COLORADO COURT OF APPEALS

DATE FILED: December 1, 2022
CASE NUMBER: 2021CA1897

Court of Appeals No. 21CA1897
Larimer County District Court No. 18CV30371
Honorable Juan G. Villaseñor, Judge

Thompson Area Against Stroh Quarry, Inc., a Colorado nonprofit corporation; Dani Korkegi; Gregory Martino; Monique Griffin; Cristi Baldino; Victoria Good; and Arlene Libby,

Plaintiffs-Appellees,

v.

Board of County Commissioners of Larimer County, Colorado; and Coulson Excavating Company, Inc.,

Defendants-Appellants.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE YUN
Fox and Tow, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 1, 2022

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¶ 1 Appellants, the Larimer County Board of Commissioners (Board) and Coulson Excavating Company, Inc. (Coulson), appeal the district court's entry of judgment in favor of appellees, Thompson Area Against Stroh Quarry, Inc., Dani Korkegi, Gregory Martino, Monique Griffin, Cristi Baldino, Victoria Good, and Arlene Libby (collectively, Thompson). Specifically, the Board and Coulson challenge the court's rulings in favor of Thompson on their as-applied due process challenge to Larimer County's conflict-of-interest rule under both C.R.C.P. 57 and C.R.C.P. 106(a)(4).

¶ 2 We reverse the district court's judgment, and we remand the case to that court for further proceedings consistent with this opinion.

I. Background

¶ 3 We first describe this case's complex factual background, then turn to its lengthy procedural history.

A. Factual Background

¶ 4 This case concerns a dispute over Coulson's plans to operate a gravel-pit mine on its property in Larimer County, Colorado. The property, which Coulson bought in 1993, was zoned for agricultural

uses, so to engage in mining, Coulson needed to receive approval from the Board for a "use by special review" (USR). *See* Larimer County Land Use Code §§ 4.1.1, 4.5.1 (2002).

¶ 5 Coulson first applied for a USR in 2002. The record is unclear about what happened over the next seven years, but Coulson's initial application was never approved, and it submitted another USR application in 2009. Because Coulson did not believe it "economically feasible" to move forward, however, that application "virtually lay dormant" until 2015. Between 2015 and 2016, Coulson conducted a noise study and a floodplain review. Then, in the fall of 2016, Coulson submitted a status update to the Larimer County Planning Department, noting that the only changes to the project since 2010 had been to "reduce impacts and insure [sic] public safety with regard to potential flood issues." Coulson also requested that its application be scheduled for a hearing before the Larimer County Planning Commission.

¶ 6 Thompson Area Against Stroh Quarry, Inc., formed in November 2016 as a non-profit entity to organize opposition to Coulson's proposed mine in the residential neighborhoods that surround Coulson's property. Its members include people who own

and reside in homes located within a thousand feet of the proposed mine.

¶ 7 Commissioner Tom Donnelly, meanwhile, was elected to his first four-year term on the Board in 2008, reelected in 2012, and reelected again in 2016.[1] During the 2012 election cycle, Commissioner Donnelly's campaign committee received $31,726.19 in campaign contributions, with Richard and Kenneth Coulson each contributing $500.[2] His opponent raised $21,237.20. In contrast, during the 2016 election cycle — i.e., between March and October 2016 — Commissioner Donnelly's campaign committee raised $56,342.16. A representative from Commissioner Donnelly's political party solicited contributions from Richard and Kenneth Coulson, who each contributed $5,000. Other donors made similarly large contributions: $7,500 from one family, $5,000 each

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[1] Before being elected to the Board, Commissioner Donnelly was a land surveyor working for a company called CDS. He estimated that he had performed about ten survey projects for Coulson when it retained CDS on those projects. But Commissioner Donnelly never had a social relationship with the Coulsons.

[2] In Colorado, campaign contributions are regulated by the Colorado Fair Campaign Practices Act. *See* §§ 1-45-101 to -118, C.R.S. 2022.

from two other families, and $5,000 from one individual. The Coulsons' combined $10,000 made up 18.6% of Commissioner Donnelly's 2016 campaign contributions and 17.7% of the money that his campaign spent in that election. His opponent raised $19,027.10. Commissioner Donnelly won the 2016 election by a margin of 55.16% (99,191 votes) to 44.84% (80,647 votes).

