

Center for Land Use Education and Research at the University of Connecticut



## Land Use Academy

Center for Land Use Education and Research

### Advanced Legal Procedures Training

# Welcome!





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## Online Version

- Please note that the answers to the questions in the presentation are highlighted in light blue on the next slide.
- This presentation is for educational purposes and not intended to represent legal advice. Consult your town attorney in matters concerning your town.



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## Center for Land Use Education & Research

CLEAR provides information, education and assistance to land use decision makers on how better to protect natural resources while accommodating economic growth.




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## Agenda

- 9:00 Welcome
- 9:15 Bias, Predisposition and Conflicts
- 10:45 Break
- 11:00 Conditions and Modifications
- 12:30 Lunch
- 1:30 Running a Meeting and Making a Decision
- 3:00 End







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## Important Information

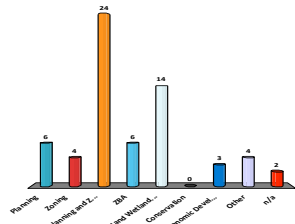
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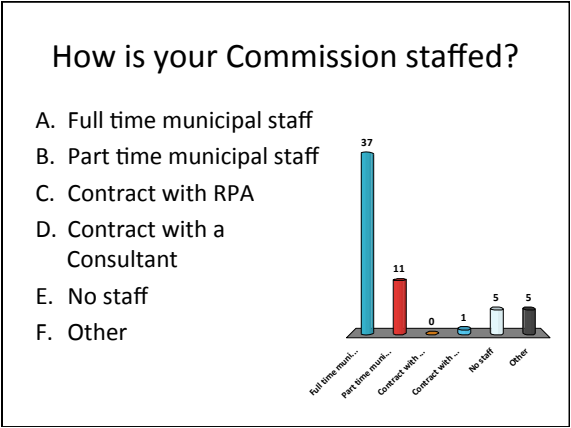
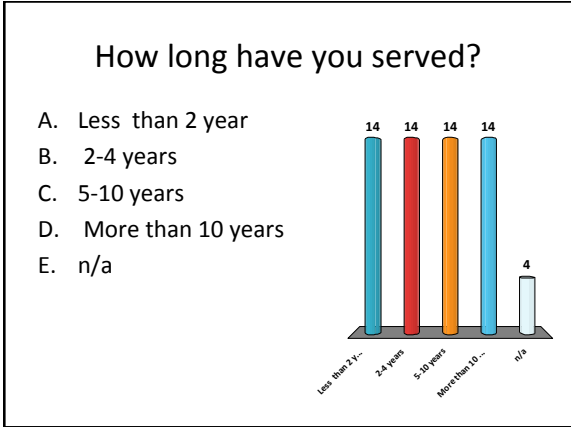
## On what commission do you serve?

- A. Planning
- B. Zoning
- C. Planning and Zoning
- D. ZBA
- E. Inland Wetlands and Watercourses
- F. Conservation
- G. Economic Development
- H. Other
- I. n/a



Commission Type	Number of Respondents
Planning	6
Zoning	4
Planning and Zoning	22
ZBA	6
Inland Wetlands and Watercourses	14
Conservation	0
Economic Development	3
Other	4
n/a	2

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## Instructors

- 
- Kenneth R. Slater, Partner    Halloran and Sage, LLC
- Dwight Merriam, Partner    Robinson and Cole, LLC
- Mark K. Branse, Partner    Branse, Willis and Knapp, LLC

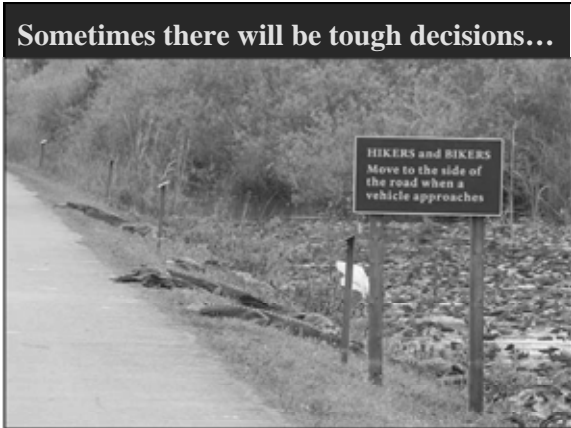
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## Special Thank you to John Pasco Policy and Research Specialist

**CPPSR**  
Center for Public Policy and Social Research  
Governor William A. O'Neill Endowed Chair in Public Policy and Practical Politics

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## Website: [clear.uconn.edu](http://clear.uconn.edu)

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## Bias, Predisposition and Conflicts

