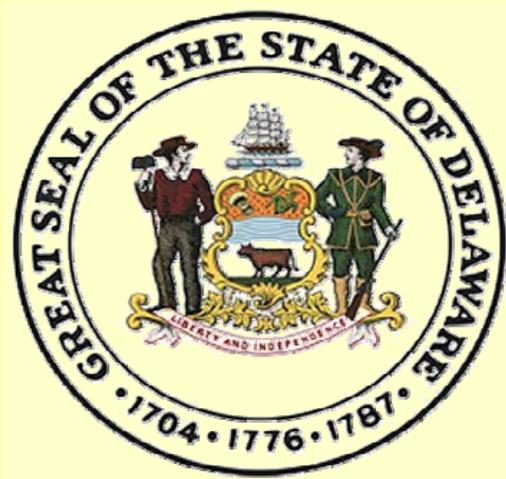


*State of Delaware*

*State Public Integrity Commission*



**ANNUAL REPORT**

**March 1, 2008**

*Terry J. Massie, Chair*

*Barbara H. Green and Bernadette Winston, Vice Chairs*

*Commissioners*

*Barbara A. Remus*

*Dennis L. Schrader, Esq.*

*William D. Dailey, Jr.*

*Wayne T. Stultz*

# STATE PUBLIC INTEGRITY COMMISSION

## Annual Report - March 1, 2008

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## I. Mission and History

**M**ission: An independent agency, the State Public Integrity Commission is charged with administering, interpreting and enforcing four State laws: Code of Conduct (ethics); Financial Disclosure; Dual Compensation; and Lobbyists' Registration. *29 Del. C., Chapter 58.*

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From 1984 until mid-year 1991, the State Personnel Commission and the Attorney General administered the Executive Branch's Code of Conduct (Ethics law). The Cabinet level position of State Personnel Director was the administrative head; supervised administrative and technical activities; and developed policies and procedures. The Attorney General's (AG) office gave advice. In 1991, the General Assembly created an independent State Ethics Commission, eliminating self-governing of ethics in the Executive Branch. Only private citizens could serve on the Commission, increasing the public's confidence in its government.

The Commission had no dedicated staff, but had jurisdiction over more than 48,000 Executive Branch personnel--full-time, part-time, and State Board and Commission appointees.

Two years later, its jurisdiction grew. The 57 local governments became subject to the State Code unless they adopted a Commission approved Code. *29 Del. C. § 5802(4)*. The Commission still had no dedicated staff.

The General Assembly addressed the staff concern in the 1994 "State Public

Integrity Act.” The Commission could hire its own attorney, rather than use periodic services of a Deputy Attorney General (DAG). That insured further public confidence in the Commission’s independence, and avoided even the appearance that an elected office might try to impose decisions on the Commission.

As the Act also gave the Commission jurisdiction over more than just Executive Branch ethics, the Public Integrity Commission became its new name.

Its jurisdiction increased in a two-step process. The first step added responsibility for the Financial Disclosure law beginning in January 1995. Executive and Legislative Branch elected officials; Judges; Cabinet Secretaries, Division Directors and their equivalents; other senior Executive officials, and Candidates for State office must file the reports. *29 Del. C., Chapter 58, Subchapter II.* This increased jurisdiction by more than 300 public officers.

The reports had been filed with three agencies: (1) Secretary of State’s office for the Executive Branch; (2) Controller General for the General Assembly; and (3) Clerk of the Supreme Court for Judges. Those offices did not issue advisory opinions, so they were essentially filing repositories. The Attorney General, an elected official who must comply with the ethics and disclosure laws, also was the legal advisor on compliance with both laws. Under the 1994 law, the Commission gained the duty to give advice on the law and refer suspected criminal violations to the AG for prosecution. As the single filing repository for these public records, the process for record requests under the Freedom of Information Act became “one-stop shopping” making it more user friendly for the public.

The second jurisdictional step, beginning a year later, added responsibility for the Lobbying Law. *29 Del. C., Chapter 58, Subchapter IV.* Lobbying registrations, authorizations, and quarterly expense reports were filed with a Legislative Council administrative assistant. That office did not issue advisory opinions. The 1994 Act made

the Commission the filing repository, and gave the authority to advise on all subchapters—ethics, financial disclosure, dual compensation, and lobbying laws.

Beyond increased jurisdiction, the 1994 Act mandated training, publishing annual reports, opinion synopses, etc. No agency previously had those duties. The Commission hired its own legal Counsel in January 1995. With that, its focus turned to training to further instill the public's confidence that government officials were better educated in complying. Counsel gave her first training class one week after being hired—financial disclosure to Governor Thomas Carper and his Cabinet.

In 2000, the Commission's jurisdiction was again increased. The General Assembly added school districts and boards of education to the definition of State agencies for which the Commission is responsible.

Education has been the Commission's primary focus since 1995. Training sessions cover the law, the process for obtaining advice, filing complaints, responding to complaints, etc. Tools in educational endeavors are publishing synopses, brochures, ethics bulletins, and creating and maintaining a web site.

The Commission remains committed to promoting ethics in government to instill the public's confidence in its government.





# DELAWARE PUBLIC INTEGRITY COMMISSION

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## *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 or Federal*
  - Holder of Political Party Office*
  - An officer in a political campaign*
- Generally are Appointed from all three Counties*
- Terms - one full 7 year terms; 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 29 Del. C. § 5808 and 5808A**

**(A) Commission Appointments**

The Commission is now at its full level of appointees, and none of their appointments will expire in 2008. Two will expire in 2009, and two will expire in 2010.

Staggered terms of office are an objective. However, vacancies can result in non-staggered terms. For example, in 2004, the Commission lost 4 members within three months, meaning the 4 new appointees' terms expire in the same year. One Commissioner resigned in 2007.

**(B) Commission Staff**

The Commission has had a two person staff since 1995—its attorney and administrative specialist—performing the day-to-day operations. Its attorney, in addition to legal duties, prepares Strategic Plans, Budgets, other non-legal matters and conducts all training. Jeannette Longshore, was hired as a State employee in June 2007. She performs the administrative functions, updates the website's calendar of events with the Commission agenda, minutes, etc.



### ***(C) Biographies of Commissioners***

The following citizens were on the Commission at the end of 2007.

#### ***Foster (Terry) J. Massie, Chair***

Foster J. (Terry) Massie was appointed for a seven-year term on July 23, 2002. The Commissioners twice elected him as Vice-Chair for Personnel, and in 2007 elected him as Chairman. His term expires June 30, 2009.

Mr. Massie is employed by Wells Fargo's Auto Finance as a Regulatory and Operational Risk Consultant. He has worked in Risk Management for three years.

A graduate of Henry C. Conrad High School, he completed his Associate's Degree in Accounting at Goldey Beacom College, Wilmington, Delaware. He attended Neumann College, Aston, Pennsylvania, and Wilmington College.

His commitment to his community is evidence by his community service through such positions as current President, Mendenhall Village Homeowners Association; former Board Member and First Vice President, Greater Hockessin Area Development Association; and former Chair, Upper Limestone Road Focus Group.

The Chairman resides in Hockessin, New Castle County.

#### ***Barbara H. Green, Vice Chair***

Commissioner Green was appointed in June 25, 2004 to complete the term of Paul E. Ellis, with the term expiring July 8, 2005. She was reappointed to serve her own 7-year term, which expires November 8, 2012. Her fellow members have elected her three times as one of the Commission's two Vice-Chairs. In addition to being a back-up for the Commission Chair, she is responsible for the Procedures and Orientation Committee, which designs and implements procedures for the Commission and its staff.

Ms. Green has a bachelor's degree in Medical Technology with a minor in Biology

from the University of Delaware. She is presently retired, but previously worked for Dade Behring, a global diagnostic products company, the DuPont Company, and the Wilmington Medical Center.

In her early career, she spent several years in hospital laboratory supervision before moving to the corporate world. While with the DuPont Company, she worked in research and development and developed new medical diagnostic tests for DuPont chemistry analyzers. The bulk of her career was in management, mainly in the diagnostic products manufacturing environment. More recently, she was with Dade Behring as the Director of Manufacturing for a 500 person medical diagnostics manufacturing organization. She was also responsible for global implementation of corporate level quality and efficiency processes for that organization.

Ms. Green is a resident of Rehoboth Beach, in Sussex County.

***Bernadette P. Winston, Vice Chair***

Bernadette P. Winston was the fourth Commissioner appointed in 2004. Her term expires May 12, 2011. In 2006, her fellow Commissioners elected her as the Vice Chair of Personnel.

Ms. Winston is the Executive Director of the Kingswood Community Center, Inc., in Wilmington, Delaware. In that position, she is responsible for the day-to-day operations of the Center's three sites.

She has had more than 35 years of experience in government and non-profit programs. Among her past activities, she was Board President, West Center City Early-Learning Center; Vice Chair, Interfaith House; Board of the Food Bank of Delaware; Advisory Board Member for Girls Scouts and YMCA; and Second Vice President, NAACP; Treasurer of Monday Majors; and President of Thursday Women's Major League.

She currently chairs the Wilmington Housing Authority Board of Commissioners; is a

member of Community and Schools Boards; is active with the Junior Board of Christiana Care; and is a member of the Order of the Eastern Star and the Illustrious Commandress of the Daughters of Isis.

Ms. Winston resides in Wilmington, New Castle County, with her husband, George. She has two grown daughters and four grandchildren.

### ***Commissioner Barbara A. Remus***

Barbara Remus was appointed to the Commission on July 23, 2002 for a 7-year term, which expires June 30, 2009.

She is a Senior consultant for Brokerage Concepts, Inc. (BCI). BCI is part of the largest privately held group and individual insurance brokerage company in the United States. Her employment requires continuing education and ethics classes to maintain insurance licenses. Her professional associations are in the Delaware and National Association of Insurance and Financial Advisors, and the International Foundation of Certified Employee Benefits Specialists.

A graduate of Dover High School, she obtained her Bachelor of Science Degree in Business Administration from Wilmington University. Ms. Remus received a professional designation as a Certified Employee Benefits Specialist, CEBS, from the International Foundation of Employee Benefit Specialists and the Wharton School of Business. She also is a fellow with the Foundation.

Her community service includes: Past Board member and Vice President, Camden Wyoming Sewer and Water Authority; former appointee to the State Small Employers' Reinsurance Board; and member, Delaware State and Central Delaware Chambers of Commerce. She served as Secretary, Dover Century Club; Vice President, Kent County Democrat Committee; and member, 34<sup>th</sup> District Democrat Committee. She is a member of the Dover Art League and the Dover Century Club.

She resides in Kent County in Camden.

***Commissioner Dennis L. Schrader, Esq.***

Commissioner Schrader was appointed on June 24, 2004 to complete 6 years of Marla L. Tocker's term after she relocated out of State. His term expires June 30, 2010.

Mr. Schrader earned his law degree from the West Virginia University College of Law. He is admitted to practice in West Virginia and Delaware State and Federal Courts, and admitted to the U.S. Supreme Court. He presently practices with the firm of Wilson, Halbrook & Bayard, P.A., in Georgetown, Delaware. In his practice, he has been the Town Attorney for towns in Southern Delaware, and was County Attorney for Sussex County.

Mr. Schrader has been active in the legal community for many years serving as President of the Delaware State Bar Association, and an officer/representative of such organizations as the Sussex County Bar Association, Mid-Atlantic Conference of Bar Presidents, National Conference of Bar Presidents, American Bar Association, etc. He is currently serves on the Board of Bar Examiners.

He was selected by former Chief Justice Norman Veasey to Chair the Delaware Supreme Court Committee that rewrote the Lawyer's Rules of Professional Conduct. He has been highly active in studies of the Delaware Court system, and received the Delaware State Bar Association President's Citation for service in the public interest for his work for the Professional Guidance Committee. He also was recognized for his work in furthering of the administration of justice when he received the Andrew D. Christie *Pro Bono Publico* Award.

***Commissioner William W. Dailey, Jr.***

In 2007, William W. Dailey, Jr., was appointed to serve until November 8, 2012.

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 his retirement, 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.

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 also is active in the Gull Point Condominium Council in Millsboro, Delaware.

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

### ***Commissioner Wayne R. Stultz***

The Delaware Senate confirmed Mr. Stultz's appointment as a Commissioner in January 2007.

Mr. Stultz retired from the State of Delaware as a project manager for advanced electronic card systems. He is a principal with the Stultz Group, an electronic card consulting company.

Mr. Stultz holds degrees of Bachelor of Science for Business Administration and Master of Business Administration.

His community service includes current Director and past Treasurer of the Dover Rotary Club; Board member and Operations Officer for the Volunteer Ambulatory Surgical Access Program; Business administrator for Operation We Care Overseas Medical Missions; Member of the Asset Liability Management Committee, and past Vice Chair, for the Del-One Federal Credit Union; and an assistant director for the Maryland Interstate Senior Golf Association.

Mr. Stultz resides in Dover.

### ***Commission Counsel - Janet A. Wright***

As an independent agency, the Commission appoints its own attorney. 29 Del. C. § 5809(12). Janet A. Wright was appointed in 1995. 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 (50) states, local governments, the federal government, and the Canada and Mexico governments. Ms. Wright served on its Site Selection Committee; moderated a Lobbying seminar; conducted a Dual Government employment session; and is now 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. More recently, she gave a session on "Managing Ethical Issues in Your Day-to-Day Practice in Delaware."

### ***Administrative Assistant - Jeanette Longshore***

Jeannette Longshore was hired 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 served the Commission on administrative duties February 2006.



### **III. Laws Administered by the Commission**

The subchapters of Title 29, Chapter 58, the “Laws Regulating the Conduct of Officers and Employees of the State,” administered by the Commission are:

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

**Subchapter II, Financial Disclosure**--Executive, Legislative and Judicial Branch public officers annual report of financial interests, such as assets, creditors, income, and gifts;

**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, and expense reports by those seeking legislative or administrative action with the State.

#### **A. Subchapter I, Code of Conduct – Ethical Standards**

**Purpose and Jurisdiction:** Subchapter I sets the ethical standards conduct for State employees, officers, and honorary officials in the Executive Branch and local governments, unless the local government has a Code as stringent as the State law.<sup>1</sup> 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

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<sup>1</sup>*Seven local governments have approved Codes. New Castle County, Dover, Lewes, Millsboro, Newark, Smyrna, and Wilmington.*

conflict of interest. *29 Del. C. § 5802(1)*.

The Code 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 Boards and Commissions). Approximately 58,000 persons are in those State categories. The number of employees, officers and officials in the 50 local governments over which the Commission has Code of Conduct jurisdiction is unknown.

These laws restrict participation in their State capacity where the individual has a personal or private interest in a matter pending before them; bars all employees, officers and officials from representing or assisting a private enterprise before their own agency in their private capacity; limits the individuals from obtaining State contracts; and restrict their activities for 2 years after terminating State employment. The law also restricts acceptance of gifts, outside employment or anything of monetary value; use of public office for personal gain or benefit; and improper use or disclosure of government confidential information.

An appearance of impropriety provision applies to all the restrictions, even if no actual violation occurs. The appearance issue, 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)*.

The test for an appearance problem whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the official's ability to carry out official duties with integrity, impartiality and competence is impaired. *In re Williams, 701 A.2d 825 (Del. 1997)*.

The Commissioners are the "reasonable persons" seeking all relevant facts from

reasonable inquiries about each individual fact situation.

**Penalties:** If the conduct exceeds, or appears to exceed, the rules, 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 of conduct 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 before the State on certain matters for two years after leaving State employment. 29 Del. C. § 5805(d). In addition to being able to refer suspected Code of Conduct violations for prosecution, if a majority of Commissioners finds reasonable grounds to believe a violation of any other State or Federal law 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 also, 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 are: (1) issuing letters of reprimand/censure to 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 Disclosure & Other Disclosure Requirements**

**Purpose:** 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 for each year thereafter. Identifying the interests helps the public officer recognize a potential conflict between official duties and personal interests that may require recusal or ethical guidance. The reports are public records.

**Jurisdiction:** More than 300 "public officers" in the Executive, Legislative, and Judicial branches must file reports within 14 days of becoming a public officer and on February 15 each year thereafter. 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. As State candidates must file, the number of filers varies depending on the number of candidates in a given year.

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. They also report their own creditors and creditors arising from joint debts.

The report is only a snapshot of the financial interests frozen as of the date of the

information. If those financial interests, or others later incurred, raise ethical issues in day-to-day functions, the conflict issue is made under the ethics laws for that particular officer-- Executive Branch officers - Code of Conduct, 29 Del. C., Ch. 58;--Legislative Branch officers - Legislative Conflicts of Interest, 29 Del. C. Ch. 10;--Judicial officers - Code of Judicial Conduct, *Delaware Rules Annotated*.

**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).

**Executive Branch and Local Governments - Other Disclosure Requirements:**

**(1) Executive Order Disclosures to Governor:** Senior-Level Executive Branch officers, who file under the Financial Disclosure law and include gifts of more than \$250 in that annual report, must quarterly notify the Governor's office of receipt of such gifts for posting on the Governor's web site. *Executive Order No. 8*. Additionally, when the Governor nominates appointees to Boards and Commission who must be confirmed by the Senate, they must file a Subchapter II, Financial Disclosure report for review by the Governor and the Senate.

**(2) Code of Conduct Disclosure:** All Executive Branch and local government employees and officers must, as a condition of commencing and continuing employment, file a "full disclosure" of financial interests in a private enterprise that does business with, or

is regulated by, their government. *29 Del. C. § 5805(d)*. “Honorary officials,” appointees to certain Boards and Commissions, must “fully disclose” financial interests in a private enterprise that does business with, or is regulated by, the agency to which they are appointed. *29 Del. C. § 5805(d)*.

For this disclosure, “financial interest” means: (1) ownership or investment interests; (2) receiving \$5,000 or more as an employee, officer, director, trustee or independent contractor; or (3) a creditor of a private enterprise. *29 Del. C. § 5804(5)*. Not only does this law apply across the board, “full disclosure” means more details than in reports under the Financial Disclosure law by Senior Level officials. For example, Subchapter II, Financial Disclosure, requires only a list of the source of the financial interests, not the value, and only if it falls just above the appropriate threshold amount. “Full disclosure” requires enough facts for the Commission to decide if a potential or actual conflict exists. *Commission Op. No. 98-23*. Rationally, once a financial interest is directly connected to the State or local government, a more immediate conflict potential may arise.

### **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 that ethics provision is insurance against “double-dipping,” and that the “other employment” does not raise any other ethical issues.

**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 – Registration and Expense Reporting of Lobbyists –**

**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:** At the end of 2007, 287 lobbyists, representing 652 organizations, were registered and, therefore, subject to the Commission’s jurisdiction. Each lobbyist is to file quarterly reports revealing all direct expenditures on General Assembly members and/or State agency members. 29 Del. C. § 5835. If the expense exceeds \$50, the lobbyist must identify the public officer who accepted the expenditure, and notify the official of the value.

**Penalties:**

**Administrative:** A very effective compliance tool is using the administrative penalty of canceling a lobbyist's registration if they fail to file any 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 one of their paid duties. Recognizing the impact on lobbyists if their registrations are cancelled, the Commission sends several failure to file notices, by e-mail, letter and certified letter. If the lobbyist does not respond, before their registration is cancelled, the organization which they represent is also notified. That notice is generally sufficient to trigger 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).

