STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

ELMWOOD CITIZENS FOR SENSIBLE GROWTH, INC., a Michigan non-profit corporation, and STEVE VAN ZOEREN,

Plaintiffs,

v

File No. 01-5451-CE
HON. PHILIP E. RODGERS, JR.

CHARTER TOWNSHIP OF ELMWOOD, a Michigan township, ELMWOOD TOWNSHIP BOARD OF TRUSTEES, ELMWOOD TOWNSHIP PLANNING COMMISSION, and JOHN GALLAGHER, as Planning Commission Chairman and as Board of Trustees Member, in his official capacities,

Defendants.
/

Christopher M. Bzdok (P53094)
Scott W. Howard (P52028)
Attorneys for Plaintiffs

Michael A. Kronk (P16259)
Attorney for Defendants

DECISION AND ORDER REGARDING
PLAINTIFFS' MOTION FOR STAY ON APPEAL OR,
ALTERNATIVELY, PRELIMINARY INJUNCTION AND
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Plaintiffs appeal the Defendants' approval of a conditional use permit and site condominium for a project known as Lincoln Meadows. The Stewart and Armstrong families (hereinafter collectively referred to as the "Developer") own acreage in Elmwood Township, Leelanau County, Michigan. In June of 1999, the Developer met informally with the Township Planner, the Zoning Administrator, and the Planning Commission Chairman to discuss what types of uses for their land were permitted by the Township Zoning Ordinance (hereinafter the "Ordinance") and whether a

proposed project would fit within the general allowable classifications. The Developer ultimately submitted a preliminary site plan for review by the Elmwood Township Planning Commission. The site plan was approved in February of 2000. The Township Zoning Ordinance , however, required that the proposed development also obtain a conditional use permit. A public hearing was held on March 21, 2000 and, on April 18, 2000, the conditional use permit for the proposed project was denied.

The Developer submitted a revised application to the Township Planning Commission on or about June 6, 2000. A public hearing was held on June 27, 2000. On July 6, 2000, at a special meeting, the Planning Commission found by a vote of 4 to 3 that the "proposed application meets the general criteria of Section 13.6(1), but conditions must be established to satisfy Section 13.6(2)." On August 1, 2000, the Township Planning Commission made a bald determination that the project met the requirements of Section 13.6(2) for clustered housing. On August 15, 2000, the Township Planning Commission formally authorized the conditional use permit.

The application was then presented to the Township Board for final approval. It was scheduled for the first Board meeting in January of 2001. The Township Board conducted an additional public hearing on the application and voted 5 to 1 to approve it.

The Plaintiff non-profit corporation was incorporated on January 25, 2001. On January 29, 2001, it filed the Complaint herein challenging the decision of Elmwood Township to approve the application for the Lincoln Meadows development. On March 13, 2001, it filed an Amended Complaint and added as a party Plaintiff, Steve Van Zoeren, an individual who owns land adjacent to the Lincoln Meadows project.

The Plaintiffs filed a motion for stay on appeal or, alternatively, preliminary injunction. The Plaintiffs request that the Court issue a stay and an injunction to prevent the Defendants' approval of the conditional use permit and site condominium from taking effect until this matter can be resolved. The Defendants filed a motion for summary disposition. They claim that they are entitled to judgment as a matter of law for the following reasons: (1) the Court lacks subject matter jurisdiction because the Plaintiff Elmwood Citizens For Sensible Growth has failed to show "special damages" and, thus, does not have standing to pursue this matter, MCR 2.116(C)(4); (2) the Plaintiff Elmwood Citizens For Sensible Growth lacks the legal capacity to sue, MCR

2.116(C)(5); (3) as to the Conflict of Interest allegations contained in Count II, the Plaintiffs' action is barred by the doctrine of laches, MCR 2.116(C)(7); and (4) as to the Conflict of Interest allegations contained in Count II, the Plaintiffs have failed to state a claim upon which relief can be granted, MCR 2.116(C)(8). The Plaintiffs filed a response to the Defendants' motion. The Court heard the arguments of counsel on May 14, 2001 and took the matter under advisement. The Court now issues this written decision and order.

