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2009 Ethical Considerations in Land Use

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Patricia E. Salkin

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I. Introduction

A NUMBER OF THEMES EMERGED from litigation in the last year involving allegations of unethical conduct in land use matters. The most surprising discovery, however, for a second year in a row, was the sheer number of reported cases involving allegations of unethical conduct on the part of land use attorneys.¹ Although not specifically grouped in one category for purposes of this article, discussions of attorney conduct are spread throughout the sub-topics organized below. In addition, the number of allegations of bias and malice seems to be increasing.

II. Conflicts of Interest

Exactly what constitutes a prohibited conflict of interest can be elusive because state statutes and local ordinances often provide inadequate definitions, leaving it to the courts to determine what in essence constitutes an “appearance of impropriety” or a common law conflict of interest. The recent conflicts of interest allegations discussed below center on community involvement and more specifically, involvement with a local university, familial and other personal relationships, and employment.

A. *Community Involvement*

The Montana Supreme Court ruled that a county attorney had no prohibited conflict of interest as a result of service on a board for an organization promoting sustainable development.² After serving for ten years as the elected county attorney, DePuy resigned her position and began working in the newly created part-time position as a county attorney doing civil work, including advising the Park County Commissioners, and the county planning staff on various legal issues, including land use

*Patricia E. Salkin is the Raymond & Ella Smith Distinguished Professor of Law, Associate Dean and Director of the Government Law Center at Albany Law School.

1. See generally PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING*, § 38:5 (5th ed. 2008) (overview of previously reported cases involving allegations of unethical conduct on the part of attorneys in the land use process).

2. *Park County Concerned Citizens v. DePuy*, 190 P.3d 293 (Mont. 2008).

and development issues.³ During this time she also served in a volunteer capacity as a board member of Corporation for the Northern Rockies (CNR), a non-profit organization that promotes sustainable development and protection of Montana's landscape. According to Park County Concerned Citizens (PCCC), CNR seeks to stop development of rural land.⁴ CNR had not engaged in any lobbying before the Park County Commissioners nor had it engaged in any litigation with or against Park County. PCCC sought an investigation of what it believed to be unethical conduct on the part of DePuy. After the Attorney General's office declined to pursue the matter, PCCC contacted the County Attorney's Office, which led to an investigation by the Yellowstone County Attorney's office. The investigation concluded that neither DePuy nor the Park County Commissioners had engaged in any wrongdoing. It concluded that when she resigned as County Attorney and was immediately hired as Civil County Attorney, DePuy remained employed by Park County and continued to represent the interests of the county. PCCC then filed a complaint alleging that DePuy improperly took advantage of her position as County Attorney to create a new Civil County Attorney position and then fill the position, in violation of § 2-2-105(3) of the Montana Statutes, and second, that it was unethical and in violation of § 2-2-121(5) of the state statutes for DePuy to render legal opinions on land use issues while serving on the board of CNR.⁵ The district court noted, "This lawsuit seems to have been ill-conceived,' and some of the evidence 'suggests that this is, in fact, a personal attack on Ms. DePuy filed because of suspicion and speculation, but without evidence of wrongdoing.'"⁶

In concluding that there was no unethical conduct, the Montana Supreme Court first examined Section 2-2-105(3) of the Montana Code Annotated, which provides:

A public officer or public employee may not, within 12 months following the voluntary termination of office or employment, obtain employment in which the officer or employee will take direct advantage, unavailable to others, of matters with which the officer or employee was directly involved during a term of office or during employment. These matters are rules, other than rules of general application, that the officer or employee actively helped to formulate and applications, claims, or contested cases in the consideration of which the officer or employee was an active participant.⁷

3. *Id.* at 295.

4. *Id.*

5. MONT. CODE ANN. §§ 2-2-105(3), 2-2-121(5) (2008).

6. *Park County*, 190 P.3d at 296.

