CARLIN & WARD

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

Surveying New Jersey's Ethical Landscape

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> **"In a state where news of public corruption seems to be never ending, can we ever make real the promise of ethics reform?"—Paula Franzese, Chair New Jersey Ethics Commission** [1]

Ethics issues involving eminent domain in municipal redevelopment projects undertaken under the Local Redevelopment Housing Law, N.J.S.A. 40A-12-1 et seq., are front and center in several cases contesting the right to take property in New Jersey. Paula Franzese, Chair of the New Jersey State Ethics Commission, has called for a uniform code of ethics, a top-to-bottom ethics program building an ethical culture that "honors not only the letter, but also the spirit of the laws."

Franzese suggests that a Plain Language Ethics Guide is needed to clarify a "bewildering array of rules." However, as Franzese and her colleagues push for real and meaningful ethics reform, developers and their attorneys have lobbied the legislature and made inquiries to the Advisory Committee on Professional Ethics (ACPE) for opinions which stretch the boundaries of the Rules of Professional Conduct which govern our profession.

The Advisory Committee on Professional Ethics, which is appointed by the New Jersey Supreme Court under Rule 1:19-1, consists of fifteen members of the New Jersey bar and three lay members. The Court designates a member to serve as Chairperson and another to serve as Vice Chairperson. The Administrative Director of the Courts serves as secretary of the committee. The form of the inquiry (1:19-3) is as follows:

> All inquiries shall be addressed to the secretary who shall transmit them to the committee. They shall be in writing, shall set out the factual situation in detail, shall be accompanied by a short brief or memorandum citing the rules of court of cannons of ethics involved and any other pertinent authorities, and shall contain a certificate that any opinion of the committee will not affect the interest of the parties to any pending action.

In 2006, an unnamed municipal attorney wrote the ACPE inquiring whether the "developer rule" had effectively been made null and void due to the New Jersey Supreme Court's elimination of the *appearance of impropriety* provision in the Rules of Professional Conduct. The "developer rule" was articulated in *In re A & B*, 44 *N.J.* 331 (1965). In that case, municipal attorneys were charged in a county ethics committee proceeding with representing developers whose projects were located in the same municipality. The Court was unable to conclude that the attorneys directly represented developers in their dealings with the municipality, which would have been a direct violation of then Canon 6. See Advisory Committee On Professional Ethics, Opinion 702, 184 N.J.L.J. 172 (2006) attached hereto.

The Court went on to hold that:

> It is accordingly our view that such dual representation is forbidden even though the attorney does not advise either the municipality or the private client with respect to matters concerning them. The fact of such dual representation itself is contrary to the public interest.
>
> In re A & B, *supra*, 44 *N.J.* at 334-335.

In practice, this language has been interpreted to bar a municipal attorney with a developer client operating in his or her town from contemporaneously representing that developer not only in that town but also in other municipality, irrespective of whether there is an actual conflict. This prohibition would also apply to the municipal attorney's firm. (Opinion 702, 184 N.J.L.J. at 172, 173).

After reviewing Court's decision In re A & B, the ACPE turned to the question before it which was can a "municipal attorney represent a developer owning property in the same municipality, assuming the firm limits its representation of the developer to matters outside and not adverse to the municipality." (Id.)

The ACPE performed an analysis as to how the "developer rule" situation would fare under the current Rules of Professional Conduct.

RPC 1.7 states in part:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

Further, *RPC* 1.8(k) states:

> A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client

RPC 1.7 proscribes dual representation where there is an actual conflict of interest where the representation of one client is directly adverse to another client, or where there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client. Furthermore, *RPC* 1.7(b)(1) precludes consent by a public entity where such a conflict exists.

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[1] Paula A. Franzese, "In ethics landscape, we can get back to Kansas: *Uniform code is a big step on long road to reform,"* New Jersey Star Ledger, April 17, 2006

Based on that analysis the ACPE concluded that:

> current ethics rules dictate that while an actual *RPC* 1.7 conflict will continue to disqualify both the municipal attorney and his firm from representing a private developer in other municipalities, *RPC* 1.7 will not automatically preclude the municipal attorney and his firm from such representation under a *per se* developer rule.
> (Id.)

Opinion 702 of the Advisory Committee will make it easier for ethically challenged attorneys who represent multiple conflicting interests to game the system. It is anticipated that New Jersey will issue a uniform ethics code which will streamline the existing ethics regulations into a unitary and more rigorous statute by September. The New Jersey Supreme Court should fully support this effort. Opinion 702 should be given close scrutiny by the court in light of the statewide effort underway to restore the public's faith in its elected officials.

Contesting the Right to Take Property in a Post-Kelo World

On June 26, 2006, the first anniversary of the Supreme Court's decision in Kelo v. City of New London, 125 S.Ct. 2655 (2005), President Bush issued an executive order "Protecting the Property Rights of the American People." The order stated:

> It is the policy of the United States to protect the rights of Americans to their private property, including by limiting the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.

In New Jersey, the Assembly Commerce and Economic Development Committee, passed Bill A-3257 (sponsored by Assemblyman John Burzichelli, Chair) which seeks to amend the Local Redevelopment Housing Law (LRHL) N.J.S.A. 40A:12A-1 et seq and the definition of blight.

Public Advocate Ronald K. Chen issued a report in May 2006 calling for a limited, objective definition of blight, saying the proposed legislation meets that standard. "It revises the definition of blight so that it is more clear and objective, and appropriately restricts the ability of municipalities to use eminent domain for private redevelopment to those areas that are truly blighted." However a close examination of the bill in its present form shows that it does not go far enough in providing property owners with needed reform. As of this writing, the New Jersey Senate has yet to act on its companion piece of legislation. Ironically, the only piece of legislation to pass both the Assembly and State Senate since the Kelo decision, gave municipalities the right to take over the cleanup of contaminated property in condemnation proceedings where the owner was deemed not diligent in the pursuit of the cleanup.

Given the slow pace of the reform and the fact developers and their attorneys lobby vigorously against some of the proposed changes, it has become readily apparent that property owners, now more than ever, should retain experienced attorneys who can fully advise them of their rights with regard to contesting the right to take. Timing is everything when a property owner makes the decision to contest a condemning authority's right to take their property or

challenge a redevelopment designation. Contesting the right to take can be a long and costly process as such property owners and their attorneys should consider the following challenges based on statutory arguments and the presence of conflicts of interest and impermissible favoritism when making such claims.

1. Challenging the right to take based on a condemning authority's failure to comply with the provisions of the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq. Despite the Kelo decision condemning authorities cannot side step their duties under the Act particularly the duty to conduct bona fide negotiations pursuant to N.J.S.A.20:3-6. The New Jersey Supreme Court has been clear:

> In dealing with the public, government must "turn square corners." This applies, for example, in government contracts. Also, in the condemnation field, government has an overriding obligation to deal forthrightly and fairly with property owners. It may not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over the property owner. Its primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another. (citations omitted, emphasis added)
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> FMC Stores Co. v. Morris Plains Boro, 100 N.J. 418, 426-27 (1985).