STANDARD OF REVIEW

MCR 2.116(C)(4) and (5)

When reviewing a motion for summary disposition for lack of subject matter jurisdiction under MCR 2.116(C)(4), the Court must determine whether the pleadings demonstrate that the defendant is entitled to judgment as a matter of law or whether the affidavits and other proofs show there is no genuine issue of material fact. *Steele v Dep't of Corrections*, 215 Mich App 710, 712; 546 NW2d 725 (1996), lv den 454 Mich 853, 558 NW2d 726. Whether subject-matter jurisdiction exists is a question of law. *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). In reviewing a motion for summary disposition pursuant MCR 2.116(C)(5), the Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties. *Dep't of Social Services v Baayoun*, 204 Mich App 170, 173; 514 NW2d 522 (1994). The Court must examine the entire record to determine whether the defendant is entitled to judgment as a matter of law. *Id.*

MCR 2.116(C)(7)

MCR 2.116(C)(7) sets forth the following grounds for summary disposition:

> The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

In *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (2000), the Court of Appeals said:

> When a motion for summary disposition is premised on MCR 2.116(C)(7), the nonmovant's well-pleaded allegations must be accepted as true and construed in the nonmovant's favor and the motion should not be granted unless no factual development could provide a basis for recovery. *Stabley, supra* at 365; 579 NW2d 374; *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997). '[T]he court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that has been filed or submitted by the parties.' *Horace v City of Pontiac*, 456 Mich. 744, 749; 575 NW2d 762 (1998). If no facts are in dispute, whether the claim is statutorily barred is a question of law. *Dewey, supra* at 192; 572 NW2d 715.

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc,* 167 Mich App 202, 205; 421 NW2d 631 (1988).

STANDING AND CAPACITY TO SUE

The Defendants challenge the Plaintiff non-profit corporation's standing to assert those claims set forth in its Verified Complaint. The Plaintiffs respond that (1) it has representational standing; and (2) an individual adjacent landowner has been added as a party Plaintiff.

The Plaintiffs correctly contend that "representational standing" has been recognized in Michigan. In *Trout Unlimited v City of White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992), the Court of Appeals said:

> To have standing, a plaintiff must demonstrate a legally protected interest that is in jeopardy of being adversely affected. *Health Central v Ins Comm'r*, 152 Mich App 336, 347-348; 393 NW2d 625 (1986). To have standing, a party must allege a sufficient personal stake in the outcome of the controversy to ensure that the dispute sought to be adjudicated will be presented in an adversarial context that is capable of judicial resolution. *Karrip v Cannon Twp*, 115 Mich App 726, 733; 321 NW2d 690 (1982); *Baker v Carr*, 369 US 186, 204; 82 S Ct 691, 703, 7 L Ed 2d 663 (1962); Sierra Club v Morton, 405 US 727, 731-732, 92 S Ct 1361, 1364-1365; 31

> L Ed 2d 636 (1972); *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992). Generally, a plaintiff shows a personal stake in a lawsuit by demonstrating that he has been injured or represents someone who has been injured. *Kaminskas v Detroit*, 68 Mich App 499; 243 NW2d 25 (1976). **A nonprofit corporation has standing to advocate interests of its members where the members themselves have a sufficient stake or have sufficient adverse and real interests in the matter being litigated.** *Karrip, supra; White Lake Improvement Ass'n v City of Whitehall*, 22 Mich App 262; 177 NW2d 473 (1970). [Emphasis added.]