**Richard P. Roberts**  
**Partner, Halloran & Sage LLP**




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## Outline of Topics

- Conflicts of interest
- Perceived or potential conflicts of interest
- Prejudgment/predisposition
- Recusal



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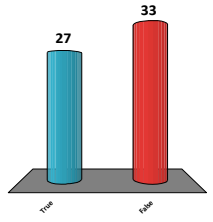
### What the State Statutes say

- CGS 8-11 Disqualification of members of Zoning Commission and Zoning Board of Appeals
- CGS 8-21 **planning commissions**
- CGS 22a-42(c) **Municipal regulation of wetlands and watercourses**
- CGS 7-148t. **Conflict of interest for members of land use and purchasing commissions and boards**

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A planning commission member may represent his neighbor at a zoning commission hearing so long as he declares that he is a member of the planning commission but is not acting in that capacity.

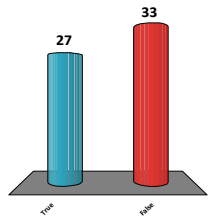
A. True  
 B. False



Response	Count
True	27
False	33

A planning commission member may represent his neighbor at a zoning commission hearing so long as he declares that he is a member of the planning commission but is not acting in that capacity.

A. True  
 B. False



Response	Count
True	27
False	33

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### CGS 8-11 Appearance and representation by Commission members

No member of any zoning commission or board and no member of any zoning board of appeals or of any municipal agency exercising the powers of any zoning commission or board of appeals, whether existing under the general statutes or under any special act, shall appear for or represent any person, firm, corporation or other entity in any matter pending before the planning or zoning commission or board or said board of appeals or any agency exercising the powers of any such commission or board in the same municipality, whether or not he is a member of the board or commission hearing such matter.

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**CGS 8-11 Financial or Personal Interest**

No member of any zoning commission or board and no member of any zoning board of appeals shall participate in the hearing or decision of the board or commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense.

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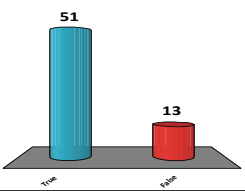
**Appearance and Representation by Commission members**

- When it s appropriate to represent your own interests
- Distinction between at and in a hearing
- What steps need to be taken to avoid a conflict
- When the steps need to be taken
- Leaving the room

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A Planning Commissioner’s cousin has proposed a subdivision for a piece of land that is adjacent to the commissioner’s hated ex-wife. She is opposed to the development and states, correctly, at the hearing that the commissioner and his cousin are partners in an on-line business. The commissioner has a conflict and should recuse himself.

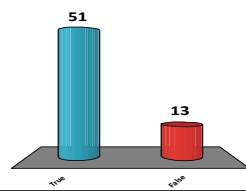
**A. True**  
**B. False**



Response	Count
True	51
False	13

A Planning Commissioner’s cousin has proposed a subdivision for a piece of land that is adjacent to the commissioner’s hated ex-wife. She is opposed to the development and states, correctly, at the hearing that the commissioner and his cousin are partners in an on-line business. The commissioner has a conflict and should recuse himself.

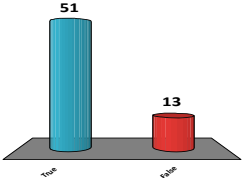
**A. True**  
**B. False**



Response	Count
True	51
False	13

A Planning Commissioner’s cousin has proposed a subdivision for a piece of land that is adjacent to the commissioner’s hated ex-wife. She is opposed to the development and states, correctly, at the hearing that the commissioner and his cousin are partners in an on-line business. The commissioner has a conflict and should recuse himself.

**A. True**  
**B. False**



Response	Count
True	51
False	13

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**In the event of a disqualification**

- Such fact shall be entered on the records of the commission or board
- A replacement shall first be made from alternate members pursuant to the provisions of sections 8-1b, 8-5a and 8-21
- The municipality may provide by ordinance that an elector may be chosen to act as a member of such commission or board in the hearing


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## Conflict of Interest

Different kinds of conflicts:

- Personal
- Financial
- Perceived or potential conflicts



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## Conflict of Interest


Financial interest includes any financial interest of a commissioner or members of his immediate family. It also includes anything where there is a pecuniary benefit to the commissioner which may be greater than the benefit to the community at large or to a substantial segment of the community.

