

# ZONING AND PLANNING LAW REPORT



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## SUPREME COURT PREVIEW: VOTING AS SPEECH WHEN A GOVERNMENT OFFICIAL HAS A CONFLICT OF INTEREST— "ANALOGY GONE WILD" OR FIRST AMENDMENT RIGHT?

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### I. Introduction

In late April 2011, the U.S. Supreme Court will hear oral arguments in *Nevada Commission on Ethics v. Carrigan*,<sup>1</sup> reviewing a Nevada Supreme Court decision holding that a city councilman had a First Amendment right to cast a vote on a development proposal in which it appeared he had a conflict of interest.<sup>2</sup> The Nevada court invalidated a state statute under which the state Ethics Commission censured the councilman because he did not recuse himself and instead voted to approve an application to develop a hotel/casino. The casino developer's consultant was a "longtime professional and personal friend" of the councilman and was his campaign manager.

The Court's decision in this case will be worth following for at least two reasons. First, the Court is

confronted with an issue it has not squarely addressed before: whether a government official's vote on a legislative or quasi-judicial matter is "speech" protected by the First Amendment, or whether it is conduct—"[an] act ... quintessentially one of governance."<sup>3</sup> The lower courts have not produced a consistent answer to this question, with some viewing voting as the highest form of political speech and thus for the most part insulated from regulation,<sup>4</sup> while others view voting-as-speech as an "analogy gone wild,"<sup>5</sup> subjecting regulations impacting official voting only to the highly deferential rational basis standard of review.<sup>6</sup> Even if the Court views official voting as not quite speech—but having an expressive element protected by the First Amendment—it could give it some form of intermediate level of protection and treat it similarly to speech by government employees, which may be regulated in varying

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degrees depending on the circumstances. The second reason this case is worth following is that the Court's decision could have widespread impact on local zoning and planning procedures nationwide, particularly if it agrees with the rationale of the Nevada court, which concluded that the councilman's voting on the development application was protected political speech, and consequently that the ethics statute was subject to strict judicial scrutiny. Should the Court adopt this approach, a variety of state and local regulations governing the conduct of members of city and county councils and boards of supervisors, planning commissions, zoning boards of appeals, and similar bodies would be called into question, and possibly subject to serious challenge.

*If the U.S. Supreme Court holds that a public official's vote is protected speech, many laws and regulations governing the conduct of members of legislative and administrative bodies would be called into question.*

## II. The Case

The case began when Michael Carrigan, a city councilman in Sparks, Nevada, did not recuse himself from considering an application for development filed by a hotel/casino project known as the Lazy 8. The developer's consultant was Carlos Vasquez, Carrigan's "longtime professional and personal friend," who served as Carrigan's campaign manager during each of his two election campaigns.<sup>7</sup> The Nevada Ethics in Government Law prohibits public officers and employees, including local elected officials, from voting or advocating on matters in which their independent judgment could be reasonably questioned because of a "commitment in a private capacity to the interests of others."<sup>8</sup> The statute defined a "commitment in a private capacity to the interests of others" as a commitment to a person:

- Who is a member of the public officer's or employee's household;
- Who is related to the public officer or employee by blood, adoption or marriage within the third degree of consanguinity or affinity;
- Who employs the public officer or employee or a member of the public officer's or employee's household;

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- With whom the public officer or employee has a substantial and continuing business relationship; or
- Any other commitment or relationship substantially similar to a commitment or relationship described above (the “catchall” provision).<sup>9</sup>

After consultation with the city attorney, Carrigan disclosed his relationship with Vasquez, but did not abstain from voting. He did not seek an advisory opinion from the Nevada Commission on Ethics. The city council denied Lazy 8’s development application by a 5-4 vote, with Carrigan casting one of the four votes for approval.

A few weeks later, in response to complaints received about Carrigan’s vote, the Commission on Ethics initiated an investigation, and concluded unanimously that he should not have voted on the Lazy 8 matter. It determined that Vasquez was Carrigan’s campaign manager at the time of Lazy 8’s application, and that Carrigan considered his assistance “instrumental” to his electoral victories. Furthermore, Carrigan’s relationship with Vasquez was a close one: he acknowledged that he confided in Vasquez “on matters where he would not confide in his own sibling.”<sup>10</sup> Although his relationship with Vasquez did not fall under any of the four specific categories detailed in the ethics statute (and recounted above), the Commission concluded the relationship was such that a reasonable person would view it as “substantially similar” to those relationships, and that therefore recusal was required.<sup>11</sup> “In other words, the Commission found that Carrigan should have known that his relationship with Vasquez fell within the catchall definition and prevented him from voting on ... the Lazy 8 project.”<sup>12</sup> The Commission censured Carrigan, but imposed no penalty because it concluded that the violation was not willful.<sup>13</sup>

The Nevada trial court affirmed the Commission’s conclusion. Applying the *Pickering v. Board of Education*<sup>14</sup> test, the court balanced the state’s interest in “promot[ing] efficiency and integrity in the discharge of official duties” against Carrigan’s First Amendment rights, and held that the Nevada ethics statute was facially valid and was constitutional as applied to Carrigan, because the state’s interest in an ethical system “outweigh[ed] any interest that a public officer may have in voting upon a matter in which he has a disqualifying conflict of interest.”<sup>15</sup>