## **Methods for Achieving Compliance**

### **(1) 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 appear on the Commission's web site. Additionally, 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 so they can complete on-line filing. Lobbyists can link to the Legislative Bill Drafting manual if they are drafting legislation for their clients. It includes links to related laws such as the Legislative Conflicts of Interest Law and the Judicial Code of Conduct.

**(2) 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(a) and (c). Those opinions later become the latest updates for the training classes.

**(B) 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 government official deviated from the law in a particular case. As some standards are so "vital" that they carry criminal penalties, making

the information public further instills confidence because an independent body is making that 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 will not identify the individual either by name or through sufficient facts to make an identification.

**(D) Complaints - 29 Del. C. § 5810(a)**

Any person, public or private, can file a complaint.

Where training, advice, or waivers fail, the Commission can enforce compliance through the complaint process.

The Commission may act on sworn complaints, or its own initiative, on violation allegations. A majority (4) must find "reasonable grounds to believe"<sup>2</sup> a violation 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. *Commission Rules, "Hearings and Decisions,"* ¶ 11. If a violation is found, the Commission may impose administrative discipline. 29 Del. C. § 5810(d). It may also refer substantial evidence of criminal law violations to appropriate federal or State authorities. 29 Del. C. § 5810(h)(2). Conversely, frivolous or non-merit complaints, or those not in the Commission's jurisdiction, may be dismissed. 29 Del. C. § 5809(3).



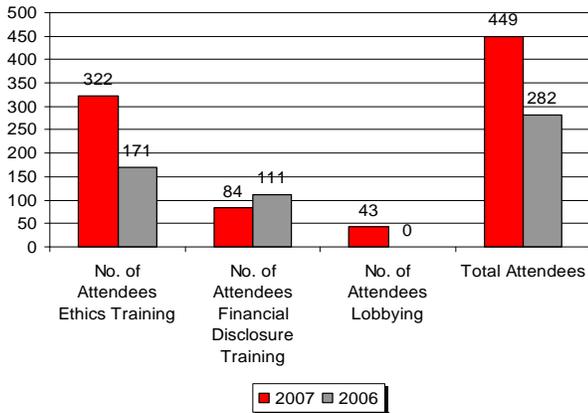
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<sup>2</sup> "Reasonable grounds to believe" means "probable cause." *Coleman v. State*, 562 A.2d 1171, 1177 (Del., 1989).

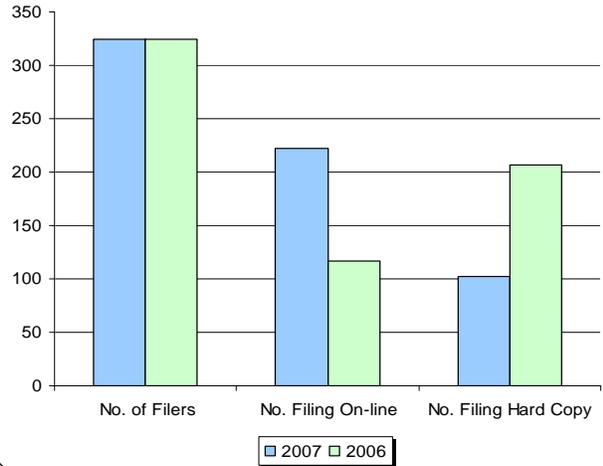
## 2007 Accomplishments Graphic Illustrations

These accomplishments, and others, are discussed in this report's text.

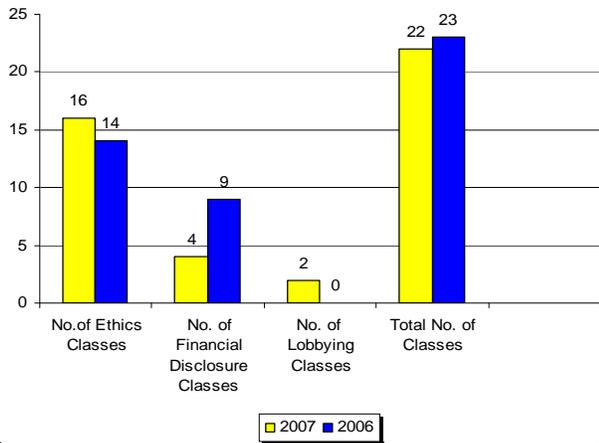
**Training Seminars Attendance  
2006 -2007**



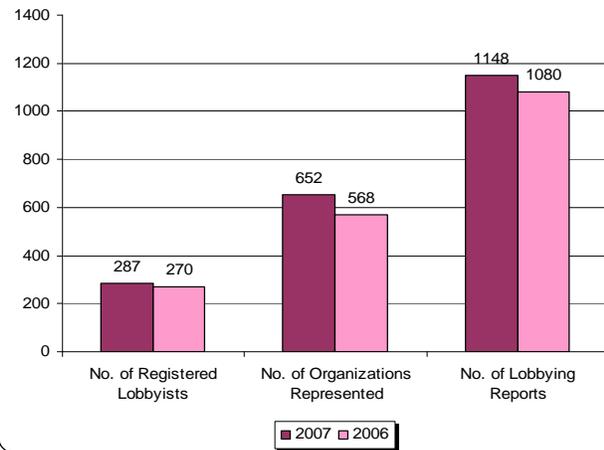
**Financial Disclosure Filing  
2006 - 2007**



**Training Classes  
2006 - 2007**



**Lobbying Activities  
2006 - 2007**



#### IV. Commission Accomplishments in 2007

The Commission's 2007 goals were to:

- (1) Continue emphasizing training in all four areas of the law;
- (2) Increase access to services for those subject to the laws;
- (3) Increase access to services for the public;
- (4) Continue meeting or exceeding performance measures used in its

budget narrative; and work to achieve an on-line training program.

#### A. Training Accomplishments

**STATUTORY MANDATE:** The Commission's Counsel is to "assist the Commission in" seminars, workshops, educating individuals covered by the law about its requirements and purposes. *29 Del. C. § 5808A(a)(1)*.

While the Commission is mandated to give training, the law has no counterpart requiring attendance. Thus, the number of classes and attendees depends on volunteers.

**PERFORMANCE MEASURE: INCREASE NUMBER OF CLASS ATTENDEES**

The Commission was highly successful in attracting a larger number of attendees. In its Fiscal Year budget request, the Commission projected a performance measure of 390 trainees. However, the number attending—449—was significantly higher (178%) than the 252 attending in 2006.

For the 2007 calendar year, Commission's Counsel conducted twenty-three (23) seminars. Compared to 2006, the number of Ethics classes increased by two (2); and the Lobbying classes also increased by two (2). There were seven (7) fewer financial disclosure classes than in 2006, but the number of attendees was still high. One (1) additional financial disclosure class scheduled for Executive Branch filers was cancelled

because only one person registered. Two additional ethics classes were cancelled because of lack of registrants. Cancellation for lack of attendees is a rarity.

Classes focus on specific subchapters but incorporate references to the others. For example, when the Ethics courses covers restrictions on other employment, attendees are told about the dual compensation law that applies if the other employment is with the government. When accepting gifts is discussed, the session includes references to the financial disclosure and lobbying reports, and how those laws could effect the receiver. Financial disclosure classes incorporate references to the applicable ethics laws for the three branches, and discuss ethics and the lobbying law as they related to gifts. Lobbying classes discuss the difference between what the lobbyists report on expenditures on public officials and what the public officials must report under the Financial Disclosure law.

Jurisdiction also is discussed in terms of the Commission's interpretation of the Code of Conduct for the Executive branch and local governments, but make it clear that it has no jurisdiction over the ethics laws for Legislators and Judges, as they have their own separate Codes.

In any class, the attendees are advised that the Commission has separate classes on the other subchapters, if they would like to attend.

The break-down of the total of 449 attendees for each type of class follows:

**(1) Ethics Training**

Ethics class attendance increased from 171 in 2006 to 322 in 2007—a 53.1% increase.

**DNREC:** One reason for the increase was the Department of Environment Control and Natural Resources request for four (4) ethics classes at four (4) different locations throughout the State. A total of 119 DNREC employees attended.

**EDUCATION AGENCIES:** The Department of Education requested two (2) classes,

and the Brandywine School District requested one (1) class. Total attendees—35..

**DEMA:** The Delaware Emergency Management Agency had 42 attendees at one (1) session.

**DEDO:** The Delaware Economic Development Office requested one (1) class. Eight (8) of its Senior-level officials attended.

**DHSS:** The Commission continued its Code of Conduct classes for the Department of Health and Social Services. This training, in part, resulted from a Legislative and Citizens recommendation when it review activities related to Nursing Home Reform for Long-Term Care personnel, as a result of a 1998 legislative recommendation.<sup>3</sup> In past years, training was usually every quarter. However, only three (3) sessions were requested in 2007. Each quarterly session in the past usually had 25-30 attendees. This year, attendance decreased with 18 at one class; 9 at the second class, and 15 at the third class, for a total of 42.

**OMB Human Resource Management Workforce Office:** For the past eleven (11) years, some Ethics classes have been scheduled through the Workforce and Organizational Development Office, Office of Management and Budget (OMB).<sup>4</sup> It has made the Commission's Ethics class mandatory for its Management Development Certificate which is for managers, supervisors and certificate participants. Like DEDO's approach, those classes focus on more upper echelon personnel, anticipating the training will flow from the top down so rank and file employees know their managers and supervisors strive to comply with the Ethics laws.

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<sup>3</sup>The State Legislative & Citizens' Investigative Panel on Nursing Home Reform issued "The Marshall Report" with recommendations on nursing home care. *February 9, 1998*. It recommended the Departments of Justice and Health and Social Services have workshops for employees with nursing home oversight on obligations under State ethics guidelines. *Marshall Report, p. 18*.

<sup>4</sup> Previously, the State Personnel Office, State Training Unit.

The Workforce Office also schedules Ethics classes for rank and file employees. The Commission's Counsel, presents the course, but the Workforce Office coordinates training dates, schedules facilities, handles course registrations, creates and publishes fliers and pamphlets with notices of the courses, reviews course evaluations (as does the Commission) and handles other paperwork. This resource saver frees Commission Counsel to focus solely on the training aspect for those classes, and gives Counsel a bit of extra time to perform other duties.

In 2007, four (4) ethics classes were given. The total number of attendees was 76.

## **(2) Financial Disclosure Training**

Four (4) financial disclosure training classes were held in 2007. Another class was cancelled for lack of registrants. The total number of attendees was 84. Of 324 total financial disclosure filers, the percentage attending dropped by 25.9%. This was a significant drop from the 111 attendees in 2006. However, the 2006 figure was an anomaly. The large attendance in 2006 was attributable to the number of public officers who were not only interested in the legal topic, but wanted information on filing on-line which the Commission started at the beginning of January 2006.

**JUDICIAL BRANCH:** Primary responders to the 2007 classes were from the Judicial Branch, as they were in 2006. The Justices and Judges invited Commission Counsel to give training at its Annual Judicial Conference. Sixty (60) Justices and Judges attended. New Castle County Court 13, Justices of the Peace, also requested training and six (6) Magistrates attended.

The Administrative Office of the Court (AOC), an arm of the Delaware Supreme Court, coordinated the training, just as in 2006. The AOC performed the same functions for this financial disclosure training as the Workforce Office performs for other classes—coordinating training, notifying the Judicial Branch, etc. Additionally, the AOC coordinates

with the Commission on Legal Education to insure the Judges receive Continuing Education Credits. Normally, if there are legal professionals attending any classes, Commission Counsel coordinates with the individuals, prepares and sends the paperwork, etc. AOC's work, like the Workforce Office work, also is a time saver for Commission Counsel.

**LEGISLATIVE BRANCH:** Financial Disclosure training has been part of orientation for new General Assembly members since 1998. The number attending varies based on the number of newly elected officers. In 2007, an abbreviated financial disclosure course was given to three (3) new members.

**EXECUTIVE BRANCH:** Two classes were held, with 21 attendees. One class was cancelled due to the lack of attendees. Again, scheduling, course location, etc., was arranged by the Workforce Office.

### **(3) Lobbying Training**

For the first time in a number of years, the Commission was asked to give Lobbying training. In 2007, two (2) classes were held for persons who are presently lobbyists or anticipate becoming a lobbyist. A total of 43 persons attended.

## **B. Advisory Opinions, Waivers, Complaints, and Referrals**

**(1) ADVISORY OPINIONS AND WAIVERS STATUTORY MANDATE: POWERS AND DUTIES OF THE COMMISSION:** Issue advisory opinions to State employees, officers, honorary officials, agencies, public officers, lobbyists and local government employees and officials. *29 Del. C. § 5809(2)*. It may grant waivers if the literal application of the law is not necessary to serve the public purpose, or if an undue hardship is created for employee, officer, official or agency. *29 Del. C. § 5807(a)*. The Commission met ten (10) times in 2007 to act on such matters.

**(2) POWERS AND DUTIES OF COMMISSION COUNSEL:** Provide legal counsel to the Commission on matters connected with exercising this statutory mandate, and draft its opinions. *29 Del. C. § 5808A(a)(2) and (5).*

**PERFORMANCE MEASURE: NUMBER OF ADVISORY OPINIONS, WAIVERS AND COMPLAINTS**

Ideally, as the result of training, the number of complaints should decrease because of knowledge of complying with the law. The number of requests for advisory opinions should fluctuate. The fluctuation occurs because of changes to: (1) the number of trainees exposed to the law, and from decide to seek advice; (2) the number of persons who leave State employment during a given year and may need post-employment advice; (3) the number of opinions further clarifying the law, which can be used as advice; (4) the number of new employees, number of Boards and Commission's added or eliminated; (5) the number of new appointees to Board and Commissions who may seek advice; and (6) the amount of changes to the law, etc. The number of waivers should continue to be rate.

In 2007, seventy-four (74) matters were submitted for action. This was 12 less than in 2006, when sixty-eight (86) matters were submitted. Of the 74 matters, two (2) were complaints and one was a request for a waiver. Two complaints alleged that State officials who held dual government positions had violated the Code of Conduct and the Dual Compensation law. The Commission found that as to their elected positions, it had no personal jurisdiction. Their full-time employment was not with a "State agency," rather, they were paid with private funds. This meant that neither held "dual government" positions, so the dual compensation law would not apply. Further, the Commission had no personal jurisdiction over the individuals because: (1) in their government job, they had their own branch's conflict law; and (2) in their second job, they were not paid with State funds, but private funds, and the Executive Branch Code of Conduct would not apply in that particular situation to them in a private job.

The number of matters submitted, as noted above, is based on each request or complaint filed by an individual. However, the number of legal issues in each request or complaint may be more than one.

### **(A) Advisory Opinions**

Examples of situations where a single individual sought an opinion, and the request raised a number of ethical issues for the Commission to address occurred in at least 22 of the total requests.

Primarily, it occurs when mandatory full disclosures are filed because the public servant had a financial interest in a private enterprise that does business with, or is regulated by, the government. *See, e.g., Commission Op. No. 07-35, Appendix A.*

The legal issues were: (1) if the filing was, in fact, a “full disclosure;” (2) if the individual reviewed or disposed of the contract in their official capacity; (3) if the individual was dealing with their own agency in their private capacity; (4) if the individual bid on a contract, was it publicly noticed and bid if the amount exceeded \$2,000; (5) if any bid on a contract reflected arms’ length negotiations; and (6) if they compromised confidential information from their government job. *29 Del. C. § 5805(a), (b) and (c);. 29 Del. C. § 5806(e), (f) and (g).*

**(B) Waivers - Statutory Mandate:** Waivers may only be given if the literal application of the law is not necessary to serve the public purpose, or there is an undue hardship on the employee or agency. *29 Del. C. § 5807(a).* Waivers are rare because this exception to complying with the rule means can violate a provision which the General Assembly deemed “so vital to government” that violators may be subject to criminal penalties. *See, 29 Del. C. § 5802(b).* Only one was granted in 2007. *Appendix A.* When a waiver is granted, the opinion becomes a public record so that the public will have an understanding of why that individual could violate the Code without any penalty.

## C. Publications

**Statutory Mandate: Commission Duties:** The Commission is to publish synopses of its advisory opinions without disclosing the identity of the applicant if no violation is found, and is to prescribe forms, and publish manuals and guides explaining the duties of individuals covered by the laws the Commission administers. *See, 29 Del. C. § 5807(d)(4); 29 Del. C. § 5809(8) and (9).*

**Commission Counsel Duties:** Assist the Commission in preparing and publishing manuals and guides explaining the duties of individuals covered by the law; give instructions and public information materials to facilitate compliance with, and enforcement of the law. *29 Del. C. § 5808(A)(1).*

In January 7, 2008, the Commission published its Financial Disclosure synopses of opinions, updated through the end of 2007. Copies were mailed in January to each of the more than 300 public officers who must file reports. The synopses gives them the most recent Commission interpretations. The updated synopses covering the years of 1996-2007 is on the Commission's web site. More recent decisions on the web site within five (5) days after a meeting.

The lobbying synopses and the dual compensation synopses also were updated through the end of 2007. They are distributed at the appropriate training class. The lobbying synopses also is offered to new lobbyists when they register. The dual compensation synopses are offered to those persons know to hold two paid government positions. Both publications are also on the Commission's web site.

The Commission distributes hard copy ethic synopses at its training classes which cover prior years.

Now, the most recent synopses of opinions dealing with any of the areas of the law

are on the Commission's web site within 5 days after monthly meetings in the form of approved minutes. The synopses section of the web site has been updated with a link to those newest opinions.

Throughout the year, the Commission continued to distribute its Ethics Brochure, at classes and to individual agencies who request the publication. In 2007, the Commission began putting several hundred copies of the brochure in the racks at training facilities.

#### **D. Local Government**

**STATUTORY MANDATE: LOCAL GOVERNMENT DUTIES:** Local governments are subject to the State Code of Conduct unless they adopt their own Code of Conduct. *68 Del. Laws, c. 433 § 1.* Local governments can seek advice and/or waivers, just as can be done at the State level. Local governments are exempt from Subchapter II, Financial Disclosure.

**COMMISSION DUTIES:** Fulfill advisory duties g Review and approve local Codes, and amendments, to insure they are at least as stringent as the State Code. *Id.*

**COMMISSION COUNSEL DUTIES:** As with all requests, speaks with the requestor about what information is needed; reviews the requests to identify any additional information required; schedules requestors to meet with the Commission; prepares a separate legal memorandum for each request; drafts Commission decisions, etc.

In 2007, the Commission reviewed Dewey Beach's local Code. It was not approved, as it lacked some State provisions. *Commission Op. No. 07-55, Appendix B.* Other areas needed clarification. At present, seven local governments have approved Codes: Dover, Lewes, Millsboro, New Castle County, Newark, Smyrna and Wilmington.

Advisory Opinion requests from local governments totaled fifteen (15)--20.2% of the total requests. This high number is attributed to State mandates for local government to have a Comprehensive Development Plan. In the context of that plan, citizens are

continually challenging the ethics of local officials. The officials asked for the Commission's advice on how to deal with these challenges, e.g., recuse, no conflict found, etc., so the Plan could move forward.

After two (2) local government advisory opinions were issued, the two officials asked for reconsideration. While the law nor the Commission rules require reconsideration, the Commission accepted their requests. The Commission reached the same conclusion-- they should recuse themselves. *Commission Op. Nos. 07-05 and 07-42, Appendix C*. One opinion dealt with the Mayor of Milton appointing his brother to the Zoning Commission when the Mayor would review his brother's decisions. The second opinion was to a Dewey Beach Zoning Commissioner who made personal, negative comments about a developer and his development when the Mayor knew it would seek his Commission's decisions.