Similarly, in *Cody Park Ass'n v Royal Oak School Dist*, 116 Mich App 103; 321 NW2d 855 (1982) the Court of Appeals held that the Cody Park Association, which was an unincorporated voluntary association[1] consisting of only a couple of property owners or users, had standing to seek a permanent injunction to restrain the school district from making changes in property without seeking and securing the permission of the city under its zoning ordinances. In reaching this conclusion, the Court reasoned that "[a] defendant is not harmed provided the final judgment is a full, final and conclusive adjudication of the rights in controversy that may be pleaded in bar to any further suit instituted by any other party."

Additionally, Section 23A of the Township Rural Zoning Act confers standing on a person with an "interest affected" by the zoning ordinance. MCL 125.293a(1); MSA 5.2963(23a); *Brown v East Lansing Zoning Board of Appeals*, 109 Mich App 688, 699; 311 NW2d 828 (1981). This standard applies to this appeal. The affidavits of Steven Van Zoeren, Paul Blystone, Anthony Winowiecki, Robert and Margie Boone, and Pei-Shan Van Zoeren, all members of the Plaintiff corporation, clearly establish that the Plaintiff corporation represents individuals who have interests affected by the decisions of the Township that are at issue in this case.

For these reasons and because Steve Van Zoeren, an individual adjacent land owner, has been added as a party Plaintiff, the Defendants' motion for summary disposition brought pursuant to MCR 2.116(C)(4) and (5) is denied.

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[1]The fact that the Plaintiff corporation was not officially incorporated until after most of the decisions complained of were made is immaterial.

CONFLICT OF INTEREST

The Defendants contend that they are entitled to judgment as a matter of law on Count II of the Complaint wherein the Plaintiffs allege a conflict of interest on the part of Defendant John Gallagher ("Gallagher").[2] At all times relevant hereto, Gallagher was a member and the Chairperson of the Township Planning Commission and a member of the Township Board of Trustees. While the Developer's site plan was being reviewed by the Planning Commission, Gallagher purchased a 20-acre parcel of property adjacent to the Lincoln Meadows development from the Developer for substantially less than the list price.

The Defendants' position is that (1) the Plaintiffs' claim is barred by the doctrine of laches and (2) Gallagher was not disqualified because, after he disclosed his acquisition of the adjoining parcel, the Planning Commission and Township Board voted that he was not precluded from acting in his official capacity in this matter.

Laches

The Court of Appeals recently described the doctrine of laches in *City of Troy v Papadelis*, 226 Mich App 90; 572 NW2d 246 (1998), saying:

> The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against defendants. *Sedger v Kinnco, Inc*, 177 Mich App 69, 73; 441 NW2d 5 (1988). In determining whether a party is guilty of laches, each case must be determined on its own particular facts. *Id.* The defendant must prove a lack of due diligence on the part of the plaintiff resulting in some prejudice to the defendant. *Badon v General Motors Corp*, 188 Mich App 430, 436; 470 NW2d 436 (1991).
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> . . . [A] lack of due diligence alone is not sufficient. The defense of laches does not apply unless the delay of one party has resulted in prejudice to the other party. *Tomczik v State Tenure Comm*, 175 Mich App 495; 438 NW2d 642 (1989). 'It is the effect, rather than the fact, of the passage of time that may trigger the defense of laches.' *Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571, 578; 485 NW2d 129 (1992).

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[2]The Plaintiffs' original Verified Complaint included allegations, based on information and belief, of conflicts of interest among at least four members of the Township Board based on campaign contributions from the Developer. Based on materials supplied by the Township, the Plaintiffs have withdrawn those allegations.

In the instant case, the Defendants have not demonstrated any prejudice that has resulted from the Plaintiffs' delay in raising the issue of Gallagher's conflict of interest. Although the Defendants continued the governmental process and ultimately approved the Developer's plans, there is no indication in the record that this action was taken in reliance on the Plaintiffs' failure to initiate suit earlier. Therefore, the defense of laches does not apply.

