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## Further Developments in Land Use Ethics

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# Further Developments in Land Use Ethics

Patricia E. Salkin\* and Darren Stakey\*\*

## I. Introduction

ETHICAL CONSIDERATIONS CONTINUE TO PLAY A FUNDAMENTAL ROLE in shaping the course of land use and developmental regulatory proceedings throughout the country. From an innocuous donation by one public official to his alma mater,<sup>1</sup> to the outright bribery of a former mayor,<sup>2</sup> the past year has been rife with a range of conduct implicating professional responsibility and land use.

## II. Conflicts of Interest

### A. Attorney Conflicts

In an unpublished *per curiam* opinion, a New Jersey appellate court found that it was not a conflict for an attorney to accept the endorsement of his former client, then-mayor, for a municipal attorney position, and that, similarly, the mayor had not acted improperly.<sup>3</sup>

A complaint was first filed against Scott M. Alexander, the then-mayor of the Borough of Haddon Heights, alleging that he “violated the Local Government Ethics Law by proposing and supporting [a candidate for] Borough[] Solicitor” who had represented him in a family law matter.<sup>4</sup> With the mayor’s support, the Haddon Heights Borough Council undertook a public vote and resolved to allocate an annual retainer for Robert Gleaner, the attorney, which covered “attendance at public meetings . . . and his ‘interactions’ with officials and citizens,” and set “an hourly rate of \$150 for litigation or special

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1. *Shain v. Lakewood Twp. Plan. Bd.*, No. A-6335-11T3, 2014 WL 1613668 (N.J. Super. App. Div. Apr. 23, 2014).

2. *In re Cammarano*, 219 N.J. 415 (N.J. 2014).

3. *Scoblink-O’Neill v. Loc. Fin. Bd., Dep’t of Cmty. Affairs*, No. A-4754-11T4, 2014 WL 6802452, at \*3 (N.J. Super. App. Div. Dec. 4, 2014).

4. *Id.* at \*1.

projects.”<sup>5</sup> The now-former mayor defended the endorsement of his personal lawyer in a letter, responding that the Advisory Committee on Professional Ethics of the New Jersey Supreme Court already ruled that “an attorney is ethically permitted to represent a municipal official in any matter that is unrelated to the municipality.”<sup>6</sup> Further, the mayor contended that there were no situations flowing from Mr. Gleaner’s municipal representation in which a “direct financial or personal involvement . . . had impaired [either party’s] objectivity or independence of judgment.”<sup>7</sup>

In reviewing the matter, the Legal Finance Board decided that the relationship between the mayor and the solicitor was too attenuated “to constitute a ‘prohibit[ed] involvement’ and could not ‘reasonably be expected to impair’ the Mayor’s ‘objectivity or independence of judgment.’”<sup>8</sup> On appeal, the Superior Court of New Jersey, Appellate Division, concurred with the Finance Board that the relationship between the mayor and his lawyer “was ‘too tenuous’ to support a violation.”<sup>9</sup> The court also found nothing unusual with regard to the attorney’s fees charged and noted that nothing in the record tended to suggest that the prior representation affected any public interest pertaining to the municipality.<sup>10</sup>

In Connecticut, allegations of impropriety were rejected where the father of a zoning board chairperson’s son-in-law served as personal attorney for an applicant whose request for variances was approved.<sup>11</sup> The original application submitted to the Fairfield Zoning Board of Appeals was for variances that would “permit the construction of a single-family residence on [an] unimproved parcel” in a flood plain zone.<sup>12</sup> Ultimately, however, the applicant, through his lawyer, sought permission to construct a three-story commercial building entirely within the flood zone.<sup>13</sup> At the “close of a public hearing, the Board . . . approve[d] the requested variances” and “the decision was published in a newspaper.”<sup>14</sup> Eight residents appealed the decision and the Superior

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5. *Id.*

6. *Id.*

7. *See id.*

8. *Id.* at \*2.

9. *Id.* at \*3.

10. *See id.*

11. *See Coppola v. Zoning Bd. of Appeals*, No. CV116023195S, 2014 WL 2055635, at \*7 (Conn. Super. Ct. Jan. 22, 2014).

12. *Id.* at \*1.

13. *Id.*

14. *Id.* at \*2.

