



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE STATE PUBLIC INTEGRITY)	
COMMISSION,)	No. 515, 2012
)	
Appellee-below/Appellant,)	On appeal from the
)	Superior Court of the
v.)	State of Delaware in and
)	for Sussex County
DIANE HANSON,)	
)	C.A. No. 11A-06-001 (ESB)
Appellant-below/Appellee.)	

**ANSWERING BRIEF ON APPEAL
OF APPELLEE DIANE HANSON**

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NATURE AND STAGE OF THE PROCEEDINGS

On June 10, 2011, appellant-below/appellee Diane Hanson, then a Commissioner and now Mayor of Dewey Beach, filed an action in the Superior Court seeking judicial review of an administrative decision of appellee-below/appellant the Delaware Public Integrity Commission ("PIC").

On August 30, 2012, the Superior Court issues a letter opinion reversing PIC's decision.

On September 19, 2012, PIC filed a Notice of Appeal to this Court. PIC filed its opening brief on appeal on January 4, 2012, and a corrected brief on January 11, 2013. On February 11, 2013, this Court entered an Order denying Hanson's Motion to Affirm.

This is Mayor Hanson's answering brief.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court thoroughly reviewed the record to determine whether PIC's decision that Hanson had a conflict of interest as defined by 29 Del. C. §5805 was supported by substantial evidence and contained any errors of law. The Superior Court reversed PIC's decision, finding there was no substantial evidence and there were legal errors. PIC's argument is based on a few lines at the end of the opinion, divorced from context and disregarding the extensive analysis that preceded those few lines. The decision of the Superior Court was not based on Hanson's motive.

2. Denied. The Superior Court did not abuse its discretion in addressing issues not raised by the parties. As the Superior Court reversed on the ground of a lack of substantial evidence, any findings unrelated thereto were, at most, harmless error. Other findings were properly raised in the briefing below. In any event, in public law cases courts are bound only by the record presented, not by the arguments of the parties.

3. Denied. After an extensive review and analysis of the record, the Superior Court properly concluded that PIC's decision was not supported by substantial evidence.

STATEMENT OF FACTS

A plan by Dewey Beach Enterprises ("DBE") to develop a property identified as "Ruddertowne" was voted down by the Dewey Beach Planning & Zoning Commission on October 19, 2007, and by the town commissioners on November 10, 2007.

DBE then submitted an application for a building permit and a site plan for an expansion of Ruddertowne in early November, 2007. Dewey Beach told DBE that its alternative plan did not comply with a provision of Dewey Beach's zoning code requiring a 3,600 square-foot lot for each residential unit. DBE appealed this decision to the Board of Adjustment on January 23, 2008. The Board of Adjustment denied DBE's appeal, reasoning that DBE's site plan did not meet the minimum lot requirement.

DBE filed an appeal of that decision with the Superior Court, which affirmed the Board of Adjustment's decision. DBE then filed an appeal of the Superior Court's decision with this Court, which reversed the Superior Court's decision and ruled in favor of DBE, concluding that the minimum lot requirement was ambiguous. *Dewey Beach Enterprises, Inc. v. Bd. of Adjustment of the Town of Dewey Beach*, 2009 WL 2365676 (Del. Super. July 30, 2009), *rev'd*, 1 A.3d 305 (Del.2010).

While DBE's site plan was working its way through the zoning and appeal process, DBE submitted building permit applications to Dewey Beach for Phases II and III of its Concept Plan on April 4, 2008. DBE also repeatedly asked Dewey Beach to either process its building permit applications, or place them before the Board of Adjustment. Dewey Beach did not comply with DBE's requests.

Apparent dissatisfied with how its development plans were being treated, DBE and Ruddertowne Redevelopment, Inc. ("RRI") filed a Complaint against Dewey Beach, Dell Tush, then-Mayor David King, Hanson and Richard Hanewinckel in the U.S. District Court for the District of Delaware on July 10, 2009, styled *Dewey Beach Enterprises, Inc. v. Town of Dewey Beach*, C.A. No. 09-507-GMS (the "Federal Action"). DBE and RRI alleged violations of various constitutional rights. They also alleged that Hanson, Wilson, and Tush should have recused themselves from the Ruddertowne matters because each owned rental properties in Dewey Beach that would be adversely affected should the Concept Plan be approved and built. They further alleged that these individuals wrongfully worked to defeat the proposed ordinance because of these personal interests.

Dewey Beach filed a motion to dismiss the Federal Action with respect to all counts. Tush, King, Hanson, and Hanewinckel (collectively, the "Individual Defendants") also filed a motion to dismiss.

Dewey Beach's motion to dismiss set forth nine grounds for dismissal of the Complaint. The District Court granted Dewey Beach's motion to dismiss with respect to two counts, and denied its motion to dismiss in all other respects. *Dewey Beach Enterprises, Inc. v. Town of Dewey Beach*, 2010 WL 3023395 (D. Del. July 30, 2010).

The Individual Defendants' motion to dismiss set forth three grounds for dismissal of the Complaint. Specifically, they argued that they were (1) immune from suit under the *Noerr-Pennington* doctrine, (2) entitled to legislative immunity for all actions involving zoning ordinances, and (3) entitled to qualified immunity for all non-legislative actions. The District Court rejected the Individual Defendants' *Noerr-Pennington*

doctrine argument and concluded that the doctrines of legislative immunity and qualified immunity could not be determined on a motion to dismiss, but had to wait for factual development. *Id.*

Although it was hardly mentioned in the District Court's decision, an issue in the consideration of DBE's Concept Plan and the Federal Action was whether the maximum building height for structures in the RB-1 zoning district was 35 feet. Dewey Beach had adopted its most recent land use plan on June 29, 2007. The 2007 Comprehensive Land Use Plan provided that in the RB-1 zoning district "Relaxed bulk standards" were available for contiguous tracts of land consisting of at least 80,000 square feet. Ruddertown was in the RB-1 zoning district. DBE believed that the maximum building height for the proposed structure in its Concept Plan was also relaxed. However, not everyone shared DBE's view.

