

RESOLUTION OF THE CITY COUNCIL

No.

Approved

WHEREAS, Recently retired Council President Pro Tempore Louis R. Stravato is the subject of a lawsuit entitled Hillside Associates v. Louis R. Stravato, and

WHEREAS, Said lawsuit has arisen out of circumstances surrounding a controversy regarding the building of Hillside Village in the Seventh Ward of the City of Providence which former Councilman Stravato represented, and

WHEREAS, Said Hillside Village is a very controversial proposal opposed by many residents of the Seventh Ward, and

WHEREAS, Said residents solicited the support and assistance of then Councilman Stravato in their fight against said project, and

WHEREAS, The City Solicitor's Office and outside counsel have advised that the City is not obligated to provide legal counsel or to pay for legal defense to defend Councilman Stravato in this case, and

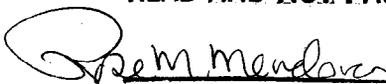
WHEREAS, The City Council believes that with all due deference to the highly professional determination of the Law Department and outside counsel that the City has no legal obligation to defend this case or to pay for legal defense, the failure of the City to defend Council Persons involved in good faith, efforts to represent the will of their constituents could be impeded by the fear of personal liability.

NOW, THEREFORE, BE IT RESOLVED, That the City Council, under the authority granted under Section 401 (d) of the Home Rule Charter of the City of Providence does, by a 2/3 vote of all the members of said City Council, authorize the hiring of outside legal counsel to be determined in consultation with the Law Department, the Council President and defendant Stravato, to fully defend the said former Councilman Stravato in the above named case, and to reimburse former Council President Pro Tempore Louis R. Stravato in the amount not to exceed Three Thousand Six Hundred Sixty-Four Dollars and Fifty Cents. (\$3,664.50)

IN CITY COUNCIL

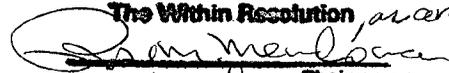
OCT 18 1990

READ AND NOT PASSED

 CLERK

**THE COMMITTEE ON
FINANCE**

**Approves Passage of
The Within Resolution**

as amended


Clark Chairman

Oct 15, 1990

IN CITY COUNCIL
SEP 7 1990
FIRST READING
REFERRED TO COMMITTEE ON

Sam Mervin CLERK

THE COMMITTEE ON

FINANCE

FINANCE
Recommends

Sam Mervin Re Continued
Clerk

August 2, 1990
August 30, 1990
Sept 27, 1990

THE COMMITTEE ON
FINANCE

Approves Passage of
The Within Resolution

Sam Mervin as amended
Clerk

October 15, 1990

Council President Easton

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

HILLSIDE ASSOCIATES :
:
v :
:
LOUIS R. STRAVATO :
:

C.A. No. 89-4309

CI

ANSWER

FIRST DEFENSE

1. Defendant LOUIS R. STRAVATO makes Answer to plaintiff's complaint by denying all allegations in its complaint, as to both counts I and II, and leaves the plaintiff to its proof thereof.

SECOND DEFENSE

1. The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

1. Defendant may take an appeal upon the issuance of a permit by an appropriate city official without fear of legal action against him, in his capacity as a councilman acting for his constituency.

FOURTH DEFENSE

1. Defendant pleads, pursuant to Rule of Civil Procedure 8(c), illegality and any other matter constituting an affirmative defense.

COUNTERCLAIM

1. Defendant is a resident of the City and County of Providence, State of Rhode Island, and, with regard to all matters pertinent hereto, is a Councilman representing his ward.

2. Plaintiff is a limited partnership with offices in the City and County of Providence, State of Rhode Island, allegedly with Vincent Mesolella and Vincent J. Mesolella, Jr. as the sole general and limited partners thereof.

3. Defendant brings this counterclaim specifically focusing upon the complaint filed herewith, and the publication thereof, and the release of data and information thereof to the general public.

COUNT I

Malicious Prosecution

4. Defendant hereby incorporates by reference all that is contained in paragraphs 1-3 above, giving full force and effect thereto.

5. The actions of the plaintiffs in bringing this action were without probable cause.

6. No state of facts existed which were sufficient to cause plaintiffs to reasonably believe that defendant should be sued as indicated herein.

7. The actions of plaintiff and its agents and servants caused defendant emotional distress and public humiliation.

WHEREFORE, defendant demands judgment against the plaintiff for TWO HUNDRED THOUSAND (\$200,000.00) DOLLARS plus interest, costs, legal fees and punitive damages.

COUNT II

Abuse of Process

8. All of Count I, paragraphs 1-7, are hereby incorporated by reference with full force and effect thereto.

9. Plaintiff has improperly and illegally brought said action against the defendant, abusing process thereby.

Defendant-Counterclaimant, by counsel,

[Handwritten signature]

SCHREIBER & SCHREIBER IRA L. SCHREIBER,
37 Sockanosset Crossroad KENNETH A. SCHREIBER,
Cranston, RI 02920 Co-Counsel 781-2000

Plaintiffs demand a
trial by jury.

[Handwritten signature]

5. The proposed Project met with a vehement protest from the neighborhood and from Defendant, who was and is a member of the City Council of Providence.

6. The said City Council, at the urging and request of Defendant, amended the Zoning Ordinance on August 10, 1978, changing the zoning classification of the land upon which the Project was to be constructed from R-3 which would permit such construction, (to R-1 which would prevent it.

7. In an action brought by Vincent Mesolella, the Superior Court, on February 9, 1979, declared the action of the Providence City Council to amend its zoning ordinance null and void, and the Rhode Island Supreme Court upheld the Superior Court decision set forth in Vincent J. Mesolella vs. City of Providence, et al, 439 A2 1370.

8. Thereafter, RIHMFC issued its commitment to finance construction of the Project and the U.S. Department of Housing and Urban Development (HUD) issued its contract to subsidize rental payments of its occupants under provisions of the United States Housing Act.

9. In reliance on the RIHMFC commitment, the HUD action, and the decision of the R.I. Supreme Court, Plaintiff, Vincent Mesolella and Vincent J. Mesolella, Jr., expended large sums of money for architectural, engineering, legal, and other fees in their attempt to fulfill RIHMFC and HUD requirements to construct the Project.

10. On July 14, 1989, the Director of the Providence Department of Inspection and Standards issued a permit to construct the foundation for construction of the Project.

11. Defendant, on July 14, 1989, filed an appeal from the action of the Director of the Providence Department of Inspection and Standards of issuance of the permit to build the foundation for the Project.

12. On July 17, 1989, Plaintiff executed and delivered various documents required by the RIHMFC commitments, and construction of the Projects was to begin approximately twelve years after RIHMFC issued its feasibility letter.

13. The act of Defendant in the filing of his said appeal was malicious and without any just or legal merit and done with the intent of causing harm to Plaintiff.

Cause of Action

Count I

Abuse of Process

1. The Defendant has abused the process established by ordinance of the City of Providence by taking an appeal to the issuance of the said permit, which appeal is wholly without merit, solely for the purpose of hindering and delaying Plaintiff.

Count II

Malicious Prosecution

1. The Defendant has appealed the issuance of the said permit solely for the purpose of hindering and delaying Plaintiff, and the appeal is without cause and is malicious.

WHEREFORE, Plaintiff demands compensatory and exemplary damages against Defendant in the sum of Six Hundred Fifty Thousand Dollars (\$650,000), interest and costs of this action.

Plaintiff,
Hillside Associates, l.p.
By its Attorney,

Mark E. Liberati, Esquire
1536 Westminster Street
Providence, RI 02909
(401) 273-7747

SCHREIBER & SCHREIBER

IRA L. SCHREIBER
KENNETH A. SCHREIBER
SIDNEY KRAMER

CINDY LEE PAGLIARO
LEGAL ADMINISTRATOR



ATTORNEYS AT LAW
RENAISSANCE PARK
37 SOCKANOSSET CROSSROAD
CRANSTON, RHODE ISLAND 02920
TELEPHONE (401) 781-2000
FAX (401) 942-6760

October 5, 1990

Mrs. Rose Mendoca
City Clerk
Providence City Hall
Providence, Rhode Island

Dear Mrs. Mendoca:

We are asked by Mr. Stravato to hand deliver the enclosed to you forthwith.

Very truly yours,
Schreiber & Schreiber

Ira L. Schreiber/rxc
IRA L. SCHREIBER, ESQUIRE

ILS:rlc
Encl.