*Pickering* did not involve an elected public official casting a vote on a legislative issue, but a government employee (a schoolteacher) dismissed for sending a letter to a local newspaper criticizing the Board of Education, which the Board claimed was defamatory.<sup>16</sup> The *Pickering* Court held that in evaluating the validity of government regulation of a public employee’s expression, a court must balance “between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>17</sup> The Court concluded that the teacher’s right to speak on a matter of public concern did not impede the performance of his teaching duties or affect the school, so the state’s interest in regulating his speech was low when compared to his expressive rights.<sup>18</sup> Thus, the Court held that “absent proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”<sup>19</sup>

### III. Nevada Supreme Court: Official Voting Is Speech and Leads to Strict Scrutiny

The Nevada Supreme Court reversed the trial court, concluded that the catchall provision of the ethics statute was facially unconstitutional, and held that balancing of interests under *Pickering* was the wrong standard to apply to an elected official’s vote. The majority held that “voting by an elected public officer on public issues is protected speech under the First Amendment.”<sup>20</sup> The court relied on a Fifth Circuit case, *Colson v. Grohman*,<sup>21</sup> which held that “[t]here is no question that political expression such as a [city council member’s] positions and votes on City matters is protected speech under the First Amendment.”<sup>22</sup> The Nevada Supreme Court majority adopted *Colson*’s rationale without detailed analysis, following a two-step rationale. First, since voting on legislative matters is a “core legislative function,”<sup>23</sup> the court concluded that “it follows that voting serves an important role in political speech.”<sup>24</sup> The court held that *Pickering* was inapplicable because that case involved balancing a government employee’s First Amendment rights against the state’s interest in good government, and as an elected councilman, Carrigan was not in the same position as a run-of-the-mill government employee.<sup>25</sup> The court held that although employed by the state, elected of-

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officials are directly responsible to the voters, and thus their rights are more protected by the First Amendment from state regulation than those of other government employees.<sup>26</sup>

Second, because the court rejected the application of the *Pickering* balancing test, and agreed with Carrigan that because his vote was speech—and more importantly, was highly protected *political* speech—the ethics statute had to be reviewed under the strict scrutiny standard. “Strict scrutiny” most often means “fatal scrutiny,” since it shifts the burden to the state to show that the speech regulation both supports a compelling state interest and is narrowly tailored to further that interest to avoid restricting First Amendment rights as much as possible.<sup>27</sup> There was no dispute that the state’s interest in protecting the integrity of the process was compelling,<sup>28</sup> so the only question was whether the catchall provision was narrowly tailored. The court concluded the definition of a “commitment in a private capacity” in the catchall provision was overbroad, because there was no limitation on what relationships it might cover. This vague definition “has a chilling effect on the exercise of protected speech,”<sup>29</sup> because it “does not inform or guide public officers as to what relationships require recusal.”<sup>30</sup>

One Justice dissented, asserting that voting by elected officials is not protected speech, but “first and foremost an act of governance.”<sup>31</sup> Thus, while public officials have some First Amendment rights when voting, because “an elected official’s vote defines his beliefs and positions in a way words alone cannot,”<sup>32</sup> that right is not absolute, and regulation of the right is not subject to strict judicial scrutiny.<sup>33</sup> The dissenting Justice also took issue with the majority’s rejection of the applicability of the *Pickering* test for regulating the speech of government employees, arguing that it was not dispositive that Carrigan was an elected officer and not a mere employee, since the state’s interest in non-self-interested officials is more important than regulation of the conduct of other employees.<sup>34</sup> The ultimate ability of the voters to remove Carrigan from office if they were dissatisfied with his vote was less important than a fair and impartial process, especially when considering land use applications in a quasi-judicial setting.<sup>35</sup> Having rejected strict scrutiny, however, the dissent did not settle on what standard of review should apply, but concluded that under either rational basis review or intermediate scrutiny, the Nevada ethics statute was constitutional and the catchall provision was not

overbroad when read in context with the entire statutory scheme.<sup>36</sup> The dissent also noted that recusal for potential conflicts of interest is well established by common law, and that Carrigan had ample opportunity to seek an advisory opinion from the Commission but chose not to, and the statute was thus not so vague that it was unconstitutional.<sup>37</sup>

The Commission sought review by the U.S. Supreme Court, and on January 7, 2011, the Court agreed to review this question:

The Nevada Supreme Court held that the vote of an elected official is protected speech under the First Amendment and that the recusal provision of the Nevada Ethics in Government Law is subject to strict scrutiny. Under that standard of review, the court concluded that a portion of the recusal statute was overbroad and facially unconstitutional. The question presented is:

Whether the First Amendment subjects state restrictions on voting by elected officials (i) strict scrutiny, as held by the Nevada Supreme Court and the Fifth Circuit, (ii) the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968), for government-employee speech, as held by the First, Second, and Ninth Circuits, or (iii) rational-basis review, as held by the Seventh and Eighth Circuits.<sup>38</sup>

The issue of official voting as speech was previously raised, but not decided by the Court, in *Spallone v. United States*.<sup>39</sup> In that case, the Court held that the federal courts could not hold city councilmembers in contempt for refusing to vote in favor of legislation implementing a city-approved consent decree.<sup>40</sup> The district court found that the city had effectively segregated its public housing, and entered a remedial decree which included an order that the city take affirmative steps to integrate and to create a long-term plan for public housing in different areas of the city.<sup>41</sup> Eventually, the city approved a consent decree in which it agreed to adopt legislation within 90 days with specific terms which would result in the development of public housing.<sup>42</sup> When the city delayed implementing the consent decree—in large part because several councilmembers refused to vote for the implementing legislation—the district court held it in contempt. It also “question[ed] the individual councilmembers as to the reasons for their negative votes, [and] ... also held each of the petitioners in contempt and imposed sanctions.”<sup>43</sup> The U.S. Court of Appeals affirmed the contempt order against the



individual councilmembers who would have voted against the legislation agreed to in the consent decree. The Supreme Court, however, avoided ruling on the councilmembers' argument that the district court's contempt order violated their First Amendment rights, and instead disposed of the case by concluding that the district court should not have held individual councilmembers in contempt until it first attempted and failed to secure compliance with the consent decree from the city itself.<sup>46</sup>

