

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE STATE PUBLIC INTEGRITY	)	
COMMISSION,	)	
	)	No. 515, 2012
Appellee-Below,	)	
Appellant,	)	
	)	
v.	)	
	)	
DIANE HANSON,	)	
	)	
Appellant-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR SUSSEX

APPELLANT'S REPLY BRIEF ON APPEAL

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ARGUMENT

I. MS. HANSON'S ARGUMENT DOES NOT OVERCOME THE SUPERIOR COURT'S ERROR FAILING TO APPLY APPLYING CONFLICT OF INTEREST ELEMENTS, AND INSTEAD APPLYING AN ELEMENT NOT IN THE LAW--HER MOTIVE--WHICH EVEN SHE NOTES IS IRRELEVANT

In PIC's opening brief (CORRECTED) ("OB"), it argued the Superior Court erred as a matter of law in finding there were 2 views of the evidence to explain why Ms. Hanson voted as she did--not a conflict of interest element. OB-13. From that error (and others), improperly found no substantial evidence to support PIC's decision. OB-13.

Ms. Hanson notes her motive is irrelevant. *Answering Brief* ("AB") at 11, but says PIC ignores what the Court said leading to its conclusion, and it constantly refers to and applies the "substantial evidence" test. AB at 24-25. "Substantial evidence" is the standard, 29 Del. C. § 5810A, but it must be applied to the elements to be proved. That did not occur. Even paragraphs Ms. Hanson cites support PIC's position. AB at 25 (citing *Hanson v. Del. State Public Integrity Com'n*, 2012 WL 3860732 (Del. Super. August 30, 2012) at *1--discussing background facts; *7--recites "substantial evidence standard," but analyses jurisdiction, not conflict law; *9--discusses market analysis and legal meaning of "competition" which are not conflict elements, and *11-17--more discussion of "competition and market analysis, size of her rentals, qualified immunity, indemnification, disclosure of ordinance's purpose; her private attorney's advice, etc. The Court periodically throws in the citation, but fails to connect conflict elements to the facts to decide if

substantial evidence supported those elements. See, e.g., *11—cites conflict law but analyzes “notice,” conflicts.

Viewing the opinion as a whole, as Ms. Hanson suggests, shows the Court’s findings of a lack of “substantial evidence” were based on such things as PIC’s failure to apply 42 U.S.C. § 1983 elements, *Id.* at *15; Mr. Nelson’s notarized statement was “unsworn” and “proof of nothing.” *Id.* at *9(*fact finder; weighing evidence*); PIC used the ordinary definition of “competition” instead of a legal definition from an out-of-State case; etc., *Id.* at *9 & *10 (*not a conflict element*)(all discussed later). The decision as a whole shows the alleged “comprehensive analysis” dealt with issues not raised before PIC, nor before the Superior Court, raised in the reply brief or at oral argument, and the Court failed to apply the facts to the elements of 29 Del. C. § 5805(a)(1); 29 Del. C. § 5805(a)(2)(b) and 29 Del. C. § 5806(a). *OB* at 13-25.

Ms. Hanson says PIC never says where the Court weighed evidence, or gave greater weight to conflicting evidence. *AB* at 25. Assuming she is referring to PIC’s last paragraph in its argument, *OB*-14, it cites statutory elements not applied; identifies the Court as a fact finder when finding only 2 evidentiary views; (neither were PIC’s view); and found PIC chose one of the 2 (it did not). As even Ms. Hanson admits her motive--why she voted as she did—is not relevant, *AB* at 11, her argument does not overcome the Court’s error in applying that element. The Superior Court must be reversed for erroneously basing its decision on non-statutory elements, and this Honorable Court should defer to PIC’s decision.

II. MS. HANSON'S ARGUMENTS DO NOT OVERCOME THE SUPERIOR COURT ERROR IN CONSIDERING ARGUMENTS NOT PROPERLY RAISED, AND EVEN IF IT COULD HAVE CONSIDERED THEM, IT ERRED IN NOT FINDING SUBSTANTIAL EVIDENCE

PIC's opening brief identified 5 other Superior Court errors. *OB at 15-25*. For the reasons in that brief and below, the Supreme Court should find each were errors of law, and uphold PIC's decision.

