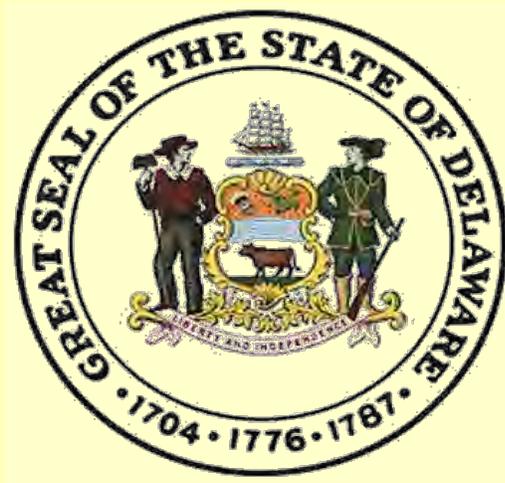


State of Delaware

State Public Integrity Commission



ANNUAL REPORT
March 1, 2013

Wilma Mishoe, Chair

William F. Tobin, Jr. and Andrew Gonser, Esq., Vice Chairs

Commissioners

Mark Dunkle, Esq.

Lisa Lessner

William Dailey, Jr.

Jeremy Anderson, Esq.

Published 1 July 2013

STATE PUBLIC INTEGRITY COMMISSION

Annual Report - March 1, 2013¹

TABLE OF CONTENTS

I. MISSION AND JURISDICTION HISTORY	1
II. COMMISSION STRUCTURE AND BIOGRAPHIES OF COMMISSIONERS AND STAFF..	1
III. LAWS ADMINISTERED BY THE COMMISSION	
A. SUBCHAPTER I, CODE OF CONDUCT – ETHICAL STANDARDS	9
B. SUBCHAPTER II, FINANCIAL AND ORGANIZATIONAL DISCLOSURE REQUIREMENTS	13
C. SUBCHAPTER III, COMPENSATION POLICY – “ANTI-DOUBLE DIPPING LAW”	15
D. SUBCHAPTER IV, REGISTRATION AND EXPENSE REPORTING OF LOBBYISTS	17
IV. METHODS FOR ACHIEVING COMPLIANCE	19
A. TRAINING AND PUBLICATIONS	20
B. ADVISORY OPINIONS	21
C. WAIVERS	22
D. COMPLAINTS	22
V. LITIGATION.....	24
VI. LEGISLATION OF INTEREST.....	25
VII. FUNDING	27
VIII. FUTURE GOALS	26
VIX. APPENDICES	
APPENDIX A – WAIVERS	A-1
APPENDIX B – HANSON V. PIC	/// /// B-1
3BB7>>3@FiE AB7@,@9 4D,78	
3@EI 7D,@9 4D,78A@ 3BB73>	
3BB7>>3@Fy D7B>K 4D,78A@ 3BB73>	

¹ Published 1 July 2013

M *ission:* Administer, interpret and enforce the Code of Conduct (ethics); Financial Disclosure; Dual Compensation; and Lobbying Laws.

Jurisdictional History

- ☑ **1991 – State Ethics:** Executive Branch officers and employees, including casual/seasonals; (over 48,000); non-legislative elected officials; State Board and Commission appointees (In 2012, over 300 Boards and Commissions).
- ☑ **1993 – Local Ethics:** 57 local governments' employees, officers, elected officials, and Board and Commission appointees, unless they submit a Code for the Commission's approval. (As of 2012, only 8 have an approved Code, leaving PIC with 49 local jurisdictions).
- ☑ **1994 – Dual Compensation:** State and local employees and officials with a second elected or paid appointed job in government.
- ☑ **1995 – Financial Disclosure:** elected officials; State candidates; Judges, Cabinet Secretaries, Division Directors and equivalents. (2012: 388 officers filed, 91 were State candidates).
- ☑ **1996 – Lobbying:** State lobbyists registration, authorization and expense reports (2012: 370 lobbyists; 1,043 organizations; 4172 expense reports).
- ☑ **2000 – Ethics:** School Districts and Boards of Education
- ☑ **2001 – Ethics:** Charter School Boards of Education
- ☑ **2010 – Organizational Disclosures:** State elected officials & candidates must disclose private organizations if they are Board or Council members.
- ☑ **2010 – Newark Housing Authority:** Newark's Code of Conduct the Authority, but the General Assembly changed the law to make it a State agency so that PIC would have jurisdiction.
- ☑ **2012 – Lobbyists:** Report within 5 business days legislative bill number or administrative action number or title on which they are lobbying. **PIC:** Report weekly to General Assembly on lobbyists' legislative/administrative action.



DELAWARE PUBLIC INTEGRITY COMMISSION

410 Federal St., Suite 3; Dover, Delaware 19901
Phone (302) 739-2399 Fax (302) 739-2398

Commission Structure

Appointments, Qualifications and Compensation

- 7 Citizens are the "Public Eye" on Government Ethics*
- Nominated by the Governor; Confirmed by the Senate*
- Elect their Own Chair*
- Cannot be:*
 - Elected or Appointed Official - State, Federal or Local*
 - Holder of Political Party Office*
 - An officer in a political campaign*
- Generally are Appointed from all three Counties*
- Terms - one full 7 year term; may serve until successor is appointed and confirmed*
- Vacancies filled just as Original Appointments*
- Pay - \$100 each official duty day; reimbursement of reasonable and necessary expenses*

II. Commission Structure and Biographies of Commissioners and Staff

(A) Commission Appointee Status

During 2012, the terms of Barbara Green, who was serving as Chair, William Dailey who was a Vice Chair were scheduled to expire in November. Ms. Green had already served more than 7 years as she was initially appointed to complete the term of another Commissioner. She asked the Governor to accept her resignation before the legislative session ended in June 2012, so that the Senate could confirm a new Commissioner, rather than having her continue to serve until January 2013, when the Senate would return. Governor Jack Markell agreed, and appointed William F. Tobin, Jr., to finish her term. By law, both Commissioner Tobin and Commissioner Dailey will continue to serve until the nomination and confirmation of any replacements.

(B) Commission Staff

The Commission has had a two person full-time staff since 1995—its attorney and administrative specialist—performing day-to-day operations. Its attorney, beyond legal duties, conducts training, prepares Strategic Plans, Budgets, and performs other non-legal duties. The Commission's Administrative Assistant performs the administrative functions, updates the website's calendar of events with the Commission agenda, minutes, etc.

In 2012, the General Assembly passed legislation requiring a new database for on-line filing for lobbyists and public officers. The Department of State (DOS) selected Delaware Inactive to create the new database, and DOS provided funding for PIC to hire a temporary administrative assistant to assist with the transition.

(C) Biographies of Commissioners

Wilma Mishoe, Ed.D., Chair

Dr. Mishoe was confirmed as a 7-year appointee to the Public Integrity Commission on March 15, 2011. Her term expires in 2017. She was elected as the Vice Chair for Procedures during the first full year of her term. In 2012, she was elected as Chair.

Dr. Mishoe earned her doctorate at Temple University where her dissertation was on the preferred learning styles of learning disabled adults at post-secondary institutions. She earned both her Masters and Bachelor Degrees from Howard University, Washington, D.C.

Dr. Mishoe retired from Delaware Technical and Community College at the end of 2010, after serving as Dean of Student Services followed by Dean in Office of Instruction. She also had been Dean of Students and Director of Financial Aid at Wilmington College (now University). Before that employment, she worked for The Brookings Institution in Washington, D.C.

She remains active in educational and community activities. She is presently a Board member of Wilberforce University in Ohio, where she serves as Board Secretary and also Chairs the Academic, Student Affairs and Compliance Committee. She is on the Board of Directors for Children and Family First, and is a member and Treasurer of the Dover Rotary Club. She presently is the Vice President of the Dover, DE Chapter of The Links, Incorporated. Founded in 1946, it is one of the oldest and largest volunteer service organizations of women who are

committed to enriching, sustaining and ensuring the culture and economic survival of African Americans and other persons of African ancestry.

Dr. Mishoe has also held the position of Vice President, Dover Alumnae Chapter, Delta Sigma Theta Sorority, and is on the Board of Stewards Pro Tem for Mt. Zion A.M.E Church. She has received numerous honors and awards for her community leadership and work in education. Most recently, the Delmarva Black Chamber of Commerce awarded her its Leadership and Service Award in Education. In past years, she received the Citizen of the Year Award from Psi Iota Chapter, Omega Psi Phi Fraternity, Inc.; Employee of the Year Award from DelTech (Terry Campus); and Super Stars in Education Finalist from the Central Delaware Chamber of Commerce.

She is a Certified Mediator by the Center for Community Justice, and received the First Line Leadership Certification from the State of Delaware.

She co-chaired the Mid-Eastern Association of Education Opportunity Program Personnel Student Leadership Conference; and through the National Council of Education Opportunity Association's Legislative Policy Seminar, she gave a presentation to Delaware's congressional assistants on the Title IV Federal TRIO program funding. TRIO is a compilation of Federal outreach and student services programs designed to identify and provide services for individuals from disadvantaged backgrounds.

Dr. Mishoe resides in Dover, Delaware.

Andrew W. Gonser, Esq.
Vice Chair, Personnel

Mr. Gonser was confirmed to serve a seven-year term on the Commission in June 2011, with his term ending in June 2017. In 2012, he was elected to serve as Vice Chair, Personnel.

Mr. Gonser is a partner in the law firm of Gonser and Gonser in Wilmington. He is experienced in all aspects of Family Court matters from divorce, property division, custody and visitation, to paternity issues, guardianships and adoptions. He currently serves as Chair of the Family Law Section of the Bar Association and was Voted 2012 Top Family Law Attorney in Delaware Today.

For two years while working on his law degree at Widener University School of Law, he was on the school's law journal, Delaware Corporate Law. After graduating *cum laude* in 2004, he clerked for the Honorable Jan Jurden, Delaware Superior Court. He also was a judicial extern in the U.S. District Court for the Honorable Sue L. Robinson. He is admitted to practice in all Delaware Courts, the U.S. District Court (Delaware), and the U.S. Supreme Court.

His undergraduate degree is in English from the University of Delaware, where he received the Division I Men's Soccer Letterman's Award.

Mr. Gonser is actively engaged in legal and non-legal activities. He is a volunteer attorney for the Legal Self-Help Center and volunteers as a Guardian *ad Litem* for children in Delaware's foster

care system. He also is a member of the Delaware State Bar Association and the Melson-Arsht Inns of Court.

Mr. Gonser resides in Wilmington with his wife and five children.

William F. Tobin, Jr.
Vice Chair, Policies & Procedures

William F. Tobin was appointed to complete a few months of the remaining term of former Chair, Barbara Green, who served for more than 8 years as a result of completing another Commissioner's term, and then being appointed to complete her own 7-year term. Mr. Tobin may be reappointed by the Governor to serve his own 7-year term.

Mr. Tobin has served many years in private sector positions, both for-profit and non-profit. His work has included managing budgets of more than \$500,000, and other fiscal aspects such as inventory control, asset management and audit reviews. He is presently a credit manager and safety director for George Sherman Corporation, Lewes, Delaware. He also has an extensive background in sales, and trained and mentored new and existing sales staff.

His public sector experience ranges from 7 years of active duty in the U.S. Coast Guard, where he developed extensive emergency management skills, to training fire company members on Small Boat Handling in conjunction with the Delaware State Marine Police.