¶ 8 In November 2017, the Planning Commission held a public hearing on Coulson's USR application and recommended that the Board approve the application. That same month, Thompson wrote a letter to the Larimer County Community Planning Division asking the County to "ensure that all potential conflicts of interest of the various decisionmakers [be] disclosed as part of the administrative record and that any decisionmakers with conflicts of interest recuse themselves from any further action on [Coulson's] Application."[3] The letter also asks the Board to comply with two specific provisions of the Larimer County Code, sections 2-67(10) and 2-71.

¶ 9 Section 2-67(10) — the conflict-of-interest rule — states:

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[3] The letter did not mention campaign contributions, nor did it name Commissioner Donnelly. The letter did, however, specifically request that a member of the Planning Commission, Gary Gerrard, recuse himself, though Gerrard did not do so.

> A member of the board of county commissioners who, in their sole opinion, believe [sic] they have a conflict of interest or for any other reason believes that they cannot make a fair and impartial decision in a legislative or quasi-judicial decision, will recuse themselves from the discussion and decision. Any recusal will be made prior to any board discussion of the issue and the board member will leave the room for the remainder of the discussion of the issue.

¶ 10 Section 2-71, in turn, is titled "Board members' code of conduct." Larimer County Code § 2-71 (2002). As pertinent here, it requires members of the Board to "represent unconflicted loyalty to the interests of the citizens of the entire county" and states that "[t]his accountability supersedes any conflicting loyalty such as that to any advocacy or interest groups, or membership on other boards or staffs" and "the personal interest of any board member acting as an individual consumer of the county government's services."

¶ 11 About three months later, on February 26, 2018, the Board held a public hearing on Coulson's USR application. At the end of the hearing, the Board voted two to one to approve Coulson's application, with Commissioner Donnelly voting in favor.

¶ 12 On March 19, 2018 — almost a month after the hearing but before the Board had issued its decision — Thompson sent another

letter, this time to the Larimer County Attorney. In its second letter, Thompson noted that Richard and Kenneth Coulson, the principals of Coulson, had contributed to Commissioner Donnelly's campaign committee, and it asked that he recuse himself from further proceedings on Coulson's USR application. The letter goes on to state that "[w]e learned from you this morning that the BOCC intends to take final action on the Application tomorrow, March 20, 2018," and it requests "that you immediately raise this issue with Commissioner Donnelly and ensure that his participation in this matter ceases."

¶ 13 The next day, March 20, 2018, the Board issued its Findings and Resolution (Resolution) approving Coulson's USR application. The Resolution specifically states that "Commissioners Donnelly and Gaiter voted in favor of the Findings and Resolution," while "Commissioner Johnson voted against the Resolution." But it does not address Thompson's request that Commissioner Donnelly recuse from deciding Coulson's USR application.

B. Procedural History

¶ 14 The following month, in April 2018, Thompson sued the Board and Coulson in Larimer County District Court. Thompson made

two claims. As pertinent here, its first claim sought a declaratory judgment under C.R.C.P. 57 that Larimer County's conflict-of-interest rule was facially unconstitutional. Specifically, Thompson alleged that Larimer County's "conflict of interest policy and recusal rule make recusal entirely voluntary and do nothing to ensure a fair and unbiased quasi-judicial process." Thompson's second claim sought relief under C.R.C.P. 106(a)(4) on the grounds that the Board had (1) abused its discretion by approving Coulson's application "despite the absence of evidence in the record that the proposed use would be compatible with existing uses and in harmony with the surrounding neighborhood"; (2) exceeded its lawful authority by basing its approval on criteria outside the Larimer County Land Use Code; and (3) "exceeded its lawful authority by permitting Commissioner Donnelly to cast the deciding vote to approve [Coulson's USR application] despite the fact that he received $11,000.00 in campaign contributions" from Richard and Kenneth Coulson while the application was pending.

¶ 15 Thereafter, the district court made four rulings pertinent to this appeal.