In 2007, the Mayor of Milton filed an appeal in the Kent County Superior Court. In February 2008, the Dewey Beach Commissioner filed an appeal with the Sussex County Superior Court. It is the Commission's position that advisory opinions cannot be appeal, as they are merely non-binding advice. The statute only permits appeals of complaints.

The legislative items, address S.B. 195, where Town of Milton seeks to amend its Charter make elected Town officials self-regulators of conflicts. The Commission's believes that it is contrary to State law that local governments are subject to the Code of Conduct unless they have a Commission approved Code that is as stringent as State law. The Milton Charter eliminates independent board decisions, when all others subject to State law, or to an approved local Code do not self-regulate.

The Commission referred one matter to the AG's office to consider for prosecution. A Laurel School Board member was found to have a conflict, and possibly be acting contrary to a State contract. The State Auditor referred it to the Commission after each of three audits. Each time, the Commission notified the agency. By law, only the State

agency may void contracts within 30 days after knowing a contract violates the Code. The agency did not void the contract. As the individual was a local elected official, the only disciplinary action the Commission could impose was a letter of reprimand. The official did not run for re-election, which may be why the AG did not seek to prosecute.

#### **E. Legislative Interest Items**

**STATUTORY MANDATE: COMMISSION DUTIES:** The Commission can recommend legislation for rules of conduct for public and officials, if appropriate. *29 Del. C. § 5809(1)*. It also monitors legislation sought by other entities if it affects the Commission.



# DELAWARE PUBLIC INTEGRITY COMMISSION

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## *Legislation of Interest - 144<sup>th</sup> General Assembly*

### *2007 Key Legislation*

➤ *Budget - H.B. 25 (FY 08) and S.B. 190 (FY 09) - \$40,100 PIC Operating Expenses - same for 12 Fiscal Years*

➤ *Lobbying - H.B. 68 - Restricts Legislators from Lobbying for One Year after their term expires. Similar proposal for Legislators and Senior Level Executive Branch officials. At present, Executive Branch and Local Government employees, officers, and officials have a 2-year post-employment law. The Commission submitted comments.*

➤ *Lobbying - S.B. 172 - Bars gifts from lobbyists to General Assembly, State employees, and officials.*

### *2008 Key Legislation*

➤ *Local Government Conflicts of Interest - S.B. 195 - Amends Milton's Charter to give elected officials authority to decide conflicts of other elected officials. The Commission provided comments.*

The General Assembly's 144<sup>th</sup>, 1<sup>st</sup> Session, resulted in 13 proposed bills of interest to the Commission in 2007. It will continue to monitor them, as the 144<sup>th</sup> Session does not end until June 30, 2008. The Commission's comments on H.B. 68 and S.B. 195, and a chart of all monitored legislation are in [Appendix D](#).

## **F. Administrative Actions**

**(1) Financial Disclosure Reports** - Public officers must file Financial Disclosure reports within 14 days of becoming a public officer and by February 15 of each year thereafter. *29 Del. C. § 5813 (c)*. The reports filed under this subchapter shall be made available at reasonable hours for public inspection and copying. *29 Del. C. § 5814 (b)*.

### **CUSTOMER SERVICE: FINANCIAL DISCLOSURE REPORTS**

In 2007, the Commission added another feature to its Financial Disclosure on-line filing capability to make the filing quicker for Public Officers who filed on-line in 2006. The new feature allows filers to insert the information from the prior filing, rather than re-entering the information. As most Public Officers have no changes, they can now complete the form, which the name, State position, and now the prior information preset. They can now complete the report in 5 minutes or less. For those who have a few changes, the old information is pre-set, and they only need to delete by one push of the button, and can rapidly add new information.

The system continues to provide individual e-mails to each public officer reminding them of the filing date. In those individual e-mails, if the public officer received gifts from lobbyists, it gives the source and value of each gift. The lobbyists must report the Public Officer's name, the gift and value if it exceeds \$50. The Public Officer must report sources and values of gifts exceeding \$250. The list of gifts gives the Public Officer several pieces

of information to use: (1) by identifying each gifts exceeding \$250, the Public Officer knows they must report those gifts; (2) by identifying gifts of less than \$250, the officer knows reporting those is optional; and (3) identifying the value of all gifts, allows the Public Officer to identify any gift that raises a discrepancy question.

**CUSTOMER SERVICE: CANDIDATES FOR STATE OFFICE:** In 2007, the Commission continued to notify Candidates for State office of their requirement to file a financial disclosure report. It works Board of Elections to identify Candidates. The Board provides the names, addresses, phone numbers, etc., as the candidates register. To make filing easier for Candidates, the Commission has a link to its web site on the Election Board's website where the Board has its required forms. Commission staff will have already entered the Candidate's "profile" information to database, e.g., names, State position as Candidate, addresses, e-mail addresses if available, etc., just as it does with other Public Officers. If they do not file as a result of seeing the form on the Election Board's website, Commission staff sends notice to their e-mail addresses to file within 14 days, if they provided that information to the Election Board. Otherwise, notice goes by regular mail.

Areas where the Candidate filings could be improved are not areas that the Commission can change in its system. Examples are: (1) while those already in State Office have e-mail addresses, Candidates may or may not have one or want to give it to the Board of Elections, meaning the Commission also would not be able to send rapid e-mail notices to the Candidates; (2) Candidates who do not file as a result of seeing the link to the form on the Election Board's web site, do not file as soon as other Candidates; (3) both items (1) and (2) mean some Candidates will never file as the 14-day notice goes to them later, and if the Candidate withdraws or the election is over, they are no longer a Public Officer and, thus, would not have to file. This means those in office make their financial interests public, while the public may never know about the Candidate's financial interests.

It also means Candidates will have access to their opponent's financial information, but the in-office Public Official will not have access to their opponent's financial information.

Regarding the dual compensation law, if the Candidate would hold dual government employment, if elected, the only means by which the Commission would know that would be if it appears in the news media. While the dual compensation law may not be of great significance during the election season, the Candidate who is already subject to the State Code of Conduct (Ethics) resulting from holding a public servant position, cannot be notified of how the Code of Conduct may apply to their particular situation, even before the election.

**NON-COMPLIANCE PENALTIES AND ACTIONS TAKEN:** If a public officer willfully fails to file a report, it is a class B misdemeanor. *29 Del. C. § 5815(a)*. If a public officer knowingly files a report that is false in any material respect, it is a Class A misdemeanor. *29 Del. C. § 5815(b)*. The Commission may refer suspected violations to Commission Counsel for "investigation." *29 Del. C. § 5815(c)*. It may refer the matters to the AG for "investigation and prosecution."

To establish failure to file, if report is not received by the deadline, notices are sent, including a certified letter saying that failure to file is a misdemeanor. After several notices and no response, Counsel provides the dates and form of notices, and the lack of response, to the Commission. A majority (4) must approve referral to the Attorney General for discretionary prosecution. The notices sent by PIC are part of the record for the element of failure to file. In 2007, the Commission referred 10 matters to the AG after the deadline passed; notices were sent, with no response.

### **(3) Lobbying Activities**

At the end of 2007, 287 lobbyists representing 652 organizations were registered-- an increase of 17 (more than 6%) registered lobbyists and 84 (more than 12%)

organizations over the 270 lobbyists representing 568 organizations in 2006.

Each lobbyist is to file quarterly reports revealing all direct expenditures on General Assembly members and/or State agency members. 29 Del. C. § 5835. If the expense exceeds \$50, the lobbyist must identify the public officer who accepted the expenditure, and notify the official of the value. In 2007, quarterly expense reports for employers totaled 2,252 filings. That was an increase of 1,228 over 2006 when 1,080 employer reports were filed—an increase of 119.92%.

Of the 287 lobbyists, all but four (4) have an e-mail address, allowing convenient, expedient, and costs saving labor, paper, postage, storage space, etc., as with the financial disclosure system. As there were more registrants in 2007, these figures are far greater than 2006 when 5 of the 270 lobbyists did not have e-mail addresses. This means more than 98% have e-mail, as compared to 88% in 2006.

Having that increase in the numbers who have e-mail means more lobbyists can be promptly notified of filing reminders, delinquent notices, notices of any pending or actual changes to the Lobbying Law, etc.

**Public Access:**

**Advisory Opinions, Waivers and Complaints:** The public has better access to agendas for meetings dealing with advice, waivers and complaints. Agendas are now posted 7 days before on the Commission's web site under the Calendar of Events, rather than just at the meeting location. The public, and those subject to the Code of Conduct, have quicker access to new decisions by the Commission because the approved Minutes, serving as synopses, are on the web site within 5 days, rather than waiting for an annual synopses. In 2007, the Commission met both of the posting deadlines.

**Financial Disclosure Reports:** Financial Disclosure Reports have always been a public record. They are not posted by the Commission on its website because of the

amount of personal information about the filer, which conceivably could be used for purposes such as “phishing” and/or identify theft. The public may review the forms at the Commission’s office and decide if they want copies, which costs 50¢ per page. Generally, after reviewing, no copies are requested, meaning most requestors have no costs. For those who cannot come to the office, the staff normally provides one filing so the individual knows if the categories reported on that form would be of interest to them. For example, if they wanted copies of every year in which an official filed, the one filing can assist them in deciding if they want all filings. Generally, after reviewing one filing, they conclude they do not need to see the others, again, saving the requestor any costs.

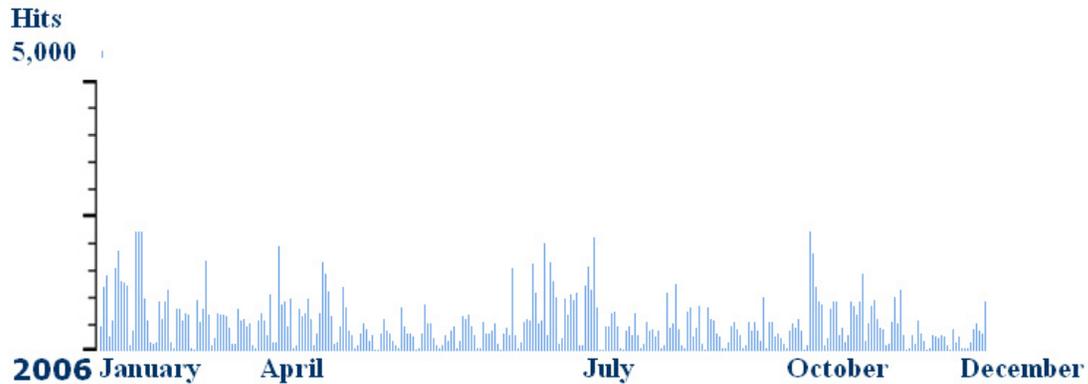
**Lobbying Information:** Since 2006, the public has had on-line access to the expense reports of lobbyists. In 2007, the Commission added a new feature to the lobbying portion of its web site. It added a list of lobbyists who had not filed on the page where the public may view the existing reports. The list is current as of each day. It means immediate and more information for the public at no cost.

**Other information:** In 2007, the web site was updated with a link to a Bill Writing Manual for those who may proposed legislation to the General Assembly. This is meant to assist lobbyists who may prepare drafts for their organizations, but also any member of the public may use the manual. Also on the web site are the Commission’s most current annual reports, including this 2007 report. Having them on the web site allows the public to see how the Commission is performing is also on the web site.

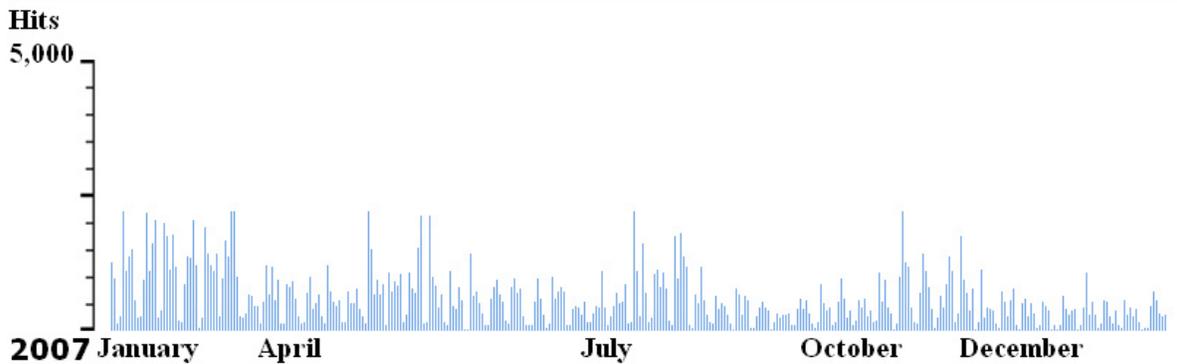
**Website Usage for Financial Disclosure Filings and Lobbyist Filings.** Advantages of on-line filing for officers, lobbyists, and the public were discussed above. The on-line public officer filing and lobbying registration, list of lobbyists and organizations, expense reports, list of those who have not filed, etc., is maintained by a private vendor. The daily hits, and the total hits for 2006 and 2007, for that part of the web site, are in

graphs below. Statistics for the part of the website handled by the State, e.g., statutes, opinion synopses, ethics bulletins, etc., were not readily available.

<b>Range Total:</b> 199,661	<b>Daily Average:</b> 547.02
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<b>Range Total:</b> 185,178	<b>Daily Average:</b> 507.34
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## V. Funding

For the year 2007, the General Assembly appropriated an operating budget of \$40, 100 for the Commission. For twelve (12) calendar years, the Commission's appropriated operating budget has remained the same, except: (1) several years when all State agencies were asked to cut 2% or more from their operating budgets; and (2) when additional funds had to be transferred

because a temporary contractor had to be hired in the absence of, and later resignation of, its full-time employee. While funds available in the personnel line after her resignation, personnel funds cannot be used for contracts. Thus, while funds did have to be transferred, the dollars spent from the personnel line were less.

The Commission operates with this small, and same, budget by tightly managing its funds, and its goals. For example, in last year's annual report, one goal was make on-line training available. Funds were not available, but the Commission did act on no-costs items related to that goal, e.g., reviewing other State and Federal Government on-line training, discussing the plans and technology needs with the E-government Office, and began identifying costs savings and benefits to officials, and to the public if Ethics training is available around the clock.

For the FY 2009 Budget, the Commission requested the same appropriations--\$40,100-- as in FY 2008, knowing of the limited resources the State is experiencing. At the time of this publication, an 8% cut was being requested for the FY 2009 Budget.

For the FY 2009 Budget, the Commission requested the same appropriations as in FY 2008, knowing of the limited resources the State is experiencing. At the time this publication went to print, the State was planning an 8% cut in the FY 2009 Budget.

## **VI. Future Goals**

The Commission's focus will continue to be education. As part of that goal, it wants to improve the media quality existing programs and get an on-line Ethics Training program.



STATE OF DELAWARE

**DELAWARE STATE PUBLIC INTEGRITY COMMISSION**

MARGARET O'NEILL BUILDING  
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May 17, 2007

Ivan Edmunds, Family Crisis Therapist  
DSCYF  
Barrett Building  
821 Silver Lake ,Suite 200  
Dover, DE 19904 D430F

**Advisory Op. No. 07-35- Outside Employment**

*Hearing and decision by: Chairman Terry Massie; Vice Chairs Barbara Green and Bernadette Winston; Commissioners Dennis Schrader and William Dailey*

Dear Mr. Edmunds:

The Public Integrity Commission reviewed your disclosure on your private job with People's Place. Based on the law and facts below, we grant a waiver for you to engage in the outside employment.

**I. Law and Facts:**

**(A) Disclosure:** State employees must file a disclosure if they have a financial interest in a private firm that does business with any State agency. *29 Del. C. § 5806(d)*. People's Place contracts with the Department of Services for Children, Youth, and Their Families (DSCYF), Division of Family Services (DFS), where you work.

**(B) State Job:** In your State job, you may not review or dispose of matters where you have a financial interest, including a private job. *29 Del. C. § 5805(b)*. You are a DFS Family Crisis Therapist. You are not in any way involved with the contract.

**(C) Private Job:** State employees may not represent or assist a private firm before their agency. *29 Del. C. 5805(b)(1)*. People's Place contracts for Juvenile services. Your job is not to work on DFS's contract, but to counsel battered and abused adults. No facts suggest you represent or assist People's Place before your agency.

**(D) Appearance Test:** State employees may not accept private jobs, if it may affect the public's confidence in its government. *29 Del. C. § 5806(b)(4)*. This is to avoid even an appearance of impropriety. *Commission Op. No. 92-11*. On the face of it, working for a firm that contracts with your Division may appear improper. However, the test is: if a reasonable person, knowing *all* the relevant facts that a reasonable inquiry would

disclose, believes the official's ability to carry out State duties with integrity, impartiality and competence is impaired. *In re Williams*, 701 A.2d 825 (Del., 1997).

Here, other relevant facts are: (1) you are technically complying with the law; (2) your private work is screened so you do not get State clients; (3) you are entitled to a strong legal presumption of honesty and integrity; (4) to further instill public confidence in its government, waivers are made public so the public will know *all* the relevant facts for the waiver; and (5) the public purposes of the restrictions are to prevent preferential treatment for the private firm by you in your State job, or from your colleagues if you represented or assisted the firm before your agency; those purposes are served here.

## II. Conclusion:

Based on the specific facts and law above, we grant a waiver, limited to these particular facts, for you to work for People's Place. If the facts change, you may need to file an updated disclosure.

Sincerely,

  
Jerry J. Massie, Chairman  
Public Integrity Commission



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**September 28, 2007**

John F. Brady, Esquire  
Brady, Richardson, Beauregard & Chasanov, LLC  
10 E. Pine St.  
P.O. Box 742  
Georgetown, DE 19947

**Advisory Op. 07-55 - Dewey Beach Code of Conduct**

*Hearing and Decision by: Chairman Terry Massie, Vice Chairs Barbara Green and Bernadette Winston; Commissioners Dennis Schrader, William Dailey and Barbara Remus*

Dear Mr. Brady:

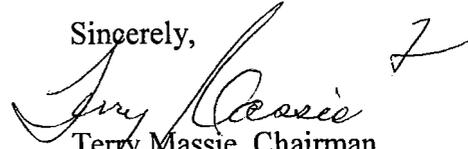
As you know, the Public Integrity Commission reviewed Dewey Beach's Code of Conduct. A critical question arose from the last paragraph in the ordinance. It said its Code was not meant to supersede the State Code. The concern which the Commission, and you, expressed was whether the language was meant to result in two ethics laws for the Town—local and State.

The legislature, in creating the law, said local governments are subject to the State Code unless their Code is approved as being as stringent as the State Code. It said: "No code of conduct legislation shall be deemed sufficient to exempt" local governments from the State law unless it is submitted and determined to be as stringent as State law. *29 Del. C. § 5802(4)*. It then says "to continue the exemption" any changes must also be approved, and be as stringent. *Id.* From that language it seems to be "all or nothing." To read it otherwise means the local Code is clearly not as stringent if some local provisions apply, but other provisions not in it would be applied by this Commission. It would not only split the jurisdiction between State law and the local Code, but split decisions between two different Commissions. We do not believe that is the legislative intent.

As we discussed, it would help if you conferred with the Town on its intent. If it wants its own Code, the one submitted is not as stringent as State law, and a few "clean-up" matters might be addressed. Assuming it wants its own Code, which "is the

desire of the General Assembly,” 29 Del. C. § 5802(4), attached is a memorandum of areas to review to upgrade for stringency. Also, to make it easier to see where the changes would come, attached are copies of the Town Code and the State Code with comments and next to the statutory provisions. They include the comments where a “clean-up” is suggested.

