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Supreme Court Addresses Summary Actions and Conflicts of Interest

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The New Jersey Supreme Court's opinion in *Grabowsky v. Township of Montclair*, 221 N.J. 536 (June 15, 2015), provides guidance for evaluating whether conflicts of interest exist when officials participate in governmental actions that might benefit the officials' family or organizations in which the officials are involved, while reminding judges to avoid sua sponte summary dismissals.

The case arose out of a familiar fact pattern. Fountain Square proposed to build an assisted living facility in Montclair, on property that had previously been declared an area in need of redevelopment under the Local Housing and Redevelopment Law. It requested that Montclair's township council adopt ordinances permitting a near variance-free site plan application. The council, after referral to the planning board, adopted ordinances amending the redevelopment plan as requested, except for the proposed height.

Richard Grabowsky, "a citizen of Montclair and an owner and developer of numerous commercial properties" in Montclair's downtown area, filed an action in lieu of prerogative writs seeking to invalidate the ordinances because the votes in favor of the ordinances of Mayor Jerry Fried and Councilman Nick Lewis allegedly were tainted by conflicts of interest. Grabowsky also sought a preliminary injunction preventing planning board review of an application pursuant to the ordinances. The Law Division judge denied this preliminary injunction, enforcing the principle that the courts should not restrain governmental entities from performing legislative or discretionary acts within their jurisdiction. See, e.g., *Passaic Jr. Chamber of Com. v. Passaic Housing Auth.*, 45 N.J. Super. 381, 392 (App. Div. 1957). But the judge also ruled, "[c]ontrary to the assertions of the parties here," that the case could be resolved in a summary manner, and dismissed the complaint.

The Appellate Division held that the trial judge improperly invoked the summary disposition procedure, noting that no party had filed a summary disposition motion under Rule 4:67-1, nor had the parties consented to this summary procedure. The appellate court nevertheless affirmed the trial judge's dismissal on the merits.

The New Jersey Supreme Court's unanimous opinion by Justice Anne Patterson reversed and remanded the case to the Law Division. The court affirmed the Appellate Division's reversal of the summary

disposition, concluding that this "denied plaintiff a fair opportunity to pursue his claim." Justice Patterson also addressed Grabowsky's conflict of interest claims under the common law, the Municipal Land Use Law and the Local Government Ethics Law.

The courts apply an objective test to determine whether members of the public could reasonably interpret the circumstances of a case to establish a likely capacity to tempt an official to depart from his or her public duty. Proof of dishonesty is not required. Conflicts of interest arise when public officials have interests not shared in common with others. The courts cite four situations requiring disqualification: (1) direct pecuniary interests, when officials participate in matters benefitting their own property or affording them a direct financial gain; (2) indirect pecuniary interests, when officials participate in matters financially benefitting people closely tied to the officials, such as employers or family members; (3) direct personal interest, when officials participate in matters benefitting blood relatives or close friends in nonfinancial ways, but in matters of great importance; and (4) indirect personal interest, when officials participate in matters in which their membership in organizations may affect their judgment because they may intend to help the organizations further their policies.

The Land Use Law also declares that an official may not "act on any matter in which he has, either directly or indirectly, any personal or financial interest." N.J.S.A. 40:55D-23(b). In contrast, the Ethics Law, which was adopted in 1991, states that a local government officer or employee may not act in his official capacity if "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 [.] [emphasis added]." N.J.S.A. 40A:9-22.5(d). This law defines three of the terms used in this section—but not "involvement."

Justice Patterson asserts in footnote 5 that the legislature did not indicate whether "involvement" should "have a broader reach than the term 'interest[.]'" She concluded that the court "need not reach the issue of whether there is a distinction between the terms used in the two statutes because the public officials' personal 'interest' that plaintiff alleges would, if proven, also constitute their 'personal involvement' in the matter."

Grabowsky claimed that Fried had a direct personal interest because, at "one of the public hearings," he commented "that an assisted living facility would benefit him because he could admit his mother to the facility." Grabowsky thus attempted to extend *Barrett v. Union Township Committee*, 230 N.J. Super. 195 (App. Div. 1989), which held an official had a conflict when he voted in favor of an ordinance that would facilitate the approval of a continuing care facility on a lot that was owned by the operators of a nursing home that was located on an adjacent lot in which his mother was a resident.

Justice Patterson refused to extend *Barrett*, stating "there is no evidence that Fried's mother depended on the proposed developers of the assisted living facility for her medical care." Fried's alleged statement therefore "does not distinguish him from any other member of the community who is responsible for an

elderly family member and would welcome a local facility for that relative's care." Because of the incomplete record on appeal, the court remanded this claim and directed the parties to stipulate to the facts; if they could not do so, the trial court was to "permit limited discovery" about Fried's statement and its "background."

Grabowsky also claimed that Fried and Lewis had indirect personal interests because they were members of a church that was adjacent to the property to be redeveloped. The court adopted a bright-line rule holding that, although the church took no position on the ordinances, it had an interest in the matter because its property was within 200 feet of the property to be developed.

Justice Paterson nevertheless rejected a "bright-line rule under which the interest of a church or other organization is automatically imputed to all of its members." Although suggesting that this imputation "ordinarily" might follow, the court held that the courts must evaluate this issue "on a case-by-case basis" because "there may be circumstances in which automatic imputation ... may be unwarranted or unjust," if, for example, an official's membership does not "necessarily denote active involvement in the group or awareness of the position it takes in a legal dispute." The courts must evaluate the evidence of an official's "substantive leadership" roles in his or her organization because these leaders might try to advance the organization's interest over the public interest.

The court also remanded this claim and directed the parties to attempt to stipulate the facts "regarding the nature and timing of any leadership roles" that Fried or Lewis "assumed, or were expected imminently to be assumed ... at the relevant time." If the parties could not do so, the trial court was to permit "limited discovery" on this issue.

A footnote directs trial courts to "carefully limit discovery to the precise issue to be decided, to avoid fishing expeditions that may deter community volunteers from entering public service." The Appellate Division addressed this concern in a case in which a local hospital that was proposing a health club advocated land use ordinance amendments permitting health clubs. The trial judge permitted the plaintiff alleging a conflict of interest to depose governing body and planning board members and ask about any medical treatments they or their families may have had at that hospital. The appellate court called this discovery "overly broad and unnecessarily intrusive" because the plaintiff had not made a "clear showing" that any of these officials "has a personal or financial interest" in the hospital. *Mahwah Realty v. Township of Mahwah*, 420 N.J. Super. 341, 353 (App. Div.), certif. denied, 208 N.J. 599 (2011).

The take way from the *Grabowsky* decision, then, is that it reiterated and applied "long-standing" principles that "should not deter public officials from becoming involved in private organizations." Litigants challenging governmental actions still must establish that conflicts are not too remote, speculative or fanciful. The Appellate Division's July 20 unpublished opinion in *Committee to Stop Mahwah Mall v. Township of Mahwah*, 2015 N.J. Super. LEXIS 1725 (App. Div. 2015), reaffirmed this rule and held that a councilman did not have a conflict of interest when he voted for a land use ordinance that was

advocated by an entity that had donated money to a local school foundation in which the councilman was a trustee. Unlike the church in *Grabowsky*, this school foundation was not an interested party in the ordinance.

Governmental lawyers may nevertheless recommend recusal if they have any doubt about an official's leadership role in an interested organization, and they should advise officials to avoid making stray comments about matters that could lead to years of costly litigation. The sua sponte dismissal reversal should not deter trial judges' efforts, at the initial Rule 4:69-4 conferences, to schedule motions, discovery, briefing and trials in actions in lieu of prerogative writs.