He has long been an active member and officer of organizations in the fire and rescue areas, serving as Treasurer and Co-Chair of the Fire and

Rescue Boat Committee, Memorial Fire Company; Sussex County Technical Rescue Team as the Finance and Budget Executive, and member of the Delaware State Fire Police and Indian River Fire Company; and Executive Administrator, assistant treasurer, finance Board member of Georgetown American Legion Post #8, Ambulance State #93.

Aside from his interest in fire and safety, he is active in his community as Treasurer, Lower Delaware Shield and Square; American Legion Post #5 member; St. John's Masonic Lodge member; DE Consistory member, and Nur Temple member.

Commissioner Tobin resides in Harbeson, Sussex County, Delaware.

William W. Dailey, Jr.

In 2007, William W. Dailey, Jr., was appointed to serve until November 8, 2012. The statute provides that he may continue to serve until a new Commissioner is nominated by the Governor and confirmed by the Senate to replace him.

Mr. Dailey has an extensive engineering and surveying background, through his education and service in the United States Army's Engineer Corps. After an honorable discharge, he continued his education. He was also Certified in Reduction and Flood Hazards, Inshore and Coastal Hydrographic Surveying. He is a licensed Land Surveyor in Delaware, Maryland, New Jersey and Pennsylvania.

Prior to retiring, he worked for VanDemark & Lynch, Inc., gaining experience in all phases of surveying and land development. He supervised field

operations for the company, including property, topographic, construction, geodetic and hydrographic surveys; supervised field crews in those areas; compiled and reviewed field data; conducted legal research where necessary; and was recognized by Courts as a legal expert in the field, and has given expert testimony.

His projects ranged from small tracts to areas exceeding 5,000 acres, where he gained extensive experience in horizontal and vertical controls for aerial mapping and hydrographic surveys. His Delaware work covered projects such as supervising field surveys for the Delaware Army and Air National Guard at the Greater Wilmington Airport; Dover Air Force Base; and Georgetown Airport. His work for the military focused on runway and taxiway extensions and improvements. He also was responsible for field surveys on Delaware's major shopping centers: Christiana Mall, Concord Mall and Brandywine Town Center.

He has taught seminars and classes on various aspects of surveying, including Boundary Law, Surveying Basics, Surveying Issues, Title Insurance, Metes and Bounds Descriptions, etc. For 15 years, he was an instructor at Delaware Technical and Community College, Stanton Campus.

He has served on and been a member of numerous Surveyor Societies, including Chair of the State of Delaware Board of Land Surveyors (1981-1990). In 1993, the Delaware Association of Surveyors selected him as its Surveyor of the Year. He also was active in the Gull Point Condominium Council in Millsboro, Delaware.

Aside from his service on many boards and committees related to surveyors, he was Youth Chairman, President and Vice President of the Red Clay Kiwanis Club. Although retired, he remains involved with VanDemark & Lynch as a consultant.

He is a Sussex County resident with his spouse in Millsboro.

Mark F. Dunkle, Esq.

Mr. Dunkle was confirmed for a seven year appointment to the Commission on June 30, 2009. His term will expire on June 30, 2016.

Mr. Dunkle is an Attorney/Director in the law firm of Parkowski, Guerke & Swayze, P.A., which has offices in all three counties. He has been a Director in this firm since July 1996.

Before receiving his law degree from Emory University School of Law in Georgia, he graduated with distinction from the University of Virginia with a degree in history. Upon completion of his law degree, he was admitted to the Georgia Bar, and three years later was admitted to the Delaware Bar. Aside from his admission to practice in all Delaware State Courts, he is admitted to practice in Pennsylvania, the U.S. District Court, District of Delaware, and the United States Supreme Court.

Mr. Dunkle is well-published in, and has made presentations on, land use law. Among his publications and presentations are: "Municipal Annexation Law in Delaware," "Delaware Land Use Law," "Delaware Condemnation Law," and "Eminent Domain Law in Delaware." His presentations have been through the auspices of the Delaware Urban Studies

Institute, the National Business Institute, and the Delaware State Bar Association. Also, in the area of land use, he was a member of the Kent County Comprehensive Development Plan Update Committee, and a member of the Kent County Transfer of Development Rights Committee. In the area of publications, he also served as co-editor of *In Re*, the Journal of the Delaware State Bar Association.

He chaired the Governor's Magistrate Screening Committee for over ten years. Presently, he is a member of the Delaware Board of Bar Examiners Character and Fitness Committee and serves by appointment of the Delaware Supreme Court on the Preliminary Investigatory Committee of the Court on the Judiciary. He also has served on the Executive Committee of the Delaware State Bar Association.

Mr. Dunkle has been active in the community of Dover and surrounding areas by serving as President of the Capital City Rotary Club and as a member of the Greater Dover Committee and the local Chamber of Commerce.

Mr. Dunkle resides in Wyoming, Delaware.

Lisa Lessner

Mrs. Lisa Lessner was confirmed as a Commissioner on June 16, 2010 for a seven year term, expiring in 2017.

For 13 years, Mrs. Lessner has actively worked as a community volunteer for various non-profits. During that time, one of her key focuses was as a founder and board member of the Delaware Children's Museum. Volunteering more

than 1,000 hours a year, she chaired its Marketing and Exhibits Committees. In 1997, she was elected Vice President, until elected President in 2004. She served in that role until February 2010.

Her efforts for Delaware's first children's museum included extensive market research, writing an extensive business plan, attending conferences and networking with professionals in other States from children's museums, securing start-up funds, hosting fund raising events, hiring professional exhibit designers and architects, creating an exhibit master plan, hiring an executive director, and securing \$5 million in funds from the Riverfront Development Corporation for the museum's land and building. Her efforts were rewarded when the Museum opened in April 2010—on time and on budget.

While undertaking those efforts, she also was a Board member of Albert Einstein Academy (2001-2007), and in 2009 became a Delaware Theatre Company Board member, although she since stepped down as a Board member.

Mrs. Lessner's business acumen began with a University of Delaware Bachelor of Science Degree in Accounting. That was followed by an MBA in Health Care Administration from Widener University, Chester, Pennsylvania. After interning for IBM and Morgan Bank, she worked for the Hospital of the University of Pennsylvania in a variety of positions, including Budget Specialist, Budget Manager, Senior Associate for Clinical Effectiveness and Senior Associate to the Executive Director. Later, she used her skills as an independent consultant for the Clinical Care Associates, University of Pennsylvania Health System. Her

consultant work encompassed being the temporary Chief Financial Officer, and working on special projects, including establishing financial and human resources policies and procedures.

Mrs. Lessner, and her family, reside in Wilmington, DE.

Jeremy D. Anderson, Esq.

Mr. Anderson was confirmed for a seven-year appointment to the Commission on June 30, 2011. His term will expire on June 30, 2017.

Mr. Anderson is an attorney at Fish & Richardson P.C. in Wilmington. He has extensive experience litigating business disputes involving mergers and acquisitions, stock appraisal, indemnification of officers and directors, demands for corporate records, trade secrets, patents and complex commercial matters. He also frequently lectures on the Delaware Corporate, Limited Liability Company and Limited Partnership laws, corporate control, fiduciary duties, and the business judgment rule. Mr. Anderson is a former Law Clerk of the Honorable Kent A. Jordan, in the United States District Court (Delaware), now a judge in the 3rd Circuit Court of Appeals.

He received his law degree from Georgetown University Law Center, in Washington, D.C., and was the Senior Editor for Law and Policy in International Business. Mr. Anderson was admitted to the Delaware Bar in 2004. He also has a Bachelor of Arts degree in English from Brigham Young University (*cum laude*).

Mr. Anderson is a member of the American Bar Association, Delaware Bar Association and Federal Bar Association. He also chairs the J. Reuben Clark Law Society, Delaware Chapter, and is a Barrister in the Richard S. Rodney Inn of Court.

Mr. Anderson resides in Hockessin, Delaware.

Commission Staff

Janet A. Wright Commission Counsel

As an independent agency, the Commission appoints its own attorney. 29 Del. C. § 5809(12). Janet A. Wright was appointed in 1995. She intends to retire in 2013.

A Widener University School of Law graduate (cum laude), she was admitted to practice in Delaware in 1989. She also is admitted to the bar in the Delaware U.S. District Court, and the U.S. Third Circuit Court of Appeals. Ms. Wright was a Superior Court law clerk for the Honorable Richard S. Gebelein. She then was an Assistant Solicitor for the City of Wilmington. Initially prosecuting Building, Housing and Fire Codes, and animal protection laws, she periodically prosecuted criminal matters in Municipal Court. Later, as a litigator, she defended the City and its employees, primarily in federal court, against alleged civil rights violations.

She has an American Jurisprudence Award in Professional Responsibility, and completed the National Institute for Trial Advocacy's skills course. She is a member of the Northeastern Regional Conference on Lobbying (NORCOL) and the Council on Government Ethics Laws (COGEL). NORCOL members administer lobbying laws from Washington, D.C. to New England. COGEL members regulate ethics, lobbying, financial disclosure, and campaign finance in all fifty states, local governments, the federal government, and Canada and Mexico. Ms. Wright served on its Site Selection Committee; moderated a Lobbying seminar; conducted a Dual Government employment session; and was on its Model Lobbying Law Committee. Her review of Alan Rosenthal's Drawing the Line: Legislative Ethics in the States was published in the "COGEL Guardian." She has given Government Ethics sessions at the Delaware Bar Association's Continuing Legal Education Classes. Her ethics presentation on "Land Use Planning and Eminent Domain in Delaware" was selected by the National Business Institute (NBI) for its on-line training program. In 2010, she gave a session on "Ethical Client Communications" as part of the "Legal Ethics for Everyday Practice" NBI presentation for the DSBA.

Administrative Assistant Jeannette Longshore

Jeannette Longshore was hired in 2006, as a temporary employee when the Commission's full-time State administrative specialist was absent. She was hired full-time in June 2007.

Ms. Longshore worked at Delaware Technical Community College, Hewlett-

Packard, and Agilent Technologies. She has experience in Microsoft Word, Excel, Access, and other computer skills. She performs the day-to-day administrative specialist functions, and updates the Commission's calendar of events on its web site with its agenda and minutes, and attends and takes minutes at the meetings, etc. She has completed courses in courses on the State Budget and Accounting; Program Management Office Training; and Grammar and Proofreading.



III. Laws Administered by the Commission

Subchapter I, Code of Conduct--Executive Branch and local government ethics;

Subchapter II, Financial and Organization Disclosures--Executive, Legislative and Judicial Branch public officers annual report of financial interests, such as assets, creditors, income, and gifts. All State elected officials and State candidates must also disclose private organizations of which they are a Board or Council member.

Subchapter III, Compensation Policy--State or local employees or officials holding dual government jobs with procedures to monitor and prevent “double-dipping;”

Subchapter IV, Lobbying—Lobbyists’ registrations, authorizations, expense reports, and specific legislative or administrative action on which they are lobbying State officials or employees.

A. Subchapter I, Code of Conduct – Ethical Standards

Purpose and Jurisdiction: Twelve (12) rules of conduct set the ethical standards for “State employees,” “State officers,” and “Honorary State Officials,” in the Executive Branch. [29 Del. C. § 5804\(6\), \(12\) and \(13\)](#). It also applies to local governments, unless the local government has a PIC approved Code that is as stringent as State law. [29 Del. C. § 5802\(4\)](#). The purpose is to instill the public’s respect and confidence that employees and officials will base their actions on fairness, rather than bias, prejudice, favoritism, etc.,

arising from a conflict, or creating the appearance thereof. [29 Del. C. § 5802](#)

Personal Jurisdiction – State Level:

The Code of Conduct applies to all Executive Branch employees (rank and file, including part-time), officers (elected and appointed Senior level Executive Branch officials), and honorary State officials (appointees to more than 300 Boards and Commissions). Approximately 48,000 persons are in those State categories.

