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 OPENING BRIEF - CORRECTED

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DATE: January 11, 2013

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NATURE OF THE PROCEEDING

This is an appeal of the Superior Court's decision overturning the Public Integrity Commission's (PIC) decision in the civil disciplinary action that concluded Mayor Diane Hanson, Town of Dewey Beach, had conflicts of interest, and/or the appearance thereof, when she voted on a Town Ordinance. PIC found she had a personal or private interest in the Ordinance because, in short summary: (1) the retroactive ordinance was meant as a defense to a federal suit, dealing with the same subject as the ordinance, in which she was personally sued by Dewey Beach Enterprises, Inc.,(DBE) the only property owner affected by the Ordinance; and (2) she rented properties basically across the highway from DBE's proposed development site and stated DBE would be competing with persons who rented. As the only penalty that may be imposed on an elected official is a written reprimand or censure, PIC's release of the opinion constituted the censure/reprimand. The Superior Court ruled PIC had not followed its own procedures, and did not have substantial evidence to find she had any conflict, or the appearance thereof.

On September 19, 2012, PIC timely filed a Notice of Appeal to the Delaware Supreme Court. This is PIC's Opening Brief.

SUMMARY OR ARGUMENT

1. The Superior Court erred by not considering elements of the law. At issue was if an official has a personal or private interest in a matter that may tend to impair judgment, they must recuse. PIC found Ms. Hanson had personal or private interests, and/or appearance thereof, in an ordinance when she voted, and as she did, PIC found she did not comply with the law. The Superior Court said there were 2 evidentiary views for *why* she voted as she did: (1) help her rentals compete with DBE's hotel and improve her legal defense in Federal Court; or (2) oppose a project about twice as tall as other Dewey Beach buildings. It said PIC chose the former instead of the latter, and the issue was if that choice was supported by substantial evidence. The Court concluded it was not. The error was no element requires PIC to find *why* she voted as she did. The law does not care *why*, but *if* she voted when she was to recuse. From its error the Court improperly found PIC chose one of the Court's imposed choices. It did not. It found she should not have voted. Her "motive" was immaterial. From its errors, the Court found PIC did not have substantial evidence to support a "choice" it never made.

2. The Court erred considering issues not raised before PIC; the opening brief; or until the reply brief or oral argument; or never raised at all, when the decision is to be “on the record.”

3. PIC did not err as a matter of law and substantial evidence supported its finding of her violation.

STATEMENT OF FACTS

(A) Facts On the Procedural Aspects

This disciplinary action against Ms. Hanson began October 1, 2010, when Joseph Nelson filed a sworn complaint. A-3–A-11. PIC can act on a sworn compliant or on its own. 29 Del. C. § 5810(a). Mr. Nelson alleged Ms. Hanson, a Dewey Beach Town Commissioner (later Mayor), sponsored and voted on an ordinance violating the Code of Conduct (hereinafter "Code"), 29 Del. C. § 5802; § 5805; § 5806. A-3;A-4. The September 11, 2010 vote was 3-2. A-4. The ordinance "defines and expresses" the drafters' "intent" of "relaxed bulk standards" in the Town's 2007 Comprehensive Development Plan (CDP); it was not to include heights over 35'. A-7-A-8. It was retroactive to 2007. A-8. He alleged she had a conflict because: (1) the ordinance applied only to the Resort Business 1 (RB-1) zone; the only RB-1 owner, DBE, wanted to develop the property and sought, under the 2007 CDP to build above 35'; Town Council, including Ms. Hanson, denied its request in 2007; in 2009, DBE sued in federal Court, and she was the only sitting Commissioner personally sued, and "relaxed bulk standards" was at issue. A-3; A-4; and (2) she owns Dewey Beach rentals; he understood she had said DBE's development would affect her rent income. A-6. He did not identify the case or her property.

Independent of Mr. Nelson, the information was reviewed and investigated, 29 Del. C. § 5808A(a)(3)and(4), resulting in documents of: (1) a *Cape Gazette* statement allegedly by her that she wanted a 35' height; DBE's proposed 68' hotel/condo or townhouses would "spread along Van Dyke to Rodney Avenues" and "compete with property owners

who rent". A-12; (2) her rentals: 5 Van Dyke Ave. and 3 Collins St., A-14-A-19; Van Dyke was available to organizations for workshops from her private business, Creative Resource Development (CRD). A-18-A-19. Her Collins ad said it was 2 blocks from "Ruddertowne," DBE's site, A-17. Van Dyke was 1 block away. A-20. Both were across the highway from DBE. A-20; and (3)a Federal Court case showing DBE personally sued her alleging her rentals were a conflict when she voted on its 2007 request; at issue was the 2007 CDP term "relaxed bulk standards;" the case was active when she voted on the ordinance, September 11, 2010, as her motion to dismiss the personal suit was denied on July 30, 2010. A-25; *Dewey Beach Enters. v. Town of Dewey Beach*, 2010 U.S. Dist. LEXIS 77466 *2,*5,*10,*19,*20,*29,*30-*38(D. Del. July 30, 2010). It left standing DBE's challenge of the 68' plan denial, saying claims of officials with conflicts were relevant. Id. at *20, *36-38.

PIC met to review the complaint, PIC Rules III(A), A-303, to decide if, with the added information, it failed to state a claim. If so, it could dismiss. 29 Del. C. § 5809(3). Otherwise, before a disciplinary hearing, a majority can find reason to believe a violation exists. 29 Del. C. § 5808A(a)(5). At that stage, PIC must assume all facts related to the complaint as true. 29 Del. C. § 5808A(a)(4). It considers probative evidence. PIC Rule IV (J). A-307. It considered the complaint, attachments, investigatory documents of location of her rentals, *Cape Gazette* article, and federal case. A-22-A-35. It dismissed some claims for lack of jurisdiction. 29 Del. C. § 5809(3); A-23-A-25. A unanimous PIC, A-22, found reason to believe, assuming all facts as true, she had a personal or private interest in:

(1) the suit as she could be personally liable; the ordinance could be a defense to it; A-30-A-33; (2) by law, her rentals were a "financial interest"; she personally opposed a height over 35'; saw DBE as a competitor; and could benefit more than others as the only renter who was a sitting official, personally sued, who could enact a retroactive ordinance by a 3-2 vote, as a defense to the suit, and bar DBE from building above 35' reducing her competition, in close proximity. A-28–A-30; and (3) based on all relevant facts, her conduct could create the appearance she used public office for personal benefit. A-34-A-35.

The opinion gave the law, facts, conclusions, and documents. A-22–A-35. It said PIC applies Superior Court Civil Rules. A-27, fn.3. She had 20 days for a written response. PIC Rule IV (D), A-306;A-36. Before that, she moved to stay until the U. S. Supreme Court ruled on a case where a Councilman voted and his campaign manager was seeking the decision. A-38; A-40. PIC denied the motion. A-52-A-55.

On March 8, 2011, she filed a Motion to Dismiss all charges. A-56–A-71. Before the motion hearing, her counsel said a witness may be called. A-78-A-79. No witness name, nor subject of their testimony, was given. A-78. At the motion hearing, she asked to call witnesses: herself, Dewey Beach's Town Attorney, Glenn Mandalas, and Max Walton, her attorney in the federal suit, who should arrive shortly. A-77. Testimony was unusual at motion hearings. A-298. However, PIC Rules allow expedited actions by a pre-hearing conference, including naming witnesses, purpose of testimony, etc. PIC Rule IV (I); A-307. PIC confirmed it was a motion to dismiss. A-76. The witnesses and testimonial subject were identified. A-77–A-78. They testified; were

questioned by PIC; and cross-examined by the Prosecutor, without objection. A-79–A-146. PIC was to include the testimony in the pleadings. A-147. She never argued the complaint was not properly sworn, or the Code was *not* the applicable law; or objected to preliminary hearing documents or those at the Motion hearing.

PIC reviewed the record--complaint; attachments; investigatory documents; preliminary hearing decision; written motion and testimony; documents referred to at the motion hearing. Finding no substantial change to the preliminary hearing *prima facia* case, it adopted those facts, with a few minor changes, and added the motion testimony. A-151–A-175. It converted the motion to dismiss to a summary judgment motion as it considered information outside the pleadings. A-154-A-155. It gave the law, facts and conclusions on her conflicts, or appearance thereof. A-159–A-175. Finding no genuine issue of fact, it ruled for the State. Id. It notified her of a reconsideration review. A-177. She appealed to Superior Court on June 10, 2011. A-1.

(B) Facts Pertaining to the Conflicts of Interest

(1) The Federal Law Suit

At the preliminary hearing, PIC applied the law barring officials from reviewing or disposing of matters if they have a personal or private interest that may tend to impair judgment in performing their duties. A-30-A-31. It found reason to believe she was personally sued by DBE in a federal suit that turned on “relaxed bulk standards”; as did the retroactive ordinance. A-30-A-33. It found the ordinance could be a defense to the suit. A-33. That established the State’s

prima facia case that she had a personal or private in the ordinance that may to tend to impair judgment in performing her duty. A-30-A-33.

Her written response sought total dismissal. A-56–A-71. It said she voted on the ordinance. A-58. She confirmed the personal suit, A-82; she bought, in part, because of the height, A-97, about a decade ago A-103; opposed a height over 35′ before and after election. A-89.

Mr. Walton represented those personally sued in the federal case, including Ms. Hanson; A-108; the 2007 CDP included "relaxed bulk standards" for RB-1; CDP issues were in the suit; the ordinance "clarified" that term. A-115–A-116. Asked if, after denial of her motion to dismiss the personal suit, he advised her of the ordinance's potential impact on her defense, he said: "I'm sure we spoke of it, yes." A-120. He spoke with her about the settlement which had a height over 35′. A-121–A-122; it released her personal suit. A-121.

Mr. Mandalas drafted the ordinance because of DBE's suit, in part dealing with heights over 35′, A-127-A-129; recommended it as they would want "the best defense possible." A-130; thought it would take an issue out of the case. A-137. Asked about the unanimous Executive Session vote on settlement, he said "those votes were to move forward with the process"— not actually settle the suit. A-132-133. Ms. Hanson also said the closed vote, which had a release from her personal suit, was unanimous; A-88-A-89; A-121. Publicly, she voted "no". A-87.

PIC applied the same law as at the preliminary hearing. A-30; A-165. It was confirmed she voted on the ordinance; had a personal suit against her when she voted; the ordinance was the "best defense

possible" to the suit, its use as a defense was discussed with her. PIC found her interest sufficient to require recusal. A-165–A-168.

(2) The Rental Properties

At the preliminary hearing, PIC applied the law that imputes a personal or private interest that tends to impair judgment, if an official has a "financial interest" in a private enterprise that would benefit more or less than like interests. 29 Del. C.§ 5805(a)(2)(b). A "financial interest" exist if they received, or will receive, more than $5,000 a year from the private enterprise. A-28.

Her rental addresses and proximity to DBE were presented. A-28-A-29. PIC found, by law, her rentals were a "financial interest." A-30. It found she could benefit as the only sitting Council member personally sued by DBE; who rented just across the highway; and the ordinance could be a defense to the suit, and also bar DBE from building over 35' close to her. A-29; A-30.

At the Motion hearing, the same law applied. A-169. Her rent locations were undisputed. She advertises two. A-95. She corrected a preliminary hearing fact--she no longer runs CRD. A-94. She bought about a decade ago, in part because of the 35' height. A-97; A-103. In 2007, before election, when RAC[1] met with DBE on its 68' building, it was said it would increase property values; her response: "who would want to live here?" A-93; she ran for office in 2007 to keep the height at 35' and said she always supported that height. A-80–A-81.

[1] Ruddertowne Architectural Committee, ad hoc committee to discuss DBE's proposal; she was a member; not a town official. DBE gave its plan to RAC on June 15, 2007; she was elected that fall. A-57; A-58.

She said the *Cape Gazette* quote: "The hotel will also compete with property owners who rent...", “was properly attributed to me.” A-95, However, she now said others mentioned that; “not because I was personally concerned… As I said, mine are oceanfront. I don’t think they would compete with me quite frankly.” A-95. However, she agreed she and DBE would provide places for families to stay; they could rent from her or DBE; she said DBE would have smaller units and she could put a whole family under one roof; but so could DBE. A-99-A-102.