Four Justices dissented, and would have affirmed the contempt order against the recalcitrant councilmembers. The dissenters saw no First Amendment problems with subjecting an official's vote to the federal judicial power to remedy constitutional violations. The dissenters rejected the councilmembers' arguments that "legislative discretion" to vote on a matter—whatever the official motivation—is protected as speech by the First Amendment.<sup>45</sup>

#### IV. Three Approaches

The Supreme Court has at least three options. First, it could adopt the rationale of the Nevada Supreme Court, and the Fifth Circuit in *Colson v. Grohman*,<sup>46</sup> and view an elected official's voting on legislative and quasi-judicial matters as protected political speech, and review regulation of that right with strict scrutiny. Every state has adopted regulations governing officials' votes on matters on which they may have conflicts of interest,<sup>47</sup> some of which contain much more generalized language than the Nevada ethics law,<sup>48</sup> and if the Court chooses to apply strict scrutiny, a wide variety of ethics regulations may be subject to invalidation or at least very serious challenge.<sup>49</sup> A rule that an official's participation and vote on a matter on which he has a conflict of interest is protected speech cannot be limited to regulations involving legislators debating and voting on land use matters, and would presumably also apply equally to rules governing executive and agency officials, elected judges,<sup>50</sup> and even appointed officials.<sup>51</sup> In addition to recusal statutes and rules, the entire body of common law regarding conflicts of interest would also be cast into doubt. Prior to codification of ethics codes, the common law required recusal of government officials when there was an actual or potential conflict of interest. As noted by the *Carrigan* dissenter, public officials are in a trustee relationship with the public, and the common law "demands exclusive loyalty,"<sup>52</sup> so an official was prohibited from

voting on a matter on which she had a conflict of interest.

Under strict scrutiny analysis, the Court would very likely accept the notion that the government's interest in regulating conflicts of interest of its officials—and their ethical conduct generally—is a compelling state interest.<sup>53</sup> By requiring recusal when there is a conflict of interest or an apparent conflict, state ethics statutes are prophylactic measures designed to prevent corruption of the public deliberation process, and the appearance of corruption. Thus, the inquiry will most likely focus on whether the regulation is narrowly tailored to achieve this goal without impacting protected freedom of expression.

The Court may also adopt the reasoning of two circuit courts, and view voting as conduct and not expression at all, with the consequence that restrictions on voting by officials is subject only to rational basis review. In *Peeper v. Callaway County Ambulance District*,<sup>54</sup> the Eighth Circuit held that the free speech rights of an elected member of a board of directors for a county ambulance district were not injured when other members limited her participation in board proceedings, mandating recusal because her husband was an employee of the district.<sup>55</sup> The court applied a rational basis standard of review. In *Risser v. Thompson*,<sup>56</sup> a case in which state legislators challenged their state constitution's veto provisions under the First Amendment, the Seventh Circuit held that the plaintiffs' claim that voting was protected speech was an "analogy gone wild," and concluded the veto provision easily passed rational basis review.<sup>57</sup> As the Nevada Commission on Ethics argues, it is far from clear what meaning should be ascribed to an official's vote:

Indeed, what an official's legislative vote "means"—apart from that a measure is one vote closer to passage—is no simple matter: the member could personally support its aims; he could be expressing the views of his constituency or a subset of potential swing votes; he could be voting in compromise on the measure with the best chance of enactment, or voting for a measure he does not support to encumber disfavored legislation with an unpopular provision; he could be currying favor with the other members or party leadership in the hope they will advance other legislative measures or his career.<sup>58</sup>

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The Commission also acknowledges that official voting has an expressive element, but argues that it is not speech and therefore does not merit strict scrutiny review. Instead, the Commission urges the Court to uphold the Nevada ethics statute because it is “reasonable and nondiscriminatory, advance[s] important government interests unrelated to expression, and do[es] not burden substantially more speech than necessary to further the government’s interest.”<sup>59</sup>

A third alternative is to adopt the *Pickering* standard for evaluating restrictions on speech by government employees.<sup>60</sup> This is the approach taken by the First, Second, and Ninth Circuits, which weigh the respective interests involved in each case, and balance the right to speak on matters of public concern with the government’s interest in its regulations. This recognizes that government officers and employees have speech rights, but that those rights may be limited if they unduly interfere with the state’s governing processes.<sup>61</sup> Relevant to this analysis is the Court’s decision in *Garcetti v. Ceballos*,<sup>62</sup> which held that public employees are not insulated from employer discipline by the First Amendment when making statements pursuant to their official duties. In that case, a deputy district attorney claimed his employer retaliated against him for his oral statements and a written memo in which he recommended dismissal of a prosecution based on his questions regarding an affidavit supporting a warrant. His supervisor rejected his recommendation and continued with the prosecution. While acknowledging that public employees “do not surrender all their First Amendment rights by reason of their employment” under *Pickering*, in an opinion by Justice Kennedy, the Court held that determination of whether a public employee may be disciplined for speech is a two-part analysis.<sup>63</sup> The first issue is “whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech.”<sup>64</sup> Only after that question is answered in the affirmative does “the possibility of a First Amendment claim” arise and the *Pickering* balancing take place.<sup>65</sup> In *Garcetti*, the Court concluded that the deputy district attorney was speaking pursuant to his official duties, and that he was not speaking as a citizen and therefore was not protected from discipline:

Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment

rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos’ official duties. Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.<sup>66</sup>

*Garcetti*’s holding appears to raise a substantial difficulty for Carrigan. When voting, a city councilmember such as Carrigan is certainly acting “pursuant to his official duties,” which means that he was not speaking as a citizen when he voted. Thus, even if his vote is viewed as speech, his employer should be entitled to regulate it without infringing upon the First Amendment rights he “enjoyed as a private citizen.”<sup>67</sup> The only distinction is that Carrigan was an elected official and not an employee of the same character as a deputy district attorney. As an elected councilman, Carrigan was directly responsible to the electorate, and the Nevada Supreme Court’s unstated assumption was that disclosure was sufficient because it would inform his “employers” that they could choose to not keep him in office if dissatisfied with his vote on the Lazy 8 matter.<sup>68</sup> Because this dynamic might compel a different result than was reached in *Garcetti*, it appears to be the fulcrum of the analysis should the Court not view voting as political speech.

Of course, it is possible that the Court may not decide what standard of review is applicable, only that the strict scrutiny is not the governing test.<sup>69</sup> The dissenting opinion in the Nevada Supreme Court took this approach, reasoning that voting was not protected political speech, and therefore that strict scrutiny was not warranted, but not definitively setting forth what standard would apply.<sup>70</sup>

## V. Conclusion

While this case has passed largely unnoticed, the Court’s decision could have widespread consequences. With literally every state having adopted recusal and ethics rules, a ruling applying strict scrutiny to those rules would mean that many of them—if not carefully tailored—would be invalid, or subject to serious challenge.

## NOTES

1. Nevada Com’n on Ethics, v. Carrigan, No. 10-568 (cert. granted Jan. 7, 2011).

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2. *Carrigan v. Commission on Ethics*, 236 P.3d 616, 126 Nev. Adv. Op. No. 28 (Nev. 2010), cert. granted, 131 S. Ct. 857 (2011).
3. *Spallone v. U.S.*, 493 U.S. 265, 302 n.12, 110 S. Ct. 625, 107 L. Ed. 2d 644 (1990) (Brennan, J., dissenting).
4. *Colson v. Grohman*, 174 F.3d 498, 506 (5th Cir. 1999).
5. *Risser v. Thompson*, 930 F.2d 549, 553 (7th Cir. 1991).
6. See, e.g., *Risser*, supra n. 5.
7. *Carrigan*, supra n.2, 236 P.3d at 618.
8. N.R.S. 281A.420(2)(c) (2007).
9. N.R.S. 281A.420(8)(a) (2007).
10. *In re Carrigan*, Nos. 06-61, 06-62, 06-66 and 06-68 (Nev. Com'n on Ethics Oct. 8, 2007) (cited in Petition for Writ of Certiorari at 6, *Com'n on Ethics v. Carrigan*, No. 10-568 (Oct. 27, 2010), WL 4278724).
11. *Carrigan*, supra n.2, 236 P.3d at 619.
12. *Carrigan*, supra n.2, 236 P.3d at 619.
13. *Carrigan*, supra n.2, 236 P.3d at 619 n.3.
14. *Pickering v. Board of Ed. of Tp. High School Dist. 205*, Will County, Illinois, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).
15. Order and Judgment Denying the Petitioner's Petition for Judicial Review and Affirming the Final Decision of the Nevada Commission on Ethics, *Carrigan v. Com'n on Ethics*, No. 07-OC-12451B (Nev. Dist. Ct. May 28, 2008) (cited in Petition for Writ of Certiorari at 8, *Com'n on Ethics v. Carrigan*, No. 10-568 (Oct. 27, 2010), WL 4278724).
16. *Pickering*, supra n.14, 391 U.S. at 564.
17. *Pickering*, supra n.14, 319 U.S. at 568.
18. *Pickering*, supra n.14, 319 U.S. at 574.
19. *Pickering*, supra n.14, 319 U.S. at 574.
20. *Carrigan*, supra n.2, 236 P.3d at 621.
21. *Colson*, supra n.4, 174 F.3d at 506.
22. *Carrigan*, supra n. 2, 236 P.3d at 621 (quoting *Colson*, supra n.4, 174 F.3d at 506 (brackets supplied)).
23. *Carrigan*, supra n.2, 236 P.3d at 621 (citing *Commission on Ethics v. Hardy*, 212 P.3d 1098, 1106 (Nev. 2009)).
24. *Carrigan*, supra n.2, 236 P.3d at 621.
25. *Carrigan*, supra n.2, 236 P.3d at 622.
26. *Carrigan*, supra n.2, 236 P.3d at 622.
27. *Carrigan*, supra n.2, 236 P.3d at 622 (citing *Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 898 (2010) (laws that burden political speech are subject to strict scrutiny, which "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieved that interest.")).
28. *Carrigan*, supra n.2, 236 P.3d at 622-23.
29. *Carrigan*, supra n.2, 236 P.3d at 622-23.
30. *Carrigan*, supra n.2, 236 P.3d at 623.
31. *Carrigan*, supra n.2, 236 P.3d at 625 (Pickering, J., dissenting).
32. *Carrigan*, supra n.2, 236 P.3d at 626 (Pickering, J., dissenting) (quoting *Spallone*, supra n.3, 493 U.S. at 302 n.12 (Brennan, J., dissenting)).
33. *Carrigan*, supra n.2, 236 P.3d at 626 (Pickering, J., dissenting).
34. *Carrigan*, supra n.2, 236 P.3d at 626-27 (Pickering, J., dissenting).
35. *Carrigan*, supra n.2, 236 P.3d at 626-27 (Pickering, J., dissenting) (citing *Siefert v. Alexander*, 608 F.3d 974, 985-86 (7th Cir. 2010), reh'g en banc denied, 619 F.3d 776 (7th Cir. 2010) and petition for cert. filed, 79 U.S.L.W. 3210 (U.S. Sept. 22, 2010) (applying *Pickering* balancing test to a challenge by a judge to campaign regulations)).
36. *Carrigan*, supra n.2, 236 P.3d at 630 (Pickering, J., dissenting).
37. *Carrigan*, supra n.2, 236 P.3d at 629-30 (Pickering, J., dissenting).
38. Petition for Writ of Certiorari at i, *Com'n on Ethics v. Carrigan*, No. 10-568 (Oct. 27, 2010), 2010 WL 4278724.
39. *Spallone*, supra n. 3.
40. *Spallone*, supra n. 3, 493 U.S. at 267.
41. *Spallone*, supra n. 3, 493 U.S. at 269.
42. *Spallone*, supra n. 3, 493 U.S. at 270 & n.2 ("The City agrees to adopt, among other things, legislation (a) conditioning the construction of all multifamily housing (inclusive of projects for future construction currently in the planning stage but which will require zoning changes, variances, special exceptions, or other discretionary approvals from the City to begin construction) on the inclusion of at least 20 percent assisted units; (b) granting necessary tax abatements to housing developments constructed under the terms of the legislation referred to in clause (a); (c) granting density bonuses to such developers; (d) providing for zoning changes to allow the placement of such developments, provided, however, that such changes are not substantially inconsistent with the character of the area; and (e) other provisions upon which the parties may subsequently agree (including the use of the Industrial Development Authority as a development vehicle and the creation of a municipally-designated, independent not-for-profit Local Development Corporation) (collectively, the 'Mandated Incentives'). The City agrees to implement a package of Mandated Incentives as promptly as practicable but, in no event, later than 90 days after the entry of this decree.").
43. *Spallone*, supra n. 3, 493 U.S. at 272.
44. *Spallone*, supra n. 3, 493 U.S. at 281. The Court held that the consent power is properly exercised to