Personal Jurisdiction – Local Level:

At the local level, the number of employees, officers and officials in the local governments over which the Commission has jurisdiction is unknown.

In 2012, Delaware City submitted and had approved its own Code of Conduct. It is the eighth local government to do so. The other local governments with their own Codes of Conduct are: New Castle County, Dover, Lewes, Millsboro, Newark, Smyrna, and Wilmington. As they now have their own Code, the Commission would no longer have jurisdiction over their employees, officer, and appointed officials. The remaining 49 local governments are under PIC's jurisdiction.

In 2012, the Superior Court specifically ruled that local officials are subject to the State Code of Conduct unless they have adopted their own Code of Conduct, approved by PIC. [Hanson v. Public Integrity Commission](#). pp. 13-14. While local officials have twice filed appeals in that Court, the Court did not specifically address the jurisdiction issue. [Post v. Public Integrity Commission](#); [King v. Public Integrity Commission](#) (dismissed at request of Mr. King). The Public Integrity Commission appealed the Hanson decision on grounds other than jurisdiction. (See Litigation discussion and other references, *infra*).

Subject Matter Jurisdiction

The Code of Conduct restricts participating in an official government capacity if there is a personal or private interest in a matter before them; bars all employees, officers and officials from representing or assisting a private enterprise before their own agency in their private capacity; bars officers (Senior Level officials) from representing or assisting a private enterprise before any agency; limits public servants in obtaining contracts with the government entity with which they serve; restricts their activities for 2 years after terminating State employment. [29 Del. C. § 5805](#). The law also restricts acceptance of gifts, outside employment or anything of monetary value; use of public office for personal gain or benefit; improper use or disclosure of government confidential information; and/or use the granting of sexual favors as a condition, either explicit or implicit, for an individual's favorable treatment by that person or a state agency. [29 Del. C. § 5806](#). The Code also bars conduct that creates a justifiable impression, or that may "raise public suspicion" of improper conduct, [29 Del. C. § 5802\(1\)](#) and [§ 5806\(a\)](#). Thus, the Commission considers if there is an appearance of impropriety.

The appearance of impropriety, under the Code of Conduct, is evaluated using the Judicial Branch standard, as interpretations of one statute may be used to interpret another when the subject (ethics) and the standard (appearance of an ethics violation) apply in both (public servant) cases. *Sutherland Stat. Constr. § 45-15, Vol. 2A (5th ed. 1992)*.

In 2012, in the [Hanson](#) case, it was argued by her to the Superior Court that PIC has no authority to apply the appearance of impropriety provision. [29 Del. C. § 5806](#). The Superior Court did not find that PIC could not apply that law; rather, it found that because there was no substantial evidence of an actual violation, that there could not be

an appearance of a violation. [Hanson](#) at p. 30.

Penalties: Both criminal and administrative penalties may be imposed.

(1) Criminal Prosecution: The General Assembly, in passing the law, found that some standards of conduct are so “vital” that the violator should be subject to criminal penalties. [29 Del. C. § 5802\(2\)](#). Four (4) rules carry criminal penalties of up to a year in prison and/or a \$10,000 fine. [29 Del. C. § 5805\(f\)](#). Those rules are that employees, officers, and honorary officials may not: (1) participate in State matters if a personal or private interest would tend to impair judgment in performing official duties; (2) represent or assist a private enterprise before their own agency and/or other State agencies; (3) contract with the State absent public notice and bidding/arm’s length negotiations; and (4) represent or assist a private enterprise on certain State matters for 2 years after leaving State employment. [29 Del. C. § 5805\(a\)2\(2\)](#) Beyond referring suspected Code violations for prosecution, if a majority of Commissioners finds reasonable grounds to believe a violation of other State or Federal laws was violated, they may refer those matters to the appropriate agency. [29 Del. C. § 5807\(b\)\(3\)](#) and(d)(3); [§ 5808\(A\)\(a\)\(4\)](#); and [§ 5809\(4\)](#)

(2) Administrative Sanctions

Violating the above rules may, independent of criminal prosecution, lead to administrative discipline. [29 Del. C. § 5810\(h\)](#).

Under some rules both criminal and/or administrative sanctions may occur, but violating the following rules results only in administrative action: (1) improperly accepting gifts, other employment, compensation, or anything of monetary value; (2) misuse of public office for private gain or unwarranted privileges; and (3) improper use or disclosure of confidential information. [29 Del. C. § 5806\(b\), §5806\(e\) and § 5806\(f\) and \(g\)](#).

Disciplinary levels: (1) reprimand/censure of any person; (2) removing,

suspending, demoting, or other appropriate disciplinary action for persons other than elected officials; or (3) recommending removal from office of an honorary official. [.29 Del. C. § 5810\(h\)](#).

B. Subchapter II, Financial and Organizational Disclosure Requirements

Purpose: Financial Disclosure: Subchapter II is meant to instill the public's confidence that its officials will not act on matters if they have a direct or indirect personal financial interest that may impair objectivity or independent judgment. [29 Del. C. § 5811](#). Compliance, in part, is insured when they report financial interests shortly after becoming a public officer, (14 days), and each year thereafter on March 15, while a public officer. [29 Del. C. § 5813\(c\)](#). Identifying the interests helps the public officer recognize a potential conflict between official duties and personal interests that may require recusal or ethical guidance.

Personal Jurisdiction: Financial Disclosure: More than 300 "public officers" in the Executive, Legislative, and Judicial branches must file financial disclosure reports within 14 days of becoming a public officer and on March 15 each year thereafter. [29 Del. C. § 5813\(c\)](#). Filers include: All Executive and Legislative Branch elected officials; all cabinet secretaries, division directors, and their equivalents; all members of the judiciary; and candidates for State office. [29 Del. C. § 5812\(n\)\(1\)](#). As State candidates must file, the number of filers varies depending on the number of candidates in a given year. **In 2012**, there were 91 candidates for State office.

Subject Matter Jurisdiction: Assets, creditors, income, capital gains, reimbursements, honoraria, and gifts exceeding \$250 are reported. Aside from their own

financial interests, officials must report: assets held with another if they receive a direct benefit, and assets held with or by their spouses and children, regardless of direct benefits. [29 Del. C. § 5813](#).

In 2012, the General Assembly passed legislation requiring a new searchable database be created so lobbyists could meet additional reporting requirements, which is discussed later, but the change also affected the database for public officers because the 2 databases interface so that the Commission can notify each public officer of expenditures on them reported by lobbyists. Primarily, the change for public officers was an updated security system which required public officers who file on line to create a new user name and password, and answer security questions to verify their identity if they do not recall their user name and password. Additionally, the format of the form, but not the substance, was changed.

Penalties: Willful failure to file a report is a Class B misdemeanor. Knowingly filing false information is a Class A misdemeanor. [29 Del. C. § 5815](#). The Commission may refer suspected violations to the Commission Counsel for investigation and to the AG for investigation and prosecution. *Id.* The penalties are: (1) up to six months incarceration and/or a fine of up to \$1,150 for a Class B misdemeanor, [11 Del. C. § 4206\(b\)](#); and (2) up to one year incarceration and a fine of up to \$2,300 for a Class A misdemeanor, [11 Del. C. § 4206\(a\)](#). The Court may also require restitution or set other conditions as it deems appropriate. [11 Del. C. § 4206\(a\) and \(b\)](#).

Personal Jurisdiction: Organizational Disclosures:

Only State elected officials and Candidates for State officer file this report. [29 Del. C. § 5813A](#). Other public officers, e.g. cabinet secretaries, division directors, and their equivalents are not required to file this information.

Subject Matter Jurisdiction: The elected officials and candidates must disclose the name and address of every nonprofit organization, (excluding religious organizations), civic association, community association, foundation, maintenance organization, or trade group incorporated in the State or having activities in the State, or both, of which the person is a council member or board member. [29 Del. C. § 5813A](#).

Purpose: Potential conflicts can arise from associational interest, even without a financial interest, and if the organization seeks action by the General Assembly, the Governor, Lt. Governor, Treasurer, Auditor, Insurance Commissioner, or Attorney General, the annual reporting reminds them of that possibility. The reports are public records, and may be requested on the [FOIA form](#), on the Commission’s website. That allows the public to also monitor the financial and associational interests of these officials.

Both the financial disclosure report and the organizational disclosure are snapshots of the interest as of the date reported.. The decision on whether those interests, or any acquired after that date, but not yet reported, create a conflict of interest, is based on the conflict laws for that particular officer. Executive Branch elected officers are subject to the [State Code of Conduct](#); Legislators are subject to the [Legislative Conflicts of Interest law](#); and Judicial officers are subject to the [Judicial Code of Conduct](#).

Penalties: Same as for financial disclosure reporting violations.

C. Subchapter III - Compensation Policy – “Anti-Double Dipping Law”

Purpose: Some elected and paid appointed officials hold a second job with State

agencies or local governments. Taxpayers should not pay an individual more than once for overlapping hours of the workday. [29 Del. C. § 5821\(b\)](#). To build taxpayers' confidence that such employees and officials do not "double-dip," those with dual positions must have the Supervisor verify time records of hours worked at the full-time job on any occasion that they miss work due to the elected or paid appointed position. [29 Del. C. § 5821\(c\)](#) and [§ 5822\(a\)](#). The full-time salary may be prorated, unless the dual employee uses leave, compensatory time, flex-time or personal time. *Id.*

Jurisdiction: The number of people to whom this law applies varies based on how many State and local government employees hold dual employment.

For those holding dual positions, who also are subject to the Code of Conduct—Executive Branch and local governments--the "double-dipping" restrictions are reinforced by the ethical limits on holding "other employment." [29 Del. C. § 5806\(b\)](#). Complying with the ethics provision is extra insurance against "double-dipping," and also helps insure the "other employment" does not raise ethical issues. Further assurance against double-dipping is that the statute requires the Auditor to annually audit time records. [29 Del. C. § 5823](#). Generally, that audit is primarily of time records for General Assembly members who are also State employees.

In 2012, the Auditor issued a report of its findings from its 2011 investigation. <http://auditor.delaware.gov/Reports/FY2013/Dual%20Employment%20Final%20Report.pdf>. No action was required by PIC.

Penalties: Aside from pro-rated pay where appropriate, discrepancies are reported to the Commission for investigation, and/or the AG for investigation and prosecution under any appropriate criminal provision. [29 Del. C. § 5823](#).

D. Subchapter IV – Lobbyists Registration and Reporting

Purpose: Individuals authorized to act for another, whether paid or non-paid, must register with the Commission if they will be promoting, advocating, influencing or opposing matters before the General Assembly or a State agency by direct communication. 29 Del. C. § 5831. Lobbying registration and reporting informs the public and government officials whom they are dealing with so that the voice of the people will not be “drowned out by the voice of special interest groups.” United States v. Harriss, 347 U.S. 612, 74 S. Ct. 808 (1954).

Jurisdiction: **In 2012**, the number of organizations which have registered lobbyists exceeded 1,000 for the first time. When PIC began administering this law, in 1996, there were about 200 organizations with lobbyists. At the end of 2012, 370 lobbyists, representing 1,043 organizations, were registered.

