Ethics in Land Use:
Guiding Principles for Attorneys and Land Use Board Members

Patricia E. Salkin, Esq.
Touro Law Center

Lester D. Steinman, Esq.
McCarthy Fingar LLP

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Recusal and Abstention from Voting: Guiding Principles

By Lester D. Steinman

Counsel to planning boards are often asked to address whether board members should recuse themselves from consideration and voting on an application or abstain from voting on an application. Set forth below are general principles which may be helpful in advising planning board members regarding the propriety of recusal or abstention in a particular case.

I. Abstention from Voting

Discharging the duties of a planning board member requires a member to vote on all applications that come before the board, assuming no conflict of interest or appearance of impropriety exists requiring recusal.[1] Indeed, a persistent refusal to vote on applications could constitute grounds for removal from office.

Applicants before the planning board have the burden of proof to support their applications. Thus, where a planning board member determines that the record contains insufficient information to satisfy the legislative criteria for granting a permit or approval, that member should vote to deny the application. Where a member has missed certain meetings on an application, the member should review the minutes and/or recordings of those meetings and discuss the issues with other board members at a public meeting to enable the board member to make an informed decision when voting on the application.[2]

In *Taub v. Pirnie*,[3] the board member in question had been a resident of the village for twenty-five years, a zoning board member for twelve years and a village trustee and was fully familiar with the neighborhood in question and its zoning problems. Before voting on the application, the member had thoroughly discussed the arguments presented at the public hearing with other members. The fact that the member in question neither attended the public hearing nor read the hearing minutes was not outcome determinative. Rather, it was sufficient that the member had the opportunity to make an informed decision by virtue of his knowledge of the neighborhood and familiarity with the issues raised at the public hearing.

Failure to vote is not a benign act of neutrality toward an application. Rather, abstention has significant consequences for the planning board's decision making. Every motion or resolution adopted by the planning board requires the affirmative vote of a majority of all the members of the board.[4] An abstention is not an affirmative vote in favor of the application,[5] and, to the extent that it cannot be counted as an affirmative vote, its effect is akin to a negative vote for purposes of compliance with statutory majority voting requirements.[6]

II. Recusal Based upon Conflicts of Interest

Where a member of the planning board has a conflict of interest affecting the consideration of an application, that member must recuse him or herself from participating in any discussion of the matter and from voting on that matter.[7] Conflicts of interest may be defined by statute,[8] local law [municipal code of ethics][9] or common law. Planning board members should familiarize themselves with the provisions of these rules.

Courts have held public officials to a high standard of conduct and have invalidated certain actions which, while not violative of the literal provisions of GML Article 18 or a local code of ethics, are tainted by the votes of members which "violate the spirit and intent of the statute, are inconsistent with public policy or suggest self interest, partiality or economic impropriety."[10] For example, in *Zagoreos v. Conklin*,[11] the court annulled the votes of two zoning board members, who were employees of the applicant, to grant variances on a controversial application to convert oil burning generating units into coal burning units. In *Tuxedo Conservation and Taxpayers Ass'n v. Town Board of the Town of Tuxedo*,[12] a town board member who was an officer of an advertising firm was disqualified from voting on a zoning application by a subsidiary of one of the firm's clients. Also, in *Conrad v. Hinman*,[13] the Court annulled a village board vote to grant a rezoning application where the deciding vote was cast by the co-owner of the property that was the subject of the rezoning petition.

Whether a member has a disqualifying conflict of interest "requires a case-by-case examination of the relevant facts and circumstances."[14] "Public officials must perform their duties solely in the public interest, and avoid circumstances which compromise their ability to make impartial judgments on any basis other than the public good."[15]

Indeed, where circumstances, viewed objectively, could reasonably be deemed to compromise a member's impartiality, avoidance of even the appearance of impropriety is essential to maintaining public confidence in the integrity of government.[16] Thus, the Attorney General has opined:

> 'It is critical that the public be assured that their officials are free to exercise their best judgment without any hint of self-interest or partiality, especially if a matter under consideration is particularly controversial.' *Matter of Byer v. Town of Poestenkill*, 232 A.D.2d 851, 852-53 (3d Dep't 1996). Thus, where a public official is uncertain about whether he should undertake a particular action due to an actual or potential conflict, he must recuse himself entirely from the matter in question unless he procures an advisory opinion from a local ethics board that concludes otherwise. *See* Op. Atty. Gen (Inf.) No. 98-38; *see also* Op. Atty. Gen. (Inf.) No. 99-21 (recusal requires the official in question to avoid 'taking any actions with respect to that matter.')[17]

Often, conflicts of interest arise out of familial relationships [recusal of planning board chairman required where his son had a pending employment application with the attorney for the applicant before the planning board];[18] prejudgment of the issues attendant to a specific application;[19] opposition to an application as a neighbor [often a neighbor acts out of their own self-interest and concerns about their own property values and families and may not be capable of measuring the merits of an application in light of the overall public interest];[20] or ongoing business relationships [where two board members were employed by the applicant, the board members must recuse themselves because "the likelihood that their employment . . . could have influenced their judgment is simply too great to ignore."].[21] However, not every private business relationship between an applicant and a board member is sufficient to require recusal. For example, in *Ahearn v. Zoning Board of Appeals of the Town of Shawangunk*,[22] the fact that one zoning board member had purchased insurance from an applicant and the spouse of another zoning board member had received a Christmas gift for teaching the applicant's daughter piano lessons was deemed to be so insubstantial that no common law conflict or appearance of impropriety was created when those members voted to grant the applicant a special use permit to construct a planned unit development.

Nor is recusal required where the interest of the member in the matter under review is not a personal or private one, but rather "an interest he has in common with all other citizens or owners of property" in the community.[23] Thus, where most of the property in a village met the acreage requirement for reclassification to a cluster residence floating zone under a proposed zoning amendment, village board members who owned qualifying property were not disqualified from voting on that zoning amendment.[24] Similarly, in *Segalla v. Planning Board of the Town of Amenia*,[25] the court refused to annul the vote of a planning board member to adopt a new master plan where the value of that member's property and the value of nearly every other property owner in the town would be similarly affected by the adoption.

Where recusal is required, the board member in question must refrain from deliberating and voting on the application or matter:

> We have stated that members with conflicts of interests must recuse themselves from participating in any deliberations or votes concerning the application creating the conflict. Op. Atty. Gen. (Inf.) No. 90-38. The board member's participation in deliberations has the potential to influence other board members who will exercise a vote with respect to the matter in question. Further, we believe that a board member with a conflict of interests should not sit with his or her fellow board members during the deliberations and action regarding the matter. The mere presence of the board member holds the potential of influencing fellow board members and additionally, having declared a conflict of interests, there would reasonably be an appearance of impropriety in the eyes of the public should the member sit on the board.[26]

Obviously, this article cannot address every potential situation in which recusal and/or abstention becomes an issue. However, by adhering to the general principles which guide those decisions, planning board members will be better able to discharge their responsibilities.

Endnotes

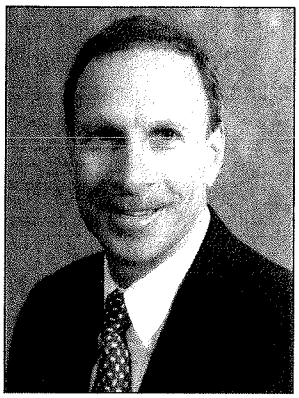
1. *See Cromarty v. Leonard*, 13 A.D.2d 275, 216 N.Y.S.2d 619 (2d Dep't 1961), *aff'd.* 10 N.Y.2d 915 (1961).
2. *See Taub v. Pirnie*, 3 N.Y.2d 188 (1957), holding that even where a board member has not attended the public hearing and not read the transcript, he may nevertheless vote on an application

where he has the means available to him to make an informed decision.

3. *Id.*
4. Village Law § 7-718(17); Town Law § 271(16); General City Law § 27(17).
5. *See Rockland Woods, Inc. v. Village of Suffern*, 40 A.D.2d 385, 340 N.Y.S.2d 513 (2d Dep't 1973).
6. *Cf. Pinnacle Consultants Ltd. v. Leucadia National Corporation*, 94 N.Y.2d 426 (2000).
7. 1995 Op. Atty. Gen. 2.
8. Article 18 of the General Municipal Law contains provisions of law pertaining to conflicts of interest arising out of direct or indirect financial interests of municipal officers and employees in contracts with their municipality. For purposes of Article 18, "contract" is defined broadly to include any "claim, account or demand against or agreement with a municipality, express or implied." GML § 800(2). With certain exceptions, a municipal officer or employee is deemed to have an interest in the contract of a spouse, minor children and dependents and an entity of which the person is an officer, member or employee. GML § 800(3). Such interest is prohibited, with myriad exceptions [GML § 802], where the officer or employee, individually, or as a member of a board, has the power or duty to negotiate, prepare, authorize or approve the contract or authorize or approve payment or audit bills or claims under the contract, or appoint an officer or employee who has any of those powers or duties. GML § 801. Regardless of whether the interest is prohibited, the officer or employee having an interest in a contract with his or her municipality must publicly disclose that interest, in writing, to the governing body of the municipality. GML § 803. Applicants for a broad spectrum of land use permits and approvals must identify the name, nature and extent of the interest of any municipal officer or employee in the application. GML § 809. A willful and knowing violation of Article 18 constitutes a misdemeanor. GML § 805.
9. Local codes of ethics typically establish standards of conduct to ensure that municipal officers and employees maintain high standards of morality and faithfully discharge their duties, regardless of personal consideration, in an independent and impartial manner. A board of ethics is established to render advisory opinions to municipal officers and employees requesting same regarding their own conduct. Among other sanctions, a knowing and willful violation of the code of ethics constitutes a violation punishable by fine and could result in disciplinary action.
10. 1991 Op. Atty. Gen. 48.
11. 109 A.D.2d 281, 491 N.Y.S.2d 358 (2d Dep't 1985).
12. 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep't 1979).
13. 122 Misc. 2d 531, 471 N.Y.S.2d 521 (Sup. Ct., Onondaga Co. 1984).
14. *Parker v. Town of Gardiner Planning Board*, 184 A.D.2d 937, 585 N.Y.S.2d 571 (3d Dep't 1992), *lv. denied*, 80 N.Y.2d 76 (1992).
15. 2002 Op. Gen. 8; *see Tuxedo, supra* note 12 at 325 ["It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest."].
16. 2002 Op. Atty. Gen. 8; *Tuxedo, supra* note 12 ["The test to be applied is not whether there is a conflict, but whether there might be]."
17. 2002 Op. Atty. Gen. 8.
18. 1989 Op. Atty. Gen. 50.
19. 1988 Op. Atty. Gen. 60.
20. 1988 Op. Atty. Gen. 59.
21. *Zagoreos, supra* note 11.
22. 158 A.D.2d 801, 551 N.Y.S.2d.392 (3d Dep't 1990), *lv. denied*, 76 N.Y.2d 706 (1990).
23. *Tuxedo, supra* note 12.
24. *See Town of North Hempstead v. Village of North Hills*, 38 N.Y.2d 334, 344 (1975).
25. 204 A.D.2d 332, 611 N.Y.S.2d 287 (2d Dep't 1992).
26. 1995 Op. Atty. Gen. 2.

Lester D. Steinman is the Director of the Edwin G. Michaelian Municipal Law Resource Center of Pace University and serves as Counsel to the law firm of Wormser, Kiely, Galef & Jacobs LLP in White Plains, New York.

From the Editor



To avoid violating ethics laws and common law conflict of interest principles, municipal board members' financial interests and business and personal relationships may require their recusal from deciding certain applications for land use, contractual or other government approvals. What happens if a majority of municipal board members recuse themselves from a particular application and no other board or official is authorized to act on that application?

