

Charles Dunnagan (Alaska Bar 7605026)
 Michelle L. Boutin (Alaska Bar 8611097)
 Peter Sandberg (Alaska Bar 0611084)
 JERMAIN, DUNNAGAN & OWENS
 3000 A Street, Suite 300
 Anchorage, Alaska 99503
 Telephone (907) 563-8844; Facsimile (907) 563-7322
 Attorneys for Plaintiff Walter E. Stuart

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
 THIRD JUDICIAL DISTRICT AT ANCHORAGE**

WALTER E. STUART,

Plaintiff,

v.

MUNICIPALITY OF ANCHORAGE,

Defendant.

Case No. 3AN-07-4155 CI

**MOTION FOR SUMMARY JUDGMENT FOR INVALIDATION
 OF ANCHORAGE ORDINANCE 2006-104(s)
DUE TO ASSEMBLY MEMBER COFFEY'S CONFLICT OF INTEREST**

TABLE OF CONTENTS

I. INTRODUCTION.....	2
II. STATEMENT OF FACTS	3
III. SUMMARY OF THE ARGUMENT.....	9
IV. STANDARD FOR SUMMARY JUDGMENT	10
V. ARGUMENT	11
A. Coffey had at least two substantial conflicts of interest under the Anchorage Municipal Code.....	12
1. Coffey had fiduciary duties to the partnership that conflicted with his ability to be a neutral decisionmaker	13

LAW OFFICES OF
JERMAIN DUNNAGAN & OWENS
 A PROFESSIONAL CORPORATION
 3000 A STREET, SUITE 300
 ANCHORAGE, ALASKA 99503
 (907) 563-8844
 FAX (907) 563-7322



2. Even if Coffey had been a passive investor, the Assembly should have disqualified him under its own Municipal Code 16

B. Alaska common law bars an Assembly member from voting on an ordinance if he has a disqualifying conflict of interest or even the appearance of a disqualifying conflict of interest 20

C. The Ordinance must be invalidated because Coffey cast the deciding vote for passage while he had an impermissible conflict of interest 23

1. Alaska Common Law Governs the Consequences of the Assembly’s failure to follow Alaska Law and the Anchorage Municipal Code 23

2. Alaska Common Law Demands that the Ordinance Be Invalidated 23

VI. CONCLUSION 25

I. INTRODUCTION

This motion is the first of two asking the Court to invalidate AO 2006-104(s). AO 2006-104(s) is an Ordinance passed by the Anchorage Assembly rezoning a tract of vacant property. This motion for summary judgment asks the Court to invalidate AO 2006-104(s) (the Ordinance) because Assembly member Dan Coffey (Coffey) cast the decisive vote despite having disqualifying conflicts of interest.

The public record shows that Coffey had at least two disqualifying conflicts of interest. First, Coffey was managing partner for a limited partnership having the sole purpose of making money from property affected by the Ordinance. Second, the Assembly allowed Coffey to vote on an ordinance that directly and significantly affected the value of his partnership interest. These were impermissible conflicts of interest under Anchorage Municipal Code (Code). Coffey cast the decisive vote that

allowed the Assembly to pass the Ordinance. The Court must invalidate the Ordinance because Coffey cast the decisive vote while laboring under an impermissible conflict of interest.

II. STATEMENT OF FACTS¹

There is no genuine issue of material fact. All of the facts necessary to show that Coffey was laboring under a disqualifying conflict of interest come from the public records, transcriptions of the municipality's recordings, or the municipality's own documents. Every fact in the following chronology comes directly from those sources.

Walmart owns the property at issue in this case. [Exh. A; Exh. B] Walmart applied in late 2005 to rezone the area for commercial use so that it could build both a Sam's Club and a Super Walmart on the property. [Exh. A] The Planning and Zoning Commission unanimously rejected the proposed rezone. [Exh. C; Exh. D, p. 2;] The Commission found the rezone did not comport with Anchorage's comprehensive plan, and rejected the rezone for that reason and other reasons. [Exh. C; Exh. D, p. 2] Walmart then filed a request that the Assembly pass an ordinance to change the zoning for the property. [Exh. E] On July 11, 2006, Assembly Chair Dan Sullivan (Sullivan) submitted a rezoning ordinance to the Assembly at the request of Mayor Mark Begich (Begich). [Exh. F]

¹ Please see the second motion for a more detailed analysis of the many procedural irregularities in the Municipality's handling of the Ordinance.