¶ 16 First, in October 2018, the court denied Coulson's and the Board's motions for summary judgment on both Thompson's claims. In doing so, the court rejected the Board and Coulson's argument that Thompson's C.R.C.P. 106(a)(4) claim was unreviewable because Thompson had not objected to the Coulsons' campaign contributions to Commissioner Donnelly "before or during" the Board proceedings on Coulson's USR. The court observed that, by sending its November 2017 letter, Thompson had "squarely presented" the issue of decision-makers' conflicts of interest more than three months before the Board's hearing on Coulson's USR application. Citing the presumption of regularity in administrative agencies' proceedings, *see Hadley v. Moffat Cnty. Sch. Dist. RE-1*, 681 P.2d 938, 944 (Colo. 1984), the court "presume[d]" that the Board had reviewed Thompson's November 2017 letter in considering Coulson's USR application. The court further presumed that Thompson's March 2018 letter, which raised a specific conflict of interest by Commissioner Donnelly flowing from the campaign contributions that he received from the Coulsons, made it to the Board and that the Board reviewed it before formally approving the application.

¶ 17 Second, two months later, the court ruled that it was construing "the substance of" Thompson's C.R.C.P. 57 claim "to involve both a facial due-process challenge to [Larimer County's conflict-of-interest] rule and an as-applied due-process challenge to the same rule." The court therefore vacated a prior ruling limiting review of Thompson's as-applied due process claim to the administrative record and, instead, allowed discovery regarding contributions to Commissioner Donnelly's reelection campaigns in 2012 and 2016. The court later denied the Board and Coulson's joint motion to reconsider this ruling. In doing so, the court noted that, though an as-applied constitutional challenge to an ordinance is generally subject to C.R.C.P. 106(a)(4) review and limited to the administrative record, this general principle does not apply "when an aggrieved party asserts that the administrative body violated its constitutional rights during a quasi-judicial proceeding." And because, by failing to consider Thompson's allegations of due process violations, the Board left Thompson with an "inadequate remedy" under C.R.C.P. 106(a)(4), Thompson's due process claim was "more properly reviewed" under C.R.C.P. 57.

¶ 18 Third, on August 12, 2019, the court resolved the parties' cross-motions for summary judgment on Thompson's C.R.C.P. 57 claims (the Rule 57 order). It ruled that, though Larimer County's conflict-of-interest rule was facially constitutional, the rule was unconstitutional as applied to the circumstances in this case and deprived Thompson of its "right to a fair and impartial decision-maker." The court also reiterated its rulings that Thompson had not waived its objection based on Commissioner Donnelly's campaign contributions and that Thompson's complaint included an as-applied due process challenge to the conflict-of-interest rule under C.R.C.P. 57. It therefore granted summary judgment to Thompson on its as-applied constitutional challenge and granted summary judgment to the Board on Thompson's facial constitutional challenge. Based on its disposition of Thompson's C.R.C.P. 57 due process claim, the court did not reach the merits of Thompson's C.R.C.P. 106 claim. The court entered a final judgment in the case the following day.

¶ 19 The Board and Coulson appealed the district court's judgment. But this court dismissed the appeal without prejudice for lack of a final, appealable judgment — the district court had left the C.R.C.P.

106 claim unresolved. *Thompson Area Against Stroh Quarry, Inc. v. Bd. of Cnty. Comm'rs*, slip op. at ¶¶ 13, 16 (Colo. App. No. 19CA1721, May 6, 2021) (not published pursuant to C.A.R. 35(e)). The case was therefore returned to the district court for it to address that claim.

¶ 20 Fourth, in October 2021 — two years after granting summary judgment to Thompson on its as-applied constitutional challenge under C.R.C.P. 57 — the district court also ruled in Thompson's favor on its C.R.C.P. 106 claim (the Rule 106 order).[4] Based on the same due process analysis it had relied on in its Rule 57 order, the court concluded that permitting Commissioner Donnelly "to cast the deciding vote despite his conflict of interest violated Thompson's due-process rights and that the violation amounted to an abuse of discretion under" C.R.C.P. 106(a)(4). To reach that conclusion in the context of C.R.C.P. 106(a)(4), the court took judicial notice of the records of contributions to the 2012 and 2016 campaigns of Commissioner Donnelly and his opponents from the Colorado

[4] The parties stipulated that "no supplemental briefing" was needed to resolve the remaining claim.

Secretary of State's website, noting that "Thompson has made a strong showing of improper behavior by . . . Commissioner Donnelly, thus warranting consideration of extra-record evidence."[5] The district court then entered final judgment in favor of Thompson and against the Board and Coulson.

¶ 21 Coulson and the Board now appeal the Rule 57 order and the Rule 106 order.

