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It's a "Criming Shame": Moving from Land Use Ethics to Criminalization of Behavior Leading to Permits and Other Zoning Related Acts

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I. Introduction

ANNUAL REVIEWS OF CASES INVOLVING ALLEGATIONS OF ETHICAL VIOLATIONS in land use typically reveal situations where members of planning or zoning boards or local legislative bodies have a real or perceived conflict of interest in their role as decisionmakers.[1] These conflicts of interest arise due to personal relationships with an applicant or neighbor, employment situations, or investments that could lead to decisions made in self-interest. Typically, these ethical dilemmas are resolved under state and local ethics laws, often laws aimed at directing the public officials involved to disclose or recuse themselves from the decision-making process.[2]

Violations for failing to adhere to these ethics laws may include civil sanctions, removal from office and the imposition of misdemeanor penalties. Except for the rare misdemeanor prosecution, state and local governments typically treat ethics violations as civil matters, and from a review of the reported case law over the years, a large number of the situations involving allegations of unethical conduct are dismissed by the courts because the statute or local law did not specifically cover

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1. *See, e.g.*, Patricia E. Salkin, *2009 Ethical Considerations in Land Use*, 41 URB. LAW. 529 (2009); Patricia E. Salkin, *Crime Doesn't Pay and Neither Do Conflicts of Interest in Land Use Decisionmaking*, 40 URB. LAW. 561 (2008).

2. *See, e.g.*, MONT. CODE ANN. § 2 2 121(5) (2013); N.J. STAT. ANN. § 40:55D 69 (West 2013).

the underlying action.[3] In recent years, however, annual reviews of cases involving allegations of ethical violations in land use have revealed a growing number of reported criminal cases. These cases largely involve criminal law issues, yet the underlying gravamen of the initial actions stem from conduct involving the land use permitting process.[4]

In the last two decades, federal prosecutors have convicted more than 20,000 defendants involved in public corruption.[5] That staggering figure includes the convictions of federal, state, and local officials, as well as private citizens involved in the corruption.[6] Perhaps more incredible is that even after putting thousands of corrupt officials behind bars, instances of public corruption are not abating. Recently, a United States Attorney for the Southern District of New York commented on this situation, characterizing it as "a culture of corruption [that] has developed and grown, just like barnacles on a boat bottom."[7] In fact, Manhattan prosecutors who have already gained reputations for "collaring crooked government officials" have pledged to redouble their efforts and fight corruption more aggressively in the future.[8] Additionally, one of the Federal Bureau of Investigation's top agency-wide priorities remains combating public corruption, behind eliminating terrorist threats, protecting the U.S. against foreign intelligence and espionage threats, and cyber-warfare attacks.[9] According to Robert Mueller III, the Director of the FBI, the Bureau has doubled the number of agents in the public corruption sector, and consequently the number of investigations has spiked as well.[10]

3. *E.g.*, Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343 (2011).

4. *See, e.g.*, Blackmon v. Richmond Cnty., 162 S.E.2d 436 (Ga. 1968); Gooding Cnty. v. Wybenga, 46 P.3d 18 (Idaho 2002).

5. PUB. INTEGRITY SECTION, U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2011 28 (2011), http://www.justice.gov/criminal/pin/docs/2011 Annual Report.pdf (tracking the number of convictions of corrupt public officials from 1992 through 2011).

6. *Id.*

7. James M. Odato, *Just like barnacles on a boat*, TIMES UNION, Apr. 23, 2013, http://www.timesunion.com/local/article/Just like barnacles on a boat 4453477.php; *see also* Elkan Abramowitz & Barry A. Bohrer, *Overcriminalization and the Fallout from* 'Skilling', 245 N.Y. L.J. 2, Jan. 4, 2011 (discussing legislative and prosecutorial efforts to prosecute corrupt public officials), http://www.maglaw.com/publications/articles/00239/ res/id=Attachments/index=0/070011116Morvillo.pdf.

8. Odato, *supra* note 7.

9. FED. BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, TODAY'S FBI: FACTS & FIGURES 2013 2014 7 (2014), *available at* http://www.fbi.gov/stats services/publications/todays fbi facts figures/facts and figures 031413.pdf/view [hereinafter TODAY'S FBI: FACTS & FIGURES 2013 2014].

10. Robert S. Mueller III, Dir., Fed. Bureau of Investigation, Remarks at the American Bar Association Litigation Section Annual Conference (Apr. 17, 2008) (transcript

One of the primary reasons for law enforcement's increase in attention to public corruption is its substantial impact: it "strikes at the heart of government, eroding public confidence and undermining the strength of our democracy."[11] When the integrity of the governing officials—who are supposed to place public service above self-interest—is sacrificed for personal benefit, the public's confidence in government is sacrificed as well. At the root, self-interest and self-dealing are essentially ethics violations with the officials violating their fiduciary duties to their constituents. The solution, so far, has been to impose higher standards of ethics on government officials and sometimes, depending on how severe the unethical conduct is, impose criminal penalties as well. The recent attention given to the issue and the increasingly visible role that federal law enforcement officials are taking is indicative of a growing plague of corruption sweeping the nation.[12]

One of the areas in which reported instances of public corruption has seen a dramatic increase in federal prosecutions is at the local level of government dealing with land use. In the past, land use ethics inquiries predominately involved conflicts of interest or an official holding public office while engaging in a previously held business or law practice. Now, prosecutors are looking at the underlying criminality of the unethical acts carried out in the context of land use decisions.[13] With a wide array of criminal statutes in the hands of federal prosecutors, almost all forms of unethical conduct could in some way also violate a federal criminal statute.[14]

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available at http://www.fbi.gov/news/speeches/corporate fraud and public corruption are we becoming more crooked).

