STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: ED DEPUY,	)	Case No. 10-1285EC
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on February 16, 2011, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Advocate: Diane L. Guillemette, Esquire
James A. Peters, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Respondent: E. Gary Early, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Ed DePuy, committed the following violations as alleged in the Ethics Commission's Order Finding Probable Cause dated December 9, 2009, and the Supplemental Order Finding Probable Cause dated September 8, 2010:

a. Whether Respondent violated section 112.3143(3)(a), Florida Statutes, regarding a July 11, 2006, vote/measure which affected a real estate development in which Respondent had an interest.

b. Whether Respondent violated section 112.3143(3)(a) regarding an August 22, 2006, vote/measure which affected a real estate development in which Respondent had an interest.

c. Whether Respondent violated section 112.3143(3)(a), regarding a January 9, 2007, vote/measure which affected a real estate development in which Respondent had an interest.

d. Whether Respondent violated section 112.3143(3)(a) regarding a March 13, 2007, vote/measure which affected a real estate development in which Respondent had an interest.

e. Whether Respondent violated article II, section 8 of the Florida Constitution by failing to disclose income received in 2007 on his 2007 CE Form 6, Full and Public Disclosure of Financial Interests.

f. Whether Respondent violated section 112.3143(3)(a) regarding a January 9, 2007, vote/measure which would inure to the special private gain or loss of a principal by whom Respondent was retained or to the special private gain or loss of the parent organization or subsidiary of a corporate principal by which Respondent was retained.

g. Whether Respondent violated section 112.3143(3)(a) regarding a March 13, 2007, vote/measure which would inure to the special private gain or loss of a principal by whom Respondent was retained or to the special private gain or loss of the parent organization or subsidiary of a corporate principal by which Respondent was retained.

h. Whether Respondent violated article II, section 8 of the Florida Constitution, by failing to disclose a secondary source of income received in 2007 on his 2007 CE Form 6, Full and Public Disclosure of Financial Interests.

PRELIMINARY STATEMENT

On December 9, 2009, the Commission on Ethics (Commission) entered an Order Finding Probable Cause finding that there was reasonable cause to believe that Respondent, as a member of the Leon County Commission, violated section 112.3143(3), Florida Statutes, by voting on four Resolutions that affected the Centerville Farms subdivision and inured to Respondent's special private gain or loss, and for failing to report income related to the sale of a lot in Centerville Farms.

On March 16, 2010, the Commission referred the matter to the Division of Administrative Hearings (DOAH) for the assignment of an administrative law judge and the conduct of a formal hearing.

The final hearing was initially scheduled for May 24 and 25, 2010. A joint motion for continuance resulted in the rescheduling of the hearing for July 13 and 14, 2010. On July 8, 2010, the Advocate filed a motion to relinquish jurisdiction based on newly discovered evidence. On July 13, 2010, an order was entered placing the case in abeyance to afford the Commission an opportunity to consider the additional charges.

On September 8, 2010, the Commission entered a Supplemental Order Finding Probable Cause finding that there was reasonable cause to believe that Respondent's January 7, 2007, and March 13, 2007, votes inured to the special private gain or loss of his principals, identified in the Commission's October 20, 2009, Report of Investigation as "Booth Properties" or "Booth Companies," and that Respondent had failed to disclose a secondary source of income in his 2007 CE Form 6, Full and Public Disclosure of Financial Interests. The alleged secondary source of income consisted of four checks, each in the amount of $3,000.00, paid to Respondent's business from the corporate principals.

The final hearing was rescheduled for December 20 and 21, 2010. On the Advocate's motion for continuance, the hearing was again rescheduled for February 16 and 17, 2011. On February 9, 2011, the parties filed an Amended Joint Prehearing Stipulation, in which they admitted to certain facts that are included in this Recommended Order. The hearing was convened and completed on February 16, 2011.

At the final hearing, the Advocate presented the testimony of Herb Thiele, county attorney for Leon County; Robert Williams, attorney and former CEO of a number of "Booth companies"[1/]; and Neal Richard Boutin, Jr., accepted at the hearing as an expert in real estate appraisal; and Respondent. Respondent presented the

testimony of Philip Claypool, executive director and general counsel for the Commission.

Joint Exhibits 1 through 6 were admitted into evidence. The Advocate's Exhibits 1 through 11 were admitted into evidence. (The Advocate's Exhibit 9 is the deposition of Hurley Booth, Jr., admitted after the Advocate demonstrated that she was unable to obtain service on Mr. Booth to obtain his live testimony at the hearing.) Respondent's Exhibits 1 through 7, Composite Exhibits 13, 14, 16, and 17 were admitted into evidence. The parties stipulated to the admission of the deposition testimony of the following witnesses, in lieu of their live testimony: Jon Kohler, Erica Glidewell, Richard Reeves, Larry Wolfe, and Nicolo Calabro.

The two-volume transcript of the hearing was filed at DOAH on March 21, 2011. The parties timely-filed their Proposed Recommended Orders, which have been fully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent served as a member of the Leon County Commission (LCC) from approximately June 2001 to December 2002 as an appointed official, and from November 2004 until November 2008 as an elected official.

2. Respondent is subject to the requirements of Part III, chapter 112, Florida Statutes, the Code of Ethics for Public

Officers and Employees, for his acts and omissions during his term as a member of the LCC.

3. Centerville Farms is a planned community development consisting of 975 acres with plans for 200 residential units. Centerville Conservation Group, LLC (CCG) and Centerville Conservation Group, II, LLC (CCG II) are the owners of Centerville Farms, each owning an undivided one-half interest in the entire parcel. The development utilizes a clustering plan by which approximately 70 percent of the property is held in conservation easements, and the lots are reduced in size and clustered in closer proximity to accommodate the conservation lands. Centerville Farms' Planned Unit Development (PUD) was approved by the LCC in 2004, prior to any of the votes at issue in this case.

4. Legal interest in CCG and CCG II is held by Jon Kohler (25%) and Hurley Booth, Jr. or a trust controlled by Mr. Booth (75%).

5. Phase 1 of Centerville Farms contains 91 lots.

6. Phases 2 through 4 of Centerville Farms contain 109 lots.

7. The LCC's attorney, Herb Thiele, testified that in 2002 or 2003, the Leon County Comprehensive Plan and land use map were amended to allow conservation subdivisions in certain land use categories.

8. In 2004, Centerville Farms underwent an extensive process of governmental review and approval as a PUD. Mr. Thiele testified that a PUD constitutes a rezoning of the subject property and is a designation generally applicable only to mixed-use developments. Though Centerville Farms is a single-use residential development, the County required a PUD because of the configuration of the lots and of the overall development. On October 12, 2004, the LCC passed Ordinance No. 04-31, which rezoned the property and approved the Centerville Farms PUD. The ordinance and documents referenced therein established the zoning and the preliminary site plan including all substantive elements of the Centerville Farms development, including the fact that it was to consist of a total of 200 lots. Respondent was not serving on the LCC when the Centerville Farms PUD was approved.