Sincerely,

A handwritten signature in cursive script, appearing to read "Terry Massie", with a large flourish at the end.

Terry Massie, Chairman  
Public Integrity Commission

cc: Dell Tush, Mayor of Dewey Beach

## COMMENTS ON DEWEY BEACH'S CODE OF CONDUCT

### (1) PROVISIONS NOT AS STRINGENT:

§ 10-2. Definitions - PAGE 2, next to last entry.

**PERSONAL OR PRIVATE INTEREST – TOWN ORDINANCE:** This is given as a definition. **STATE LAW:** It is substantive law. *29 Del. C. §5805(a)(2)(a) and (b)*. The “definition” are actually automatic conflicts and officials *must* recuse as a matter of law—not fact. The substantive law in the Town’s Code, § 10-3(A) is the common law codification and recusal is based on the facts of the “personal or private interest,” rather than an automatic conflict. *29 Del. C. §5805(a)(1)*. That common law also is in the State Constitution, with no reference to “close relative” or “financial interest,” etc. *Del. Const. art. II, § 20*. Conflict of interest statutes do not generally abrogate the common law unless expressly provided. *63 Am. Jur. 2d Public Officers and Employees § 253*. The General Assembly did not expressly abrogate the common law. After the common law was codified, Delaware Courts expressly applied *29 Del. C. §5805(a)(1)* standing alone. It did not limit its interpretation by using “close relative” or “financial interests.” *Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) aff’d, Del. Supr., No. 304 (January 29, 1996)*. To make these terms a definition is not only inconsistent with the State law, but by limiting the law defeats the ability to address situations where other “personal or private” conflicts *See, e.g., Shellburne, Inc. v. Roberts, 238 A.2d 331 (Del. Super., 1967)(common law--complaint alleged “personal interest,” “conflict of interest,” and “use of public office in the furtherance of such personal interest or conflict of interest,” because official allegedly based his decision on other than the merits because he was motivated by: (1) a desire to assist his coreligionists; (2) a close attorney-client and business relationship between the official and the civic association’s attorney who sought rezoning; and (3) a colleague’s wife was a member of the church affected by rezoning).*

**EXAMPLES:** (1) The decision affects the “financial interest” of a government “Officer” or “close relative.” “Close relative” is defined in State Code. *29 Del. C. § 5804(1)*. **Must recuse** under *29 Del. C. §5805(a)(2)(a) and/or (b)*.

(2) The decision affects a close relative but does not involve financial interests, e.g., appointing close relative to non-paid government position. The particular facts are used to render a decision under *29 Del. C. §5805(a)(1)*. If it effects a relative, but not a “close relative” as defined by the law, the facts are again applied to decide on a conflict under *29 Del. C. §5805(a)(1)*. e.g., uncles hiring nephews. “Uncles” and “nephews” are not in the State Code definition of “close relatives.” The facts may show that the uncle and nephew are close as family members, or may show that they essentially do not even know each other. Those facts are considered along with other facts. *See, e.g., Brice v. State, 704 A.2d 1176 (Del. 1998)(Merit Rules defined “immediate family,” basically the same as the Code defines “close relative.”* It did not include uncles and nephews. The Court still found a conflict in the uncle hiring his nephew. If an official awards a contract to a boyfriend, who is not defined in “close relative, it can be a conflict. *Ford v. Dep’t. of Public Instruction, C.A. #96A-01-009, J. Gebelein (Nov. 24 1997); 1997*

*Del Super LEXIS 5641997 Del. Super LEXIS 564 (upholding termination of State employee who award contracts to fiancé); State v. Nancy Ford, (Ford) Def. Id # 9510008237 and Richard L. Thornton, (Thornton) Def. Id # 9510008245, Co-defendants, 1996 Del Super LEXIS 691996 Del. Super. LEXIS 69, Criminal Action Number: 95-10-0183-0186, 95-10-0187-0191, J. Graves (Del. Super., March 26, 1996) (prosecution for abuse of office and misuse of public funds).*

**ACTION:** Move “Personal or Private Interest” to substantive law.

### PAGE 3 § 10-3 Standards of Conduct

**(A) “Personal or Private Interest.”** See above.

**(B) “Use of Public Office.”** Limits acts to situations of compensation or gratuities. **STATE LAW:** No such limit. Officials can misuse for other purposes, e.g., appointing friends or relatives to office; awarding contracts to friends; using public office to avoid police action—official using General Assembly ID – House Ethics Committee applied “misuse of office.” Also, see (H) below--same subject.

**ACTION:** Rewrite so it does not limit misuse to compensation or gratuity situations. Also, as (B) and (H) are the same subject consider combining with some changes, or write one “Use of Public Office” as stringent as State law and delete the other.

**(F) “Personal or Private Interest.”** Refers to definition section. **ACTION:** Delete reference as it will no longer be a definition. *See comments above.*

Requires public announcement that official cannot delegate duty and why. **STATE LAW:** Mandates that official file a confidential disclosure with PIC with the reason for not delegating. *29 Del. C. § 5805(3).*

Reasons to file with the Commission:

- (1) It is an independent body which helps instill the public’s confidence in the decision.
- (2) It would not require the official to make the call. Delaware Courts have held that if officials must make the judgment call on their own, the line becomes “blurred” and the official could misstep. *In re: Ridgely, 106 A.2d 527 (Del., 1954).* The Commission, looking through clearer eyes, sometimes finds ways to delegate that were not considered.
- (3) If someone other than the Commission makes the judgment call and is wrong, the official could be exposed to a complaint or disciplinary action. *Ethics Bulletin 009, ¶ 6-8.* Filing with the Commission and following its advice, even if wrong, protects the official from a complaint or disciplinary action. *29 Del. C. 5807.* The Commission is created for that very purpose—guide and protect.
- (4) A Commission decision that the official can participate limits the possibly of persons demanding the official recuse for “tactical purposes,”--not a genuine conflict. Delaware Courts have recognized that problem with the way ethics laws are used. *See, e.g., Seth v. State of Delaware, 592 A.2d 436 (Del., 1991)(alleging private attorney, who also was part-time prosecutor, had or appeared to have a conflict).*

Council members will support contracts for their “cronies,” deny them for political or personal reasons, etc. This does not mean it would actually happen, but may “raise public suspicion” of an improper appearance, which is prohibited. *See, 29 Del. C. § 5806(a)*. Again, the purpose of an independent Board making the decision helps eliminate some public concerns, and will avoid complaints against Council members showing favoritism, bias, etc.

**ACTION:** The authority must belong to the Commission.

**(B)** This provision and (A) refer to contracts of more than \$2,000. **STATE LAW:** For a State employee or official to seek a State contract of more than \$2,000, the contract must be publicly noticed and bid so that it will not be suspected that the contract is awarded out of favoritism, preferential treatment, conflicts and like. If less, there must be arm’s length negotiations. *29 Del. C. § 5805 (c)*.

**ACTION:** Add requirement for public notice and bidding, and arm’s length negotiations, similar to *29 Del. C. § 5805 (c)*. The Town ordinance can set the bidding requirement at a lesser level, but not at a higher level.

In contracting with the government, the full disclosure requirement discussed in (K) above becomes very significant, because contracting with their own government is the mostly likely area where a conflict or the appearance thereof could arise. Again, the Commission, not the Town Council, must decide. Same reasons: (1) an independent decision would build the public’s confidence; and (2) Council’s decision would not give the official protection because the advice on contracting was not from the Commission. *See, Ethics Bulletin 009, and cases cited therein*.

**MISSING PROVISION:** Dewey’s Code does not bar employees, officers and officials from private dealings, e.g., contracting with their own agency. **STATE LAW:** No one may not represent or otherwise assist private enterprises before their own agency. *29 Del. C. § 5805(b)(1)*. Senior level officials cannot represent or assist a private enterprise before their own agency **or any agency**. *29 Del. C. § 5805(b)(1) and (2)*. This recognizes their broader range of influence.

Those provisions preclude not only dealings where a financial interest exists, e.g., contract, but also if no financial interest exists. **EXAMPLE:** Official is a non-paid member or officer of a non-profit. It wants a service, grant-in-aid, or something else, and the official’s agency makes the decision. The official cannot “represent,” e.g., formal appearance, written request, etc., or “otherwise assist,” e.g., help the organization put together a request for a variance for its property, etc. The bar puts distance between the official and co-workers/colleagues who make the decision, to avoid undue influence or favoritism, and increases the public’s confidence in its government.

**ACTION:** Must add provision similar to *29 Del. C. § 5805(b)*.

**POST-EMPLOYMENT:** No provision. **STATE LAW:** *29 Del. C. §5805(d)*.  
**ACTION:** Must add similar provision.

**APPEARANCE OF IMPROPRIETY** – No provision. **STATE LAW:** 29 Del. C. §5806(a). **ACTION:** Must add similar provision.

**ADDITIONAL COMMENTS: Procedural provisions**

Some of the procedural provisions are addressed in the above comments. In addition: it does not have a provision against Commissioners being officers of a political party or running for office. That restriction diminishes the possibility or appearance that the Commission is politically inclined.

Some parts give the Commission's duties to others. For example, it makes the attorney the hearing officer, rather than the Commissioners being as the fact finders. The gives a single person the ability to usurp the Commission's duties. It is compounded by the fact that if the attorney performs their statutory duties, e.g., attorney for the Commission; investigating complaints; etc., and also is the fact finder, it could raise a number of conflicts of interest and conflicts of duties. It is further compounded in this situation because the attorney is an elected official. It would defeat the purpose of trying to eliminate politics, or the appearance there of, by barring Commissioners from public office, but then giving their duty to be fact finders to the attorney, who is also an elected official. It could be alleged that politics would influence his decisions

See comments on the attached Dewey Beach Code and State Code for other procedural details.

**(2) See comments on the Town and the State Code for “clean-up” suggestions. “Clean ups” are just suggestions; not required.**



STATE OF DELAWARE

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**September 5, 2007**

John F. Brady, Esq.  
Brady, Richardson, Beauregard & Chasanov, LLC  
10 E. Pine St.  
P.O. Box 742  
Georgetown, DE 19947

***Motion for Reconsideration - 07-05***

***Hearing and Decision by: Terry Massie, Chairman and Vice Chair Barbara Green;  
Commissioners Dennis Schrader, William Daily and Wayne Stultz***

Dear Mr. Brady:

The Public Integrity Commission considered the Motion for Reconsideration of its prior decision that concluded Milton's Mayor, Donald Post, should not have appointed his brother as an alternate on Milton's Historic District Commission. *Tab A, Motion; Tab B, Op. No. 07-05*. Based on the following law and facts, we reach the same conclusion.

**I. Standard for Reconsideration**

Reconsideration is not addressed in the statute. *29 Del. C. §§ 5807(c) & 5810*. PIC's Rules specifically allow reconsideration in complaint proceedings; not advisory opinions. *Tab C, Rule IV (C)(P), p. 7*. PIC treated the filing as an advisory opinion. (*¶ (B)(3) below*). However, PIC has reconsidered advisory opinions. *Op. No. 96-21*.<sup>1</sup> We do so here.

We use Superior Court Rule 59 as the standard. Rule 59 motions are to correct errors; not add new arguments. *Beatty v. Smedley, C.A. No. 00C-06-060 JRS, J. Slights III (Del. Super., March 12, 2003)*. It is denied unless controlling precedents or legal principles were overlooked,

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<sup>1</sup>Public bodies exercising judicial functions inherently have powers, like Courts, to reconsider, vacate judgments, etc. *Henry v. Dep't of Labor, 239 A.2d 578 (Del. Super., 1972)(State Commission acting in a judicial capacity, like a court, needs an opportunity to correct errors, change of mind, etc. Id. at 581); Family Court v. Reeves, Del. Super., C.A. 97A-10-001 RCC, J. Cooch (Nov. 21, 1997)(State Board had no Procedure for Reconsideration but had inherent authority to hear the motion as it was like Superior Court motions).*

or the fact finder misunderstood the law or facts that would change the underlying decision. *Id.*

## II. Application of Legal Principles and Facts

**Argument 1. Mayor Post did not receive written notice of the hearing as required in the Public Integrity Commission Rules, nor was he able to attend that meeting in person.**

**(A) Legal Principle:** Mr. Post may be alleging denial of notice and opportunity to be heard.

**(1) Constitutional Due Process.** If he is alleging Constitutional due process denial, PIC has no jurisdiction. Generally, administrative agencies have only the jurisdiction conferred by statute. *2 Am. Jur. 2d Administrative Law* § 275 (1994). PIC's jurisdiction is only the Code of Conduct. *29 Del. C. §§ 5805(a), 5809(3) and 5810(a)*. Courts have held that Constitutional issues are in the courts' expertise; not an administrative agency's. *Plano v. Baker*, *2d Cir.*, *504 F.2d 595, 599* (1974); *Matters v. City of Ames*, *Iowa Supr.*, *219 N.W.2d 718* (1974); *Hayes v. Cape Henlopen School District*, *341 F. Supp.* 823, 833 (D. Del., 1972).

**(2) Complaint Process:** If he is alleging due process denial under the statute or rules, those rights apply only to the complaint process. *29 Del. C. § 5810(a)(10)*; *Tab C, Rule IV (C), (D) and (E)*, p. 5. This filing was treated as an advisory opinion. See, ¶ (B) (3) below.

**(3) Advisory Opinion Process:** The statute does not require appearance. PIC may proceed on a "written request." *29 Del. C. § 5807(c)*; *Tab C, Rule VI (A)(1) and (4)*, pp. 8-9. The Rules address attendance. *Tab C, Rule VI (A)(5)*, p. 9. It is the Commission's option. *Id.*

### **(B) Process in this Particular Case.**

**(1) Complaint Process:** A sworn complaint, or PIC acting on its own, triggers this process. *29 Del. C. § 5810(a)*. Either way, PIC can refer it for investigation and a report. *Tab C, Rule III (A) and (E)*. Then its Counsel, the Attorney General, or Special Counsel may file a complaint. *Tab C, Rule III (C)(1)*. If a complaint is filed, notice and hearing rights arise. *29 Del. C. § 5810(a)*; *Tab C, Rules III (D) and IV (D) and (E)*. This was not a sworn complaint. *Tab D, Jones Filing*. PIC did not pursue a complaint on its own.

**(2) Advisory Process: Official's written filing.** Marion Jones is a Commissioner, Board of Adjustment-Historic District Commission, and its Ordinance Review Committee. *Tab E, Minutes*, pp. 2, 3. She was present at the meeting. *Tab E, Minutes*, pp. E-4. She wrote the filing. *Tab D, Jones Filing*.

**(3) Notice of the Advisory Process and Written Statement:** Advisory requests do not require notice. However, the Solicitor was told by phone that PIC could treat the filing as an advisory request. A letter to him cites advisory opinion sections—*29 Del. C. § 5807(c)*, not

the complaint section-- 29 Del. C. § 5810. It says "if an official obtains advice," and calls it a "filing." Mr. Post was copied. *Tab F, PIC Counsel ltr., June 5, 2007, p.1 ¶(3)*.<sup>2</sup> The Solicitor reviewed the filing; asked for dismissal; and copied Mr. Post. *Tab G, Brady Ltr, April 30, 2007*. Informing Mr. Post is consistent with Mr. Brady's duty of client communication, not PIC's Counsel. *Delaware Lawyer's Rules of Professional Conduct (DLRPC), Rules 1.2, 1.4 & 4.2*.

#### **(4) Notice of PIC's meeting and Opportunity to Be Heard:**

(A) The dismissal request was one opportunity to be heard. Like advisory opinions, they are decided on the pleadings--the "paperwork." *Super. Ct. Rule 12*. As a responsive filing, it is equal to a general appearance. *Canaday v. Super. Ct., 119 A.2d 347(Del., 1956)*.

(B) A second opportunity was when PIC set a meeting date and time for Mr. Post and Counsel to appear. They did not, as they were at the County's budget hearings. *Tab A, Reargument Motion ¶ (3)*. The Town Manager appeared. *Id.* He contacted the Solicitor on whether to proceed. He proceeded. (*Tab H, PIC Transcript, pp. 1-2*). It was presumed then, and confirmed by the Reargument Motion, that he was the Town's representative. *Tab A, Reargument Motion, ¶ (3)*. He said his knowledge was from "review of the files and minutes" and "meetings." *Tab H, PIC Transcript, p. 4*. He also was copied on correspondence. *See, e.g., Tab G, Brady Ltr, April 30, 2007*. PIC presumes Mr. Post and his Counsel, communicated on the decision to have Mr. Dickerson speak, and knew where his knowledge came from. *DLRPC 1.2 and cmt 1. (With respect to the means by which a client's objectives are pursued, the lawyer shall consult with the client and take such action as impliedly authorized)*. An extension of time or rescheduling was not sought. Mr. Dickerson was not treated as, nor acted as, an attorney. He was a fact witness. *Tab H, PIC Transcript, pp. 1-11*.

#### **Argument 2: PIC's Counsel did not ask the Town Solicitor questions about Mr. Post except on another appointment.**

No facts or laws are cited requiring PIC's Counsel to ask questions about Mr. Post's appointment of his brother. If this seeks Counsel's work-product or thought processes, those are privileged. *Carlton Investments, v. TLC Beatrice International Holdings, Inc., C.A. No. 13950, Del. Ch., M.C. Parker (Sept. 17, 1996)*. Mr. Post's Counsel had the filing. *Tab G, Request to Dismiss*. The filing specifically refers to Mr. Post appointing his brother. *Tab D, Jones Filing ¶ 2*. The Minutes were attached in support. *Tab E, Minutes pp. 2, 4*. These facts could have been challenge if desired. The motion to dismiss did not do so. *Tab G, Request to Dismiss*. PIC considered the facts in the filing, the minutes, Mr. Dickerson's statements, and the Request to

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<sup>2</sup>Mr. Post is personally knowledgeable of the statute and Rules process, as he has not only sought advice but has filed at least three "complaints" about other officials, which were treated as advisory opinions. *Commission Op. Nos. 05-44, 46, 49 and 63*. Most of them dealt with questions on relatives of officials.

Dismiss. It did not consider questions that PIC's Counsel *did not* ask.

**Argument 3. (A) Due to a required appearance of the Town Solicitor's other duty as the Recorder of Deeds for Sussex County, Counsel did not arrive in time for the hearing.**

**(B) The Town was represented by the Town Manager, George Dickerson, who is not a member of the Delaware Bar.**

**(C) No questions were asked about Mr. Post.**

(A) *See, (B)(4) above.* PIC learned the morning of its meeting that the Solicitor would; be late. *Tab H, PIC Transcript, p. 1.* The Solicitor authorized Mr. Dickerson to proceed. *Id.* *See discussion, Argument 1, ¶(B)(4)(b) above.*

(B) Mr. Dickerson was a fact witness. PIC had the legal position--a motion to dismiss.

