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BRENDA KORMANDY, GARIS KORMANDY, JANICE HOSBACH, DAVID P. MORISETTE, and SANDRA S. MORISETTE, Plaintiffs, v. TOWN OF PHILLIPSBURG TOWN COUNCIL, governing body of the municipality, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION WARREN COUNTY Docket No.: WRN-L-248-21 Civil Action

TRIAL BRIEF OF DEFENDANT TOWN OF PHILLIPSBURG TOWN COUNCIL

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PRELIMINARY STATEMENT

This case involves objectors' attempt to manufacture a conflict of interest by alleging that individual governing body's limited representation by a medium size law firm results in an imputed conflict of interest to a separate construction entity that is purported owned by a named partner in said law firm.

The Phillipsburg Town Council adopted an ordinance approving amendments to a redevelopment plan. The designated redeveloper is Peron Construction ("Peron"), which Plaintiffs contend is owned by Michael Perrucci, Esq., a named partner in the law firm of Florio, Perrucci, Steinhardt, and Cappelli (the "Florio Firm").

In response to Plaintiffs' interrogatory requests, Phillipsburg disclosed that certain members received representation from the Florio Firm for litigation against Phillipsburg that named them in their official capacities. Phillipsburg's joint insurance fund appointed the Florio Firm, so the appointment was not made by the governing body. Additionally, one governing body member had personal representation by the Florio Firm for a municipal court matter totaling $7,000 and drafting and execution of instruments totaling $1,000. None of these representations were provided by Mr. Perrucci.

Contrary to Plaintiffs' contentions, the Florio Firm's representation of certain governing body members – by attorneys other than Mr. Perrucci – does not create an interest or personal involvement as to Mr. Perrucci placing them in conflict. The case law promoted by Plaintiffs is highly distinguishable and does not provide any parallel factual basis to support the extraordinary relief of setting aside a validly adopted ordinance.

For these reasons, there is no conflict of interest and Plaintiffs are not entitled to prerogative writ relief invalidating the ordinance.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On April 20, 2021, the Phillipsburg Town Council considered Ordinance 2021-14, titled "An Ordinance of the Town of Phillipsburg, County of Warren, New Jersey Adopting The District 5 (Riverside Industrual) Amendment – Riverfront Redevelopment Plan" (the "Ordinance"). Pf. Exh. 1. The Ordinance adopts amendments to Phillipsburg's Riverfront Redevelopment Plan, which comprises Block 2102, Lots 1, 2.01, and 2.02 on the official tax maps of the Town (the "Property"). Ibid. The redeveloper of the property – designated independent of and prior to adoption of the Ordinance – is Peron Construction, Inc. ("Peron"). Plaintiffs maintains that individual Michael Perrucci, Esq. is the owner of Peron based upon an uncertified website link.[1]

Each of the governing body members engaged in a colloquy regarding the merits of the proposed measure, as reflected in the meeting minutes. Pf. Exh. 12 at p. 9-10. It was introduced by a 3-2 vote, with Council President Frank McVey III, Vice President Robert Fulper, and Randy Piazza voting in favor, and Councilmembers Danielle DeGerolamo and Harry Wyant voting against the measure.

During the ensuing public comment period at this meeting, Plaintiff David Morisette questioned the governing body if any of its members were previously represented by the law firm of Florio, Perrucci, Steinhardt, and Cappelli (the "Florio Firm"). Pf. Exh. 12 at 16. This public

[1] Phillipsburg advised in its interrogatories that it "lacks sufficient information" to confirm if Mr. Perrucci owns Peron. Plaintiffs claim this response is "frivolous" and that such information is "accessible in [Phillipsburg's] own files." The subject interrogatory demanded an answer whether Perrucci owned Peron and the dates of such ownership from January 1, 2020 to the date of response. Phillipsburg has no means of knowing the precise ownership of Peron during a continuum of date ranges, and Plaintiff evidently has failed to obtain such information in a manner that can be certified to this Court.

comment is consistent with the gravamen of Plaintiffs' legal argument, claiming that Peron is owned by a Michael Perrucci, Esq., and that Perrucci is a named partner in the Florio Firm, presenting a conflict of interest.