11. TODAY'S FBI: FACTS & FIGURES 2013 2014, *supra* note 9, at 38.

12. *See* Ed Pilkington, *New Jersey scandal highlights cycle of ongoing corruption: Pundits in the state express frustration at inability to rout out pervasive corruption at a local level*, THE GUARDIAN (July 24, 2009), http://www.guardian.co.uk/world/2009/jul/24/new jersey corruption mayors rabbis (describing why, in 2009, law enforcement officials arrested forty four public officials for corruption); Thomas J. Gradel & Dick Simpson, *Patronage, Cronyism and Criminality in Chicago Government Agencies*, Feb. 2011, http://www.uic.edu/depts/pols/ChicagoPolitics/AntiCorruptionReport 4.pdf (detailing roughly 400 public corruption arrests in Chicago in the last two decades).

13. Again, FBI field offices continue to fight public corruption at all levels of gov ernment and in all capacities, specifically referencing the crimes that could stem from all fields related to land use. *See, e.g.*, *Birmingham Division*, FBI.GOV, http://www.fbi.gov/birmingham/about us/priorities/priorities (last visited Mar. 18, 2014) (describing the duties of the Birmingham Division of the Federal Bureau of Investigation).

14. Title 18 U.S.C. § 201, the federal bribery statute, has been interpreted narrowly, unlike its stepchildren: the honest services fraud statute, 18 U.S.C. § 1346, which expands upon § 201 to cover more public officials; the Hobbs Act, 18 U.S.C. § 1951,

Part II of this article reviews the federal statutes most often used by federal prosecutors and provides some examples of recent reported cases in which the underlying illegal or unethical conduct involved alleged criminal activity. Part III offers some examples of recent reported state court cases in which criminal acts involving land use permitting or decision-making were the underlying cause of the subsequent or reported court action. Part IV concludes with the caveat that municipal attorneys and public officials can no longer simply view ethical issues in land use as a local or state civil matter, and those who work in and advise those in the public sector should be mindful of the tools at the disposal of federal investigators and prosecutors.

II. Federal Criminal Conduct in the Land Use Context

A. *18 U.S.C. § 201—Bribing a Public Official*

Public officials guilty of federal corruption charges are most frequently convicted of accepting a bribe.[15] Bribing a government official—or accepting a bribe as an official—is inherently unethical because the official renders a decision tainted by self-interest to obtain a personal benefit, and the resulting outcome may not be in the public's best interest. While every state has penal laws that prohibit this type of conduct and prescribe appropriate criminal penalties, often the local jurisdiction is unenthusiastic about addressing situations involving political players who may be viewed as peers or friends. Furthermore, local prosecutorial offices are often understaffed and challenged to prioritize street crimes and to deal with public safety issues rather than pursuing corrupt officials. Increasingly, the federal government has been stepping in to fill this prosecutorial void.

Title 18 U.S.C. § 201 prohibits both bribery and the acceptance of certain gratuities by a public official to influence an official act.[16] The United States Supreme Court in *United States v. Sun-Diamond Grow-*

which criminalizes extortion under the color of official right; and 18 U.S.C. § 666, which has become almost a general anti corruption statute with an expansive scope. Additionally, while § 201 requires proof of a quid pro quo, or the receiving of a benefit in exchange for something (which is a government act in the public corruption con text), § 1346 does not. There is a federal circuit court split on whether § 666 requires proof of a quid pro quo.

15. *Corruption Update: A Busy Month Comes to a Close*, FBI.GOV, http://www.fbi.gov/news/stories/2011/june/corruption 063011/corruption 063011 (last visited Mar. 18, 2014).

16. 18 U.S.C. § 201(b)(c) (2012); *see also* United States v. Sun Diamond Growers of California, 526 U.S. 398, 404 05 (1999) (explaining the statute's prohibitions).

ers of California[17] provided the clearest description of the two crimes, stating:

> The first crime, described in § 201(b)(1) as to the giver, and § 201(b)(2) as to the recipient, is bribery, which requires a showing that something of value was cor ruptly given, offered, or promised to a public official (as to the giver) or corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient) with intent, *inter alia,* 'to influence any official act' (giver) or in return for 'being influenced in the performance of any official act" (recipient). The second crime, defined in § 201(c)(1)(A) as to the giver, and in § 201(c)(1)(B) as to the recipient, is illegal gratuity, which requires a showing that something of value was given, offered, or promised to a public official (as to the giver), or demanded, sought, received, accepted, or agreed to be received or ac cepted by a public official (as to the recipient), 'for or because of any official act performed or to be performed by such public official.'[18]

In other words, a public official is guilty of accepting a bribe under § 201(b) when he receives something of value from a third party that is intended to influence the performance of his duties as a public official.[19] The agreement must include a quid pro quo, that is, something of value in exchange for an official act.[20]

