

February 9, 1994

Mr. A. Dean Tranmer
Pocatello City Attorney
P.O. Box 4169
Pocatello, ID 83205

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Bannock Regional Medical Center

Dear Mr. Tranmer:

You requested an opinion from this office regarding the denial of a conditional use permit by the Pocatello City Council and whether certain members of the city council had conflicting interests in the matter. According to your letter, the Bannock Regional Medical Center applied to the City of Pocatello for a conditional use permit in order to expand its facility. After a public hearing, the city's community development commission recommended that the conditional use permit be granted. Upon review, the city council voted to reject the community development commission's recommendation and denied the Bannock Regional Medical Center's request for a conditional use permit.

The Bannock Regional Medical Center has raised the issue whether a member of the city council had a conflict of interest when considering the conditional use permit application. This councilmember, Ed Brown, sits on the Board of Directors for the Pocatello Regional Medical Center which you state is a "competitor" of Bannock Regional Medical Center. Mr. Brown receives no compensation for his role as a director and has no pecuniary interest in the Pocatello Regional Medical Center. (A former councilmember, Earl Pond, was a member of the Pocatello Regional Medical Center's foundation, a fundraising entity for the medical center when this matter came before the council. Councilman Pond has since left the city council and would not participate in any council reconsideration of the conditional use permit.)

Councilman Brown has no direct interest or association with Bannock Regional Medical Center. Nevertheless, Bannock Regional Medical Center contends that Councilman Brown's association with Bannock Regional Medical Center's main

competitor creates a conflict of interest within the framework of Idaho Code § 67-6506 as well as the Ethics in Government Act of 1990, chapter 7, title 59, Idaho Code. Our analysis will focus upon Idaho Code § 67-6506 since it deals specifically with zoning proceedings and is prohibitory in nature. Our conclusions would be no different if Idaho Code § 59-701, et al. were discussed.¹

IDAHO CODE § 67-6506

Idaho Code § 67-6506 is set forth in the Local Planning Act of 1975, chapter 65, title 67, Idaho Code. This statute prohibits public officers from participating in planning or zoning proceedings in which they have an economic interest:

A governing board creating a planning, zoning, or planning and zoning commission, or joint commission shall provide that the area and interests within its jurisdiction are broadly represented on the commission. A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business(,) associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action. Any actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered. A knowing violation of this section shall be a misdemeanor.

(Emphasis added.) This provision is specific in that the conflict must be economic in nature. Unlike many other states' zoning laws, personal bias alone is not an enumerated factor in determining conflicting interest. See Conn. Gen. Stat. Ann. § 8-11; N.J. Stat. Ann. § 40:55-1.4.

The Idaho Supreme Court construed Idaho Code § 67-6506 in Manookian v. Blaine County, 112 Idaho 697, 735 P.2d 1008 (1987). In that case, Idaho Power applied for a conditional use permit to build a power transmission line through Blaine County. The proposed route for the power line crossed property owned by a county planning and zoning commissioner and a county commissioner. The conditional use permit over that route was denied and an alternate route was approved by

the county. Both the planning and zoning commissioners and the county commissioner participated in the proceedings advocating their positions.

The landowners impacted by the alternate route challenged the conditional use permit, charging that the proceedings were invalid due to the conflicts of the county commissioner and the planning and zoning commissioner. The district court agreed and voided the conditional use permit due to the participation of the two interested public officials.

Upon review, the Idaho Supreme Court affirmed, stating:

Appellants argue that the construction of a high voltage public utility transmission line across a person's property does not have the type of economic effect contemplated by 67-6506 on that property. We disagree. First, construction of such a development requires not only zoning approval but also the purchasing of easements from the affected property owners. In this case, Purdy had already sold Idaho Power an easement creating a measurable economic impact on his property. Second, by their very nature, utility transmission lines impact the land they occupy both visually and physically. Depending on the present and future use of the property, there are innumerable ways the effects could be encountered. For example, the location of transmission lines may render property unsuitable for residential use and thereby foreclose that possibility of future development to the landowner. Suffice it to say that the location of such lines could adversely affect the property, and this adverse effect can be quantified in economic terms.

112 Idaho at 701, 735 P.2d 1012 (emphasis added).

Justice Shepard dissented, arguing that any impact upon the commissioners' property could not be established from an economic standpoint. Therefore, he argued, the interest was not prohibited by Idaho Code § 67-6506 and the officials' participation was not illegal. It is clear from Idaho Code § 67-6506 and Manookian that the prohibited interest must be "a measurable economic interest" or the adverse effect must be such that it "can be quantified in economic terms."

In reaching its conclusion, the court noted the strong public policies established by the legislature in prohibiting interested parties from participating in zoning proceedings:

In adopting 67-6506, the legislature acted to assure that, consistent with our democratic principles, only impartial and objective persons make decisions affecting other persons' liberty and property.