Court of Connecticut, Judicial District of Fairfield, held that five of the residents had standing due to the close proximity of their property to the subject parcel.<sup>15</sup> Though the court determined that the applicant's property was not entitled to preexisting nonconforming use status because the previous use had been abandoned for several years, it rejected the argument that the affirmatively-voting chairman of the Zoning Board of Appeals had a conflict of interest simply because the father of his son-in-law was the applicant's attorney.<sup>16</sup> The court asserted that "municipal governments would be seriously handicapped[] if any conceivable interest, however remote or speculative, would require the disqualification of a zoning official," and because there were no personal or pecuniary interests implicated by the subject matter of the application, or any relationship with any of the parties who were before the Zoning Board of Appeals, no violation had occurred.<sup>17</sup> Further, as the chairman was not directly related, by blood or marriage, to the applicant and was not a part owner of the parcel in question, "the fact that his daughter [was] married to the son of the personal attorney and cousin of an owner to the property [was] too attenuated" a basis upon which to maintain a personal interest claim against the chairman.<sup>18</sup>

#### B. *Ex Parte Communications*

With increasing frequency, communications have triggered ethical inquiries this past year. In the Aloha State, an email exchange between counsel for the University of Hawai'i and a hearing officer, regarding the approval of a Conservation District Use Application (CDUA), was deemed an impermissible *ex parte* communication.<sup>19</sup> Litigation began shortly after the State of Hawai'i transferred eighteen acres of land to the University, on condition that the land was being set aside for creation of the Haleakala High Altitude Observatory.<sup>20</sup> The University of Hawai'i Institute of Astronomy, accordingly, secured a permit to install a Solar Telescope, but Kilakila 'O Haleakalâ (KOH), "an organization dedicated to the protection of the sacredness of the summit of Haleakalâ[,] opposed [the application] . . . to build on the project

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15. *See id.* at \*2-3.

16. *Id.* at \*5-6.

17. *See id.* at \*6-7.

18. *Id.* at \*7.

19. *See Kilakila 'O Haleakalâ v. Bd. of Land & Nat. Res. (KOH II)*, No. CAAP-13-003065, 2014 WL 5326757, at \*3 (Haw. Ct. App. Oct. 17, 2014), *cert. granted*, No. SCWC-13-0003065, 2015 WL 114807 (Haw. Jan. 7, 2015).

20. *See id.* at \*2.

site” and demanded a stay and a contested case hearing, which was eventually ordered by Hawai’i’s high court.<sup>21</sup>

KOH then sought, unsuccessfully, to disqualify Board of Land and Natural Resources advisor and Deputy Attorney General Linda Chow, due to her prior representation of the Board in a related proceeding against KOH.<sup>22</sup> Around this time, the Board announced that it was aware of an impermissible email sent by the assigned contested hearing officer, Steven Jacobson, to counsel for the University.<sup>23</sup> In the email, Jacobson stated that the offices of the Governor and of United States Senator Daniel Inouye had been pressuring him into making a quick recommendation to grant the permit, and asking counsel for the University, “So, my question for you is whether any of you had anything to do with what the Senator’s and Governor’s offices were doing.”<sup>24</sup>

At the conclusion of the hearing, the Board approved the CDUA to build an astronomical observation tower and denied KOH’s post-hearing motion for disclosure of all other communications surrounding the Solar Telescope, maintaining that pressure placed on Jacobson “did not influence the outcome of his decision,” while nevertheless discharging Jacobson for his impermissible ex parte communication and striking Jacobson’s work product from the record.<sup>25</sup> KOH appealed to the Intermediate Court of Appeals of Hawai’i, which held, among other things, that “any impropriety was cured when the Board discharged Jacobson and appointed [a new hearing officer].”<sup>26</sup> However, the case is still ongoing, as KOH’s writ of certiorari was granted by the Supreme Court of Hawai’i and has been scheduled for oral arguments.<sup>27</sup>

Back on the mainland, in Oregon, the mere appearance of impropriety created by ex parte communications was insufficient to vitiate a land use board proceeding, when an approved plan to build a gas pipeline was later reconsidered.<sup>28</sup> This dispute ripened when the Oregon

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21. *Kilakila ‘O Haleakalā v. Bd. of Land & Nat. Res. (KOH I)*, 317 P.3d 27, 29, 40 (Haw. 2013) (internal quotation marks omitted).