Furthermore, this matter was not ripe for judicial review until the Township Board, with its final review and decision-making authority on such projects, approved the project in January of 2001. Section 23 a of the Township Rural Zoning Act, MCL125.293a; MSA 5.6293(23a) provides:

> The decision of the board of appeals rendered pursuant to section 23 shall be final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal the circuit court shall review the record and decision of the board of appeals to insure that the decision:
>
> (a) Complies with the constitution and laws of the state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
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> (d) Represents the reasonable exercise of discretion granted by law to the board of appeals.
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> (2) If the court finds the record of the board of appeals inadequate to make the review required by this section, or that there is additional evidence which is material and with good reason was not presented to the board of appeals, the court shall order further proceedings before the board of appeals on conditions which the court considers proper. The board of appeals may modify its findings and decision as a result of the new proceedings, or may affirm its original decision. The supplementary record and decision shall be filed with the court.
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> (3) As a result of the review required by this section, the court may affirm, reverse, or modify the decision of the board of appeals.

T.P. Planning Comm. applied Zoning Ordinance and T.P. Board approved.

The Plaintiffs' Complaint was filed within 21 days of the Board's final decision. This appeal is timely. *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57; 445 NW2d 61 (1989).

The Defendants' motion for summary disposition on the conflict of interest issue on the basis that it is precluded by the doctrine of laches is denied.

Disclosure

The Defendants claim that they are entitled to judgment as a matter of law on the issue of Gallagher's conflict of interest because the Plaintiffs have failed to state a claim upon which relief may be granted. MCR 2.116(C)(8). The Defendants rely upon the undisputed fact that Gallagher "disclosed his acquisition of the adjoining parcel both during the course of the deliberations of the Planning Commission as well as the deliberations of the Township Board" and "[i]n both instances, the applicable bodies (the Planning Commission and the Township Board) voted that Trustee Gallagher did not have a "conflict of interest" that would preclude his acting on the issue before either the Planning Commission or the Board of Trustees."

The Plaintiffs, on the other hand, contend that disclosure of the acquisition alone is not enough. The Plaintiffs contend that Gallagher failed to disclose that he purchased the property adjacent to the project site from the Developer while the Developer's zoning application was being reviewed and decided by the Planning Commission and Township Board and "he appears to have obtained the property for tens of thousands of dollars below the property's value." According to the documentary evidence submitted by the Plaintiffs, Gallagher (along with others) entered into a purchase agreement with the Developer six months after the Developer filed its site plan application. The parties closed on the sale in November of 1999. Gallagher paid $150,000 for the parcel that was originally listed for $225,000. After the sale, the Township Assessor estimated the value of the parcel to be $218,000 and it has been appraised at $180,000.

At the March 21, 2000 public hearing on the project, Gallagher disclosed that he had purchased the 20-acre parcel from the Developer, but he did not disclose the purchase price, appraisal value or the date of the transaction. The remaining Planning Commission members voted 4 to 2 against recusing Gallagher.[3] On January 8, 2001, the Township Board held its public hearing on the project. At the beginning of the hearing, Gallagher again disclosed that he had purchased a parcel of land from the Developer and he asked for a vote to determine whether the Board would recuse him. Again he did not disclose the purchase price, appraisal value or the date of the transaction. The Board voted 6 to 1 not to recuse him.

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[3]No authority has been cited to the Court for the proposition that a governmental body may itself vote to excuse a conflict of interest and endorse participation by the subject official.

While the parties dispute whether or not Gallagher has a conflict of interest, they agree that Michigan law has long recognized that a conflict of interest deprives the parties of their due process right to a fair and impartial administrative hearing. *Crampton v MI Dep't of State*, 395 Mich 347; 235 NW2d 352, 354 (1975) and *Barkey v Nick*, 11 Mich App 381; 161 NW2d 445, 447 (1968). In *Crampton, supra,* the court delineated those factors which suggest the appearance of a conflict of interest sufficient to overturn an administrative decision. The list describes as inherently impermissible those situations in which a member of the administrative body:

(1) Has a pecuniary interest in the outcome;

(2) Has been the target of personal abuse or criticism from the party before him;

(3) Is enmeshed in (other) matters involving petitioner;

(4) Might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decision maker. *Id* at 354.