Asked if it may appear to be a conflict with her making rent and voting on DBE’s plan, she said “no”; it was not a “financial interest” but a “quality of life” issue. A-97-A-98; She said the “quality of life” non-financial value of height is: “the higher you go, you do obstruct views; it increases density, traffic, response of emergency vehicles, people on the beach.” A-98. She also said:

> “You asked about making money on rental properties. You don't make money on rental properties. If lucky, you break even and cover your mortgage. The amount of - - the increase in rent over the last decade that I've owned these properties has been so minimal it's pathetic. Because the market will only take so much. But now you're required to provide high-speed internet, another $60 a month per property. Electricity has gone up. Insurance has skyrocketed. You know, then you have repairs, you have to pay the commissions to the realtors, and the garbage, and--I mean it just--it's phenomenal the expenses of running a beach house. At best, if you’re lucky, you break even.” A-103-A-104.

She did agree covering the mortgage paid down the debt. A-107.

PIC again found her rentals were a defined “financial interest” A-169, and no exception existed based on ownership costs. A-170. She told the *Cape Gazette* DBE would complete with those who rent, but changed that at the hearing. A-170. She agreed DBE would seek people from the same market, etc., A-170; her Sea Dune (Collins) rental is a

“second level condo”; DBE will offer condos, A-170; fn 18; she said the “market would only take so much” and her rent increases have been “pathetic”; based on her statements, the plain and ordinary meaning of “competition” encompassed her situation. A-170. While DBE is across on the Bay, PIC noted the close proximity; it could advertise for the same market and basically same location—“her beach” one block over; increased traffic and people on the beach would be in her immediate area; and DBE renters would not pay her rent. A-171. Limiting her “neighbor’s” size, could limit the market impact on her rent and traffic and people on “her beach.” A-170-171. By law, she had a “financial interest” that “may tend to impair judgment,” and would experience a benefit right across the highway. A-170-A-171.

She also argued she did not have a financial interest as it was a “quality of life” issue. A-98. PIC found the definition of “financial interest” was met, but addressed her “quality of life” defense, noting the Code is not limited just a defined “financial interest.” A-171. It found “quality of life” was a personal interest: her desire to buy because of the low height; her comments “who would want to live here” if the building were 68’; she agreed traffic and people would increase, A-94 (in her immediate area); it could affect property values if DBE built; A-94; despite her remark a 68’ building would not impact on her view, a 68’ building across the street could impact on the bay to ocean view. A-172-A-173. It held she had a personal or private interest because of her property’s proximity and her opposition to DBE’s plans before election, which would tend to impair judgment, whether it was or was not a “financial interest.” A-174.

(3) Appearance of Impropriety

At both proceedings, PIC applied the provision that officials must pursue conduct that will not raise public suspicion they are violating the public trust. 29 Del. C. § 5806(a). PIC calls this the "appearance of impropriety" standard. A-34; A-175. The test is if a reasonable person, knowledgeable of all relevant facts, would still believe an official cannot act with honesty, integrity and impartiality in their duties. A-175. PIC applied all relevant facts and found she acted contrary to the public trust as the public may suspect she used her office for personal benefit. A-34–A-35; A-175.

(4) Written defenses to the complaint

Ms. Hanson's written motion sought dismissal of all charges on: (1) a "public policy" basis that PIC should not be drawn into politics or civil actions, or allow Title 29 to be misused to assist litigants or disenfranchise the public. A-58. Even assuming her allegations on the politics and personalities were true, denied as no such "public policy" exist. A-152–A-154; (2) 1st Amendment protection of her speech in voting, A-71; denied as PIC has no Constitutional jurisdiction. A-154; (3) failure to state a claim as: (a) DBE publicly sued, so the litigation should count as disclosure to PIC, A-137, under the Code that lets officials participate if they cannot delegate. A-58–A-59. Denied as the law demands a prompt written statement to PIC describing the conflict and why she could not delegate. That did not happen. A-155–A-158; and (b) no one objected to her participating in DBE matters. A-138. PIC found the suit a fairly loud objection, and public objections are not required. A-158-A-159.

The State's *prima facia case* was not contradicted. Her arguments it was "not a financial interest" because of costs, and "quality of life" failed, as did other defenses, PIC found against her. A-155.

The only penalty for an elected official who violates, or appears to violate, the Code is a censure or reprimand, 29 Del. C. 5810(d)(1), achieved by public release of the opinion.

On appeal, she argued: (1) PIC lacked jurisdiction over local officials; (2) PIC erred by finding per se conflicts because she was a defendant in a law suit, and owns rentals; (3) PIC exceeded its authority by: (a) applying common law conflicts of interest to her "quality of life" argument; and (b) in relying on the "Appearance of Impropriety" as a separate ground for a conflict as that provision is not in § 5805, but is in § 5806(a). A-213-A-227. PIC argued it: (1) has jurisdiction over local officials; (2)did not make per se findings but based its decision on her particular facts; (3) did not exceed its authority in:(a) considering her "quality of life" defense; or (b) applying the appearance of impropriety provision because, among other things, it is part of "this chapter." A-239–A-267.

The Superior Court found PIC had jurisdiction, but did not follow its procedures for a full-trial, and lacked substantial evidence to conclude *why* Ms. Hanson voted as she did, which was not the issue. *Hanson v. Delaware State Pub. Integrity Comm.*, 2012 Del. Super. LEXIS 403. (Del. Super. August 30, 2012). PIC appeals as the Court considered arguments not on the record; erred in finding PIC did not follow its procedures and that PIC did not have substantial evidence to conclude she had a conflict and/or the appearance thereof.

ARGUMENT

I. THE SUPERIOR COURT ERRED AS A MATTER OF LAW BY REVERSING PIC'S OPINION ON ITS OWN FINDINGS OF AN ELEMENT THAT WAS NOT AT ISSUE, AND IGNORED THE ELEMENT ON WHICH THE ENTIRE CASE TURNED.

Question Presented

Did the Superior Court err as a matter of law by finding two views of the evidence to explain *why* Ms. Hanson voted the way she voted, when the legal issue was not *why* she voted, but *if* she should have voted at all? *Hanson* at *49.

Standard and Scope of Review

The Supreme Court reviews errors of law *de novo*. *Sullivan v. Mayor and Town of Elsmere*, 23 A. 3d 128, 133 (Del. 2011).

Merits of the Argument

The Superior Court erred as a matter of law in holding that:

> "There are two ways to view the evidence in this case." *Hanson at*49*. (1)"Hanson voted for the ordinance to help her rental properties compete with DBE's hotel and to improve her legal defenses in the Federal Case" or (2) "Hanson voted for the 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." Id.

PIC had to prove she had a personal or private interest in the ordinance that would *tend* to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1)(any interest)and 29 Del. C. § 5805(a)(2)(b)("financial interest" in a "private enterprise" as defined by law) or the appearance thereof. 29 Del. C. § 5806(a). If she had to recuse, it was a violation. It was undisputed: a personal suit and rental of properties were personal or private interests; her rentals were a "private enterprise"; they were 1 & 2 blocks from DBE, A-20; the ordinance would bar DBE from building over 35', A-8 A-9; she

voted on it, A-3-A-4. The ordinance was the “best defense possible” to the suit, A-130; after her federal motion to dismiss failed, the ordinance as a defense was discussed with her. A-120. The only issue left was if her interests required recusal. A-165. Whether an interest is enough to disqualify is “necessarily a factual one” depending on “the circumstances.” *Prison Health Services v. State*, 1993 Del. Ch. LEXIS 107 at *1*2 (Del. Ch. July 2, 1993). The case turned on that—not on *why* she voted as she did. Other facts were: she bought in Dewey Beach about 10 years ago because of the height, A-103; thought “who would want to live here” with a 68’ height before being elected, A-97; opposed the height when running for office, A-80–A-81. By law, her rentals were a “financial interest” in a “private enterprise” as her defenses to a “financial interest” failed. A-170-A-171A. Based on the facts, PIC found she had an interest that, by law, would *tend* to impair judgment, as it would benefit her defense to a private suit, and bar DBE from building over 35’ in her immediate area. A-170-A-171.

The Court is to consider an agency’s expertise and competency, and the law’s purpose. *Kopicko v. Dept. of Serv. For Children, Youth and Their Families*, 23003 Del. Super. LEXIS 282 at*6 (Del. Super. August 15, 2003). It did not defer; or construe the law “to promote high standards of ethical conduct,” 29 Del. C. § 5803;or consider the purpose “to instill the public’s confidence.” 29 Del. C. §5802(1).

The Court erred: it was a fact finder; weighed evidence; created evidentiary “views”; ignored the legal elements; did not consider PIC’s expertise; and from its errors found PIC lacked substantial evidence on something it did not have to prove. It must be reversed.

ARGUMENT

II. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN CONSIDERING ARGUMENTS NOT RAISED BEFORE PIC, AND/OR NOT RAISED IN MS. HANSON'S OPENING BRIEF; AND/OR NOT RAISED IN, OR UNTIL, MS. HANSON'S REPLY BRIEF; AND/OR NOT RAISED AT ALL BY MS. HANSON.

Question Presented

Did the Superior Court err in considering issues not raised before PIC and/or before the Court? *Hanson* at *3,*12-*14,*26,*27, *31,*43.

Standard and Scope of Review

The Supreme Court reviews errors of law *de novo*. *Avallone v. Dep't. of Health and Social Services*, 14 A. 3d 566, 570 (Del. 2011).

Merits of the Argument

Superior Court's review of PIC decisions, absent actual fraud, is to decide if its decision is supported by substantial evidence on the record. 29 Del. C. § 5810A. The burden of proof is on appellant.[2]*Id*.

On appeal "on the record," the Superior Court is not to consider arguments not raised below; not raised in opening briefs; not developed; or never raised. *Camas v. Delaware Bd. of Medical Practice*, 1995 Del. Super. LEXIS 528 at *15,*16 (Del. Super. November 21, 1995); *Bradley v. State*, 2003 Del. Super. LEXIS 331 at *14 (Del. Super. September 16, 2003);*Pioneer House v. Div. of Long Term Care Resident's Protection*, 2007 Del. Super. LEXIS 346 at *15(Del. Super. November 5,

[2]Review of the law is not addressed. If procedures are not given, Superior Court should turn to its rules, e.g., Super. Ct. Civ. R. 72--appeals from commissions, boards and courts. *Schweizer v. Board of Adjustment*, 930 A.2d 929 (Del. 2007). Rule 72(g) has been held to require *de novo* review of the law. *City of Wilmington v. Minella*, 879 A.2d 656,659 (Del. Super. 2005).

2007); *Beebe Medical Ctr. v. Certificate of Need Appeals Board,* 1994 Del. Super. LEXIS 473 at *6 (Del. Super. August 31, 1994). Here, the Superior Court considered matters not "on the record":

(1) PIC's Procedure. The Court said PIC did not follow its procedures and should have had a full-trial. H*anson* at *3; *12,*13. Ms. Hanson never raised the issue; at oral argument, the Court asked if PIC had rules. A-292. The Court may review the law *de novo*, but a record of the claim must exist. *Sweeney v. Dept. of Transportation & Merit Employee Relations Board*, 2012 Del. LEXIS 554 at *11 (Del. October 23, 2012). As it was not raised before PIC, or on appeal, and not even discussed at oral argument, it was error to consider it.

Even if it could, the Court erred. PIC followed its procedures: reviewed the complaint and documents and found reason to believe a violation occurred, PIC Rule III (A), A-304, 29 Del. C. § 5808A(a)(4); provided a decision, PIC Rule III (C) and (D), A-306; saying it applies Superior Court Civil Procedure Rules A-27. Her written response moved to dismiss all charges, A-56-A-71, which PIC can consider. *29 Del. C.§ 5809(3).* At the motion hearing, she asked to call witnesses. A-77. PIC Rules allow an expedited process. PIC Rule IV (I), A-307. That occurred: her witnesses and testimonial reasons were identified; PIC confirmed it was her motion to dismiss; A-77–A-79, and was asked to include the testimony in the pleadings. A-147.

Considering matters outside the pleadings turns a dismissal motion into a summary judgment action. *Super. Ct. Civ. R. P. 12(b)(6)*. The record is reviewed for material issues of fact. *Super. Ct. Civ. R. P. 56(c)*. If none, a decision can be made *for, or against,* the moving

party. *I.U.N. Am., Inc. v. A.I.U. Ins. Co., 896 A.2d 880(Del. Super. 2006)(summary judgment to nonmoving party); Liggett Group, Inc. v. Affiliated FM Ins. Co. 2001 WL 1456774* (Del. Super. 2001)*; Bank of Delaware v. Claymont Fire Co.*, 528 A.2d 1196 (Del. 1987). PIC found the *prima facia* case in its preliminary opinion was undisputed. She owns rentals near DBE, A-20; told the *Cape Gazette* its plan would compete with owners who rent, A-12; bought in part, because of a 35' height, A-97; admitted the personal suit; A-82; knew when she voted it was a defense as it was discussed with her; A-120. It barred DBE from a 68' building in her area. A-8-A-9. All PIC had to decide was if her interests required recusal. A-159. It found they did. A-159-A-175.