(C) The transcript shows questions and discussions about Mr. Post. *Tab H, PIC Transcript, pp. 3, 6, 7, 8, 9, and in general.*

**Argument 4. (A) The opinion characterizes that Mayor Post "appointed" his brother. When in fact, Mayor Post who was reading a list of nominees, withheld his brother's name to seek a legal opinion.**

**(B) No appointment took place and Mayor Post's brother does not, nor has he held any position on a Board since Mayor Donald Post was sworn into office in April of 2006.**

(A) "Appointments" are the selection or designation of a person, by the persons having authority to do so, to fill an office or public function and discharge those duties. *Black's Law Dictionary, p. 99, (6<sup>th</sup> ed., 1990).* The Mayor has the authority; used it; and no one except those on his list was "nominated" or "appointed" by any person for any position. The law on his "appointment" authority was attached to the underlying opinion. *See, Tab B, p. 2, III (2), ¶ 2.*

(B) The Mayor did not just read. "Someone" created the list and named the positions. That was his duty. Also, the Minutes show he did not just read; he commented on his brother's qualifications. *Tab E, Minutes, p. E-4.*

(C) The Mayor did not withhold his brother's name. It was on the list that he moved for acceptance. *Tab E, Minutes, p. E-2.* The Minutes say a vote occurred before Ms. Jones asked about a conflict. *Tab E, Minutes, p. E-4.* The Mayor then said he wanted to see the law precluding his brother from serving. *Id.* At best, he tabled the name.

(D) The issue is not if his brother held or holds a position. It is if the Mayor, in his official duties "reviewed or disposed" of his brother's appointment. *29 Del. C. § 5805(a).* The underlying opinion cites the law and facts establishing the elements. *See also, Response to Argument 4(b).* "Someone" exercised the Mayor's duty, giving specific names for specific Boards. Mere logic says he, at a minimum, "reviewed" those before acting. Moreover, the law

does not require Council's approval so he has legal authority to completely "dispose" of the matter. Even the Reargument Motion concedes that the Town Charter may not require Council to approve. *Tab A, Reargument Motion*, ¶ 5. We address the Council's "practice" in Argument 5.

(E) The Minutes do not show he withdrew his brother's name. *Tab E, Minutes, p. E-4*. They say the vote was taken with no discussion before Ms. Jones raised the conflict issue. *Id.* The Mayor then said he wanted to see in writing what precluded his brother from serving<sup>3</sup>. *Id.* At best, he tabled the appointment, as he did with Ms. Louise Frey, when a conflict was raised. Only after learning that another law barred him from appointing any alternates, did he cease to proceed.

(F) At the reargument meeting, it was said that the Minutes are not always accurate. That argument was not in the motion to dismiss, although a copy was sent with that motion. It was not in the motion to reargue, although the opinion cited the Minutes as a fact basis, and Mr. Post relies on them in the next argument. Reargument is not for new arguments. However, we address it.

They are the official Minutes. Mr. Dickerson relied on them, and meetings, for his knowledge. He was asked to be the factual representative, presumably with knowledge of where he obtained his facts, and what those facts were. The Minutes show the facts which Ms. Jones also personally observed. No one says the Minutes are inaccurate in the list of appointees which include the Mayor's brother. The Minutes call the acts "appointments." It is the statutory term for the Mayor's duty, so that is not inaccurate. Even the reargument motion says his acts were "appointments," except somehow it was not an "appointment" of his brother. We address that below.

**Argument 5. A common practice has been that all nominees receive council approval, although the Charter may reflect different. The minutes show that this was the process that the Mayor was performing; that he put all names in for consideration by council and since neither the Town Solicitor not the Town Manager were present due to the fact that both positions were vacant. The Mayor then contacted the Attorney General's office to get the opinion of Assistant State Solicitor, Keith Brady (no relation to the Town Solicitor).**

(A) The legal issue is not Council's duties or practice. The fact issues are not if Council approved or not; or if the Solicitor or Town Manager were present. The issue is the Mayor's duties and acts. The "process" he used was consistent with his statutory duties to appoint, and he appointed his brother. Delaware Courts have held that officials do not have to be the final decision maker, or show actual bias or undue influence. *Beebe, supra; Prison Health Services Inc. v. State, Del. Ch., C.A. No. 13,010, V.C. Hartnett III (July 2, 1993)*. In those cases, the officials were not the final decision makers; did not vote; had only "indirect" and "unsubstantial"

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<sup>3</sup>Relatives can be public servants; but relatives who are officials cannot review or dispose of that decision.

involvement, or made only “neutral” and “unbiased” comments. Their interests still required that they not participate. Thus, even if the law or practice was for Council to approve, by appointing his brother, the Mayor’s conduct still would be prohibited. Similarly, even if the conduct were not an actual violation, it has been that it would be “prudent” for the Mayor of Odessa and certain Council members to recuse themselves because of their close relative’s interest in a zoning matter, even without a financial interest. *Harvey v. Zoning Board of Adjustment of Odessa, Del. Super., C.A. No. 00A-04-007 CG, Goldstein, J. (November 27, 2000).*<sup>4</sup> In essence, the Court was saying that even without a legal conflict, the appearance of impropriety could require recusal.

(B) PIC had the Attorney General opinion to consider. However, that does not protect Mr. Post from PIC’s conclusion. Only PIC has statutory authority to interpret the Code of Conduct. Courts have held that if an official gets advice from sources other than the one designated, the advice cannot be used as a defense. *Tab I, Ethics Bulletin, 009 ¶¶ 6-9*. Also, it cannot be argued that he did not know the law required PIC to make the decision. “Ignorance of the law” is no excuse in Delaware. *Kipp v. State, 704 A.2d 839 (Del., 1998)*. Moreover, as a factual matter, he knows PIC decides conflicts.<sup>5</sup> We do credit officials who seek advice, even if not from PIC. However, it is only one fact, among the rest. PIC gave him the presumption that he did not intentionally “create”<sup>6</sup> alternate positions and appoint his brother to circumvent the Code or others laws. PIC did not go forward with a complaint or refer it for prosecution. It merely advised that the conduct was improper.

**Argument 6: The issue appears to be one of first impression and the Mayor has not had the opportunity to appear before the Commission in order to respond in a formal manner.**

(A) This is not an issue of first impression. Delaware case law on officials’ participating if close relatives are involved is cited in the underlying opinion. *Prison Health, supra; Harvey, supra*. Also, as a factual matter, Mr. Post has obtained advice from PIC on an official participating if a relative may be involved, and filed complaints against other officials on close relative issues.

(B) We addressed his opportunity to be heard. Also, he appeared at the meeting on this motion, with Counsel. He made statements at the meeting.

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<sup>4</sup> In *Harvey*, the Court said: “Although this statutory provision [29 Del. C. § 5805(a)(2)] does not apply to employees of a municipality or township, the Court finds that it provides further guidance in this matter.” However, on July 22, 1992, the Governor signed Senate Bill No. 406 which specifically provides that: “Subchapter I, Chapter 58 of Title 29 shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation [local code of conduct legislation at least as stringent as the State Code of Conduct] by January 23, 1993.” The Town of Odessa has not enacted such legislation. Thus, its employees, elected, and appointed officials are subject to the State Code of Conduct. The Court and Counsel were notified of the application to local governments.

<sup>5</sup>See footnote 2.

<sup>6</sup>See, Tab H. Mr. Dickerson stating that the Mayor wanted to “create” the alternate positions.

### III. Conclusion

The motion is denied. Controlling precedents or legal principles were not overlooked. PIC, as the fact finder, did not misunderstand the law or facts that would change the underlying decision.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry Massie", with a checkmark-like flourish at the end.

Terry Massie, Chairman  
Public Integrity Commission

Cc: Marion Jones  
Mayor Don Post  
George Dickerson, Town Manager



STATE OF DELAWARE  
**DELAWARE STATE PUBLIC INTEGRITY COMMISSION**

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**January 24, 2008**

Mr. Craig A. Karsnitz  
110 West Pine Street  
P.O. Box 594  
Georgetown, DE 19947

**Advisory Op. No. 07-42 Motion for Reconsideration**  
***Decision and Hearing by: Chairman Terry Massie; Vice Chairs Barbara Green and Bernadette Winston; Commissions William Dailey, Barbara Remus and Dennis Schrader***

Dear Mr. Karsnitz:

The Public Integrity Commission (PIC) reviewed the Motion for Reconsideration of its advice that David King, Vice Chair, Dewey Beach Planning and Zoning Commission, recuse from matters on the Ruddertowne property. *Tab A, Op. No. 07-42*. No controlling precedents or legal principles were overlooked; nor were the law or facts misunderstood. The advice is the same: Mr. King, as Zoning Commissioner, must recuse on the Ruddertowne development matters.<sup>1</sup> *Just as in the underlying opinion, the conduct creates at least an appearance of impropriety. Id. at ¶ 3 ("specter of bias").*

**I. Standard for Reconsideration**

PIC's statute does not address reconsideration. *29 Del. C. § 5807 and § 5810*. PIC's Rules allow it in complaints. *Tab B, PIC Rule IV (C)(p), p. 7*. Mr. King's reconsideration motion acknowledged that the Rule applies to complaints,

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<sup>1</sup>*We discuss the term "matter" later in this opinion.*

but not advisory opinions. *Tab C, Motion for Reconsideration, p. 1. (July 31, 2007)*. Mr. Eisenhauser's filing was treated as an advisory opinion request. *See, infra*. While the statute nor the Rules provide for reconsidering advisory opinions, we have done so. *Tab D, Commission Op. No. 07-05*. We do so here.

Superior Court Rule 59 is the standard.<sup>2</sup> *The motions are to correct errors; not add new arguments.*<sup>3</sup> *Del. Super. Ct. Rule of Procedure 59*. They are denied unless controlling precedents or legal principles were overlooked, or the fact finder misunderstood the law or facts that would change the underlying decision. *Id.*

## II. Background

Dewey Beach's Town Council appointed the Ruddertowne Architectural Committee (RAC) to evaluate and negotiate development of the Ruddertowne property. *Tab E, RAC Chair Eisenhauar, e-mail filing (June 14, 2007); Tab F, Town Minutes, December 9, 2006*. As an appointee,<sup>4</sup> *Mr. Eisenhauar, may seek an advisory opinion. 29 Del. C. § 5807(c)*. He asked PIC if Mr. King's conduct in expressing a personal opinion on RAC's work and the development violated the Code since the Zoning Commission considers these matters. *Tab E, Eisenhauar e-mail*. The Mayor appoints and Council confirms Zoning Commissioners, such as Mr. King. *Dewey Beach Code ch. 185 § 33-2*. The Zoning Commission acts on developers' draft ordinances affecting their property; building height, site plans, etc. *Dewey Beach Code, ch. 181-1; 185-43, 185-68, etc.; Tab G, Transcript, PIC meeting, see, e.g., p. 20, line 272 (Zoning Commission makes recommendations to Council on "substantive matters"); pp. 39-40, lines 530- 546 (Zoning Commission reviews draft ordinances and the Ruddertowne developer has submitted a draft).*<sup>5</sup>

## III. Arguments and Responses

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<sup>2</sup>*Tab D, Commission Op. No. 07-05, fn. 1 (State Commission's inherent authority to hear rearguments).*

<sup>3</sup>*In some instances, but not all, we note the new arguments. We address them anyway.*

<sup>4</sup>*Under the Code, appointees are "Honorary Officials" or "employees." 29 Del. C. § 5804(6) and (12)(b)(2). Delaware Courts have applied the Code's "personal and private interest" provision, 29 Del. C. § 5805(a)(1), to unpaid appointees to a State Board. Tab N, Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996).*

<sup>5</sup>*Mr. King sometimes says the Zoning Commission has no power over such things as height restrictions, site plans, etc., but Dewey's Code shows otherwise.*

**Argument 1. The Advisory Opinion was not in accord with 29 Del. C. § 5802(4); and is outside PIC's jurisdiction. See, also, 29 Del. C. § 5812. - New Argument.**

Mr. King gives no legal or factual understanding of why PIC has no jurisdiction. He only gives the two Code sections without any reasoning on why they preclude PIC's jurisdiction. Accordingly, we will try to cover numerous legal principles as they relate to jurisdiction under those two provisions.

**RESPONSE (A): Jurisdiction Under 29 Del. C. §5802(4)**

The statute provides:

“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 [Public Integrity Act of 1994] to apply to their employees and elected and appointed officials. Subchapter I, Chapter 58, of Title 29 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 23, 1993. No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29. Any change to an approved Code of Conduct must similarly be approved by the State Ethics Commission to continue the exemption from Subchapter I, Chapter 58, Title 29.” *Tab H-6, 67 Del. Laws, c. 417, §§ 1, 2; 68 Del. Laws, c. 433, § 1(emphasis added).*

To the extent it is argued that Subchapter I does not apply to local officials because Subchapter I defines “State agency” as exempting “political subdivisions,” that is a definition, not the substantive law. *29 Del. C. § 5804(11)*. Substantive law is clear: “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 23, 1993....” *29 Del. C. § 5802(c)*. That law specially tells local governments how they can be “exempt” and how to “continue that exemption.”

**Application of Facts and Law:** (1) Dewey is a Town; and (2) has no approved Code.<sup>6</sup> *Thus, it has not established the "exemption." Its employees, elected, and appointed officials are subject to Subchapter I. 29 Del. C. § 5802(4). Mr. King is a Zoning Commission appointee. Subchapter I gives PIC jurisdiction.*

**RESPONSE (B) - Jurisdiction under 29 Del. C. § 5812.**

The motion does not refer to a specific provision in § 5812. Section 5812 defines the terms in Subchapter II, Financial Disclosure. It applies to "public officers" as specifically listed, but exempts "elected and appointed officials of political subdivisions of the State...." 29 Del. C. § 5812(n)(2). If it is argued that by exempting them from Subchapter II that they are exempt from Subchapter I, that is contrary to the plain language. Subchapter I says the only way local officials are exempt, and can "continue the exemption from Subchapter I," is to have their own Code and changes approved by PIC.

**Legal Principle:** "Where the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls." *See, generally, Cede & Co. and Cinerama, Inc., v. Technicolor, Inc., 758 A.2d 485 (Del., 2000); Coastal Barge Corp. v. Coastal Zone Indus. Control Board, 492 A.2d 1242, 1246 (Del., 1985).*

**Application of Facts and Legal Principle:** The language of both Subchapters is clear. Subchapter I gives PIC jurisdiction over local officials; Subchapter II does not.

**RESPONSE (C) - Jurisdiction - Consistency with Rules of Statutory Construction**

**(1) Legislative Intent.** The law requires construction consistent with the General Assembly's manifest intent. 1 Del. C. § 301.

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<sup>6</sup>Local officials were notified of the General Assembly's desire on or about April 15, 1992. Later, a letter was sent specifically to then Mayor, Patricia Wright, saying local Codes need approval. Tab I, Ltr to Mayor Wright, ¶ 2, January 6, 2003. In April 2003, an ordinance was passed. It was never sent for approval. The 2003 version was replaced July 8, 2005. The 2005 version was not sent for approval. Dewey's Code was submitted for review at PIC's September 2007 meeting, but was not as stringent as State law. Tab I, Commission Op. No. 07-55. Dewey has not submitted any changes to make it as stringent.

(a) In deciding legislative intent, Courts look first to the statutory language. *Tab N, Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991)*. Where the persons and things to which a statute refers are affirmatively or negatively designated, it infers the legislative intent. *Id.* (citing *Norman v. Goldman, 173 A.2d 607,610 (Del. Super., 1961)*).

**Application of Principle:** The law affirmatively declares local officials subject to Subchapter I, absent an approved Code. It negates Subchapter II application to them.

**(2) Legislative History:** Courts also look to the legislative history to aid in deciding legislative intent. *Cede & Co., supra.*

The original Subchapter I did not mention local officials. *59 Del. Laws, c. 575 and 64 Del. Laws, c. 110*. Later, the 135<sup>th</sup> General Assembly asked the Delaware State Bar Association's Special Committee on Public Officials' Code of Conduct<sup>7</sup> to assist in drafting ethics legislation. *Tab H-1, Committee Report, June 7, 1990*. The Committee said to General Assembly leaders:

"Your request indicated an intent that our proposed legislation should provide rules for the Executive branch of State government and for local government officials similar to the rules we proposed in 1986 for the members of the General Assembly." *Id.*

In discussing local officials and employees, they noted that elected and appointed officials of political subdivisions... "are not deemed public officers within the meaning of the financial disclosure law." *Tab H-4 and 5*. Regarding the Code of Conduct, [Subchapter I], the report said local political subdivisions could enact their own Codes. *Tab H-4*. It also said local ordinances were not reviewed for purposes of the report. *Id.*

The Committee proposed that the legislation include the General Assembly's "desire" that local governments adopt their own Code within two years. *Tab H-2 and 3*. In 1991, when Subchapter I was rewritten, passed and approved, it included the language about its "desire" that all local governments adopt Code of Conduct legislation similar to the act to apply to their public officials. *Tab H-6, 67 Del.*

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<sup>7</sup>Hereinafter "Committee."

*Laws, c. 417 § 2.* It also directed the State Ethics Commission [now PIC] to report to the General Assembly within two years the existence of local legislation and make a recommendation on legislation to be adopted and to cover such officials. *Id.* The exemption of local officials from Subchapter II, Financial Disclosure, was not changed.

In 1992, the General Assembly adopted new language. Rather than a “desire,” for local Codes, it mandated that local officials were subject to Subchapter I, unless they had an approved Code. *Tab H-6, 68 Del. Laws, c. 433.* That is the present law. *29 Del. C. § 5802(4).*

**Application of Principle:** The legislative history repeatedly reflects the manifest intent of the General Assembly that local officials are subject to Subchapter I, absent a PIC approved Code, with changes also approved. It is the only means of “continuing exemption.”

**(3) Unreasonable results:** Interpretations of statutes should not lead to a result so unreasonable or absurd that it could not have been the legislature’s intent. *Synder v. Andrews, 708 A.2d 237 (Del., 1997).*

**Application of Principal:** To conclude PIC has no jurisdiction would lead to the unintended result that most local governments would not have a Code of Conduct.<sup>8</sup> *Such conclusion would be an attempt at an implied repeal of 29 Del. C. § 5802(4). Implied repeals are not favored at law. Silverbrook Cem. v. Board of Assm’t Review, 355 A.2d 908 (Del. Super., 1976), aff’d. as modified, 378 A.2d 619 (Del., 1977).* Further, that conclusion would ignore: (1) the clear language in Subchapter I mandating application; (2) the clear distinction between Subchapter I jurisdiction, as opposed to Subchapter II; (3) the repeated legislative acts that lead to including local officials; and (4) the rules of statutory construction.

**(4) Consent to Jurisdiction:** Delaware Courts have long recognized the ability to consent to jurisdiction. “The consent doctrine has been enunciated in many judicial decisions and is a satisfactory enough explanation of the basis of jurisdiction where consent is in fact given.” *Standard Oil v. Superior Court, 44 Del. 538 (Del., 1948).* Jurisdiction is appropriate when persons waived defenses to

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<sup>8</sup>Seven of 57 local governments have approved Codes: Dover, Lewes, Millsboro, Newark, Smyrna, Wilmington, and New Castle County. PIC Annual Report, March 2006.

personal jurisdiction by their conduct. Hornberger Management Company v. Haws & Tingle General Contractors, Inc. 768 A.2d 983 (Del. Super., 2000).

**Application of Law and Facts:** At the time of the filing, Dewey Town Solicitor, John Brady, represented Mr. King. He had a copy of Mr. Eisenhauer's filing; was advised it would be treated as an advisory opinion; advised of the meeting date; and said PIC could proceed, but he would not be available. PIC's underlying opinion states that the decision was "at your request." *Tab A-1*. That is not disputed. No jurisdictional objection to jurisdiction was made between the time of the filing through the issuing of the underlying opinion. Jurisdiction issues can be considered waived if they are not raised. Here, it was newly raised in this motion. Motions for Reconsideration are not for new arguments. *Del. Super. Ct. Rule of Procedure 59*.

