

2006 WL 1161361

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Law Division, Monmouth County.

BEACON HILL FARM, LLC, Saul P.
Schwartz, Arlene Schwartz, Russell B.
Reeves, and Kathleen C. Reeves, Plaintiffs,

v.

TOWNSHIP OF MARLBORO, the Mayor
and Township Council of the Township of
Marlboro, and Joseph Pernice, Defendant.

Marlboro Holdings, Llc, Plaintiff,

v.

Township of Marlboro and Mayor and Township
Council of the Township of Marlboro, Defendants.

James and Patrick Smith, Plaintiffs,

v.

The Mayor and Township Council of the Township
of Marlboro and Marlboro Township, a Municipal
Corporation of the State of New Jersey, located
in Monmouth County, New Jersey Defendants.

Kenneth Stattel, Robert Stattel
and William Stattel, Plaintiffs,

v.

The Township Council of the Township
of Marlboro, New Jersey, Defendants.

Angelo D'Arpa, Carlo D'Arpa and
Gioacchino D'Arpa, Plaintiffs,

v.

The Mayor and Township Council of the Township
of Marlboro and Marlboro Township, a Municipal
Corporation of the State of New Jersey, located
in Monmouth County, New Jersey Defendants.

Decided April 28, 2006.

Synopsis

Background: Resident brought action against township
council, seeking to invalidate zoning ordinance.

Holding: The Superior Court, Law Division, Monmouth
County, [Lehrer, J.](#), held that township council president was
required to physically remove himself from the council during
zoning ordinance debate after he recused himself.

Ordered accordingly.

Attorneys and Law Firms

[Robert F. Munoz](#), for plaintiff Beacon Hill Farm. LLC
(Lomurro, Davison, Eastman & Munoz).

[Michael A. Pane](#), for plaintiffs Marlboro Holdings, LLC, and
Angelo D'Arpa, et al (Giordano, Halleran & Ciesla).

[Jonathan M. Heilbrunn](#), for plaintiffs James and Patrick Smith
(Heilbrunn, Pape & Goldstein, LLC).

[Francis C. Accisano](#), for plaintiff Kenneth Stattel, et al
(Francis C. Accisano Law Offices).

[Andrew Bayer](#), for defendant Township of Marlboro, et al
(GluckWalrath, LLP).

[LEHRER, J.](#)

OPINION

*1 Joseph Pernice has been a member of the Township
of Marlboro Council since January 2004, and, in 2005, he
was appointed Council President. As Council President, Mr.
Pernice directs the debate on all matters of public comment,
he recognizes the persons who address the Township Council,
recognizes the Council Members who wish to speak, and
requests that the clerk conduct a roll call vote of the Township
Council once public discussion has been completed. He
controls the meeting and conveys to the public the power to
control the legislative process.

The LC Ordinance was one of many zoning ordinances
considered by the Marlboro Township Council in the summer
of 2005 to bring zoning consistent with the new Land Use
Element of the Township's Master Plan adopted in February
2005. The LC Ordinance changed the zoning of hundreds of
lots in Marlboro from a minimum density of 1 residential unit
for every two acres to a minimum density of 1 residential unit
for every five acres.

The LC Ordinance was introduced for first reading by the Township Council at the July 14, 2005 public meeting. When Council President Pernice arrived to preside over the meeting, he discovered Angelo D'Arpa in attendance. Mr. D'Arpa was one of the property owners impacted by the LC Ordinance. Council President Pernice knew Mr. D'Arpa for a number of years and Mr. D'Arpa's brother is married to Council President Pernice's cousin. Prior to Mr. Pernice's tenure as a member of the Township Council, he consulted with Mr. D'Arpa in Mr. D'Arpa's capacity as a real estate agent, but never purchased any of the properties that were shown to him by Mr. D'Arpa. Based upon the involvement of Mr. D'Arpa, Council President Pernice recused himself from the consideration of the LC Ordinance. After recusal, Mr. Pernice continued to sit with Counsel and act as its President, but did not vote on the first reading.