SCHREIBER & SCHREIBER
37 Sockanosset Crossroad
Cranston, Rhode Island 02920

July 11, 1990

Mr. Nicholas Easton, President
Mr. Louis Stravato, Administrator
Providence City Council
Providence, Rhode Island

Re: Hillside/Mesollela v Stravato : Prov Sup Ct #89-4309

FOR LEGAL SERVICES RENDERED:

August	15, 1989	Initial conference with Mr. Stravato	1.8
August	30, 1989	Conference with Mr. Stravato	1.4
September	11, 1989	At U.S. District Court, clerk's office; at Prov. County Superior Court, clerk	.9
September	18, 1989	In-house conference, placing file in order, and review thereof	.8
September	25, 1989	Tel. Mr. Stravato	0
October	5, 1989	Conference with client	1.7
October	12, 1989	Conference with client	1.2
October	18, 1989	Initial Legal research as to issues	1.8
October	19, 1989	Tel. Mr. Stravato	0
October	24, 1989	Complete initial research, confer with client and determine not file motions until and unless a decision is reached which is favorable on the part of the zoning board of review as to standing	1.6
November	15, 1989	Confer with asst. city solicitor	.6
December	12, 1989	Confer with asst. city solicitor	.3
December	14, 1989	Tel. Mr. Stravato	0
January	17, 1990	Tel. zoning board clerk	.4
January	26, 1990	Tel. zoning board clerk; tel. client	0
February	6, 1990	Tel. Mr. Stravato	0
February	23, 1990	At Prov. County Superior Court, clerk	.5

March	8, 1990	Conference with client	.7
March	14, 1990	Tel. counsel	0
March	26, 1990	Tel. counsel's office; tel. client	0
April	11, 1990	At City Hall, brief discussions	.6
May	11, 1990	Tel. clerk of court	0
May	18, 1990	Tel. client	0
May	20, 1990	(Sun.) Preparation of Motion for Summary Judgment, no issue of material fact; Preparation of Motion to Dismiss; onset of memorandum of law in support thereof	4.5
May	21, 1990	Preparation of letter to client	0
May	22, 1990	Refinement of Memoranda of Law; Preparation of letter to Clerk	1.8 .2
May	23, 1990	Conference with client, new thoughts; Legal research conducted	2.3 2.2
May	24, 1990	At Providence County Superior Court for new hearing date, received same; Preparation of Affidavit	.5 .5
May	26, 1990	Preparation of new Motion to Dismiss and Completion of Memorandum of Law; Same preparation for the Motion for Summary Judgment and Memorandum	3.2
May	27, 1990	Tel. client	0
June	6, 1990	At Superior Court, briefly	.3
June	12, 1990	Tel. client	0
July	3, 1990	Conference with client; at Providence County Superior Court, judgment for Mr. Stravato	.4 2.5
July	5, 1990	Preparation of letter to client; Preparation of Order, to court for Judge Gemma's signature	0 1.8
July	6, 1990	Close this file, even if appeal taken	0

hours

Out-of-court @ \$100.00/hr:	\$3,200.00	:	32.0
In-court @ \$150.00/hr:	375.00	:	2.5
Out-of-pocket costs in-house:	89.50		
Paid by Mr. Stravato:	3,664.50		
Due Mr. Stravato from City:	3,664.50		
Due firm from Mr. Stravato:	0		

Thank you.

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

HILLSIDE ASSOCIATES

v

LOUIS R. STRAVATO

:
:
:
:
:

C.A. No. 89-4309

PLAINTIFF'S REPLY TO COUNTERCLAIM

1. Plaintiff admits that Defendant is a resident of the City and County of Providence, but denies that Defendant was acting in his capacity as a councilman with regard to the matters as set forth in the Complaint.

2. Plaintiff admits the allegations contained in Paragraph 2.

3. Plaintiff avers that no response is necessary to Paragraph 3.

COUNT I

4. Plaintiff incorporates its answers to Paragraphs 1, 2 and 3 above.

5. Plaintiff denies the allegations contained in Paragraph 5.

6. Plaintiff denies the allegations contained in Paragraph 6.

7. Plaintiff is without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 and leaves Defendant to his proof.

WHEREFORE, Plaintiff demands the counterclaim be dismissed and judgment enter in Plaintiff's favor.

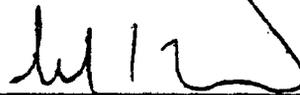
COUNT II

8. Plaintiff incorporates his answers to Paragraphs 1 through 7 of the reply.

9. Plaintiff denies the allegations contained in Paragraph 9.

WHEREFORE, Plaintiff demands the counterclaim be dismissed and judgment enter in Plaintiff's favor.

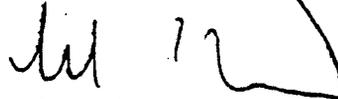
Plaintiff,
By its Attorney,



Mark E. Liberati, Esquire
1536 Westminster Street
Providence, Rhode Island 02909
(401) 273-7747

CERTIFICATION

I hereby certify that, on September 8, 1989, I mailed a true copy of the foregoing Reply to Counterclaim to Ira L. Schrieber, Esquire and Kenneth A. Schrieber, Esquire, SCHREIBER & SCHREIBER, 37 Sockanosset Crossroad, Cranston, Rhode Island 02920, by regular mail, postage prepaid.



Filed 8/29/89 4:13 p.m.

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

HILLSIDE ASSOCIATES :
:
v :
:
LOUIS R. STRAVATO :
:

:

C.A. No. 89-4309

ANSWER

FIRST DEFENSE

1. Defendant LOUIS R. STRAVATO makes Answer to plaintiff's complaint by denying all allegations in its complaint, as to both counts I and II, and leaves the plaintiff to its proof thereof.

SECOND DEFENSE

1. The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

1. Defendant may take an appeal upon the issuance of a permit by an appropriate city official without fear of legal action against him, in his capacity as a councilman acting for his constituency.

FOURTH DEFENSE

1. Defendant pleads, pursuant to Rule of Civil Procedure 8(c), illegality and any other matter constituting an affirmative defense.

COUNTERCLAIM

1. Defendant is a resident of the City and County of Providence, State of Rhode Island, and, with regard to all matters pertinent hereto, is a Councilman representing his ward.

2. Plaintiff is a limited partnership with offices in the City and County of Providence, State of Rhode Island, allegedly with Vincent Mesolella and Vincent J. Mesolella, Jr. as the sole general and limited partners thereof.

3. Defendant brings this counterclaim specifically focusing upon the complaint filed herewith, and the publication thereof, and the release of data and information thereof to the general public.

COUNT I

Malicious Prosecution

4. Defendant hereby incorporates by reference all that is contained in paragraphs 1-3 above, giving full force and effect thereto.

5. The actions of the plaintiffs in bringing this action were without probable cause.

6. No state of facts existed which were sufficient to cause plaintiffs to reasonably believe that defendant should be sued as indicated herein.

7. The actions of plaintiff and its agents and servants caused defenant emotional distress and public humiliation.

WHEREFORE, defendant demands judgment against the plaintiff for TWO HUNDRED THOUSAND (\$200,000.00) DOLLARS plus interest, costs, legal fees and punitive damages.

COUNT II

Abuse of Process

8. All of Count I, paragraphs 1-7, are hereby incorporated by reference with full force and effect thereto.

9. Plaintiff has improperly and illegally brought said action against the defendant, abusing process thereby.

Defendant-Countclaimant, by counsel,

SCHREIBER & SCHREIBER	<u>IRA L. SCHREIBER,</u>
37 Sockanosset Crossroad	KENNETH A. SCHREIBER,
Cranston, RI 02920	Co-Counsel 781-2000

Plaintiffs demand a
trial by jury.

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

HILLSIDE ASSOCIATES, l.p. :

Vs. :

LOUIS R. STRAVATO :

C.A. No. _____

COMPLAINT

1. Plaintiff is a duly organized Rhode Island limited partnership and is the owner of certain real estate located on Plainfield Street, Providence, Rhode Island, and designated as Assessor's Plat 111, Lots 2, 31 and "the real estate").

2. The sole general and limited partners of Plaintiff, Hillside Associates, l.p., are Vincent Mesolella and Vincent J. Mesolella, Jr.

3. Defendant, Louis R. Stravato, is a resident of the City and County of Providence, State of Rhode Island.

4. On September 29, 1977, Rhode Island Housing and Mortgage Finance Corporation (RIHMFC) issued a feasibility letter to Vincent J. Mesolella, Jr., expressing interest in Mr. Mesolella's proposal to construct 42 units of subsidized housing on land located on Plainfield Street in Providence, R.I., then owned by Vincent Mesolella (Project).

5. The proposed Project met with a vehement protest from the neighborhood and from Defendant, who was and is a member of the City Council of Providence.

6. The said City Council, at the urging and request of Defendant, amended the Zoning Ordinance on August 1, 1978, changing the zoning classification of the land upon which the Project was to be constructed from R-3 which would permit such construction, to R-1 which would prevent it?

7. In an action brought by Vincent Meselella, the Superior Court, on February 9, 1979, declared the action of the Providence City Council to amend its zoning ordinance null and void, and the Rhode Island Supreme Court upheld the Superior Court decision set forth in Vincent J. Meselella vs. City of Providence, et al, 439 A2 1370.

8. Thereafter, RIHMFC issued its commitment to finance construction of the Project and the U.S. Department of Housing and Urban Development (HUD) issued its contract to subsidize rental payments of its occupants under provisions of the United States Housing Act.

9. In reliance on the RIHMFC commitment, the HUD action, and the decision of the R.I. Supreme Court, Plaintiff, Vincent Meselella and Vincent J. Meselella, Jr., expended large sums of money for architectural, engineering, legal, and other fees in their attempt to fulfill RIHMFC and HUD requirements to construct the Project.