**CONCLUSION:** No jurisdictional precedents or legal principles were overlooked. No law or facts were misunderstood. The underlying decision is not changed. PIC has Subchapter I jurisdiction of local officials, including Mr. King. *29 Del. C. § 5802(4)*. It does not have Subchapter II jurisdiction over locals. *29 Del. C. § 5812(n)(2)*.

**Argument 2. This complaint was not based on sworn testimony and is in violation of the law and the Rules of this Commission. See, Public Integrity Commission Rule III.**

**RESPONSE: 29 Del. C. § 5807(c) and 29 Del. C. § 5810(a).**

Complaints require a "sworn complaint of any person" or PIC may act on its own. *29 Del. C. § 5810(a)*. If PIC acts on its own, after an investigation, a complaint must be filed with PIC by Commission Counsel, the Attorney General, or Special Counsel. *29 Del. C. § 5809(a); Tab B, PIC Rules, III. INVESTIGATIONS, (C) (1) Report of Investigation*.

**Application of Law to Facts:** Neither Mr. Eisenhauer nor PIC instigated a complaint. It was a request for an advisory opinion which only require a "written statement." *29 Del. C. § 5807(c)*. They may be filed by employees, officers, honorary officials, an agency or a public officer.<sup>9</sup> *Id.* Mr. Eisenhauer was

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<sup>9</sup>As discussed above, "public officers" are specifically identified at those who must file financial disclosure reports. *29 Del. C. § 5812*. Local officials are exempt from that requirement. *Id.* The 1994 law increased PIC's

appointed to RAC, a Town Council created body. RAC acted on Council's behalf on Ruddertowne negotiations.<sup>10</sup> *Mr. Eisenhower was authorized to seek an advisory opinion. 29 Del. C. § 5807(c).* The law and procedures used were for advisory opinions, not complaints. *29 Del. C. § 5807(c); Tab B, PIC Rules, (VI) "Requests for Advisory Opinions and Waivers," § (A)(1)-(5).* PIC treated the filing as an advisory request at the proceeding. The underlying opinion was captioned "Advisory Op. 07-42." *Tab A.* Mr. King's motion acknowledged it as such, and called it an "advisory opinion." *Tab C, Motion for Reargument, pp. 1 & 2.* The motion also acknowledges that *Rule IV(C)(p)* "applies to hearings and decisions on complaints and does not appear to apply to requests for Advisory Opinions." *Id. at p. 1.* The argument that it was a "complaint" was made at the reargument motion. PIC's deliberations covered the "complaint" versus "advisory opinion" issue. *Tab G-58 lines 778-817 and G-79 lines 1062-1064.* PIC again concluded it was an "advisory opinion."

Aside from the use of the word "complaint" in this argument and argument 4, the motion refers to a "complaint" one other time. It says: "it is believed" that "the true nature of this dispute is a complaint..." *Tab C-1 ¶ 1.* No facts are given to support that belief. Mere allegations, without supporting facts, are insufficient. *Del. Super. Ct. Procedural Rules 6(b) and 56.*

**CONCLUSION:** No law or facts change the underlying decision, nor is it shown that any legal principle was ignored in treating the filing as an advisory opinion.

**Argument 3. This entire process violated Mr. King's right to due process since he had no notice of the complaint against him and no opportunity to be heard on any of the issues. - New Argument**

**RESPONSE: Notice and Due Process**

(A) The complaint provision provides for "notice and opportunity to be heard." *29 Del. C. § 5810(a).* Again, it was not a "complaint," or treated such. *See, above.* The advisory opinion provision does not require appearance, only a

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*authority to interpret and administer more than Subchapter I. 29 Del. C. § 5809(15). When it gave that authority, effective January 15, 1996, for the Financial Disclosure law, it amended the Advisory Opinion section to include "public officers," as those who could seek and receive advice from PIC.*

<sup>10</sup>*RAC was later disbanded.*

written statement by the requesting official. 29 Del. C. § 5807(c)(emphasis added). PIC's Advisory Opinion rules only require written statements. Tab B, PIC Rules, Advisory Opinions and Waivers.

Attendance is at PIC's discretion:

**Rule IV(A)(5) Attendance at Meeting - Decisions Without Attendance -** Prior to reaching its decision on the Application for a Waiver or an Advisory Opinion, the Commission *may* require the applicant and others, with pertinent knowledge of the facts necessary for the Commission to reach a decision, to attend a meeting of the Commission and testify. The Commission may in its discretion require that the testimony be under oath. The Commission may in a clear case grant or deny a Waiver or issue an Advisory Opinion based on the written application without requiring the attendance at a meeting of the applicant or others. (emphasis added).

**Application of Law and Facts:** It is undisputed that: (1) Mr. Eisenhower had authority to make a request; (2) he filed a written request with pertinent knowledge of the facts, attaching Mr. King's e-mail; and (3) it is undisputed that Mr. King wrote the e-mail. Mr. King does not deny the contents, but says the e-mail was: a "note;" "a draft;" "a brain dump," and/or a "scenario." No matter what it is called, the factual contents are not questioned. Those facts were used for the underlying decision. Tab A, Commission Op. No. 07-42.

This argument does not identify the basis of any notice and due process denial. Assuming the basis of this argument is that he was entitled to notice and process under: (1) a Constitutional right; (2) the Code and Rules for complaints; or (3) the Code and Rules for advisory opinions, we previously addressed those issues in Commission Op. No. 07-05. Tab D-2 and D-3.<sup>11</sup> We also addressed Counsel's duty of notice. *Id.* To the extent those notice and due process requirements are the basis of this argument, the same laws and procedures apply.

Even the complaint provision, says "notice and the opportunity to be heard." That does not necessarily mean physical appearance. For example, a motion to dismiss may be filed by Counsel, and the subject of the motion need not physically appear. He is "heard" through Counsel. Commission Op. No. 07-05.

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<sup>11</sup> It was sent to the Town Solicitor and to present counsel before this reargument. Tab J.

Aside from notice and opportunity to be heard given prior to the first ruling, Mr. King had the opportunity to physically appear, and did so, to give facts at this motion.

**CONCLUSION:** The facts nor the law were ignored, and no facts or law in the reargument change the underlying opinion.

**Argument 4: The complaint against Mr. King is factually incorrect. At the time of the preparation of the material of which Mr. Eisenhower now complains, there was no pending proceeding by any individual regarding “Ruddertowne” before the Planning and Zoning Commission. In addition, Mr. King’s notes were talking points only and in no way indicated any prejudice for or against any particular development. - New argument**

**RESPONSE: Use of term “complains.”**

The filing was not a “complaint.” *See, above.*

**RESPONSE: “No Pending proceedings”**

In his e-mails, Mr. King repeatedly refers to upcoming zoning matters as they relate to the Ruddertowne Development. The Town ordinance identifies specific areas with which the Zoning Commission deals, e.g., height, footage, site plans, Comprehensive Development Plan (CDP). *Dewey Beach Code, ch. 181-1; 185-43, 185-68, etc.*

(a) **June 3, 2006** –“Thoughts from the last RAC meeting.” *Tab K.* He specifically identified the Ruddertowne developer selected by Highway One LLP, Harvey Hanna & Associates (HHA). He said the developer “had read the new Comprehensive Development Plan (CDP)...walked into this deal planning to build a mega mall and include a large hotel...with an understanding that they could build to a height that is more than twice the current height limit ...planned on an expanded structured parking which will require developing to a higher total square footage...a primarily residential along the Van Dyke side --image six or seven floors of new condos from SR-1 to the Bay...they want a major re-development statement and intend a convention hotel as the keystone to this project.”

He said three meetings were scheduled, June 15, 22 and 29...that “will build sequentially to a final design concept that will be launched into the Town’s preliminary zoning approval process at the July Town meeting. *Id.*

(b) **June 5, 2006--** “HW1 coming through the back door.” He said RAC is talking about special zoning for the proposed RB1, to permit 70 feet. ...there is strong concern from many town residents that this will spread to other zoning districts, it is clear that this dramatic change in zoning will apply to the Highway One Rusty Rudder property. *Tab K.*

(c) **June 7, 2006 -** “Call to arms.” Said there was a “strong concern that the starting point will be “too high/too big.” *Tab K.* He then proposed a course of action on these particular issues as it related to opposing the Ruddertowne Development:

(1) “get as many like-minded residents and property owners to” attend the Town meeting, we need voices to say they strongly favor retaining commercial or mixed us in Ruddertowne, but not at the cost of a too-massive development. He said “see talking points in my earlier e-mails.” *Id. at ¶1.*

(2) “get as many like-minded residents and property owners to”--“meet on Saturday at 2:30 behind my condo to discuss what we heard at the Friday meeting and to plan a contingent course of action pending the 6/15 presentation by HHA. I am assuming we will respond to an undesirable proposal with a two-to-three page mailing to all town voters and would like to collect names of residents and property owners who support our efforts and are willing to be identified in any such mailing at this meeting and/or are willing to help finance this mailing.” *Id. at ¶2.*

(3) “get as many like-minded residents and property owners to” attend, listen, and as appropriate voice their concerns at the June 15<sup>th</sup> RAC meeting at which HHA is to present their design concept—presuming including drawings, specifications, etc., of their proposed development. *Id. at ¶ 3.* He said he was hopeful that when the RAC and commissioners were confronted with strong community opposition to any massive development project “grossly exceeding current zoning restrictions” that they will require a downscaling of the proposed

development or rejection of such a plan.

(d) **June 8, 2006.** “Change in plan and role.” He said he was advised by a Town official that it was premature for him to appear to be “taking sides” in the developing Ruddertowne discussions. *Tab K.* He continued:

“It has been my intent in circulating the ‘convention/resort hotel complex’ scenario now as throughout the entire comprehensive plan development process....”

...Although I have not taken a position for or against any specific proposal or future zoning applicant, there is the possibility that convening/hosting a meeting that might lead to the formulation of a defensive plan of action against a potential future zoning applicant might be perceived as bias on my part against any such application. This would be improper and has not been/is not my intent.”

“Therefore, to avoid an appearance of conflict of interest *I must retract my offer to host a meeting of Dewey Beach citizens concerned about any potential developments inconsistent with current town zoning*” (emphasis in original). *Tab K.*

The e-mails alone identify areas where, as a Zoning Commissioner, he could expect to be involved. He confirmed that at PIC’s meeting on this motion.

(E) **December 9, 2006**—The Town minutes show he discussed the CDP. He was specifically asked how he about the recent site plan<sup>12</sup> *from Highway One would affect the CDP. Tab F, Town Minutes, “Discuss and Vote—To approve a draft of the Town of Dewey Beach Comprehensive Plan.” (December 9, 2006).*

The facts show Mr. King knew about the Ruddertowne’s development; its connection to the CDP and zoning approval process. He repeatedly spoke against it on zoning issues, and specifically said zoning issues would be considered the very next month after his e-mails were sent. *Tab K.*

To say nothing was pending pertaining to the Ruddertowne zoning, or that he did not recognize zoning issues in which he would be involved, is inconsistent with:

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<sup>12</sup> *At the reargument motion, Mr. King said the Zoning Commission does not review site plans. It is unclear why he would have been asked about the site plan impact if the Zoning Commission does not review them.*

- (1) his undisputed correspondence, and the Town minutes;
- (2) his presumed knowledge of his legal and official duties to act on Zoning matters. *Dewey Beach Code, ch. 181-1; 185-43, 185-68, etc.*;
- (3) his own recognition that he had to make a “change in role and plans,” because of his official position;
- (4) his own concern that his actions could raise an appearance of impropriety because of his remarks as they related to his official duties;
- (5) his own concern that his actions could be perceived as “bias.” If he did not believe any of this would come before the Zoning Commission, what would be his reason for any concern about appearance or bias?

**CONCLUSION.** The facts were not incorrect. The facts used were Mr. King’s own statements. PIC arrived at the very same conclusion he did— his conduct could raise an appearance of impropriety and of bias. It said it could “raise the specter of bias.”

**Argument 3: Mr. King’s note were talking points only and in no way indicated any prejudice for or against any particular development.**

(a) The e-mails show that Mr. King’s “note” refers only to the Ruddertowne development—a “particular development.”

(b) The “note”—the initial e-mail—is five pages, formatted with headings, bullets, issues, etc. The plain and ordinary meaning of “note” is “a condensed or informal record;” “a brief comment or explanation.” *Webster’s Collegiate Dictionary, p. 794, 10<sup>th</sup> ed. (1994)*. It means “to make a brief written statement.” *Black’s Law Dictionary, p. 1060, 6<sup>th</sup> ed. (1990)*. Mr. King’s e-mail initial e-mail refers to it as a “draft” and a “brain dump.” *Tab K-1*. In later e-mails, he says he is proposing “the following course of action;” that “like-minded residents,” use them as “talking points.” *Tab K-8*. At the reargument motion, he says it was a “scenario” that “I thought” the town should discuss. *Tab G-11 and 12, lines 150 to 163*. He referred to that scenario as a “massive development” with townhouse and hotel. *Tab G-12*. That is the same description in his initial e-mail. *Tab K-3*. Although he said it thought was for the “town” to discuss, he then said his e-mails were sent to about 12 people who were “friends.” *Tab G-12*. He had asked those “friends” to pass the talking points to their network of “concerned friends.” *Tab K-7*. As a factual matter, just his initial e-mail was more than a mere note. He wanted it used for much more.

(c) In the e-mail he: expressed “disappointment that these developers

(1) seemed so poorly informed/mis-informed about the needs and desires of the Town's residents and property owners, and (2) seemed into a massive re-development rather than something more in scale with the rest of Dewey Beach and more closely mated to the 'way of life' that brought us here." He called it a "white elephant."

(d) He consistently found faults. After just one meeting, he said RAC "seems unwilling to make critical comments and/or to take a hard stand." *Tab K-2*. That comment is interesting in light of his many statements that he did not know what the proposal would be. RAC's officials, like all public officials, are stay open-minded and base their decisions on the merits. Courts have noted that requirement when decision makers are involved in zoning. *Tab N, Mackes v. Board of Adj. of the Town of Fenwick Island, C.A. No. 06A-03-001-RFS, Stokes, J. (February 8, 2007), p. 7 and fn. 6 ("Zoning hearing Board is quasi-judicial; Board member was prejudiced and biased; Board decision reversed); Brittingham v. Board of Adj., City of Rehoboth Beach, Del. Super., C.A. No. 03A-08-002, Stokes, J. (January 14, 2005), p. 9 (Zoning Board is quasi-judicial and must act with impartiality, as a neutral arbiter and not as an advocate for one position or another).*

If the proposal is not known, taking a hard stand would be inconsistent with the need for open-mindedness. Mr. King was the one who took a hard stand, when he says he did not know the proposal. *Tab K-2 through 8*. Assuming he did not know the proposal, he still was able to find faults with the developer and the development. The developer was "poorly informed/misinformed;" had "no sense" of the Town's "needs/desired; did not "read the new Comprehensive Development Plan;" etc. *Tab K-2*. Again assuming he did not know their proposal, he was able to identify very specific items that were problems: the footage size, the height, the "structured parking lot" that would "raise the construction costs;" result in a "twenty-fold" increase in vacant stores; etc.

(e) He acknowledges that "then it hit me. The RAC is talking about special zoning." *Tab K-7*. After sending out more e-mails, he notified his "friends" that a Town official advised him that it was "premature for him to 'take sides' in the developing Ruddertowne discussions." *Tab K-9*. Regarding his earlier offer to have "like-minded residents" meet as his home to "plan a contingent course of action," *Tab K-8*, he said "there is a possibility that convening/hosting a meeting that might lead to the formulation of a 'defensive plan of action' against a potential future zoning applicant might be perceived as bias on my part against such application" and "this would be improper...." *Tab K-9*.

**CONCLUSION:** The Town official's concern and Mr. King's concern about at least the perception of bias were on target. Contrary to the argument, the facts show he: talked only of one "particular development;" criticized the developers and the project; even before he allegedly knew the proposal; sought to ally a force of "like-minded" persons to develop a "defensive" plan, etc. The plain and ordinary meaning of "prejudice" is: "an adverse opinion or leaning formed without grounds or before sufficient knowledge." *Webster's Collegiate Dictionary*, p. 919. It arises from: prejudging or "bias." *Id.* The facts are his written facts. We find as before--his acts at least raise the "specter of bias."

**Argument 5: The citation to Jones v. Board of Edu. of Indian River Sch. Distr., C. A. No. 93A-06-003, Graves, J. (Del. Super., January 19, 1994), is inapposite. The reasoning in the Jones case involved the review of a decision maker in a teacher dismissal case whose own children had been taught by the teacher in question and had certain negative experiences in that teacher's classroom. This is far from the circumstances of this case. Had the Board allowed a full record to be developed, this distinction would have been made clear.**

**RESPONSE:** The Code of Conduct states that an official cannot review or dispose of official matters where he has a "personal or private" interest that tends to impair judgment in making official decisions. *29 Del. C. § 5805(a)(1)*.

In *Jones*, a government official's "personal or private interest" was the result of a familial relationship with a teacher, when he knew his official duties were to hear termination proceedings for that particular teacher. Before performing those duties he made negative statements about her. It was decided his statements showed pre-judgment and he should not have reviewed or disposed of that matter. Here also, Mr. King expressed his "personal and private interest" on a particular matter --the Ruddertowne development--when he knew, or should have known, his official duties were to participate in proceedings on that particular development. He made personal and negative statements about the particular development and developer. His "personal and private statements" were negative and showed pre-judgment. Thus, *Jones* is not inapposite.

"Personal or private interests" need not be familial as in the *Jones* case, nor do the proceedings have to be termination proceedings. They are "any matter" in

which the official has a “personal or private interest.” 29 Del. C. § 5805(a)(1). If the “personal or private interest” may result in a financial benefit or detriment to the official or their close relatives, those are automatic conflicts under the law, rather than a conflict that must be decided on the particular facts. 29 Del. C. § 5805(a)(2).

Delaware Courts have held under the common law that personal interests can arise from a relationship between an official and parties to planning and zoning matters. *Shellburne, Inc. v. Roberts*, 238 A.2d 331 (Del., 1967) (alleging “personal interest” or “conflict of interest” where church of decision maker would benefit from decision was sufficient to raise factual issue for Court). The common law has not been abrogated; it is codified in 29 Del. C. § 5805(a)(1). Tab L-and 2.

Thus, it is an issue of fact of whether the relationship is sufficient to create a “personal interest” or “conflict.” Recusal, when there is an interest that rises to the level of a conflict, is so that judgment will not even *tend to be impaired*. 29 Del. C. § 5805(a). No actual impairment is required; only the appearance thereof. *Commission Op. No. 92-11*. Recusal insures that the conduct will not “raise suspicion among the public” that the public trust is being violated. 29 Del. C. § 5802 and 5806(a). Thus, in a re-zoning case, the Court found no actual violation on the requirement to recuse when close relatives and/or the official had financial interests, but as a factual decision said the Board members would be “prudent” to recuse themselves because of the rule of necessity—recusal was not possible. *Harvey v. Zoning Board of Adjustment of Odessa, Del. Super., C.A. No. 00A-04-007, J. Goldstein (January 12, 2001)*.<sup>13</sup> As in *Harvey* and *Jones*, this case does not show Mr. King has any financial interest. PIC has never said he did.<sup>14</sup> *That does*

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<sup>13</sup> In *Harvey*, the Court said the local officials were not subject to the State Code of Conduct. That misstates the law. Local governments which do not adopt their own Codes of Conduct are subject to the State Code. 68 Del. Laws, c. 433; 29 Del. C. § 5802(4). The Court and attorneys for each party were notified by PIC after the opinion came out. Despite the statement that the Code did not apply to locals, the Court used it as the legal measure of their conduct. Further, the Court’s decision that it would be “prudent” to recuse because their relatives were involved, even though there was no violation of 29 Del. C. § 5805(a)(2), is consistent with our prior decisions where there was no technical violation, but recusal was required to avoid an appearance of impropriety. In this underlying decision, PIC found Mr. King’s conduct created at least an appearance of impropriety—“specter of bias.”