II. Analysis

¶ 22 The Board argues that the district court reversibly erred by (1) concluding that Thompson timely objected to Commissioner Donnelly's participation in Coulson's USR application; (2) reviewing Thompson's as-applied due process challenge under C.R.C.P. 57 rather than C.R.C.P. 106; and (3) taking judicial notice of extra-record facts in resolving Thompson's C.R.C.P. 106 claim. The Board, joined by Coulson and amicus curiae the Colorado

[5] The court did not address Thompson's other two C.R.C.P. 106 arguments — namely, that the Board (1) abused its discretion by approving Coulson's application without competent evidence of the requisite criteria and (2) exceeded its jurisdiction by basing its decision on matters outside the Larimer County Land Use Code.

Municipal League, also argue that the district court's due process analysis was incorrect. We examine each of these issues in turn.

A. Waiver

¶ 23 The Board first argues that, by waiting until after the hearing and vote on Coulson's USR application to object to Commissioner Donnelly's participation in the Board's review of the application, Thompson waived any such objection. We disagree.

1. Standard of Review

¶ 24 We review a district court's ruling regarding whether a waiver occurred for abuse of discretion. *In re Marriage of Kann*, 2017 COA 94, ¶ 56. A district court abuses its discretion if its ruling is manifestly arbitrary, unreasonable, or unfair, or if it misapplies or misconstrues the law. *Id.*

2. Discussion

¶ 25 Waiver is "the *intentional* relinquishment of a *known* right or privilege." *People v. Rediger*, 2018 CO 32, ¶ 39 (quoting *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984)). Before the hearing, Thompson sent a letter generally asking to "ensure that all potential conflicts of interest of the various decisionmakers [be] disclosed" and that "any decisionmakers with conflicts of interest

recuse themselves." And before the final written decision, Thompson sent a letter specifically raising the Coulsons' campaign contributions and asking Commissioner Donnelly to recuse himself. These circumstances do not suggest that Thompson intentionally relinquished a known right. Therefore, the district court did not abuse its discretion by concluding that Thompson did not waive the right to raise Commissioner Donnelly's conflict of interest.

¶ 26 We are not persuaded otherwise by the Board's reliance on *Mountain States Telephone & Telegraph Co. v. Public Utilities Commission*, 763 P.2d 1020, 1028 (Colo. 1988), and *Whitelaw v. Denver City Council*, 2017 COA 47, ¶ 35. Both those cases are distinguishable.

¶ 27 In *Mountain States*, 763 P.2d at 1028, the plaintiff "waited approximately nine months to raise the question of disqualification" of a PUC commissioner and then did so only after the PUC had made its decision. As a result, the Colorado Supreme Court concluded that the plaintiff had "made a tactical choice and waived whatever objection it may have had to" the commissioner's participation in the case. *Id.* By contrast, Thompson raised the decision-makers' conflicts of interest, in general, three months

before the Board's public hearing and raised Commissioner Donnelly's campaign contributions, in particular, before the Board issued its Resolution approving Coulson's USR application. Thus, we cannot say that Thompson "made a tactical choice" to waive its objection to Commissioner Donnelly's participation in the case. *Id.*

¶ 28 *Whitelaw* is similarly inapplicable. There, the division declined to review evidence of political contributions to city council members in a C.R.C.P. 106(a)(4) proceeding because the plaintiffs first raised the issue in the district court. *Whitelaw*, ¶ 35. As mentioned above, however, unlike the plaintiffs in *Whitelaw*, Thompson *did* raise its objection to the decision-makers' conflicts of interest before the Board.

B. Rule 57 Order

¶ 29 Next, the Board argues that the district court reversibly erred by reviewing Thompson's as-applied due process challenge under Rule 57 rather than Rule 106(a)(4) — which allowed the court to take into consideration facts outside the administrative record before the Board. We agree.

¶ 30 "A constitutional challenge to an ordinance as applied is concerned with the application of a general rule or policy 'to specific

individuals, interests, or situations' and is generally a quasi-judicial act subject only to C.R.C.P. 106(a)(4) review." *Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670, 676 n.7 (Colo. 1982) (quoting *Snyder v. City of Lakewood*, 189 Colo. 421, 427, 542 P.2d 371, 375 (1975)); *cf. Yakutat Land Corp. v. Langer*, 2020 CO 30, ¶ 17 (a facial challenge to the constitutionality of a regulation may be brought under Rule 57 simultaneously with a Rule 106 claim that the regulation was applied incorrectly under the circumstances presented). *But see Native Am. Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283, 287 (Colo. App. 2004) (suggesting that review under C.R.C.P. 57 may be appropriate when the plaintiff requests a declaratory judgment and C.R.C.P. 106(a)(4) provides an inadequate remedy).