10. On July 14, 1989, the Director of the Providence Department of Inspection and Standards issued a permit to construct the foundation for construction of the Project.

11. Defendant, on July 14, 1989, filed an appeal from the action of the Director of the Providence Department of Inspection and Standards of issuance of the permit to build the foundation for the Project.

12. On July 17, 1989, Plaintiff executed and delivered various documents required by the RIHMFC commitments, and construction of the Projects was to begin approximately twelve years after RIHMFC issued its feasibility letter.

13. The act of Defendant in the filing of his said appeal was malicious and without any just or legal merit and done with the intent of causing harm to Plaintiff.

Cause of Action

Count I

Abuse of Process

1. The Defendant has abused the process established by ordinance of the City of Providence by taking an appeal to the issuance of the said permit, which appeal is wholly without merit, solely for the purpose of hindering and delaying Plaintiff.

Count II

Malicious Prosecution

1. The Defendant has appealed the issuance of the said permit solely for the purpose of hindering and delaying Plaintiff, and the appeal is without cause and is malicious.

WHEREFORE, Plaintiff demands compensatory and exemplary damages against Defendant in the sum of Six Hundred Fifty Thousand Dollars (\$650,000), interest and costs of this action.

Plaintiff,
Hillside Associates, l.p.
By its Attorney,

Mark E. Liberati, Esquire
1536 Westminster Street
Providence, RI 02909
(401) 273-7747

1500 FLEET CENTER
PROVIDENCE, RHODE ISLAND 02903
401 274-2000
FAX: 401 277-9600
TELEX: 952039 HATS PVD-UD

HINCKLEY, ALLEN, SNYDER & COMEN
Attorneys at Law

September 6, 1989

Mr. Thomas A. Devine
Chief of Staff
Mayor's Office
City Hall
Providence, RI 02903

Re: Suit Against Louis R.
Stravato

Dear Mr. Devine:

This letter is in response to your request for our opinion pertaining to the request of Louis R. Stravato, until recently a member of the City Council, that the City of Providence provide or pay for an attorney to defend him in a certain legal action brought against him.

We understand the facts to be as follows.

The suit against Mr. Stravato arises out of a low-income housing project, known as the Hillside project, which has been proposed for construction within the Seventh Ward which Mr. Stravato represented in the City Council until August 10, 1989, the date upon which his resignation became effective.

The proposed project has aroused much controversy in the Seventh Ward and Mr. Stravato, while a member of the City Council, has actively opposed its construction and was the sponsor of an ordinance amending the Providence Zoning Ordinance so as to prevent construction of the project. In subsequent litigation, this amendment was invalidated by the Rhode Island Supreme Court. Other litigation was initiated in the United States District Court against the City, Mr. Stravato and others by a tenants' group. In that suit, the tenants' alleged that the actions of the defendants with respect to the Hillside project had violated the federal Fair Housing Act. The parties negotiated a settlement and the resulting consent decree, awaiting the approval of the Court, in substance confirms the right of the developers of the Hillside project to obtain from the City in the usual manner all necessary permits, licenses and the like that are available to other developers who meet applicable City requirements.

Mr. Thomas A. Devine
September 6, 1989
Page 2

Earlier this year, the Director of the Department of Inspection Standards issued a building permit for construction of the Hillside project. Shortly thereafter, pursuant to Section 45-24-16 of the General Laws of Rhode Island, Mr. Stravato appealed issuance of the building permit to the Zoning Board of Review alleging, among other things, that the Project was not in compliance with the Zoning Ordinance provisions regulating parking and paved areas for dwellings.

Mr. Stravato was a member of the City Council at the time he filed the appeal but he thereafter resigned his Council office. We note further the following. As a City Councilman, Mr. Stravato had no legal duty or authority to appeal the issuance of a building permit; there is no legally-imposed duty requiring members of the City Council to take actions on behalf of their constituents outside of formal City Council proceedings or activities authorized by the City Council or otherwise by law; and nothing indicates that Mr. Stravato's appeal was made in connection with any legislative activity relating to the Hillside project. We further note that Mr. Stravato's appeal was not an action which council members are authorized to take in their official capacity by any statute or ordinance.

The lawsuit filed against Mr. Stravato alleges that his appeal of the issuance of the building permit constituted an abuse of process and malicious prosecution. The complaint, while alleging Mr. Stravato's position on the City Council, does not purport a claim against Mr. Stravato in his official capacity. Mr. Stravato has submitted a request to the City Solicitor that the City provide or pay for an attorney to defend him in this litigation.

You have asked us whether the City may properly undertake to defend Mr. Stravato's in this litigation. It is our opinion that a well reasoned decision of the Rhode Island Supreme Court would hold that the City may not do so.

The Rhode Island Supreme Court has ruled that a city council is empowered to indemnify an officer of the city against liability arising out of performing the duties of his office in good faith. See Sherman v. Carr, 8 R.I. 431 (1867), in which the Court upheld Newport's payment of a judgment against its mayor arising out of a civil action for false imprisonment.

Mr. Thomas A. Devine
September 6, 1989
Page 3

The law in Rhode Island pertaining to a city council's power to indemnify council members has been confirmed by the General Assembly. A city council may by ordinance or otherwise indemnify any elected official "from all loss, cost, expense, and damage, including legal fees and court costs, if any, arising out of any claim, action, compromise, settlement or judgment by any reason of any intentional tort or by reason of an alleged error or misstatement or action or omission or neglect or violation of the rights of any person under any federal or state law . . . [if the official] was acting within the scope of his or her official duties or employment." General Laws of Rhode Island, §45-15-16, enacted in 1986 (emphasis added).

Similarly, the Providence Home Rule Charter charges the City Solicitor with defending all suits to which the City or its departments, boards, commissions, bureaus and officers parties an agency of the City may be a party by reason of "matters relating to their official powers and duties." Home Rule Charter, §§603(b)(2) and (5).

Thus, the power of the City Council to indemnify council members and to provide or pay for their defense in lawsuits is limited to claims that arise from conduct within the scope of the council member's official duties. The City's authority to provide defense counsel to Mr. Stravato accordingly turns on whether he acted within the scope of his official duties.

The Rhode Island Supreme Court has not articulated a test for distinguishing those actions of a public official that constitute the performance of official duties from those which are taken as an individual. We therefore must look to other authority which we believe would be persuasive in a well reasoned decision of the Rhode Island courts.

We have extensively searched reported opinions from the courts of other jurisdictions and have found cases determining the scope of duty of public officials generally but only two of them address the question of the scope of a council member's duty. The first, a Wisconsin case, holds that a council member is not acting within the scope of his "employment" if he disobeys a court order. We do not believe that this case is helpful in answering the question put to us.

Mr. Thomas A. Devine
September 6, 1989
Page 4

The second case, however, deals with factual circumstances similar to those addressed by this opinion. The case is Palmentieri v. City of Atlantic City, 555 A.2d 752, 231 N.J. Super. 422 (1988), an opinion of a judge of the New Jersey Superior Court.

In the Palmentieri case, an Atlantic City city councilman, Gene Dorn, was the president of a citizens committee which was formed to express concern over racism in the community involving the local newspaper and employment practices of the casinos. The city councilman appeared at a rally which was organized by the committee to focus public attention on its concerns. Various city officials spoke at the rally, including Dorn, the mayor, four other councilmen and various civic leaders.

Shortly after his speech, in an interview with a newspaper reporter, Dorn made derogatory remarks about a certain black casino executive which were published in the newspaper. The black executive sued Dorn for defamation. The city council thereafter authorized the mayor to provide a legal defense for Dorn and to indemnify him for any damages arising from the suit. The plaintiffs in Palmentieri sought to set aside the council's attempt to defend and indemnify Dorn.

The Superior Court judge first considered the scope of the legislative powers and duties of a city council member and held that they included "those activities which are incidental to, or reasonably calculated to result in, legislation or legislative efforts." The judge held that Dorn's statement was not made pursuant to his legislative powers or duties; he was not sent to the rally by the city government, there was no ordinance pending or resolution authorizing his attendance at the rally, and there was no investigation or legislative process being conducted or intended at the rally. The judge also found that the city council had not delegated to Dorn the power to act on its behalf generally in opposing racism.

The court therefore concluded that Dorn's statement was not made within the scope of his official duties because there was no evidence that his statement had been authorized by the city council or that it expressed the belief or policy of the council. Accordingly, the judge invalidated the resolution of the council and enjoined Atlantic City from indemnifying or defending Dorn.

Mr. Thomas A. Devine
September 6, 1989
Page 5

We believe that the authority cited above and the analysis of Palmentieri compels the same conclusion here. It is therefore our opinion that a well reasoned decision of the Rhode Island Supreme Court would hold that Mr. Stravato was not acting within the scope of his duties when he appealed the issuance of the building permit for the Hillside project and that the City may not properly provide or pay for an attorney to defend him.

Very truly yours,

Hinckley, Allen, Snyder & Comen

eg

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc.