The municipal attorney advised the councilmembers that they did not need to respond to this question as it was posed during the public petition section of the meeting, not a question and answer period. The municipal attorney also advised that the Florio Firm had represented the Town of Phillipsburg as assigned counsel by the Joint Insurance Fund. Ibid.

The Ordinance subsequently received final adoption on May 4, 2021 by the same 3-2 vote.

Plaintiffs filed the instant prerogative writ action challenging the validity of the Ordinance, specifically alleging that certain governing body members possessed conflicts relative to the Florio Firm. Plaintiffs propounded interrogatories inquiring of each of the governing body members whether they had "ever been provided legal advice or representation by any lawyer or other professional of the Florio Firm." Pf. Exh. 3A at p.4.

Consistent with the municipal attorney's representation at the April 20, 2021 meeting, Phillipsburg disclosed that in five specific cases, Phillipsburg was sued for various claims, and that certain members of the governing body were sued in their official capacities. Phillipsburg made a claim to its insurer, the Statewide Joint Insurance Fund, which in turn appointed the Florio Firm to defend Phillipsburg and its elected officials, including some members of the governing body that voted on the Ordinance. The following are the identified cases: Corcoran v. Town of Phillipsburg, WRN-L-24-20; Ellis v. Town of Phillipsburg, WRN-L-57-18; Post-Sheedy v. Town of Phillipsburg, WRN-L-59-18; Cappello v. Town of Phillipsburg, WRN-L-127-18; and Thompson v. Fulper et al., WRN-L-159-20. Phillipsburg also disclosed that Councilman McVey was represented in a personal individual capacity: (1) in 2018 by Donald Sauders, Esq. of the

Florio Firm in connection with a municipal court matter, with a total estimated cost of representation of $7,000[2]; and (2) in 2021 by Michael DeMarco, Esq. of the Florio Firm in connection with the drafting and execution of two legal instruments, with a total estimated cost of $1,000.

LEGAL ARGUMENT

I: THE ORDINANCE WAS PROPERLY ADOPTED AND NO DISQUALIFYING CONFLICT EXISTED BY ANY OF THE GOVERNING BODY MEMBERS.

A: Plaintiffs' Claims Fail to Satisfy the Applicable Legal Standards Governing Challenges to Municipal Ordinances on Conflict of Interest Grounds.

"As a general principle, a municipal ordinance is afforded a presumption of validity, and the action of a board will not be overturned unless it is found to be arbitrary and capricious or unreasonable, with the burden of proof placed on the plaintiff challenging the action." Grabowsky v. Twp. of Montclair, 221 N.J. 536, 554 (2015). A challenge to a municipal ordinance on conflict-of-interest principles is based upon the "entitlement to a fair and impartial tribunal," which is administered by the common law disqualifying public officials from acting when they have "a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body." Id. at 551 (quotations omitted).

At the same time, "[a] court's determination 'whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case.'" Id. at 554 (quoting Van Itallie v. Borough of Franklin Lakes, 28 N.J. 258, 268 (1958)). "[T]he nature of an official's interest must be carefully evaluated based on the circumstances of the

[2] Contrary to Plaintiffs' allegation of a "highly misleading response," Phillipsburg accurately disclosed in its interrogatories that McVey retained the Florio Firm in connection with a "municipal court matter." Evidently, Plaintiffs do not like this neutral, accurate description because it does not provide them an opportunity to malign the Councilman for the underlying matter in which he was charged.

specific case." Ibid. (citing Van Itallie, 28 N.J. at 268). "The ethics rules must be applied with caution, as '[l]ocal governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official.'" Ibid. (quoting Wyzykowski v. Rivas, 132 N.J. 509, 523 (1993)).