The timing of the illegal gratuity under § 201(c) is irrelevant—it could have been given and received before an official act is commenced or after the act is completed.[21] Furthermore, the "thing of value" could also constitute an illegal gratuity if it is given to an official for an act that the official has already decided to execute, similar to an appreciative gesture.[22] One of the last elements to establish a violation of this statute is that the government must prove that the bribe or illegal gratuity is directly linked to a specific official act.[23]

The distinguishing element of each of these crimes is the intent: to be convicted of bribery, one must intend to influence an official act or to be influenced in performing an official act, while accepting or giving an illegal gratuity only requires that the gratuity be given or accepted "for or because of" an official act.[24] Under § 201(b), bribery, either the recipient or giver must intend to receive or give something in exchange for a specific, desired official action (quid pro quo), whereas under § 201(c) an illegal gratuity "may constitute merely a reward for

17. 526 U.S. 398 (1999).
18. *Id.* at 404.
19. *Id.*
20. *Id*. at 404 05.
21. *Id.*
22. *Id.* at 404.
23. *Id.* at 414.
24. *Id.* at 404 05.

some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken."[25]

Another distinguishing factor of the two crimes is the punishment upon conviction. Someone guilty of bribery could be sentenced to up to 15 years of imprisonment, a fine of $250,000 (or triple the value of the bribe, whichever is greater), and disqualification from holding office.[26] On the other hand, violating the illegal gratuity statute could lead to a sentence of up to 2 years of prison and a fine of $250,000.[27]

1. CASH BRIBES FOR LAND USE ACTIONS

In the land use arena, bribes have reportedly been given to officials to vote a certain way for variances, zoning approval, granting development rights, and other land use decisions.[28] For example, in *United States v. Curescu*,[29] defendant Curescu converted residential buildings to apartments.[30] Curescu paid about $10,000 to an FBI informant and professional expediter, Catherine Romasanta, to alter the computer mainframe records to show that Curescu's building originally contained more units and to pay off a city inspector to overlook the code violations.[31] Curescu had used Romasanta on previous projects, for which he paid her about $4,000 for each additional unit he sought.[32] Between 2004 and 2007, Romasanta passed about $187,000 to more than 25 Chicago officials for favorable treatment, including expedited building inspections, grants of variances, and inspectors' approvals of code violations.[33] Curescu was arrested and subsequently convicted of conspiracy to bribe a public official (the zoning inspector), bribery of a zoning inspector, and bribery under 18 U.S.C. § 666.[34]

Romasanta assisted the FBI again in *United States v. Reese*,[35] helping convict supervising building inspector Reese who perpetrated a bribery scheme with two other Chicago officials. Reese apparently conspired with a building inspector and building contractor to accept money from other individuals to issue certificates of occupancy, expe-

25. *Id.* at 405.
26. *See* 18 U.S.C. §§ 201(b), 3571.
27. *See* 18 U.S.C. §§ 201(c), 3571.
28. *See, e.g.*, United States v. Boone, 628 F.3d 927 (7th Cir. 2010).
29. United States v. Curescu, No. 08 CR 398, 2011 WL 2600572 (N.D. Ill. June 29, 2011).
30. *Id.* at *1.
31. *Id.* at *2.
32. *Id.*
33. *Id.*
34. *Id.* at *11. *See infra* Part II.C. for discussion of 18 U.S.C. § 666 (2012).
35. 666 F.3d 1007 (7th Cir. 2012).

dite permit approvals, and grant variances. It was alleged that in about a year and a half, Reese was personally accountable for $117,000 in bribes.[36] He was sentenced to sixty months imprisonment.[37]

2. SERVICES IN EXCHANGE FOR REZONING

Any good or service that is given or performed in order to elicit some benefit in the form of an official act may constitute bribery. Sometimes, the benefit received does not take the form of tangible items like cash or a gift, but instead takes the form of services. In *United States v. Boender*,[38] the defendant purchased property in an industrial district and sought to have it rezoned for commercial and residential uses.[39] In order to facilitate the rezoning, Boender cultivated the support of the local alderman by making improvements to the alderman's house.[40] The improvements included painting, installing new windows, replacing several doors, and performing other interior work.[41] In total, the equivalent value of the contracting services was around $38,000.[42] These services formed the basis for the charge of corruptly giving things "of value" to a public official.[43] In short, any good that is given or services that are performed in order to elicit some benefit in the form of an official act will constitute bribery.

3. CAMPAIGN CONTRIBUTIONS IN EXCHANGE FOR PERMITS

Generally, campaign contributions are not considered to be bribes, even though contributing to a campaign may lead a donor to expect some sort of benefit in return.[44] A campaign contribution, however, can have the same effect as a bribe in that the donor may receive benefits from the elected official as a result of the campaign contribution. They can even be used as a tool to circumvent the bribery statute: the donor can donate to a campaign fund instead of passing money directly to the official. Congress has passed extensive laws governing

36. *Id.* at 1011.
37. *Id.*
38. 649 F.3d 650 (7th Cir. 2011).
39. *Id.* at 651
40. *Id.* at 651 52.
41. *Id.* at 652.
42. *Id.*
43. *Id.* at 653.
44. *See* U.S. v. Biaggi, 909 F.2d 662, 695 (2d Cir.1990); *Cf.* McCormick v. U.S., 500 U.S. 257, 271 (1991); U.S. v. Allen, 10 F.3d 405, 410 (7th Cir. 1993) (suggesting that more than a mere campaign contribution is needed to be convicted under the Hobbs Act).

campaign finance and contributions so that a "loophole" in one law is closed by another law.[45]