On the August 11, 2005 the Township conducted a second reading of the LC Ordinance. Council President Pernice reiterated his conflict and again indicated his recusal from consideration of the LC Ordinance. He stated:

"I just want to state for the record, at the last meeting that we had, the first meeting July 14th, I recused myself due to I had a known individual who I dealt with as well as a relative that is an objector to this. So I'm going to recuse myself again. I just want to make it clear for the record, it's related to one block and one lot of this resolution and ordinance".

Council President Pernice did not have any substantive participation in the public hearing held on August 11, 2005; however, he performed his function as Council President; he recognized persons who wished to address the Township Council; he recognized Council Members who wanted to speak; he directed the debate; he controlled the meeting; and clearly conveyed to the public the power to control the process. The Ordinance was carried by the Township Council for consideration at its next public meeting.

*2 On September 8, 2005 the Marlboro Council considered and voted on the LC Ordinance. Council President Pernice did not make any substantive comments regarding the LC Ordinance prior to the vote, and did not participate in the vote. However, he conducted the meeting, called for the vote and again created the appearance he was in charge of the process.

After the vote to adopt the LC Ordinance, Council President Pernice made a substantive comment about that Ordinance. He stated:

"The previous ordinance that I recused myself, I recused myself because I believe there was a conflict, and it was my decision. And I ran on a platform of honesty and integrity as well as stopping development. But I will have to say that because of that one parcel I've removed myself. I believe that the master plan, the scope of the master plan was to control overdevelopment. If I had the opportunity to vote on that one previously I would have probably, I would have voted yes with it."(T2:57-1-10).

The Court holds the actions of the Council President, Joseph Pernice, in presiding over and conducting the meetings concerning the adoption of the LC Ordinance vitiates the action of the Council in its adoption.

Mr. Pernice indicated at the outset of the hearings that he was disqualified from acting on the Ordinance. Notwithstanding his opening remarks, Mr. Pernice continued to conduct the meetings and direct the proceedings which considered the adoption of the Ordinance. This action clearly conveyed to the public control of the process.

A public office is a public trust. As fiduciaries and trustees of the public interest, elected officials must serve that interest with the highest fidelity. *Aldom v. Borough of Roseland*, 42 N.J.Super. 495, 500, 127 A.2d 190 (App.Div.1956).

At common law, a public official is disqualified from participating in a proceeding in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of a public body. *Paruszewski v. Tp. of Elsinboro*, 154 N.J. 45, 58, 711 A.2d 273 (1998); *Wyzykowski v. Rizas*, 132 N.J. 509, 523, 626 A.2d 406 (1993).

In 1991, the Legislature adopted *N.J.S.A. 40A:9-22.5 et seq.*, the code of ethics for local government offices. The code prohibits a local government officer from acting in an official capacity where the official has a direct or indirect and/or personal interest that might reasonably be expected to impair objectivity or independence of judgment. *N.J.S.A. 40A:9-22.5(d)* and (e). Here, the conflict and disqualification is not in doubt; it was recognized and declared by Mr. Pernice.

In *Scott v. Bloomfield*, 94 N.J.Super. 592 (Law Div.1967), *aff'd* 98 N.J.Super.(App.Div.1967), *appeal dismissed* 52 N.J. 473, 246 A.2d 129 (1968), the court held that the mayor's presence at five private and public meetings and his continuing to preside at the council meetings established a

conflict between his holding public office and his being a member and director of the Boys' Club. Although he did not vote on the resolution to lease township property to the Boys' Club, his presence at the meetings tainted the actions of the town council. The court stated at page 507-508:

*3 “... the infection of the concurrence of the interested person spreads, so that the action of the whole body is voidable”.

The significant participation of a recused public official in the hearing poisons the impartiality of the board's quasi-judicial proceedings and, as such, the board's action must be reversed. *Szoke v. Zoning Bd. of Adjustment*, 260 N.J.Super. 341 (App.Div.1992).

A recused public official's actions cannot be capable of forming a part of or affecting the deliberative process. The spirit of impartiality must govern the public body's proceedings. *Baghdikian v. Bd of Adjustment Ramsey*, 247 N.J.Super. 45, 48 (App.Div.1991).