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## Conflict of Interest

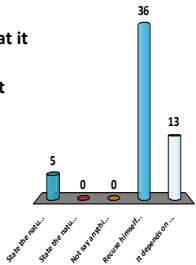
Personal interest includes close friendships or other association with the applicant



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### If a Commissioner has a perceived conflict of interest, he/she should:

- State the nature of the conflict and assure the public and the applicant that it will not influence his/her judgment
- State the nature of the conflict and say that it really isn't a conflict, just perceived
- Not say anything because it isn't a conflict
- Recuse himself/herself because the appearance of a conflict is just as bad as a real conflict
- It depends on the circumstances



Response Option	Count
State the nature...	5
State the nature...	0
Not say anything...	0
Recuse himself/h...	36
It depends on...	13

### If a Commissioner has a perceived conflict of interest, he/she should:

- State the nature of the conflict and assure the public and the applicant that it will not influence his/her judgment
- State the nature of the conflict and say that it really isn't a conflict, just perceived
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Response Option	Count
State the nature...	5
State the nature...	0
Not say anything...	0
Recuse himself/h...	36
It depends on...	13

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## Conflict of Interest

- Perceived or potential conflicts—even though a conflict might not be an actual conflict, it may be perceived by the public to be one
- The action taken by the Commissioner may depend on the individual circumstances

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**Municipal Employee Conflict of Interest**

A member of the City's public works department has a master's degree in planning and has been asked by the Earth First Party Town Committee Chairman to run for Zoning Commissioner. The town has no ordinance which prohibits her/him from serving. It is appropriate for her/him to run for this position.

**A. Yes**  
**B. No**

Response	Count
A. Yes	34
B. No	31

**Municipal Employee Conflict of Interest**

A member of the City's public works department has a master's degree in planning and has been asked by the Earth First Party Town Committee Chairman to run for Zoning Commissioner. The town has no ordinance which prohibits her/him from serving. It is appropriate for her/him to run for this position.

**A. Yes**  
**B. No**

Response	Count
A. Yes	34
B. No	31

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**Municipal Employees Serving on Commissions**

Under CGS 7-421(e) municipal employees may not serve a members of:

- any body which has responsibility for direct supervision of the employee
- board of finance
- zoning commission
- planning commission
- inland wetlands commission

**BUT:** Municipality may enact an ordinance allowing employees to serve on zoning, planning or inland wetlands commissions

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**Bias vs. Predetermination**

- Bias** generally refers to a personal feeling of either favoritism or antipathy toward a particular person or position
- Predetermination** or **prejudgment** is a predilection to vote for or against a particular application
- In certain cases bias and predetermination may both exist

Definitions from *What is Legally Required* by Michael Zitka

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**Avoid the Appearance of Bias**

- The Commission members must not create an atmosphere of hostility
- Be careful how your statements may be interpreted
- If you allow prejudice to flare at a public hearing, you are inviting the overturn of your decision and, even worse, money damages against your town

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**Avoid the Appearance of Bias**

Especially critical where the flashpoint is a civil right issue all its own: religion, free speech (adult book stores or other entertainment uses or political signs), ethnic background, race, disability.

**Examples:**


- Church, Synagogue, Mosque in a residential zone
- Affordable housing application
- "Half-way" house for juveniles transitioning out of prison or disabled persons recovering from alcohol or drug addiction
- "Half-way" house for Treatment facility for persons suffering from Alzheimer's Disease
- Residential facility for people who are developmentally disabled

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## Predisposition

- **Must not publicly take a position on granting or denial of an application before the application has been formally heard and considered**
- **Keep an open mind**




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## What's the Standard?

Courts generally will not uphold a claim of bias or predetermination without compelling evidence




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## Recusal

- **Who decides if a member should recuse himself?**
- **What is the basis for recusal?**
- **Appointment of an alternate**



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## Court Remedies


- **Reversal of the commission's decision**
- **Remand to the commission for a new hearing or a new vote without the conflicted member(s) participating**
- **Other remedies that the court deems appropriate based on the facts including, potentially, ordering approval of an application or issuance of a permit**
- **Potential money damages if civil rights claims are made successfully**

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## Ex parte Communications

- **Information from staff or commission experts**
- **Information from applicants or applicants' experts**
- **Information from the general public**




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## Ex parte Communications

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### Ex parte Communications

- Not all ex parte communications are impermissible
- Must be evidentiary and/or prejudicial
- Due process concerns, opportunity to rebut or cross-examine

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### Conflict of Interest

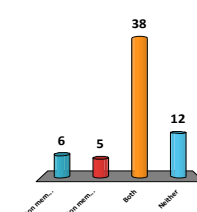
“Local governments would ... be seriously handicapped if any conceivable interest, no matter how remote and speculative, would require the disqualification of a zoning official. ... [Courts] must, however, also be mindful that to abrogate a municipal action on the basis that some remote and nebulous interest may be present would be to deprive unjustifiably a municipality, in many important instances, of the services of its duly elected or appointed officials.