Furthermore:

> the requirements of N.J.S.A. 20:3-6 are important in giving a condemnee an opportunity to receive and keep his full award. If the condemnor starts a condemnation action, ordinarily a condemnee contesting the case will have expenses in opposing either the condemnor's right to condemn or in seeking compensation in excess of that offered. If the condemnor is finally successful in obtaining title, as it ordinarily is, the compensation paid cannot make the condemnee whole, for his expenses of litigation must be borne by him. Thus, if the procedural omissions cause a condemnation action to be brought which might otherwise have been avoided, they may have a substantive impact on a condemnee.
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> Borough of Rockaway v. Donofrio, 186 N.J. Super. 344, 352-53 (App. Div. 1982)

Procedural defects such as not allowing the property owner to accompany the Condemning Authority's expert on his/her appraisal, failure by the condemnor to disclose and/or provide all relevant appraisals, an inadequate or incorrect description of the property to be taken, and an unclear or unjust offer of compensation, all may be considered defects under the Act as to call for a dismissal of the complaint.

2. Contesting the designation of a property to be "in an area in need of redevelopment." Too often municipalities and developers move forward with development projects without first laying the statutory ground work necessary to condemn properties as being blighted. If the conditions of blight do not exist, then there is no need for redevelopment, especially where it entails the taking of private property for private redevelopment.

The Appellate Division recently affirmed unanimously the decision of the Hon. Patricia Costello, A.J.S.C. in which she dismissed a complaint in condemnation against the property

owners of 110 Washington Street in Bloomfield based in part on the Township's failure to establish evidence of blight. The Appellate Division rejected the main argument of the Township of Bloomfield outright. The Township argued that a previous decision by Judge Coleman, who dismissed 110 Washington Street's prerogative writ suit on the grounds that it timeliness, was dispositive of the merits of the case. The Appellate panel disagreed and refused to apply the doctrines of res judicata and collateral estoppel to bar the challenge in this proceeding. The three judge panel stated that the defendants were entitled to a full and fair opportunity to litigate all the issues, since Judge Coleman only focused on the lack of timeliness (i.e., it wasn't filed within the 45-days required to contest municipal action) and not the merits of the case.

The Appellate Division's decision in 110 Washington was consistent with its early holding in ERETC, L.L.C., v. City of Perth Amboy, 381 N.J. Super. 268 (App. Div. 2005). In ERETC, a property owner filed an action in lieu of prerogative writs challenging the designation of its property to be in an area in need of redevelopment pursuant to the LRHL. The Appellate Division found that even though the trial court had correctly applied the deferential standard in considering the municipality's action, the City's designation of the property to be in need of redevelopment was not supported by substantial evidence as required by the LRHL. Id. at 279-281. The evidence provided by the City's planner supporting the City's designation of the property failed to include support that the buildings were substandard, unsafe, unsanitary, dilapidated, or obsolescent. Id. The Appellate Division further found the City's proof lacking because the City's Planner had not inspected the buildings' interiors, reviewed relevant occupancy rates, reviewed applications for building permits, or ascertained the number of people employed in the area. Id.

The 110 Washington and ERETC holdings clearly show that a property owner can successfully challenge the right to take based on a condemning authority's failure to demonstrate blight pursuant to the criteria set forth in the LRHL.

3. A challenge asserting a claim that the taking is for a private purpose rather than a public one. Under both the United States and New Jersey constitutions, the government may exercise its power of eminent domain only to satisfy a public purpose. U.S. Const. Amend. V, N.J. Const. Art. I, ¶ 20 ("Nor shall private property be taken for public use without just compensation."). In most cases Courts will generally not inquire into a public body's motive concerning the necessity of the taking. Mount Laurel Twp. v. Mipro Homes, L.L.C., 379 N.J.Super. 358, 375 (App. Div. 2005). However, "although the public purpose for taking land may be valid, if the true reason is beyond the power conferred by law, the condemnation may be set aside. In other words, public bodies may condemn for an authorized purpose but may not condemn to disguise an ulterior motive." Borough of Essex Fells v. Kessler Institute for Rehabilitation, Inc., 289 N.J.Super. 329, 338 (Law Div. 1995). Simply stated the power of eminent domain must be used solely for a public purpose and the process must be void of impermissible favoritism and conflicts of interest.

Impermissible Favoritism and Conflicts of Interest

In her dissenting opinion in the Kelo decision, Justice O'Connor characterized the consequence of the Court's decision as follows:

> The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property

> from those with fewer resources to those with more. The Founders cannot have intended this perverse result.

Kelo supra at 2677.

Justice Kennedy joined Justice O'Connor in that sentiment by writing in his concurring opinion: "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit[.]"

Both Justice Kennedy and Justice O'Connor warn of overly aggressive municipalities, who seek to expand their power of eminent domain only to benefit a select few. The New Jersey Supreme Court has also addressed this issue in the matter of City of Atlantic City v. Cynwyd Investments, 148 N.J. 55, 73 (1997) in which the court held:

> The condemnation process involves the exercise of one of the most awesome powers of government. Generally, when the exercise of eminent domain results in a substantial benefit to specific and identifiable private parties, "a court must inspect with heightened scrutiny a claim that the public interest is the predominant interest being advanced." Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455, 459 (1981). In determining whether projects with substantial benefit to private parties are for a public purpose, this Court has held that the trial court must examine the "underlying purpose" of the condemning authority in proposing a project as well as the purpose of the project itself.
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> The New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 states:
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> (a) In our representative form of government, it is essential that the conduct of public officials and employees shall hold the respect and confidence of the people. Public officials must, therefore, avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.
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> (b) To ensure propriety and preserve public confidence, persons serving in government should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards amongst them. Some standards of this type may be enacted as general statutory prohibitions or requirements; others, because of complexity and variety of circumstances, are best left to the governance of codes of ethics formulated to meet the specific needs and conditions of the several agencies of government.
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> (c) It is also recognized that under a free government it is both necessary and desirable that all citizens, public officials included, should have certain specific interests in the decisions of government, and that the activities and conduct of public officials should not, therefore, be unduly circumscribed.

Property owners must be made aware that the courts have a mechanism in place to handle such allegations of impermissible favoritism in the context of an eminent domain action. "[i]f any party objects to a [condemnation trial] and there may be a genuine issue as to a material fact, the court shall hear the evidence as to those matters which may be genuinely in issue, and render final judgment." County of Bergen v. S. Goldberg & Co., 39 N.J. 377, 380 (App. Div. 1963).