22. *KOH II*, 2014 WL 5326757, at \*2.

23. *See id.*

24. *Id.* at \*2-3.

25. *Id.* at \*5.

26. *Id.* at \*24.

27. *Kilakila ‘O Haleakalā v. Bd. of Land & Nat. Res. (KOH III)*, No. SCWC-13-0003065, 2015 WL 114807, at \*1 (Haw. Jan. 7, 2015).

28. *See Columbia Riverkeeper v. Clatsop Cnty.*, 341 P.3d 790, 804 (Or. Ct. App. 2014).

Pipeline Company's petition to build a forty-one mile long segment of natural gas pipeline, initially approved by the Clatsop County Board of Commissioners, was appealed to the Land Use Board of Appeals (LUBA) by parties who opposed the application.<sup>29</sup> While the appeal was still pending, three new commissioners were elected to Clatsop County's Board, one of whom had openly discussed rejection of the pipeline plan.<sup>30</sup> Before the LUBA was even provided the record for appeal, "the [B]oard—with its three newly elected commissioners—voted to withdraw its approval [of the application] and reconsider [the] decision."<sup>31</sup> The withdrawal was immediately challenged "through a mandamus action in the circuit court[,] . . . [but] [t]he circuit court dismissed" and the Supreme Court of Oregon declined to review.<sup>32</sup>

On reconsideration, the Board denied the pipeline application in a 4-1 vote.<sup>33</sup> The Oregon Pipeline Company appealed, alleging that Commissioner Peter Huhtala had campaigned against the pipeline as part of his election platform and that his bias had tainted the proceeding.<sup>34</sup> The Company cited more than a half-dozen remarks Commissioner Huhtala had made, including statements in opposition to land use approvals for a downstream distribution channel to market the natural gas and a comment that "[i]t could become the policy of the Port of Astoria that we oppose the construction of a liqu[e]fied natural gas facility anywhere in the Columbia River Estuary and direct staff to do everything possible to make that happen."<sup>35</sup> Nevertheless, based on the totality of his statements, the Court of Appeals of Oregon found that Commissioner Huhtala never "explicitly, or by necessary implication, commit[ted] to an irrevocable position on the merits of [the pipeline] application."<sup>36</sup> Thus, actual bias was not established and the mere appearance of bias created by his *ex parte* statements was insufficient.<sup>37</sup>

Moving from natural gas to water, *ex parte* communications made to officials in Connecticut were deemed sufficient to render a public

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29. *Id.* at 794.

30. *See id.* at 793.

31. *Id.*

32. *Id.* at 793 (citing *State ex rel. Or. Pipeline Co. v. Clatsop Cnty.*, 288 P.3d 1024 (Or. Ct. App. 2012), *rev. den.*, 299 P.3d 889 (Or. 2013)).

33. *See id.* at 794.

34. *See id.* at 793.

35. *See id.* at 804-05.

36. *Id.* at 808.

37. *Id.* at 809.

hearing unfair.<sup>38</sup> There, a member of the Enfield Planning and Zoning Commission, named Lori Longhi, was accused of illegally orchestrating the denial of an application to construct a thirty-eight unit residential subdivision.<sup>39</sup> Longhi had been a social friend of one of [Villages, LLC's] owners, Jeannette Tallarita, and her husband, former Mayor, Patrick Tallarita, but since had a falling out and was now alleged to have "arbitrarily predetermined the outcome" of the applications based on her "personal animus."<sup>40</sup> The rift began when Longhi accused then-Mayor Peter Tallarita of using his influence to affect the outcome of Commission decisions in a way adverse to Longhi's interests.<sup>41</sup> Now, with Patrick Tallarita acting as counsel for Villages, LLC, Longhi stated that "she wanted [Tallarita] to suffer the same fate of denial by the commission that she had suffered," and engaged in ex parte communications with an official from the Hazardville Water Company to discuss the issue of whether there was sufficient water pressure for the fire department to extinguish a blaze at the subdivision.<sup>42</sup> The trial court found that Longhi, who "played a significant role in deliberations[] and voted to deny the . . . applications," had a conflict of interest due to her bias against Tallarita.<sup>43</sup> The Appellate Court of Connecticut agreed, noting that "evidence of bias may be cumulative," and ruled that Longhi's ex parte comments were harmful and deprived Villages, LLC of a fair hearing.<sup>44</sup>