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- coerce compliance even if it would interfere with legislator's independence, but that imposing contempt sanctions against individual legislators would result in a "much greater perversion of the normal legislative process than does the imposition of sanctions on the city for the failure of these same legislators to enact an ordinance." 493 U.S. at 280-81. Consequently, since contempt sanctions should only be imposed after other alternatives have been exhausted, the district court should not have sanctioned the councilmembers since there was a reasonable probability that the "sanctions against the city would accomplish the desired result." 493 U.S. at 278.
45. *Spallone*, supra n. 3, 493 U.S. at 301 (Brennan, J., dissenting).
  46. *Colson*, supra n.4.
  47. See National Conference of State Legislatures, Voting Recusal Provisions (Oct. 2009), <http://www.ncsl.org/?TabId=15357> (cited in Petition for Writ of Certiorari at 25 n.9, *Com'n on Ethics v. Carrigan*, No. 10-568 (Oct. 27, 2010)).
  48. The Commission's certiorari petition noted three examples of recusal statutes that contain much broader language than the catchall provision invalidated by the Nevada Supreme Court. See Petition for Writ of Certiorari at 25-26, *Com'n on Ethics v. Carrigan*, No. 10-568 (Oct. 27, 2010), 2010 WL 4278724 (citing Va. Code. Ann. § 30-108 (2001) ("personal interest"); N.C. Gen. Stat. § 138A-37(a) (2006) (persons "associated" with a legislator); N.J. Admin. Code § 19:61-7.4(d)-(e) (2010) (relationships which are "incompatible" with official duties)).
  49. Eight states filed an amici curiae brief in support of the Ethics Commission's certiorari petition, asserting that "[e]very state regulates public official voting at the State and local levels as to matters on which the officials have outside interests," Brief of Florida, Alabama, Colorado, Idaho, Louisiana, Mississippi, Ohio, and Texas as Amici Curiae in Support of the Petition for a Writ of Certiorari at 13, *Com'n on Ethics v. Carrigan*, No. 10-568 (Nov. 24, 2010), 2010 WL 4852436, and consequently that "decisions imposing strict scrutiny on measures governing elected officials' voting, such as the Nevada Supreme Court's, create uncertainty and threaten the validity of similar state conflict of interest provisions." Brief at 1.
  50. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991) (elected judges are "representatives" under the Voting Rights Act).
  51. See, e.g., *Stella v. Kelley*, 63 F.3d 71, 76 (1st Cir. 1995) (for purposes of the First Amendment, any distinction between elected and appointed officials is "a wholly artificial dichotomy").
  52. *Carrigan*, supra n.2, 236 P.3d at 629 (Pickering, J., dissenting) (quoting 2 Antieau on Local Government Law § 25.08[1]).
  53. The Nevada Supreme Court took this position in *Carrigan*. *Carrigan*, supra n.2, 236 P.3d at 623 ("We agree ... that that promoting the integrity and impartiality of public officers through disclosure of potential conflicts of interest is clearly a compelling state interest").
  54. *Peeper v. Callaway County Ambulance Dist.*, 122 F.3d 619 (8th Cir. 1997).
  55. *Peeper*, supra n.54, 122 F.3d at 623 n.4 ("Here, however, the May resolution only limits Peeper's participation as a member of the Board and does not limit her ability to vote for Board members, to speak before the Board during public comment periods, or to otherwise express her opinions about the District's operation as any other citizen may under the First Amendment's free speech guarantee.").
  56. *Risser v. Thompson*, 930 F.2d 549, 553 (7th Cir. 1991).
  57. *Risser*, supra n. 56, 930 F.2d at 553 ("And all this assumes that freedom of speech is enlarged or contracted by rules allocating voting power. The assumption equates voting to speech; yet 'the right to vote, per se, is not a constitutionally protected right,' and the right to speak is. Of course, in a practical sense the power of one's speech can indeed be augmented or diminished by voting power. But it can also be augmented or diminished by money. There is something amiss in a mode of constitutional argumentation that derives a right to a redistribution of income and wealth from the free-speech clause. It is another example of analogy gone wild.") (citations omitted).
  58. Brief for the Petitioner at 27, *Com'n on Ethics v. Carrigan*, No. 10-568 (Feb. 22, 2011), 2011 WL 661711.
  59. Brief for the Petitioner at 32, *Com'n on Ethics v. Carrigan*, No. 10-568 (Feb. 22, 2011), 2011 WL 661711 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)).
  60. See *Pickering*, supra n.14.
  61. *Pickering* requires a court to balance "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, supra n.14, 391 U.S. at 568.
  62. *Garcetti v. Ceballos*, 547 U.S. 410, 419, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).
  63. *Garcetti*, supra n.62, 547 U.S. at 418.
  64. *Garcetti*, supra n.62, 547 U.S. at 418.
  65. *Garcetti*, supra n.62, 547 U.S. at 418.
  66. *Garcetti*, supra n.62, 547 U.S. at 421.
  67. *Garcetti*, supra n.62, 547 U.S. at 421.
  68. That may not have been possible, as the Lazy 8 vote was one of Carrigan's last before being termed out of the city council.