Conduct totally incompatible with noninvolvement and recusal requires the public body action be voided. *Szoke, supra*, at pg. 345; *Barrett v. Union Tp Committee*, 230 N.J.Super 195, 200 (App.Div.1989). Significant participation of a public official after recusal is not remedied by the fact the public official does not vote. *Szoke, supra*, at pg. 345.

In *Darrell v. Governing Body of Township of Clark*, 169 N.J.Super. 127, 132, *aff'd* 82 N.J. 426, 413 A.2d 610 (1980), the Court *in dicta* stated:

“Although we affirm the trial court disposition of this unfortunate issue, we feel constrained to voice our vigorous and unequivocal disapproval of the action of one who deems himself disqualified from a vote but nevertheless uses his office, and whatever influence he may wield, to influence the votes of others. An official disqualified to vote on any measure, for any reason, must observe the substance as well as the form of his abstention”.

No New Jersey authority explicitly requires a public official to remove himself from the presence of the public body after recusal if that public official does not enter into the debate or participate in the vote. However, under the circumstances presented here, the Court finds *Cox, New Jersey Zoning and Land Use Administration* (2006) § 3-2 at page 55-58, persuasive. The author states at page 55:

“When a board member is disqualified from acting, either upon the members own initiative or a board determination that the member has an interest in the subject matter of the application, the member should physically remove himself from the presence of the board and either leave the room or take his place among the general public or in the place reserved for the general public. Said disqualified member may not sit with the board either in public or private session thereafter at any time that the board is considering the particular application. Where a board member, after disqualification, continues to sit with the board, even though he takes no active part in consideration of the application, the board's action may be set aside by a reviewing court. See *Scott v. Bloomfield* 94 N.J.Super. 592, 600-601 (*Law Div.*1967) *aff'd* on other grounds 98 N.J.Super. 321 (*App.Div.*1967) *appeal dismissed* 52 NJ473 (1968); *Aldom v. Borough of Roseland*, 42 N.J.Super. 495, 500 (*App.Div.*1956); *Darrell v. Governing Body of Township of Clark*, 169 N.J.Super. 127, 132-133 (*App.Div.*1979), *aff'd* on other grounds 82 N.J. 426, 413 A.2d 610 (1980).

*4 Here, Mr. Pernice declared himself in conflict and disqualified himself from the debate and the vote. Notwithstanding the conflict, he continued to sit with the Township Council and act as its presiding officer during questions, discussions, public deliberations and adoption of the subject ordinance. He directed the debate and conveyed to the public that he controlled the process. A fair reading of *N.J.S.A. 40a:9-22.5*, New Jersey cases, and authorities prevents Mr. Pernice from acting in any official capacity after the declaration of conflict to include sitting with the Council, presiding over the proceedings and directing the debate.

The effect of continued participation on the debate, the process, and the public can never be known or measured. There is no way to tell if the debate was stifled, public

sentiment affected, or the votes or opinions of others influenced. Therefore, a public official disqualified to vote on any measure, for any reason, must observe the form as well as the substance of said recusal. It is not sufficient for that official to only decline to vote. The official must avoid any action that may have the potential, or appear to have the potential, to influence the vote, the debate or the process. *Darrell v. Governing Body of Township of Clark, supra* at pg. 132.

Once it is established that a public official has a conflict of interest, any official action taken taints the process and the action must be invalidated. The mere existence of a conflict, and not its actual effect, requires the municipal action to be invalidated. *Griggs v. Borough of Princeton, 33 N.J. 207, 220,*

162 A.2d 862 (1960; *Friends Retirement v. Bd. of Ed.*, 356 *N.J. Super.* 203, 217 (App.Div.2002)). Where a public official indicates that he or she is disqualified because of a conflict, such public official may not continue to sit with the governing body, conduct the meeting or participate in any manner in the proceedings. The public official should physically remove him or herself from the presence of the public body and leave the room until consideration of the topic which caused the recusal is complete.

For the reasons and authorities set forth in this opinion, the Court orders the Council's action in adopting Ordinance 2005-28 be set aside and the adoption of the LC Ordinance invalidated.