Here, Gallagher acquired an interest in a 20-acre parcel of land adjacent to the subject development. He purchased his interest from the Developer during the time in which the Developer's site plan was pending for approval before the Planning Commission of which he was both a member and Chairperson. In his official capacity on both the Planning Commission and the Township Board, Gallagher was required to discuss and vote on whether to approve the Developer's site plan. Further factual development is needed in order to determine whether Gallagher actually had a conflict of interest, i.e., whether he received a gift (purchase at a price significantly less than fair market value) from the Developer or engaged in a business transaction in which he may profit from his official position or authority or benefit financially from confidential information which he has obtained or may obtain by reason of his position or authority.

In this Court's opinion, however, further pursuit of this issue is unnecessary. Based on the record before this Court, Gallagher's involvement with the Developer creates at least an appearance of impropriety. While Michigan law is not clear on this point, it has been long recognized in other states that an appearance of impropriety is every bit as damaging as a conflict of interest. Both destroy the faith and trust that is integral to the operation of government in a representative democracy. As our government becomes increasingly more remote from its people, it seems

important to strengthen the ethical requirements for those who participate in it. The people's confidence in government cannot long be sustained if we turn a blind eye to behavior that creates an impermissible appearance of impropriety.

The public policy served by the enforcement of the so-called "appearance" doctrine is an important one:

> The evil lies not in influence improperly exercised 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 in the exercise of zoning power. *Mills v own Plan & Zoning Comm of the Town of Windsor*, 144 Conn 493; 134 A2d 250 (1957).

Courts across our country have repeatedly questioned the participation by a board or commission member in a proceeding, including zoning proceedings, where such participation creates an appearance of impropriety, partiality, bias, or lack of fairness. In *Abrahamson v Wendell*, 72 Mich App 80; 249 NW2d 403 (1976), on reh 76 Mich App 278; 256 NW2d 613 (1977), the Court of Appeals ruled, as a matter of law, that the appearance of a township supervisor before the zoning board of appeals, where the supervisor had appointment power over the board, presented the potential for duress and rendered the action of the board void. The Court emphasized the need to create confidence in public officials by avoiding even the appearance of impropriety: "[i]t is hoped that this conclusion will help bolster the public confidence in the decision makers who must represent their interests and who must seek to avoid even the appearance of impropriety." 72 Mich App at 83.

Similarly, in *Barkey v Nick*, 11 Mich App 381; 161 NW2d 445 (1968), the action of a zoning board of appeals was also invalidated due to the appearance of partiality. There, the Court held that a ruling of the zoning board of appeals was void due to the fact that a city commissioner who had zoning board of appeals appointment power represented his brother before the board. The appearance of the commissioner before the board was deemed improper because it created an appearance of partiality: "[i]t creates an abuse of trust imposed by the assumption of public office and creates a personal pecuniary interest conflicting with the fiduciary duty owed all members of the public. Further, it creates a doubt in the public mind as to the impartiality of the board's action." 11 Mich App at 385; see also, OAG, 1979-1980, No. 5774, p 972 (Sept. 8, 1980). A member of a township

board must avoid even the appearance of impropriety; any conflict of interest between personal profit and public duty must be scrupulously avoided.