For the reasons set forth herein, Plaintiffs' allegation that the governing body members were conflicted because they had past representations involving the Florio Firm by attorneys other than Mr. Perrucci – and Mr. Perrucci is a principal in Peron Construction – fails. Plaintiffs' impermissibly seek to manufacture a conflict that is "remote and speculative" and cannot overcome the presumption of validity that attaches to a municipal ordinance.

B: The Phillipsburg Governing Body Members Do Not Have a Conflict Relative to Mr. Perrucci or Peron Construction.

Plaintiffs allege that the Phillipsburg governing body members possessed disqualifying conflicts of interest under the Local Government Ethics Law, N.J.S.A. 40A:9-22.1, et seq. The relevant provision cited by Plaintiff provides as follows:

> No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment[.]
>
> [N.J.S.A. 40A:9-22.5(d)].

Under this provision, in order for Plaintiffs to state a conflict, they must establish that the individual Phillipsburg governing body members had an "interest" or "financial or personal involvement" that may impair their judgment.

Based upon the legal argument set forth in Plaintiffs' complaint and trial brief, Plaintiffs set forth a potential basis for certain governing body members to possess a conflict of interest as to the Florio Firm – because that firm provided certain legal representations to them. For example,

if the Florio Firm were seeking a redevelopment designation before the Phillipsburg governing body, Plaintiffs' argument would follow. But that is not what Plaintiffs are claiming.

Instead, Plaintiffs argue for the imputation of a potential conflict that governing body members may have with the Florio Firm – to an entirely separate entity, Peron Construction Inc. – merely because the entities purportedly share a common officer, Mr. Perrucci. Plaintiffs fail to allege – let alone establish – any factual basis that connects the governing body members to Perrucci, placing them into conflict with his entity, Peron.

Plaintiffs have bombarded this Court with hundreds of pages of court filings, yet not one of them was filed by Mr. Perrucci. Instead, these pleadings have each been filed by other attorneys of the Florio Firm. The only potential linkage that Plaintiffs can argue is that Mr. Perrucci's name is contained on the filings, because he happens to be a named partner of the Florio Firm.

Plaintiffs cannot manufacture a conflict because of a law firm's named partner, especially when considering its large size. Based upon the Florio Firm's website, which Plaintiffs themselves rely upon, it holds itself out as having forty-eight (48) attorneys across six different offices. Attorneys, *Florio, Perrucci, Steinhard, Capelli Tipton & Taylor* LLC (May 4, 2022), https://www.floriolaw.com/attorneys/; Contact, *Florio, Perrucci, Steinhard, Capelli Tipton & Taylor* LLC (May 4, 2022), https://www.floriolaw.com/contact/. Contrary to what Plaintiffs would like to portray, the Florio Firm is not a small law firm in which interaction with Mr. Perrucci could potentially be implied. Rather, it is a large size law firm that represented the Phillipsburg governing body members in limited capacities, along with hundreds if not thousands of other clients.

In one set of instances, certain governing body members were sued in their official capacities, and Phillipsburg's joint insurance fund insurer appointed the Florio Firm to provide representation to Phillipsburg and the individual governing body members in their official

capacities. Such litigation against municipalities and appointment of counsel by a joint insurance fund is commonplace. Because the firm was appointed by the carrier, the governing body members never voted upon the Florio Firm to be their legal representative. In each of the litigations, the governing body members were sued in their official capacities and indemnified for the subject claims. While certain lawsuits may allege counts seeking punitive damages in which indemnification may not apply, these mere allegations do not provide Plaintiffs with any reasonable basis to claim that the governing body members were therefore thrust into legal "jeopardy" that somehow creates a conflict for them as to Perrucci or Peron.

In the other instance, Councilman McVey disclosed that he had two limited private representations by the Florio Firm. First, in 2018, he was represented by Donald Souders, Esq. of the Florio Firm in connection with a municipal court matter, with a total estimated cost of representation of $7,000. Second, in 2021, McVey was represented by Michael DeMarco, Esq. of the Florio Firm in connection with the drafting and execution of two legal instruments, with a total estimated cost of $1,000. McVey's procurement of these limited legal services from two attorneys at the Florio Firm does not present any reasonable basis upon which he would be placed into conflict with Perrucci or Peron.