In order to resolve the issue, Dewey Beach introduced the Clarifying Ordinance, which stated, among other things, that "'Relaxed bulk standards' for contiguous tracts consisting of at least 80,000 square feet, as that phrase is used in the 2007 Comprehensive Plan's description of the RB-1 zoning district, does not permit any height increase beyond 35 feet, which is (and has been) the maximum height in all zoning classifications in Dewey Beach." (A-8-9).

Hanson and two other town commissioners voted in favor of the Clarifying Ordinance on September 11, 2010, causing it to pass.

Joseph W. Nelson, a Dewey Beach property owner and resident of Milton, Delaware, filed an unsworn five-page complaint against Hanson with PIC on October 1, 2010. His complaint focused on DBE's efforts to re-develop Ruddertowne and the Clarifying Ordinance. Nelson alleged that

Hanson violated the Code of Conduct when she voted in favor of the Clarifying Ordinance by (1) intentionally withholding information so that she could mislead the public regarding passage of the Clarifying Ordinance, (2) failing to reveal obvious conflicts of interest, and (3) taking actions in violation of the public trust that reflected unfavorably upon the State and its government. (A-3-20).

PIC held a hearing on March 15, 2011. PIC did not offer any witnesses. Hanson testified in her own behalf, and presented the testimony of Glenn C. Mandalas, Esq., who represented Dewey Beach in the Federal Action, and Max B. Walton, Esq., who represented Hanson and the other individual defendants in the Federal Action. (A-72-150).

PIC issued an undated written decision finding that Hanson had violated 29 Del. C. §5805. (A-151-78). Hanson filed an appeal to the Superior Court, which reversed the decision of PIC.

ARGUMENT

I. THE PIC DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. QUESTION PRESENTED.

Is PIC's conclusion that Hanson had an actual conflict of interest as defined by 29 Del. C. §5805 unjustified due to the lack of substantial evidence? This issue was explicitly raised by Hanson in briefing before the Superior Court (A-218-224, 276-90) and decided by the Superior Court.

B. STANDARD OF REVIEW.

On appeal from a decision of an administrative agency, this Court reviews the agency's decision directly to determine whether it is supported by substantial evidence and is free from legal error. *Sweeney v. Del. Dept. of Transportation*, 55 A.3d 337, 341 (Del. 2012).¹ Whether substantial evidence exists is an issue of law for the Court's independent determination. *Gaveck v. Arizona State Bd. of Podiatry Examiners*, 215 P.3d 1114, 1118 (Ariz. App. Div. 1 2009). Issues of law, and applications of law to undisputed facts, are reviewed *de novo*. *Blinder, Robinson & Co., Inc. v. Bruton*, 552 A.2d 466, 470 (Del. 1989).

In determining whether there is substantial evidence in the record, courts are obliged to guard against an agency drawing inferences that are arbitrary in relation to the facts found. *U.S. v. Int'l Brotherhood of Teamsters*, 170 F.3d 136, 143 (2nd Cir. 1999); *Midtec Paper Co. v. U.S.*, 857 F.2d 1487, 1498 (D.D.C. 1988). For inferences to be reasonable, they must be based on probabilities rather than possibilities, and must rise

¹ Although PIC made no reference to the applicable legal standard in its decision, under its own rules the prosecutor had the burden of establishing a conflict of interest by clear and convincing evidence. *Hanson*, WL Op. at *4 (citing PIC Rule IV(k)).

above the level of conjecture and speculation. *Alholm v. Wareham*, 358 N.E.2d 788, 792 (Mass. 1976); *Kramer v. Weedhopper of Utah, Inc.*, 490 N.E.2d 104, 107 (Ill. App. 1986); *Pawlowski v. Delta Sigma Phi Fraternity, Inc.*, 35 A.2d 410, 415 (Conn. Super. 2010), *aff'd*, 35 A.2d 1081 (Conn. 2012).

The "substantial evidence" test also is not met by evidence which gives equal support to conflicting inferences. *Torrington Co. v. N.L.R.B.*, 506 F.2d 1042, 1047 (4th Cir. 1974); *Sawkow v. I.N.S.*, 314 F.2d 34, 38 (3rd Cir. 1963).

When an agency bases its decision on unreasonable inferences and conclusions, the Court owes the agency's decision no deference. *Bereano v. State Ethics Comm'n*, 944 A.2d 538, 561 (Md. 2008).

C. MERITS OF THE ARGUMENT.

1. Conflicts of Interest Law.

(1) No state employee, state officer or honorary state official may participate on behalf of the State in the review or disposition of any matter pending before the State in which the state employee, state officer or honorary state official has a personal or private interest, provided, that upon request from any person with official responsibility with respect to the matter, any such person who has such a personal or private interest may nevertheless respond to questions concerning any such matter. A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter.

(2) A person has an interest which tends to impair the person's independence of judgment in the performance of the person's duties with respect to any matter when:

a. Any action or inaction with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons; or

b. The person or a close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise.

