

The following pages indicate that a county or municipal official violated the Local Government Ethics Law. It is possible, however, that the violation was, or will be, reversed by another tribunal. For example, if the pages below reveal that an Administrative Law Judge (ALJ) found that a violation occurred, it is possible that the Local Finance Board (LFB) later rejected the ALJ's findings. Also, if the pages below reveal that the Local Finance Board found a violation, the official may have subsequently appealed to the Appellate Division of the Superior Court. In sum, readers should be aware that a finding by an ALJ or the LFB might not be the final outcome, and that further inquiries may need to be made.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NOS. CFB 8021-06

AND CFB 8022-06

AGENCY DKT. NOS. LFB 05-0018(B)

AND LFB 05-0018(A)

(CONSOLIDATED)

**JOHN P. BRENNAN, JR., AND
ELWOOD MALICK,**

Petitioners,

v.

LOCAL FINANCE BOARD,

Respondent.

John P. Brennan, Jr., Esq., petitioner, pro se

Scott W. Kenneally, Esq., for petitioner Malick (Starkey, Kelly, Bauer, Kenneally
& Cunningham, attorneys)

Patricia Stern, Deputy Attorney General, for respondent (Anne Milgram,
Attorney General of New Jersey, attorney)

Record Closed: November 23, 2007

Decided: February 19, 2008

BEFORE **JOSEPH F. FIDLER, ALJ:**

These consolidated matters concern Notices of Violation issued by the Local Finance Board in August 2006. The Board alleges that Mr. Brennan and Mr. Malick are members of the Wall United Methodist Church, the only church in the Borough of Spring Lake Heights, and that while serving respectively as councilman and council

president of the Borough, they violated N.J.S.A. 40A:9-22.5(c) and (d) of the Local Government Ethics Law by voting on Borough Ordinances exempting their church and pastor's home, the church day care center, and the church cemetery from water and sewer charges. The Board assessed \$100.00 fines from the two local government officers. Both Mr. Brennan and Mr. Malick have denied that they committed violations of the Local Government Ethics Law, and they contend that they relied on the advice of the Borough Attorney that it would not be a conflict of interest for them to vote on the subject ordinances. The parties have submitted cross-motions for summary decision.

The Board transmitted these matters to the Office of Administrative Law on October 2, 2006, for determination as contested cases, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to-13. A prehearing conference was held on January 24, 2007. As these matters involve common questions of fact and law, the parties agreed to consolidation. Following a period for discovery, the parties filed their moving and responsive papers on the motion and cross-motion for summary decision. The last of these was received on November 23, 2007, and the record closed on that date.

N.J.S.A. 40A:9-22.5(c) of the Local Government Ethics Law provides:

No local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others.

N.J.S.A. 40A:9-22.5(d) of the Local Government Ethics Law provides:

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;

The material facts are undisputed. At the times relevant to this matter, petitioner Elwood Malick was Council President of Spring Lake Heights Borough and petitioner John P. Brennan, Jr., was a Councilman. During a special Borough Council meeting on March 17, 2003, Brennan and Malick voted, together with Councilwoman Mary Beth McKnight and Councilman Robert Solinski, to introduce two ordinances exempting

“Religious Properties” from payment of local sewer and water service charges. The introduced ordinances would also reduce the annual sewer and water service charges for senior and disabled residents. A public hearing on the ordinances was held on April 14, 2003. At that time, a resident inquired as to the number of residents eligible for the senior and disabled benefit and Councilman Solinski responded that the number was approximately 60 people. The ordinances were then adopted, with Brennan, Malick, McKnight and Solinski voting in favor and Council members Clapp and Linton abstaining.

The religious property to be exempted from payment of local sewer and water services charges was defined identically in Ordinance Nos. 3-2003 and 4-2003 as “any property actually used in the work of associations and corporations organized exclusively for religious purposes, including religious worship and any additional property, not exceeding two, actually occupied as a parsonage by the officiating clergyman of any religious corporation of this State.” These ordinances did not specifically identify any entities organized exclusively for religious purposes nor did they specifically identify any properties that potentially could be eligible for the exemption. It is undisputed, however, that there was within the Borough only one entity organized exclusively for religious purposes that actually was receiving sewer and water services when the payment exemptions took effect. This was the Wall United Methodist Church, the only active church remaining within the municipal boundaries. The property included a house of worship, a parsonage, a day-care center, and a cemetery.

