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New York State Commission on Government Integrity

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IN THE MATTER OF A PUBLIC HEARING
CONDUCTED IN FURTHERANCE OF AN INVESTIGATION
PURSUANT TO EXECUTIVE ORDER OF THE GOVERNOR
WITH REGARD TO CONFLICTS OF INTEREST IN
LOCAL GOVERNMENT
[JUNE 26, 1989]

OCLC:
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STATE OF NEW YORK
COMMISSION ON GOVERNMENT INTEGRITY

In the Matter of

A Public Hearing conducted in furtherance of an investigation pursuant to Executive Order of the Governor with regard to conflicts of interest in local government.

Justice Building, Courtroom #1
Empire State Plaza
Albany, New York
Monday, June 26, 1989

The above entitled matter came on before the Commission commencing at 9:00 a.m.

BEFORE: JOHN D. FEERICK, Chairman
RICHARD D. EMERY, Commissioner
JAMES L. MAGAVERN, Commissioner
BERNARD S. MEYER, Commissioner

APPEARANCES: KIM E. GREENE, ESQ.
Deputy Counsel
Commission on Government Integrity
330 Broadway
Albany, New York 12207

THOMAS A. McSHANE, ESQ.
Staff Counsel
Two World Trade Center
New York, New York 10047

REPORTED BY: BETH S. GOLDMAN, RPR
Certified Shorthand Reporter

Beth S. Goldman, CSR, RPR
(518) 439-6772
INTRODUCTION

PROCEEDINGS

CHAIRMAN FEERICK: This hearing is now in session. I would like to note for the record the presence to my far left of Commissioner Richard Emery, to my immediate left, James Magavern, to my immediate right, Commissioner Judge Meyer; to his right, special counsel Thomas Schwarz, to his right Executive Director of the Commission Peter Bienstock, and to his right Deputy Counsel Kim Greene.

I have a brief statement to read at the outset of this hearing following which we will proceed to the examination of witnesses.

The Commission on Government Integrity was created by Executive Order of the Governor with approval of the Legislature on April 21, 1987. The Commission is directed by the executive order to investigate weaknesses in laws and procedures that create the potential for corruption and create the appearance of impropriety in state and local government and to make recommendations for improvement in those laws.

More specifically, the Commission was
(INTRODUCTION)

directed to investigate whether the laws
prohibiting conflicts of interest and providing
for disclosure of potential conflicts are strong
enough to assure the highest ethical standards
in local government and to maintain the public's
faith that government business is conducted
without favoritism, undue influence or abuse of
official position.

Since its inception, the Commission
has been working to develop a new ethics law
governing the conduct of municipal public
officials and employees. We have proposed a
code that provides for more stringent
prohibitions against actions by municipal public
officials that give rise to conflicts of
interest. Under our proposed law a municipal
official would be required to abstain from
taking an action on any transaction with or
matter before the municipality that would
personally benefit the official. Disclosure of
the official's interest would also be required.

As part of its inquiry into the
efficacy of the ethics laws governing
municipalities and its work to develop this new
code, the Commission commenced an investigation last year into the operation of the government of the City of Albany. In particular, the Commission has examined the issues that arise when a public official, in this case Mayor Thomas M. Whalen, III is involved in a law firm that represents clients and business dealings with the city.

Today, we will examine through testimony and documents some of the official actions taken by the Mayor with respect to his law clients. We will also examine some of the issues or conflicts engendered by the city's use of not-for-profit corporations, public benefit corporations, and public authorities to carry out city business and award state and federal funds to private entities. These quasi-governmental entities which were directed and staffed by Mayoral appointees and associates are exempt from the Freedom of Information Law, and the Open Meetings Law, as well as the conflict of interest prohibitions contained in the current General Municipal Law. In drafting its proposed municipal ethics law, the
Commission deferred decision pending the conclusion of certain investigations, including the one in Albany, on whether to recommend that coverage be extended to these entities.

I want to emphasize that it is not the Commission's function to uncover evidence of criminality or other wrongdoing. That is the job of prosecutors. In fact, some of the events we have investigated in Albany have already been the subject of a criminal investigation that resulted in the conclusion that criminal laws were not broken. However, the Commission's investigations are guided by the principle that public servants are properly held to a higher standard. And it is the Commission's legal mandate to investigate conduct which may be entirely permissible under current law, but may fail to reach those higher standards and which may illustrate the need for legislative reform.

With the exception of Mayor Whalen, all witness who will testify have been served with a subpoena by the Commission. All of the witnesses who testify and all persons who are mentioned during the testimony of any witness

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have certain rights under the New York Civil Rights Law Section 73. For example, a witness has the right at the conclusion of his or her testimony, to file a brief sworn statement for incorporation into the record of the hearing. Any person whose name is mentioned or who is specifically identified during the testimony of another and who believes that he or she has been adversely affected by the testimony has the right to likewise submit a sworn written statement for incorporation into the record of this hearing. Witnesses may be accompanied by counsel, and counsel may advise the witness of his or her rights, as long as there is no obstruction or interference with the ordinary conduct of this hearing. Counsel may submit proposed questions to be asked of a witness, and the Commissioners shall ask any such questions they deem appropriate.

The Commission calls as its first witness Mr. Jack Fox.

JOHN FOX,
called herein as a witness before the Commission, and being duly sworn by the

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(FOX, JOHN - FOR THE COMMISSION)

Chairman, testified as follows:

CHAIRMAN FEERICK: Please be seated.

We recognize Commission Deputy Counsel Kim Greene.

MS. GREENE: Thank you, Mr. Chairman.

EXAMINATION BY MS. GREENE:

Q Good morning Mr. Fox. Are you ready to begin?

A Yes, I am.

Q Mr. Fox, could you tell me what is your occupation?

A I am a staff investigator with the Commission on Government Integrity.

Q What was your prior occupation?

A I was an investigator with the state police for twenty-one years.

Q What were your duties and responsibilities with the state police?

A I conducted all aspects of felony investigations.

Q And as an investigator for the Commission on Government Integrity, did you participate in the investigation concerning the City of Albany?

A Yes, I did. I was the lead investigator.

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I interviewed witnesses, collected and reviewed and analyzed documents provided by the City of Albany and other sources. I also assisted the Commission attorneys in all stages of the investigation.

Q Mr. Fox, if I could ask you to keep your voice up a little, please.

A Certainly.

Q Thank you. When did the investigation begin?


Q And how did the Commission gather information in the course of the investigation?

A We conducted informal interviews, and analyzed records and documents supplied by the City of Albany and other sources. Subsequent to that, the staff attorneys took sworn private testimony from the witnesses.

Q And what was the focus of the Commission's investigation?

A The investigation examined the dual role of Mayor Whalen as a public officer and attorney in private practice.

Q And what period of time did the investigation cover?

Q Did Mayor Whalen hold public office in 1982?

A Yes, he did.

Q And what office did he hold?

A He was President of the Common Council, I believe.

Q And did he subsequently become Mayor of the City of Albany?

A Yes, in 1983 upon the death of Mayor Corning.

Q Was the Mayor affiliated with the law firm of Cooper, Erving & Savage in 1982?

A Yes. He was a partner in the firm, and also a partner in the successor firm until -- 1988, I believe it was, when he resigned from the firm, March of 1988.

Q Okay. If I could remind you again just to keep your voice up.

A I'm sorry.

Q Had Mayor Whalen held public office prior to '82?

A Yes. In 1969 he was elected city court judge for a six-year term.
MS. GREENE: Mr. Chairman, for the record, I would like to identify the chart that is Exhibit 1. And it is here to my right. The chart lists municipal entities on which Mayor Whalen holds or has held a position and has appointment powers with respect to each of these entities. The sources of the information contained on the chart is legal research by the staff of the Commission. On testimony before the Commission, we will be hearing testimony throughout the day that relates to this chart. And it is reproduced again as Exhibit 1.

Q Mr. Fox, I would now like to ask you to look at Commission Exhibit 2, and would you please identify this for me.

A Exhibit 2, which is on the easel to my right in front of me, is a chart to describe the examples of instances where the Mayor's law practice and his public position intersected.

Q I would like at this time to discuss in succession each of these examples listed on the chart beginning with the first one. The first one is the bond issue by the Albany IDA for the benefit of First Realty of Albany in 1982. Could you explain the
significance of this event?

A  Yes. First Realty received an IDA bond issue. It was represented at that time by a former partner of Mayor Whalen, Mr. Drislane.

Q  Did Mr. Drislane serve as counsel to the company before the agency?

A  He did.

Q  And did your investigation determine whether Mayor Whalen took official acts on this bond issue?

A  Yes. He cast a vote in favor of the project and took other official acts concerning it.

Q  And what was his position on the IDA at that time?

A  He was Vice-Chairman and a voting member.

Q  Was the law firm paid a fee for the work?

A  Yes, it was.

Q  And how much was that fee?

A  $5,150.

Q  Did Mr. Whalen share in that fee?

A  Our investigation revealed that the partners shared in all of the fees with the executor and guardian fees paid into the firm.

Q  I would like to move to the second item on
the chart and address your attention to the Albany Local Development Corporation. Can you tell me what this corporation is?

A The Albany Local Development Corporation is a private not-for-profit corporation established by the city. It distributes the funds supplied by state and federal housing development and industrial development grants.

Q Have those funds been granted officially to the City of Albany?

A Yes.

Q And who is the staff; who comprises the staff of the Albany Local Development Corporation?

A Let's see. I want to refer to my notes. It was staffed by city employees.

Q Where are the offices located?

A They occupy city office space.

Q Did your investigation reveal what the total assets of the corporation are?

A In 1988 an annual report of the corporation indicates assets of twenty-five million dollars.

Q And what is the structure of the corporation?

A The corporation is run by a board of
(FOX, JOHN – FOR THE COMMISSION)

directors.

Q Does the corporation also have members?
A It does, approximately fifty.

Q What role do the members play?
A According to the by-laws the members elect
the directors of the corporation.

Q Did your investigation disclose how the
voting members have been selected since 1983?
A A review of the minutes and other documents
from the city, four voting members have been added to
it since 1983. Their names are Harold Joyce, Marvin
Alphonso, James DiNapoli and Raymond Kinley, Jr.

Private testimony to the Commission from Charles
Newland indicated that Mayor Whalen selected each of
these.

Q Do the directors receive any compensation,
to your knowledge?
A They receive $225 per meeting.

Q How do you know that?
A From the financial records of the
corporation.

Q On average, how many board meetings are
held each year?
A Eleven.
Q Did Mr. Whalen represent any clients from the Albany Local Development Corporation?

A Yes, he did.

Q And could you tell me the names of the clients, please.

A In 1983 he represented Neenan's Garage, which was for the purpose of a low interest mortgage.

Q Is this matter reflected on the Commission chart?

A Yes, on line two.

Q Did Mayor Whalen receive a fee for this representation?

A Two hundred dollars.

Q What was his role with respect to the Albany Local Development Corporation at that time?

A He was a member of the corporation.

Q And did he also hold public office?

A Yes. He was President of the Common Council.

Q I would like to move now to the third item on the chart. And first, I would like to ask you to look at Commission Exhibit 3. Can you identify this document for me?

A Exhibit 3 is a license agreement between
Phillip C. Curley and the City of Albany. It is an agreement to operate a restaurant known as the Tap Room, which is located on the Albany municipal golf course.

Q By whom was this agreement executed?
A It was executed by Thomas M. Whalen, III the Mayor and Phillip C. Curley.

Q When was it executed?
A October 31, 1983.

Q Do you know whether the law firm played a role in this matter?
A Yes. Mayor Whalen's law partner Michael Kornstein represented Mr. Curley to obtain that liquor license for the Tap Room.

Q Did the firm secure the liquor license for Mr. Curley?
A Yes, it did.

Q Did Thomas take official action on this matter after Mr. Curley retained the Mayor's law firm, to your knowledge?
A Yes. From the information provided to us, he set the terms and signed the agreement.

Q And did Mr. Kornstein have dealings with the City of Albany on behalf of Mr. Curley in

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connection with this matter?

A   Yes. He dealt with Corporation Counsel to
work out the agreement, the licensing agreement.

Q   And when you refer to a licensing
agreement, you are referring to the license to
operate the concession at the tavern; is that
correct?

A   Yes.

Q   I would now like to move to Exhibit 4. I
would like to ask you to identify this document for
me.

A   Exhibit 4 is page 1465 dated October 19,
1983 of the Albany City Record.

Q   And what does the resolution on that page
provide, Mr. Fox?

A   "Resolved, that the Mayor of the City of
Albany be, and he hereby is, authorized and empowered
to enter into an agreement with Phillip C. Curley to
maintain the food, liquor and bar facilities located
in and on the Albany municipal golf course.

Q   Does the resolution specify the terms or
conditions of the agreement such as the amount of
rent to be paid to the city?

A   No.
Q: I would like to move now to Exhibit 5, please. Can you identify this exhibit for me?
A: Exhibit 5 is a memorandum from Paul Collins, the Deputy Corporation Counsel to Mayor Whalen dated October 18, 1983, the subject matter being Albany municipal golf course license agreement.

Q: I would like to direct your attention to the second paragraph of the letter and ask you to read it for the record.
A: "The terms and conditions are those as set forth in your instructions as superseded by our recent discussion to reflect a period of operation without a liquor license."

Q: Mr. Fox, on October 31, 1983 when Mayor Whalen executed the lease agreement, was Mr. Kornstein representing Mr. Curley on this matter?
A: Yes.

Q: Did the law firm receive a fee from Mr. Curley?
A: Yes, one thousand two-hundred fifty dollars. Did the Mayor share in that fee?
A: He did.

Q: I would now like to move to the fourth item on the chart. Did the Commission investigate a...
(FOX, JOHN - FOR THE COMMISSION)

project known as 80 State Street Partners?

A Yes.

Q Could you tell me what this project is?

A An office building that was originated by Lewis and Edward Swyer.

Q Did this project receive a bond issue from the Albany Industrial Development Agency?

A Yes.

Q By the way, are those the same developers who sponsored the First Realty of Albany project?

A They are.

Q Did the law firm of Cooper, Erving & Savage represent any of the parties involved in this project?

A Yes, Mr. Drislane, the law partner represented the Swyers.

Q Did he serve as the counsel to the company before the agency?

A He did.

Q Did the Mayor serve on the Albany IDA at this time?

A Yes.

Q And what was his position on the agency?

A He was chairman.
Q In that capacity did Mr. Whalen take official actions on the bond issue?
A he signed all of the documents necessary for the bonds issue.
Q Did he cast any vote on this bond issue?
A No.
Q I'm sorry. Can I ask you to repeat the answer?
A No, he didn't.
Q Did Mayor Whalen's law firm receive a fee for acting as counsel to this company?
A Yes.
Q Do you know the amount of the fee?
A It was approximately ten thousand dollars.
Q What is the source of your information on that?
A That was obtained from Edward Swyer's testimony to the Commission.
Q Did any other Swyer projects come before the Albany IDA awhile Mayor Whalen was chairman?
A In 1984 there was a project called the State Street Center Garage, another project by the Swyers, and it received a bond issue from the IDA.
Q Was this matter reflected on the chart which is Exhibit 2?
A No, it is not.
Q Why is it not there?
A Cooper, Erving & Savage the law firm, did not provide any direct legal counsel to the producers of the project.
Q Did the Commission's investigation reveal any relationship between this project and the Mayor's law firm?
A One of the partners in the project was Stuyvesant Plaza, Inc. James Drislane served on the board of directors of Stuyvesant Plaza, Inc. and he was also counsel for that corporation.
Q And was Mr. Drislane a law partner of the Mayor's at that time?
A He was.
Q Did Stuyvesant Plaza pay fees for representation on other matters to Cooper, Erving & Savage during the period that the bond issue was pending?
A Yes.
Q How do you know this?
A That was provided to us in a letter from Mr. Swyer's attorney where he advised us what fees were paid at that time.
(FOX, JOHN - FOR THE COMMISSION)

Q I would like to direct your attention to Commission Exhibit 6. Is this a copy of the letter that Mr. Swyer's attorneys provided to us?

A Yes, it is.

Q At the time of the State Street Center Garage project, Mr. Fox, was Mayor Whalen a voting member of the Albany IDA?

A Yes, he was.

Q Did he vote on any aspect of the State Street Garage application for the bond issue?

A I am unable to determine that. The vote tallies provided to us by the city were blank.

Q Do we have documentation of the fact that he was at the meeting at which the inducement resolution was considered?

A Yes, we do. Exhibit 7.

MS. GREENE: Mr. Chairman, for the record, we have requested a copy of the vote tallies for all resolutions, and our request is reflected in Exhibit 8. Exhibit 9 is a document provided to the Commission in response to the letter listing all the vote tallies provided by the city. As you can see, the city did not supply the vote for the resolution on May 17,
1983 as requested, we have subpoenaed a vote tally. And that subpoena is currently the subject of litigation.

Q Mr. Fox, I would next like to direct your attention to another aspect of the investigation. Did your investigation reveal union negotiations with the City of Albany in which union members were represented by the Mayor's law firm?

A Yes.

Q And what did you learn from that investigation?

A Our line five of the chart, in 1984 the Construction and General Labor Local 190 was represented by Eugene Devine in the negotiation with the City of Albany.

Q How many union members were represented in this transaction?

A We believe there were four or five.

Q I would now like to direct your attention to another area. Are you familiar with First American Bank and Bankers Trust?

A Yes.

Q What is the relationship between those banks?
(FOX, JOHN - FOR THE COMMISSION)

1 A Bankers Trust was purchased by First American Bank in 1985.

Q Do you know whether these banks were ever represented by Cooper, Erving & Savage?

A Bankers Trust was a long-time client of Cooper, Erving & Savage. And upon the takeover by First American Bank, they also became a client of the firm.

Q Did the Commission investigate examples of the interaction between the City and First American Bank?

A Yes.

Q I would like to discuss with you one of the examples investigated by the Commission. And I refer you to line six of the chart. Could you tell me what this matter refers to?

A This was a matter of a potential reassessment of the properties purchased by First American Bank by the Albany City Assessor.

Q In what year did this transaction occur?

A That occurred in '85.

Q On whose behalf did the Mayor contact the assessor?

A On behalf of the First American Bank.
Q And what was the assessor's response to the Mayor?

A The assessor gave the Mayor two options. One, to leave the assessment as it was, and the second was a raise.

Q Which option did the Mayor choose?

A To leave it as it was.

Q I would like to turn now to Exhibit 16 and ask you if you can identify Exhibit 16 for me.

A Exhibit 16 is a memorandum to Bruce McDonald, the city assessor, from Mayor Whalen concerning the First American Bank.

Q I would like to turn to Exhibit 7 and ask you to identify that.

A This is a memorandum dated June 4, 1985 to Mayor Whalen from Bruce McDonald, again concerning First American Bank.

Q Is this in response to the Mayor's memorandum which is Exhibit 16?

A Yes.

Q And can you read for me the last line of that document for the record, please?

A The last paragraph on Exhibit 17, "For your information, if we applied the 19.77 percent..."
tentative equalization rate, the revised assessment
would be based on sales price, which would be one
million sixty-five --" over one million dollars.
Q Would you read the last line beneath that?
A I would appreciate your advice on the
above."
Q Now, I would like you to turn to Exhibit
18, and I ask you to identify this document.
A A memorandum dated June 5, 1985 to Bruce
McDonald, an assessor, from Mayor Whalen, the subject
matter being the First American Bank of New York.
Q And for the record, could you read the text
of that memorandum?
A "In view of the fact that the sales price
for the First American transfers only related to a
merger transaction between Bankers Trust Company into
First American Bank, I believe we should leave the
matter alone until such time as we conduct an entire
review of the assessments on banking properties."
Q Thank you. Did the firm of Cooper, Erving
& Savage represent First American Bank with respect
to the question of the tax assessment of the
properties purchased by the bank in the City of
Albany?
(FOX, JOHN - FOR THE COMMISSION)

1. A Yes, they did.

2. Q Do you know which members of the firm were involved?


4. Q Was the firm paid a fee for this matter?

5. A Yes. They were.

6. Q Was this part of the monthly retainer paid to the firm?

7. A Yes, it was.

8. Q What did the Commission's investigation disclose with respect to the next item on the chart, the Albany Ventures project?

9. A Albany Ventures in 1985 received an industrial revenue bond issue. They were represented by the Mayor's former law partner James Drislane.

10. Q Was this bond issued by the Albany Industrial Development Agency?

11. A It was.

12. Q And did Mayor Whalen hold a position on the Albany IDA at the time of the bond issue?

13. A He was chairman through December 15, 1985. He resigned on December 15th and the bond issue was finalized on December 30, 1985.
(FOX, JOHN - FOR THE COMMISSION)

Q Who replaced Mayor Whalen as the chairman of the agency?
A Charles Hemingway.

Q Who elected Charles Hemingway to be Chairman of the agency?
A Mayor Whalen.

Q Was this selection confirmed by the Common Council?
A Yes, it was.

Q Did the Mayor's law firm play a role with respect to this bond issue?
A Yes. They represented the company.

Q Was the law firm paid a fee for this representation?
A Twelve thousand five hundred dollars.

Q I would like to direct your attention next to the matter of V. F. Conner. Did the investigation disclose a connection between this company of the law firm and official actions by the Mayor?
A Yes. The V. F. Conner Company was represented personally by Mayor Whalen in the purchase of a piece of city property.

Q In what year did this transaction occur?
Q Did your investigation determine what the purchase price for the property was?
A The purchase price was $14,000.
Q How do you know this?
A From the deed, Exhibit 19.
Q For the record, did you say the deed, Exhibit 19?
A Yes.
Q What is the location of the property that was the subject of the transaction?
A 283-285 Sheridan Avenue.
Q Who signed the deed for the city?
A Mayor Whalen.
Q When was it signed?
A The 17th day of April, 1985.
Q I would like to refer you now to Exhibit 20. Can you identify this document for me, please?
A Exhibit 20 is page 127 dated January 28, 1985 of the Albany City Record.
Q And in this document did the city list the value of the property later sold to V. F. Conner Company?
A Yes. It listed 283 to 285 Sheridan Avenue as having a land value of fifteen thousand dollars.
Q Did Mayor Whalen receive a fee for his representation of V. F. Conner?
A Yes, $410.
Q I would like to turn now to the Tricentennial Commission. Did you investigate the Tricentennial Commission?
A We did.
Q What was the Tricentennial Commission?
A The Tricentennial Commission was a private not-for-profit corporation established by the City of Albany to celebrate its three hundredth birthday.
Q Did the City of Albany and State of New York provide funding to this Commission?
A They did.
Q What did your investigation disclose with respect to this Commission?
A It disclosed that the Tricentennial Commission was a client of Cooper, Erving & Savage during its existence.
Q Did the Tricentennial Commission pay fees to the law firm?
Q They did.
Q I would like to ask you to move to Exhibit 21 now. Can you identify this document for me?
(FOX, JOHN - FOR THE COMMISSION)

A Yes. Exhibit 21 is a copy of three checks paid by the City of Albany Tricentennial Commission to Cooper, Erving & Savage.

Q What is the total amount of these checks?
A $1,593.08.

MS. GREENE: Mr. Chairman, before we move away from this chart, I would like to note for the record that the chart contains a column on the far righthand listing campaign contributions to Mayor Whalen by individuals and entities who have a direct relationship with the matters listed on the chart. The campaign contributions were compiled by Commission staff members from records of the Albany County Board of Elections for contributions to the Mayor's campaigns from the years 1983 through 1988.

Q Mr. Fox, I would like to turn now to some matters that are not listed on the charts. During the course of the investigation, did the Commission investigate an industrial revenue bond issue on behalf of Crisafulli Brothers food warehouse?
A We did.

Q I would like to ask you to turn to Exhibit
22. Can you tell me what this document is?
   A Exhibit 22 is a closing memorandum from the industrial development agency concerning an industrial development revenue bond granted to the Crisafulli project; the price on it being five hundred thousand dollars, dated March 24, 1983.

Q Who executed this closing memorandum for the agency?
   A On page five, Thomas M. Whalen, III, Vice-Chairman.

Q Who is listed as the purchaser of this bond issue?
   A Bankers trust.

Q Did the Commission's investigation reveal who represented Banker's Trust for the purpose of this bond issue?
   A Yes, Cooper, Erving & Savage.

Q I would like to ask you now to look at Exhibit 23. Can you identify this document for me?
   A Exhibit 23 is an invoice from Cooper, Erving & Savage to Vincent Crisafulli. It is for "Review of the City of Albany Industrial Development Agency, 1983; five hundred thousand dollar industrial revenue bond (the Crisafulli project) in behalf of Beth S. Goldman, CSR, RPR (518) 439-6772
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Banker's Trust Company of Albany, North America."

Q  What is the amount of the fee?
A  $3,750.

Q  That fee includes total services and disbursements?
A  That is correct.

Q  Were you able to determine the amount of fees paid to Cooper, Erving & Savage for the matters you have testified to?
A  Yes.

Q  And what is that total amount?
A  $34,853.08.

Q  Does that total exclude the two matters listed on the chart as covered by monthly retainers?
A  No.

Q  Mr. Fox, I would like to repeat the question again. Does this total exclude --
A  I'm sorry. I thought you said "include." it is excluded, yes, I'm sorry.

Q  I would like to turn now to another matter not on the chart. During the course of the investigation did you learn anything about the relationship between a company known as Maiden Lane Auto Park and the law firm?
A Maiden Lane is a long-time client of Cooper, Erving & Savage.

Q And did Maiden Lane Auto Park have any dealings with the Albany Parking Authority?

A Yes. They were awarded a contract twice.

Q Was this the same contract that was awarded twice?

A It was.

Q What was the purpose of the contract?

A It was to operate the municipal parking lot.

Q When did the first contract award occur?

A 1986.

Q Did Mr. Whalen hold a position on the Parking Authority at the time of the first contract award?

A He did.

Q And what was his position?

A He was the chairman of it until October 1, 1987.

Q Did Mayor Whalen resign from the Parking Authority before the second contract award was made?

A Yes.

Q Did he vote to award the first contract award to Maiden Lane Auto Park in 86?
(FOX, JOHN - FOR THE COMMISSION)

A Yes.

Q How do you know this?

A That information was provided to us, to the Commission by Mayor Whalen and Mr. LaJoy, who is the executive director of the parking lot.

MS. GREENE: Mr. Chairman, I would like the record to reflect that we subpoenaed the record of this vote along with other documents of the Parking Authority. In response to that subpoena, the Parking Authority turned over a number of things. They provided the meeting of December 6th at which Mayor Whalen testified he voted to have awarded contracts to Maiden Lane Auto Park were not included in the records turned over to the Commission.

Q What happened after the Authority voted to award the contract to Maiden Lane Auto Park in 1986?

A That original contract was rescinded.

Q And how was this rescission accomplished?

A I don't know. The information supplied to us by the Parking Authority wasn't clear; it didn't indicate.

Q But the records do show that the contract was awarded a second time?
A second time, yes.

Q With respect to the first contract award in 1986, how many proposals did the city receive in response to the request for proposal?

A Two.

Q Was Maiden Lane Auto Park proposal's less expensive than the other company's?

A No, it was not.

Q I would like to direct your attention to Exhibit 24 and ask you to identify this document for me.

A This document is a memorandum to Vincent McArdle, Corporation Counsel, from Joseph H. LaJoy, Director of the Parking Authority. It is dated November 25, 1986.

Q And what does Mr. LaJoy recommend?

A In the second paragraph, and I quote: "Although in total, the price of CitiPark seems to be less expensive, this does not seem to be in the best interest of the facility operations."

Q And on page two of the memorandum, does Mr. LaJoy recommend that Maiden Lane Auto Park being selected as the operator of the Parking Authority facility?
Q I would like to turn to an office building project known as 39 North Pearl Street. Did the Commission investigate this office building project?
A It did.
Q And what did the Commission's investigation disclose?
A It disclosed that the Mayor's law firm considered renting space and investigated this project back in April '83.
Q Investing in the project back in April '86?
A Yes.
Q And did the law firm subsequently enter into a lease for space in this office building?
A Yes, on August 8, 1986.
Q Did the lease give the firm the option to purchase up to forty percent of the project for four hundred thousand dollars?
A Yes.
Q Did your investigation reveal whether Mayor Whalen took any official actions with respect to this project during the period April through August, 1986?
A It did; he took official actions.
Q Did the Mayor and others subsequently form
an investment partnership and invest in the project?

A  They did.

Q  When did that occur?

A  I believe that was in December of 1986.

Q  Did the Mayor subsequently leave the investment partnership?


Q  And did this project continue to receive funds and other benefits from the city subsequent to January '87?

A  Yes, it did.

MS. GREENE: Thank you very much, Mr. Chairman, I have no further questions of this witness.

CHAIRMAN FEERICK: Thank you. Are there any questions from the Commissioners or Special Counsel?

(No response noted)

CHAIRMAN FEERICK: Thank you, Mr. Fox.

(The witness was excused.)
(FOX, JOHN - FOR THE COMMISSION)

CHAIRMAN FEERICK: Is Mr. Curley here?

MR. BRESLIN: I am his attorney. I just walked in and saw that he was scheduled for 10:30.

CHAIRMAN FEERICK: The schedule did not contemplate Mr. Curley's appearance until a little later. That's correct.

MR. BRESLIN: I spoke to him and he said he would be here prior to ten. And he said, "I am going to go out and get a cup of coffee," and he will return, Mr. Chairman.

CHAIRMAN FEERICK: I would suggest we take a brief recess until he is able to come back.

(A brief recess.)

CHAIRMAN FEERICK: The hearing is now in session. Mr. Curley, would you stand, please, to swear you in.

PHILIP C. CURLEY, called herein as a witness before the Commission, and being duly sworn by the Chairman, testified as follows:

CHAIRMAN FEERICK: Please be seated.

