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THE PUBLIC RELEASE OF BODY CAMERA VIDEOS

PUBLIC NUISANCE: MUNICIPALITIES AND THE COMMON GOOD



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Bias and Prejudgment in the Quasi-Judicial Decision-Making Process

PAUL D. REUVERS, *Partner, Iverson Reuvers Law Firm, Bloomington, Minnesota*



"Government is a trust, and the officers of the government are trustees. And both the trust and the trustees are created for the benefit of the people."[1]

I. INTRODUCTION

Across the United States, quasi-judicial decision-making authority is delegated to municipal public officials. Quasi-judicial conduct is "marked by an investigation into a disputed claim and a decision binding on the parties."[2] In land use contexts, quasi-judicial decisions typically include "variances, special exceptions, subdivision plats, zoning code violations, site-specific rezoning to PUD, site plan review and the decisions of a board of adjustment, and many decisions of a planning commission."[3]

As government agents, public officials must comply with Fourteenth Amendment Constitutional due process. In particular, the Constitution protects parties' rights to an impartial decision maker.[4] A decision maker's impartiality can be significantly affected by bias and prejudice, conflict of interest, ex parte communications, and of course, bribery. Municipal officers are arguably more prone to these external influences than judges or other quasi-judicial decision makers because they typically live and work in the communities they serve.

This article will review how courts have handled each of these forms of bias and prejudgment. It will offer suggestions for how to address these issues. And it will outline the types of remedies available to aggrieved parties.

1. Bias and Prejudice

Bias is defined as a "prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair."[5]

In the land use context, there are three common forms of bias. The first is procedural bias, which deals with unfair procedures that benefit one party over another. The second is actual bias, which is genuine prejudice for or against a party. And the third is implied bias, which is bias based on relationships. The existence of any form of bias can be grounds for a reversal.

Procedural Bias

Procedural bias occurs when all the requirements of a fair hearing are not met.[6]

The most common form of procedural bias arises in pre-hearing decisions. In *Barbara Realty Company v. Zoning Board of Review of the City of Cranston*, a zoning board was set to hear an application that would allow the petitioner to build a motor lodge.[7] Before the hearing, a member of the zoning board told the petitioner that the board would object to the application. When asked why, the board member said "what difference does it make, we are going to shove it down your throats anyways." The court held that the board member should be disqualified in the interest of justice and to preserve public confidence in his impartiality.

As described previously, the job of quasi-judicial decisions is to do an investigation into a disputed claim and render a binding decision – not arbitrarily deciding ahead of time, without considering the full record. If a decision maker has already made

up his or her mind befor the hearing, without consideration of the record at the hearing, this can lead to finding of bias.

(Another form of procedural bias arises in ex parte communications, which will be discussed below).

Actual Bias

Actual bias is defined as "genuine prejudice that a judge, juror, witness, or other person has against some person or relevant subject."[8]

Actual bias by one decision maker can invalidate the votes of others, especially when that decision maker is in a unique position of influence. In *Continental Property Group, Inc. v. City of Minneapolis*, a city council member took a closed mind approach to a high rise proposed in her ward of the city.[9] She also organized neighborhood opposition to the project and took an advocacy role to sway the opinions of other voting council members. The council denied the applications at issue in a unanimous 13-0 vote, but the court invalidated the decision because of the impact of the biased council member. Biased opinions by a decision maker regarding projects in their ward/district are often given substantial weight by other officials. Bias by one decision maker can be imputed onto other decision makers and invalidate decisions made with a large majority.

Quasi-judicial decision makers can also create bias by going beyond their roles and interfering with conclusions of independent experts. Municipal officials are often not experts in the fields that they make decisions in. As a result, municipalities frequently hire outside, independent experts to conduct studies to help them understand the impact of their decisions. Public officials cannot interfere with independent experts to favor their own personal beliefs.[10]

In *Living Word Bible Camp v. County of Itasca*, an environmental scientist was hired by the county to draft an Environmental Assessment Worksheet (EAW).[11] A county commissioner who opposed the proposed development requested that the scientist delete a number of "no-impact" and "mitigation" statements that favored development. Ultimately, the commissioner succeeded in having the scientist remove some conclusory language in the EAW that favored the development. The county board voted 3-1 to require an Environmental Impact Statement. The court held that the commissioner's actions that altered the independent EAW were biased and rendered the decision-making process arbitrary and capricious. Quasi-judicial decision makers cannot interfere with independent experts to alter or sway their conclusions to favor one side.