Reporting Requirements: Each lobbyist is to file quarterly reports revealing direct expenditures on General Assembly members and/or State agency members. 29 Del. C. § 5835(c). That results in 4,172 expense reports. If the expense exceeds \$50, the lobbyist must identify the public officer who accepted the expenditure, and notify the official of the value. *Id.*

In 2012, legislation was passed creating an additional reporting requirement. Under that law, with an effective date of January 1, 2013, lobbyists must report legislation by bill number and administrative action by number or title, within 5 business days of lobbying a State official. 29 Del. C. § 5836. “Lobbying” consists of direct communication with a State employee or official, including General Assembly members, for the purpose of

advocating, promoting, opposing, or influencing legislation or administrative action. [29 Del. C. § 5831\(5\)](#). The law also required that all registration, expense reports, and the new “Lobbying Activity Report” be filed on line. [29 Del. C. § 5832\(a\)](#). Because PIC has had on-line filing for lobbyists since 2002, only about 6 lobbyists were not filing on line, so that part of the transition was not difficult. However, because of the new system, all lobbyists had to create a new user name and password to be able to access their accounts which result in some technical difficulties.

Beyond the “Lobbying Activity Reports” that the lobbyists must file, the legislation requires PIC to report the lobbying activity to the General Assembly on at least a weekly basis while the General Assembly is in session. [29 Del. C. § 5836\(d\)](#). Further, it required that a [searchable public database](#) be created so that the public could search for information not only on the names of lobbyists and their employers, and expense reports, but also the new Lobbying Activity Report. [29 Del. C. § 5836\(d\)](#) The new searchable database was activated on New Year’s Day of 2013. As that was also the end of the last quarter of 2012, and lobbying expense reports were to be filed between the 1st and the 20th of January, some lobbyists actually filed reports on the first day the system was operational.

Penalties:

Administrative: A very effective compliance tool is using the administrative penalty of cancelling a lobbyist’s registration if they fail to file required reports. *Id.* They may not re-register or act as a lobbyist until all delinquent authorizations and/or reports are filed. *Id.* Obviously, this personally affects their ability to represent an organization in which they are interested enough to volunteer, or affects their job performance if they cannot perform their paid duties. Recognizing the impact on lobbyists if their registrations are cancelled,

the Commission sends several failure to file notices, by e-mails, followed by certified letter.

If the lobbyist does not respond, before their registration is cancelled, the organization which they represent is also notified. That notice generally triggers the required filing.

Criminal: Any person who knowingly fails to register or knowingly furnishes false information may be found guilty of a misdemeanor. [29 Del. C. § 5837](#). Unclassified misdemeanors carry a penalty of up to 30 days incarceration and a fine up to \$575, restitution or other conditions as the Court deems appropriate. [11 Del. C. § 4206\(c\)](#).

IV. Methods for Achieving Compliance



(A) Training and Publications - [29 Del. C. § 5808\(A\)\(a\)\(1\)](#)

As the Commissioners normally meet monthly, the day-to-day work of providing guidance and facilitating compliance with the laws, conducting seminars and workshops, publishing materials, etc., are the Commission Counsel's statutory duties. *Id.*

To best assist government officials and lobbyists in understanding and complying with the law, the Commission's primary focus is on training. Training is reinforced by handouts of publications which can be reviewed later. For quick reference, an Ethics Brochure with the 12 rules of conduct with some brief cases examples is provided. It also has procedures for obtaining advice or waivers, and filing complaints. Opinion synopses have more specific cases decided over the years. As individuals encounter similar situations, they can refer to the cases. These publications also are on the Commission's web site. The web site includes the statutes, all Ethics Bulletins, a brochure on Delaware's gift laws, the Commission's rules and its annual reports. For Financial Disclosure filers and Lobbyists, it has instructions for on-line filing. Lobbyists can link to

the Legislative Bill Drafting manual if drafting legislation for clients. It includes links to related laws such as the Legislative Conflicts of Interest Law and the Judicial Code of Conduct.

In 2012, the Commission gave nine training classes to a total of 177 attendees

Date	Agency	Class and # of ATTENDESS
3/12/2012	Dept. of Health & Social Services	Ethics in Government 9
4/3/2012	Dept. of Transportation	Ethics in Government 8
4/10/2012	Dept. of Transportation	Ethics in Government 16
6/12/2012	Dept. of Transportation	Ethics in Government 16
7/9/2012	Lobbyists	Lobbying Law 8
8/23/2012	Dev. Disabilities Council & Governor's &	Ethics in Government 15
	Adv. Council for Exceptional Children	
9/10/2012	Dept. of Services for Children Youth and Their Families/ Pension Office	Ethics in Government 33
10/8/2012	Dept. of Transportation	Ethics in Government 48
10/10/2012	Employees and officials from any Agency	Ethics in Government 22

(B) Advisory Opinions - [29 Del. C. § 5807\(c\)](#). Any employee, officer, honorary official, agency, or lobbyist may seek the Commission's advice on the provisions applying to them. While training and publications expose those subject to the law to a broad and general view, the Commission's advisory opinions and waiver service on particular fact situations gives the individual personal attention on a potential conflict, guiding them through the steps that would prevent crossing the ethics line. While advisory opinions are non-binding, if the individual follows the advice, the law protects them from complaints or disciplinary actions. [29 Del. C. § 5807\(c\)](#).. Synopses of those opinions the become

updates at training classes.

In 2012, the Commission acted on 40 requests for advisory opinions, plus 5 requests carried over from late 2011 to January 2012.

(C) Waivers - [29 Del. C. § 5807\(a\)](#) Any employee, officer, honorary official, agency, or lobbyist may seek a waiver. In rare cases, an individual may need to deviate from the law. The Commission may grant waivers if: (1) the literal application of the law is not necessary to serve the public purpose; or (2) an undue hardship exists for the agency or employee. Waivers are open records so the public knows why a deviation from the law was allowed in a particular case. As some standards are so “vital” that they carry criminal penalties, making the information public further instills confidence that an independent body makes the decision. It also gives the public better exposure to the Commission’s deliberation process which may not be as clear when only a synopsis that cannot identify the individual by name or through sufficient facts is permitted.

In 2012, three waivers were granted. Commission Op. Nos. 12-32; 12-42 and 12-43. When a waiver is granted, the proceedings become a matter of public record. Those decisions are on the Commission’s website and at [Appendix A](#) in this report.

(D) Complaints - [29 Del. C. § 5810\(a\)](#). Any person, public or private, can file a sworn complaint. The Commission may act on the sworn complaint, or its own initiative. A majority (4) must find “reasonable grounds to believe” a violation may have occurred. [29 Del. C. § 5808\(A\)\(a\)\(4\)](#). If probable cause is found, the Commission may conduct a disciplinary hearing. [29 Del. C. § 5810](#). The person charged has statutory rights of notice and due process. Violations must be proven by clear and convincing evidence. If a violation is found, the Commission may impose administrative discipline. [29 Del. C. §](#)

[5810\(d\)](#). It may refer substantial evidence of criminal law violations to appropriate federal or State authorities. [29 Del. C. § 5810\(h\)\(2\)](#). Frivolous or non-merit complaints, or those not in the Commission’s jurisdiction, may be dismissed. [29 Del. C. § 5809\(3\)](#).

In 2012, the Commission acted on three complaints. Two were dismissed for lack of jurisdiction, pursuant to [29 Del. C. § 5809\(3\)](#). One alleged discrimination based on gender, which is not covered by the Code of Conduct, but the individual’s concern may be covered by Equal Employment Opportunity laws. PIC was suggested that he contact that State office to see if they could assist him, and he was provided with the phone number and name of a contact. The other dismissal for lack of jurisdiction arose from a letter complaining about the treatment of prisoners with disabilities. The individual cited a number of federal laws, such as the Americans with Disabilities Act, but this Commission has no jurisdiction over Federal laws. PIC obtained some information from the Developmental Disabilities Council, which suggested he contact the “Disabilities Law Program,” and PIC provided the Sussex County office address and phone number. The third complaint alleged a local official had a conflict of interest in voting on certain zoning matters. The Commission found no evidence the official had a financial interest or land that would be impacted by the zoning, or any personal and private associational relationship in the matter. Thus, the complaint was dismissed. Commission Op. No. 12-25.

The total number of advisory opinions, waivers and complaints acted on was 51.



V. *Litigation*

In 2012, the Superior Court issued its decision on the appeal of Diane Hanson, the Mayor of the Town of Dewey Beach. The Commission had ruled that she had conflicts of interest and/or the appearance thereof, when she voted on a retroactive ordinance that applied to only one property owner, because when she voted: (1) that property owner had a pending suit against the Town and against her personally, and the ordinance would create a retroactive defense to the law suit; and (2) she owned rental properties in close proximity to the land the property owner wanted to develop, including building to a height of 68', and the ordinance was intended to bar that property owner from building above 35'. *Commission Op. No. 10-31*. The Superior Court reversed, holding that, among other things, it should have held a full-trial instead of rendering a summary judgment decision after she moved to dismiss and asked that testimony from her three witnesses be incorporated into her motion. [Hanson v. Public Integrity Commission](#). It further held that there was not substantial evidence to support PIC's findings of conflicts, and PIC should not have concluded that based on a defense raised by Ms. Hanson, that her legal defense actually resulted in a factual finding of another violation.

In 2012, the Commission appealed the Superior Court's decision to the State Supreme Court. The briefs by both parties to that Court are at [Appendix B](#).

VI. Legislation



Legislation of Interest - 146th General Assembly (2011-2012)

The 146th General Assembly was heavily involved in legislation that impacted on lobbyists and the current lobbying law. Most was not passed, but the final result was that Lobbyists must now file on-line; must report legislative activity by bill number within 5 business days of lobbying; PIC must send lobbying activity report of that data to the General Assembly at least once a week while in session; a new database was created allowing the new reports to be filed and allowing the public to search the database.

Click
For
Status

Senate

[S. B. 19](#) ➤ *Lobbying*: Bars lobbyists from being employed as a consultant by any State Agency or public body, or serving on any State Commission, Council, Board or performing any official function for the State. The synopsis says this is to avoid conflicts. Status: Assigned to Senate Judiciary Committee; no further action. If passed this could have resulted in State agencies not being able to use the expertise of some of these people even in areas where there would be no conflict because it is not a matter they lobbying on. As appointees to State Boards and Commissions they would be subject to the State Code of Conduct, which addresses conflicts for such appointees. It also would bar lobbyists from serving on the Lobbying Law Study Commission, H.J.R. 4 below, which specifically provides that they should serve on that Commission.

[S.B.141](#) ➤ *Lobbying*: Adds comprehensive lobbyist reform provisions including additional financial reporting requirements. It also adds conflict of interest prohibitions and limitations on unethical conduct making such conduct illegal. If passed, would also require an entirely new database. If this passed and H.J.R 4, below, passed, it could mean that after making all the necessary changes in this legislation, that the Lobbying Law Study Commission could identify changes needed in this law. Bars lobbyists from performing official duties for State government to avoid conflicts.

[S.B.185](#) ➤ *Lobbying*: The Governor, in his State of the State address, said he planned to introduce legislation to have lobbyists update their registration

information with a specific bill numbers, or specific administrative action, and have it hyperlinked so that the public know not only the number assigned to a bill but can actually view the bill itself. **The legislation passed with an effective date of January 1, 2013**, to give time to the vendor to create the necessary database program that would allow the lobbyists to report that information, and time to create a searchable database system for the public. The legislation also requires that PIC provide a weekly lobbying activity report to the General Assembly while it is in session.