<sup>14</sup> Mr. King has raised the issue of the reason for citing 29 Del. C. § 5806(b), indicating that it appears to relate only to financial interests, e.g., in a private enterprise, other employment, compensation, gifts or anything of value. While it specifically identifies those interests, it also says “or incur any obligation” which substantially conflicts with performing their duties. Statutory terms “must be construed according to the common and approved

not mean he should not recuse. He still has a “personal or private interest” in a matter for which he would also have official authority, and, thus, should not “review or dispose of the matter.” 29 Del. C. § 5805(a)(1)

In interpreting that very provision, Delaware Courts assumed a conflict because a Board appointee to an unpaid position said he might have a conflict. The Court said even though his statements were “neutral” and “unbiased,” and he did not participate in the final vote, he should have recused himself “at the outset.” *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff’d*, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996).<sup>15</sup> The Board member’s participation was challenged by an applicant who was not successful with the Board, and alleged the Board member had a “personal or private interest” because his private employer had an indirect business relationship with the other applicant, and his failure to recuse rose to the level of a violating his due process rights before the Board. Thus, it does not matter if the official statements are unbiased, nor is actual bias required.

Like *Beebe*, Mr. King is an unpaid appointee. He has a “personal and private interest” in an official matter that would come before him. Unlike *Beebe*, his comments were not neutral and unbiased, but slanted against the party who would have to deal with Mr. King’s Board. Once a conflict arises, recusal should occur “from the outset.” *Beebe*. The reason is not only to avoid actual bias, but the appearance thereof. As in *Beebe*, we gave Mr. King the strong presumption of honesty and integrity, even though his biased remarks were made when the CDP was to be considered the next month, and he spoke about it the site plans at the December Town meeting. These final facts may suggest he did not recuse himself on the matter, however, he was given every benefit of the presumption of honesty.

**CONCLUSION:** *Jones* is not inapposite. Not only does *Jones* apply, but so does *Beebe*, which interpreted the same provision at issue here—29 Del. C. § 5805(a)(1). Again, PIC did not misunderstand the law or facts, or the legal principle.

## **Argument 6: The opinion of the Public Integrity Commission is so broad and**

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usage of the English language.” 1 Del. C. § 303. The common and ordinary meaning of “any” includes “every - used to indicate selection without restriction” and “all - used to indicate a maximum or whole.” *Webster’s Seventh New Collegiate Dictionary*, p. 40 (1967). To limit the provision to only things that have a monetary value would be contrary to the plain word “any.” Further, it would ignore the fact that non-monetary items can create conflicts, e.g., relationships with civic associations seeking decisions. See, *Shellburne*, *supra*.

<sup>15</sup>The official in *Beebe*, like Mr. King, was a non-paid appointee to a government board.

sweeping as to cast doubt on Mr. King's ability to participate in any zoning decision. The decision itself is not clear in what "decisions on this matter" Mr. King should not participate.

(a) "Matter" is the term used in the statute. *29 Del. C. § 5805(a)(1)*.

(b) "Matter" is defined in the statute. *29 Del. C. § 5804(a)(1)*. It means: "any application, petition, request, business dealing or transaction, of any sort."

(c) "Matter" is framed in the context of the "personal or private interest," as it relates to Mr. King's duties pertaining to the Ruddertowne development, as the Commission bases its findings on the law and the "particular fact situation." *29 Del. C. § 5807(a)*. That was identified in the underlying opinion. As the decision must rest on the particular facts, we cannot speculate on all of the "matters" that could arise for Mr. King, as it would be engaging in hypotheticals, not "particular facts."

(d) At least one "matter" example was given by Mr. King at the meeting. (*Tab G, transcript, pp.26, lines 349-355*). He said "it was his understanding" that if read literally it [the underlying opinion] would mean he could not participate in a review of a site plan on the Ruddertowne property. He then said that site plan review would not come to the Zoning Commission. Again, that statement is contrary to the Dewey Code which says the Zoning Commission reviews site plans. It also is contrary to the Town Minutes which show he was asked to comment on this specific site plan. *Tab F-2*. However, the significance of his statement is that he identified an action [review of a site plan] and the particular property [Ruddertowne] on which he made his statements. This shows the lay person's grasp of the term "matter." In fact, Argument 9 of this motion asks that Mr. King be able to respond on "this matter" but "this matter" is not specified. It is from the particular facts—the context—that it is understood that "this matter" means the subject of this particular motion—PIC's opinion, just as Mr. King understood the advisory opinion as referring to "matter" within the factual contents.

(e) As "matters" arise, if clarification is needed, Mr. King can request additional guidance, just as guidance was requested on the same day as a Town meeting he was attending after the underlying opinion. Guidance was given to the Town Solicitor for him that same day. *Tab J-14*. The guidance given was also sent to Mr. Karsnitz that same day. *Id.* Guidance, when the Commission is not available, is Commission Counsel's duty, based on PIC's prior rulings. *29 Del. C.*

§ 5808(A)(a).

Any upcoming matters of which he is now knowledgeable can be asked now. As agendas for the Zoning Commission's upcoming meetings are normally posted at least 7 days in advance of a hearing, he would have time to get guidance. To be able to post in advance, he might even know before the posting date if he has any need for guidance.

**CONCLUSION:** This argument does not change the underlying opinion. That opinion found he should recuse from "matters" on the Ruddertowne Development/its developer. It does not apply to other zoning "matters" unrelated to that development. The statute defines "matter," and examples of the definition are that, "application" or "petition" or "request" would include such things as requests for variances (e.g., height, footage), review of site plans, review of draft ordinances, etc., as they relate to the particular development/developer which was the subject of Mr. King's statements.

**Argument (7): Fundamental due process requires an ability to respond on behalf of Mr. King in this matter.**

**RESPONSE:** "Due process" is the opportunity for notice and the opportunity to be heard. No facts or law suggest this argument is different from Argument 3 on Mr. King's right to "due process" was denied. *See, Argument 3 response.*

(C) The following arguments were not raised in the written reargument motion, but raised at the meeting for the first time.

**Argument (8): Mr. King does not know the length of time the advice should be followed.**

Again, this argument would require speculation rather than "particular facts." 29 Del. C. § 5807(c). It could entail such speculation as: *If* the development submits a proposal; *if* the proposal is accepted by the Zoning Commission; *if* it is accepted by the Town Council put in the CDP, *if* the CDP is kicked back; *if* a basis of the rejection relates to this development; etc. The basic rule is that he recuse in the Ruddertowne development "matter." He has indicated an ability to spot a "matter." Further, he can seek guidance from the Commission.

**CONCLUSION:** This argument does not change the underlying opinion. He is to recuse from matters on the Ruddertowne Development

**Argument 9: The Zoning Commission acts in a legislative capacity, not a quasi-judicial capacity.**

**RESPONSE:** Mr. King said the Zoning Commission does not act as a legislative body. *Tab G, p. 4, line 50, e.g.* The Zoning Commission is appointed by the head of the Executive Branch (the Mayor). No law or facts are given to substantiate that the Zoning Commission is an arm of, or operates as, a legislative body. No facts or law suggest the Zoning Commission can pass laws, which is the purview of the legislative body. Delaware Courts have recognized the quasi-judicial nature of Zoning entities. *Tab N, Mackes v. Board of Adj. of the Town of Fenwick Island, C.A. No. 06A-03-001-RFS, Stokes, J. (February 8, 2007), p. 7 and fn. 6* (“Zoning hearing Board is quasi-judicial; Board member was prejudiced and biased; Board decision reversed”); *Brittingham v. Board of Adj., City of Rehoboth Beach, Del. Super., C.A. No. 03A-08-002, Stokes, J. (January 14, 2005), p. 9* (Zoning Board is quasi-judicial and must act with impartiality, as a neutral arbiter and not as an advocate for one position or another).

In a prior decision, we discussed at length why the judicial standard is relevant in interpreting the State Code of Conduct. *See, Extract of Commission Op. No. 02-23, see fn. 18, infra.*

**CONCLUSION:** No law or facts were misunderstood.

**Argument (10) Right to Free Speech: Mr. King is entitled to free speech.**

**RESPONSE:**

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To the extent this is a Constitutional question, PIC has no jurisdiction. *See, Argument 3, supra, citing Commission Op. No. 07-05.*

The State statute does limits the matters on which an official can speak. Applicable here is that they may not review or dispose of matters where they have

a personal or private interest. 29 Del. C. § 5805(a)(1). When they have such interests, they are required to recuse themselves from speech in their official capacity. *Id.* Delaware Courts have recognized that it can restrict speech. *Beebe, supra.* (State Board appointee should not have made even “neutral” or “unbiased” statements because of possible conflict). This restriction is not uncommon in conflict of interest rules for both public officials and private persons, e.g., Judicial Code of Conduct; Legislative Conflict of Interest Law, 29 Del. C. § 1002(a)(legislator cannot participate in debate nor vote if there is a personal or private interest). The ban on General Assembly members voting if they have a “personal or private interest,” is also found in the Delaware Constitution. *Del. Const., art. II § 20.* Corporate entities can have by-laws on such restrictions. *Commission Op. No. 02-23.* Attorneys can be made to withdraw from a case because of a conflict. *Delaware Lawyer’s Rules of Professional Responsibility.*

To the extent it is argued that elected officials can speak on their platform on a particular issue, they have the right to political expression to their constituents because their duty is to represent those persons. Mr. King is not an elected official who can run on platforms. He was not elected to office to represent the people. He was appointed to a board to make fair and unbiased decisions in his official duties. If there is a “personal and private interest,” the government duties must “command precedence.” *In re Ridgely, 106 A.2d 527, 530-31 (Del. Super., 1954).*<sup>16</sup> The Court said the reason for not having personal interests which are opposed to public duties is because “no man can serve two masters,” and that in choosing between the State and the outside employment, “his private interest must yield to the public one.” *Id. at 531.* In *Ridgely*, the Court concluded the official duties were so significant that it did not need to interpret the Lawyer’s canons which also would apply to Mr. Ridgely. *Id.* Mr. King placed the “personal interest” before the public one, so he must now recuse himself from his public responsibility on this matter.

**CONCLUSION:** Mr. King’s argument is contrary to the statute and case law. The argument does not change the underlying decision.

**(B) Ms. Joan Claybrook’s letter was incorporated into the motion for**

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<sup>16</sup>*Ridgely* was decided before the Code of Conduct was enacted, but interpreted the common law restriction against public officials having a personal or private interest which would impair judgment in performing official duties. See, Tab L-1 and 2.

**reconsideration.**

**RESPONSE:**

She states that she is not a lawyer. Yet, her letter makes strictly legal arguments on such things as jurisdiction, due process, statutory interpretation, etc. *Tab C-4 thru 7*. She also is not a Town employee, officer or appointed official. We first address a concern about her right to intervene and then a concern about incorporating her letter, as it relates to the legal arguments as part of the motion.

**(1) Right to Intervene:**

Delaware Superior Court Rule 12 addresses the circumstances of intervention.

A person desiring to intervene must state the grounds for intervening. She states no grounds to intervene.

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when an applicant claims an interest relating to the property or transaction which is the subject matter of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The advisory opinion statute limits the persons who can seek an opinion and to whom an opinion can apply. *29 Del. C. § 5807(c)*. It authorizes only government employees, officers, officials or agencies to seek opinions, and the advice applies only to government officials. *Id.* Ms. Claybrook is not a government official. The statute does not confer any unconditional or unconditional right to intervene. She has no legal interest or claim or defense in the "matter."<sup>17</sup> *The disposition of the action would not impair or impede her ability to protect a legal interest, as she has none in this "matter."* She may have a personal and private interest, but not a legal interest. *Tab N, e.g., Gamble v. Thompson, Del. Super., C.A. Number 98A-07-007-JOH, Herlihy, J. (October 27, 1999)(individual had no standing as a complainant).*

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<sup>17</sup> This time, the term "matter" is the term in the Court Rules.

**(2) Practice of Law:** As noted, she is not a lawyer but mainly makes legal arguments, statutory interpretations, etc. They are mainly the same legal arguments as in motion submitted by Mr. King through his Counsel. As her legal arguments were incorporated into the motion for Mr. King, the question is if her acts constitute representation of him, and if she is interpreting the law, preparing legal instruments, etc. *Tab N, see, e.g., In re Mid-Atlantic Settlement Services, Inc., Board on the Unauthorized Practice of Law, File No. UPL 95-15.* Again, we note the concern, but have do not entertain whether her conduct is contrary to non-lawyers acting as lawyers.

**(3) Fact Witness:** To the extent Mr. King may want her considered a “fact witness,” that has not been indicted. However, as the letter supports him, and it includes many of the same things in Mayor Tesh’s letter and the facts she stated at the PIC meeting, we will assume Mr. King wanted her as a fact witness. We also received additional correspondence and calls supportive of him, and considered them.

**(a) Letters of Good Will and Good Intentions:** Ms. Claybrook’s letter and letters from others, and phone callers spoke to the important role of Mr. King on the Zoning Commission, his value to the community, that he is honest, etc. (e.g., *Tab Tab C-4 thru 7, Ms. Claybrook; Tab M, Mr. Cooke and Mayor Tesh*). We have never suggested Mr. King’s work is not of value to the Zoning Commission, the community, etc. However, the law does not distinguish between the “good” and the “bad,” the “honest” and “dishonest. *29 Del. C. § 5805(a)(1)*. It applies to all officials--that is what insures the public’s confidence in its government. *29 Del. C. §5802*.

Mr. King, and these persons, say he had no intent to violate the law. He is entitled to a strong legal presumption of honesty and integrity, as are all public officials. *Beebe, supra*. Mr. King was given that presumption, even though he apparently did, at a minimum, review the draft ordinance. He was given an advisory opinion, which requires no sworn statements, from Mr. King, or any others. *29 Del. C. § 5807(a)*. A violation of this law may be found during an advisory opinion request, and may then be referred for prosecution. *29 Del. C. § 5807(b)(3)*. The filing was not treated as a criminal prosecutorial matter. If so, the law would require “knowingly or willfully violating any provision,” carrying up to a year in prison and/or up to a \$10,000 fine. *29 Del. C. § 5805(f)*. Thus, he received

the benefit that he did not intend to violate the law.

What the advisory opinion section requires is “full disclosure” of all the material facts. 29 Del. C. § 5807(c). Although Mr. King did not disclose he wrote e-mails other than the June 3, 2006 e-mail, PIC and the Town Solicitor were sent copies of additional e-mails by him attached to a “complaint.” That complaint alleged violations of the Dewey Beach Code, not the State Code. It was dismissed because, among other things, PIC has no jurisdiction to interpret the local ordinance, only the State law. *Tab J, Commission Op. No. 07-47*. Specific reference to the June 8 e-mail was made in PIC Counsel’s e-mail to Mr. King’s Counsel, as was the letter from Mayor Tesh. *Tab J-13*.

It is PIC’s Counsel’s statutory responsibility to “review information coming to the attention of the Commission relating to potential violations of this chapter.” 29 Del. C. § 5808A(a)(3). Mr. Eisenhower’s request was already pending at the time of the “complaint” referred to above. Counsel, pursuant to those duties, brought the information to PIC’s, to aid in “full disclosure” as required by 29 Del. C. § 5807(a).

Mr. King cannot have it both ways—have PIC consider the letters of goodwill, but not the e-mails he wrote on this matter.

Ms. Claybrook’s other facts:

(1) She repeatedly refers to PIC’s ruling as an advisory opinion. (*Tab C-4 and 5*).

**RESPONSE:** Her factual statement, like the fact that the motion refers to PIC’s ruling as an advisory opinion, supports PIC’s position that the filing was, as a factual matter, treated as an advisory opinion. Using that term is also contrary to the argument previously addressed that there was a “belief” that it was a “complaint.” *See, Argument (3)*. An argument that had no factual basis.

(2) PIC is inconsistent in its opinions because it previously ruled it had no jurisdiction over a school board member under 29 Del. C. § 5812[financial disclosure].

**RESPONSE:** PIC is not inconsistent. Had it had been asked to consider how the financial disclosure law applied to Mr. King, it would have found no jurisdiction under that Subchapter. *See Tab H-1, Legislative History, and Response to Jurisdiction argument. (Subchapter I, Code of Conduct, applies; Subchapter II, Financial Disclosure, does not apply)*.

(3) PIC’s decision was “a very brief opinion less than one page in

length” on a “highly controversial issue” and “800 voters” who registered their concerns.

**RESPONSE:** This argument is factually and legally incorrect.

(a) As a factual matter, the 800 registered voters were not expressing their concern about PIC’s opinion, but about the development.

(b) As a matter of law, no Code provision or rule gives the number of voters as a basis for the length of an opinion, or the basis to exempt officials from the law. *Commission Op. No. 01-20*. In that opinion, it was argued that a local official had been elected by a large number of voters, and so he should not have to recuse. PIC said: “No Code provision states that the number of votes received is a basis for letting an elected official participate in the face of a conflict of interest. If those were the rules, no elected official would ever have to recuse themselves when they had a conflict of interest. The restrictions would then become meaningless.” In essence, we would be putting an exemption in the law. Language cannot be grafted onto the law. *Goldstein, supra*.

(c) As a matter of law and fact: Land use issues are usually controversial, so that fact is not unique to Dewey. Delaware Courts have recognized some issues can be so “highly controversial,” that a State official should not even serve on a committee at all. *Tab N, Your [Judge’s] April 20, 1999 Request for an Opinion from the Judicial Ethics Advisory [sic] Committee, JEAC 1999-1, Super. Ct., 1999*.<sup>18</sup> The Court concluded that even though it was unlikely any matters related to the education committee, on which he wished to serve, may come before him, or that he could recuse himself, that it may raise the appearance of impropriety if he served on the committee at all. Similarly, PIC concluded that

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<sup>18</sup>*Extract - Commission Op. No. 02-23. While your letter indicated that the standards for judges’ may not necessarily be the same standards that apply to Executive Branch officials, we note that both Codes impose duties to:*

- (1) uphold the integrity of the office;
- (2) avoid impropriety and the appearance thereof;
- (3) perform official duties impartially and diligently; and
- (4) attempt to avoid activities that risk a conflict with official duties.

Interpretations of one statute can be used in interpreting another statute 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 (5<sup>th</sup> ed. 1992). Here, both persons are public officers and subject to Codes of Conduct with similar purposes and obligations. *See also, Harvey, supra*. (using judge’s recusal standard for local government officials on land use issue, e.g. rule of necessity).

Some examples of similar purposes and obligations for Judges subject to the Judicial Code of Conduct and officials subject to the State Code of Conduct are that both Codes impose duties to:

- (1) uphold the integrity of the office;
- (2) avoid impropriety and the appearance thereof;
- (3) perform official duties impartially and diligently; and
- (4) attempt to avoid activities that risk a conflict with official duties.