7. MONT. CODE ANN. § 2-2-105(3) (2008).

The court noted that the preamble to a 1995 amendment to the statute noted that the Montana Constitution intends to “prohibit[] conflict between public duty and private interest for . . . all state and local government officers and employees.”⁸ The court reasoned that both “the Constitution and this statute are intended to prevent public employees from taking advantage of a government position to benefit themselves when they leave their prior employment.”⁹ Since PCCC did not offer any evidence to show that when DePuy was hired as Civil County Attorney she somehow gained an advantage, unavailable to others, over some matter handled by Park County or the Park County Attorney’s office, no violation occurred. Section § 2-2-121(5) of the Montana Code Annotated provides that:

A public officer or public employee may not participate in a proceeding when an organization, other than an organization or association of local government officials, of which the public officer or public employee is an officer or director is: (a) involved in a proceeding before the employing agency that is within the scope of the public officer’s or public employee’s job duties; or (b) attempting to influence a local, state, or federal proceeding in which the public officer or public employee represents the state or local government.¹⁰

The court concluded that “DePuy provided uncontradicted evidence that CNR was not, and had not been, ‘involved in a proceeding’ in Park County, and that CNR was not, and had not been, ‘attempting to influence’ a proceeding in Park County.”¹¹ Further, the court noted that PCCC did not dispute DePuy’s evidence, rather they simply argued that there is an “inherent” conflict in DePuy serving both as a County Attorney handling civil matters and acting as a board member of CNR. This argument, said the court, has no basis in the statute.¹²

B. *Personal Relationships*

The New Jersey appeals court determined that a planning board member’s personal relationship with an engineering firm principal created a prohibited conflict of interest.¹³ For the previous ten years, the chairwoman of the city planning board had lived and owned a home with the principal of the engineering firm that employed the contracted-for services of the planning board engineer. The board’s annual contract for

8. *Park County*, 190 P.3d at 297.

9. *Id.*

10. MONT. CODE ANN. § 2-2-121(5) (2008).

11. *Park County*, 190 P.3d at 297.

12. *Id.* at 297-98.

13. *Randolph v. City of Brigantine Planning Bd.*, 963 A.2d 1224 (N.J. Super. Ct. App. Div. 2009).

engineering services with the engineer acknowledged the relationship of the engineer to the firm he worked for, and allowed any member of the firm to provide engineering work for the city. Further, the principal of the engineering firm, Doran, was also the city zoning officer. Since the board was a combined board, at times it was called upon to interpret the zoning ordinance, and the chairwoman acknowledged that this presented a conflict for her.

At issue was a site plan review for a hotel. After the first round of hearings, at which the planning board engineer had provided a report and information to the board, the chairwoman recused herself at the request of the plaintiff, who alleged she had a conflict in interest in reviewing the application (although she disagreed and said she did not have a conflict). The board voted to approve the application subject to certain conditions and the plaintiff asked the court to vacate the approval due to a real or perceived conflict of interest on the part of the chairwoman.

Noting that this was a case of first impression in New Jersey because the alleged conflict did not directly implicate the applicant, but rather involved a board member and a board professional, the court reiterated that “determining whether a conflict [of interest] exists requires a case-by-case, fact-sensitive analysis.”¹⁴ The New Jersey Municipal Land Use Law provides that “[n]o member of the planning board shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest.”¹⁵ In reviewing a line of cases interpreting what constitutes a direct personal interest, the court noted, “it is not simply the existence of a conflict that may be cause to overturn an action of a public official, but also the appearance of a conflict.”¹⁶ The court further noted that “the public could perceive that chairwoman Roberts’s personal involvement with Doran could reasonably be expected to impair her objectivity and independent judgment.”¹⁷ The court stated that the public could reasonably conclude that the board engineer might discuss matters with the principal of his firm; that the chairwoman could have a personal interest in the reappointment of the board engineer since this would benefit Doran’s firm; and that, therefore, as a result of Roberts’s participation in the initial hearing on the application, the board’s proceedings must be set aside in their entirety.¹⁸

14. *Id.* at 1229.

15. N.J. STAT. ANN. § 40:55D-23b (West 2008).

16. *Randolph*, 963 A.2d at 1230.

17. *Id.* at 1233.

18. *Id.* at 1233-34.

C. *Employment*

Law firms are not immune from allegations of conflicts of interest in land use matters. In one recent case, an Ohio court determined that a law firm was not disqualified even though it had previously represented a subsidiary company on a land use matter.¹⁹ Skycasters sued Didado Electric for breach of contract in a dispute over electrical work on its satellite dish. Prior to trial, Skycasters moved to disqualify Didado's attorneys because they had helped an agent for Skycasters obtain a zoning variance to allow it to install the satellite dish. The trial court denied the motion and a jury found for Didado. Skycasters appealed, alleging, among other things, that the trial court erred in failing to disqualify Didado's lawyers for a conflict of interest.