¶ 31 In a similar case, a division of this court concluded that the plaintiffs' as-applied due process challenges to Larimer County's conflict-of-interest rule should have been brought under C.R.C.P. 106. *No Laporte Gravel Corp. v. Bd. of Cnty. Comm'rs*, 2022 COA 6M, ¶ 29. Consistent with the *Laporte* division's analysis, we conclude that the district court abused its discretion in its summary judgment order by considering Thompson's as-applied

constitutional challenge to the Larimer County's conflict-of-interest rule under Rule 57 rather than under Rule 106(a)(4).

C. Rule 106 Order

¶ 32 Both the Board and Coulson challenge the district court's ruling in Thompson's favor under Rule 106(a)(4).

¶ 33 As an initial matter, the Board contends that the court erred by taking judicial notice of facts outside the administrative record — namely, taking judicial notice of the records of campaign contributions on the Colorado Secretary of State's website. But we need not decide this issue. Even assuming that the court was correct in doing so, we agree with Coulson, joined by the Board and the amicus curiae, that the court reversibly erred by concluding that "a total of $11,000 in campaign contributions given between 1.5 and 5.5 years prior to Board action created an impermissible risk of bias for Commissioner Donnelly such that his participation violated Thompson's right to due process."

1. Standard of Review

¶ 34 We review an as-applied constitutional challenge to a statute or ordinance de novo. *People v. Trujillo*, 2015 COA 22, ¶ 15; *Kruse v. Town of Castle Rock*, 192 P.3d 591, 600 (Colo. App. 2008).

Because we presume that statutes and ordinances are constitutional, to succeed on an as-applied challenge, a party "must establish the unconstitutionality of a statute [or ordinance], as applied to him or her, beyond a reasonable doubt." *Trujillo*, ¶ 15; *see also Tri-State Generation & Transmission Co.*, 647 P.2d at 677.

¶ 35 To prevail on an as-applied constitutional challenge, the challenging party must establish that the statute or ordinance "is unconstitutional 'under the circumstances in which the plaintiff has acted or proposes to act.'" *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1085 (Colo. 2011) (quoting *Developmental Pathways v. Ritter*, 178 P.3d 524, 534 (Colo. 2008)). "The practical effect of holding a statute [or ordinance] unconstitutional as applied is to prevent its future application in a similar context, but not to render it utterly inoperative." *Developmental Pathways*, 178 P.3d at 534 (quoting *Sanger v. Dennis*, 148 P.3d 404, 411 (Colo. App. 2006)).

2. Discussion

¶ 36 In *Caperton v. A.T. Massey Coal Co.*, the United States Supreme Court explained that "most matters relating to judicial disqualification [do] not rise to a constitutional level." 556 U.S.

868, 876 (2009) (alteration in original) (quoting *Fed. Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702 (1948)). It characterized the Due Process Clause as setting the "constitutional floor," with the ceiling set by "common law, statute, or the professional standards of the bench and bar." *Id.* at 889 (quoting *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)). The Court recognized that the states are free to "adopt recusal standards more rigorous than due process requires," *id.* (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)), and that generally "the codes of judicial conduct provide more protection than due process requires," *id.* at 890. Accordingly, "most disputes over disqualification will be resolved without resort to the Constitution." *Id.*

¶ 37 Against this backdrop, the *Caperton* Court considered whether a litigant's $3 million in spending in support of a justice's election would create bias in favor of the litigant, requiring the justice's recusal. In *Caperton*, a West Virginia circuit court had entered a $50 million judgment against a coal company. *Id.* at 872. Before appealing that judgment to the West Virginia Supreme Court, the company's chair contributed $3 million to help elect a candidate to

unseat one of the court's incumbent justices. *Id.* at 873. The chair's $2,500,000 contribution to a political action committee and $500,000 expenditure for direct mailings, letters, and advertisements were triple the amount spent by the candidate's own campaign and $1 million more than the total expenditures by both candidates' campaigns. *Id.* The candidate won the election and, as a new justice slated to hear the appeal, denied the opposing party's motion for recusal. *Id.* at 873-74. The new justice was later part of the three-to-two majority that reversed the judgment against the coal company. *Id.* at 875.

