Conflicts of Interest, Bias, Recusal, and Ethics In Office
Introduction

- Explosion of challenges to municipal actions based on bias and conflicts of interest over the past five years

- A great many of these challenges are attempts to disqualify potentially unfavorable votes on a municipal board or council
Consequences

- Even if an elected official perceives that the challenges are politically motivated, a municipal official must take claims of conflict or bias seriously.

- Under new law, if even one member has an impermissible bias or conflict of interest, the entire body's actions may be overturned.

- A member that improperly participates in a proceeding may also face personal liability.
Purpose of Ethics Laws

- The purpose of the conflict of interest and bias standards are to ensure and preserve public confidence.

- The public policy behind most codes of ethics is to avoid actions that are in violation of the public trust or give the impression that the public trust is being violated.
State and Local Law

- Title 29, Chapter 58 of the Delaware Code is the Code of Conduct for State Employees

- Chapter 58 requires that all counties, cities, and towns adopt a code of conduct that is at least as stringent as the state requirements or the state requirements apply to the local officials
Key Ethical Requirements

- No person can participate in a matter where they, or a close relative, have a financial interest.

- An official cannot participate in a matter when they have a "personal or private interest" - an interest which tends to impair a person's independence of judgment.
Independence of Judgment

- In many codes, the standard is not whether one's judgment is impaired, but rather whether the participation creates an appearance of impropriety.
- The state law does not contain this "appearance of impropriety" standard.
- The Public Integrity Commission, however, has held that an appearance that judgment will be impaired (as opposed to actual impairment) is a sufficient to require recusal of the official.
When should a municipal official recuse?

- Formerly there were bright line tests to determine whether a municipal official should participate.
- For a financial interest, disqualification was only required if a hearing officer or members of the body had a "direct, personal [or] substantial pecuniary interest in the outcome of the case."
When should a municipal official recuse?

- In the realm of bias, disqualification was only required when the decision maker had formerly expressed opposition to the matter decided.

- These bright line rules are now gone. Whether recusal is required is now done on a case by case basis.
Rehoboth Art League v. Town of Helopen Acres (Del. 2009)

- The case challenged the denial of a variance by the Board of Adjustment and sought to overturn the decision because:
  1. a Town Commissioner who had the power to appoint the members of the Board (and voted to appoint special counsel for the Board) spoke against the variance request; and
  2. a Board member stated on the record that the number of variances should be reduced
Rehoboth Art League v. Town of Henlopen Acres (Del. 2009) con’t

- The Court held that when a Commissioner appeared in opposition to the variance in his personal capacity and not as a representative of the Town, there was no impermissible participation and no imputed bias.

- On prejudgment, the Court held that "a hearing before a neutral arbiter is a fundamental element of due process" but nothing required recusal under the facts of the case.
Rehoboth Art League v. Town of Henlopen Acres (Del. 2009) con’t

- The Court reiterated that the focus is on whether Board members considered the application "free from corruption, bribery, or other illegal means," and further held that prehearing comments adverse to the application are not necessarily grounds for disqualification.

- The Court reaffirmed that Board members are entitled to have a view of the evidence and express that view at the hearing.
Mackes v. Board of Adjustment (Del. Super. Ct.)

- Case involved a claim of bias because a Board member stated on the record that she did not believe any variances should be granted from the 25 foot setback.

- The Court held that a statement on the record that no variance should be granted from the setbacks was an "arbitrary and unreasonable position" and demonstrated that the application could not be fairly considered.
Mackes v. Board of Adjustment (Del. Super. Ct.) con’t

- The Superior Court held that this statement "tainted the proceedings" and prevented the applicant from ever obtaining a fair hearing.

- The Court also held that this single member's position "poisoned the proverbial well."

- The entire Board’s decision was overturned because of one member's statement.
A County official presided over a meeting during which a matter was advanced by a member of the spouses business.

The official presided, called witnesses, but did not otherwise inject himself into the matter and did not vote on the application.
NCC Ethics Opinion – 10-02 con’t

- The Commission held that even through the presider did not vote on the application, a violation of the County ethics code still occurred.

- The Commission held that the official's acts created, at minimum, an appearance of impropriety, and that the presider should have delegated control of the meeting to another member.
The Public Integrity Commission held that a member of a Planning Commission - a recommending body - was required to recuse himself from proceedings on a controversial application because the member had expressed a preconceived view of the application.
PIC Advisory Op. 07-42 con’t

- Previous cases held that there can be no due process violation based upon a Planning Board recommendation because the Planning Board is not the final decision maker.

- The PIC, however, held that because the Board member expressed a preconceived view, he was barred from participating.
PIC Advisory Op. 07-42

- This appears to be a significant change in the law. Prior to this opinion, it was widely held that for legislative acts, such as zoning actions, a legislator could express preconceived views and not be required to recuse.

- The Public Integrity Commission, at least for members of the Planning Commission, makes it clear that those who express views prior to the application being heard will likely be required to recuse themselves from the vote.
Sullivan v. Town of Elsmere (Del. 2011)

- Case dealt with the Town Council's attempt to remove the police chief

- At the hearing, the allegations were that the police chief was being retaliated against because he would not hire a relative of one of the sitting members of the Town Council. The same member of Town Council was on the panel that unanimously removed the police chief from his position.
Sullivan v. Town of Elsmere (Del. 2011) con’t

- While noting that the law presumes that the decision makers carried out their duties with honesty and integrity, the Court held that - in the face of these unrebutted allegations of misconduct - there was an "unlawful appearance of bias."

- The Court held the police chief was deprived of due process because the Councilmember participated, and held that all other members of council were tainted by the unlawful participation.
Dewey Beach Ent. v. Town of Dewey Beach (D. Del. 2010)

- This case is a federal civil rights action relating to an alleged denial of due process.
- The Developer claimed that at least three members of Town Council should have disqualified themselves from the vote on a rezoning ordinance because they made public statements against the particular zoning application prior to the rezoning hearing - in violation of the Developer's due process rights.
The Developer also claimed that the Town Council members should not have participated in the rezoning because the Council members owned rental properties within the Town that might be in competition with the Developer's proposed project.
The District Court held that these allegations were enough to survive a motion to dismiss the constitutional claims, and held that the individuals, based upon these allegations, did not have immunity from suit.

By allowing the claims to go forward against the Town Council members in their individual capacities, the Council members faced potential personal liability for their failure to recuse.
Final Thoughts

- Doctrine of necessity
- Other decisions of note
- Potential future clarification of the law
Questions?