On February 14, 2006 New York Supreme Court Judge Carol Edmead ruled in favor of property owners and other community organizations and forced attorney David Paget to disqualify himself for representing the Empire State Development Corporation (ESDC). The ESDC is the agency in charge of overseeing developer Bruce Ratner's massive project for Prospect Heights, Brooklyn, located at Flatbush and Atlantic Avenues. Paget had previously represented Forest City Ratner (FCR) privately on the same project and then became ESDC's lawyer. The judge called this "a severe crippling appearance of impropriety" and scoffed at the agency lawyer's arguments that the relationship was "collaborative."

The Court concluded:

> Potentially, the interests of Ratner Companies, as an applicant or project sponsor, are adverse to the interests of the ESDC, which is charged with the responsibility to protect the environment and regulate the activities of individuals and corporations so that "due consideration is given to preventing environmental damage." The oft bottom-line, profit-making pursuits of real estate development corporations, may not necessarily align with the stated, valid environmental interests of the ESDC, whose very function in this matter is to subject the proposed action to a high level of environmental review. Thus, the simultaneous representation of the ESDC and Ratner Companies is *prima facie* evidence of a conflict of interest....
>
> Further, the Court is cognizant that Mr. Paget and his firm are members of a boutique, discrete area. However, avoiding even the appearance of impropriety is critical in a case of this magnitude and with such long-lasting effects the Borough of Brooklyn and the City of New York generally."

The opinion of the Court was grounded on the New York State Code of Professional Responsibility DR5-105 (A) and (B) (22 NYC RR §1200.24) which provides:

> A lawyer shall decline proffered employment if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interest....A lawyer shall not continue multiple employment if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests....

The full decision can be found at http://njeminentdomain.com >National>02/16/06

On March 24, 2006 Judge Lawrence Lawson, A.J.S.C heard arguments challenging the right to take properties in the MTOTSA (Marine Terrace, Ocean Terrace, Seaview Avenue) area cases including *Long Branch v. Anzalone* and *Long Branch v. DeLuca.* Defendants challenged the right to take based in part on the presence of an alleged conflict of interest between the City's attorneys and the redeveloper and Monmouth Community Bank. Despite the Supreme Court's ruling In re Advisory Opinion 452 of the Advisory Committee on Professional Ethics, 87 N.J. 45, 51 (1981) which states "with attorneys holding public offices, the appearance of conflict strikes at an essential element of public trust, the ability to exercise discretion unimpeded by external

considerations. An attorney for a public body, like Caesar's wife, must be above suspicion," Id. at 52. The committee also held in Opinion 69, 88 N.J.L.K. 97 (1965):

> The relationship between the municipality and the developer where the interpretation and enforcement of so many statutes, ordinances, rules and regulations are brought into play, is indeed a fertile field for conflicting interests, and when the public is involved the municipal attorney must avoid any semblance of divided loyalty. The public image of the legal profession as a whole would be detrimentally affected if such a practice, as here proposed, were permitted. And this is so although the lawyer may be guided by the purest of altruistic intentions because it is the suspicion engendered in the mind of the public by such conduct that creates the mischief. All that we have said concerning the municipal attorney and the municipality he represents applies with equal force to an attorney representing any municipal board, agency or other public body. (citations omitted).

Judge Lawson rendered a written a written opinion in favor of the City of Long Branch dismissing defendants' challenges in their entirety. Judge Lawson did not grant defendants a hearing or discovery to further develop the conflicts argument. Accordingly that decision is currently being appealed by the MTOTSA residents.

In the previously referenced case Township of Bloomfield v. 110 Washington Street Associates, Judge Costello dismissed the complaint based in part that there was an impermissible conflict of interest present which tainted the Township's underlying action. The Township violated the provisions of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. by having the same attorney represent the board of adjustment, the planning board, and the mayor and council. ACPE Opinion 67, 88 N.J.L.J 81 (1965) addressed a similar inquiry by holding:

> a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose….While an attorney representing two private clients may properly act in exceptional cases with the consent of each, even though a possibility of conflicting interests exists, consent is generally unavailable where the public interest is involved. See Drinker, Legal Ethics 120 (1953) ...Where there is no express (constitutional or statutory) provision, the true test is, whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing out of them In our opinion, a municipal attorney cannot serve as attorney for any board or agency of the same municipality if there is or may be a conflict of interest in a particular situation.

The appellate division in affirming Judge Costello's chose not to address the conflicts of interest argument however the ACPE has addressed similar matters in other advisory opinions which include:

- Opinion 67, 88 N.J.L.J. 81 (1965), held that "a municipal attorney cannot serve as attorney for any board or agency of the same municipality if there is or may be a conflict of interest in a particular situation."

- In Opinion 91, 89 N.J.L.J. 248 (1966), it was held that a zoning board attorney could not without violation of the Canons of Professional Ethics appear for the municipal body in a zoning appear where the municipality had reversed the decision of the board of adjustment.

- In Opinion 112, 90 N.J.L.J. 365 (1967), it was stated that a municipal planning attorney could not even represent his wife in personally objecting to the granting of a variance.

- Opinion 117, 90 N.J.L.J. 745 (1967), concluded that a municipal attorney could not serve as legal adviser to the municipality's planning board in the preparation of a master plan where "the prospect of differences of opinion as to policy between the planning board and governing body is not so remote as to be discounted, ..."

- In Opinion 127, 91 N.J.L.J. 262 (1968) it was held that it is improper for an attorney to represent both the zoning board and the planning board. It is not the function of this Committee to decide whether there is incompatibility between the two offices as a matter of law. Such determination can only be made by our courts.

It must be noted that a challenge based on a conflicts of interest argument can be successful; however, it may ultimately just serve to delay the condemning authority's ability to take property. The condemnation process may be able to continue once the errors or conflicts are cured.

The Courts must apply strict scrutiny to credible allegations of the presence of a conflicts of interest and/or impermissible favoritism. In addition to changes in the way the courts view such allegations Professor Franzese suggest that the legislature must call for a bi-partisan effort to:

- Rein in local government. New Jersey's counties and municipalities should be within the jurisdiction of the State Ethics Commission and bound by the Uniform Ethics Code. The State Ethics Commission should be armed with the resources to oversee mandatory ethics training at the county and municipal levels

- Merge the Joint Legislative Committee on Ethical Standards, a toothless enterprise responsible for investigating allegations of misconduct within the Legislative Branch, into the State Ethics Commission.

- Eliminate dual office-holding. Tighten the state's pension laws to end double-dipping and pension-padding, and cancel pension benefits for public officials convicted of serious wrongdoing.

- Make real the promise of the Open Public Records Act and the Open Public Meetings Act at all levels of government.

- Create a joint task force to coordinate the effort to fight fraud, waste and ethical misconduct in government.

- Ban "pay-to-play" meaningfully at all levels of government.

Redeveloper Pay-to-Play

The "Pay-to-Play" Act, N.J.S.A. 19:44A-20.4 et seq. was enacted with the purpose of placing restrictions on government contractors with regard to their political contributions. There is no question that development has been on the rise in New Jersey, and with it an era that rewards big name political contributors by designating them private developers of alleged "blighted" areas. Further reform is needed to close these loopholes and put an end to the system of rewards to a select few political insiders.