(1) PIC Procedures: The Superior Court said PIC failed by not having a full-trial hearing. *Hanson v. Del. State Pub. Integrity Com'n*, 2012 Del. Super. LEXIS 403 (Del. Super. August 30, 2012 at *3, *12, *13). PIC argued it was not raised below, and thus, error to consider it. *OB at 16*. Ms. Hanson admits she did not raise that issue. *AB at 27*. This Honorable Court could reverse on that basis. *OB 15-25*.

She now says she argued below, and now argues, PIC lacked authority to find a conflict based on "quality of life." That is addressed below in ¶ (5). As she did not, and does not, argue a full trial was required, nor dispute PIC properly acted on a motion to dismiss based on Super. Ct. Civ. R. of Pro. 12(b)(6) and 56, *OB at 16-18*, this Honorable Court should find the Superior Court erred, and find PIC followed proper procedures in these circumstances.

(2) Nelson Complaint: PIC argued the Superior Court erred in its independent fact finding from a footnote, A-208 & A-235, and improperly found Mr. Nelson's notarized statement was "unsworn" as it was not raised before PIC or fully briefed on appeal, despite notice to Ms. Hanson of PIC's use of it, A-22, and an opportunity to object. *OB at 18-21*. The Court acted as trier of fact using law never cited, and factually concluded it was "unsworn" without inquiry, as required. *Estate of Osborn v. Kemp*, 2009 Del. Ch. LEXIS 149 at *19; *24 (Del.

Ch. August 20, 2009) aff'd., 2010 Del. LEXIS 135 (Del. March 25, 2010). That law is not disputed. From its error, it weighed and found it "unpersuasive" and "proof of nothing", *Hanson*, 2012 WL 3860732 at *9, when it is not to weigh evidence, determine credibility, or act as fact finder. *OB at 18-21 (citing Sullivan v. Mayor and Council of Town of Elsmere*, 2010 Del. Super. LEXIS 307 at *16 (Del. Super. July 15, 2010). Also, it ignored testimony confirming his allegations of her personal law suit and rental properties, which was substantial evidence of the element of "personal or private interest."

She does not dispute she never objected to his complaint, or the only mention is in a footnote, A-208 and A-235, and cites nothing contrary to law that issues not raised below/not fully briefed are not considered. *OB at 15-16*. This Court could dismiss on that basis.

If not, she says PIC was not reversed on that ground and the only relevance of his statement was it was double-hearsay. *AB at 28*. It is much more significant. The Court ruled on a footnote, A-208 & A-235; conducted its own "in-house" determination of law, facts, and value of the document, when Delaware law requires facts on a notarized statement be given by the signing party and notary. *Estate of Osborne, supra*. Without inquiry, the Superior Court found it was "unsworn;" concluded it was "double hearsay" (when the objection was not raised); without applying the law that administrative agencies may consider hearsay, especially as no objection was made; weighed its own fact findings and concluded the notarized statement was "proof of nothing," and so was not "substantial evidence." *OB-18-21*. Clearly, the Superior Court reversed in that area, which was error.

She never disputes the ordinary meaning of "sworn statement" includes "notarized statements," or that Super. Ct. R. Civ. Pro. Rule 11 may have been considered sufficiently followed, especially as Mr. Nelson was pro se. *OB-20-21*. Based on the undisputed legal arguments in PIC's opening brief and here, this Honorable Court should find it was error for the Court to: consider it; make its own fact findings and weigh the evidence. Moreover, the ordinary meaning supports it being a sworn statement; it could be in substantial compliance with Rule 11; and should not be barred as an "unsworn" complaint, especially as it was the notary's duty, not his, to add it was sworn. *29 Del. C. § 4328(3)*. To hold a pro se complainant before an administrative agency to a higher standard than Superior Court Rules, would discourage citizens from filing complaints with PIC because it would be "too technical" and they are not a lawyer. Also, having a Court rule a pro se's efforts in obtaining a notarized statement was "proof of nothing" discourages such filings.