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69. For a recent example of the Court failing to adopt a standard of review while at the same time agreeing that the plaintiff did not meet its burden to establish liability (whatever that burden might be), see *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010). In that case, Justice Scalia took issue with the Justices who declined to enunciate what standard applied to a claim of “judicial taking,” arguing that they could not reject a claim in the absence of a standard. 130 S.Ct. at 2603 (“Justice Breyer must either (a) grapple with the artificial question of what would constitute a judicial taking if there were such a thing as a judicial taking (reminiscent of the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?), or (b) answer in the negative what he considers to be the ‘unnecessary’ constitutional question whether there is such a thing as a judicial taking.”).
70. See *Carrigan*, supra n.2, 236 P.3d at 627 (Pickering, J., dissenting) (“A law limiting an elected official’s ability to vote on matters as to which he has an actual or apparent conflict of interest does not trigger strict scrutiny. It commands either rational basis ... or at most the intermediate level of review given laws regulating conduct that incidentally regulate speech.”) (citations omitted).

## OF RELATED INTEREST

Discussion of matters related to the subject of the above article can be found in:

Am. Jur. 2d, Zoning and Planning §§525, 526

C.J.S., Zoning and Land Planning §§90, 212, 274, 324

Salkin, *American Law of Zoning* §§38:8 to 38:18

Salkin, *The Tables Turn: Ethical Checks on the Public*, 32 Zoning and Planning Law Report 1 (September 2009)

Salkin, *Relationships, the Rules of Professional Conduct and Land Use: Ethical Quagmires for Land Use Attorneys*, 39 Real Estate L.J. 367 (2010)

Ziegler, Rathkopf’s *The Law of Zoning and Planning* §§32:14 to 32:28

## RECENT CASES

### Eleventh Circuit holds that county adduced sufficient evidence to support enactment of its zoning and public nudity ordinance regulating operation of sexually oriented businesses.

Manatee County, Florida, adopted an ordinance setting forth regulations to govern the manner in which sexually oriented businesses could operate in the county. The ordinance contained both zoning provisions—including physical requirements for the premises of sexually oriented businesses, restrictions on their hours of operation, and a prohibition on serving alcoholic beverages—and public nudity regulations forbidding employees from appearing in a “state of nudity” (as defined by the ordinance), and establishing rules for the conduct of employees appearing “semi-nude” (as defined by the ordinance).

Three adult dancing establishments went to court to challenge the ordinance, asserting that it was unconstitutional on its face and as applied to them. The district court granted summary judgment to the county.

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed. The zoning and public nudity portions of the ordinance, noted the Court, were to be measured against the same standard: whether they were reasonably designed to serve a substantial government interest. The initial burden was on the county to produce evidence on which it had relied to reach its conclusion that the ordinance furthered its interest in reducing the negative secondary effects associated with sexually oriented businesses. Of the county met that burden, then the onus shifted to the one remaining plaintiff in the action to cast “direct doubt” on the county’s rationale, either by showing that the evidence did not support its rationale or by producing evidence disputing the county’s factual findings.