The Assembly began discussing the steps necessary to pass the Ordinance at a work session on August 11, 2006. [Exh. Q] At some point during the worksession, Assembly members discovered that they needed eight votes to pass the ordinance. [Exh. G, pp. 10-11] Coffey also began to ask various people for their opinion regarding a possible conflict of interest. [Exh. G, p. 5; Exh. H] According to Coffey, he received mixed responses.

I talked to the Assembly attorney. I talked to the Mayor. I talked to Assembly Members. I talked to people outside of the Assembly and got a variety of opinions.
Some said, oh, yes, you do, and some said oh, no, you don't[.] [Exh. G, p. 5]

Coffey took the matter to the Assembly for a vote. [Exh. G, p. 2] Sullivan tried to summarily rule that Coffey did not have a conflict of interest. [Exh. G, p. 2] Coffey asked Sullivan for a vote from the whole Assembly, which Sullivan granted. [Exh. G, p. 2] Coffey described his situation. [Exh. G, p. 3]

There is a company called Noodlum Equities, which owns the Muldoon Mall that is located at Debarr and Muldoon. It is across, directly across, from Fred Meyer and very -- not adjacent, but quite close to the proposed rezone. I own a 31%, 31 point something or other percent interest in Noodlum Equities, which is a partnership. I am also one of two managing partners. [Exh. G, p. 3]

Noodlum Equities' (Noodlum) limited partnership certificate makes clear that Noodlum has only one reason for existence. [Exh. I] As amended on February 2, 2006, the certificate states:

The Limited Partnership's continued purpose is to own, develop, lease and sell the real property and the improvements located thereon as described below: Tract 'A', MULDOON HEIGHTS, according to the official plat thereof, filed

under Plat Number 70-257 ... and to carry on such other activities necessary or incidental to the foregoing purposes. [Exh. I, p. 1]

The property listed in the partnership agreement is the property where Muldoon Mall and its outbuildings are located. [Exh. J] The property and its improvements were worth \$6,292,300.00 according the Municipality's assessment in January 2006.² [Exh. J] Coffey and his family own 30.625% of the limited partnership. [Exh. I, p. 2] Coffey and his family's 30.625% share was worth about \$1,927,016.87 in January 2006. [Exh. I, p. 2; Exh. J]

Coffey never discussed the scope of his fiduciary duties to Noodlum or its partners. The Assembly did not discuss that relationship either. [Exh. G] Coffey and the Assembly extensively discussed how access for his tenants might be adversely affected by the ordinance. [Exh. G, pp. 3-4] This question was a red herring by the time Coffey brought it up for the Assembly to consider. On August 9, 2006, Walmart representatives told Coffey they planned to preserve a left turn lane for Coffey's fast food tenants. [Exh. H, p. 3] Coffey wrote in an e-mail that same day that this change "appears to answer the 'easy access to fast food' issue previously raised." [Exh. H, p. 3] Why Coffey and the Assembly discussed this issue as if it was the main conflict of interest question at the August 15, 2006, meeting is a mystery. Coffey and at least some of the Assembly members decided days earlier

² The Municipality inspected Coffey's property for a tax assessment in October 2006. The Municipality did not make any changes in its estimate of the property's value based on that inspection. [Exh. J]

that access was not the major concern. [Exh. G, p. 7; Exh. H, p. 3] But, it is not a subject the Court is required to investigate for this motion because Coffey also had an interest in the value of the property. Coffey discussed it at the August 15 meeting. [Exh. G, p. 4]

[I]f Debarr and Muldoon becomes the commercial center of Muldoon, of that east side of town, which the addition of a Walmart store or stores would certainly enhance that, then this area, Debarr and Muldoon where my property is, will become the key commercial center of east Anchorage. Unquestionably it will be where it is. It won't be at Boniface and Northern Lights. It won't be at Debarr and Boniface. ... That will enhance my -- the value of my property undoubtedly. It is right in the area that is designated a town center. So whatever happens with the former Jack Miller property and where Walmart is now the owner of some 53 acres, it will increase the value of my property over time. [Exh. G, p. 4]

Coffey asked the Assembly to consider whether "the potential of an increase in value of my property gives rise to a conflict of interest for me on this deal[.]" [Exh. G, p. 5] Coffey also noted the nature of the potential increase in value. "Taking industrial property and zoning it business or a combination of business and residential certainly is a better thing than having industrial property in that location in my judgment so, and I think it would also advantage me over time in the -- in the property that I own." [Exh. G, p. 5]