Under limited circumstances, board members who would otherwise be disqualified from voting on a matter may nonetheless act under a doctrine known as the Rule of Necessity. The Court of Appeals has articulated the basis for the Rule of Necessity as follows:

> The participation of an independent, unbiased, adjudicator in the resolution of disputes is an essential element of due process of law, guaranteed by the Federal and State Constitutions...the Rule of Necessity provides a narrow exception to this principle requiring a biased adjudicator to decide cases if and only if the dispute can not otherwise be heard... Thus, where all members of an adjudicating body are disqualified and no other body exists to which the appeal might be referred for disposition, the Rule of Necessity ensures that neither the parties nor the Legislature will be left without the remedy provided by law.[1]

Although its genesis can be traced to the obligation of a judge to decide a case in which he or she has a personal interest if the case cannot be heard otherwise,[2] the Rule of Necessity has been applied to conflicts of interest involving administrative and legislative bodies.[3]

Under these cases, for example, if three members of a five member town board were to recuse themselves, the Rule of Necessity would be applicable since, under General Construction Law § 41, the two remaining town board members would have no power to take any action. Conversely, the Rule of Necessity would not apply in the event of two recusals and a 2-1 vote by the remaining three town board members since the board, through the votes of those three members, would be capable of acting even though it would be unable to muster the number of affirmative votes required to act.[4]

Assuming that there are only two recusals, a related question concerns whether the Rule of Necessity could be applied where a county planning board disapproves of a proposed zoning amendment and the town board, because of two recusals, is mathematically incapable of obtaining the supermajority vote required under General Municipal Law § 239-m(5) to override that disapproval. Nor is it clear, assuming that the Rule of Necessity can be properly invoked, whether a previously recused board member can be compelled to vote should that person choose not to.

In this issue of the *Municipal Lawyer*, Patricia Salkin's Message from the Chair describes the Section's spectacularly successful Fall Meeting in Washington, D.C., highlighted by the grandeur of the proceedings to admit twenty-two members of our Section to the United States Supreme Court. Chair Salkin's Message also previews topics to be addressed at the Annual Meeting in January, 2011, including the use of social networking sites, affordable housing and case law updates.

Model ethics legislation proposed by the New York State Comptroller is critiqued in an article entitled, "How Not to Draft an Ethics Law" by Mark Davies, Executive Director of the New York City Conflicts of Interest Board. While acknowledging the need for an overhaul of Article 18 of the General Municipal Law and applauding the Comptroller's goals in proposing the legislation, the article discusses the problems raised by the Comptroller's bill and proposes a different approach to revising Article 18.

Enacting a model green building ordinance is the subject of an article by Michael B. Gerrard, Andrew B. Sabin Professor of Professional Practice and Director of the Center for Climate Change at Columbia Law School, and Jason James, a Post-Doctoral Research Fellow at the Center. Mr. Gerrard and Mr. James review the essential provisions to be incorporated into a green building ordinance, discuss the legal issues raised in connection with such ordinances and explain how the model ordinance would avoid these vulnerabilities.

Finally, the various types of employments and appointment procedures available to the state and political subdivisions as public employers are reviewed by Harvey Randall, former principal attorney for the New York State Department of Civil Service. Topics

addressed include employment in the classified and unclassified service, employment by public benefit corporations and employment of retired public employees.

Endnotes

1. *Matter of General Motors Corporation-Delco Products Division v. Rose*, 82 N.Y.2d 183, 188 (1993).
2. *See Morganthau v. Cooke*, 56 N.Y.2d 24, 29 (1982).
3. *Matter of General Motors Corp. supra* note 1, [Rule of Necessity may not be employed to enable otherwise disqualified Commissioner of the Division of Human Rights to act where she had the authority to appoint a subordinate to act in her place.]; *Duquette v. Town of Peru Town Board*, 18 Misc.3d 1129 (A) (Sup. Ct. Clinton Co. 2008) [Rule of Necessity applies to allow the interested town board members to vote on a resolution to confer themselves with municipal defense and indemnification protection from a pending lawsuit where otherwise the town board would be disabled from acting.]; *Malone v. City of Poway*, 746 F.2d 1375 (9th Circuit 1984) [City council was the only body authorized to consider an application for land use approval and therefore cannot be subject to a civil rights damage action for failure to disqualify themselves.].
4. *See Vesely v. Town of New Windsor*, 90 A.D.2d 770 (2d Dept. 1982) [Town board deadlock does not permit resort to the Rule of Necessity to allow board member with conflict of interest to vote to break the deadlock.].

Lester D. Steinman

How to Analyze an Ethics Problem: Recognizing Common Law Conflicts of Interest

By Steven G. Leventhal

In New York, most ethics problems can be analyzed by considering three questions: (1) does the conduct violate Article 18 of the New York General Municipal Law; (2) if not, does the conduct violate the local municipal code of ethics; and (3) if not, does the conduct seriously and substantially violate the spirit and intent of the law, and thus create a prohibited appearance of impropriety?

Article 18 of the New York General Municipal Law is the state law that establishes minimum standards of conduct for the officers and employees of all municipalities within the State, except the City of New York.[1] Among other things, Article 18 prohibits a municipal officer and employee from having a financial interest in most municipal contracts that he or she has the power to control individually or as a board member;[2] from accepting gifts or favors worth $75.00 or more where it might appear that the gift was intended to reward or influence an official action;[3] from disclosing confidential government information;[4] from receiving payment in connection with any matter before his or her own agency;[5] and from receiving a contingency fee in connection with a matter before any agency of the municipality.[6]

Local municipalities are authorized by Article 18 to adopt their own codes of ethics.[7] A local ethics code may not permit conduct that is prohibited by Article 18. However, a local code may be stricter than Article 18; it may prohibit conduct that Article 18 would allow.[8] Local ethics codes typically fill gaps in the coverage of Article 18 by, among other things, closing the "revolving door" (post-employment contacts with the municipality), establishing rules for the wearing of "two hats" (the holding of two government positions, or moonlighting in the private sector)[9] and, in some cases, prohibiting "pay to play" practices and the political solicitation of subordinates, vendors and contractors.

Ethics regulations are not only designed to promote high standards of official conduct, they are also designed to foster public confidence in government. An appearance of impropriety undermines public confidence. Therefore, courts have found that government officials have an implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.[10]

In *Matter of Tuxedo Conservation & Taxpayers Assn. v. Town Bd. of Town of Tuxedo*,[11] decided by the Second Department in 1979, the Town Board voted to approve a major development project. The decisive vote was cast on the eve of a change in the composition of the Board by a trustee who was Vice President of a public relations firm under contract to the developer's parent company. The Court inferred that the Board's approval of the development project would likely result in the public relations firm obtaining all of the advertising contracts connected with the project. Despite the fact that the Board member's vote did not violate Article 18 of the New York General Municipal Law,[12] the Court annulled the Board's decision approving the development project.

The *Tuxedo* Court concluded that "while the anathema of the letter of the law may not apply to... [the trustee's] action, the spirit of the law was definitely violated. And since his vote decided the issue... [the Court] deemed it egregious error." The Court directed the Board member's attention to the

> soaring rhetoric of Chief Judge Cardozo... '[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.' Thus, [the Court concluded that] the question reduces itself into one of interest. Was... [the trustee's] vote prompted by the 'jingling of the guinea' or did he vote his conscience as a member of the Town Board? In view of the factual circumstances involved, the latter possibility strains credulity. For, like Caesar's wife, a public official must be above suspicion.

Reviewing decisions of the courts of other states, the *Tuxedo* Court concluded that "[a]n amalgam of those cases indicates that the test to be applied is not whether there is a conflict, but whether there might be.... It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest."

Six years later, in *Matter of Zagoreos v. Conklin*,[13] the Second Department reaffirmed the principles announced in *Tuxedo*. There, a major, controversial development project was approved by votes of the Zoning Board of Appeals and the Town Board. At the ZBA, the decisive votes were cast by two Board members who were employed by the applicant. At the Town Board, the decisive vote was cast by a trustee who was employed by the applicant. As in *Tuxedo*, the Court annulled the decisions of the ZBA and the Town Board approving the development project despite the fact that the respective board members' votes did not violate Article 18 of the New York General Municipal Law.[14]

The *Zagoreos* Court noted that the employment of a board member by the applicant might not require disqualification in every instance. However, the failure of the board member-employees to disqualify themselves here was improper because the application was a matter of public controversy and their votes in the matter were likely to undermine "public confidence in the legitimacy of the proceedings and the integrity of the municipal government."

Further, the *Zagoreos* Court noted that the importance of the project to the applicant-employer was obvious, and that

> equally so are those subtle but powerful psychological pressures the mere knowledge of that importance must inevitably place on any employee of the... [applicant-employer] who is in a position to either effectuate or frustrate the project and who is concerned for his or her future with the... [applicant-employer]. Any attempt to disregard these realities would be senseless for the public is certainly aware of them.

The Court found that, even in the absence of any attempt by the applicant-employer to improperly influence the board member-employees, "human nature, being what it is... it is inconceivable that such considerations did not loom large in the minds of the three [board member-employees]. Under these circumstances, the likelihood that their employment by the... [applicant-employer] could have influenced their judgment is simply too great to ignore."[15]

In the years since *Tuxedo* and *Zagoreos* were decided, the appellate courts of this state have consistently reaffirmed the vitality of the principle that a prohibited conflict of interest may exist in the absence of a statutory prohibition, and that a common law conflict of interest may justify the judicial invalidation of a municipal action. Moreover, the application of this principle has not been limited to cases involving conflicts based on pecuniary interests or economic improprieties. A prohibited conflict of interest may exist, and that conflict may justify judicial invalidation of a municipal action, where the voting members of a municipal board have manifested bias or have prejudged an application.

In *Matter of Schweichler v. Village of Caledonia*,[16] three members of the Village Planning Board signed a petition in support of a developer's project and application for rezoning, and thus appeared to have impermissibly prejudged the application. In addition, the Planning Board's chairperson wrote a letter to the Mayor in support of the project and application for rezoning, stating that she "would really like to see new housing available to [her] should [she] decide to sell [her] home and move into something maintenance free."

Despite the fact that the Planning Board's vote to approve the developer's site plan did not violate Article 18 of the New York General Municipal Law,[17] the Fourth Department concluded in *Schweichler* that the appearance of bias arising from the signatures of the three Planning Board members on the petition in support of the project and application, and the actual bias of the Chairperson manifested by her letter to the Mayor expressing a personal interest in the project, justified annulment of the Planning Board's site plan approval.

A common theme among many of the New York cases in which courts have declined to invalidate a municipal action based on the alleged conflicts of municipal officers and employees was the absence of a personal or private interest as distinguished from an interest shared by other members of the public generally.[18] In *Town of North Hempstead v. Village of North Hills*,[19] the Court of Appeals found that Village Board members were not disqualified from voting on an amendment to the Zoning Code that would allow cluster zoning of properties that they owned, where most land in the Village was similarly affected, and the disqualification of the Board members would preclude all but a handful of property owners from voting in such matters.[20]

In *Friedhaber v. Town Bd. of Town of Sheldon*,[21] the Fourth Department adopted the reasoning, and affirmed a decision by the Appellate Term, First Department, that distinguished between the "clear and obvious" conflict that would have arisen from a vote to change the zoning status of particular properties owned by the voting Board members, and their permissible vote to change the zoning status of other properties in which they had no interest.[22]

The Appellate Term noted that there were a sufficient number of votes to approve the change in zoning status even if the Board members had

disqualified themselves. Indeed, all of the reported cases in New York that have invalidated municipal actions based on common law conflicts of interest involved decisive votes cast by conflicted members of voting bodies. However, it should be noted that recusal involves more than the mere abstention from voting. A properly recused officer or employee will refrain from participating in the discussions, deliberations or vote in a matter.[23] The New York Attorney General has opined that:

> The board member's participation in deliberations has the potential to influence other board members who will exercise a vote with respect to the matter in question. Further, we believe that a board member with a conflict of interest should not sit with his or her fellow board members during the deliberations and action regarding the matter. The mere presence of the board member holds the potential of influencing fellow board members and additionally, having declared a conflict of interest, there would reasonably be an appearance of impropriety in the eyes of the public should the member sit on the board.
>
> Thus, it is our view that once a board member has declared that he or she has a conflict of interest in a particular matter before the board, that the board member should recuse himself or herself from any deliberations or voting with respect to that matter by absenting himself from the body during the time that the matter is before it.[24]

Accordingly, a municipal action that results from the influence or persuasion of a conflicted member of a voting body should also bear critical scrutiny and, where appropriate, judicial invalidation, even where the conflicted member refrained from voting.

