

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003060-23

**GLENN LUCIANO and MELANIE
SIMON**

Plaintiff-Respondent,

v.

**RIVKA BIECAGZ, ZHI LIANG,
MARK PARK and BOROUGH
OF ENGLEWOOD CLIFFS**

Defendants-Appellants

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: BERGEN COUNTY

DOCKET NO.: BER-L-786-24

Sat Below:

Hon. Christine A. Farrington, J.S.C. (ret'd
t/a)

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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PRELIMINARY STATEMENT

Glenn Luciano and Melanie Simon (collectively ““Plaintiffs””) filed a one-count verified complaint against Rivka Biecagz, Zhi Liang, Mark Park (collectively ““Defendants””), and the Borough of Englewood Cliffs (the “Borough” or “Englewood Cliffs”). Plaintiffs and Defendants are five of the seven members of Englewood Cliffs’ governing body. Plaintiffs’ goal is to prohibit Defendants from voting on matters relating to former Borough of Englewood Cliffs attorney, Albert H. Wunsch III.

The 2023 election in Englewood Cliffs included three local offices: mayor and two council seats. During their campaign as the Republican candidates, the Defendants engaged in political communications to residents criticizing Wunsch. In retaliation, Wunsch filed a defamation lawsuit against the Defendants. The Defendants won the November 2023 election and took their respective offices in January 2024. Plaintiffs allege that Wunsch’s lawsuit creates a conflict of interest for defendants, that should prevent them from voting on the Plaintiffs’ motion to rehire Wunsch. Plaintiffs’ sole allegation is that Defendants’ votes against re-hiring Wunsch’s to represent the Borough in litigation violated the Local Government Ethics Law (““LGEL””). N.J.S.A. 40A:9-22.1 to -22.25.

The current Borough Council includes three members in favor of rehiring Wunsch and three members against doing so. Consequently, Defendant Park, as mayor, holds the tie-breaking vote. He also opposes rehiring Wunsch. As a result, Wunsch was not rehired by Englewood Cliffs. Plaintiffs want to prevent the Defendants from voting on matters related to Wunsch to facilitate Wunsch's rehiring in spite of the desire of the majority of the members of the governing body. If the Defendants are prohibited from voting on motions, a minority group of the governing body would rehire Wunsch. Wunsch and his supporters are leveraging his defamation lawsuit to hinder three members of the governing body from participating in votes relating to Englewood Cliffs' official business.

The trial court judge found Defendants voting on matters violated the LGEL. It erred in doing so because the LGEL affords exclusive jurisdiction to govern and guide the conduct of local officials with the Local Finance Board in the Division of Local Government Services in the Department of Community Affairs. Despite this, Judge Farrington found the Defendants' votes were improper due to their alleged conflict with Wunsch despite lacking subject matter jurisdiction. It is clear the trial court was without jurisdiction to make such a determination, and that judicial review of matters relating to the LGEL is limited to review pursuant to Rule 2:2-3(a)(2).

STATEMENT OF FACTS

On February 3, 2024 the Plaintiffs filed a one count verified complaint against Defendants¹ and the Borough (Da16).² On February 8, 2024 the Honorable Christine A. Farrington, J.S.C. (ret.) t/a entered an order to show cause temporarily restraining Defendants from voting on motions or resolutions regarding the hiring or firing of Wunsch and setting a briefing schedule and hearing date (Da5). The sole count in Plaintiffs verified complaint alleged Defendants violated the LGEL when voting to terminate Albert Wunsch, Esq., as an attorney for Englewood Cliffs (Da18). There is no common law conflict of interest claim alleged.

Plaintiffs allege a conflict of interest exists because Wunsch filed a defamation lawsuit against Defendants (Da17, ¶12). Plaintiffs allege Wunsch filed suit because, “During the course of their campaign for the positions of council, Defendants defamed Wunsch repeatedly and damaged his reputation as both a resident and attorney.” (Da17, ¶10). Defendants went on to win the election after Wunsch filed suit (Da18, ¶15). On January 3, 2024 Defendants voted to not rehire Wunsch as counsel for the Borough (Da18, ¶¶17-18).

¹ Park was the Republican candidate for mayor, while Biecagz and Liang were Republican candidates for the council. All three were victorious in their elections.

² Plaintiff and Defendants are members of the Borough of Englewood Cliffs Mayor and Council.

Defendants filed a motion to dismiss plaintiffs' complaint on March 15, 2024 (Da14; Da78). On April 1, 2024 Judge Farrington entered an order denying Plaintiffs' request for a permanent injunction and dismissing the complaint with prejudice (Da1). This order determined that the Defendants violated the LGEL but did not address their argument in the motion to dismiss which asserted that the trial court lacked jurisdiction over matters related to the LGEL. Specifically, Judge Farrington found:

The court finds the defendants' votes on the resolution were contrary to the Local Government Ethics Law. The court finds the vote therefore was ineffectual and void regarding the subjects of the resolution which pertain to Mr. Wunsch.

[Da2.]

On April 17, 2024, Plaintiffs filed a motion to enforce litigants' rights (Da55). Plaintiffs claimed that Defendants' decision to table matters concerning Wunsch amounted to a vote against Wunsch (Da56, ¶¶4-5). Plaintiffs' motion requested, among other things, that Defendants be held in contempt and be ordered to cease voting on matters related to Wunsch, including the prohibition of voting to table such matters (Da56-Da57, ¶7).

On April 19, 2024 Defendants filed a motion to reconsider Judge Farrington's April 1, 2024 ruling because it failed to address Defendants' motion to dismiss assenting the lack of subject matter jurisdiction because the New

Jersey Legislature expressly afforded exclusive jurisdiction over alleged violations of the LGEL to, in this instance, the Department of Community Affairs (Da58; Da81). On May 10, 2024 Judge Farrington issued an order amending her April 1, 2024 order. This order, in relevant part, stated:

The April 1, 2024 order of the court is amended to remove the language finding the defendants' votes on the resolution were contrary to the Local Government Ethics Board [Law]; it is further

ORDERED, the court refers the issue of the vote on the resolution in question to the Local Finance Board for its consideration regarding the propriety thereof; and it is further

ORDERED, that the order is further amended to find defendants' votes on the resolution were improper on account of their conflict with Mr. Wunsch, regardless of the determination of the Local Government Ethics Board...

[See Da3]

Judge Farrington's May 10, 2024 order acknowledges the trial court is without jurisdiction to rule on matters relating to the LGEL yet still finds Defendants violated it (Da3a-Da4).