I would like to ask counsel to identify himself.
(CURLEY, P. - FOR THE COMMISSION)

for the record.

MR. BRESLIN: Thomas Breslin, 151 Chestnut Street, Albany, New York.

CHAIRMAN FEERICK: I recognize Commission staff counsel Thomas McShane, for questioning.

MR. McSHANE: Thank you, Mr. Chairman. May I inquire?

CHAIRMAN FEERICK: Yes, please.

EXAMINATION BY MR. McSHANE:

Q Mr. Curley, would you please state your full name for the record.

A Phillip C. Curley, C-u-r-1-e-y.

Q Thank you. Mr. Curley, what is your current occupation?

A I operate a nineteenth hole restaurant and tavern at the Albany Municipal Golf Course.

Q For how long have you done that?

A Approximately five and a half years.

Q Is the facility you run part of an Albany city facility?

A The facility I run is my own business. I lease from the City of Albany.

Q It is on city property; is that correct?
(CURLEY, P. - FOR THE COMMISSION)

A That's correct.
Q Prior to 1983, Mr. Curley, what did you do?
A I was the owner, co-owner of a restaurant in White Plains, New York.
Q Mr. Curley, can you tell us how you first learned that the concession to operate the tap room which you now operate was available in 1983?
A Yes. I was at the family camp in the Adirondacks, and my brother John informed me that the business at Albany muni(cipal) was becoming available. And it would seem, since my business was dissolving, that it would be a great idea for me to try to get it.
Q Did your brother work for the city of Albany at the time?
A Yes.
Q Do you know what his position was with the city at that time?
A I can't be sure. I think he was a foreman in the Public Works Department.
Q I'm sorry, with the Public Works Department?
A Yes. I am not quite sure what his actual position was or job title was.
(CURLEY, P. - FOR THE COMMISSION)

Q Does he still work for the Albany Public Works Department?

A He does.

Q What did you first do all after hearing about the possibility of your operating that concession in your attempt to secure the concession?

A What did I first do? Well, as I said, I consulted with my brother as to, you know, what to do. He said, "Let's draft a letter and submit it to the city, a proposal, a bid, if you will, whatever you want to call it. And this is what we did.

Q You submitted a letter to the city?

A Yes.

Q Mr. Curley, I will ask you at this point, if you would, to take a look at Commission Exhibit 25. And it is in the black book right in front of you.

A Can we move this microphone? (indicating)

There it is, yes.

Q Do you recognize that?

A Yes, I do.

Q What do you recognize that exhibit to be?

A This is the letter of my proposal to the
City of Albany to operate the concession at the golf course.

Q What is the date of that letter, Mr. Curley?

A September 8, 1983.

Q To whom is it addressed?

A Commissioners Harry Maikels, Commissioner of the Department of Public Works, City of Albany.

Q How did you know to send the letter to Mr. Maikels?

A I got help on that from my brother.

Q Now, did there come a time after you sent that letter that you met with Mr. Maikels?

A Yes. There was a time that I met with Mr. Maikels.

Q Can you tell me where you met him?

A My first meeting with Mr. Maikels was in front of City Hall. I don't know the date.

Q It was after September 8th; is that correct?

A Oh, yes.

Q How was that meeting with Mr. Maikels arranged?

A I was told by my brother who worked under
Maikels to meet the Commissioner in front of City Hall. And this, I did.

Q At the time when you met with Mr. Maikels had you been informed by anyone that you would, in fact, get the concession to operate the Tap Room on the golf course?

A Yes.

Q Who told you that?

A My brother.

Q And did you ever receive written notification of that fact before your meeting with Mr. Maikels?

A I can't recall if I did or not. I don't recall getting anything, but I don't want that to mean that I didn't. I can't recall.

Q Do you know whether you ever received written notification of your receipt of this concession award after you met with Mr. Maikels?

A No. That is basically the same question that you are asking me.

Q No. I asked you whether or not you had written notification before you met with Mr. Maikels. I am now asking you whether after the meeting --

A Before or after the meeting, I don't recall.
Q You don't recall written notification. You were informed by your brother as far you can recall; is that true?

A Yes.

Q At the time you met with Mr. Maikels, did you then subsequently meet with anyone else?

A We met at that time after meeting cordially with Mr. Maikels, we went into the Mayor's office in City Hall.

Q When you say "we," to whom are you referring?

A Commissioner Maikels and myself.

Q Your brother did not come with you into City Hall; is that it?

A No. He did meet us in front of City Hall and introduced me to the Commissioner. And he had duties to attend to, he said, and then he left.

Q And did you have a conversation with the Mayor at that time?

A Yes.

Q In City Hall?

A Oh, yes.

Q That is Mayor Whalen; is that correct?

A That's correct.
Can you tell us what you spoke to Mayor Whalen about at that time?

If I understand your question -- Are you asking me the purpose of the meeting; is that what you are asking me?

Yes, I am. I am asking you the purpose of the meeting, and I am also asking you, I guess, what it is you discussed once you were in the meeting.

The purpose of the meeting was for the Mayor to meet me and instruct me to the fact that the improprieties that had been going on out at the golf course concession in past years were not to continue; that it should be run for an orderly and businesslike manner. And I assured him that it would be.

Did you have any conversation with the Mayor at that time about what the rent would be?

We had a conversation about the rent, but it was pretty much decided beforehand, seeing as how they accepted my proposal in the letter. But we did discuss it. He wanted to reiterate that there would be a minimum payment, a monthly payment to the city.

Mr. Curley, are you saying that the terms of the rent were established before your meeting with the Mayor?
CURLEY, P. - FOR THE COMMISSION

A Well, I submitted a letter and I was told that it was accepted and that I would be the concessionaire. So, I would have to assume that the answer to that would be yes. It would be reasonable to assume that that would be yes.

Q But did you have a conversation with Commissioner Maikels outside of City Hall concerning your rent payment?

A I don't believe so. I don't recall that I did, no.

Q So, it would be fair to say that the first person from the City of Albany that you had occasion to actually discuss a rent payment with was the Mayor; is that correct?

A Face to face, I would have to say yes to your question.

Q Was there any discussion at that meeting concerning the length of the agreement between yourself and City Hall or the City of Albany?

A No.

Q Mr. Curley, were you represented by an attorney at that meeting?

A No I was not.

Q Did you sign any formal agreement at that
I's meeting?

A No, I did not.

Q Did you subsequently sign a formal agreement with the City of Albany?

A Yes. A lease agreement, if that is what you mean, I subsequently did.

Q Do you recall the date of that lease agreement?

A No, I don't recall.

Q At this time, Mr. Curley I would ask you to take a look at Commission Exhibit 3 which is in the black binder in front of you again. Do you recognize that document?

A Yes.

Q What do you recognize that document to be, Mr. Curley?

A I recognize this to be the lease agreement between myself and the City of Albany. And I see that my signature appears on the third page.

Q Mr. Curley, I would ask you to look at the first page of the document. Do you notice at the top of this documents that a date is indicated?

A Yes. It is written in where the rest is typed, and says 31st of October, 1983.
Q Does that refresh your recollection regarding the date of the agreement that you signed with the City of Albany?

A Are you asking me if I signed this on the 31st of October; is that your question?

Q I am asking whether or not this document with the date indicated refreshes your recollection as to the date when you signed the agreement.

A No, it doesn't.

Q I would ask you to turn to the third page.

A In other words, I don't know the date I signed it. If you tell me I signed it on the 31st, I will take your word for it.

Q Mr. Curley, you are testifying; I am not. I want to make sure we understand exactly when you signed this document.

A I will accept that I signed it on the 31st of October, 1983. I mean it is a point we don't have to argue about.

Q You did sign it --

A What I am saying is that I don't recall that that was the day, but it appears by this document that that was the day.

Q Thank you, Mr. Curley. By that date, the
31st of October, Mr. Curley, had you hired an attorney?

A I believe so.

Q And who was the attorney that you hired?

A I hired Michael Kornstein.

Q Were you aware when you hired Mr. Kornstein that he was a partner of the Mayor's in the Mayor's law firm?

A I was aware of the fact that he worked in the Mayor's law firm. I wasn't aware of the fact that he was a partner.

Q Were you aware of the fact that Mr. Kornstein and the Mayor were part of the same law firm when you met with the Mayor?

A No.

Q When did you learn that Mr. Kornstein was a member of the law firm with which the Mayor was associated?

A When I hired him.

Q Do you recall when that was?

A I don't know the exact date, but it would have to be somewhere between -- somewhere in September or October of 1983.

Q Did you believe that it might be helpful to
you to have an attorney associated with the Mayor's law firm represent you on this matter?

A Did I believe that it might be helpful? I don't know what you mean by "helpful." Helpful, no. It was my understanding that -- I believed it would be helpful for me to acquire a liquor license, which is the reason I hired him, yes.

Q Did you believe it would help you in your dealings with the city to have Mr. Kornstein represent you?

A My dealings with the city, as far as the agreement was concerned, was already, in my mind, was already over. So that is not the reason that I hired Mr. Kornstein, no.

Q Mr. Curley, do you recall testifying before the Commission at a private session on August 19, 1988?

A I recall testifying before the Commission, yes.

Q And do you recall at that time -- and I am referring to page 31 of your testimony, do you recall at that time being asked the following questions and giving the following answers. And I am turning to page 31 here.
(CURLEY, P. - FOR THE COMMISSION)

A (Pause) Okay, go ahead.

Q Question: when you asked your brother, "Hey, I want to do the right thing, what did you mean?" Answer: "Well, what I meant was, you know, I want to -- I have got a city concession and I want to -- I don't want to go out to Schenectady somewhere and get some lawyer that way." Question: "Like paybacks?" Answer: "I don't think so, no. I just wanted to do business -- if you are doing business in the city of Albany, I wanted to get people that knew people in the city of Albany. You know, I did not find anything wrong with that. I just wanted to do it that way. I didn't want to bring in -- at the last meeting with you, the man asked me why didn't I bring the lawyer up from White Plains. It is a very prestigious firm, and they charged us a fortune to dissolve the business. Can you imagine him driving up here to meet about how much for the fryolater? Now, that wouldn't make sense."

A I am down in White Plains for twelve years. So when I went up, I said, "John, in picking the law firm what do you think I should do and what insurance?" But, again, those decisions were mine, absolutely. And yes, I recall that.
(CURLEY, P. - FOR THE COMMISSION)

Q Again, I ask you the question now -- at the time when you hired Mr. Kornstein was it your motivation to hire somebody that knew people in the City of Albany?
A That wasn't my motivation for hiring Mr. Kornstein, no.
Q Mr. Curley, do you recall the Mayor suggesting to you that you contact Mr. Kornstein to represent you?
A I don't recall specifically him mentioning that, no.
Q Do you recall him generally mentioning that?
A I did get a business card from the Mayor.
Q When did you receive the business card?
A At that meeting, when the meeting was breaking up.
Q Who gave you the business card?
A The Mayor.
Q What was on the business card?
A His name, and on the back was Mike Kornstein's name.
Q And do you recall how it came about that the Mayor handed you his business card with Mr.
Kornstein's name on the back?

A Well, our business had been concluded and we were breaking up. And I was going over in my own mind what I needed to do at this point to get things rolling. And one of the things I needed to get was a liquor license. And I believe I said that out loud to nobody in particular. We were on our way out, and he said, "If you need a liquor license, there is a man in my office that does liquor licenses and this is his name." And I thanked him. That was at the end of the meeting when it was breaking up. I want to emphasize that that wasn't the reason for the meeting.

Q I'm sorry; what was not the reason for the meeting?

A What I just said.

Q Your obtaining a lawyer through the Mayor wasn't the reason for the meeting; is that what you are saying?

A That is what I am saying.

Q After the meeting and after you retained Mr. Kornstein, Mr. Curley, did you have further discussions with the city concerning the length of your agreement with the City of Albany?
A Yes. The length of the lease, I would assume you are talking about?

Q Yes.

A Yes. When you say "with the city" you mean anybody that was -- any official of the city?

Q I am referring specifically to your lease agreement with the city.

A Yes.

Q And you had further discussions concerning the term of that lease?

A About the length, yes. We -- okay.

Q I'm sorry?

A I don't want to get ahead. You go ahead and ask the questions.

Q Did the term of the lease change from a two-year lease to a three-year lease?

A Yes. When we applied for a liquor license it was about that time that the state had gone from a one-year liquor license to a three-year liquor license for more revenue for the state. So, in order to obtain a liquor license the State Liquor Authority informed us -- informed my lawyer that we had to have a three-year lease; that they were not going to give a three-year license on a two-year lease. So we had
to conform that lease, to conform that to the state regulations.

Q When you received the formal document, the lease agreement from the City of Albany, did you discuss that with your attorney Mr. Kornstein?

A Yes. I received it in his office, I believe.

Q And you discussed this matter with him, the matter of your lease with the City of Albany; is that correct?

A I didn't discuss the lease; we discussed the two-year and three-year. He said, "We have to make it three years in order to conform with the state laws."

Q Mr. Curley, if you would, again, I would like to refer you to your testimony before the Commission on August 19, 1988. Can you turn to page 28. Do you recall being asked the following question and giving the following answer: Question: "When did you first find out about the lease, if you recall?" Answer: "I got myself a lawyer and sat in his office. And he told me that they are making up a lease and -- was it Paul -- what the hell was his name? And we secured a copy of it, and I read it over. And there
were things that I didn't feel comfortable with. We discussed it, and I remember talking to Paul -- what was his last name? He is no longer with the city."

A Yes, Paul Collins. It was my understanding that Paul wrote the lease.

Q Is it your testimony today that you then discussed that lease with your lawyer Mr. Kornstein after you received it from the city?

A If I could clarify -- when I said there were things I wasn't comfortable with, if you have a copy of the license agreement, I will tell you exactly what I was talking about. The front page of the license agreement, about the fourth paragraph down, during the month of October '83, a license fee of one hundred twenty-five dollars plus one fourth of the utility bills. The month of November, $250 plus half of the utilities. Now, I didn't get my liquor license -- and we opened December 1, 1983. And I objected to paying $375 rent on a place that I wasn't in, open or operating. Also, there is a passage in there about the days I had to be open. I think it was seven days a week. And I was -- if I wanted to take Christmas off or Easter off, I didn't want to be in violation of their -- it's Section 15 on the last
page: "seven days a week for at least the following
hours." Now, when I say "the things I objected to,"
it was those three things. And I called Paul Collins
personally and objected to those things. I said to
him, "If I lease from the city and I operate a
business, why should you tell me the hours to open
and everything, you know, if I am a businessman."
And he said, "We just don't want you to open for the
cocktail hour and close the rest of the time. And I
mentioned to Paul Collins about the $375 rent. I
said, "Why should I pay rent on something that I am
not even in?" And he said, basically, it was -- "That
is the way it is." It was not negotiable; sort of a
take it or leave it thing. I also discussed it with
my brother, and he said, "Don't worry; just pay the
money." And I complained to my brother about it. It
was very helpful to me. But basically, that was the
way it was going to be.

Q My question to you now, Mr. Curley, is
whether or not it is your statement that you
discussed the lease which you received from the city
with your attorney, the statement you made during
your testimony on August 19, 1988.

A "I got myself a lawyer and sat in his
office, and he told me they were making up a lease."

Q If you read further down it says, "We discussed it." Are you correcting that testimony today or do you stand by that testimony?

A Well, I am correcting it. I don't recall specifically discussing sections of the lease with him, although I may have. The purpose of my hiring the attorney was two reasons; to help me secure a liquor license -- and that was the main thrust of his business -- and to help me to deal with the tenants that were in the golf course at the time as to what would be required in payment to them. And that was the purpose of hiring that attorney. Now, whether we discussed the lease was secondary. It was not -- I didn't hire him to negotiate a lease with the city. That is not the reason I retained him. And I want to make that perfectly clear. And that is the reason that I called Paul Collins myself and objected to these things.

Q Okay. My question to you, Mr. Curley, is not the reason why, the main reason why you hired Mr. Kornstein to represent you. My question is whether or not you discussed --

A Well, it should be a main question.
Q If you would let me finish my question, Mr. Curley. The question it is whether or not you consulted your attorney concerning that lease.

A Now, you have called me down here four times and --

MR. McSHANE: Mr. Chairman, I would ask the witness --

CHAIRMAN FEERICK: I would like to ask the reporter -- I have lost the last question. And would you go back and see if we can reconstruct the last question and what the witness's response is to it.

(Testimony was read by the reporter)

CHAIRMAN FEERICK: Let me see if I can cut through this a little bit. I take it, it is your testimony today that you don't recall whether you discussed the terms of the lease when you met with your attorney?

THE WITNESS: I don't recall. If I did, it was so minute. That wasn't foremost in my mind.

Q So you have no recollection at this point of any precise discussion with your attorney on that subject?
A I don't have any.

Q I take it from what you said, you did discuss certain provisions of the proposed lease with an official in the government?

A Yes. I called him on the phone.

Q Who was that person you called?

A His name was Paul Collins.

Q What was his position at the time, if you know.

MR. BRESLIN: I can help. He was Deputy Corporation Counsel, one of the attorneys in the city's law office that did the leases.

CHAIRMAN FEERICK: How did you know to call him?

THE WITNESS: That is a good question. I believe that my brother told me that Paul Collins was the one doing the leases. I am not sure how I got his name.

CHAIRMAN FEERICK: Can counsel go to a new area of questioning?

MR. McSHANE: Yes, Mr. Chairman.

Q Mr. Curley, you have indicated that at the time of your meeting with Mr. Whalen you received a business card of the Mayor's with Michael Kornstein's
name written on the back by the Mayor; is that correct?

A That's correct.

Q Mr. Curley, I would like you to take a look at page thirty of your testimony before the Commission on August 19, 1988. And I am going to ask you whether you recall being asked the following questions and giving the following answers: "In what direction did he steer you?" Answer: "He steered me toward Mike Kornstein in the office of Cooper, Erving & Savage." Question: "And did you know that the Mayor's -- that that was the Mayor's law firm?" Answer: "I did, yes. Also, he steered me to, insurance-wise, to Albany Associates. And I had said John, who do you think I should use? And he said I should use these people. Go see -- I can't remember his name either -- the man that ran the office, a big guy, a nice guys. Basically, I told John, 'I want to do everything right. What do you think I should do?' I want to emphasize that at no time were any of these people were suggested by any of the city administration. And that is the God's truth.'" Mr. Curley are you correcting that testimony here this morning?
(CURLEY, P. - EXAM. BY THE COMMISSION)

A Not really. What I want to say is I checked with my brother as to the law firm and this gentleman Kornstein. And he said, "Yes, he is a good man," and also with the insurance -- Otto Fossil (phonetic). I use him; he is a good man.

Q I want to direct your attention specifically to the last sentence, last two sentences which we had; "You know, I want to emphasize that at no time were any of these people suggested by any of the city administration. And that is the God's truth." And my question to you, again, is: are you correcting that testimony here this morning, when you say the Mayor handed you a business card with Michael Kornstein's name on the back?

A The answer is yes.

MR. MCSHANE: Thank you, Mr. Curley.

I have no further questions.

BY COMMISSIONER EMERY:

Q Mr. Curley, maybe I misunderstood your testimony. I want to be clear on it. I thought you testified that at some point, there came a time when you originally, at least orally, negotiated a two-year lease. And because the State Liquor Authority required a three-year license, you needed a
(CURLEY, P. - EXAM. BY THE COMMISSION)

three-year lease. Did you testify as to that?
A  Not specifically. I said that the lease, as written, was written as two years. I didn't say we negotiated a two-year lease.
Q  I see. Now, Exhibit 3, is that a two- or three-year lease that you are referring to there?
A  Let's read it over. What is it saying -- it is three years.
Q  It is a three-year lease; is that correct?
A  Yes.
Q  There was a prior lease to that that was a written lease?
A  Oh, yes. A two-year lease.

MR. BRESLIN: The Commission asked for it and we couldn't find it. I said we don't know where it is at. I think it was a prior draft. I am trying to help you along.
Q  This is a lease you negotiated with the city, and ultimately the three-year version was signed by Mayor Whalen; is that correct? If you look at the last page of that --
A  Yes. It was signed. It seemed to be, yes.
Q  During the period prior to the signing of this lease you were negotiating or trying to get your
(CURLEY, P. - EXAM. BY THE COMMISSION)

liquor license using Mr. Kornstein as your attorney; isn't that correct?

A    That's right.

Q    And in using Mr. Kornstein as your attorney you had to secure a three-year lease from the city in order to meet the requirements of the State Liquor Authority; is that correct?

A    That's right.

Q    So you discussed it with Mr. Kornstein; did you not, your lease with the city?

A    Yes, I did.

Q    Relevant to the three years; is that right?

A    I already testified to that fact.

Q    That is what I am trying to make sure. You testified that you did discuss with Mr. Kornstein a lease with the city that had to be changed from a two-year original to the three-year that would comply with the State Liquor Authority requirements?

A    That's right.

Q    Now, in your discussions with him, if you wish to reveal it -- and you may consider these as privileged discussions; I don't know your position on that -- did you discuss how that lease was to be changed, who was going to do that work, how it was...
going to get done to change the lease from a two-year lease to a three-year lease?

A No. I didn't discuss how that was going to be done.

Q Did he tell you what measures he might take to accomplish such a change?

A No.

Q Well, how was it left when you said to him -- or he told you, "We need a three-year lease." How did that occur?

A You will have to ask him. We left it pursuant to our application to the State Liquor Authority. They won't accept anything less than a three-year lease.

Q How did you get a three-year lease?

A I left it up to him. He must have done what he had to do to make it three years. But that is consistent with what I testified as to getting me a liquor license. You can't get a liquor license if they don't accept it.

Q You testified just now, you testified that Mr. Kornstein took care of the matter dealing with a two-year to three-year lease as part of his work in getting you the liquor license?
(CURLEY, P. - EXAM. BY THE COMMISSION)

A Yes.

Q I believe you testified that prior to the meeting with Mayor Whalen that there was no negotiation whatsoever on the rent; that you had proposed a certain rent in your Exhibit 25, I believe, in your letter to Mr. Maikels, and that you assumed that that might have been accepted when you were informed by your brother that you had the concession?

A That's correct.

Q Do you know of anybody else seeking this concession? Did you ever hear?

A Not at that time. After I was in business I had people come up to me and say, you know, "I tried to get it," or, "I tried to get it for my son," or something of that nature. But that was after I was in business.

Q Do you know how you got this concession; do you know where the information came from that caused your brother to tell you that you had received the concession?

A It was my understanding that the decision was made by Commissioner Maikels. At that time Public Works ran the Parks Department also. It has
since changed.

MR. BRESLIN: You mean which ran the
golf course.

THE WITNESS: The golf course, yes.

And Commissioner Maikels had the say as to who
was going to be in on -- who was going to be the
concessionaire at the golf course. That was my
understanding, anyway.

Q Did you know if your brother had any
relationship with Commissioner Maikels?

A He worked closely with Commissioner
Maikels, and I know that we were personal friends.

Q Is it your understanding that your brother
vouched for you and that is how you got the
concession?

A I think that was a very, very big part of
it, yes.

Q How was it that you got the information
proposed in Exhibit 5 to set a rent based on the
revenues, I take it that you somehow learned, in the
first paragraph, were forthcoming from that
concession?

A When I say John -- my brother said that he
believed this is what it was going to take to get the
concession.

Q So he advised you on those amounts?
A Oh, yes.

Q And when you met with Mr. Maikels, Commissioner Maikels out in front of the City Hall, I believe you testified --
A Yes.

Q -- your testimony is that you did not discuss the rent at that point?
A I don't believe I did, no.

Q Had your brother told you that the rent had been settled?
A My brother told me that this letter was accepted and that I was going to get the concession based on the information in this letter. And that was already decided, that was done.

Q At any point in your discussion with Mayor Whalen subsequently when you met with him in the office, did he indicate to you words to the effect that he had seen this letter?
A No. He didn't indicate it to me. I had no knowledge of whether he had seen the letter or not.

COMMISSIONER EMERY: That is all I have.
(CURLEY, P. - EXAM. BY THE COMMISSION)

BY CHAIRMAN FEERICK:

Q  Can I just get your best recollection of the time period? I take it that when you met Commissioner Maikels at that particular point, it was your understanding that you essentially had been accepted for the concession; correct?

A  It was my understanding, yes.

Q  Can you put a date on that meeting, if the lease was signed hypothetically on October 31st?

A  It would have to be at the end of September '83. I don't recall the specific date.

Q  I take it that when you met Commissioner Maikels, that was the first time you met him; correct?

A  Yes.

Q  And is it that very same day that your meeting with Mayor Whalen occurred?

A  Yes, that was the purpose. John introduced me to the Commissioner out in front of City Hall. Then the Commissioner and I went into the Mayor's office.

CHAIRMAN FEERICK: Thank you.

BY COMMISSIONER MAGAVERN:

Q  Mr. Curley, to your knowledge, was there

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ever an RFP to operate this concession?

A  I don't understand the question. Can you clarify it a little better?

Q  Did you ever become aware of any -- to your knowledge, were there ever any competing proposals that had been submitted to the city in competition with yours?

A  Not to my knowledge.

Q  And you never received any formal invitation to submit a proposal in writing?

A  No, I didn't.

Q  What was the basis of your fee rate with Mr. Kornstein? Was an hourly fee rate discussed at all before the arrangement?

A  We discussed the rate, and he had to work on a liquor license and negotiate with the tenants there at the golf course. He gave me a number. Do you want to know what that was?

Q  Was that before or after he submitted the bill?

A  That was before; that was in his office. That was at our first meeting, I think, when he told me what the fee would be.

Q  Was it a fixed fee in advance?
A What do you mean; pay in advance, is that what you mean?

Q No. In your conversation with him before he did the work, you agreed upon what the fee would be?

A We agreed on a fee, yes. Well, we had -- at my first meeting with him, I don't know if we had done some work and then talked about the fee. I think that is the way it was. We had gone over some information as to what was needed to be done for the liquor license, and at the end of that meeting is when we had discussed this fee.

Q How much did he tell you it was at that time?

A He said it would be between one thousand and fifteen hundred dollars.

COMMISSIONER MAGAVERN: Okay, thank you.

CHAIRMAN FEERICK: Special Counsel Tom Schwarz.

BY MR. SCHWARZ:

Q Sir, you had already had a liquor license in connection with another premise; had you not?

A I held a license in a restaurant I had in
White Plains. That's correct.

Q And at the time that you met with Commissioner Maikels, did you still hold that license?

A No. We terminated our business down there.

I remember the last day of business was the last day of August 1983. And the very next day or very shortly after that, we turned our license in because you do get -- you are entitled to a little bit of a refund.

Q You didn't have any reason to believe that you would have any difficulty in obtaining the liquor license, did you?

A No. I have a pretty good reputation down there.

Q You didn't have suspensions or revocations of your license, sir?

A No, I didn't.

Q Just so the record is clear, when you received the business card from the Mayor with Mr. Kornstein's name written on it, do you recall what the business card reflected with respect to the Mayor? Did it reflect that he was the Mayor, or did it reflect that he was a member of the firm of
Cooper, Erving & Savage?

A I am not sure if I understand your question about the reflection.

Q You had a business card. What business did it reflect?

A He was the man in that firm that did liquor licenses.

Q No, no. My question --

MR. BRESLIN: Did the card say Cooper, Erving & Savage or Mayor on it? That was the question, I think.

Q Yes. That was the question.

A Gee, I can't recall. I don't know.

Q And lastly, Exhibit 25, your letter to Commissioner Maikels refers -- at the bottom it says, "Reference: Mr. Harold Joyce."

A Yes.

Q Who is Mr. Harold Joyce?

A He is a good friend of my brother John's in the Sixth Ward in Albany.

Q In the Sixth Ward?

A He is a member of the Albany County Legislature --

Q I'm sorry, sir?
A -- and the head of the electricians' union.
Q And a member of the Albany County Legislature, did you say?
A That's correct.
Q And he is a member of the Democratic political organization; is that what you knew at the time?
A Yes.
MR. SCHWARZ: I have no further questions.
CHAIRMAN FEERICK: I would like counsel to show the witness -- I am not sure if the document was presented before, Exhibit 36. For the record, document 36 appears to be a license agreement between the witness and the city dated October 20, 1983, eleven days in advance of the final license agreement. That, I believe, is Exhibit 3.
THE WITNESS: Here is the one with two years, okay.
BY CHAIRMAN FEERICK:
Q If the witness would examine Exhibit 36, and particularly the signature page on page three, I will ask whether, Mr. Curley, that is your signature...
(CURLEY, P. - EXAM. BY THE COMMISSION)

on the page.

A This is exhibit 36, the third page. And

that is my signature.

Q Does that document in any way refresh your

recollection as to the events that took place with

respect to you and your attorney following the

meeting with Mayor Whalen?

A Yes. This is consistent with, you know,

with everything. I guess the other one, the amended

one for three years we discussed was October 31st.

So you can see it was eleven days later. And it

would be interesting to compare the two documents.

To my recollection, the only thing that would be

changed would be from two years to three years to

conform with the State Liquor Regulations. So, how

much negotiation had to be done there is, you know,

ridiculous. All you have to do, I think -- I didn't

compare the two. But I think if you do, you will

find that they are the same except with respect from

two years to three years.

CHAIRMAN FEERICK: I just wanted to

make sure the record was complete.

MR. BRESLIN: I'm sorry. We might

have been better able to respond if you had
given it to us. We had asked for it and staff
to give us --

CHAIRMAN FEERICK: Counsel, when you
have had an opportunity to examine the exhibits
in entirety, we would be happy to accept any
additional written statement the witness might
have following this hearing.

BY COMMISSIONER EMERY:

Q Do you know now or recollect what the
reasons were or the reason for the two-year term
initially?