For instance, many states and the federal government impose limits on the amount of money a person can contribute to a political candidate's campaign.[46] To get around this limitation, a candidate may ask a campaign contributor to write a number of checks just below the maximum dollar amount permitted by that jurisdiction for contributions using false names of contributors or the names of others as a ruse.[47] Such was the tactic of the defendant in *Boender*. The defendant, in his efforts to procure favorable outcomes for rezoning applications, contributed to the alderman's aunt's congressional campaign under his own name and false names, and also reimbursed his workers for their contributions.[48] This loophole was closed by laws prohibiting a person from making donations in the name of another person.[49] Congress passed 2 U.S.C. § 441(f), proscribing contributions made "in the name of another person or knowingly permitting his name to be used to effect such a contribution."[50] By extension, § 441(f) also prohibits a person from knowingly "accept[ing] a contribution made by one person in the name of another person."[51] In the *Boender* case, the court held that this statute unambiguously proscribes "straw man"—as well as false name—contributions and found that Boender had violated § 441(f).[52]

Again, intent is important. As touched upon before, campaign contributions are somewhat odd in that, on their face, they operate much like a bribe, although they do not usually constitute a bribe due to lack of intent. For example, the basic premise of a campaign contribution is that the constituent donates money with the expectation of receiving some benefit in return, but what is lacking is an agreement that the

45. *See* David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 REV. LITIG. 85 (1999).

46. FED. ELECTION COMM'N., CONTRIBUTION LIMITS 2013 14, http://www.fec.gov/pages/brochures/contriblimits.shtml; NAT'L CONFERENCE OF STATE LEGISLATURES, STATE LIMITATIONS ON CONTRIBUTIONS TO CANDIDATES 2011 2012 ELECTION CYCLE, http://www.ncsl.org/Portals/1/documents/legismgt/Limits to Candidates 2011 2012.pdf (last updated Sept. 2011).

47. *See* United States v. Beldini, 443 F. App'x 709, 710 (3d Cir. 2011) ("[The defendant] broke the money up into smaller increments to conceal the identity of the real contributor.").

48. *Boender*, 649 F.3d at 653.

49. 2 U.S.C. § 441f (2012) ("No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.").

50. *Id.*

51. *Id.*

52. *Boender*, 649 F.3d at 660.

payment will influence an official act.[53] A bribe doubling as a campaign contribution will not insulate it from scrutiny.[54] A campaign contribution may be more likely to fly under the radar of law enforcement if it has a legitimate alternative explanation, such as representing a citizen's general support for the candidate and his views, than if there is no legitimate alternative explanation.[55] To rebut this alternative and support a finding of a quid pro quo, the prosecution would have to look at the circumstances surrounding the contribution to ensure it was a legitimate contribution rather than a bribe.[56]

B. *Extortion Under Color of Official Right—Hobbs Act, 18 U.S.C. § 1951*

The Hobbs Act,[57] enacted in 1946, provides that a public official is guilty of extortion "under color of official right" when he induces someone to relinquish their property in exchange for some act that the official is already under a duty to perform.[58] In short, an official who chooses to use or refrain from using his authority in order to induce payment from someone has violated the Hobbs Act. This Act therefore embraces bribery under title 18 U.S.C. § 201, but unlike that statute,[59] the Hobbs Act is applicable to government officials at all levels, not just federal, and no quid pro quo is required.[60] To be convicted under the Hobbs Act, it is sufficient for a politician merely to accept property to which he is not entitled knowing it was given in exchange for official acts.[61] The Hobbs Act, however, is narrower than

53. *See* United States v. Terry, 707 F.3d 607 (6th Cir. 2013) ("So long as a public official agrees that payments will influence an official act, that suffices.").

54. *Id.* at 613.

55. *See* United States v. McGregor, 879 F. Supp. 2d 1308, 1314 (M.D. Ala. 2012) ("[T]he government must prove beyond a reasonable doubt that a campaign contribu tion was 'made in return for an explicit promise or undertaking by the official to per form or not to perform an official act.' ").

56. *See id.* ("Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those ben eficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, 'under color of official right." (quoting McCormick v. United States, 500 U.S. 257, 272 (1991))).

57. 18 U.S.C. § 1951 (2012).

58. *Id.*; *see also* Evans v. United States, 504 U.S. 255, 273 (1992) (Kennedy, J., concurring) (determining that "the word 'induced' in the statutory definition of extor tion applies to the phrase 'under color of official right.' ").

59. 18 U.S.C. § 201 (2012).

60. 18 U.S.C. § 1951 (2012).