Not every personal or private relationship between a board member and parties interested in a matter before the board will give rise to a disqualifying conflict of interest. Generally, a mere social relationship between a board member and the applicant will not give rise to a disqualifying conflict of interest where the board member will derive no benefit from the approved application.[25] In *Ahearn v. Zoning Bd. of Appeals*,[26] the Third Department concluded that:

> ...petitioner has shown nothing more than that, as active members of their community, the Board members have a variety of political, social and financial interests which, through innuendo and speculation, could be viewed as creating an opportunity for improper influence. For example, petitioner perceives a conflict of interest in the fact that the wife of one of the Board members teaches piano to the applicant's daughter and was given a Christmas gift for doing so. Petitioner also contends that since the applicant is a long-term member of the Board, other junior Board members might have viewed him as their leader and might have been influenced even though the applicant disqualified himself from any Board consideration of the application. Petitioner sees a similar conflict in the applicant's involvement in local politics, and in the fact that one of the Board members purchased homeowners' and automobile insurance from the applicant. Petitioner also contends that one of the Board members was improperly influenced since his mother-in-law voiced her criticism of opponents to the applicant's project. We are of the view that these claims, and others advanced by petitioner, do not rise above the type of speculation that would effectively make all but a handful of citizens ineligible to sit on the Board.

Nor will every financial relationship between a board member and parties interested in a matter before the board give rise to a disqualifying conflict of interest. In *Parker v. Town of Gardiner Planning Bd.*,[27] the Third Department observed that:

> Resolution of questions of conflict of interest requires a case-by-case examination of the relevant facts and circumstances and the mere fact of employment or similar financial interest does not mandate disqualification of the public official involved in every instance. In determining whether a disqualifying conflict exists, the *extent* of the interest at issue must be considered and where a substantial conflict is inevitable, the public official should not act (citation omitted; emphasis added).

In *Parker*, the Board Chairman was President of a local steel fabrication and supply company that sold products to a local construction firm owned by one

of the applicant's principals. During the previous three years, the construction firm purchased between $400.00 and $3,000.00 in steel products from the Chairman's steel company. During the same period, the Chairman's steel company had annual gross sales of approximately $2,000,000.00 to $3,000,000.00.

Based on these facts, the New York Attorney General concluded in an informal opinion letter that a conflict of interest existed and that the Chairman was required to recuse himself in the matter. However, the Town Board of Ethics reached a contrary conclusion, reasoning that the amount paid to the Chairman as a result of the purchases by the applicant's construction firm was insufficient to create a conflict of interest.

The *Parker* Court concluded that the determination of the Town Board of Ethics was rational and entitled to considerable weight, and found that "[u]nder these circumstances,...the likelihood that such a *de minimis* interest would or did in fact influence...[the Chairman's] judgment and/or impair the discharge of his official duties...[was] little more than speculative" (citations omitted).

In summary, courts may set aside board decisions (and by implication, other municipal actions) where decision-making officials with conflicts of interest have failed to recuse themselves. A disqualifying interest is one that is personal or private. It is not an interest that an official shares with all other citizens or property owners. A prohibited appearance of impropriety will not be found where the improper appearances are speculative or trivial.

In considering whether a prohibited appearance of impropriety has arisen, the question is whether an officer or employee has engaged in decisive official action despite having a disqualifying conflict of interest that is clear and obvious, such as where the action is contrary to public policy, or raises the specter of self-interest or partiality.

Where a contemplated action by an official might create an appearance of impropriety, the official should refrain from acting. Officials should be vigilant in avoiding real and apparent conflicts of interest. They should consider not only whether they believe that they can fairly judge a particular application or official matter, but also whether it may appear that they did not do so. Even a good faith and public spirited action by a conflicted public official will tend to undermine public confidence in government by confirming to a skeptical public that government serves to advance the private interests of public officials rather than to advance the public interest.

At the same time, officials should be mindful of their obligation to discharge the duties of their offices, and should recuse themselves only when the circumstances actually merit recusal.[28] Such restraint should be exercised by the members of voting bodies, and in particular by legislators, because recusal and abstention by a member of a voting body has the same effect as a "nay" vote,[29] and, in the case of an elected legislator, also has the effect of disenfranchising voters.

The goal of prevention—and just plain fairness—requires that officers and employees have clear advance knowledge of what conduct is prohibited. Discernable standards of conduct help dedicated municipal officers and employees to avoid unintended violations and unwarranted suspicion. These standards are derived from Article 18 of the New York General Municipal Law, local municipal codes of ethics, and from the application of common law principles.

Endnotes

1. For a helpful summary of Gen. Mun. Law Article 18, *see* Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officer and Employees*, NYSBA/MLRC Municipal Lawyer, Summer 2005, Vol. 19. No. 3, pp. 10-12.
2. *See* Gen. Mun. Law §§800-805.
3. *See* Gen. Mun. Law §805-a.
4. *Id. N.B.* The phrase "confidential information" is not defined in Gen. Mun. Law Article 18. Taken together, the Freedom of Information Law (Pub. Off. Law, art. 6) and the Open Meetings Law (Pub. Off. Law, art. 7) are a powerful legislative declaration that public policy disfavors government secrecy. *See* Leventhal and Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential?*, NYSBA/MLRC Municipal Lawyer, Spring 2004, Vol. 18, No. 2, pp. 22-24.
5. *Supra*, note 4.
6. *Id.*
7. *See* Gen. Mun. Law §806.
8. *See* Davies, *Enacting a Local Ethics Law—Part I: Code of Ethics*, NYSBA/MLRC Municipal Lawyer, Summer 2007, Vol. 21, No. 3, pp. 4-8.
9. In the absence of a constitutional or statutory prohibition, an official may hold two public offices, or a public office and a position of secondary employment, unless the duties of the two positions are incompatible, such as those of chief financial officer and auditor. *See People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874); *see also*, 1997 Op. Atty. Gen. 14.
10. *See e.g., Matter of Zagoreos v. Conklin*, 109 A.D.2d 281 (2d Dept. 1985); *Matter of Tuxedo Conservation & Taxpayer Assn. v. Town Board of Town of Tuxedo*, 69 A.D.2d 320 (2d Dept. 1979).
11. 69 A.D.2d 320 (2d Dept. 1979).
12. The vote did not violate section 801 of the New York General Municipal Law (conflicts of interest prohibited) because that section generally prohibits a municipal officer or employee from having an interest in a contract with the municipality where he or she has the power or duty to approve or otherwise control the contract but, in *Tuxedo*, there was no contract with the Town; and the vote did not violate section 809 of the New York General Municipal Law (disclosure in certain applications) because that section only requires the disclosure of any interest of an officer or employee in a land use applicant—it does not mandate recusal by the interested officer or employee.
13. 109 A.D.2d 281 (2d Dept. 1985).
14. As in *Tuxedo, supra*, the vote did not violate section 801 of the New York General Municipal Law (conflicts of interest

Ethical Problems in Everyday Environmental and Municipal Practice

By Michael D. Zarin

> "In civilized life, law floats in a sea of ethics."
>
> —Earl Warren[1]

There are many ethical scenarios that present themselves daily to the environmental and municipal lawyer. For many of us, our benchmark consists of facing the mirror at the end of the day, and inquiring whether I reasonably balanced my obligation of competent client advocacy and not compromising myself or the integrity of our profession. This article discusses a sampling of ethical quandaries that a municipal or environmental lawyer may face in their everyday practice. In the end, not unfamiliar to many, the article raises more questions than answers.

Maintaining Confidentiality

A thought-provoking example of the intersection of environmental/municipal law and ethical concerns arises when a lawyer's obligation to maintain confidentiality potentially conflicts with a statutory or regulatory environmental reporting requirement.[2] New York's Rule of Professional Conduct ("Rule") 1.6(a) obligates a lawyer to maintain confidential information,[3] stating that a "lawyer shall not knowingly reveal confidential information...or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person."[4] Rule 1.6(a) creates several general exceptions which permit a lawyer to divulge confidential information, including, most notably, where "disclosure is permitted by Rule 1.6(b)."[5]

One of Rule 1.6(b)'s exceptions pertains to situations where "[a] lawyer *may* reveal or use confidential information *to the extent that the lawyer believes is reasonably necessary...when permitted or required under these Rules or to comply with other law or court order.*"[6] Within the universe of environmental law, certain statutes and regulations arguably obligate lawyers to report confidential client information. New York's regulation regarding the "Handling and Storage of Petroleum,"[7] states, *inter alia*, that "*[a]ny person with knowledge* of a spill, leak or discharge of petroleum *must report* the incident to the department within two [2] hours of discovery." This regulation, and those with similar reporting requirements, could trigger Rule 1.6(b).[8] While the circumstances of *Vantage Petroleum* do not involve the Professional Rules, the decision is significant for its reference to the regulatory requirement's "mandatory" "obligation" to report, an affirmative obligation that may warrant the invocation of the exception listed in the Rules.

Not unlike most of the ethical scenarios presented herein, Commentary provided by the New York State Bar Association's Committee on Professional Ethics[9] defers resolution of what legal requirements might require a lawyer to divulge confidential information to the informed discretion of the subject lawyer, stating, that "whether...a law supersedes [the Confidentiality Rule] is a question of law beyond the scope of these Rules."[10] Moreover, the Commentary highlights a lawyer's obligation to consult with a client under all circumstances unless:

> such consultation would be prohibited by other law. If the lawyer concludes that other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures *as are necessary to comply with the law.*[11]

Rule 1.6(b) provides for other circumstances that may allow a lawyer to divulge confidential information when there is no law or regulation that would arguably compel a lawyer to breach its confidentiality. If in your due diligence involving a client, for example, it reveals improper hazardous waste storage or defective conditions on site, a "lawyer *may* reveal or use confidential information to the extent that the lawyer believes is reasonably necessary...to prevent reasonably certain death or substantial bodily harm [or] to prevent the client from committing a crime."[12] The threshold involving the potential for committing a "crime" is particularly sensitive for the environmental or municipal lawyer as many violations under New York State environmental law are considered criminal in nature, even though many are resolved or arise from administrative or regulatory matters.[13]

The Commentary goes further and sets out six factors for a lawyer to consider in determining whether to disclose the information:

(i) the seriousness of the potential injury to others if the prospective harm or crime occurs,

(ii) the likelihood that it will occur and its imminence,

(iii) the apparent absence of any other feasible way to prevent the potential injury,

(iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime,

(v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and

(vi) any other aggravating or extenuating circumstances.[14]

The Commentary notes that these factors should be given "great weight," but in reality, the mirror and the lawyer's practical and subjective judgment become the final arbiter.[15]

If, after balancing the aforementioned criteria, a lawyer believes that there are circumstances potentially warranting disclosure of confidential information, a lawyer's initial duty, where practicable, is to remonstrate the client.[16] The Commentary guides the lawyer to "where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure. *In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose.*"[17] The Rule and Commentary make clear that if the lawyer feels ethically compelled to make a disclosure, such disclosure must be carefully circumscribed to those matters the lawyer reasonably believes are necessary for corrective action. Thus, in a matter where the lawyer believes that there might be a threat to the health and safety of a community due to a possible regulatory violation or the potential for the committing of a crime due to such violation, for example, the question is whether the lawyer (i) limits himself or herself to verbally contacting the relevant governmental agency, (ii) contacting the potential involved watchdog citizen group, or perhaps (iii) going to the press. Not an easy or prescribed decision.

Withdrawing Representation

Instead of disclosing potential confidential information, a lawyer may withdraw from a representation if his or her client insists on engaging in potentially unethical or unlawful acts. This scenario presents itself to environmental and municipal practitioners, for example, if a client refuses to divulge a hazardous or toxic condition discovered on its property to the appropriate governmental entity, or a situation where, for example, the lawyer may know of a violation of a regulatory requirement, yet there is no immediate threat to the public's health and safety.

Rule 1.16(b) mandates that "a lawyer *shall withdraw* from the representation of a client" under circumstances including when "the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law."[18] The interesting qualifier here is that if the lawyer is not being asked to undertake any activity in furtherance of the subject violation or potential violation, then it would appear not to fall under the "representation" threshold required to trigger mandatory withdrawal. Query, does a lawyer's omission or failure to remedy a known or potential violation constitute an affirmative "representation" mandating withdrawal under Rule 1.16(b)?