Assembly member Anna Fairclough (Fairclough) spoke at length on Coffey's possible conflict of interest. She asked: "Mr. Coffey, do you think that your own financial interests would weigh in on a decision making process before this Body?" [Exh. G, pp. 8-9] Coffey responded with an equivocal answer that focused on access

for his tenants and ignored the possibility of his own business and its increased property value. [Exh. G, p. 9] Coffey finished his statement with “[t]hat is why I brought it to you folks.” [Exh. G, p. 9] Fairclough gave the following opinion immediately after Coffey’s non-response. [Exh. G, p. 9]

I have worked with all colleagues on the Assembly and while there is sometimes an appearance of an impropriety or a conflict that is there, I believe that the public elects individuals and they understand that there are different ties into our community with each individual that they choose to elect and I would concur with Ms. Ossiander that I understand that there is an ownership issue there, but I don’t see a direct relationship with economic benefit or economic loss should Mr. Coffey participate in the discussion. [Exh. G, p. 9]

Fairclough ignored Coffey’s own earlier testimony and completely failed to discuss the requirements of the municipal code and Alaska law. The Assembly then voted seven-to-two to allow Coffey to participate and vote on the Ordinance. [Exh. K, p. 1]

Another undercurrent faced the Assembly as it voted to allow Coffey to participate. The Ordinance could not pass without eight votes. [Exh. D, p. 4; Exh. G, pp. 9-10; Exh. L] Immediately after the Assembly voted on Coffey’s conflict of interest, Fairclough explained what was necessary to pass the Ordinance.

I asked at the work session that we had on this project the issue of that we have a valid appeal before this Body and what was the number required of positive votes to affirm this rezone.

The answer at the work session was that eight, I believe, that we required a super-majority. So I wanted to confirm with counsel that is still indeed the law as it applies to this particular case. So in order, as I understand it from the worksession, in order to pass this rezone, we need eight assembly members in favor. [Exh. G, pp. 10-11]

Assembly chair Sullivan answered “[t]hat is correct.” [Exh. G, p. 10] The Assembly then began the first night of contentious public debate on the Ordinance. [Exh. K]

The Municipality’s Ethics Board discussed Coffey’s case on August 18, 2006. [Exh. M, p. 1] The Ethics Board members’ opinions varied wildly. [Exh. M, p. 2] One member said “were he in this situation, he would recuse himself as no matter which way he voted it would appear to be a conflict.” [Exh. M, p. 2] Another member thought that although the 31 percent ownership was “substantial” there were too many variables to predict the impact of the Assembly vote would be. [Exh. M, p. 2] Another member agreed, but thought that “it would be wise for Mr. Coffey to recuse himself.” [Exh. M, p. 2] Another member “felt that either way the vote would go, there would be enough concern raised that he would elect not to participate in the discussion. He felt this was an example of an apparent conflict of interest that may not meet the legal definition of ‘conflict.’” [Exh. M, p. 2] None of the Ethics Board members discussed any implications of Coffey’s fiduciary duties to his partnership. [Exh. M, p. 2]

After this discussion, Assembly member Ken Stout (Stout) and municipal attorneys Julia Tucker (Tucker) and Fred Boness (Boness) spoke up to encourage the Board not to vote on the possible conflict. [Exh. M, p. 2] Stout was one of the seven assembly members who voted to allow Coffey to participate and vote on the Ordinance. [Exh. K, p. 1] Tucker advised the Assembly at that same meeting that she did not think that Coffey had a conflict of interest. [Exh. K, p. 1] It is unclear

why either of them contributed to the Board's discussion. The real shocker came from Boness.

Mr. Boness thought it best for the Board of Ethics not to respond at all to the request since the Assembly had required Mr. Coffey's participation. Should the Board advise that he abstain, it would put him in a difficult situation. [Exh. M, p. 3]

Immediately after Boness' comment a Board Member "recommended that the Board inform Mr. Coffey that his concerns were answered by the Assembly decision on August 15[.]" [Exh. M, p. 3] The Board notified Coffey that their "consensus was that [Coffey's] question was substantially answered by the Assembly on August 15." [Exh. M, p. 1] The Board members apparently put aside their differences to save Coffey from being "in a difficult situation" based on his conflict of interest.

On October 17, 2006, the Assembly passed a completely revised Ordinance.³ [Exh. N] Coffey cast the decisive eighth vote for the super-majority necessary to pass the Ordinance. [Exh. D, p. 6; Exh. L; Exh. O] Two Assembly members, Dick Traini and Janice Shamberg voted against the ordinance. [Exh. O] Without Coffey's vote the Ordinance could not have passed. [Exh. D, p. 6; Exh. L]

III. SUMMARY OF THE ARGUMENT

The Court should invalidate the Ordinance. The public record shows that Coffey had at least two disqualifying conflicts of interest under the Code. First,

³ Please see the second motion for a more detailed description of how the Ordinance was revised and the ways that these revisions run afoul of the municipal code and Alaska law.