The law of other jurisdictions is similar to that of Michigan, and there are limitations on the application of the doctrine. Mere contact with a party or the existence of a remote fact which might suggest the impropriety was held not to be sufficient to call the doctrine into play in *King County Water District v King Count v Boundary Review Board*, 87 Wash 2d 536; 554 P2d 1060 (1976). The Oregon Supreme Court declined to follow the doctrine in *1000 Friends of Oregon v Wasco County*, 304 Or 76; 742 P2d 39 (1987), cert den, 486 US 1007 (1988). There, a member of the board of county commissioners had voted to call an election on a proposal to incorporate a city. His vote was challenged on the grounds that he had sold cattle to the petitioners before the vote at generally unfavorable terms. The commissioner in question had informed his fellow commissioners of this sale but not members of the public. The Oregon Court of Appeals invalidated the vote because the cattle sale created an appearance of impartiality. The Oregon Supreme Court reversed this decision, stating as follows:

> . . . A reviewing body may find it less painful to order reconsideration of an official's action for insufficient respect for appearances than to determine whether the official in fact acted under the influence of bias or self-interest. But the two standards serve different interests. Actual impartiality protects the substantive quality of the official action as well as the parties' interest in its fairness. Invalidation for appearance alone, as the *Swift* court said, aims to preserve public confidence and it does so regardless whether the decision in fact was both correct and fair. The price of such invalidation is delay of what, but for appearances, is a proper application of public policy, at potentially heavy cost to an innocently successful proponent as well as to the agency. 742 P2d at p 44.

Other limitations on the doctrine do not allow the alleged appearance of impropriety to be speculative. A zoning commissioner was not disqualified merely because he was a member of an association opposed to an applicant's request for a special permit, *Holt-Lock, Inc v Zoning and Planning Commission of the Town of Granby*, 161 Conn 182, 286 A2d 299 (1971), or because he had once sold equipment to the applicant for a variance ten years earlier. *Fail v LaPorte County Board of Zoning Appeals*, 171 Ind App 192, 355 NE2d 455 (1976). Nor was the decision invalid simply because the law firm representing an applicant had in the past represented a corporation in which a commissioner owned a substantial amount of stock. *Anderson v Zoning Comm of the City*

of Norwalk, 157 Conn 285, 253 A2d 16 (1968). Finally, in *Dana-Robin Corp v Common Council of the City of Danbury*, 166 Conn 207, 348 A2d 560 (1974), a planning commission member was held not disqualified upon the grounds of conflict of interest or an appearance of impropriety because he, his mother and sister were the sole stockholders in real estate corporations which owned properties in the city unrelated to the properties involved in the proceeding.

Recognizing the validity of the appearance doctrine, it applies in this case for several reasons. Gallagher disclosed his acquisition of a parcel of property from the Developer. He did not, however, disclose the date of the transaction which occurred shortly before the Planning Commission's first consideration of the Developer's site plan. Further, Gallagher did not disclose the purchase price, listing price or Township assessor's appraised value. Based on the limited information that was disclosed, the Planning Commission and subsequently the Township Board both voted to allow Gallagher to participate in the decisions regarding the development. Whether or not a conflict of interest was created, full disclosure of these facts would have created an appearance of impropriety that precluded Gallagher's participation and which could not be rectified by a vote of his fellow Board members.

In offering its opinion on this matter, the Court is well aware that members of township boards, planning commissions, and zoning boards of appeals are friends, neighbors, and acquaintances and often members of families who have resided in the region for several generations. They serve for little or no compensation, are known to those who elect or appoint them, enjoy good reputations and, clearly, embody the concept of public service. Yet, the juxtaposition of growth and rapid development with the lifestyle selected by those who live in a rural area can create, among these neighbors, confrontations characterized by anger, frustration with the decision-making process, and a feeling of helplessness. In resolving such disputes at the township level, it is critically important that issues are resolved in a fair hearing untainted by the appearance of impropriety.[4]

Here, Gallagher was the Chairperson of the Planning Commission and a Trustee on the Township Board. Gallagher was vocal in his support for the project. There was perceived alliance

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[4]This Court's views on this issue are well known and were first described and publicly reported on July 16, 1991 in the Decision and Order entered in *Garfield Neighborhood Watch et al v Charter Twp of Garfield*, Grand Traverse County Circuit Court File No. 90-8075-CE. The Court has taken the liberty of "plagiarizing" much of its own earlier decision in this opinion.