Alternatively, pursuant to Rule 1.16(c), an attorney *may* withdraw under circumstances, including when:

- "[T]he client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- [T]he client has used the lawyer's services to perpetuate a crime or fraud; or
- [T]he client insists upon taking action with which the lawyer has a fundamental disagreement."[19]

In an attempt to clarify which circumstances warrant withdrawal, the New York State Bar Association under the analogous Disciplinary Rules[20] spelled out the process a lawyer should go through if he or she believes that the client's conduct is illegal. The New York State Bar Association opined that "[i]f, in the lawyer's professional opinion, it appears that the client's proposed conduct is illegal, the lawyer should explain the serious potential consequences of engaging in improper conduct, urge him not to engage in it, and withdraw from the retainer if the client rejects the lawyer's advice."[21]

Rule 1.16(e) also enumerates how a lawyer must take affirmative steps to ensure that a client is not harmed by the lawyer's potential withdrawal. Rule 1.16(e) demands that a client, even though his or her lawyer rightfully withdrew, be protected from undue harm caused by the lawyer's withdrawal. Rule 1.16(e) states that "[e]ven when withdrawal is otherwise permitted or required...a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client."[22] These "steps" include,

> giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.[23]

Thus, by insisting that a lawyer perform these actions, the Rules aim to ensure that no former clients are placed in a worse position than they were in when the former lawyer's representation commenced.

If the lawyer, however, would like to distance himself or herself from the client's actions, and safeguard its reputation, the lawyer may make a "noisy

withdrawal." After a lawyer has gone through the aforementioned steps above, the lawyer may publicly withdraw from the representation, including notifying the Court or applicable governmental agency that he or she is resigning from the retainer, as well as withdrawing a particular representation or statement that he or she might have made to such entities on behalf of the client. The New York State Bar Association's comment to Rule 1.6(b) allows but does not mandate that the lawyer may

> withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime of fraud.[24]

The "noisy withdrawal" is an option for a lawyer who seeks to maintain client confidences under Rule 1.6, but at the same time would like to disaffirm a statement relied upon by a third party. A "noisy withdrawal" can also provide a "heads-up" for an unsuspecting third party/tribunal that something may be wrong, and further investigation should be sought.

Municipal Conflicts: Retention as Special Land Use Counsel and Concurrent Representation of a Private Client

Another area of conflict may arise when a lawyer is retained as special land use counsel for a municipality, and that lawyer or someone in the firm seeks to represent a private client before another municipal board or agency in the same municipality. Rule 1.7 establishes that "[a] lawyer shall not represent a client if a reasonable lawyer would conclude that either:

- the representation will involve the lawyer in representing *differing interests*; or
- there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."[25]

Rule 1.0(f) defines "differing interests" to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."[26] But what constitutes an inconsistent or diverse interest that may adversely affect a lawyer's loyalty or judgment? The New York State Bar Association posited under the Rule 1.7 analog under the Disciplinary Rules that special counsel retained by a municipality in connection with a "particular subject matter, proceeding, or litigation" may represent clients before Planning Boards or Zoning Boards of the same municipality.[27] The New York State Bar Association's opinion emphasized that "a different rule would apply if the attorney frequently represented the town as special counsel, or if the extent of the current representation was such that special counsel was functionally equivalent to a part-time member of the town attorney's staff."[28] The New York State Bar Association focused on the multitude of circumstances in play when a lawyer represents both a municipality and a private client. The New York State Bar Association stated that:

> the duty of undivided loyalty and the heightened danger of compromising confidences and secrets, coupled with the "special sensitivity" required of lawyers for the public to "take particular care not to...accept any private employment which would tend to undermine public confidence in the integrity and efficiency of the legal system," would preclude representation of private clients before agencies whose legal representation is under the umbrella of the town attorney's office.[29]

The New York State Bar Association, once again, keyed in on specific oft-cited factors that are implicated in concurrent representations. The preservation of the integrity of the legal system, avoiding the perception of an improper relationship, and the necessity of sustaining zealous advocacy to all clients should all be in the forefront of a lawyer's mind when entering into such representations. Ultimately the New York State Bar Association stated in this specific instance that the "[f]act that a zoning board traditionally hears appeals from adverse determinations of a town official...does not necessarily mean that the interests of the applicant are adverse to those of the town," and that "[t]here is nothing in the statutory scheme to suggest that an application to a planning board for a particular approval involves interests that are necessarily conflicting, diverse or inconsistent with those of the town."[30] The question presented, once again, to the everyday practitioner is whether he or she will be willing to zealously represent a private client when it might put him or her in conflict with the municipality he or she is also representing as special counsel on another matter. The other question is whether the lawyer will have unfair access to municipal officials on behalf of the private client, thereby potentially compromising the public perception of the subject approval process?

The New York State Bar Association noted in Opinion 630, however, that "once litigation is anticipated, and perhaps before, the conflict would be palpable" and that "before undertaking the representation, special counsel should advise the prospective private cli-

ent that extra expense and delay may flow from his inability to handle and future litigation."[31]

Concurrent conflicts may also present a challenge to an environmental or municipal lawyer. Rule 1.7 states that a lawyer may represent a client notwithstanding a concurrent conflict if:

- "[T]he lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- [T]he representation is not prohibited by law;
- [T]he representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; *and*
- [E]ach affected client gives *informed consent, confirmed in writing.*"[32]

"Informed consent" is defined by Rule 1.0(j) as

> the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.[33]

The New York State Bar Association's Commentary elucidating the practical requirements of "informed consent" notes that there are proactive measures that are necessary to meet the requirements of "informed consent."

> [Informed consent] will require communication that includes a disclosure of the facts and the circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's options or alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek advice of other counsel.[34]

The hurdles to obtaining "informed consent" are not insurmountable, but on the other hand are also not merely perfunctory tasks. If disclosing the facts and circumstances of the situation and the pros and cons of the proposed course of conduct can be articulated to the client in a concise and cogent manner, the client can make its own decision as to whether to grant its "informed consent." Discussing a client's options or alternatives, however, may be complicated. The client's perception of the universe of options and alternatives will likely be limited to what the lawyer conveys to it. The lawyer must be sensitive to avoid having its presentation to the client clouded by the lawyer's desire to have the client provide its "informed consent" with respect to the potential conflict.

One court has shed light on the practical requirements of obtaining "informed consent." The New York State Supreme Court, Kings County, held in *U.S. Bank N.A. v. Emmanuel*,[35] that a lawyer:

> Need[s] to provide an affirmation explaining whether both [clients gave]..."informed consent, confirmed in writing" in the instant action, and the information presented to them by the [lawyer] included "the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved."[36]

Suffice to say, in procuring "informed consent," it is in the best interest of a lawyer to be as forthright, open, and inclusive with information as possible in advising the client. Memorializing such consent in a detailed affirmation also can be a viable option.

In regards to whether a governmental entity could provide "informed consent" under the Rules, the New York Bar Association, in a 1992 Committee on Professional Ethics Opinion, abrogated the prior "per se ban" on a governmental entity's providing informed consent, and stated that "a blanket prohibition against lawyers accepting the consent of governmental entities is paternalistic and excessive."[37]

As a result, a lawyer:

> seeking consent from [a governmental] official must be satisfied not only that the official in question is legally authorized and empowered to furnish the requested consent and has complied with all applicable legal requirements, but also that the process by which the consent is granted is sufficient to preclude any reasonable public perception that the consent was provided in a manner inconsistent with the official's public trust.[38]

Determining whether the lawyer is representing "differing interests" that could arguably compromise his or her judgment is probably the most difficult self-assessment presented to a lawyer evaluating his or her ethical obligations in these matters.

Municipal Conflicts: Representing One Municipality on a Substantive Issue and Counseling a Private Entity Who May Oppose the Same Substantive Issue

Consistent with the above, can a municipal or environmental practitioner represent, for example, mining interests interested in securing leaseholds to permit hydraulic fracturing in certain geographic areas while simultaneously assisting municipalities seeking to restrict or prohibit hydraulic fracturing in other areas? Would this violate Rule 1.7's prohibition against representing "differing interests?" Alternatively, would this type of concurrent representation "adversely affect either the judgment or the loyalty of a lawyer to [either] client, whether it be a conflicting, inconsistent, diverse, or other interest?"[39] Or would Rule 1.6 be triggered, requiring that a lawyer "not knowingly reveal confidential information...or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person"?[40]

While many lawyers represent different clients involving the same or similar legal issues, in the aforementioned hypothetical, the threshold issue is whether the lawyer believes that he or she can retain his or her independence to advocate certain legal theories regarding hydraulic fracturing in furtherance of a municipal client's objectives, while concerned that he or she does not alienate his or her private clients by advocating legal positions that could be construed as hostile to its industry clients? This is the honest self-assessment that must guide the ethical lawyer. The other issue is whether Rules 1.0 and 1.7 would be invoked because the lawyer in such dual representation would inherently obtain confidential information or knowledge related to each client in this specialized area so as to present the potential for an improper conflict?

In such a scenario, the conservative—and probably unappealing—approach would be for the lawyer to avoid the perception of a conflict, and obtain the "*informed consent, confirmed in writing*" from each of the clients. Most lawyers, presented with such facts in these demanding economic times, will more than likely rationalize that the two clients hold differing viewpoints on this discrete issue, maintaining that it will not affect his or her objectivity or competent representation of either client. Your call.

Municipal Conflicts: Representing a Municipal Agency and Subsequently Representing a Private Applicant Before the Same Agency or Body

After representation of a municipal agency terminates, a lawyer (or his firm) may have a private client who ends up before that same municipal agency. Rule 1.9 (a) speaks to this issue. Rule 1.9(a) states that:

> [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*.[41]

The integral part of Rule 1.9(a) can be found in the phrase "substantially related matter in which that person's interests are materially adverse to the interests of the former client."[42] The New York State Bar Association's Commentary states that:

> matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.[43]

There is often ambiguity, however, as to where the line is drawn regarding what matters can be construed as "substantially related," and whether the interests are in fact "materially adverse." In *Pellegrino v. Oppenheimer & Co.*,[44] for example, the First Department indicated, in reference to the analogous Disciplinary Rule, that there is a presumption of a conflict if a former client is involved, the current issues are substantially related to those involved in the former client's representation and the positions are materially adverse.[45] In *Pellegrino*, an employee complained to in-house counsel about sexual harassment by another employee.[46] Before speaking with the in-house counsel, the employee asked her to "keep the substance of their conversation within the confines of the attorney-client privilege."[47] The Court held that:

> As a result, when [the employee] testified at her first examination before trial, she stated that she believed she and [in-house counsel] had an attorney-client relationship and declined to answer several questions based on that asserted privilege. However, at [the employee's] second deposition, conducted after defendants moved to disqualify [the employee's hired counsel], she no longer asserted the privilege for questions pertaining to communications between herself and [the in house counsel].[48]

In-house counsel and the employee, "due to the alleged pervasive discriminatory environment," went to the employee's hired counsel to "inquire as to how they could notify their employer about the difficult situation in the office in an effective manner without suffering adverse employment consequences."[49] After the employee's termination, the in-house counsel "related to [the employee] the substance of conversations she had with [the general counsel] subsequent to [the employee's] termination."[50]

The First Department found, however, that while the presumption of a conflict exists, there was no basis in the record to conclude that an attorney-client relationship existed between the in-house counsel and the employee's retained counsel who was hired by the employee after she was fired, or that confidential information was disclosed when the in-house counsel met with employee's new counsel.[51]

The First Department also held, in *Develop Don't Destroy Brooklyn v. Empire State Development Corp.*,[52] that where a lawyer represented a development corporation over a number of years in various matters, and then subsequently represented a developer on limited matters relating to the same development corporation and project, said lawyer could represent that development corporation in connection with the environmental review of the developer's project.[53] Such representation was allowed under the rules because the lawyer received informed consent in writing from both the development corporation and the developer.[54] The First Department added that, as an initial matter, the advocacy group that challenged the lawyer's representation lacked standing to even raise the conflict issue because it had no attorney-client relationship with the lawyer.[55] Further, the advocacy group's "recourse for protecting the public interest" was instead participating in the environmental review process.[56] The First Department added that even if there had not been informed consent, there would still have been no "appearance of impropriety," and set forth "three basic principles" of inquiry:

- "[I]f the representation does not violate another ethical or disciplinary rule [such as regarding representing concurrent clients or protecting former client interests], there can be no appearance of impropriety,
- [T]he mere appearance of impropriety alone is insufficient to warrant disqualification, and
- [T]he appearance of impropriety must be balanced against a party's right to the counsel of its choice as well as the possibility that the motion for disqualification may be motivated purely by tactical consideration."[57]