Pre-existing Bias

Unlawful bias can be formed prior to decision makers becoming public officials. In *McVay v. Zoning Hearing Board, a* developer sought a special exception permit to build multi-family dwellings.[12] The city had never staffed its zoning board, so they appointed five new members for the sole purpose of deciding the special exception permit. But before being appointed to the zoning board, a majority of the zoning board members had signed petitions opposing the multi-family development. After a hearing and deliberations, the zoning board unanimously rejected the permit. The court held thatthe decision was void because of bias. And the court gave little merit to the zoning board members' claims that the previous opposition was personal, not official.

Implied Bias

Implied bias is defined as "Bias, as of a juror, that the law conclusively presumes becauseof kinship or some other incurably close relationship; prejudice that is inferred from the experiences or relationships of a judge, juror, witness, or other person."[13]

Relationships can undoubtedly cause bias in municipal decision makers. They can be grounds to invalidate a decision. Implied bias intersects with conflicts of interest. It will be discussed further below.

Bias Takeaways

Bias is grounds for a reversal. This is true even if a vote was unanimous or had a large majority. Courts have focused on the impact the biased decision maker might have had on the others.

Admittedly, identifying bias can be difficult. It typically is not as obvious as a council member openly organizing opposition in the community. But if bias is actually identified, it is important to remove the biased decision maker from all further proceedings regarding the matter.

If the proceedings have not begun, it is best practice to simply proceed without the decision maker. If the proceedings have already begun, gauge the potential impact the biased decision maker might have had on the other decision makers. If the impact is minimal, proceedings might be able to continue without the biased decision maker. But if the impact was potentially substantive or substantial, consideration should be given to potentially restarting the proceedings without the biased decision maker.

2. Conflicts of Interest

Conflicts of interest are easier to spot but difficult to manage. "A conflicting interest arises when the public official has an interest not shared in common with the other members of the public."[14] Generally, "public officials are disqualified from participating in proceedings in a decision-making capacity when they have a direct interest in the proceedings' outcome."[15] But there is not a settled rule as to "whether such an interest will disqualify an official," and courts must make a case by case decision based on the facts.[16] In municipal quasi-judicial decisions, conflicts are

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often caused by financial considerations and relationships.

Financial Conflicts

The purest form of conflicts are financial conflicts. Municipal officials live and often own property in the communities they serve. For this reason, courts use a balancing approach when analyzing financial conflicts. In Minnesota, the courts consider the following factors:

(1) The nature of the decision being made;
(2) the nature of the pecuniary interest;
(3) the number of officials making the decision who are interested;
(4) the need, if any, to have interested persons make the decision; and
(5) the other means available, if any, such as the opportunity for review, that serve to insure that the officials will not act arbitrarily to further their selfish interests.[17]

A common conflict of interest involves property values. There is a conflict of interest any time a public official's property value changes based on their decision. In *E.T.O., Inc. v. Town of Marion*, a town board denied a bar's application to renew its liquor license in a 2-1 vote. One of the board members that voted "no" owned 53 acres across from the bar, and his property had been devalued by $100,000 after the bar opened. The court held that "A more direct, admitted financial interest is hard to imagine. A public official with a direct conflict of interest should not be permitted to vote in such a situation or our statutes and decisions prohibiting conflict of interest would be a mere mockery."[18] The town board's decision was reversed because of the conflict.

Property conflicts can also be formed through affiliation. In *Grabowsky v. Township of Montclair*, two members of a township board were members and in leadership (trustee) roles in a church.[19] A developer sought to build a large assisted living facility in a lot beside the church. The plan required a zoning application, which was approved by the township board. The court noted that an organization "may have an interest in the [zoning] application by virtue of its proximity to the property in dispute" whether or not the organization participated in the application. Here, a state statute required notice to all properties within 200 feet of a proposed zoning change. Because the church was within200 feet, the court held that it had an interest. The court declined to impute automatic conflicts for all members of a church or organization with a conflict. Instead, it held that public officials with "substantive leadership" positions in an organization will share the conflict themselves. Therefore, a conflict existed for the two public officials.

Conflicts created by property interests are particularly common for municipal officials because their property values might easily be affected by zoning changes, variances, conditional use permits, or grants of liquor licenses.

