Recusal from voting by planning comm. members

Number: INFORMAL

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Mr. Michael S. Craig
Polk County Attorney
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Dear Mr. Craig:

On behalf of the Polk County Commission, you have asked for this office's assistance regarding the recusal from voting of certain members of the Polk County Planning Commission. According to information you have supplied, the Board of County Commissioners of Polk County appointed the seven members of the planning commission and designated the commission as Polk County's local planning agency pursuant to section 163.3174, Florida Statutes.

Part II, Chapter 163, Florida Statutes is the "Local Government Comprehensive Planning and Land Development Regulation Act."[1] As provided by the Legislature, "[i]t is the intent of this act that the activities of units of local government in the preparation and adoption of comprehensive plans, or elements or portions therefor, shall be conducted in conformity with the provisions of this act."[2] The provisions of the act are declared to be the minimum requirements necessary to accomplish the stated purposes and objectives set forth therein.[3]

The act provides that the local planning agency is the agency designated to prepare the comprehensive plan or plan amendments required by the act.[4] Pursuant to section 163.3174(4), the local planning agency is generally responsible for the conduct of the comprehensive planning program. In accomplishing its responsibilities, the agency prepares the comprehensive plan or plan amendments and makes recommendations to the county regarding the plan or plan amendments.[5] The local planning agency is charged with monitoring and overseeing the effectiveness and status of the comprehensive plan and recommending changes as may be required.[6] The agency must review proposed land development regulations, land development codes, or amendments thereto and make recommendations relating to the consistency of the proposal. The planning agency may also perform any other functions, duties, and responsibilities assigned to it by the county or required by general or special law.[7] All meetings of the local planning agency are public meetings and records of the agency are public records.[8]

Pursuant to section 163.3167, Florida Statutes, the county is required to "establish, support, and maintain administrative instruments and procedures to carry out the provisions and purposes of this act."[9] Procedures adopted by the local planning agency "shall provide for broad dissemination of the proposals and alternatives, opportunity for written comments, public hearings as provided herein, provisions for open discussion, communications programs, information services, and consideration of an response to public comments."[10]

With regard to the voting requirements provided by statute to be followed at meetings of governmental bodies, section 286.012, Florida Statutes, provides:

"No member of any state, county, or municipal governmental board, commission, or agency who is present at any meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may abstain from voting in regard to any such decision, ruling, or act; and a vote shall be recorded or counted for each such member present, except when, with respect to any such member, there is, or appears to be, a possible conflict of interest under the provisions of s. 112.311, s. 112.313, or s. 112.3143. In such cases, said member shall comply with the disclosure requirements of s. 112.3143."

Thus, members of the Polk County Planning Commission must vote at any meeting at which official action is to be taken and a vote must be recorded for each member.[11] If however, a conflict of interest may exist under the terms of the Code of Ethics for Public Officers and Employees, Part III, Chapter 112, Florida Statutes, the commission member must follow the directive in section 112.3143, Florida Statutes:

"(3)(a) No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes."

Thus, Florida law imposes an affirmative duty on elected officials to vote on all matters before them; abstaining from a vote is prohibited except when there is or appears to be a possible conflict of interest. Section 286.012, Florida Statutes, is directed to situations when a public official *may* abstain from voting; it does not set forth the circumstances under which a public official *must* abstain from voting. The statutory provisions providing for mandatory abstention in the situation of voting conflicts for county officers such as the Polk County Planning Commission is section 112.3143(3)(a), Florida Statutes. Under section 112.3143(3)(a), the identification of a "special private gain or loss" to the appointed public officer as a result of his or her participation is a necessary condition for disqualification.

Questions regarding whether particular situations may constitute prohibited voting conflicts should be addressed to the Commission on Ethics; however, previous opinions of the Commission and a recent federal court case, indicate that to constitute a prohibited voting conflict, the possibility of gain must be direct and immediate, not remote and speculative.[12]

I trust that these informal comments will be helpful to you in advising your clients.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] Section 163.3161(1), Fla. Stat.

[2] Section 163.3161(6), Fla. Stat.

[3] Section 163.3161(7), Fla. Stat.

[4] *See* s. 163.3164(14), Fla. Stat.

[5] Section 163.3174(4)(a), Fla. Stat.

[6] Section 163.3174 (4)(b), Fla. Stat.

[7] Section 163.3174 (4)(d), Fla. Stat.

[8] Section 163.3174(5), Fla. Stat.

[9] Section 163.3167(1)(d), Fla. Stat.

[10] Section 163.3181(2), Fla. Stat.

[11] *And see* Op. Att'y Gen. Fla. 02-40 (2002) (advisory boards, voting requirements).

[12] *See George v. City of Cocoa*, 78 F.3d 494 (11th Cir. 1996); Ops. Comm. Ethics 93-4 (1993) and 94-18 (1994). *And see* Op. Att'y Gen. Fla. 96-63 (1996).