Of the four council members who voted in favor of the subject ordinances, only Malick and Brennan were members of the Wall United Methodist Church. Sensitive to the possibility of a conflict of interest, the two officials sought a formal ethics opinion from their Borough Attorney as to whether or not they should vote on the proposed sewer and water ordinances. By letter to Malick and Brennan dated March 13, 2003, Borough Attorney Scott W. Kenneally wrote:

It is my understanding that you have both requested an opinion from my office on whether it is appropriate for you to vote on the proposed sewer and water ordinance. Both of you have expressed concern over your involvement in the Wall Methodist Church, and whether this presents a conflict of interest when voting

on the proposed sewer and water ordinance. Please be advised that it is my opinion that your involvement with the Church does not create a conflict of interest that would warrant you abstaining on the matter.

As you are aware, the ordinance establishes reduced rates for seniors and the disabled. This provision of the ordinance is consistent with amendments made several years ago to the State water and sewer law which permits a public entity to provide reduced rates for seniors or the disabled. N.J.S.A. 40A:31-10.1. The ordinance also provides an exemption for properties owned by religious entities consistent with the language contained in the statute governing property tax exemptions. N.J.S.A. 54:4-3.6. This provision is consistent with language quoted with approval by the Appellate Division of the Superior Court in Camden County v. Pennsauken Sewerage Authority, 28 N.J. Super. 586 (App. Div. 1953), aff'd 15 N.J. 456 (1954), which noted that it was not improper to “give free or reduced rates to or for public, municipal, charitable, or religious institutions or purposes.”

As indicated in my prior opinion to the Council, it is my understanding that the exemption for religious properties has always existed in Spring Lake Heights, however, it was not specified by ordinance. Consistent with the provisions of 40A:31-1, et seq., I do believe that if the exemption for water and sewer is to continue, and the reduced rates for seniors and the disabled are to be adopted, it is appropriate that these provisions be codified by ordinance.

The issue framed by your inquiries is, therefore, whether it is appropriate for the two of you to vote on the ordinance. As indicated above, I do not believe your involvement with the church presents a conflict of interest. It should also be noted that I also do not believe it would be a conflict for a member of the Council to vote on the matter if they, or a member of their family were 65 or older, or permanently and totally disabled for the same reasons.

In each case, the issue is whether the proposed ordinance results in a Council member directly or indirectly receiving some sort of improper benefit not available to others, or whether the ordinance is the codification of a policy measure which serves to benefit the whole community or a large segment thereof. (See 35 N.J. Prac. Section 9.8 Conflict Issues as to Public Officers-Legislative Action). Because the ordinance falls into the latter category it does not present a conflict. My analysis is confirmed by a reading of the Local Government Ethics law which provides in relevant part:

i. No local government officer shall be deemed in conflict with these provisions if, by reason of his participation in the enactment of an ordinance, resolution or other matter required to be voted upon or which is subject to executive approval or veto, no material or monetary gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of such business, profession, occupation or group.
N.J.S.A. 40A:9-22.5i.

I trust the foregoing is responsive to your inquiry. If I can be of further assistance, please feel free to contact my office.

Malick and Brennan relied upon the advice of the Borough Attorney regarding ethics issues. They fully disclosed their potential conflict to the Borough Attorney and requested a formal written opinion from him. Malick and Brennan considered the written opinion to be responsive to their request and authoritative. The opinion did not contain any caveats or restrictions, and they relied upon it completely when they voted in favor of the subject ordinances.

The ordinances attracted attention. On October 15, 2003, Spring Lake Heights Borough resident Raymond Miller filed a Complaint in Lieu of Prerogative Writs in Monmouth County Superior Court. In that action against the Borough and Borough Council, he claimed, in part, that as members and parishioners of the Wall United Methodist Church, Malick and Brennan had a conflict of interest when they voted on the sewer and water ordinances that would provide the church with a direct financial benefit.