A No. As opposed to on a one-year?

Q As opposed to a one-year or two-year term.

MR. BRESLIN: The city attorney who
did it never did a license for a premises
wherein you have liquor. Cities are not usually
in the business of renting out businesses that
have liquor licenses. While the city does many
leases, they don't lease premises wherein you
serve liquor. So he was unaware of the fact --

THE WITNESS: And that was new, too.

They had just gone to a three-year license when
Cuomo was elected. That was one of the first
things he did.
(CURLEY, P. - EXAM. BY THE COMMISSION)

Q Mr. Curley, my question is: do you know the reason they fixed on a two-year term for your lease?

A No, I don't.

CHAIRMAN FEERICK: You don't know whether it was "ridiculous" or any degree of negotiating, or how difficult the negotiations were to change it to a three-year term; do you?

THE WITNESS: No. I don't know if it was difficult to change it from a two-year.

COMMISSIONER EMERY: That's all. That is my question.

CHAIRMAN FEERICK: Thank you very much.

(The witness was excused.)
CHAIRMAN FEERICK: The Commission calls as its next witness Eugene Devine.

EUGENE DEVINE, called herein as a witness before the Commission, and being duly sworn by the Chairman, testified as follows:

CHAIRMAN FEERICK: Please be seated.
I would like to ask counsel to identify himself for the record, please.

MR. TROMBLY: Edward J. Trombly, Key Corp. Plaza.

CHAIRMAN FEERICK: I recognize Thomas McShane.

MR. MCShANE: Thank you, Mr. Chairman.

BY MR. MCShANE:

Q Mr. Devine, would you please state your full name and spell your last name.

A Eugene P. Devine, D-e-v-i-n-e.

Q Now, Mr. Devine, where are you presently employed?

A I am a partner in the firm of Devine, Piedmont & Rutnik.

Q For how long have you been with that firm?

A Since September, 1985.
(DEVINE, E. - FOR THE COMMISSION)

Q Prior to your association with the current firm, were you associated with another law firm?
A Yes. I was a partner in the law firm of Cooper, Erving & Savage.

Q For how long were you a partner in that firm?
A Approximately from 1981 or 1980 to when I left in September '85.

Q And prior to being a partner in the firm, were you an associate in the firm?
A I was an associate in the firm from '75 until I became a partner.

Q And when did you leave the firm?
A September of 1985.

Q During the time when you were a partner, Mr. Devine, how many other partners were there in the firm?
A I believe there were eight. Seven other partners, eight partners total.

Q Were any of those other partners senior partners?
A Yes. There were three senior partners.

Q Who were they?
A James Drislane, Tom Whalen and Jim Brennan.
Q Mr. Devine while you were with the firm of Cooper, Erving & Savage did the firm have dealings on behalf of clients with municipalities?
A Yes.
Q And did the firm have dealings with the City of Albany on behalf of clients?
A Yes.
Q In 1982, Mr. Devine, Thomas Whalen, a partner in the firm, became President of the Common Council; is that correct?
A I believe so.
Q And did he subsequently become Mayor?
A Yes.
Q And do you recall when he became Mayor?
A He became Mayor upon the death of Mayor Corning. I am not sure what year that was. I think it was in the spring, maybe May. But I don't recall the year.
Q When Mr. Whalen became a member of the Common Council he remained a partner in the firm of Cooper, Erving & Savage; is that correct?
A That's correct.
Q And when he later became Mayor he remained a partner in the firm; is that correct?
(DEVINE, E. - FOR THE COMMISSION)

A That's right. That's correct.

Q As a partner in the firm he shared in the profits generated by the firm's business?

A Yes.

Q Mr. Devine, did the members of the firm address the issue of Mr. Whalen's serving as an official in the City of Albany while remaining a partner in the firm?

A Yes.

Q And in what context did those issues get raised?

A I believe sometime subsequent to his becoming Mayor, it was raised at a partnership meeting. And we discussed the pluses and minuses and whether it would be feasible.

Q What were the concerns of the members of the firm, Mr. Devine?

A I think, basically, not in terms of governmental ethics, but in terms of the legal ethics; that there were possible conflicts of interest, things like how much time would be spent in the office, how much time would be spent in the Mayor's office, those types of things.

Q Were these concerns raised directly with
May or Whalen?

A Yes.

Q Do you recall what his position was?

A I think Tom felt that he could at least temporarily stay as Mayor and stay in the law firm, and that we could deal with the conflicts of interest on a case by case basis, and deal with them as fairly as we could.

Q Did you ever hear the Mayor make reference to the fact that his position as Mayor would be a benefit to the firm?

A Yes. I think at that same meeting, in discussing the pluses and minuses and pros and cons of his position, I think Tom felt, and others in the firm felt that the exposure would be beneficial to the law firm.

Q Do you recall the Mayor ever making reference and comparing his situation to Mayor Corning's regarding this matter?

A Yes. As I say, we were discussing a lot of different things. And I think that Tom felt that the Mayor, the former Mayor had been able to assist certain other law firms in the city. But again, that was something that was discussed. And there was a
difference in that Tom was a partner in the law firm and we felt, and he did too, that he certainly couldn't be as helpful because we would run into conflict situations.

Q Did he make specific reference to the other firms in the city that he was speaking about?

A I would have to clarify that. I don't know whether he did or someone else did. But yes, mention was made.

Q Which firms were those?

MR. SCHWARZ: Can we clarify which firms those were to which reference was made in connection with Mayor Corning when he was Mayor?

THE WITNESS: I can recall at least two, I think, among several. Rutnik & Rutnik and Richard Meyers were mentioned as having been known as involved in politics when Corning was Mayor, and that it was beneficial, we felt it was beneficial to their business.

Q Mr. Devine, if you would, I would ask you -- first of all, do you recall testifying before a private Commission hearing on November 1, 1988?

A Yes.

Q I would ask you, if you could, to take a
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look at page 30 in the transcript of that testimony.

And I would ask you whether or not you recall being
asked the following question and giving the following
answer: "Did the Mayor ever give any specific
examples of how, as Mayor, he might be able to assist
the law firm? Answer: "Well, I think that Tom at
that point was still not sure of his political
career, where it was going. At one particular
meeting he used an example. And he said that, 'Look
what Mayor Corning has done for the Noonans and
Rutniks.' And you know, I think a lot of business
was generated by close political ties."

A The problem that I felt with that was that
Mayor Corning wasn't a partner in those two law
firms, and I didn't think that business would be as
easily referred because of the conflict.

Q My question, Mr. Devine, is: does that
refresh your recollection as to who made the comment
with reference to the Noonans and Rutniks in the
firm?

A That refreshes your recollection that that
is what I said that day, yes. But I think I am
clarifying it now.

Q Thank you, Mr. Devine. Mr. Devine, did the

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law firm of Cooper, Erving & Savage handle tax protest matters on behalf of clients?

A Yes.

Q Are those referred to as tax certiorari matters?

A Ultimately, yes.

Q After Mayor Whalen assumed office, did the law firm continue to handle those cases for a time?

A Which office?

Q I'm sorry?

A After he assumed which office?

Q Office of President of the Common Council.

A I believe so.

Q And can you explain how the firm handled those matters?

A Well, basically, if we had a client who requested us to handle tax protest matters, normally we would file a tax protest. And if that were denied, we would file a certiorari proceeding.

Q Did the firm continue to handle those matters after Mr. Whalen became Mayor?

A Once.

Q Can you describe how it was handled on that one occasion?
A To the best of my recollection -- and I am a little unclear on this -- I believe that Corning died sometime in the time of -- sometime in May. That is around the time when you are doing tax protest work. And my understanding was -- and I received this information from Jim Drislane sometime after the fact, that we were in the process of preparing tax certioraris when the Mayor died. At that point, apparently Jim Drislane realized that there was a conflict there with Tom now being the Mayor as opposed to President of the Common Council. And the matters were referred to a Joseph Yavanditti, an attorney in town in our office. He was not associated with our office, but rented space. And he proceeded from there.

Q Is it your recollection that the work, substantive work on the matter was performed by Cooper, Erving & Savage, and subsequently the papers were submitted by Mr. Yavanditti?

A Yes. My recollection is that we had the bulk of the work done when we referred the files over. All that remained to be done was for them to be submitted.

Q Mr. Devine, while you were with the firm of
Cooper, Erving & Savage was First American Bank a
client of the firm's?

A Yes.

Q And do you recall what percentage of the
firm's billings were generated by the work performed
for First American Bank?

A I recall we would discuss it from time to
time; probably twenty-five percent.

Q Do you recall in 1984 First American Bank
becoming concerned about the real estate -- real
property tax consequences of its purchase of Banker's
Trust?

A I think the acquisition by first American
was in 1984. I think it was the spring of '85. That
is the period you are referring to.

Q I'm sorry. Spring '85 rather than 1984?

A Yes.

Q Do you recall at that time First American
Bank being concerned about the tax consequences of
that?

A Yes.

Q Could you explain exactly what the concerns
were in this regard?

A My recollection is that one of the -- there
were several branches, a main office and several branches. One of the local towns where a branch was located sent a notice of an early or tentative reassessment. And I received a phone call, I believe, from John Burn asking me what the bank could do to alleviate this. Freling Smith who was with our office primarily handled the bank work, and I got the call because Freling was out, or I told John that Freling was out, and I would have him look into it. And subsequently, when Freling returned we discussed this. I went in to discuss this one particular problem with him.

Q. Do you recall discussing with Mr. Smith your concerns about a possible conflict with the City of Albany on this tax matter?

A. What happened then is in discussing the one particular problem, we realized that there were transfers in the City of Albany and in the other towns, and that the ones in the City of Albany could be a problem because Tom had now become Mayor.

Q. Was this issue raised within the firm at a partnership meetings?

A. Yes. Freling Smith and I thought that the best way to do it was to discuss it at a partnership
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meeting and get everyone's thoughts on the matter.

Q Was the Mayor present at that partnership meeting?

A Yes.

Q Do you recall what he said about the matter?

A Yes. After -- I don't recall whether Freling bought the matter up or I did. And there was some discussion, and Tom said, "Let me take a look at it. Let me look into the matter, and I will get back to the law firm." And he said, "Let me talk it over with Freling after the meeting and we will see what happens."

Q Did the Mayor subsequently comment on the matter at another partnership meeting?

A Approximately two or four weeks later, Tom, I think in his capacity as Mayor, after having learned that there was a possible tax problem, had investigated the matter and came back and informed us that it was taken care of, there was no problem; meaning that there is no conflict, that there was no problem.

Q Was it your understanding that the Mayor had personally looked into the matter?
(DEVINE, E. - FOR THE COMMISSION)

1 A That is what I thought, yes.
2 Q Mr. Devine, are you familiar with the Tricentennial Commission?
3 A Yes.
4 Q What is the Tricentennial Commission?
5 A It was a not-for-profit corporation set up to do many things, I think, in celebrating Albany's three hundredth birthday.
6 Q Did there come a time when you represented the Tricentennial Commission?
7 A Yes.
8 Q And what did you do for the Tricentennial Commission?
9 A I incorporated it.
10 Q Can you tell us how you ended up representing the Tricentennial Commission?
11 A Yes. Tom came in, and I said, "Tom -- " he either called from the Mayor's office, and asked if I would go up and see him, or came into my office down at the law firm, and asked me if I would like to work on it.
12 Q And as a result of the work that you did on behalf of the Tricentennial Commission was the firm paid a fee?

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(DEVINE, E. - FOR THE COMMISSION)

1 A Yes, I believe so.

2 Q And at that time Mr. Whalen was a member of the firm?

3 A Yes.

4 Q And he shared in that fee; is that correct?

5 A Yes.

6 Q By the way, do you know who the chairman of the Tricentennial Commission was?

7 A I think it was Lew Swyer.

8 Q And did you ever have any conversation with him about your being retained for the Tricentennial Commission?

9 A No.

10 Q In your view, was it the Mayor's decision to hire you for that purpose?

11 A He asked me. I don't know whose decision it was.

12 Q Mr. Devine, during the time when James Drislane was a partner with the Cooper, Erving & Savage firm, you were aware, were you not, of the fact that he represented Maiden Lane Auto Park in its dealings with the Albany Parking Authority and other city agencies when Mayor Whalen was Mayor; is that correct?
(DEVINE, E. - FOR THE COMMISSION)

A  Yes.

Q  And did you ever bring this matter to the
attention of any of the partners?

A  No, I didn't. It was brought to my
attention.

Q  Who brought it to your attention?

A  Jim Drislane.

Q  Did you have a conversation with him
regarding this matter?

A  Yes.

Q  Can you tell us what the conversation was?

A  I knew that Jim represented Maiden Lane. I
didn't know the particulars of what they were doing
at that point in time. And I was in Jim's office on
something else one day, and he informed me as to what
was going on, and thought that it would be a problem
but felt, at least in his opinion, that it would be a
problem -- not be a problem for the law firm, but
maybe a problem for Tom, and that he would speak to
him about it.

Q  Did he ever discuss the conversation that
he had with the Mayor concerning this matter with
you?

A  No.
Again, I would like you to refer to the private testimony that you gave before the Commission, to page 52 at the bottom of the page. Do you recall being asked this question and giving this answer: "Do you have any knowledge of any discussions with Mr. Drislane regarding the clients that he represented in front of city agencies or city related entities such as the Albany Parking Authority?" Answer: "I had a discussion with Jim Drislane once in his office in regard to Maiden Lane, that it is a problem. And he said to me, 'Maiden Lane has been a client of mine. I have a relationship with them and I intend to service them. I have told Tom it is a problem with his being Mayor. But as far as I am concerned it is his problem and not mine, and I intend to continue servicing them.'" Do you recall giving that testimony?

Yes.

Q Does that refresh your recollection regarding your conversation with Mr. Drislane about his conversation with the Mayor?

I don't think that that differs too much with what I just said. Maybe I should clarify it. I am not sure whether he said, "I have told Tom," or "I
(DEVINE, E. - FOR THE COMMISSION)

will tell him." And if that needs clarification, I
will clarify it. But his basic thing was that it
wasn't a problem for the law firm and he would
continue to service them. And there were some
discussions with Tom.

Q Thank you. By the way, the firm continued
to represent Maiden Lane Auto Park; is that correct?

A I think -- I can't answer that, I don't
think, because I think I left shortly thereafter.

Q Mr. Devine, while you were at Cooper,
Erving & Savage did there come a time when you
represented the members of the union local in
discussions with the City of Albany?

A Yes.

Q Can you describe how that took place?

A Yes. I received a call from my client who
informed me that the contract for the four or five
laborers who work at the city landfill was up for
renewal. And what he told me was that, basically,
the laborers historically waited for the other city
workers to settle, and whatever percent raise they
got, the laborers were willing to accept. So, I
called corporation Counsel's office and had a very
short discussion with Vincent McArdle who told me he
(DEVINE, E. - EXAM. BY COMMISSIONERS)

didn't see any reason why that practice shouldn't continue. This was in between the former Mayor passing away and Tom taking over. And I was told that that would be the practice in the future, and that has been.

Q That was the extent of your negotiation with the city with regard to that matter?

A I object to "negotiation," but that was the extent of my discussions, yes.

MR. McSHANE: Thank you, Mr. Devine.

I have no further questions, Mr. Chairman.

CHAIRMAN FEERICK: Thank you.

Commissioner Magavern?

BY COMMISSIONER MAGAVERN:

Q Mr. Devine, considering whether your firm might have any problem of conflict after Mr. Whalen first became Council President and when he became Mayor, did you personally do any research on that? Did you happen to take a look at Article 18 of the General Municipal Law, for example?

A I don't recall specifically looking at Article 18, no.

Q One of our concerns is whether Article 18 is sufficiently clear to the people to work
effectively with it. Do you recall forming an
opinion on that, as to whether Article 18 gave you
sufficient guidance?

A I don't recall what Article 18 says.

Q Was it your opinion that the firm should
not handle tax certiorari proceedings after Mr.
Whalen became Council President?

A I think it was everyone's opinion,
including Tom Whalen's.

Q What did you base that opinion on?

A Well, a tax certiorari is, in actuality, a
lawsuit brought against the city by an aggrieved
taxpayer, with corporation counsel's office. And the
attorney for the aggrieved taxpayer oftentimes will
conference and settle the matter like any other
lawsuit. And, as I say, the Corporation Counsel is
the city attorney. We thought it would be a problem
in continuing to do this.

Q That was because it was a direct
adversarial relationship?

A Correct.

Q In your opinion, would it be appropriate
for someone in the firm to deal with the city, not in
litigation, but rather in negotiations?
MR. TROMBLY: I object, Mr. Chairman, to the question. You are calling for a conclusion on the part of the witness, and no foundation has been laid. His opinion is not any more valid than anyone else's in this room.

CHAIRMAN FEERICK: I will direct the witness to answer the question.

THE WITNESS: What was the question?

Q I will rephrase it. In your opinion, by extension of the same policy which precluded your firm from handling matters on behalf of private clients in a direct adversarial relationship against the city, by extension, would that same principle apply to negotiations on behalf of a private client with the city?

MR. TROMBLY: May I have a minute to confer with my client?

CHAIRMAN FEERICK: Sure.

(Attorney client conference)

THE WITNESS: I think I have answered that I have not reviewed Article 18 and, therefore, I don't know the answer to your question.

Q Let me phrase the question in terms of
policy making. Within your own firm, did you ever consider it in your own firm as to whether it would be appropriate for members of your firm to represent private clients with the city or with city related agencies in which Mayor Whalen served as an official to negotiate business transactions?

A To my knowledge, nothing specifically was discussed.

Q Did you become aware at any time that members of your firm were representing private clients before the IDA at a time when Mr. Whalen sat as a member of that agency?

A Yes.

Q Did you ever consider whether that was within proper guidelines of your firm?

A On the several occasions that I learned about it, it was after the fact; it was a fait accompli at that point.

Q Did you ever express an opinion as to whether your firm ought to adopt guidelines to prohibit such representation?

A Yes.

Q What was your opinion that you expressed?

A Well, I didn't think that I -- several
people didn't think that we should, and I would
include Tom in this. I think we tried to avoid that.

Q Do you know what steps he took to prevent
that in the future?

A Nothing, other than we would look at a case
when it came in on a case by case basis and examine
it and see if we saw any conflict at all.

Q When is the first time they expressed the
view that members of your firm should not represent
private clients before the IDA?

A I don't recall. Did you ask me if he did
or if anyone did?

Q If any member of the firm did.

A I don't recall, but I thought you just
asked me when is the first time that he did. And I
don't know who brought it up.

Q What I want to know is -- let me state my
question, and maybe I can clarify it. Apparently,
you misunderstood it. Mr. Whalen expressed the
opinion that members of the firm should not represent
private clients in transactions of the IDA; is that
right?

A That opinion was expressed at the law firm,
and I think he concurred in it. I am certain that he
(DEVINE, E. - EXAM. BY COMMISSIONERS)

1. Q. Was that opinion expressed at the law firm soon after he became Council President?
   A. I don't recall when it was.
2. Q. Did you subsequently become aware that, in fact, members of the firm did handle matters before the IDA?
   A. Yes.
3. Q. And that was after the opinion had already been expressed within the firm that the firm should not to do so; is that right?
   A. No. I don't know when it was.
4. Q. You don't know one way or the other?
   A. No, that's right.

COMMISSIONER MAGAVERN: That is all.

BY COMMISSIONER EMERY:

Q. Mr. Devine, I believe you testified that there were two meetings at which the issue of the bank, the FAB reassessment of property values came up, where a question of conflict came up. The first one, Mayor Whalen was present and he said he would look into it; is that correct?
   A. That's correct.
23. Q. And then two or four weeks later, you said
in his capacity as Mayor he did something. That is what I didn't understand. What do you mean by "in his capacity as Mayor"?

A My understanding of the situation is that the Mayor oftentimes will receive a letter or complaint from an aggrieved taxpayer stating why they think their taxes are out of proportion to the others in the neighborhood, or whatever, and that he will then look into the matter. That is what I think he did.

Q In other words, it was your understanding that after the first meeting, after he had been alerted by his law firm that there was this issue of these reevaluations, and that it also presented a potential for conflict, he came back to you in the second meeting even though he was sitting in the partnership and he was acting in his capacity as Mayor when he told you it has been taken care of?

A Yes.

Q And that it was no problem?

A Yes.

Q Now, he was at that time your partner; was he not?

A Yes.
Q: Did you ask him what he meant by that, how could it be "taken care of"?

A: Well, it could be taken care of if the taxes were not raised. Then there would be no need for a certiorari. And then there would be no need for a lawsuit and there would be no conflict on our part. I assumed it to mean that he had looked into the matter and it was not going to be a problem for the law firm.

Q: It was not a problem for the law firm. And the considerations at that partnership meeting were not concerned with his duties as Mayor to the people of the City of Albany with respect to maximizing appropriately under legal limits the tax base of property there?

A: I think we were concerned with our own professional ethics.

Q: And with your clients?

A: Yes.

Q: Now, when Mr. Drislane said to you in a meeting with respect to Maiden Lane and you had the discussion you testified to, do you remember whether that was before or after the FAS issue?

A: My recollection is that it was after.
because I think it was shortly before I left the law firm.

Q And I believe in your testimony, the testimony that Mr. McShane read, you had testified previously words to the effect that James Drislane said to you, "I told --" or "I will tell Mayor Whalen that it is his problem, and I intend to continue to service Maiden Lane." Now, did you detect on his part some frustration with the situation that he had been put in by this problem?

A No.

Q Simply that, "It is his problem; it is not a problem for me"?

A Yes.

Q Did you ever hear expressions to that effect by other members of the law firm with respect to these issues that apparently by that time had come up on a number of occasions?

A Yes. I think we discussed from time to time different issues.

Q Well, what I am asking you is: was there some sense in the law firm that this was a problem, and it was a continuing problem and it was not going away and the Mayor wasn't doing anything about it?
A Up until the last part of your -- the last part of your statement, yes, it was a problem. And it came up from time to time, and we tried to deal with it on a case by case basis. I am not saying that he is not -- that he didn't do anything about it. He attempted to deal with the situation.

Q Perhaps you could tell me, to your knowledge, was there any occasion on which the law firm did anything to deal with it?

A Yes.

Q What measures did the law firm take on any occasion to deal with this problem, other than the time that you handed over the certiorari that you testified to?

A We handed over the certiorari. There were, I believe, a couple of false arrest suits which we felt we couldn't take on because they were involved with suing the city. There was another situation -- and forgive me because I don't recall. I think we referred out some IDA work that we felt we couldn't do. And there may have been others.

Q Do you remember any actions that Mayor Whalen took in his capacity as Mayor to avoid the problems that you perceived prior to your leaving in
1985?

A I don't know what he did in his capacity as Mayor to alleviate the problem, no.

Q You didn't become aware of anything that he did other than, I guess, on the one occasion that he said at the partnership meeting that it was "taken care of"?

A No.

COMMISSIONER EMERY: That is all I have.

BY MR. SCHWARZ:

BY MR. SCHWARZ:

Q Just to go over a couple of questions that Mr. Emery asked you; was there ever a time in connection with your firm's representation of a client that some public disclosure was made, as far as you know, that the firm represented a particular client?

A Other than which time; did you say "other than" --

Q I said other than the time that you mentioned with respect to the tax certioraris where you handed the matter over, in connection with any other matter where the firm did continue to represent
a client in some negotiations with the city, was there any disclosure made by the firm, as far as you are aware?

A To the best of my recollection, in the laborers' situation, I sent a letter to the city.

Q That would have been a letter written by you to whom?

A Corporation Counsel, I believe.

Q Aside from that, was there anyplace where any public filing was made by your firm? And by public filing, I don't mean something that might be subject to the Freedom of Information Law.

A I have no knowledge.

Q Was the FAB -- First American Bank on retainer at the time of this assessment issue?

A I believe when first American came in, that is when we went to an hourly basis.

Q And last, with respect to the sharing of fees in your firm, without getting into the specifics of who had what percentage interest which I am not interested in, is it correct that the revenues would be deposited in the account, the expenses would be paid, and then over the course of a year there would be distributions in accordance with the net profit.
participation of the partners?

A Yes.

Q Were all fees treated equally in that respect?

A Except those of a fiduciary nature.

Q Like guardianship?

A Yes.

Q And how were those treated?

A Those were the property of the partner who was appointed guardian, trustee, receiver, what have you.

Q If the check in connection with one of those fiduciary matters was made out to a firm -- to the firm, would that then be deposited but an equal amount given to the partner?

A I don't recall any instance where it would ever be made out to the firm.

Q In other words, it was just maintained separately from the firm's revenues?

A Yes.

Q Was there any reason why that could not have been done with respect to a check that came to the firm in connection with the work done in connection with negotiations for the city on behalf of.
of a client? Is there a technical reason why that could not have been done?

A  What?

Q  For example, if the firm received a ten thousand dollar fee from a client in connection with the negotiation with the city, was there any reason why that amount could not have been subtracted from any particular partner's account; it was just an accounting mechanism; wouldn't it have been?

A  I don't understand the question.

Everything came in. And after overhead, everything was split, other than fiduciary, Any formal day to day legal work. I don't understand the question.

Q  In other words, was there anything inconsistent with the accounting mechanism of your firm that would have made it impossible to separate out any fee that the firm thought it was inappropriate, for example, for Mayor Whalen to participate in?

A  Oh, not to my knowledge, not before I left.

Q  In other words, that could have been done?

A  Yes.

MR. SCHWARZ: Nothing further.

CHAIRMAN FEERICK: Thank you very
(BELL, G. - FOR THE COMMISSION)

much.

(The witness was excused.)

COMMISSIONER FEERICK: The Commission calls before the luncheon break the final witness, Mr. Bell.

GORDON C. BELL,
called herein as a witness before the Commission, and being duly sworn by the Chairman, testified as follows:

CHAIRMAN FEERICK: I would ask counsel to identify himself for the record.


CHAIRMAN FEERICK: Thank you. I recognize Kim Greene for questioning.

MS. GREENE: Thank you, Mr. Chairman.

BY MS. GREENE:

Q Good morning Mr. Bell. Could you state your full name for the record, please.

A Gordon C. Bell.

Q What is your current occupation, Mr. Bell?

A I run a sheetmetal fabricating shop in Albany.

Q And what is your position with that
Mr. Bell, do you own property known as 283-85 Sheridan Avenue?

The company does, yes.

When did the company purchase this property?

I guess in 1985. I am not sure. Could I have a look at that, counselor?

1985, yes.

Thank you. And who did the company purchase this property from?

From the City of Albany.

Were you represented by an attorney for the purpose of purchasing this property?

Yes, I was.

And who was your attorney?

Thomas Whalen.

Why did you want to purchase this property?

Why did I want to purchase it? Well, it was near my business, and I had seen it vacant for a long time. And I made inquiries, and that is -- I needed it for warehouse and parking.
(BELL, G. - FOR THE COMMISSION)

Q  What was the first step you took in buying this property?

A  I went to a real estate agent.

Q  What did you ask the real estate agent to do?

A  To find out who owned the property and see if we could buy it.

Q  And did he report back to you with that information?

A  Yes, he did.

Q  And who was the owner of the property at that time?

A  The City of Albany.

Q  What did you do next, Mr. Bell?

A  I wrote a letter with the instructions from my real estate man to somebody in the city to make inquiries as to buying it.

Q  I would like to refer your attention to Exhibit 48 which is in the book in front of you on the table.

A  Okay.

Q  Mr. Bell, can you identify Exhibit 48 for me, please?

A  Yes.
Q What is it?
A It is a letter that I wrote to Paul M. Collins asking if -- what did I do -- I was interested in purchasing a piece of property.
Q What was the date of your letter to Mr. Collins?
A November 28, 1984.
Q What was Mr. Collins' position?
A Well, office of Corporation Counsel, but I didn't know Mr. Collins from Adam. I did what I was told.
Q Did you receive any response to this letter?
A Not for months.
Q What happened next, Mr. Bell?
A I think that I was told by the real estate man that the property that I was -- that I was to get the property or I was to be considered if I pay the price. So, I think I put a call in to Cooper, Erving & Savage and asked for the Mayor to call me.
Q Mr. Bell, do you recall when you testified privately to the Commission on June 21, 1989?
A Yes, I do.
Q Is it correct that you testified to the
(BELL, G. - FOR THE COMMISSION)

Commission at that time -- let me refer you to the
document.

A Now?

Q Yes, if you will, please. Here is a copy
of your deposition. And I would like you to turn to
page six, please. I would like to ask you if you
recall being asked the following question and giving
the following answer. Question: "Did you receive a
response to this letter?" Answer: "I don't think I
did. When is that dated?" Question: "The letter is
dated November 28, 1984"

A Wait a minute. I am not following you.
I'm sorry. (pause) Okay, all right.

Q Question: "The letter is dated November
28, 1984." Answer: "I didn't receive any response to
that letter."

A I think months went by, possibly three
months. And I don't know how it happened, but I
think -- I kept calling Larner, and I was getting
nowhere. And I think I get a call from Tom Whalen,
from Mayor Whalen, and he told me at that time that
if I were interested in the property, I would have to
remove the tanks. Essentially, I don't know whether
I called him or whether I got it through Larner. But
(BELL, G. - FOR THE COMMISSION)

anyway, I did get a call from Mr. Whalen saying that
was I aware that if I purchased the property that I
would have to remove tanks that were left in the
ground and contaminants. Yes, that is exactly -- but
how we we got there, months went by and I don't know.

Q During the course of this conversation, Mr.
Bell, did Mayor Whalen indicate to you how he knew
that you were interested in purchasing this property?

A No, he didn't. No -- no.

Q Did Mayor Whalen discuss the purchase price
for the property with you at this time?

A No, he did not.

Q Did you tell Mayor Whalen who your real
estate broker was in this matter?