LEGAL ARGUMENT

- I. THE LEGISLATURE VESTED THE DEPARTMENT OF COMMUNITY AFFAIRS WITH EXCLUSIVE JURISDICTION OVER DETERMINATIONS UNDER THE LOCAL GOVERNMENT ETHICS LAW. (Da1 – Da4)**

The Legislature enacted the LGEL to govern and guide the conduct of local government officers. When doing so, the Legislature vested authority for the Local Finance Board in the Division of Local Government Services in the Department of Community Affairs with jurisdiction to govern and guide the conduct of local government officers or employees regarding violations of the LGEL. The statute explicitly deprives the trial court of any power to rule or make findings relating to the LGEL. The LGEL provides:

The Local Finance Board in the Division of Local Government Services in the Department of Community Affairs shall have jurisdiction to govern and guide the conduct of local government officers or employees regarding violations of the provisions of this act who are not otherwise regulated by a county or municipal code of ethics promulgated by a county or municipal ethics board in accordance with the provisions of this act...The board in interpreting and applying the provisions of this act shall recognize that under the principles of democracy, public officers and employees cannot and should not be expected to be without any personal interest in the decisions and policies of government; that citizens who are government officers and employees have a right to private interests of a personal, financial and economic nature; and that standards of conduct shall distinguish between those conflicts of interest which are legitimate and unavoidable in a free society and those conflicts of interest which are prejudicial and material and are, therefore, corruptive of democracy and free society

[N.J.S.A. § 40A:9-22.4 (emphasis added)]

Here, Judge Farrington³ found “[t]he defendants’ votes on the resolution were contrary to the Local Government Ethics Law. The court finds the vote therefore was ineffectual and void regarding the subjects of the resolution which pertain to Mr. Wunsch.” (Da2). That order was modified by the order on Defendants’ motion for reconsideration. Judge Farrington’s second order referred the matter to the Local Finance Board (Da3) and amended the prior order stating:

[t]hat the order is further amended to find defendants’ votes on the resolution were improper on account of their conflict with Mr. Wunsch, regardless of the determination of the Local Government Ethics Board.

[Da3]

Judge Farrington’s ruling was erroneous as the Local Finance Board in the Division of Local Government Services in the Department of Community Affairs has exclusive jurisdiction over this matter.

This Court has held that the Local Finance Board has exclusive jurisdiction to govern and guide the conduct of local government officers who are not regulated by a county or municipal code of ethics. In re Local Ethics Bd. Decisions, No. A-1019-18T4, 2020 N.J. Super. Unpub. LEXIS 1460, at *8 (App.

³ The transcript of the motion hearing dated April 1, 2024 will be referred to as 1T and the transcript of the motion hearing dated May 10, 2024 will be referred to as 2T. Defendants do not refer to the transcripts in this supporting brief but will make such references, if necessary, in its reply brief.

Div. July 21, 2020) (Da24). A decision of the Local Finance Board can be appealed the same way any final State agency decision may be appealed. N.J.S.A. 40A:9-22.9. Therefore, review from the Local Finance Board may be undertaken pursuant to Rule 2:2-3(a)(2), but it cannot originate in the trial court.

Plaintiffs' complaint did not allege any cause of action that provided the trial court with jurisdiction to review the matter (Da16). The LGEL unambiguously vested jurisdiction solely with the finance board, or local ethics boards, to govern and guide the conduct of local government officers. See N.J.S.A. 40A:9-22.4. Judicial review is limited to an appeal as of right pursuant to Rule 2:2-3(a)(2).

II. THE COURT BELOW ERRED IN RULING THAT DEFENDANTS HAD A CONFLICT OF INTEREST BECAUSE IT LACKED SUBJECT MATTER JURISDICTION. (Da1 – Da4)

The trial court did not have subject matter jurisdiction to consider Plaintiffs' complaint. It has been, “[w]ell established that a court cannot hear a case as to which it lacks subject matter jurisdiction even though all parties thereto desire an adjudication on the merits.” Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 65-66 (1978). Murray v. Comcast Corp., 457 N.J. Super. 464, 470 (Super. Ct. App. Div. 2019). Jurisdiction over subject matter is the power to hear and determine cases of the general class to which the proceeding in question belongs. Petersen v. Falzarano, 6 N.J. 447, 454 (1951).

Our Supreme Court defined jurisdiction as:

the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials: (1) the court must have cognizance of the class of cases to which the one to be adjudicated belongs; (2) the proper parties must be present, and (3) the point to be decided must be, in substance and effect, within the issue.

[Petersen v. Falzarano, 6 N.J. 447, 453 (1951)]

Subject matter jurisdiction refers to the power of a court to hear and determine cases of the class to which the proceeding in question belongs. N.J. Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 411 (App. Div. 1997) (quoting State v. Osborn, 32 N.J. 117, 122 (1960)). The issue of whether a court has subject matter jurisdiction rests upon having been granted such power by the Constitution or by valid legislation. State v. Osborn, 32 N.J. 117, 122 (1960).

Here, neither the Constitution nor valid legislation vested subject matter jurisdiction in the trial court. In fact, the LGEL provides, “The Local Finance Board in the Division of Local Government Services in the Department of Community Affairs shall have jurisdiction.” N.J.S.A. § 40A:9-22.4. It is clear the trial court did not have jurisdiction to make any determination relating to the allegations in Plaintiffs’ complaint.

If a defect in subject matter jurisdiction exists, the court must dismiss for lack of subject matter jurisdiction upon motion “or *sua sponte*, upon its own

initiative.” SMS Fin. P, LLC v. M.P. Gallagher, LLC, 2019 N.J. Super. Unpub. LEXIS 1914, *10. If a court is not authorized to decide the question before them, consideration of the issue is “wholly and immediately foreclosed.” Baker v. Carr, 369 U.S. 186, 198 (1962). Here, the trial court’s consideration was appropriately wholly and immediately foreclosed upon due to the Local Finance Board having exclusive jurisdiction. Plaintiffs appropriately moved for dismissal based upon the court’s lack of jurisdiction. The court below should have done that and no more.

III. THE COURT ERRED IN RULING A CONFLICT EXISTED WITHOUT AN APPROPRIATE HEARING (Da1 – Da4)

The Local Finance Board has been vested with numerous powers to give effect to its responsibilities and implementation of the LGEL. See N.J.S.A. 40A:9-22.7. These include the powers, “To initiate, receive, hear and review complaints and hold hearings with regard to possible violations of this act.” Id. Here, no hearings took place regarding the substance of the allegations in Plaintiffs’ complaint.

The Local Finance Board is required to acknowledge receipt of the complaint within 30 days and investigate the facts set forth in the complaint and initiate an investigation concerning the facts contained in the complaint. N.J.S.A. 40A:9-22.9. This was not done as the complaint was never filed with the Local Finance Board. The officer or employee accused of violating the LGEL shall

have the opportunity to present to the Local Finance Board with any statement or information concerning the complaint. Id. Thereafter, the board shall conduct a hearing if in the manner prescribed by N.J.S.A. 40A:9-22.12 concerning the possible violation and any facts or circumstances regarding the officer or employee's conduct.