29 Del. C. §5805.

Section 5805(2) defines a conflict of interest as existing when an action "would" result in a financial benefit or detriment, not when it "might" result in a financial benefit or detriment.² For a conflict of interest to exist, the conflict must be concrete, direct and immediate. A remote or speculative conflict is insufficient. *Bluffs Development Co., Inc. v. Board of Adjustment of Pottawattamie County, Iowa*, 499 N.W.2d 12, 15 (Iowa 1993); *Haggerty v. Red Bank Borough Zoning Bd. of Adjustment*, 897 A.2d 1094, 1101 (N.J. Super. A.D. 2006); *State ex rel. Thomson v. State Bd. of Parole*, 342 A.2d 634, 639 (N.H. 1975).

As demonstrated below, the Superior Court correctly concluded that there is no evidence, much less substantial evidence, supporting PIC's conclusions.

2. The Federal Lawsuit.

PIC first determined that Hanson had a conflict of interest because she was a defendant in the Federal Action, where the plaintiff sought compensatory and punitive damages from Hanson, among others.

² The word "would" is used here as a "defective verb," connoting the past tense of the word "will." *The American Heritage Dictionary of the English Language* 1478 (1969). "Will" indicates a mandatory requirement. *Del Pharmaceuticals, Inc. v. Access Pharmaceuticals, Inc.*, 2004 WL 1631355 at *8 n.32 (Del. Ch. July 16, 2004).

Assuming that in some circumstances the naming of an elected official in a lawsuit can create a conflict of interest³, there is no evidence in the record that, in fact, Hanson's vote would have materially aided in her defense against personal liability in the Federal Action, such that the circumstances of this case evidence a conflict of interest.

PIC did not have before it the Complaint or the briefing in the Federal Action. The sole evidence relied upon by PIC to support its conclusion was testimony from Hanson's lawyer in the Federal Action, Mr. Walton, that he discussed with her whether the clarifying ordinance might have an impact on her defense regarding qualified immunity. All Mr. Walton said was "I'm sure we spoke of it, yes." (A-120). Nothing more. Mr. Walton did not testify that the Clarifying Amendment would aid materially in Mayor Hanson's defense in any way, or that without the Clarifying Amendment her defenses were demonstrably weaker. As the Superior Court noted:

Walton's testimony simply does not support PIC's finding. Walton's advice could have ranged anywhere from "the Clarifying Ordinance is a complete defense to all of DBE's claims against you" to "the Clarifying Ordinance is no defense at all to DBE's claims against you because it cannot be given retroactive effect because to do so would violated DBE's constitutional and vested rights." Notwithstanding this, PIC

³ As a policy matter, government officials should not be deemed to have a conflict of interest when they are sued by applicants in matter before them. Otherwise, applicants will feel free to file suit as a tactical device to get opponents off of relevant administrative boards.

PIC cites *Beebe Medical Center v. Certificate of Need Appeals Board*, 1995 WL 465318 (Del. Super. June 30, 1995), *aff'd mem.*, 676 A.2d 900 (Del. 1996), as support for the concept that officials should not vote if they have taken defensive action. (Plaintiff's Opening Brief ("POB") 28-29). In that case, however, no defensive action was taken, and the individual conceded a conflict, which the Court accepted without analysis (and with some reservation). This case is inapposite.

concluded, as a finding of fact, that Walton told Hanson that the Clarifying Ordinance would help her qualified immunity defense.

Hanson v. Delaware State Public Integrity Com'n, 2012 WL Op. 3860732 at *14 (Del. Super. Aug. 30, 2012).

This testimony, standing alone, at best equally supports both inconsistent inferences. Such equipoise does not permit a finding of substantial evidence. *Torrington Co.*, 506 F.2d at 1047; *Sawkow*, 314 F.2d at 38.

Moreover, as PIC emphasizes strongly in its brief, Hanson's motive for her vote is irrelevant. Rather, the evidence must show that the vote actually would have benefitted her. There is no evidence supporting a conclusion that the vote would have actually and materially assisted Mayor Hanson's defense in the Federal Action.⁴ To be able reach such a conclusion fairly, PIC would have had to have been presented with expert⁵ evidence of (i) what factual issues had to be addressed to resolve the issue of qualified immunity, (ii) what the evidence was on both sides as to those factual issues, and (iii) the law to be applied to those facts

⁴ PIC points to testimony from Mr. Mandalas, the lawyer for Dewey Beach (but not for Mayor Hanson), that the Clarifying Ordinance was a good defense for Dewey Beach. (POB 24). But, as the Superior Court noted, "it is clear that Mandalas told the public that the purpose of the Clarifying Ordinance was to help Dewey Beach in the Federal Case. There is no evidence in the record suggesting that he told Hanson and the other individual defendants that the purpose of it was to help them personally." *Hanson*, WL Op. at *13.

⁵ Federal civil rights law is beyond the ken of lay people, as is knowledge of the factors that go into balancing evidence and law to determine the degrees of risk of liability under different scenarios. Where matters are outside the competence of lay people, expert testimony is required. David L. Finger & Louis J. Finger, *Delaware Trial Handbook* §18:2, http://www.delawgroup.com/dth/?page_id=390 (collecting cases).

in determining whether immunity attached. PIC would then need guidance on the likelihood of the application of qualified immunity based on a balancing of the law and the facts. After that, PIC would have to consider the legal effect of Hanson's vote on her immunity defense, and be guided on if and whether that vote would have tilted the odds of success in her favor.