A Yes, I would think so because he had acted
for me before with the same real estate broker.

BY MR. SCHWARZ:

Q Who is "he"?

A The real estate broker.

Q You said in your answer, "He had acted for
me before"?

A The Mayor had acted for me before with the
same real estate broker.

Q He had been your counsel before?
(BELL, G. - FOR THE COMMISSION)

A  Before, oh, yes.

MR. SCHWARZ: Will you tell bring that out please, counsel.

BY MS. GREENE:

Q  Mr. Bell, had Mayor Whalen previously represented you on other matters?

A  Yes, he had.

CHAIRMAN FEERICK: Over what period of time?

THE WITNESS: It is now twenty-two years, so it was seventeen years then.

Q  Mr. Bell, at the conclusion of your conversation with Mayor Whalen, was it your understanding that Mayor Whalen would represent you with respect to this property transaction?

A  Yes, it was. Yes, it was.

Q  Did you then have a conversation with your real estate broker regarding the price for the property?

A  Yes, I did.

Q  What was that price?

A  Fourteen thousand dollars.

Q  Do you know how your broker had gotten this price?
(BELL, G. - FOR THE COMMISSION)

A No, I don't. I just suppose he -- I don't know.

Q Did you have any other conversation with Mayor Whalen concerning the purchase of this property?

A Yes, I did. Sometime after that, he called me and said that he didn't like the deed that I was getting and that -- he asked me if I was in a hurry to get it, and I said not really -- that he was going to get a title guarantee or something, and it would take about three weeks. And that was the other conversation that I had.

MR. SCHWARZ: I'm sorry. Would you go back? You said he didn't like the deed. Could you explain that for the record, please?

THE WITNESS: I'm sorry. I didn't hear you.

MR. SCHWARZ: You said he didn't like something about he didn't like the deed?

THE WITNESS: He said he d
(BELL, G. - FOR THE COMMISSION)

A No, I don't. I just suppose he -- I don't know.

Q Did you have any other conversation with Mayor Whalen concerning the purchase of this property?

A Yes, I did. Sometime after that, he called me and said that he didn't like the deed that I was getting and that -- he asked me if I was in a hurry to get it, and I said not really -- that he was going to get a title guarantee or something, and it would take about three weeks. And that was the other conversation that I had.

MR. SCHWARZ: I'm sorry. Would you go back? You said he didn't like the deed. Could you explain that for the record, please?

THE WITNESS: I'm sorry. I didn't hear you.

MR. SCHWARZ: You said he didn't like -- something about he didn't like the deed?

THE WITNESS: He said he didn't like the deed I was to receive. Whether it was a tax deed, I don't know anything about it.

MR. SCHWARZ: He wanted you to wait and get a better deal?
(BELL, G. - FOR THE COMMISSION)

THE WITNESS: Oh, sure. The deed, as I understand it, the title insurance.

Q Mr. Bell, if I may refer you to Exhibit 19 in the book in front of you. Mr. Bell, can you identify this document for me?

A No, I can't.

Q I understand; it is a poor copy. If I may read the top. "This indenture made the 17th day of April, 1985 between the City of Albany, an municipal corporation organized under the laws of the State of New York, having its principal place of business at City Hall, Eagle Street, Albany, New York, party of the first part, and V. F. Conner Co., Inc., residing at 67 Northern Boulevard, Albany, New York 12210, the party of the second part."

A I don't recognize it, but it is --

Q Have you ever seen this deed before, Mr. Bell?

A I must have, yes.

Q And if you would turn to the third page of the document, and can you tell me who executed this deed on behalf of the City of Albany?

A Thomas M. Whalen, III, Mayor.

Q Mr. Bell, did there come a time when the
purchase for this property was completed?

A Yes.

Q I would like to ask you to turn to Exhibit 49. Mr. Bell is this the invoice -- a copy of the invoice you received from Cooper, Erving & Savage for Mr. Whalen's representation of you in the purchase of the property for you from the city?

A Yes.

Q What was the amount of the fee for the services rendered in this transaction?

A $410.

Q Did you also receive a letter from Mr. Whalen concerning this transaction?

A Yes, I did.

Q Would you turn to Exhibit 50, please. Is this the letter that you received from Mayor Whalen regarding the transaction?

A Yes.

Q And did you subsequently pay the bill for the services to Cooper, Erving & Savage?

A Yes. I did, yes.

MS. GREENE: Thank you. Mr. Chairman, I have no further questions.

BY COMMISSIONER EMERY:
(BELL, G. - EXAM. BY COMMISSION)

Q Just a quick question. Mr. Bell, when you thought about buying the property in the first place and went through the real estate broker, at that point did it ever cross your mind to call your long-time attorney Tom Whalen?

A No, because I thought that Mobil Oil owned it.

Q When did you find out that the city owned it?

A Through the real estate man.

Q Was there a period after you found out that the city owned it that took some time until you came in contact with Mr. Whalen?

A Yes. But the ways of the real estate people are mysterious, and I didn't know why it took so long. But it did take a long time, and I just waited. I was busy and --

Q You were just going to let him handle it instead of calling your long-time attorney?

A Yes.

BY COMMISSIONER MAGAVERN:

Q Just for the record, you referred to a Larner or Mr. Larner?

A Yes.
(SELL, G. - EXAM. BY COMMISSION)

Q  Was that the agent?
A  Yes.

BY MR. SCHWARZ:

Q  Can you just go over please, again, sir, how the price was set.
A  You know, I never knew.
Q  Did someone just tell you that the price would be fourteen thousand?
A  Yes. When you go -- when you are buying something, you get a figure in your mind, what will I pay for this thing. After I found out I had to remove the tanks and I was told it would cost me six thousand dollars, at least, to do it, and fourteen thousand -- I was figuring I would have to pay between twenty and twenty-five thousand, and it was -- it sounded all right to me.
Q  So, you might have paid $25,000 for this?
A  Yes.
Q  And did you ever become aware during the course of the -- from the time you wrote the letter to some other time, that there was any public announcement or any ad or anything that this property was for sale and that bids would be taken?
A  I did not, no.
MR. SCHWARZ: Nothing further.

MR. HAYES: If I am not aware, please tell me, sir -- if I could ask that the witness be asked if the witness knew either before or after that the property had been the subject of a prior agreement to sell to some third party for fourteen thousand dollars and that the buyer had backed out when he found out he would have to incur the additional expenses to remove the tank?

CHAIRMAN FEERICK: Do you understand the question that was just raised?

THE WITNESS: The very first part, was I aware either before or after -- either before or after, no, I was not aware.

MR. HAYES: Thank you, Mr. Chairman.

CHAIRMAN FEERICK: Thank you. We will now break for lunch and resume at one o'clock.

(The luncheon recess)
CHAIRMAN FEERICK: The hearing is now in session. And the commission calls as its next witness Michael Kornstein.

MICHAEL KORNSTEIN, called herein as a witness before the Commission, and being duly sworn, testified as follows:

CHAIRMAN FEERICK: Will counsel identify himself for the record, please.

MR. BUCKLEY: James Buckley, lawyer, Albany, New York at 39 North Pearl Street.

CHAIRMAN FEERICK: I would like to recognize Thomas McShane, Commission staff counsel for questioning.

MR. MC SHANE: Thank you, Mr. Chairman.

BY MR. MC SHANE:

Q Mr. Kornstein, could you please state for the record your full name, and spell your last name. My full name is Michael Alan Kornstein. K-o-r-n-s-t-e-i-n.

Q Thank you. Mr. Kornstein, what is your current occupation?

A I am an attorney.

Beth S. Goldman, CSR, RPR (518) 439-6772
Q And are you associated with a law firm?
A Yes, I am.
Q With which law firm are you associated?
A Cooper, Erving & Savage, Nolan & Heller.
Q For how long have you been associated with that firm?
A Since 19 -- well, that particular law firm came into existence in January 1987. Prior to that I was with Cooper, Erving & Savage since I graduated from law school in 1977.
Q Are you a partner in the law firm of Cooper, Erving & Savage, Nolan & Heller?
A Yes, I am.
Q Had you been a partner in the law firm of Cooper, Erving & Savage?
A Yes.
Q When did you become a partner in that firm?
A January '83.
Q Mr. Kornstein, you remember the law firm Cooper, Erving & Savage when the merger with the law firm of Nolan and Heller took place; is that correct?
A That's correct.
Q When did that merger take place, again?
Q Mr. Kornstein, I would ask you just to speak up a little more loudly because the people in the back are having difficulty hearing you.

Were you part of a committee that was established to find suitable office space for the merged firms?

A Yes, I was.

Q And who else was on that committee?

A Howard Nolan.

Q Was that referred to as the real estate committee in the firm?

A That's correct.

Q Do you recall when that committee was formed?

A That committee was formed in April of 1986.

Q And when did that committee complete its work, Mr. Kornstein?

A The committee completed its work by making a recommendation to the two firms probably at the end of July in 1986. And shortly thereafter, we negotiated a lease, probably the first week in August of 1986.

Q When the real estate committee was searching for space for the merged firms did it

Beth S. Goldman, CSR, RPR
(518) 439-6772
periodically report to the partners of the representative firms regarding its progress?

A I would say that it possibly did.

Q And was Mayor Thomas Whalen a member of the firm during that period?

A Yes, he was.

Q He was a partner in the firm?

A He was a partner in Cooper, Erving & Savage.

Q Mr. Kornstein, I would like now to refer you to Commission Exhibit 26 which is in front of you in the black binder. Do you recognize that document?

A Yes, I do.

Q What do you recognize that document to be, Mr. Kornstein?

A I recognize this document to be a memo from Mark Heller to the other partners of the merging firms reporting on the executive committee meeting held the day before the date of this memo.

Q The date of the memo is what?


Q You have referred to the executive committee, Mr. Kornstein. Can you tell me what that is?
A That was a group of people from the two law firms who were handling some of the merger details.

Q Was Mr. Whalen a member of the executive committee?

A My recollection is that he was.

Q Mr. Kornstein, I would like now to direct your attention to the second paragraph in the memo which is Exhibit 26 where reference is made to the fact that on July 28th at a meeting of the executive committee, Howard Nolan presented proposals for the Vulcan building as well as 100-110 State Street; is that correct?

A That is my recollection.

Q That is what is contained in this memo; is that correct?

A That is correct.

Q Is the Vulcan Building 39 North Pearl Street?

A Yes, it is.

Q I would also like to direct your attention in Exhibit 26 to the first paragraph. Reference is made in the first paragraph to the executive committee meeting held July 28th. Absent were Kristina Burns and Terrance Christenson. Do you see
(KORNSTEIN, M. - FOR THE COMMISSION)

1. that?
   A. Yes, I do.
   Q. Would it be fair to say that that reflects
the members of the executive committee not present
for the meeting on July 28th?
   A. I wasn't a member of the executive
committee. I might have been present at that
meeting. I don't have any other independent
recollection.
   Q. But the indication here is that those two
people were absent from that meeting; is that
correct?
   A. That is what the memo says.
   Q. There is no reference to anybody else being
absent; is there?
   A. No.
   Q. Mr. Kornstein, did the Vulcan company offer
the law firms as prospective tenants at 39 North
Pearl Street an opportunity to invest in the
property?
   A. There was the possibility of an investment
because the building was going to be owned by a
limited partnership. And the answer to your question
is yes.

Beth S. Goldman, CSR, RPR
(518) 439-6772
Q I would like now to direct your attention to the third paragraph again in Exhibit 26 where reference is made to the fact that a consensus was reached at the July 28th executive committee meeting that, "no law partner should be forced to be an investor in the building, but all should be invited to participate." Do you see that language?

A Yes.

Q Would it be fair to say that the equity facet of the 39 North Pearl Street property was discussed in that July 29th meeting?

A Again, I have no independent recollection of whether or not it was discussed. But let me add that at that point if it was discussed, it was only discussed in very general terms, as we hadn't received any financial data from the owner of the building at that point in time.

Q But the equity possibility was, according to this memo, at least presented to the executive committee at that time; is that correct?

A The memo speaks for itself.

Q Thank you. Mr. Kornstein, did the firms eventually decide to invest in that property?

A Yes, we did.
(KORNSTEIN, M. - FOR THE COMMISSION)

Q When was that decision made?
A I would say in the fall of 1986.
Q How was that investment handled?
A Could you be a little bit more specific?
Q Did the individual members of the firms invest independently of one another in the property or was another arrangement made?
A As I recall, the individual partners of the combined firms, or the then two firms each received their own prospectus from the developer of the building. Subsequent to that, there was a decision made by our law firm to make the investment, which we ended up doing by establishing a separate partnership.
Q Was Mr. Whalen a member of the separate investment partnership that you have just referred to?
A He was for a period of about two weeks.
Q Did he subsequently resign that position?
A Yes, he did.
Q Do you know for what reason Mr. Whalen resigned the investment partnership?
A Shortly after the investment partnership was organized we learned that there was a federal
I believe, which prohibited a city official from having an ownership interest in a building where I believe it was -- where JDA funds were used as part of the financing package.

Q Do you recall the date when he resigned from the investment partnership?

A I believe it was early January, 1987.

MR. SCHWARZ: Would you have him identify this?

Q Could you please identify a little bit more specifically the federal that you have just referred to in your testimony?

A I don't have any other knowledge of that. My understanding was that they were JDA. I don't know if they were federal funds or state funds controlled by federal purse strings.

Q Would it be fair to say that there were federal moneys involved in the project at 39 North Pearl Street that were provided by HUD?

A I would be speculating. I have not -- I wasn't involved in the financing of it, nor went out looking at the prospectus which may contain that information. I have no independent knowledge.

Q Mr. Kornstein, during the period between
(KORNSTEIN, M. - FOR THE COMMISSION)

April 1986 when the real estate committee first began looking for suitable space for the merged firms, and January, when you have testified Mr. Whalen resigned his position with the investment partnership, did Mr. Whalen ever advise you that he had taken any official actions as Mayor regarding the property at 39 North Pearl Street?

A No, he did not.

Q Were you aware of that fact independently?

A No, I wasn't.

Q Are you aware of Mr. Whalen's having mentioned that fact to anyone else in the firm?

A No, I am not.

Q But no member of the firm ever came to you as a member of the real estate committees and told you that Mr. Whalen had mentioned it to him?

A No.

Q Was the matter of a potential conflict regarding 39 North Pearl ever raised at partnership meetings by either Mr. Whalen or other members of the firm?

A Potential conflict -- in what manner are you speaking?

Q I am asking whether the potential for a
conflict involving that property was ever raised at a partnership meeting.

A No, not until this came to light in early January 1987.

Q Mr. Kornstein, I would like now to direct your attention to another topic. Did there come a time in 1983 when you were retained by Mr. Phillip Curley?

A Yes, I was.

Q And for what purpose did Mr. Curley retain you?

A He retained me to represent him in securing a liquor license for a restaurant, and also to negotiate the purchase of some assets from the people who formerly operated the particular restaurant.

Q Did Mr. Curley tell you how he had chosen you to represent him?

A He made mention of the fact that -- the answer to your question is yes.

Q What did he say to you about that decision that he made?

A He told me he had met with city officials regarding the negotiation of an agreement to run the restaurant at the Albany Municipal Golf Course. He
(KORNSTEIN, M. - FOR THE COMMISSION)

said he needed a liquor license. My recollection is
that he knew of our firm and he asked the Mayor if he
could use our firm to obtain that liquor license.
The Mayor and I had worked previously together on
several similar transactions, and I had some
familiarity with liquor license applications and the
purchase of assets.

Q Did Mr. Curley clearly indicate to you that
he discussed your representation of him with the
Mayor, or the fact of your representation of him with
the Mayor?

A He mentioned that I was recommended.

Q By the Mayor?

A That's correct.

Q All right. Now, Mr. Kornstein, you have
stated that the main reason that Mr. Curley retained
you was to handle his application for a liquor
license from the State Liquor Authority; is that
correct?

A Can you repeat the question? I'm sorry.

Q You have stated that the main reason that
Mr. Curley retained you was to handle his application
for a liquor license with the State Liquor Authority;
is that correct?
(KORNSTEIN, M. - FOR THE COMMISSION)

A That was the only reason he retained me, as well as negotiating the purchase of the assets from the former owners.

Q Yet, Mr. Kornstein, not all matters concerning Mr. Curley's lease with the city had been completed when you entered the picture; isn't that correct?

A My understanding when I entered the picture is that he had negotiated the terms of agreement with the city.

Q But there was no final agreement signed when you entered the picture; was there?

A No, there wasn't.

Q In fact, you corresponded with the city and with the law department of the city concerning that lease; did you not?

A There was a certain amount of correspondence going both ways. Yes, there was.

Q I would ask you at this time, Mr. Kornstein, to look at in front of you again Exhibit -- Commission Exhibits 28 through 35 on the table. Starting with Commission Exhibit 28, do you recognize that document?

A Yes, I do.
Q What is that document?
A It is a letter from Paul Collins, then executive Deputy Corporation Counsel, to myself.
Q And what is the date of that letter?
A October 11, 1983.
Q Could you tell me in sum and substance what that letter refers to?
A It refers to a license agreement which Mr. Collins drafted in reference to the municipal golf course agreement between the city and Mr. Curley.
Q There is a sentence in there: "I think you should look it over in accordance with our conversation before Mr. Curley comes in to execute same."
A There is a sentence that says that.
Q Mr. Kornstein, I would like you now to take a look at Commission Exhibit 29. Do you recognize Commission Exhibit 29?
A Yes, I do.
Q What do you recognize that to be?
A That is a letter from myself to Paul Collins enclosing copies of the agreement executed by Mr. Curley.
Q What is the date of that letter, Mr.
Kornstein?

A October 14, 1983.

Q Is there a sentence in this letter that reads: "You will note that I have attached a rider to the agreement to clarify what I perceive as the understanding you reached with Mr. Curley as to when rent will become due."

A Yes, there is.

Q I would like you now to take a look at Commission Exhibit 30, Mr. Kornstein. Do you recognize Commission Exhibit 30?

A Yes, I do.

Q What do you recognize that to be?

A A letter from myself to Paul Collins.

Q What is the date of that letter?

A October 24, 1983.

Q And is there a sentence contained in that letter which reads as follows: "I have accordingly prepared a second rider to the agreement and would request that you have the Mayor sign same at his earliest convenience"?

A Yes.

Q I'm sorry?

A Yes.
Q Thank you. I would ask you now to take a look at Commission Exhibit --

MR. SCHWARZ: Counsel, can you identify that handwriting for the record, please.

Q I'm sorry. Mr. Kornstein, there is on Exhibit 30, handwriting in the margin which I will represent to you was on the document when it was received by the Commission. Do you recognize the handwriting at all?

A No, I don't.

Q Is it yours?

A No.

Q Mr. Kornstein, again, I would like you to take a look at what is marked as Commission Exhibit 31.

COMMISSIONER EMERY: I want to ask him a question. We are going back to Commission Exhibit 30. Reference is made to "Bill, the way to do this is to redraw --" This is on a note to Bill on the letter of October 24th. Have you any idea who Bill is?

THE WITNESS: No, I don't.

Q Once again Exhibit 31, Mr. Kornstein, do
(KORNSTEIN, M. - FOR THE COMMISSION)

you recognize Exhibit 31?

A Yes, I do.

Q What do you recognize Exhibit 31 to be?

A It is a letter from Paul Collins to myself apparently delivering signed copies of the license agreement to me for signature by Mr. Curley.

Q What is the date on that letter?

A November 1, 1983.

Q Mr. Kornstein, I would like you to take a look at Commission Exhibit 32. Do you recognize that document?

A Yes, I do.

Q What do you recognize that to be?

A It is a letter from myself to Mr. Collins enclosing a fully executed copy of the license agreement.

Q What is the date of that letter?

A November 4, 1983.

Q I would like you to to turn now to Exhibit 33. Do you recognize that document?

A Yes, I do.

Q What do you recognize that document to be?

A It is a letter from myself to Paul Collins.

Q And what does that letter concern?
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A That letter advises the city that Mr. Curley's liquor license application has been approved and he is now open for business. There was also a second paragraph which makes reference to a conversation that Paul and I had regarding the proper or the actual ownership of certain restaurant equipment. There was some thought at one time that the city owned the restaurant equipment that my client was intending to purchase from the previous licensee. And, in fact, I believe it was Mr. Collins who made that initial suggestion. I asked him to clarify that. I didn't want to have to buy equipment twice.

Q And you were attempting to clarify that matter with the city on behalf of your client; is that correct?

A That's correct.

Q Mr. Kornstein, on Exhibit 33, again, there is handwriting and a note which appears to be to Bill. Do you recognize that handwriting at all?

A No, I don't.

Q Mr. Kornstein, I would like you now to take a look at Commission Exhibit 34. Do you recognize that document?
Q What is the date of that letter?
A December 7, 1983.
Q And what does that letter concern, Mr. Kornstein?
A It concerns the payment of rent by Mr. Curley to the city and the apportionment of certain utility bills.
Q And would it be fair to say that Mr. Collins is attempting to settle with you a payment schedule that your client Mr. Curley might abide by?
A I am not sure that would be fair to say. He merely advised me of what was outstanding and what he proposed to do.
Q With regard to the payment of rent; is that correct?
A That's correct.
Q Mr. Kornstein, I would like you now to take a look lastly at Commission exhibit 35. Do you recognize that document?
A Yes, I do.
Q What do you recognize that document to be?
A A letter from Paul Collins to myself advising that, in fact, the city did not own the
restaurant equipment.

Q What is the date of that letter?
A December 9, 1983.

Q Thank you, Mr. Kornstein. I would like you now to take a look, if you would, at Commission Exhibit 3. Do you recognize that document?
A Yes, I do.

Q What do you recognize that document to be?
A This is a license agreement for this restaurant executed by the city and by Mr. Curley.

Q And is the document notarized?
A The document is notarized.

Q Who notarized the document?
A Mr. Collins and myself.

Q And who signed the document on behalf of the City of Albany, Mr. Kornstein?
A Thomas M. Whalen III, Mayor.

Q Now, Mr. Kornstein, at that time Mr. Whalen was a law partner of yours; is that correct?
A That's correct.

Q Mr. Kornstein, did you ever inform the members of your law firm at that time that you had been retained by Mr. Curley?
A Yes, I did.
(KORNSTEIN, M. - FOR THE COMMISSION)

Q And can you tell me how that disclosure was made to your firm?

A Formally, by opening up a new file with a four-part label. One of those four parts was circulated to each attorney as is our normal practice, or as was our normal practice in Cooper, Erving & Savage.

Q Did any of the members of the firm ever suggest that there might be a problem with your representation of Mr. Curley in this matter?

A Well, as I said, the purpose of the engagement was to represent the client in connection with the liquor license application which is what the subject matter of the engagement was labeled on that particular label.

Q Did you ever discuss your representation of Mr. Curley with the Mayor?

A Only to the extent in passing, I may have mentioned that Mr. Curley came in to see me about obtaining a liquor license.

Q Did the Mayor indicate at any time that measures should be taken to keep him insulated from the matter?

A I have no such specific recollection.
Q By the way, you made reference to a four-part system. When the two firms merged was that system continued?

A No. There is a similar system in place. There is still -- all files, all new files are circulated to all attorneys in the office.

Q So, the purpose for the new system is essentially the same?

MR. BUCKLEY: Excuse me.

Q I said the purpose for the new system in the merged firm is essentially the same as the old system; that is, to apprise the firm of new business that comes in and the clients represented?

A That's right, to make sure that there are no conflicts of interest.

Q By the way, Mr. Kornstein, was the law firm paid a fee for your representation of Mr. Curley?

A Yes, it was.

Q And did the Mayor share in that fee?

A The Mayor shared in all fees of the firm. There was an exception in that the Mayor credited the other partners with a certain dollar amount off of his earnings after he became Mayor.
MR. SCHWARZ: Excuse me. Could I have that answer read back?

(The answer was read by the reporter.)

Q Mr. Kornstein, could you explain that policy to me, please?

A Yes. The Mayor was a partner in the partnership. And as a partner in the firm, he was entitled to compensation based on his percentage interest in the firm. When he became Mayor, shortly after he became Mayor -- I don't know the exact date -- because of his reduced involvement in the daily activities of the firm, he thought that it would be unfair to continue to take his full draw from the firm. And my recollection is that at about that time, he took all of his draw except the sum of two thousand dollars per month. So, in effect, he gave up what was at the very beginning two thousand dollars a month of what he would have been entitled to as a partner in the law firm.

MR. SCHWARZ: He reduced the draw by two thousand dollars; he didn't reduce his percentage?

THE WITNESS: That's correct.

Q Mr. Kornstein, do you recall the issue of
Mayor Whalen's holding official position as Mayor of the City of Albany and remaining a partner in the law firm ever being discussed at partnership meetings?

A Yes, it was.

Q Can you tell me what the nature of that discussion was?

MR. BUCKLEY: Excuse me. Can we have a time frame?

Q During the time after Mr. Whalen became Mayor prior to the time when he resigned his position with the law firm.

A There were several discussions.

Q Can you tell me what those discussions entailed?

A Well, there was some concern about the ability of the Mayor to continue to practice law in the firm, about the time he would be able to devote to the law practice. There was concern about the appearance of impropriety, about the firm which had traditionally done certain types of business prior to his becoming Mayor not being able to continue to do that kind of business because of the potential conflicts that might arise. As I say, there were numerous discussions over an extended period of time.
Q How did the Mayor respond to these discussions about this matter?

A Well, my recollection is that he felt he could still make a significant contribution to the firm and that his duties as Mayor would not prevent him from continuing to practice law with our firm.

Q Do you recall the Mayor ever making reference to the fact that his position as Mayor would enhance the visibility and, thereby, the reputation of the firm?

A I believe he probably made a statement like that.

MR. McSHANE: I have no further questions of the witness, Mr. Chairman.

CHAIRMAN FEERICK: Thank you.

BY MR. MAGAVERN:

Q Mr. Kornstein, at any time -- let me first ask, when a customer of the Industrial Development Agency, potential customer of the IDA has to borrow from the IDA and asks a member of the firm to represent it in connection with that borrowing, would that create a new file within the firm?

A If the person became a client of the office, that would create a new file.
Q If it was an existing client but with a new transaction; that is, the borrowing from the IDA, would that generate one of those four-part slips that you referred to that would be passed around?

A Generally, any transaction would require a new file to be opened.

Q Did you become aware that the firm was representing borrowers from the City of Albany IDA?

A At what point in time?

Q At any time after -- at any time after 1982?

A I am not certain that I am aware of a particular client who was a borrower. In a few instances, we represented a bank which was the lending institution in connection with a transaction of this sort. And in that particular case I believe a file would have been opened up in the name of the bank client.

Q Do you know -- does the name First Albany mean anything to you?

A I have heard that name before.

Q Was that a client of the office?

A I have no specific recollection of that.

Q How about Crisafulli warehouse; is that a
(KORNSTEIN, M. - EXAM. BY COMMISSIONERS)

1 client of the office?
2    A  To my knowledge, that wasn't a client of
3 the office.
4    Q  Is that a case where the firm represented a
5 bank in a borrowing by Crisafulli?
6    A  That is my understanding.
7    Q  How about 80 State Street Center; was that
8 a client of the office?
9    A  I believe that that was a client of the
10 office.
11    Q  Do you know whether or not a member of the
12 firm represented that client before the IDA?
13    A  I have no independent knowledge of that.
14    Q  At any time was the question raised within
15 your firm, to your knowledge, of whether it would be
16 proper for a member of the firm to represent a
17 borrower from the IDA or a bank that was purchasing a
18 bond from the IDA?
19    A  I don't recall any specific discussions
20 about the matter.
21    Q  Was there any general discussion that would
22 contain that subject?
23    A  Again, I don't have any independent
24 recollection.
Q Did you become aware of a discussion within
the firm as to whether the firm could represent
clients in tax certiorari proceedings after Mr.
Whalen became Mayor?
A Yes, I do.
Q Did you participate in those discussions
yourself?
A I am not certain that they came in in the
context of a formal partnership meeting or not, or
whether they came up informally.
Q Do you know whether anyone researched the
law to determine what could and what could not be
done by the firm in representing clients in
transactions in which the city was affected?
A I know that the law was researched at some
point in time. I don't know what specific point in
time that was looked at.
Q Do you know who did the research?
A I am sure that on occasion there may have
been several people who may have looked at it
independently or collectively.
Q Let me -- I don't want to be mysterious
about this, but one of our concerns is whether
existing law is adequately clear to give guidance to
people who are in the position your firm was in at the time. And with that as introduction, do you recall any expressions of opinion within your firm as to ambiguities in the law or uncertainties in the law?

A Again, there was a lot of discussion; most of it informal. And I don't have any specific recollection of what you are asking me.

Q Do you know if the question was ever raised whether it would be appropriate for members of the firm to represent clients before city agencies or city related agencies in matters other than litigation?

A Yes, it was.

Q What was the answer?

A The answer was that we were not going to represent clients before city agencies.

Q Would that include representing clients before the IDA?

A I am not sure if that is a city agency.

Q What was the reason for that policy of not representing clients before city agencies?

A To avoid conflicts of interest and appearances of impropriety.
Q Would the same reasoning apply to the IDA at a time when the Mayor was a member of that agency?
A I would guess that it would.
Q Would the same reasoning apply to representing clients in transactions with the Local Development Corporation at a time when the Mayor was a member of that corporation and influential in determining who the directors of that corporation were?
A The answer would be yes.
Q Did you ever become aware of any time in which that policy you just described was violated by any member of your firm?
A I understand there have been allegations that it might have been violated at the time of the transaction. I wasn't personally aware of them.
Q Can you tell me on what basis you set your fee to Mr. Curley?
A The basis was based on what I felt the number of hours involved in the project would probably require, as well as my experience in handling other matters of a similar nature.
Q Did you keep track of the hours that you spent working for him?
A Yes, I did.