Ms. Hanson tries to justify the Court's error on the "unsworn" complaint issue, with a second issue never raised before PIC or the Superior Court, not even in a footnote—"hearsay." Aside from the fact it was not objected to as hearsay, that does not justify the "unsworn" error, as: (1) the Court never considered PIC's Rules permit any probative information, PIC Rule IV (J), A-307, (2) PIC is not bound by the Rules of Evidence; (3) it was never objected to as hearsay, although it is undisputed that Ms. Hanson was on notice of it from the preliminary hearing; (4) PIC did not rely only on Mr. Nelson's allegations to decide she had a personal and private interest in the

federal suit (a public record—the Federal Court’s decision was used); testimony (not hearsay) with her admitting she made the *Cape Gazette* statement (which she subsequently caveated that other people mentioned to her and the Commission had to weigh her conflicting statements); and Ms. Hanson and her witnesses admitting existence of the federal law suit. Even Ms. Hanson’s cites hold administrative agencies are not bound by the Court’s Rules of Evidence, and if the Board does not rely solely on hearsay, “mere admission of hearsay, whether proper or improper, does not warrant reversal.” *Crooks v. Draper Canning Co.*, 1993 WL 370851 at *2(Del. September 7, 1993); See also, *Geshner v. Del. Real Estate Comm’n*, 1994 WL 680090 (Del. Super. October 12, 1994). Thus, Ms. Hanson’s attempt to support the Court’s error on “unsworn” is not helped by her “hearsay” argument. As a matter of fact, law, and equity, the Superior Court’s ruling should be reversed, and PIC upheld.

(3) Analysis of “Competition”: The Superior Court said PIC should not have applied the common and ordinary meaning of “competition” but should have performed a market analysis and applied the legal meaning from an out-of-State case to decide if Ms. Hanson and DBE were “competitors.” *Hanson* at 2012 WL 380737 *8 - *11.

Ms. Hanson did not object or raise the hearsay issue on the *Cape Gazette* article. She admitted the statement was properly attributed to her. A-95. Usually, admissions against interests are exceptions to hearsay, even under the rules of evidence. Nor did she appeal use of the “plain and ordinary meaning” of “competition.” Now, she says

competitive harm issues need an expert. AB at 17. This Honorable Court should not consider the issue.

Even if does, she cites an anti-trust case dealing specifically with competition restrictions in an agreement as authority for the principle that "judges often lack necessary expert understanding of market structures and behavior to make accurate determinations about a practice's effect on competition." AB at 17 (citing *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 343 (1982)). Her argument fails as it is clear that Court had to address the competition element. That is not a Delaware conflict law element. OB at 21-22. Ms. Hanson does not dispute Delaware law holds it is error for a Court to impose non-statutory elements. *City of Wilmington v. Minella*, 879 A.2d 656, 662 (Del. Super. 2005). Moreover, in *Arizona*, the U.S Supreme Court rejected the argument that the judiciary cannot make a decision on competition without experts. It said:

"That the judiciary has had little antitrust experience in the health care industry is insufficient reason for not applying the *per se* rule here. "[T]he Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *Arizona*, 457 U. S. at 333.

She says a word's meaning is a legal issue, and the Court need not defer. AB at 29(citing *Liberty Nursing Ctr. v. Dept. of Health & Mental Hygiene*, 624 A.2d 941, 946 (Md. 1993). That is not Delaware law. Delaware law is: "Words and phrases shall be read within their context and shall be construed according to the common and approved usage of the English language." 1 Del. C. § 303. PIC did that; OB at 21-22; A-170; the Court did not. Thus, it erred in not applying

conflict elements and instead imposed non-statutory elements. No law or facts support her current argument.

(4) Qualified Immunity: PIC argued the Superior Court erred in holding PIC's decision lacked legal analysis or substantial evidence as PIC did not read the federal Court complaint or briefs on the federal dismissal motion, and said PIC had to apply 42 U.S.C § 1983 without citing any law. Delaware law holds it is error for a Court to impose non-statutory elements. *OB at 22* (citing *Minella, supra*). She cites nothing contrary to *Minella*, nor disputes it was not raised before PIC. Its preliminary opinion gave her notice of applicable law.

Ms. Hanson says she did not wait until her reply. *AB at 29-30*. Yet, her opening brief never argues 42 U.S.C. § 1983 elements, or that § 1983 can be grafted onto State conflict laws. She admits her reply identified "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." *OB at 30*. If that were in her opening brief, PIC could have briefed those "specific factual and legal issues." For the reasons in PIC's opening brief and herein, it is error for a Court to impose non-statutory elements. *Minella, supra*.