¶ 38 In concluding that the justice's failure to disqualify himself violated due process, the Court made clear that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal." *Id.* at 884. However, under the "extreme facts" of the case, the Court held, "the probability of actual bias r[ose] to an unconstitutional level" for two reasons. *Id.* at 886-87. First, the Court observed that the chair's "campaign contributions — in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election — had a significant and disproportionate influence on the electoral

outcome." *Id.* at 885. Second, the Court noted that the timing of the contributions was critical, as they were made before the coal company appealed the judgment, when it was reasonably foreseeable that the case would be before the newly elected justice. *Id.* at 886. Thus, the Court determined that the timing of the contributions, along with the disproportionate influence that the donations had in placing the justice on the case, created such a high risk of actual bias that the justice's failure to disqualify himself violated due process. *Id.* at 886-87; *see also United States v. Rodriguez*, 627 F.3d 1372, 1382 (11th Cir. 2010) (noting that *Caperton*'s holding was narrow and limited to the "'extraordinary situation' where the 'probability of actual bias rises to an unconstitutional level'" (quoting *Caperton*, 556 U.S at 887)).

¶ 39 Earlier this year, the *Laporte* division applied *Caperton* to similar facts. *Laporte*, ¶¶ 6-22. A cement company applied for a USR in Larimer County in December 2016, about a month after Commissioner Donnelly was reelected. *Id.* at ¶ 35. The company, its founders, and several shareholders had donated a combined $4,100 to his campaign. *Id.* at ¶ 34. In November 2018, after two

public hearings, the Board approved the cement company's USR application. *Id.* at ¶¶ 13-14.

¶ 40 The *Laporte* division first rejected the argument that *Caperton*, which involved a judicial officer (albeit an elected one), is inapplicable to an elected official's performance of quasi-judicial acts. *Id.* at ¶ 57; *see City of Manassa v. Ruff*, 235 P.3d 1051, 1057 (Colo. 2010) (the fundamental protections of neutrality and fairness under the Due Process Clause apply to nonjudicial decision-makers acting in a quasi-judicial capacity); *Margolis v. Dist. Ct.*, 638 P.2d 297, 305 (Colo. 1981) (a local government's land use determinations are considered quasi-judicial for the purposes of judicial review). We agree with the division that applying *Caperton* to elected officials is necessary given "the underlying logic of *Caperton* — namely, that in certain 'extraordinary situation[s],' campaign contributions can create a constitutionally impermissible risk of actual bias on the part of an adjudicatory decision-maker." *Laporte*, ¶ 53 (alteration in original) (quoting *Caperton*, 556 U.S. at 887).

¶ 41 The *Laporte* division also concluded that neither the temporal connection between the cement company's contributions and its USR application nor the size of the contributions sufficed to create

a due process problem under *Caperton*. First, the division noted that unlike in *Caperton*, where the donations were made after a trial, no "event (such as a jury verdict) supporting an inference that an identifiable action (like an appeal) was imminent" had occurred. *Id.* at ¶ 61. Second, Commissioner Donnelly's receipt of $4,100 — just 7.65% of the total he raised for his 2016 campaign and 21.54% of the total his only challenger raised — was, "in raw and proportionate terms, a far cry from" the $3 million at issue in *Caperton*, which exceeded the amount spent by all the candidate's other supporters and both his competitors combined. *Id.* at ¶ 62.

¶ 42 Here, as in *Laporte*, we cannot say that the probability of actual bias rose to an unconstitutional level under *Caperton*.