Anderson v. Zoning Commission, 1968 CT Supreme Court

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### Which is a conflict of interest?

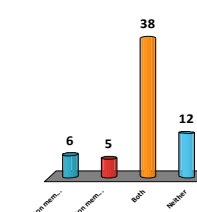
- A. Commission member owns a boat yard one-quarter mile from applicant’s boat yard
- B. Commission member owns a property 400-500 feet from the subject property
- C. Both
- D. Neither



Scenario	Count
Commission member owns a boat yard one-quarter mile from applicant’s boat yard	6
Commission member owns a property 400-500 feet from the subject property	5
Both	38
Neither	12

### Which is a conflict of interest?

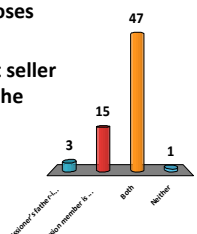
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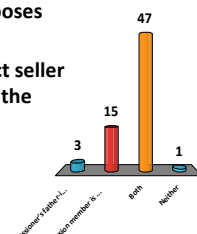
- A. Commissioner’s father-in-law lives “across the street” from subject parcel and commissioner actively opposes application
- B. Commission member is contract seller of property which is subject of the application
- C. Both
- D. Neither



Scenario	Count
Commissioner’s father-in-law lives “across the street” from subject parcel and commissioner actively opposes application	3
Commission member is contract seller of property which is subject of the application	15
Both	47
Neither	1

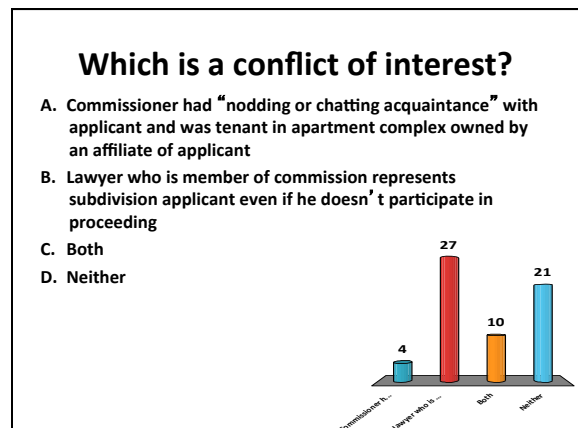
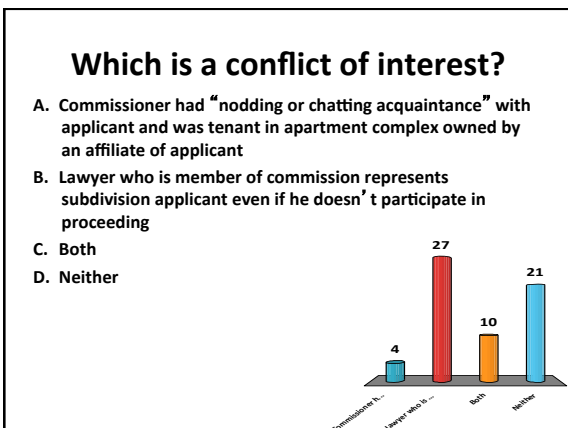
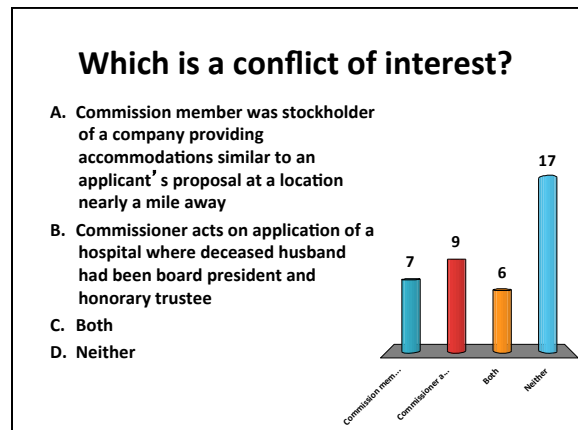
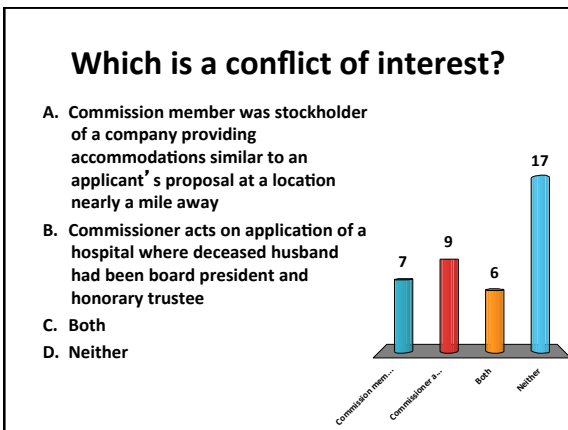
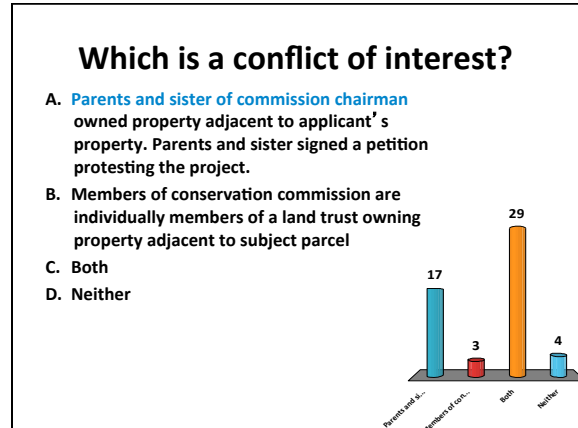
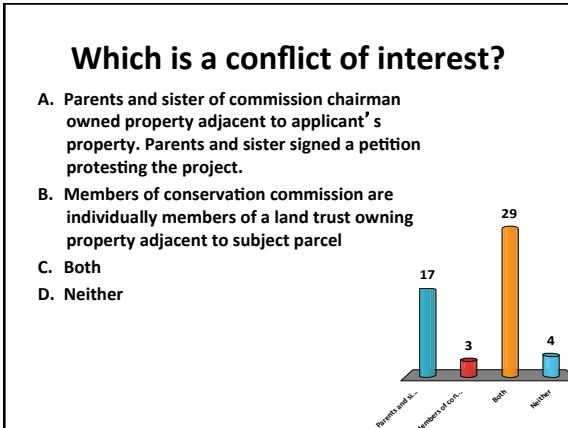
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Commission member is contract seller of property which is subject of the application	15
Both	47
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### Predisposition