N.J.S.A. 40A:9-22.12 requires all hearings to “[b]e conducted in conformity with the rules and procedures, insofar as they may be applicable, provided for hearings by a State agency in contested cases under the ‘Administrative Procedure Act.’” Here, no hearing ever took place. Plaintiffs’ actions completely circumvented the procedures of the LGEL leading to the trial court’s erroneous holdings.

IV. THE COURT BELOW ERRED IN RULING ON ISSUES BEYOND THE LOCAL GOVERNMENT ETHICS LAW SINCE THEY WERE NEVER PROPERLY PLEADED IN THE VERIFIED COMPLAINT. (Da1 – Da4)

Despite referring the issue of Defendants’ votes to the Local Finance Board, the court below improperly found Defendants’ votes were improper on account of their conflict with Wunsch (Da3). Plaintiffs’ complaint contained one count alleging a violation of the LGEL. The complaint does not include a cause of action alleging a conflict of interest pursuant to common law. Without this, the trial court was without jurisdiction.

This Court has held “[a] public official is disqualified from participating in judicial or quasijudicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body.” Scotch Plains-Fanwood Bd. of Educ. v. Syvertsen, 251 N.J.Super. 566, 568 (App.Div.1991). It also held “Common law conflict-of-interest principles prohibit a public official from participating in matters in which he has a direct or indirect personal or private interest.” Speroni v. Borough of Point Pleasant Beach, Nos. A-5356-12T3, A-5357-12T3, A-5430-12T3, A-5431-12T3, A-5760-12T3, A-3770-13T3, 2015 N.J. Super. Unpub. LEXIS 1615, at *8-9 (Super. Ct. App. Div. July 6, 2015) citing Aldom v. Borough of Roseland, 42 N.J. Super. 495, 502 (App. Div. 1956).

Here, Plaintiffs did not plead a common law conflict of interest. Rule 4:5-7 requires each allegation to be, “[s]imple, concise and direct, and no technical forms of pleading are required. All pleadings shall be liberally construed in the interest of justice.” A party’s pleadings must fairly appraise an adverse party of the claims and issues to be raised at trial. Miltz v. Borroughs-Shelving, 203 N.J.Super. 451, 458, (App.Div.1985); see also Hewitt v. Hollohan, 56 N.J.Super. 372, 377 (App.Div.1959). In Miltz an allegation in the complaint that plaintiff’s injuries were proximately caused by the defendant’s failure to properly install stairs was insufficient notice of a negligent-inspection theory of the case. Miltz,

203 N.J. Super. at 458. This Court ruled the plaintiff in Miltz failed to make sufficient claims for relief to sustain a cause of action. Here, plaintiffs failed to allege any cause of action outside of a purported LGEL violation. Here, like Miltz, Plaintiffs failed to plead a cause of action alleging a common law conflict of interest. Plaintiffs failed to make sufficient claims to sustain a cause of action to provide the trial court with jurisdiction.

Without a common-law cause of action alleging a conflict of interest, the trial court erred in finding defendants voters were improper on account of a conflict with Wunsch. Plaintiffs' complaint fails to properly plead any claim that provides the court with jurisdiction to rule on the propriety of Defendants' votes regarding Wunsch's employment by the Borough. The trial court's finding was erroneous as that issue was not proper before it. As such, the trial court's ruling was erroneous and must be reversed.

CONCLUSION

The trial court's finding that Defendants violated the LGEL must be reversed for the reasons set forth above.

Dated: August 22, 2024

s/Giancarlo Ghione

GIANCARLO GHIONE, ESQ.

**SUPERIOR COURT OF NEW JERSEY
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**On Appeal from Superior Court of New Jersey
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(Docket No. Ber-L-786-24)**

Sat Below:

Hon. Christine A. Farrington, J.S.C.

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COUNTER STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

The Plaintiff-Respondents, Glenn Luciano and Melanie Simon (“Plaintiffs”) are Council Members of the Governing Body of the Borough of Englewood Cliffs, New Jersey. The Defendant-Appellants, Rivka Biecagz, and Zhi Liang are newly elected Council Members of the Borough of Englewood Cliffs, and the Defendant-Appellant, Mark Park is the newly elected Mayor. (Da 16).

Non-party Albert H Wunsch, III, Esq., has represented the Borough of Englewood Cliffs on and off since 2019. He continues to be counsel of record in a variety of matters involving affordable housing matters. (Da 17).

During the course of the 2023 election campaign for the Council, the Defendants and others made numerous defamatory statements against Wunsch, in both his personal and professional capacities. The assault on Wunsch’s reputation was a central part of the Defendants’ campaigns for the Council and Mayor of the Borough, and ultimately led to them being elected to their positions in November 2023. (Da 17).

In October 2023, prior to the election, Wunsch filed a defamation lawsuit against the Defendants and other parties involved in making the defamatory statements (Docket No. BER-L-5605-23). That matter remains pending on appeal

¹ Because the facts and procedural history are intertwined, they are presented together.

in the Appellate Division. (1T5-6 to 18; Da 17)².

In November 2023, the Defendants were elected to serve on the Borough Governing Body, three years each for Biecagz and Liang, and four years in the case of Park as Mayor. (Da 18).

On January 3, 2024, at the initial and reorganization meeting of the Borough, a motion was made to terminate Wunsch as attorney for the Borough. The Motion was made by the Defendant Biecacz and seconded by the Defendant Liang. The result of the Motion was 4-3 in favor of terminating Wunsch, with Biecagz and Liang voting in favor of termination and Mayor Park breaking the tie. (Da 18).

On February 2, 2024, given that the Defendants were also defendants in the Wunsch defamation lawsuit and thus had a conflict of interest in voting on Wunsch's employment, the Plaintiffs filed a Verified Complaint (Da 16-21) and Order to Show Cause against the Defendant-Respondents, seeking the following interim relief:

- A. Determining that the Defendants had a conflict of interest in voting on matters involving the hiring/firing of Albert Wunsch, Esq. as attorney for the Borough.
- B. Enjoining the Defendants from voting in any future employment by Mr. Wunsch until his lawsuit of BER-5605-23 is completed.

(Da 6).

² "1T" refers to Law Division transcript dated April 1, 2024
"2T" refers to Law Division transcript dated May 10, 2024

On February 8, 2024, the Law Division entered an Order temporarily restraining the Defendants from voting on motions or resolutions regarding the hiring or firing of Wunsch and setting a briefing schedule and hearing date. (Da5).

On March 15, 2024, the Defendants filed a motion to dismiss the Complaint. (Da 79-80). After holding oral argument on April 1, 2024, the Law Division entered a Decision and Order (Da 1-2) the same day denying the Plaintiffs' request for a permanent injunction and dismissing the Complaint with prejudice on the basis that it was moot:

The court further finds that his contract having expired by its own terms on December 31, 2023, Mr. Wunsch is no longer employed by the Borough, with the caveat that he shall be fully compensated for all services rendered to the Borough through the date of this Order. The issues relating to the resolution and conflicts of the defendants pertinent to the injunction are moot.