Agencies can grant summary judgment[3]; due process does not require a full hearing if no material disputed fact exists. 2 Am. Jur. 2d *Admin. Law* § 303. A right to a trial-type hearing is usually limited to where facts are in issue. *Id*. at § 300. Agencies are encouraged to use informal procedures. 2 Am Jur. 2d Admin Law § 302. Even if a full-trial is provided for, agencies may refuse if it has no purpose. *Id*. at § 300. Here, no genuine issue of fact existed; calling her witnesses at the motion hearing resulted in admissions, confirmations, and answers. As for Mr. Nelson not testifying, the investigation established rental addresses/proximity to DBE and the federal suit. That information was in the Preliminary Opinion, so she had time to review and oppose it. Instead, it was confirmed. Thus,

[3]At oral argument, Ms. Hanson's Counsel said PIC treated it like a summary judgment motion. A-293. However, he and the Court then compared it to criminal proceedings. A-294-A-297. PIC twice said it was not a criminal proceeding. A-294; A-297.

calling him had no purpose. As no issue of material fact was found, PIC issued a decision, and advised her of an administrative review option. A-199; *Id*. at § 300 (agency should give reasons and identify available review). She chose to appeal to Superior Court. A-1.

Deference is due to an agency's interpretations of its rules or regulations. *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382 (Del. 1999). The Court erred in finding a full-trial was required; cites nothing barring PIC from using Superior Court Rules; and did not defer to its interpretation that was consistent with the Rules. In procedural decisions, abuse of discretion occurs if the agency's judgment is manifestly unreasonable. *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954). If adequate and proper grounds for discretion exist, the ruling will not be disturbed. Id.

(2) Nelson Complaint. The Superior Court said Mr. Nelson's complaint was "not properly sworn." *Hanson* at *14; *26. While Ms. Hanson discussed him and his complaint in her written motion to dismiss alleging he "is a DBE supporter;" his complaint was DBE's basis for its 6th suit; her political opponent's information was in his complaint; he was on the "committee of a Hanson opposition group; "and his wife accused Ms. Hanson of assault—"investigated…no grounds for charges," A-56-A-58, she never argued his complaint was not "properly sworn."[4] She knew of his letter as of the November 22, 2010 decision. A-22. Thus, she had time to review and object before PIC at any time.

[4]Her facts were not supported by any evidence, and although on a motion to dismiss the standard is usually the non-moving party's facts are accepted as true, PIC assumed her facts as true, but found it was not a legal basis to dismiss. A-152-A-154.

Instead, in her opening brief was a footnote:

"In PIC's Denial of Respondent's Motion to Dismiss and Final Disposition Opinion, PIC characterized the Complaint as "sworn." PIC Op. at 1. Although the letter from Mr. Nelson was notarized, nothing in the letter indicated that it was submitted under oath." A-208.

PIC responded: "Appellant notes that Mr. Wilson's letter was notarized, but said nothing suggests it was under oath. If Appellant is trying to raise this as an argument, this was never raised below." A-235.

Clearly, the argument was not developed. Thus, it was still error for the Court to consider it. *Pioneer House, supra.* It crafted its own argument of law and facts, saying the applicable law was in 29 Del. C. § 4327. *Hanson at *14.* It noted Mr. Nelson signed the letter and "a notary public signed her name and placed her notary seal below her signature." *Id*. The Court said Mr. Nelson had to swear or affirm his statements; "He did not do that." *Id*. Even if 29 Del. C. § 4327 applied, no record exists of a Court hearing on the notary's or Mr. Nelson's testimony, to know if he took an oath, or if the notary just failed to add her notary act per 29 Del. C. § 4328(3). In deciding the meaning of a notarized statement with a signature, sealed and signed by the notary but with no notary act: "The notary public's involvement … is relevant in determining the authenticity; as is the intent of the parties." *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). In *Osborn*, the Chancery Court heard the notary's and signers' testimony and applied contract law--law on what the document purportedly was—a land sales contract. Id. *at* *23. This Court acted as trier of fact—minus *any* witnesses—and found "he did not" make a sworn statement; then decided the weight: "unpersuasive"

as he did not testify and his "complaint is not properly sworn."[5] *Id. at* *26. On appeal from an administrative agency, the Court is not to weigh evidence; decide witness credibility; or independently find facts. *Sullivan v. Mayor and Council of Town of Elsmere, 2010 Del. Super. LEXIS 307 at *16* (Del. Super. July 15, 2010).

As his complaint was a pleading, the Court could have turned to its procedures. *Schweizer, supra.* Under Super. Ct. Civ. R. P. 11 if the party is unrepresented, it shall be signed and need not be verified or accompanied by affidavit; "the signature of …a party constitutes a certificate by him that he has read the pleading…to the best of his knowledge, information, and belief formed after an inquiry reasonable to the circumstances….Id. Mr. Nelson is not an attorney; he said: "I have become aware of information that leads me to believe" and gives the information on why he believes it may be a violation. A-3-A-7. Delaware's Rule 11 and Federal Rule 11 are comparable. *Crumplar v. Super. Ct. in & for New Castle County*, 2012 Del. LEXIS 553 at *12 (Del. January 27, 2011). That case also cited Federal Advisory Committee Comments on the Rule. Comments on Rule 11 state: "Amended Rule 11 continues to apply to anyone who signs a pleading…Although the standard is the same for unrepresented parties, who … sign pleadings, the Court has discretion to take account of the special circumstances in pro se situations." Fed. R. Civ. P. 11, Advisory Committee Note, 1983 Amendments.

[5]In *Osborn*, the Chancery Court noted a copied notarized document may not reflect the embossing seal. That is true here. However, the seal is clear on the original and will be presented if the Court requests.

"Sworn" complaint is not defined so it should have its plain and ordinary meaning. *3 Del. C. § 303*. Synonyms of "sworn statement" are "affidavit, attestation, deposition, **notarized statement**, oath, sworn evidence, sworn testimony,…."*Roget's 21st Century Thesaurus, 3rd Ed.* http://thesaurus.com/browse/notarizedstatement*(emphasis added)*. Using the plain and ordinary meaning, his notarized complaint is "sworn." Given that meaning, his statements; that it was a pleading, and never objected to, it should not be an abuse of discretion to accept it as a "sworn" complaint.[6] The Court should be reversed.

(3) Legal Analysis of "Competition": The Court erred in holding PIC needed to apply a market analysis meaning of "competition" as defined in a non-Delaware case, to decide if Ms. Hanson and DBE were "competitors" (*Cape Gazette* statement*, A-12*). *Hanson* at *26; *27. That law was not argued to PIC; on appeal, it was not cited; nor argued that PIC's use of the plain and ordinary meaning of "competition" was improper. Again, the Court must have a record of the claim before it. *Sweeney, supra.* The Court should be reversed for considering it.

Even if it could, when Ms. Hanson spoke with the *Cape Gazette,* no facts suggest she used the legal meaning of "competition." A-12. At the hearing, she did not testify as a legal or marketing expert. She was a fact witness. That is why PIC used the plain and ordinary

[6]PIC's Counsel reviews and investigates information that, if true, may be a violation. 29 Del. C. § 5808A(a)(3) and (4). That resulted in information on addresses/proximity to DBE, and the federal case in which Ms. Hanson was sued. PIC also can act on its own. 29 Del. C. § 5810(a). Thus, even if his complaint were not "properly sworn" his information could be reviewed as a potential violation, and still be presented to PIC to act on its own.

meaning. A-170. Further, the legal meaning of "competition" is not an element of the Code. When a statute sets out the elements for the government to prove, it is an error for the Court to impose a non-statutory element on it. *City of Wilmington v. Minella, 879 A.2d 656, 662 (Del. Super. 2005)*. The element being discussed was her "financial interest" and how they may be affected, A-99-A-102; 29 Del. C. § 5805(a)(2)(b). She had confirmed the *Cape Gazette* properly attributed to her the statement: "The hotel will also compete with property owners who rent homes…." A-95. Now, she said DBE was not her competitor. A-95. PIC asked her about similarities, e.g., if both would supply places to stay in Dewey Beach, etc. A-99-A-102. She agreed both would; while families could stay at her rentals, they also could stay at DBE's; and people who rented from her have also stayed on the Bay, etc. Id. PIC properly used the plain and ordinary term to weigh her 2 "competition" statements. A-170. On appeal, the Court does not weigh evidence, determine witness credibility, and should defer to the agency's expertise in its fact conclusions. *Sullivan, 2010 Del. Super. LEXIS 307 at *16.* The Court did not defer. Instead, it imposed elements that PIC does not have to prove. It should be reversed.

(4) Qualified Immunity Defense: The Superior Court erred in deciding no legal analysis or substantial evidence supported PIC'S finding that the ordinance could help Ms. Hanson's qualified immunity defense as "PIC never reviewed DBE's complaint against the Town of Dewey Beach, Ms. Hanson and the individual defendants or their respective motions to dismiss." *Hanson* at *43. It "relied on the District Court's decision on the motions to dismiss …" Id. The Court

then said PIC should have applied the elements of qualified immunity, e.g., if a constitutional right was violated, etc. Id. at *44; *45. She never argued PIC should apply those elements until her reply brief. A-279-A-280. Even then, she never argued it should have read the federal compliant and briefs, instead of case law. At oral argument, the Court mentioned PIC did not read the federal complaint. A-298. Her Counsel then argued PIC had to decide on § 1983 elements; show a constitutional violation, A-300, and PIC did not have "the complaint or the brief, [it] could not have any basis to know what the violation was." A-301. From that, the Court ruled: PIC should have read the federal complaint and briefs, and as it did not, the Court said it found no substantial evidence or legal analysis for its decision. *Hanson* at *43. It should be reversed.

Even if it could consider the argument, it cites no legal authority that: agencies must read complaints and briefs of federal cases they cite; or require PIC, in interpreting **State** law, to prove a federal qualified immunity case. PIC was deciding if she had a **State** law conflict. It PIC applied State law at its preliminary hearing. A-28; A-30; A-34. She was on notice as of the November 22, 2010 decision of the law applied, and did not object.

State law does do not include § 1983 elements. The federal case connection to her State case was: (1) She allegedly had a conflict in voting on the ordinance as she was sued in federal Court on the same matter. A-4. The case was not identified. At the preliminary hearing, the exact case was provided on "relaxed bulk standards" and 35' height under the 2007 CDP, like the ordinance; she was personally

sued; her personal case was active as the Court had denied her motion to dismiss, A-30–A-33; and (2) allegedly had a conflict because of her rentals. A-6. The federal case, nor Mr. Nelson's complaint, identified her properties. The investigation gave the addresses/proximity to DBE; and her alleged statement that DBE was a competitor. A-12-A-20. PIC, like the federal Court, was deciding if the claim should be dismissed. A-23. It cited the federal case as persuasive in not dismissing the claim as the federal court did not dismiss on even fewer facts. A-30. Use of that case did not require reading the federal complaint and briefs. Without applying § 1983, and before Mr. Mandalas' testified, PIC found reason to believe it was a defense. A-33.

He testified it was the "best defense possible" A-130—a defense not available *but for* the ordinance where she broke a 2-2 deadlock. *After* losing her federal motion to dismiss, her attorney was sure he told her of the ordinance's impact on her immunity defense. A-120.

PIC rightfully found it was a defense. Under Delaware law, if a conflict is alleged, but the official's actions are "ministerial," the conflict is immaterial. A-249. The ordinance retroactively barred heights over 35', A-8-A-9. The suit alleged she should not have voted in 2007 on its 68' plan because of a conflict. Now, she could argue it was made a "ministerial duty" retroactive to her 2007 vote, so a conflict did not matter. A-249. PIC's finding was based on its State conflicts expertise. DBE cited PIC's decision on State law in its allegations the officials participated when they had a conflict. *Dewey Beach Enters.*at *9. At oral argument, PIC argued it was State law. A-300. The Court should have deferred. Instead, it imposed elements not

in State law that would require PIC to ignore jurisdiction limits on constitutional issues when a conflict defense could be found without that law, as **State** law creates the defense. It was error to impose non-statutory elements on the government's case. *Minella, supra*.