9. After the PUD approval, Centerville Farms underwent a Type B site review in accordance with Section 10-7.404 of the Leon County Code of Ordinances (Leon County Code). This review finalized the substantive elements of the development, including the size, location and configuration of each of the 200 building lots, the conservation easements, and the infrastructure improvements. The finalization of the Centerville Farms plans through the Type B site review was part of the PUD process and did not require a vote of the LCC aside from the initial passage

of Ordinance No. 04-31. The Development Review Committee approved Centerville Farms as a Type B site and development plan on January 23, 2006. Respondent was not involved with the Type B site review of the Centerville Farms project.

10. The Centerville Farms PUD and plats showed that the development would have ingress and egress from Centerville Road and from Pisgah Church Road. The latter road was at the time a red clay dirt road. Mr. Thiele testified that, in a development with the expected traffic volume of Centerville Farms, the County normally requires the developer to ensure access from a paved public road. Ordinance No. 04-31 provided that the LCC should "investigate the traffic impacts upon Pisgah Church Road, and the safety implications that may necessitate paving a portion or all of Pisgah Church Road." The LCC completed a study of this issue in 2005 and then entered into an agreement with CCG and CCG II that required the companies to pave the road, and to donate funds to Leon County to contribute toward repaving when such became necessary. Mr. Thiele testified that this agreement was made in late October 2005.[2/]

11. Mr. Thiele testified that once the ordinance was passed and the PUD had been adopted by the LCC, the developer had substantive property rights in the PUD approval. Once the PUD was approved, the developer could begin making preliminary site improvements.

12. Mr. Thiele testified that the LCC had the discretion to approve or deny the development at the PUD approval stage. The adoption of Ordinance No. 04-31 rendered the subsequent approval of the plats for Phases 1 through 4 of the project ministerial acts that required no policymaking or discretionary review. A plat either meets the criteria set forth in the Leon County Code and Part I of chapter 177, Florida Statutes, or it does not. If the plat meets those criteria, the developer could initiate a mandamus action against the County if for some reason the LCC refused to approve it.

13. Mr. Thiele testified that in his 21 years as the Leon County attorney, he has never seen the LCC flatly deny the approval of a plat. There may be a problem with the plat, such as an incorrect survey or an unaccounted-for property interest, but such problems involve only a temporary delay in approval pending cure of the problem.

14. On March 17, 2005, Respondent entered into a contract to purchase Lot 60 (since renumbered as Lot P2) in Phase 1 of Centerville Farms for $170,000. Respondent closed on Lot P2 in October 2006. In June 2007, Respondent sold Lot P2 to Chris Kise for $225,000, a gain of $55,000.

15. Respondent did not disclose the income from the sale of Lot P2 on his 2007 Form 6.

16. On May 16, 2005, Respondent entered into a contract to purchase Lot 184 (since renumbered as Lot I1) in Phase 2 of Centerville Farms for $210,000. Respondent closed on Lot I1 in October 2007.

17. Jon Kohler, the 25 percent member of CCG and CCG II, was the broker in charge of marketing Centerville Farms. Respondent understood that Mr. Booth had an interest in the companies developing Centerville Farms, but Respondent dealt exclusively with Mr. Kohler and sales director Erica Glidewell in purchasing his two lots.

18. On July 11, 2006, the LCC considered Agenda Request 27, which sought approval of the plat of Phase 1 of Centerville Farms and a performance agreement and surety device in the amount of $2,045,076.26. The staff's agenda request noted that the project had been approved as a Type B site and development plan, and that the portion being platted consisted of 438.92 acres containing 89 lots.[3/] The agenda request further provided:

> As of the date of the preparation of the agendum, staff reviews have not been completed by the appropriate agencies and departments. The developer is requesting the Board's approval prior to final review being completed due to date sensitive contractual obligations coupled with the next scheduled Board meeting not being until August 22. Staff will not record the plat until final review and approval by all appropriate departments.

> Staff recommends the Board accept the plat and approve recording upon completion of staff's review. Should the review necessitate a change in the plat, staff will resubmit it to the Board for ratification.

19. Mr. Thiele testified that the approval of the plat made no material change in the number or size of the lots or in their configuration as against the PUD adopted in 2004 by Ordinance No. 04-31. The approval of the plat created no new rights or obligations for the developer.

20. Mr. Thiele also stated that no one other than the developer may take legal title to a lot prior to approval of the plat.[4/] If a lot is conveyed prior to plat approval, the County considers it an illegal subdivision of the property and will not issue a building permit for the lot.

21. Mr. Thiele testified that the purpose of a performance agreement and surety device is to ensure that the approved infrastructure is built in accordance with the approved plat. Since the early 1990s, the Leon County Code has required the developer to post a surety device. The County's professional engineering staff determines the amount of the surety device, which by ordinance must cover 110% of the estimated cost of completion.[5/] The staff monitors the project as the developer completes the infrastructure. As the infrastructure moves toward completion, it is typical for the developer to request a reduction in the amount of the surety device to reflect the

reduction in the remaining risk that the project will not be completed.

22. Mr. Thiele testified that the performance agreement is on a form that the County sends to the developer to accompany the surety device. He stated that Leon County has been using the same performance agreement form for at least 19 years.

23. Respondent voted to approve Agenda Request 27 on July 11, 2006.

24. On August 22, 2006, the LCC considered Agenda Request 35, which sought acceptance and ratification of a conservation easement for Phase 1 of the Centerville Farms project. In the agenda request, staff explained that the conservation easement was required by the County's Growth and Environmental Management department as part of the site plan review and permit process, but was inadvertently left out of the July 11, 2006, agenda package.

25. Mr. Thiele testified that conservation easements are found in section 704.06, Florida Statutes, and that the statutory requirements for conservation easements are mirrored in the Leon County Code.[6]/ The conservation easement is granted by the property owner to Leon County, and gives the development rights in the property to the County for the purpose of keeping the property in its natural state in perpetuity.

26. Mr. Thiele further testified that the conservation easement approved in this vote and those approved on January 9, 2007, were generally approved in Ordinance No. 04-31, though the precise locations of the easements were approved by staff during the Type B site review. The site plan is merely a refinement of the approval contained in the PUD.

27. Mr. Thiele testified that, because the easement requirement was part of Ordinance No. 04-31, the votes on the conservation easements on August 22, 2006, and January 9, 2007, were ministerial votes. The LCC's discretion regarding the easements was limited by the previously approved PUD. If the conservation easement meets the requirements of the PUD and the Type B site approval, the LCC lacks the discretion to disapprove it. The LCC's vote was necessary to formally accept the easement on behalf of Leon County because staff is not permitted to accept property on behalf of Leon County.