In sum, Plaintiffs fail to establish how any of Phillipsburg's governing body members have an impermissible "interest" or "direct or indirect financial or personal involvement" with Perrucci or Peron. For these reasons, Plaintiffs' claim of an impermissible conflict requiring invalidation of the Ordinance must be rejected.

C: None of the Cases Promoted by Plaintiffs Support Their Claims.

Plaintiffs cite four cases in their brief that address conflicts of interest. Following a fair reading of the cases, and recognizing that all conflict of interest matters are fact-sensitive, it is clear that these cases do not support Plaintiffs' claim that a conflict of interest.

Plaintiffs promote dicta in a conflict of interest case decided by our Supreme Court, Piscitelli v. City of Garfield Zoning Bd. of Adjustment, 237 N.J. 333 (2019), but a fair reading of that case does not support Plaintiffs' proposition that a conflict exists. In Piscitelli, members of the Conte family sought site plan approval and variances to build a gas station, car wash, and quick lube. Id. at 339. Two of the three lots were co-owned by irrevocable trusts of Dr. Kenneth S. Conte and Dr. Daniel P. Conte, Jr. ("Dr. Daniel") Ibid. The latter personally owned the third lot. Ibid. A trust benefiting Dr. Kenneth's nephew, Dr. Daniel P. Conte, III ("Dr. Daniel III") – and his two nieces – applied for the development approvals. Id. at 338-39. Dr. Kenneth S. Conte, Dr. Daniel, and Dr. Daniel III all practiced medicine in the adjacent medical building that was owned by Dr. Kenneth and Dr. Daniel, Jr. Id. at 339. Before the Board, "Dr. Kenneth left no doubt about his interest in the project to the Zoning Board," and even attacked the plaintiff's standing to object. Id. at 355. The Court wrote that "Dr. Kenneth's manifest interest in his family's project" by a "property owned, in part, by a trust in his name when the development application was filed" was "self-evident." Id. at 356.

To start, the Supreme Court stated that it "bears emphasizing" that "Dr. Daniel and Dr. Daniel III stood to financially benefit" if the approvals were granted. Id. at 358. On these facts, the Court held there would be a conflict if a "[b]oard member or his or her immediate family member had a *meaningful* patient-physician relationship with any of th[e] three doctors during or before the Board proceedings." Id. at 359. The Court "reach[ed] th[is] conclusion" based upon "the

special nature of the patient-physician relationship -- a relationship in which the patient 'reposes the greatest trust for health-care decisions' in the hands of the physician." Id. at 359.

> Physicians are responsible for caring for and maintaining the physical and mental health of their patients so that they can enjoy productive and happy lives. In that light, the deep bonds that develop between patients and their physicians are understandable.
> Physicians every day diagnose and treat patients for the mild and malignant maladies that afflict the human body and mind. It would be natural for a patient to owe a debt of gratitude to a doctor who has removed a cancerous lesion from the skin, repaired a shoulder injury, replaced a knee, set a broken bone, performed heart or kidney surgery, delivered a child, prescribed life-enhancing or -saving medications, provided psychiatric therapy, or every year treated symptoms for the common cold or flu. It is not unusual for a physician to treat a family over the course of decades.
>
> A person may have difficulty judging objectively or impartially a matter concerning someone to whom he would naturally feel indebted. By any measure, under the conflict-of-interest codes previously discussed, we cannot expect Zoning Board members to have a disinterested view of a doctor with whom they, or immediate members of their family, have had a meaningful patient-physician relationship.
>
> We cannot here fully limn the contours of what would constitute a meaningful patient-physician relationship because that may depend on the length of the relationship, the nature of the services rendered, and many other factors. The determination will be fact specific in each case. A few examples, however, should provide some guidance. On one end of the relationship spectrum may be the physician who, once five years ago, merely inoculated the patient with a flu shot, and on the other end may be the physician who, ten years ago, performed a life-saving heart transplant. A primary-care physician who examines a patient annually and tends to the patient's health-care issues as they arise or the surgeon who performs a life-altering or -enhancing procedure will fall within the sphere of a meaningful relationship that should prompt disqualification.
> [Id. at 359-60].