Undertaking a detailed review of the evidence, the court had no difficulty holding that the county had met its initial burden. The county cited to the findings and interpretations of eight U.S. Supreme Court decisions and 17 other federal and state court decisions. Many of the cases upheld ordinances containing provisions similar to those at issue in the instant case, and many of them accepted legislative findings regarding the negative secondary effects of adult businesses. The county also relied on 20 stud-

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ies, many of which were empirical, conducted in other cities, which also studied the nexus between sexually oriented businesses and negative secondary effects. Those studies found, inter alia, higher incidence of sex offenses in neighborhoods surrounding sexually oriented businesses compared with control areas, and a correlation between sexually oriented businesses and lower property values. The county also referenced findings of illegal activity, including physical and sexual abuse of dancers, taking place on the premises of such businesses.

The court went on to hold that the plaintiff had failed to meet its burden of casting direct doubt on the county's rationale for adopting its ordinance. The court rejected the plaintiff's contention that it was "extremely problematic" for the county to use judicial opinions as evidence, noting that in prior litigation involving the same parties the court had squarely held that evidence described in a judicial opinion may be relied upon in the enactment of a secondary effects ordinance.

The court also rejected the argument that four of the studies relied on by the county were problematic because they contained opinion surveys. There was no precedent, said the court, barring a county from relying on studies that are not empirical in nature.

The heart of the plaintiff's attack on the county's evidence was testimony submitted on behalf of the plaintiff by three experts. One expert claimed that the studies conducted in other cities ("foreign studies") were defective. However, noted the court, that expert challenged the findings of only 17 of the foreign studies; neither he nor either of the other two plaintiff's experts said anything about three foreign studies, all of which described in detail negative secondary effect of sexually oriented businesses. Moreover, said the court, none of the plaintiff's expert testimony directly addressed the 25 judicial opinions relied upon by the county, or the evidence describing illegal activity taking place in such businesses.

The court canvassed the other expert testimony offered on behalf of the plaintiff, and held that the county had presented a substantial body of evidence in support of its ordinance, and that the plaintiff had failed to address much of that evidence at all, and had failed to show that the county's rationale or its body of evidence was unreasonable. *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.*, 2011 WL 182819 (11th Cir. 2011).

## New Jersey Supreme Court holds that limitation period for appeal of site plan approval was tolled due to incorrect information supplied by township official.

The Planning Board of Hopewell Township granted preliminary site plan approval to the Berwind Property Group Development Co., L.P. (BPG), to develop a 360-acre parcel of real estate. The approval was memorialized in a resolution adopted by the board on September 25, 2008. BPG published notice of the resolution in a local newspaper on September 27, and published a second notice in another local newspaper on October 2.

A member of the public who objected to the approval contacted the board and was informed that the notice had been published on October 2. In reliance on that information, the objector calculated the 45-day period within which any action challenging the decision in court had to be filed. When the action was filed against, inter alios, BPG and the board, they moved for dismissal on the grounds that the 45-day limitation period had begun to run upon the first publication of the resolution on September 27, not the second publication on October 2, and had therefore expired several days before the objector's action was filed. The objector responded that she had been misled by the board as to when the publication had occurred and that accordingly the 45-day limitation period should be enlarged. The trial court disagreed, and the Appellate Division sustained the trial court.

On appeal, the Supreme Court of New Jersey reversed. The issue, noted the court, was whether an extension of the limitation period was warranted under the governing provision of state law, which provided that the limitation period for review of land use decisions may be enlarged "where it is manifest that the interest of justice so requires." The court engaged in an extensive review of case law and concluded that the instant case presented "the exact constellation of circumstances" that the quoted statutory passage was intended to address. The objector, said the court, had acted reasonably in contacting the board for information. Contrary to the Appellate Division's conclusion, the objector could be granted relief even though the incorrect information was given by the board by mistake rather than in a deliberate attempt to mislead. The objector could not have been said to have slumbered on her rights, and the defendants could not have suffered prejudice sufficient to war-

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rant barring of the litigation merely due to the objector's being six days late in filing the action. The court remanded the case to the trial court for reinstatement of the complaint. *Hopewell Valley Citizens' Group, Inc. v. Berwind Property Group Development Co., L.P.*, 204 N.J. 569, 10 A.3d 211 (2011).

### **Superior Court of New Jersey holds that objector who went to court and obtained desired relief from zoning board's decision could not appeal court's judgment in his favor merely because he disagreed with its rationale.**

Hudson Heights Development, LLC, filed an application with the Union City Zoning Board of adjustment, seeking approval to build an eight-story building containing 96 residential units. The property was zoned in a mixed residential zone which did not permit multi-family development unless a use variance was obtained. The Board approved the application, and no appeal of its decision was taken.

Later that year, Hudson Heights filed a new application, seeking approval to construct, on the same property, a four-story, 48-unit residential building. The application was approved by the board. Larry Price, a resident and taxpayer of Union City, challenged the decision in court and ultimately obtained a judgment holding that the board had applied the wrong standard in approving the application. Hudson took no further action on its application and no final approvals were ever obtained. However, during the pendency of that appeal Hudson Heights requested and received two one-year extensions of the approval it had previously received for its 96-unit proposal.

Hudson later submitted a third application to the board for approval of the construction of eight three-family homes on its property. The board approved the application, but Hudson did not pursue the project, instead reverting to its original plan to develop the property as a 96-unit structure. Because of doubt on the part of the board's attorney as to whether the board's approval of the 96-unit building had expired, the board in a 2009 meeting confirmed by resolution that its approval was still valid.