Specifically, Skycasters alleged that Didado's attorneys represented a subsidiary of Skycasters in acquiring the zoning change to allow Didado to install the satellite dish. Skycasters argued that the law firm's work on the zoning matter allowed the attorneys to learn about Skycasters' business and the property where Didado performed its electrical work. The appeals court noted that attorney disqualification is a drastic measure to be imposed only where absolutely necessary, and that "[a] mere allegation that allowing the representation presents the possibility of a breach of confidence is . . . not enough."²⁰ A prerequisite for disqualification based on a conflict of interest arising from the representation of a former client exists where there is a substantial relationship between the subject matter of the former representation and the matter encompassed by the present representation.

In this instance, the appeals court affirmed that the trial court was correct in determining that Didado's attorneys should not be disqualified. The court held that, although the attorneys assisted the subsidiary in obtaining a zoning change for Skycasters' property, based upon the fact that both the subsidiary and Skycasters were independent companies and Skycasters' owner's relationship with the subsidiary was at arm's length, "Skycasters, therefore, failed to establish that there was a prior attorney-client relationship between it and Didado's attorneys."²¹

In another case, a Kansas appellate court held that the fact that the county counsel represented the county in a quasi-judicial proceeding to determine damages as a result of the county's vacating two un-

19. *Skycasters LLC v. J.W. Didado Elec., Inc.*, 2008 Ohio 4849 (Ohio Ct. App. 2008).

20. *Id.* at *21(citation omitted).

21. *Id.* at *22.

improved roads that provided access to a ranch, and that counsel had a long-standing relationship as the county board's legal advisor, was insufficient to find a due process violation.²² While the plaintiff argued that the fact that the attorney offered evidence at the commission hearing, cross-examined witnesses at the hearing, and then drafted the decision for the commission, which constituted a violation of his due process rights, the court found no evidence to suggest to that the attorney's action in drafting the board's findings and order had actually affected the commission's decision.

Although the plaintiff asserted that the attorney's "dual role" had "created a probability of actual bias and impartiality on the part of the board that is simply too high to be constitutionally tolerable," the court noted that the plaintiff conceded that the attorney "did not conduct himself in a manner to cause such bias to occur."²³ The court found no evidence in the record to suggest that the attorney's actions created an appearance of impropriety. In fact, commissioners testified that the attorney did not influence their decision. Lastly, the court noted that the plaintiff never requested that the attorney withdraw from the proceedings, nor did he request that the commission retain separate counsel. The court concluded, "[w]ithout evidence that an attorney's action in representing a board at a quasi-judicial hearing as well as advising the Commission has actually affected the Commission's decision, we will not find a due process violation."²⁴

D. *Disclosure of Conflicts of Interest*

The Massachusetts Land Court concluded that the failure to disclose potential conflicts of interest, when such conflicts could not reasonably be seen as influential, is not sufficient grounds to invalidate the adjudication of a vote upholding the decision of a building inspector.²⁵ The vote in question was the unanimous upholding of a decision by the Merrimac building inspector, with two of the four votes coming from board members who had family members living in homes owned by the defendant. The court determined that the connections were not such that the affirmation of the vote by the zoning board should be invalidated.²⁶

22. *Davenport Pastures, LP v. Morris County Bd. of County Comm'rs*, 194 P.3d 1201 (Kan. Ct. App. 2008).

23. *Id.* at 1205-06.

24. *Id.* at 1207.

25. *Merrimac Planning Bd. v. Moran*, Nos. 342752 (CWT), 342769 (CWT), 2009 WL 191840 (Mass. Land Ct. Jan. 28, 2009).

26. *Id.*

The building inspector's decision not to require a special use permit or site plan review for a demolition and construction on a parcel of property was challenged by the planning board, and it was subsequently upheld by the zoning board following a public hearing.

The planning board then sought to have the decision annulled on the grounds that two of the four members of the zoning board had conflicts of interest that they failed to disclose prior to the vote, and they failed to recuse themselves. Specifically, one of the board members was the father of a woman who rented an apartment owned by the proposed developer. The other board member personally resided on property owned by the proposed developer. The Massachusetts Land Court disagreed, noting that the allegation of a conflict on the part of the father of a tenant was "fairly attenuated" and insufficient to show that the board member was improperly influenced.²⁷ With respect to the allegation that a second board member and the proposed development share a residential address, the court determined that a reasonable person would not conclude that this influenced the board member.²⁸ However, even if it did, the connection was not sufficient to justify overturning the vote.