(5) Quality of Life Defense

Ms. Hanson testified it was not a "financial issue" but a "quality of life issue." A-98. The Court said PIC erred in considering as PIC did not notify her it could be a separate violation. *Hanson* at *31. She never made the argument. The Court should be reversed.

Even if it could consider it, she raised it as a defense to a "financial interest." A-98. Asked if it may appear as a conflict for her to make rent money and vote on DBE's proposal, she said "no"; it was not a "financial interest" but a "quality of life" issue. A-97-A-98. No law is cited barring PIC from considering defenses. PIC considered it and found it was a violation "whether or not she had a 'financial interest'", A-174. PIC had already found a "financial interest", so to that extent, it did not err because it was not a defense to a "financial interest." If PIC erred by finding a separate violation even without a "financial interest," she received notice, and a chance to respond. A-174, A-199. Also, it is not reversible if an agency "inartfully" expresses its decision. *Avallone*, 14 A.3d at 573. In *Avallone*, the Merit Employee Relations Board allegedly shifted the burden to an agency saying it "met its burden with regard to the first two elements." The Court said it "inartfully expressed" its conclusion but it was not reversible. Id. Thus, her "quality of life" issue may have been more artfully called a failed "defense."

ARGUMENT

III. THE PUBLIC INTEGRITY COMMISSION DID NOT ERR AS A MATTER OF LAW, AND THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT ITS FINDINGS THAT MS. HANSON VIOLATED THE CODE

Question Presented

Did the Public Integrity Commission err as a matter of law or render a decision not supported by substantial evidence? *Hanson* at *3, *24, *26, *31, *33, * 35, *38, *40, *43, *47, *49, *50.

Standard and Scope of Review

The Supreme Court reviews administrative agency decisions to decide if the factual findings are supported by substantial evidence and free from legal error. *Avallone*, *supra.*

Merits of the Argument

PIC found Ms. Hanson violated the Code, which applies to local officials. A-159–A-202; 29 Del. C. § 5802(4)*Hanson* at *1; *20-23. Procedurally, PIC followed the statute, its rules and the law of procedural rules. *Argument II (A),supra.* Substantively, its decision is free from legal error and supported by substantial evidence.

(a) The Federal Law Suit

Applicable Law: (1) Officials may not review or dispose of a matter if they have a personal or private interest that may tend to impair judgment in performing official duties with respect to that matter. 29 Del. C. § 5805(a)(1).

Allegedly, when she voted on the ordinance on September 11, 2010, she had a conflict as she was personally sued in federal Court by the only owner affected by the ordinance, DBE, who wanted to build

above 35′, but was denied by Town Council, including Ms. Hanson, in 2007. A-3-A-6; A-8-A-9. At the preliminary hearing, it had to be decided if the facts, assumed as true, gave reason to believe she violated the provision. 29 Del. C. § 5808A(a)(4). Those facts were: a federal case existed; DBE sued her personally; the case and ordinance dealt with "relaxed bulk standards" and heights over 35′ under the Town's 2007 CDP; DBE was contesting the 2007 denial of its request to build over 35′ based on that language; the ordinance "defined" and expressed the drafters' "intent" backdated to 2007, barring DBE from building over 35.′ A-8-A-9. *Dewey Beach Enters*. at *4-*9;*26;*37(D. Del. July 30, 2010**)**. DBE claimed when she voted on its 2007 request, she had a conflict because of her rentals. Id. at *10. The federal Court denied her motion to dismiss her suit, July 30, 2010, noting the alleged improper conduct of officials was relevant. Id. at *37-*38. Assuming as true that she voted on September 11, 2010, A-3, she voted when the suit was active. PIC found the ordinance was a defense. A-33. It found the facts gave reason to believe she had a personal or private interest (personal suit) in the matter (ordinance) when she reviewed and disposed of it (sponsored and voted), it was a defense to her suit; and her interest required recusal. A-31-A-33. Thus, the *prima facia* case of all elements was made. PIC notified her, with facts, findings, law applied, and preliminary documents. A-22-A-35. She was to file a written response to the *prima facia* case. A-36.

Her written response sought dismissal of all charges. A-56-A-70. At the motion hearing, she called witnesses. A-77. She did not dispute: the suit created a personal or private interest; she

sponsored and voted on September 11, 2010. It was confirmed as a defense, A-130; she knew it when she voted as her attorney testified after the Federal Court denied her motion to dismiss, he was sure he spoke with her on the impact it could have on her defense. A-120.

PIC's only issue was if her interest required recusal. A-165. Under the Code, whether an interest requires recusal is a fact issue. *Prison Health, supra*. Based on the facts, PIC found her interest required recusal. A-168. As she did not, she violated this provision.

Substantial evidence is more than a scintilla; less than a preponderance. *Justice of the Peace Court v. Carty*, 2012 Del. Super. LEXIS 17 *7-*8 (Del. Super. January 9, 2012). The facts established all the elements, thus, there was substantial evidence. Deference is given to an agency's interpretations of its own rules. *Public Water Supply Company v. DiPasquale*, 735 A.2d 378, 382 (Del. 1999).

PIC's interpretation is also consistent with the law. Generally, recusal is mandated if the official is personally involved in the litigation as a party. *Municipal Lawyer*, "Protecting Attorney-Client Privilege in the Public Sector," September/October 2007 Vol. 48, No. 5; *Sullivan, 23 A.3d 136 (Del. 2011)*(*participation of a judge with a substantial interest in the outcome of a case of which he knows at the time he participates necessarily imports a bias into the process*). While PIC found no case where an official was involved in creating legislation as a defense to a personal suit, even after a case settles, it can be "prudent" to recuse. *Aronowitz v. Planning Board of Township of Lakewood*, 608 A.2d 451 (N.J. Super. 1982). It also is consistent with Delaware's interpretation of this provision.

Beebe Medical Center v. Certificate of Need Appeals Board, 1995 Del Super LEXIS 329 (Del. Super. June 30, 1995) *aff'd*., 1996 Del LEXIS 31(Del. January 29, 1996). In *Beebe*, Beebe and Nanticoke Hospitals each sought certificates for new cardiac services. *Beebe at *18*. At the onset, a State Board member, who was privately Milford Hospital's Administrator, said he may have a conflict. Id. at *19. Nanticoke got a certificate; Beebe did not. It appealed alleging the official violated 29 Del. C. § 5805(a)(1) in giving Nanticoke a certificate because 14 days after a final decision, Nanticoke and Milford announced a pact on the new service. Id. at *18. Reviewing the public transcript, the Court found he did not participate in discussions leading to the vote, or vote. Id. at *18-*19. The Executive Session transcript showed he commented; started a discussion on a Nanticoke unit impact on a regional hospital; and questioned some procedures. Id. at *21-*22. It found his comments neutral. Id at *22. It found the record did not say when the alliance was discussed—before or after he participated. Id. at *21. It found conflicts can be imputed. Id. at *20-*21. It concluded--without knowing what he knew and when--that as he said he had a conflict, it would impute one. Id. at *21.

PIC had the fact *Beebe* was missing—what she knew and when. Ms. Hanson knew when she voted the ordinance was a defense. A-120. Her motion to dismiss the personal suit was denied July 30, 2010, her attorney spoke with her about the defense, and by September 11, she was sponsoring and voting on it. It would not be an error of law for PIC to conclude—knowing the missing fact—she violated 29 Del. C. § 5805(a)(1)—the law at issue in *Beebe. Id* at *20.

(b) The Personal Property Interest

Applicable Law: "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, 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).

"A person has a "financial interest" in a private enterprise if the person is associated with the enterprise and received from the enterprise during the last calendar year or might reasonably be expected to receive from the enterprise during the current or the next calendar year income in excess of $5,000 for services as an employee, officer, director, trustee or independent contractor. 29 Del. C. § 5804(5)(b).

"Private enterprise" means "any activity conducted by any person, whether conducted for profit or not for profit and includes the ownership of real or personal property."29 Del. C. § 5804(9).

The allegation of a conflict because of her rentals did not identify the properties. A-6. At the preliminary hearing, they were identified: 5 Van Dyke and 3 Collins. A-13-A-19. They were within 1 and 2 blocks of DBE, across the highway. A-20. The complaint also alleged she had said if DBE built, it could affect her rent income. A-6. At the preliminary hearing, a *Cape Gazette* article was presented in which she allegedly said if DBE built to 68' feet, "it will quickly spread … from Van Dyke to Rodney Avenue;" its "hotel will also compete with property owners who rent…." A-12. PIC noted the proximity to DBE. A-29. PIC considered documents describing her rentals and locations. A-28-A-29; A-14-A-20. It concluded, assuming all facts as true, that by law, her real property was a "financial interest", in a "private enterprise." A-28-A-29. That creates an interest that, by law, "may tend to impair judgment." 29 Del. C. § 5805(a)(2)(b). Thus, if she benefitted more or less than others, her conduct may violate the Code.

Id. PIC found while the short answer may be that anyone in Dewey Beach who rents may benefit from an ordinance restricting a competitor, she was in a class by herself. A-29: the only renter with a personal suit against her on the same matter in an official position to make decisions affecting DBE's development and the suit by ordinance. A-29. Thus, a *prima facia* case of all elements was made.

At the motion hearing, she said she had 2 rentals, A-91; did not dispute the documents or addresses/proximity to DBE; or that it was a "private enterprise."

She did argue it was not a "financial interest" as she does not make money because of rental costs; her rent increases have been "pathetic" and the "market will only bear so much." A-103. PIC found no exemption from "financial interest" based on her facts. A-170. Thus, by law, she had a "financial interest" in a "private enterprise" that would "tend to impair judgment" if her interests would be affected more or less than like interests. 29 Del. C. § 5805(a)(2)(b).

She also argued it was not a "financial interest" but a "quality of life" issue. A-97-A-98. She said, "quality of life" was a non-financial interest related to height as "the higher you go, you do obstruct other views; it increases traffic; increases response of emergency vehicles. It increases the number of people on the beach." A-98. She agreed all those things could affect property values of surrounding properties. A-98. In other words, affect her "financial interest" in her "private enterprise." In reviewing her "quality of life" argument, PIC found even if she had no "financial interest"—

except she did—Courts have held that such arguments, can invoke a financial interest and a conflict. A-169; A-173–A-74; *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152 (2nd Dist. 1996), cert. denied, 570 U.S. 1167; 117 S. Ct. 1430 (1997). *See, Argument II (5)*.

She confirmed she made the *Cape Gazette* statement, but now said others told her that; she and DBE would not be competitors as she has larger units on the oceanside, not bayside. A-95, A-101.

PIC noted the Collins St. ad is for a "second level condo." A-170,fn. 18. DBE plans to offer condos. A-170, fn. 18. She agreed both would supply places to stay; families could stay at her rentals, but also at DBE's; people did not like crossing Route 1, but have done so. A-92. She said ocean proximity is a selling point. A-96. PIC noted DBE could advertise its proximity to the ocean—across the street and on "her beach." A-170-A-171. It also found a 68' building across the street could obstruct a bay to ocean view from her rentals. A-172-A-173. PIC's preliminary hearing noted the closeness. A-29. With more information, it found the proximity and competition for basically the same space and market put her in her own class. A-171. The Mutual Agreement showed how close: an walkway from *Van Dyke* to Dickinson and at least 60 parking slots within *Van Dyke* and Dickinson Avenues. A-171. Limiting her "neighbor's" size could limit the market impact from which she draws her rent, and limit traffic and people on her beach. PIC found barring DBE from building over 35' more immediately affected her rentals than others, and was a defense to the suit. A-171.

Where an official was a renter—not the owner—the Court held he had a financial interest and a conflict in voting to bar a developer

from building a 35′ property as he lived one block inland from the ocean where the building would be, and opposed it before election. *Clark, supra.* Also, the U.S. Supreme Court held it is improper for a local official to vote where a friend/campaign manager was seeking the decision. *Nevada Ethics Commission v. Carrigan*, 131 S. Ct. 2343 (2011). No facts suggested that Councilman would benefit. Ms. Hanson could benefit twice: no 68′ building in her immediate areas, and a defense to DBE's suit. When an administrative finding is supported by some evidence, the Court will not substitute its judgment. *In re Artesian,* 189 A.2d 435 (Del. 1963). The substantial evidence is she had a "financial interest," in a "private enterprise" which, by law, is "an interest which tends to impair … independence of judgment." 29 Del. C. § 5805(a)(2)(b). The only element left was if her interest would be affected more than like interests. PIC, in applying the facts, found a greater benefit to her.