61. *See, e.g.*, United States v. Manzo, 636 F.3d 56, 60 (3d Cir. 2011) ("For the gov ernment to prove a violation of the Hobbs Act . . . it 'need only show that a public

§ 201 in that only the government official would be guilty of extortion under the Hobbs Act. Under § 201, both the donor and the official would be guilty of a federal felony.[62]

One of the most recent high-profile arrests of a government official for extortion under color of official right was that of Martha Shoffner, the Arkansas State Treasurer, who was accused of passing large sums of the state's bond holdings to a single individual in exchange for over $30,000.[63] According to federal prosecutors, Shoffner extorted thousands of dollars from a securities broker who sought a larger share of the state's bond business. She resigned before being formally removed from office and faced up to twenty years in prison, a fine of $250,000, or both.[64] Her trial is scheduled to begin March 3, 2014.[65]

One Hobbs Act case that specifically relates to land use is *Van Pelt v. United States*.[66] In *Van Pelt*, the defendant was a New Jersey Assemblyman and a Waretown Township Committeeman who promised to help an undercover FBI cooperator (Solomon Dwek) acquire permits and Department of Environmental Protection approval for a fictitious development.[67] In return, Dwek passed $10,000 to Van Pelt and also promised to meet with other committee members and bribe them if necessary to expedite the process and render a favorable decision for Dwek.[68] Van Pelt's willingness to accept Dwek's payment in return for his assistance in obtaining the necessary government approvals violated the Hobbs Act

official has obtained a payment to which he was not entitled, knowing that the pay ment was made in return for official acts' "); United States v. Donna, 366 Fed. App'x 441, 449 (3d Cir. 2010) ("[T]he official does not have to promise to perform a specific action in exchange for a specific gift; instead, the official can accept a 'stream of benefits' in exchange for one or more official acts as though the official is on a retainer."); United States v. Ganim, 510 F.3d 134, 144 (2d Cir. 2007) ("[T]o obtain conviction for Hobbs Act extortion, it was sufficient for government to prove that former mayor understood that he was expected, as a result of payment, to exercise particular kinds of influence, on behalf of the donor, as specific opportu nities arose").

62. *See* United States v. Brock, 501 F.3d 762, 764 (6th Cir. 2007) (the donor of a bribe to a government official cannot "conspire with that official to extort property from himself in violation of the Hobbs Act").

63. Ana Campoy, *Arkansas Official Accused of Extortion*, WALL ST. J., May 20, 2013, http://online.wsj.com/article/SB10001424127887323463704578495452219840198.html.

64. *Id.*

65. Chuck Bartels, *Government describes evidence for Shoffner trial*, THE WASHINGTON TIMES, Feb. 17, 2014, http://www.washingtontimes.com/news/2014/feb/17/government describes evidence for shoffner trial/.

66. Van Pelt v. United States, Civ. No. 11 6810 JAP, 2013 WL 592285 (D.N.J. Feb. 14, 2013).

67. *Id.* at *1.

68. *Id.*

because, as a committeeman, Van Pelt was required to evaluate permit applications.[69] Van Pelt was sentenced to forty-one months in prison.[70]

C. *18 U.S.C. § 666—Bribery Concerning Programs Receiving Federal Funds*

Another tool in the arsenal of federal prosecutors is 18 U.S.C. § 666, which criminalizes theft or bribery in programs receiving federal funds.[71] This statute was created in the wake of the Supreme Court's decision in *Dixon v. United* States,[72] which limited § 201 to federal officials. As a result, Congress passed § 666 to establish criminal liability for agents of *any* organization, government, or agency who "corruptly solicit[] or demand[] . . . anything of value" worth more than $5,000[73] when the official's employing organization receives more than $10,000 in federal funds during a twelve-month period.[74]

This statute has provided federal prosecutors with a powerful tool for combating corruption in a wide array of circumstances including state and local governments, thus shifting from a statute with an original purpose to protect federal funds to a general anti-corruption statute.[75] The scope of § 666 is incredibly broad; all states and most municipalities receive some form of federal funding above $10,000 annually.[76]

The far-reaching applicability has implicated officials on grounds that are tenuous at best. For example, former Illinois Governor Rod Blagojevich was convicted under § 666 for threatening to block state funding for a hospital unless its CEO contributed $50,000 to his campaign, which has nothing to do with mishandling federal funds, but not for the more infamous charge of attempting to sell a then-vacant Senate seat.[77] *Boender* is also evidence of § 666's expansive public corruption scope. In *Boender*, bribing the alderman with contracting ser-

69. *Id.*
70. *Id.*
71. 18 U.S.C. § 666 (2012).
72. Dixson v. United States, 465 U.S. 482, 496 (1984).
73. 18 U.S.C. § 666(a)(1)(B) (2012).
74. 18 U.S.C. § 666(b) (2012).
75. *See* United States v. Frega, 933 F. Supp. 1536, 1543 (S.D. Cal. 1996); *see also* United States v. Cicco, 938 F.2d 441, 446 (3d Cir. 1991) ("Congress intended § 666 to address different and more serious criminal activity.").
76. Part of the reason for these attenuated links is that federal funds need not be affected in any way for a § 666 violation to have occurred. *See* Salinas v. United States, 522 U.S. 52, 56 57 (1997) ("The enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered, does not support the interpre tation that federal funds must be affected to violate § 666(a)(1)(B).").
77. *See Rod Blagojevich Public Corruption Case*, FBI.GOV (Mar. 12, 2012), http://www.fbi.gov/news/podcasts/inside/rod blagojevich public corruption case.mp3/view; Brian Greene, *Rod Blagojevich Begins 14 year Prison Sentence*. US NEWS, Mar. 15,

vices served as the basis of the § 666 count,[78] yet neither Boender nor the alderman exchanged money or affected federal distribution of funds in any way. Even with this tenuous link, the defendant's conviction was upheld.[79] Under § 666, it matters only that the government, organization, or agency *receives* federal funds, and not that these funds were implicated in influencing a public official.[80]

Another key distinction between § 666 and § 201 is that § 201 requires a quid pro quo; the federal circuit courts of appeals are split on whether § 666 requires a quid pro quo. The Second,[81] Fourth[82] and Eighth[83] Circuit Courts of Appeals require proof of a quid pro quo while the Sixth,[84] Seventh,[85] and Eleventh[86] Circuits do not. Therefore, in some jurisdictions conviction under § 666 can result merely from proof of money being given to a public official with an attempt to reward or influence him.[87]

1. SOLICITING BRIBES TO EXPEDITE PERMIT PROCESS

United States v. Beldini[88] exemplifies § 666 in a land use context. In *Beldini*, Solomon Dwek, an FBI coordinator, posed as a real estate de-

2012, http://www.usnews.com/news/articles/2012/03/15/rod blagojevich begins 14 year prison sentence.