State Senator Ellen Karcher (D-Monmouth, 12th District), proposed bill S1576, which attacks "pay to play" at its roots. Senator Karcher seeks to eliminate developer money and its pervasive influence on the political process. She states: "I crafted this bill as a direct response to the corruption surrounding development deals we've witnessed in Monmouth County. As scandal after scandal is revealed, we can no longer ignore the outcry to curb the influence of developers in the political and planning process. For too long, developers have bankrolled local elections and then expected, and in some cases demanded, favorable treatment from office holders and local zoning and planning boards. This has led to poor planning, dense overdevelopment, loss of open space, congested roads, crowded classrooms and increased property taxes. With this scheme, developers are enriched and homeowners are socked with the costs."

Senator Karcher's bill is an important step in preventing eminent domain abuse where developers take people's homes and businesses for private gain in exchange for political contributions.

"Finally, pay-to-play must be removed from the important and growing arena of redevelopment. While redevelopment can bring positive changes in communities, the nearly unfettered power given to state and local governments to condemn property provides tremendous potential abuse and corruption. Too often, redevelopment projects are awarded to large campaign contributors and are used as a reward to a select few inside political players. Since redevelopment agreements are a form of government contracts, pay-to-play contribution restrictions can and should be put in place."—Harry Pozycki, chair of the Citizens' Campaign, "Corzine must lead on pay-to-play," New Jersey Star Ledger, July 19, 2006

Attachments

- Advisory Committee On Professional Ethics Opinion 702
- *Haggerty v. Red Bank Borough Zoning Board of Adjustment*

_____N.J.L.J____
_____N.J.L.____

Advisory Committee on Professional Ethics
Appointed by the Supreme Court of New Jersey

Opinion 702
Advisory Committee on Professional Ethics

Developer Rule; Conflict of Interest: Concurrent Representation of Municipality and Developer of Projects Elsewhere Not Adverse to the Municipality

The inquirer asks whether the long-standing "developer rule" has effectively been abolished by virtue of the New Jersey Supreme Court's elimination of the appearance of impropriety provision in the Rules of Professional Conduct. More specifically, the inquirer questions whether *RPC* 1.7 or 1.8 are violated if a municipal attorney represents a developer owning property in the same municipality, assuming the firm limits its representation of the developer to matters outside and not adverse to the municipality.

What has become known as the developer rule was first enunciated in *In re A & B*, 44 *N.J.* 331 (1965). There, municipal attorneys were charged in a county ethics committee proceeding with representing developers whose projects were located in the same municipality. The Court was unable to conclude that the attorneys directly represented developers in their dealings with the municipality, which would have been a direct violation of then Canon 6. Nonetheless, in a *per curiam* opinion the Court went on to state:

> . . . the subject of land development is one in which the likelihood of transactions with a municipality and the room for public misunderstanding are so great that a member of the bar should not represent a developer operating in a municipality in which the member of the bar is the municipal attorney or the holder of any other municipal office of apparent influence. We all know from practical experience that the very nature of the work of the developer involves a probability of some municipal action, such as zoning applications, land subdivisions, building permits, compliance with the building code, etc.
>
> It is accordingly our view that such dual representation is forbidden even though the attorney does not advise either the municipality or the private client with respect to matters concerning them. The fact of such dual representation itself is contrary to the public interest.

In re A & B, supra, 44 *N.J.* at 334-335.

In practice, this language has been interpreted to bar a municipal attorney with a developer client operating in his or her town from contemporaneously representing that developer not only in that town but also in other municipality, irrespective of whether there is an actual conflict. This prohibition would also apply to the municipal attorney's firm.

The Court's precise basis for this conclusion was not expressly articulated. It may have been premised in common law, but it is also possible that it was based, at least in part, upon the appearance of impropriety doctrine. The present inquirer suggests that with the abrogation of the appearance doctrine, the developer's rule is no longer viable. Because the Court's decision was not expressly grounded in the prior canons, and may have been based in common law, this committee does not view itself as empowered to draw such a conclusion. It can, however, offer its analysis as to how the "developer rule" situation would fare under the current Rules of Professional Conduct.

RPC 1.7 states in part:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

Further, *RPC* 1.8(k) states:

> A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client
> .

RPC 1.7 proscribes dual representation where there is an actual conflict of interest – where the representation of one client is directly adverse to another client, or where there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client. Furthermore, *RPC* 1.7(b)(1) precludes consent by a public entity where such a conflict exists.

Arguably, this constitutes a more just result from the client's standpoint, as the client is

not deprived of what may be a firm's longstanding representation simply because one of its attorneys begins representing a municipality where the developer operates or owns property. Such a result also probably reflects the reality that any perceived advantage to the client resulting from his attorney's municipal solicitorship in a given municipality has little if any practical influence over decision makers in other municipalities. At bottom, the concerns expressed by the Court in *A & B* grow out of a realization of the more intimate relationship which can exist among attorneys and elected or appointed officials within a single municipality. By contrast, an analysis under *RPC* 1.7 does not support a *per se* bar where a firm represents a municipality as well as a private client developing property in another town.

In each case, the particular facts will determine the outcome. Situations will arise in which an actual conflict exists requiring disqualification, not only of the municipal attorney under *RPC* 1.7, but of all attorneys in the firm under *RPC* 1.10. For example, a municipal solicitor or a planning board attorney involved in a master plan review mandated by the Municipal Land Use Law may well be called upon to evaluate changes in the master plan which might have a beneficial or detrimental impact upon a client owning property in an adjoining municipality. Under those circumstances, the attorney cannot escape the conclusion that his actions may have an impact not only upon land owned by his client in the adjoining municipality, but also in the municipality where the attorney serves as municipal or planning board solicitor. Similar disqualifying circumstances can arise in the face of competing local demands for scarce water and sewer capacity resources, where decisions made by the municipality with the advice of counsel will have an impact upon the solicitor's clients who are also clients of the firm.

In summary, an analysis pursuant to the present Rules of Professional Conduct, subsequent to the deletion of the appearance of impropriety doctrine, does not support a *per se* bar along the lines of the *A & B* developer rule. Nonetheless, because *In re A & B* can be interpreted as announcing a common law rule, this committee does not view itself as possessing the authority to declare a decision of the Supreme Court to be without further applicability. The inquirer or other affected parties may petition the Court for review of this opinion and question pursuant to *R.* 1:19-8. If the developer rule were found to no longer have vitality as a matter of common law, current ethics rules dictate that while an actual *RPC* 1.7 conflict will continue to disqualify both the municipal attorney and his firm from representing a private developer in other municipalities, *RPC* 1.7 will not automatically preclude the municipal attorney and his firm from such representation under a *per se* developer rule.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4251-04T3

GERALD G. HAGGERTY and
MARY JANE HAGGERTY, KATHY LOU
COLMORGEN, KAYE ERNST, JEFFREY
M. WEINER, RUDY VENER and
GINA VENER, and DAVID PROWN,

Plaintiffs-Appellants,

v.