Q Did you review those hours before you submitted a bill to him?

A Initially, I had quoted a fee to him. And Mr. Curley paid approximately one half of that fee quotation as an advance retainer to the firm.

Q What was the fee quotation?

A Excuse me?

Q What was the fee quotation; how much?

A The fee was approximately $1,500.

Q I believe there is an exhibit that shows a statement for the amount of $1,250. And would that statement have included the amount paid in advance?

Well, let me ask you this. Was that the total amount, including the initial payment and the final payment?

A I don't recall what the amount Mr. Curley finally paid to our firm was. And I don't know what exhibit you are referring to.

Q When you submitted your final bill to him, did that bill cover all hours you spent working for him?

A There was a bill that was outstanding for some time. The final bill -- or the final fee wasn't
received until approximately two years after the date that the liquor license was acquired and he was in operation.

Q Let me ask you this. Did the bill include the work you spent in discussing and corresponding with Mr. Collins about the lease?

A The bill included all the time I spent on the transaction I was handling for Mr. Curley.

COMMISSIONER MAGAVERN: Okay. Thank you. That's all.

BY COMMISSIONER EMERY:

Q Mr. Kornstein, when you were representing Mr. Curley, you testified, I believe, that you initiated representation to get a liquor license and to negotiate with some property holders on the golf course in relation to his restaurant there; is that correct?

A That's correct.

Q And at some point the representation expanded to include the matters that are reflected in exhibit -- I believe it was Exhibits 28 through 35 which you reviewed earlier?

MR. BUCKLEY: Excuse me?

Q The correspondence between you and Mr.
Collins --

MR. BUCKLEY: Could we have a second, please?

COMMISSIONER EMERY: Sure.

(Assistant/client conference)

When Mr. Curley first contacted me, he had already met with city officials and made a proposal to them regarding the operation of the golf course restaurant. When Mr. Curley came to me, my understanding was that those negotiations had already taken place, as witnessed by the letter which is Exhibit 28 from Paul Collins to myself. Paul Collins sent me over a draft of the license agreement which I assume contains the terms and representations that had been negotiated between him and Mr. Curley. My involvement thereafter with Collins was tangential to the securing of the liquor license, in that when we filed the liquor license, one requirement of the State Liquor Authority was that the initial term of the agreement be two years from the date of approval of the license agreement. As originally drafted, the -- as a matter of fact, as the first license agreement was initially drafted, my recollection was that it was a two-year term. When we went to file
the license, I may have mentioned that to Mr. Collins saying we need a three-year term. I believe that is reflected in the license agreement which is annexed hereto as Exhibit 36 -- I'm sorry. That exhibit number 36 is the license agreement for a two-year term. I think there is another exhibit which shows the license agreement to expire in September 1986. That wasn't sufficient for SLA requirements. And thereafter, I mentioned that to Mr. Collins in this letter to the State Liquor Authority. You don't seem to have that here. But I believe Mr. Collins directly corresponded with the State Liquor Authority agreeing to amend the license agreement to reflect a termination date of three years from the date of approval of the license.

Some of the other matters that are reflected in my correspondence came as a result of conversation I had with Mr. Curley indicating to me what his agreement was with the city. And I was trying to clarify that for the record because the agreement initially did not have that spelled out.

Q When you received the referral of Mr. Curley, had you ever spoken with Mr. Curley before; had you ever known him?
(KORNSTEIN, M. - EXAM. BY COMMISSIONERS)

A No, I had not.

Q And the referral came to you from the Mayor?

A No. Mr. Curley had previously operated a restaurant in White Plains, New York. And the first contact I had with Mr. Curley is that he placed a call for me from his White Plains restaurant, and I returned the call.

Q And at some point you learned that the Mayor recommended you as an attorney to handle various matters with the liquor license; is that correct?

A Yes.

Q At what point was that?

A I think in my first telephone conversation with Mr. Curley he indicated that.

Q Did he indicate that the Mayor gave him a card with your name on the back of it?

A No.

Q He indicated that the Mayor referred the matter to you?

A He indicated that he met with the Mayor.

Q At what point did you receive a copy of Exhibit 36, the license agreement which had been
executed for two years in the sequence of events?

A My recollection is that I received the agreement which is identified as Exhibit number 36 along with Mr. Collin's letter to me of October 11, 1983.

Q And that was what triggered your activity in seeking a three-year agreement, so that you could satisfy the requirement of the SLA; is that correct?

A I think that came a little bit -- maybe sometime later when I discovered that the requirements of the SLA were a three-year agreement.

Q So, you received this document, Exhibit 36, prior to having done the work that is exhibited -- what work there was exhibited in Exhibits 28 through 35?

A No. I don't think -- No. I am not sure that I follow your question.

Q What I am trying to find out is when you received Exhibit 36, when you became aware of Exhibit 36 or saw for the first time Exhibit 36 in this sequence of events in relating to negotiating the liquor license or executing a liquor license.

A My recollection is that I received an unsigned copy of this license agreement along with
the letter of October 11, 1983. My recollection is also that the dates on the first page of that license agreement were not penned in at the time I initially received that agreement.

Q And at some point, the two-year agreement was executed?

A My recollection is that Mr. Curley signed this. I notarized it and sent it back to Mr. Collins. Just to further answer your question, Mr. Curley contacted me in mid September. And as I said, he contacted me from White Plains. I believe he came up to Albany the following week and we met in my office, at which point we immediately started the preparation of the liquor license application. Mr. Curley had, as I said, operated the restaurant in White Plains which had gone out of business. He was eager to get the liquor license application underway and have the license approved so that, hopefully, he could open the restaurant prior to the end of the fall golf season and get back to work, if you will.

Q And when you sent back the executed Exhibit 36, the license agreement that was with the letter which is exhibit 30, I believe, is it not -- I'm sorry. It must be 29, your letter of October 14,
1983, Exhibit 29?

A That letter accompanying -- Exhibit 29, that's correct.

Q So, at that time, as of the date of Exhibit 29 you sent back this agreement executed by Mr. Curley where the agreement on its face was to be executed on behalf of the city by Thomas M. Whalen, your partner; is that correct?

A That's correct.

Q Did bells go off in your head? What happened when you saw an agreement that you were negotiating on behalf of a client was being executed by your partner on behalf of the city?

MR. BUCKLEY: Object to the form of the question.

COMMISSIONER EMERY: I am asking what his response was to that.

MR. BUCKLEY: I object to your characterization that he was "negotiating" this on behalf of his client.

COMMISSIONER EMERY: I didn't say the word "negotiate."

MR. BUCKLEY: I believe you did.

Q "Just tell me what your reaction was, how
(KORNSTEIN, M. - EXAM. BY COMMISSIONERS)
you responded to the notion that you are sending an
agreement signed by your client, which is to be
executed by the city by your law partner.

MR. BUCKLEY: Can we have a moment?

(Attorney/client conference)

A I earlier testified that at the time Mr.
Curley came to me, the deal had been made, or the
agreement had been negotiated. What I perceived that
I was doing, I was not negotiating an agreement but
witnessing my client's execution of an agreement that
he had already made with the city. My involvement in
terms of the rider attached to that agreement was
based on my client's representation to me that the
city had agreed that he would not pay rent, or the
license agreement, if you will, would not take effect
until he received his liquor license from the State
Liquor Authority. Obviously, without that, he wasn't
about to go into the restaurant business at this
location.

Q What I am asking you is when you saw that
your client, for whatever reasons you were
representing him, was executing a document which you
were notarizing that was executed by the opposing
parties, by the opposite parties, by your law
partner, did that cause you any pause? Did you think about conflict of interest? Did you do anything to deal with what I would consider to be quite frankly a very strange situation?

A Well, let me say two things. First of all, I did not -- I think when Mr. Curley came to see me, I advised him that I could not specifically represent him in the actual negotiation of the lease or the license agreement with the city. He advised me that that already took place.

Secondly, I didn't see it as an adversarial situation. Perhaps in hindsight, given the amount of the fee involved here, it would have been better had we not been involved in this. But at the time, I didn't consider myself to be in negotiation with the city or bargaining with the city on behalf of my client.

Q Now, when you testified earlier you said that your firm had a system of notification for new cases that had four -- maybe you can review it -- that had four items that went --

A I believe it was four or five.

Q Excuse me?

A I believe it was four or maybe five
carbonless copies of the same label.

Q. How was that distributed within the firm?

A. One copy went in the file, one copy went in
the lawyer's personal card catalogue, one file went
in the firm-wide catalogue, one copy probably went to
the lawyer's secretary. And then one copy was
circulating with all filed labels on a weekly basis
throughout the firm.

COMMISSIONER EMERY: I have nothing
further.

BY COMMISSIONER MEYER:

Q. At the time that this transaction with Mr.
Curley's lease was involved, were you aware of
section 805-a of the General Municipal Law;
specifically, subdivision (c). And I will read it to
you: "No municipal officer or employee shall: (c)
receive or enter into any agreement, express or
implied, for compensation for services to be rendered
in relation to any matter before any municipal agency
of his municipality of which he is an officer, member
or employee of any municipal agency over which he has
jurisdiction or to which he has the power to appoint
any member, officer or employee."

A. I am not sure that I was specifically aware
of that specific section.

COMMISSIONER MEYER: No further questions.

BY MR. SCHWARZ:

Q At any time, did anyone from the city
acting on behalf of the city give you any opinion of
the city, or did city corporation counsel, as to what
was appropriate or not appropriate for your law firm,
given the Mayor's partnership?

A I believe that Mr. Collins and I may have
had a discussion about that. And we both agreed that
we would be careful not to negotiate the terms of the
license agreement.

Q I am not talking about this situation
specifically, but in general. When your partner
became Mayor of the City of Albany, at any time from
that point forward did you ever receive any advice
from anyone representing the city in connection with
what a proper role would be for your law firm?

A I don't believe that the law firm received
any formal advisement from the city.

Q Did you ever look at the city ethics code?

A I have not formally looked at the city
ethics code. I might have had -- I might add that on
one or two occasions, one of the city court judges advised that he did not want our firm appearing in city court because of the potential conflict issue that was raised by virtue of the fact that the Mayor had appointed that city court judge. I am not sure that that was an actual conflict of interest, but we did refrain from appearing in city court.

Q Aside from that situation, am I correct that you never received any advice from any ethics board or the corporation counsel as to what was, if anything, a limitation on your law firm?

A I personally don't recollect that, although I do understand that the city corporation counsel may have advised the Mayor on that at some point in time.

Q I am not asking that, sir. I am asking you as a private lawyer whose partner is the Mayor of the city whether, to your knowledge, you as a private lawyer ever received any advice from the city by way of a code, an opinion, or anything else as to what the role of your law firm could or could not do?

A No. I answered that no.

Q You mentioned before that you were not bargaining with the city on behalf of a client in connection with the Curley matter. Do you recall...
KORNSTEIN, M. - EXAM. BY COMMISSIONERS

that?

A Yes, I do.

Q And why did you express that opinion to Mr. Curley?

A Well, by virtue of the fact that I didn't want to be caught in the situation that I find myself caught in today. I didn't think it was appropriate for myself as a partner of the Mayor's to be negotiating directly with the City of Albany.

MR. SCHWARZ: Nothing further. Thank you.

CHAIRMAN FEERICK: Thank you.

(The witness was excused.)
(NEWLAND, C. - FOR THE COMMISSION)

CHAIRMAN FEERICK: The Commission calls as its next witness Charles Newland.

CHARLES NEWLAND, called herein as a witness before the Commission, and being duly sworn by the Chairman, testified as follows:

CHAIRMAN FEERICK: Please be seated.

I recognize Kim Greene, Commission Deputy Counsel. But before proceeding to the questions, I would like to ask counsel for the witness to identify themselves for the record, please.

MR. McARDLE: Your Honor, I am Vincent J. McArdle, Jr., Corporation Counsel for the City of Albany.

MR. MUMFORD: My name is Brian Mumford. I am of counsel to Mr. McArdle. I am from the firm of Harvey, Harvey & Mumford here in Albany. Mr. Chairman, may I pass something up to Mr. Bienstock that I promised?

CHAIRMAN FEERICK: Surely.

MR. MUMFORD: (Offering)

MS. GREENE: Thank you, Mr. Chairman.

EXAMINATION BY MS. GREENE:

Beth S. Goldman, CSR, RPR
(518) 439-6772
(NEWLAND, C. - FOR THE COMMISSION)

Q Mr. Newland, for the record, would you state your full name and spell your last name.
A My name is Charles E. Newland, N-e-w-l-a-n-d.

Q What is your current occupation?
A I am now retired.

Q What was your previous occupation?
A I was the erstwhile Commissioner of the Economic Development Department for the City of Albany.

Q Who were you appointed by to this position?
A I was appointed by Mayor Whalen.

Q Did you serve at the pleasure of Mayor Whalen?
A I did.

Q Was the Office of Economic Development created by Mayor Whalen?
A Yes, it was.

Q Why did the Mayor establish this entity?
A If I may, he initially established a Bureau of Economic Development primarily to focus on the redevelopment on the city's downtown.

Q And what year was this bureau established?
A I believe 1983 at the time he assumed the

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responsibility of Mayor.

Q I would like to turn now to the Albany
Local Development Corporation, if I may. In 1982 did
you hold a position with this corporation?

A Yes, I did.

Q And what was your position?

A Secretary.

Q And were you also a voting member of this
agency?

A I was.

Q Are you familiar, Mr. Newland, with the low
interest mortgage loan granted by the Albany Local
Development Corporation to a company known as
Neenan's Garage?

A I am.

Q And what was your role with respect to this
mortgage?

A I was the officer in charge of the day by
day operations of the Albany Local Development
Corporation, and would have generally overseen the
process of receiving the application, seeing to the
process and its ultimate review by the board of
directors and, once approved, its closing. And
following its closing, its maintenance during the
terms of the contract.

Q Did Thomas Whalen represent Neenan's Garage for the purpose of obtaining this mortgage?
A Yes.

Q Is it correct that you initially determined that Neenan's Garage should submit an appraisal of the property that was the subject of this mortgage as a precondition to receiving the mortgage?
A If I may, counsel, I need to better define that question. It was determined that an appraisal of the property which was being sold by Neenan as part of the consideration for the new property that was to be used as security for the lending of the Albany Local Development Corporation. The board of the Local Development Corporation did not require an appraisal of the property originally owned by Neenan's Garage and to be used as part of the consideration. That determination and that requirement was one that I made as the officer in charge. And it was based upon my some twenty years experience in mortgage lending across various sectors of the country in which I recognized and had assumed, as a personal discipline, a thorough investigation of transactions where swaps were involved. This is not

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to say I suspected that there was a problem, but this was a discipline that I had adopted based upon years of experience.

Q Did there come a time when Thomas Whalen asked you to waive the appraisal requirement on behalf of his client?

A He did.

Q And did Thomas Whalen offer to supply an affidavit at all concerning the property in lieu of this appraisal?

A He did.

Q And did he supply such an affidavit?

A He did not.

Q Why not?

A I preferred to satisfy the lending criteria by reviewing and analyzing the value of the Neenan property personally. And I felt I was adequately equipped to do that by virtue of some twenty years experience in direct real estate lending. And it was also an attempt on my part to recognize the fact that two thousand dollars represented a considerable amount of money, and that it was my management style while functioning as the operating head of the Local Development Corporation to put deals together and,
where feasible and possible, to mitigate those restrictions or those constraints that would be resistant to putting deals together. So, I undertook to satisfy myself that the transaction was appropriate. I did, and I was able to conserve the two thousand dollar fee.

Q Mr. Newland, you made reference to a figure of two thousand dollars in your statement. Can you tell me what that figure refers to?

A I believe that during the course of our previous testimony, it was determined that there was a fee of two thousand fifty dollars, I believe, that was represented to me which would have been the fee to be charged for that appraisal that I was requiring.

Q I would like to ask you to look at Exhibit 55 which appears in the black book that is directly in front of Mr. Mumford and Mr. McArdle.

A Exhibit 55?

A Yes.

Q Do you recognize this document, Mr. Newland?

A Yes, I do.

Q And what do you recognize this to be?
This is a file note that I composed for the file to cover the details of what had transpired.

Mr. Newland, at the time of this transaction was Mayor Whalen a member of the Local Development Corporation?

He was a member.

And during your tenure at the Albany Local Development Corporation were you involved in other transactions similar to this one in which properties were swapped for each other?

I don't recall any specifics where that was part of a transaction involving a property swap. There may have been, but I don't recall.

Were there other instances in which you waived the appraisal requirement and substituted your personal inspection of the property for it?

It is not unlikely, but I cannot specifically remember such an occasion.

Mr. Newland, to your knowledge, while this mortgage transaction was pending before the Albany Local Development Corporation, did Thomas Whalen disclose to the corporation that he was representing Neenan's Garage for the purpose of obtaining this mortgage?
(NEWLAND, C. - FOR THE COMMISSION)

A Would you please repeat that question?

Q At any time while this mortgage transaction was pending before the Albany Local Development Corporation, to your knowledge, did Thomas Whalen disclose to the corporation at any time that he was representing Neenan's Garage for purposes of obtaining this mortgage?

A Well, in the process of submitting the application and, I dare say, when he called advising me as to his desire to submit a personal affidavit on the part of his client, he would have de facto advised the corporation. The lines of communication to the corporation consisted primarily through the board of directors, and even more specifically to me as the secretary who was the officer with the day by day operational responsibilities for the corporation.

Q Other than the fact that his name appeared as the attorney on the application for the mortgage, are you aware of any disclosure of any kind to the corporation regarding Mr. Whalen's role in this transaction?

A No.

Q I would like to turn now to the Maiden Lane Triangle Project, if I may. Are you familiar with
(NEWLAND, C. - FOR THE COMMISSION)

this project?

A Yes, I am.

Q Did this project include an office building known as 39 North Pearl Street?

A Yes.

Q What was your role with respect to this project?

A I need to take a moment to answer that.

(Pause) At the time of the Mayor's appointment of me as the Director of the Bureau of Economic Development, the primary purpose was the redevelopment of downtown. There were several advantages that we had. Namely, we had some raw material by way of a goodly number of properties which were owned by the city. We had developed some expertise in accessing funds from both the federal government and the state government, and so we had that resource, the financial resource very necessary to participate in the redevelopment of the basic city raw material which, as I mentioned, consisted of a number of disabled properties.

Q Mr. Newland, if I may ask you what your role was with respect to this project?

A I am getting to that. My role was to put

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together a program to, in effect, cause the
redevelopment and rehabilitation of those properties
owned by the city, bringing to bear as much federal,
state and other financing as I could to make it
possible, to contact the public at large to induce
them to look again at downtown Albany which had
become extremely blighted, and to engage however we
could in the redevelopment of downtown. I think that
is it.

Q. And to your knowledge, what was the Mayor's
role with respect to this project?

A. Well, that was one of our advantages also,
because the bureau which he had created had the
Mayor's full support and backing to accomplish that
which we were trying to accomplish. And, so, he gave
us every encouragement and, when necessary, provided
us with the necessary administrative machinery
required to accomplish the task.

Q. Did you ever report to Mayor Whalen on your
office's progress on this project?

A. Yes. But when you say "this project," this
project consisted of a number of properties, not just
39 (North Pearl). There was an entire city block
plus some additional properties that were involved,
virtually simultaneous with redevelopment through
individual and separate and distinct parties.

Q Mr. Newland, which city agency or entities
were involved in the financing of this project?

A The Albany Local Development Corporation,
the city's Community Development Agency, the Albany
Industrial Development Agency. Those were the major
ones. There may have been others.

Q To your knowledge, did the 39 North Pearl
Street project receive Urban Development Action Grant
Funds?

A Yes, it did. And, if I may, that was the
nature of the funds involved that induced, as will be
discussed, I am sure, my advising the Mayor that he
had to divest himself from participation, because of
the UDAGs. In other words, it was not JDA funds..

Q What are the restrictions to which you are
referring that HUD places on UDAG funds?

A They are found in the assurances that the
city and Mayor makes to the federal government.

Q Mr. Newland, if I could ask you to turn to
Exhibit 44 in the book, please. Can you identify
this document for me, Mr. Newland?

A It is a list of assurances produced and
promulgated by HUD and used by cities who desire to and do, in fact, utilize federal funds for community development.

Q Are those the UDAG assurances to which you just made reference?

A I would assume so, although I am not sure. I am not trying to be evasive here. The assurances can and have been known to change over the years. Generally speaking, they are the ones. These are the ones. If they are not exactly the ones, they are very close to it.

Q If you would turn to the last page of the document, I would like to direct your attention to paragraph ten. Are you familiar with this provision, Mr. Newland?

A Yes, I am.

Q And is this one of the restrictions that HUD places on the UDAG loans that you referred to earlier?

A Yes.

Q Are you aware of any other restrictions that the UDAG loans carry with them concerning conflicts of interest?

A Concerning --
CHAIRMAN FEERICK: Conflicts of interest.

A No.

Q Mr. Newland, if you would move down to the bottom of the page, could you tell me who executed the assurance document?

A It is executed by Thomas W -- Thomas M. Whalen, III.

Q What is the date on which it is executed?

A November 28, 1984.

Q As a Director of the Economic Development Bureau and later the Office of Economic Development, what steps did you take to ensure that this requirement contained in the UDAG agreement was followed with respect to the 39 North Pearl Street project?

A As projects are processed by the Department of Economic Development, the projected and proposed financing is generally defined conceptually as so-much private financing, so-much conventional financing, so-much subsidized financing. And generally, there are some indications up front as to who is going to be participating in what. If at that period of time or at any sequential period of time

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during the processing stage and as the UDAG particularly is finally approved, those elements of financial participation are ultimately pinned down specifically. And at that particular point in time it becomes possible to identify any potential conflict of interest that may exist. If I may comment that the nature of the problem in 39 North Pearl Street involves a limited partnership, the limited partners of which were sequentially secured long after or considerably after the approval of the financing, the completion of the project, and while the project was well into it existence.

Q. Mr. Newland, I would like to refer you again to the language of paragraph ten. And for the record, it reads: "It will establish safeguards to prohibit employees from using positions for a purpose that is or gives the appearance of being motivated by a desire for private gain for themselves or others; particularly those with whom they have family, business or other ties." And I would like to ask you if you took any affirmative steps to establish such safeguards.

A. They would be virtually impossible to establish when you consider that some projects are

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very major projects which involve syndication. Syndication takes place on a national basis. And it seems to me that somebody participating in a syndication could be acquiring syndicated units from a broker and never know what is involved in the property that is being syndicated. It would be virtually impossible to pin down except, you know, we are alert and we -- to the extent that we can be -- on the local scene, we recognize conflicts when we see them and attempt to do something about them.

Q Did the city impose any requirement that individuals or syndications, as you have referred to them, who subsequently invest in projects that receive these types of funds disclose their investment to the city?

A Not to my knowledge.

Q Mr. Newland, did there come a time when you learned that the Mayor's law firm was occupying or planning to occupy space at 39 North Pearl Street?

A Yes.

Q And when did you learn this?

A It would have been in late fall, I believe, of 1986.

Q And how did you learn that?
(NEWLAND, C. - FOR THE COMMISSION)

A I believe through media.

Q Did you take any steps in response to
learning this news at the time?

A Yes, I did.

Q What did you do?

A I had occasion to have breakfast with the
Mayor at the annual meeting of the membership of the
Albany Local Development Corporation on January 13, I
believe, of the following year. And I advised him at
that time that if, in fact, he had as an individual
participated, in effect, in connection with this
option that he was aware the developer was making
available to lessees, that he should either not or,
if he has, he should dispose of it because it would
conflict with the constraints imposed by the federal
government in their UDAG assurances.

Q Mr. Newland, how did you learn in the fall
of '86 that the Mayor --

A I believe through public media, newspaper.
It was late fall. I am thinking of December as fall.
(Pause) Counsel suggested that when I say late fall,
I mean late fall. And this probably is in December
sometime.

Q Mr. Newland, how did you arrive at the
conclusion that the Mayor's actions violated the UDAG regulations?

A. How did I come to the conclusion? It is one thing to lease property, pay fair market rent. It is another thing to make an equity investment in real estate which, hopefully, has appreciative potential. And given the circumstances as to the existence of the UDAG funds and, for that matter, other funds that were invested in the property, in my opinion this represented a potential problem that the Mayor should extricate himself from. And I believe that he immediately did so.

Q. What other funds were you referring to for this project?

A. They are -- in addition to the UDAG funds, there was an element of community development funds.

Q. Did those community development funds carry the same kind of restrictions on them concerning the appearance of --

A. As a matter of fact, administratively from HUD's point of view, UDAG funds and CD funds are inseparable.

Q. So, then, is it correct that the CD funds are constrained by the same kind of restrictions that

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the UDAG fund are?
A Yes.
Q Mr. Newland, at any time did you consult with an attorney regarding the interpretation of these regulations?
A No. Although, if I may, I may have reviewed it with in-house counsel. But I don't recall that specifically.
Q Who is the in-house counsel to which you refer?
A James Aiello.
Q What was Mr. Aiello's position?
A As I say, I don't recall specifically. I may have discussed it with him, but I don't recall.
Q Is it correct that it was your determination that the Mayor's investment in this project violated the UDAG regulations but the leasing of the space by the law firm did not?
A Surely.
Q In January 1987 after you informed the Mayor that you believed that his action violated these regulations, what did the Mayor say to you?
A I don't recall him saying anything really. He took what I told him under advisement. And then I
learned subsequently, quite shortly subsequently, that he had acted upon my advice and had divested himself of the investment.

Q With respect to any of the other development projects that you have worked on during your tenure in the Office of Economic Development, to your knowledge did Mayor Whalen ever decline to participate in any of the projects of your office because of his law firm's involvement with it or with any party to it?

A No.

MS. GREENE: Thank you, Mr. Chairman, that is all the questions I have.

BY COMMISSIONER MAGAVERN:

Q Mr. Newland did you take steps to ascertain whether or not the rent being paid by the Mayor's law firm was fair market value?

A I was aware of what rental was being charged, which at that time was approximately one to two dollars in excess of market and which, as a matter of fact, was one of the reasons why it was taking some additional while to fully lease the property. I must admit it was only subsequent to all of this that I did check that out. But I did...
(NEWLAND, C. - EXAM. BY COMMISSIONERS)

determine subsequently that they did, in fact, pay
the then going price for what was being asked by the
developer.

Q The same as paid by others tenants?
A To the best of my knowledge, that was
reported to me.

Q Can you tell me what the selection process
was for members of the LDC?
A For members, originally, we had a
contingent of some forty members. And I remember
that they were achieved by sitting down in Mayor
Corning's office and reviewing the universe of the
citizens of Albany at large, keeping in mind that
this, the LDC was originally created by way of
putting into place a 501(c)(3) corporation which was
necessary in order to interface with the then SBA 502
program. And that SBA program provided for certain
participation in the membership by various sectors of
society; educators, lawyers, bankers, labor people, a
cross-section, if you will, of the population at
large. And, so, we sat down with Mayor Corning and
went through Albany at large and came up with forty
names that provided for that representations.

Q Were those people named in the bylaws?

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A Originally, yes. I believe so. Well, I am not sure. I don't believe they are named in the bylaws.

Q Who has the power to appoint new members?

A Well, subsequent to that, if you will, after the initial chartering, we had attrition in the membership, obviously. And at that time and before each meeting, we presented to the then Board of Directors how many additional new members we should have in order to maintain the minimum levels. And names are suggested at that time.

Q And the board then selects members; is that correct?

A The board nominates them anyway.

Q Who makes the final appointment?

A Well, the board does.

Q Okay. Now, who appoints the directors?

A That is done by election. It is done at we have an annual meeting once a year, and the directors are elected by the membership.

Q Is there a nominating committee?

A No. Nominations are accepted from the floor.

Q Who, in practice, has been making

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nominations for directors?

A   To the best of my knowledge, a different person has made the nominations during my tenure, which was since the beginning of 1979.

Q   Has the practice been that one person nominates the whole slate?

A   It has been to just nominate the slate for reelection.

Q   Pardon me?

A   The practice has been or experience has been to nominate the slate for reelection.

Q   There are changes in the slate from year to year?

A   No.

Q   It is the same board?

A   The same board, except that in recent years, we have been adding to that board. And one member has deceased.

Q   How do you add members to the board; does the board make the decision?

A   The board makes a -- pencils a resolution to increase the membership.

Q   Does the board have an executive committee?

A   No. There were originally five members,

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and so it was not necessary to have an executive committee.

Q In actual practice how does the board go about identifying people to fill vacancies, staff vacancies or membership for board members?

A For membership, we sit down at a board meeting just prior to the next annual meeting, and we brainstorm as to who might be appropriate to replace those people who may have left.

Q Does the Mayor sit in on those meetings?

A No.

Q Does anyone consult with him about prospective new members and directors?

A I am sure we do.

Q Who does the consulting?

A We probably run them by him when we come up with the names, to be sure that he has no objection.

Q Is that process of running it by the Mayor written in the bylaws?

A No. If I might, though, I think it is important to point out that while this is, in fact, a 501(c)(3) and is, as such, a private entity, the fact remains that the effectiveness of the Albany LDC is directly related to the fact that since 1979 the City

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of Albany has been providing the necessary capital, at least in the beginning years, the necessary capital to enable it to function as originally, as a 502, interfacing with the SBA programs which required a certain amount of capital participation as the local insertion. It also has been helpful in putting together JDA loans. And the LDC has been necessary to interface with state funding under that program and operation. So, the city has been a major player in the success of LDC and, hopefully, the success of the redevelopment of downtown and economic development thrust. And so, if for no other reason, out of respect for the fact that they gave us the financial power to do what we did, I think it is only appropriate that we should run this sort of information by the chief executive officer.