(C) Appearance of Impropriety

Applicable law: Officials "shall endeavor to pursue a course of conduct which will not raise suspicion among the public that …[the] 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. C. § 5806(a).

PIC refers to this as "the appearance of impropriety," A-34; A-175; no actual violation is required, only that it raise public suspicion of a violation. In deciding if substantial evidence exists, Courts consider an agency's experience and competency, and purposes of the law. *Kopicko at* *6. The General Assembly said the conduct of officers must hold the respect and confidence of the people; they must avoid conduct violating the public trust or which creates a

justifiable impression among the public such trust is being violated." 29 Del. C. § 5802(a), and the law "shall be construed to promote high standards of ethical conduct in …government." 29 Del. C. § 5803.

PIC relies on the standard for public officials in the judicial branch which is: if the conduct would create in reasonable minds, with knowledge of all relevant facts that a reasonable inquiry would disclose, a perception the official's ability to carry out official duties with integrity, impartiality and competence is impaired. *In re Williams, 701 A.2d 825 (Del. Super., 1997)*.[7] In a detailed opinion, PIC found, based on all relevant facts, her conduct could raise suspicion she violated the public trust as it may appear she used her office for personal benefit, contrary to 29 Del. C. § 5806(e).

Ms. Hanson did not object to that standard after she was notified in the preliminary decision. PIC administers "this chapter." 29 Del. C. § 5809(3); 29 Del. C. § 5810(a). As it is part of "this chapter," PIC properly applied the provision. It was applied in *Avallone v. State of Delaware/Dep't of Health and Social Services*, 2011 Del. Super. LEXIS 360 at *4 (Del. Super. August 17, 2011). In *Avallone*, a State employee was disciplined after ordering a product from a vendor for his personal use but billing it to the State. Id. He stalled in paying the vendor but later repaid the State. Id. His agency found he violated this provision; the penalty was dismissal. Id. He appealed to

[7]Interpretations of one law can be used to interpret another if language of one is incorporated in another or both statutes are such closely related subjects that consideration of one naturally brings to mind the other. *Sutherland Stat. Constr. § 45.15, Vol. 2A (5th ed. 1992).* Here, both are officials subject to Codes of Conduct with similar purposes and obligations.

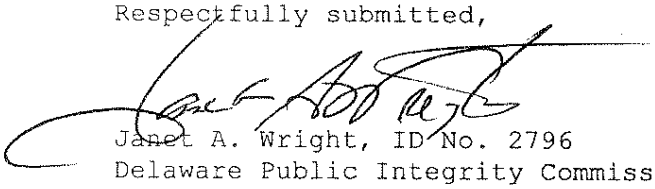
the Merit Employee Relations Board, which upheld disciplining him, but not to the extent of dismissal; it reduced his penalty to back pay denial. *Avallone v. State,* 14 A.3d 566, 570 (Del. 2011). The Delaware Supreme Court said an agency's authority should be construed to permit the fullest accomplishment of legislative intent or policy. Id. at 572. Like the *Avallone* employee, Ms. Hanson's conduct could raise suspicion of personally benefiting from her decision, and PIC could conclude, without error in law, this provision applies.

If PIC cannot apply this law, it would create an inequity. The Delaware Supreme Court still applies an appearance of impropriety to local officials. *Sullivan* at **16. At Ms. Hanson's motion to stay hearing, it was agree Delaware Courts recognize that standard. A-46. If PIC cannot apply it, those charged under the Code would not have the appearance weighed, but those who have common law applied would. That would not "promote high standards of ethical conduct" or instill public confidence in government. 29 Del. C. § 5802(a) and § 5803.

Conclusion

As the Superior Court erred in considering arguments never raised below and erred in concluding PIC did not follow its procedures, and PIC lacked substantial evidence, its decision should be reversed, and the Delaware Supreme Court should uphold PIC's decision.

Respectfully submitted,



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Diane Hanson v. Delaware State Public Integrity Commission

C.A. No: 11A-06-001 (ESB)

SUPERIOR COURT OF DELAWARE, SUSSEX

2012 Del. Super. LEXIS 403

August 30, 2012, Decided

NOTICE:

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PRIOR HISTORY: *Murray v. Town of Dewey Beach, 2012 Del. Ch. LEXIS 129 (Del. Ch., May 31, 2012)*

COUNSEL: [*1] Charles Slanina, Esq., David L. Finger, Esq., Finger, Slanina & Liebesman, LLC, Hockessin, DE.

Janet A. Wright, Esq., Delaware State Public Integrity Commission, Dover, DE.

JUDGES: E. SCOTT BRADLEY, JUDGE.

OPINION BY: E. SCOTT BRADLEY

OPINION

This is my decision on Diane Hanson's appeal of the Delaware State Public Integrity Commission's ("PIC") finding that she violated the State Employees,' Officers' and Officials' Code of Conduct (the "Code of Conduct") when, as a town commissioner for Dewey Beach, she voted in favor of an ordinance purportedly clarifying the height limit applicable to structures in the Resort Business-1 ("RB-1") zoning district in Dewey Beach. This case arises out of the efforts by Dewey Beach Enterprises ("DBE") to re-develop a commercial development known as Ruddertowne in Dewey Beach, litigation filed by DBE against Dewey Beach, Hanson and other Dewey Beach officials when its development efforts were unsuccessful, and Dewey Beach's efforts to deal with that litigation. Hanson was at all times relevant hereto a Dewey Beach town commissioner, a resident of Dewey Beach, and an owner of two oceanside rental properties in Dewey Beach. DBE submitted to the Dewey Beach town commissioners a Concept **[*2]** Plan to re-develop Ruddertowne, which is located in the RB-1 zoning district. The Concept Plan proposed, among other things, a 120 room five-star hotel and condominium in a structure that was to be 68 feet tall. Hanson and all of the other town commissioners voted against the Concept Plan. DBE then filed a lawsuit against Dewey Beach, Hanson and other Dewey Beach officials in the United States District Court for the District of Delaware, alleging a host of constitutional and other violations (the "Federal Case"). DBE sued Hanson in both her official and individual capacities. An issue in the lawsuit was whether Dewey Beach's longstanding 35 foot height limit had been relaxed for the RB-1 zoning district when Dewey Beach enacted its 2007 Comprehensive Land Use Plan. While the Federal Case was pending, Hanson and other town commissioners passed an ordinance purportedly clarifying the height limit, stating that it

was 35 feet and making it retroactive to the adoption of the 2007 Comprehensive Land Use Plan (the "Clarifying Ordinance"). A Dewey Beach property owner then filed a complaint with PIC, alleging that Hanson voted in favor of the Clarifying Ordinance to protect her rental **[*3]** properties from having to compete with DBE's proposed hotel and condominium and to enhance her legal defenses in the Federal Case. PIC investigated the matter, held a "hearing," and concluded that Hanson did have several conflicts of interest and never should have voted in favor of the Clarifying Ordinance. Hanson then filed an appeal of PIC's decision with this Court. I have reversed PIC's decision, concluding that it is not supported by substantial evidence in the record and violates PIC's own rules of procedure.

I. Ruddertowne

DBE released its Concept Plan for Ruddertowne to the public on June 15, 2007. Ruddertowne consists of 2.36 acres of land and existing improvements located near Rehoboth Bay on the western side of Coastal Highway in Dewey Beach. The Concept Plan proposed a welcome center, a bayside boardwalk, public restrooms, a 120 room five-star hotel and condominium, public parking, a convention center, and a funland for children in a structure that was to be 68 feet tall. The Ruddertowne Architectural Review Committee, which was created specifically to review the Concept Plan, voted to approve the Concept Plan after seven public meetings. The town commissioners then held **[*4]** a public hearing to introduce an ordinance allowing the Concept Plan to proceed and sent the ordinance to the Planing & Zoning Commission for review. The Planning & Zoning Commission voted to reject the ordinance on October 19, 2007. The town commissioners voted unanimously to reject the ordinance on November 10, 2007.

DBE then submitted an application for a building permit and a site plan for a three-story, mixed-use structure for an expansion of Ruddertowne in early November, 2007. The site plan would expand Ruddertowne by removing portions of the existing commercial building and adding a parking garage and 62 residential units in a structure that would only be 35 feet tall. 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 this decision with the Superior Court, which affirmed the Board of Adjustment's decision. [1] DBE then filed an appeal of the Superior **[*5]** Court's decision with the Supreme Court, which reversed the Superior Court's decision and ruled in favor of DBE, concluding that the minimum lot requirement was ambiguous. [2]

1 *Dewey Beach Enterprises, Inc., v. Board of Adjustment of the Town of Dewey Beach, 2009 Del. Super. LEXIS 286, 2009 WL 2365676 (Del. Super. July 30, 2009).*

2 *Dewey Beach Enterprises, Inc., v. Board of Adjustment of the Town of Dewey Beach, 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.

II. The Federal Case

Frustrated with how its development plans were being treated, DBE and Ruddertowne Redevelopment, Inc. ("RRI") filed a complaint against Dewey Beach, Dell Tush ("Mayor Tush"), David King ("King"), Hanson and Richard Hanewinckel ("Hanewinckel") in the United States District Court for the District of Delaware on July 10, 2009. The complaint alleged: (1) violations of substantive due process under **[*6]** *42 U.S.C. §1983* (Count I); (2) *§1983* violations of procedural due process (Count II); (3) *§1983* violations of the *Equal Protection Clause* (Count III); (4) regulatory taking (Count IV); (5) *42 U.S.C. §1985* civil conspiracy (Count V); (6) *42 U.S.C. §1986* failure to prevent actionable harm (Count VI); (7) *First*

Amendment free speech and petition violations (Count VII); (8) equitable and promissory estoppel (Count VIII, DBE against all defendants; Count IX, RRI against all defendants); and (9) abuse of official power and violation of substantive due process against the individual defendants (Counts X-XIII). In connection with these allegations, DBE sought compensatory and punitive damages, attorneys' fees, costs, pre-and post-judgment interest, and injunctive relief. DBE further alleged that Hanson, Wilson, and Mayor 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." DBE also alleged that these individuals wrongfully worked to defeat and/or against its proposed ordinance because of these personal interests. Dewey Beach filed a motion to dismiss **[*7]** the plaintiffs' complaint with respect to all counts. Mayor 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 plaintiffs' complaint. Specifically, Dewey Beach argued that: (1) DBE's claims challenging Dewey Beach's denial of the RB-1 68 foot ordinance were unripe because DBE failed to seek a variance or other available remedy; (2) because a municipality cannot be held liable for a *§1983* claim under the respondent superior doctrine articulated in *Monell v. N.Y. City Dep't of Social Services*, [3] DBE did not identify or attribute a wrongful custom or policy to Dewey Beach; (3) DBE's due process rights were not violated because the legislative and executive actions at issue were rationally based and did not shock the conscience; (4) DBE's equal protection claims failed because it did not identify a similarly situated party and Dewey Beach's actions were rationally based; (5) DBE's procedural due process claim failed both because DBE did not have a constitutionally protected property right and because there was no viable procedural due process claim for **[*8]** legislative acts; (6) no regulatory taking occurred because DBE had not sought a state remedy and viable uses of the property remained; (7) there were no actionable *First Amendment* claims because Dewey Beach did not engage in retaliation and would have reached the same determination irrespective of the party involved; (8) the state law estoppel claim failed because the alleged damages were not recoverable in an estoppel claim under Delaware law; and (9) DBE's *§1985* and *§1986* claims failed because the complaint did not allege a conspiracy and no underlying constitutional violation existed. The District Court granted Dewey Beach's motion to dismiss with respect to Count III (Equal Protection) and Counts VIII and IX (Equitable Estoppel), and denied its motion to dismiss in all other respects. [4]

3 *436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).*

4 *Dewey Beach Enterprises, Inc., v. Town of Dewey Beach, 1 A.3d 305, 2010 WL 3023395 (D. Del. 2010).*

The Individual Defendants' motion to dismiss set forth three grounds for dismissal of DBE's complaint. Specifically, they argued that the District Court should grant their motion because the Individual Defendants were: (1) immune from suit under the *Noerr-Pennington* doctrine [5]; (2) **[*9]** 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, given the state of the facts that at the time, the doctrines of legislative immunity and qualified immunity could not be applied.