But that would not be the end of it. Even if Hanson had been determined not to have the benefit of qualified immunity, that does not mean she would have been subject to liability ultimately. PIC would also have to know the facts and the law as to the merits of the underlying claims. Thus, PIC would also have needed to be educated as to (i) the facts and law as to the underlying merits and Mayor Hanson's defenses apart from immunity, (ii) how to determine the risk of liability, and (iii) if Mayor Hanson's vote altered that risk and, if so, how and to what degree. None of that appears in the record.⁶

PIC suggests that the issue in the federal action is merely whether her action was merely ministerial. (POB 24). Her defense, however, is not so limited. In addition and apart from the issue of whether a given action was "ministerial," a court evaluating a claim of qualified immunity "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Conn. v. Gabbert*, 526 U.S. 286, 290 (1999). This "generally turns on the 'objective legal reasonableness' of the action

⁶ The Superior Court offered its analysis that the vote on the Clarifying Ordinance would not have been a viable defense in any event. *Hanson*, WL Op. at *14-15.

... assessed in light of the legal rules that were 'clearly established' at the time [the action] was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (internal citation omitted). The District Court stated that "[s]ince the court is unable to determine at this stage the nature and manner of the alleged violations of DBE's rights, it also cannot address whether such rights were clearly established." *Dewey Beach Enterprises, Inc.*, WL Op. at *11 n.23.

Simply put, if Hanson had other good defenses, any effect her vote had on the issue of qualified immunity would not necessarily be determinative of or material to her ultimate risk of liability.

PIC heard absolutely no evidence about any of that, made no effort to undertake such an analysis and made no factual findings on any of these points. See *Hanson*, WL Op. at *15-16.

There is no testimony or other evidence demonstrating that Hanson's vote had or could have any actual, material effect on her defenses in the Federal Action. Additionally, as the Superior Court noted, Dewey Beach had a statutory obligation to indemnify Hanson. *Hanson*, WL Op. at *12 ("PIC, which had the burden of proof, never determined whether Hanson was paying her own attorneys' fees or whether they were being covered by Dewey Beach or its insurance carrier when she voted in favor of the Clarifying Ordinance," citing Dewey Beach C. § 22-1).

There is no evidence (expert or otherwise) in the record demonstrating that, at the time of the vote on the clarifying ordinance, (i) Hanson was truly vulnerable to personal liability in the federal lawsuit, or (ii) her vote materially benefitted her defense to personal liability in the federal lawsuit. As such, there was no basis in fact

or law for the conclusion that there existed an actual conflict of interest. In the absence of any such evidence, the decision of PIC was arbitrary and capricious.

3. Real Property Interest.

PIC found that Hanson had a conflict of interest because she owns rental properties in Dewey Beach and that the Clarifying Ordinance "would more specifically benefit her properties." (A-171). However, there is absolutely no competent evidence whatsoever in the record to support this conclusion, and indeed PIC cites to none in its ruling.

a. There Is No Evidence Showing That Mayor Hanson Benefits Differently From Others in the Same Class.

As demonstrated in the next section, there was no evidence of a actual threat of competition, and hence no economic benefit connected to Hanson's vote. However, the Court need not address that issue, because the simple matter is that there is no evidence in the record demonstrating a conflict as defined by the statute.

Section 5805(a)(2) only applies where the benefit or detriment accrues to the official "to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons." There is absolutely no evidence in the record that the effect of the ordinance on property values would not be the same for all Dewey Beach property owners, or that the effect on marketing of rental units would not be the same for all lessors in Dewey Beach. The record is silent on this.

PIC attempts to get around this by characterizing Hanson has being "in a class or group by herself. She is the only renter who is a sitting Commissioner and has an individual lawsuit pending against her on the

same matter, and is in an official position to make decisions affecting the development, and the lawsuit through the ordinance.” (A-29).

This is illogical and improper bootstrapping. Any alleged benefit relating to property values or rental income would not accrue to Hanson because she was a Commissioner, or because she was a defendant in the Federal Action. Those characteristics are simply irrelevant to class designation here. PIC ignores the fact that other property renters in Dewey would also suffer any alleged consequences equally. PIC did not justify its restrictive definition of the class, and defined it in an arbitrary manner to reach the result it wanted to reach.

Moreover, to place a party in an individual class because he or she is the (or one of the) government decision-makers would render Section 5805(a)(2) meaningless, as it would automatically place such decision-makers in a class unique from the general public or any subset thereof. Statutes should not be interpreted in a manner which renders any part of them superfluous. *Cordero v. Gulfstream Development Corp.*, 56 A.3d 1030, 1036 (Del. 2012).

Similarly, the fact that Hanson was a party to the Federal Action was irrelevant to class determination, especially in the absence of any showing that her vote actually could have benefitted her defense.

b. There Is No Competent Evidence of Any Effect on Hanson's Properties.

(1) Property Values.

The effect of zoning decisions on the ability to market rental properties and potential increases or decreases in revenue or property values is not a matter within the expertise of the average person (or PIC's administrative competence), and so required expert testimony. See

Cell South of New Jersey, Inc. v. Zoning Bd. of Adjustment of West Windsor Township, 796 A.2d 247, 251 (N.J. 2002) (effect of cell tower on adjacent property values required expert testimony).

There was no expert testimony here. There was no basis, beyond pure speculation, from which PIC could determine that Hanson's vote would have an actual, material and direct personal pecuniary impact.

Moreover, even if expert testimony was not required (which it clearly was), there is no testimony in the record of any kind, expert or lay, explaining the methodology for determining the effect the vote would have had (if any) on property values. As such, PIC's decision is based purely on speculation.

PIC's argument is that it could determine that Hanson obtained a unique benefit to her property values because she owned property two-to-three blocks from where the zoning applicants planned to build a hotel. (POB 32). This misses an important step: proof that the existence of the new hotel would have any impact on property values. Where is the evidence?

