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Recommended Citation

46 Urb. Law. 815 (Fall 2014)

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Recent Developments in Land Use Ethics

Patricia E. Salkin*

I. Introduction

CURRENT EVENTS ACROSS THE COUNTRY REVEAL NO SHORTAGE of allegations of unethical conduct in the land use review process. For example, in the Northeast, the mayor of Trenton, New Jersey was convicted on six federal corruption counts for soliciting bribes from parking garage developers.¹ In Newark, New Jersey, a high-profile case that came to light five years ago with the arrests of dozens of corrupt politicians, ended quietly when the final defendant in the biggest federal corruption sting in New Jersey history admitted she pocketed a portion of the \$15,000 in cash a federal informant gave her campaign in exchange for her vote on a bogus real estate project.² In the town of Nutley, New Jersey, a resident raised conflict of interest concern because the Nutley Planning Board Chairman is married to the Nutley Zoning Board Attorney.³ In Connecticut, a local resident filed a complaint seeking to overturn the Planning and Zoning Commission-approved football field project because a commission member who took part in the vote had an apparent conflict of interest given his past involvement with the Darien Athletic Foundation and the Darien Junior Football League.⁴ In Rhode Island, a judge ruled that the Woonsocket Zoning Board of Review failed to give a developer a fair hearing by allowing a board member with business and political connections to an opponent

* Dean and Professor of Law at Touro Law Center. Special thanks to Touro Law Students Andrew Wilson, Gillian Holland, and Michael Henry for their research assistance.

1. Jenna Pizzi, *Trento Mayor Tony Mack Found Guilty on All Counts in Federal Corruption Trial*, NJ.COM TRUE JERSEY (Feb. 7, 2014, 5:40 PM), http://www.nj.com/mercer/index.ssf/2014/02/trenton_mayor_tony_mack_is_found_guilty_of_corruption.html.

2. Ted Sherman, *Sweeping NJ Corruption and Money Laundering Sting Finally Ends with One Last Plea Deal*, NJ.COM TRUE JERSEY (Apr. 29, 2014, 6:15 AM), http://www.nj.com/news/index.ssf/2014/04/sweeping_nj_corruption_and_money_laundering_sting_finally_ends_with_one_last_plea_deal.html.

3. Hasime Kukaj, *Two Nutley Residents Take Government to Task*, NORTHJERSEY.COM (May 9, 2014, 11:47 AM), <http://www.northjersey.com/news/education/two-residents-take-government-officials-to-task-1.1011504?page=all>.

4. Melvin Mason, *Darien Selectmen OK \$4 million Turf Fields Gift*, DARIENTIMES.COM (May 6, 2014), <http://www.darientimes.com/31239/darien-selectmen-ok-4-million-turf-fields-gift/>.

of his housing proposal to vote on the project.⁵ The Rhode Island Ethics Commission fined the Rhode Island Speaker of the House, Gordon Fox, \$1,500 for violating the state's code of ethics when he did not report income for legal work with the Providence Economic Development Partnership.⁶ In Massachusetts, a former Planning Board member in Chelmsford was fined \$5,000 for violating the state's conflict of interest laws by representing clients in two lawsuits against the town.⁷

This problem is not confined to the Northeast. A Fredericksburg, Virginia Planning Commissioner submitted his resignation after he was pressured to resign by the city attorney because of conflicts of interest.⁸ In North Carolina, the mayor of the state's largest city was indicted on public corruption charges after accepting more than \$48,000 in bribes from FBI agents posing as real estate developers.⁹ A Gastonia City councilman reportedly made a controversial vote on a request to rezone after he received a \$250 campaign contribution from the local developer.¹⁰

In Missouri, a Camden County Associate District Commissioner is currently denying an alleged conflict of interest in an ongoing legal dispute between the county and the developer of an establishment.¹¹ The mayor of Fort Collins, Colorado is currently contemplating whether or not she should participate in the debate regarding a plan

5. Katie Mulvaney, *Judge Orders Woonsocket Zoning Board to Reconsider Developer's Housing Proposal*, PROVIDENCE JOURNAL (Nov. 25, 2013, 1:00 AM), <http://www.providencejournal.com/breaking-news/content/20131125-judge-orders-woonsocket-zoning-board-to-reconsider-developers-housing-proposal.ece>.

6. *NEW: Fox Fined \$1500 by Ethics Commission for PEDP Non-Disclosure*, GO-LOCAL PROV NEWS (Jan. 28, 2014), <http://www.golocalprov.com/news/new-fox-fined-1500-by-ethics-commission-for-pedp-non-disclosure/>.

7. Grant Welker, *State Fines Ex-Chelmsford Planning Boardmember McClure \$5G in Ethics Breach*, LOWELLSUN.COM (Aug. 27, 2013, 7:19:56 AM), http://www.lowellsun.com/news/ci_23952577/state-fines-ex-chelmsford-planning-board-member-mcclure.

8. *Fredericksburg Planning Commissioner Submits Resignation*, FREDERICKSBURG.COM (Apr. 29, 2014, 1:21 PM), <http://news.fredericksburg.com/citybeat/2014/04/29/fredericksburg-planning-commissioner-submits-resignation/>; *see also* Pamela Gould, *Mayor Urges Planning Commissioner to Resign*, FREDERICKSBURG.COM (Apr. 29, 2014, 1:00 PM), <http://news.fredericksburg.com/newsdesk/2014/04/29/mayor-urges-planning-commissioner-to-resign/>.