Q  How much of the capital of the LDC did originate with the city in one way or another?
A  We were originally capitalized at three hundred thousand a year.

Q  Is that from the Community Development funds?
A  Yes. I am not attempting to quantify the fact of all of the staff costs necessary to run it

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and to operate it and make it effective were covered by the city's Community Development Agency.

Q Do you also receive UDAG funds by virtue of applications to which the city is a signatory?
A Yes. They are processed through the Community Development Agency, but are but packaged through the Albany LDC.

Q Is it fair to say, then, that the LDC functions essentially as an arm of city government?
A Yes.

Q Does the LDC have any formal ethical standards or conflict of interest standards?
A They were never, at the time I left, never formalized, although we would have utilized, I am sure, the existing city code.

Q Did you consider the existing city code applicable to the LDC?
A Well, to the extent that we are, in fact, an instrumentality of the city, I dare say.

Q How about the General Municipal Law and state statutes governing the city government? Do you consider them applicable also to the LDC?
A At the time I left, Commissioner, we were in the process, and our attorney is now, looking into
the development of our own set of ethical standards. And I am not sure whether they are not -- one, in fact, may have been adopted. I am not sure.

Q Let me pose to you what may be a dilemma, and see if you have had experience with it. The dilemma would be that you might want serving on a corporation like the LDC people who are very active in economic development because of their expertise and also to help encourage this participation in economic development. At the same time, if you bring them on the board, you may encounter conflict of interest problems. In fact, the present Article 18 of the General Municipal Law provides that if you have a conflict of interest, the contract is absolutely prohibited, cannot be cured by a simple disclosure and recusal. I wonder if you have encountered that problem in your efforts to structure this board and, at the same time, comply with the ethical standards applicable to the City of Albany.

A I am very aware of what you are saying. Fortunately, the LDC board, with the exception of the most recent appointment, did not seem to run -- when I say the "board," I mean board of directors, which is the element within the corporation that makes and
executes decisions, policy decisions, primarily. Fortunately, we have had very little problem with respect to conflicts of interest. I would suggest that one needs to distinguish between membership, general membership at large which oftentimes is required, such as the SBA 502 program. As I mentioned earlier, they wanted a segment of society to fully represent a cross-section of society. But, in fact, they officially have very little, if anything, to do with the day by day policy decisions which are made, other than the fact that they do, in fact, wind up electing a slate of board of directors each year. My concern in this process is that the statute providing for the creation of Local Development Corporations in the State of New York provides certain abilities to facilitate the process. And I dare say the statute was developed to enable a city to extricate itself from blight and from economic problems of various dimensions. And to the extent that the laws on the books which were developed and evolved to enable cities to do things which the existing municipal law prevented them from doing in a businesslike fashion, to the extent that new legislation evaporates the ability of existing
legislation for things to get done and for things to happen, it has to be looked at very closely because while it is important -- and I understand what it is that you are trying to do -- it is important not to negate the capacity of strong government to get things done that need to be done. And, as I say, we have utilized the laws that are on the books as well as possible to overcome extraordinary hurdles. And to the extent that these instruments are made invalid or become ineffective to solve problems, to that extent you need to look very carefully at what it is you are doing.

Q. Did you have any responsibility for the IDA as well as the LDC?

A. Yes.

Q. I won't ask you for all the -- but let me go onto another question.

A. The federal government had a 108 program which, in order for it to be operative, had to be handled through the IDA. And to the extent that I oversaw the administration of the 108 program through the IDA, to that extent I participated in it.

Q. Did you become aware that members of the Mayor's law firm were representing either bond

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purchasers before the IDA or borrowers in transactions with the IDA?

A    Probably.

Q    Did you recognize that to be a problem under existing municipal law?

A    I didn't, although -- and I will explain why. The IDA does not lend money. It authorizes the issuance of tax exempt bonds --

Q    I think I understand that.

A    -- to my knowledge.

Q    The IDA makes tax exemptions available though to a borrower; does it not?

A    That's right.

Q    Federal income tax collection, the local property tax, and state sales tax exemption; right?

A    Right. There are many incentives involved, to my knowledge, through the years for any appropriate project. I have never known the board of the IDA to turn down any project.

Q    Well, you are aware of the limitation in the tax reform Act of 1986; you are aware of the volume cap?

A    Yes.

Q    Is it your testimony that the IDA has never
(NEWLAND, C. - EXAM. BY COMMISSIONERS)

came up against the volume cap?

A  That's right. During the previous cap --

Q  You have answered the question, Mr. Newland. Thank you.

BY MR. SCHWARZ:

Q  I have just two questions. Do you recall, sir, testifying before this Commission, at page 93 of your transcript and being asked, in substance --

MR. MUMFORD:  May we have a moment, please?  (Pause) May I have the question please?

Q  On page 93 of your transcript, you were asked the following: "I will direct your attention to the fourth paragraph from the bottom of page two. It states: "Major business being over, the meeting was adjourned. And Vice-Chairman Tanksley welcomed the board and new ALDC Board of Directors member Mr. James M. DiNapoli." Who nominated Mr. DiNapoli to be a member of the board?" Answer: "Mayor Whalen." Do you recall that?

A  Yes.

Q  Page 94, you were asked, and I will direct your attention to the fourth paragraph from the bottom of page two. The paragraph states: "Judge Herzog informed the board and staff that the Mayor
(NEWLAND, C. - EXAM. BY COMMISSIONERS)

1 has requested that the an LDC increase their board
2 membership to seven persons; one possibly being Mr.
3 Raymond J. Kinley, Jr." Do you recall that, sir?
4 A Yes.
5 Q Later in the paragraph it indicates,
6 question: "Mr. Newland, did Mayor Whalen give any
7 reasons for wanting to increase the membership of the
8 board?" Answer: "Not to me." Do you recall that
9 answer, sir?
10 A Yes.
11 Q Also, with respect to the Neenan Garage
12 that you testified before you waived the appraisal
13 on, do you recall that, sir?
14 A Yes.
15 Q Who would have paid the two thousand dollar
16 fee?
17 A I would assume Neenan's.
18 Q Mayor Whalen's client?
19 A Yes.
20 MR. SCHWARZ: Nothing further. Thank
21 you.
22 (The witness was excused.)
23 CHAIRMAN FEERICK: Thank you. We will
24 take a short recess and resume at about three
25 o'clock.
(WHALEN, T. - FOR THE COMMISSION)

(A brief recess)

CHAIRMAN FEERICK: Mayor Whalen, may I swear you in?

THOMAS M. WHALEN, III,
called herein as a witness before the Commission, and being duly sworn by the Chairman, testified as follows:

CHAIRMAN FEERICK: Please be seated, Mayor. I understand that you would like to make a brief preliminary statement. I am certainly going to grant that request. I would note for the record that the Commission's normal policy is to request of witnesses that they provide in advance of the hearing that written statement at least a day in advance of the hearing. And we are happy to provide witnesses the opportunity to do so, to make a brief opening statement.

The Commission did receive a copy of your written statement within the hour. So we, speaking for myself, have not had an opportunity to examine it, which I certainly will after the hearing is concluded today.

As I mentioned at the outset, I would be happy to provide you with an opportunity to
make a brief summary of your written statement.

MAYOR WHALEN: Thank you, Mr. Chairman. Members of the Commission and members of the Commission staff: thank you for this opportunity to address those issues you have expressed concerns about, and to share with you the experiences and the observations I have had during my tenure as Mayor of Albany these past six years.

I hope to be able to provide the Commission with insight not only into the specific circumstances of Albany, but the decision making process of all of us in local government who continually face perceived conflicts of interest and real prohibited conflicts of interest.

You have a formidable challenge, for all of us in government from high elected state officials to village employees face potential conflicts. Mayors and municipal officials, on the front line of day-to-day city operations have great exposure on a continual basis. We try to focus on keeping our municipalities running smoothly and efficiently while, at the
same time, laying a strong foundation for the future. Our stewardship is based on the desire of those we are elected to represent.

Prohibited conflicts of interest are detrimental to good, efficient government and an anathema to our constituencies. Nevertheless, we are routinely confronted with situations with the prospect of conflict. Some are real, others are perceived by those unaware of the environment in which we work.

A Mayor must constantly balance what is best for his city and what one might perceive to be a conflict. In my case, this has been even a stronger challenge because I was a partner with one of Albany's largest and most active law firms when I took office as President of the Common Council in January 1982.

Thereafter, and during my predecessor's illness I increasingly assumed city responsibilities until Mayor Corning passed away on May 29, 1983.

As Government officials, we all face potential conflicts of interest. The fact is that we are all exposed to different levels of perceived conflict. Elected municipal officials
and municipal employees have a far greater exposure because of the myriad activities and the services we provide and the countless transactions our administrations perform on a day-in day-out basis.

Let me offer as an example a situation you have investigated and which I am sure you will want to explore further. First Realty of Albany is a development firm owned by the Swyer family. James J. Drislane, now deceased, became associated with our firm in 1981. He had previously represented the Swyers for twenty or twenty-five years. In 1980, before Mr. Drislane came with our firm, the Swyers received an IDA inducement to rehabilitate an old, dilapidated warehouse building. Two years later in January '82 I was appointed to the three-member IDA. After that inducement vote of 1980, the next action was the bond resolution on December 14, 1982. One week before the project's closing -- Mayor Corning was hospitalized in Boston from the preceding August of that year and wasn't available to vote. I had two choices. One, absent myself from the IDA vote and thus avoid
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the appearance of conflict. This would have meant no quorum, no decision and no rehabilitation of a building important as part of the economic development initiatives of the city, not to mention a breach of the inducement agreement with the developer, which again, that inducement resolution had been entered into before Mr. Drislane came with our firm and before I became President of the Common Council. Or, I could have cast my vote, acknowledged the conflict, and made proper public disclosure. I concluded that to absent myself from the vote would have constituted an abdication of my duties and responsibilities to serve both the IDA and the City of Albany. Arrangement were therefore made for a full written disclosure, and I cast my vote. That disclosure is displayed at Tab 9 of the IDA closing documents.

As you know, in another matter, the Crisafulli Food Warehouse IDA loan, I went even further to indicate disclosure. In that case the law firm did not represent the borrower but the lender, which is even more remote. And there was full written disclosure to all parties.
to the transaction and within the closing
documents. Have I encountered conflicts as a
city official? Of course, I have. And in the
case of the Swyers, I saw the conflict coming,
identified it, and responded by offering proper
disclosure.

On another matter which you have
investigated, my law partners and I purchased
shares in a limited partnership, a new office
building that we were to occupy as part of our
law firm at 39 North Pearl Street. It had
received UDAG funds. I did not identify the
conflict, but fortunately, within three weeks a
member of my staff did. And soon as that
conflict was brought to my attention, I
immediately and in writing withdrew, and I
terminated the conflict.

As for the case of Gordon Bell's
purchase of city property for an agreed upon
price of fourteen thousand dollars, when a
purchaser for the same price had backed out of
the transaction which had been approved by the
Common Council, there was no identification of a
conflict by me or my staff, no assessment of the
level of conflict and, therefore, no response. It got by me. I can only now in retrospect say that it was so inconsequential in substance and in amount that I did not at that time give it the attention it deserved.

We all live in anxiety of conflicts getting by us. Sometimes they do. Most times they do not. The V. F. Conner case is the only one over that extended period of time, to my knowledge, that wasn't recognized and dealt with.

I am proud of the ethical standards and the achievements of the City of Albany in this administration. Please consider before I took office in 1983 that the State Comptroller recommended a financial control board to handle Albany's fiscal affairs. This past January, I received the Mayor's Financial Leadership Award from the United States Conference of Mayors, a reflection on all of us that work for this city. When I took office, Albany's bond rating was at its lowest level. Today, Standard and Poor, and just a week ago Moody's now gives us an "A" rating with further increase being considered.
We have developed a purchasing manual for the first time in the city's history. It is now strictly in force. The State Comptroller who had consistently over the years found fault with the city's purchasing practice, was unable to find a single example of improper practices in his most recent audit covering a two-year period. We have revamped the assessment process, we have created a new review process for leases and contracts. We have worked with community and business groups to develop a stiff master plan, and brought in a highly professional, highly motivated and experienced staff. I mention these examples that are not a result of conflict of interest or of creating a climate where using public office for private gain is permissible, but rather results from the creation of a positive community attitude, spearheaded by a city government that is efficient, open, and totally honest.

Last week I was proud to accept on behalf of the city another award for our affordable housing program at the U. S. Conference of Mayors meeting in Charleston, the
third national award we have received in the past two years. I think this is another shining example of the public/private partnership which works so well in Albany. This relationship would not exist if the private sector believed preference was being given to a selected few.

I could go on with many more examples of the improvements made during this administration. But every change, every improvement, every formal process initiated was designed to assure honesty, efficiency and integrity in the government of the City of Albany. There is no room left for violating purchasing practices, for favoritism or for inefficiency. As you know, I was an attorney for many years, sharing status in the community and a fine income with one of Albany's oldest and most prestigious law firms. Currently, there is no law which prohibits a municipal official from having a legal practice or having any other means of income. Moreover, if such a law were enacted, it would have an exceedingly unfavorable result, since only the independently wealthy could then afford to take public office.
For my part, such legislation is no longer needed.

When I found out that the duties of being Mayor of this great city required all of my time, I resigned as a member and partner of that law firm. I did so at financial sacrifice. But in retrospect, since well over a year as elapsed since I withdrew from the law firm, I have ambivalent feelings. On the one hand, all of us can feel more comfortable in that not even an intimation of conflict can be inferred. On the other hand, while my income is reduced, this is a sacrifice that many of us who are in the public service must consider. In Albany, as in many cities our size, community leaders wear many hats. Business executives, community volunteers, chamber of commerce activists, institutional board members. In the morning I may work with an individual on addressing a problem like affordable housing or economic development, and then find myself across the business table with the same person that afternoon on a totally unrelated matter, and perhaps a matter in which we represent totally
I am sure you do not propose the elimination of businessmen and women from community service or the ending of public/private partnerships to avoid the appearance of conflict.

Thank you, Mr. Chairman, and members of the Commission for allowing me these comments. I will try my best to answer your questions and, hopefully, provide you with answers that will assist you.

CHAIRMAN FEERICK: I would like to now recognize Commission Deputy Counsel Kim Greene.

MS. GREENE: Thank you, Mr. Chairman.

Good afternoon, Mayor Whalen.

THE WITNESS: Good afternoon.

EXAMINATION BY MS. GREENE:

Q Mayor Whalen, between 1982 and March of 1988 were you engaged in the private practice of law?

A I was.

Q And in what capacity did you do that?

A I was a partner in the firm of Cooper, Erving & Savage. Subsequent to that, until I left the active practice of law in January of 1988,
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effective March 1988, I was a partner in the merged
law firm of Cooper, Erving & Savage, Whalen, Nolan &
Heller.

Q When you became Mayor, approximately how
much of your time did you devote to your law
practice?

A Well, it varied in degree. When I became
Mayor initially, I would say probably it was not as
much as it was in succeeding years. I would say
probably I spent twenty-five percent of my time
practicing law, seventy-five percent of my time as
Mayor. Obviously, as my tenure increased and a
myriad of activities went on in the City of Albany
many of which we initiated, I found that I was
spending sixty, seventy, eighty hours a week of being
Mayor, and it consumed all of my time.

Q Were you a senior partner in the law firm
of Cooper, Erving & Savage both before and after you
became Mayor?

A I was, along with other senior partners.

Q Did you play a management role in the firm
before you became Mayor?

A I did. And I played a management role
afterwards as well.
Q What sorts of matters did you continue to handle personally after you became Mayor?

A I did bankruptcy work, I was a trustee in the United States District Court for the Northern District of New York for Judge Mahoney as an official trustee. I did a limited amount of bank work and some trial work. My practice was a rather general practice. I don't think I tried to disassociate myself from any particular aspect of it, but my time became greatly diminished.

Q After you became Mayor, did you or your law firm take any steps or set up any system to wall yourself off from any matters which might present conflicts of interest with your official duties?

A Yes, we did. We had regular meetings of the law firm, usually once or twice a month. At those meetings we discussed the potential conflicts that might exist. There was also a card system relating to new files that were initiated by each attorney. And those would identify, although not in the first instance, they could identify potential conflicts of interest.

Q Around the time you became Mayor, did you participate in any discussion with other members of
the firm regarding the impact your public role would have on the firm's practice?

A Yes. As I stated in my private testimony, there had been a history of public service in our law firm. A prior county treasurer, a prior judge, prior county legislator. A variety of former partners in the law firm had held public office. And it was always felt that in return for that sharing by partners in the law firm, the reputation of the law firm would be enhanced.

Q Prior to 1982, Mayor Whalen, did the firm represent clients before city agencies and related entities such as authorities?

A Yes, it did. Excuse me. There was a period of time prior to that that we did not. I was on the bench for six years here in the city. And during that period we did not represent clients before the city or agencies. And also, one of the prior partners was also on the bench in city court, and we gave effect to the same prohibition. That would have been in the 1950s '60s and early '70s.

Q Did the firm change its practice after you became Common Council President with respect to the entities that it would appear before?
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A  Yes. We tried to set up general principles which were understood by the lawyers, both the partners and the associates, as to what and what would not be proper for the law firm to engage in.

Q  And could you articulate for me what those principles were?

A  Yes. In essence, that there was a general prohibition against appearing in any matter involving the city and any of its agencies, commissions, or authorities, but that those matters should be brought up at partner meetings as often as they could be brought up. And discussion would be had relative to any potential conflict.

Q  Did you include the IDA within your definition of an agency before which you could not appear?

A  Yes.

Q  And how about with respect to the Parking Authority; is that also true?

A  I don't think we segregated out any of the allied agencies or authorities of the city. But again, I think that if a case arose, it would have been considered on a case by case basis. And we would try to have a full and open discussion at one
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of the partners meetings to see if an actual conflict
would occur if the law firm decided to represent a
client.

Q  Mayor Whalen, could you explain what the
need was to have discussion about individual cases if
there was a blanket prohibition against appearances
before certain agencies?

A  I think that was consistent with our goal
to make sure that there was a complete awareness on
the part of all attorneys in the office.

Q  Prior to 1982 were all the legal fees paid
to members of the law firm pooled and shared by
members of the firm?

A  As far as I know, they were. And the same
thing occurred after 1/83 when I became Mayor.
However, I took a voluntary deduction from my share
of the net income. It was consistent in varying
degrees. As the Mayor's salary increased from 1983
to 1988 when I resigned from the active practice of
law, which was the salary offset against what would
have been my normal participation of the net income
in the law firm.

Q  And is it correct that you resigned from
your law firm?

Q Thank you. I would like to turn now to the matter of V. V. Conner, if I may. Mayor Whalen after you became Mayor, did you ever perform legal services for clients who wanted to buy city property?

A Yes, with reference to the Gordon Bell matter, I understand that Mr. Bell testified this morning. I tried to say in my opening statement that I should not have been involved in that transaction. I was.

Let me give you a little bit of the background. There had been a prior purchaser for fourteen thousand dollars. When that prior purchaser found out that there were in-ground oil tanks, he backed out. There was at that time that Gordon Bell -- oh, incidentally, the independent appraisal of that piece of property was nine thousand five hundred dollars. So the fourteen thousand dollars was considered a good purchase price. That prior purchaser backed out after the matter had been approved by the Common Council of the City of Albany and I executed the transfer of deed. Mr. Bell indicated an interest in it. I don't remember the
phone conversation that he and I had. I would imagine that he called me at the law firm. I did represent him and I shouldn't have. And as I said before, obviously, your schedule here shows a fee of four hundred ten dollars. My net share of that fee would have been under fifty dollars. I am sure I wasn't motivated by the dollar considerations. I think all I can say is that I didn't think of it. Things were moving quite rapidly at the time. I am sure it was for Gordon Bell's convenience and no other.

Q Mayor Whalen, forgive me if I am causing you to repeat yourself, but do you have any recollection concerning how you first learned that Mr. Bell was interested in purchasing this property?

A Well, I don't remember a telephone call. I would imagine that Gordon Bell would have been initiated it and called me at the law firm.

Q May I draw your attention to exhibit 48 in the book that is on the table in front of you.

A Yes.

Q And I would like to ask you if you have ever seen this letter before.

A Yes, just recently when it became an
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exhibit of the Commission.

Q And prior to that, you hadn't seen this letter before?

A I don't remember ever seeing this. It is not to say I couldn't have. It is a letter addressed to Paul Collins who at that time was the Executive Deputy Corporation Counsel in which Gordon Bell on behalf of his corporation V. F. Conner Company, Inc. indicates an interest in the piece of property which he ultimately purchased for $14,000.

Q Mayor Whalen, do you recall whether your representation of Mr. Bell with respect to this property was entered into the laugh firms card system that you previously described that was used in part to identify conflicts of interest?

A No. I have no recollection as to whether or not it was. If it had, it obviously got by me.

Q I would like to move, now --

A And got by other partners as well.

Q I would like to turn now, if we could, to the APA. Did you serve as the chairman of this Authority at any time?

A Yes, I did.

Q And do you recall the date of your service
in that position?

A Yes. If you will give me a chance here, I am sure that I can -- I was chairman of the Parking Authority as of August 15, 1983. I was a member of the Authority from January 3, 1983 until October 5, 1987. We had reactivated the APA because of a strategy that we considered would be beneficial to the economic development of downtown. Parking in the city has always been a dilemma, as we all know. And we felt that it was time for the city to show its initiative in economic development by providing new parking structures for the public. That is the reason why we activated the Parking Authority.

Q Did there come a time in 1986 when you voted in favor of awarding a contract to manage the facilities of the Parking Authority to the Maiden Lane Auto Park?

A Yes, there did. And at that time, James Drislane of the law firm represented Maiden Lane parking. Immediately after that vote, I walked out of my office with Mr. McArdle, the Corporation Counsel, and I said, "Vince, I shouldn't have voted on that selection. You have to go back and void that vote." Mr. McArdle did just that. And it was based
on that action that I took that there was the
resubmission to the Parking Authority by vendors of
an entirely new RFP. And Maiden Lane Auto Park on
the second time around was represented by another
attorney. And by that time I had withdrawn as
Chairman of the Parking Authority.

Q And, Mayor Whalen, what was the reason for
you determining that you should not have voted in
favor of this matter?

A Because this was a conflict. I immediately
recognized it, that I should not have been involved
in it. And as soon as I did recognize it -- It would
have been much preferable had I sat there and excused
myself from voting. It didn't dawn on me that
morning at 7:30. It dawned on me immediately
subsequent to the meeting being adjourned when Mr.
McArdle and I walked into my office.

Q I don't mean to belabor this, but what was
the conflict that this vote presented to you?

A That Jim Drislane was the attorney for
Maiden Lane Parking.

Q Did you inform anyone else other than
Vincent McArdle of your decision to rescind your vote
in favor of this contract?
A Mr. McArdle went ahead and informed the other members of the Authority and all those that had submitted the original RFP that there would be a second RFP that would come out from the city.

Q How do you know that Mr. McArdle informed the members of the Parking Authority regarding your decision?

A He told me.

Q Prior to your having cast this vote in favor of Maiden Lane, did you disclose at any time to the Parking Authority that Maiden Lane was a client of your law firm?

A No. And I saw no reason to, because at that point there was no engagement on the part of the city with Maiden Lane Auto Park with the Parking Authority.

Q I would like to ask you to look at Exhibit 53 in the book in front of you.

A Yes.

Q And I would like to ask you if you can identify what this document is.

A Well, it is a letter from Louis Gottlieb to Mr. McArdle dated November 17, 1986 relative to open surface parking facilities, park and lock facilities.
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in which he makes a proposal.

Q And if we could turn to the second to last page of this document which is denominated page 13, I would like to direct your attention to the second small indented paragraph from the bottom. And I would like to draw your attention to the name listed there as stated, Mr. James J. Drislane, Cooper, Erving & Savage, State Street and Broadway, Albany, New York 12207.

A Yes. That is put there by Mr. Gottlieb. It says: "Listed below are some of our lessors and banking facilities for references as to our financial ability and technical ability to operate parking facilities." He also gives Lew Swyer and a number of other people as references.

Q Mayor Whalen, do you recall if you reviewed this proposal prior to casting a vote on it at the Parking Authority?

A No. I have no recollection of ever seeing that document. That is not to say that I couldn't have. But you are asking me now did I see something that is three years old. No, I have no current recollection.

Q And if we could go back to the first page
of the document, can you tell me what the date is of this proposal?

A November 17, 1986.

Q Thank you, Mayor Whalen. Now, with respect to your resignation from the Parking Authority in 1987, could you tell me the reason why you resigned from the Authority when you did?

A Yes. I think that I resigned for three reasons. Again, my time was being completely consumed as being Mayor of the city. We also had started very early on in the city to try to bring in private sector people into the city’s agencies, authorities and commissions. I am proud of the fact that we have brought in so many people as part of that operation now. It is a continuation of what I tried to say in my opening statement; that there is a good mix of public/private initiatives now in this city. That was consistent with that strategy and that goal. The third reason was that I wanted to avoid the appearance of conflict.

Q And before you resigned from the Parking Authority in October '87, do you recall if you approved the second RFP for the management contract for the parking facilities of the Authority?
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Q Mayor Whalen, I would like to turn now to the Tricentennial Commission. Did you establish this Commission?

A Well, no. I didn't establish the Commission. The city did under my leadership. And we knew that the celebration of a Tricentennial was a unique event, and not only from the standpoint of instilling pride in the city, but also to give visibility to the City of Albany. I was fortunate enough again to bring on board some highly motivated energetic citizens of the city of Albany. The chairman of that Commission was Lewis A. Swyer. There were a number of vice-chairmen. We met on a regular basis. I would say we probably started two years prior to 1986 because we knew a great deal of planning would be entailed in developing a successful tricentennial year. Our law firm did the work for the Tricentennial. I initially asked Mr. Devine who was then with the law firm if he wanted to handle the incorporation of the Tricentennial. I told him it would be good exposure. He said, yes, that he did.
He went ahead and he represented the Tricentennial Commission in the very early stages. When he left the law firm, representation of the Tricentennial Commission was then done by another partner, Terrance Christenson. I understand that Terry Christenson stated publicly that he did a substantial amount of work which was pro bono and that the fees that he received for the work he did were substantially under the value. We set up an -- and I understand from chairman Feerick's opening statement that there is a concern on the part of the Commission about the closeness between the City of Albany and not-for-profit corporations. What we did was pattern our Tricentennial Commission after that which was established in the city of Rochester. I called Mayor Tom Ryan of Rochester because they had just celebrated their 150th anniversary, and I asked him now he did his event. And he said, "We formed a not-for-profit corporation, we got private sector people on board to raise money, and it was very successful. I will send you the information on it," which he did. And we patterned ourselves after this.

Q If I could direct your attention to Exhibit 47 in the book in front of you; I would like to, if I
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may, direct your attention to the second paragraph of the text of the letter which reads: "In support of Albany's Tricentennial activities, we --" referring to the law firm which has sent this letter -- "we would be pleased to provide our professional services gratis to help secure a New York State and/or federal trademark registration for the Tricentennial logo. I would like to ask this question. Before you chose Cooper, Erving & Savage to represent the Tricentennial Commission, did you take any steps to determine whether other law firms would provide those services on a completely pro bono basis?

A  No. I have never seen this letter before. I imagine the solicitation of business by this law firm was ethically proper. But I don't see why the Tricentennial Commission would want to switch from one law firm providing pro bono work to another law firm providing pro bono work.

Q  Mayor Whalen, is it correct that Cooper, Erving & Savage was paid a fee for its representation of the Tricentennial?

A  Yes, they did, that's correct. And, as I tried to say, the majority of the work was pro bono. And that was stated publicly by attorney Terrance
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1 Christenson.

2 Q Was the decision to select Cooper, Erving & Savage ever voted upon by the members of the Tricentennial Commission?

3 A No, it was not. There were seven or eight people on the Executive Committee of the Tricentennial Commission headed up by Mr. Swyer. I don't ever recall having a formal vote on any initiative of the Tricentennial Commission that I was present at, and I wasn't present at all of them. Most of the time it was a consensus after a discussion led by Mr. Swyer.

4 Q Do you know what the amount of the fees paid by the Tricentennial Commission to your law firm is?

5 A I recall somebody saying that -- let's see here. It says $1,593.08. If that is a figure that you documented, I can't argue with it.

6 Q Did you receive a share of these fees?

7 A I did, reduced by a proportionate amount for the Mayor's salary. I received a portion of the income of every fee that the law firm received until such time as I disengaged myself from the active practice of law.
Thank you, Mayor. I would like to turn now to the matter of 39 North Pearl Street. Did there come a time when your law firm Cooper, Erving & Savage decided to merge with the law firm of Nolan and Heller?

A Yes, there did.

Q And were you a member of the executive committee which was comprised of members of both law firms?

A Yes, I was a member of the executive committee. And the matter was being handled at that time by Michael Kornstein and Senator Howard Nolan who had gone out -- Once we came to an agreement that the law firms would merge, there were details.

MR. SCHWARZ: May I have the question back, please.

(The question was read by the reporter.)

MR. SCHWARZ: That question was --

THE WITNESS: Excuse me, Mr. Schwarz. I would like the opportunity to explain when I do answer, if that is permissible. I would hope that I would be given that opportunity.

MR. SCHWARZ: I would like to ask the
Chair if he would go along.

CHAIRMAN FEERICK: The Chair will certainly accept some latitude in responding to a question. On the other hand, I think it would be helpful in terms of the orderly progress of this hearing today if when questions are asked, try to focus your answers on the questions asked. And if at the end of your testimony you feel there is some additional comment that you want to make on any subject of your testimony, I will accept that. But I think it would be helpful to the commissioners if, as the questions are asked by staff counsel, if you can do the best you can in responding to those questions. And we will certainly give you every opportunity to provide any additional statement you want to make on the subject.