### C. *Pecuniary Conflicts*

Two contrasting cases from New Jersey last year addressed what does and does not create a pecuniary conflict of interest. First, it was not a conflict for the Chairman of the Lakewood Township Planning Board to make a donation to the school from which he graduated, Beth Medrash Govoha of America, a specialized graduate level educational institution, even though the school was subject to Board review and approval for its expansion plans.<sup>45</sup> Neighbors residing across from the proposed development decried the Board's approval as being biased,

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38. *Villages, LLC v. Enfield Planning & Zoning Comm'n*, 89 A.3d 405, 416-17 (Conn. Ct. App. 2014).

39. *See id.* at 407-08.

40. *Id.* at 408.

41. *See id.* at 408-09.

42. *Id.* at 408-09 (alteration in original).

43. *Id.* at 408.

44. *Id.* at 414, 416-17.

45. *Shain v. Lakewood Twp. Planning Bd.*, No. A-6335-11T3, 2014 WL 1613668, at \*1-2 (N.J. Super. App. Div. Apr. 23, 2014).

using as evidence the recent donation made by the Chairman and the fact that another board member was also an alumnus of the school.<sup>46</sup> On appeal, the challenging neighbors relied on a New Jersey Municipal Land Use provision that “prohibit[s] any member of [a] planning board” from taking part in a “matter in which [the member] has . . . any personal or financial interest.”<sup>47</sup> The Superior Court of New Jersey, Appellate Division, upheld the Board’s conclusion that no violation was committed affirming the Board’s approval of the academic expansion.<sup>48</sup>

Things turned out very different in another part of New Jersey for Pemberton Township Councilmember Sherry Scull, who voted on the salaries of twelve supervisory positions, including the water superintendent, despite her husband’s employment with the Pemberton Township Water Division.<sup>49</sup> The Township Solicitor’s office investigated Scull’s affirmative vote for the Communications Workers of America Salary Ordinance after “the public questioned whether [Scull] should have recused herself from voting on the contract.”<sup>50</sup> The Solicitor’s office ruled that the appellant had no conflict of interest.<sup>51</sup> But, the Local Finance Board also lodged a complaint, alleging that Scull violated the section 40A-9-22.5(d) of the Local Government Ethics Law.<sup>52</sup> The Board ultimately issued a Notice of Violation and concluded that both Scull and her husband stood to gain from the ordinance, which might have “impair[ed their] objectivity or independence of judgment.”<sup>53</sup> Scull requested a hearing to contest the determination, and an administrative law judge ruled that Scull had indeed violated the Local Government Ethics Law when she voted to increase the salary of her husband’s direct supervisor.<sup>54</sup> Scull appealed to the Superior Court of New Jersey, Appellate Division, which ruled that, even if Scull did not specifically intend to use her office for the benefit of her husband, the key issue was the existence of the conflict.<sup>55</sup> Scull should have recused herself and, by not

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46. *See id.* at \*1.

47. *Id.*; *see* N.J. STAT. ANN. § 40:55D-23(b) (2015).

48. *Shain*, 2014 WL 1613668, at \*2.

49. *See Scull v. Loc. Fin. Bd.*, No. A-4786-11T4, 2014 WL 2440783, at \*1 (N.J. Super. App. Div. June 2, 2014).

50. *Id.*

51. *Id.*

52. *See id.*

53. *Id.* (quoting the Board’s Notice of Violation).

54. *Id.* at \*1.