28. The Advocate presented the testimony of Neal R. Boutin, Jr., who was accepted as an expert in real estate appraisal. Mr. Boutin examined whether the existence of a conservation easement within a residential subdivision in Leon County has an impact on the value of a single family lot. Mr. Boutin compared Centerville Farms to four other developments in the immediate area. He conducted a market survey of real estate brokers and financial institutions. While noting that

the wide range of variables from property to property made it impossible to attribute a specific value to the conservation easement, and that his market survey yielded no specific findings, Mr. Boutin nonetheless concluded, based on his "experience and common sense," that the easement would have some positive impact on the value of a lot.[7/]

29. Respondent voted to approve Agenda Request 35 on August 22, 2006.

30. At all times relevant to this proceeding, Respondent maintained his practice as a governmental consultant/lobbyist, either as an individual contracting directly with clients or as the employee of a lobbying firm, in addition to serving on the LCC.

31. At some point between August 22, 2006, and October 17, 2006, Respondent was retained by three Booth companies: Boothco Hansford, LLC, (Boothco Hansford), Boothco Coastal, LLC, (Boothco Coastal), and Booth Holdings Booth Trust, LLC (Booth Holdings Booth Trust). Respondent worked for these entities until at least May 3, 2007. Respondent provided lobbying services regarding Booth developments in Franklin and Jefferson Counties. These three companies were indisputably Respondent's principals for purposes of section 112.3143(3)(a).

32. Boothco Hansford, Boothco Coastal, and Booth Holdings Booth Trust, were lawfully organized, and remained in existence

at the time of the hearing. Each company did business and owned property in its own name. None of these companies owned shares of either CCG or CCG II, nor did CCG or CCG II own shares in these three companies.

33. Mr. Booth, or a trust of which he is a trustee, has a controlling interest in Boothco Hansford, Boothco Coastal, LLC, and Booth Holdings Booth Trust.

34. Robert Williams is an attorney who acted as the chief executive officer of the Booth companies from 2005 through 2008. Mr. Williams testified that during his tenure there were approximately 100 companies operating under the Booth aegis, and that real estate development was their main business.

35. Mr. Williams was in charge of the day-to-day operations of the Booth companies. He reported directly to Mr. Booth, but testified that Mr. Booth left most of the operational decisions to him. Mr. Booth made the final decisions on important strategic issues.

36. Mr. Booth is a personal friend of Respondent, and he made the decision to hire Respondent. However, once Respondent began working, he reported to Mr. Williams.[8/] Respondent reported to Mr. Williams in person every month or so and met with project engineers more frequently.[9/]

37. Respondent believed himself to be employed by Boothco Hansford, Boothco Coastal, and Booth Holdings Booth Trust in

their corporate capacities. Respondent was never under the impression that he was personally employed by Mr. Booth.

38. Neither Respondent nor Mr. Booth recalled having any conversations with each other regarding the Jefferson and Franklin County projects, and both denied ever discussing the Centerville Farms project with each other. Mr. Williams did not recall that Respondent was ever asked to perform services for any project in Leon County. Mr. Williams never heard any discussions with Respondent about Centerville Farms.

39. Mr. Williams testified that Respondent warned him at the outset of his hiring that he would have to recuse himself "from anything that we had before the County Commission."

40. Respondent testified that he never worked for any Booth entity that was doing business in Leon County, and never believed that he had been retained by CCG or CCG II. Respondent stated that his only involvement with CCG or CCG II involved the purchase of his lots from Mr. Kohler and Ms. Glidewell.

41. Respondent understood that Mr. Booth had an ownership interest in Centerville Farms, but was uncertain of its nature. Respondent and Mr. Booth both denied ever having private discussions about Centerville Farms.

42. Mr. Williams explained that at the time Respondent was hired, the Booth companies were reassessing their projects in light of the deteriorating economy. Respondent was hired to

help the Booth companies "touch base" with local government officials in Jefferson and Franklin counties to gauge the best uses for their properties during the downturn. Boothco Hansford was the company formed to own and oversee the Bailey's Mill development in Jefferson County. Boothco Coastal was formed to own and oversee the Eastpoint development in Franklin County.

43. Mr. Williams stated that Respondent did not "lobby" on behalf of Boothco Hansford and Boothco Coastal, but that he did "talk to people" about the projects.

44. Respondent was paid through the Booth companies' central management system. The Booth companies' controller, Nicolo Calabro, testified that he kept separate bookkeeping entries for each Booth company, but that each company did not have a separate bank account.

45. All payments to Respondent for Booth company work were made through Booth Holdings Booth Trust, and the accounting software indicated for which company the work was done. The charges for the work would be attributed to the company that owned the real estate, and Respondent would receive a 1099 from that company. Respondent's connection to Booth Holdings Booth Trust was limited to receiving payments through this central accounting system.

46. The record indicates that Respondent received six payments of $3,000 each from an account of Booth Holdings Booth

Trust. The payments were dated October 17, 2006, November 30, 2006, January 18, 2007, March 1, 2007, April 5, 2007, and May 3, 2007.

47. The four checks received by Respondent during 2007, totaled $12,000. The 1099s received by Respondent in 2007 indicated that the payments were accounted for as follows by the Booth entities: $8,100 from Boothco Hansford, $3,000 from Booth Holdings Booth Trust, and $900 from Boothco Coastal.[10/]

48. On November 14, 2006, the LCC considered Agenda Request 29, which was a status report on Leon County's agreement with CCG and CCG II regarding the provisions for the replacement of the pavement on Pisgah Church Road. The specific issue was the amount that the developer should be required to deposit with the County to pay for the anticipated repaving of the road eight to ten years after the initial use of "open graded cold mix" (OGCM) asphalt to pave the road.

49. Mr. Thiele testified that the County's usual practice is to require the developer to pave the road with regular asphalt. However, in settling previous litigation over development, the County had agreed not to allow any more paved roads within Bradfordville, an area that includes the Centerville Farms property. Mr. Thiele testified that the County concluded that it could comply with the settlement by requiring Centerville Farms to use OGCM, which is drivable but

more porous than regular asphalt. Because OGCM does not have the same life expectancy as regular asphalt, the County and the developer agreed in October 2005 that the developer would pay for one repaving of Pisgah Church Road. See Finding of Fact 10, supra.

50. The agenda item permitted the LCC to consider the developer's request that the $500,000 amount of the deposit be reduced, in consideration of the fact that the County would hold the money in an interest-bearing account for eight to ten years preceding the need to repave the road. The motion was for the LCC to direct staff to negotiate with the developer to arrive at a number reflecting the amount of the deposit necessary to provide for repaving in eight to ten years' time.

51. Respondent recused himself from voting on Agenda Request 29 on November 14, 2006. As required by law, Respondent filed a Form 8B, Memorandum of Voting Conflict for County, Municipal, and Other Public Officers on November 27, 2006. The Memorandum of Voting Conflict stated that a measure came before the LCC that inured to the special gain or loss of "Booth Properties," by whom Respondent was retained as a consultant.