(Da 2).

In its April 1 Order, the Law Division also ruled that the Defendants had a conflict of interest at the time of the January 2024 vote, stating:

The court finds the defendants' votes on the resolution were contrary to the Local Government Ethics Law. The court finds the vote therefore was ineffectual and void regarding the subjects of the resolution which pertain to Mr. Wunsch.

(Da 2).

On April 10, 2024, despite the conflict of interest ruling by the Law Division, the Defendants voted at a Council meeting to pay Wunsch only 20% of his outstanding fees for services rendered to the Borough. (Da 55-57). As noted by Plaintiff Luciano:

Moreover, despite a clear conflict and in violation of Court Orders and the N.J. Local Government Ethics Law, these same defendants continue to vote on matters concerning Mr. Wunsch. They have also utilized the process of “tabling” matters dealing with Mr. Wunsch which is essentially a vote against him. His bills have been “tabled” in March and a Resolution introduced to rehire him has been tabled on April 10, 2024. The vote was 3-3 with the Mayor breaking the tie.

(Da 56). Thus, whether the Defendants “table” a vote or engage in a vote involving Mr. Wunsch, either procedure demonstrates voting upon a matter in which the Defendants have a clear conflict of interest. (Ibid.).

As a result, on April 17, 2024, the Plaintiffs filed a motion to enforce litigants’ rights, requesting, among other things, that the Defendants be held in contempt and be ordered to cease voting on matters related to Wunsch, including the prohibition of voting to table such matters. (Da 56-57).

On April 19, 2024, the Defendants filed a motion to reconsider the April 1 Order, on the basis that the court allegedly lacked subject matter jurisdiction. (Da 81-82).

On May 10, 2024, after holding oral argument (2T), the Law Division issued an Order stating the following in relevant part:

The April 1, 2024 order of the court is amended to remove the language finding the defendants' votes on the resolution were contrary to the Local Government Ethics Board; it is further

ORDERED, the court refers the issue of the vote on the resolution in question to the Local Finance Board for its consideration regarding the propriety thereof; and it is further

ORDERED, that the order is further amended to find defendants' votes on the resolution were improper on account of their conflict with Mr. Wunsch, regardless of the determination of the Local Government Ethics Board;

(Da 1; emphasis added).

The Defendants subsequently filed a Notice of Appeal with the Superior Court, Appellate Division.

STATEMENT OF THE STANDARD OF REVIEW

Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review:

* * * we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.

In re Trust Created By Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008), quoting *Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am.*, 65 N.J. 474, 484 (1974).

LEGAL ARGUMENT

POINT I

BECAUSE THE LAW DIVISION, NOT THE DEPARTMENT OF COMMUNITY AFFAIRS, POSSESSES THE POWER TO ORDER INJUNCTIVE AND RELATED RELIEF, THE PLAINTIFF HAD NO OBLIGATION TO FILE ANYTHING WITH THE DEPARTMENT OF COMMUNITY AFFAIRS.

The Defendants have never contended -- either on appeal or before the Law Division -- that they did not have a conflict of interest in voting on matters involved Albert Wunsch. Their brazen acts in voting on these issues constitutes a conflict of interest as a matter of law, causing injury to third parties. They seek to escape liability for their actions by remarkably contending that the Plaintiff's Order to Show Cause should have been filed with the local ethics board of Englewood Cliffs.

The injuries complained of in the instant case require court intervention, not the filing of a complaint with a local ethics board, whose powers are essentially limited to issuing advisory opinions and fining government employees. The common law principles governing conflict of interest are well equipped to provide a remedy for the Plaintiff in the Superior Court. The mere fact that the Verified Complaint cites the Local Government Ethics Law is irrelevant, and does not operate to deprive the Law Division of subject matter jurisdiction.

On appeal, the Defendants in Points I through III contend in a variety of ways

that because (1) the Department of Affairs has exclusive jurisdiction over determinations under the Local Government Ethics Law, (2) the Law Division lacked subject matter jurisdiction to entertain the dispute between the parties.

The Plaintiff agrees with first statement and disagrees with the second. The facts giving rise to this case indisputably create a cause of action requiring remedies that can be provided solely by a court of law. The jurisdiction of a local ethics board, whether exclusive or not, is irrelevant to the Plaintiff's claim for relief.

The Local Government Ethics Law (LGEL), N.J.S.A. 40A:9-22.1 to -22.25, establishes a code of ethics which “governs virtually every person who serves in local government, except individuals appointed to purely advisory bodies, and officials, such as school board members and municipal court personnel, who are guided by other equally rigorous requirements.” *Department of Community Affairs, Local Finance Bd. v. Cook*, 282 N.J.Super. 207, 209 (App. Div.1995). The statute states, in pertinent part, that:

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[.]

N.J.S.A. 40A:9–22.5(d). As noted by a leading authority, the LGEL can be divided into three parts:

- a structural component which allows municipalities and counties the option of creating a local ethics Board or allowing the New Jersey Local Finance Board the act as the local Board;
- a minimum mandatory code of conduct regulating *all* offices and employees in all local units;
- financial reporting/disclosure requirements applicable only to certain specialized officials in *all* local units.

34 New Jersey Practice, Local Government Law § 9:13 (4th ed. 2024). The powers of a local ethics board are severely limited, and prohibit the kind of injunctive and other relief sought by the Plaintiffs here. N.J.S.A. 40A:9-22.7, entitled “Powers of Local Finance Board,” provides as follows:

With respect to its responsibilities for the implementation of the provisions of this act, the Local Finance³ Board shall have the following powers:

- a. To initiate, receive, hear and review complaints and hold hearings with regard to possible violations of this act;
- b. To issue subpoenas for the production of documents and the attendance of witnesses with respect to its investigation of any complaint or to the holding of a hearing;
- c. To hear and determine any appeal of a decision made by a county or municipal ethics board;
- d. To forward to the county prosecutor or the Attorney General or other governmental body any information concerning violations of this act

³ As noted above, the LGEL allows municipalities the option of creating a local ethics Board or allowing the New Jersey Local Finance Board the act as the local Board.

which may become the subject of criminal prosecution or which may warrant the institution of other legal proceedings by the Attorney General;

- e. To render advisory opinions as to whether a given set of facts and circumstances would constitute a violation of this act;
- f. To enforce the provisions of this act and to impose penalties for the violation thereof as are authorized by this act; and
- g. To adopt rules and regulations pursuant to the “Administrative Procedure Act,” P.L.1968, c. 410 (C.52:14B-1 et seq.) and to do other things as are necessary to implement the purposes of this act.