SUPERIOR COURT

HILLSIDE ASSOCIATES, L.P. :

Vs. :

#89-4309

LOUIS R. STRAWATO :

MOTION HEARD BEFORE
MR. JUSTICE HENRY GEMMA, JR.
ON JULY 3, 1990

APPEARANCES:

MARK E. LIBERATI, ESQUIRE. FOR THE PLAINTIFF

IRA L. SCHREIBER, ESQUIRE. FOR THE DEFENDANT

(ELAINE P. AUDETTE: COURT REPORTER)

C E R T I F I C A T I O N

I, ELAINE P. AUDETTE, hereby certify that
the succeeding pages, PAGE 1 through 7,
inclusive, are a true and accurate transcript
of my stenographic notes.

Elaine P. Audette

ELAINE P. AUDETTE
COURT REPORTER

1 TUESDAY, JULY 3, 1990

2 MORNING SESSION

3 THE COURT: The next matter is Hillside Associates
4 Vs. Stravato, #89-4309. This is the defendant's motion
5 for summary judgment?

6 MR. SCHREIBER: And a motion to dismiss.

7 THE COURT: And a motion to dismiss;
8 Mr. Schreiber?

9 MR. SCHREIBER: Well, we begin with deciding
10 whether or not either of the two grounds brought by the
11 plaintiff reflecting process are properly identified as
12 to an appeal. Is there any way that Mr. Stravato's
13 appeal can be a process? And I say no.

14 And the Rhode Island law is silent on it. I
15 examined Am. Jur. and found two or three cases that were
16 very nebulous in that area. I have to assume that the
17 language service of process means exactly that, and
18 there's no way that an appeal is a service of process.
19 An appeal does not contain a service of process.

20 This is a zoning board building inspector's
21 decision, and what Mr. Stravato did was he filled out a
22 document and he took an appeal from that decision to the
23 body, the zoning board itself, and then the zoning board
24 was to make a decision.

25 And in taking that appeal, no process was served.

1 No response was served and he took no action himself for
2 himself. It didn't fit a Superior Court or District
3 Court suit. However, out of an abundance of caution my
4 memorandum explores the two in some detail.

5 I have cited every case in Rhode Island. There are
6 seven cases in Rhode Island on both these actions.
7 Malice, of course, would have to be shown; and out of
8 fear that I might lose this motion if I filed it too
9 soon, I waited for the decision of the zoning board.
10 And the zoning board had before it a question of whether
11 or not Mr. Stravato had standing, because if he didn't
12 have standing, then it is arguable that as a result of
13 him not having standing that there was something
14 malicious, or at least it could be attributable to him.
15 It could be decided by a trier of fact.

16 The zoning board found specifically that he had
17 standing; that he had the right to take the appeal.
18 That decision in three of the four issues was appealed
19 to this Court, but the fourth, whether he had standing
20 was not appealed by the city zoning board. It was never
21 appealed by the city so it's now res judicata he had
22 standing.

23 So there's no way to show, even if we find
24 ourselves ignoring the argument that an appeal is not a
25 service of process, that Mr. Stravato acted in a

1 malicious manner.

2 In point of fact he also applied for and received
3 approval from the city council of the city to fund the
4 appeal that he took in this case that's before you now
5 in the action that he took in defending this case. I
6 think I can rely very much as well upon his affidavit.

7 Mr. Stravato makes a statement, "I brought the
8 appeal in good faith and in behalf of my constituents."
9 We know that's true because it's res judicata.

10 "I brought it because I do not believe that such a
11 housing development is proper for the area in question
12 and I do not believe the building inspector was properly
13 within his legal authority in granting a permit to erect
14 the foundation."

15 We know that's true because that's still the issue
16 to be determined and both sides in another case are
17 litigating this extensively. "I have nothing against
18 the plaintiff. I have not acted maliciously. I have
19 simply acted for my constituents."

20 THE COURT: Mr. Liberati, is there any evidence
21 that Mr. Stravato acted with malice?

22 MR. LIBERATI: The evidence of malice, Your Honor,
23 is determined by how you define malice and you define
24 malice in the case of Brough Vs. Foley as being ill
25 will, hostility, and in clear language ". . . or did

1 not believe that he or she would succeed in that
2 action."

3 So the malice is brought about, the malice is
4 brought to Your Honor's attention by virtue of the
5 definition of malice where it's clear to me that
6 Mr. Stravato didn't think that he could win this action.
7 He's filing an appeal from the decision of the building
8 inspector. And with that appeal he's attaching a copy
9 of a letter where he acknowledges that.

10 Hillside Associates has met the terms of the zoning
11 code. I can't understand, Your Honor, I can't
12 understand how you can find probable cause. How you can
13 find good faith when a person is filing an appeal from a
14 decision of the building inspector and at the same time
15 admitting that all of the requirements of the code have
16 been met.

17 Okay, as Your Honor knows, this case is far more
18 complex than those two simple documents. Mr. Stravato
19 in 1978 convinced the city council to change the zoning
20 on this parcel because he didn't want this project. The
21 plaintiff, or plaintiff's predecessor, Vincent
22 Mesolella, brought the case twice to the Supreme Court.
23 The Supreme Court threw out the re-zoning of this parcel
24 to prevent Mr. Mesolella's project.

25 I think Mr. Mesolella then collected a million

1 dollar judgment against the city; all at the behest of
2 Mr. Stravato.

3 After it was all resolved, after all agreed the
4 property was properly zoned, Mr. Stravato goes off, not
5 as a member of the city council, Your Honor, but as an
6 individual, and appeals the decision of the building
7 inspector issuing a permit just as a last gasp attempt
8 to stop the project.

9 How you can determine in this case Mr. Stravato in
10 good faith believed he would win this appeal is beyond
11 me. But, again, Your Honor has to be aware of the
12 definition of malice.

13 I don't think it's enough for Mr. Stravato to say
14 that he was not hostile or didn't have ill will. I
15 think it's clear that he didn't believe he was going to
16 win the appeal and that falls within the language of
17 Brough Vs. Foley.

18 MR. SCHREIBER: Well, we have no counteraffidavits,
19 Judge. Obviously here --

20 MR. LIBERATI: No, Your Honor. I'll be happy to
21 file a counteraffidavit that Mr. Mesolella believed that
22 Mr. Stravato believed he wouldn't win, but I don't know
23 what purpose that would serve. I think the documents
24 demonstrate that Mr. Stravato could not have felt that
25 he could win this appeal.

1 THE COURT: Hillside brings this suit against
2 Mr. Stravato alleging that Stravato in taking the appeal
3 was abusing process and maliciously prosecuting
4 Hillside.

5 MR. LIBERATI: Yes, Your Honor.

6 THE COURT: Where a party exercises its legal right
7 to take an appeal, such action affords no basis for an
8 inference of malice for want of probable cause.

9 While causes of action involving state of mind are
10 generally not proper subject matters for summary
11 judgment, the United States Supreme Court in Anderson
12 vs. Liberty, 477 U.S. also 91 Lawyers' Edition 2nd
13 stated that, "Summary judgment in malice cases is proper
14 where the plaintiff fails to come forth with some facts
15 or probative evidence to support the malice allegations
16 in the complaint. If no evidence supporting the finding
17 of malice is presented, summary judgment should issue."

18 In this case, Hillside had the opportunity to
19 specify the circumstances which would allow the
20 inference that Stravato took his appeal with a tortious
21 state of mind. Hillside had the opportunity to set out
22 the circumstances which allows the inference that
23 Stravato filed this appeal with that type of state of
24 mind. None was offered.

25 While this Court is required to make all inferences

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

against Mr. Stravato and in Hillside's favor, this Court still must be presented with facts and circumstances which allow such inferences to be made. Since Hillside has failed to produce evidence in support of its claim that Stravato filed his appeal with a tortious state of mind, the defendant's motion for summary judgment is granted.

The Court is satisfied that there are no genuine issues of material fact.

* * * * *



Department of Law
"Building Pride In Providence"

September 13, 1989

Councilman David G. Dillon
292 Waverly Street
Providence, Rhode Island 02909

Dear Councilman Dillon:

I write in response to your correspondence of September 9, 1989, regarding the pending resolution for the hiring of outside legal counsel for the defense of former Councilman Stravato, and the serious issues raised by that case.

First, I wish to make clear that the decision by the Law Department not to provide or pay for the legal defense of Mr. Stravato was reached after very careful consideration of the unusual circumstances involved here, and is in no way reflective of any policy decision to not provide legal defense of council members during the ordinary course of events. This position of the Law Department has been concurred in by an opinion rendered by outside counsel, and a copy of that opinion is attached hereto.

Turning to the implications of this matter, it does indeed raise certain concerns, but need not cause alarm. As you correctly point out, an action directly filed against an individual councilperson is unusual. In the normal course of events, Plaintiffs normally seek recourse against the City and not against individual members of the Council. One reason for this is that council members enjoy limited immunity that insulates them from liability.

However, this immunity is limited to those acts which are carried out within the scope of a councilperson's duties. The purpose of this immunity is not to protect the individual members against prosecution for their own benefit, but to support the rights of the people by enabling their representatives to execute the functions of their office, without fear of civil or criminal liability. The key test is whether the activity undertaken falls within the duties of a councilperson.