52. At the final hearing, Respondent testified that his rationale for recusing himself had less to do with his representation of the Booth companies outside of Leon County than with his contracts to purchase two lots in the Centerville

Farms development. Respondent stated that the paving of Pisgah Church Road could not help but improve the value of the lots in Centerville Farms, and that he did not wish to appear to be voting to improve the value of his own property.

53. Respondent testified that he consulted with Mr. Thiele prior to the November 14, 2006, Commission meeting, and Mr. Thiele advised him to err on the side of caution to avoid anything that might appear inappropriate.[11/]

54. Respondent testified that Mr. Thiele prepared the Memorandum of Conflict for his signature. Respondent acknowledged that the Memorandum of Conflict mentioned his employment with the Booth companies but failed to mention Respondent's interest in the lots in Centerville Farms. He testified that he signed the Memorandum because his arrangement with the Booth companies was also a valid reason to recuse himself under the circumstances.[12/]

55. On January 9, 2007, the LCC considered Agenda Request 18, requesting approval of seven conservation easements for Phases 2, 3, and 4 of Centerville Farms. The staff analysis of the proposal stated as follows:

> The proposed conservation easements place the landowner and all other subsequent landowners on legal notice that development is prohibited in the protected areas. Acceptance of the conservation easements will require County approval. The proposed easements do not create any County

> maintenance responsibility or any other County responsibility for the easements. The property owner will still own and protect the land as appropriate under conditions of the proposed easements.

56. Respondent voted to approve Agenda Request 18 on January 9, 2007.

57. On March 1, 2007, Respondent accepted a salaried position as an employee of SCG Governmental Affairs, LLC (SCG), a Tallahassee lobbying firm. Under the employment agreement, Respondent brought his existing clients to SCG, and they became clients of SCG. All work performed on behalf of those clients was billed by SCG, and any receivables due to Respondent from those clients became the property of SCG.

58. In accordance with the employment agreement, Respondent signed over to SCG the checks he received from Booth Holdings Booth Trust on April 5, 2007 and May 1, 2007. These checks were deposited into SCG's bank account and reported as income by SCG.[13/] Respondent's 2007 income from the Booth companies was therefore not the $12,000 indicated on the original 1099s, but $6,000 from the checks issued on January 18 and March 1, 2007, prior to Respondent's employment with SCG.[14/]

59. As noted at Finding of Fact 47, supra, $8,100 of the $12,000 indicated on the original 1099s was attributable to Boothco Hansford. However, the $3,000 check dated April 5, 2007, was part of that $8,100, meaning that it was actually the

property of SCG. The May 3, 2007, check for $3,000 was entirely attributable to Booth Holdings Booth Trust. It, too, was the property of SCG. Therefore, Respondent's actual 2007 income from these entities was $5,100 from Boothco Hansford and $900 from Boothco Coastal.

60. On March 13, 2007, the LCC considered Agenda Request 16, which involved the following:

> i. For Phase 1, a request by CCG that Leon County release the existing $2,045,076.26 performance agreement and surety device and replace it with one totaling $532,324. The County's Public Works Engineering division had inspected the subdivision and reviewed the construction estimate for completion of the remaining infrastructure and concurred with the estimated amount for the replacement performance agreement and surety device;
>
> ii. For Phase 2, a request by CCG that the plat be recorded. Because Phase 2 had complete infrastructure within the development proper, no performance or maintenance agreements or surety devices were required. However, a portion of Pisgah Church Road, west of Centerville Road, would be affected by the development. Therefore, the plat included a dedication of additional right-of-way along Pisgah Church Road. The development's permit requirements also mandated that Pisgah Church Road be improved by utilizing open graded cold mix asphalt (OGCM).
>
> Initially, the improvements to Pisgah Church Road were to be completed prior to plat approval. The proposed amendment to the CCG/County agreement allowed for the plat to be approved with the guarantee that the Pisgah Church Road construction would be

> completed by a date certain, enforced by a $300,000 public construction bond. CCG further agreed to contribute an additional $300,000 to the County for future costs of repairing and replacing the OGCM.
>
> After review and comment from various divisions of the County, Commission staff recommended approval of the plan in conjunction with the $300,000 public construction bond for the Pisgah Church Road improvements, and recording of the plat contingent upon compliance with all provisions of the amended agreement, including issuance of operating permits, receipt of payment of the $300,000 OGCM repair and replacement contribution, and delivery of the $300,000 bond for the Pisgah Church Road construction;
>
> iii. For Phases 3 and 4, a request by CCG that the plats be recorded. After review and comment from various divisions of the County, Commission staff recommended approval of the plats in conjunction with construction and infrastructure performance agreements in the amount of $400,165.00 for Phase 3 and $694,472.00 for Phase 4. Recording of the plats would be contingent upon compliance with all provisions of the amended CCG/County agreement and delivery of the surety devices associated with the Phase 3 and Phase 4 performance agreements.

61. Mr. Thiele testified that the vote to record the plats for Phases 2-4 was similar to the July 11, 2006, vote to approve the recording of the plat for Phase 1, in that Phases 2-4 had also been approved as part of Ordinance No. 04-31 and were subject to the same Type B site review approval process. The vote to record the plats for Phases 2-4 was likewise ministerial and non-discretionary.

62. Mr. Thiele stated that the March 13, 2007, vote changed nothing regarding the configuration or size of Centerville Farms. The approved plats were identical to the plan of the Type B review. The plat approval created no new rights for the developer and did not allow the developer to do anything not already approved by the Type B site review.

63. Mr. Thiele testified that the vote to approve performance agreements and surety devices for Phases 3 and 4 involved the same principles and was taken pursuant to the same ordinances as the vote to approve the performance agreement and surety device for Phase 1, discussed at Findings of Fact 21 and 22, supra.

64. Mr. Thiele testified that the vote to release the existing $2,045,076.26 performance agreement and surety device and replace it with one totaling $532,324 simply reflected that the developer had completed the bulk of the infrastructure requirements. After inspecting the project, County staff applied the same formula and the same 110 percent multiplier to arrive at a surety device that insured completion of the remaining infrastructure.

65. Mr. Thiele testified that such a reduction in the amount of the surety is typical in large scale developments with surety devices in excess of $1 million. It indicates that

infrastructure has been completed, not that the infrastructure requirements are being lessened.

66. Mr. Thiele believed that the vote to reduce the surety was ministerial, in that the same standards were applied to the substituted surety device as were applied to the original surety device.

67. Mr. Thiele testified that the reduction in the amount of the OGCM replacement deposit from $500,000 to $300,000 reflected the fact that the replacement of the OGCM would not occur for about ten years given normal usage, and that $300,000 held at an average interest rate would cover the cost of replacement in ten years' time. See Finding of Fact 50, supra. Mr. Thiele stated that the LCC was recognizing that the original $500,000 estimate was too high.