9. Mitch Weiss, *Charlotte Mayor Patrick Cannon Indicted on Public Corruption Charges*, HUFFINGTON POST (Mar. 26, 2014, 2:02 PM), http://www.huffingtonpost.com/2014/03/26/patrick-cannon-indicted_n_5036527.html.

10. Michael Barrett, *City Council Votes on Rezoning Issue Raise Questions About Ethics*, GASTON GAZETTE (May 1, 2014, 4:25 PM), <http://www.gastongazette.com/spotlight/city-council-votes-on-rezoning-issue-raise-questions-about-ethics-1.313593>.

11. Amy Wilson, *PAC Accuses Luber of Conflict of Interest in Ongoing Legal Case*, LAKE NEWS ONLINE (Feb. 24, 2014, 4:30 PM), <http://www.lakenewsonline.com/article/20140227/News/140228776>.

to revitalize a mall because she has a conflict of interest.¹² In Texas, a San Marcos Planning and Zoning vice chair, was charged with a conflict of interest and brought before the Ethics Review Commission.¹³ In Kentucky, not only did a Louisville ethics panel refer a conflict to Metro Council due to three ethics complaints regarding votes the Metro Council President made in voting cases involving zoning,¹⁴ but in McCracken County officials were indicted in a zoning case involving unauthorized zone changes in the county that affected at least 500 pieces of property.¹⁵ In Florida, two planning board members in Hollywood quit after a conflict of interest warning from the city attorney.¹⁶

Sadly, there are countless other media accounts of alleged and proven conflicts of interest and other ethical misconduct. In this annual review of reported decisions involving ethics in land use, recent decisions are discussed in the hopes that municipal attorneys will use this information as the basis of ongoing training for members of planning boards, zoning boards, and local legislative bodies who must be routinely reminded of not only their legal but ethical responsibilities in upholding the public trust.

II. Conflicts of Interest

A. *Members of a Church and a Board Member with an Elderly Mother*

In an unreported decision of the New Jersey appellate division, a plaintiff sought to disqualify the mayor and a councilmember from voting on an ordinance involving a redevelopment plan that would include an assisted living facility as a permitted use on a parking lot adjacent to the Unitarian Universalist Congregation Church where both

12. Kevin Duggan, *Fort Collins Mayor Not Sure About Joining Mall Debate*, COLORADOAN (May 5, 2014, 6:13 PM), available at <http://www.coloradoan.com/story/news/local/2014/05/05/fort-collins-mayor-sure-joining-mall-debate/8744205/>.

13. James Carniero, *Officials Review Alleged Conflict of Interest*, THE UNIVERSITY STAR (Sept. 12, 2013, 12:14 AM), available at <https://star.txstate.edu/node/735>.

14. Marcus Green, *Louisville Ethics Panel Refers Conflict of Interest Opinion to Metro Council*, WDRB.COM (Mar. 20, 2014, 5:19 PM), <http://www.wdrb.com/story/25032672/louisville-ethics-panel-refers-conflict-of-interest-opinion-to-metro-council>.

15. *McCracken County Officials Indicted in Zoning Case*, WHAS11.COM NEWS (Jan. 11, 2014, 5:33 PM), <http://www.whas11.com/news/local/239661171.html>.

16. William Gjebre, *Hollywood Planning Board Members Quit After Conflict of Interest Warning from City Attorney*, BROWARD BULLDOG (Mar. 3, 2014, 6:25 AM), <http://www.browardbulldog.org/2014/03/hollywood-planning-board-members-quit-after-conflict-of-interest-warning-from-city-attorney/>.

individuals were members.¹⁷ Further, the mayor had reportedly commented that, "it would be beneficial for his elderly mother if an assisted living facility were constructed in town."¹⁸ The trial court dismissed the complaint, and on appeal, the plaintiff contended that there was still an issue as to whether the council members' affiliation with the church impaired their objectivity or independence of judgment in passing the ordinance.¹⁹ The New Jersey Municipal Land Use Law states that, "[n]o member of the board of adjustment shall be permitted to act on a matter in which he has, either directly or indirectly, any personal or financial interest."²⁰ However, not all interests possess the same capacity to tempt a public official, and a remote and speculative interest will not disqualify an official.²¹ In fact, the New Jersey Supreme Court has identified four situations where the statutory provision would preclude action by a board member:

- (1) 'Direct pecuniary interests,' when an official votes on a matter benefitting [sic] the official's own property or affording a direct pecuniary gain;
- (2) 'Indirect pecuniary interests,' when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member;
- (3) 'Direct personal interest,' when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman's mother being in the nursing home subject to the zoning issue; and
- (4) 'Indirect Personal Interest,' when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.²²

Here the court found that the council members' mere membership in the church, and the fact that one of them made a comment that his mother could potentially benefit from the development were indirect

17. *Grabowsky v. Township of Montclair*, 2013 WL 3835357 (NJ Super. Ct. App. Div. 2013).

18. *Id.* at 1. *See generally* *Care of Teneffly, Inc. v Teneffly Bd. of Adjustment*, 704 A.2d 1032 (N.J. Super. Ct. App. Div. 1998), certif. denied, 713 A.2d 500 (N.J. 1998) (discussing common law approach to when a zoning board member's interest disqualifies them from participating in zoning proceedings).