55. *Id.* at \*5.



doing so, her vote “presented the potential to undermine the public[’s] confidence in the objectivity and impartiality of the local government in violation of [the Ethics Law].”<sup>56</sup>

#### D. *Proprietary Conflicts*

A line of advisory opinions from California this past year may help practitioners to draw that ethical line between right and wrong for conflicts of interest created by property ownership. The California Fair Political Practices Commission weighed in on a potential conflict implicating San Luis Obispo City Council Members Dan Carpenter and John Ashbaugh, who both owned real property within the boundaries of an area where the City Council was to award a grant that would impact their property values.<sup>57</sup> The Legal Division of the Commission advised that any government decision directly affecting a financial interest in real property is presumed to be material, unless “rebutted by proof that it is not reasonably foreseeable” to have “even a ‘penny’s worth’” of an effect on the property’s value.<sup>58</sup> As both council members owned property directly within the General Plan Land Use and Circulation Elements grant zone, both had prohibited conflicts of interest, and neither could participate in the decision until each of their conflicts was resolved by the City Council using either segmentation and screening, or a random selection process.<sup>59</sup>

In light of this advisory opinion, it seems clear that owning property in an area subject to development creates a conflict of interest for the public officials charged with approval or rejection of that development. But, what if a public official just rents the property subject to development? That is exactly the issue that the California Fair Political Practices Commission grappled with next, when the propriety of Davis City Councilmember Robb Davis was called into question last year.<sup>60</sup> Davis was newly elected and had rented a loft for a one-year term in “the downtown core area of Davis.”<sup>61</sup> The potential conflict arose quickly, as there were a number of projects near Davis’ rented residence slated for consideration.<sup>62</sup>

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56. *Id.*

57. Cal. Fair Political Practices Comm’n Advice Letter, No. A-13-160, 2014 WL 764125, at \*1-2 (Feb. 10, 2014).

58. *Id.* at \*4.

59. *Id.* at \*7.

60. See Cal. Fair Political Practices Comm’n Advice Letter, No. A-14-175, 2014 WL 5797812, at \*1 (Oct. 20, 2014).

61. *Id.*

62. *Id.*

Using the standard of reasonable foreseeability, the Legal Division of California's Fair Political Practices Commission reasoned that Davis' leasehold did not "have a material financial effect on [his political] interest" in the development, because Davis' lease was non-renewable.<sup>63</sup> Thus, even if Davis were to negotiate a new lease in the same space after the expiration of his current term, the councilmember would have no present conflict of interest in debating and voting on projects that directly affected the value of the property he leased.<sup>64</sup>

Another issue still: what if the public official owns the real property, but the property is located within 500 feet, and not directly within, a zone subject to land use approval? The California Fair Political Practices Commission dealt with this issue too during the last year.<sup>65</sup> The request for advice spurring this advisory opinion concerned Cupertino City Councilmember Barry Chang, whose home lay within 500 feet of the accompanying land dedication for a proposed eight and one-half acre residential development to be approved by the City Council.<sup>66</sup> The issue was that the development could adversely affect Chang's "pristine" view, as well as the councilmember's property value.<sup>67</sup>

Beginning with the "penny test" analysis, the Commission's Legal Division noted that a public official has a conflict of interest if "the government decision in which he or she participates has a 'reasonably foreseeable material financial effect' on [the official's personal] interests"—even a "penny's worth."<sup>68</sup> Then, surprisingly, the Legal Division seemed to abandon its cut-and-dry materiality test in favor of a more conjectural analysis, stating that financial effect cannot be measured merely by actual change in property value, but that "the analysis must also address how the potential for change is altered."<sup>69</sup> After contacting a property appraiser to get more information on the potential for change in local property values over time, the Commission concluded that Councilmember Chang was not conflicted because the exact placement of homes within the development had yet to be determined; Chang's property was oriented to the east of the city lights, not the

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63. *See id.* at \*2, 4.

64. *See id.* at \*4-6.

65. *See* Cal. Fair Political Practices Comm'n Advice Letter, No. A-14-167, 2014 WL 5797808, at \*5 (Oct. 8, 2014).

66. *Id.* at \*1-2.

67. *See id.* at \*5.

68. *Id.* at \*3.