Monmouth County Prosecutor John Kaye was informed of the ordinances and an investigation was conducted. Prosecutor Kaye issued a letter on October 20, 2003, stating his conclusion that the Borough Council's passage of the subject ordinances exceeded its authority pursuant to the Municipal and County Sewerage Act, N.J.S.A. 40A:26A-1 et seq., and the County and Municipal Water Supply Act, N.J.S.A. 40A:31-1 et seq. Prosecutor Kaye noted that the ordinances applied solely to the Wall United Methodist Church and associated properties. He acknowledged that the applicable

statutes permit municipalities to establish rates which provide for a reduction or total abatement of charges for senior citizens and persons who are permanently and totally disabled. He found no provision, however, within either of the statutes which authorized a municipality to reduce water and sewer rates, or provide a complete exemption from payment of charges, for a private religious entity. Without setting forth the source of his authority to do so, Prosecutor Kaye directed that water meters be installed in the church and parsonage and that the church begin paying water and sewer charges.

The Rev. Glenn K. Miller, Pastor of the Wall United Methodist Church, expressed his thoughts on the controversy in a letter received by the Borough on October 27, 2003. He emphasized that while it was true the church had not paid water and sewer charges since the founding of the Borough, this was not because it had refused to pay; rather, it had never been charged. Pastor Miller stated that this appeared to be a courtesy extended by the Borough, which was appreciated, but the resulting calamity was regrettable. He was amazed at the amount of fallacious information that had been passed on to the prosecutor's office, and he summarized his perspective:

For more than 25 years, I have believed that one of the purposes of any church is to provide services to the people of the community. Let me recite some of the services provided by Wall Church: a community sponsored soup luncheon uses the church facility once a month, free of charge. AARP, tutoring for children of Spring Lake Heights, Red Oak Women's Club, West Belmar Extension Group, Adult Children of Alcoholics, and now a quilting class are among other groups using our facility free of charge (though they use water and toilet facilities). Some have suggested that we begin to charge these groups for the use of our facilities, but I along with other officials of the church do not believe that is in keeping with our Christian witness to the community. It is regrettable that the church has become the subject of political debate, but this debate will not keep us from ministering to our community, even if it means paying for water and sewer. Let's move on. Aren't there more important things to occupy our time?

On October 21, 2003, Borough Mayor Frank Adams issued an Official Information Release describing how the controversy arose. There had been three churches in Spring Lake Heights at one time, but only the Wall United Methodist

Church remained. It was established in 1834, but the Borough did not come into existence until 1927. At no time in the Borough's history had any religious institution been billed for water or sewer service, and this practice was understood to not be uncommon. In February 2003, the Borough Attorney responded to the Utilities Committee's request for a legal opinion by advising that publicly owned property in the Borough could remain informally exempted from water metering, but if religious properties were to continue to be exempted, this could legally be done by formal ordinance. Following passage of the subject ordinances, the Borough learned of the County Prosecutor's opinion to the contrary, and Mayor Adams stated in the Official Information Release that the Borough would comply with the prosecutor's directive.

There is no genuine dispute concerning the foregoing, and it is thus **FOUND AS FACT.**

Enacted in 1991, the Local Government Ethics Law is based upon the Legislature's findings that local public officers and employees hold their positions as a public trust and that the vitality and stability of representative democracy depend upon the public's confidence in the integrity of its elected and appointed representatives. N.J.S.A. 40A:9-22.2a and b. The Legislature further found that even the perception of a conflict between the private interests and the public duties of a government officer or employee can imperil the public's trust and confidence. N.J.S.A. 40A:9-22.2c.

The Local Finance Board contends that Brennan and Malick had a disqualifying conflict of interest in the sewer and water service fee exemptions for religious properties and that their participation in the vote on the ordinances violated N.J.S.A. 40A:9-22.5(d). The Board further asserts that by voting in their official capacities to codify sewer and water service fee exemptions for their church, Brennan and Malick secured an unwarranted advantage in violation of N.J.S.A. 40A:9-22.5(c). The Board argues that it is not bound by the legal opinion from the attorney for the Borough of Spring Lake Heights that there was no conflict of interest and that Brennan and Malick need not disqualify themselves from the vote on the exemption ordinances. Brennan and Malick maintain that they did not have a disqualifying involvement, that they acted

in the public interest to codify a longstanding practice, and that they justifiably relied upon the ethics opinion of their Borough Attorney.

N.J.S.A. 40A:9-22.5(d) prohibits a local government officer or employee from acting in his official capacity in any matter in which 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. This prohibition codifies a long standing principle of common law, that is, that a public official is disqualified from acting in a matter in which he has a conflicting interest that may interfere with the impartial performance of his public duty. Wyzykowski v. Rizas, 132 N.J. 509, 523, (1993), citing Scotch Plains-Fanwood Bd. of Educ. v. Syvertsen, 251 N.J. Super. 566, 568 (App. Div. 1991).