The Second Department reached a somewhat opposite conclusion in *Astor Rhinebeck Assoc., LLC v. Town of Rhinebeck*, where there was no written confirmation of consent, although the former client indicated a de facto consent to the arrangement.[58] In *Astor Rhinebeck*, the author's firm was very briefly retained by a landowner, and then represented the municipality (in which the owner's land was located) two years later, in connection with the Town's comprehensive planning and rezoning effort.[59] When the landowner sought to rehire the firm soon after the firm was retained by the municipality, the landowner did not object, and merely asked for a referral. The landowner moved to disqualify the law firm three years later, after the lengthy administrative process, in which it fully participated. The Town ultimately adopted zoning changes, which the landowner opposed.[60] The Court held that disqualification was still warranted notwithstanding the fact that the landowner raised no objection to the law firm's retention by the municipality until the land owner commenced a legal challenge to rezoning.[61] The Second Department found that the landowner "is not barred from moving to disqualify their attorney by the doctrine of laches," because the "interests of the petitioner/plaintiff and the appellants did not become materially adverse until the commencement of the present litigation, the petitioner/plaintiff could not have sought disqualification at an earlier time."[62] As a result there was "no basis upon which to conclude that the petitioner/plaintiff inexcusably waited too long to seek disqualification of the appellants' attorney."[63]

While *Astor Rhinebeck* was noteworthy for the very brief nature of the original representation, the Second Department's decision in *Walden Federal Savings and Loan Association v. Village of Walden*[64] indicates that even the passage of decades will not obviate the potential need for written consent by the parties to overcome a conflict. In *Walden*, a law firm represented a Village as land use counsel for many years. During that period it assisted the Village in enacting, among other things, certain zoning changes. Years after its representation terminated with the Village, the law firm represented a bank in a legal challenge against the Village with respect to certain approvals granted to the bank, involving zoning provisions, which the law firm helped enact during its representation of the Village.[65] Even though decades had passed since the representation of the Village, the Second Department held that the law firm's "former and current representations were both substantially related, as well as adverse."[66] Moreover, the Court found that it was reasonable to conclude that the law firm received confidential information during its representation of the Village, and this information could have been used to the advantage of the bank, thus creating an appearance of impropriety.[67]

No matter how minor the representation or the time lapse between the potentially conflicting representations, it appears that the only sure safeguard to avoiding a disqualifying conflict is obtaining the informed consent of both parties.

"Taint Shopping"

"Taint shopping" is a practice where a potentially adverse lawyer is conflicted out of a case because a possible "client" engages the lawyer in preliminary consultations and divulges confidential information to the lawyer. Rule 1.18 establishes that:

> [a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client..." [e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.[68]

To avoid improper taint shopping, Rule 1.18(e)(2) establishes that a person who contacts a lawyer with the sole purpose of conflicting an attorney out is not a prospective client within the meaning of the Rule, stating that "[a] person who communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client within the meaning of [the Rule]."[69]

Putting aside how one proves that the "purpose" of the interview was to disqualify the lawyer, the New York Bar Association suggests[70] that when meeting with a new client for the first time or undertaking a new matter for an existing client, the lawyer should "limit the initial interview to only such information as reasonably appears necessary for that purpose."[71] A lawyer may also opt to "condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter."[72] Worthwhile suggestions, but not very pragmatic from a lawyer's vantage where it is awkward to insist on such qualifiers before meeting with a prospective client.

Correcting False Statements Before Planning or Zoning Boards

Is a lawyer ethically obligated to correct misstatements made before Planning or Zoning Boards? For example, a private client informs his lawyer that he or she should not worry about future mitigation conditions or other conditions of approval since they can be challenged later, and just concentrate on obtaining the necessary approvals. Rule 3.3 states that "[a] lawyer shall not knowingly...make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made *to the tribunal* by the lawyer."[73] Rule 1.0 defines "tribunal" as "a legislative body, administrative agency or other body *acting in an adjudicative capacity.*"[74] Peeling this back one more layer, a legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

New York case law is predominantly silent as to what constitutes an adjudicatory body. The Second Department in *Halperin v. City of New Rochelle* noted that a ZBA is generally recognized as a *"quasi-administrative"* rather than quasi-judicial body.[75] The Second Department held that "[m]unicipal land use agencies like the Zoning Board are *'quasi-legislative, quasi-administrative'* bodies," and distinguished Zoning Board actions from "quasi-judicial determination[s] reached upon a hearing involving sworn testimony."[76] The issue is joined, the answer is unclear.

Ex Parte Communications

Is a lawyer allowed to communicate with public officials or municipal consultants outside the presence of counsel? Municipal practitioners regularly practice before municipal boards consisting of public officials and municipal consultants. Rule 4.2, the so-called "No Contact Rule," states that "[i]n representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, *unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.*"[77]

The New York State Bar Association Committee on Professional Ethics noted, however, that while Planning Board members are parties within the meaning of the Rule, communications between an applicant's in-house attorney and an individual planning board member are "authorized by law" because they are "within the protection of the First Amendment right to petition," and are not prohibited "provided that counsel for the planning board is given reasonable advance notice that such communications will occur."[78] In the environmental or municipal practice context, communication with a Planning Board member is further allowed if the communication is "about pending SEQRA, site plan and subdivision determinations *provided* that: (a) the proposed communications solely concern municipal development policy issues; and (b) the *lawyer*

gives planning board counsel reasonable advance notice of the proposed communications."[79] Query, since the New York State Bar Association Committee on Professional Ethics specifically noted that its opinion does not "address ex parte communications with an *adjudicatory body*," would the result be different for a zoning board of appeals, which may constitute a "tribunal" or adjudicatory body?

Ex parte communications with municipal engineers, planners and municipal consultants do not appear to be covered as "parties" under Rule 4.2 since they *do not have the ability to bind* the municipality.[80]

Conclusion

The best analogy for me in summarizing the theme of this article is the scene at the end of the movie *Saving Private Ryan* when the older Private Ryan is at the cemetery with his family and grandchildren, and turns to them and asks, "Tell me I have been a good person."[81] Isn't that the question we all ask in the end, "Have I been a sensitive and ethical attorney?" Presumably, we all try our best.

Endnotes

1. Earl Warren, Chief Justice, U.S. Supreme Court, Speech at the Louis Marshall Award Dinner of the Jewish Theological Seminary of America (Nov. 11, 1962).
2. *See e.g.*, N.Y. COMP. CODES R. & REGS. tit. 6, § 613.8 (2011).
3. NYSBA RULES OF PROF'L CONDUCT R. 1.6(a) (2009).
4. *Id.*
5. *See* NYSBA RULES OF PROF'L CONDUCT R. 1.6(b) (2009).
6. *Id.* at (b)(6) (emphasis added).
7. N.Y. Comp. Codes R. & Regs. tit. 6, § 613.8 (2011).
8. The Supreme Court, Albany County held in *State v. Vantage Petroleum*, 2008 WL 4096527 (N.Y. Sup. Ct. Albany Cty), for example, that the DEC regulations create an obligation to report any spill, leak or discharge of petroleum" and that this regulatory requirement demanded the "mandatory reporting of a discharge" of petroleum. *Id.* at *4.
9. NYSBA RULES OF PROF'L CONDUCT pmbl. (2009). The preamble to the New York Rules of Professional Conduct states that "[c]omments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." *Id.*
10. NYSBA RULES OF PROF'L CONDUCT R. 1.6 cmt. 12 (2009).
11. *Id.* (emphasis added).
12. NYSBA RULES OF PROF'L CONDUCT R. 1.6 (b)(1-2) (2009).
13. *See* N.Y. ENVTL. CONSERV. LAW § 33-1301 (McKinney 2010) (establishing criminal violations for the unlawful sale of certain pesticides); N.Y. ENVTL. CONSERV. LAW § 11-2503 (McKinney 2005) (addressing violations of the Interstate Wildlife Compact); N.Y. COMP. CODES R. & REGS. tit. 6, § 750-2.4 (2003) (establishing operator and permitee criminal liability for SPDES permitting); N.Y. COMP. CODES R. & REGS. tit. 6, § 550.6 (1972) (setting offenses and penalties for violating mineral resources regulations).
14. *Id.*
15. *Id. Cf. Art Capital Group LLC v. Rose*, 54 A.D.3d 276, 862 N.Y.S.2d 369 (1st Dep't 2008) (holding that "[a] party may not invoke the attorney-client privilege where 'it involves client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct'").
16. NYSBA RULES OF PROF'L CONDUCT R. 1.6 cmt. 6A (2009).
17. NYSBA RULES OF PROF'L CONDUCT R. 1.6 cmt. 14 (2009) (emphasis added).
18. NYSBA RULES OF PROF'L CONDUCT R. 1.16(b)(1) (2009).
19. NYSBA RULES OF PROF'L CONDUCT R. 1.16(c)(2-4) (2009).
20. The Rules of Professional Conduct, which are set forth in 22 N.Y.C.R.R. Section 1200.0, replaced the prior Disciplinary Rules, with certain changes, and are set forth in a format and numbering system based on the American Bar Association Model Rules. *See* Editors' Note to Judiciary Law Appendix Rules of Professional Conduct.
21. NYSBA Comm. on Prof'l Ethics, Informal Op. 545 (1982).
22. NYSBA RULES OF PROF'L CONDUCT R. 1.16(e) (2009).
23. *Id.*
24. NYSBA RULES OF PROF'L CONDUCT R. 1.6 cmt. 15 (2009).
25. NYSBA RULES OF PROF'L CONDUCT R. 1.7(a)(1-2) (2009) (emphasis added).
26. NYSBA RULES OF PROF'L CONDUCT R. 1.0(f) (2009).
27. NYSBA Comm. on Prof'l Ethics, Informal Op. 630 (1992).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. NYSBA RULES OF PROF'L CONDUCT R. 1.7(b)(1-4) (2009) (emphasis added).
33. NYSBA RULES OF PROF'L CONDUCT R. 1.0(j) (2009).
34. NYSBA RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2009).
35. 2010 WL 1856016 (N.Y. Sup. Ct. Kings Cty.).
36. *Id.* at *3-*4.
37. NYSBA Comm. on Prof'l Ethics, Informal Op. 629 (1992).
38. *Id.*
39. NYSBA RULES OF PROF'L CONDUCT R. 1.0(f) (2009).
40. NYSBA RULES OF PROF'L CONDUCT R. 1.6(a) (2009).
41. NYSBA RULES OF PROF'L CONDUCT R. 1.9(a) (2009) (emphasis added).
42. *Id.*
43. NYSBA RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (2009).
44. 49 A.D.3d 94, 851 N.Y.S.2d 19 (1st Dep't 2008).
45. *Id.* at 23.
46. *Id.* at 21.
47. *Id.*
48. *Id.*
49. *Id.* at 22.
50. *Id.*
51. *Id.* at 23-25.
52. 31 A.D.3d 144, 816 N.Y.S.2d 424 (1st Dep't 2006).
53. *Id.* at 428-33.
54. *Id.* at 431.

55. *Id.* at 430.
56. *Id.*
57. *Id.* at 432.
58. 85 A.D.3d 1160, 925 N.Y.S.2d 896 (2d Dep't 2011).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. 212 A.D.2d 718, 622 N.Y.S.2d 796 (2d Dep't 1995).
65. *Id.* at 797.
66. *Id.*
67. *Id.*
68. NYSBA RULES OF PROF'L CONDUCT R. 1.18(a-b) (2009) (Rule 1.9 generally allows a lawyer to disclose confidences of former clients where the same would be permitted under Rule 1.6 (e.g., to prevent reasonably certain death or bodily harm)).
69. NYSBA RULES OF PROF'L CONDUCT R. 1.18(e)(2) (2009).
70. NYSBA RULES OF PROF'L CONDUCT R. 1.18 cmt. 4 (2009).
71. *Id.*
72. NYSBA RULES OF PROF'L CONDUCT R. 1.18 cmt. 5 (2009).
73. NYSBA RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2009).
74. NYSBA RULES OF PROF'L CONDUCT R. 1.0(w) (2009).
75. 24 A.D.3d 768, 809 N.Y.S.2d 98 (2d Dep't 2005) (holding that "[m]unicipal land use agencies like the Zoning Board are 'quasi-legislative, quasi-administrative' bodies," distinguishing ZBA actions from "quasi-judicial determinations reached upon a hearing involving sworn testimony").
76. *Id.* at 103 (emphasis added).
77. NYSBA RULES OF PROF'L CONDUCT R. 4.2(a) (2009) (emphasis added).
78. NYSBA Comm. On Prof'l Ethics, Informal Op. 812 (2007).
79. *Id.* (emphasis added).
80. *See* NYSBA RULES OF PROF'L CONDUCT R. 4.2(a) (2009) (emphasis added).
81. SAVING PRIVATE RYAN (Dreamworks SKG 1998).