RED BANK BOROUGH ZONING BOARD
OF ADJUSTMENT,

Defendant-Respondent,

and

BUILDING & LAND TECHNOLOGY, a/k/a
BUILDING & LAND TECHNOLOGY INC.,

Defendant,

and

PALATIAL HOMES AT RED BANK, L.L.C.,

Defendant/Intervenor-
Respondent.

APPROVED FOR PUBLICATION

May 22, 2006

APPELLATE DIVISION

Argued March 29, 2006 - Decided

Before Judges Conley, Weissbard and Sapp-Peterson.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, L-1088-04.
William E. Meyer argued the cause for appellants.

Kevin E. Kennedy argued the cause for respondent Red Bank Borough Zoning Board of Adjustment.

Stephen E. Barcan argued the cause for respondent Palatial Homes at Red Bank (Wilentz, Goldman & Spitzer, attorneys; Mr. Barcan, of counsel and on the brief; Jessica S. Pyatt, on the brief).

The opinion of the court was delivered by

WEISSBARD, J.A.D.

Plaintiffs, landowners in the Borough of Red Bank (Borough), appeal from the dismissal of their complaint in lieu of prerogative writs challenging decisions of defendant, Red Bank Borough Zoning Board of Adjustment (Board), granting the bifurcated application of Building and Land Technology (BLT) for a "d"/density variance, and thereafter for bulk variances and site plan approval to construct condominiums and townhouses. Because of an impermissible conflict of interest on the part of the Board's presiding officer, we reverse and remand for new hearings.

BLT was the contract purchaser of real property located along Monmouth, West, and Oakland Streets in the Borough, also known as Block 42, lots 1, 2, 2.01, 3, 4, 19, and 20 (the property). Lots 1, 2, 2.01, 3, and 4 are located in the Borough's Business/Residential (BR)-1 zone; lots 19 and 20 are located in the BR-2 zone. The combined lot area is 52,511 square feet, including 39,250 square feet in the BR-1 zone and

13,261 square feet in the BR-2 zone. A variety of residential and commercial uses surround the project site including, but not limited to, the Red Bank Train Station.

On July 18, 2002, Patrick Nulle, on behalf of BLT, submitted a development application for a proposed project of two condominium buildings of sixteen units, with each unit consisting of 1680 square feet, to be constructed on lots 1, 2, 2.01, 3, and 4. The application indicated that the proposed condominiums would replace an existing gas station/car wash on the property. The application included a sworn statement dated July 16, 2002, from Frank M. Torra stating that he owned lots 1, 2, and 2.01 and that he approved and agreed to the application, and a sworn statement dated July 17, 2002, from Maureen Grimaldi stating the same as to lots 3 and 4.

On July 29, 2002, the Director of Planning and Zoning denied the development permit, noting that the applicant needed to go before the Zoning Board for a "d"/density use variance and site plan approval.

On October 25, 2002, Torra signed another statement confirming that he owned lots 19 and 20, and approved and agreed to the development application. Apparently around the same time, Nulle submitted an undated disclosure-of-ownership form stating that he was a sole proprietorship, that he held a 100% ownership interest in connection with the application, and that

he resided at 138 Bodman Place in the Borough. BLT's name did not appear on the form.

BLT subsequently reapplied to the Zoning Board for a density variance, bulk variances, and site plan approval associated with a request to construct a thirty-unit condominium complex and a five-unit townhouse development. BLT elected to bifurcate its application and, therefore, first sought to obtain the density variance.

On December 5, 2002, defendant-intervenor, Palatial Homes at Red Bank, L.L.C. (Palatial) entered into an agreement with Nulle under which BLT agreed to assign to Palatial its right to purchase the property contingent on BLT's obtaining the necessary land-use approvals for construction of thirty-five residential units.

I

A. The Density Variance

The Zoning Board held public hearings on BLT's application for a density variance, N.J.S.A. 40:55D-70d, on December 19, 2002, January 16, 2003, and February 6, 2003. Although BLT did not seek site plan approval at that point, it submitted preliminary and final site plans dated September 30, 2002 to the Board. Approximately eight individuals at the hearings expressed opposition to the application, including plaintiffs Gerald Haggerty and Kathy Colmorgen. BLT presented five

witnesses: Marta Pierson Villa, a revitalization consultant; Anthony Ercolino, a licensed architect; Thomas Santry, a licensed land surveyor; Nicholas Verderese, a traffic engineer; and Andrew Janiw, a professional planner.

At the first hearing, Board Chairman Michael DuPont recused himself, stating that he did so to avoid an appearance of conflict because he or his partner at the law firm of McKenna, DuPont, Higgins & Byrnes (McKenna DuPont) represented "one or both" of the applicants "a number of years ago." DuPont did not elaborate further. As a result of DuPont's recusal, Vice-Chairperson Lauren Nicosia, whose father, retired Judge Benedict R. Nicosia, served in an "of counsel" capacity at the same law firm, served as acting chairperson with regard to BLT's application.

Because of the grounds on which we decide this appeal, we have no need to detail the evidence presented at the several hearings. At its hearing on February 6, 2003, the Board conditionally approved BLT's application for a density variance.

On March 20, 2003, the Board adopted, by a six-to-one vote, a sixteen-page resolution memorializing its conditional approval of the density variance for a thirty-unit condominium complex and a five-unit townhome development. Among other things, the Board found that the proposed development was an appropriate use for the site, was consistent with the Borough's master plan, and

was compatible with the surrounding area. The Board expressly conditioned its approval upon BLT's obtaining appropriate site plan and bulk variance approvals, and all necessary approvals from outside agencies. No appeal was filed challenging the Zoning Board's density approval.

B. Site Plan Approval and Bulk Variances

Subsequently, BLT submitted its application to the Board for approval of its site plan and bulk variances. N.J.S.A. 40:55D-70c.[1]

BLT sought bulk variances for minimum lot area, front and side-yard setbacks, buffer areas, and parking as well as design waivers. Chairman DuPont again recused himself, stating that he formerly represented the owner of the gas station on the property in some of his business dealings. On December 11, 2003, the Board approved the application as submitted, finding that the project would have no detrimental effect on local property values or the health and welfare of the community.