69. *See id.* at \*5.

west; and because Chang's view of a ridge beyond the nearby picturesque canyon would not be obstructed by the new construction.<sup>70</sup>

Examining the foregoing advisory opinions together, a clearer picture of what is considered ethically permissible in California emerges. For a public officer, it is considered a disqualifying conflict to own property subject to land use regulation by the governing body to which that authority figure belongs. Yet, there is no conflict if the official merely has a leasehold interest in the same property. The issue becomes thornier when real property is adjacent to an area of development. As of now, it would seem as though real property interests as close as 500 feet do not necessarily disqualify owner-politicians. This assessment comports with another advisory opinion issued by the California Fair Political Practices Commission last year, which opined that there was no conflict of interest for a board member, whose property was located within 500 feet of a newly proposed project to address flood control and other measures, to participate in the matter despite an acknowledged collateral personal effect.<sup>71</sup>

### III. Recusal and Disqualification

#### A. *Partial Recusal*

Following the denial of an "application to use a portion of their property for storing wrecked and impounded vehicles," Jimmy and Jill Lewis of Siloam Springs, Arkansas, appealed, arguing "that a recused board member's continued participation in the application process deprived them of their due[]process rights."<sup>72</sup> Kenneth Knight, one of the neighbors disputing the Lewis' plan to open a towing business out of their home, was subsequently appointed to the Benton County Planning Board and openly voiced his opposition to the permit application during a Technical Advisory Committee meeting.<sup>73</sup> Under a section entitled "general public comments," minutes from this meeting reveal that Knight's concerns were "the decreased properly values [the towing facility] would cause, the increased traffic through the neighborhood, the nuisance created by lights and noises, and possible water contamination."<sup>74</sup>

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70. *Id.* at \*4-5.

71. Cal. Fair Political Practices Comm'n Advice Letter, No. A-14-053, 2014 WL 1498287, at \*5-6 (Mar. 26, 2014).

72. *Lewis v. Benton Cnty.*, 436 S.W.3d 181, 181 (Ark. Ct. App. 2014).

73. *Id.* at 182.

74. *Id.*

Knight did not attend the first public hearing in which the interested application was discussed and recused himself on the day of the vote.<sup>75</sup> Still, Knight did join other neighbors in speaking against the proposed use of the land during the Planning Board meeting, after attending the meeting in an official capacity, and participating in the roll call.<sup>76</sup> The Board thereafter rejected the application in a 5-1 vote.<sup>77</sup> On appeal, the Benton County Circuit Court found “that although it probably could have been done differently, Knight did not abuse his discretion as a Planning Board member.”<sup>78</sup> The Court of Appeals of Arkansas affirmed, showing that, in this part of the country, there is no prohibited conflict where a planning board member recuses himself from voting, but participates in the discussion of a conflicted issue.<sup>79</sup>

### B. *Total Disqualification*

In Missouri, a faulty removal did not deprive the federal court of jurisdiction to disqualify counsel.<sup>80</sup> The City of Greenwood had been in a dispute with Martin Marietta Materials (Martin) over a rock quarry located south of the city.<sup>81</sup> The law firm of Zerger & Mauer LLP served as Greenwood’s counsel throughout the litigation and racked up over \$4,000,000 in fees by the time the case was ultimately settled. The settlement consisted of Martin paying Greenwood \$7,000,000 in exchange for truck access to Second Avenue and Greenwood declaring that quarry traffic was reasonable and did not constitute a nuisance.<sup>82</sup>

Not long after this settlement, Zerger & Mauer agreed to represent “eighteen individual plaintiffs who held property interests on Second Avenue . . . in [a] Missouri state court [action] against Martin,” which sought “damages for a private nuisance, among other claims.”<sup>83</sup> Martin removed the case and the district court, believing it had subject-matter jurisdiction, entertained Greenwood’s prompt motion to disqualify Zerger & Mauer on the ground that the current representation was a

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 183.

79. *See id.* at 184-85.

80. *Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 930 (8th Cir. 2014).

81. *Id.* at 929.

82. *Id.* at 929-30.

83. *Id.* at 930.

conflict of interest.<sup>84</sup> “The district court agreed with Greenwood and . . . disqualified Zerger & Mauer,” which appealed.<sup>85</sup>

The United States Court of Appeals for the Eighth Circuit found that the district court lacked jurisdiction to hear the case, yet upheld the attorney disqualification.<sup>86</sup> The appellate court reasoned that “the district court’s inherent need to manage its bar and uphold the rules of professional conduct [were] no less significant for the ‘maintenance of orderly procedure’ than . . . Rule 11 sanctions,” which were within the district court’s authority.<sup>87</sup> Further, because resolution of Greenwood’s motion to disqualify was separate from the substantive case, “the jurisdictional infirmity did nothing to disturb the district court’s order.”<sup>88</sup>