68. Respondent voted to approve Agenda Request 16 on March 13, 2007.

69. The parties to the instant case stipulated that "there is no legal obligation for a developer/landowner to disclose the number of lots in a subdivision that are under contract, or the number or identity of persons holding contracts.

70. There was no evidence that Respondent had any idea how many Centerville Farms lots were under contract at the times he cast his votes on July 11, 2006, August 22, 2006, January 9, 2007, and March 13, 2007.

71. The number of lots under contract during the relevant times was disclosed during the discovery process by Ms. Glidewell, and only after considerable effort on her part to piece together the information. At the time of the July 11, 2006, and August 22, 2006, votes, 90 of the 91 lots in Phase 1 were under contract for sale to 41 persons or entities. These numbers do not include any transfers or assignments of contracts from the original purchaser to a third party. On March 17, 2005, Respondent entered a contract to purchase Lot P2 in Phase 1, and closed on the lot in October 2006.

72. At the time of the January 9, 2007, and March 13, 2007, votes, 31 of the 109 lots in Phases 2 through 4 were under contract for sale to 26 persons or entities. These numbers do not include any transfers or assignments of contracts from the original purchase to a third party. On May 16, 2005, Respondent entered a contract to purchase Lot I1 in Phase 2, and closed on the lot in October 2007.

73. Respondent testified, without contradiction, that all four of the votes at issue in this proceeding were on the LCC's consent agenda. The "consent agenda" consists of non-controversial items that are voted on as a group. Consent agenda items are those that require the approval of the LCC but need no discussion because they are not controversial. Consent items require unanimous consent of the LCC members. A single

member may have an item removed from the consent agenda and placed on the regular agenda if he believes it merits discussion prior to voting.

74. Respondent admitted that he failed to report the income related to his sale of the lot in Phase 1 on his 2007 CE Form 6, Full and Public Disclosure of Financial Interests. Respondent's gain from the sale was $55,000.[15/]

CONCLUSIONS OF LAW

75. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

76. The Commission is authorized to conduct investigations and make public reports on complaints concerning violations of Part III, chapter 112, Florida Statutes, the Code of Ethics for Public Officers and Employees (Code of Ethics). § 112.322, Fla. Stat.; Fla. Admin. Code R. 34-5.0015.

77. The Commission, through its Advocate, is asserting the affirmative of the issues involving the Respondent's purported violations of section 112.3143(3)(a) and article II, section 8 of the Florida Constitution. The party having the affirmative of the issues in a proceeding bears the burden of proof. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977).

78. In this case, the elements of the alleged violation must be established by clear and convincing evidence. Siplin v. Comm'n on Ethics, 59 So. 3d 150 (Fla. 5th DCA 2011); Latham v. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

79. In Evans Packing Co. v. Dep't of Agric. & Consumer Servs., 550 So. 2d 112, 116, n.5 (Fla. 1st DCA 1989), the court defined clear and convincing evidence as follows:

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

80. Judge Sharp, in her dissenting opinion in Walker v. Fla. Dep't of Bus. & Prof'l Reg., 705 So. 2d 652, 655 (Fla. 5th DCA 1998) (Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

> Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 133 L.Ed.2d 672 (1996), 116 S. Ct. 719. The sum total of evidence must be

> sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the fact finder a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

81. It is alleged that Respondent has committed six violations of section 112.3143(3)(a) in relation to four votes he made on plats and conservation easements for Centerville Farms. Section 112.3143(3)(a) provides as follows:

> No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in section 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

82. Respondent does not contest the first element of proof under section 112.3143(3)(a), i.e., that at the time of the votes in question he was a "county, municipal, or other local

public officer." As a member of the LCC, Respondent was clearly subject to the provisions of the Code of Ethics.

83. Respondent's four votes are alleged to have generated six violations of section 112.3143(3)(a). All four votes are alleged to have inured to Respondent's own special private gain or loss, in that he had an interest in two Centerville Farms lots at the time of all four votes. As to the January 9, 2007, and March 13, 2007, votes, Respondent is further alleged to have knowingly voted on measures that inured to the special private gain or loss of a principal by whom Respondent was retained, or to the parent organization of a corporate principal by whom Respondent was retained.

84. As to all of the votes, there is a threshold question as to whether they were merely ministerial. The Commission recognizes that some agenda items are simply procedural or preliminary to later actions that would result in actual gain or loss, and therefore do not present voting conflicts for an official who would have such a conflict if the vote were on substantive measures concerning the same subject. In CEO 78-74 (Fla. Comm. on Ethics October 20, 1978), the question before the Commission was whether a voting conflict was created when a school board member voted to remove a school audit report from the board's consent agenda and to defer acceptance of the report, which was critical of the transfer of a certificate

deposit to a bank in which the board member was a stockholder and of which the board member was chairman of the board. The Commission found no conflict because the vote to remove the audit from the consent agenda "was merely a procedural move, resulting in no gain or loss either to you or to your bank." As to the vote to defer acceptance of the report, the Commission found no conflict based on the fact that the vote "would have the effect only of postponing the matter in order to clarify what had been represented by the administration" as to the interest being offered by the bank. Because a separate vote would have been required to actually remove the certificate of deposit from the bank even if the audit had been accepted, the Commission found that the vote on postponing the audit's acceptance did not result in any gain or loss to the board member or the bank.

85. In CEO 93-10 (Fla. Comm. on Ethics April 22, 1993), the Commission concluded that a town council member who was prohibited from voting on a measure to resolve a real property ownership dispute between the town and a group of private property owners that included the council member was further prohibited from voting on a measure to survey the disputed property. The Commission reasoned as follows:

> Inasmuch as it appears that the property dispute resolution outlined in Question 1 cannot be considered or move forward without

> such a survey being done, a vote on whether to procure such a survey seems to us to be akin to a vote to refer a zoning petition to a city's zoning department prior to a vote on the proposed zoning change itself, where a vote not to refer the petition would have effectively killed the petition. Therefore, such a vote would not be merely preliminary or procedural, and thus section 112.3143(3)(a) would prohibit you from voting on the survey measure. Compare Chavez v. City of Tampa, 560 So. 2d 1214 (Fla. 2nd DCA 1990).[16/]

86. The Advocate contends that the approvals of the plats in the instant case were not merely preliminary or ministerial because the LCC was required by statute to approve the plats before they could be recorded. § 177.071(1), Fla. Stat. Mr. Thiele testified that the individual lots could be legally conveyed only after a plat was recorded, meaning that Respondent could not complete the contract on his lots until the Commission approved the plats. Further development of Centerville Farms could not proceed without acceptance of the plats.