(5) Quality of Life: PIC argued the Superior Court erred as this was not raised on appeal. *OB at 25*. That is undisputed. This Honorable Court could dismiss on that basis. She cites nothing to dispute PIC's ruling that her "quality of life" defense to the element of "financial interest" failed to overcome that violation. She argues she had no notice or opportunity to be heard on a violation based on "quality of life." *AB at 30*. She does not dispute *she* raised "quality of life" as

a defense to "financial interest." No law suggests PIC cannot consider defenses. Also, she had an opportunity to be heard on a reconsideration motion. A-199. She chose not to; nor did she raise it on appeal. She now says she raised it by arguing the evidence and law did not support PIC's finding. *AB at 30 citing A-218-233*. Those pages do not reflect a notice and opportunity argument. If she can now raise it, she does not identify a Constitutional right, or the process due. Even if Constitutional due process is clearly raised, the interest at stake, and process due that interest must be identified. Even with a Constitutional property interest in employment, a post-termination hearing may be enough process. *Cleveland Board of Ed. v. Loudermill*, 470 U.S. 532(1985)(teacher dismissed; due process found by termination notice with respond *after* termination); *Board of Regents v. Roth*, 408 U.S. 564 (1972)(no Constitutional process due non-tenured teacher; procedural due process applies to deprivation of 14th Amendment liberty or property interest; if those interests are implicated "some kind of hearing" is required, but the range of interest covered by due process is not infinite). *Id. at 569-570*. Ms. Hanson does not suggest a Constitutional property interest—she was not terminated; she was reprimanded. 29 Del. C. § 5810(d)(1). She does not identify a protected interest or a process due that interest; cites no law that a post-decision hearing on a reprimand is not enough. Also, it is undisputed this Honorable Court declined to reverse a Board when it "inartfully expressed" a conclusion, and could conclude a more artful expression would be her "quality of life" defense failed. *Avallone v. Dep't. of Health and Social Services*, 14 A.3d 566, 573 (Del. 2011)).

III. PIC'S DECISION THAT MS. HANSON HAD CONFLICTS FROM THE PERSONAL LAW SUIT AND RENTAL PROPERTIES IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Bradley v. State and Industrial Accident Board*, 2003 Del. Super. LEXIS 331 (Del. Super. September 16, 2003). It is "more than a scintilla of evidence, but less than a preponderance." *Id.* at *12 (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)). When factual decisions are the issue, the Court shall take account of the agency's experience and specialized competence and purpose of the law under which it acted. *Id.* The Court is not trier of fact and will not weigh witness credibility, thus, it cannot substitute its opinion for the Board's if sufficient evidence exists to support the Board's decision, and the decision will stand if supported by substantial evidence. *Id.* (citing *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998)).

Ms. Hanson argues the "substantial evidence" test is not met if there is equal support for conflicting inferences. *AB* at 8 (citing *Torrington Co. v. N.L.R.B.*, 506 F.2d 1042 (4th Cir. 1974)). That is not Delaware law, which is clear: it ranges from a scintilla to less than a preponderance. Nothing in those terms suggests a 50-50 level of evidence is insufficient to sustain a Board's ruling.

(1) The Federal Suit

Ms. Hanson then argues the applicable law on both issues--the Federal suit and the rental properties--is 29 Del. C. § 5802, which has elements of a specifically defined "financial interest." *AB* at 8-9. PIC's Preliminary Opinion (A-30), final opinion (A-159-160; A-165),

Superior Court Brief (A-246;A-257-258), and opening brief to this Honorable Court (OB at 26) show the law applied to her conflict arising from the Federal suit is 29 Del. C. § 5805(a)(1). The provision is clear: it does not require a finding of an actual financial benefit or detriment. The elements are: (1) a personal or private interest; (2) in a matter pending; (3) that may tend to impair judgment in performing official duties. The Delaware Supreme Court affirmed a decision where that provision stood alone, not in conjunction with the "financial interest" provision in 29 Del. C. § 5805(a)(2). *Beebe Medical Center v. Certificate of Needs Appeal Board*, 1995 WL 465318 (Del. Super. June 30, 1995), aff'd., *mem.*, 676 A.2d 900 (Del. 1996). While Ms. Hanson says *Beebe* is "inapposite," AB at 10, 2d ¶ fn 3, this Court's affirmation of a case where 29 Del. C. § 5805(a)(1) stood alone is consistent with the State Constitutional provision for legislators which stands alone without requiring a financial interest. *Del. Const. art. II § 20*. That law is undisputed. The General Assembly is presumed to have been aware of that law when it enacted the Code of Conduct with the same provision. *State ex rel. Milby v. Gibson*, 140 A.2d 774(1958)(General Assembly assumed cognizant of existing law when it later used the same statutory terms).