5 See *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).*

III. The Clarifying Ordinance

Although it was hardly mentioned in the District Court's decision, an important issue in the consideration of DBE's Concept Plan and the Federal Case 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. Ruddertowne was in the RB-1 zoning district. DBE believed that the maximum building height for the proposed structure in **[*10]** 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:

> The 2007 Comprehensive Plan provides that in the Resort Business-1 (RB-1) zoning district "Relaxed bulk standards" (setbacks, lot coverage, etc.) are available for contiguous tracts consisting of at least 80,000 square feet with a detailed commercial, mixed- and multi-family land-use development-plan review as an overlay district or alternate method of development, provided that there is public access to all common areas of the development and any waterfront area shall be public use.
>
> Section 2. The Commissioners of the Town of Dewey Beach further clarify their intent 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.
>
> Section 4. This Ordinance, upon adoption by a majority vote of all Commissioners of the Town of Dewey **[*11]** Beach, shall be effective immediately and shall apply retroactively to June 29, 2007, the date of adoption of Ordinance No. 597. It i s the express intent that this clarification ordinance apply retroactively.

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

IV. Joseph Nelson's Complaint

Joseph W. Nelson, a Dewey Beach property owner and resident of Milton, Delaware, filed a five-page complaint against Hanson with PIC on October 1, 2010. His complaint focused on DBE's effort s to re -devel op Ru ddert owne an d the C larif ying 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. Attached to Nelson's complaint were a copy of the Clarifying Ordinance and a series of e-mails between a State Representative and the State Director of Planning about the Clarifying **[*12]** Ordinance.

V. The Rules for PIC Proceedings

PIC has adopted rules governing its proceedings. [6] The Code of Conduct also sets forth rules governing how PIC is to proceed. [7] The process generally starts with the filing of a sworn complaint with PIC by a person alleging a violation of the Code of Conduct. [8] PIC then meets to review the complaint to determine if it is frivolous or states a violation. [9] If PIC determines that the complaint sets forth a violation, then PIC sets the matter down for a hearing. [10] PIC's legal counsel is the prosecutor at the hearing. [11] The complaint must be served on the person charged with violating the Code of Conduct. [12] The complaint must specifically identify each portion of the Code of Conduct that the person is alleged to have violated and the facts upon which each alleged violation is based. [13] The burden of proving violations of the Code of Conduct is on the prosecutor and such violations must be proven by clear and convincing evidence. [14] The clear and convincing evidentiary standard is an intermediate evidentiary standard, higher than mere preponderance, but lower than proof beyond a

reasonable doubt. [15] The hearing is to proceed as follows:

> (1) The **[*13]** Chairperson or the Chairperson's designee shall open and preside at the hearing.
> (2) An opening statement by the Prosecutor.
> (3) An opening statement by the Respondent.
> (4) Witnesses and other evidence by the Prosecutor.
> (5) Witnesses and other evidence by the Respondent.
> (6) Rebuttal witnesses and other evidence by the Prosecutor, if appropriate.
> (7) Witnesses may be cross-examined by the opposing party. Redirect examination and recross-examination may be permitted in the Commission's discretion. Commission members may also question witnesses.
> (8) Closing argument by the Prosecutor.
> (9) Closing argument by Respondent.
> (10) Rebuttal closing argument by the Prosecutor, if appropriate. [16]

6 Rules of the Delaware State Public Integrity Commission ("PIC Rule").
7 *29 Del. C. §5810*
8 *Id.*; PIC Rule III.
9 PIC Rule III(A).
10 PIC Rule III(A)(1).
11 *29 Del. C. §5810(a)*; PIC Rule IV(A).
12 PIC Rule IV(c)(1).
13 PIC Rule IV(c)(2).
14 PIC Rule IV(k).
15 *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC, 2012 Del. Ch. LEXIS 109, 2012 WL 1869416, (Del. Ch. May 16, 2012).*
16 PIC Rule IV(L).

Four members of PIC constitute a quorum and sanctions may be imposed only by the affirmative action of at least four members. [17]3 PIC's decisions **[*14]** must set forth (a) findings of fact based on the evidence, (b) conclusions of law as to whether the Respondent has violated the Code of Conduct, and (c) what sanctions PIC is imposing if violations of the Code of Conduct are found. [18] PIC members, if any, who disagree with PIC's decision may file dissenting opinions. [19]

17 PIC Rule IV(N); *29 Del. C. §5808(d).*
18 PIC Rule IV(O).
19 *Id.*

VI. PIC's Proceedings Against Hanson

Nelson's complaint against Hanson was filed with PIC on October 1, 2010. The Code of Conduct and PIC's rules of procedures require complaints to be sworn. Nelson's complaint was not properly sworn. Nelson signed his complaint twice. Below his second signature, Wendy L. Compton, a notary public for the State of Delaware, signed her name and placed her notary seal below her signature. The requirements for a properly sworn and notarized statement are set forth in *29 Del. C. §4327*. Essentially, Nelson had to swear or affirm that the statements that he was making were true and correct. He did not do that. Nevertheless, PIC accepted his complaint and the allegations in it as true and correct.

PIC met and voted to proceed against Hanson on October 15, 2010. PIC preliminarily found **[*15]** (the "Preliminary Decision") that when Hanson voted in favor of the Clarifying Ordinance she violated (1) *29 Del. C. §5805(a)(2)(a)* and *(b)* because the Clarifying Ordinance would make it more difficult for DBE's bayside hotel and condominium to compete with her oceanside rental properties; (2) *29 Del. C. §5805(b)* because the Clarifying Ordinance would aid her defenses in the Federal Case; and (3) *29 Del. C. §5806(a)* because the public might suspect that she was using her public office to benefit her own interests. The Preliminary Decision was issued on November 22, 2010. Hanson filed a Motion to Stay on February 7, 2011. PIC denied it on February 28, 2011. Hanson filed a Motion to Dismiss and a Response to the Preliminary Complaint on March 8, 2011.

PIC held a hearing on Hanson's Motion to Dismiss on March 15, 2011. Hanson's attorney

called Hanson, Glenn C. Mandalas, Esq. , and Max B . Walton, Esq. , to testify. Mandalas represented Dewey Beach in the Federal Case. Walton represented Hanson and the other individual defendants in the Federal Case. Hanson testified about her longstanding support of the 35 foot height limit, the Clarifying Ordinance, her rental properties, and quality **[*16]** of life issues. Mandalas and Walton testified about the Clarifying Ordinance, the Dewey Beach zoning code and the Federal Case. Hanson's attorney offered the testimony of Hanson, Walton and Mandalas in an effort to show that Hanson had no conflicts of interest when she voted in favor of the Clarifying Ordinance. Even though PIC's counsel had the burden of proof, she called no witnesses and introduced no exhibits. PIC's counsel did cross-examine Hanson and the two lawyers.

PIC denied Hanson's Motion to Dismiss and issued a Final Disposition Opinion on May 13, 2011. Its Final Disposition Opinion was based on Nelson's complaint, an article in the *Cape Gazette*, advertisements for Hanson's oceanside rental properties, a map of Dewey Beach, the District Court's decision, an open letter from the Dewey Beach town manager about the settlement of the Federal Case, the settlement agreement for the Federal Case, Sussex County tax records for Hanson's properties, and the Dewey Beach zoning map.

PIC found that when Hanson voted in favor of the Clarifying Ordinance she violated (1) *29 Del. C. § 5805 (a)(1)* because the Clarifying Ordinance would help her rental properties compete with DBE's hotel and **[*17]** condominium, (2) *29 Del. C. § 5805 (a)(1)* because the Clarifying Ordinance would improve her quality of life, (3) *29 Del. C. § 5805 (a)(1)* because the Clarifying Ordinance would help her qualified immunity defense in the Federal Case, and (4) *29 Del. C. §5806 (a)* because the public might suspect that she was using her public office to benefit her own interests. In reaching its conclusions, PIC found that Hanson had conflicts of interest involving her rental properties, qualified immunity defense in the Federal Case, and quality of life. I have summarized PIC's reasoning as follows:

(a) Hanson's Rental Properties

Hanson has two oceanside rental properties. DBE wanted to build a 120 room five-star hotel and condominium in a 68 foot tall structure on the bay. Hanson's rental properties and DBE's hotel would compete with each other for the same tenants. The Clarifying Ordinance would limit DBE's structure to 35 feet, making the hotel smaller or non-existent and a less fearsome competitor to Hanson. Thus, Hanson had an impermissible conflict of interest when she voted in favor of the Clarifying Ordinance.

(b) Hanson's Quality of Life

Hanson was concerned about her quality of life. She believed **[*18]** that DBE's large structure would bring in more traffic and people and diminish her quality of life. The Clarifying Ordinance would reduce the size of DBE's structure, which would reduce the traffic and congestion associated with it, which would minimize the impact on Hanson's quality of life. Thus, Hanson had an impermissible conflict of interest when she voted in favor of the Clarifying Ordinance.

(c) Hanson's Qualified Immunity Defense

Hanson was sued personally in the Federal Case, putting her at risk of having to pay both a judgment and attorney's fees. The Clarifying Ordinance would help her qualified immunity defense in the Federal Case. Hanson's attorney told her that the Clarifying Ordinance would help her qualified immunity defense in the Federal Case. Thus, Hanson had an impermissible conflict of interest when she voted in favor of the Clarifying Ordinance.

(d) Hanson's Appearance of Impropriety

Lastly, according to PIC, if the public was aware of all of Hanson's conflicts of interests it would conclude that she was using her public office to advance her own interests.

VII. The Standard of Review

The standard of review on appeal is whether PIC's decision is supported by substantial **[*19]** evidence on the record. [20] Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." [21] It is more than

a scintilla, but less than a preponderance of the evidence. [22] It is a low standard to affirm and a high standard to overturn. If the record contains substantial evidence, then the Court is prohibited from re-weighing the evidence or substituting its judgment for that of the agency. [23]

20 *29 Del.C. §5810A.*
21 *Olney v. Cooch, 425 A.2d 610, 614 (Del.1981)* (citing *Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966)).*
22 *Breeding v. Contractors-One-Inc., 549 A.2d 1102, 1104 (Del. 1988)* (citing *DiFilippo v. Beck, 567 F.Supp. 110 (D.Del. 1983)).*
23 *Janaman v. New Castle County Bd. of Adjustment, 364 A.2d 1241, 1242 (Del. Super. 1976).*

VIII. Hanson's Arguments

Hanson argues that (1) PIC does not have jurisdiction to hear and decide conflict of interest matters involving municipal officials, (2) there is not substantial evidence in the record to support PIC's finding that the Clarifying Ordinance would help her rental properties compete with DBE's hotel, (3) PIC exceeded its statutory grant of authority when it found that **[*20]** the Clarifying Ordinance would improve her quality of life, (4) there is not substantial evidence in the record to support PIC's finding that the Clarifying Ordinance would help her qualified immunity defense in the Federal Case, and (5) PIC exceeded its statutory grant of authority when it found that she had an appearance of impropriety.

(a) PIC's Jurisdiction

Hanson argues that the Code of Conduct does not apply to her because she is a town officer, not a State officer. Her argument is based on a conflict between the scope and definitional sections of the original Code of Conduct and an amendment to the Code of Conduct enacted by the legislature to make the Code of Conduct applicable to counties, municipalities and towns. The Code of Conduct, as originally enacted, did not apply to town officers. It only applied to certain State employees, officers and honorary officials. The Code of Conduct generally prohibits State employees, officers and honorary officials from participating on behalf of the State in the review or disposition of any matter pending before the State in which the State employee, officer or honorary official has a personal or private interest. [24] It also generally requires **[*21]** State employees, officers and honorary officials to behave in such a manner that will not cause the public to suspect that the State employee, officer or honorary official is engaging in acts which are in violation of the public trust and which will reflect unfavorably upon the State. [25] The definition of State employee covers anyone who receives compensation as an employee of a State agency, anyone who serves as an appointed member, trustee, director or the like of any State agency and who receives more than $5,000 per year, and elected or appointed school board members. [26] The definition of State agency excludes political subdivisions of the State and their agencies. [27] However, the legislature changed the scope and application of the Code of Conduct when it added *29 Del. C. § 5802(4)*, which states:

> It is the desire of the General Assembly that all counties, municipalities and towns adopt code of conduct legislation at least as stringent as this act to apply to their employees and elected and appointed officials. This subchapter shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation by January **[*22]** 23, 1993. No code of conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of this subchapter unless the code of conduct has been submitted to the State Ethics Commission and determined by a majority vote thereof to be at least as stringent as this subchapter. Any change to an approved code of conduct must similarly be approved by the State Ethics Commission to continue the exemption from this subchapter.