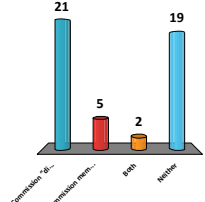
“The law does not require that members of zoning commissions must have no opinion concerning the proper development of their communities. It would be strange, indeed, if this were true. The decisive question ... is whether [a commissioner] had actually made up his mind, in advance of the public hearing, that he was going to approve the proposed change of zone regardless of any changes or arguments in opposition which might be urged at the hearing.

Furtney v. Simsbury Zoning Commission, 1970 CT Supreme Court

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### Which is considered predisposition?

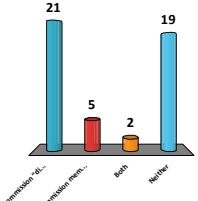
- A. Commission “didn’t ask a lot of questions” and chairperson allegedly “steered the proceeding in a biased way”
- B. Commission member attended a public forum where application was discussed
- C. Both
- D. Neither



Response	Count
Commission “didn’t ask a lot of questions” and chairperson allegedly “steered the proceeding in a biased way”	21
Commission member attended a public forum where application was discussed	5
Both	2
Neither	19

### Which is considered predisposition?

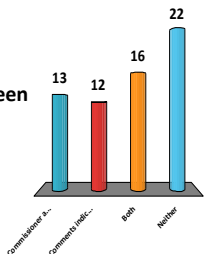
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Response	Count
Commission “didn’t ask a lot of questions” and chairperson allegedly “steered the proceeding in a biased way”	21
Commission member attended a public forum where application was discussed	5
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Neither	19

### Which is considered predisposition?

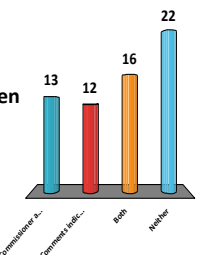
- A. Commissioner and applicant’s engineer made a series of ethnic jokes
- B. Comments indicating that the application was very similar to ones which had been already been denied twice
- C. Both
- D. Neither



Response	Count
Commissioner and applicant’s engineer made a series of ethnic jokes	13
Comments indicating that the application was very similar to ones which had been already been denied twice	12
Both	16
Neither	22

### Which is considered predisposition?

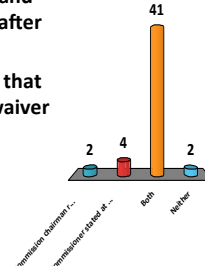
- A. Commissioner and applicant’s engineer made a series of ethnic jokes
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- C. Both
- D. Neither