E. Siting of Alternative Energy Leads to Ethics Allegations

Following alleged corruption in upstate New York between wind energy companies and local government officials²⁹ that included allegations of conflicts of interest and improper influence surfacing in about a dozen counties,³⁰ the New York Attorney General commenced an investigation to determine "whether wind companies improperly influenced local officials to get permission to build wind towers, as well as whether different companies colluded to divide up territory and avoid bidding against one another for the same land."³¹ In launching the investigation, the Attorney General stated,

The use of wind power, like all renewable energy sources, should be encouraged to help clean our air and end our reliance on fossil fuels. However, public integrity remains a top priority of my office and if dirty tricks are used to facilitate even clean-energy projects, my office will put a stop to it.³²

27. *Id.* at *2.

28. *Id.* at *3.

29. Nicholas Confessore, *In Rural New York, Windmills Can Bring Whiff of Corruption*, N.Y. TIMES, Aug. 17, 2008, at A1.

30. *Id.*

31. Confessore, *supra* note 29.

32. *NY Attorney General Launches Investigation of Potential Unethical and Illegal Dealings Between Wind Power Companies and Municipalities* (July 17, 2008), <http://>

As a result of the Attorney General's investigation, his office developed a voluntary code of ethics for wind farm developers.³³

Recently, an appellate court dismissed a petition calling for removal of a town legislator that alleged that the legislator concealed a conflict of interest when he voted to approve a wind energy facility because the project would include a turbine on his property, finding that the petitioner failed to prove the existence of an actual conflict of interest.³⁴ In a second case, following the condemnation of a portion of the petitioners' property by the Town Board to create easements to enable the placement of underground electricity lines for a wind farm project, the petitioners challenged the action alleging that the Town Supervisor, who cast the deciding vote on both the resolution commencing the condemnation proceedings and the resolution approving the condemnation had a conflict of interest that required recusal.³⁵ The court, however, said that since the appeal was made pursuant to the State Eminent Domain Procedure Law³⁶ their review was:

limited to whether the proceeding was in conformity with constitutional requirements, whether the proposed acquisition is within the statutory jurisdiction or authority of the condemnor, whether the condemnor's determination and findings were made in accordance with the procedures set forth in EDPL article 2 and ECL article 8, and whether a proposed [public] use, benefit or purpose will be serviced by the acquisition.³⁷

The court determined that conflicts of interest allegations should be raised in a proceeding pursuant to CPLR Article 78, and that the EDPL is not the proper procedural vehicle to resolve that allegation.³⁸ The court also concluded that the petitioners failed to meet their burden of establishing that the Town Board's determination was "without foundation and baseless," since the board findings stated that the condemnation for the purpose of creating easements would, "create jobs, provide infrastructure, and possibly stimulate new private sector economic

lawoftheland.wordpress.com/2008/07/17/ny-attorney-general-launches-investigation-of-potential-unethical-and-illegal-dealings-between-wind-power-companies-and-municipalities.

33. See generally Patty Salkin, *New Code of Ethics for Wind Energy Companies Doing Business in New York: A Back-Door Approach to Regulating Municipal Ethics*, 23 MUN. LAW. 13 (2009); Patty Salkin, *Wind Blows in New Code of Ethics for Companies Doing Business in New York State*, 20-2 ENVTL. L. IN N.Y. 1 (2009).

34. *Hedman v. Town Bd. of Howard*, 867 N.Y.S.2d 634 (N.Y. App. Div. 2008).

35. *Dudley v. Town Bd. of Prattsburgh*, 872 N.Y.S.2d 614 (N.Y. App. Div. 2009).

36. N.Y. Em. Dom. Proc. Law § 207(c) (Consol. 2009).

37. *Dudley*, 872 N.Y.S.2d at 615 (citing *In re Pfohl v. Vill. of Sylvan Beach*, 26 A.D.3d 820 (2006)).

38. *Id.*

development.”³⁹ These, said the court, demonstrate the requisite public use or public benefit.