24 *29 Del. C. §5805(a).*
25 *29 Del. C. §5806(a).*
26 *29 Del. C. §5804(12).*
27 *29 Del. C. §5804(11).*

When the legislature added *§5802(4)* it did not amend the rest of the Code of Conduct, leaving conflicting language in the scope and definitional sections. Even though the legislature never amended the rest of the Code of Conduct to make it consistent with *§5802(4)*, both the plain language of *§5802(4)* and intent of the legislature are clear. [28] *§5802(4)* states that "[t]his subchapter (which is the subchapter setting forth the scope of the Code of Conduct) shall apply to any County, Municipality or Town and the employees and elected officials thereof which has not enacted such legislation by July 23, 1993" that has been approved by the State Ethics **[*23]** Commission. This language and the legislature's intent could not be more clear. Thus, the Code of Conduct applies to Dewey Beach and Hanson. Dewey Beach does not have a code of conduct approved by PIC. Hanson is an elected official of Dewey Beach. Therefore, I have concluded that PIC has jurisdiction over Hanson as a Dewey Beach town commissioner.

28 *Alexander v. Town of Cheswold, 2007 Del. Super. LEXIS 183, 2007 WL1849089, at *2 (Del. Super. June 27, 2007)* ("Interpreting a statute is a question of law. When interpreting a statute, "the predominant goal of statutory construction is to 'ascertain and give effect to the intent of the legislature.' "Thus, if looking at the plain meaning of the statute it is clear what the intent of the legislature is, then the statute is unambiguous and the plain meaning of the statute controls. If the statute is ambiguous, meaning if it is "reasonably susceptible of different conclusions or interpretations," then the Court must attempt to ascertain the intent of the legislature. In doing so, if a literal interpretation causes a result inconsistent with the general intent of the statute, "such interpretation must give way to the general intent" to allow the court to promote the purpose **[*24]** of the statute and the legislature's intent.")(Citations omitted).

(b) Hanson's Rental Properties

Hanson argues that PIC's finding that her two oceanside rental properties would compete with DBE's bayside hotel and condominium is not supported by substantial evidence in the record. PIC relied on the following evidence in the record to support its finding:

> (1) The following statement in Nelson's complaint to PIC:
>
> The situation is exacerbated by the facts [*sic*] that Commissioner Hanson owns rental income property in Dewey Beach and I am informed she has previously said that the redevelopment of Ruddertowne would jeopardize her rental income, thereby creating a conflict of interest. (Emphasis added.)
>
> (2) Hanson's statement in a *Cape Gazette* interview dated September 12, 2007:
>
> What height and type of construction (a 68-foot hotel/condo hybrid or 48 townhouses) do you feel is best for Ruddertowne?
>
> Hanson: A 120-unit 5-star condo/hotel complex is not a town center. I would like to see a third option of a mixed-use complex that follows our current zoning laws at a height of 35 feet - one that is truly a town center. However, because Harvey, Hanna and Associates have refused to negotiate, we have **[*25]** only a choice between a massive hotel and townhouses at this time. If the hotel is allowed to breach our current height limit, buildings of 68 feet will quickly spread along the business zone from Van Dyke to Rodney avenues. The hotel will also compete with property owners who rent their homes or for those selling their properties. (Emphasis added.)
>
> (3) Hanson's testimony at the hearing. Hanson acknowledged during the hearing that both she and

DBE would be offering rentals in Dewey Beach, that renters could stay in her rentals or DBE's rentals, that people who had rented from her had also rented on the bay.

(4) DBE's proposed hotel and condominium is close to Hanson's rental properties, being two blocks past Hanson's Sea Mist Villa and one block past Hanson's Sea Dune Villa.

PIC reasoned that since both Hanson and DBE would both be renting rooms in Dewey Beach that they were in the same market and thus in competition with each other, stating "It is this proximity and competition for essentially the same ocean space, and for the same market, that puts her in a different class than others." PIC supported its reasoning, stating "[t]he very meaning of competition is the effort of two or more **[*26]** parties acting independently to secure the business of a third party by offering the most favorable terms."

I have concluded that PIC's analysis of the rental market in Dewey Beach is overly simplistic and that its ultimate conclusion is not supported by substantial evidence in the record. Quite simply, while PIC defined what competition is, it never addressed the factors that a Court looks at to determine if people are competitors.

The statements in Nelson's letter and the *Cape Gazette* article are unpersuasive. Nelson did not testify at the hearing and his five-page complaint is not properly sworn. Nelson did not state that he heard Hanson admit that DBE's hotel would compete with her rental properties. He instead stated that someone told him that they heard Hanson say this. This is double hearsay. As such it is inherently unreliable because no one knows who made the statement and the person making the statement was not subject to cross-examination. An unsworn statement that is double hearsay is proof of nothing. Hanson only stated in the *Cape Gazette* interview that DBE's proposed hotel and condominium would hurt rental properties in general. She did not say that they would compete **[*27]** with her rental properties. Indeed, Hanson was adamant during her testimony at the hearing that DBE's bayside hotel offered no competition for her oceanside houses.

Hanson's statements at the hearing are similarly unpersuasive. The mere fact that both she and DBE offer rentals in Dewey Beach and that people could stay at either one does not mean that they would and it does not mean that she and DBE would be competitors. Hanson's statement that a person who had rented on the bay had also rented from her was taken out of context by PIC. What Hanson actually said was that she had a tenant who rented her oceanfront house who had rented property on the bay the previous year and decided it was worth $1,500 more per week to rent on the ocean to avoid having to cross Coastal Highway with her belongings and children in order to get to the ocean. This does not support PIC's finding. It does support the finding that Hanson's rentals are very different from bayside rentals and cost substantially more to rent.

Competition is usually defined more narrowly than PIC defined it. It has been stated that competition "entails more than mutual existence in the marketplace; rather, it requires an endeavor **[*28]** among business entities to seek out similar commercial transactions with a similar clientele." [29] Put another way, competitors are those "who vie for the same dollars from the same consumer group." [30] In order to determine if people are actually competing with each other for the same consumers you have to "compare all relevant aspects of the products, including price, style, intended uses, target clientele, and channels of distribution." [31] It is this critical step that PIC never took in its analysis of the Dewey Beach rental market.

29 *McKinnon v. CV Industries, Inc., 2012 NCBC 36, 2012 WL 2107119 (N.C. Super. 2012).*

30 *West v. Gold, Inc., 2012 U.S. Dist. LEXIS 98700, 2012 WL 2913207 (N.D. Cal. July 16, 2012).*

31 *Toni & Guy (USA) Ltd. v. Nature's Therapy, Inc., 2006 U.S. Dist. LEXIS 25291, 2006 WL 1153354 (S.D.N.Y. May 1, 2006).*

PIC never examined or compared the price and nature of Hanson's oceanside rentals to the price and nature of DBE's hotel. Merely because Hanson and DBE would be renting rooms in the same town hardly means that they would be competing with each other, particularly given what is known about

each property suggests just the opposite and what is unknown about each property is substantial and important.

PIC assumed that Hanson's rental **[*29]** 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 **[*30]** 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 **[*31]** 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.

(c) Hanson's Quality of Life

Hanson argues that PIC exceeded its statutory grant of authority when it found that her vote in favor of the Clarifying Ordinance was motivated by her desire to maintain her quality of life. PIC concluded in its Final Disposition Opinion that Hanson voted for the Clarifying Ordinance because it would help her maintain her quality of life. I have reversed PIC's decision because it did not follow its own rules when it made this finding. PIC has adopted rules governing its proceedings. Rule IV(c)(2) requires PIC to, when it takes action against someone, to "specifically identify each portion of the Code of Conduct Respondent is alleged to have violated and facts upon which each alleged violation is based." PIC, while it alleged that Hanson violated *29 Del. C. §5805* and *§5806* in its Preliminary Decision by voting on the Clarifying Ordinance because she had conflicts of interest involving her rental properties and qualified immunity defense, never preliminarily found or told Hanson that she violated these sections because she **[*32]** had a conflict of interest because of her quality of life concerns. It is well-settled law that once an agency adopts regulations governing how it handles its procedures, the agency must follow them. If the agency does not, then the action taken by the agency is invalid. [32] Nelson did not raise the quality of life conflict in his complaint. PIC did not make a preliminary finding about it. PIC did not tell Hanson about it. The issue did not even come up until Hanson testified at the hearing on her Motion to Dismiss. PIC heard this quality of life testimony and concluded that Hanson had yet another conflict of interest and found yet another violation of the Code of Conduct. However, PIC never followed its own rules by first making a preliminary finding that Hanson had such a conflict, informing her of the conflict, and giving her an opportunity to rebut the

finding before finally determining that she did have such a conflict of interest.

32 *Dugan v. Delaware Harness Racing Commission, 752 A.2d 529 (Del. 2000).*

(d) Hanson's Qualified Immunity Defense

Hanson argues that PIC's finding that the Clarifying Ordinance would help her qualified immunity defense in the Federal Case is not supported **[*33]** by substantial evidence in the record. PIC's finding is based largely on the testimony of Mandalas and Walton and its own legal analysis of qualified immunity. PIC's findings of facts are reflected in the following statements:

> This undisclosed purpose - not on the face of the ordinance - is at the heart of the allegation that she had a personal or private interest because she was personally sued by DBE.
>
> She argues her judgment was not impaired by her personal interest because: "I've been consistently in favor of keeping the height limit at 35'." The law does not require that it actually be impaired - only that it may "tend" to be impaired. It also does not say she can participate in the face of a conflict as long as she is consistent in how she votes. It is not how she voted, but that she voted when she had a personal or private interest and knew specifically she could personally benefit from her own decision. (Emphasis added.)
>
> It has been established that Respondent was clearly aware of the ordinance's undisclosed purpose - creating a legal defense to the law suit in which she was personally sued - and was advised by her Attorney that it could affect her qualified immunity argument. Thus, **[*34]** she not only knew the purpose was not on the face, but was advised of the personal benefit to her if it passed. (Emphasis added.)

I have summarized PIC's reasoning as follows:

The Relaxed bulk standards in Dewey Beach's 2007 Comprehensive Land Use Plan and the 68 foot height limit were at the heart of the Federal Case. The Clarifying Ordinance would set the height limit at 35 feet and make it retroactive. This would allow Hanson to argue that the Clarifying Ordinance made her acts going back to 2007 official acts for which she is entitled to qualified immunity. The Clarifying Ordinance, if accepted, could also be a defense to DBE's claims that it could build a structure taller than 35 feet. This would allow Hanson to argue that her vote against the Concept Plan was merely a "ministerial" act, releasing her of personal liability. Hanson knew all of this because her lawyer told her so and that is why she had a conflict of interest when she voted for the Clarifying Ordinance.

The critical elements of PIC's findings of fact and its legal reasoning are: (1) Hanson was personally at risk for damages and attorney's fees because DBE had sued her individually, (2) the real purpose of the Clarifying **[*35]** Ordinance was to help Dewey Beach and Hanson and the other individual defendants in the Federal Case and this real purpose was not disclosed to the public, (3) Hanson's lawyer told her that the Clarifying Ordinance would help her qualified immunity defense, (4) the Clarifying Ordinance could be accepted, and (5) the Clarifying Ordinance would help Hanson's qualified immunity defense.

PIC's findings are not supported by substantial evidence in the record in several important respects.

1. Personal Risk

There is scant evidence in the record to support PIC's finding that Hanson was at risk personally in the Federal Case. PIC concluded that Hanson was at risk for damages and attorney's fees simply because DBE sued her individually. However, Dewey Beach had an obligation to indemnify Hanson, from the general funds of the town's treasury, to the extent not otherwise covered by appropriate insurance, for any matter arising out of an action taken by her in connection with the performance of her official duties, against expenses (including attorney's fees), judgments, fines, amounts paid in settlement

incurred by her in connection with such action. [33] The Federal Case had been settled at the time **[*36]** of the hearing on Hanson's Motion to Dismiss. However, 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.