19. *Grabowsky*, 2013 WL 3835357, at *1 (NJ Super. Ct. App. Div. 2013).

20. N.J. REV. STAT. § 40:55D-69 (2004).

21. *Grabowsky*, 2013 WL 3835357, at *3 (citing *Haggerty v Red Bank Borough Zoning Bd. of Adjustment*, 897 A.2d 1094, 1100-01 (N.J. Super. Ct. App. Div. 2006)).

22. *Grabowsky*, 2013 WL 3835357, *3-4 (citing *Wyzykowski v Rizas*, 626 A.2d 406, 414-15 (1993)).

interests and too speculative, and failed to show a disqualifying conflict of interest.²³ The court further pointed out that the Church was not even the applicant, nor a party in the matter, and that the claim that the Church would benefit from “having immobile, elderly neighbors next door,” was too far a stretch.²⁴ Lastly, the mayor’s statement about his mother failed to show that he had pre-judged the issue.²⁵

B. *Attorney Conflicts of Interest*

1. CHANGING CLIENTS

Kane Properties, LLC sought several variances to develop property in Hoboken, New Jersey and Skyline Condominium Association, Inc., represented by Michael Kates, was a major opponent to the project.²⁶ The Zoning Board of Adjustment held several hearings regarding the application where Kane and Skyline provided evidence both for and against the project and Kates actively participated, opposing the project on behalf of Skyline.²⁷ After a unanimous vote, the board ultimately approved all of Kane’s applications.²⁸ Skyline appealed the board’s decision to the city council and shortly thereafter Kates was appointed to serve as the legal advisor to the council and was replaced by W. Mark O’Brien as counsel for Skyline.²⁹ Kates wrote a letter to both Kane and Skyline, informing them of the procedures of the appeals process and Kane immediately objected to Kates being involved in the appeal, claiming that it was a conflict of interest since Kates had previously served as counsel for Skyline.³⁰ Edward J. Buzak, of the council responded, advising that Kates had recused himself from the appeal and that he, Buzak, would be taking Kates’ place.³¹ Kates’ conflict of interest remained undisputed by the parties and in February of 2010, Kates sent a legal memorandum to the members of the council explaining the procedures to be taken regarding appeals of zoning board decisions, to

23. See *Grabowsky*, 2013 WL3835357, at *3-4.

24. *Id.* at *4.

25. *Id.* at *4.

26. *Kane Properties, LLC v. City of Hoboken*, 68 A.3d 1274 (N.J. 2013).

27. See *id.* at 1279.

28. *Id.*

29. *Id.*

30. *Kane Properties*, 68 A.3d at 1279-80.

31. *Id.* at 1280.

which Kane again objected.³² In March of 2010, Buzak appeared at a hearing for the Kane-Skyline appeal and Kates did not appear.³³ After the hearing, the Council reversed the Board's decision, resulting in all but one of Kane's variances being denied.³⁴ Shortly thereafter, at a council meeting regarding their recent decision, Kates served as counsel for the city instead of Buzak.³⁵ Kates actively participated in this meeting and even signed and approved the council's resolution.³⁶ The resolution listed six specific reasons in support of their decision to reverse the board's approval of the variances, concluding that Kane failed to demonstrate that the property was "particularly suitable" for its intended use.³⁷

Kane sued the city and its council alleging, among other things, that Kates' involvement in the appeal constituted a conflict of interest that "irreparably tainted and thoroughly undermined the City Council's decision."³⁸ In support, Plaintiff cited the memorandum sent by Kates regarding the present appeal; Kates' presence and participation in the meeting following the council's decision; and Kates' signing and approval of the resolution.³⁹ The trial court determined that Kates' conflict of interest did not taint the council's decision, finding that the memorandum was merely a procedural act of his administrative capacity and that his involvement in the resolution was too minimal to have affected the council's decision.⁴⁰

The appellate court reversed, finding that Kates' participation and conflict of interest did taint the council's determination.⁴¹ The court said that the applicable standard should have been whether, "in the mind of a reasonable citizen fairly acquainted with the facts, this scenario would create an appearance of improper influence."⁴² Citing to the different ways in which Kates involved himself in the appeal, the court held that such involvement was inappropriate and would

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1281.

38. *Id.* at 1282.

39. *Kane Properties*, 68 A.3d at 1282.

40. *Id.* (The trial court determined that the applicable standard of review was "actual prejudice," not "appearance of impropriety." As such, Plaintiff would need to provide actual evidence of Kates having influenced the council's decision as opposed to a mere appearance of unethical behavior.)

41. *Id.* at 1283.