Michael D. Zarin, Esq., is a Partner to Zarin & Steinmetz in White Plains, New York, where he represents several municipalities and private interests in the areas of environmental and general litigation, land use, urban renewal and public private redevelopment, multi-party environmental litigation, site remediation and all aspects of environmental due diligence, counseling and general administrative law. Mr. Zarin is currently a member of the Executive Committee of the New York State Bar Association's Environmental Law Section and a Co-Chair of the Land Use Committee. The author would like to thank Daniel M. Richmond, Esq. and Jeremy Kozin who contributed to this article.

Communication with Represented Public Officials: The "No Contact Rule" as Applied to the Government Client

By Steven G. Leventhal

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.... In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

The Declaration of Independence

Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, First Amendment

No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof...and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

N.Y. Constitution, Article I, § 9(1)

Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to communications of members of the public on public issues.

Minnesota St. Bd. for Comm. Colleges v. Knight[1]

The venerable notion that a lawyer should not directly communicate with the client of his or her adversary is deeply rooted in the American legal tradition. The current rule applicable in New York, Rule 4.2 of the New York Rules of Professional Conduct,[2] echoes earlier, similar prohibitions found in the Nation's first professional code of ethics for attorneys, the Alabama Code of Ethics of 1887, and in other state codes of ethics that followed Alabama's lead, and in the Canons of Professional Ethics adopted by the American Bar Association in 1908 and by the New York State Bar Association in 1909.

The purpose of the "No Contact Rule" is "to preserve the proper functioning of the attorney-client relationship and to shield the adverse party from improper approaches."[3] To accomplish this end, Rule 4.2 (Communication with Person Represented by Counsel)[4] provides that:

> (a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.
>
> (b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Rule 4.2 does not prohibit communication with a represented party concerning matters outside the representation.[5] Unlike the analogous ABA Rule, the New York Rule prohibits communications with a represented "party." ABA Model Rule 4.2 was clarified in 1995 when the word "person" was substituted for "party." Report-

edly, this change was made at the request of prosecutors who were concerned that the broader rule might impede their investigative activities. New York did not make the same substitution in adopting Rule 4.2, possibly indicating that the New York Rule is limited to adversary proceedings. In 2007, the New York Court of Appeals affirmed that former employees are not parties for purposes of DR 7-104(A)(1).[6]

A lawyer having independent justification or legal authorization for communicating with a represented party or person is permitted to do so. Communications authorized by law may include communications made on behalf of a client who is exercising a constitutional or other legal right to communicate with the government, or the investigative activities of lawyers representing government entities prior to the commencement of criminal or civil enforcement proceedings.[7]

The No Contact Rule applies only where the lawyer knows that the person is represented in the matter to be discussed, but the lawyer may not ignore the obvious; this knowledge may be inferred from the circumstances.[8] If the lawyer does not know that the person is represented in the matter to be discussed, the lawyer's communications with the person are subject to Rule 4.3 (Communicating with Unrepresented Persons).

Since a primary purpose of the No Contact Rule is to preserve the proper functioning of the attorney-client relationship, then, in the government context, we are once again faced with the familiar and sometimes vexing question, who is the client of a government lawyer? In her informative article on the erosion of the government attorney-client confidentiality, Professor Salkin noted that there are five possible clients of the government lawyer: the responsible official; the government agency; the branch of government (executive or legislative); the government as a whole; or the public.[9]

Rule 1.13 (Organization as Client) provides, in pertinent part, that:

> (a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents....
>
> (d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.13 Comment [9] indicates that the duties defined in that rule apply to governmental organizations, but that:

> Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules.... Moreover, in a matter involving the conduct of government officials, a government lawyer may have greater authority under applicable law to question such conduct than would a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified....

As difficult as it may sometimes be to identify the client of a government lawyer, that identification may determine whether the communications between the attorney and the government officer or employee are confidential. Legal advice is privileged only when given to a client. Recent cases have eroded the government attorney-client privilege in federal grand jury investigations. The Federal Circuit Courts of Appeal have split, with the majority view being that:

> When an executive branch attorney is called before a...grand jury to give

> evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence....
>
> ...[T]he proper allegiance of the government lawyer is contemplated by the public's interest in uncovering illegality among its elected and appointed officials.[10]

For now, the government attorney-client privilege is alive and well in the Second Circuit, which adopted the minority view that:

> [I]f anything, the traditional rationale for the [attorney-client] privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice.[11]

Having thus identified the client, and irrespective of whether particular communications with a government client are protected by the attorney-client privilege, a municipal attorney must still determine which of the government officers and employees are considered "parties" under Rule 4.2 and whether, on the facts presented, direct contact by adversary counsel with a represented party is "authorized by law."

In New York, the rights and responsibilities of corporations and corporate employees have served as a template for those of government entities, officers, and employees.[12] In 1990, the New York Court of Appeals held in *Niesig v. Team I*, a personal injury action, that plaintiff's counsel was permitted to conduct ex parte interviews of employees of the corporate defendant who were merely witnesses to the underlying accident.[13]

In an opinion written by Chief Judge Kaye, the *Niesig* Court traced DR 7-104(A)(1) of the Code of Professional Responsibility (the predecessor to Rule 4.2)[14] to the American Bar Association Canons of 1908, and noted that the rule fundamentally embodied principles of fairness. The general aim of the rule was to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralized the contact. By preventing lawyers from deliberately dodging adversary counsel to reach—and exploit—the client alone, DR 7-104(A)(1) safeguarded against clients making improvident settlements, ill-advised disclosures and unwarranted concessions. In a concurring opinion, Judge Bellacosa noted that DR 7-104(A)(1) was not intended to protect a corporate party from the revelation of prejudicial facts.

The *Niesig* Court observed that often in litigation only the entity, not its employee, is the actual named party; on the other hand, corporations act solely through natural persons, and unless some employees are also considered parties, corporations are effectively read out of the rule. The issue therefore distilled to which corporate employees should be deemed parties for purposes of DR 7-104(A)(1), and that choice was one of policy.[15] The Court noted that a broader definition of "party," while furthering the interests of fairness to the corporation, would result in greater cost by foreclosing vital informal access to facts.

The *Niesig* Court rejected both a blanket ban and a "control group" test, and concluded that the test that best balanced the competing interests was one that defined "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. This definition of "party" as the term is used by DR 7-104(A)(1) served to negate the potential unfair advantage of extracting concessions and admissions from those who will bind the corporation. The Court concluded that all other employees could be interviewed informally.

Concern for the protection of the attorney-client privilege prompted the Court also to include in the definition of "party" the corporate employees responsible for actually effectuating the advice of counsel in the matter. However, in a concurring opinion, Judge Bellacosa noted that the confidentiality of attorney-client communications was unaffected by the case, and that the attorney-client privilege serves different purposes and policies.

In its practical application, the *Niesig* test would prohibit direct communication by adversary counsel "with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation." The test would permit direct access to all other employees, and specifically it would clearly permit direct access to employees who were merely witnesses to an event for which the corporate employer is sued. The Court noted that a similar test is the one overwhelmingly adopted

by courts and bar associations throughout the country. This long practical experience persuaded the Court that, in day-to-day operation, the test was workable.

In his concurrence, Judge Bellacosa noted that an attorney representing an adverse party seeking to interview any corporate employee who has individually retained counsel would be bound by the prohibition of DR 7-104(A)(1).

Some commentators have criticized *Niesig* either for diminishing the attorney-client privilege, notwithstanding Judge Bellacosa's concurring opinion,[16] or for applying an unhelpful test for determining which corporate employees are parties for purposes of the No Contact Rule.[17]

In the period before *Niesig* was decided, the New York State Bar Association twice considered how the No Contact Rule might apply in the government setting, and the New York City Bar Association considered the question once. So too, in the period after *Niesig* was decided, the New York State Bar Association has twice considered the question, and the New York City Bar Association has considered the question once.

In 1970, the Ethics Committee of the New York State Bar Association considered whether DR 7-104(A)(1) permitted a lawyer to communicate with an adverse party who is a public officer or board member.[18] The Committee concluded that a governmental unit has the same rights and responsibilities in a controversy as any other corporation or individual and that the attorney for a governmental unit and opposing counsel must abide by the provisions of DR 7-104. Therefore, once there is an indication that counsel has been designated by a party, whether a government unit or otherwise, with regard to a particular matter, all communication concerning that matter must thereafter be made with the designated counsel, except as provided by law.

In 1975, the Committee considered whether an attorney representing a petitioner reviewing a split decision of the Board of Education may contact the minority members of the board in connection with such proceedings without the consent of the board's attorney.[19] The Committee found that DR 7-104(A)(1) did not prohibit an attorney from interviewing employees or witnesses of an adverse party, as long as such witnesses were not, in fact, adverse parties in the action. It reasoned that the overriding public interest compels that an opportunity be afforded to the public and its authorized representatives to obtain the views of, and pertinent facts from, public officials representing them. The Committee opined that minority members of a public body should not, for purposes of DR 7-104(A)(1), be considered adverse parties to their constituents whom they were selected to represent.

In 1988, the Ethics Committee of the New York City Bar Association considered an inquiry from an attorney representing a client who had a dispute with a government agency.[20] The agency had retained private counsel for the matter. The inquiring attorney requested the opportunity to submit comments to the head of the agency regarding the agency's exercise of its authority in the matter. The government's private counsel advised the inquiring attorney that a staff attorney for the government agency objected to the request, and took the position that such a communication would constitute an ethical violation by the inquiring attorney. The Committee balanced the competing interests of providing the government with the same protections that were afforded to other parties with the need to ensure relatively unrestricted public access to government. It opined that the inquiring attorney must first determine whether the head of the agency was acting in an official capacity. If so, then pursuant to the "authorized by law" exception DR 7-104, the attorney was permitted to submit comments to the head of the agency concerning the subject matter of the representation, provided that he notified the government's private counsel of the intended communication and that he provided counsel with copies of the submissions. However, if the inquiring attorney concluded that the head of the agency was acting in a private capacity, then he was not permitted to communicate with that person, unless he had the consent of opposing counsel or was authorized by law to do so.

In its first post-*Niesig* opinion addressing the application of the No Contact Rule in the government setting, the Ethics Committee of the New York State Bar Association considered whether an attorney may communicate directly with officials or employees of a government entity that is represented by counsel. The Committee noted that, in New York, the governing principle is set forth in the *Niesig* decision, which "define[d] 'party' to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally." The Committee concluded that an attorney may communicate with officials or employees of a governmental entity that is represented by counsel in connection with a matter provided: (a) the officials or employees lack the power to bind the entity; (b) the communication is directed to an attorney representing the entity in connection with the subject matter of the communication; or (c) the attorney concludes that he or she is authorized by law to make the communication.

In 1991, the Ethics Committee of the New York City Bar Association considered an inquiry from an attorney that represented a former prison employee challenging

his discharge from the position of prison guard.[21] The inquirer wished to interview various government employees outside of the presence of, and without notice to, the agency's counsel. The Committee concluded that the inquirer was permitted to interview guards who were merely witness to the incident, outside the presence of and without notice to the agency's counsel, so long as the inquirer clearly identified himself and his interest to the persons being interviewed. As to agency supervisory officials whose acts or omissions may be imputed to the agency for purposes of liability, the Committee concluded that the inquirer was not permitted to interview such persons outside the presence of and without notice to the agency's counsel. As to those officials who had the authority to settle the dispute, the Committee concluded that the Rule, as construed in a manner consistent with the logic of *Niesig*, would generally prohibit the inquirer from communicating with such officials outside of the presence of the agency's counsel; however, certain communications with high-level agency officials relating to "the subject of the representation" may be ethically permitted as authorized by the legal and constitutional rights of the lawyer and his or her client to petition or otherwise have access to the government.