[S.B.260](#) ➤ ***Budget:*** Budget Bill provided for the same budget for PIC as in prior years: \$188.5 with \$30,600 of that as PIC's operating budget. That was the same as Governor's recommended budget.

House

[H.J.R. 4](#) ➤ ***Lobbying:*** Would establish a Study Commission to examine Delaware's ethics laws as they relate to regulated lobbyists. The 13-member Study Commission would include (i) 4 individuals appointed by the President Pro Tempore of the Senate, (ii) 4 individuals appointed by the Speaker of the House of Representatives, and (iii) 5 individuals appointed by the Governor. PIC was to staff the task force. The Study Commission would report findings to the Governor and General Assembly no later than December 31, 2012, after which the Study Commission would terminate. At hearings, the House recognized that PIC's two person staff was insufficient staff to serve the Study Commission and amended the resolution to have that work performed by Legislative Counsel. Passed by the House; not by Senate. See, S.B. 141, and S.B. 185.

Would significantly change the lobbying law and database. If S.B. 141 and H.J.R 4 had both passed, it would have meant changing the law and the database a second time after the study was completed, which could be a costly result.

[H.B.4](#) ➤ ***Lobbying:*** Bars General Assembly members from being lobbyists for 1 year after the end of a term. Substituted by [HS 1 to HB 4](#)

[H.B. 5](#) ➤ ***FOIA:*** Agencies to respond to Freedom of Information Act Requests in 15 days.

[H.B. 24](#) ➤ ***Lobbying:*** Restricts General Assembly members, heads of State agencies, Cabinet Officials, and Governor's Executive Staff from lobbying for one (1) year after their term of office ends or State employment ends. Note: Executive Branch already has a 2 year post-employment restriction. [29 Del. C. § 5805\(d\)](#)

[H.B. 25](#) ➤ ***Budget:*** Governor's Recommended Budget for FY ending June 30, 2012.

[H.B. 190](#) ➤ *Budget*: Appropriations for FY ending June 30, 2012. PIC - \$185.9

[H.B.233](#) ➤ *Lobbying*: Lobbyists to disclose to PIC the name of nonprofits, community associations, trade groups, etc., if the lobbyist is a council or board member. If passed, would require additional administrative work and change to database. Present legislation does not allow time after passage and before effective date to change database. This would be another piecemeal patch to the existing system. Both S.B. 285 and S.B.141 would require revamping the complete database system.

VII. Funding

As noted in the legislative section above, the General Assembly appropriated the same personnel and operating budget as in last year's report--\$188.5, with an operating budget of \$30, 600. The Commission continues to spend less than 1¢ per person on the more than 58,000 people it regulates, while at the same time its duties increased.

VIII. Future Goals

The Commission's focus will continue to emphasize education of employees, officers, officials, and lobbyists.



APPENDIX A



STATE OF DELAWARE
DELAWARE STATE PUBLIC INTEGRITY COMMISSION

MARGARET O'NEILL BUILDING
410 FEDERAL STREET, SUITE 3
DOVER, DELAWARE 19901

TELEPHONE: (302) 739-2399
FAX: (302) 739-2398

August 21, 2012

Ms. Christine Montgomery
309 Odessa Ave.
Wilmington, DE 19809

12-32 Concurrent Employment – Revised Opinion

Hearing and Decision By: Vice Chairs William Dailey and Wilma Mishoe; Commissioners Mark Dunkle, Esq., and Andrew Gonser, Esq., Commissioners

Dear Ms. Montgomery:

The Public Integrity Commission previously reviewed your disclosure on your planned employment with New Behavioral Network (NBN). At that time, you knew NBN contracted with the Department of Services for , Children, Youth and Their Families (DCYFS), Division of Prevention and Behavioral Health Services (DPBHS). You did not know it also contracted with the Division of Family Services (DFS), where you work. In fact, NBN alerted us to that change, which has now been considered. Based on the following law and facts, we still find one conflict, but still grant a waiver of that provision.

I. Applicable Law and Facts:

(a) State employees must file a full disclosure if they have a financial interest in a private firm that does business with the State. [29 Del. C. § 5806\(d\)](#). **A financial interest@ includes private employment.** [29 Del. C. § 5804\(5\)\(c\)](#). You filed the required disclosure so a waiver of this law is not required. ²

(b) State employees may not:

² The Commission appreciates your honesty in revealing that you previously worked for another vendor that contracted with your Department, but not your Division, and you did not file a disclosure as you did not know of the requirement. While that legal requirement is not to be taken lightly, as it could result in the forfeiture of your State employment, we are aware that such events have occurred with other employees and understand how it is possible. To insure you are current on all the Code provisions, we recommend you attend the Ethics in Government Training class. The details are at the end of this letter.

(1) **review or dispose of State matters if they have a personal or private interest that may tend to impair judgment in performing State duties.** [29 Del. C. §5805\(a\)\(1\)](#). Private employment can create a personal or private interest. [Beebe Medical Center v. Certificate of Need Appeals Board](#), C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). You are a Family Service Assistant, in DFS. Your duties involve assisting social workers in the adoption unit. You deal with adoption recruitment, paper and computer work related to adoptions; transportation of the children (e.g., to meet with prospective families) and do not have a caseload. That work does not require you to review or make decisions about NBN's contract with DFS. Also, DPBHS develops, awards, and oversees another contract. Again, you have no involvement in that contract. In your private job, you will work with clients that are not processed for adoption through your Division. Thus, you would have no occasion to make decisions about your private clients in your State job. Your conduct does not violate this provision, so no waiver is required.

(2) **represent or otherwise assist a private enterprise before the State agency with which they are associated by employment.** [29 Del. C. § 5805\(b\)\(1\)](#). A State agency means a Department. [29 Del. C. § 5804\(11\)](#). Your work for NBN will involve working with clients who receive treatment and assistance in behavioral health. NBN has said it will not assign clients from DFS to you. Specifically, you expect to do such things as take the clients to functions or activities and observe their behavior in social settings. You will report your observations to the NBN therapist who is assigned to the child. Your observations will assist her in assessing the child's needs.

If your clients are not from your Department, this provision would not apply. However, because your NBN client is from DPBHS, the therapist is required to meet with DPBHS on a regular basis to discuss the clients. The effect is that your observations, reported to the therapist, are being used by NBN to show how it is fulfilling its contractual obligations of providing services to the Department's clients. We have held that such involvement constitutes assisting the private enterprise before the agency by which the State employee is associated. *Commission Op. No. 06-38*. Ideally, NBN should not assign you clients from your State agency to avoid a violation. We discuss below, the waiver granted so you can continue to deal with the one client who is assigned to you.

(3) **Waivers may be granted if the literal application of the law is not necessary to serve the public purpose.** [29 Del. C. § 5807\(c\)](#). One purpose for not representing or assisting a firm before one's agency is to ensure your colleagues and co-workers do not base their decisions on the fact that you are involved with the private enterprise. The other reason is to insure that State employees do not use their public office to secure unwarranted privileges for themselves or the private enterprise. Here, nothing suggests these purposes could not be served. Regarding decisions by your immediate colleagues and co-workers, no decisions are made about your NBN client(s) because NBN will not assign you clients from your Division. Thus, the possibility of loyalty or favoritism toward you is more remote. As far as decisions made by DPBHS employees, they do not make direct decisions about your work. Rather, your interactions and observations pertaining to the child are evaluated by a professional therapist at NBN so that the therapist can decide on the approach to, and success of, therapy. How, and whether, that approach or its

effectiveness fits into NBN's contractual obligations—not whether your reported observations are correct or incorrect—is what DPBHS determines. Regarding using your public office to obtain special benefits for NBN that is not likely to occur as you do not draft, write, approve, manage, etc., the DPBHS contract, nor does anyone in your Division. Also, you said that in performing these same functions for your prior employer, you never had occasion to deal with DPBHS. Finally, at present, you only have one client. You explained that during approximately 2 years with this client, the client has been relocated with different family members several times; has had several different therapists; and as a result you have been the only stable feature in the client's life. At its meeting with NBN Director Brenda L. Farside, ICSW, and Case Manager Raychel Bouchat, they confirmed the need for such stability in a client's life, whenever possible. We weigh that against the remote possibility that your input on a single client to the NBN therapist will influence the decisions of State employees in another Division, and the even more remote possibility that you could use your public office on behalf of NBN to influence DPBHS decisions, and conclude that a literal application is not necessary under the particular facts of this case.

(4) State employees may not misuse public office to secure unwarranted privileges, private advancement or gain. [29 Del. C. §5806\(e\)](#). We noted above the remoteness of misusing your public office to give NBN an advantage. Also, under this restriction, you may not use State time and/or State resources (e.g., phone, fax, computer, e-mail, etc.) to perform your private work.

II. Conclusion

We find compliance with most of the rules and waive one provision because of the remoteness of possible misconduct. This waiver is limited solely to these particular facts. Should your situation change, contact the Commission.

FOR THE PUBLIC INTEGRITY COMMISSION



William Dailey, Vice Chair

Want to Learn More About Ethics in Government? We offer training to State and Local Governments through the State Training Office. Presently, a class is scheduled on October 10, 2012, Paradee Building, Dover, DE. It is open to any employee or official from any government. You may register on the website: [Ethical Conduct in Government Class](#). We also offer direct training for any agency or local government. Call 302-739-2399.



STATE OF DELAWARE
DELAWARE STATE PUBLIC INTEGRITY COMMISSION

MARGARET O'NEILL BUILDING
410 FEDERAL STREET, SUITE 3
DOVER, DELAWARE 19901

TELEPHONE: (302) 739-2399
FAX: (302) 739-2398

January 31, 2013

Imran Trimzi, M.D.
Mary Diamond, M.D.
1901 North DuPont Highway
New Castle, DE 19901

12-42 and 12-43 – Contracting with the State

Hearing and Decision by: Wilma Mishoe, Chair; Commissioners: William Dailey, Mark Dunkle, Lisa Lessner and Jeremy Anderson

Dear Doctors Trimzi and Diamond, and Mr. Yeatman:

The Public Integrity Commission (PIC) reviewed the Department of Services for Children, Youth and their Families (DSCYF) request for a waiver to allow it to privately contract with Doctors Imran Trimzi and Mary Diamond. Based on the following law and facts, a waiver is granted until the beginning of the new fiscal year, because of the dire need to provide psychiatric services to children at the Terry Children's Center. It is our understanding that the positions will be publicly noticed for bidding at that time.

I. Applicable Law and Facts

(A) State employees who have a financial interest in a private enterprise that does business with, or is regulated by the State, must file a full disclosure with PIC as a condition of commencing and continuing employment with the State. [29 Del. C. § 5806\(d\)](#). Doctors Trimzi and Diamond's private contract with the State constitutes a "private enterprise" and their employment constitutes a "financial interest." [29 Del. C. § 5804\(9\)](#) and [§ 5804\(5\)\(b\)](#). Both have complied with this requirement.

(B) State employees may not review or dispose of State matters if they have a personal or private interest in the matter. [29 Del. C. § 5805\(a\)\(1\)](#). Here, the State matter was their private contracts. However, Dr. Trimzi and Dr. Diamond work for a totally separate Department—Health and Social Services (DHSS). Thus, they were not in any manner responsible for the contract, as that was a matter handled by Mr. Yeatman and others at DSCYF.