On January 22, 2004, the Board adopted a thirty-seven-page resolution granting the application as presented and modified for site plan approval and bulk variances subject to certain enumerated conditions and the applicant's compliance with all

[1] The Board of Adjustment has power to deal with the site plan review where it is ancillary to an application for a "d" variance. N.J.S.A. 40:55D-60; William M. Cox, New Jersey Zoning and Land Use Administration, § 15-7 at 356 (Gann 2006).

other appropriate rules, regulations, and ordinances. The modified application called for the construction of a five-unit townhouse development consisting of one building (Phase I) and twenty-nine upscale residential units including a twenty-four-unit condominium complex consisting of two buildings (Phase II). As such, the proposed development had a lower density than that approved during the first portion of the bifurcated application hearing. BLT's application also sought to consolidate Block 42, lots 19 and 20 so as to create a proposed lot 19.01 which would contain the townhouses, and to consolidate Block 42, lots 1, 2, 2.01, 3 and 4 so as to create a proposed lot 1.01 which would contain the condominiums.

The resolution contained sixty-six findings of fact. In particular, the Board found that the application satisfied the statutory requirements of N.J.S.A. 40:55D-70c(bulk variances) and, in conjunction with noted conditions and requested design waivers, satisfied the site plan requirements of the Borough's land development ordinance. The Board also found that the project would further the objectives of the master plan to encourage growth and development near the train station and in the Monmouth Street vicinity without adverse impacts on traffic, the environment or surrounding uses.

The Board further found: that it had proper jurisdiction to hear the matter; that condominiums and townhouses were

permitted in the subject zones except for the proposed densities, and were appropriate uses; that the upscale and well-designed residential complex would appropriately complement the adjoining residential uses and not substantially impair the character of the existing area; that, subject to conditions, the bulk variances and design waivers could be granted without causing substantial detriment to the public good; that the application's benefits outweighed any of its detriments); and that approval of the application would promote various purposes of the MLUL, such as promoting "a desirable visual environment through creative development techniques."

II

On March 8, 2004, plaintiffs Gerald G. Haggerty, Mary Jane Haggerty, Kathy Lou Colmorgen, Kaye Ernst, Jeffrey M. Weiner, Rudy Vener, Gina Vener, and David Prown[2] filed a complaint in lieu of prerogative writs against the Board and BLT, challenging the Board's decision to grant site plan and variance approvals for BLT's development application. On April 5, 2004, the Board filed an answer, and on May 4, 2004, BLT filed an answer with a

[2] According to counsel for Palatial, the Haggerty plaintiffs subsequently sold their property in the Borough and moved to Florida. In addition, plaintiffs' counsel has advised, without explanation, that David Prown should be removed as a plaintiff.

counterclaim for damages. The counterclaim apparently was dismissed on a subsequent motion by BLT.

On October 7, 2004, Palatial moved to intervene as owner of the property. On June 22, 2004, Palatial had purchased Block 42, lots 1, 2, 2.01, 19 and 20 pursuant to its December 5, 2002, agreement with BLT. On August 30, 2004, Palatial purchased lots 3 and 4. On October 20, 2004, the trial judge issued an order granting Palatial leave to intervene as a defendant.

On January 7, 2005, the judge denied plaintiffs' motion to expand the record and permit discovery on alleged conflicts of interest, finding that the motion was filed out of time. Specifically, the judge noted that plaintiffs filed the motion on December 22, 2004, more than three weeks after they submitted their trial brief, and that its return date of January 7, 2005, was only four days prior to the scheduled trial. Moreover, the trial court noted that it had denied plaintiffs' initial request to expand the record on their conflicts-of-interest allegations, finding that they were too speculative, and on October 20, 2004, had advised plaintiffs that any further request must be made by formal motion. Instead, plaintiffs filed their trial brief, which violated the court's pretrial order by impermissibly relying on evidence outside of the record below. As the trial judge explained:

> It appears that [plaintiffs' attorney] is now seeking retroactively to cure this defect by filing the within notice of motion to expand the record below to include such extensive evidence.
>
> . . . .
>
> Based on the foregoing facts, the Court finds that it would be inappropriate to entertain such a motion. [Plaintiff's attorney] should not be permitted to ignore this Court's specific instructions and adopt his own procedure for expanding the record by unilaterally introducing extensive evidence in a trial brief and then seeking to justify its attachment with an untimely notice of motion.
>
> [Plaintiff's attorney] had ample time to file a proper motion to expand the record, but simply failed to do so.

At the bench trial on January 12, 2004, among plaintiffs' arguments were that: (1) BLT was a non-existent and false entity; (2) Alexis Nulle (Patrick's wife) and Palatial had undisclosed ownership interests in BLT; (3) Board members Nicosia and Murphy had conflicts of interest that required their recusal, and member Irving was too one-sided and unfair in his questions during the hearings; and (4) the Board improperly permitted BLT to bifurcate its application and approved the density variance without the requisite votes.

In a twenty-four-page opinion, filed February 24, 2005, the judge affirmed the Board's decision to approve the site plan and variances, finding that: (1) there was no adequate basis to

extend the time limitations under R. 4:69-6 to challenge the Board's approval of BLT's application for a density variance or to challenge the bifurcation of BLT's application; (2) in any event, the Board did not act arbitrarily, capriciously, and unreasonably in permitting the bifurcation; (3) the Board's four-to-two vote in favor of the site plan and bulk variances was sufficient to approve the application; and (4) there was insufficient evidence as a matter of law to establish that any Board members or the Board's attorney, had disqualifying conflicts of interest. An order dismissing the complaint with prejudice was entered on March 11, 2004.

On appeal plaintiffs argue as follows:

> POINT I
> THE DENSITY "d" VARIANCES APPROVAL CONSTITUTED AN IMPROPER USURPATION OF THE ZONING POWER RESIDING IN THE MUNICIPALITY.
> POINT II
> THE APPLICANT BLT DID NOT EXIST, IT WAS A DEVICE SOLELY TO PERPETRATE A FRAUD, HAVING NO STATUS AS A DEVELOPER OR APPLICANT, AND THE APPROVALS GRANTED TO THIS NON-EXISTENT NAME WITHOUT STATUS ARE VOID.
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> POINT III
> THE PROCESS WAS PERMEATED WITH UNDISCLOSED AND SUBSTANTIAL DISQUALIFYING CONFLICTS OF INTEREST.
>
> PALATIAL HOMES/BOARD CHAIR NICOSA [sic]
>
> NULLE-PALATIAL/BOARD MEMBER MARIE MURPHY
>
> POINT IV
> THE APPEAL ON ALL ISSUES IS TIMELY.

We agree that there was a disqualifying conflict of interest on the part of Board Vice-Chairperson Nicosia which called for her recusal. As a result of her participation in both portions of the bifurcated hearing, the entire process was tainted and must be set aside. As a result of our disposition, we have no need to address Points I and II. We deal briefly with Point IV.