For example, it is clear that acts undertaken in furtherance of the legislative process of the council are protected. Comments or activities undertaken during deliberations or investigations of proposed

Councilman David Dillon
September 13, 1989

Page Two

ordinances are the very heart of the process, for which no liability should attach, and are the types of activities which the Law Department would vigorously defend.

But, when a councilperson does an act which does not fall within the scope of his or her duties as a councilperson, that immunity does not apply. For example, if councilperson X were involved in a motor vehicle accident on the way home from the beach and sued for damages, the immunity clearly would not apply.

Returning to the facts regarding Mr. Stravato, his acts in appealing the issuance of a building permit do not fall within the scope of his council duties. His council duties are to represent the interests of his constituents before the full council, his duties do not extend to prosecuting the appeal of the issuance of a building permit. Therefore, for the reasons stated in the opinion of outside council, we can not provide legal representation, nor do we believe that we can authorize payment of Mr. Stravato's legal fees.

Finally, you requested copies of the pleadings in the Stravato case, and my comments thereon. A copy of the pleadings are attached. However, I am reluctant to attempt to predict the outcome of this matter. Court cases have been known to lead to unusual results.

I hope this information clarifies any questions you have regarding this situation.

Very truly yours,


Edward C. Clifton,
City Solicitor

ECC/sms

1500 FLEET CENTER
PROVIDENCE, RHODE ISLAND 02903
401 274-2000
FAX: 401 277-9600
TELEX: 952039 HATS PVD-UD

HINCKLEY, ALLEN, SNYDER & COMEN

Attorneys at Law

September 6, 1989

Mr. Thomas A. Devine
Chief of Staff
Mayor's Office
City Hall
Providence, RI 02903

Re: Suit Against Louis R.
Stravato

Dear Mr. Devine:

This letter is in response to your request for our opinion pertaining to the request of Louis R. Stravato, until recently a member of the City Council, that the City of Providence provide or pay for an attorney to defend him in a certain legal action brought against him.

We understand the facts to be as follows.

The suit against Mr. Stravato arises out of a low-income housing project, known as the Hillside project, which has been proposed for construction within the Seventh Ward which Mr. Stravato represented in the City Council until August 10, 1989, the date upon which his resignation became effective.

The proposed project has aroused much controversy in the Seventh Ward and Mr. Stravato, while a member of the City Council, has actively opposed its construction and was the sponsor of an ordinance amending the Providence Zoning Ordinance so as to prevent construction of the project. In subsequent litigation, this amendment was invalidated by the Rhode Island Supreme Court. Other litigation was initiated in the United States District Court against the City, Mr. Stravato and others by a tenants' group. In that suit, the tenants' alleged that the actions of the defendants with respect to the Hillside project had violated the federal Fair Housing Act. The parties negotiated a settlement and the resulting consent decree, awaiting the approval of the Court, in substance confirms the right of the developers of the Hillside project to obtain from the City in the usual manner all necessary permits, licenses and the like that are available to other developers who meet applicable City requirements.

Mr. Thomas A. Devine
September 6, 1989
Page 2

Earlier this year, the Director of the Department of Inspection Standards issued a building permit for construction of the Hillside project. Shortly thereafter, pursuant to Section 45-24-16 of the General Laws of Rhode Island, Mr. Stravato appealed issuance of the building permit to the Zoning Board of Review alleging, among other things, that the Project was not in compliance with the Zoning Ordinance provisions regulating parking and paved areas for dwellings.

Mr. Stravato was a member of the City Council at the time he filed the appeal but he thereafter resigned his Council office. We note further the following. As a City Councilman, Mr. Stravato had no legal duty or authority to appeal the issuance of a building permit; there is no legally-imposed duty requiring members of the City Council to take actions on behalf of their constituents outside of formal City Council proceedings or activities authorized by the City Council or otherwise by law; and nothing indicates that Mr. Stravato's appeal was made in connection with any legislative activity relating to the Hillside project. We further note that Mr. Stravato's appeal was not an action which council members are authorized to take in their official capacity by any statute or ordinance.

The lawsuit filed against Mr. Stravato alleges that his appeal of the issuance of the building permit constituted an abuse of process and malicious prosecution. The complaint, while alleging Mr. Stravato's position on the City Council, does not purport a claim against Mr. Stravato in his official capacity. Mr. Stravato has submitted a request to the City Solicitor that the City provide or pay for an attorney to defend him in this litigation.

You have asked us whether the City may properly undertake to defend Mr. Stravato's in this litigation. It is our opinion that a well reasoned decision of the Rhode Island Supreme Court would hold that the City may not do so.

The Rhode Island Supreme Court has ruled that a city council is empowered to indemnify an officer of the city against liability arising out of performing the duties of his office in good faith. See Sherman v. Carr, 8 R.I. 431 (1867), in which the Court upheld Newport's payment of a judgment against its mayor arising out of a civil action for false imprisonment.

Mr. Thomas A. Devine
September 6, 1989
Page 3

The law in Rhode Island pertaining to a city council's power to indemnify council members has been confirmed by the General Assembly. A city council may by ordinance or otherwise indemnify any elected official "from all loss, cost, expense, and damage, including legal fees and court costs, if any, arising out of any claim, action, compromise, settlement or judgment by any reason of any intentional tort or by reason of an alleged error or misstatement or action or omission or neglect or violation of the rights of any person under any federal or state law . . . [if the official] was acting within the scope of his or her official duties or employment." General Laws of Rhode Island, §45-15-16, enacted in 1986 (emphasis added).

Similarly, the Providence Home Rule Charter charges the City Solicitor with defending all suits to which the City or its departments, boards, commissions, bureaus and officers parties an agency of the City may be a party by reason of "matters relating to their official powers and duties." Home Rule Charter, §§603(b)(2) and (5).

Thus, the power of the City Council to indemnify council members and to provide or pay for their defense in lawsuits is limited to claims that arise from conduct within the scope of the council member's official duties. The City's authority to provide defense counsel to Mr. Stravato accordingly turns on whether he acted within the scope of his official duties.

The Rhode Island Supreme Court has not articulated a test for distinguishing those actions of a public official that constitute the performance of official duties from those which are taken as an individual. We therefore must look to other authority which we believe would be persuasive in a well reasoned decision of the Rhode Island courts.

We have extensively searched reported opinions from the courts of other jurisdictions and have found cases determining the scope of duty of public officials generally but only two of them address the question of the scope of a council member's duty. The first, a Wisconsin case, holds that a council member is not acting within the scope of his "employment" if he disobeys a court order. We do not believe that this case is helpful in answering the question put to us.

Mr. Thomas A. Devine
September 6, 1989
Page 4

The second case, however, deals with factual circumstances similar to those addressed by this opinion. The case is Palmentieri v. City of Atlantic City, 555 A.2d 752, 231 N.J. Super. 422 (1988), an opinion of a judge of the New Jersey Superior Court.

In the Palmentieri case, an Atlantic City city councilman, Gene Dorn, was the president of a citizens committee which was formed to express concern over racism in the community involving the local newspaper and employment practices of the casinos. The city councilman appeared at a rally which was organized by the committee to focus public attention on its concerns. Various city officials spoke at the rally, including Dorn, the mayor, four other councilmen and various civic leaders.

Shortly after his speech, in an interview with a newspaper reporter, Dorn made derogatory remarks about a certain black casino executive which were published in the newspaper. The black executive sued Dorn for defamation. The city council thereafter authorized the mayor to provide a legal defense for Dorn and to indemnify him for any damages arising from the suit. The plaintiffs in Palmentieri sought to set aside the council's attempt to defend and indemnify Dorn.

The Superior Court judge first considered the scope of the legislative powers and duties of a city council member and held that they included "those activities which are incidental to, or reasonably calculated to result in, legislation or legislative efforts." The judge held that Dorn's statement was not made pursuant to his legislative powers or duties; he was not sent to the rally by the city government, there was no ordinance pending or resolution authorizing his attendance at the rally, and there was no investigation or legislative process being conducted or intended at the rally. The judge also found that the city council had not delegated to Dorn the power to act on its behalf generally in opposing racism.

The court therefore concluded that Dorn's statement was not made within the scope of his official duties because there was no evidence that his statement had been authorized by the city council or that it expressed the belief or policy of the council. Accordingly, the judge invalidated the resolution of the council and enjoined Atlantic City from indemnifying or defending Dorn.

HINCKLEY, ALLEN, SNYDER & COMEN

Mr. Thomas A. Devine
September 6, 1989
Page 5

We believe that the authority cited above and the analysis of Palmentieri compels the same conclusion here. It is therefore our opinion that a well reasoned decision of the Rhode Island Supreme Court would hold that Mr. Stravato was not acting within the scope of his duties when he appealed the issuance of the building permit for the Hillside project and that the City may not properly provide or pay for an attorney to defend him.