87. As to the July 11, 2006, plat approval, the Advocate makes the additional argument that staff reviews had not been completed at the time of the vote. The agenda request noted that the item was being placed on the agenda prior to review completion at the request of the developer, "due to date sensitive contractual obligations coupled with the next scheduled Board meeting not being until August 22." The agenda request went on to assure the LCC that staff would not record

the plat until final review and approval by all appropriate County departments. The Advocate contends that even if the routine approval of a plat is ministerial, this preemptive approval prior to completed staff review was an exercise of discretion that removed the July 11, 2006, vote from the category of ministerial votes.

88. The Advocate also argues that the votes on the conservation easements could not have been ministerial. A conservation easement must be accepted by the governing body of the County because it is a conveyance of an interest in real property. The plat for Phase 1, though approved by the July 11, 2006, vote, would not be considered complete until the easement was conveyed by the August 22, 2006, vote. The vote to accept the conservation easements was a necessary step in making the project a reality by making lots available to purchasers such as Respondent.

89. The Advocate likens this situation to that discussed in CEO 93-10, quoted at Conclusion of Law 85, supra, where a vote to refer a zoning petition to a city's zoning department appears to be merely procedural until one considers that a vote not to refer the petition would have the effect of killing it. Similarly, a vote not to accept the conservation easement would have halted Centerville Farms in its tracks.

90. Respondent counters that all four of the votes in question were entirely ministerial and administrative in nature because all of the elements that were the subject of the Centerville Farms votes had previously been specifically approved as part of the PUD process. Respondent cites Mr. Thiele's testimony that, having approved the PUD, the LCC lacked the discretion to reject the plats so long as they met the criteria set forth in the Leon County Code of Ordinances and Part I of Chapter 177, Florida Statutes.

91. This testimony is supported by Broward County v. Narco Realty, Inc., 359 So. 2d 509 (Fla. 4th DCA 1978), which held that mandamus will lie where the landowner has complied with all the criteria for platting but the county commission refuses to approve the plat. The court pointedly stated that "the property owner has done all the law required of him to entitle his plat to be recorded. At that point any discretion in the County Commission vanished." Id. at 511. See also City National Bank of Miami v. Cty. of Coral Springs, 475 So. 2d 984, 985 (Fla. 4th DCA 1985) ("It is elementary that once a party complies with all legal requirements for platting there is no discretion in government authority to refuse approval of the plat.").

92. The Narco Realty opinion has been accepted by the United States Court of Appeals for the Eleventh Circuit, which has held that Narco Realty "enunciated the principle of Florida

law that is controlling here." Southern Coop. Dev. Fund v. Driggers, 696 F.2d 1347, 1352 (11th Cir. 1983). The defendants in Driggers urged a narrow reading of Narco Realty, to the effect that plat approval is a ministerial action only where the county commission in question has stipulated that all legal requirements of the plat approval process have been met, as was the case in Narco Realty. The Driggers court pronounced itself "unimpressed" by this attempt to undermine "the principle that a Commission's action in reviewing a plat application is ministerial instead of discretionary in nature." Driggers, 696 F.2d at 1352. The court held that under the circumstances presented, in which the plaintiffs had complied with all the requirements of the subdivision regulations in question, the county commissioners "had an administrative duty to approve the plaintiffs' proposed plat and their refusal to do so was a violation of the plaintiffs' guarantee of due process." Id. at 1356.[17/]

93. Respondent argues that the ministerial nature of his votes was clear because at the time of those votes, all of the conditions precedent created by the PUD ordinance and the Type B site approval had been performed. No policymaking or discretionary review was required. The votes themselves created no rights nor conferred any benefits, such rights and benefits having been created and conferred earlier by the PUD.

94. As to the particulars, Respondent states that the votes to allow recording of the Centerville Farms plats were entirely ministerial. The plats were identical to the site plan approved as part of the PUD process. The consent agenda items on which Respondent voted created no new rights and extinguished no obligations. The votes made no change to the size, configuration or location of any element of Centerville Farms. The LCC, and Respondent as a member thereof, had a non-discretionary duty to approve the recording of the plats. The votes were required by law.

95. Regarding the performance agreements and surety devices that were part of the July 11, 2006, vote (regarding Phase 1) and March 13, 2007, (regarding Phases 3 and 4), Respondent notes that surety devices are mandated by Leon County ordinance for any development that includes infrastructure improvements. The ordinance has been in effect since the early 1990s, and the form of the performance agreement has been unchanged for at least 19 years.

96. The obligation of CCG and CCG II to execute and post performance agreements and surety devices was established in the PUD process, and was already in place when Respondent voted on July 11, 2006, and March 13, 2007. Respondent states that the votes allowing Leon County to accept the sureties were not an

exercise of any legislative or discretionary authority, but were ministerial acts required by law.

97. The March 13, 2007, vote to reduce the Phase 1 surety from $2,045,076.26 to $532,324 was based upon completion of the infrastructure. The vote did not affect any element of the infrastructure, the developer's obligation to construct, or the projected overall cost. The vote merely recognized that CCG and CCG II had completed a significant portion of the infrastructure. Respondent contends that this vote was merely ministerial.

98. Respondent's position is supported by Section 10-7.604(2)(b) of the Leon County Code, which provides: "The surety device shall . . .[c]over 110 percent of the cost of any uncompleted road, storm water management conveyance improvements, or other infrastructure as estimated by the engineer of record and approved by the county engineer. . . " (Emphasis added.) Moreover, section 10-7.612(4)(a) of the Leon County Code states that the reduction in the amount of the surety device is an issue that may be decided at a level below the LCC:

> Where inspection reports indicate satisfactory completion of work within time limits set and in accordance with other terms of the agreed-upon stages for the entire work, the county engineer shall so indicate to the applicant and any surety company involved, and to the county

> administrator or designee. The county administrator or designee, upon such notification and any further assurance as may be required from the county attorney or governmental bodies exercising operating control shall then release all or any portions of the performance guarantee or surety device in accordance with the terms thereof.

99. The quoted ordinances strongly suggest that the reduction of the amount of the surety device was not a legislative decision. The Advocate contends that the vote imparted to the developer the benefit of freeing up a significant amount of capital for other projects, but the ordinances indicate that Leon County had no clear right to hold a surety device in an amount exceeding 110 percent of the uncompleted infrastructure. The evidence indicated that the "freed up" capital was merely an amount roughly equal to that which the developer had already spent on infrastructure, that the developer was entitled to the reduction in the surety device under Leon County's ordinances and that the county administrator arguably could have reduced the amount of the surety device without the involvement of the LCC at all.

100. As to the votes on the conservation easements, Respondent points out that all elements of the conservation easements and the obligation to donate them to Leon County were created in the PUD process. The substantive requirements for the easements are established by statute and ordinance. The

votes authorized no changes to the size, nature, configuration or location of the easements, and created no additional rights or obligations in Centerville Farms. Respondent contends that, as a member of the LCC, he had an administrative, non-discretionary duty to vote to have Leon County accept the easements, and the votes were entirely ministerial. The LCC was without discretion to reject the conservation easements.