Relationships

Relationships can potentially create conflicts of interest. As previously stated, a trustee orleadership role in an organization or church can create a conflict, although mere membership is usually insufficient. The relationship conflict can also be based on legal obligations.

In *Appeal of City of Keene*, the city requested the county board chair make a public necessary determination for properties surrounding an airport.[20] The chair of the board was an attorney whose law partner previously represented two property owners near the airport and subject to the determination. The county board denied the request for a public necessity determination. The Supreme Court of New Hampshire invalidated the decision because of the chair's conflict of interest. The court reasoned that under the ABA model code, the board chair previously shared his partner's ethical obligations to two former clients—and that they maintained a duty to them as former clients.

Conflict of Interest Takeaways

The same approach regarding biased decision makers should be used with conflicts. Courts will reverse decisions because of impact of a decision maker with an actual conflict. This is true even if they do not vote. "A board member may not cure a conflict of interest by abstaining from the vote after he has already participated in the Board's discussion and voiced his opinion."[21]

An additional step that can be taken to avoid conflicts is a disclosure form. For financial conflicts, "this usually takes the form of a financial disclosure statement that sets forth anofficial's substantial financial interests."[22] To avoid other forms of conflict (and potential bias), information can be disclosed "on the record any prior knowledge or contacts with the parties to a quasi-judicial hearing."[23] The key is disclosure.

3. Ex Parte Communications

Ex parte communications are defined as "any communication outside of the record of the pending proceeding."[24] In reality, these are the conversations by public officials outside the hearing—often to other public officials, friends, members of the public, or even parties to the hearing itself. Due process "requires a quasi-judicial officer to refrain from ex parte communications."[25]

Courts have used varying approaches to analyzing ex parte communi-

cations.[26] The first, and seemingly minority approach, holds that "an ex parte communication does not deny due process where the substance of the communication was **capable of discovery by the complaining party** in time to rebut it on the record."[27] The second, and seemingly majority approach, focuses "upon **the nature of the ex parte communication** and whether it was **material to the point that it prejudiced the complaining party** and thus resulted in a denial of procedural due process."[28]

In *Jennings v. Dade County*, the court applied the second approach.[29] The court reasonably recognized that public officials will "unavoidably be the recipients of unsolicited ex parte communications regarding quasi-judicial matters they are to decide." But the occurrence of such a communication does not mandate automatic reversal. Instead, the court created a cause of action where the aggrieved party proves that an ex parte communication occurred. Such a showing creates a presumption the communication was prejudicial unless the defendant proves contrary. The burden of persuasion stays with the public official.

The key to the second approach is determining the *prejudicial effect* of an ex parte communication. The court in *Jennings v. Dade County* adopted criteria from the D.C. Circuit to analyze the prejudicial effect of ex parte communications. These criteria have been adopted by other jurisdictions (at least in part).[30] This criteria are:

> Whether, as a result of improper ex parte communications, the agency's decision making process was irrevocably tainted so as to make the **ultimate judgment of the agency unfair, either as to an innocent party or to the public interest that the agency was obliged to protect.** In making this determination, a number of considerations may be relevant: the gravity of the ex parte communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose. Since the principal concerns of the court are the integrity of the process and the fairness of the result, mechanical rules have little place in a judicial decision whether to vacate avoidable agency proceedings. Instead, any such decision must of necessity be an exercise of equitable discretion.[31]

In the context of municipal quasi-judicial decisions, ex parte communications are bound to happen. This is why all ex parte communications are not *per se* grounds for reversal. But when they do happen, it is important to identify them and disclose them. For example, a stray comment in response to a random question on the street will surely have less of a prejudicial effect than speaking in depth to an interested party before the hearing. It is a balancing act that turns on the facts.

4. Bribery

The purest form of bias and prejudgment in a quasi-judicial decision is a bribe. Bribery by a quasi-judicial decision maker is plainly a due process violation.[32] Evidence of bribery makes the case at bar undoubtedly reversible. Additionally, evidence of a decision maker's *past* bribery can render future decisions reversible as well. This theory is called compensatory bias, and it "occurs when a decision maker, who is taking bribes in some cases, is **biased against those who do not bribe the decision maker**, so he or she avoids being perceived as uniformly and suspiciously soft on the party opposing the government."[33] Therefore, a decision maker's acceptance of bribes in the past creates a presumption that they may unfairly decide cases where no bribe is being offered.