The Ethics Committee of the New York State Bar Association revisited the question in 2007.[22] The Committee was asked whether, over the objection of counsel representing a town planning board, the in-house counsel for a real estate development company may communicate privately, separately, and informally about the developer's pending application with the individual members of the board who support the developer's proposed project. The controversial project, construction of a shopping center, was supported by members of the Town Board but opposed by a majority of the members of the planning board.

The planning board was represented with respect to the shopping center project by outside counsel. The developer also retained outside counsel to "formally" represent the developer before the planning board, limiting in-house counsel's role to communicating "separately and informally" on behalf of the developer with the "more receptive" minority of planning board members who supported the project. The inquirer stated that these communications were not in the nature of legal advice or assistance and were not designed to supplant guidance provided to the board by their own legal counsel. Rather, the separate communications were confined to the provision and receipt of factual information and the discussion of state and local environmental and land use issues and polices and were intended "to ensure that supportive members of the planning board had the information they needed to counter the opposition's efforts to derail the project, and were able to share facts and strategies with the developer." The developer thus sought to create an even playing field with members of the public who opposed the project and who "communicate and strategize freely with like-minded members of the planning board, without going through the board's legal counsel." Counsel for the planning board objected to the separate, private communications regarding the project with individual members of the planning board, and directed that the developer's counsel limit his communications to written submissions addressed to the planning board secretary for distribution to the entire board and for inclusion in the administrative record.

The Committee applied a two-step analysis to determine whether direct contact by the developer's counsel with minority members of the planning board was permitted under DR 7-104(A)(1). The Committee first analyzed whether the minority planning board members were "parties" within the meaning of the *Niesig* decision and, upon concluding that they were (because the planning board was invested with the power to issue binding SEQRA, site plan and subdivision determinations with respect to the matter before it), the Committee next determined whether the proposed communications were "authorized by law."

The Committee noted that most authorities share the sentiment that "the literal application of the 'no-contact' rule must be tempered by constitutional considerations where the First Amendment right to petition government is implicated." The Committee adopted the approach of the American Bar Association Standing Committee on Ethics and Professional Responsibility in ABA 97-408 that allowed, without consent, contacts with government officials that would otherwise have been prohibited by the model No Contact Rule, subject to three conditions: (a) the official to be contacted must have authority to take or recommend action in the controversy, (b) the sole purpose of the communication must be to address a policy issue, and (c) advance notice of the proposed communications must be given to the lawyer representing the government official in the matter so as to afford government counsel the opportunity to advise his or her client with respect to the communication, including whether even to entertain it.

The Committee concluded that the communications fell within the protection of the First Amendment right to petition and were therefore not prohibited by DR 7-104(A)(1), provided that counsel for the planning board was given reasonable advance notice that such communications will occur. Noting that the precise parameters of the constitutional right to petition were beyond its jurisdiction, the Committee noted that communications directed to government officials who do

not have the authority to take or recommend action in the matter, or communications that are intended to secure factual information relevant to a claim (such as interviews with witnesses to government misconduct), should be fully subject to the No Contact Rule as, in each of these situations, there are no First Amendment considerations at play. Of course the communications, even if not protected by the First Amendment right to petition, would be permissible under the No Contact Rule if the respective government officials are not "parties" as the term was defined in *Niesig*.

The Committee concluded its analysis with several important caveats. First, it did not opine on whether additional "private," "separate" or "informal" communications with board members might violate a state statute or local ordinance that governs planning board procedures, or whether such communications may implicate a locally adopted ethics code. Second, it did not address ex parte communications with an adjudicatory government body, such as a zoning board of appeals, which present different considerations. Third, the Committee cautioned that the inquirer may not deliberately elicit information that is protected by attorney-client privilege or as attorney work product. Fourth, the Committee stated that the inquirer should cease contact with a planning board member if the member so requests.

Effective April 1, 2009 the New York Appellate Divisions jointly adopted the New York Rules of Professional Conduct (22 NYCRR Part 1200) making New York the last state to adopt the Model Rules of Professional Conduct; this now allows us to look to judicial decisions and ethics opinions rendered in other jurisdictions for guidance in interpreting the New York Rules of Professional Conduct. As noted by the Ethics Committee of the New York State Bar Association, the majority view is that the No Contact Rule is limited in the government setting by application of the right to petition government guaranteed by the Constitutions of the United States and the State of New York.

In his comprehensive treatise on New York Rules of Professional Conduct, Professor Simon gives the following advice to New York lawyers interpreting the No Contact Rule:[23]

> First, the interpretation of the no-contact rule remains very much a state by state affair. Even though the text of the rule is likely to be almost identical from one state to the next, the interpretation of the rule differs greatly. For litigators in particular, it is crucial to research the meaning of the no-contact rule in each jurisdiction where litigation is pending.
>
> Second, the meaning and operation of the no-contact rule varies from context to context. An interpretation that works in the context of a class action may not work in the context of a suit against a state agency or a visit to a web site.
>
> Third, the meaning of the no-contact rule is evolving over time. Courts and ethics committees are producing a steady stream of opinions interpreting the rule, and it is important to check the latest offerings before engaging in ex parte communications with those who may be within the sweep of the no-contact rule.
>
> Fourth, opposing attorneys are eager to seek sanctions for violations of the no-contact rule, including suppression of evidence, disqualification, and monetary sanctions-and courts are often willing to oblige if they find a violation.
>
> In sum, it pays to pay attention to the nuances and frequent developments in the scope and meaning of the no-contact rule. Lawyers who fail to do so are taking great professional risks.

There are very few cases construing the "right to petition" clause of the First Amendment. However, while the First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances, and while the government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy or by imposing sanctions for the expression of particular views it opposes, the First Amendment right to associate and to advocate "provides no guarantee that a speech will persuade or that advocacy will be effective...[Nor does it] impose any affirmative obligation on the government to listen...[or] to respond...."[24]

It is not uncommon for litigation adversaries or their counsel to confront government officials at their public meetings. The Open Meetings Law[25] is silent on the issue of public participation. Thus, a government body is not required to permit members of the public to speak or participate at meetings; if a body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, it is not obligated to do so. But, if a government body chooses to permit public participation, it must do so in a reasonable manner, based on reasonable rules that treat all members of the public equally.[26]

If the public is generally permitted to speak at meetings, a public body cannot validly prohibit a person from speaking because of the possibility that he or she might at some point initiate litigation, as that person's comments would divulge nothing about the public body's strategy in the potential or eventual litigation.[27]

In summary, under Rule 4.2 (Communication with Person Represented by Counsel), an attorney may communicate directly with officers or employees of a government entity provided that either: (a) they are not "parties" as defined by the Court of Appeals in *Niesig*; (b) the contacted officer or employee is an attorney representing the entity in connection with the subject matter of the communication; or (c) the contacting attorney is authorized by law to make the communication, such as a communication on a policy issue made on behalf of a client who is exercising a constitutional or other legal right to communicate with the government, upon reasonable advance notice to counsel. Municipal attorneys should fully inform their clients of the dangers that attend unguarded conversations with litigation adversaries, and should urge them to exercise caution and restraint in responding to direct communications from adversary counsel.

Endnotes

1. 465 U.S. 271, 272 (1984).
2. N.Y. COMP. CODE OF R. & REGS. TIT. 22 § 1200.0 (2012).
3. N.Y. State 652 (1993); N.Y. State 650 (1993); N.Y. State 607 (1990).
4. Unless otherwise stated, all "Rules" cited in this outline are found in the New York Rules of Professional Conduct, N.Y. COMP. CODE OF R. & REGS. TIT. 22 § 1200., effective April 1, 2009.
5. Rule 4.2 Comment [4]. The Appellate Divisions have not adopted the Comments, which are published by the New York State Bar Association to provide guidance for attorneys in complying with the Rules.
6. Muriel Siebert Co. v. Intuit, Inc., 8 N.Y.3d 506 (2007).
7. Rule 4.2 Comment [5].
8. Rule 4.2 Comment [8].
9. Patricia Salkin, *Beware: What You Say to Your [Government] Lawyer May be Held Against You—The Erosion of the Government Attorney-Client Confidentiality*, 35 URB. LAW 283 (2003). *See also*, Fed. Ethical Consideration 5-1 of Canon 5 of the ABA Code of Prof. Resp. (1973) (the immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency).
10. In re Lindsay, 158 F.3d 1263 (D.C. Cir. 1998).
11. In re Grand Jury Investigation v. John Doe, 399 F.3d 527 (2d Cir. 2005).
12. *See* New York State Bar Association, Opinion 160 (October 9, 1970).
13. Niesig v. Team I et al., 76 N.Y.2d 363 (1990).
14. DR 7-104(A)(1) provided that "[d]uring the course of representation of a client a lawyer shall not...[c]ommunicate or cause another to communicate with a party [the lawyer] knows to be represented by a lawyer in that matter unless [the lawyer] has the prior consent of the lawyer representing such other party or is authorized to do so."
15. "In interpreting statutes, which are the enactments of a coequal branch of government and an expression of the public policy of this State, [the Court is] of course bound to implement the will of the Legislature; statutes are to be applied as they are written or interpreted to effectuate the legislative intention. The disciplinary rules have a different provenance and purpose. Approved by the New York State Bar Association and then enacted by the Appellate Divisions, the Code of Professional Responsibility is essentially the legal profession's document of self-governance, embodying principles of ethical conduct for attorneys as well as rules of professional discipline. While unquestionably important, and respected by the courts, the code does not have the force of law. That distinction is particularly significant when a disciplinary rule is invoked in litigation, which in addition to matters of professional conduct by attorneys, implicates the interests of nonlawyers. In such instances...[the Court is] not constrained to read the rules literally or effectuate the intent of the drafters, but to look to the rules as guidelines to be applied with due regard for the broad range of interests at stake. When [the Court agrees] that the Code applies in an equitable manner to a matter before [it, the Court] should not hesitate to enforce it with vigor. When [the Court] find[s] an area of uncertainty, however, [it] must use [its] judicial process to make [its] own decision in the interests of justice to all concerned." Niesig, 76 N.Y.2d at 369-70 (citations omitted).
16. *See* C. Evan Stewart, *How One Bad Ruling Can Spoil a Whole Bunch of Cases*, N.Y. L.J., Jan. 8, 2009, at 5, col. 2.
17. *Id. See also*, Brian C. Noonan, *The Niesig and NLRA Union: A Revised Standard for Identifying High-level Employees for Ex Parte Interviews*, 54 N.Y. L. Sch. L. Rev. 261 (2009/2010).
18. New York State Bar Association, Opinion #160 (1970).
19. New York State Bar Association, Opinion #404 (1975).
20. NYC Bar Association, Formal Opinion 1988-8 (1988).
21. NYC Bar Association, Formal Opinion 1991-4 (1991).
22. New York State Bar Association, Opinion #812 (2007).
23. ROY D. SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 833 (2012 Ed.).
24. Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464-65 (1979) (internal citations omitted).
25. N.Y. PUB. OFFICERS LAW Art. 7.
26. *See* Comm. on Open Gov't OML-AO-4810, 4691, 4644, 4573, 4044, 4024, 3845, 3518, 3405, 3364, 3295, 3171, 2896, 2894, 2798, 2794, 2696, 2585, 2199 (Opinions of the Committee on Open Government are available at http://www.dos.ny.gov/coog/index.html.).
27. Comm. on Open Gov't OML-AO-2696.

Steven G. Leventhal is an attorney and certified public accountant. He is a partner in the Roslyn law firm of Leventhal, Sliney & Mullaney, LLP. Steve is the former chair of the Nassau County Board of Ethics. He currently serves as Village Attorney for the Village of Muttontown and as counsel to several municipal boards.

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FURTHER DEVELOPMENTS IN LAND USE ETHICS[1]

By 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,[2] to the outright bribery of a former mayor,[3] 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.[4]

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.[5]

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*Dean and Professor of Law, Touro College Jacob D. Fuchsberg Law Center; chair of the ABA State and Local Government Law Section's Committee on Ethics in Land Use.
**2015 graduate of Touro College Jacob D. Fuchsberg Law Center; N.Y. Pro Bono Scholar, inaugural class; clerk to Associate Justice J. Michael Eakin of the Supreme Court of the Commonwealth of Pennsylvania.

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

[3] *In re* Cammarano, 219 N.J. 415 (N.J. 2014).

[4] 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).

[5] *Id.* at *1.