The court went on to cite Missouri Rule of Professional Conduct 4–1.9(a), which “outlines the duties an attorney owes [to] former clients:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.<sup>89</sup>

Accordingly, the Eighth Circuit ruled that the district court’s disqualification order was appropriate.<sup>90</sup> Of course, the order only governed Zerger & Mauer’s representation in the federal proceeding and will likely become an issue again when the matter heads back to state court.<sup>91</sup>

South Dakota was the location of another interesting debate implicating ethics and land use last year. There, the Eastern Farmers Cooperative (EFC) was granted a conditional use permit to build and operate an agronomy facility on approximately 60 acres of land located a few miles north of Colton, South Dakota.<sup>92</sup> The facility would store, distribute, and sell a variety of farm products, including anhydrous ammonia.<sup>93</sup> The Hansons, whose residence was situated across from the proposed facility, appealed and, at the appeal hearing, Minnehaha County “Commissioner [Dick] Kelly disclosed that he had toured

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84. *Id.*

85. *Id.*

86. *Id.* at 931.

87. *Id.*

88. *Id.*

89. *Id.* at 932; see also MISSOURI RULES OF PROF’L CONDUCT § 4-1.9(a) (2007).

90. *Zerger & Mauer LLP*, 751 F.3d at 935.

91. *Id.*

92. In re Conditional Use Permit No. 13-08, 855 N.W.2d 836, 838 (S.D. 2014).

93. *Id.*

[a similar] facility [operated by EFC] and was impressed by the safety measures in place.”<sup>94</sup> Following the County Commission’s unanimous decision to uphold the approval of the permit, the Hansons sought de novo review before the Second Judicial Circuit in Minnehaha County.<sup>95</sup> After holding a trial and hearing evidence, the circuit court found that Commissioner Kelly’s tour of the related facility “constituted an [impermissible] ex parte communication that disqualified his vote.”<sup>96</sup> However, finding no evidence of bias with the remaining three votes, the court left the decision intact, holding that the Hansons’ position would not have changed because the vote was unanimous.<sup>97</sup> The Supreme Court of South Dakota agreed that Commissioner Kelly’s disqualification did not require a new hearing and affirmed the circuit court’s invalidation of Kelly’s vote as a sufficient remedy to cure the alleged due process concerns arising out of his participation in the hearing.<sup>98</sup>

#### IV. Bribery, Censure, and Malpractice

The law firm of Cozen O’Connor P.C. found itself embroiled in a dispute with a former client over its representation in a zoning matter.<sup>99</sup> The Cherry Hill Market Corporation pleaded two causes of action in its complaint, alleging that Cozen O’Connor “provided inadequate and ineffective representation because [their] ‘objectives’ in the zoning matter were not achieved, and because a summary-judgment motion was not filed by the court-imposed deadline in the unrelated litigation.”<sup>100</sup> The trial court, however, dismissed the complaint without prejudice due to insufficient allegations as to proximate cause, and because the claim for ineffective representation in the zoning matter should have been brought as legal malpractice instead of common law negligence or breach of fiduciary duty.<sup>101</sup> The appellate court agreed and applauded the trial court for “providently exercis[ing] its discretion.”<sup>102</sup>

Elsewhere in New York last year, after a career spanning more than fifty years, one attorney’s gross neglect of a client matter led to a

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94. *Id.*

95. *Id.* at 839.

96. *Id.*

97. *Id.*

98. *Id.* at 845.

99. *Cherry Hill Mkt. Corp. v. Cozen O’Connor P.C.*, 118 A.D.3d 514, 514 (N.Y. App. Div. 2014).

100. *Id.*

101. *Cherry Hill Market Corp. v. O’Connor*, No. 154292/12, 2013 WL 1783552, at \*1-3 (N.Y. App. Div. Apr. 22, 2013).