In determining whether a particular interest is sufficient to disqualify, “[t]he question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty.” Wyzykowski, supra, citing Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958). Not every circumstance will serve to disqualify an official:

Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this was so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said, “Universal distrust creates universal incompetency.”

[Wyzykowski, supra, 132 N.J. at 523-24, quoting Graham v. United States, 231 U.S. 474, 480, 34 S.Ct. 148, 151, 58 L.Ed. 319, 324 (1913).]

While the mere suggestion of a remote and vague interest should be insufficient to disqualify an official, the Court in Wyzykowski further explained that an actual conflict or dishonesty need not be shown:

An actual conflict of interest is not the decisive factor, nor is 'whether the public servant succumbs to the temptation,' but rather whether there is a potential for conflict. Griggs v. Borough of Princeton, 33 N.J. 207, 219, (1960) (citing Aldom, supra, 42 N.J. Super. at 502). A conflicting interest arises when the public official has an interest not shared in common with the other members of the public. Id. 33 N.J. at 220-21. Another way of analyzing the issue is to understand that "[t]here cannot be a conflict of interest where there do not exist, realistically, contradictory desires tugging the official in opposite directions." LaRue v. Township of East Brunswick, 68 N.J. Super. 435, 448 (App. Div. 1961).

[Wyzykowski, supra, 132 N.J. at 524.]

The courts have applied these principles under varied circumstances. The circumstances can be "distilled" into four types of conflicting interests that require disqualification: direct pecuniary interests, indirect pecuniary interests, direct personal interests, and indirect personal interests. Wyzykowski, supra, at 524-26 (citing Michael A. Pane, Conflict of Interest: Sometimes a Confusing Maze, Part II, New Jersey Municipalities, March 1980 at 8, 9).

"Direct pecuniary interests" occur when "an official votes on a matter benefiting the official's own property or affording a direct financial gain." Id. at 525; see Scotch Plains-Fanwood Bd. of Educ., supra, 251 N.J. Super. at 568-70 (App. Div. 1991) (barring a Board member from meetings at which a private cause of action he instituted was discussed); Tighe v. Local Fin. Bd. 97 N.J.A.R.2d (CAF) 76, 79-81 (violation occurred when zoning board member voted to approve a project in which he had a direct financial interest); Wargacki v. Local Fin. Bd. 97 N.J.A.R. 2d (CAF) 1, 4 (violation occurred when mayor acted in his official capacity to attempt to establish an amnesty program for illegal multi-family homes in order to avoid paying fines for several such units that he owned); Martine v. Local Fin. Bd. 96 N.J.A.R. 2d (CAF) 111 at 115

(violation found when councilwoman voted to fund two governmental agencies that employed her).

“Indirect pecuniary interests” occur when “an official votes on a matter that financially benefits one closely tied to the official, such as an employer or family member.” Wyzykowski, supra, 132 N.J. at 525; see CARE of Tenafly v. Tenafly Zoning Board, 307 N.J. Super. 362, 373-74 (App. Div. 1998) (violation occurred when zoning board member voted on plan that directly affected the financial integrity of his mother's property). In Griggs v. Borough of Princeton, supra, 33 N.J. 207, the Court considered whether an employment relationship, even a limited one, is a sufficient connection between a public official and an outside entity such that the official's acting in an official capacity upon matters involving that entity constituted a conflict of interest in violation of the Code of Ethics, even where there was no allegation of actual corruption. The Court found that two members of the local borough council who voted on a matter involving a blighted area were professors employed by Princeton University. The University held a controlling interest in a municipal improvements corporation owning a significant amount of property in the blighted area.

The Court held that the councilmen’s conduct violated the Ethics Code. Their interests as employees of the University, which itself had a significant interest in the matter of public concern upon which they voted, created a conflict. The Court said that

It is true that the prime interests of [the professor-councilmen] in the University are in its academic affairs. But the same long standing association which gives these men security in their positions could tend to bind their loyalties to the University in such a manner that they would be interested in all matters affecting the institution . . . The potential for psychological influences cannot be ignored . . . We do not hold that these matters had an effect in the instant case . . . [n]evertheless, we perceive the rule to be that the mere existence of a conflict, and not its actual effect, requires the official action to be invalidated.

[Id. at 220.]