Besides being a serious due process violation, it is illegal for public officials to accept bribes in every American jurisdiction.[34] Typically, it is a felony offense.[35] Some states have created limited immunity for quasi-judicial decision makers that protects against criminal liability for incomplete, reckless, or grossly negligent decisions.[36] But this limited immunity is not absolute. The Supreme Court of Pennsylvania has explained that "official behavior involving crimes of corruption such as bribery, extortion, public office crimes, Crimen falsi, conspiracy to commit crimes, etc., are not protected by judicial or quasi-judicial immunity."[37]

Bribery is truly the most blatant unethical form of bias and prejudgment. For that reason, it is a reversible error even if the official's bribery was limited to past cases. Furthermore, officials who accept bribes will be subject to significant criminal liability and will not be protected by any limited immunity that may be afforded to decision makers for poor but otherwise uncorrupt decisions.

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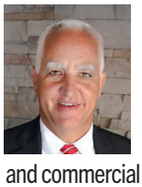

Paul Reuvers co-founded the Iverson Reuvers law firm in 2001. He practices in the defense of municipal liability claims, civil rights lawsuits, appeals, land use and commercial litigation, as well as estate planning, long term care planning and probate and trust litigation. Paul has regularly been named a Super Lawyer by *Minnesota Law & Politics* magazine. He holds a BA in Economics from Notre Dame and a JD from William Mitchell College of Law.

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5. Remedies

An aggrieved party may request that the court approve/deny the pertinent application, without further proceedings on the basis that rendered the quasi- judicial decision arbitrary and capricious. When a "zoning authority's decision is arbitrary and capricious, the standard remedy is that the court orders the permit to be issued."[38] But courts have noted an exception "when the zoning authority's decision is premature and not necessarily arbitrary" (in applying the incorrect legal standard).[39] In applying this theory to cases of public official bias, courts have held the existence of a biased public official more akin to applying the wrong legal standard, rather than deeming the entire decision as wholly arbitrary.[40]

Remand

Remand is the typical remedy when faced with bias or prejudicial conduct in quasi-judicial decision making. Municipalities are given quasi-judicial authority by the legislature, and that power is usually exclusive. For example, in Minnesota a county's "board of adjustment shall have the **exclusive power** to order the issuance of variances from the requirements of any official control."[41] When there is exclusive authority (as in Minnesota zoning decisions), the Minnesota Supreme Court has stressed the importance that "the judiciary does not encroach upon the constitutional power spheres of the other two branches of the government," or exceed "the limited role of the judiciary in reviewing zoning decisions."[42] The best way for the courts to avoid a separation of powers issue is to direct a remand.

In *Continental Property Group, Inc v. City of Minneapolis* (previously discussed where a biased city council member wrongfully lobbied other council members to vote against a project), the Minnesota Court of Appeals held "the city council relied on factors it was not intended or permitted to consider in denying CPG's applications."[43] In discussing the proper remedy, the court explained "the city council's decision would not necessarily have been arbitrary and capricious had the council followed the correct standards and procedures… namely, **had it not allowed a biased councilmember to participate in the decision.**" Therefore, the court remanded the case back to the city council. This is significant because the vote denying the project was 13-0.

As previously discussed in *Living Word Bible Camp v. County of Itasca,* a biased county board member wrongfully interfered with an independent Environmental Impact Statement.[44] The Minnesota Court of Appeals held that "the record supports the finding that [the board member's] conduct demonstrated bias and that her ability to alter the EAW to reflect her bias rendered the decision making process arbitrary and capricious." The court held that a remand was necessary because it was a 2-1 vote (with the biased member in the majority), and because the EIS needed to be redone by the expert without the wrongful input of the biased board member.

When a case is remanded to the quasi-judicial decision makers, the new case must be heard entirely without the participation of the biased official. This was the case in both *Continental Property Group* and *Living Word Bible Camp*. It was also the case in numerous similar state and federal cases.[45] Theoretically, if the reason the quasi-judicial decisions were arbitrary and capricious was the biased official, then their absence should cure the due process faults.

When a quasi-judicial decision is initially challenged at the district or appellate court (depending on state statutes), the court that hears the case is acting as a court of appeals.