(C) State employees may not represent or otherwise assist a private enterprise before the agency with which they are associated by employment. [29 Del. C. § 5805\(b\)\(1\)](#). As noted, the Doctors work for a totally separate agency, DHSS, so they will have no occasion to deal with their own agency.

(D) State employees may not contract with the State if the contract is for more than \$2,000 unless there is public notice and bidding. [29 Del. C. § 5805\(c\)](#). Here, the agency has not yet publicly noticed and bid the contracts, and requests that a waiver be granted.

On the written request of any State agency, or an individual subject to the Code, the Commission may grant a waiver to the specific prohibition if the Commission determines that the literal application of the law is not necessary to serve the public purpose, or would result in an undue hardship on an employee, officer, official or State agency. [29 Del. C. § 5807\(a\)](#).

Here, the agency seeks a waiver based on the following facts: In early 2012, it lost two full-time Child Psychiatrists who worked in the Terry Children's Center. Such psychiatrists are required to have an additional two years of training in Child and Adolescent Psychiatry over psychiatrists not in that specialty. As a result, they usually have increased payments to be made on student loans, so the salary can be a critical issue. As far as State of Delaware employment, these positions have a lower salary than the rate paid to full-time Psychiatrists in DHSS, even though those positions do not require the additional 2 years for training required for Child Psychiatrists. Pulling from other States also is difficult because there has been a recognized national shortage of Child and Adolescent Psychiatrists in studies identified to DFYCF in September 25, 2012, and this shortage has been on-going since at least 2006, and is expected to continue. Moreover, due to changes in Delaware laws that require a more stringent background investigation of Physicians who deal with children, it can take longer for out-of-State licensees to receive a State of Delaware license which they must have for the positions.

Efforts made to fill the full-time positions included multiple job notice advertisements in the Regional Council of Child and Adolescent Psychiatry of the Delaware Valley (Philadelphia and Southern New Jersey region) and the Regional Council of Child and Adolescent Psychiatry of Delaware. The agency also distributed the job notice to members of the Psychiatric Society of Delaware, and contacted provider services including Delaware Guidance, Psychiatry at Crozier-Keystone Health System, and Child Guidance Resource Center, and had the Director of the Department of Child and Adolescent Psychiatry at Jefferson University Hospital assist in recruiting attempts. The only applicant for the full-time State job would not even accept an interview because of the pay offered.

Other attempts to solve the problem included contracting with, as opposed to direct hiring of, a full-time child psychiatrist to work at the Terry Center, but he only worked for approximately 4 months: February – June 2012. During that time, a State Task Force had completed a report on Child Mental Health Needs in Kent and Sussex County, which identified a need to recruit two psychiatrists to Sussex County, because the Terry Center presently provides child and youth residential services <http://ltgov.delaware.gov/taskforces/cmhtf/finalreport.shtml> That report was submitted to the Governor, the Speaker of the House of Representatives, and the President Pro Tem of the Senate on March 12, 2012.

The agency continued trying to recruit child psychiatrists for the Terry Center, and were able to hire a part-time Child Psychiatrist in July 2012, who continues to work there. However, that is insufficient for the caseload at the Terry Center. In the meantime, the agency had lost other full-time Child and Adolescent Psychiatrists in other programs, such as at the Stevenson House Detention Center and the Youth

Rehabilitation Services, in October 2012, Two other full-time Child & Adolescent Psychiatrists with whom DSCYF contracted, left their positions at Delaware Guidance in August and September 2012. Another part-time contract child psychiatrist is not able to provide additional time. The agency again sent job announcements to the Regional Council of Child & Adolescent Psychiatry of Delaware and the Psychiatric Society of Delaware; personally contacted practicing psychiatrists; and had a potential hiring of one psychiatrist who decided not to pursue their offer.

Beyond the difficulties encountered in trying to find replacements, the agency had to consider the impact on children in need of services by the Terry Children's Center. It has a capacity to provide services to 12 residential clients, 24 day treatment clients, 15 intensive outpatient clients and up to 4 crisis clients. That dictates that the facility have psychiatric services year round, 24 hours per day. Without a psychiatrist to work with the children and issue medications, their health and welfare could be affected. As a result, the agency turned to Dr. Trimzi and Dr. Diamond to see if they would contract for part-time services to insure the facility remained operational and could meet the needs of youth in care. The agency said it is continuing to try to find other sources for services. It also plans to work toward having a more competitive salary so it can attract full-time employees, and plans to publicly notice and bid the contract in the next fiscal year, which starts in July 2013.

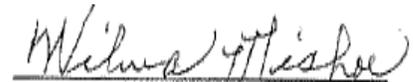
While it is conceivable that public notice and bidding of the part-time contract may have attracted others who would be willing to contract part-time, as Dr. Trimzi and Dr. Diamond have done, we recognize the agency's focus was on obtaining full-time employees due to the operational nature of the Terry Center. Also, the time spent on trying to find either full-time, part-time or contractual hires has apparently identified the reality of the shortage in a manner not fully recognized before because the 2 full-time employees who left at the beginning of the year had been working for the State for almost 2 decades. Further, there has been an increased need for assistance to children identified not only during the Bradley investigation but also as a result of dangerous behaviors such as suicides of youth, which dictates timely evaluations and treatment for children, which is not as readily attainable at present without the assistance of Doctors Trimzi and Diamond.

Also, as waivers become a matter of public record, the public will have access to this information on why the need was critical and be assured that actions are being taken to insure uninterrupted service to the Terry Center's children.

II. Conclusion

Based on the above facts and law, we grant a waiver to the agency to continue with these private contracts until the new fiscal year, beginning July 1, 2013, when public notice and bidding is expected.

FOR THE PUBLIC INTEGRITY COMMISSION



Wilma Mishoe, Chair

Want to Learn More About Ethics in Government? We offer training to State and Local Governments through the State Training Office. We also offer direct training for any agency or local government. Call 302-739-2399 to schedule training for your organization.

APPENDIX B

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

Janet A. Wright, ID No. 2796
Delaware Public Integrity Commission
410 Federal St., Suite 3
Dover, DE 19901
(302) 739-2399
Attorney for Appellant

DATE: January 11, 2013

TABLE OF CONTENTS

TABLE OF CITATIONSiii

NATURE OF THE PROCEEDING1

SUMMARY OF ARGUMENT2

STATEMENT OF FACTS3

 (A) Facts On the Procedural Aspects3

 (B) Facts Pertaining to the Conflicts of Interest6

 (1) The Federal Law Suit6

 (2) The Rental Properties87

 (3) Appearance of Impropriety11

 (4) Written defenses to the complaint11

ARGUMENTS

 I. THE SUPERIOR COURT ERRED AS A MATTER OF LAW BY REVERSING PIC’S
 OPINION ON ITS OWN FINDINGS OF AN ELEMENT NOT AT ISSUE13

 II. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN CONSIDERING
 ARGUMENTS NOT RAISED BEFORE PIC, OR IN THE OPENING BRIEF; OR NOT IN,
 OR UNTIL, THE REPLY BRIEF; AND/OR NOT RAISED AT ALL15

 (A) PIC’S Procedure16

 (B) Nelson Complaint18

 (C) Legal Analysis of “Competition”21

 (D) Qualified Immunity Defense22

 (E) Quality of Life Defense25

 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 CODE26

 (A) The Federal Law Suit26

 (B) The Personal Property Interest30

 (C) Appearance of Impropriety33

CONCLUSION35

Attachment

SUPERIOR COURT DECISIONA

TABLE OF CITATIONS

Cases

Aronowitz v. Planning Board of Township of Lakewood, 608 A.2d 451 (N.J. Super. 1982)28

Avallone v. State/Dep't. of Health and Social Services, 14 A. 3d 566, 570 (Del. 2011).....15,25,26,35

Avallone v. State of Delaware/Dep't of Health and Social Services, 2011 Del. Super. LEXIS 360 (Del. Super. August 17, 2011) 34

Bank of Delaware v. Claymont Fire Co., 528 A.2d 1196 (Del., 1987)... 17

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) 29

Beebe Medical Ctr. v. Certificate of Need Appeals Board, 1994 Del. Super. LEXIS 473 (Del. Super. August 31, 1994) 16

Bradley v. State, 2003 Del. Super. LEXIS 331 (Del. Super. September 16, 2003) 15

Camas v. Delaware Bd. of Medical Practice, 1995 Del. Super. LEXIS 528 (Del. Super. November 21, 1995) 15

City of Wilmington v. Minella, 879 A.2d 656 (Del. Super.2005)15,22,25

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).....32,33

Crumplar v. Super. Ct. in & for New Castle County, 2012 Del. LEXIS 553 Del. January 27, 2011).....20

Dewey Beach Enters. v. Town of Dewey Beach, 2010 U.S. Dist. LEXIS 77466 (D. Del. July 30, 2010).....4,24,27

Estate of Osborn v. Kemp, 2009 Del. Ch. LEXIS 149 (Del. Ch. August 20, 2009)aff.d. 2010 Del. LEXIS 135 (Del. March 25, 2010) 19,20

Hanson v. Delaware State Pub. Integrity Commission, 2012 Del. Super. LEXIS 403 (Del. Super. August 30, 2012) passim

I.U.N. Am., Inc. v. A.I.U. Ins. Co., 896 A.2d 880 (Del. Super. 2006) 17

In re Artesian, 189 A.2d 435 (Del. 1963).....	33
Justice of the Peace Court v. Carty, 2012 Del. Super. LEXIS 17 (Del. Super. January 9, 2012).....	28
Kopicko v. Dept. of Serv. For Children, Youth and Their Families, 23003 Del. Super. LEXIS 282 Del. Super. August 15, 2003).....	14,33
Liggett Group, Inc. v. Affiliated FM Ins. Co. 2001 WL 1456774 (Del. Super 2001).....	17
Nevada Ethics Commission v. Carrigan, 131 S. Ct. 2343 (2011).....	33
Pioneer House v. Div. of Long Term Care Resident’s Protection, 2007 Del. Super. LEXIS 346 (Del. Super. November 5, 2007).....	15,19
Pitts v. White, 109 A.2d 786, 788 (Del. 1954).....	18
Prison Health Services v. State, 1993 Del. Ch. LEXIS 107 (Del. Ch. July 2, 1993).....	14,28
Public Water Supply Company v. DiPasquale, 735 A.2d 378, 382 (Del., 1999).....	18,28
Schweizer v. Board of Adjustment, 930 A.2d 929 (Del. 2007).....	15,20
Sullivan v. Mayor and Town of Elsmere, 23 A. 3d 128, 133 (Del. 2011).....	13,28
Sullivan v. Mayor and Council of Town of Elsmere, 2010 Del. Super. LEXIS 307 (Del. Super. July 15, 2010).....	20,22,35
Sweeney v. Dept. of Transportation & Merit Employee Relations Board, 2012 Del. LEXIS 554 (Del. October 23, 2012.....	16,21

STATUTES

3 Del. C. § 303.....	4
29 Del. C. § 4327.....	19
29 Del. C. § 4328.....	19
29 Del. C. § 5802.....	3,14,26,34,35
29 Del. C. § 5803.....	14,34,35
29 Del. C. § 5804.....	30