101. Finally, Respondent argues that the October 2005 agreement called for CCG and CCG II to pave Pisgah Church Road and to provide Leon County with funds to meet the estimated future cost of repaving the road after the initial application of OGCM reached the end of its useful life. The March 13, 2007, vote reduced the repaving deposit from $500,000 to $300,000, reflecting the value of the County's holding the funds at interest for the ten year period preceding repaving. The vote did not alter the preexisting obligation of CCG and CCG II to pave and then to repave Pisgah Church Road.

102. In summary, it is concluded that Respondent's general point is correct: the passage of Ordinance No. 04-31 rendered ministerial the subsequent votes regarding the plats and conservation easements. The reduction in the amount of the surety device for infrastructure was mandated by ordinance. The Advocate is correct that the votes on the plats and easements were necessary for the Centerville Farms project to continue,

but the Advocate's argument overlooks the fact that the LCC lacked discretion not to adopt the plats and conservation easements once the PUD ordinance was adopted and the proffered plats and easements met the technical requirements of the relevant Florida Statutes and corresponding local ordinances.[18/]

103. Despite the correctness of Respondent's general point, in two particulars the votes in question do not meet the standard of preliminary, procedural or ministerial votes discussed above. First, the July 11, 2006, plat approval was undertaken prior to completion of the staff reviews, for reasons of convenience to the developer. The Advocate is correct that this preemptive placement of the plat on the LCC's agenda was an exercise of discretion that removed the July 11, 2006, vote from the category of ministerial votes. Second, the March 13, 2007, vote to reduce the repaving deposit for Pisgah Church Road appears from the evidence to have been entirely discretionary. Though Respondent is correct that the vote did not change the preexisting obligation of CCG and CCG II to repave the road, the vote did reduce the deposit required for the repaving in a fashion not mandated by any ordinance or by any aspect of the October 2005 agreement referenced by Respondent.

104. As to whether the votes inured to Respondent's own special private gain or loss, the Commission stated as follows

in its advisory opinion CEO 96-12 (Fla. Comm'n. On Ethics May 1, 1996):

> It is our view, long held and often stated, that even when a measure inures to the private gain of a public official, it will nevertheless not inure to the official's "special" private gain if the class of persons or properties affected by the measure is sufficiently large.

105. The Commission uses a "size of the class" test to determine whether a private gain is sufficiently large and particular to the beneficiary to be termed "special." The size of the class test has been explained as follows:

> An analysis in which the determination as to whether a particular vote would inure to the "special gain or loss" of a public officer is made by examining the "size of the class" of persons who stand to benefit or lose from the measure to be voted upon. Where the class of persons is large, we have concluded that "special gain" will result only if there are circumstances unique to the officer under which he or she stands to gain more than the other members of the class. Where the class of persons benefiting from the measure is extremely small, we have concluded that the possibility of "special gain" is much more likely. In other words, when a measure affects a class of sufficient size, the gain is of a "general" nature and thus is not the "special" gain addressed by the voting conflicts law. CEO 00-13.

In re: Irving Ellsworth, COE Final Order No. 06-024 (Apr. 26, 2006), p. 8-9 n.3.

106. The Commission has "typically . . . concluded that no voting conflict was presented in situations where the interests

of the public official involved one percent or less of the class." CEO 00-13 (Fla. Comm'n. On Ethics Aug. 29, 2000). The Commission has on many occasions reiterated that this "one percent" rule is "typically" or "generally" applicable,[19/] but has also cautioned that:

> the statute establishes no hard and fast percentage threshold. The "size of the class" test is a tool developed by the Commission to aide [sic] in the analysis of voting conflicts, which are addressed on a case-by-case basis, based on all the known facts and circumstances. It is not an arbitrary boundary separating legal behavior from illegal on the basis of a tenth of a percentage point.

Ellsworth, p. 9.[20/]

107. The parties do not agree as to the proper measurement of the size of the class in the instant case. The Advocate notes that at the time of the July 11, 2006, vote to approve the Phase 1 plat and the August 22, 2006, vote to approve the conservation easement for Phase 1, a total of 41 separate individuals held contracts on 90 of the 91 lots in Phase 1 of Centerville Farms. The Advocate contends that the appropriate "class" in this instance would be the 41 individuals who had pending contracts on lots affected by the vote, because every person in that class obtained the same gain from the approval of the plat. Under this analysis, Respondent's interest represented 2.44% of the class affected by the vote. If the

class were found to constitute the number of lots under contract, then Respondent's interest in one out of 91 lots would represent 1.1% of the class affected by the vote.

108. As to the January 9, 2007, vote to approve the conservation easements for Phases 2, 3 and 4, at the time of the vote there were a total of 26 separate entities or individuals holding contracts on 31 of the 109 lots in Phases 2-4. If the class were based on the persons holding contracts, Respondent's interest represented 3.8% of the class affected by the vote. If the class were based on the number of lots under contract, then Respondent's interest in one out of 31 lots would represent 3.2% of the class affected by the vote.

109. Because the March 13, 2007, vote affected Phase 1 as well as Phases 2-4, the Advocate contends that Respondent's interest should be determined in accordance with his interests as a holder of a lot in Phase 1 and in Phases 2-4, using the percentages derived above.

110. Respondent contends that the Advocate's argument is contrary to directly applicable and binding Commission precedent. In In re: Jim Vandergrifft, Case No. 08-1438 (DOAH Nov. 17, 2008; adopted in toto by COE Final Order 09-038 Jan. 28, 2009), the ALJ concluded as follows:

> 30. The Respondent was not able to determine the class size as made up of properties under contract to be sold in the

> history overlay district at the time of the vote. Similarly, at the time he voted on the ordinance the Respondent could not determine that the class size would be made up of property sold within the Historic Overlay District in February 2006. A determination allowing such subjective classes would lead to confusion in interpretation of the relevant law and create an undue burden and uncertainty for public officials in approaching many of the votes they have to make.
>
> 31. In view of the past decisions and opinions of the Commission, and the guidelines thus established, although concededly there is no rule establishing any one percent standard, or establishing with precision how to determine the scope of the measuring class, the clear and persuasive evidence shows that the class size is appropriately made up of all properties that could be affected by the proposed ordinance. This seems patently logical because the ordinance, by its terms, was designed to apply to properties not to persons. It would have applied to all properties within the historic overlay district regardless of whether they were held in long-term ownership by an owner, were on the market to be sold, were under contract for sale, or had recently been sold. The point is that the logical class scope should be made up of all properties in the District affected by the ordinance. Any other determination would be contrary to the guidelines the Commission has proceeded under previously for determining the scope or size of a class.
> (emphasis added).