Accordingly, they should abide by fundamental rules of appellate procedure.[46] Under these rules, parties cannot raise new issues or arguments for the first time on appeal, and they may not raise the same general issues litigated below on new theories.[47] Remands avoid these issues when courts merely give guidance, remand, and allow the public officials to re-hear the case.

Additional support for a remand as the proper remedy comes from other types of cases where bias has been found. In criminal cases, jurors must "swear that he could set aside any opinion he might hold and decide the case on the evidence."[48] In a case where a juror did not swear he could set aside any opinion he might hold and decide the case on the evidence, "but only that he would try," the Minnesota Court of Appeals held that the trial court erred by not striking the juror.[49] The remedy was not an acquittal, but **a new trial** – the functional equivalent of a remand. Additionally, the Minnesota Supreme Court held a trial judge's act of questioning the veracity of testimony by a defense witness and conducting independent investigation into correctness of witness's testimony deprived the defendant of his right to a fair trial.[50] But again the remedy was a remand.

Section 1983 Claims

Finally, the existence of a protected property interest is a prerequisite for a constitutional claim. "The right to procedural due process does not guarantee process for process's sake; the right to due process guarantees process for the sake of protecting an established property interest."[51] "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing."[52] Because an applicant does not have a protected property interest in a land use application, an applicant has no constitutional right to due process in the application-review process.[53] In other words, there is no section 1983 liability in the application-review process. ML