42. *Id.*

give a “reasonable citizen cause for concern,” and remanded the matter back to the council.⁴³

Kane appealed to the supreme court of New Jersey objecting to the remand to the council and defendants cross-appealed, contesting the finding that Kates’ involvement created an appearance of impropriety and tainted the council’s decision.⁴⁴ The supreme court first reviewed the issue regarding Kates’ involvement by acknowledging that the conflict of interest is not only undisputed, but it is also clearly satisfied by the definition provided in the Rules of Professional Conduct.⁴⁵ The main issue was whether Kates’ involvement, despite his recusal from the matter, was inappropriate under the circumstances.⁴⁶ The court said that while the appearance of impropriety standard is correctly inapplicable to an *attorney’s* conflict of interest, a different standard applies to those acting in a *judicial capacity*.⁴⁷ According to the Code of Judicial Conduct, judges are to avoid both “impropriety and the appearance of impropriety in all activities.”⁴⁸ Since Kates’ role gave him the “opportunity to interpret the law and advise on legal matters,” the supreme court reasoned that Kates’ responsibilities were “quasi-judicial” enough to require the appearance of impropriety standard.⁴⁹ When this standard is applied to Kates’ conduct, the court determined that a reasonable, informed member of the public would indeed question the council’s impartiality and the integrity of the proceedings.⁵⁰ In remanding the matter to the trial court for a *de novo* review of the board’s decision, the court also directed that the matter be sent to a different judge who would be unquestionably unbiased and impartial.⁵¹

43. *Id.* at 1283-84.

44. *Id.* at 1284.

45. *Kane Properties*, 68 A.3d at 1285. According to the Rules of Professional Conduct, a government lawyer cannot participate in a proceeding in which he had previously been involved while in a non-governmental private capacity. *Id.*

46. *Id.*

47. *Id.* at 1286.

48. *Id.*

49. *Id.* at 1286-87 (The court noted that deciding whether there was an appearance of impropriety requires a determination of whether “a reasonable, fully informed person [would] have doubts about the judge’s impartiality[.]” The judge’s conduct should not give the public any “reason to lack confidence in the integrity of the process and its outcome[.]” No evidence of actual bias or impropriety is required under this standard.).

50. *Id.* at 1286. (Kates acknowledged the conflict of interest and recused himself, and he therefore should not have further participated in the appeal. The court explained that a recusal requires a person to completely dissociate himself from the matter, which Kates failed to do.).

51. *Id.* at 1293.

2. FORMER CLIENT

Reszka commenced an action seeking removal of Collins, a council member of the town board of the Town of Hamburg alleging that Collins, an attorney, continued a previously filed claim against the town on behalf of a client after taking office.⁵² Reszka also alleged that Collins had a complaint of harassment filed against him for filing repeatedly frivolous actions against the town, and posted flyers advertising his legal practice.⁵³ Collins refuted the allegations by submitting affidavits attesting to the fact that he has not appeared in court since taking an elected position, and Reszka did not provide further evidence to the contrary.⁵⁴ The court dismissed the petition, finding that this type of behavior, even if it were true, did not constitute grounds for removing an official from office as the allegations did not demonstrate unscrupulous conduct, a gross dereliction of duty, or a pattern of misconduct and abuse of authority.⁵⁵

C. *Conflict of Interest Based on Business Investment*

A conflict of interest question arose in a dispute over an ordinance that regulated and restricted non-metered parking in certain districts that were close to the boardwalk and its commercial attractions whereby only those persons who were qualified residents within the district were permitted to park in non-metered spaces from 12:30 a.m. to 4:00 a.m.⁵⁶ The primary purpose of the ordinance was to prevent non-residents from entering into the neighborhoods at night while loitering in the streets, wandering drunkenly, and to prevent the degrading of property value.⁵⁷ A councilman who was to vote on the newly proposed ordinance was also an owner of a business that owned houses within the district that the ordinance was to be imposed where he had lived for 51 years.⁵⁸ Objectors of the ordinance claimed that the councilman had a conflict of interest because of his property within the district and the possibility for him to earn additional fees once the ordinance is passed.⁵⁹ The councilman stated that he did not

52. Reszka v. Collins, 109 A.D.3d 1134 (N.Y. App. Div. 2013).

53. *Id.*

54. *Id.* at 1135.

55. *Id.*

56. Speroni v. Borough of Point Pleasant Beach, 2013 N.J. Nos. OCNL313512, OCNL-L-1719-12, 2013 WL 3878558, at *1 (N.J. Super. Ct. Law Div. June 17, 2013).

57. *Id.*

58. *Id.* at *4.

59. *Id.* at *7.

have a conflict of interest and, at the close of the final hearing, the ordinance passed by a vote of 4-3.⁶⁰

In deciding whether the councilman was required to disqualify himself from the voting board, the Superior Court of New Jersey ruled that there is a conflict of interest if an individual has a direct or indirect pecuniary interest, or when there is a direct personal interest, or indirect personal interest.⁶¹ The superior court noted that a local government official should not act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.⁶² The court found that the councilman had a conflict of interest because he acknowledged he would receive a direct financial benefit, and that his pecuniary interest derived from his business relationship and ownership in the property, and this interest could reasonably impair his objective judgment.⁶³

*D. No Unethical Conflict of Interest by
Board Member Who Had Previous Business
Dealing with Applicant*

Saratoga Springs Preservation Foundation (Foundation) is a not-for-profit organization that preserves historic structures in Saratoga Springs.⁶⁴ In September 2008, Boff purchased a piece of property, Winans-Crippen House, in a historic area of the city.⁶⁵ The house was recognized as a historic structure and listed on the National Register of Historic Places. Boff sought to demolish the house because it was an unsafe structure. The Saratoga Springs Design Review Commission (DRC) deemed itself responsible for overseeing such a request pursuant to the State Environmental Quality Review Act (SEQRA). The DRC found the requested demolition was a “type I” action and issued a positive declaration of environmental significance. It also required Boff to submit a draft environmental impact statement, which

60. *Id.* at *13.

61. *Id.* at *20.