Coffey was in charge of managing a limited partnership with the sole purpose of making money from property affected by the Ordinance. Second, the Anchorage Assembly allowed Coffey to vote on an ordinance that directly and significantly affected the value of Coffey's partnership interest. Coffey cast the decisive vote that allowed the Assembly to pass the Ordinance. The remedy under Alaska common law is invalidation of the ordinance when a conflicted assembly member casts the decisive vote. The Court must invalidate the Ordinance under Alaska common law because Coffey cast the decisive vote while laboring under an impermissible conflict of interest.

IV. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if, viewing the evidence in the light most favorable to the non-moving party, no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law.⁴ The non-moving party cannot create a genuine issue of material fact by making broad factual assertions or by making unsupported conclusory allegations.⁵

⁴ See Alaska Civil Rule 56(b).

⁵ See *Petranovich v. Matanuska Elec. Ass'n*, 22 P.3d 451, 454 (Alaska 2001) (“Once the movant has made a prima facie case, the non-movant is required, in order to prevent summary judgment, to set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of fact exists. Broad generalizations and unsupported conclusory allegations are not statements of fact sufficient to prevent a grant of summary judgment.”).

V. ARGUMENT

An Assembly member cannot vote to pass an ordinance while laboring under a substantial conflict of interest. An ordinance must be invalidated if a conflicted Assembly member casts the decisive vote to pass an ordinance. The leading treatise on municipal law sets out the generally applicable law:

The public is entitled to have its representatives perform their duties free from any personal or pecuniary interest that might affect their judgment. Public policy forbids the sustaining of municipal action founded upon a vote of a council member or a member of a municipal governing body in any matter before it which directly or immediately affects him or her individually. ... A finding of self-interest sufficient to set aside municipal action need not be based upon actual proof of dishonesty, but may be warranted whenever a public official, by reason of personal interest in a matter, is placed in a situation of temptation to serve his or her own purposes, to the prejudice of those for whom the law authorizes that official to act. So, members of the legislative body should not be permitted to act in matters before them, as a body, in which they are either directly or indirectly pecuniarily interested. In addition, an individual member ordinarily cannot vote on a matter in which that member or his or her employer is interested. ... Where the vote of a member interested is necessary to pass an ordinance or bylaw, such ordinance or bylaw is void, irrespective of how beneficial the ordinance may be.⁶

Allowing conflicts of interest in the zoning context is even more damaging to our system of representative government. “Zoning decisions that are tainted by financial influences especially undermine public confidence in the process, because this type of bias creates a strong impression of local government corruption and dealmaking.”⁷ “Courts have invalidated zoning decisions where a local official

⁶ 4 McQuillin Mun. Corp. § 13.35 (3rd Ed. Rev. 2002) (emphasis added) (footnotes omitted.).

⁷ 32 Am. Jur. Proof of Facts 3d 531 § 13 (2006).

actually benefited, as well as where the decisionmaker could potentially benefit financially. Zoning decisions have been struck down when a zoning official stands to gain financially as a neighboring landowner[.]”⁸ It is simply unacceptable for a conflicted Assembly member to vote on a zoning ordinance.

A. Coffey had at least two substantial conflicts of interest under the Anchorage Municipal Code.

Coffey had at least two disqualifying conflicts of interest under the Code. The Municipality’s “Conflict of Interest” chapter, AMC 1.15, defines conflicts of interest under municipal law.⁹ AMC 1.15.020 states that:

The purpose of this chapter is to set reasonable standards of conduct for elected and appointed public officials, and for municipal employees, so that the public may be assured that its trust in such persons is well placed and that the officials and employees themselves are aware of the high standards of conduct demanded of persons in like office and position.¹⁰

These standards of conduct should be broadly construed.

This chapter shall be liberally construed to protect the public interest in full disclosure of conflicts of interest and promoting ethical standards of conduct for municipal officials and employees.¹¹

Two prohibitions within that chapter deserve particular attention. AMC 1.15.180.E governs whether Assembly members can engage in business operations

⁸ *Id.*

⁹ The Assembly passed the Ordinance in October 2006. In this brief, all references to the “Anchorage Municipal Code” or “Code” are to the Code as it existed prior to changes that went into effect in January 2007.

¹⁰ AMC 1.15.020.A.

¹¹ AMC 1.15.030.B.

that conflict with their duties. Coffey's participation and voting on the Ordinance violated this provision. AMC 1.15.180.C governs financial conflicts of interest for Assembly members. The Assembly failed to follow AMC 1.15.180.C when it allowed Coffey to participate in the fact of his admittedly potentially large financial interest in the result.