THE WITNESS: Could I respond to that, please? As you know, I have no right to present witnesses of my own. I have no right to present rebuttal testimony. I don't even have the right to question other people that have given depositions or sworn testimony here today. I think it would be awfully difficult for me at
the very end of this to try to resurrect those instances where I felt comment was necessary.
If we are here to get the entire story, then it seems to me that my explanations are important to the deliberations of this Commission.

CHAIRMAN FEERICK: Let me restate what has been our rule, which I am going to have to insist on today as well. We have had many public hearings and we have had officials from all over the state address our Commission. And we have pretty much tried to stay with the basic operating rules. I mentioned at the outset we generally request that a written statement be provided at least a day in advance so that we might have the benefit in our questioning of a witness who does present a written statement to ask questions that might be suggested to us as a result of our reading of the written statement. Now, we were denied that opportunity by virtue of the fact that we only received your statement less than an hour before your testimony today, although we did receive an outline of the seven points that I think you indicated that you would present in your written statement. I don't know
if we have to sort of deal with that subject at this point. And your attorneys have the right, certainly, to propose questions to the Commissioners to ask of you. And I would be happy to receive any questions that they have that we should consider putting to you in the interest of completeness and fairness. But it is not going to be helpful to us if our questions, as put by the staff, are not responded to. On the other hand, I think you can appreciate as a member of the bar that we are entitled to our response to the questions that are put. I recognize that you don't have a right to cross-examine, but we are doing the best that we can in giving you fairness and giving our witnesses fairness. And, at the end of the hearing, if there is anything additional that you want to present to us, we would be more than happy to receive it. If you have any suggestions of additional witnesses we should examine, we would be happy to receive your suggestions. If you have any suggestions of additional documents that we should examine to ensure fairness, we would be happy to examine
those documents. We have every interest in
according you every protection to ensure
fairness. At the same time, we have an
obligation to conduct this hearing in a way that
is orderly and there is the framework of
questions, the witnesses responding to
questions. And if you had the ability, or any
witness had the ability to go beyond the
question in a rather lengthy sort of way, I
think it would be inconsistent with what we are
hoping to accomplish today.

THE WITNESS: Mr. Chairman, just by
way of explanation, I came back from Charleston
last Wednesday. That was the first instance
that I knew you wanted in advance a written
statement. I provided the Commission staff with
an outline of that on Friday. Obviously, I
didn't have the time. The sheer magnitude of
what has transpired over the eighteen-month
period that you have been investigating the City
of Albany meant that I wanted to be extremely
deliberate in my opening statement. I have no
intention of trying to obfuscate the issues. I
have answered, and I intend to answer as fully
as I can. Again, I think that I am entitled to give an explanation, and I would ask you to provide me and accord me that right.

CHAIRMAN FEERICK: If, as we go, you feel there is something more that you want to add to the question, for example the last question that Mr. Schwarz asked the reporter to read was a very simple question, simply whether you are a member of the executive committee of the firm, as I understood the question. I am not sure that a yes or no answer is not complete under those circumstances. There may be some follow-up questions that on your part require some additional elaboration. And if you indicate that to me, because it is not confined simply to the question, I can assure you that the Chair will provide you latitude in responding.

THE WITNESS: Thank you.

Q Mayor Whalen, I believe that you had stated that there was a real estate committee formed to locate new office space for the merged law firms; is that correct?

A That's correct.

Beth S. Goldman, CSR, RPR
(518) 439-6772
(WHALEN, T. - FOR THE COMMISSION)

Q And when did this committee commence its activities?
A In April of 1986.

Q And were you regularly informed of the activities of this committee?
A I was informed of the activities on a regular basis. I would say that Senator Nolan and Mr. Kornstein reported whenever we had meetings.

Q Can you tell me when you first knew that your law firm was considering leasing office space at 39 North Pearl Street?
A Yes. On July 28, 1986 in Executive Committee meeting at which Senator Nolan gave a report.

Q I would like to refer you to Exhibit 26 in the exhibit book. Can you identify this document, Mayor Whalen?
A It is a memorandum to partners of the law firm from Mark Heller re Executive Committee meetings on July 28, 1986, dated July 29, 1986.

Q Mayor Whalen, were you present for the meeting that is reflected in this memorandum?
A The memorandum indicates that I was present.
(WHALEN, T. - FOR THE COMMISSION)

Q And is it your testimony that at this meeting on July 28th was the first time that you knew that the law firms were engaged in discussions with the developers of the 39 North Pearl Street project regarding leasing office space in that building?

A Yes. I believe that there was a general discussion of space in downtown Albany, and this was one of the locations.

Q Had you heard any previous discussion of this space?

A Not to my knowledge.

Q I would like to ask you to turn to Exhibit 46 in the book, please. I would like to direct your attention to the third paragraph of the first page that begins, "Whereas --" to the middle of that paragraph, and ask you if you see where it describes that this document relates to the acquisition of one half acre parcel of land located at 37-41 North Pearl Street in the City of Albany, New York; do you see that?

A Excuse me; what page?

Q The first page of the document, third paragraph starting with, "Whereas --" in the middle of that paragraph.
(WHALEN, T. - FOR THE COMMISSION)

1. A Yes.
2. Q Is that land identified there; is that the land that became known subsequently as 39 North Pearl Street?
3. A Yes. It is identified here as 37-41. And I believe that is the property upon which 39 North Pearl Street was purchased.
4. Q If you could turn to the last page of the document, please, denominated page 3. Is that your signature that appears at the bottom of the page?
5. A It is.
6. Q And could you tell me the date on which you executed this document?
8. Q And can you tell me what this document is?
9. A Approving the issuance by the City of Albany IDA of four million dollars aggregate principal amount industrial development revenue bond to acquire and construct and install an industrial development facility in the City of Albany.
10. Q On the date that you executed this Mayoral approval, that being June 26, 1986 did you know that your law firm was considering leasing space and investing in this project?
( WHALEN, T. - FOR THE COMMISSION)

A. No. The first indication that we had, as I had previously testified, was on July 28, 1986 which is the date of that executive committee meeting of the law firm at which Howard Nolan reported.

Q. If I may direct your attention to Exhibit 27, Mayor Whalen, do you see -- do you recognize this document?

A. I can tell you what it is. I don't know that I have ever seen it before.

Q. Please tell me.

A. Well, it purports to be a letter from Mark J. Simmons, the President of Vulcan Development and Management Corporation to Senator Howard C. Nolan Jr., who at that time was a partner in the law firm of Nolan & Heller. And it is addressed to him at Fifty Chapel Street, Albany, New York.

Q. Is it correct that at this time Senator Nolan was a member of the executive committee of which you were also a member comprised of the partners in both law firms?

A. In April of 1986 -- I don't even know that we had had an executive committee formed at that time.

Q. Is it your testimony that there was a real
estate committee formed at that time?

A Yes. I would say in answer to the question that Howard Nolan was off checking a number of locations in downtown Albany for the location of the law firm which would merge in January of 1987.

Q And did Senator Nolan share with you at any time the information contained in this letter?

A I have no recollection of him discussing that with me, no.

Q If I could direct your attention to the first sentence of the third paragraph which reads, "Besides office leases, we offer the unique option of limited party equity ownership to tenants. This will entitle you to below market rental sites and capital appreciation." Do you see that statement, Mayor Whalen?

A I do see that statement.

Q Can you tell me when you were first provided with the opportunity to invest in this project?

A Again, my recollection is at that executive committee meeting on July 29, 1986 was the first time that was brought to my attention.

THE WITNESS: Mr. Chairman, may I?

Beth S. Goldman, CSR, RPR
(518) 439-6772
CHAIRMAN FEERICK: Yes.

A And again, I tried to allude to this in my opening statement. When I found out from Charles Newland at a meeting of the Local Development Corporation at a breakfast meeting of the membership, he turned to me and he said that there is a federal regulation that prohibits any indicia of ownership when any municipal UDAG grant is set forth. And that UDAG covered the entire Maiden Lane Triangle. He told me that, and I obviously took it very seriously because I went right back up to my office and wrote a letter and withdrew any interest in that limited partnership. And I brought it right down to 39 North Pearl Street to Mark Heller who, at that time, was the managing partner. By way of explanation, I am trying to say that I saw that as a prohibition, and immediately dealt with it when it was brought to my attention.

Q Mayor Whalen, if I might direct your attention to Exhibit 44 in the exhibit book. I would like to ask if you can identify this document for me.

A It says -- I am trying to -- "Part IV" at the top, "Assurances." Underneath that it is a four-page single spaced document with fifteen
paragraphs which I signed on November 28, 1984 as
Mayor of Albany.

Q Mayor Whalen, this document, for the
record, was provided to us by the City of Albany
appended to the Maiden Lane Triangle UDAG
application. And the assurances are assurances that
are carried with that UDAG application. If I may
direct your attention to paragraph ten, which appears
on the last page of this document. And I would like
to read it for the record. Paragraph ten states: "It
will establish safeguards to prohibit employees from
using positions for a purpose that is or gives the
appearance of being motivated by a desire for private
gain for themselves or others, particularly those
with whom they have family, business, or other ties."
And I would like to ask you what safeguards did you
establish as the Mayor of Albany to carry out the
purpose of this paragraph?

A Well, I think that probably the city code
of ethics would have been distributed which was
consistent with paragraph ten. I don't recall any
other specific directions that were taken by the city
in that regard. But I think it was generally
understood that all of us would make every effort, a
complete effort to avoid any such instances where it appeared that there might be favoritism to family, business, or other ties as is set forth in paragraph ten.

Q If I may direct your attention to Exhibit 43, can you identify this document for me, Mayor Whalen?

A Yes. This is a document dated June 6, 1986 directed to a Mr. Donald Dodge, Deputy Assistant Secretary for Program Management. It says it is the certification by chief officer of the City of Albany, and would have been prepared for my signature by David Riker, who was then the Director of the Urban Renewal Agency.

Q Does this certification provide that the city has complied with all of the requirement of the UDAG application and all of the provisions contained in the agreement?

A Yes, it does. Mr. Chairman?

CHAIRMAN FEERICK: Yes.

A That document doesn't register with me, Counsellor. And I would say that it probably is a document that is included in dozens of submissions that are made to the federal government. And I would
having said that, I would think that the person that prepared it for my signature, David Riker, could be able to expound much better than I as to what requirements and what steps the city had taken to be in full compliance.

Q Is it fair to say that without your certification here, that the UDAG funds for the 39 North Pearl Street project would not have been given to the city?

A I don't think I could answer that question.

Q At the time you executed the certificate on June 6, 1986 did you know that your law firm was considering leasing space and investing in this project?

A No. I think I testified previously that it was on July 28, 1986. Mr. Chairman?

CHAIRMAN FEERRICK: Yes.

A There was no grand design on my part or on the part of any of my partners to create any type of secret interest in a building in downtown.

Q Did you subsequently join in an investment partnership and personally invest in this project?

A I did not -- yes. I did not invest any personal funds. The funds that were used to purchase
the equity interest in 39 North Pearl Street were all funds that were borrowed.

Q When did you decide to make this investment?
A In October of 1986.

Q How much did you invest in this project?
A There were eight shares at fifty thousand dollars a share for a total of four hundred thousand dollars. My share would have been a proportion which was directly related to my percentage of participation in the net income of the law firm. I have since been told by Mr. Heller that the actual interest would have been less than one percent.

Q And what was your percentage participation in the law firm at that time?
A I don't remember.

Q Did you at any time disclose to any city agency or other entity that provided funds for this project that you had made this investment?
A Did I disclose to any agency of the city?
Q Yes.
A (Pause) Mr. Mumford has asked me to back up for a minute.

CHAIRMAN FEERICK: We will let you
back up.

THE WITNESS: Thank you, Mr. Chairman.

A And Mr. Mumford informs me that my percentage of participation in the law firm wasn't the same as my percentage of participation in the limited partnership. That may be indicative of how much attention I was paying to the law firm and to the limited partnership.

BY MR. SCHWARZ:

Q Just to clarify something, you said one percent. Did you mean one percent of the overall equity?

A In the building, yes. Excuse me; did I disclose to any agency -- The purchase of the interest in Vulcan took place on December 26, 1986, I withdrew my interest, as I stated previously, at the LDC breakfast on January 13, 1987, which would have been within three weeks. During that period of time I don't remember making any disclosure to any city official or member of any agency.

Q Thank you, Mayor Whalen. I would like to turn now to the question of the tax assessment of certain properties that were purchased by First American Bank in the City of Albany. As Mayor, do
you appoint the city tax assessor?

A  I do.

Q  And did there come a time in 1985 when you
approached the city assessor regarding a number of
commercial properties that First American Bank had
purchased in the City of Albany?

A  Yes. I wrote a memo to the then city
assessor Bruce McDonald.

Q  What prompted this approach?

A  I had been made aware by someone in the
bank or by a member of the firm that Banker's Trust
company was about to be acquired by First American
Bank. And my recollection is that there was a
purchase of assets of one institution by the other.
This came up at a partner's meeting in Cooper, Erving
& Savage. There was a discussion on this, and I
said, "Let me look into it." I went up to my office
in City Hall. I wrote a memo to the then city
assessor, Bruce McDonald, and asked him to please let
me have his advice with respect to this inquiry which
was similar to inquiries that I still receive on a
regular basis from property owners in the city, and I
give them the same response. And Mr. McDonald wrote
back to me, and he used the phrase, "The assessments
are in the ball park." And my response to him was,
"Let the assessments stay where they are until such
time as we have a general review of banking
assessment in downtown, which was part of an overall
process that we had undertaken when I became Mayor
which still exists today.

Q  Mayor Whalen, was First American Bank a
client of your law firm at the time this matter
arose?

A  Yes, it was.

Q  And at this time, was your lawyer firm a
tenant in one of the properties that was listed in
the memo concerning the reassessment?

A  We occupied space at 35 State Street in the
city. I hesitate to agree with your categorization
that we were a tenant, although in a loose sense we
probably were. I am not aware that we ever had a
written lease, and that goes back many, many years to
the point when the senior partner in the law firm was
also President of the bank.

Q  Mayor Whalen, during the period of the
memos that you just described that went between
yourself and the assessor Bruce McDonald, did you at
any time disclose to the assessor that First American
Bank was a client of your law firm?

A No. I did not, Mr. Chairman, because I think this shows a dilemma that many of us have. And I mentioned this in my private sworn testimony. I would be a little fearful of getting into an area where I walked into a room and announced to people that so-and-so is a client of our firm, period. I think it could send out the entirely wrong message to another official that somehow or other I was letting them quietly know who the law firm's clients were. And I quite frankly don't know the right way that that should be handled. But I think it shows a dilemma. At that time, I said nothing to Mr. McDonald. I considered it to be another function that I had as Mayor. I am still stopped on the street by people that talk about their assessment. And my answer to them is the same as it was when this one was asked. "Let me look into it, and I will get back to you."

Q I would like to turn now to the matter of the concession at the Tap Room restaurant located on the Albany Municipal Golf Course. In 1983 did you meet with Phillip Curley to discuss this concession?

A Yes, I did.
Q And where did this meeting occur?
A The meeting occurred in my office in City Hall.

Q At this meeting did you discuss the amount of rent that Mr. Curley would pay for this concession?
A There may have been reference made to what the rent would be. My recollection is that the terms of the occupancy by Mr. Curley had already been established between Mr. Curley and the then Commissioner of Public Works, Mr. Maikels under whose supervision the restaurant at the golf course was.

Q Mayor Whalen, during that meeting did you decide the amount of rent to be five hundred dollars a month?
A No. It had been previously decided.

Q By whom had it previously been decided?
A Between Commissioner Maikels and Phillip Curley.

Q At the conclusion of your meeting with Mr. Curley did you direct him to go to corporation counsel's office so that the necessary legal documents could be prepared?
A I did.
Q Did you also refer Mr. Curley to your law partner Michael Kornstein for purposes of providing legal representation to him?
A Yes. Might I, Mr. Chairman?
CHAIRMAN FEERICK: Yes.
A Mr. Curley in the course of the conversation indicated that he was not from Albany. He also indicated that he needed to obtain a liquor license and did I know of a lawyer. I gave him my law firm card, I wrote Mr. Kornstein's name on the back of it, I believe, and I gave it to Mr. Curley. And I said, "Mike Kornstein of our law firm does SLA work. If you want to see him, you can." To the best of my knowledge he went and saw Mike Kornstein who did the lawyer work for him with respect to the SLA application. Incidental to that work and ancillary to it was some contact that Mr. Kornstein had to have with Paul Collins who was then Executive Deputy Corporation Counsel of the city. In order for the license agreement to be in proper form for the SLA, there was never any indicia of -- indication that we were to represent -- by "we," I mean the law firm of Cooper, Erving & Savage -- represent Mr. Curley in any of his negotiations with the city. Obviously,
given the notoriety that this particular transaction has received, I would never do that again.

Q Mayor Whalen, if I may ask you a final question with respect to this matter, that being while the matter was pending in the corporation counsel's office, did you at any time disclose to that office that a member of your law firm was representing Mr. Curley?

A Did I disclose to the Corporation Counsel's office?

Q Yes.

A No. I think Mr. Kornstein indicated to Mr. Collins that my name is on the letterhead of the law firm.

Q Mayor Whalen, I would like to turn now to something you addressed in your opening statement; that being the First Realty of Albany project. Did your law firm serve as counsel to the company, First Realty of Albany for purposes of obtaining a bond issue from the Albany industrial development agency?

A No. Our firm did not. My recollection is that the firm of Krolick and DeGraff represented First Realty with respect to the bond issue.

Q Isn't it correct that Krolick & DeGraff
served as the counsel for the bond issue?

A  But Mr. Drislane served as counsel to the company in connection with this bond issue. Krolick and DeGraff represented the Swyer interests, I believe, in every single IDA transaction as bond counsel. If I might, Mr. Chairman -- and I am not trying to cloud the issue here. But in IDA transactions, the fact that somebody is listed as counsel, I don't think is of any import. The work, all of the work is done by bond counsel. There may be an opinion letter that is put in those documents by the general counsel to the firm. And in my experience, even that letter, although signed by counsel to the firm, is prepared by bond counsel. And the fact that Mr. Drislane might have been identified at some point as being the attorney for the Swyers doesn't mean that he played some role in the transaction. In addition to that, and in particular in this case which is a piece of property up on Central Avenue, Mr. Drislane represented the Swyers with respect to the acquisition of the property and other indicia of representation that related to the real property, not necessarily to the industrial revenue bond financing.
Q  Mayor Whalen, if Mr. Drislane had not acted as counsel in this matter, then what was the necessity for disclosure that you made in the bond closing documents concerning your relationship to both the law firm and the IDA?

A  So that there would be no question but that his representation and my position was noted for the record.

Q  Did your law firm receive a fee in connection with Mr. Drislanes' actions on this matter?

A  Well on this matter, I really don't have information within which to give you an accurate answer. I am sure he received a fee probably for the real property transaction that was related to the transaction involving that Central Avenue property and its rehabilitation.

Q  Mayor Whalen, did you disclose the relationship between your law firm and First Realty of Albany Company to anyone else, other than the disclosure that was made in the bond closing documents?

A  Yes, I did.

Q  And to whom did you make that disclosure?
A  I disclosed it to Mr. McArdle, the Corporation Counsel of the city. At that time, Mayor Corning was ill in the hospital in Boston. And Mr. McArdle in a letter to Mayor Corning indicated that we had to expand the number of people on the IDA. And he specifically alluded to the fact that there may be instances where some of Tom's clients are involved in IDA closings and he may have to absent himself. It was based on that letter from Vincent McArdle that went to the Mayor who at that time was a member of the IDA, that the membership was expanded from three to five. So, yes, there was a disclosure.

Q  I would like to direct your attention to Exhibit 39, and further direct your attention to the second page, second full paragraph on the page headed IDA members. The question is: is this the letter that Mr. McArdle sent to Mayor Corning after you made this disclosure to him?

A  Yes, it is.

Q  Is this letter a matter of public record, Mr. Whalen?

A  Excuse me, public record? It is part -- it is a letter that is subject to the Freedom of Information disclosure, which I would assume makes it
a public document.

Q And is it correct that you just testified that after this letter was written to Mayor Corning that the membership of the IDA was increased from three members to five members?

A That's correct.

Q And could you explain to me why you cast a vote in favor of this bond issue the week before rather than waiting for another week until the membership was expanded and thereby excluding the necessity of your voting on this matter?

A Well, we are into the fall of 1982 when I was President of the Common Council. At that particular time, I am going to say there were seven or eight different IDA closings pending. And this is a very hectic period of time where everybody wants to close before the end of the year for tax purposes. We wanted to get through these as fast as we could as an accommodation to the people that were involved in rebuilding Albany. And I am sure that is the reason I went ahead without waiting until Christmas week for other members to come on board.

Q I would like to direct your attention now to the project known at 80 State Street Partners.
Are you familiar with this project?

A Well, am I familiar with it. It is a new office building in downtown Albany constructed in 1984.

Q Did this project receive -- was it the recipient of an Albany IDA bond issue while you were chairman of the agency?

A Yes, it was.

Q And did a member of your law firm represent the company in connection with the bond issue?

A No. It was represented by Krolick and DeGraff who were bond counsel to the IDA and to the Swyers. The Swyers are the same Swyers that were involved in First Realty which we just discussed, 80 State Street and the 80 State Street Garage.

Q Mayor Whalen, I would like to ask you if you recall your private testimony to the Commission given on May 23, 1989.

CHAIRMAN FEERRICK: Can you refer to a page?

MS. GREENE: I intend to.

Q Do you have a copy of your transcript? I would like to direct your attention to page 83 of the transcript and ask you if you recall being asked the
following question and giving the following answer.

Question: "At the time that you did that --" which refers to the closing -- "execute the closing memorandum of the bond issue, did you know that James Drislane represented the company was serving as counsel to the company for purposes of this bond issue?" Answer: "I did. And I also knew that by executing that document was a ministerial act, and I was mandated to do so. And had I not signed those documents, a new twenty million dollar -- twenty-two million dollar building in downtown Albany would not have been built." Do you recall giving that testimony?

A Yes.

THE WITNESS: May I. Mr. Chairman?

CHAIRMAN FEERICK: Yes.

A I am not so sure that I am not saying the same thing now, that Mr. Drislane was the counsel to the company, but bond counsel was Krolick and DeGraff. And again, they are the ones to play the role in the issuance of a bond for an IDA closing.

Q Did your firm receive a fee for Mr. Drislane's role in connection with this bond issue?

A Did the firm receive a fee?
Q Yes.

THE WITNESS: Mr. Chairman?

CHAIRMAN FEERICK: If you don't know, that is certainly perfectly acceptable.

A I don't. I am assuming Mr. Drislane received a fee, but the fee with respect to the acquisition of the real property, not with respect to the IDA loan. And I might also say that, again, the record shows full disclosure in Tab 9 of the closing documents of Mr. Drislane being counsel to the company and my position as President of the Common Council and as a member of the IDA.

CHAIRMAN FEERICK: Next question.

Q Mayor Whalen, I would like to move now to the question of the Crisafulli Brothers Warehouse project. Do you recall whether this project received a bond issue from the Albany Industrial Development Agency?

A I have been told that it did, yes.

Q I would like to direct your attention to exhibit 38. Exhibit 38 is a copy of the inducement resolution for a bond issue on behalf of Crisafulli Brothers Warehouse project --

A Yes.
Q -- dated September 10, 1982. Mayor Whalen did you cast a vote in favor of the inducement resolution for this project?

A Exhibit 38 indicates on the last page that Mayor Corning was absent, and that both myself and David Riker voted in the affirmative.

Q Did your law firm represent Bankers Trust, the purchaser of this bond issue from the IDA?

A The law firm represented the lender which I tried to say in my opening statement, it did, who had been the bank for the Crisafulli Brothers for the past forty to fifty years.

MS. GREENE: Thank you, Mayor Whalen.

I have no further questions, Mr. Chairman

MR. MUMFORD: You had suggested at some time if we had some exhibits, you wanted us to make an offer. I have two in particular now. I just didn't know when you wanted me to offer them. I think it might be helpful during the Commission's questioning.

CHAIRMAN FEERICK: In other words, you have two additional documents you would like us to examine?

MR. MUMFORD: I do. I think they are
extremely pertinent to this matter, and for some
reason they have not been.

CHAIRMAN FEERICK: I would ask that
they be marked, and we will receive them. Just
identify each one that is presented to us.

MR. MUMFORD: If I may, yes. The
first is what Mayor Whalen has referred to as
Tab 9. It is one of the closing documents in
the closing of the First Realty project. And at
page 48 of Tab 9 under the caption of "related
parties and transactions," I quote: "Thomas M.
Whalen, III, Vice-Chairman of the issuer is a
senior member of the law firm of Cooper, Erving
& Savage, counsel to the company."

The next is a document with respect
to--

CHAIRMAN FEERICK: I take it that the
first document was sought by Commission subpoena
which is part of the litigation; is that
correct, that document that you just made
reference to?

MR. MUMFORD: This is a photocopy of a
document that was turned over to this Commission
approximately sixteen months ago.
CHAIRMAN FEERICK: Okay, thank you.

MR. MUMFORD: It is Tab 9. At Mayor Whalen's private deposition, Tab 8 was shown to him as an exhibit, but Tab 9 wasn't presented to him. And today, Tab 9 has not been presented here. And I am just offering it up.

CHAIRMAN FEERICK: I am going to ask our special counsel to put a question to you.

MR. SCHWARZ: Is that one of the documents that was then returned to the city when documents were returned and then was resought as part of the recent subpoena?

MR. MUMFORD: I don't have those papers here. I wouldn't be surprised.

MR. SCHWARZ: In other words, you gave it to us and we gave it back to you and we had to go to court to get it back?

MR. McARDLE: You didn't think it was important.

MR. SCHWARZ: We asked you for it recently; did we?

MR. MUMFORD: We received information that you obtained it somewhere else. You withdrew the application because you said you
found it somewhere else.

    MR. SCHWARZ: Isn't that one of the
documents that is part of the subpoena?

    MR. McARDLE: It possibly is. But you
also indicated that you didn't need it for this
proceeding. We need it.

    CHAIRMAN FEERICK: In any event, we
will accept that document for whatever it shows
and whatever relevance it might have to this
hearing. What is the next item?

    MR. MUMFORD: The next item is one
that you clearly do have because it was before
the Commission just on Friday at a deposition
which is the Crisafulli closing matter. And at
page 38 of that at Section 7.14 under the
caption "Interrelationship of certain persons,"
the parties to this bond purchase agreement have
all been advised and are aware that Thomas M.
Whalen, III is vice-chairman of the issuer and a
partner in the law firm of Cooper, Erving &
Savage, counsel to the holder."

    CHAIRMAN FEERICK: Let's see the
document.

    MR. MUMFORD: (offering)
CHAIRMAN FERRICK: Thank you very much. We are at the point where the Commissioners would put questions to Mayor Whalen. We have been going for about an hour and a half. If you would wish a short recess, I would grant it. If not, we will just go on with the questions.

THE WITNESS: Let's continue, yes.

COMMISSIONER MAGAVEREN: Mayor Whalen, I want to preface my questions by indicating to you the spirit of them and the task that we are facing. Our problem is to determine whether the existing laws dealing with conflicts of interest and ethical standards for public officials are sufficient to avoid pressure on private parties by public officials, to avoid private influence on government of an ulterior kind, to protect public confidence in government. And it is a point you recognize, to encourage good people to serve in government, not putting unnecessary barriers in their way, and providing them with clear guidance. And one of my particular concerns is the last point, whether clear guidance is, in fact, provided by existing law.
You have lived through a series of problems. You pointed out in your opening statement that there can be difficult problems. You have found yourself in dilemmas at various times. And, so, although it is not a role necessarily to be relished, you are an ideal person to testify as to the reality of trying to serve as a public official, also maintaining a base in the private sector under present law. And therefore, I am going to have to ask you at times to look to the law, to give me your reaction to it. It is not in the spirit of trying to be argumentative with you or be personally critical of you, but rather draw out the problems we have under existing law.

EXAMINATION BY COMMISSIONER MAGAVERN:

Q Let me turn just first to a couple of minor housekeeping points. You testified, I think, that the land value in the Conner transaction was valued by the city at $9,000. I wonder if you would look at Exhibit 20 and see if that doesn't indicate a different value. And perhaps you can explain what the difference is.

A I think I testified, Mr. Magavern, that the
appraised value as given by an independent appraiser was nine thousand five hundred dollars.

Q Can you look at Exhibit 20, Mayor Whalen.

A Those are assessment figures; they are not actual market value figures. Those are assessment figures.

Q Okay. What is your equalization rate?

A Oh, boy. The difference between commercial and residential --

MR. McARDLE: Can I clarify this, just a point of clarification?

MR. MAGAVER: Yes.

(Attorney/client conference)

THE WITNESS: These figures relate to a property which is tax exempt, and they go back to the time when it was taxable when Mobil Oil owned the property and it was a going gas station. And the figures when Mobil transferred it to the city would have never changed, and this was back in the '70s. And they don't reflect anything to do with the real value of the property once it becomes tax exempt.

Q This was taken from the tax bill?

A It was a calculation based on the
(WHALEN, T. - EXAM. BY COMMISSIONERS)

equalization rate. It was exempt.

Q And the equalization rate would have been a fraction of market value?

A That is one of the problems. We had had many properties downtown. It would have been no relation to its real value. That, we corrected within the last seven or eight years.

Q I must question -- it is confusing to me. Mayor Whalen, when you became Mayor, I think you said you started devoting about seventy-five percent of your time to city business and only twenty-five percent to the law firm.