62. *Id.*

63. *Id.*

64. *Saratoga Springs Pres. Found. v. Boff*, 110 AD3d 1326 (N.Y. App. Div. 2013).

65. *Id.*

he complied with in June 2012, and the DRC voted to accept in November 2012.

In December 2012, the Foundation and four individuals commenced an Article 78 proceeding against the city, Boff, and individual members of the DRC challenging the SEQRA determination and seeking an order enjoining the demolition of the house. The DRC voted to approve Boff's demolition application permit, and petitioners brought an additional claim challenging that determination as well. Petitioners argued that one of the four voting members of the DRC had a conflict of interest that should have disqualified him according to the City's Code of Ethics.⁶⁶ Specifically, petitioners relied on a portion of the code, which dealt with a city officer having knowledge or having a reason to know that he would receive a personal financial benefit from action taken for a client.⁶⁷ The petitioners were referring to a particular DRC member's business relationship with Boff. The member, Richard Martin, had been under contract with Boff on an unrelated construction project two years prior, disclosed this information, and found that recusal was not required.⁶⁸ Boff had hired a general contractor and that general contractor hired Martin's construction company for other work.⁶⁹ Martin stated that during the time Boff's demolition permit application was pending they were unaware of their business relationship. The court found that because they did not know of their business relationship, nor should they have known, and because the decision on Boff's application occurred two years after their business relationship concluded, Martin was not disqualified for a conflict of interest.

E. Potential Conflicts Must Be Raised Timely

Richard Dahm submitted an application to the Stark County Board for a zoning amendment to change his property from agricultural to residential to create a 99-lot residential subdivision.⁷⁰ After several public hearings, the board denied Dahm's application by a 5-0 vote. On appeal Dahm argued that two of the commissioners had conflicts of interest stemming from their own land development projects, and prejudice against Dahm's competing project.⁷¹ Dahm argued that both of

66. *Id.* at 840.

67. *Id.*

68. *Id.*

69. *Id.*

70. Dahm v. Stark Cnty. Bd. of Cnty. Comm'rs, 841 N.W.2d 416, 419 (N.D. 2013).

71. *Id.* at 420.

the commissioners separately contracted with developers to turn land in the vicinity of Dahm's project from commercial to residential, however Dahm did not raise this potential conflict of interest to the board and attempted to raise it for the first time in the district court.⁷² The court found that the information Dahm sought to introduce was merely speculative, and could not be raised for the first time on appeal.⁷³

III. Recusal and Disqualification

A. Recusal Not Required for Three Board of Supervisors Members Who Disclosed Relationships With Governmental Applicant and its Attorney

In 2010, Iskalo CBR, LLC ("Iskalo") filed an application for a special exception to build a Washington Metropolitan Area Transit Authority ("WMATA") bus maintenance facility on a parcel of land in Fairfax County.⁷⁴ After a public hearing, the planning commission approved the facility as being substantially in accord with the comprehensive plan and thus recommended approval of the application by the board of supervisors. The plan was not well received by the inhabitants of Newberry Station, a residential community situated a mile from the proposed facility and less than a quarter-mile from the road over which the bus traffic would flow. Newberry Station contended throughout the approval process that the facility would significantly increase vehicular traffic over the road, both due to the buses and the cars of employees, throughout the day and night. The Newberry Station Homeowner's Association submitted official comments to the board, recommending they overturn the planning commission's approval.

The board approved the application but not before three of its members made disclosures to the public regarding their personal or professional interest or relationship with the project itself or Iskalo. The board's chairman and a supervisor disclosed that they had received campaign contributions from Iskalo's attorneys and two other members disclosed that they were directors of WMATA. The vote passed 6-3 with the board's chairman abstaining from the vote while the three supervisors who had made disclosures voting to approve the application.

72. *Id.*

73. *Id.* at 424.

74. *Newberry Station Homeowners Ass'n v. Bd. of Supervisors*, 285 Va. 604 (2013).

The Newberry Station Homeowners Association filed a complaint seeking declaratory judgment that the board's approval of the application was void and injunction barring construction of the facility. They argued that the county code required the interested board members to recuse themselves from consideration of the application. The board argued that the code did not require the supervisors to recuse themselves because they did not have a conflicting business or financial interest covered by the statute. The circuit court sustained the board's argument and Newberry Station appealed.

Newberry Station's main argument was that the interested supervisors were required to recuse themselves from consideration because they each had a conflict of interest. The board's argument in response is the language of the statute, which provides that recusal pertains to instances where there is a "business or financial relationship" and does not require recusal for "business or financial interest." This issue, being statutory in nature, led the court to first analyze whether the plain meaning of the statute could determine whether there is a clear difference between the use of relationship and interest. The court, after determining the language of the statute to be ambiguous looked to the legislative history of the statute and determined that there was no intent by the legislature for the two phrases to have different meanings. However, the court affirmed the circuit court's decision because WMATA is a governmental agency created by a pact between Maryland, Virginia, and Washington D.C. and as such it affords no opportunity for financial benefit to its unpaid directors. Without the financial benefit to its directors, WMATA does not fall under the statute's definition of "corporation". Thus, the court held it was not improper for the supervisors to participate in the consideration process.