III. Bias, Prejudice and Bad Faith

A. *Malicious Action on the Part of Public Official*

The Sixth Circuit Court of Appeals found that a mayor acted with malicious intent and violated substantive due process in his efforts to thwart a zoning permit.⁴⁰ Joseph Dorr purchased a home next to Larry Salisbury, who was later elected mayor of the city of Ecorse. Dorr’s home was a 90-year-old building in need of repair and was considered a legal nonconforming use. He obtained approvals and permits from the city to make significant repairs and improvements to bring the home up to code. Following completion of the repairs, Dorr received a certificate of occupancy from the city and also received a beautification award from a local civic association in recognition of the considerable work he did on the dwelling. Unfortunately, from the beginning, Dorr and Salisbury had a contentious relationship, Salisbury having sued Dorr for alleged zoning violations. The court dismissed the lawsuit as frivolous and ordered Salisbury to pay actual damages and expenses to Dorr, including attorneys’ fees.

Dorr subsequently applied for and received a permit to construct a garage extension, and obtained approval from the city on his final garage inspection. Dorr decided to sell the home, and entered into a purchase agreement. Pursuant to city ordinances, he was required to obtain a new certificate of occupancy and undergo standard building code inspections. Around this time, Salisbury was elected mayor. Despite having passed all of the necessary inspections, Dorr was denied a certificate of occupancy both administratively and from the zoning board of appeals. Although Dorr then obtained a court order compelling the city to issue the certificate of occupancy, the city still refused to issue the certificate, precluding Dorr from selling his home.

Dorr sued the city and Salisbury, in both his official and individual capacity, alleging a violation of his substantive due process rights by unlawfully denying him a certificate of occupancy which prevented him from selling his property. Following a jury finding that Dorr’s due pro-

39. *Id.*

40. Dorr v. City of Ecorse, No. 07-1604, 2008 WL 5397760 (6th Cir. Dec. 29, 2008).

cess rights were violated, Dorr was awarded compensatory and punitive damages.⁴¹ The city and Salisbury appealed.

In upholding the decision of the federal district court,⁴² the Sixth Circuit found that Dorr had a vested property interest in the certificate of occupancy.⁴³ The court noted Dorr had a valid building permit and in reliance thereon he completed substantive work on the property which passed all relevant building code inspections.⁴⁴

Dorr met the required showing for Mayor Salisbury to be held liable under section 1983 by showing that after Salisbury was elected, he retaliated against building inspectors who had granted permits to Dorr. Further, Dorr proved that Salisbury knew the reasons being used by the building department to withhold the certificate of occupancy were the same ones deemed frivolous and intended to harass Dorr in Salisbury's earlier lawsuit against Dorr. The court found sufficient evidence "to establish that Salisbury acted under color of state law," and that "it was clearly foreseeable that Dorr would suffer damages as a result of City and Salisbury's refusal to issue the certificate of occupancy."⁴⁵

With respect to punitive damages, the court held that there was sufficient evidence presented to the jury from which they "could infer malicious intent."⁴⁶ Specifically, "Dorr presented evidence that Salisbury terminated inspectors who approved permits for Dorr, and ended City's contract with firms that resisted Salisbury's new policy of strict enforcement."⁴⁷ The court also noted that "Salisbury testified that he was [] aware that City's building department was using the same grounds to deny Dorr a certificate of occupancy that the [state appellate court had] held were frivolous and brought to 'injure or harass' Dorr."⁴⁸ Lastly, the court upheld the award of attorneys' fees as reasonable.⁴⁹

B. *Allegation of Judicial Bias*

A Utah appeals court determined that a judge was not required to recuse himself on a boundary dispute matter where he participated in a

41. *Id.*

42. Dorr v. City of Ecorse, No. 05-73074, 2007 WL 1308684, at *1 (E.D. Mich. May 3, 2007).

43. Dorr v. City of Ecorse, No. 07-1604, 2008 WL 5397760 (6th Cir. Dec. 29, 2008).

44. *Id.* at **3-4.

45. *Id.* at *5.

46. *Id.* at *6.