“Direct personal interests” occur when “an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but in a matter of great importance.” Wyzykowski, supra, 132 N.J. at 525; see Barrett v. Union Twp. Comm., 230 N.J. Super. 195, 196-97 (App. Div. 1989) (voiding zoning work where councilman's mother resided in a nursing home favored by a zoning amendment).

“Indirect personal interests” occur when “an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.” Wyzykowski, supra, 132 N.J. at 526; see Zell v. Borough of Roseland, 42 N.J. Super. 75, 81-83 (App. Div. 1956) (conflict arose where zoning/planning board member voted on property reclassification that would have a direct impact on his church); Gunthner v. Planning Board of Bay Head, 335 N.J. Super. 452, 460-61 (Law. Div. 2000) (conflict of interest arose when planning board members were also members of a yacht club that could be affected by proposed plan).

In Marlboro Manor, Inc. v. Bd. of Comm. of Montclair, 187 N.J. Super. 359 (App. Div. 1982), the court considered whether a conflict of interest arose when two council members voted on a place-to-place transfer of a liquor consumption license when they were members of a church that was a principal objector to the transfer. Citing Griggs v. Borough of Princeton, supra, the court noted that the question was whether there was a potential for conflict, not whether the public servant succumbs to the temptation or is even aware of it. The court perceived the rule to be that the mere existence of a conflict, and not its actual effect, required the official action to be invalidated. Marlboro Manor, supra, at 362. The court further explained:

It has been observed by this court, in a similar context, that “the members of a non-pecuniary organization must be deemed to have the same relative interest in it (although non-pecuniary) as stockholders have in a corporation . . . The totality of interest in a church obviously resides in its entire membership.” Zell v. Roseland, 42 N.J. Super. 75, 81 (App. Div. 1956).

We do not impugn the motives of the two members of the council who, while members of the protesting church, participated without disclosure of their personal interest. We

assume they acted sincerely and voted in the belief that they thereby served the public interest. However, the principles applicable to conflict of interests must be applied with an even hand where a potential for a division of loyalties exists.

A personal interest or relationship that has reasonable prospect of influence upon the decisional process should, at the very least, be disclosed. Such disclosure secures to the applicant the right, prior to exercise of the discretion vested in a council member, to timely challenge the composition of the hearing body. Cf. Fanwood v. Rocco, supra, 33 N.J. at 417. Here, the two council members held interests different from that which they held in common with members of the public. They were confronted with a protest voiced by their spiritual mentor that the location of the liquor license in proximity to the church will have serious adverse effect upon church interests. In these circumstances there can be no doubt that a question of the prospect of divided loyalties between their personal interest and their obligation of official civic duty existed. In such circumstances rectitude compelled disclosure and the public interest required disqualification. Only by such action can the exercise of the discretionary power of government, like Caesar's wish for his wife, "be not so much as suspected."
[Marlboro Manor, supra, at 362-363.]

These cases guide conclusions in this matter. When seeking an ethics opinion from the Borough Attorney, Brennan and Malick did acknowledge their membership in the Wall United Methodist Church prior to their votes on the sewer and water service fee exemption ordinances. They relied upon the ethics opinion that there was no conflict of interest when they voted to codify the long-standing practice within the Borough to so exempt religious properties. I note that, notwithstanding the potential for other properties to qualify for the exemption in the future, the Wall United Methodist Church was the only religious property to qualify at the time of the vote. In any event, there is no credible evidence that Brennan or Malick had any improper or pecuniary motivation; rather, the significant fact when they voted was their church membership. As set forth above, even the perception of a conflict between the private interests and the public duties of a government officer can imperil the public's trust and confidence. N.J.S.A. 40A:9-22.2c. I **CONCLUDE** that Brennan and Malick acted in their official capacity in a matter in which they had an indirect personal involvement that might

reasonably be expected to impair their objectivity or independence of judgment, in violation of N.J.S.A. 40A:9-22.5(d).