Notes

1. Attorney and United States Senator Henry Clay.
2. Meath v. Harmful Substance Comp. Bd., 550 N.W.2d 275, 279 (Minn. 1996)
3. https://www.extension.iastate.edu/communities/legislative-v-quasi-judicial-land- use-decisions
4. Humenansky v. Minnesota Bd. of Med. Examiners, 525 N.W.2d 559, 565 (Minn. Ct. App. 1994), *citing* Goldberg v. Kelly, 397 U.S. 254, 267–68, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970).
5. Oxford Languages, https://www.lexico.com/en/definition/bias
6. David W. Owens, *Bias and Conflict in Land-Use Management Decisions*, University of North Carolina 1997.
7. Barbara Realty Co. v. Zoning Bd. of Rev. of City of Cranston, 85 R.I. 152, 128 A.2d 342 (1957).
8. *Black's Law Dictionary*.
9. Cont'l Prop. Grp., Inc. v. City of Minneapolis, No. A10-1072, 2011 WL 1642510 (Minn. Ct. App. May 3, 2011).
10. Living Word Bible Camp v. Cty. of Itasca, No. A12-0281, 2012 WL 4052868, at *8 (Minn. Ct. App. Sept. 17, 2012).
11. *Id*.
12. McVay v. Zoning Hearing Bd. of New Bethlehem Borough, 91 Pa. Cmwlth. 287, 496 A.2d 1328 (1985).
13. *Black's Law Dictionary*.
14. Wyzykowski v. Rizas, 132 N.J. 509, 524, 626 A.2d 406, 413 (1993).
15. 1989 St. Imp. Program (117th St.) v. Denmark Twp., Washington Cty., Minn., 483 N.W.2d 508, 510 (Minn. Ct. App. 1992).
16. Lenz v. Coon Creek Watershed Dist., 278 Minn. 1, 15, 153 N.W.2d 209, 219 (1967).
17. *Id*.
18. E.T.O., Inc. v. Town of Marion, 375 N.W.2d 815 (Minn. 1985).
19. Grabowsky v. Twp. of Montclair, 221 N.J. 536, 115 A.3d 815 (2015).
20. Appeal of City of Keene, 141 N.H. 797, 798, 693 A.2d 412 (1997).
21. Friends Ret. Concepts v. Bd. of Educ. Borough of Somerville, 356 N.J. Super. 203, 216, 811 A.2d 962, 969 (Law. Div. 2002).
22. *Owens, supra* note 6.
23. *Id*.
24. 75-80 Properties, L.L.C. v. Rale, Inc., 470 Md. 598, 647, 236 A.3d 545, 573 (2020).
25. Asmussen v. Comm'r, New Hampshire Dep't of Safety, 145 N.H. 578, 594, 766 A.2d 678, 694 (2000).
26. *See* discussion in Jennings v. Dade Cty., 589 So. 2d 1337, 1340 (Fla. Dist. Ct. App. 1991).
27. Jennings v. Dade Cty., 589 So. 2d 1337, 1340-41 (Fla. Dist. Ct. App. 1991) citing Richardson v. Perales, 402 U.S. 389, 410, 91 S.Ct. 1420, 1431–32, 28 L.Ed.2d 842 (1971); United Air Lines, Inc. v. C.A.B., 309 F.2d 238 (D.C. Cir. 1962); Jarrott v. Scrivener, 225 F.Supp. 827, 834 (D.D.C. 1964).
28. Jennings v. Dade Cty., 589 So. 2d 1337, 1341 (Fla. Dist. Ct. App. 1991).
29. *Id*.
30. *See S*upreme Court of Connecticut (Martone v. Lensink, 207 Conn. 296, 306, 541 A.2d 488, 493 (1988)), Appellate Court of Illinois (E & E Hauling, Inc. v. Pollution Control Bd., 116 Ill. App. 3d 586, 606, 451 N.E.2d 555, 571 (1983), aff'd, 107 Ill. 2d 33, 481 N.E.2d 664 (1985)), Supreme Court of Hawaii (Kilakila 'O Haleakala v. Bd. of Land, 138 Haw. 383, 450, 382 P.3d 195, 262 (2016)), Court of Appeals of Kentucky (Louisville Gas & Elec. Co. v. Com. ex rel. Cowan, 862 S.W.2d 897, 900–01 (Ky. Ct. App. 1993)).
31. Pro. Air Traffic Controllers Org. v. Fed. Lab. Rels. Auth., 685 F.2d 547, 563–64 (D.C. Cir. 1982).
32. *See* Hall v. Superior Ct., 3 Cal. App. 5th 792, 809–10, 208 Cal. Rptr. 3d 186, 199 (2016).
33. *Id*. at 809.
34. For example, *see* Minn. Stat. § 609.42, N.Y. Penal Law §§ 200.10, 200.11, 200.12, and Cal. Penal Code, § 68.
35. *See Id*.
36. *See* Petition of Dwyer, 486 Pa. 585, 597, 406 A.2d 1355, 1361 (1979).
37. *Id*. (emphasis added).
38. Krummenacher v. City of Minnetonka, 783 N.W.2d 721, 732–33 (Minn. 2010).
39. *Id*. at 733.
40. *See* Cont'l Prop. Grp., Inc. v. City of Minneapolis, No. A10-1072, 2011 WL 1642510, at *4 (Minn. Ct. App. May 3, 2011); Living Word Bible Camp v. Cty. of Itasca, No. A12-0281, 2012 WL 4052868, at *2 (Minn. Ct. App. Sept. 17, 2012).
41. Minn. Stat. § 394.27, subd. 7.
42. Big Lake Ass'n v. Saint Louis Cty. Plan. Comm'n, 761 N.W.2d 487, 491 (Minn. 2009).
43. Cont'l Prop. Grp., Inc. v. City of Minneapolis, No. A10-1072, 2011 WL 1642510, at *6 (Minn. Ct. App. May 3, 2011).
44. Living Word Bible Camp v. Cnty. of Itasca, No. A12-0281, 2012 WL 4052868, at *2 (Minn. Ct. App. Sept. 17, 2012).
45. *See* Cinderella Career & Finishing Sch., Inc. v. F.T.C., 425 F.2d 583, 592 (D.C. Cir. 1970); Barbara Realty Co. v. Zoning Bd. of Rev. of City of Cranston, 85 R.I. 152, 154, 128 A.2d 342, 344 (1957); Texaco, Inc. v. F.T.C., 336 F.2d 754, 757 (D.C. Cir. 1964), *vacated and remanded on other grounds,* 381 U.S. 739 (1965).
46. Leppink v. Water Gremlin Co., 944 N.W.2d 493, 501 (Minn. App. 2020).
47. *Id*.
48. Patton v. Yount, 467 U.S. 1025, 1036 (1984).
49. State v. Logan, 535 N.W.2d 320, 324 (Minn. 1995).
50. State v. Dorsey, 701 N.W.2d 238, 249-53 (Minn. 2005).
51. Cont'l Prop. Grp., Inc. v. City of Minneapolis, No. A10-1072, 2011 WL 1642510, at *4 (Minn. Ct. App. May 3, 2011).
52. *Id*. citing Carey v. Piphus, 435 U.S. 247, 266, 98 S.Ct. 1042, 1054 (1978) (quotation omitted)).
53. *Id*. at *6.