The only evidence as to property values was Hanson's testimony that there is a difference in property values between beachfront property and inland property. She did not offer any testimony about any effect the zoning decision might have on property values, her own or those of other property in the area. Her testimony as to the difference in her property value did not relate to or explain the effect of a new hotel on her property values in any unique way. Instead, the difference in her property value was due to a fact differentiating her property from the

new hotel - the location of her property, being closer to the ocean. As such, there is no evidence in the record to support PIC's conclusion.

(2) Competition.

PIC found a conflict by concluding that the proposed building posed a competitive threat to Hanson's ability to rent beachfront property she owned.

Initially, issues of competitive harm need to be established by expert testimony, because "[j]udges often lack necessary expert understanding of market structures and behavior to make accurate determinations about a practice's effect on competition." *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 343 (1982). There is nothing here to show that PIC had such understanding.

Not only was there no expert evidence on competitive impact, the only evidence of any kind, lay or expert, was Hanson's testimony that the proposed hotel would not be a competitive threat to her. (A-91-92).⁷ No one testified to contradict Hanson's testimony that the hotel would not be a competitive threat to her property.

As the Superior Court found, PIC's conclusion was based on assumptions made without evidentiary support (and which were outside any agency expertise):

⁷ PIC also relied on an unsworn complaint (A-3-12) in which the Complainant (who did not appear at the hearing and was not subject to cross-examination) stated what he claimed to have heard from an unidentified third party. The Superior Court deemed that inherently unreliable double hearsay. *Hanson*, WL Op. at *9. Even under the relaxed evidentiary standards applied to administrative proceedings, double hearsay is inadmissible. See *Crooks v. Draper Canning Co.*, 1993 WL 370851 at *1 (Del. Sept. 7, 1993), *disposition reported at* 633 A.2d 369 (Del. 1993) (TABLE) (administrative decision may not be based solely upon hearsay); *Screws v. Ballard*, 574 So.2d 827, 829 (Ala. Civ. App. 1990) (double hearsay inadmissible in administrative proceeding).

PIC assumed that Hanson's rental properties and DBE's hotel are similar enough in nature, location and price to appeal to the same group of potential renters. That assumption is not supported by the evidence. Hanson has two rental properties in a residential area. Sea Mist Villa is a three-story, four-bedroom, two bath, oceanfront house. Three of the bedrooms have adjoining decks with two of the decks overlooking the ocean. The living area has a large deck that overlooks the ocean. Sea Dune Villa is a six-bedroom, four and one-half bath second story condominium one house back from the ocean. It has a screened-in porch, several decks, a two-car garage and ocean views from nearly all of the rooms.

DBE has proposed building a 120 room hotel in a commercial area on the bay. Virtually nothing is known about the rooms it plans to offer. What is known is that Hanson's rental properties are very large with multiple bedrooms and are oceanfront and one house back from the ocean. DBE's hotel will be on the bay. Hanson's rental properties and DBE's hotel are separated by Coastal Highway, a four-lane highway with two lanes in each direction separated by a median. Hanson's tenants do not have to cross this very busy highway to get to the ocean. DBE's tenants will have to cross it to get to the ocean and cross it again to get back to their rooms. PIC minimized this inconvenience, stating that "The other side of Route 1 is not the dark side of the moon" and that Hanson's and DBE's rentals are "across the street" from each other. Well, the street is a major highway that people do not like to cross and will pay a lot of money to avoid. Obviously, those who want to pay less will do so and rent on the bayside. Those who want to pay more will do so and rent on the oceanside. Hanson's rental properties are located in the most desirable area of Dewey Beach and DBE's proposed hotel is not.

Moreover, what is not known about Hanson's and DBE's rental properties is substantial and important. There is no evidence in the record about how much Hanson charged for her oceanside properties or what DBE planned to charge for its bayside hotel rooms. Price is always an important consideration and there is no evidence in the record about it.

PIC concluded that a four bedroom ocean front house and a six bedroom condominium one house back from the ocean in a residential area on the other side of a major highway will compete with hotel rooms of an unknown size on the bay in a commercial area. There simply is not substantial evidence in the record to support this finding.

Hanson, WL Op. at *10-11. PIC, in its brief, does not refute this at all.

4. Quality of Life.

PIC found that Hanson violated Section 5805(a)(1) because her decision to vote against the Clarifying Ordinance was based on her view on the effect on the quality of life in Dewey Beach. (A-171-73). In so finding, PIC exceeded its statutory mandate.

PIC is an administrative board charged with administering and implementing provisions of Chapter 58 of Title 29 of the Delaware Code. 29 Del. C. §5808. As PIC is a creature of statute, its powers are limited to those granted by statute. *Maxwell v. Vetter*, 311 A.2d 864, 865 (Del. 1973); *State ex rel. Clarke v. Cook*, 134 N.E. 655 (Ohio 1921); *People ex rel. Mosco v. Service Recognition Board*, 86 N.E.2d 357, 363 (Ill. 1949). A corollary of this is that administrative boards have no common law powers. *Little v. Conflict of Interest Commission*, 397 A.2d 884, 886 (R.I. 1979); *Vehslag v. Rose Acme Farms, Inc.*, 474 N.E.2d 1029, 1033 (Ind. App. 1985); *Sioux City Community School Dist. v. Iowa Dept. of Education*, 659 N.W.2d 563, 568 (Iowa 2003); *State ex rel. Anderson v. State Bd. of Equalization*, 319 P.2d 221, 226 (Mont. 1957).