Ms. Hanson argues for a policy that government officials should not be deemed to have a conflict when they are sued by applicants in matters before them. AB at 10 fn. 3. The General Assembly specifically and clearly included local elected officials as being subject to the conflict laws, 29 Del. C. § 5802(4), just as the General Assembly has conflict laws. *Del. Const. art. II § 20*; 29 Del. C., ch. 10., and made

the Code apply to the non-legislative elected State officers. 29 Del. C. § 5804(13) and 29 Del. C. § 5812(n)(1). That is an issue for the General Assembly, and notably seems contrary to the law's purpose of instilling the public's confidence, avoiding even improper appearances, and contrary to construing the Code to promote high ethical standards. 29 Del. C. ¶ 5802 and 29 Del. C. ¶ 5803.

Ms. Hanson does not argue a personal suit is not a personal or private interest, but argues no record evidence shows her vote would have materially aided in her defense against the personal suit, such that the circumstances of her case evidence a conflict of interest. *AB at 10*. Again, that is not an element. Even if it were, the record reflects: she had just lost her defenses in her motion to dismiss the private suit that claimed a conflict because of her properties. *Dewey Beach Enters. v. Town of Dewey Beach*, 2010 U.S. Dist. LEXIS 77466 (D. Del. July 30, 2010), with the Court saying relevant facts were allegations of officials reviewing the matter when they had a personal interest, *Id. at* *20, *36-38; her private attorney is sure he spoke with her after that on the ordinance's impact on her immunity defense, A-120; the Town attorney testified the ordinance was drafted because of the federal suit; it would take out an issue; and it was the "best defense possible." A-127-A-129; A-130; A-137. It is undisputed she sponsored and voted for the ordinance in September breaking a 2-2 tie, saying she had to vote which was "especially true because of the 2-2 deadlock." A-155; the defense would not have passed but for her vote; passage created a defense not previously available to her; and as a matter of law, and fact, it could be a defense against a State claim

of a conflict as a ministerial action, A-249 (citing *Darby v. New Castle Gunning Bedford Ed. Assoc.*, 336 A.2d 209, 211 (Del. 1975); *State ex. rel. Rappa v. Buck*, 275 A.2d 795 (Del. Super. 1972)). The federal opinion shows DBE was alleging a State conflict claim, citing to a PIC opinion. *Dewey Beach Enters, supra*, at *9. To claim based on these facts that it would not have aided her defense while cloaked behind the argument “he could have advised her”... or “he could have advised her”...actually adds strength to the finding of a defense, which PIC found before it was admitted in testimony as being a defense. She states her attorney’s advice “could have been” in a range from no defense to a complete defense. Thus, even she recognizes one inference just from his testimony is that it could benefit her. Add to that the facts of her conduct in sponsoring and breaking a tie vote, that it was the “best possible defense”, etc., it was a reasonable inference that it would benefit her.

The Delaware Supreme Court has recognized, in a case where it was alleged a local elected official had a conflict, that personal suits can create an interest requiring recusal, without mentioning a required “financial interest.” *Sullivan v. Mayor and Council of the Town of Elsmere*, 2011 Del. LEXIS 307 (Del. June 17, 2011). In *Sullivan*, a Town employee lost his job and alleged a Council member should have recused as the Councilman asked the employee for “a favor”—to hire his daughter’s boyfriend. No facts suggest the Councilman/father would get a financial benefit, or whether or not he was indemnified. While it is a fact that may be considered, the law’s purpose is not just bar a financial interest benefit, but instill

integrity in government actions. 29 Del. C. § 5802. Participating in the face of a conflict could result in, or appear to result in, bias even if indemnified. Ms. Hanson's indemnification argument was not raised before PIC or the Court, yet, the Court, citing only the ordinance; not briefed; and no legal analysis, said PIC had to rule on it. A definite ruling on indemnification is not required to find a conflict. 29 Del. C. § 5805(a)(1); *Sullivan, supra*.