Thus, the local ethics or finance board for the Borough of Englewood Cliffs has no power, for example, to enjoin the Defendants from voting in any matters involving Mr. Wunsch until the resolution of his lawsuit against them (BER-5605-23). Such a remedy can only be achieved by filing an Order to Show Cause with the Superior Court.

At oral argument at the second hearing, the Plaintiff, Glenn Luciano, noted the limited authority of a local ethics board, stating:

It’s my understanding that the Ethics Committee can only punish, they can not necessarily stop the action that is taken place or the votes that have taken place in violation of your order. And it just seems kind of unrealistic to me that they’re going to say that this should be before the Ethics Board when the Ethics Board has no ability to prevent the vote, to overturn a vote, or to -- to enforce standing New Jersey Law.

(2T6-9 to 17)⁴. This assessment by the Plaintiff is accurate, as reflected by N.J.S.A. 40A:9-22.7 cited above. In addition, N.J.S.A. 40A:9-22.10, entitled “Penalties,” provides that a local government employee “found guilty” by an ethics board can be fined in amounts from \$100 to \$500.

Subsection (c) of the statute states: “The remedies provided herein are in addition to all other criminal and civil remedies provided under the law.” (emphasis added). Thus, the LGEL expressly acknowledges its limited scope, and the fact that aggrieved parties have ready recourse to civil remedies available in courts of law.

Accordingly, the fact that the Plaintiff chose to file suit in the Superior Court instead of the local ethics board is neither here nor there. The Law Division was not deprived of subject matter jurisdiction on the mere basis that the Plaintiff cited that statute in its Verified Complaint.

The Defendants’ reliance upon *Matter of Local Ethics Bd. Decisions*, A-1019-18T4, 2020 WL 4150716 (App. Div. July 21, 2020) for the proposition of “exclusive” jurisdiction thus falls flat, as that venue is unable to provide the relief sought by the Plaintiffs. Noteworthy is the fact that in that unpublished case, the complaining parties sought no injunctive or other relief routinely entertained by the New Jersey courts. As noted by the Appellate Division: “The gist of the complaints

⁴ The Defendants fail to cite or even mention the existence of the oral arguments occurring before the Law Division (1T, 2T).

was that as a member of the township's governing body, McCauley voted to approve salary increases for Ferrara and Borek, and, several months later, both listed their homes for sale with McCauley as the listing real estate agent.” Id. at *1.

As a result, the Defendants’ contention of exclusive jurisdiction exercised by a local ethics board is untenable and without support.

POINT II

THE RELIEF SOUGHT BY THE PLAINTIFFS IS BASED UPON COMMON LAW AND STATUTORY AUTHORITIES AND GRANTS SUBJECT MATTER JURISDICTION UPON THE LAW DIVISION.

Both common law and statutory conflict of interest principles support the filing of the instant case in Superior Court. As noted below, New Jersey opinions routinely cite and rely upon both types of legal authority in lawsuits involving a conflict of interest of a municipal employee or officer. Here, the Plaintiffs cited the Local Government Ethics Law (LGEL), N.J.S.A. 40A:9-22.1 to -22.25 in its Verified Complaint. However, the very relief sought -- and the nature of this case -- explicitly requires and cries out for Superior Court intervention.

Common law principles dictate that a “public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body.” *Grabowsky v. Twp. of Montclair*, 221 N.J. 536, 551-52 (2015), quoting *Wyzykowski v. Rizas*, 132 N.J. 509, 523 (1993).

“To determine whether there is a disqualifying interest, a court need not ascertain whether a public official has acted dishonestly or has sought to further a personal or financial interest; the decisive factor is ‘whether there is a potential for conflict.’” *Ibid*, quoting *Wyzykowski*, 132 N.J. at 524. However, “the ethics rules

must be applied with caution, as ‘local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official.’” Ibid., quoting *Wyzykowski*, 132 N.J. at 523. Thus, “the 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.” *Van Itallie v. Borough of Franklin Lakes*, 28 N.J. 258, 268 (1958).

Such principles govern the instant case. In addition, LGEL has a role to play. However, its role was not that of an adjudication via a local ethics board, but rather, a reliance upon the general principles set forth in that statute. Such statutory principles are routinely relied upon by the New Jersey courts.

For example, in *Piscitelli v. City of Garfield Zoning Bd. of Adjustment*, 237 N.J. 333 (2019), in addressing a conflict of interest in a zoning board of adjustment member, the New Jersey Supreme Court noted the interplay of common law and statutory conflict of interest principles:

The overall objective “of conflict of interest laws is to ensure that public officials provide disinterested service to their communities” and to “promote confidence in the integrity of governmental operations.” Thompson v. City of Atlantic City, 190 N.J. 359, 364, 921 A.2d 427 (2007). Whether a disqualifying conflict of interest required the recusal of any member of the Garfield Zoning Board of Adjustment from hearing the development application is governed by three distinct sources of law: the Local Government Ethics Law, N.J.S.A. 40A:9-22.2; the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-69; and

the common law, which is now codified in those conflict statutes and still guides us in understanding their meaning. See Grabowsky v. Township of Montclair, 221 N.J. 536, 552, 115 A.3d 815 (2015).

Id. at 349–50.

In *Piscitelli*, like the instant case, there was no filing with or adjudication by a local ethics board. Requiring such a filing would be non-sensical, in that the relief sought could not have been granted or even addressed by such a board. Rather, redress was through the filing of a Law Division complaint. However, the court was free to rely upon and cite the LGEL for guidance in its determination.

Similarly, the New Jersey Supreme Court relied upon both the common law and the LGEL in issuing the following ruling:

Applying the statutory standards set forth in the Municipal Land Use Law, *N.J.S.A.* 40:55D–1 to –163 (MLUL), and the Local Government Ethics Law, *N.J.S.A.* 40A:9–22.1 to –22.25 (LGEL), as well as established common law authority, we hold that when a church or other organization owns property within 200 feet of a site that is the subject of a zoning application, public officials who currently serve in substantive leadership positions in the organization, or who will imminently assume such positions, are disqualified from voting on the application.

Grabowsky v. Twp. of Montclair, 221 N.J. 536, 541 (2015).

Here, the Law Division’s May 10, 2024 Order is soundly grounded upon common law principles, together with relevant principles under the LGEL. It aptly declares that the “defendants’ votes on the resolution were improper on account of

their conflict with Mr. Wunsch, regardless of the determination of the Local Government Ethics Board.” (Da 3).

This decision should be affirmed, as it does not warrant reversal on appeal under any recognized principle of law.