102. *Cherry Hill Mkt. Corp.*, 118 A.D.3d at 515.

formal investigation and censure.<sup>103</sup> The Grievance Committee of New York filed a petition against Attorney J. Michael Shane alleging that, in 1986, he agreed to represent a client on a contingent fee basis against a municipality to recover damages for zoning regulations that reduced the value of the client's business.<sup>104</sup> Shane stipulated that, "in July 1986, [he] falsely informed [his] client that papers had been served on the municipality."<sup>105</sup> From 1986 through 2012, Shane misled his client into believing that he "was prosecuting the matter, and [he] bolstered those misrepresentations with . . . false documents, [which] include[ed] a purported court order and notice of appeal."<sup>106</sup> Over the years, Shane manufactured a myriad of excuses for the substantial delay until finally confessing to the client, in July of 2012, that he had never actually filed the claim.<sup>107</sup> The appellate court concluded that the attorney committed numerous violations of New York's Rules of Professional Conduct, including: "engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; . . . engaging in conduct that is prejudicial to the administration of justice; and . . . engaging in conduct that adversely reflects on his fitness as a lawyer."<sup>108</sup>

Determining that censure was the appropriate sanction, the appellate court highlighted several mitigating factors, including the attorney's "otherwise unblemished record," the fact that the attorney "did not commit the misconduct for personal gain or profit," that the attorney voluntarily "self-reported [his] misconduct to the client," and that the attorney expressed remorse.<sup>109</sup> Attorney Shane also fully cooperated with the Grievance Committee's investigation, and there was no proof that the client suffered an actual financial loss.<sup>110</sup> According to the court, it appeared that the lawyer was just trying to avoid telling the client that his claim lacked merit.<sup>111</sup>

Finally, bribery did not pay off for a lawyer-turned-politician who traded permits for payoffs in New Jersey.<sup>112</sup> During his campaign, and after being elected Mayor of Hoboken, attorney Peter J. Cammarano, III accepted monies from a cooperating witness disguised as a

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103. *In re Shane*, 117 A.D.3d 117 (N.Y. App. Div. 2014).

104. *Id.* at 118.

105. *Id.*

106. *Id.* at 119.

107. *Id.* at 118-19.

108. *Id.* at 119.

109. *Id.*

110. *Id.* at 119-20.

111. *Id.* at 120.

112. *In re Cammarano*, 98 A.3d 1184, 1185 (N.J. 2014).

developer.<sup>113</sup> For a \$25,000 fee, the mayor agreed to “expedite[] zoning approvals for unspecified construction projects.”<sup>114</sup> Arrested after just a month in office, Cammarano resigned as mayor and pled guilty to one count of conspiracy to obstruct interstate commerce by extortion under color of official right.<sup>115</sup> The now-former mayor was ordered to make restitution of \$25,000 and sentenced to two years in federal prison, to be followed by two years of supervised release.<sup>116</sup>

“On the basis of the criminal conviction, the Office of Attorney Ethics (OAE) filed a motion for final discipline with the Disciplinary Review Board.”<sup>117</sup> Though “[t]he OAE recommended disbarment . . . a four-member majority of the [Board] voted [instead] to impose a three-year . . . suspension” because Cammarano did not orchestrate the scheme.<sup>118</sup> The Supreme Court of New Jersey then granted the OAE’s petition for review and ordered Cammarano’s disbarment.<sup>119</sup>

New Jersey’s high court rebuked Cammarano, calling his actions “so patently offensive to the elementary standards of a lawyer’s professional duty that they *per se* warrant[ed] disbarment,” and announced that “[g]oing forward, any attorney who is convicted of official bribery or extortion should expect to lose his license to practice law in New Jersey.”<sup>120</sup> Thus, despite Cammarano’s previously unsullied reputation, service to the community, contrition, and rehabilitative efforts, “ordering any discipline short of disbarment [would] not be keeping faith” with the court’s duty to the public.<sup>121</sup>

## V. Conclusion

The Land Use Ethics Committee of the ABA Section on State and Local Government Law strives to stay current by continually reviewing and discussing relevant cases and opinions from around the country that implicate professional responsibility and ethical practices in land use decision making. To ensure that land use proceedings remain fair and transparent, we invite readers to assist in this effort by contributing to the discussion.

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113. *Id.*

114. *Id.* at 1186.

115. *Id.* at 1185-86.

116. *Id.* at 1185.

117. *Id.*

118. *See id.* at 1185, 1187.

119. *Id.*

120. *Id.* at 1187-88.

121. *Id.* at 1189.