1. Coffey had fiduciary duties to the partnership that conflicted with his ability to be a neutral decisionmaker.

Coffey was the managing partner of a business that stood to gain financially from his decision. [Exh. G, pp. 3-4] This fact alone should have disqualified Coffey from voting on the Ordinance. AMC 1.15.180.E governs whether Assembly members can engage in business operations that conflict with their duties. The Code has a concise directive regarding Assembly members whose business operations that conflict with the duty to be a neutral decision maker: it is a conflict of interest. AMC 1.15.180.E reads:

A municipal official or employee may not engage in business or accept employment with, or render services for, a person other than the municipality where that activity will conflict with the official's or employee's duties to the municipality or impair the official's or employee's independence of judgment in performing those duties.

The application of this provision is straightforward. It is a substantial conflict of interest for an Assembly member's duties to his business to conflict with his municipal duties or impair his independent judgment in exercising those duties. Under the Code, "[n]o member of the assembly may vote or participate in any

official action of the assembly on any question in violation of Chapter 1.15.”¹² The Assembly may not waive a conflict under AMC 1.15.180.E.¹³

Coffey’s duties and his judgment could not help but be impaired by the fact that he was a managing partner in the limited partnership. Coffey would have been remiss in his duties as a managing partner if his position did not influence his decision. General partners in an Alaskan business are fiduciaries.¹⁴ Under Alaska’s Revised Uniform Partnership Act, a partner’s duty of loyalty requires that he “refrain from dealing with the partnership in the conduct of the partnership ... as or on behalf of a party having an interest adverse to the partnership.”¹⁵

This rule is derived from Sections 389 and 391 of the Restatement of (Second) of Agency. Comment c to Section 389 explains that the rule is not based upon the harm caused to the principal, but upon avoiding a conflict of opposing interests in the mind of an agent whose duty it is to act for the benefit of the principal.¹⁶

¹² AMC 2.30.070.A.

¹³ *Id.*

¹⁴ See e.g. *Munn v. Thornton*, 956 P.2d 1213, 1220 (Alaska 1998) (citing *Paskvan v. Mesich*, 455 P.2d 229, 232 (Alaska 1969)); AS 32.11.170(b) (“Except as provided in this chapter or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and other partners.”).

¹⁵ AS 32.06.404(b)(2).

¹⁶ National Conference of Commissioners on Uniform State Laws, *Uniform Partnership Act* § 404 cmt.2 (1997) (emphasis added).

This duty to act for the benefit of Noodlum was not something that Coffey could simply decide not to allow to affect his judgment.¹⁷

A partner only overcomes a breach of fiduciary duty if there is a full and complete disclosure to the other partner and if the breaching partner secures the other partner's approval and consent. This includes a full disclosure of the fact that he or she is dealing on his or her own account and all the facts which are material to the transaction. Consent must be informed consent with knowledge of facts necessary to an intelligent choice.¹⁸

There has never been any contention that Coffey asked for his partners' consent or that they granted it.

Coffey had a duty to act for the benefit of the Noodlum Equities.¹⁹ Coffey's duty severely limited his ability to vote against the Ordinance. Noodlum Equities' sole purpose as an organization "is to own, develop, lease and sell the real property" where the Muldoon Mall and its outbuildings are located. [Exh. I, p. 1 (emphasis added)] Approval of the ordinance would "undoubtedly" raise the value of the partnership's property. [Exh. G, p. 4] Coffey's duty to act for the benefit of the partnership demanded that he vote for the Ordinance.

If the Municipality's interests were better served by not allowing the rezone, Coffey could not vote against it without breaching his fiduciary duty of loyalty.

¹⁷ Stuart recognizes that the fiduciary duties of partners can be limited somewhat in scope by the partnership agreement, though they cannot be eliminated. See AS 32.06.960(b)(3). Stuart does not have access to Noodlum Equities partnership agreement and no one has ever alleged that Noodlum's partnership agreement limits the duty of loyalty.

¹⁸ *Wirum & Cash, Architects v. Cash*, 837 P.2d 692, 701 (Alaska 1992) (citations omitted).

¹⁹ AS 32.06.404(b)(2); National Conference of Commissioners on Uniform State Laws, *Uniform Partnership Act* § 404 cmt.2 (1997).

Voting the Municipality’s interests at that point would have been acting “on behalf of a party having an interest adverse to the partnership[.]”²⁰ Voting against the Ordinance would have breached Coffey’s fiduciary duties to his partners.²¹ Coffey could not vote against the Ordinance without breaching his fiduciary duties.