POINT III

**THE ABSENCE OF A COUNT IN THE COMPLAINT
ASSERTING A COMMON LAW CONFLICT OF
INTEREST CAUSE OF ACTION IS NOT CAUSE FOR
REVERSAL OF THE LAW DIVISION'S DECISION.**

The issue of the Defendants' conflict of interest in voting on matters involving Mr. Wunsch was front and center in this litigation. The Verified Complaint and Order to Show Cause reflect this reality, as expressly set forth on the relief sought at the very outset of this litigation, which reads:

- A. Determining that the Defendants had a conflict of interest in voting on matters involving the hiring/firing of Albert Wunsch, Esq. as attorney for the Borough.
- B. Enjoining the Defendants from voting in any future employment by Mr. Wunsch until his lawsuit of BER-5605-23 is completed.

(Da 6). In addressing this conflict of interest -- a conflict never denied by the Defendants -- the Law Division issued appropriate relief below.

In Point III, the Defendants advance the following argument:

Plaintiffs' complaint contained one count alleging a violation of the LGEL. The complaint does not include a cause of action alleging a conflict of interest pursuant to common law. Without this, the trial court was without jurisdiction.

(Db 11). Such an argument runs headlong into well established authority.

The trial court's broad discretion to permit amendment to conform to the evidence is required to be liberally exercised. See, e.g., *Kernan v. One Washington Park*, 154 N.J. 437, 457 (1998); *Cuesta v. Classic Wheels, Inc.*, 358 N.J. Super. 512, 517 (App. Div. 2003); *Oscar v. Simeonidis*, 352 N.J. Super. 476, 489 (App. Div. 2002); *Fanarjian v. Moskowitz*, 237 N.J. Super. 395 (App. Div. 1989).

In addition, where a “beyond the issues as framed” objection to evidence is made, that discretion must be exercised with due regard to the opportunity of the opposing party to meet the evidence. See, e.g., *Rivera v. Gerner*, 89 N.J. 526 (1982); *Colucci v. Oppenheim*, 326 N.J. Super. 166, 179 (App. Div. 1999), certif. den. 163 N.J. 395 (2000); *Bainhauer v. Manoukian*, 215 N.J. Super. 9, 45 (App. Div. 1987); *Essex County Adjuster v. Brookes*, 198 N.J. Super. 109 (App. Div. 1984); *Cola v. Packer*, 156 N.J. Super. 77 (App. Div. 1978). The opposing party will ordinarily be deemed to have been on notice sufficient to meet that evidence if the issue has been injected into the case prior to trial even if in a technically deficient manner. See, e.g., *Winslow v. Corporate Express, Inc.*, 364 N.J. Super. 128, 140 (App. Div. 2003) (issue of legal fraud adequately raised by deposition testimony); *68th St., Inc. v. Lauricella*, 142 N.J. Super. 546, 561 (Law Div. 1976), aff'd o.b. 150 N.J. Super. 47 (App. Div.), certif. den. 75 N.J. 20 (1977) (a legal theory advanced neither in the pleadings nor pretrial order may nevertheless be resorted to in the ultimate determination of the controversy where it has been fully aired at trial and in post-

trial briefs). See also *Aly v. Garcia*, 333 N.J. Super. 195, 202 (App. Div. 2000), certif. den. 167 N.J. 87 (2001); *Teilhafer v. Greene*, 320 N.J. Super. 453, 466 (App. Div. 1999).

Here, the Defendants had every opportunity from the outset to contest the Plaintiffs' claim of conflict of interest. They chose not to, and instead, advanced technical arguments having no basis in law or fact.

Affirmance of the Law Division's May 10 Order is thus warranted.

POINT IV

ALTERNATIVELY, THIS MATTER SHOULD BE SENT FOR A LIMITED REMAND TO THE TRIAL COURT FOR THE PURPOSE OF OBTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

In entering its May 10, 2024 Order, the Law Division neglected to provide findings of facts and conclusions of law. Instead, the court merely entered an Order resolving the issues between the parties. (Da 3-4).

Rule 1:7-4 requires trial courts in non-jury actions to “find the facts and state its conclusions of law thereon.” As noted by the New Jersey Supreme Court in *Curtis v. Finneran*, 83 N.J. 563, 569-570 (1980):

In a non jury civil action, the role of the trial court at the conclusion of the trial is to find the facts and state conclusions of law. *R. 1:7-4*. Failure to perform that duty “constitutes a disservice to the litigants, the attorneys and the appellate court.” Naked conclusions do not satisfy the purpose of *R. 1:7-4*. Rather, the trial court must state clearly its factual findings and correlate them with the relevant legal conclusions.

[citations omitted]. Similarly, the Appellate Division has declared:

Meaningful appellate review is inhibited unless the judge sets forth the reasons for his or her opinion. In the absence of reasons, we are left to conjecture as to what the judge may have had in mind.”

Salch v. Salch, 240 N.J.Super. 441, 443 (App.Div. 1990); *See Also, McCann v. Biss*, 65 N.J. 301, 304, n. 2 (1974) (“Trial judges should always state their reasons so that counsel and an appellate tribunal may be fully informed.”); *Monte v. Monte*, 212 N.J.Super. 557, 565 (App.Div. 1986) (“A mere recitation of factors considered is not sufficient”).

Here, the Law Division neglected to provide the parties with any findings of fact or conclusions of law. Neither the parties nor the Appellate Division are given any guidance whatsoever as to how the trial court arrived at its decision. As recognized by the Appellate Division, “mere conclusory terminology * * * does not suffice.” *Kenwood Assocs. v. Englewood Bd. of Adj.*, 141 N.J.Super. 1, 4 (App.Div. 1976).

Thus, in the event that the Appellate Division elects to not exercise its original jurisdiction under Rule 2:10-5, a limited remand to the Law Division is necessary for the trial court to fulfill its obligations under Rule 1:7-4.

CONCLUSION

For all of the foregoing reasons, the Plaintiff-Respondents, Glenn Luciano and Malanie Simon, respectfully request the Appellate Division to affirm the Law Division's Order entered on May 10, 2024.

Respectfully Submitted,

// Louis G. DeAngelis //
LOUIS G. DEANGELIS, ESQ.

Date: September 6, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003060-23

**GLENN LUCIANO and MELANIE
SIMON**

Plaintiff-Respondent,

v.

**RIVKA BIECAGZ, ZHI LIANG,
MARK PARK and BOROUGH
OF ENGLEWOOD CLIFFS**

Defendants-Appellants

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: BERGEN COUNTY

DOCKET NO.: BER-L-786-24

Sat Below:

Hon. Christine A. Farrington, J.S.C. (ret'd
t/a)

DEFENDANT-APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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Relevant excerpt of Defendants' brief¹ entered March 15, 2024 89a

¹ Defendants submit the pertinent sections of their brief from the lower court proceedings in accordance with Rule 2:6-1, in response to plaintiffs' claim that defendants failed to argue the absence of a conflict of interest at the trial level.

