St. Paul	X	X	X
Seattle	X	X**	X
Tulsa	X	X	X
Wichita	X	X**	X***

* Must leave the area but not necessarily the room

** Permits board members to represent themselves as the applicant

*** Requires "disassociating"

More information about the surveyed cities' handling of potential conflicts of interest can be found in

Exhibit A.

Both the American Planning Association's ("APA") Professional Institute in conjunction with the American Institute of Certified Planners ("AICP")(collectively the "APA/AICP") and the National Alliance of Preservation Commissions ("NAPC") have published standards of conduct addressing situations in which members have potential conflicts of interest.

In 2006, the NAPC adopted a Code of Ethics for Commissioners and Staff. In relevant part, the NAPC's Standards of Professional Conduct state:

Commissioners and Staff should disclose all personal or financial advantages that might accrue to them, their business interests or family members either directly or indirectly from a recommendation or decision.

Preservation Commissioners and Staff who have an actual or apparent conflict of interest in a matter coming before them should recuse themselves entirely from deliberations and decisions.

Commissioners and Staff are obligated to utilize their knowledge and experience to make decisions and therefore should abstain from participating and voting only in cases of a bona fide conflict of interest.

The APA/AICP adopted "Ethical Principles in Planning" in May 1992. It is a "guide to ethical conduct for all who participate in the process of planning". In relevant part, the guide states:

Planning Process Participants should:

* * *

2. Make public disclosure of all "personal interests" they may have regarding any decision to be made in the planning process in which they serve, or are requested to serve, as advisor or decision maker.
3. Define "personal interest" broadly to include any actual or potential benefits or advantages that they, a spouse, family member or person living in their household might directly or indirectly obtain from a planning decision;
4. Abstain completely from direct or indirect participation as an advisor or decision maker in any matter in which they have a personal interest, and leave any chamber in which such matter is under deliberation, unless their personal interest has been made a matter of public record; their employer, if any, has given approval; and the public official, public agency or court with jurisdiction to rule on ethics matters has expressly authorized their participation.

The APA/AICP has also published "Ethics in Planning: A Toolkit for Conducting Ethics Sessions" (Revised: 7.17.2012). The following scenario is included:

A planner in private practice also sits on City Board of Zoning Adjustment. The principal in her firm has case before BZA. Does she have to recuse herself?

Yes, since the planner serves the principal in her firm, it would not be possible for her to sit in judgment over a project of her firm. Recusal means both a public disclosure and leaving the room entirely during presentation and discussion of the case.

In summary, the APA/AIPC recommends leaving the room when a member recuses due to a personal interest whereas the NAPC recommends recusing entirely from deliberations and decisions. Most of the surveyed boards and commissions strongly recommend or required a member to leave the room when recusing due a conflict of interest.

Leaving the room requirements can, however, create both quorum issues and open meeting law issues. First, to conduct a meeting of a public body in Minnesota, a quorum of the public body must be in attendance. Situations could arise where a member with a financial interest discloses a potential conflict of interest, recuses and leaves the meeting room resulting in a loss of the quorum. At that point in time, the public body is no longer authorized to conduct business. Second, Minnesota's Open Meeting Law, Chapter 13D, requires meeting of public bodies to generally be open to the public. Open Meeting Law serves "three vital purposes: Prohibits actions from being taken at a secret meeting where the interested public cannot be fully informed of the decisions of public bodies or detect improper influences; Ensures the public's right to be informed; and gives the public an opportunity to present its views." (League of Minnesota Cities, HANDBOOK FOR MINNESOTA CITIES, Ch.7:9 (Jan. 2012).) As a member of the public, the recused member arguably has a right to observe the public meeting.

Suggestions have been made to the Ethics Officer that establishing term limits will decrease the number of situations in which development related board members will need to recuse themselves. Some of the surveyed development related boards and commissions have term limits. Frequently, the term limits were not applicable to only development related boards and commissions but applied to all of the city's boards and commissions.

The reported basis for the term limit suggestion is that over time a professional will, by virtue of serving on a development related board or commission, gain prestige and ultimately more business. This basis was not supported by Minneapolis development related board and commission recusal statistics. Newly appointed members were as likely to have a potential conflict of interest requiring recusal as a long-serving member.

Conclusions /Recommendations

The research from the surveyed development related boards and commissions does support a best practice of prohibiting a local official from addressing a city board, commission, city council committee

or city council when the local official has a financial interest that requires disclosure. To conform to best practices a change should be made to the Ethics Code to eliminate the "act in official capacity" element of a violation of the conflict of interest provision. With this change a member with a financial interest requiring recusal would violate the conflict of interest provision by addressing a board with decision making authority. Additionally, the Development Boards should consider amending their by-laws or rules of procedure to prohibit members from addressing their own board or commission on behalf of a client.

A "leave the room" requirement can cause both quorum and open meeting issues. Because of these issues, no recommendation is being made for an amendment to the conflict of interest provisions of the Ethics Code. Development Boards may wish to amend their by-laws or operating rules to include such a requirement.

No evidence was found to support a conclusion that term limits will reduce the number of conflicts of interest on the City's Development Boards.