¶ 43 First, Richard and Kenneth Coulson's campaign contributions to Commissioner Donnelly were not so extraordinary in comparison to other donations that they "had a significant and disproportionate influence" on the election. *Caperton*, 556 U.S. at 885. The district court acknowledged that Commissioner Donnelly's 2016 election campaign committee received many large contributions, "including a combined donation of $7,500 and several others of $5,000 per family." Thus, in contrast to the contributions in *Caperton*, the

Coulsons' contributions ($5,000 each) in 2016 were proportional to those from other supporters of Commissioner Donnelly and made up only 18.6% of the total amount his campaign raised and only 17.7% of the total it spent in the election. *Cf. Ivey v. Eighth Jud. Dist. Ct.*, 299 P.3d 354, 357-58 (Nev. 2013) (holding that a trial judge was not required to recuse under the Due Process Clause when one party to a pending divorce contributed the single largest individual sum to the judge's reelection campaign). And Commissioner Donnelly, the incumbent, won the 2016 election by a 10% margin against a candidate he previously defeated in the 2012 election. We therefore cannot conclude, as the *Caperton* Court did, that the "campaign contributions — in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election — had a significant and disproportionate influence on the electoral outcome." 556 U.S. at 885.

¶ 44 Second, the Coulsons' donations did not occur when their company's USR application was "pending or imminent" before the Board. The Coulsons made their contributions eighteen months before the Board's decision, at a time when the Planning

Department was still reviewing their company's USR application.

The district court described the USR application process as follows:

> To obtain a USR permit, the applicant must submit an application to the Larimer County Planning Department . . . . After receiving a USR application, the Planning Department sends it to referral agencies and other county departments for review and comment. If a referral agency or department identifies any issues with a USR application, the applicant must resolve those issues with the agency before the application can proceed.
>
> Once a USR applicant resolves all referral agency and Planning Department comments and issues, the Planning Commission provides notice to the general public of the USR application and holds a hearing in which the public will have the opportunity to submit written comments in advance and be heard at the hearing. After the public hearing, the Planning Commission recommends approval or denial of the application to the Board, and forwards the matter to the Board for its consideration. In turn, the Board holds a hearing on the USR application, providing public notice of the hearing and allowing the public to submit written comments or to testify at the hearing.

Therefore, the referral agencies' approval and the Planning Commission's recommendation following a public hearing were prerequisites to the Board's review. Given the uncertainty of Coulson's application at the time of the campaign contributions, the

temporal and procedural circumstances did not make it reasonably foreseeable that Commissioner Donnelly would preside over the application.

¶ 45 We are not unmindful of the district court's view that "the Coulsons' campaign contributions created an objective and reasonable perception of bias" when Commissioner Donnelly participated in the Board hearing on Coulson's USR application and cast the deciding vote in favor of the application. We also agree with the district court's view that litigants involved in quasi-judicial proceedings are entitled to fair and impartial decision-makers. But "[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications," and in most circumstances, statutes, ordinances, and codes of conduct impose more rigorous standards for judicial disqualifications than the Constitution does.[6] *Caperton*, 556 U.S. at 889-90. Because this is not the kind of "rare,"

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[6] In 2019, the General Assembly limited contributions to county commissioners' campaigns to $1,250 per person in the primary election and $1,250 in the general election. Ch. 97, sec. 1, § 1-45-103.7(1.5)(a)(I), 2019 Colo. Sess. Laws 356. But these limits were not in effect at the time of the Coulsons' donations to Commissioner Donnelly's 2012 and 2016 campaigns, and the question before the district court was whether a constitutional violation, not a statutory violation, occurred.

"exceptional," and "extreme" circumstance that requires resort to the Constitution under *Caperton*, the district court erred by concluding that the undisputed material evidence established beyond a reasonable doubt that the county's conflict-of-interest rule, as applied to Commissioner Donnelly's actions, violated due process. *Id.* at 884, 887, 890.

III. Conclusion

¶ 46 For these reasons, we reverse the district court's entry of judgment in Thompson's favor on its as-applied constitutional challenge under C.R.C.P. 57 and C.R.C.P. 106, and we remand the case to that court for further proceedings on Thompson's remaining C.R.C.P. 106(a)(4) arguments: that the Board (1) abused its discretion by approving Coulson's application without competent evidence of the requisite criteria and (2) exceeded its jurisdiction by basing its decision on matters outside the Larimer County Land Use Code.

JUDGE FOX and JUDGE TOW concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

Notice to self-represented parties**: You may be able to obtain help for your civil appeal from a volunteer lawyer through The Colorado Bar Association's (CBA) pro bono programs. If you are interested in learning more about the CBA's pro bono programs, please visit the CBA's website at **www.cobar.org/appellate-pro-bono** or contact the Court's self-represented litigant coordinator at 720-625-5107 or **appeals.selfhelp@judicial.state.co.us.