The Delaware Code empowers PIC to prosecute (through Commission Counsel) violations of "this chapter" (Chapter 58). 29 Del. C. §§5809(3), 5810(a). See also 29 Del. C. §5810A (permitting appeal to the Superior Court when "the Commission finds that any person has violated any provision of this chapter..."). The repeated references to "this chapter" (Chapter 58) makes abundantly clear that PIC's jurisdiction is limited to prosecuting alleged violations as defined in Chapter 58. Conflict of interest transactions are specifically defined by Section

5805. They involve circumstances where a decision would result in a unique financial benefit or detriment. 29 Del. C. §5805(a)(2).

Section 5805 does not define conflicts of interest to include abstract intangible benefits like "quality of life" (which in any event affect all residents equally). The inclusion of Section 5805, with specific definitions of what constitute conflicts of interest under that Act indicates a legislative intent to exclude other types of conflicts of interest from the purview of PIC. *Wyant v. O'Bryan*, 1999 WL 33116507 at *3 (Del. Super. Dec. 28, 1999).

As such, PIC acted in excess of its statutory authority.

5. Appearance of Impropriety.

PIC also relied on the general rubric of "appearance of impropriety" as a separate ground for finding a violation of the Code of Conduct. (A-175). As with the "quality of life" issue, this exceeds PIC's statutory authority because "appearance of impropriety" is not the standard set forth by Section 5805. Rather, there must be an actual financial benefit or detriment.

As explained above, PIC has no powers other than those granted by statute. Section 5805 does not authorize PIC to determine whether an "appearance of impropriety" exists, only whether an actual conflict of interest, as defined by statute, exists. As such, PIC's action is void and should be vacated.

PIC points to Section 5806 as authorizing a finding of "appearance of impropriety." (POB 34). Whether or not PIC's interpretation of Section 5806 is correct, that statute only applies to "state employee[s], state officer[s] and honorary state official[s]." Those terms are

defined in 29 Del. C. §5804(6), (12) and (13) as meaning only employees and officials of State government, not municipal or township officials. See 29 Del. C. §5804(11) (specifically exempting political subdivisions from the definition of "state agency"). Had the Legislature wanted to include local officials like Hanson, it would not have included this express exemption.

Moreover, "appearance of impropriety," untethered to any specific standards, is too vague to justify disciplinary measures. *Essex Equity Holdings USA, LLC v. Lehman Brothers, Inc.*, 909 N.Y.S.2d 285, 294 (N.Y. Supr. 2010). See also *Spargo v. New York State Commission on Judicial Conduct*, 244 F.Supp.2d 72, 91 (N.D.N.Y.), vacated on other grounds, 351 F.2d 65 (2nd Cir. 2003) (provision of Code of Judicial Conduct requiring judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" is unconstitutionally vague). Such vagueness allows for arbitrary action by PIC, which is impermissible. *Kreshtool v. Delmarva Power & Light Company*, 310 A.2d 649, 652 (Del. Super. 1973).

This case provides a prime example of a vague statute leading to arbitrary action. PIC based its conclusion of an "appearance of impropriety" on the "totality of the facts." First, the phrase "totality of the facts," without tying any facts to the specific charge, is itself conclusory. Findings of an administrative agency must be explanatory, not merely conclusory. *Motiva Enterprises LLC v. Secretary of Dept. of Natural Resources & Environmental Control*, 745 A.2d 234, 250 (Del. Super. 1999). Without tying specific facts to a legal standard, the decision is arbitrary and capricious. Here there are no specific facts tied to

a sufficiently clear legal standard which allows the Court to determine whether the decision of PIC is non-arbitrary and free from legal error.

PIC suggests that an actual conflict is not required, so long as there is a perception that the public official's judgment is impaired. (POB 34). However, PIC ignores the fact that the circumstances which "tend to impair judgment" are specifically defined by Section 5805(a)(2), which requires conduct that "would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons." As such, the statute requires an actual, not theoretical or speculative, benefit or detriment to constitute a conflict of interest.⁸ Similarly, PIC has not cited any Delaware case, or any case from any other jurisdiction with a similar statute, authorizing an administrative agency to find an ethics violation

⁸ PIC cites *Nevada Ethics Commission v. Carrigan*, 131 S.Ct. 2343 (2011), as support for a claim of conflict of interest can arise without proof of a benefit. (POB 33). The Nevada statute at issue in that case is materially different from Delaware's statute. The Nevada statute prohibits an elected official from voting on a matter "(a) Regarding which the public officer or employee has accepted a gift or loan; (b) In which the public officer or employee has a pecuniary interest; or (c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interest of others." Nev. Rev. Stat. §281A.420. The violation at issue in that case involved subsection (c), which by its terms does not require any personal benefit. As such, that case is inapposite.

PIC also seeks support from *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152 (Cal. App. 1996). (POB 32). In that case, however, the Court was construing common law principles. As noted above, PIC may not apply any standards outside the express terms of Section 5085. Moreover, in that case, the councilman faced a loss of ocean view if the project went through. There was no evidence in the present action of any such specific harm to his property right, only a speculation of economic benefit. As such, this case does not help PIC.

on the basis of an economic benefit to real estate values in the absence of any evidence in the record of such a benefit.

Finally, PIC argues that it would "create an inequity" if PIC were not allowed to utilize an "appearance of impropriety" standard. (POB 35). If such a result is inequitable, "such complaints are best addressed to the Legislature, which is the body empowered to remedy any inequities in the statute." *Black v. Allstate Ins. Co.*, 711 N.Y.S.2d 15, 16 (N.Y.A.D. 1st Dept. 2000). See also *Schindele v. Nu-Car Carriers, Inc.*, 402 A.2d 1307, 1310 (Md. App. 1979) ("[w]e must take the statute as we find it and if inequities result from its clear and unambiguous meaning, requests for relief therefrom should be addressed to the legislature, not the courts").

