

MEMORANDUM

State of Alaska

Department of Law

TO: Designated Supervisor

DATE: September 6, 1996

FILE NO.: 663-97-0074

TELEPHONE NO.: 465-2123

FROM: Sarah J. Felix
Assistant Attorney General
Governmental Affairs - Juneau

SUBJECT: State Commission Member
Former Member of Municipal
Planning Board

Your memorandum of August 12, 1996, regarding a potential conflict of one of the state commission members has been referred to this office for an advisory opinion in accordance with AS 39.52.240.

You initially requested our advice on this matter at a meeting of the Commission on August 5, 1996, and I provided you with oral advice at that time that the commission member did not have a prohibited conflict. Before requesting our advice, the Commission considered the potential conflict of interest at this meeting, and determined under its bylaws relating to the Ethics Act that the commission member did not have a prohibited conflict of interest. During the meeting, you requested that our advice be reduced to writing, and later provided our office with a written request.¹

You requested advice as to whether a commission member would be in violation of the Executive Ethics Act (Ethics Act), AS 39.52, if she/he voted on a petition for creation of a new borough where the commission member was formerly a member of

¹ You provided our office with the following materials to assist us in providing this advisory opinion:

1. March 17, 1996, letter from petitioner's representatives claiming a commission member had a conflict;
2. April 5, 1996, letter from the division director;
3. May 1, 1996, letter from Commission member alleged to have a conflict;
4. May 1, 1996, letter from Commission member alleged to have a conflict; and
5. Bylaws of the Commission.

the Planning & Zoning Board (Planning Board) of the existing borough from which the proposed new borough seeks detachment. The petitioners propounding the new borough have complained that the commissioner has a conflict as a result of his prior service on the municipal Planning Board. You point out in your request that the commission member resigned from the municipal Planning Board before assuming duties on the Commission. You also indicate that the commission member has explained that the Planning Board did not consider the petition during the commission member's service on the Planning Board. Additionally, the commission member owns property in the area of the proposed new borough.

Commission's Internal Procedures on Ethics

The Commission considered the member's potential conflict under the Commission's bylaws and determined that the member did not have a prohibited conflict. The bylaws at issue are set out in Article IX, Ethics.² Article IX, Section 1 is the

²

These bylaws are as follows:

ARTICLE IX - ETHICS

Section 1. Commission members are required to comply with AS 39.52.010 - 39.52.960, the Alaska Executive Branch Ethics Act. The Commission adopts the general goals advanced by the Executive Branch Ethics Act, those being: 1) to discourage public officials from acting upon personal or financial interests in the performance of their public responsibilities; 2) to improve the standards of public service; and 3) to promote and strengthen the faith and confidence of the people of this state in their public officers. As provided by AS 39.52.960(8), the Chairman shall act as the designated supervisor for the Commission members.

Section 2. In addition to the ethics standards established by the Executive Branch Ethics Act, the following policies apply to members of the Commission:

(a) A member of the Commission is prohibited from having ex parte contacts (i.e., any contact outside a formal proceeding of the Commission with another party) concerning a matter for which a petition has formally been submitted to the Department of Community and Regional Affairs. The prohibition shall take effect once the Commission member has been advised by the Department that a petition has been received. The prohibition shall remain in effect until the Commission's power to order reconsideration of its decision on the petition expires.

(b) Unless exempted under (f) of the section, a member of the Commission may not participate by way of discussion or voting on any matter before the Commission if a Commission member was employed by or had a contract with the petitioner or a respondent unless a minimum of 180 days has passed since the employment or contract ended. For purposes of this subsection, the 180 days is measured from the date that a Commission member has been advised by the

Department that a petition or response brief has been received by the Department.

(c) Unless exempted under (f) of this section, a member of the Commission may not accept employment from or contract with a petitioner or respondent if the member of the Commission acted upon a petitioner's or respondent's proposal that was before the Commission unless a period of 180 days has passed since the Commission acted on the matter. For purposes of this subsection, the 180 days is measured from the date that the Commission takes its final action, including reconsideration, on a proposal.

(d) Unless exempted under (f) of this section, a member of the Commission may not participate in the consideration of a proposal before the Commission where the proposal affects a territory in which the Commission member resides or owns real property. This subsection applies to action on territory that is proposed for: 1) annexation, detachment, merger, or consolidation; or 2) dissolution or incorporation of a municipality.

(e) Unless exempted under (f) of this section, a member of the Commission may not participate in the consideration of a proposal before the Commission if the Commission member has a personal interest in or is affiliated with the petitioners, a respondent, or an organization that advocates a position with respect to the proposal before the Commission.