Price filed a suit to challenge the board's action, contending that Hudson Heights had abandoned its 96-unit plan by virtue of its subsequent applications for approval of other projects. After trial, the court

declared the board's action null and void for lack of jurisdiction, without deciding whether Hudson Heights had abandoned the 96-unit plan. Unhappy with the court's rationale for its decision, Price appealed.

The Superior Court of New Jersey dismissed the appeal. The court noted that Price had obtained from the trial court the relief he sought—the invalidation of the board's resolution—and therefore was not aggrieved by the judgment below. He had no personal or pecuniary interest or property right adversely affected by the judgment. The rationale underlying the judgment was not independently appealable. Appeals, said the court, are taken from judgments of the trial court, not opinions. *Price v. Hudson Heights Development, LLC*, 417 N.J. Super. 462, 10 A.3d 232 (App. Div. 2011).

### **Appeals Court of Massachusetts holds that horse training facility was protected agricultural use under state law, although deed restriction might bar such use.**

Gray Wolf Development Corporation owned a 46-acre parcel of land zoned for single-family residential use. Although the property lacked the frontage necessary to allow construction of a residence, in 1998 a predecessor in interest of Gray Wolf obtained a variance to permit construction of such a residence. The variance was conditioned on imposition of a deed restriction limiting the use of the property to a single-family dwelling. The variance was never used, and when it lapsed under state law, the then owner obtained a second variance in 1999. The property was conveyed by deed in 2000, and the deed contained a restriction providing that only one dwelling could be constructed on the land.

No residence was built on the land by any prior owner, and in 2005 Gray Wolf applied to the zoning board of appeals for a special permit to construct a primary dwelling consisting of two housekeeping units, and structures to be used as horse stables, an indoor training area, a trainer's residence, and other facilities related to horse training. The permit was denied, but when Gray Wolf appealed to the Land Court, the court remanded the case to the board for determination of whether the proposed use was allowed as a protected agricultural use under state law. On remand, the board concluded that it was, and granted the special permit with conditions. Adjoining landowners appealed the

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board's decision to Superior Court, where Gray Wolf was granted summary judgment.

On appeal, the Appeals Court of Massachusetts affirmed in part, reversed in part, and remanded the case. The court held that the board was correct in concluding that Gray Wolf's proposed use was entitled to protection under state law as an agricultural use. Although the neighbors argued that the board abused its discretion by failing to impose more stringent conditions on the grant of the special permit, this contention was unsupported by evidence.

Turning to the question of whether the neighbors had standing to enforce the deed restriction, the court noted that the state statute controlling the issue was arguably ambiguous, and held that an owner of land adjacent to land subject to a deed restriction is entitled to enforce the restriction regardless of whether the deed contains an express statement that the restriction is intended to benefit the adjacent land. The court remanded the case to Superior Court for further proceedings as to the effect of the deed restriction on Gray Wolf's proposed use. *Rosenfeld v. Zoning Bd. of Appeals of Mendon*, 78 Mass. App. Ct. 677, 2011 WL 242734 (2011).

### Supreme Court of Pennsylvania holds that ordinance barring sale of certain tobacco products within 500 feet of schools or other specified buildings was not a zoning ordinance.

The City of Philadelphia enacted an ordinance which banned the sale of flavored cigars and other tobacco products preferred by illicit drug users as vehicles for smoking marijuana and other illegal drugs, and also banned the sale of cigars and other tobacco products in quantities of less than three. The ordinance also prohibited the sale of single or flavored tobacco products or of drug paraphernalia within 500 feet of a school, recreation center, day care center, church, or community center. Several tobacco retailers, manufacturers, and trade associations went to court to challenge the ordinance on the grounds that it was preempted by the drug paraphernalia provisions of the state Controlled Substance, Drug, Device and Cosmetic Act.

The trial court held that the ordinance was preempted. On appeal, the Commonwealth Court affirmed in part and reversed in part. The Commonwealth Court upheld the trial court's order insofar as it deemed pre-

empted the ordinance provisions banning the sale of single or flavored cigars or other tobacco products. However, the Commonwealth Court further held that the ordinance provision banning the sale of certain tobacco products or other potential drug paraphernalia within 500 feet of a school or other specified building was a zoning regulation, and hence was not preempted pursuant to the preemption clause of the Act (which provided that nothing in the Act would invalidate "any consistent local ordinance, including zoning and nuisance ordinances, relating to the possession, sale or use of drug paraphernalia").

On appeal, the Supreme Court of Pennsylvania affirmed the order of the Commonwealth Court in part, and reversed it in part. The Supreme Court devoted most of its opinion to holding that the entire ordinance was preempted by the state controlled substances statute, because the state statute, while also prohibiting the sale of drug paraphernalia, included a mens rea element not present in the Philadelphia ordinance. The mens rea element evinced an intent by the state legislature to protect those who innocently sell items that can be used legally or as drug paraphernalia. The absence of any mens rea element in the ordinance conflicted with this intent, and so the ordinance could not stand.

The court rejected the Commonwealth Court's holding that the 500-foot sale restriction was a zoning ordinance and as such exempted by the state law from preemption. The court noted that the ordinance did not concern land use, the province of zoning, as it did not regulate *where* businesses could be located. Rather, it regulated what retailers could sell, e.g., no flavored cigars, or how they could sell their wares, e.g., no single cigars. Such regulation of business activities did not fit within the concept of zoning. *Holt's Cigar Co., Inc. v. City of Philadelphia*, 10 A.3d 902 (Pa. 2011).

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