

Zoning Board of Appeals Member Voting on “Same Matter”

MCL 125.3601(13) states that:

“(13) A member of the zoning board of appeals who is also a member of the zoning commission, the planning commission, or the legislative body shall not participate in a public hearing on or vote on the same matter that the member voted on as a member of the zoning commission, the planning commission, or the legislative body. However, the member may consider and vote on other unrelated matters involving the same property.”

This is, on the face of it, a confusing provision. But it really is very limited in actual practice. The simplest way to explain it is that it is a general legal principal of due process that a person cannot objectively review the correctness of his or her own decisions. It does not mean that a person on the ZBA must abstain from any decision regarding a property once that person has ruled on anything involving that property. There is no presumption of bias.

But this provision does mean that if you are being asked, as a ZBA member, to hear an appeal of a decision you made on the planning commission or township board, then yes, you must recuse yourself and abstain. You cannot “check your own work.”

This issue has actually existed for some time, and the language in the MZEA was included to clarify in statute what had not been previously addressed in the zoning statutes. The Legislature included this provision in the 2008 amendments to the MZEA in recognition of at least two previous Attorney General opinions regarding the due process issues of hearing an appeal of a decision you originally rendered on another body:



AG 7201 March
2007.pdf



AG 6742 Dec
1992.pdf

As Attorney General Opinion 7201 of 2007 stated, “OAG No 6742 concluded that due process requires that a member of a county zoning commission serving as the statutorily required member of a county zoning board of appeals refrain from participating in the **review of** any decision in which the member has previously participated as a member of the county zoning commission.”

Note that the opinions are not saying a ZBA member must refrain from participating in any decision regarding a property where the ZBA member has previously made any sort of decision or vote regarding the same property. The due process concern is limited to a ZBA member reviewing his or her decision.

Also note that zoning ordinance adoption, amendment and rezoning decisions are not subject to ZBA appeal. They are legislative, not administrative, decisions.

So, what does this mean in practice? Depending on your township’s ordinance, it may mean that such a situation will occur only rarely, if ever. And in that case, the MZEA authorizes a township to appoint alternate ZBA members for just this reason.

What are the situations in which this issue can arise?

Under MCL 125.3603, the zoning board of appeals shall hear and decide:

(1) Questions that arise in the administration of the zoning ordinance, including the interpretation of the zoning maps.

According to the MTA publication, [Township Planning & Zoning Decision-making](#), “A ZBA interpretation is not an appeal; if the zoning administrator made a decision as to how the ordinance should be used in a given situation, based on past rulings or use, a party who disagrees with that decision has the right to file an appeal of an administrative decision [see below]. However, for those situations where there are legitimate arguments for a difference of opinion in the application of the text before a decision is made, the zoning administrator can have the ZBA review the situation, not as an appeal, but as an interpretation of the ordinance.” (page 86)

Since neither interpretations of the ordinance nor interpretations of the zoning map are appeals of previous decisions, the issue of conflict of interest would not apply, and a ZBA member would not be required to abstain.

(2) Matters referred to the zoning board of appeals or upon which the zoning board of appeals is required to pass under a zoning ordinance adopted under this act.

Usually, this means variances. Any township may grant dimensional (non-use) variances. A township may grant use variances only if the township granted use variances or provided for use variances in its ordinance prior to February 15, 2006.

But a variance request is not the same thing as an appeal of a denial. According to the MTA publication, [Township Planning & Zoning Decision-making](#), “The terms ‘appeals’ and ‘variances’ are often used interchangeably. However, they are distinctly different decisions. A variance is the authority given the ZBA to alter the requirements of the zoning ordinance. An appeal is a request to change a decision made by an administrative officer. Each decision has distinctly different review and decision considerations.” (page 83)

Although an applicant may be prompted to apply for a variance because he/she has been denied a zoning compliance permit or special use permit, etc., the decision to grant or deny a variance is not a review of the original decision to grant or deny a required approval or permit. The decision to grant a variance is based on specific standards and criteria.

So, although it may involve the same property, the same project or same applicant, a decision to grant a variance is not a review of a decision in which a ZBA member has previously participated on the planning commission or township board.

(3) Appeals from and review any administrative order, requirement, decision, or determination made by an administrative official or body charged with enforcement of a zoning ordinance adopted under this act.

According to the MTA publication, [Township Planning & Zoning Decision-making](#), “An appeal [of an administrative decision] is a request to change a decision made by an administrative officer.” (page 83)

This could potentially involve a review of a decision in which a ZBA member has previously participated on the planning commission or township board. But note that it would not likely include an appeal of an administrative decision made by the zoning administrator or other administrative official, because a ZBA member cannot be a township employee (unless the person was previously the ZA and then was appointed to the ZBA, for example). Also, administrative decisions made by a public body are generally very limited. They “usually include the day-to-day determinations made by the zoning administrator, and site plan approvals made by the official or body authorized by the zoning ordinance.” (page 83)

So, although this goes to the heart of the MZEA’s prohibition, it is a very narrow type of circumstance.

(4) For special land use and planned unit development decisions, an appeal may be taken to the zoning board of appeals only if provided for in the zoning ordinance.

If your township’s zoning ordinance does not specify that the ZBA will hear appeals of special use permit or planned unit development denials, then the ZBA cannot hear them, and there is no potential for a ZBA member reviewing of a decision in which the ZBA member previously participated on the planning commission or township board.

If, however, your zoning ordinance does specify that the ZBA will hear appeals of special use permit or planned unit development denials, then there is a potential for a ZBA member reviewing of a decision in which the ZBA member previously participated on the planning commission or township board. A township board could choose to amend its ordinance to remove such a provision.