Newberry Station also argued that the board approved the application without sufficient evidence. In particular they alleged that the board's actions were arbitrary and capricious because they were undertaken in violation of an existing ordinance. The court rejected this argument, stating that the special exception application was within the authority granted to the board and therefore was not in violation of an ordinance. Newberry Station also argued that the board had failed to properly consider open space, noise, and hazardous materials. The court rejected these contentions because there was ample evidence of consideration of open space and noise, while the statute at issue placed no burden on the board to consider the hazardous materials; instead it places an obligation on the applicant to list toxic substances.

B. Board Member's Recusal from Voting Because He Was Previously Employed by Applicant Was Sufficient

Gunnery, a private boarding school in Connecticut, submitted an application to the Wetlands and Watercourse Commission (IWC) for a permit to construct athletic fields; and it was approved subject to conditions.⁷⁵ Gunnery then applied to the Washington Zoning Commission (WZC) for a special permit to have construction done on the property, and following several hearings, the WZC ruled that the project was consistent with the Washington Plan of Conservation and Development as it balanced the needs of the school and the town.⁷⁶ The board then voted in favor of the application with one of the board members, Reich, recusing himself from voting due to his past experience as a teacher at the school and his involvement with the defendants.⁷⁷ Reich, however, did not recuse himself from the case, because, he stated, he had retired from the school six years before he joined the WZC, and he currently had no ties with the school.⁷⁸ Plaintiff argued that the WZC demonstrated clear bias, but the defendant responded that the plaintiff failed to establish the Reich was predisposed on the matter.⁷⁹ In deciding whether the commissioners had their minds made up prior to the public hearing, the Superior Court of Connecticut held that there is a presumption that administrative board members acting in an adjudicative capacity are not biased.⁸⁰ As a result, the court dismissed the appeal, finding Reich was truthful in his statements about working as a teacher in the Gunnery school, and that neither Reich's employment as a teacher nor the decision of the school to honor Reich's deceased son rose to the level of a conflict of interest.⁸¹

C. Disqualification Based on Prejudgment

In a recent Rhode Island case, the plaintiff had submitted variance applications on several occasions and each was denied.⁸² It was later discovered that, prior to the last hearing, one of the judges told a board

75. *Stern v. Town of Wash. Zoning Comm'n*, 2013 WL 5496459 at 1 (Conn. Super. Ct. Sept. 11, 2013).

76. *Id.* at 7-8.

77. *Id.* at 8.

78. *Id.* at 11.

79. *Id.* at 9.

80. *Id.* at 14.

81. *Id.* at 13.

82. *Fernandez v. Bruce*, 2013 R.I. Super. LEXIS 184 (RI Sup. Oct. 21, 2013).

member that he already decided to vote against the application a month before the hearing was conducted.⁸³ The judge's business associate also spoke out publicly against the application. On appeal from the denial, the superior court vacated the zoning board's decision, and the zoning board then determined that the judge did not have to recuse himself due to his business associate's opposition.⁸⁴ The superior court disagreed, ruling that it would be more in keeping with justice and fair play to disqualify a judge who objects to a proposed change even before the hearing, and that the judge should be disqualified because he had already decided how he was voting before the hearing.⁸⁵

IV. Bribery

A recent trend in reported cases reveals an alarming increase in federal corruption cases involving land use permits.⁸⁶ A number of federal laws are used to ferret out corruption including title 18 U.S.C. § 201(b), which prohibits bribery and the acceptance of certain gratuities.⁸⁷ Bribery may manifest itself in cash given in exchange for permits,⁸⁸ services in exchange for approvals,⁸⁹ and campaign contributions.⁹⁰ Other federal statutes that have been used to convict corrupt actors in the land use game include: the Hobbs Act,⁹¹ theft of honest services,⁹² and bribery involving federally funded programs.⁹³

83. *Id.* at 18.

84. *Id.* at 1-2

85. *Id.* at 17.

86. See Patricia Salkin & Bailey Ince, *It's a "Criming Shame": Moving from Land Use Ethics to Criminalization of Behavior Leading to Permits and Other Zoning Related Acts*, 46 URB. LAW. 249-67 (2014).

87. 18 U.S.C. § 201(b) (2012). For an explanation, see *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999).

88. See, e.g., *United States v. Curescu*, 2011 WL 2600572 (N.D. Ill. June 29, 2011).

89. See, e.g., *United States v. Boender*, 649 F.3d 650 (7th Cir. 2011).

90. See, e.g., *United States v. Beldini*, 443 Fed. App'x 709, 710 (3d Cir. 2011); *United States v. Boone*, 628 F.3d 927 (7th Cir. 2010).

91. 18 USC § 1951 (2012). A public official is guilty of extortion under color of official right when he or she induces someone to relinquish their property in order to perform some act the official was already under a duty to perform. See *Evans v. United States*, 504 U.S. 225, 273 (1992).

92. 18 U.S.C. § 1346 (2012).

93. 18 U.S.C. § 666 (2012).

A. Promise of Donation to Charity and Threat of Lawsuit If Opposition to Rezoning

Issa, a developer seeking rezoning to develop an IHOP restaurant told city council member Benson that he would make a donation to charity upon the closing of the IHOP property, but Benson was not amenable to the request.⁹⁴ Issa then told Benson he would sue the council if Benson were going to garner opposition to the rezoning.⁹⁵ Benson informed the council of Issa's attempt to bribe him prior to the council voting on the property, and the council denied the rezoning.⁹⁶ Issa then sued the councilman for allegedly defaming him on two separate occasions when the councilman accused Issa of offering a bribe to influence Benson's vote on the rezoning issue.⁹⁷ The Tennessee Court of Appeals agreed with Councilman Benson that his statements were protected under both legislative and litigation privilege.