78. *Boender*, 649 F.3d at 653.

79. *Id.* at 661.

80. *See Salinas*, 522 U.S. at 57 ("The prohibition [of accepting a bribe] is not con fined to a business or transaction which affects federal funds. The word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose this nar rowing construction.").

81. *Ganim,* 510 F.3d at 151 (holding there was no plain error in a jury instruction that stated that the government must prove a corrupt intent, which "means the intent to engage in some specific quid pro quo").

82. United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir. 1998) (holding that the "corrupt intent" requirement in § 666 requires the government to prove a quid pro quo).

83. United States v. Redzic, 627 F.3d 683 (8th Cir. 2010).

84. United States v. Abbey, 560 F.3d 513, 520 (6th Cir. 2009) ("While a 'quid pro quo of money for a specific . . . act is sufficient to violate [18 U.S.C. § 666(a)(1)(B)],' it is 'not necessary" (quoting United States v. Gee, 432 F.3d 713, 714 (7th Cir. 2005))).

85. *Gee*, 432 F.3d at 714 ("A quid pro quo of money for a specific legislative act is *sufficient* to violate the statute, but it is not *necessary*.").

86. United States v. McNair, 605 F.3d 1152, 1188 (11th Cir. 2010) ("There is no requirement in § 666(a)(1)(B) or (a)(2) that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific of ficial act, termed a quid pro quo."); *see also* United States v. Siegelman, 640 F.3d 1159, 1170 (11th Cir. 2011) (noting that "the Supreme Court has not yet considered whether the federal funds bribery, conspiracy or honest services mail fraud statutes require a similar 'explicit promise' [by the official to perform or not perform an offi cial act].").

87. *McNair*, 605 F.3d at 1188.

88. United States v. Beldini, 443 F. App'x 709 (2011).

veloper in order to unearth corruption at City Hall.[89] In 2009, Leona Beldini was the Deputy Mayor of Jersey City reporting directly to the Mayor, Jerramiah Healy.[90] Solomon Dwek, the same FBI cooperator from *Van Pelt*, posed as a real estate developer in order to unearth corruption in City Hall.[91] When Dwek attempted to set up a meeting with the mayor, he was referred to Beldini.[92] In return for obtaining the necessary permits and approvals from various city agencies, Dwek promised to retain Beldini as the exclusive broker to sell the development's units and to donate thousands of dollars to Healy's campaign fundraising funds.[93] Beldini assured Dwek and the other officials that she could funnel the bribes through three different campaign accounts and that she would break up the money into smaller increments to conceal the true identity of the donor.[94] For these actions, Beldini was charged with federal program bribery in violation of § 666, and conspiracy to commit extortion under color of official right, in violation of the Hobbs Act.[95] Beldini was acquitted of the Hobbs Act charge, but was convicted of bribery under § 666 because the court determined that Beldini was an "agent" of a government, and that the campaign contributions were "things of value,"[96] thereby sustaining the federal program bribery conviction.[97] Furthermore, there was no legitimate alternative explanation Beldini could proffer to establish that the donations had a legal purpose.[98]

2. OVERZEALOUSLY REPRESENTING A CLIENT MAY LEAD TO CONSPIRACY FOR AN ATTORNEY

In *United States v. Ciresi*,[99] Robert Ciresi, a seventy-eight year old attorney, was charged with conspiring to purchase the votes of corrupt town councilmen regarding two zoning matters.[100] One of Ciresi's clients applied to the town council to rezone residential land so the client

89. *Id.* at 710.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 711.
94. *Id.*
95. *Id.* at 712.
96. *Id.* at 719 ("The campaign contributions at issue are thousands of dollars. Bel dini's proposition that this money is not a thing of value strains credulity.").
97. *Id.* at 721.
98. Beldini would also have a difficult time explaining why, if the donations were legitimate, she divided the $10,000 into smaller increments, concealed the true iden tity of the donor, and funneled them through different campaign fund accounts.
99. United States v. Ciresi, 697 F.3d 19 (1st Cir. 2012).
100. *Id.* at 23.

could build a supermarket.[101] Ciresi set up the meeting at which his client agreed to pay $25,000 in exchange for the votes of the city councilmen, and Ciresi made it clear that his client wanted his application to be approved with no conditions. For the first project, the council approved the application and the conspirators split $25,000.[102] For the second project, Ciresi represented two developers seeking to convert an industrial mill complex into apartments.[103] Zambarano and Ciresi again sought to exact a bribe from them, but Ciresi eventually backed out.[104] However, Zambarano and the informant still managed to secure a bribe, and the rezoning application was subsequently approved.[105] Ciresi was later charged and convicted of bribing a local government official in violation of § 666 and conspiring to commit the same.[106] His attempts to procure favorable results for his clients' applications by purchasing votes were undoubtedly unethical, and also subjected him to criminal punishment.[107]