The utter and total absence of evidence renders PIC's decision arbitrary and capricious, and it should be vacated.

II. THE SUPERIOR COURT DID NOT APPLY AN INCORRECT STANDARD OF REVIEW.

A. QUESTION PRESENTED.

PIC asks whether the Superior Court apply an incorrect standard of judicial review by acting as a fact finder and weighing evidence instead applying the "substantial evidence" standard of review.

B. STANDARD OF REVIEW.

Whether the Superior Court applied the correct legal standard is an issue of law reviewed *de novo* by this Court. *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1134 (Del. 1991); *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 590 (3rd Cir. 2012).

C. MERITS OF THE ARGUMENT.

PIC argues that the Superior Court applied a *de novo* standard of review of PIC's decision instead of the "substantial evidence" standard applied to decisions of administrative agencies. PIC bases its argument on the following brief passage at the conclusion of the decision of the Superior Court:

There are two views of the evidence in this case. One view is that Hanson voted for the Clarifying Ordinance in order to help her rental properties compete with DBE's hotel and to improve her legal defenses in the Federal Case. The other view is that Hanson voted for the Clarifying Ordinance because she was opposed to a project nearly twice as tall as virtually every other building in Dewey Beach. PIC chose the former instead of the latter. The issue is whether that choice is supported by substantial evidence in the record. I have concluded that it is not.

Hanson, WL Op. at *17.

PIC's argument blithely ignore everything said by the Superior Court leading up to this conclusion. Specifically, it ignores the Superior Court's comprehensive analysis of whether or not there was a conflict of

interest and its constant reference to and application of the "substantial evidence" standard. *Id.* WL Op. at *1, 7, 9, 11-17.

Although the Superior Court noted that there were two assumptions that could be made as to the motive behind Hanson's vote, it did not decide the case based on motives, but rather on whether there was substantial evidence supporting a finding of a unique personal benefit as required by the law.

PIC accuses the lower court of weighing evidence, but does not identify where in the opinion that occurred, or show that the lower court gave any evidence greater weight than any conflicting evidence (to the extent there was any). PIC accuses the lower court of ignoring "the legal elements," but does not show where this occurred, identify which "legal elements" were ignored, or explain how PIC was prejudiced. PIC accuses the lower court of failing to consider PIC's administrative expertise, but fails to identify the relevant area(s) of expertise or show how they were applied in assessing the evidence.⁹

PIC is grasping at straws, and its argument is utterly without merit.

⁹ As noted previously, the issues in this proceeding requiring expertise related to federal civil rights law, real estate values and competition in the Dewey Beach housing rental market. PIC cannot claim administrative expertise in any of these areas. Further, even if PIC members had some expertise in these areas, they were obligated to disclose that fact in advance of the hearing. See *Feinson v. Conservation Comm'n of Town of Newton*, 429 A.2d 910, 914 (Conn. 1980) ("[i]f an administrative agency chooses to rely on its own judgment, it has a responsibility to reveal publicly its special knowledge and experience, to give notice of the material facts that are critical to its decision, so that a person adversely affected thereby has an opportunity for rebuttal at an appropriate stage in the administrative proceedings").

III. THE LOWER COURT DID NOT COMMIT REVERSIBLE ERROR IN ADDRESSING ISSUES NOT RAISED BY THE PARTIES.

A. QUESTION PRESENTED.

PIC has raised the question whether the lower court improperly addressed issues unfavorably to PIC which were either not raised by any party below or were allegedly raised only in Hanson's reply brief.

B. STANDARD OR REVIEW.

Appellate courts have discretion to review legal issues not raised by the parties. *Tingley v. Kortz*, 688 N.W.2d 291, 294 (Mich. App. 2004); *Graham v. Swift*, 228 P.2d 969, 972 (Colo. 1951). As such, the issue is whether the lower court abused its discretion.

C. MERITS OF THE ARGUMENT.

1. In the Absence of Substantial Evidence, Any Decision on an Unrelated Issue is Harmless Error.

As demonstrated herein, PIC's decision was properly reversed by the Superior Court because it was not supported by substantial evidence. As such, any other findings by the Superior Court not affecting that conclusion are mere surplusage, and do not constitute a basis for reversal, irrespective of the correctness of those findings. *Kurzmann v. State*, 903 A.2d 702, 720 (Del. 2006); *Normand by and through Normand v. Ray*, 785 P.2d 743, 751 (N.M. 1990); *Tetreault v. Tetreault*, 535 A.2d 779, 782 (Vt. 1987); *Hanka v. Pogatchnik*, 276 N.W.2d 644, 636 (Minn. 1979).

2. In Public Law Cases, an Appellate Court is Free to Decide Sua Sponte Issues Not Raised by the Parties.

When issues of public law are involved, courts are free to address *sua sponte* matters not raised by the parties in order to resolve the case. This right is not circumscribed by the arguments tendered by the

parties, but only by the record brought for review. *Russell v. Bd. of County Com'rs, Carter County*, 952 P.2d 492, 497 (Okla. 1997); *Reynolds v. Special Indem. Fund*, 725 P.2d 1265, 1270 (Okla. 1986).

"Public law" is defined as including laws involving "the responsibilities of public officers to the state...That portion of law which is concerned with political conditions: that is to say, with the powers, rights, duties, capacities and incapacities which are peculiar to political superiors, supreme and subordinate." Black's Law Dictionary 1106-07 (1979). Section 5805, regulating the conduct of public officials, clearly meets this definition.