29 Del. C. § 5805.....	3,12
29 Del. C. § 5805(a)(1).....	13,26,29
29 Del. C. § 5805(a)(2)(b).....	8,13,22,30,31,33
29 Del. C. § 5806(a).....	3,11,12,13,33
29 Del. C. § 5806(e).....	34
29 Del. C. § 5808A(a)(3).....	3,21
29 Del. C. § 5808A(a)(4).....	3,4,16,21,27
29 Del. C. § 5808A(a)(5)	4
29 Del. C. § 5809(3).....	4,16,34
29 Del. C. § 5810(a).....	3,21,34
29 Del. C. § 5810(d)(1).....	12
29 Del. C. § 5810A.....	2,15,21

OTHER AUTHORITIES

2 Am Jur. 2d Admin Law § 302.....	17
2 Am. Jur. 2d Admin. Law § 300.....	17,18
2 Am. Jur. 2d Admin. Law § 303.....	17
Municipal Lawyer, "Protecting Attorney-Client Privilege in the Public Sector," September/October 2007 Vol. 48, No. 5.....	28
Roget's 21st Century Thesaurus, Third Edition.....	21

RULES

Fed. R. Civ. P. 11.....	20
Fed. R. Civ. P. 11, Advisory Committee Note, 1983 Amendments.....	20
Rules of the Public Integrity Commission.....	passim
Super. Ct. Civ. R. 11.....	20
Super. Ct. Civ. R. P. 12(b)(6).....	16
Super. Ct. Civ. R. P. 56(c).....	16
Super. Ct. Civ. R. P. 72	15

Sutherland Stat. Constr. § 45.15, Vol. 2A (5th ed. 1992) 34

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 complaint 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 facie case that she had a personal or private in the ordinance that may 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 RAC¹ 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 compete 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 facie* 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,

²Review 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. *Hanson* 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 facie* 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 judgment³; 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,

³At 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.

⁴Her 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.

⁵In *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

⁶PIC'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 complaint 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 facie* 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

⁷Interpretations 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.

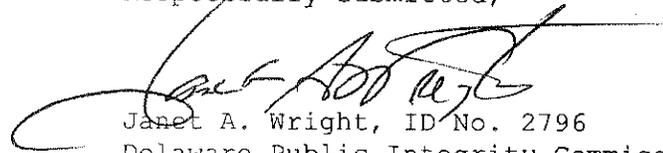
the Merit Employee Relations Board, which upheld disciplining him, but not to the extent of dismissal; it reduced his penalty to back pay denial. *Avallone v. State*, 14 A.3d 566, 570 (Del. 2011). The Delaware Supreme Court said an agency's authority should be construed to permit the fullest accomplishment 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 agreed 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,



Janet A. Wright, ID No. 2796
Delaware Public Integrity Commission
410 Federal St., Suite 3
Dover, DE 19901
(302) 739-2399
Attorney for Appellant



1 of 100 DOCUMENTS

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:

THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

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 Planning & 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 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* doctrine⁵; (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 is 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 efforts to re-develop Ruddertowne and the Clarifying Ordinance. Nelson alleged that Hanson violated the Code of Conduct when she voted in favor of the Clarifying Ordinance by (1) intentionally withholding information so that she could mislead the public regarding passage of the Clarifying Ordinance, (2) failing to reveal obvious conflicts of interest, and (3) taking actions in violation of the public trust that reflected unfavorably upon the State and its government. 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 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.

purpose [*24] of the statute and the legislature's intent."(Citations omitted).

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

(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



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

David L. Finger (DE Bar ID #2556)
Charles Slanina (DE Bar ID #2011)
Finger & Slanina, LLC
One Commerce Center
1201 N. Orange Street, 7th fl.
Wilmington, DE 19801-1186
(302) 573-2525
Attorney for Appellant-Below/Appellee
Diane Hanson

Dated: February 27, 2013

TABLE OF CONTENTS

NATURE AND STAGE OF THE PROCEEDINGS 1

SUMMARY OF ARGUMENT 2

STATEMENT OF FACTS 3

ARGUMENT 7

I. THE PIC DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE . 7

 A. QUESTION PRESENTED 7

 B. STANDARD OF REVIEW 7

 C. MERITS OF THE ARGUMENT 8

 1. Conflicts of Interest Law 8

 2. The Federal Lawsuit 9

 3. Real Property Interest 14

 a. There Is No Evidence Showing That Mayor Hanson
 Benefits Differently From Others in the Same Class
 14

 b. There Is No Competent Evidence of Any Effect on
 Hanson’s Properties 15

 (1) Property Values 15

 (2) Competition 17

 4. Quality of Life 19

 5. Appearance of Impropriety 20

II. THE SUPERIOR COURT DID NOT APPLY AN INCORRECT STANDARD OF REVIEW
 24

 A. QUESTION PRESENTED 24

 B. STANDARD OF REVIEW 24

 C. MERITS OF THE ARGUMENT 24

III. THE LOWER COURT DID NOT COMMIT REVERSIBLE ERROR IN ADDRESSING ISSUES
 NOT RAISED BY THE PARTIES 26

 A. QUESTION PRESENTED 26

B.	STANDARD OR REVIEW	26
C.	MERITS OF THE ARGUMENT	26
1.	In the Absence of Substantial Evidence, Any Decision on an Unrelated Issue is Harmless Error	26
2.	In Public Law Cases, an Appellate Court is Free to Decide <i>Sua Sponte</i> Issues Not Raised by the Parties	26
3.	PIC's Violation of its Own Rules	27
4.	The Nelson Complaint	28
5.	Legal Analysis of Competition	29
6.	Qualified Immunity Defense	29
7.	Quality of Life	30
	CONCLUSION	31

TABLE OF AUTHORITIES

Cases

Alholm v. Wareham, 358 N.E.2d 788 (Mass. 1976) 8

Anderson v. Creighton, 483 U.S. 635 (1987) 13

Arizona v. Maricopa County Medical Soc., 457 U.S. 332 (1982) . . . 17

Beebe Medical Center v. Certificate of Need Appeals Board, 1995 WL 465318 (Del. Super. June 30, 1995), *aff'd mem.*, 676 A.2d 900 (Del. 1996) . 10

Bereano v. State Ethics Comm'n, 944 A.2d 538 (Md. 2008) 8

Bethel v. Bd. of Educ. of Capital School Dist., 2009 WL 4545208 (Del. Dec. 4, 2009), *disposition reported at* 985 A.2d 389 (Del. 2009) (TABLE) 27

Black v. Allstate Ins. Co., 711 N.Y.S.2d 15 (N.Y.A.D. 1st Dept. 2000)23

Blinder, Robinson & Co., Inc. v. Bruton, 552 A.2d 466 (Del. 1989) . 7

Bluffs Development Co., Inc. v. Board of Adjustment of Pottawattamie County, Iowa, 499 N.W.2d 12 (Iowa 1993) 9

Brown v. City of Niota, Tenn., 214 F.3d 718 (6th Cir. 2000) 28

Cell South of New Jersey, Inc. v. Zoning Bd. of Adjustment of West Windsor Township, 796 A.2d 247 (N.J. 2002) 16

Clark v. City of Hermosa Beach, 48 Cal. App. 4th 1152 (Cal. App. 1996) 22

Conn. v. Gabbert, 526 U.S. 286 (1999) 12

Cordero v. Gulfstream Development Corp., 56 A.3d 1030 (Del. 2012) . 15

Crooks v. Draper Canning Co., 1993 WL 370851 (Del. Sept. 7, 1993), *disposition reported at* 633 A.2d 369 (Del. 1993) (TABLE) 17

Del Pharmaceuticals, Inc. v. Access Pharmaceuticals, Inc., 2004 WL 1631355 (Del. Ch. July 16, 2004) 9

Dewey Beach Enterprises, Inc. v. Bd. of Adjustment of the Town of Dewey Beach, 2009 WL 2365676 (Del. Super. July 30, 2009), *rev'd*, 1 A.3d 305 (Del. 2010) 3

Dewey Beach Enterprises, Inc. v. Town of Dewey Beach, 2010 WL 3023395 (D. Del. July 30, 2010) 4, 13

<i>Essex Equity Holdings USA, LLC v. Lehman Brothers, Inc.</i> , 909 N.Y.S.2d 285 (N.Y. Supr. 2010)	21
<i>Feinson v. Conservation Comm'n of Town of Newton</i> , 429 A.2d 910 (Conn. 1980)	25
<i>Gaveck v. Arizona State Bd. of Podiatry Examiners</i> , 215 P.3d 1114 (Ariz. App. Div. 1 2009)	7, 28
<i>Graham v. Swift</i> , 228 P.2d 969 (Colo. 1951)	26
<i>Haggerty v. Red Bank Borough Zoning Bd. of Adjustment</i> , 897 A.2d 1094 (N.J. Super. A.D. 2006)	9
<i>Hanka v. Pogatchnik</i> , 276 N.W.2d 644 (Minn. 1979)	26
<i>Hanson v. Delaware State Public Integrity Com'n</i> , 2012 WL 3860732 (Del. Super. Aug. 30, 2012)	passim
<i>Kramer v. Weedhopper of Utah, Inc.</i> , 490 N.E.2d 104 (Ill. App. 1986)	8
<i>Kreshtool v. Delmarva Power & Light Company</i> , 310 A.2d 649 (Del. Super. 1973)	21
<i>Kurzmann v. State</i> , 903 A.2d 702 (Del. 2006)	26
<i>Liberty Nursing Ctr. v. Dept. Of Health & Mental Hygiene</i> , 624 A.2d 941 (Md. 1993)	29
<i>Little v. Conflict of Interest Commission</i> , 397 A.2d 884 (R.I. 1979)	19
<i>Marcus v. BMW of North America, LLC</i> , 687 F.3d 583 (3rd Cir. 2012)	24
<i>Maxwell v. Vetter</i> , 311 A.2d 864 (Del. 1973)	19
<i>McKnight v. Southeaster Penn. Transp. Auth.</i> , 583 F.2d 1229 (3rd Cir. 1978)	28
<i>Midtec Paper Co. v. U.S.</i> , 857 F.2d 1487 (D.D.C. 1988)	7
<i>Motiva Enterprises LLC v. Secretary of Dept. of Natural Resources & Environmental Control</i> , 745 A.2d 234 (Del. Super. 1999)	21
<i>Nevada Ethics Commission v. Carrigan</i> , 131 S.Ct. 2343 (2011)	22
<i>Normand by and through Normand v. Ray</i> , 785 P.2d 743 (N.M. 1990)	26
<i>Pawlowski v. Delta Sigma Phi Fraternity, Inc.</i> , 35 A.2d 410 (Conn. Super. 2010), <i>aff'd</i> , 35 A.2d 1081 (Conn. 2012)	8