N.J.S.A. 40A:9-22.5(c) prohibits a local government officer or employee from using or attempting to use his official position to secure unwarranted privileges or advantages for himself or others. An unwarranted privilege or advantage would be one that is unjustified or unauthorized, one that would permit the municipal official to obtain something otherwise not available to the public at large. In the Matter of Zisa, 385 N.J. Super. 188, 196 (App. Div. 2006). John Zisa was Mayor of the City of Hackensack and was also a principal in a real estate company. In pursuit of his private interests, he purchased property near a parcel of city land on which a parking lot was to be built. Zisa leased the property to a tenant and secured the city's agreement to lease parking spaces in the city's lot, to be used by his tenant. When Zisa voted as mayor on a resolution to award a contract to pave the city's lot, the Local Finance Board found, in part, that he had violated N.J.S.A. 40A:9-22.5(c). The Appellate Division reversed, finding that the mayor's vote did not provide him with an "unwarranted" privilege because he had leased the parking spaces on the same terms and conditions available to any member of the public and there was no advantage to the mayor in having the lot paved for his tenant.

In this matter, the Board contends that when Brennan and Malick voted in their official capacities to codify the sewer and water service fee exemptions for their church, they secured an unwarranted advantage for themselves and their church, in violation of N.J.S.A. 40A:9-22.5(c). In so arguing, the Board aptly observes that neither the validity of the ordinances nor the motivation behind the complaint against these officials is relevant to the issue of whether they used their official positions to secure an unwarranted privilege. Again, what is relevant is the officials' membership in the Wall United Methodist Church. Recognizing that two other Council members voted in favor of the exemption ordinances, it is the Board's position that the church membership of Brennan and Malick is an indispensable element of the violation.

I agree that it is by virtue of their church membership that Brennan and Malick had a conflict of interest when they used their official positions to obtain exemptions for

Wall United Methodist Church. This is so because “the totality of interest in a church obviously resides in its entire membership.” Marlboro Manor, supra, at 362, citing Zell v. Borough of Roseland, supra, at 81. Thus, any financial advantage accruing to their church as a result of the utilities fee exemption ordinances must be deemed to be an advantage to Brennan and Malick. No matter how public spirited their motivation may have been, a consequence of so using their official positions was to obtain something for themselves which was not available to the public at large. Therefore, Brennan and Malick secured an unwarranted privilege or advantage, in violation of N.J.S.A. 40A:9-22.5(c). I so **CONCLUDE**.

Brennan and Malick have raised the defense of advice of counsel. In IMO John F. Zisa, supra, at 197-199, the Appellate Division described four prerequisites to establish the defense in the context of alleged violations of the Local Government Ethics Law:

1. That the approval or advice was received prior to the action being taken.
2. That the individual who offered the advice or approval relied upon possessed authority or responsibility with regard to ethical issues.
3. That the individual seeking advice or approval made a full disclosure of all pertinent facts and circumstances.
4. That the individual comply with the advice received, including any restrictions it might contain.

It is undisputed that Brennan and Malick were sensitive to the possibility of a conflict of interest and that they sought a formal ethics opinion from their Borough Attorney as to whether or not they should vote on the proposed sewer and water ordinances. The Borough Attorney was their appropriate source of advice regarding ethics issues. The two public officials fully disclosed their potential conflict to the Borough Attorney when they requested a formal written opinion from him.

The Borough Attorney’s written ethics opinion was detailed in its description of the ethics issue and the purpose and effect of the proposed ordinances and it set forth

citations to statutes, case law, and other authority. The opinion did not contain any caveats or restrictions. Under these circumstances, I **CONCLUDE** that it was reasonable for Brennan and Malick to consider the written opinion to be responsive to their request and authoritative, and it was reasonable for them to have relied upon it completely when they voted on the ordinances. Thus, I further **CONCLUDE** that Brennan and Malick have established that they are entitled to the defense of advice of counsel in this matter and that the determinations of violations of the Local Government Ethics Law should be **DISMISSED**.

I so **ORDER**.

I hereby **FILE** my initial decision with the **LOCAL FINANCE BOARD, DIVISION OF LOCAL GOVERNMENT SERVICES**, for consideration.

This recommended decision may be adopted, modified or rejected by the **LOCAL FINANCE BOARD, DIVISION OF LOCAL GOVERNMENT SERVICES**, which by law is authorized to make a final decision in this matter. If the Local Finance Board, Division of Local Government Services, does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **LOCAL FINANCE BOARD, DIVISION OF LOCAL GOVERNMENT SERVICES, 101 South Broad Street, PO Box 803, Trenton, New Jersey 08625-0803**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 19, 2008

DATE

JOSEPH F. FIDLER, ALJ

Date Received at Agency:

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Petitioners:

Briefs and attachments

For Respondent:

Briefs and attachments

WITNESSES

For Petitioners

None

For Respondent:

None