The Court did not reverse the application. Rather, it remanded so that the trial court could engage in further fact finding consistent with the opinion. Id. at 362.

The instant case is distinguishable from Piscitelli for numerous reasons. First, the Piscatelli case involved a conflict arising from the patient-physician relationship, which the Court found to establish "deep bonds" resulting in a patient feeling "indebted" because they could treat a patient for "maladies that afflict the human body and mind" for "the course of decades." It noted how a conflict would exist with a doctor that performed "a life-altering" surgery or annually provides a patient's care. While legal representation concededly involves an attorney-client relationship resulting in a privilege attaching, Plaintiff does not cite any legal proposition that stands for any similar "deep bonds" that would arise by virtue of an individual that is responsible for and helps nurture the individual's personal health and performs medical procedures on them.

Even if it did, the Piscatelli case afforded a remand to determine if any of the Board members had a patient-physician conflict with any of the three doctors that were involved with the subject application. In this case, the record does not establish any legal representation of Phillipsburg governing body members by Mr. Perrucci. While some of his forty-eight attorney colleagues may have afforded them limited representation, this does not create a fact pattern that is in any way analogous to the three doctors – who were all family – and intimately involved in their family's medical practice and land dealings.

Second, Plaintiffs promote Haggerty v. Red Bank Borough Zoning Bd. of Adjustment, 385 N.J. Super. 501 (App. Div. 2006), but again this case is distinguishable. In that case, a zoning board chairman recused because he practiced at a law firm and his law partner had represented "one or both" of the applicants in the past. Id. at 505. At the same time, the vice chairman did not recuse, even though her father was "of counsel" at that same law firm. Id. at 505-06. On appeal, discovery revealed that "throughout the proceedings before the Board, [the applicant], who had a clear and distinct interest in the Red Bank proceedings, was being represented by [the subject law]

firm." Id. at 515-16. On these facts, the Appellate Division found that the vice chair's father's "of counsel" position gave him "a sufficient stake in the financial viability of the firm as to impute to such individual any disqualification of the firm arising from client representation by partners or associates in the firm." Id. at 516. Unlike this case, the Phillipsburg governing body members are not law partners in the Florio Firm. They merely happened to be represented by it in certain limited capacities. These elected officials lack any financial stake in the Florio Firm, and they lack any financial stake in Mr. Perrucci or Peron.

In contrast, in Petrick v. Planning Board of Jersey City, the court found no conflict where a planning board's site plan approval was challenged on the basis that a board member was in conflict by virtue of the fact that his wife was an employee of the applicant, a local hospital. 287 N.J. Super. 325, 328 (App.Div.1996). The court found no conflict of interest because the wife's employment with the hospital was occasional. Id. at 331. The court also noted that there was no evidence to suggest that the board member's wife's employment status "would be enhanced by the passage of the parking garage resolution" Id. at 332, concluding that the relationship of the board member's wife with the hospital was too remote and too attenuated to disqualify [the board member] from voting on the hospital's application for site plan approval. Id.

Here, Plaintiffs fail to demonstrate any direct or indirect interest involving Mr. Perrucci or Peron to the members of the governing body. Furthermore, the record is devoid of any evidence indicating that any of the voting members stand to procure a benefit from the passing of the Ordinance. The mere fact that some of Mr. Perrucci's forty-eight attorney colleagues may have provided limited representation to the governing is too remote and too attenuated to create an impermissible conflict warranting invalidation of the Ordinance.

CONCLUSION

For the foregoing reasons, Plaintiffs' claim of an impermissible conflict requiring invalidation of the Ordinance must be rejected.

Respectfully submitted,

/s/*Matthew C. Moench*
Matthew C. Moench, Esq.

Dated: May 13, 2022