D. *18 U.S.C. § 1346—Theft of Honest Services*

The predecessor to the modern-day mail and wire fraud laws originated in 1872 and proscribed the use of mail to perpetrate "any scheme or artifice to defraud."[108] Congress amended the statute in 1909 to include "any scheme or artifice to defraud, obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[109] One after another, the U.S. Courts of Appeals interpreted the term "scheme or artifice to defraud" as including deprivations of intangible rights in addition to deprivations of money or property.[110] The "theft of honest services" doctrine was created in *Shushan v. United States*[111] when the Fifth Circuit equated a bribe of a public official to a scheme to defraud the public.[112] In essence, the logic is this: a bribe is a type of fraud, and fraud is a type of theft, and what the

101. *Id.*
102. *Id.* at 23 24.
103. *Id.* at 24.
104. *Id.*
105. *Id.*
106. *Id.* at 25.
107. *Id.* at 32.
108. Skilling v. United States, 561 U.S. 358, 399 (2010) (quoting McNally v. United States, 483 U.S. 350, 356 (1987)).
109. *Id.*; *see also* 18 U.S.C. § 1341 (2012).
110. *Skilling*, 561 U.S. at 400 401.
111. Shusan v. United States, 117 F.2d 110 (5th Cir. 1941).
112. *Id.* at 115.

defendants are "stealing" is their constituents' right to an honest official as part of an honest government.[113]

In 1988, Congress codified the judicial concept of "honest services" in 18 U.S.C. § 1346.[114] This was a windfall for prosecutors because "honest services" could mean almost anything, and prosecutors encompassed public and corporate fraud, as well as other forms of dishonesty, in its scope. However, major restrictions on § 1346 were imposed when the Supreme Court decided *Skilling v. United States*.[115] There, the Court limited § 1346's application to only bribes and kickbacks[116] in order to save the overbroad statute from being invalidated for unconstitutional vagueness.[117]

More likely than not, a charge of theft of honest services will complement other related crimes such as bribery, extortion, and money laundering. As it relates to land use, honest services fraud can result from accepting seemingly innocuous assistance from acquaintances and returning the favor in the form of official acts. For instance, in *United States v. Wright*,[118] the defendant was the chief of staff to a Philadelphia city councilman while also maintaining his side job as a realtor.[119] Wright's office was in the same building as Ravinder Chawla, owner of a real estate firm, and Andrew Teitelman, an attorney who did not work for Chawla but whose practice was almost exclusive to representing Chawla's firm.[120]

The three befriended one another, so when Wright began facing legal and housing trouble while going through a contentious divorce, Chawla and Teitelman assisted him by letting him stay rent free in an

113. Deirdre Van Dyk, *The Supreme Court's Ruling on 'Honest Services' Theft*, TIME MAGAZINE (June 25, 2010), http://www.time.com/time/business/article/0,8599,1999768,00.html ("The honest services law purports to make it a federal crime to deprive someone of honest services to which that person is entitled").

114. Act of Nov. 18, 1988, Pub. L. No. 100 690, 102 Stat. 4181 (1988).

115. 561 U.S. 358 (2010).

116. *Id.* at 408 09.

117.

> [T]here is no doubt that Congress intended § 1346 to reach *at least* bribes and kick backs. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doc trine. To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe and kickback core of the pre *McNally* case law.

Id.

118. United States v. Wright, 665 F.3d 560 (3d Cir. 2012).

119. *Id.* at 565.

120. *Id.*

apartment and giving him free legal advice.[121] Chawla also promised exclusive commissions on his company's projects to Wright.[122] In return, Wright acted on behalf of Chawla's firm by expediting and granting a zoning variance application, opposing a proposed ordinance that would cripple one of the firm's projects, and passing along knowledge about potential sales of city property before it became public.[123]

A conviction for honest services fraud requires the fact finder to find two things: first, that the donor provided something of value to a public official expecting to receive favorable treatment that would not normally be given, and second, that the official accepted those benefits with the intent to promote the donor's interests.[124] More importantly, for a situation like the one that developed in *Wright*, each quid, or thing "of value," does not need to be directly linked to a quo, or the official act.[125] Instead, a bribe can take the form of a "stream of benefits,"[126] making the statute's reach even more expansive.

In the *Wright* case, Wright received mutual and contemporaneous benefits, including a free stint in an apartment, commissions, and free legal services.[127] Wright was simultaneously using his official position to benefit Chawla and Teitelman by assisting them with zoning issues and offering other political support.[128] In addition to the ethics charges that emerged as a result of these self-dealings and conflicts of interest, criminal charges including honest services fraud and bribery were brought against all three individuals.[129] State and local

121. *Id.*
122. *Id.*
123. *Id.* at 566.
124. *Id.* at 568 (citing United States v. Bryant, 655 F.3d 232, 240 41 (3d Cir. 2011)).
125. *Id.*
126.

> [T]he Government is not required to present evidence that attributes each official action to a corrupt payment. It is enough for the [G]overnment to present evidence that shows *a course of conduct* of favors and gifts flowing to a public official in ex change for a *pattern of official actions* favorable to the donor. Thus, payments may be made with the intent to retain the official's services on an 'as needed' basis, so that whenever the opportunity presents itself the official will take specific action on the payor's behalf. The evidence of a *quid pro quo* can be implicit, that is, a con viction can occur if the Government shows that [the defendant] accepted payments or other consideration with the implied understanding that he would perform or not perform an act in his official capacity.