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between Gallagher and the Developer. Gallagher acknowledged throughout the proceedings that the development did not comply with the clustered housing provisions of the Ordinance and took the position that he did not believe it should have to meet those requirements. After the approval was granted, however, on the advice of counsel, the Board made a bald official finding that the development satisfied the requirements of clustered housing.

This Court cannot review the record below and reach any conclusion other than that Gallagher's participation created an atmosphere which has weakened public confidence and created a doubt in the public mind as to the impartiality of the Planning Commission's and the Township Board's actions. Gallagher's participation is analogous to that of Bell and Jones discussed below:

> It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well.
>
> In the instant case, we find no evidence of, nor do we impute any, dishonest, dishonorable or self-serving motives or conduct on the part of any members of the planning commission in conducting the hearing and entering their findings of fact and recommendations. Neither do we hold that the respective individual actions, relationships and expressed views of the chairman of the planning commission, Mr. Bell, or Mr. Jones constitute any breach of public trust which, standing alone, would necessarily and fatally infect the hearing and fact-finding proceeding. Nevertheless, we, as was the trial court, are driven to the conclusion that the unfortunate combination of circumstances heretofore outlined and the cumulative impact thereof inescapably cast an aura of improper influence, partiality, and prejudgment over the proceedings thereby creating and erecting the appearance of unfairness condemned in *Smith v Skagit County* 75 Wash 2d 715, 739; 453 P2d 832, 846 (1969); *Chrobuck v Snohomish County*, 78 Wash 2d 858; 480 P2d 489, at 496 (1971). See also, *Fleming v City of Takoma,* 81 Wash 2d 292: 502 P2d 327 (1972).

In fashioning a remedy for the appearance of impropriety which has been created in this case, the Court is guided by *Murach v Planning and Zoning Comm of the City of New London*, 196 Conn 192; 491 A2d 1058 (1985). *Murach* involved an appeal from a trial court decision upholding a zoning reclassification approved by the city of New London's Planning and Zoning Commission. While it was determined that one member of the commission had been illegally appointed and had made the motion to approve the disputed zoning reclassification, the Connecticut Supreme Court

noted that while the appearance of impropriety was sufficient to require disqualification, it did not necessarily invalidate the commission's action. On this point, the Court wrote as follows:

> . . . we have often stated that the test for disqualification 'is not whether personal interest does, in fact, conflict, but whether it reasonably might conflict.' [Citations omitted.] In such matters, however, we have not always adhered to a per se rule of invalidation when a member of a board or commission had a conflict of interest that should have counseled disqualification in a matter upon which the member should not have participated. [Citation omitted] We note at this juncture that the trial court neither found nor do the plaintiffs contend, that Nunes had any personal or financial interest in this particular zoning classification.
>
> The statutes at issue, which we hold to have precluded Nunes' membership on the city of New London Planning and Zoning Commission, do not in their language provide any guidance as to what remedy a reviewing court should grant in the event of a post-hoc Sec. 8-19 and Sec.8-4a disqualification. The case law on this point is also sparse. In *Board of Comm'r v Thompson*, 216 Ga 348; 116 SE2d 737 (1960), a challenge was made to the commission's approval, by a six to three margin, of a zoning reclassification request. Five affirmative votes were needed to grant the request, but two of the members voting in favor of the approval were disqualified. One of those disqualified, a judge of the county juvenile court, was prohibited by a statute comparable to Sec. 8-19 from membership on the commission. In holding that the trial court properly held the zoning commission's action void, the court tallied up the remaining valid affirmative votes, four, and noted that "[e]liminating the two illegal votes, the resolution failed to carry by a vote of four to three." *Id*, 349.
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> Significantly, the Court did not hold that the illegal votes per se tainted the entire action. In cases involving municipal councils, generally 'where the required majority exists without the vote of a disqualified member, his presence and vote will not invalidate the result.' 56 Am Jur 2d, Municipal Corporations, Sec. 172, p 225 (1971); See also, *Marshall v Ellwood City*, 189 Pa 348, 354; 41 A 994 (1899); Annot., 43ALR 2d 698, 751, Sec. 27[b] (1955).