This is a major conflict of interest that runs afoul of the Code. AMC 1.15.180.E demands that an Assembly member not engage in activities that might interfere with his duties or impair his independent judgment. Coffey’s fiduciary duties to his partners could not help interfering with his duty to be a neutral decisionmaker or impairing his judgment.

2. Even if Coffey had been a passive investor, the Assembly should have disqualified him under its own Municipal Code.

Aside from his fiduciary duties owed to Noodlum, Coffey also had a disqualifying financial interest in passage of the Ordinance. The Assembly should have disqualified Coffey even if Coffey had not been under the influence of fiduciary duties to his partners. The Assembly declined to do so. [Exh G., p. 10] The decision to allow Coffey to vote reflects the Assembly’s failure to follow its own Code provisions. The Code specifically defines when a financial interest becomes a prohibited conflict of interest.²² Coffey’s conflict fit squarely within the Code’s prohibitions.

²⁰ AS 32.06.404(b)(2).

²¹ *Id.*

²² AMC 1.15.180.C; AMC 1.15.030A.4.

Defining financial conflicts of interest is a multi-step process under the Code.

AMC 1.15.180.C read:

A municipal official or employee who is a voting member of a municipal board, commission or legislative body shall disclose any financial interest in any decision before the board commission or legislative body before debating or voting upon the decision, and may not participate in the debate or vote upon the decision if the board, commission or legislative body determines that a financial interest is substantial as defined by the definition of “financial interest” in Section 1.15.030.A.²³

This is a simple set of requirements. The Assembly members must fully disclose financial interests, and the Assembly must determine whether that interest fits under the definition provided by AMC 1.15.030.A. If the Assembly member fully discloses his financial interests then the Assembly must decide whether they are “‘substantial’ as defined by the definition of ‘financial interest’ in Section 1.15.030.A.” The Assembly member “may not participate in the debate or vote upon the decision” if it falls within that definition.²⁴

The definition of “financial interest” contained in AMC 1.15.030.A is not a vague standard. It is very specific.

Financial interest means an expectation of receiving a pecuniary benefit. A financial interest of a person includes any financial interest of a member of that person’s immediate family. A person has a financial interest in an organization in which that person has an ownership interest, or is a director, officer or employee. A person has a financial interest in a decision if a financial interest of that person will vary with the outcome of the decision.²⁵

²³ AMC 1.15.180.C (emphasis added).

²⁴ *Id.* (emphasis added).

²⁵ AMC 1.15.030.A (emphasis added).

The Code is straightforward when AMC 1.15.180.C and AMC 1.15.030.A are read together. An Assembly member “may not participate in the debate or vote upon the decision” if the Assembly finds that “a financial interest of that person will vary with the outcome of the decision.”²⁶ Other provisions of the Code demand the same result. AMC 2.30.070.A reads:

No member of the assembly may vote or participate in any official action of the assembly on any question in violation of Chapter 1.15. In the event that a member of the assembly declares, under the provisions of Section 1.15.180.C, that he or she has a financial interest in a decision coming before the assembly, the nature of that interest shall be disclosed in sufficient detail to permit the assembly to determine if the interest is substantial as defined in Section 1.15.030.A.4. ... If the vote on the question is in the affirmative, then the assembly member shall not vote and shall not participate in any further proceedings or decisions on the matter.²⁷

There are only three bases for the Assembly to conclude that a member’s interest does not fall within AMC 1.15.030 if that interest will vary with the outcome of the decision. A financial interest does not include the following:

- (1) A personal or financial interest which is not of the magnitude that would exert an influence on an average, reasonable person;
- (2) A personal or financial interest of a type which is generally possessed by the public or a large class of persons to which that official or employee belongs; or
- (3) An action or influence which would have an insignificant or conjectural effect on the matter in question.²⁸

Coffey told the Assembly that he had a financial interest that would vary depending on whether the zoning ordinance passed. [Exh. G, p. 4] The only task left

²⁶ AMC 1.15.180.C; AMC 1.15.030.

²⁷ AMC 2.30.070.A (emphasis added).

²⁸ AMC 1.15.030.

for the Assembly under AMC 1.15.030 was to determine whether his financial interest fit within the three exclusions. The public record shows that the Assembly could not have both decided that Coffey's interest fit within one of the three exclusions and actually reviewed the pertinent facts.