Response	Count
Commissioner and applicant’s engineer made a series of ethnic jokes	13
Comments indicating that the application was very similar to ones which had been already been denied twice	12
Both	16
Neither	22

### Which is considered predisposition?

- A. Commission chairman removed applicant’s name from agenda and refused to attend FOIA hearing after complaint filed
- B. Commissioner stated at hearing that he would not agree to grant a waiver “under any circumstances”
- C. Both
- D. Neither



Response	Count
Commission chairman removed applicant’s name from agenda and refused to attend FOIA hearing after complaint filed	2
Commissioner stated at hearing that he would not agree to grant a waiver “under any circumstances”	4
Both	41
Neither	2

### Which is considered predisposition?

- A. Commission chairman removed applicant's name from agenda and refused to attend FOIA hearing after complaint filed
- B. Commissioner stated at hearing that he would not agree to grant a waiver "under any circumstances"
- C. Both
- D. Neither

Response	Count
Commission chairman removed applicant's name from agenda and refused to attend FOIA hearing after complaint filed	2
Commissioner stated at hearing that he would not agree to grant a waiver "under any circumstances"	4
Both	41
Neither	2

### Which is considered predisposition?

- A. Commissioner's forceful and unfortunate statements during public hearing
- B. Commissioner made motion from prepared statement after close of hearing and was little discussion
- C. Both
- D. Neither

Response	Count
Commissioner's forceful and unfortunate statements during public hearing	10
Commissioner made motion from prepared statement after close of hearing and was little discussion	16
Both	23
Neither	16

### Which is considered predisposition?

- A. Commissioner initially recused himself saying "I don't even want to hear this proposal" but later participated in process
- B. Commissioner told applicant that he was "wasting his time and money" because he would never get approval
- C. Both
- D. Neither

Response	Count
Commissioner initially recused himself saying "I don't even want to hear this proposal" but later participated in process	1
Commissioner told applicant that he was "wasting his time and money" because he would never get approval	18
Both	39
Neither	2

### Which is considered predisposition?

- A. Commissioner initially recused himself saying "I don't even want to hear this proposal" but later participated in process
- B. Commissioner told applicant that he was "wasting his time and money" because he would never get approval
- C. Both
- D. Neither

Response	Count
Commissioner initially recused himself saying "I don't even want to hear this proposal" but later participated in process	1
Commissioner told applicant that he was "wasting his time and money" because he would never get approval	18
Both	39
Neither	2

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### Is it a conflict and what should be done? #1

An application has been submitted for zone change from residential to commercial. The neighbors present a protest petition against zone change but the commission votes unanimously in favor of zone change.

The chairman of commission is husband of the applicant and he participates in hearing, states he has no financial interest, and votes in favor of application

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### Is this a conflict and what should he have done?

- A. Since it was a zone change and he says he has no financial interest, he should state so for the record and vote
- B. He should recuse himself because it is a conflict
- C. He can participate in the discussion but should not vote
- D. It depends

Response	Count
Since it was a zone change and he says he has no financial interest, he should state so for the record and vote	1
He should recuse himself because it is a conflict	37
He can participate in the discussion but should not vote	3
It depends	3

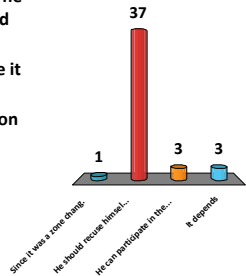
**Is this a conflict and what should he have done?**

A. Since it was a zone change and he says he has no financial interest, he should state so for the record and vote

B. He should recuse himself because it is a conflict

C. He can participate in the discussion but should not vote

D. It depends



Response	Count
Since it was a zone change...	1
He should recuse himself...	37
He can participate in the discussion...	3
It depends	3

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**ANSWER: Recuse himself entirely from participating**

Quotation from Low v. Madison, 1948 CT Supreme Court:  
 “Zoning restrictions limit the individual’s free use of his real estate in the interest of the general public good. The administration of power of that nature ... demands the highest public confidence. Anything which tends to weaken such confidence and to undermine the sense of security for individual rights which the citizen is entitled to feel is against public policy.”

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**Is it a conflict and what should be done? #2**

The Chairman of wetlands commission votes in favor of two subdivision applications and subsequently obtains a \$250,000 contract for road building in first subdivision. He then obtains \$170,000 contract for road building in second subdivision and votes in favor of third subdivision application, which decision is appealed.