Mr. King's participation (but only on this particular matter) could "raise the specter [appearance] of "bias" [impropriety]. PIC did not go so far as to bar him from being on the Zoning Commission; it only required that he properly recuse.

(4) PIC cited only one case.

**RESPONSE:** No law or procedure mandates the number of cases to cite. No facts are given to suggest that when a person goes for advice on the law that the advice must be a legal treatise.<sup>19</sup> *It is advice--non-binding--not a Court briefing. As a factual matter, when advice is given, including legal, it is difficult to image that every case, regulation, etc., would be identified.*

(5) PIC's practice is to treat correspondence about the behavior of third parties as a complaint.

**RESPONSE:** Ms. Claybrook gives two opinions she believes support that fact. Commission Op. No. 00-28 and 93-15.<sup>20</sup> Both were filed by private citizens, not officials or agencies. Advisory opinions are not given to private citizens. 29 Del. C. § 5807(a). Any person, including private citizens, can file complaints, but they must be sworn. 29 Del. C. § 5810(a). The private citizens did not file a sworn statement. They were told of the law and rules on the requirement. PIC also advised that "even assuming a complaint," the law gave PIC no jurisdiction over a school board member or General Assembly members. Ms. Claybrook is factually incorrect about the implications of those opinions. Aside from the law given in the opinion, as a factual matter, it would be a waste of the citizens' time to be told only about the need for a "sworn complaint," and not be told about the jurisdictional limits. They would then file a sworn complaint, only to have it dismissed for lack of jurisdiction. (5) Mr. King has no "financial" interest in the matter, and no "personal" interests have been asserted for Mr. King.

**RESPONSE:** As addressed in detail above: (1)PIC has never said or suggested that he has a financial interest; (2)the law is not limited to pecuniary interests; (3) his "personal interest" was given in his own e-mails; identified in the underlying opinion; and (4) his own remarks at reargument. *Tab A, Tab G ("I personally would have started at the other extreme, start low and build up rather than start up and build low....") and Tab K.*

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<sup>19</sup>It appears that this document is turning into a legal treatise as a result of duplicate arguments, arguments made so broadly without facts and law to identify exactly what the claim is, etc.

<sup>20</sup>Ms. Claybrook noted that in Op. No. 93-15, PIC concluded it had no jurisdiction of the individual in his School Board capacity. It is unclear what she believes is the factual relevance. In 1993, at the time of that decision, the law was: (1) PIC had jurisdiction over local officials in towns, municipalities, etc. See, Legislative History discussion above. School districts and Board members were not subject to the law until it was amended in 2000 to include "school districts," "Boards of Education," and "Board members." 29 Del. C. § 5804(11) and (12)(a)(3).

Ms. Claybrook refers to his e-mail as “the musing of a private citizen.” That shows even a lay person’s understanding of the “personal” or “private interest.” A “personal and private interest” for Mr. King has been established, and he should not “review or dispose” of matters related to the Ruddertowne development. *29 Del. C. § 5805(a)(1)*.<sup>21</sup>

(6) PIC called Mr. King’s e-mail an “open letter” to the community, but it was only e-mailed to nine people.

(a) PIC called it by the name Mr. King used. *Tab K-1, “Open Letter to Dewey Beach Residents and Property Owners.”*

(b) Mr. King asked those persons to pass this along your network of concerned friends. *Tab K-8.*

(c) Regardless of the number of people to whom it was sent; who received it; saw it; had it read to them; were told about it, etc., the content is the same—it gives his personal position on the development. Conflicts are not based on the number of persons who are aware of an official’s personal or private interest. It is the official’s duty to recuse even if no one else is aware of the conflict. There is no legal or factual basis for such an exemption. *29 Del. C. § 5805(a)(1)*.

**FINAL CONCLUSION:** Based on the above law and facts, we find that no law or facts were misunderstood, nor were facts or legal principles overlooked. The underlying opinion is not changed: Mr. King has a “personal or private interest” in the Ruddertowne matter. His personal statements about the development and developer, when he knew or should have know the development matter could come before him, at a minimum raise the “specter of bias,” and he should recuse from those matters.

Sincerely,

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<sup>21</sup>*Ms. Claybrook says: “Many, including David King, believed that the Ruddertowne project would go before the Board of Adjustment for a zoning variance rather than coming before his commission.” To the extent Ms. Claybrook can speak to the facts of who believed what, regardless of what “many” believed, Mr. King knows, or should know, his official duties under the Dewey Code including such things as height variances, etc. He knew it would be considered as part of the CDP. He knew there was a concern about the potential conflict, and expressed that in his own e-mails, saying he would have to decline from hosting a meeting at his private residence for other like-minded people. Tab K. Recusal from hosting the meeting at his private residence, is not recusal in this official capacity, which is what the statute requires once the personal or private interest exists. 29 Del. C. § 5805(a)(1). PIC’s advice was to recuse from the official duties on this on “matters” before the Zoning Board.” Thus, even if the facts showed that it was “his belief” that it would not come before him, if and when it did, he was to recuse.*

  
Terry Massie, Chairman  
Public Integrity Commission

cc: John F. Brady, Esq.



STATE OF DELAWARE

**DELAWARE STATE PUBLIC INTEGRITY COMMISSION**

MARGARET O'NEILL BUILDING  
410 FEDERAL STREET, SUITE 3  
DOVER, DELAWARE 19901  
**January 25, 2008**

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

Senator David B. Sokola  
Legislative Hall  
P.O. Box 1401  
Dover, De 19903 **D580B**

Dear Senator Sokola:

Senate Bill No. 196, amending and revising the Town of Milton's Charter, is assigned to the Senate Community/County Affairs Committee. *S.B. 196*. It has a conflict of interest provision for Town Council members, giving the Mayor and other Council members the right to review and decide if a Council member has a conflict and if the official may participate in a decision. *Id. at p. 2 of 43 ¶ (d), lines 43-50*. It also requires Council members to complete an Ethics Form. *Id. at line 48*. It has no such provision for the Mayor, other officials or employees.

The Public Integrity Commission (PIC) seeks to comment on the provision under its authority to recommend rules of conduct to the General Assembly. *29 Del. C. § 5809(1)*.

Under existing State law, all local employees, officers and officials, including all elected officials such as the Mayor, are subject to the State conflicts law, unless it submits a local Code for PIC's review to decide if it is at least as stringent as State law. *29 Del. C. § 5802(4)*. Milton has not submitted a Code.

PIC's concerns are that the proposed legislation:

(1) could be viewed as overturning existing State law at it applies to Milton, when all other local governments must comply with State law. *29 Del. C. § 5802(4)*. Further, it could be viewed as favoritism to those to whom it would not apply, when State law applies equally to all;

(2) would not serve the public purpose of existing State law which creates an independent Commission, not made up of public officials, to decide conflicts to instill public confidence in officials. *29 Del. C. § 5802(1) through (4)*. By giving the Mayor and Council members authority to decide, the public may well suspect that favoritism, preferential treatment, or bias for or against their fellow elected officials, could drive the decision. Delaware Courts have said unsubstantiated ethics claims can be used as a tactical tool just to disqualify an official from

participating when, in fact, no conflict exists. *Seth v. State*, 592 A.2d 436 (Del., 1991)(individual worked for private law firm and also part-time for the Department of Justice).

(3) could deny those officials to whom it would apply, an independent ethics body's assessment of conflicts, and deny them their statutory rights under existing law, such as:

(a) the right to confidential advice on their particular fact situation. 29 Del. C. § 5807(b) and § 5807(c). Under existing law, local officials must file a full confidential disclosure of, if they have a financial interest in a private enterprise that does business with, or is regulated by, their local agencies. 29 Del. C. § 5806(b).<sup>1</sup> Confidentiality is to encourage officials to seek advice; protect business dealings that may be confidential, e.g., negotiations, etc., and;

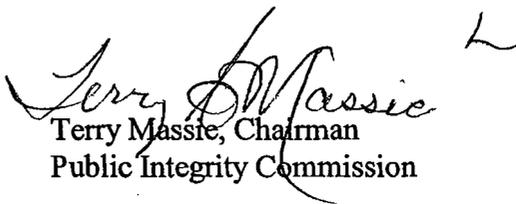
(b) the right to rely on an independent agency's decision which statutorily protects them from complaints or disciplinary action if they fully disclose the facts and in good faith rely on the independent agency's advice. 29 Del. C. § 5807(a) and (c). Courts have held that where the official seeks advice from an entity other than the one which by statute issues advice, the official can be prohibited from using the advice as a defense. *Ethics Bulletin 009 ¶¶ 6, 7 and 8 (attached)*.

(4) Could result in inconsistent opinions. Under State law, PIC is to strive for "consistency in its opinions and recommendations, subject to the confidentiality requirements." 29 Del. C. § 5809(5). If Milton has different laws, decided by its officials, rather than the expertise of an independent agency whose only duties are to interpret conflict laws, inconsistency could occur. That already has occurred at the State level where two agencies, other than PIC, rendered different opinions on laws assigned to PIC. *Ethics Bulletin 009 ¶ 6*.

Accordingly, PIC recommends the provision be stricken and the existing State law from 29 Del. C. § 5802(4) be adopted as an amendment.

PIC appreciates the opportunity to comment, and if it can further assist, such as appearance of PIC's Legal Counsel at any hearings, Counsel Janet A. Wright, may be contacted at 302-739-2399.

Sincerely,

  
Terry Massie, Chairman  
Public Integrity Commission

cc: The Honorable Colin R. J. Bonini  
The Honorable Dorinda A. Connor

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<sup>1</sup>This provision is more stringent than the Financial Disclosure reporting provisions in Subchapter II, that applies to State Public Officers, such as General Assembly members. There, sources are reported, but not a full disclosure. See, 29 Del. C. § 5813. Even under that law, public officers are entitled to a confidential request when they seek advice on the financial disclosure law. 29 Del. C. § 5807(c). Just as Executive Branch employees and officials, and local governments can seek confidential ethics advice from PIC, General Assembly members can seek confidential ethics advice from the House or Senate Ethics Committees. 29 Del. C. 1003(a).

The Honorable Margaret Rose Henry  
The Honorable Harris B. McDowell  
The Honorable Robert L. Venables  
The Honorable V. George Carey



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**February 19, 2008**

Representative Richard C. Cathcart  
Legislative Hall  
P.O. Box 1401  
Dover, DE 19903 D580C

Re: Senate Bill 196, Milton Town Charter

Dear Representative Cathcart:

As you know, Senate Bill No. 196, amending Milton's Town Charter, was assigned to the House Administration Committee after it was passed by the Senate.

The Public Integrity Commission had submitted comments on a provision that gave the Mayor and Council members' authority to decide if another Council member has a conflict. The Commission believes this is contrary to the General Assembly's expressed legislative intent for local governments to: (1) be subject to the State Code of Conduct; or (2) adopt a Code approved by this Commission to be as stringent as the State Code, which includes having an independent body render conflict decisions to instill the public's confidence that each local government has a comparable standard of ethics. 29 Del. C. §5802.

Regrettably, the Commission's comments apparently were not received before the Senate acted.

The letter to the Senate Community/County Affairs Committee is attached and the Commission respectfully submits its comments for your Committee's consideration.

If you need additional information, or if you would like to have the Commission's Counsel attend any hearings on the proposed legislation, you may contact Janet A. Wright, 302-739-2399.

Sincerely,

A handwritten signature in cursive script that reads "Terry Massie" followed by a small flourish.

Terry Massie, Chair  
Public Integrity Commission

cc: The Honorable Robert F. Gilligan  
The Honorable Helene M. Keeley  
The Honorable Clifford G. "Biff" Lee  
The Honorable Terry R. Spence  
Ronald Smith, Esq., House Attorney

*144<sup>th</sup> General Assembly - 1st Session – 2007*

<b>SENATE LEGISLATION</b>			
<b>BILL #</b>	<b>SYNOPSIS</b>	<b>REASON FOR MONITORING</b>	<b>STATUS</b>
<b><u>S.B. 40</u></b>	Prohibits legislators who are also State employees from serving on the Bond Bill/Capital Infrastructure and Joint Finance Committees.	Amends the legislative conflict of interest law, but PIC administers dual compensation law for State employees holding dual positions so the reference connects to the dual job law.	Senate Executive 03/13/2007
<b><u>S.B. 84</u></b>	Replaces and updates Title 24, Pharmacy chapter. Provides that Board appointees are subject to the Code of Conduct.	Board & Commission members are already subject to the Code. A provision in the Board's enabling law helps insure they know the Code applies.	Jul 24, 2007 - Signed by Governor
<b><u>S.B. 88</u></b>	Amends 24 Del. C., Chapter 52, Board of Examiners for Nursing Home Administrators. Provides Code of Conduct applies to Board members.	Board & Commission members are already subject to the Code. A provision in the Board's enabling law helps insure they know the Code applies.	Stricken On 05/09/2007
<b><u>S.B. 94</u></b>	Nursing Home Administrators – See above	See above	Jul 05, 2007 - Signed by Governor
<b><u>S.B. 135</u></b>	Freedom of Information Act - Gives 10 days, excluding weekends and holidays to give access to public records requestor; minutes are to be no later than 30 days from the meeting date or by the time of the next regularly scheduled meeting, whichever is first. Make reasonable efforts to accommodate # of persons who might be expected to attend meeting.	PIC is subject to FOIA.	Senate Executive Committee On 06/13/2007

<b>HOUSE LEGISLATION</b>			
<b>BILL #</b>	<b>SYNOPSIS</b>	<b>REASON FOR MONITORING</b>	<b>STATUS</b>
<b><u>H.R. 3</u></b>	House Rules. Includes that: House Members comply with Financial Disclosure Law, Rule 16(d)(IV)(7); Lobbyists register as required by the Lobbying Law, Rule 54; and has a rule on lobbyists taking the House floor, Rule 57(a).	PIC Administers the Financial Disclosure and Lobbying laws.	House Passed 01/09/2007
<b><u>H.B. 9</u></b> <b><u>H.A. 1</u></b> <b><u>H.A. 2</u></b>	Criminal Statute on Illegal Gratuities and Misconduct in Office changes penalty to felony. Amend. Amendment 1 Defines Illegal Gratuities law term "value" to reflect Ethics Code for Public Officials value for reporting. Acceptance is a class A misdemeanor and a class A felony. Amendment 2 relates to fraud in honest services.	Ethics Code sets \$150 as value for reporting gifts. Amendment to criminal provision on illegal activities gives value between \$250 and \$1,000. PIC administers financial reporting law.  PIC publishes a brochure that lists the various gift laws in Delaware. If passed, the brochure would need to be update.	Jun 27, 2007 - HS 1 for HB 9 - Assigned to Judiciary
<b><u>H.B. 25</u></b>	Governor's Recommended Budget – FY 08 See H.B. 250	\$40,100 operating budget for PIC-same budget since 1996.	House Appropriations 01/25/2007
<b><u>H.B. 38</u></b>	Amends 24 Del. C., ch. 38 - Dietitian/Nutritionist licensure act. Provides that Board appointees are subject to the Code of Conduct. 24 Del. C. § 3803 (b).	Board and Commission members are already subject to the Code. A provision in the Board's enabling law helps insure they know the Code applies.	Senate Passed 6/14/07 House Passed 4/4/07 <b>Signed 06/21/2007</b>

**144<sup>th</sup> General Assembly - 1st Session – 2007**

<p><b><u>H.B. 68</u></b> <b><u>Amendment 1</u></b></p>	<p>Legislators may not lobby for a year after their term expires; penalty - unclassified misdemeanor. (Note: Executive Branch has a limited 2-year post-employment restriction after leaving State service. 29 Del. C. § 5805(d). Amendment: Changes one-year to 2 years.</p>	<p>PIC administers the lobbying law and Executive Branch post employment law.</p>	<p>Out of Committee on 05/02/07 May 09, 2007 - Amendment HA 1 - Introduced and Placed With Bill</p>
<p><b><u>H.B. 89</u></b></p>	<p>Amends the Sunset Act, clarifying some provisions. Review criteria is: agency safeguards against conflicts; ethical conduct provisions of an agency are limited to ethical or moral conduct; or provisions or rules with commercial prohibitions &amp; restrictions; &amp; the extent to which the agency is complying with 29 Del. C. , c. 58</p>	<p>PIC administers 29 Del. C., c. 58.</p>	<p>May 16, 2007 - Reported Out of Committee (SUNSET) in Senate with 3 On Its Merits</p>
<p><b><u>H.B. 155</u></b> <b><u>H.A. 1 thru 5</u></b></p>	<p>Creates State Inspector General Office. It will be provided office space and Staff by the Secretary of State, “but the Secretary shall have no oversight and control similar to the Public integrity Commission.”</p>	<p>Reinforces the independent nature of the Public Integrity Commission.</p>	<p>House Passed – 6/21/07 Jun 26, 2007 - Assigned to Finance Committee in Senate</p>
<p><b><u>H.B. 196</u></b></p>	<p>Amends Lobbying Law: Bars Legislators, Cabinet Secretaries, Office Heads, and Governor’s Staff, from Lobbying for 1 year after they terminate. Related Legislation: <b><u>H.B. 68</u></b></p>	<p>PIC Administers Lobbying Law</p>	<p>Jun 20, 2007 - Reported Out of Committee (HOUSE ADMINISTRATION)</p>
<p><b><u>H.B. 248</u></b></p>	<p>Amends 29 Del. C. § 9004C. Merit employees must have signed Acceptable Use of Computers, etc., policy in their personnel file.</p>	<p>PIC has a merit employee. Both the Merit employee and the exempt employee have signed the policy.</p>	<p>Housing &amp; Community Affairs Committee 06/26/2007</p>

<p><b><u>H.B.</u></b> <b><u>250</u></b></p>	<p>Fiscal Year 2008 Appropriation Act.</p> <p>Section 33. Amend §5806 of Title 29 of the Delaware Code by inserting the following as a new subsection (i): Notwithstanding the provisions of 29 Del. C. c. 58, 59, 69 and the State Merit Rules of Personnel Administration, State employees may contract to provide foster care or respite care for individuals with fees paid for by the State provided further that the employee does so at other than assigned work hours. Additionally, these individuals are not permitted to participate in the review or disposition of any matter related to foster and/or respite care in which they have or may have a personal or private interest and may not be monitored or reviewed by other State employees who are more junior or related to them.”</p>	<p>Would appropriate \$204.9 for PIC personnel and operating costs.</p> <p>Foster Care. Health and Social Services. used budget bill to overturn PIC’s ruling that Department must follow the Ethics laws: (1) State agencies to publicly notice and bid contracts of more than \$2,000 if a State employee wants the contract and avoid the appearance that they may receive preferential treatment in the award of the contract or regulation by their own agency. Public notice and bidding would alert any citizen to the need for providers and declares that it needs more. (2) barring State employees from doing business with or being regulated by own agency. That bar is meant to insure State employees are not having their own colleagues or co-workers do not regulated their performance as a foster care provider, and that they not feel pressured by the Senior Level officials into taking on the foster care role, and may think they their State performance evaluations will be affected if they do not take the provider role. Department of Services for Children, Youth and Their Families complied with the law.</p>	<p>Jul 01, 2007 - Signed by Governor</p>
<p><b><u>H.B.</u></b> <b><u>271</u></b></p>	<p>Grants-in-Aid</p>	<p>Prohibits Grant recipients from using funds to pay elected official’s salary or benefits; or on political campaign; or to hire lobbyists.</p>	<p>Jul 01, 2007 - Signed by Governor</p>