The first exclusion does not apply because Coffey and his family's 30.625% interest in the property was worth about \$1,927,016.87 in January 2006. [Exh. I, p. 2; Exh. J] Relatively small percentage changes in value are worth many thousands of dollars when dealing with numbers that large. The second exclusion does not apply because the Ordinance did not affect the general population or even a large segment of the population in the same manner as Coffey. [Exh. D, p. 5; Exh. P, p. 6] And, the third exclusion cannot apply when an Assembly member unequivocally discloses that an ordinance will significantly increase the value of his property because of its proximity to his property. [Exh. G, p. 4]

The Assembly had enough information to know that these exclusions did not apply to Coffey's situation. Yet, the Assembly ignored its own Code and allowed Coffey to vote on the ordinance. [Exh. G, pp. 4-10] If the Assembly had followed the Code, it would have found that Coffey had a disqualifying financial conflict of interest under AMC 1.15.180.C. The Court should apply the Code and find that Coffey had a disqualifying financial interest in the Ordinance.

B. Alaska common law bars an Assembly member from voting on an ordinance if he has a disqualifying conflict of interest or even the appearance of a disqualifying conflict of interest.

Under Alaskan common law, an Assembly member cannot vote on a zoning ordinance if he has a substantial conflict of interest. Although the Assembly can modify the common law, it had not done so at the time this vote was taken.²⁹

The Alaska Supreme Court outlined the contours of Alaskan common law regarding conflicts of interest in zoning decisions in *Griswold v. City of Homer* (*Griswold I*).³⁰ In *Griswold I*, the Court looked first to the city's code provisions in order to define what behavior was specifically prohibited.³¹ Both Coffey and the Assembly failed to follow the Municipal Code and engaged in prohibited conduct, as was shown in the previous section.

The Alaska Supreme Court then used the common law to define the contours of those prohibitions. The Court narrowly defined the focus of the common law inquiry. "Under common law, 'the focus ... [is] on the relationship between the public official's financial interest and the possible result of the official's action,

²⁹ The Assembly changed the Anchorage Municipal Code's chapter on conflicts of interest in December 2006 to override the common law regarding whether an Assembly member could be disqualified based on the "appearance of impropriety." AO 2006-140(s-1) at p. 3 (*available at* [http://www.muni.org/iceimages/Assembly2/ao2006-140\(S-1\).pdf](http://www.muni.org/iceimages/Assembly2/ao2006-140(S-1).pdf)). The Anchorage Municipal Code made no reference to overruling the common law on conflicts of interest prior to these revisions.

³⁰ *Griswold v. City of Homer*, 925 P.2d 1015 (Alaska 1996).

³¹ *Id.* at 1025-1026.

regardless of the official's intent."³² There is no occasion to discuss the official's actual thought process.

After establishing the proper inquiry, the Alaska Supreme Court established what generally constitutes a disqualifying conflict of interest in a zoning decision.

Most of the cases [of disqualifying conflict of interest] have involved a charge of more-or-less direct financial interest, and it is clear that such an interest is a proper ground for disqualification, as where an officer himself holds property which is directly involved or affected by the proceeding. ... The clearest situation in which disqualifying bias or prejudice is shown is where the zoning officer himself owns property the value of which will be directly promoted or reduced by the decision to be made and it is not surprising that upon a showing of such interest the courts have usually held the officer disqualified.³³

The Court then found that the council member had a disqualifying conflict of interest because the ordinance was likely to raise the value of land he owned.³⁴

The Alaska Supreme Court dealt with the issue of how direct the benefit must be in the second *Griswold v. City of Homer* case (*Griswold II*).³⁵ In that case, Griswold argued that a council member was disqualified from voting on an ordinance allowing auto businesses on certain parcels of land.³⁶ Griswold argued that the ordinance was "a significant 'step'" towards allowing those businesses on other land

³² *Id.* at 1026 (quoting *Carney v. State, Bd. Of Fisheries*, 785 P.2d 544, 548 (Alaska 1990)).

³³ *Id.* at 1027 (quoting W.E. Shipley, Annotation, *Disqualification for Bias or Interest of Administrative Officer Sitting in Zoning Proceeding*, 10 A.L.R.3d 694, 697 (1966)).

³⁴ *Id.*

³⁵ *Griswold v. City of Homer*, 34 P.3d 1280 (Alaska 2001).