The Chairman testifies that he hadn t decided whether or not to bid on road building work in third subdivision

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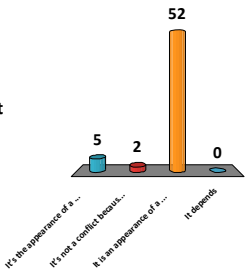
**Is this a conflict and what should he have done?**

A. It’s the appearance of a conflict and he should state that it will not influence his decision

B. It’s not a conflict because he may not bid on the work

C. It is an appearance of a conflict sufficient for him to recuse himself

D. It depends



Response	Count
It's the appearance of a conflict...	5
It's not a conflict because...	2
It is an appearance of a conflict sufficient...	52
It depends	0

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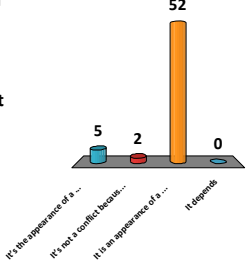
**Is this a conflict and what should he have done?**

A. It’s the appearance of a conflict and he should state that it will not influence his decision

B. It’s not a conflict because he may not bid on the work

C. It is an appearance of a conflict sufficient for him to recuse himself

D. It depends



Response	Count
It's the appearance of a conflict...	5
It's not a conflict because...	2
It is an appearance of a conflict sufficient...	52
It depends	0

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**ANSWER: The appearance of conflict of interest is sufficient for chairman to have been disqualified**

Quotation from Brunswick v. Bethany IWWC, 1992 CT Appellate Court : “The law does not require proof that the interested commissioner actually acted wrongfully. The evil lies not in the wrongful act of the commissioner but ‘rather in the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured will always exist’”.

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### Is it bias or predisposition? #1

An application is made to planning and zoning commission for expansion of gravel mining operation. The chairman visited site regularly , followed trucks leaving property and interviewed a family for whom the applicants had done construction work.

During the public hearing, two commissioners discussed potential impacts on wetlands beyond the scope of the application

The wife of commissioner who recused himself testified in opposition at the hearing and read a letter she had submitted to the commission.

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### Was there impermissible predisposition or bias?

A. Yes  
B. No

Response	Count
A. Yes	14
B. No	42

### Was there impermissible predisposition or bias?

A. Yes  
B. No

Response	Count
A. Yes	14
B. No	42

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### ANSWER: NO

- Chairman s actions, although zealous , did not prove predisposition or bias
- Statements of two commissioners during hearing was insufficient to prove predisposition or bias
- Wife s statements did not constitute appearance by husband at hearing – 22a-42(c) is different from 8-11 in that regard
- Cioffoletti v. Ridgefield PZC, 1988 CT Supreme Court decision

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### Is it bias or predisposition? #2

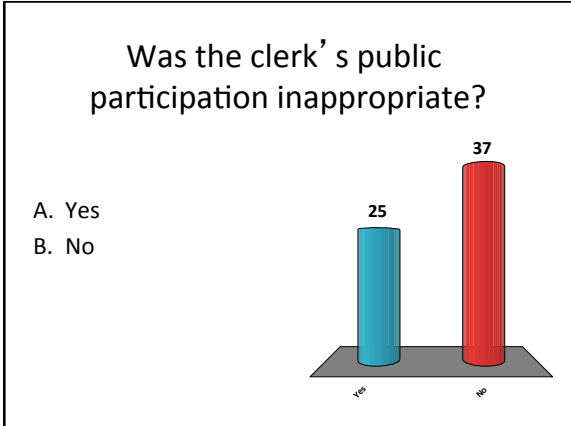
An application is submitted to historic district commission for approval of modifications to various exterior architectural features. The commission clerk recuses himself at the start of the public hearing. After applicant s presentation, clerk provides testimony against application as an expert witness. At second hearing, clerk “continued to comment extensively” on the application as a member of the public and an expert in architecture. The clerk submits eight page single-spaced letter detailing reasons to deny the application. The application is denied.

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### Was the clerk’s public participation inappropriate?

A. Yes  
B. No

Response	Count
A. Yes	25
B. No	37



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### ANSWER: YES

Level of participation by commission member violated applicant's right to fundamental fairness in the proceeding

The recused commissioner was found to have a personal interest in the application by virtue of his "expert" testimony

**Barry v. Litchfield HDC**, 2008 CT Appellate Court decision

"While proceedings before zoning and planning boards and commissions are informal and conducted without regard to the strict rules of evidence ... they cannot be so conducted as to violate the fundamental rules of natural justice. ... In short, the conduct of the hearing must be fundamentally fair."

