

October 11, 2002

John Guldner
Town of Alta Administrator
P.O. Box 8016
Alta, Utah 84092

**HEARING SUBMITTAL TO
DIVISION OF WATER RIGHTS**

Right No.: a 28548 + a 28545
Date: 7/13/2011
Submittee: Applicant
Kevin Taltos

RE: LEE KAPALOSKI, ESQ.

Dear John,

I would like to get on the agenda for the upcoming October 17th 2002 Town council meeting in order to speak about the potential conflict of interest involving Lee Kapalowski serving as a planning commissioner. Since the Town Council members approve the planning commission members, I believe this is a relevant and timely issue to resolve at the Town Council level.

It is my current understanding:

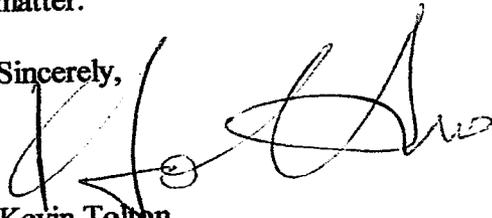
- 1) that planning commission members serve as appointed, not elected laypersons.
- 2) that Mr. Kapaloski, Esq. officially serves on the planning commission as a layperson and also provides legal advise to the Alta Planning Commission especially as it relates to water issues and development issues.
- 3) that Mr. Kapaloski, acting as a non-lawyer, is still a lawyer.
- 4) that Lee Kapaloski, Esq. also provides legal advise to the town of Alta.
- 5) that Lee Kapaloski, Esq. gave legal advise to and appeared on behalf of the town of Alta in the case of Haik v. Town of Alta (Civil No. 96-C-732J).
- 6) that when Mr. Kapaloski appeared as a lawyer for the town of Alta against Mark Haik, he attached a conflict of interest to his planning commission scope of representation.
- 7) that Mr. Kapaloski has a fiduciary duty as legal counsel to represent the Town of Alta, but he also has a separate "public interest" duty in his scope of responsibilities as a planning commission member. Mr. Kapaloski may also have a fiduciary duty in his role as a lawyer/layperson on the Planning Commission. If, for example, the Alta General Plan failed to appropriate sufficient water for storage related to fire fighting and fire prevention, then property owners could make a fiduciary duty claim to the Town of Alta's insurance carrier.
- 8) that the planning commission is currently drafting a new 2002 General Plan to replace the 1992 General Plan of the Town of Alta.
- 9) that the General Plan itself constitutes public policy that has some binding or enforceable power and authority relative to topics like land development and land use, especially as it relates to water and sewer, private property rights, land use policies including the implementation of those policies.
- 10) that Lee Kapaloski provides legal advice to two different masters with technically separate interests and liabilities, namely the Town of Alta and the Alta Planning Commission.

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- 11) that Lee Kapaloski, Esq. has an ongoing conflict of interest serving as both a lay person and as a lawyer for the Town of Alta with respect to each other and also with respect to Mark Haik given the fact that Lee Kapaloski, Esq. appeared as legal council for Alta against Mark Haik, and now as planning commissioner, Mr. Kapaloski is essentially enacting a plan whose intent and policies are to deny property owners, especially Mark Haik, use of their lands.
- 12) that under the rules of professional conduct 1.7(2b), governing conflicts of interest:
"a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third party."
Mr. Kapalowski's duty of loyalty to the TOA as a lawyer impairs his duty of loyalty to the public interest as both a layperson-planning commissioner and as a lawyer advising the Planning Commission.
- 13) that while lawyers, as a class, are obviously not barred from serving on the planning commission, they must recuse themselves in circumstances where conflicts of interest exist.
- 14) that Mark Haik is currently in the process of obtaining a building permit to develop property he owns in the Town of Alta, and
- 15) furthermore that Lee Kapalowski, Esq. serving as a lawyer for the Town of Alta also has a potential conflict of interest with every landowner applying for a building permit as it relates to property owners. If Kapaloski is a town fiduciary with legal liability exposure, then it would be difficult for him to give independent non-biased advise to the town of Alta or in the alternative to act prudently on behalf of property owners' interests by advising the town to abide by statutory requirements to provide municipal services to taxpaying residents of the town.
- 16) that the responsibilities of these two roles conflict. This dual role compromises the lawyer's independence of professional judgment.
- 17) that Mr. Kapaloski should recuse himself on any matters related to this conflict of interest including the General Plan, any building permit or land-use policies,
- 18) and that short of Mr. Kapalowski either withdrawing from representing the TOA or Alta Planning Commission, the mayor and the Town of Alta should act to rescind Mr. Kapaloski's appointment on the Planning Commission or terminate him as their lawyer.