B. Another Distressing Corruption Scheme

Federal law prohibits local and state government agents from "corruptly solicit[ing] or demand[ing] for the benefit of any person, or accept[ing] or agree[ing] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such . . . government . . . involving any thing of value of \$5,000 or more."⁹⁸

Fourteen defendants were indicted by a federal grand jury in September 2007 on various counts, including bribery, extortion, money laundering, and fraud. Of these fourteen defendants, Darren Reagan, D'Angelo Lee, Donald Hill, and Sheila Farrington appealed.⁹⁹ Hill was an elected member of the City Council of Dallas, Texas, and Lee was appointed by Hill to the City Plan and Zoning Commission ("CPC").¹⁰⁰ Farrington was Hill's mistress and future wife, who acted as a consultant under the business name Farrington & Associates.¹⁰¹ Reagan was the chairman and chief executive of the Black State Employees Association of Texas and the BSEAT Community Development Corporation, and Brian Potashnik and James Fisher were two housing developers who were involved in illegal activity

94. *Issa v. Benson*, 420 S.W.3d 23 (Tenn. Ct. App. 2013).

95. *Id.*

96. *Id.*

97. *Id.*

98. *United States v. Reagan*, 725 F.3d 471, 481 (2013).

99. *Id.* at 477.

100. *Id.*

101. *Id.*

with appellants in attempts to obtain “public financing, zoning clearance, and political support for their rival housing development plans in Dallas.”¹⁰²

In order to gain political support from Hill for his housing developments, Potashnik hired Farrington as a “community consultant.”¹⁰³ Potashnik paid Farrington regularly, even though Farrington never did any work for him and instead used the money to buy cars for Hill and Lee.¹⁰⁴ Hill promised Potashnik that, in return, Hill would push the council to finance one of Potashnik’s developments.¹⁰⁵ Lee then requested that Potashnik hire a woman named Andrea Spencer as a minority contractor, who did no work herself but partnered with a white male contractor named Ron Slovacek.¹⁰⁶ After Spencer and Slovacek were given a concrete contract, Hill pushed the council to fund two of Potashnik’s developments and obtain permits for a different development.¹⁰⁷ As it later turned out, Lee had been taking 10% of Slovacek’s checks.¹⁰⁸ In exchange for Potashnik’s working out another deal with Spencer and Slovacek, Lee and Hill offered to push a proposal to the council that would reduce certain zoning requirements in one of Potashnik’s developments, and when the proposal did not pass, Potashnik refused to enter into a contract with Spencer and Slovacek.¹⁰⁹

Appellants were also involved in similar illegal schemes with Fisher, Potashnik’s rival.¹¹⁰ In August of 2004, Reagan asked Fisher for portions of his developer’s fee, and in exchange, “Reagan would ensure that Fisher would not have problems with Hill and the City Council.”¹¹¹ Later that October, several zoning rulings were made that negatively affected Fisher’s developments and days later when Fisher refused to contribute money to fund Hill’s birthday party, a CPC vote that would affect Fisher was postponed.¹¹² Fisher signed a contract with Reagan in November of 2004, which resulted in the council’s approval to finance one of Fisher’s developments, Pecan

102. *Id.*

103. *United States v. Reagan*, 725 F.3d at 478.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 478-79.

110. *Id.* at 479.

111. *United States v. Reagan*, 725 F.3d at 479.

112. *Id.*

Grove.¹¹³ Thereafter, two inexperienced contractors, Rickey Robertson and Jibreel Rashad, told Fisher that if they were to serve as subcontractors on the Pecan Grove project, Lee would get the CPC to approve another one of Fisher's projects.¹¹⁴ Fisher refused to deal with Robertson and Rashad after learning that they (1) expected Fisher to cut them in on 10% of the projects' value and (2) planned to subcontract out all the work given to them. Reagan sent invoices to Fisher requesting payment for various alleged services.¹¹⁵ When Fisher refused to pay, Hill delayed another council vote on one of Fisher's projects.¹¹⁶ In February 2005, Reagan demanded more fees from Fisher and named subcontractors that he wanted Fisher to use and, although Fisher refused these requests, he did pay Reagan a portion of the requested amount.¹¹⁷ The FBI photographed Reagan handing an envelope with \$10,000 to Hill, who gave \$5,000 to Farrington, who gave \$2,500 to Lee.¹¹⁸ Hill further delayed the votes on one of Fisher's developments and Reagan demanded more money from Fisher.¹¹⁹ The FBI took photographs of Reagan giving \$7,000 to Lee, \$2,500 of which was deposited into Hill's campaign account the following day.¹²⁰

Fisher was then told that if he worked together with Kevin Dean, owner of an asphalt company, and John Lewis, an attorney, Hill would approve one of Fisher's development projects.¹²¹ After Fisher signed a contract with Lewis and made an initial payment of \$50,000, Hill was successful in getting zoning approval for Fisher's development.¹²²

After reviewing the foregoing evidence at trial, the jury found Hill, Lee, and Farrington guilty on several counts of fraud, bribery, and conspiracy to launder money.¹²³ All four appellants were also found guilty for extortion.¹²⁴ The substantive issues on appeal dealt with evidentiary sufficiency,¹²⁵ and for purposes of this review are not relevant.