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### Hypothetical Question #1

Businesses and residents form a non-stock corporation to advocate zoning policy against "big box stores"

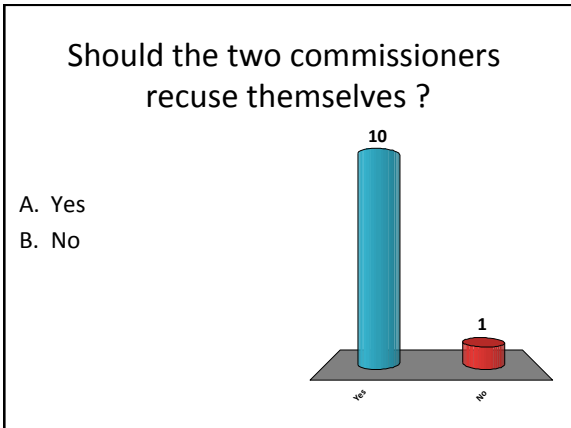
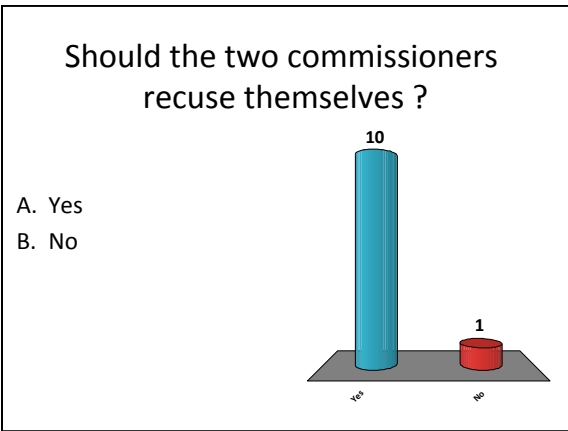
Corporation applies for amendment to regulations to require additional studies and information for certain large retail proposals

Corporation requests that two members recuse themselves because of financial conflicts of interest

One commissioner and his wife own a large parcel of property in the zone where "big box" was to be located and developer held an option on it

One commissioner is the son-in-law of another owner of a large parcel of property in the same zone and developer held an option on it

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### Hypothetical Question #2

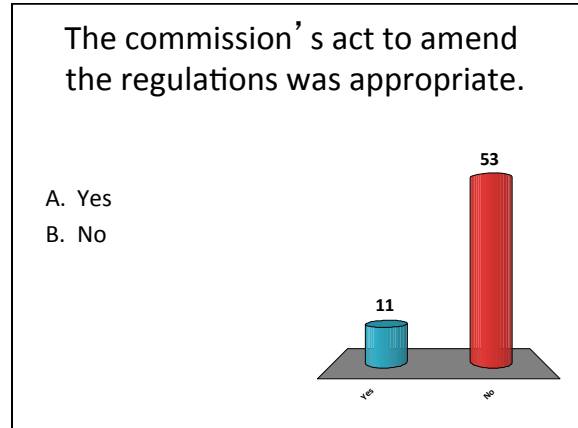
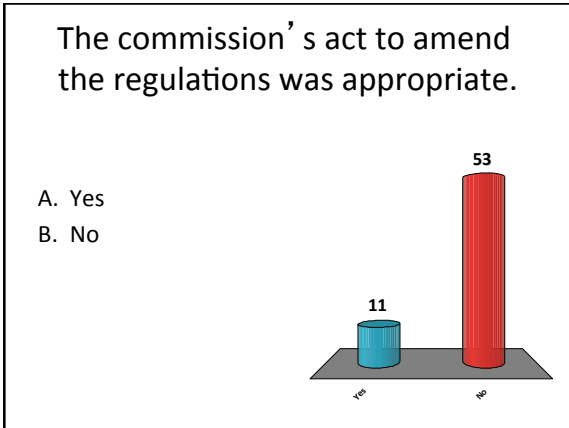
Business files application for a particular commercial use, permitted as a special exception in that zone

Commission denies application because applicant had failed to obtain approval of architectural review board

Approval of architectural review board not required by regulations for special exception

Two weeks later, commission files an application to amend zoning regulations to prohibit the applicant's proposed use in that zone

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# QUESTIONS?

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A slide with a grey header bar containing the text 'Center for Land Use Education and Research at the University of Connecticut'. Below the header, the word 'QUESTIONS?' is written in large, bold, black letters. Underneath, there are two small square images: the left one shows a woman with her hand to her head in a thoughtful pose, and the right one shows a man in a suit with his hand to his head in a similar pose. At the bottom of the slide, there is a small circular logo and a line of fine print: '© University of Connecticut. The University of Connecticut supports all state and federal laws that promote equal opportunity and prohibit discrimination.'