III

The trial judge held that plaintiffs' complaint challenging the density variance was untimely because it was not filed within forty-five days after publication of the notice of the Board's first resolution on March 20, 2003. R. 4:69-6(a). The judge explained:

> Here, the Board adopted its memorializing resolution granting BLT's "d" variance on March 20, 2004 [sic]. Moreover, BLT published notice of the resolution on March 31, 2003. Thus, pursuant to R. 4:69-6(b)(3), plaintiffs were obligated to file their appeal by May 15, 2003. Plaintiffs, however, did not file their complaint until March 8, 2004, almost one year after notice of the Board's resolution was published. Clearly, such an untimely challenge must be dismissed pursuant to R. 4:69-6. Plaintiffs should not be permitted to slumber on their rights, especially when an applicant has in good faith relied on their statutory right to bifurcate an application.

On appeal plaintiffs argue that the density variance proceeding and the subsequent site plan and bulk variance

proceedings were so interrelated that their complaint must be deemed timely since it was filed within forty-five days of the second resolution. Although there are substantial arguments on both sides of this question, our determination concerning the disqualification issue makes it unnecessary to decide the important question thus posed. Since there must be a new hearing, we have no reason to address plaintiff's attack on the Board's decision (Point I) which the trial judge found was barred due to non-compliance with the time limits of R. 4:69-6(a).

Although the judge did not find that plaintiffs' disqualification argument was similarly time-barred, at least with respect to the first density variance hearing, and while defendants do not make that specific claim on appeal, it warrants our consideration. We conclude that the issue of a disqualifying conflict goes to the fundamental integrity of the proceedings and may be raised on appeal even though, as in this case, no separate appeal was filed at the conclusion of the first half of the bifurcated hearing process. Thus, a timely appeal at the conclusion of the entire process may raise a disqualification issue that affects the first part as well as the second. Clearly, the "interest of justice" compels such a conclusion. R. 4:69-6(c). Accordingly, we turn to plaintiffs' disqualification argument.

IV

As noted, at the outset of the first hearing on the density variance, Board Chairman DuPont recused himself, stating: "I will not be able to sit on this Board this evening, as I have or my partner has represented one of the or both of the applicants previously a number of years ago. So in deference to caution and also in the appearance of conflict, I'm stepping down. So Ms. Nicosia can fill the role here." DuPont did not provide further details and no one present inquired further. As a result, the Board's Vice-Chairperson, Lauren Nicosia, served as acting chairperson with respect to both parts of BLT's application. Nicosia's father, retired Superior Court Judge Benedict R. Nicosia, was at the time "of counsel" to the McKenna DuPont firm.

At trial and again on appeal, plaintiffs argue that Lauren Nicosia was disqualified from participating in the proceedings. The trial judge found the allegations concerning Nicosia "too remote and speculative to warrant disqualification." He explained:

> Ms. Nicosia's father, retired Judge Benedict Nicosia, simply serves in an "of counsel" capacity to the McKenna DuPont law firm. As such, the Court finds that Ms. Nicosia does not have an "indirect pecuniary interest" in BLT's application, as there is no evidence indicating that Judge Nicosia would financially benefit from the approval of BLT's application. Wyzykowski [v. Rizas,

> 132 N.J. 509, 525-26 (1993)]. Furthermore, there is no proof to substantiate any allegation that BLT's application would benefit Ms. Nicosia in a non-financial way, such as "in the case of councilman's mother being in a nursing home subject to the zoning issue." Ibid. Likewise, the Court rejects any assertion that Judge Nicosia's "of counsel" relationship with the McKenna DuPont law firm creates an "indirect personal interest" for Ms. Nicosia. Ibid.
>
> Overall, the Court finds that the circumstances of this case cannot be "reasonably interpreted to show that they had the likely capacity to tempt [Ms. Nicosia] to depart from [her] sworn public duty." Van Itallie [v. Borough of Franklin Lakes, 28 N.J. 258, 268 (1958)]. There was simply no incentive for Ms. Nicosia to compromise her duty as a municipal officer. In the end, plaintiffs' allegation that Ms. Nicosia should be disqualified because her father serves in an "of counsel" capacity to a law firm that once represented the contract purchaser of the subject property is precisely the type of suggestion of "a remote and nebulous interest" that the New Jersey Supreme Court previously warned against. See Wyzykowski, supra, 132 N.J. at 524.

We disagree.

The governing principles are well known. Under the common law, the public is entitled to have its representatives perform their duties free from any personal or pecuniary interests that might affect their judgment. Wyzykowski v. Rizas, 132 N.J. 509, 522-23 (1993); Barrett v. Union Twp. Comm., 230 N.J. Super. 195, 200 (App. Div. 1989). "This is essential if the public is to have confidence and trust in the representatives who are

required to decide public issues coming before them." Barrett, supra, 230 N.J. Super. at 200. The question is whether there is a potential for conflict, not whether the conflicting interest actually influenced the action. Wyzykowski, supra, 132 N.J. at 523; Griggs v. Borough of Princeton, 33 N.J. 207, 219 (1960); Care of Tenafly, Inc. v. Tenafly Zoning Bd. of Adj., 307 N.J. Super. 362, 370 (App. Div.), certif. denied, 154 N.J. 609 (1998).

Thus, "[a] conflict of interest arises when the public official has an interest not shared in common with the other members of the public." Wyzykowski, supra, 132 N.J. at 524; see also Barrett, supra, 230 N.J. Super. at 204 (holding councilman had disqualifying conflict -- not held by members of the public -- where his mother resided in nursing home favored by zoning amendment). All interests, however, do not possess the same capacity to tempt the public official to depart from his or her sworn duty. Barrett, supra, 230 N.J. Super. at 201. "A remote and speculative interest will not be held to disqualify the official." Ibid. (citing Van Itallie v. Borough of Franklin Lakes, 28 N.J. 258, 269 (1958)).

In Wyzykowski, the Court identified four situations that require disqualification:

> (1) "Direct pecuniary interests," when an official votes on a matter benefiting the official's own property or affording a

> direct financial 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.
>
> [Wyzykowski, supra, 132 N.J. at 525-26 (citing Michael A. Pane, Conflict of Interest: Sometimes a Confusing Maze, Part II, New Jersey Municipalities, March 1980, at 8, 9).]

Where a board member has an immediate and real conflict, it must be disclosed. See McVoy v. Bd. of Adj. of Twp. of Montclair, 213 N.J. Super. 109, 113 (App. Div. 1986) (stating that, "disclosure is necessary to be able to judge 'whether a particular interest is sufficient to disqualify' or is too 'remote and speculative'"); Marlboro Manor, Inc. v. Bd. of Comm'rs of Twp. of Montclair, 187 N.J. Super. 359, 362-63 (App. Div. 1982) (nullifying proceedings where two council members failed to disclose that they belonged to the church whose pastor appeared at a hearing to speak against the application for a liquor license). Thus, conflicts-of-interest issues are fact sensitive and depend upon the circumstances of the particular

case. See Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 58-60 (1998) (holding appearance of township attorney before zoning board did not create potential conflict where he advocated position not for his own private interest, but for the public's interest); Wyzykowski, supra, 132 N.J. at 526 (holding building official appointed to salaried positions by mayor had disqualifying interest in outcome of mayor's application).