Very truly yours,

Hinckley, Allen, Snyder + Comen

eg



Department of Law
"Building Pride In Providence"

August 10, 1989

Councilman Louis R. Stravato
18 Jacqueline Drive
Providence, Rhode Island 02909

RE: Hillside Associates, L.P. -vs- Louis R. Stravato

Dear Councilman Stravato:

I have personally reviewed your request to me dated August 10, 1989 and have determined that:

- (1) the action commenced is not brought against you in your capacity as a City Councilman, and;
- (2) that this office can neither represent you in this matter nor retain outside counsel on your behalf.

The reason for the above determinations is that although the complaint makes reference in one paragraph (Paragraph 5) that Defendant (Stravato) "...was and is a member of the City Council of Providence", that statement above is simply a statement of fact. That statement does not, standing alone, transform this action into an action against you in your capacity as a City Councilman.

As this is the law office of a municipal corporation, we are only permitted to represent the corporation (City of Providence) itself or its officers, directors, employees or agents only when they are being sued in their capacity as such. Given my earlier conclusion that you are not being sued in your official capacity, we cannot represent you, nor can we engage outside counsel on your behalf.

Councilman Louis R. Stravato
August 10, 1989

Page Two

I am returning to you the summons and complaint that you provided me with. I would urge you to consult with and engage legal representation of your own choosing as soon as possible so as to protect your rights in this matter.

Respectfully,



EDWARD C. CLIFTON
City Solicitor

ECC/vav

cc: Tad Devine

COUNCILMAN
DAVID G. DILLON
DEPUTY MAJORITY LEADER
292 WAVERLY STREET
PROVIDENCE, RI 02909
Res. 273-7572



COMMITTEES

Finance
Vice-Chairman

Urban Redevelopment,
Renewal and Planning

Providence
Redevelopment
Agency

City of Providence, Rhode Island

September 24, 1989

Mr. Louis R. Stravato
18 Jacqueline Drive
Providence, RI 02909

Dear Louie:

I have read all the information that has been sent to me in the case of Hillside Associates vs. Stravato. I want to make you aware of my thoughts on the case thus far.

We now have several legal opinions on the matter of whether the City Council can or should pay your legal fees. Ed Clifton indicates that the opinion furnished by the Law Department was not his alone, but concurred in by several of the Assistant City Solicitors, we have an opinion from Hinkley, Allen, Snyder & Comen, and now we have an opinion from Schreiber & Schreiber. The City Council has not always followed the advice of the City Solicitor, but we should have very sound reasons if we adopt a course of action that is contrary to his advice.

The "Response by Schreiber & Schreiber to Legal Opinion offered by Hinckley, Allen, Snyder & Comen With Regard to the Right of Providence City Council to Financially Support Councilman Louis Stravato" was very informative. It quotes (on Page 4) the case of Cobb v. City of Cape Mae, which enumerates three tests which determine whether public official is acting "within the scope of his employment":

"(He)... must have been acting in a matter in which the corporation has an interest, he must have been acting in the discharge of the duty imposed or authorized by law, and he must have acted in good faith."

Louis R. Stravato
September 24, 1989
Page 2

Let me comment on each of these points individually:

He must have been acting in a matter in which the corporation has an interest.

I have great difficulty with this test, because I sincerely do not believe the city as a whole has an interest in the appeal of this building permit or any other action which will delay the Hillside Village Project project further. As I understand it, Mesolella has already been awarded a judgement in this matter, and the city is in the process of negotiating a consent decree in the discrimination suit that was brought by Project B.A.S.I.C.. I assume that part of that consent decree will be an agreement not to interfere with the Hillside Village Project. The outcome of that case could have implications that reach far beyond the borders of the Seventh Ward. As you know, the issue of where in the city low income housing will be located is a very sensitive one, and some of the Council Members are concerned that voting for a resolution to provide for your legal defense will be interpreted as endorsing discrimination.

He must have been acting in the discharge of a duty imposed or authorized by law.

I cannot accept the premise that is offered by the Law Department and Hinkley Allen that you were acting outside your duties as a City Councilman when you filed an appeal of the building permit. In this day and age, a member of the City Council who confined his or her activities to the passing of resolutions and ordinances, and who declined to become involved in the Zoning Board, Building Board, and License Board Hearings, as well as a host of other activities affecting the ward would soon be an Ex-Council Member. The filing of an appeal is authorized by law, and a Council Member does not need specific authority from the full City Council to act in a matter which affects his or her ward alone.

He must have acted in good faith.

All the members of the City Council know your dedication to your constituents, and even if some of us do not agree with your actions in this matter, none of us doubts that you were sincerely acting in their behalf.

Louis R. Stravato
September 24, 1989
Page 3

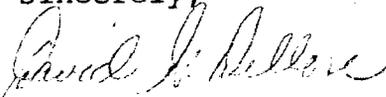
The last sentence on page 3 of the Schreiber response sums up the whole issue:

"A municipality's voluntary assumption of responsibility for acts outside the scope of employment or reflecting willful misconduct serves no public purpose and is legally impermissible..."

Whether your conduct in filing this appeal constitutes malicious and willful misconduct is precisely the matter the court will decide. Until that decision is made, you as an individual deserve the benefit of the doubt, and I think the public interest is served by giving any councilperson serving his constituents the benefit of that doubt. But, if the court does decide that your conduct was malicious, then I think you should reimburse the city for any legal fees it has paid, in addition to paying any damages awarded.

Could you please ask Schreiber & Schreiber to provide some estimates as to how much their bill would be in this case if they were selected to represent you, as well as their opinion as to whether the case can be settled. From what I hear, the court case would probably not succeed on the merits, but neither would the building permit appeal. I do not think another ten years of litigation on this matter is in the public interest, and I would suggest that it be settled as soon as possible.

Sincerely,



David G. Dillon
Chairman, Committee on Finance

cc: Council President Easton
Finance Committee Members
Edward C. Clifton, Esq.
Thomas A. Devine

SCHREIBER & SCHREIBER

IRA L. SCHREIBER
KENNETH A. SCHREIBER
SIDNEY KRAMER

CINDY LEE PAGLIARO
LEGAL ADMINISTRATOR

September 28, 1989



ATTORNEYS AT LAW
RENAISSANCE PARK
37 SOCKANOSSET CROSSROAD
CRANSTON, RHODE ISLAND 02920
(401) 781-2000

Mr. David G. Dillon
292 Waverly Street
Providence, Rhode Island 02909

In re: L. Stravato

Dear Mr. Dillon:

It is my understanding that you, in your capacity as chairman of the City Council Committee on Finance, have inquired as to fees and costs incurred in defending former Councilman Louis Stravato in that matter entitled, "Hillside Associates v Louis R. Stravato, No. 89-4309, Providence County Superior Court". I respond.

We were retained in August, 1989. On August 30, 1989, Mr. Stravato paid a retainer fee of \$1,500.00 and signed an agreement, a copy of which is enclosed. The retainer applies against per diem hourly fees of \$100.00 out of court, \$150.00 in court.

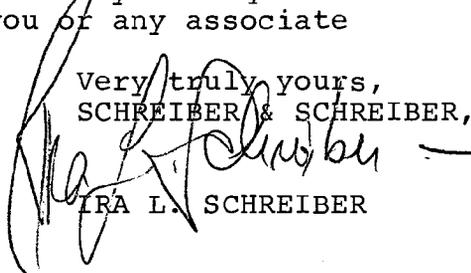
Because of the nature of the inquiry, we will quote you both maximum and likely fees to be expected; if per diem figures exceed maximums, Mr. Stravato will pay for that excess. If the case ends via agreement of the parties, which we believe is not likely, while pending in the Superior Court, the likely fee will not exceed the retainer, the maximum fee will be \$2,500.00. If the case ends as a result of the granting of a motion for summary judgment filed by us, the likely fee and the maximum fee will be \$5,000.00. If there is a trial, the maximum fee will be \$10,000.00, the likely fee will be in excess thereof. Since the maximum fee incurred at the Superior Court level is \$10,000.00, we would have to look to Mr. Stravato for the difference, if any.

It is apparently recommended that the Council not be liable to pay for any damages incurred by Mr. Stravato if there is a finding against him; that seems to be reasonable.

There is always the spectre of the losing party appealing to the Supreme Court, but that is speculative, of course, and is not now a matter for our concern.

One more thought: if the City Council and Mr. Stravato decide that he should be represented by other attorneys, we will withdraw on request, at which time our billing will probably not equal the retainer fee paid. Call us at 781-2000 if you or any associate have questions.

Very truly yours,
SCHREIBER & SCHREIBER,


IRA L. SCHREIBER

ILS/mch

Response by Schreiber & Schreiber
to Legal Opinion offered by
Hinckley, Allen, Snyder & Comen
With Regard to the Right of Providence
City Council to Financially Support
Councilman Louis Stravato

September 14, 1989

MEMORANDUM, September 14, 1989 |
TO: Public, Clients, Mayor |
FR: Schreiber & Schreiber |
RE: Silver Lake Assn/Hillside |

IN RE: PALMENTIERI v CITY OF ATLANTIC CITY¹

On September 9, 1987, a complaint was filed in the New Jersey Superior Court by a black executive associated with Caesars Casino against an Atlantic City Councilman, Gene Dorn, accusing him of defamation. On January 20, 1988, the city council authorized the mayor to retain independent counsel to defend Dorn and pay damages incurred. Casino executive Cade then appealed to the Superior Court, which set aside the authorization because Dorn voted to support it. The council, however, again approved the resolution (4-3), this time with Dorn abstaining, and Cade again appealed. The Palmentieri opinion of the Superior Court resulted.