PRELIMINARY STATEMENT

In their opposition, Plaintiffs attempt to argue that the issue of conflict of interest was never disputed and that the trial court rightfully found the conflict under the Local Government Ethics Law (LGEL). This mischaracterizes the record. The Defendants, from the outset, contended that no conflict of interest exists with respect to their votes on the re-hiring of Wunsch. While Plaintiffs now focus on the LGEL as the basis of their claim, it is important to underscore that Defendants raised substantive arguments challenging both the existence of a conflict and the jurisdiction of the trial court.

The opposition incorrectly implies that the Defendants' attack on the complaint was limited to procedural or technical grounds. On the contrary, Defendants consistently maintained that there is no actual conflict under the law and that the trial court erred in its findings. Furthermore, the Defendants argued that the trial court lacked subject matter jurisdiction, as the LGEL vests the exclusive authority for determining ethical conflicts in the Local Finance Board, not the courts.

Plaintiffs brief ignores these key substantive arguments, instead asserting that the trial court's ruling should stand based on general principles of conflict of interest without regard to the applicable statutory framework. As the Defendants have argued throughout, the issue of whether a conflict exists was improperly adjudicated by the trial court, and the resolution of this matter should have been left to the Local

Finance Board, which is empowered and uniquely equipped to handle such disputes under the LGEL.

It is also important to note that Plaintiffs never moved to amend their complaint to assert a common law conflict of interest claim. Despite relying on both statutory and common law principles in their opposition, Plaintiffs did not plead a common law cause of action in the trial court. This failure is significant, as the complaint solely alleged a violation of the LGEL. Plaintiffs now attempt to retroactively introduce common law arguments to justify the trial court's ruling, yet they failed to seek an amendment that would have appropriately placed those issues before that court. Without such an amendment, the trial court was not presented with, nor did it have jurisdiction to rule on, a purported common law conflict of interest claim. Defendants have consistently argued that the complaint, as framed, was insufficient to provide the relief Plaintiffs sought, and Plaintiffs' attempt to reframe the issue on appeal is unavailing.

LEGAL ARGUMENT

I. A CONFLICT OF INTEREST PREVENTING DEFENDANTS FROM VOTING ON MATTERS RELATING TO ALBERT WUNSCH DOES NOT EXIST. (Da89)

Plaintiffs falsely assert that defendants never claimed a lack of conflict of interest in voting on matters related to Albert Wunsch. (Pb at 7). This is inaccurate. This issue was briefed by defendants in the court below. (Da89)². At no time did a conflict of interest arise that would have prevented the three defendant members of the seven-member governing body from voting on issues concerning Wunsch.

Determining whether a specific interest is sufficient to disqualify a public official is highly fact-sensitive, relying on the unique circumstances of each case. Care of Tenafly, Inc. v. Tenafly Zoning Bd. of Adjustment, 307 N.J. Super. 362, 366 (App. Div. 1998). A conflict arises when a public official holds an interest that is not shared with the public. Id. at 370. The central issue is whether the individual's interest creates a scenario where the public official is inclined to prioritize personal interests over the interests of those, they are legally obligated to serve. S & L Assocs., Inc. v. Washington, 61 N.J. Super. 312, 329 (App. Div. 1960).

In this case, the facts demonstrate that no conflict of interest existed that would have prevented the defendants from voting on matters relating to Borough's

² Defendants submit the pertinent sections of their brief from the lower court proceedings in accordance with Rule 2:6-1, in response to plaintiffs' claim that defendants failed to argue the absence of a conflict of interest at the trial level.

attorney-client relationship with Wunsch. The defendants participated in political campaign communications leading up to the 2023 general election, during which the effectiveness and value of Wunsch, who served as the borough attorney under the prior administration, became an issue voters considered when casting their vote. (1T 5-12 to 5-18). Englewood Cliffs overwhelmingly agreed with defendants' view that Wunsch was ineffective in meeting the town's needs. The defendants were ultimately elected and fulfilled their commitment to hire counsel they believed to be best suited to address the community's challenges. (Da18 ¶15). Now, defendants seek to prevent the government from acting to implement the voters' will.

It is also important to recognize that disqualifying officials based on potential conflicts of interest can significantly hinder governmental functions. Graham v. United States, 231 U.S. 474, 480 (1913). The decisions of municipal officials should not be viewed with unwarranted suspicion. Van Itallie v. Franklin Lakes, 28 N.J. 258, 269 (1958). However, courts must carefully examine the facts and condemn any indication of corruption or favoritism. Id. That is not the case here as no corruption or favoritism is being displayed.

Here, the voters of Englewood Cliffs and defendants felt the need to sever their relationship with Wunsch. Plaintiffs allege that the defendants, as political candidates, targeted the former borough attorney in their campaign and were ultimately elected. (Da17 ¶10). It appears the plaintiffs initiated this action to hinder

the legitimate operations of local government by preventing elected officials from acting in their official roles. The issue as to continuing Wunsch's employment was an election issue, and the voters of Englewood Cliffs agreed with defendants to sever ties with their previous borough attorney – Wunsch.

The alleged conflict of interest was not created by the defendants but by Englewood Cliffs' former borough attorney. Wunsch filed a lawsuit against the defendants, claiming defamation based on their political speech. (Da17 ¶¶12-13). Holding that this action by Wunsch created a conflict of interest for the defendants would set a troubling precedent. Any dissatisfied vendor facing an administrative change could file a lawsuit against opposing political candidates, fabricating a conflict to avoid termination if the election outcome did not favor them.

Moreover, if a conflict existed, it would be mutual, and Wunsch would also be disqualified from representing Englewood Cliffs. Defendants are members of the litigation control group in Englewood Cliffs, and Wunsch's lawsuit would prevent representation. This type of conduct has already been addressed by our Supreme Court. In re Simon, 206 N.J. 306 (2011), the Court reprimanded an attorney who sued his client while continuing to represent them. Id. at 307. Wunsch would be unable to continue his defamation lawsuit against defendants while simultaneously providing legal advice for them to consider in the interests of Englewood Cliffs.

II. PLAINTIFFS DID NOT ALLEGE COMMON LAW CONFLICTS OF INTEREST OR AMEND THEIR COMPLAINT TO ASSERT A CAUSE OF ACTION BEYOND THE LOCAL GOVERNMENT ETHICS LAW (Da16)

Plaintiffs contend that the court may allow an amendment to align with the evidence presented. In support of this argument, plaintiffs rely on Kernan v. One Washington Park, 154 N.J. 437 (1998). However, Kernan does not allow a pleading to be amended to introduce a cause of action that was not initially pleaded. Id. at 459.

In Kernan the respondent brought an action in negligence for injuries suffered in a slip and fall against a commercial landowner that was in bankruptcy. The named defendant, however, was not a debtor in possession of the subject properties. The Supreme Court permitted an amendment pursuant to Rules 4:9-1 and 4:9-3 because the amendment did not “introduce a new cause of action” and instead allowed plaintiff to proceed against defendant the trustee named in bankruptcy. Ibid. Here, plaintiffs are attempting to add a new cause of action.