33 Dewey Beach C. §22-1.

2. Disclosure

The evidence in the record shows that the purpose of the Clarifying Ordinance was, in part, to help Dewey Beach, but not necessarily Hanson and the other individual defendants, in the Federal Case, and that this purpose was disclosed to the public by Mandalas. I assume that PIC concluded that the real purpose of the Clarifying Ordinance was undisclosed because the text of the Clarifying Ordinance only discussed clarifying the maximum height limit in the RB-1 zoning district. However, the fact that the purpose of the Clarifying Ordinance was, in part, to help Dewey Beach in the Federal Case was discussed publicly by Mandalas before Hanson and the other Dewey Beach commissioners voted on it. Mandalas was Dewey Beach's attorney. He prepared the initial draft of the Clarifying Ordinance. He testified at the hearing that the Clarifying Ordinance had "served a couple purposes." **[*37]** One purpose was to clarify the meaning of the bulk standards to show that they did not relax the maximum 35 foot height limitation. The other purpose was to help Dewey Beach in the Federal Case. Mandalas believed that by clarifying the meaning of bulk standards it would remove an issue in dispute in the Federal Case. Mandalas told PIC this at the hearing in response to PIC's legal counsel's question on the matter. The following is an excerpt of their exchange:

Q. And did you, as counsel to the Town, recommend to Mayor Hanson and the other commissioners that a clarifying ordinance be adopted?

A. I recommend that. And I've discussed this in open session, so this isn't violating any client confidences. I did, in fact, recommend that for litigation purposes, I thought this ordinance was an ordinance that should be adopted. (Emphasis added.)

Now that's separate from a policy decision. Whether, as a member of the commission, somebody as a matter of policy thought it was good to go above 35 feet or not good to go about 35 feet, my view was that since we're in litigation, if we want to put on the best defense possible with that litigation, I did recommend adoption of this ordinance.

Thus, it is **[*38]** 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.

3. Walton's Advice

There is not substantial evidence in the record to support PIC's finding that Walton told Hanson that the Clarifying Ordinance would help her qualified immunity defense. PIC did not find that it was a conflict of interest for Hanson to vote in favor of the Clarifying Ordinance in order to help Dewey Beach in the Federal Case. It was only a conflict of interest if she did so to help her own defense in the Federal Case. However, Walton, who was the attorney for Hanson and the other individual defendants, did not testify that he told Hanson that the Clarifying Ordinance would help her. He only testified that he discussed the impact of the Clarifying Ordinance on her qualified immunity defense. This is a meaningful distinction. The following is his testimony:

Ms. Wright: After that was passed - well, after the Federal Court ruled that those claims could still exist against the Town and Ms. Hanson, **[*39]** did you advise her - and I'm not asking you what you advised her. Did you advise her of the potential impact that the clarifying ordinance could have in her defense regarding qualified immunity?

The Witness: I'm sure we spoke of it, yes.

Ms. Wright: Thank you.

Based on this, PIC concluded that Hanson "not only knew the purpose was not on the face, but was advised of the personal benefit to her if it passed." 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 concluded, as a finding of fact, that Walton told Hanson that the Clarifying Ordinance would help her qualified immunity defense.

PIC's findings in this regard are critical to its ultimate finding that Hanson had a conflict of interest. Mandalas openly advised the Dewey Beach Mayor, Hanson and the other Dewey Beach commissioners to pass the Clarifying Ordinance to help Dewey Beach **[*40]** in the Federal Case. Hanson, as a non-lawyer, certainly would not know the legal consequences of the Clarifying Ordinance on her qualified immunity defense unless her attorney told her what those consequences were. Thus, it was critical for PIC to determine if Walton had told Hanson that the Clarifying Order would help her qualified immunity defense. This is why PIC's counsel asked Walton whether he had discussed the effect of the Clarifying Ordinance on Hanson's qualified immunity defense. Walton testified that he did talk to Hanson about it, but he never told PIC what his advice was. Thus, there is no evidence in the record that he told Hanson that the Clarifying Ordinance would help her qualified immunity defense. Therefore, PIC's finding that he did is not supported by substantial evidence in the record. Even though the record does not support PIC's finding about what Walton told Hanson, which I view as fatal to its conflict of interest finding, I will briefly address the rest of PIC's findings in this regard.

4. The Clarifying Ordinance

There is not substantial evidence in the record or legal analysis supporting PIC's finding that the Clarifying Ordinance would ever be accepted. **[*41]** The fact is that such ordinances are usually not given retroactive effect. There is no doubt that, in the absence of constitutional provisions to the contrary, the legislative branch of Government can adopt legislation having a retroactive or retrospective affect. [34] Legislation is either introductory of new rules or declaratory of existing rules. [35] A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law or the meaning of another statute and declares what it is and ever has been. [36] Such a statute therefore is always, in a certain sense, retrospective because it assumes to determine what the law was before it was passed. [37] It is always permissible to change an existing law by a declaratory statute where the statute is only to operate upon future cases. [38] But the legislative action cannot be made retroactive upon past controversies and to reverse decisions which the courts in the exercise of their undoubted authority have made. [39] The United States Supreme Court has said that the legislature has the power to declare by subsequent statute the construction of previous statutes so as to bind the courts in reference to transactions **[*42]** occurring after the passage of the law and may at times enunciate the rule to govern courts in transactions that are past provided no constitutional rights are prejudiced. [40] However, the legislative branch of government has no power by subsequent act to declare the construction of a previous act prejudicially affecting constitutional and vested rights which have attached under the prior act and before the passage of the declaratory law. [41]

34 2 *Sutherland Stat.Constr.*, 2nd Ed.Sec. 2201 et seq.
35 1 Cooley's Const. Lim., 188 (8th Ed.).
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*
40 *Stockdale v. Atlantic Insurance Companies, 87 U.S. 323, 22 L. Ed. 348, 23 F. Cas. 112, F. Cas. No. 13462 (1873)*; *Town of Koshkonong v. Burton, 104 U.S. 668, 26 L. Ed. 886 (1881).*
41 *Id.*

There is no doubt that DBE, after having spent a considerable sum of money to prepare the Concept Plan, would have argued that its right to build a 68 foot tall structure under the Relaxed bulk standards applicable in the RB-1 zoning district had "vested" and could not be impaired by the Clarifying Ordinance. [42] Thus, it seems highly

unlikely that the Clarifying Ordinance would have ever of been of any help to Hanson in any event.

42 *In re: 244.5 Acres of Land, 808 A.2d 753 (Del. 2002).*

5. The Qualified Immunity Defense

There **[*43]** is not substantial evidence in the record or legal analysis to support PIC's finding that the Clarifying Ordinance would have helped Hanson's qualified immunity defense. PIC never reviewed DBE's complaint against Dewey Beach, Hanson and the individual defendants or their respective motions to dismiss. It instead relied on the District Court's decision on the motions to dismiss in order to analyze the legal issues in the Federal Case.

The common-law doctrines that determine the tort liability of municipal employees are well established. [43] Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts. [44] Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. [45] The hallmark of a discretionary act is that it requires the exercise of judgment. [46] In contrast, ministerial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. [47]

43 *Bridgeport Harbor Place I, LLC v. Ganim, 2006 Conn. Super. LEXIS 510, 2006 WL 493352, at *3 (Conn. Super. Feb. 16, 2006).*
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*

Defendants in a *Section 1983* action **[*44]** are entitled to qualified immunity from damages for civil liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [48] Qualified immunity balances two important interests: the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. [49] The existence of qualified immunity generally turns on the objective reasonableness of the actions, without regard to the knowledge or subjective intent of the particular official. [50] Whether a reasonable officer could have believed his or her conduct was proper is a question of law for the court and should be determined at the earliest possible point in the litigation. [51] In analyzing a qualified immunity defense, the Court must determine: (1) whether a constitutional right would have been violated on the facts alleged, taken in the light most favorable to the party asserting the injury; and (2) whether the right was clearly established when viewed in the specific context of the case. [52] "The relevant dispositive inquiry **[*45]** in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." [53]

48 *Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).*
49 *Harlow v. Fitzgerald, 457 U.S. 800, 815, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).*
50 *Id. at 819.*
51 *ACT UP!/Portland v. Bagley, 988 F.2d, 868, 872-73 (9th Cir. 1993).*
52 *Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).*
53 *Id.*

PIC never conducted this analysis to determine if the Clarifying Ordinance would be of any help to Hanson's qualified immunity defense. Indeed, such an analysis would have been difficult to undertake because PIC never reviewed DBE's complaint against Hanson and thus was not aware of the underlying factual allegations against her. PIC also never determined if Hanson's qualified immunity defense would overcome her conflicts of interest. [54] PIC did conclude that Hanson could argue that her vote against the Concept Plan was merely a ministerial act. However, PIC never discussed the land use process for evaluating and voting on a "Concept Plan." Thus, it cannot be determined whether Hanson's vote was a ministerial act or not.

54 *Wong v. Allison, 208 F.3d 224, 2000 WL 206572, FN3 (9th Cir. 2000).*

(e) The [*46] Appearance of Impropriety

Hanson argues that PIC exceeded its statutory grant of authority when it found that she had acted in such a manner so as to create an appearance of impropriety. PIC found that when Hanson voted for the Clarifying Ordinance she engaged in a course of conduct that would raise suspicion among the public that she was engaging in acts that were in violation of the public trust and which did not reflect favorably upon Dewey Beach. This finding is based in turn on PIC's finding that Hanson should not have voted on the Clarifying Ordinance because she had conflicts of interest arising out of her rental properties, the desire to strengthen her qualified immunity defense in the Federal Case, and the desire to maintain her quality of life. Given these conflicts of interest, PIC concluded that the public would suspect that Hanson "used her public office for personal gain or benefit." This is based on an appearance of impropriety test. The test is, according to PIC, if the conduct would create in reasonable minds, with knowledge of all relevant facts, a perception that an official's ability to carry out her duties with integrity, impartiality and competence is impaired.

Having **[*47]** concluded that there was not substantial evidence in the record to support PIC's conflict of interest findings regarding Hanson's rental properties and her qualified immunity defense in the Federal Case, and that the conflict of interest issue regarding Hanson's quality of life was not properly before PIC, I have concluded that PIC's finding regarding the appearance of impropriety must be reversed because it is based upon these three unproven conflicts of interest.

I note that Hanson testified that she had, both before and after she became an elected official in Dewey Beach, maintained that she was steadfastly committed to a maximum height of 35 feet for structures and had always voted against DBE because its structure in the Concept Plan exceeded 35 feet. PIC concluded that she had not always felt this way, noting that Hanson had twice reviewed and voted in executive session in favor of the mutual release and agreement, which permitted a maximum height for DBE's structure of 45.67 feet. PIC went on to state, "Thus, her approval of the Mutual Agreement in Executive Session appears to contradict her statement that she always voted against DBE's height exceeding 35 feet." In reaching **[*48]** this conclusion, PIC took the evidence in the record out of context. This matter was discussed by PIC's legal counsel and Mandalas. The following is an excerpt of their exchange:

Q. And are you familiar with or aware of how Mayor Hanson voted with regard to accepting or rejecting the proposed settlement?

A. Yes. Mayor Hanson was the one nay vote, voting - - voting not to settle the litigation.

Ms. Wright: Mr. Mandalas, prior to that, there were votes on the mutual agreement and release; is that correct?

The Witness: Yes.

Ms. Wright: And within that mutual agreement and release, it discusses having a height above 35 feet, and my understanding is that it was a unanimous vote to move that forward to the town manager. Correct?

The Witness: Not entirely correct. The way the mutual agreement and release worked is that it kind of had a two-step process, where the town manager worked with Dewey Beach Enterprises to develop this mutual agreement and release. Once the town manager was satisfied with it, she brought it to council in executive session. And after reviewing the mutual agreement and release in executive session, council came out of executive session.

And the decision then was whether to **[*49]** pursue the public hearing process and the public meeting process that was established in the mutual agreement, to pursue whether a settlement made sense.

The mutual agreement and release makes clear that the settlement would only be adopted, and the mutual agreement and release would only be adopted upon a vote of the entire council after these public hearings occurred.

So those votes I think that you're referring to were votes to move forward with the process that's laid out in the mutual agreement and release, but not to actually settle the litigation. Not to actually adopt the mutual agreement and release. That happened - - whatever the date that the meeting was.(Emphasis added.)

I note this only because it is another example of how PIC reached a conclusion that was not supported by substantial evidence in the record. Hanson did vote against approving the settlement with DBE.

IX. Conclusion

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 **[*50]** 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.

The decision of the Delaware State Public Integrity Commission is reversed.

IT IS SO ORDERED.

/e/ E. Scott Bradley

E. SCOTT BRADLEY