Ms. Hanson argues PIC could not have reached its conclusion without expert testimony on qualified immunity, *AB at 11-12*, yet cites no legal authority; nor disputes she did not raise it before PIC. Also, this Honorable Court may take judicial notice that civil rights claims can be, and are, heard by lay persons, without a legal expert testifying on immunity defenses. PIC knew DBE relied on PIC's ruling on State conflict law. *Dewey Beach Enterps. at *9*. From PIC's State law conflict expertise it knew a defense against State conflicts is "ministerial acts." A-248-A-249. It was reasonable to find the ordinance assisted her defense. PIC found it was a defense before her attorneys said: (1) it was the "best possible defense"; and (2) the impact on her immunity defense was discussed *after* her other defenses failed. PIC's conclusion should receive deference.

She says PIC had to apply 42 U.S.C. § 1983. Those elements were not raised until her Superior Court reply brief. She still cites no authority that State conflict allegations must adopt 42 U.S.C. § 1983 elements, especially as agencies usually cannot interpret the Constitution. A-24. It is error to graft other elements on statutory elements that limit what must be proved. *Minella, supra*. The record

shows: she had a personal or private interest; participated in the face of that interest, and substantial evidence existed to conclude her interest may "tend to impair judgment in performing official duties," and if she should have recused was a fact issue. *Prison Health Services v. State*, 1993 Del. Ch. LEXIS 107 (Del. Ch. July 2, 1993). PIC found the facts required recusal. The Court is not to substitute its judgment for the Board's expertise when substantial evidence exists. There is substantial evidence, and PIC did not err in not deciding: (1) if she was indemnified, or (2) on 42. U.S. § 1983 elements.

(2) Rental Property Interests

The law automatically imputes an interest that tends to impair judgment in performing a person's duties when:

"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(a)(2)(b)(emphasis added).

Ms. Hanson does not dispute she received or could receive more than \$5,000 from her rentals--the "financial interest" definition, 29 Del. C. § 5804(5)(b) or that her rentals are a "private enterprise" which includes "ownership of real property." 29 Del. C. § 5804(a).

She argues no evidence supports a decision she would benefit more than others; PIC should not have put her "in a class by herself"--the only renter who is a sitting Commissioner and has an individual lawsuit pending against her on the same matter, and in an official position to make decisions on the development, and lawsuit through the

ordinance; no testimony explains the method to decide the effect on property values; and a marketing expert was needed. *AB at 14-17.*

The issue on the expert is in Argument II, (3), *supra*.

She does not dispute that as a factual matter she is the only renter sitting as a Commissioner....” Rather, she argues as a matter of law that PIC should that because no benefit relating to property values or rental income would not accrue to her because she was a Commission, or because she was a defendant in the federal action and those characteristics are simply irrelevant. *AB at 15.* She says the fact that she is a Commissioner is not relevant to deciding what class she is in. *AB at 15.*

The statute is clear. One element is that the law applies to “a person or a close relative. It has not been alleged a close relative is involved. Identifying her as a sitting Commissioner meets that element. It relates to the element of her “action or inaction”. Her action was to break a tie vote on an ordinance. Her action benefited her more because it would achieve 2 persona benefits: (1) bar DBE from building a towering 68’ building across from her; and (2) at the same time, created a legal defense to her personal law suit. PIC rightfully concluded that the general population does not fit that class. It is that combined uniqueness that the general population does not have. As far as a financial interest being benefited, the record is clear why her properties would like benefit to a lesser or greater extent. It heard her testimony, e.g., how she personally makes no money as *her* rent increases have been pathetic; that the higher the building goes, you obstruct property views; DBE’s plan