3. PIC's Violation of its Own Rules.

The Superior Court reversed PIC's conclusion that there was a conflict of interest arising from the fact that Hanson voted to help maintain the quality of life in Dewey Beach because PIC failed to give her notice of this charge, which was not even included in the complaint filed by Mr. Nelson. *Hanson*, WL Op. at *11.

Hanson concedes that she did not assert this as a ground for reversal below, arguing instead (as argued herein) that PIC lacked statutory authority to find a conflict of interest based on "quality of life."

Nonetheless, PIC found Hanson guilty of a violation for which she had never been charged. Prior notification of the charges and an opportunity to prepare a defense is mandated not merely by PIC's procedural rules but also by due process. See *Bethel v. Bd. of Educ. of Capital School Dist.*, 2009 WL 4545208 at *4 (Del. Dec. 4, 2009), disposition reported at 985 A.2d 389 (Del. 2009) (TABLE); *Wolfe v. Kelly*,

911 N.Y.S.2d 362, 365 (N.Y.A.D. 1st Dept. 2010), *app. dismissed*, 954 N.E.2d 1163 (N.Y. 2011).¹⁰

It is appropriate for a court to address *sua sponte* an apparent due process violation. See *Wood v. Georgia*, 450 U.S. 261, 264 (1981). As such, it cannot be concluded that the Superior Court abused its discretion.

4. The Nelson Complaint.

The Superior Court noted that the complainant submitted an unsworn complaint. *Hanson*, WL Op. at *5, 9. However, the Superior Court did not reverse on this ground. The only relevance the Superior Court attributed this fact is that statements in it constituted double hearsay, which could not sustain a finding a substantial evidence. *Id.* at *9.

On appeal from an administrative decision, it is entirely proper for a court to review the record to determine whether there is substantial evidence to support the decision. In so doing, the court is not required to accept the agency's determination of substantiality. See *Wetherell v. Douglas County*, 146 P.3d 343, 344 (Or. App. 2006). Rather, whether substantial evidence exists is an issue of law for the Court's independent determination. *Gaveck*, 215 P.3d at 1118. The issue of whether there was substantial evidence was squarely raised below. As such, the

¹⁰ Although PIC is not authorized to remove elected officials for violations, it may issue reprimands. 29 Del. C. §5810(d). Such reprimands can injure an elected official's public reputation. The due process right to notice attaches to governmental actions harming reputation. *McKnight v. Southeaster Penn. Transp. Auth.*, 583 F.2d 1229, 1235 (3rd Cir. 1978); *Brown v. City of Niota, Tenn.*, 214 F.3d 718, 722 (6th Cir. 2000).

Superior Court did not commit error in looking at the evidentiary effect of Mr. Nelson's unsworn complaint containing double-hearsay.

5. Legal Analysis of Competition.

PIC argues that the Superior Court erred by setting a legal definition of "competition" in determining whether Hanson obtained a benefit from her vote in the form of limiting competition for rental of her beach properties.

Although PIC criticizes the action of the Superior Court, it does not offer anything to suggest that the definition provided by the Superior Court was incorrect.

The issue of competition was central to PIC's determination of a conflict of interest. The Superior Court had a right to question that assumption underlying that conclusion.¹¹

The meaning of words is a legal issue. Courts do not owe any deference to administrative agencies as to legal issues, and are free to substitute their judgment for that of the agency on such questions. *Liberty Nursing Ctr. v. Dept. of Health & Mental Hygiene*, 624 A.2d 941, 946 (Md. 1993).

6. Qualified Immunity Defense.

PIC argues that Hanson did not, until her reply brief, argue that PIC had to review the filings in the Federal Action and decide whether the vote would have materially benefitted her defenses in the Federal Action. (POB 22-23). This is incorrect.

¹¹ PIC suggests that the Superior Court improperly "impose[d] a non-statutory element" on Section 5805. (POB 22). Of course, the Superior Court did no such thing, but merely analyzed whether or not there was an actual conflict of interest according to the terms of the statute arising from the claimed economic threat of competition.

In her opening brief below, Hanson argued that there was no substantial evidence to support the conclusion that her vote benefitted her in the Federal Action, and that the PIC tribunal lacked the legal expertise necessary to make that determination. (A-218-223).

In its answering brief below, PIC responded that it relied on the fact that the District Court denied the motion to dismiss the Federal Action. (A-247-48). In her reply brief below, Hanson explained why such reliance was inadequate by identifying the specific factual and legal issues raised in the Federal Action that would need to be addressed and weighed to do a fair and proper analysis. (A-278-81).

Mere elaboration is not a new argument. Hanson responded by showing why denial of a motion to dismiss the Federal Action was insufficient to determine whether the vote actually personally benefitted Hanson with regard to her defense in the Federal Action.¹²

7. Quality of Life.

Hanson expressly challenged this in briefing below. (A-224-26). To the extent that PIC argues that Hanson did not dispute this at the administrative level, that is because, as the Superior Court noted, PIC never charged her with a conflict of interest based on her support of the quality of life in Dewey Beach. As such, there was no prior notice or opportunity to prepare a defense. Hanson argues before the Superior Court that the evidence and the law did not support the findings of PIC.

¹² PIC complains that there is no legal authority requiring that it read the filings in the Federal Action to determine whether the vote had any effect on the claims and defenses in that action, all of which are based in federal law. (POB 23). PIC does not explain how it was able to make that determination, which was necessary to determining whether there was in fact a conflict of interest, without such information or the benefit of expert testimony.

CONCLUSION

WHEREFORE, for the foregoing reasons, appellant-below/appellee Diane Hanson respectfully requests that this Court affirm the decision of the Superior Court reversing the decision of appellee-below/appellant the Delaware Public Integrity Commission.

Respectfully submitted,

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