113. *Id.* at 479.

114. *Id.*

115. *Id.* at 480.

116. *Id.* at 479-80.

117. *Id.* at 480.

118. *Id.*

119. *United States v. Reagan*, 725 F.3d at 480.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* 480-81.

124. *Id.*

125. *Id.* at 481.

*C. Revocation of Host Community Agreement
Following Bribery Upheld*

In an earlier proceeding, plaintiff was found to have engaged in a criminal conspiracy to bribe a city council member, and it was determined that the bribe resulted in the council member's changing of votes towards the plaintiff's zoning plan.¹²⁶ As a result, the plaintiff's conditional use grant for the host community agreement was revoked. The plaintiff appealed claiming that he still had an interest in the land, therefore, the city must return payments that were made under the host community agreement.¹²⁷ In denying the plaintiff's motion, the court found it was a matter of fact that there were apparent acts of bribery involved in procuring the host community agreement.¹²⁸ The city's ultimate denial of the host community agreement did not unjustly enrich the city, because the host community agreement would have expired on its own terms and the plaintiff made no efforts to rescind the agreement.¹²⁹

D. Miscellaneous

1. AICP CODE OF ETHICS DOES NOT ESTABLISH A
LEGAL DUTY OF ENFORCEABLE STANDARD OF CARE

In a recent Colorado case, plaintiff hired the defendant for land planning and development services to provide a development analysis for properties owned by the plaintiff.¹³⁰ The defendant then filed a claim against the plaintiff, stating that the plaintiff gave inaccurate advice about how the properties would be developed, and the plaintiff also filed a claim against the defendant for breach of contract.¹³¹ The Colorado Court of Appeals ruled that an expert's opinion as to the best practices and ethics of a type of service does not necessarily establish a legally enforceable duty of care independent of the applicable agreement, and that the American Institute of Certified Planners code does not establish a legal duty or an enforceable standard of care independent of those in the agreement.¹³²

126. *Systematic Recycling, LLC v. City of Detroit*, No. 09-11430, 2013 WL 425431 (E.D. Mich. Jan. 24, 2013).

127. *Id.*

128. *Id.*

129. *Id.* at *12-13.

130. *Stan Clauson Assocs., Inc. v. Coleman Bros. Constr., LLC*, 297 P.3d 1042, 1044 (Colo. Ct. App. 2013).

131. *Id.* at 1044.

132. *Id.* at 1047-48.

2. EX PARTE COMMUNICATION WAS INAPPROPRIATE
BUT DID NOT TAINT BOARD'S DECISION

Berwick Iron operated a metal and automobile recycling business in a rural commercial and industrial district under a conditional use permit for automobile recycling.¹³³ In 2010, Berwick Iron applied for and received another conditional use permit to install and operate a metal shredder.¹³⁴ Abutters challenged the board's decision.¹³⁵

The board hired an environmental consulting firm to conduct an independent review of the potential air emissions and sound levels from the facility but because Berwick Iron was required to pay for the environmental firm, the board obtained three estimates from engineering firms to compare prices and the town planning coordinator then contacted the attorney representing Berwick Iron and attached the proposals.¹³⁶ The attorney for Berwick Iron responded to the email and stated that the firm with the lowest estimate could proceed with the review.¹³⁷ Neither the planning coordinator nor the board informed the public or the attorney for the nine abutting landowners of the email exchange.¹³⁸

After receiving the results of the independent review, the board again voted to approve the conditional use permit for the shredder.¹³⁹ The abutters again sought review, and the court vacated the board's decision again on the basis that it violated the abutters' due process rights when it failed to notify the public or the abutters' counsel of the email exchange discussing the choices for an independent reviewer.¹⁴⁰ The board asked the superior court to clarify its decision, and the court stated that although the board did violate due process, it did not influence the outcome of the case, but the board's lack of compliance with its own emissions statute was the reason.¹⁴¹

On appeal, the abutters argued that the planning board violated their due process rights when the planning coordinator sent an email only to Berwick Iron.¹⁴² The court stated that, in the context of municipal planning boards, due process means the party is entitled to a fair

133. *Duffy v. Town of Berwick*, 82 A.3d 148, 151-52 (Me. 2013).

134. *Id.* at 151-52.

135. *Id.* at 153.

136. *Id.*

137. *Id.*

138. *Id.* at 153.

139. *Id.*

140. *Id.*

141. *Id.* at 154.

142. *Id.*

and unbiased hearing.¹⁴³ The supreme court agreed with the superior court that the email did not taint the board's decision because the board had essentially made its decisions and was merely seeking Berwick Iron's approval because it was required to pay for the expert, therefore, the gravity of the ex parte communication was limited.¹⁴⁴ The court also noted that the abutters had the opportunity to respond to the choice of independent reviewer during the public hearing. The court concluded that the ex parte communication was not enough to require the court to vacate the board's decision.¹⁴⁵

V. Conclusion

The Land Use Ethics Committee of the ABA Section on State and Local Government Law continues to review and discuss new cases in this area on an annual basis. Attorneys representing governments and applicants before governments are welcome and encouraged to participate in this effort to ensure that the land use process proceeds in a transparent, fair, and ethical manner.

143. *Id.* at 155.

144. *Id.* at 155-56.

145. *Id.* at 156.