A Yes.

Q And at that time how much did you cut back your income from the law firm?

A It varied.

Q There has been testimony -- it might have been by Mr. Kornstein or Mr. Devine, I am not sure -- that it was two thousand dollars a month. Does that sound right?

A The Mayor's salary since 1983 obviously went up through 1988. I am going to say that it varied anywhere from twenty thousand dollars to forty thousand dollars. As the salary of Mayor increased,
I proportionately reduced my percentage -- The percentage stayed the same, but there was an offset from my actual draw.

Q Your contributions to the law firm were reduced by far more than your salary reduction or your income reduction to the firm?

A Well, I don't know that that would actually be the case, because I am sure that there were matters that I had worked on that for the next few years still generated substantial income for the firm.

Q When you joined the firm -- I'm sorry when you first became Council President, did you then at that time review the problem of conflicts of interest that might occur in representation of clients by your firm before or in respect to any city agency?

A Yes.

Q Did you come -- let me refer to page twenty-five of your deposition, if you will, in your private testimony, line 13. Now your testimony there is, "When I became president of the Common Council, we automatically disassociated ourselves from representing any individuals before city government or city agencies." Before you disassociated
(WHALEN, T. - EXAM. BY COMMISSIONERS)

yourself, can you explain a bit what that policy was beyond the deposition?

A We used to have partners meetings once or twice a month. And although housekeeping matters were generally on the agenda, there would also be discussions to the effect that if I represent John Jones generally, do I have to get another lawyer to represent him before the board of Zoning Appeals, or if this is part of a transaction, do I have to go out and get special counsel insofar as the city is concerned. You are asking me to go back seven years, and I can only try to recollect what would be the general parameters.

Q Was this document adopted as a general principle by your firm that you say you disassociated yourself at that time from representing yourself before any city government or agency?

A Yes.

Q Did that mean representing private clients before city government or agencies in respect to litigation?

A Yes, it would.

Q Did it also include, in addition to litigation, did it include negotiated transactions,
business transactions, and the like?

A I don't think we got that definitive.

Q You left that hanging?

A Well, I don't know whether it is fair to say we left it hanging. I am not so sure that we sat there and really brainstormed, perhaps not as thoroughly as we should have about what is and what is not legal representation. But if it was a general business transaction, it may very well have fallen outside the parameters of legal representation.

Q Do you believe that the same policy should apply to representation of a client in, say, a development project before some city agency?

A I would be very wary of setting that forth with a broad brush. I think that would be awfully difficult. I think that type of an instance has to be taken on a case by case basis.

Q Let's take 80 State Street as a case, then. That was a transaction in which a developer borrowed money through a bond issue by the Albany IDA in 1983; correct?

A Yes.

Q And your firm represented the borrower, you said, at least in respect to the real property aspect
of that transaction?

A  The developer, the borrower of the bond.

Q  The borrower is -- let me see if we can get
this straight. The form of the loan is strictly a
financing loan; is that right?

A  Say that again.

Q  The developer is ultimately borrowing money
from a bank through the IDA -- from a bank through
the IDA; correct?

A  Yes. Did I just -- I am probably going to
say something that you already know. Industrial
revenue bonds are not obligations of the city.

Q  I quite understand that. And the only
involvement of the city or the Industrial Development
Agency in these obligations is to be a vehicle for
economic development, and so that they take on the
aegis of being tax exempt for state and federal
income tax purposes. They also have discretion
whether or not to issue a bond for a particular
project; correct?

A  No one can mandamus them to issue a bond.

That's correct. But by the same token, in the six
years I have been Mayor and since I have been
president of the Common Council, we have never turned
down any developer that has received an inducement resolution, which means they found a bank to buy their bond.

Q The inducement resolution is a resolution of the agency?
A Correct.

Q And when the agency does determine to finance a project through issuance of a bond, that carries with it local property tax exemptions, too; does it not?
A But there is a pilot agreement attached to it.

Q And?
A So there are taxes.

Q Okay. Let's find out what are the terms of the pilot agreement. Are they to pay taxes on the full value of the development project or just on the value prior to development?
A No. It ultimately goes to the full value.

Q Over how much time?
A Well, in the City of Albany over a period of five years. But that is not through the IDA bond. That is through the incentive board under, again, a program that we have set up to initiate the
(WHALEN, T. - EXAM. BY COMMISSIONERS)

development opportunities in the city where we provide developers of commercial properties with an incentive. And again, anybody that qualifies for it gets it.

Q Your testimony, as I understand it, is that IDA financing does not bring with it a tax exemption other than what the developer would get without -- and I am talking about property tax exemption -- other than what the developer would get with a conventional loan. There is an agreed upon payment in lieu of taxes by the developer to the city for such period of time that the property remains tax exempt to pay at the full value of the property as improved; is that your testimony?

A That's correct.

Q Okay. Now, in the case of 80 State Street, Inc., did you absent yourself from the vote in that case?

A Yes. Can I give you the chronology that relates to 80 State Street? Obviously, in September of 1980 at the time of the inducement resolution, I had no official office so I did not participate. Mr. Drislane joined the law firm in September 1981. On September 21, 1983, I was absent at the time of the
modified inducement resolution, and there was no participation on my part. In December, three years later, December 14th, I was absent at the public hearing and there was no participation. On December 20, 1983, as Chairman, I was absent for the bond resolution. There was no participation. On December 23, 1983, I signed the documents at the closing. There was full disclosure at that particular time.

It was a ministerial act mandated by the IDA.

Q There is a point that we take a look at the laws, Section 803 of the General Municipal Law. If you don't have it, I will ask someone to provide it to you.

A (Pause) Yes.

Q Okay. Can you tell me to whom disclosure is to be made under that section?

A In the second paragraph it says, "Such written disclosure shall be made part of and set forth in the official record of the proceeding of such body."

Q Paragraph one, who is the disclosure to be made to?

A The governing body -- "The agency shall publicly disclose the nature and extent of such
interest in writing to the governing body thereof."

Q Who is that? The governing body of the agency, I take it, is the members of the agency; is it not?

A I would think so.

Q Did you make disclosure to the members of the agency?

A Yes. I believe that this is the one where I informed Mr. McArdle, and he informed Mayor Corning.

Q At 80 State Street?

A Mr. McArdle, that was First Realty. Okay, that was another closing which was First Realty, which -- and the General Municipal Law also says that if there is disclosure in one transaction involving the same parties, there is disclosure to all within a one-year period.

Q In the case of 80 State Street who was the party?

A It was the Swyers.

Q In reality, who was the legal entity? It wasn't just the Swyers; there was a legal entity, right, that was the borrower?

A No. I think all of us looked at the
development of 80 State Street and First Realty as being developments of Lewis Swyer, number one, and his son Edward Swyer, number two.

Q Was there an entity in the 80 State Street project known as a partnership, 80 State Street Partnership, something like that?

A I think it goes also to partners one, two, three and four in the course of these transactions. And I think you will always see that in 80 State Street, the inducement resolution was to First Realty, which shows the interconnection of the Swyers with respect to all of their developments.

Q Let me see if I can get briefly to the point. Reflecting on it now, do you think that the disclosure in -- what document is that, Tab 9?

A Tab 9, that is First Realty.

Q Would you call it a --

A The issuing statement, I believe.

Q The issuing statement, okay. Do you think that that disclosure which was effected by your talking to Mr. McArdle, was compliance with Section 803 which requires disclosure of the nature and extent of your interest in writing to the governing body of the agency?

Beth S. Goldman, CSR, RPR
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A Yes, I would think.

Q You are satisfied with that disclosure?

A Well, what is the purpose of disclosure?

The purpose of the disclosure, as I understand it, is to make sure that everybody is aware of all the relationships between the respective parties to that particular transaction.

Q I will submit that there is another thing, Mayor. One of the purposes of Section 803 is to send out a letter to every decision maker and to make it a part of the public record so that the public and its decision makers are alerted that there may be a problem here and we ought to look at it closely. Would you agree with that?

A That there is a problem?

Q There may be a problem.

A (No response)

Q I won't press it.

A Again, I have difficulty with that.

Q Let me turn, if I may -- and this is not to be critical of Mr. McArdle nor of you, really. Let's turn to Exhibit 39, page two, the paragraph under IDA members that was rendered, I believe, in your direct testimony.
(WHALEN, T. - EXAM. BY COMMISSIONERS)

A Yes.

Q That indicates, I think -- and correct me if I am wrong -- that you understood at that time that you could handle a conflict of interest on the agency by abstaining from participation in the agency procedures; correct?

A Yes.

Q Now, I submit to you that under Section 801 of the General Municipal Law that it is not a sufficient remedy for prohibiting conflict of interest, that Section 801 prohibits conflicts. If you fall within the terms of the conflict, it is absolutely and it is not remedied by disclosure and abstention. And if you don't mind a short commercial message on my part, one of the problems we see in the law is precisely that, that the conflicts are dealt with -- They don't deal with the kind of indirect relationships that are kept with in the public arena by disclosure and abstention.

Second, in the narrow confines too rigidly, so that a firm who is perfectly innocent in intention and who is willing to disclose his interest or her interest and abstain and not have anything to do with the matter can stand up in public and say, "There is"
nothing to hide here, it's okay, everybody can look at it. And if you disagree, vote me out of office," that person handles then the conflict by disclosure and abstention. That seems to be the conclusion you have reached. And I submit to you, it is at odds with present law, and it is something we would like to change. That may be a bit self-serving for me to tag on and say, "Do you think that is a great idea?" But let me ask you anyway.

A Any modifications to existing laws that you can recommend to the Governor that are consistent with trying to foster the integrity of the public officials, I support. Now, that is as broad as the question you asked.

Q Who selects bond counsel for an IDA transaction?

A Usually the developer.

Q Not the agency?

A No. We never get involved in that. I can't think of -- in all of the IDAs we have had I have never been approached, ever, to suggest bond counsel to a developer. As you know, it is a very specialized area of law. There are only a few law firms in Albany; two, maybe three, that represent...
themselves as bond counsel.

Q One of the critical documents in the documentation of a bond project is the lease which states the terms, basically, the payment terms for the ultimate borrower.

A For the developer, right.

Q And the borrower and developer is a party to that lease, right, and has a vital interest in the terms of that lease; correct —

A Yes.

Q -- and must be represented by counsel in working out the terms of that lease, even if the lease is drafted by that bond counsel; isn't that right, too?

A No. I would say that again, the attorney for the developer/borrower has little, if anything, to say about the terms of that instrument; that the developer will be guided almost exclusively by the advice he receives from bond counsel because he knows that he cannot borrow that money without the opinion of bond counsel. And, therefore, bond counsel will dictate to him exactly what he needs in order to borrow the money.

Q Bond counsel will not determine the payment
provisions, do they; their concern is to see a valid
bond issue?

A They will be decided exclusively by whoever
buys the bond, the bank.

Q And when people deal with banks, don't you
advise your clients that they ought to be represented
by counsel when they deal with banks on important
things like that?

A I think at that particular stage, bond
counsel is in it.

Q And in your experience, don't bond counsel
and counsel to the developer meet to discuss the
terms, to get the papers in order, to arrange the
closing?

A Well, if it is insofar as the technical
representation of the borrower/developer, yes. But
again, if we had to give a ratio, it's 99:1 in favor
of bond counsel.

Q In the Crisafulli case, in that case your
firm represented Bankers Trust Company at that time?

A They were the borrower.

Q In that case your firm got a fee of, I
think five thousand dollars, or something of that
sort, for reviewing bond documents; isn't that right?
(WHALEN, T. - EXAM. BY COMMISSIONERS)

A I don't know whether that is right or not. I know that --
Q If the evidence indicates it, you wouldn't disagree; if there is an invoice that says five thousand dollars for reviewing the bond documents, you are not going to disagree?
A As far as their legality is concerned, as far as Bankers Trust Company was concerned, I would not dispute it, nor would I dispute the fact that as happens in all of the cases, at least locally, the bank gets the borrower to pay the legal fee to the bank.
Q I want to correct the record, because I may have confused myself. It is three thousand seven hundred fifty dollars. And that was for review for Banker's Trust of the bond document. And that was a fee earned by your firm for direct services on the bond documents on a bond issued by the IDA; is that correct?
A Yes, and there was disclosure.
Q But the fact is, your firm had an interest in that bond issue; did it not, and it was going to earn a fee?
A I think that is stretching it to say that
somehow or other there was an interest of the firm because it received a fee for representing the bank which was payable by the borrower.

Q Let me go to another subject, if I may. Let me take the Local Development Corporation. Do you view the LDC essentially as an arm of city government?

A No, not essentially as an arm of city government. I don't think that is a proper categorization, and I will tell you why.

Q I will accept your answer, Mayor.

Q You believe it should be governed by the same?

A Could I explain?

Q Well, I think you have answered it, and I would hate to cut you off if you think it is essential, but --

A No. There have been some innuendos that somehow or other there are these great connections between the LDC and the city. To some degree, that is true. But the membership on the Local Development Corporation is entirely from the private sector, appointed by the board of directors upon recommendation of the Mayor. But in the City of
Albany the LDC has been a magnificent vehicle for us to use for further economic development and also a magnificent vehicle to bring in private sector people.

Q Having delivered a commercial message a short time ago, maybe you are on this one.

A Sure.

Q I want to ask your opinion as to whether the city code of ethics and the state laws regarding conflicts of interest that apply to the city should also apply to the LDC?

A Yes.

Q Okay. Now, going back to -- I think it is the First American Bank appraisal problem, as I understand it from prior testimony, the question was raised in your firm as a discussion in which you were present as to whether the firm could represent the bank in seeking a favorable assessment or avoiding an increase in the assessment based on what was the punitive price for the property between Bankers Trust and First American; right?

A No. There was never any discussion about our representing the bank with respect to the first American assessment.
Q Was there any discussion?
A The question, as I understand it, that was raised was the propriety of my taking the memo and saying, "Let me look into it."
Q Was that in the context of a discussion within your firm about conflict of interest?
A On that?
Q Yes.
A No. I don't think we had any discussion. It was at a round table meeting where the question of the First American assessment came up. I said, "Let me look into it." I am trying to -- I did that as Mayor. And I tried to indicate that that is the same thing I have done, and it is documented.
Q Was it indicated to you that if you raise the assessment -- if the city raised the assessment based on the punitive purchase price, that the bank might want to litigate it in a tax certiorari proceeding?
A No.
Q No discussion of that point?
A No.
Q No discussion of the probability that the firm would have a conflict of interest in that case?
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A No. We didn't discuss it. I think the
reason we didn't discuss it, because I was Johnny-on-
the-spot as Mayor. And although it was given to me
in a partner's meeting, it was given to me as Mayor.
And I made that statement, "Let me look into it."

Q Basically, you averted a conflict of
interest by avoiding litigation; didn't you? If the
bank had wanted to litigate the increase in
assessment, your firm would have had a conflict of
interest problem that it would have had to deal with;
right?

A I think we can stretch this out to what
might have been.

Q I am basing this on testimony by Mr.
Devine, I am not making it up out of whole cloth.

A There was never any consideration or
thought given to future litigation, at least not by
me.

Q It never occurred to you that that might be
a problem?

A No, it didn't. It didn't cross my mind.

Q You indicated that as a basis for keeping
assessment at its current level, that the prices were
part of a merger agreement; right?
A Correct.

Q Did you inquire into what function those prices played in the merger agreement, and specifically whether they didn't establish a fair market value attributed to the property by the parties that would be used for depreciation purposes, for federal tax purposes?

A No. I passed on the information to the city assessor Bruce McDonald at that point. And I don't think we got into any of the details relating to that.

Q Prior to that time had it been the practice of the assessor to raise assessments based on new sales prices?

A Not generally, no. There was a "welcome stranger" procedure that had been involved here in the city before I became Mayor. And that system was the famous rollercoaster yo-yo that I testified to in my private testimony. And one of the first things we did in 1983 was to tell people in the private sector, particularly those involved in downtown, that that would no longer happen.

Q Have you completed that comprehensive review of bank properties yet?
A I would say yes, we have. But the reassessment of properties in Albany -- we found out that most of the bank properties were overassessed. That is what happened.

Q Has the First American Bank property been reduced since then?

A I would have to check my records, or the records in the city assessor's office would show what has happened. I know before I took over, the books were riddled with red ink which showed the rollercoaster, and they no longer are. That record, I wish you would look at it.

Q I would be glad do look at it sometime. Could you look at Section 805-a of the General Municipal Law?

A Yes.

Q Now, do you think that section which generally prohibits -- the particular subdivision 1-c, I draw your attention to that one. I will just read for the record the essence of that section: "No municipal officer or employee shall --" skipping down, "receive or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any
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1 municipal agency in which he is an officer, member, 
2 or employee of any municipal agency over which he has 
3 jurisdiction or to which he has the power to appoint 
4 a member, officer or employee." Without going to the 
5 question of acknowledged intent or anything of that 
6 sort, in reflection -- let me ask you this. Did you 
7 ever look at that section?

A I am sure I have. And I can't tell you 
8 exactly when.

Q Did you determine whether such transactions 
9 as the First Realty transaction and 80 State Street 
10 Center, and Crisafulli, the Tap Room, V. F. Conner, 
11 whether those transactions might be covered by that 
12 prohibition?

A If you are asking me did I pull out this 
13 section and review the facts of those particular 
14 instances in the context of the prohibition contained 
15 in 805-a, I did not.

Q Looking at it now, do you see a problem?

A I would rather not answer that with a yes 
19 or no. I think that I have tried to give you as best 
20 as I could the reasons for my actions when those 
21 actions were undertaken.

Q Okay. Do we agree, then, Mayor Whalen,
that these cases at least demonstrate the kinds of
dilemmas and difficulties that a public official can
be placed in trying to maintain some of the private
sector base and, at the same time, acting as a public
official?

A I would agree with you absolutely and
wholeheartedly.

Q What role has your board of ethics -- Does the city have a board of ethics?

A Yes. Judge Bergen, Holt-Harris and Bishop Ball.

Q What role has that played in your efforts to deal with the problems described today?

A They have not played an active role lately. They did in 1986 and 1987 when they received a request from myself that related to 39 North Pearl Street, even though it was after the fact. And I believe they also received requests from newspaper reporters.

Q Did they give you an opinion?

A They did. They told me that it had the potential of a conflict of interest. But since I immediately withdrew, the question was moot.

Q Have you submitted any other problems to
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them?

A No. That is the only one.

Q Have you any ideas as to whether -- let me ask you this. Do you believe it might be a good idea to strengthen the board of ethics by giving it power to initiate its investigations or to review complaints?

A Whether or not they would be the proper vehicle, I don't know. But I do believe that there should be some -- there should be something set up that would have that function to decide it upon inquiry from the general public, or on their own, or from the municipal official himself.

Q Reflecting on all of these transactions that have been brought to your attention in recent days, do you see that some of the practices that have existed -- not isolating you, but that have existed in the city and some of the interrelationships that exist -- and you use the term "potential conflict of interest," could be a matter of concern to other folks, to business people who might want to deal with the city or its agencies who are affected by its decisions, and to the general public, and that that experience demonstrates a need to adopt more clear
and more general and engender more rigorous rules?

A It hasn't just been recent days, Mr. Magavern. It has been eighteen months that we have been at this. And yes, I am very sensitive to that. However, in a city the size of Albany -- and I tried to allude to this in my opening comments -- I think it is very, very difficult to factor out and all of a sudden to make prohibition with a broad brush. This it's not midtown Manhattan. You have got a very sophisticated business community that interacts with government all the time.

Q Would you agree that at least there ought to be a process to get the issues out on the table at the early -- before the transactions occur, make a better public record to expose to scrutiny and deal with it in an explicit way?

A I do. But I also think that if there were the appearance, a general appearance that there was some undercurrent in the city that showed favoritism, that would be exposed so fast given the smallness of the Albany community, that we would all be aware of it at once. And I think that the proof that that isn't there is the relationship that city government does have with the private sector.
Q Finally, do you have any specific recommendations as a result of your experience that you think we ought to be looking at?

A Public service and private sector involvement is a dilemma that faces all of us now. We see it being -- we see it being faced now in Washington, and certainly I faced it here up until the time I resigned from the practice of law. And this is a very difficult subject. Is public service to be only for the wealthy? Is service on the federal bench to be only for the wealthy, or in congress, or in municipal government? I think that ethics problems are all a part of that -- all of a part of that all-encompassing subject of people being in public service. And the parameters here are difficult to handle.

COMMISSIONER MAGAVERN: Thank you, Mr. Mayor.

BY MR. EMERY:

Q Mr. Mayor, do you know John Curley?

A I do. He is a Superintendent in the Department of Public Works.

Q Did you know him prior to the time that his brother came to you and confirmed a license agreement
that he had worked out, apparently, with Commissioner Maikels?

A Yes. That would be in '83; in the fall, we are talking about, shortly after I became Mayor. I would say I probably knew John Curley was an employee. Did I know him, no.

Q Do you know why, if there is a reason -- and maybe this displays my lack of knowledge -- but why there was no RFP on the Tap Room license agreement, why there weren't competing bids or why there wasn't an open process? Why is it that Mr. Curley got that restaurant license from the city as opposed to any one of a number of other people who may have wanted it?

A No. I relied on Commissioner Maikels who made the affirmative -- he was the Commissioner of the Department of Public Works who told me that Phil Curley's proposal was the best one. At that time, I was a brand new Mayor. I was the new boy on the block, and these were people that worked for the city for a long time. In those early months, I was inclined to take their word as being rather substantial.

Q If you were to do that now, you would make
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sure that there were other people included in the process?

A Yes. I think that as we operate now, we send out RFPs with respect to most city licenses and contracts.

Q Now, turning to a different matter; when you were meeting with the partners in your firm -- when you first became Mayor and you were discussing, according to Mr. Kornstein and Mr. Devine's testimony this morning, when you were discussing the issue of your role as Mayor while you would remain a partner of the firm, they reported to us that you said words to the effect that your presence as Mayor as a partner of the law firm would be helpful for the firm, as the exposure would be helpful. Did you say that at the partners' meetings?

A I would say that someone is alleged to say, "Look what Corning did for Doug Rutnik and Richie Meyers." I don't know who alluded to that; I don't have a recollection of that. But I, or I would think Mr. Brennan who at that time was a senior partner, and Mr. Drislane who was also a senior partner, more than the young partners would have said that the visibility would have enhanced the image of the law
Q What you meant by that was that there would be more business coming to the law firm as a result of your role as Mayor?

A Yes. I think that that is probably accurate; that there is that possibility, like the possibility exists for somebody in the state senate.

Q And that, in fact, awareness on the part of the people to express that, to your recollection, including yourself, that being a public official may draw people to the firm as clients who are interested in the influence that those public officials can wield?

A May I draw -- I don't say that your entire sentence is accurate. I don't know that anybody said anything about using influence as much as there had been a history of public service in the law firm; that it had proved to be beneficial for the law firm in the past, and this would be a continuum of that. Just picking up for one moment on some of the questions Mr. Magavern asked you about the First American Bank --

Q Reassessment?

A

Q I take it from the testimony that when that
(WHALEN, T. - EXAM. BY COMMISSIONERS)

occurred -- when that whole series of events occurred, you were proposed as Mayor by your law firm to see what could be done about the reassessment problem and, at some point later on at a partnership meeting you reported back -- the testimony was by Mr. Devine -- that, "It is taken care of and there is no problem?" That's correct; isn't it?

A No. I have no recollection of saying that "it is taken care of."

Q That it was not going to be a problem because there weren't going to be any reassessment; you reported that to the law firm?

A I don't know how it got back to the law firm. I am not so sure I did report back. It might have been someone from the bank contacted Bruce McDonald.

Q If Mr. Devine testified here today that you reported that back, you wouldn't necessarily dispute it; would you?

A I have no recollection that what he testified to is accurate, no.

Q Despite the fact that there was that decision as reflected in your memorandum that is an exhibit here that there would be no reassessment at
(WHALEN, T. - EXAM. BY COMMISSIONERS)

this time; that was your memorandum to Mr. McDonald, is that correct?

A Yes.

Q That was at the very same time that there was this bank merger between First American Bank and Bankers Trust. That was shortly after that merger?

A Yes, that I wrote him the memo based on his memo to me that it was in the ball park.

Q And Bankers Trust had been your firm's long term client; had it not?

A Yes.

Q And First American Bank was a new bank, as far as your client was concerned, that merged with Banker's Trust?

A That's correct. They were coming up from Washington.

Q It was not at all clear, was it, that they were going to retain or keep your law firm's services at that time?

A I don't remember that being a consideration.

Q But it could very well have been a consideration; could it not?

A I think there could have been a lot of
things that entered into who represented First
American and Banker's Trust. But if you are asking
me was that a consideration of mine at the time, I
don't recall giving that any consideration.

Q The representation of First American Bank
was a whole new ball game, was it not, in terms of
coming up here and finding a law firm to represent
them in the multiplicity of matters that they came to
have over the years?

A I don't know. This was Clark Clifford's
law firm that represented First American. And I am
sure Clark Clifford would have picked whatever lawyer
he wanted in Albany, New York.

Q Now, the fact is that that client
represented about twenty-five percent of the law
firm's billings; is that correct?

A If you have testimony to that effect, I am
not aware of it. And I am not about to say right now
what percentage income the law firm had from first
American.

Q The final point, with respect to the 39
North Pearl Street project, I believe you testified
as to a sequence of events that went from somewhere
in April '86 through January '87 when you finally
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1 withdrew from your investment partnership; is that correct? Am I mistaken?
2
3 MR. MUMFORD: October.
4 Q The final withdrawal was January '87; was it not?
5 A Yes.
6 Q And at that time your partners had invested and you withdrew from that investment?
7 A That's correct.
8 Q And prior to that, you had executed in your discretionary capacity as Mayor a number of actions, three or four actions, at least, which had permitted the development or authorized the development of North Federal Street including an IDA loan and other matters, an easement and other matters; is that correct?
9 A It is, but --
10 Q Prior to the time you withdrew?
11 A Yes. And at that time, there was no definitive indication that the law firm was going to be a tenant or that we would have an equity participation.
12 Q I am saying as of January when the investment was made, there was such knowledge on your
(WHALEN, T. - EXAM. BY COMMISSIONERS)

part?

A. Yes. As I tried to say, as soon as the UDAG prohibition was brought to my attention, I immediately withdrew.

Q. And the result of all of your actions, even though it was not to benefit yourself directly, was to benefit your partners substantially; was it not?

A. As I understand Mr. Newland's testimony here, the per square foot rental of the space at 39 North Pearl Street was two dollars above market.

Q. I am talking about the investment opportunity and the matter of participating in an equity investment on the redevelopment project at 39 North Pearl. This was a substantial boon to your partners?

A. I would say right now that those gentlemen are on a four hundred thousand dollar note. And if you characterize that as a boon to them, it is a boon that they have not realized yet or may never.

COMMISSIONER EMERY: Thank you.

MR. SCHWARZ: I will try to be brief.

Mr. Mayor, you have used the words with respect to Mr. Curley, you said you would never do it again, and with respect to somebody else you
said you didn't look at something as thoroughly
as you should have. I guess the question I have
when I come away from that is the eighteen
months experience that you have had with
investigations and this Commission, and
everything else, it has no doubt sensitized you
to these issues. And that is all to the good of
the next Mayor who comes in and is going to
start all over.

Q  So, my question is: what do we do here? I
was interested in noting from the deposition that you
hadn't looked at the model code that this Commission
proposed. In answer to the Chair's question before,
I believe you said to Mr. Magavern's question, I
believe you said that the board of ethics hadn't been
asked to do anything more since submitting questions.
What steps have you taken since all of this to make
these rules clearer in your city for other officials
in your city, and perhaps for your successor?

A  Well, I am not so sure that you are
paraphrasing my comments with respect to Mr. Curley
and my other testimony.

Q  Remove that preface.

A  You say why haven't I done something --
Q I didn't ask you in connection with --
A -- that you feel should have been done. I would say I am so consumed with running the city and trying to prepare for the eventual hearing that I have had little time to do anything else. Now, hopefully, I will have time to look into some of these items.

MR. SCHWARZ: I have no further questions.

CHAIRMAN FEERICK: I have no questions to put to you, Mayor. I would just like to make a short statement as to what our mutual procedure is after a hearing is complete. If there is any additional work we need to do of a factual nature and discuss the subject at a Commission hearing -- or at a Commission meeting and, depending on the discussion, to crystalize our views on the subject of the hearing and whatever recommendations seem to be merited as a result of that discussion. And we usually submit a report to the Governor as the appointing authority for our Commission.

That being the case, I certainly know
that the Commissioners would welcome any additional information that you would want to review after you have had a chance to review the statements made today and examine the testimony of the witnesses that you didn't hear personally. And we would be happy to consider that additional statement along with other information we have compiled in terms of formulating our final report.

THE WITNESS: Thank you. We welcome the opportunity.

CHAIRMAN FEERICK: Thank you. This hearing is ended.

(The proceedings before the Commission were concluded at approximately 5:35 p.m.)
CERTIFICATION

IN THE MATTER OF: State of New York
Commission on Government Integrity

RE: PUBLIC HEARING
Witnesses presented:
John Fox
Phillip C. Curley
Terrence P. Devine
Gordon C. Bell
Michael Kornstein
Charles E. Newland
Hon. Thomas M. Whalen, III

AT: Justice Building, Courtroom #1
Empire State Plaza
Albany, New York

ON: June 26, 1989
9:00 a.m. - 5:35 p.m.

I, Beth S. Goldman, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public do hereby certify that the foregoing is a true and accurate transcription of the proceedings conducted in the above-entitled matter, as reported by me, to the best of my knowledge and belief.

DATE: June 28, 1989

Beth S. Goldman, CSR, RPR
(518) 439-6772