The Local Government Ethics Law, N.J.S.A. 40A:9-22.1 to -22.5 (Ethics Law), also governs conflicts of interest. That statute provides in pertinent part:

> No local government officer or employee shall 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.
>
> [N.J.S.A. 40A:9-22.5d.]

The Ethics Law defines "local government officer" as any person "serving on a local government agency which has the authority to enact ordinances, approve development applications or grant zoning variances," N.J.S.A. 40A:9-22.3g(2), and a "local government agency" as a municipal board which performs functions in other than a purely advisory nature. N.J.S.A. 40A:9-22.3e.

The MLUL also expressly prohibits a zoning board member from acting "on any matter in which [the member] has, either directly or indirectly, any personal or financial interest." N.J.S.A. 40:55D-69. The same prohibition applies to planning board members. N.J.S.A. 40:55D-23b. See Trust Co. of N.J. v. Planning Bd. of Borough of Freehold, 244 N.J. Super. 553, 559-60 (App. Div. 1990) (holding, among other things, that N.J.S.A. 40:44D-23b prohibited board members who were an associate and partner in law firm that represented the bank seeking site plan approval from voting for ordinance declaring that banks were permitted in B-1 zone).

At the time of his voluntary recusal, DuPont stated that he or his partner had represented "one or both of the applicants" some years earlier. DuPont did not say which of his partners was being referred to nor did he provide any further details. Since BLT was the applicant and Nulle signed the application on behalf of the corporation as to which he asserted a 100% ownership interest, we assume that DuPont was referring to Nulle or BLT.[3]

[3] In its brief, Palatial states that: "Plaintiffs do not allege that Mr. DuPont's law firm represented the applicant BLT." However, at the time DuPont made his statement, there is no evidence plaintiffs would have thought that he meant anything but Nulle or BLT. If he meant something else, he should have said so.

However, at the time of trial in the Law Division, the judge was presented with additional information respecting DuPont's law firm.[4] In May 2002, Palatial had filed a development permit with the Borough of Little Silver seeking approval for a major subdivision. The application was signed by Edward J. McKenna Jr. as attorney for Palatial. McKenna is a named partner in the McKenna DuPont law firm. Thereafter, McKenna represented Palatial before the Little Silver Planning Board, representation that continued until at least January 2004. As we have noted, on December 5, 2002, shortly before the hearings in this matter commenced, BLT agreed to assign its right to purchase the properties on Monmouth Street to Palatial, contingent on BLT obtaining all the required land use approvals to construct the condominiums. Thus, throughout the proceedings before the Board, Palatial, who had a clear and distinct interest in the Red Bank proceedings, was being represented by DuPont's firm. While we do not address whether Palatial's interest should have been disclosed to the Board, since it was

[4] The trial judge permitted plaintiffs to expand the record to include documents that were attached to plaintiffs' motion to "Expand the Record/Allow Discovery." The judge denied plaintiffs' request for additional discovery.

not the "applicant," N.J.S.A. 40:55D-3, it provided an additional reason why DuPont's recusal was appropriate.[5]

The question before us is, then, whether Lauren Nicosia had a disqualifying conflict arising from her father's "of counsel" relationship with the McKenna firm. We conclude that her disqualification was required.

While no prior decision has addressed the "of counsel" relationship in this context, see Staron v. Weinstein, 305 N.J. Super. 236, 240-43 (App. Div. 1997) (discussing "of counsel" in the context of attorney malpractice), we are satisfied that a person in an "of counsel" relationship with a law firm has a sufficient stake in the financial viability of the firm as to impute to such individual any disqualification of the firm arising from client representation by partners or associates in the firm. See Restatement of the Law (Third), Restatement of the Law Governing Lawyers, § 123, cmt. c(ii) (2000) (ordinarily imputing attorney conflicts of interest to "of counsel" attorneys in the law firm). Indeed, in order to properly use the designation "of counsel," there must be a close, ongoing relationship with the firm. Ibid.; see also Michels, New Jersey Attorney Ethics, § 5:6 at 60-62, § 7:2-8 at 98-99, § 36:4-2c at

[5] Indeed, by the time of the Law Division proceedings, Palatial had, pursuant to its agreement with BLT, become sole owner of the properties in question, having closed title on June 22 and August 30, 2004.

795-96 (Gann 2005). Without doubt, Judge Nicosia was a "member of [Lauren Nicosia's] immediate family," N.J.S.A. 40A:9-22.5d, a "family member," Wyzykowski, supra, 132 N.J. at 525. It does not matter, as defendants have urged, that Ms. Nicosia is an adult living her life independent of her family. Her independent status does not sever her family ties and thereby eliminate the conflict. Contrary to the trial judge's view, the conflict was neither "remote" nor "speculative." We consider the appearance of impropriety inherent in this relationship to be "something more than a fanciful possibility." Petrick v. Planning Bd. of Jersey City, 287 N.J. Super. 325, 331 (App. Div. 1996) (quoting Aronowitz v. Planning Bd. of Lakewood, 257 N.J. Super. 347, 352 (Law Div. 1992)). Nor would it matter that Ms. Nicosia was not aware of the conflict; it is the potential for conflict that requires disqualification. Id. at 524; Gunther v. Planning Bd. of the Borough of Bay Head, 335 N.J. Super. 452, 460-61 (Law Div. 2000). Here, of course, Ms. Nicosia was on actual notice of the conflict as a result of DuPont's recusal. Nicosia was, therefore, disqualified from participating in these proceedings.

As a result of Nicosia's participation, the Board proceedings, in their entirety, are void and must be set aside. Aldom v. Borough of Roseland, 42 N.J. Super. 495, 501 (App. Div.

1956). It will not suffice to simply void Nicosia's vote.[6] "The fact that the measure had sufficient affirmative votes to pass without [her] participation does not save it from being voided." Id. at 507 (citing Pyatt v. Mayor and Council of Dunellen, 9 N.J. 548, 557 (1952)); see also Griggs v. Princeton Borough, 33 N.J. 207, 220 (1960); Szoke v. Zoning Bd. of Adj. of Monmouth Beach, 260 N.J. Super. 341, 345 (App. Div. 1992); Trust Co. of N.J., supra, 244 N.J. Super. at 559-60; Barrett, supra, 230 N.J. Super. at 202-03; Cox, supra, § 3-2 at 55-56.

As a result of our conclusion concerning Nicosia, we have no need to address plaintiffs' arguments respecting Board member Murphy. Regrettably, Nicosia's ill-advised participation in these proceedings necessitates setting them aside and remanding to the Board for entirely new hearings.[7]

Reversed.

[6] It appears that without Nicosia's vote there still would have been the necessary five votes needed for approval. N.J.S.A. 40:55D-70d.

[7] We were advised at oral argument that the composition of the Board has changed since the original hearings under review.