Plaintiff also improperly relies on Oscar v. Simeonidis, 352 N.J. Super. 476, 479 (App. Div. 2002). In Oscar the defendant did not object to the trial court receiving proofs on an issue that was outside of the complaint. Id. at 489. That did not occur here as defendants objected to the court’s subject matter jurisdiction.

In Fanarjian v. Moskowitz, 237 N.J. Super. 395, 400 (App. Div. 1989) the plaintiff did not object, and instead agreed to “submit” to a ruling on defendant’s request for declaratory relief that was not previously pleaded. This was enough to put the plaintiff on notice that the defendant was making a counterclaim for declaratory relief. Id. Similarly, in Rivera v. Gerner, 89 N.J. 526 (1982) the Court pointed out that a plaintiff’s complaint must provide “the gist of a substantive ground of relief ... be set forth, albeit informally.” Id. at 536 (1982) citing Jersey City v. Hague, 18 N.J. 584, 601 (1955). Here, the relief sought was only by way of invoking the LGEL. The complaint is devoid of any substantive ground or claim defendants violated any common law conflict of interest.

Rule 4:9-2 in pertinent part provides:

When issues not raised by the pleadings and pretrial order are tried **by consent or without the objection** of the parties, they shall be treated in all respects as if they had been raised in the pleadings and pretrial order.

[Rule 4:9-2, *emphasis added.*]

Plaintiffs relied on the LGEL, which clearly outlines an administrative procedure that follows the proper submission of a complaint. At no point did plaintiffs move to amend their complaint to include a cause of action under the common law sounding in conflicts of interest. Defendants, moreover, explicitly objected to the court not having jurisdiction over the matter. Defendants objected to expanding the matter to include common law conflict of interest claims.

Plaintiffs claim defendants did not contest the issue as to if a conflict of interest exists and instead advanced technical arguments having no basis in law or fact. (Pb at 19). This is not simply false. It ignores that plaintiffs never properly framed the argument that a conflict of interest existed outside of the LGEL. Plaintiffs relied on the LGEL at the trial level and failed to articulate any elements of common law conflict of interest. The trial court judge did not—and could not—on her own motion amend the pleading to include the common law conflict. Cf Cola v. Packer, 156 N.J. Super. 77, 78 (Super. Ct. App. Div. 1977) (Defendant must be given fair opportunity to defend alternative theories liability that are not within the complaint).

The trial court removed any reference to the LGEL from its orders and referred the matter to the Local Finance Board after the defendants objected, arguing that the court lacked subject matter jurisdiction. (Da3). Additionally, the court never gave the defendants an opportunity to defend against the claims of common law conflict of interest because it was not properly pleaded.

Plaintiffs' failure to amend their complaint precludes their untimely assertion of common law conflict of interest in this appeal. Plaintiffs' assertion that the relief sought is based upon common law conflict of interest is incorrect. Plaintiffs exclusively relied on the LGEL in the lower court and failed to invoke any common law cause of action or elements in their submissions. As such, they are limited to that

cause of action at this stage. Plaintiffs, moreover, failed to appeal any issue below and, therefore, should be prohibited from attempting such a late amendment.

III. THIS MATTER CANNOT BE REMANDED TO THE TRIAL COURT TO OBTAIN FINDINGS OF FACT AND CONCLUSIONS OF LAW BECAUSE THE TRIAL COURT IS WITHOUT SUBJECT MATTER JURISDICTION (Da3)

Plaintiffs contend that this case should be remanded to the trial court for the limited purpose of obtaining factual findings and conclusions of law. However, this overlooks the fact that their complaint and legal briefs solely alleged violations of the Local Government Ethics Law (LGEL). Rather than amending their complaint to assert a common law cause of action, plaintiffs maintained that the relief they sought could only be granted by the trial court. At no point did plaintiffs take steps to amend their complaint or advance legal arguments asserting that a common law conflict of interest warranted judicial intervention.

In support of this contention plaintiffs incorrectly state the trial court failed to issue findings of facts and conclusions of law. The applicable rule is:

The court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury, on every motion decided by a written order that is appealable as of right, and also as required by R. 3:29. The court shall thereupon enter or direct the entry of the appropriate judgment.

[Rule 1:7-4(a).]

The trial court issued its decision and order on April 1, 2024. (Da1). This order outlines the factual background and procedural history leading to its issuance. The court also concluded that Wunsch's prior contract with Englewood Cliffs expired on December 31, 2023, and incorrectly determined that the defendants' votes regarding Wunsch were ineffective and void as they violated the Local Government Ethics Law (LGEL). The trial court later amended its April 1, 2024 order on May 10, 2024. (Da3). This contradicts the plaintiffs' claim that the trial court failed to provide any findings of fact or conclusions of law.

As a threshold matter, the trial court is without jurisdiction to entertain the matter. The LGEL provides:

The Local Finance Board in the Division of Local Government Services in the Department of Community Affairs shall have jurisdiction to govern and guide the conduct of local government officers or employees regarding violations of the provisions of this act who are not otherwise regulated by a county or municipal code of ethics promulgated by a county or municipal ethics board in accordance with the provisions of this act...The board in interpreting and applying the provisions of this act shall recognize that under the principles of democracy, public officers and employees cannot and should not be expected to be without any personal interest in the decisions and policies of government; that citizens who are government officers and employees have a right to private interests of a personal, financial and economic nature; and that standards of conduct shall distinguish between those conflicts of interest which are legitimate and unavoidable in a free society and those conflicts of interest which are prejudicial

and material and are, therefore, corruptive of democracy and free society

[N.J.S.A. § 40A:9-22.4 (emphasis added)]

The trial court determined that Wunsch's contract with Englewood Cliffs had expired according to its own terms. (Da1). Following the defendants' motion for reconsideration, which argued that the trial court lacked jurisdiction, the court below amended its previous order to remove any references to the Local Government Ethics Law (LGEL), recognizing that the court did not have jurisdiction to rule on matters related to that statute. Consequently, a remand for additional findings of fact and legal conclusions would serve no purpose, as the trial court lacks jurisdiction to make factual findings regarding any alleged common law conflict.

CONCLUSION

The trial court erred in ruling the defendants' votes were improper on account of their alleged conflict with Mr. Wunsch. Plaintiffs' failure to plead a common law conflict of interest is fatal to their complaint, and they cannot move to amend their complaint after failing to raise this argument in the lower court. For the foregoing reasons, the ruling of the trial court that the voters were improper should be reversed.

Respectfully submitted,

/s/ Giancarlo Ghione

Giancarlo Ghione

Dated: September 20, 2024