47. *Id.*

48. Dorr v. City of Ecorse, No. 07-1604, 2008 WL 5397760, at *6 (6th Cir. Dec. 29, 2008).

49. *Id.* at *7.

rezoning request of the subject property seven years earlier as a planning commissioner.⁵⁰ On the first day of a trial to resolve a boundary dispute, the presiding judge informed the parties that when he was the county attorney he had been “‘consulted about a boundary line issue’ related to the” property of one of the litigants, and he stated “‘that he had ‘no recollection with whom [he had] talked.’”⁵¹ He also disclosed that seven years prior to his appointment to the bench, the judge had served as a member of the city planning commission where he presided as acting chair over a request “to change the zoning of a portion of [one of the litigant’s property] from agricultural to residential.”⁵² At the time, the requested “zoning change was unopposed and the seven-member planning commission approved the change unanimously.”⁵³ Following this disclosure, “[b]oth parties stated . . . that they ‘had no concerns about a possible conflict of interest.’”⁵⁴

After the judge ruled on the matter, however, the non-prevailing party claimed that the judge should have recused himself because of his involvement with the zoning issue.⁵⁵ The Utah appellate court noted that while judges should recuse themselves in any proceeding where impartiality may be reasonably questioned, where there is disclosure “the parties may waive disqualification” upon the consent of all parties.⁵⁶ The court was not persuaded that the judge’s involvement in a unanimous zoning matter (decided in ten minutes nearly a decade earlier) “could have provided him with ‘personal knowledge of disputed evidentiary facts concerning the [trial at issue].’”⁵⁷ Further, noted the court, “both parties waived the disqualification” of the judge after his disclosure statement.⁵⁸

C. Allegation that Board Member May Have Been Predisposed to Act Does Not Equate to Bias

In a controversial action involving the operation of a quarry and a rock crusher, a citizen’s group challenging the planning board’s actions alleged that the board chairman was biased in that he “was predisposed

50. *Lunt v. Lance*, 186 P.3d 978, 984 (Utah Ct. App. 2008).

51. *Id.* at 981.

52. *Id.* at 983-84.

53. *Id.* at 982.

54. *Id.* at 981.

55. *Lunt*, 186 P.3d at 983.

56. *Id.*

57. *Id.* (quoting UTAH CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(a) (2008)).

58. *Id.* at 984.

to approving [the quarry's] application prior to hearing evidence in the case."⁵⁹ In support of this claim, the group pointed out that "the chairman wrote a letter to the local newspaper on an unrelated matter" prior to the hearings in the present case, where he expressed "disdain for the land use ethic of people 'from away.'"⁶⁰ In addition, immediately following the first public hearing on the matter, "the chairman allegedly stated" to the former board chair that this particular project "would be good for the landowner who signed the lease [with the quarry] and that he should have what he signed on for with [the quarry]."⁶¹ Further, a local "resident reported hearing the chairman" talking about the application and "trying to engage others in conversation about it" at a local store.⁶² After the board approved the application, "the chairman stated in an interview with the local newspaper that he believed [the citizen's group] was interfering with the [planning] process . . . and that the Town needed the development."⁶³

The Supreme Judicial Court of Maine concluded that although it was clear that the chairman did personally support the application, the evidence presented "falls short of proving that his conduct at the meetings was biased or that he participated in them from a standpoint of predisposition."⁶⁴ The court looked to the "extensive Planning Board transcripts" that demonstrated that over the sixteen months that the board chairman presided over this matter, he refereed a highly contentious process and "moved the process forward while following the presentations, questioning witnesses, and fairly discussing the evidence."⁶⁵ Lastly, the court noted that while the chairman's statements to the newspaper "may have been of sufficient magnitude to warrant his recusal from future deliberations, they did not demonstrate sufficient bias to taint the prior proceedings."⁶⁶

D. *Allegation of Gender Bias*

In a federal civil rights suit alleging both a substantive due process claim and a gender-based equal protection claim, the property owner alleged that her constitutional rights were violated when her property

59. *Lane Constr. Corp. v. Town of Washington*, 942 A.2d 1202, 1211 (Me. 2008).

60. *Id.* at 1211 n.6.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Lane Constr. Corp.*, 942 A.2d at 1211.

65. *Id.*

66. *Id.*

was excluded from a new mixed-use development zone in 2003 because of her gender.⁶⁷ When the plaintiff purchased her property in 1994, the property was, and still is, zoned as residential.⁶⁸ While the city was considering the new zoning area, as part of the process it prepared several maps for discussion, and although the plaintiff's property was included in the initial maps, it was excluded from the final rezoning.⁶⁹

As to the substantive due process claim, the federal district court for the district of Connecticut determined that the plaintiff could not establish that she had a property interest in the rezoning necessary to satisfy the first prong of a substantive due process claim.⁷⁰ The mere inclusion of property on a proposed map does not give a party a property interest in having their property rezoned. The court noted that the maps even contained a written notation "they were not final and their advisory nature was reiterated during at least one of the public hearings."⁷¹ Further, "under state law, the board has complete discretion [] to accept or reject the proposed map[] as well as [the plaintiff's] request[] that her property be included in the [development] zone."⁷² Lastly, the court noted that under Connecticut law, master plans, such as the one at issue here, "are 'merely advisory' and are not binding on a zoning commission in its later adoption of specific zoning regulations."⁷³ Therefore, with no entitlement to the inclusion of her property in the rezoning, the plaintiff's substantive due process claim fails.