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 projects."[6] 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."[7] 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."[8]

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.'"[9] 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."[10] 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.[11]

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

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[6] *Id.*
[7] *Id.*
[8] *See id.*
[9] *Id.* at *2.
[10] *Id.* at *3.
[11] *See id.*

was approved.[12] 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.[13] Ultimately, however, the applicant, through his lawyer, sought permission to construct a three-story commercial building entirely within the flood zone.[14] At the "close of a public hearing, the Board . . . approve[d] the requested variances" and "the decision was published in a newspaper."[15] Eight residents appealed the decision and the Superior 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.[16] 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.[17] 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.[18] 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

[12] *See* Coppola v. Zoning Bd. of Appeals, No. CV116023195S, 2014 WL 2055635, at *7 (Conn. Super. Ct. Jan. 22, 2014).
[13] *Id.* at *1.
[14] *Id.*
[15] *Id.* at *2.
[16] *See id.* at *2-3.
[17] *Id.* at *5-6.
[18] *See id.* at *6-7.

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.[19]

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.[20] 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.[21] 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 site" and demanded a stay and a contested case hearing, which was eventually ordered by Hawai'i's high court.[22]

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.[23] 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

[19] *Id.* at *7.
[20] *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).
[21] *See id.* at *2.
[22] Kilakila 'O Haleakalâ v. Bd. of Land & Nat. Res. (*KOH I*), 317 P.3d 27, 29, 40 (Haw. 2013) (internal quotation marks omitted).
[23] *KOH II*, 2014 WL 5326757, at *2.

for the University.[24] 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."[25]

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.[26] 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]."[27] 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.[28]

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.[29] This dispute ripened when the Oregon 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.[30] While the appeal was still pending,

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[24] *See id.*
[25] *Id.* at *2-3.
[26] *Id.* at *5.
[27] *Id.* at *24.
[28] Kilakila 'O Haleakalâ v. Bd. of Land & Nat. Res. (*KOH III*), No. SCWC-13-0003065, 2015 WL 114807, at *1 (Haw. Jan. 7, 2015).
[29] *See* Columbia Riverkeeper v. Clatsop Cnty., 341 P.3d 790, 804 (Or. Ct. App. 2014).
[30] *Id.* at 794.

three new commissioners were elected to Clatsop County's Board, one of whom had openly discussed rejection of the pipeline plan.[31] 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."[32] 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.[33]

On reconsideration, the Board denied the pipeline application in a 4-1 vote.[34] 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.[35] 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."[36] 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."[37] Thus, actual bias was not established and the mere appearance of bias created by his ex parte statements was insufficient.[38]

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[31] *See id.* at 793.
[32] *Id.*
[33] *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).
[34] *See id.* at 794.
[35] *See id.* at 793.
[36] *See id.* at 804-05.
[37] *Id.* at 808.
[38] *Id.* at 809.

Moving from natural gas to water, ex parte communications made to officials in Connecticut were deemed sufficient to render a public hearing unfair.[39] 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.[40] 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."[41] 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.[42] 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.[43] 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.[44] 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.[45]

C. *Pecuniary Conflicts*

[39] Villages, LLC v. Enfield Planning & Zoning Comm'n, 89 A.3d 405, 416-17 (Conn. Ct. App. 2014).
[40] *See id.* at 407-08.
[41] *Id.* at 408.
[42] *See id.* at 408-09.
[43] *Id.* at 408-09 (alteration in original).
[44] *Id.* at 408.
[45] *Id.* at 414, 416-17.

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.[46] Neighbors residing across from the proposed development decried the Board's approval as being biased, using as evidence the recent donation made by the Chairman and the fact that another board member was also an alumnus of the school.[47] 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."[48] 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.[49]

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.[50] 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."[51] The Solicitor's office ruled that the appellant had no conflict of interest.[52] But, the Local Finance Board also lodged a

[46] Shain v. Lakewood Twp. Planning Bd., No. A-6335-11T3, 2014 WL 1613668, at *1-2 (N.J. Super. App. Div. Apr. 23, 2014).
[47] *See id.* at *1.
[48] *Id.*; *see* N.J. STAT. ANN. § 40:55D-23(b) (2015).
[49] *Shain*, 2014 WL 1613668, at *2.
[50] *See* Scull v. Loc. Fin. Bd., No. A-4786-11T4, 2014 WL 2440783, at *1 (N.J. Super. App. Div. June 2, 2014).
[51] *Id.*
[52] *Id.*

complaint, alleging that Scull violated the section 40A-9-22.5(d) of the Local Government Ethics Law.[53] 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."[54] 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.[55] 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.[56] Scull should have recused herself and, by not 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]."[57]

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.[58] The Legal Division of the Commission advised that any government decision directly affecting a financial interest in real property is presumed to be

[53] *See id.*
[54] *Id.* (quoting the Board's Notice of Violation).
[55] *Id.* at *1.
[56] *Id.* at *5.
[57] *Id.*
[58] Cal. Fair Political Practices Comm'n Advice Letter, No. A-13-160, 2014 WL 764125, at *1-2 (Feb. 10, 2014).

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.[59] 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.[60]

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.[61] Davis was newly elected and had rented a loft for a one-year term in "the downtown core area of Davis."[62] The potential conflict arose quickly, as there were a number of projects slated for consideration near Davis' rented residence.[63]

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.[64] 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.[65]

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[59] *Id.* at *4.
[60] *Id.* at *7.
[61] *See* Cal. Fair Political Practices Comm'n Advice Letter, No. A-14-175, 2014 WL 5797812, at *1 (Oct. 20, 2014).
[62] *Id.*
[63] *Id.*
[64] *See id.* at *2, 4.
[65] *See id.* at *4-6.

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.,.[66] 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.[67] The issue was that the development could adversely affect Chang's "pristine" view, as well as the councilmember's property value.[68]

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."[69] 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."[70] 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 west; and because Chang's view of a ridge beyond the nearby picturesque canyon would not be obstructed by the new construction.[71]

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[66] *See* Cal. Fair Political Practices Comm'n Advice Letter, No. A-14-167, 2014 WL 5797808, at *5 (Oct. 8, 2014).
[67] *Id.* at *1-2.
[68] *See id.* at *5.
[69] *Id.* at *3.
[70] *See id.* at *5.
[71] *Id.* at *4-5.

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.[72]

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."[73] 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.[74] Under a section entitled "general public comments,"

[72] Cal. Fair Political Practices Comm'n Advice Letter, No. A-14-053, 2014 WL 1498287, at *5-6 (Mar. 26, 2014).
[73] Lewis v. Benton Cnty., 436 S.W.3d 181, 181 (Ark. Ct. App. 2014).
[74] *Id.* at 182.

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.[75]

Knight did not attend the first public hearing in which the interested application was discussed and recused himself on the day of the vote.[76] 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.[77] The Board thereafter rejected the application in a 5-1 vote.[78] 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."[79] 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.[80]

B. *Total Disqualification*

In Missouri, a faulty removal did not deprive the federal court of jurisdiction to disqualify counsel.[81] The City of Greenwood had been in a dispute with Martin Marietta Materials (Martin) over a rock quarry located south of the city.[82] 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

[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 183.
[80] *See id.* at 184-85.
[81] Zerger & Mauer LLP v. City of Greenwood, 751 F.3d 928, 930 (8th Cir. 2014).
[82] *Id.* at 929.

in exchange for truck access to Second Avenue and Greenwood declaring that quarry traffic was reasonable and did not constitute a nuisance.[83]

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."[84] 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 conflict of interest.[85] "The district court agreed with Greenwood and . . . disqualified Zerger & Mauer," which appealed.[86]

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.[87] 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.[88] 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."[89]

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

[83] *Id.* at 929-30.
[84] *Id.* at 930.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 931.
[88] *Id.*
[89] *Id.*

> person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.[90]

Accordingly, the Eighth Circuit ruled that the district court's disqualification order was appropriate.[91] Of course, the order only governed Zerger & Mauer LLP's representation in the federal proceeding and will likely become an issue again when the matter heads back to state court.[92]

The Mount Rushmore State 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."[93] The facility would "store, distribute, and sell a variety of farm products, including anhydrous ammonia."[94] 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 [a similar] facility [operated by EFC] and was impressed by the safety measures in place."[95] 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.[96] 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."[97] However, finding no evidence of bias with the remaining three votes, the court left the decision intact, holding

[90] *Id.* at 932; *see also* MISSOURI RULES OF PROF'L CONDUCT § 4-1.9(a) (2007).
[91] *Zerger & Mauer LLP*, 751 F.3d at 935.
[92] *Id.*
[93] In re Conditional Use Permit No. 13-08, 855 N.W.2d 836, 838 (S.D. 2014).
[94] *Id.*
[95] *Id.*
[96] *Id.* at 839.
[97] *Id.*

that the Hansons' position would not have changed because the vote was unanimous.[98] 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.[99]

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.[100] 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."[101] 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.[102] The appellate court agreed and applauded the trial court for "providently exercis[ing] its discretion."[103]

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 formal investigation and censure.[104] The Grievance Committee of New York filed a petition against Attorney J. Michael Shane for

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[98] *Id.*
[99] *Id.* at 845.
[100] Cherry Hill Mkt. Corp. v. Cozen O'Connor P.C., 118 A.D.3d 514, 514 (N.Y. App. Div. 2014).
[101] *Id.*
[102] Cherry Hill Market Corp. v. O'Connor, No. 154292/12, 2013 WL 1783552, at *1-3 (N.Y. App. Div. Apr. 22, 2013).
[103] *Cherry Hill Mkt. Corp.*, 118 A.D.3d at 515.
[104] *In re* Shane, 117 A.D.3d 117 (N.Y. App. Div. 2014).

misconduct, alleging that Shane "neglected a client matter, and for approximately 25 years thereafter . . . deceived the client regarding the status of the matter." The Referee for the matter found "that, in 1986, [Shane] 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]."[105] After accepting the representation, Shane "falsely informed [his] client that papers had been served on the municipality."[106] Finally, the Referee found that 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."[107] 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.[108] 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."[109]

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."[110] Attorney Shane also fully cooperated with the Grievance Committee's investigation,

[105] *Id.* at 118.
[106] *Id.*
[107] *Id.* at 119.
[108] *Id.* at 118-19.
[109] *Id.* at 119.
[110] *Id.*

and there was no proof that the client suffered an actual financial loss.[111] According to the court, it appeared that the lawyer was just trying to avoid telling the client that his claim lacked merit.[112]

Finally, bribery did not pay off for a lawyer-turned-politician who traded permits for payoffs in New Jersey.[113] During his campaign, and after being elected Mayor of Hoboken, attorney Peter J. Cammarano, III "accepted monies from a cooperating witness disguised as a developer."[114] For a $25,000 fee, the Mayor agreed to "expedite[] zoning approvals for unspecified construction projects."[115] 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."[116] 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."[117]

"On the basis of the criminal conviction, the Office of Attorney Ethics (OAE) filed a motion for final discipline with the Disciplinary Review Board."[118] 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.[119] The Supreme Court of New Jersey then granted the OAE's petition for review and ordered Cammarano's disbarment.[120]

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[111] *Id.* at 119-20.
[112] *Id.* at 120.
[113] *In re* Cammarano, 98 A.3d 1184, 1185 (N.J. 2014).
[114] *Id.*
[115] *Id.* at 1186.
[116] *Id.* at 1185-86.
[117] *Id.* at 1185.
[118] *Id.*
[119] *See id.* at 1185, 1187.
[120] *Id.*.

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."[121] 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.[122]

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 new 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.

[121] *Id.* at 1187-88.
[122] *Id.* at 1189.

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

Patricia Salkin*
Bailey Ince**

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

*Patricia Salkin is Dean and Professor of Law at Touro Law Center. She is the author of the five-volume American Law of Zoning and the four-volume New York Zoning Law and Practice. Salkin frequently writes and lectures on the subject of ethics and land use.

**Bailey Ince is a 2013 graduate of Touro Law Center where he served as New York Constitutional Law Editor on the TOURO LAW REVIEW.

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 government 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 context), § 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 corruptly 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 accepted 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 contribution was 'made in return for an explicit promise or undertaking by the official to perform 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 beneficiaries, 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 extortion 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 government 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 payment 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 opportunities 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 interpretation 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 confined 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 narrowing 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 official 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 official 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. Beldini'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 identity 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 kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. 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 exchange 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 conviction 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 remanded 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 "anything 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.

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 Tenefly, Inc. v Tenefly 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. *Gravowsky*, 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, OCN-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.