



# MUNICIPAL NEWS



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This bulletin addresses recent developments affecting municipalities and local governments in New Jersey.

The Firm's Municipal / Local Government practice, headed by Joel A. Kobert, along with Lawrence P. Cohen, Michael S. Selvaggi, Michael B. Lavery, John E. Ursin, Howard A. Vex, Katrina L. Campbell and Robert B. McBriar, is one of the largest in North-west New Jersey, representing many school boards, municipalities and local government entities.

## FAILURE TO TAKE CONCRETE ACTION ON AFFORDABLE HOUSING MAY HAVE DRASTIC CONSEQUENCES

Recently the Court sent a clear message to municipalities that have flouted their responsibility to take official action to provide for affordable housing. In Landmark at Radburn, LLC, et als v. Borough of Fairlawn, et als., BER-L-8226-07, the Court declared that a municipality's failure to comply with its constitutional obligation to provide affordable housing may result in the Court Ordering site specific builder remedies, the usurpation of municipal legislative power by a court-appointed special master and monetary damages.

Fairlawn was required to provide a specific number of affordable housing units based upon the formula established by the Council on Affordable Housing ("COAH"). For numerous years, Fairlawn put forth proposals and ideas, but failed to enact any ordinances to further its obligation to actually provide for affordable housing. As a result, the developer instituted an action against Fairlawn, alleging that its failure to act constituted exclusionary zoning. Fairlawn resisted the lawsuit by contending, in part, that the proposals and studies that were prepared and debated by Borough officials were sufficient to demonstrate compliance with their obligation to pursue a plan to provide affordable housing.

The Court flatly rejected Fairlawn's position that mere proposals, studies, debate and ideas were sufficient to satisfy a municipality's obligations. Rather, the Court found that Fairlawn's land use ordinances were unconstitutional. The Court further appointed a special master to assist the municipality in meeting its constitutional obligation, all at the municipality's sole cost and expense. Finally, the Court held that the builder was entitled to proceed through litigation to prove that it was entitled to a site-specific builder's remedy.

A review of the Court's decision makes it clear that a municipality's failure to take official action to provide for affordable housing may have extreme and dire consequences. A municipality may lose its ability to determine where, when and how the

obligation will be satisfied. The municipality may be saddled with the high cost of paying a special master to perform the obligations that the municipal officials failed to do. It may also be subject to a site-specific builder's remedy and face a potential monetary judgment. Accordingly, municipalities should take all necessary steps to ensure that they are in compliance with their affordable housing obligations by enacting appropriate ordinances aimed at satisfying their responsibility. Proposals, studies and debate will not suffice.

## New Jersey Appellate Division Lashes Out Against Conflicts of Interest

The New Jersey Appellate Division may have dramatically narrowed the number of persons eligible to serve on local land use boards. In Randolph v. City of Brigantine Planning Board, the Court declared that the need for "unfettered objectivity" outweighs any potential difficulties for a small municipality to find individuals to serve on local boards.

William Randolph was angry that the planning board approved an application for a hotel. He believed there was a conflict of interest between the Board's chairwoman, Rose Roberts, and the Board's Engineer, Edward Stinson. Ms. Roberts lived with the owner of Doran Engineering, Matthew Doran, who employed Mr. Stinson. Mr. Randolph alleged that this was improper and tainted the board's actions. This case was an issue of first impression, as the alleged conflict did not directly implicate the applicant, but involved a board member and a board professional.

The Court agreed with Mr. Randolph. It determined that there was a conflict of interest because Mr. Doran supervised Mr. Stinson, and therefore it was reasonable for the public to assume his supervision may include the work Mr. Stinson did for the board. Also, Ms. Roberts acknowledged that reports generated by Mr. Stinson was given significant weight in the board's evaluation of an application. Further,

Ms. Roberts had a personal interest in the reappointment of Mr. Stinson, as it would benefit Mr. Doran's engineering firm.

It is interesting to note that the Court found an impermissible conflict of interest existed even though Ms. Roberts recused herself from the second hearing, when the vote on the application was taken. The Court held that Ms. Roberts and Mr. Doran's personal involvement might reasonably be expected to impair Ms. Roberts impartiality. Consequently, (because Ms. Roberts participated in the first Board hearing), the Board proceedings were void in their entirety.

It is clear that the New Jersey Appellate Division intends to take conflicts of interest extremely seriously. In Randolph, the conflict did not involve the applicant. In fact, the applicant was an innocent party. The court obviously wanted to advise local officials that they must be careful when appointing people to serve and avoid any appearance of impropriety. Thus, going forward, it is important to be aware of this ruling, because the failure to do so may undermine a local board's actions.

## E-MAIL COMMUNICATIONS: THE UNTHOUGHT-OF PUBLIC MEETING

As technology continues to advance, it often creates previously unthought-of consequences. For instance, electronic communications circulated among public officials may qualify as a "public meeting" under the Open Public Meetings Act. As you already know, all meetings where a quorum of the public body will be present must be advertised and open to the public. However, the term "meetings" is also defined to include electronic communications among elected and public officials. While many might not think of a series of e-mails as being a "meeting", they can be if those e-mails are used by elected officials to exchange ideas, "discuss" an issue, or reach decisions. In short, e-mail exchanges will constitute a public meeting if they accomplish those objectives that usually take place at a public meeting where elected officials are physically present. Therefore, think twice before you hit the "Reply" button.

It is also important to remember that e-mails exchanged between elected officials and the municipal staff which do not violate the Open Public Meetings Act may still be considered public records under the Open Public Records Act. For this reason, elected officials and municipal staff should refrain from including comments in an e-mail that they would not want to read about in the newspaper. Elected and public officials should also be careful using their workplace e-mail account for personal use. The workplace e-mail account may be subpoenaed in litigation and members of the governing body could be required to produce their hard drives. Therefore, it is recommended that every municipality adopt a policy that prohibits public or elected officials from using their municipal e-mail accounts for personal business.

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