As to the gender-based equal protection claim, the plaintiff was not able to demonstrate "that she suffered purposeful or intentional discrimination by the Board on the basis of her gender."⁷⁴ There was "no evidence of any gender-based comments" by a board member, only the allegations that the three other properties included in the rezoned area were owned by men and that there was "no rational reason why those three properties were included in the [] zone and [why the plaintiff's] was not."⁷⁵ The court noted that there were legitimate reasons for the board's decision not to include the plaintiff's property in the new zone, including the fact that her request for inclusion was "met with loud opposition from [] her

67. *Dutko v. Lofthouse*, 549 F. Supp. 2d 187, 188-89 (D. Conn. 2008).

68. *Id.* at 189.

69. *Id.* at 190.

70. *Id.*

71. *Id.*

72. *Dutko*, 549 F. Supp. 2d at 190.

73. *Id.*

74. *Id.* at 191.

75. *Id.*

neighbors, most of whom signed a petition protesting” the designation of her property as part of the new district.⁷⁶ Both of her adjacent neighbors opposed a change in the zoning for their properties and for the plaintiffs.⁷⁷ The court also noted that the owners of the three properties that were rezoned did not request the board to rezone their land.⁷⁸ Ultimately, the court concluded that the fact that the plaintiff is a woman and that the “three properties she uses as comparators are owned by men” is not, alone, “sufficient to permit a reasonable jury to find that the Board engaged in gender discrimination.”⁷⁹

E. *Depositions Cannot Be Taken to Prove Prejudice*

Sometimes allegations of unethical conduct in land use decision making relate to alleged improper motivation on the part of board members. Where the motivation is not specifically verbalized on the record, parties may have a difficult, if not impossible, time proving the allegation. Such was the situation recently in California where an applicant wanted to depose members of a commission, as well as staff, to prove prejudice.⁸⁰ A California district appeals court held that “a disappointed applicant to a local agency formation commission” (LAFco) could not “take the depositions of the” commission or the commission’s executive officer to learn what information outside of the record the commissioners either “had when they denied the application,” or “needed to approve the application.”⁸¹ The court ruled that the depositions were not permitted for two reasons.⁸²

First, the extra-record evidence that the applicant wanted to obtain in the depositions was not admissible anyway. The action involved “a quasi-legislative administrative decision” by the commission.⁸³ A mandamus proceeding that challenges a quasi-legislative administrative decision depends upon whether the agency has engaged in “prejudicial abuse of discretion.”⁸⁴ Such abuse of discretion exists where the court finds that the agency’s “decision is not supported by substantial evidence

76. *Id.* at 192.

77. *Dutko v. Lofthouse*, 549 F. Supp. 2d at 192.

78. *Id.*

79. *Id.*

80. *San Joaquin County Local Agency Formation Comm’n v. Superior Court*, 76 Cal. Rptr. 3d 93 (Cal. Ct. App. 2008).

81. *Id.* at 96-97.

82. *Id.* at 96.

83. *Id.*

84. *Id.* at 98.

in light of the whole [administrative] record.”⁸⁵ Therefore, because judicial review “is limited to the administrative record,” the extra-record evidence sought by the applicant in the depositions was not admissible.⁸⁶

The applicant then tried, unsuccessfully, to shoe-horn the case into an exception to the “no extra-record evidence” rule.⁸⁷ Extra-record evidence is allowed in the rare situation where “(1) the evidence [] existed *before* the agency made its decision, and (2) it was not possible in the exercise of reasonable diligence” for the party to have presented “this evidence to the agency *before* the decision was made.”⁸⁸ However, the applicant in this case failed to satisfy that criteria. The applicant failed to convince the court that the commissioners applied some “secret standards” that the applicant was not aware of during the administrative proceedings.⁸⁹ The court explained: “[P]ermitt[ing] disappointed applicants to inquire as what further showing was necessary would result in unending cases and impede upon the separation of powers and the deference accorded quasi-legislative decisions.”⁹⁰