³⁶ *Id.* at 1286.



nearby, though the ordinance did not itself affect the nearby land.³⁷ Griswold also argued that the fact that the council member’s business used sand from a business that rented an affected property parcel mandated disqualification.³⁸ Griswold argued this despite the fact that the council member had “no direct business relationship” with the actual property owner.³⁹

The Alaska Supreme Court unsurprisingly held that these interests were too remote and attenuated to be disqualifying conflicts of interest. But, the Court discussed what would constitute a direct and disqualifying conflict of interest. The court said that an assembly or council member would be disqualified if “he participate[d] in any business operations that are directly benefited by the ordinance.”⁴⁰

These common law standards apply to this case. An Assembly member has a disqualifying conflict of interest because his business operation is directly benefited by the ordinance. Coffey not only had a partnership interest that would be directly benefited by the Ordinance, Coffey had fiduciary duties to his partners to act in their benefit. [See Section A of this brief] These conflicts violated the Municipality’s Code on conflicts of interest. [*Id.*] Alaska common law demands that an Assembly member not be allowed to vote in that situation.

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at 1287 (emphasis added).

C. The Ordinance must be invalidated because Coffey cast the deciding vote for passage while he had an impermissible conflict of interest.

1. Alaska Common Law Governs the Consequences of the Assembly's failure to follow Alaska Law and the Anchorage Municipal Code.

Alaskan common law governs whether an ordinance must be invalidated due to a conflict of interest when the municipal code does not specify a remedy. The ethics provisions in this case “deal with disqualification, and do not address the consequences of participation by a conflicted member.”⁴¹ As the Alaska Supreme Court found in *Griswold I*:

The drafters of the code must have contemplated that violations might occur notwithstanding the prohibition. They nevertheless specified no remedy. Had they intended that particular consequences would follow from violation of the prohibition ... they could have easily so provided. Their failure to specify a remedy for violation implies that the drafters intended that the courts specify a remedy.⁴²

Similarly, no Code provision spells out the consequences of an Assembly members' conflicted vote. Alaska common law controls.

2. Alaska Common Law Demands that the Ordinance Be Invalidated.

The determination this Court must make is simple under Alaska common law. Under Alaska Supreme Court precedent, the Court must invalidate the ordinance if

⁴¹ *Griswold v. City of Homer*, 925 P.2d 1015, 1028 (Alaska 1996).

⁴² *Id.*

the conflicted member cast the decisive vote.⁴³ “In determining whether the vote of a conflicted member demands invalidation of an ordinance, courts should keep in mind the two basic public policy interests served by impartial decision-making: accuracy of decisions, and the avoidance of the appearance of impropriety.”⁴⁴ As the Alaska Supreme Court said in *Griswold I*,

Initially the court must determine whether a member with a disqualifying conflict of interest cast the decisive vote. If so, the ordinance must be invalidated.⁴⁵

Coffey had a disqualifying conflict of interest under both Alaska common law and the Anchorage Municipal Code. Even if Coffey had not had an actual conflict, the actions of Coffey and the Assembly have the appearance of impropriety. Assembly member Fairclough admitted as much immediately before she voted to allow Coffey to participate and vote on the Ordinance. [Exh. G, p. 9; Exh. K, p. 1] Yet, the Assembly allowed Coffey to cast the decisive vote to pass the Ordinance. Alaska law is clear on what the Court must do. The Court must invalidate the Ordinance.

⁴³ *Id.* at 1029.

⁴⁴ *Id.* at 1028-1029. (citing Mark W. Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D. L.Rev. 161 (1989)).


⁴⁵ *Id.*


VI. CONCLUSION

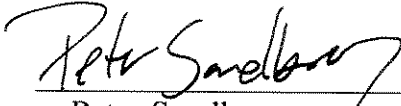
An Assembly member laboring under a disqualifying conflict of interest cast the decisive vote to pass AO 2006-104(s). This Court should invalidate the Ordinance.

Respectfully submitted in Anchorage, Alaska on this 8 day of March, 2007.

JERMAIN, DUNNAGAN & OWENS, P.C.
Attorneys for Plaintiff Walter E. Stuart

By: 
Charles Dunnagan
Alaska Bar No. 7605026

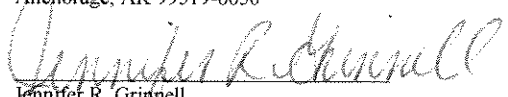

Michelle L. Boutin
Alaska Bar No. 8611097


Peter Sandberg
Alaska Bar No. 0611084

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 8 day of March, 2007, to the following:

Robert P. Owens
Assistant Municipal Attorney
P.O. Box 196650
Anchorage, AK 99519-6650


Jennifer R. Grinnell

LAW OFFICES OF
JERMAIN DUNNAGAN & OWENS
A PROFESSIONAL CORPORATION
3000 A STREET, SUITE 300
ANCHORAGE, ALASKA 99503
(907) 563-8844
FAX (907) 563-7322