Further, the court stated the importance of this public policy in relation to the remedies available to the public through the courts:

The policy behind the statute is essential because, under the Idaho Administrative Procedure Act, I.C. §§ 67-5201 *et seq.*, the findings of fact of an administrative agency are subject to review only under the "substantial evidence test" on appeal to a district court. I.C. § 67-5215(f), (g)(5); *Van Orden v. State Dept. of Health & Welfare*, 102 Idaho 663, 637 P.2d 1159 (1981). In Idaho a district court may reverse a zoning decision only if one of the grounds set forth in subsection (g) of this section is found to exist. *Love v. Board of County Comm'rs*, 108 Idaho 728, 701 P.2d 1293 (1985). With appellate review so limited, it is imperative that biased or potentially biased commissioners be barred from participating in the zoning procedure.

112 Idaho at 701, 735 P.2d at 1012 (emphasis added). The statute is aimed at barring participation by those who may be biased or potentially biased by virtue of some measurable economic interest impacted by their decision.

COUNCILMAN BROWN

Councilman Brown, as a board member of the Pocatello Regional Medical Center, is, at a minimum, a "business associate" of the medical center, which brings his relationship within the scope of Idaho Code § 67-6506. Although Councilman Brown may have no personal pecuniary interest in the medical center, when acting as a member of the board, the board exercises all corporate powers, directly or by delegation, over the business affairs of

Pocatello Regional Medical Center. Further, Councilman Brown has a statutory duty to "serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation." Idaho Code § 30-1-35. His statutory responsibilities as a director essentially create a unity of interest between Pocatello Regional Medical Center and Councilman Brown. Consequently, pursuant to Idaho Code § 67-6506, Councilman Brown should not participate in the proceeding if Pocatello Regional Medical Center has a quantifiable economic interest in the proposed conditional use permit of Bannock Regional Medical Center.

The determination whether a quantifiable economic interest exists is factual and one of degree. For example, a quantifiable economic impact to a business such as a service station could be determined if another service station were to be built directly across the street. On the other hand, it is doubtful that a quantifiable economic impact could be identified if another station were built five miles away which was one of dozens in the area. Consequently, a public official facing the former situation should not participate if he is economically interested in the existing service station. The latter situation probably would not pose a prohibited conflict of interest. As the above examples reflect, whether a quantifiable economic impact exists will depend on the specific facts of each case.

Whether to refrain from participation is frequently a difficult decision. For example, there is no doubt that remote, nebulous and speculative interests could handicap local governments to the point of inaction if every possible potential interest disqualified officials from acting. Justice Holmes noted in Graham v. United States 231 U.S. 474, 480 (1913), that, "Universal distrust creates universal incompetency." If every remote interest were sufficient to disqualify public officials from doing their duty, capable men and women would be discouraged from serving the public and local governments could not competently provide the services expected of them.

On the other hand, it is well established that a public official owes an undivided loyalty to the public served, and a public officer cannot serve two masters at the same time. The public's interest in an unbiased process and impartial decisions must come before expediency. See 63A Am. Jur. 2d

Public Officers and Employees § 322-324. Anderson v. Zoning Commission of City of Norwalk, 253 A.2d 16 (Conn. 1968).

Given our limited information on the competitiveness of the medical centers in the Pocatello region, this office cannot definitively determine whether Councilman Brown was prohibited from participating in the conditional use permit matter. Nevertheless, given the competitiveness of the medical services market in general, and our own point of reference in Boise where two medical centers dominate the market, it seems very likely that a major expansion of Bannock Regional Medical Center would have a quantifiable economic impact upon Pocatello Regional Medical Center. In all likelihood, Pocatello Regional Medical Center does have an interest in the conditional use permit proceedings and Councilman Brown should not participate when the conditional use permit is reconsidered by the city council.

In summary, while we recognize that we are not in a position to definitively determine whether Pocatello Regional Medical Center has a quantifiable economic interest in the outcome of the proceeding, based upon what we do know it appears likely that Pocatello Regional Medical Center does have such an economic interest. Unless the facts are very different than we have been told, i.e., this is a major expansion that is critical to Bannock Regional Medical Center's continued competitiveness in the market, our advice is that Councilman Brown should not participate in the reconsideration proceeding. We also recommend that public officials refrain from participation in close cases. In close cases, the public's trust in having an unbiased decision and proceeding is at stake. Consequently, we recommend erring on the side of caution.

Yours very truly,

FRANCIS P. WALKER
Deputy Attorney General

¹ The Ethics in Government Act, Idaho Code § 59-701, *et al.* is not prohibitory but, rather, requires prior disclosure if a public official has a pecuniary interest in a proceeding.