Second, the depositions that the applicant wanted to conduct would have violated the “deliberative process privilege.”⁹¹ Under that privilege, “senior officials of all three branches of government enjoy a qualified, limited privilege not to disclose or to be examined” about 1) “the mental processes by which” they reached a decision, and 2) “the substance of . . . deliberations . . . reflecting advice, opinions, and recommendations by which” they form government policy.⁹² The concept is that an agency’s “decision-making process” should not have to be exposed.⁹³

IV. Attorney Failure to Report

The Nebraska Supreme Court sent a serious reminder to land use lawyers in January when it reiterated that attorneys can be responsible for

85. *San Joaquin County Local Agency Formation Comm'n*, 76 Cal. Rptr. 3d at 100 (quoting CAL. GOV'T CODE § 56107(c) (Deering 2008)).

86. *Id.*

87. *Id.*

88. *Id.* (quoting *Western States Petroleum Ass'n v. Superior Court*, 888 P.2d 1268, 1278 (Cal. 1995)).

89. *Id.* at 101.

90. *San Joaquin County Local Agency Formation Comm'n*, 76 Cal. Rptr. 3d at 101-02.

91. *Id.* at 96.

92. *Id.* at 102 (quoting *Regents of Univ. of Cal. Superior Court*, 976 P.2d 808, 827 (Cal. 1999), *superseded on other grounds as recognized in Shapiro v. San Diego City Council*, 117 Cal. Rptr. 2d 631, 639 (Cal. Ct. App. 2002)).

93. *Id.* at 102-03.

client felonies when failing to report.⁹⁴ In this case, attorney Boose was licensed in Florida and Nebraska, and “[h]is practice in Florida focuse[d] on land use and zoning laws.”⁹⁵ “He regularly appeared before the Palm Beach County Board of County Commissioners in Florida, seeking approval of land use, zoning, and other real-estate-related matters.”⁹⁶

Attorney Boose’s problems stemmed from his representation of a Palm Beach County Board of County Commissioner’s member, who he represented in a real estate transaction. Boose assisted this commissioner with the purchase of a 150-acre tract of land in an area known as Nine Gems. Subsequent to the purchase of the property, the public official used his position “to pursue the purchase” of the land he had just bought “by the South Florida Water Management District,” but “[h]e did not disclose that he had a financial interest in the land.”⁹⁷ “The district ultimately purchased” the land.⁹⁸

[B]efore the closing on the sale, [attorney] Boose became aware that [his client] misused his public position to advance and leverage the sale of [the property]. But Boose did not make [his client’s] self-dealing known to the authorities. The government later charged Boose with having knowledge . . . of a felony and failing to report it, in violation of 18 U.S.C. § 4.⁹⁹

Boose pleaded guilty, was sentenced to twenty-four months in prison and fined \$25,000 and placed on one year of supervised release.¹⁰⁰ He “also paid more than \$400,000 in restitution.”¹⁰¹ As a result, the Florida Supreme Court “suspended Boose from the practice of law for 3 years” finding that he violated two rules of conduct: “(1) committing an act that is unlawful or contrary to honesty and justice and (2) committing a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer.”¹⁰² He was not disbarred because the referee’s report “found that [he] had not been previously disciplined; he had sought interim rehabilitation and shown remorse; . . . [a] criminal sentence[] had been imposed; and the record demonstrated abundant evidence of [his] good character and reputation.”¹⁰³ Because Boose was

94. State *ex rel.* Counsel for Discipline of the Neb. Supreme Court v. Boose, 759 N.W.2d 110 (Neb. 2009) (per curiam).

95. *Id.* at 111.

96. *Id.*

97. *Id.* at 112.

98. *Id.*

99. *Boose*, 759 N.W.2d at 112.

100. *Id.*

101. *Id.*

102. *Id.* at 112.

103. *Id.*

also admitted in Nebraska, the Court entered an order of reciprocal discipline.¹⁰⁴

V. Conclusion

Ethics education remains the best proactive measure to ensure that both attorneys and their clients in the land development process steer clear of unintended land mines with respect to allegations and potential findings of unethical conduct in the land use decision-making process.

104. *Boose*, 759 N.W.2d at 113.