United States v. Bryant, 655 F.3d 232, 241 (3d Cir. 2011) (emphasis in original).
127. *Wright*, 665 F.3d at 568.
128. *Id.*
129. *Id.* at 576 577. The Third Circuit determined that the district court judge's jury instructions were erroneous, so the convictions were vacated and the case was re manded for a new trial. *Id.* at 577 78.

attorneys therefore need to be cognizant of federal laws regulating such unethical behavior in order to represent their clients more effectively.

III. Examples of Criminal Activities in the Land Use Context at the State Level

A. *Bridgeport Mayor*

Joseph P. Ganim served as Mayor of Bridgeport, Connecticut, from 1991 until he was convicted in 2003 of bribery, racketeering, and honest services fraud.[130] During his term Ganim became acquainted with Leonard Grimaldi, the sole proprietor of a public relations company, and Paul Pinto, who was associated with an architecture and engineering firm.[131] Ganim used his inside knowledge of Bridgeport's projects to the economic advantage of Grimaldi and Pinto, who would then provide benefits to Ganim in return.[132] Ganim's role in this scheme was to steer city contracts to companies represented by Grimaldi and Pinto, increasing the benefits to them.[133] By using his position as a public official for personal economic gain, Ganim violated Connecticut's Code of Ethics for Public Officials, which strictly proscribes using one's official position for personal financial gain.[134] By awarding contracts to Grimaldi and Pinto and sharing in their fees, Ganim managed to collect tens of thousands of dollars in cash and gifts[135] from his two co-conspirators. Not surprisingly, this type of ethics violation is also a violation of two federal laws: extortion under the Hobbs Act in violation of § 1951, and bribery involving programs receiving federal funds in violation of § 666. For these criminal offenses, Ganim was sentenced to 108 months imprisonment.[136]

B. *New Orleans Mayor*

In another situation involving ethics violations that led to criminal charges, the former Mayor of New Orleans, C. Ray Nagin, engaged in self-dealing transactions involving kickbacks and other benefits.

130. *Ganim*, 510 F.3d at 136 37 (2d Cir. 2007).
131. *Id.* at 137.
132. *Id.* at 137 40.
133. *Id.* at 138.
134. CONN. GEN. STAT. § 1 84 (c) (2013).
135. A public official is also prohibited from receiving a "gift," defined as "any thing of value," from restricted donors, including those seeking to do business with the department or agency. CONN. GEN. STAT. § 1 79 (e) (2013).
136. *Ganim*, 510 F.3d at 136.

According to the grand jury indictment, Nagin used his position as mayor to approve an ordinance that would allow a retail corporation to purchase certain property.[137] At the same time, Nagin negotiated a business arrangement with the same corporation that would personally benefit his family-owned granite business.[138] Additionally, and similarly to Ganim, Nagin awarded numerous city contracts to contractors (or, in this case, co-conspirators) in exchange for kickbacks and payoffs, as well as accepted illicit gifts in the form of free granite for his company.[139] These self-dealing actions, along with many others, violated § 1346 by depriving the citizens of New Orleans of honest services and § 666 for bribery involving a federally funded program.[140] In February of 2014, Nagin was convicted on twenty counts of fraud and bribery.[141]

IV. Conclusion

Public officials must be on notice that unethical conduct could potentially expose them to criminal liability. Because federal prosecutors and law enforcement officials are taking a more visible role in government corruption, the increased instances of arrests and the resulting media attention show that political corruption in the land use arena is widespread. This culture of corruption, infecting all levels of government, is aptly described in the introduction by a U.S. Attorney as "barnacles on the bottom of a boat"[142] because barnacles will inevitably appear on a boat that takes no preventative measures and will hinder the performance of the boat by causing drag. Similarly, corruption, as a byproduct of human fallibility and susceptibility, appears to be inherent in our system of government; without investigations into and arrests of corrupt public officials, the public's trust in government will be eroded and the ability of government agencies and officials to get things done would be hampered.

While no area of government at any level is immune from unethical and corrupt conduct, as demonstrated above, with respect to land use

137. Indictment at 10, United States v. Nagin, No. 13 11, 2013 WL 5532516 (E.D. La., Jan. 18, 2013), *available at* http://ftpcontent.worldnow.com/wvue/documents/20130118114952280.pdf.

138. *Id.*

139. *Id.* at 6.

140. *Id.* at 8.

141. Campbell Robertson, *Nagin Guilty of 20 Counts of Bribery and Fraud*, N.Y. TIMES, Feb. 12, 2014, http://www.nytimes.com/2014/02/13/us/nagin corruption verdict.html? r=0.

142. Odato, *supra* note 7.

in particular, criminal liability can emerge from ethics violations such as self-dealing or conflicts of interest. Without even a basic understanding of the public corruption statutes set forth above, a municipal attorney can unknowingly compound the penalties for a public official client who faces charges of ethics infractions perceived to be merely civil in nature. This issue is significant in light of the increase in federal attention to government corruption and the correspondingly high number of convictions in general and specifically in the land use context.[143]

143. *See* PUB. INTEGRITY SECTION, *supra* note 5.