Please inform me, John about the meeting agenda issue and whether or not the Town of Alta has any policies and procedures in place that would govern the resolution of this matter.

Sincerely,



Kevin Tolton

Cc: William H. Levitt

Cc: Lee Kapaloski, Esq.

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October 8, 2002

Lee Kapalowski, Esq.
Parsons, Behle & Latimer
One Utah Center
201 South Main, Suite 1800
Salt Lake City, Utah 84111

Dear Lee,

I understand that you presently sit on the Town of Alta Planning Commission. I also understand that you are a lawyer licensed to practise in the State of Utah. Furthermore, the planning commission is currently revising the Town of Alta General Plan which is attempting to limit private property rights, especially in it's land use policies section. You will also recall that you represent the Town of Alta and in particular appeared against me in District Court (Haik v. Town of Alta) opposing my attempt to assert my private property rights in obtaining municipal services pursuant to obtaining a building permit.

I contend that, as a lawyer for the town, you have a duty under both the Procedural Rules (i.e. "Rule of Lawyer Discipline and Disability") and the Rules of Professional Conduct (i.e. rule 1.2, Scope of Representation, Rule 1.7, Conflict of Interest: General Rule; Rule 1.9 Conflict of Interest: Former Client; and Rule 1.10 Imputed Disqualification: General Rule, Rule 1.13 Organization as a Client) to resign from your position on the Alta Planning Commission or to withdraw from representing the Town of Alta.

Your duty to act as a layperson planning commissioner serving the public interests of the town require you to include in the Alta General Plan a specific planned future course of action to provide municipal services to taxpayers within the town boundaries. The scope of your representation of the Town of Alta attaches other fiduciary duties. And your Attorney's Oath and State Bar License require you to "support, obey and defend the Constitution of the United State and the Constitution of this state and to strictly observe the Rules of Professional conduct promulgated by the Supreme Court of the State of Utah."

The intersection of these various "duties of loyalty," I believe, puts you in the crossroads of a conflict of interest. A lawyer is still a lawyer, even if acting as a non-lawyer. Therefore, advise which you provide to the planning commission constitutes legal advise. Rule 1.7 Conflict of Interest 2b states, "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third party..."

Rule 1.13b states, "If in a matter related to the representation of an organization, a lawyer knows that an officer, employee or other person associated with the organization is

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engaged in, intends to engage in or refuses to take action in violation of a legal obligation of the organization or a violation of law that may reasonable be imputed to the organization and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization, except as required by law or other rules of professional conduct. Such measures may include among others:

- 1) asking reconsideration of the matter;
- 2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- 3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
- c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of the law and is likely to result in substantial injury to the organization, the lawyer has "good cause" to resign or withdraw, as appropriate, under Rule 1.16 (b)(6).
- d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7 the consent shall be given by a person or entity, other than the individual who is to be represented, properly authorized by the organization.
- f) A lawyer elected, appointed, retained, or employed to represent a governmental entity shall be considered for the purpose of this rule as representing an organization. The government lawyer's client is the governmental entity except as the representation or duties are otherwise required by law. The responsibilities of the lawyer in paragraphs (b) and (c) may be modified by the duties required by law for the government lawyer.

For the above stated reasons, I believe that you must either withdraw from representing the Town of Alta or resign from your appointment on the Alta Planning Commission.

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In the event that you either refuse to take the necessary action under the Rules of Professional Conduct, I will be forced to file a complaint with the Utah State Bar Office of Attorney Conduct.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Haik', written in a cursive style.

Mark Haik

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