<i>People ex rel. Mosco v. Service Recognition Board</i> , 86 N.E.2d 357 (Ill. 1949)	19
<i>Reynolds v. Special Indem. Fund</i> , 725 P.2d 1265 (Okla. 1986)	27
<i>Russell v. Bd. of County Com'rs, Carter County</i> , 952 P.2d 492 (Okla. 1997)	27
<i>Sawkow v. I.N.S.</i> , 314 F.2d 34 (3rd Cir. 1963)	8
<i>Schindele v. Nu-Car Carriers, Inc.</i> , 402 A.2d 1307 (Md. App. 1979)	23
<i>Screws v. Ballard</i> , 574 So.2d 827 (Ala. Civ. App. 1990)	17
<i>Sioux City Community School Dist. v. Iowa Dept. of Education</i> , 659 N.W.2d 563 (Iowa 2003)	19
<i>Spargo v. New York State Commission on Judicial Conduct</i> , 244 F.Supp.2d 72 (N.D.N.Y.), vacated on other grounds, 351 F.2d 65 (2nd Cir. 2003) 21	21
<i>STAAR Surgical Co. v. Waggoner</i> , 588 A.2d 1130 (Del. 1991)	24
<i>State ex rel. Anderson v. State Bd. of Equalization</i> , 319 P.2d 221 (Mont. 1957)	19
<i>State ex rel. Clarke v. Cook</i> , 134 N.E. 655 (Ohio 1921)	19
<i>State ex rel. Thomson v. State Bd. of Parole</i> , 342 A.2d 634 (N.H. 1975)	9
<i>Sweeney v. Del. Dept. of Transportation</i> , 55 A.3d 337 (Del. 2012)	7
<i>Tetreault v. Tetreault</i> , 535 A.2d 779 (Vt. 1987)	26
<i>Tingley v. Kortz</i> , 688 N.W.2d 291 (Mich. App. 2004)	26
<i>Torrington Co. v. N.L.R.B.</i> , 506 F.2d 1042 (4th Cir. 1974)	8
<i>U.S. v. Int'l Brotherhood of Teamsters</i> , 170 F.3d 136 (2nd Cir. 1999)	7
<i>Vehslag v. Rose Acme Farms, Inc.</i> , 474 N.E.2d 1029 (Ind. App. 1985)	19
<i>Wetherell v. Douglas County</i> , 146 P.3d 343 (Or. App. 2006)	28
<i>Wolfe v. Kelly</i> , 911 N.Y.S.2d 362 (N.Y.A.D. 1st Dept. 2010), app. dismissed, 954 N.E.2d 1163 (N.Y. 2011)	27
<i>Wood v. Georgia</i> , 450 U.S. 261 (1981)	28
<i>Wyant v. O'Bryan</i> , 1999 WL 33116507 (Del. Super. Dec. 28, 1999)	20

Other authorities

29 Del. C. §5804	21
29 Del. C. §5805	passim
29 Del. C. §5806	20
29 Del. C. §5808	19
29 Del. C. §5809	19
29 Del. C. §5810	19, 28
29 Del. C. §5810A	19
Dewey Beach C. § 22-1	13
Nev. Rev. Stat. §281A.420	22
Black's Law Dictionary (1979)	27
David L. Finger & Louis J. Finger, <i>Delaware Trial Handbook</i> §18:2	11
<i>The American Heritage Dictionary of the English Language</i> (1969)	9

NATURE AND STAGE OF THE PROCEEDINGS

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

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

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

This is Mayor Hanson's answering brief.

SUMMARY OF ARGUMENT

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

A. QUESTION PRESENTED.

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

B. STANDARD OF REVIEW.

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

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

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

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

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

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

C. MERITS OF THE ARGUMENT.

1. Conflicts of Interest Law.

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

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

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

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

29 Del. C. §5805.

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

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

2. The Federal Lawsuit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Real Property Interest.

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

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

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

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

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

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

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

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

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

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

(1) Property Values.

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

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

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

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

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

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

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

(2) Competition.

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

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

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

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

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

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

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

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

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

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

4. Quality of Life.

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

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

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

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

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

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

5. Appearance of Impropriety.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. QUESTION PRESENTED.

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

B. STANDARD OF REVIEW.

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

C. MERITS OF THE ARGUMENT.

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

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

Hanson, WL Op. at *17.

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

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

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

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

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

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

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

A. QUESTION PRESENTED.

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

B. STANDARD OR REVIEW.

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

C. MERITS OF THE ARGUMENT.

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

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

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

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

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

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

3. PIC's Violation of its Own Rules.

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

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

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

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

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

4. The Nelson Complaint.

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

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

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

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

5. Legal Analysis of Competition.

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

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

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

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

6. Qualified Immunity Defense.

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

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

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

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

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

7. Quality of Life.

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

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

CONCLUSION

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

Respectfully submitted,

/s/ David L. Finger
Charles Slanina (DE Bar ID #2011)
David L. Finger (DE Bar ID #2556)
Finger & Slanina, LLC
One Commerce Center
1201 North Orange Street, 7th floor
Wilmington, Delaware 19801-1186
(302) 573-2525
Attorneys for appellant-below/appellee
Diane Hanson

Dated: February 27, 2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

APPELLANT'S REPLY BRIEF ON APPEAL

Janet A. Wright, ID No. 2796
Delaware Public Integrity Commission
410 Federal St., Suite 3
Dover, DE 19901
(302) 739-2399
Attorney for Appellant

DATE: March 14, 2013

TABLE OF CONTENTS

Table of Contents.....i

Table of Citations.....ii

I. MS. HANSON’S ARGUMENT DOES NOT OVERCOME THE SUPERIOR COURT’S ERROR FAILING TO APPLY APPLYING CONFLICT OF INTEREST ELEMENTS, AND INSTEAD APPLYING AN ELEMENT NOT IN THE LAW--HER MOTIVE--WHICH EVEN SHE NOTES IS IRRELEVANT.....1

II. MS. HANSON’S ARGUMENTS DO NOT OVERCOME THE SUPERIOR COURT ERROR IN CONSIDERING ARGUMENTS NOT PROPERLY RAISED, AND EVEN IF IT COULD HAVE CONSIDERED THEM, IT ERRED IN NOT FINDING SUBSTANTIAL EVIDENCE...3

(1) PIC Procedures.....3

(2) Nelson Complaint.....3

(3) Analysis of “Competition”.....6

(4) Qualified Immunity.....8

(5) Quality of Life.....8

III. PIC’S DECISION THAT MS. HANSON HAD CONFLICTS FROM THE PERSONAL LAW SUIT AND RENTAL PROPERTIES IS SUPPORTED BY SUBSTANTIAL EVIDENCE.10

(1) The Federal Suit.....10

(2) Rental Property Interests.....15

(3) Appearance of Impropriety.....18

CONCLUSION.....20

TABLE OF CITATIONS

Cases

Anchor Motor Freight v. Ciabattoni, 716 A.2d 154, (Del. 1998)10

Arizona v. Maricopa County Medical Soc., 457 U.S. 332, (1982)7

Avallone v. Dep't. of Health and Social Services, 14 A.3d 566 (Del. 2011).....9

Beebe Medical Center v. Certificate of Needs Appeal Board, 1995 WL 465318 (Del. Super. June 30, 1995), *aff'd.*, mem., 676 A.2d 900 (Del. 1996).....11

Board of Regents v. Roth, 408 U.S. 564 (1972)9

Bradley v. State and Industrial Accident Board, 2003 Del. Super. LEXIS 331 (Del. Super. September 16, 2003).....10

City of Wilmington v. Minella, 879 A.2d 656 (Del. Super. 2005) .7, 8, 14

Cleveland Board of Ed. v. Loudermill, 470 U.S. 532 (1985)9

Crooks v. Draper Canning Co., 1993 WL 370851 (Del. September 7, 1993) 6

Darby v. New Castle Gunning Bedford Ed. Assoc., 336 A.2d 209 (Del. 1975).....13

Dewey Beach Enters. v. Town of Dewey Beach, 2010 U.S. Dist. LEXIS 77466 (D. Del. July 30, 2010).....12, 13, 14

Estate of Osborn v. Kemp, 2009 Del. Ch. LEXIS 149 Del. Ch. August 20, 2009) *aff'd.*, 2010 Del. LEXIS 135 (Del. March 25, 2010).....3, 4

Geshner v. Del. Real Estate Comm'n, 1994 WL 680090 (Del. Super. October 12, 1994).....6

Hanson v. Del. State Pub. Integrity Com'n, 2012 Del. Super. LEXIS 403 (Del. Super. August 30, 2012).....3, 19

Hanson v. Del. State Public Integrity Com'n, 2012 WL 3860732 (Del. Super. August 30, 2012).....1, 2, 4, 6

Liberty Nursing Ctr. v. Dept. of Health & Mental Hygiene, 624 A.2d 941 (Md. 1993).....7

Olney v. Cooch, 425 A.2d 610 (Del. 1981)10

<i>Prison Health Services v. State</i> , 1993 Del. Ch. LEXIS 107 (Del. Ch. July 2, 1993).....	15
<i>State ex rel. Milby v. Gibson</i> , 140 A.2d 774(1958)	11
<i>State ex. rel. Rappa v. Buck</i> , 275 A.2d 795 (Del. Super. 1972)	13
<i>Sullivan v. Mayor and Council of the Town of Elsmere</i> , 2011 Del. LEXIS 307 (Del. June 17, 2011).....	13,14
<i>Sullivan v. Mayor and Council of Town of Elsmere</i> , 2010 Del. Super. LEXIS 307 (Del. Super. July 15, 2010).....	4
<i>Torrington Co. v. N.L.R.B.</i> , 506 F.2d 1042 (4th Cir. 1974)	10

Statutes

1 Del. C. § 303.....	7
29 Del. C. § 4328(3).....	5
29 Del. C. § 5802	10, 11, 14, 19
29 Del. C. § 5802(4)	19
29 Del. C. § 5804(13)	12
29 Del. C. § 5804(5)(b)	15
29 Del. C. § 5804	12, 15, 19
29 Del. C. § 5804(a)	15
29 Del. C. § 5805	18, 19
29 Del. C. § 5805(a)(1)	2, 11, 14
29 Del. C. § 5805(a)(2)	2, 11, 15
29 Del. C. § 5805(a)(2)(b)	2, 15
29 Del. C. § 5806(a)	2, 18, 19
29 Del. C. § 5808(a)	19
29 Del. C. § 5809(2)	19
29 Del. C. § 5810(a)	19
29 Del. C. § 5810(d)(1)	9
29 Del. C. § 5810A	1

29 Del. C. § 5812(n)(1)	12
29 Del. C., ch. 10	11
42 U.S.C. § 1983	2, 8, 9, 14, 15

Rules

Public Integrity Commission Rule IV (J).....	5
S. Ct. Rules 7, 9 and 15	19
Super. Ct. Civ. R. P. 12(b)(6)	3
Super. Ct. Civ. R. P. 11	3
Super. Ct. Civ. R. P. 56	3

Constitutional Provisions

Del. Const. art. II § 20	11
--------------------------------	----

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) The Federal Suit

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

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

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

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

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

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

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

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

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

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

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

(2) Rental Property Interests

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

"The person or a close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise." 29 Del. C. § 5805(a)(2)(b)(emphasis added).

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

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

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

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

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

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

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

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

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

(3) Appearance of Impropriety

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

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

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

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

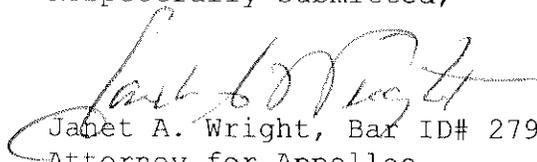
The law is clear: "This subchapter [1] shall apply to any county, municipality or town and the employees and elected and appointed officials." 29 Del. C. § 5802(4). She did not dispute that before PIC, but argued to the Superior Court, Subchapter 1 did not apply as the terms used are "State employee,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

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

CONCLUSION

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

Respectfully submitted,


Janet A. Wright, Bar ID# 2796
Attorney for Appellee
Public Integrity Commission
410 Federal St., Suite 3
Dover, DE 19904
1-302-739-2399

DATED: March 14, 2013