Dorn admitted making this statement to the media,

"We feel that Caesars represents the mentality of of the majority of casinos. They have Al Cade, who we feel is as racist as the most bigoted white man walking on the face of the earth."

Our comment on this statement is brief: a jury could easily find it to be defamatory. The Palmentieri court agreed. Also,

(a) The court indicated that the sole issue in the case was "whether the city may voluntarily assume Gene Dorn's liability under the facts as presented"; and

(b) "Resolution of the dispute turns on whether the City has the statutory or common law authority to pass a resolution (of financial support for Dorn)."

The Providence law firm of Hinckley, Allen, Snyder & Comen was selected by the Mayor of Providence via his Chief of Staff to give an opinion as to whether the city council may assume Councilman Louis Stravato's liability or pay for his legal services in a matter considered similar to Palmentieri. Hinckley, Allen's letter of September 6, 1989, focusing upon Palmentieri, which is appended hereto as Ex. 1, concludes that the council cannot as a matter of law pass such a resolution.

1. 555 A.2d 752 (N.J. Super L. 1988).

The facts in Stravato are as follows. The Providence Building Inspector granted a permit to Vincent J. Meselella and Hillside Associates permitting a foundation for a low income Section 8 housing development on Plainfield Street in Providence. Mr. Stravato appealed that decision. He was sued in Superior Court by Meselella for abuse of process and malicious prosecution.

Mr. Stravato says that he acted for his constituency when he filed the appeal and he asks the Providence City Council to grant him legal and financial support in defending against Meselella. He further adds that he acted for a great number of citizens who banded together a decade ago to oppose the Section 8 development in a group called The Silver Lake Annex Assn., of which he was a driving force. The city solicitor reacted initially by advising the council that it did not have the legal authority to so act. Then came the request for the Hinckley, Allen opinion which was contained in the letter of September 6, 1989².

Mr. Stravato and The Silver Lake Annex Assn. asked Schreiber & Schreiber for an opinion on the contents of the Hinckley, Allen letter of September 6, 1989 advising no council support for Mr. Stravato. We respond.

(a) As to whether we support the opinion of Hinckley, Allen, we do not.

(b) As to whether the city council must defend Mr. Stravato, there is no such legal requirement.

(c) As to whether the city council ought to defend Mr. Stravato, that is for the council to determine, for it is free to examine the facts and reach its own conclusion.

(d) As to whether Palmentieri, cited by Hinckley, Allen as its SOLE authority, is controlling here, it is not.

2. At the onset we must comment upon the fact that our copy of the Hinckley, Allen letter is unsigned. The opinion is examined elsewhere here, but if there is a reason for failing to affix a signature to a letter of such import to the Mayor, to the City Council and to the people of the City, we don't know what it is. In any event, we prepared our opinion without any preconceptions, and without attempting to obtain case law in contravention of that offered by Hinckley, Allen; and, we will sign it and stand behind it, for better or for worse.

I. THE PALMENTIERI REASONING AND DECISION.

Palmentieri begins with an overview of the Common Law, which recognizes a moral obligation of a sovereign to pay expenses incurred in good faith by public officers to further governmental purposes. It is also the duty of a public board such as a city council to raise monies to prosecute and defend rights which fulfill and execute the legal purposes, objects and affairs of the city, says the court, adding,

"This common law protection extends to costs incurred in defending law suits brought against public officials who are executing the powers and duties of their office or carrying out a governmental obligation. In State v Hammonton (citation omitted), a city councilman was sued for malicious prosecution when he initiated a council-authorized suit against a prosecutor who was believed to have defrauded the town. The court there ordered the municipality to pay the costs of the councilman's defense, finding that his actions were clearly engendered by a 'town purpose'."

Ergo, a public official is entitled to compensation for expenses incurred in the performance of his official duties. In New Jersey, as in Rhode Island, a municipality may provide financial indemnification "to indemnify local public employees". Local protection is permissive, not mandatory.

The implication is that if Councilman Dorn's actions were for a "town purpose", the council could support him financially, but did not have to do so, i.e. permissive, not mandatory.

That being said, the court then reviewed a number of state statutes and added the thought that,

"A public entity is not liable for the acts of a public employee constituting a crime, fraud, actual malice or willful misconduct...A municipality can only indemnify an employee or official for acts within the scope of employment and which are not criminal, fraudulent, malicious or instances of willful misconduct."

So, councilman Dorn could only be protected if he acted within the scope of his employment as a councilman, and if his acts were not instances of willful misconduct. A municipality's voluntary assumption of responsibility for acts outside the scope of employment or reflecting willful misconduct serves no public purpose and is legally impermissible, the court indicates.

The court then addressed the phrase, "scope of employment", describing it as a "formula designed to delineate generally which unauthorized acts of the servant can be charged to the master", and cited Cobb v City of Cape Mae, 113 N.J. Super 598, 274 A.2d 622 (1971), in which a mayor was sued for libel and the court examined the question as to whether he was acting "within the scope of his employment", noting that in order to be given the desired financial support he

"...must have been acting in a matter in which the corporation has an interest, he must have been acting in the discharge of the duty imposed or authorized by law and he must have acted in good faith."

That court decided for the mayor and the city council resolution granting him the requested support, finding that he was acting in good faith, as authorized by law, discharging a duty, and acting in a matter in which the city had an interest.

It appears that a number of private citizens organized as the "Citizens For Action Committee", a loosely knit group of people, with Councilman Dorn an active participant. A July 4th rally was planned which was to focus upon racial inequities in the casino industry, in The Press Newspaper and as to certain officials. By design, white city council members were not invited to speak at the rally. Cade brought suit against Dorn for his aforesaid remarks which were made after the rally concluded.

The court made short shrift of racial bias.

"The question of whether racism can properly be a concern of the Atlantic City Government may be answered in the affirmative. Racial discrimination in any form and any milieu is an offense to all government and to all individuals morally and legally."

"The July 4 rally was planned, publicized and participated in by private individuals espousing a personal cause. There was no action or discussion by the (city council) concerning the rally, policies or activities of the Citizens For Action Committee. This court concludes that, although racism is a serious concern of all government, the Citizens For Action Committee was a purely civic organization formed to broach the problem through citizen awareness and public exposition at the July 4 rally. Dorn attended as its President, lending his stature as a city councilman but not its authority."

The Palmentieri court concludes by determining that Councilman Dorn cannot legally be given financial and other support by the city council in his defense.

"At trial, Dorn did not deny uttering the statement against Cade; however the communication was made not on the public platform of the rally, but moments afterward to a reporter. This statement was a purely personal vilification of a private individual. A public official is generally liable for defamatory statements unless made in discharging his official duties....It stretches the imagination to believe that his statement about Cade in any way expressed a policy or rationale, fulfilled or discharged a duty or furthered an interest of the City of Atlantic City."

In other words, Dorn's attack upon Cade was purely personal. He should not be insulated any more than any other citizen who expresses such opinions publicly. His statements were not within the scope of his employment as a city councilman. In communicating the statements he was guilty of willful misconduct. The defamatory statement was made after the rally, not during it. Dorn was not authorized by the city council to speak as he did. Who could disagree with this reasoning, and with the court's ultimate determination to reverse the council resolution.

II. DISTINGUISHING PALMENTIERI FROM STRAVATO.

Any belief that the Palmentieri and Stravato cases are consistent in fact patterns is absurd. We draw several comparisons, using as a base the conclusion offered by the New Jersey court.

(a) Gene Dorn was not acting within the scope of his official duties when he uttered the statement against Cade. Louis Stravato was acting within the scope of his official duties when he filed the appeal in behalf of his constituents as part of his official duties as a councilman.

(b) The statement made by Dorn was willful and defamatory enough to reach a jury---a clearly held posture by the Palmentieri court. Mr. Stravato took no action which was defamatory. The suit against him is pre-eminently based upon malice; it seems clear that Mr. Stravato is not guilty of a malicious act by taking a legally permissible step, such as the filing of an appeal.

(c) The statement made by Dorn was remote and not part of his authorized duty as a city councilman. There was no "statement" made by Stravato. His appeal was not remote and was part of his authorized duty.

(d) Dorn's statement was not within the scope of employment. Stravato's action was within the scope of his employment, a further reference to the fact that he acted for his constituents, and such representation was part of the scope of his employment as a councilperson.

(e) Dorn's statement was a purely personal vilification of a private individual and he should be liable for such statements. Stravato's action in taking the appeal was neither a statement nor a personal vilification of a private individual.

(f) Dorn's statement was not authorized by the city council. Neither was Mr. Stravato's appeal.