would bring additional traffic, and affect property values of *surrounding properties*. From the very beginning PIC has noted the significant role of the location of her properties and how DBE's building could impair her judgment because of that proximity, and in breaking the tie vote she could bar them from building to that height, which could effect property values of surrounding properties. Certainly, not every piece of property in Dewey is located just across the highway and 1 to 2 blocks away. Thus, there is substantial evidence from which PIC could conclude she would benefit more directly than others. She said PIC left out an important step—proof that DBE's plan would impact on property values. That is not what had to be proved. The elements are that her private "enterprise or interest" (financial) be affected to a "lesser or greater extent than like (private) enterprises or other interests in the same enterprise. PIC found her private enterprise would benefit more than others if DBE could not build higher than 35 because she would not have a towering object blocking the panoramic view; would not have all the additional traffic and people just across the street, and would not have to share "her beach" with all of those extra people. Thus, as PIC held, it is the close proximity that gives her a greater benefit if DBE were blocked. See, e.g., A-128-129; A-169.

She now argues, among other things in fn. 7, spanning more than an entire page, that the price of the rent she charges and the rent DBE will charge (when it has not even finished building); what DBE's rooms will look like, etc., was all necessary factual information. That may have been interesting, but is not necessary. The issue is

whether she had an interest that "may tend to impair judgment in performing official duties." She admits the statement she made to the Cape Gazette—that DBE would be in competition with those who rent. Her mind was made up, sight unseen, and no idea of what DBE would charge, etc., before DBE laid brick one. That is the entire essence of the conflict. As far as all the rest of the factual information she includes in that footnote, PIC discussed the facts that are on the record. Without a single cite to the record, she gives her version of the facts. PIC knew what her rentals looked like and number of rooms, etc., from the exhibits it reviewed at the preliminary hearing and before the final opinion. It discussed the fact that her rentals are on the beach side, etc. It is noted that she refers to DBE's place as just a hotel, when the record is clear that DBE had plans for condos also. She does throw in another fact that the Superior Court also threw in—that Highway One is separated by a median. As it is such a major highway, having the median would seem to reduce Ms. Hanson's concern for those who do not like to cross.

(3) Appearance of Impropriety

Those subject to the Code, "shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such state employee, state officer or honorary state official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government." 29 Del. § 5806(a).

Ms. Hanson argues PIC exceeded its statutory authority by applying this provision because it has only the powers granted by statute; she argues it is not part of § 5805, which she refers to as a definition section; and argues the provision applies only to "State

employees, State officers and Honorary State officials; and not to local officials and employees.

PIC's authority pertains to all provisions in "this chapter."—29 Del. C. **chapter 58**. 29 Del. C. § 5808(a); § 5809(2), (3), § 5810(a). The above provision--§ 5806(a)—is clearly in "this chapter." It is not part of § 5805 as they are separate sections; § 5805 is not a definition Ms. Hanson says. Definitions are in § 5804. Thus, § 5805 and § 5806 are substantive law. All are in Subchapter 1.

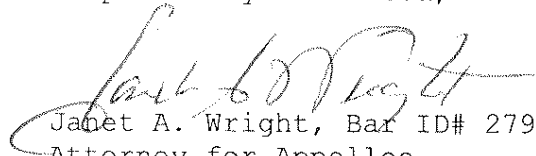
The law is clear: "This subchapter [1] shall apply to any county, municipality or town and the employees and elected and appointed officials." 29 Del. C. § 5802(4). She did not dispute that before PIC, but argued to the Superior Court, Subchapter 1 did not apply as the terms used are "State employee, State Officer, and Honorary State Official." A-213. PIC objected to its consideration, but argued the merits also. A-239. The Superior Court ruled against her. *Hanson*, 2012 LEXIS 403 at *21-*23. The way to contest was by Cross Appeal. Del. S. Ct. Rules 7, 9 and 15. Even if not required, and even if 29 Del. C. § 5802(4) were ambiguous, legislative history shows intent for local officials to have all of Subchapter I applied. AR-1- AR-6.

PIC did not exceed its authority by finding an "appearance of impropriety," when it considered the totality of facts, as required by law. She argues the law requires an actual financial benefit or detriment. No § 5806 element requires that. It requires "public suspicion," consist with the laws 2 purposes--(1) officials not violate the law, and (2) they avoid a "justifiable impression among the public" that they are. 29 Del. C. § 5802(1)

CONCLUSION

For the above stated reasons, this Honorable Court should find the Superior Court erred as a matter of law, and substantial evidence supported PIC's decision.

Respectfully submitted,


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