Murach, supra, at 1064-1065.

The better-reasoned decision of courts which apply the appearance doctrine have not adopted a per se rule of invalidation. Here, the Court has not decided whether there was a conflict of interest as more factual development is needed to make that determination. The Court has found, however, that there was an appearance of impropriety. While the appearance of impropriety had its origins in the timing and price paid when Gallagher acquired property from the Developer and while the participation of Gallagher in that real estate transaction disqualified him from participation in

proceedings involving the Lincoln Meadows development, public confidence was probably most affected by the selective disclosure of information about the purchase, his vocal support of the project, and the fact that he cast the deciding vote for approval. There is no evidence that Gallagher has any ongoing business arrangement with the Developer, but he does continue to own the property whose value will invariably be affected by the Lincoln Meadows development.

This case is particularly troubling because the Planning Commission's vote was not unanimous. Without Gallagher's support, the conditional use permit would not have been approved. According to the minutes of the meetings of the Planning Commission and Township Board, Gallagher voted to approve the development at every stage in the process. He voted for the project in the 4 to 3 vote of the Planning Commission to initially deny the request and he cast the deciding vote in favor of the project in the 4 to 3 vote of approval in the Planning Commission. He also served a Chairperson of the Planning Commission's meetings.

Recognizing that the Plaintiffs bear the burden of demonstrating that the disqualification of Gallagher tainted the entire proceeding, the Court has reviewed the record. The minutes of the relevant Planning Commission meetings indicate that without Gallagher's vote a quorum was still present and the vote on the conditional use permit would have been tied.

Notwithstanding the strong presumption of regularity in the proceedings of a public body such as a township planning commission or township board, the clear indication from the record is that Gallagher's participation actually impaired the integrity of the decision-making process. It is then, this Court's conclusion that his participation rendered the Planning Commission's and the Township Board's decisions invalid.

Gallagher should have disqualified himself due to an appearance of impropriety. This ethical issue cannot be resolved by a Township Board's vote to proceed; which vote, in fairness to the Board, was made with incomplete information. This Court is constrained to find that the disqualification of Gallagher tainted the entire proceeding.

The Defendants' motion for summary disposition on this issue is denied. The Plaintiffs are entitled to summary disposition on this issue. MCR 2.116(I)(2). The decisions of the Planning Commission and the Township Board are invalid and of no force and effect. The site plan approval and conditional use permit are void. The case is remanded to the township for further action

consistent with this opinion. In its reconsideration of the Developer's proposal, the Township must specifically discuss the relationship of the proposed development to the clustered housing provisions of the Zoning Ordinance. Its findings must be supported factually and with reference to the relevant Zoning Ordinance provisions.

CONCLUSION

In summary, the Court finds that the Plaintiff corporation has standing and the legal capacity to sue. The Defendants' motion for summary disposition on these issues is denied. The Court further finds that the doctrine of laches does not bar the Plaintiffs' conflict of interest claim. The Defendants' motion for summary disposition on this issue is also denied.

Finally, the Court cannot find that Gallagher had an actual conflict of interest without further factual development. The Court holds, however, that this point need not be further explored because of the appearance of impropriety created by Gallagher's purchase of an adjacent parcel of land from the Developer during the time period that the Developer was seeking site plan approval. The appearance of impropriety disqualified Gallagher from participating in the site plan review proceedings and rebuts the presumption of regularity in those proceedings. The Planning Commission and Township Board decisions in which Gallagher participated are invalid and of no force and effect. The Defendants are enjoined from issuing permits to the Developer on this record. The Developer's proposal is remanded to the Township. This Decision and Order resolves all issues raised and closes the case.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/06/01