The Palmentieri fact pattern is far removed from that faced in Stravato---it is "apples and oranges". It is a statement by Dorn and an appeal by Stravato. It is a statement libelous in nature and the taking of a legal appeal. It is something said in bad faith as opposed to something done in good faith. It is helpful only in offering common and statutory law for our review.

In that vein we focus upon a factor inflicted upon Stravato by Palmentieri: the scope of employment. Dorn hardly acted within the scope of his official duties when he badmouthed Cade. The Hinckley, Allen view is that Stravato did not act within the scope of his official duties when he appealed. Only his name is on the appeal. It was not specifically authorized by the council.

Mr. Stravato contends that he acted in behalf of his Ward constituents and The Silver Lake Annex Assn. He says that he and other councilpersons have often taken official actions in their own names in the belief that they acted for their constituents. He says that the council does not have to approve such steps in order for him to be acting within the scope of his employment, i.e., as a councilman. In other words, he says that he acted in good faith. If the city council agrees, we believe that it may grant him financial support. The right conferred upon the city councils of Providence and Atlantic City is permissive in nature.

3. We know of no occasion on which Mr. Stravato has libeled or otherwise vilified Mr. Mesolella despite over a decade of strife.

III. THE HINCKLEY, ALLEN LETTER.

We turn now from our view of Palmentieri to that espoused by Hinckley, Allen in its September 6, 1989 letter. The letter begins by averring that Mr. Stravato actively opposed construction of the Hillside project and sponsored an ordinance intended to "prevent construction of the project". The zoning ordinance in question included a number of lots which had nothing to do with this project. It has always been a matter of debate whether or not this ordinance was to "prevent construction of the project", yet Hinckley, Allen accept that view which may well be incorrect.

Hinckley, Allen then notes that litigation was initiated in the U.S. District Court against Mr. Stravato and others. Unless they know something we don't know, Mr. Stravato is not a party to such litigation. He was not sued in the U.S. District Court.

They add that the parties in that case, presumably including Mr. Stravato, negotiated a settlement which only awaits approval of the court. On the same date as that of the letter, September 6, 1989, the Court refused to approved the decree⁴. Mr. Stravato was not a participant in any negotiations. By such indications, Hinckley, Allen portray Mr. Stravato as acting as an individual, rather than in behalf of others. The premise certainly to some extent creates an expected result.

Hinckley, Allen then adds, as previously noted, that Mr. Stravato took the appeal without "legal duty or authority". This presupposes that no councilperson can take such action unless he or she has council approval and expects the council to provide financial support.⁵ The letter concludes after reference to Palmentieri by indicating that the Providence City Council could not as a matter of law support Mr. Stravato as requested. As indicated, we most respectfully disagree.

4. It was actually a "Consent Order", executed by the city solicitor of Providence and plaintiff Project Basic, subject, however, to approval of Chief Judge Boyle. He refused, continuing the matter to October. Meanwhile, The Silver Lake Annex Assn. moved for permission to file an amicus curiae brief.

5. We do not contend that Mr. Stravato took the appeal after receiving approval by the council. We do contend that he does have a legally imposed duty, imposed by his constituency, to act in their behalf in such matters, furthering their cause within the city, a cause which may be of no interest to any other ward in the city, and that he did have approval of that constituency.

Hinckley, Allen's letter notes G.L.R.I. Section 45-15-16 (1956, amended 1986) whereby a city council may indemnify an elected official for judgment of a tort if the official "was acting within the scope of his or her official duties or employment". This language is not unlike the language utilized in Palmentieri. Their letter concludes by noting that the decision against Dorn was because his statement was "not made within the scope of his official duties (since it was not) authorized by the city council or...expressed the belief or policy of the council."

IV. COMMENTARY.

Hinckley, Allen has failed to compare the fact patterns in Palmentieri with Stravato as we have here. We do not fault our brothers for their views, we simply disagree with them. And how.

Is it not ludicrous to compare a statement made to the public in a defamatory manner by a city councilman not acting in his official capacity or for any of his constituents with an appeal taken from the issuance of a building permit?

We do not take the position, however, that Palmentieri authorizes reimbursement of expenses incurred as a result of the taking of an appeal by a councilman IN BEHALF OF THE COUNCIL. This is not what occurred. Mr. Stravato acted for his constituency, but, even if he acted alone while believing that he acted for his constituency, he is deserving of support from the city council. The restriction placed by the New Jersey court was based upon the fact that the Dorn statement was maliciously aimed at a single individual and COULD NOT be the statement of the city council nor qualify for city council aid. We believe that Palmentieri may be read as supporting a councilperson improperly sued pursuant to the facts in Stravato; the sole inquiry would be as to good faith in the taking of the appeal, and the resulting determination that Mr. Stravato was acting pursuant to his duties as a councilman.

If Mr. Stravato acted in good faith for his constituents and did not act in a malicious, improper manner, he deserves support from the council. Statutory law bestows that right upon it, it "may" so act. Failure on the part of the city council to support Mr. Stravato will invite Open Season upon members of the city council. The "chilling factor" will hardly be to the advantage of the general public, and will certainly be to the disadvantage of city council members. Public policy, good faith, and plain common sense: they are the ingredients upon which good government is based.

It may not be lost on the reader that Mr. Dorn's Citizens For Action Committee bears some resemblance to Mr. Stravato's Silver Lake Annex Association. Both men may have believed that they owed a duty to such neighborhood groups. (This may be a kind of duty which all councilpersons owe; it is a kind of duty which Mr. Stravato believes is imposed upon him.) In that sense, they have something in common; otherwise, they don't.

Mr. Dorn, the detractor, demagogue, defamer, acted solely on his own, giving his own personal opinion, publicly. Mr. Stravato took an appeal in behalf of his neighbors.

A recent resolution of the Providence City Council asking for financial support of Mr. Stravato uses the following language to which we were not privy but which well illustrates our view,

"The failure of the city to defend councilpersons involved in good faith efforts to represent the will of their constituents could be impeded by the fear of personal liability".

Even without any legal research, and tons of words from lawyers, the Providence City Council used its common sense and focused upon the real issue it faced: good faith. It should now examine that issue and if satisfied that Mr. Stravato fulfilled the requirements of good faith, that he did act for constituents, and thus fulfilled his obligations and duties as a public servant and councilman, and that he did not exhibit by taking the appeal any aspects of maliciousness, it should take advantage of its statutory right to protect former Councilman Stravato from the financial drain upon his resources imposed by the Mesolella suit.

Respectfully submitted,
SCHREIBER & SCHREIBER

Ira L. Schreiber, Esq.

Kenneth A. Schreiber, Esq.

September 14, 1989
Schreiber & Schreiber
37 Sockanosset Crossroad
Cranston, RI 02920
401-781-2000

COUNCILMAN
DAVID G. DILLON
DEPUTY MAJORITY LEADER
292 WAVERLY STREET
PROVIDENCE, RI 02909
Res. 273-7572



COMMITTEES

Finance
Vice-Chairman

Urban Redevelopment,
Renewal and Planning

Providence
Redevelopment
Agency

City of Providence, Rhode Island

September 9, 1989

The Honorable Edward C. Clifton, Esq.
Law Department
City Hall
Providence, RI 02903

Dear Mr. Clifton:

A resolution authorizing the hiring of outside legal counsel for the defense of former Councilman Louis R. Stravato in a suit instituted by the developers of the proposed Hillside Apartments has been referred to the Committee on Finance.

I suppose when we start out, all of us who get in to politics expect to make our place in history. We all hope our great grandchildren will be able to read our names on bronze plaques, granite cornerstones, or on historic legislation such as the Sherman Antitrust Act or the Gramm-Rudman Bill. After we've been in office a short time we realize our descendants will more likely find our names immortalized as a defendant in some legal case, and after we've been in office for a long while we consider our careers quite successful if none of these cases begins "United States vs..." or "People vs...".

All of us have been sued at one time or another in our capacity as Council Members. Most plaintiffs either seek specific performance, or if damages are involved, prefer to reach in to the deep pockets of the city. I do not ever remember a case being brought against a Council Member personally and not in his or her official capacity. So this case has serious implications. In my ward there have been many times, especially in matters before the Zoning Board of Review or the Bureau of Licenses where the neighbors look to me to act as their spokesman before these boards, especially if they cannot afford legal counsel. Could not every such applicant or petitioner use the threat of a personal lawsuit to intimidate a Council Member who acted in that capacity? Legal fees would have to be expended even if the lawsuit were frivolous.

Edward C. Clifton, Esq.
September 9, 1989
Page 2

It has been suggested that as members of a legislative body we may enjoy certain immunities that protect us from such a lawsuit. I would appreciate your researching the law in this regard. I would also appreciate copies of the complaint against former Councilman Stravato as well as the legal opinions regarding his defense prepared by yourself and Jacques Hopkins.

Finally I would like your comments and opinion as to the likely outcome of this case. We may have already spent too much time on a case that is going nowhere, but we might also be stepping into a legal and political snake pit.

As always, your cooperation is appreciated.

Sincerely,



David G. Dillon
Councilman Eighth Ward

cc: Mayor Joseph R. Paolino, Jr.
Finance Committee Members
Louis R. Stravato