(f) A member of the Commission may be exempted from the prohibitions specified in (b)-(e) of this section, if a majority of the other Commission members present conclude that:

(1) the Commission member's participation in the matter would not result in any violation of the Executive Branch Ethics Act;

(2) the Commission member's conflict is minor and inconsequential and his/her participation in the matter will not interfere with the full and faithful discharge of duties as a Commission member, examples of such are:

(A) the member's conflict is insignificant in relation to the size, population, and other characteristics of the area encompassed by the petition;

(B) the area which is the subject of the petition is not in close proximity to the residence or other property owned by the Commission member as specified in (d) in this section;

(C) the nature of the affiliation of the Commission member to the petitioner, respondent, or other party(s) that have advocated a position concerning the matter pending before the Commission as specified in (e) of this section is insignificant.

Commission's policy statement on ethics. Article IX, Section 2 sets out the substantive ethics provisions; Article IX, Sections 2(a) and Section 2(c) are not applicable to the question presented.

As we understand the Commission's proceedings, the Commission determined that the member was not "employed by or had a contract with . . . a respondent." Therefore, the Commission member did not have a conflict under Article IX, Section 2(b) of the bylaws. The Commission next determined that the member owned property in the petition area, thus implicating Article IX, Section 2(d). However, the Commission also determined that this property ownership would not interfere with the member's full and faithful discharge of duties as a commission member. Therefore, under Article IX, Section 2(f), the Commission exempted the member from the prohibition set out in Article IX, Section 2(d).

The Commission also considered whether the member had a personal interest in, or was affiliated with, a respondent or an organization that advocates a position with respect to the proposal before the Commission under Article IX, Section 2(e). The Commission determined that the member was no longer a member of the municipal zoning board and, therefore, was not affiliated with a respondent. Also, the Commission determined that the member's personal interest in the matter, if any, was insignificant under Article IX, 2(f). Therefore, the Commission determined that the member could participate in the petition without any violation of the Ethics Act.

The Commission's determination appears to be supported by substantial evidence; therefore, we agree with the Commission's determination under its bylaws.

Ethics Act

The Ethics Act was passed in an effort to help ensure that public officers will not act improperly upon their personal and financial interests in the performance of their public responsibilities. The Commission is an entity created by statute whose members are appointed by the governor. The Ethics Act states that except as specifically provided, it "applies to all public officers within executive-branch agencies, including members of Boards and Commissions. AS 39.52.910(a). "Board or Commission" is defined to include any Board, Commission . . . established by statute in the executive branch." AS 39.52.960(4). Clearly, the Commission is established by statute within the executive branch and, therefore, its members are public officers subject to the provisions of the Ethics Act. The section of the Ethics Act applicable to the present matter is AS 39.52.120(b)(4): "A public officer may not . . . take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest."

With the facts before us, it does not appear that the commission member has a "personal" interest in the petition before the commission, because the commission

member is no longer a member of the Planning Board. AS 39.52.960(18) defines "personal interest" as

an interest held or involvement by a public officer . . . including *membership, in* any organization, whether fraternal, non-profit, for profit, charitable, or political, from which, or as a result of which, a person or organization receives a benefit.

(Emphasis added.) However, as noted above, the commission member is no longer a member of the Planning Board. Because (1) the commission member is not a member of the Planning Board; and (2) the Planning Board did not consider the petition at the time that the commission member was a member of the Planning Board, we do not believe that the commission member is barred by the Ethics Act from voting on the petition. *See e.g.*, 1994 Inf. Op. Att'y Gen. at 6-7 (Jan. 1; 663-93-0257).

Similarly, we agree with the Commission's determination that the commission member's ownership of a cabin in the area covered by the petition is not a prohibited financial interest because it is insignificant. Whether the property value of the cabin would change as a result of action taken on the petition is a question of fact to be resolved, in the first instance, by the Commission. AS 39.52.220.³ The Commission determined that there was no conflict. AS 39.52.110(b)(2) (no conflict if "action or influence would have insignificant or conjectural effect on the matter.") We are aware of no evidence to suggest that this decision was wrong.

Conclusion

Given the lack of a significant personal or financial interest in the petition, we do not believe it would be a violation of the Ethics Act if the commission member votes on the petition.

SJF:clh

³ The three-step process for the Commission to evaluate a member's potential conflict is set out in AS 39.52.220:

- (1) The commission member declares the potential conflict.
- (2) The commission chairperson makes a determination on the potential conflict; and
- (3) there is an opportunity for the Commission to object to and vote on the chairperson's determination.

See e.g., 1994 Inf. Op. Att'y Gen. at 6 (Jan. 1; 663-94-0185).