111. Respondent points out that in the instant case, as in Vandergrifft, the votes at issue affected the lots equally, without reference to whether they were under contract. The amenities and infrastructure of Centerville Farms, including the

use and enjoyment of the lands under conservation easement, were equally available to each of the 200 lots in the development. Therefore, Respondent claims, the class affected by Respondent's votes is the 200 lots in the Centerville Farms development, and Respondent's interest in two of those lots gave him a 1% interest in the overall number of lots affected by his votes.

112. Respondent further argues that even if the class determination is narrowed to the lot under contract that was part of the development phase directly subject to the votes, Respondent's votes did not inure to his special gain or loss. As to Phase 1, Respondent had a contract to purchase 1 of 91 lots, constituting 1.09% of the lots affected by the votes on Phase 1. As to Phases 2-4, Respondent had a contract to purchase one of 109 lots, constituting .91% of the lots affected by the votes on Phases 2-4.

113. Respondent acknowledges that his 1.09% interest in Phase 1 exceeds the 1% threshold that the Commission "typically" uses in its size of the class analysis. However, he also points to Commission precedent finding that a town commissioner was not prohibited from voting on issues related to a project that would directly benefit his residential neighborhood and would be assessed against the homeowners in that neighborhood, where the commissioner owned 1.2% of the total number of lots (one lot out

of 83) in the neighborhood. See CEO 90-71 (Fla. Comm'n. on Ethics Oct. 19, 1990).

114. The undersigned is persuaded, in accord with Vandergrifft, that the total number of lots affected by the votes in question is the most objective and therefore the best way of determining the size of the class in this case. Respondent can reasonably be charged with contemporaneous knowledge of the number of lots in a development in which he was investing. The numbers of lots under contract or of persons holding contracts were not readily available to Respondent and in any event constituted moving targets subject to sudden change and arbitrary application.[21/]

115. However, acceptance of Respondent's view of the size of the class is not dispositive of whether he received a special private gain. Respondent had contracts on 1% of the total number of lots in Centerville Farms. One percent is a strong indicator that any gain to Respondent through his votes in these matters was "general," but one percent "is not an arbitrary boundary separating legal behavior from illegal on the basis of a tenth of a percentage point." Other factors must be examined to determine whether Respondent received a special private gain under section 112.3143(3)(a).

116. Another test the Commission has applied is termed the "remote and speculative" test, described as follows:

> In past decisions, we have found that the statute does not apply in situations where, at the time of the vote, there is uncertainty whether there will be any gain or loss to the officer, his principal (employer), or to other persons or entities standing in an enumerated relationship to the officer, and if so, what the nature and magnitude of the gain or loss might be. Thus, we frequently have found no special private gain or loss to exist when the circumstances were such that any gain or loss to the officer, or to an enumerated person or entity, was too remote or speculative. See, for example, CEO 06-21 (town commission member voting on land use matters where member's employer has extensive contractual relationships with land use applicant), CEO 05-15 (city commissioner whose client is potential developer of affordable housing within city voting on amendments to affordable housing ordinance), CEO 05-2 (village workforce/affordable housing committee member voting on mobile home park measures), and CEO 88-27, Question 3, (city commissioner voting on rezoning of property sold contingent on rezoning where commissioner probably will be building contractor on the property).

CEO 07-7 (Fla. Comm’n on Ethics Mar. 7, 2007).

117. The deciding question is not whether the voting officer or an "enumerated person or entity" ultimately received a special private gain. The judgment must be based on the circumstances as they existed at the time of the vote, not on hindsight. "If, in light of these circumstances, one could have only speculated 'at the time of the vote' as to whether or not a prohibited 'special private gain or loss' would result from the

measure voted on, the officer cannot be found guilty of having violated the statute by voting on the measure. . . ." In re: Carl Sabatello, Case No. 08-0782EC (DOAH Mar. 4, 2009), ¶ 88.

118. The Advocate argues that the votes approving the plats had a significant and direct effect on Respondent's interests because Respondent could not have completed the purchase of his lots in the Centerville Farms development without the July 11, 2006, and March 13, 2007, votes. Absent those votes, the County would have considered the sale of the lots to be an illegal subdivision and would not have approved building permits for the lots. The Advocate argues that the votes on the conservation easements were necessary to finalize approval of the plats and therefore also essential to Respondent's taking ownership of the lots. The Advocate also cites the testimony of Mr. Boutin as establishing that the conservation easements added to the value of Respondent's lots in a direct way.

119. Respondent persuasively responds that Mr. Boutin's expert opinion amounted to little more than educated speculation as to the improvement in value of lots in a development caused directly by conservation easements. However, Respondent himself testified that he considered the conservation easements to be a selling point of Centerville Farms. It simply stands to reason that the developer would not have adopted the conservation

easement concept had he not believed it would maximize the value of the Centerville Farms lots.

120. It is concluded that the Advocate has established that the gain or loss to Respondent from the approval of the plats and of the conservation easements was not "remote and speculative." The ability to complete the purchase of a lot was a direct consequence of plat approval. However, any gain realized by Respondent as to the value of his lots was no different in kind from the gains realized by the other lots in the development. Respondent was a little less or a little more than one percent of the class of persons affected, depending on whether the vote concerned Phase 1 or Phases 2-4. Viewing the "remote and speculative" analysis in light of the "size of class" analysis, the evidence is not clear and convincing that any "special private gain or loss" inured to Respondent by virtue of his votes on July 11, 2006, November 14, 2006, January 9, 2007, and March 13, 2007.

121. As to the allegations that Respondent's votes on January 9, 2007, and March 13, 2007, inured to the special private gain or loss to a principal by whom Respondent was retained or to the special private gain or loss of the parent organization or subsidiary of a corporate principal by whom Respondent was retained, Respondent argues that respect for the corporate form compels a conclusion that Respondent's votes did

not involve any principal or entity by whom Respondent was retained.

122. Respondent argues for the well established rule set forth as follows by the Supreme Court of Florida:

> The corporate veil will not be penetrated either at law or in equity unless it is shown that the corporation was organized or employed to mislead creditors or to work a fraud upon them.
>
> Every corporation is organized as a business organization to create a legal entity that can do business in its own right and on its own credit as distinguished from the credit and assets of its individual stockholders. The mere fact that one or two individuals own and control the stock structure of a corporation does not lead inevitably to the conclusion that the corporate entity is a fraud or that it is necessarily the alter ego of its stockholders to the extent that the debts of the corporation should be imposed upon them personally. If this were the rule, it would completely destroy the corporate entity as a method of doing business and it would ignore the historical justification for the corporate enterprise system.

Dania Jai-alai Palace, Inc. v. Sykes, 450 So. 2d 1114, 1120 (Fla. 1994), quoting Advertects, Inc. v. Sawyer Industries, Inc., 84 So. 2d 21, 23-24 (Fla. 1955). See also, e.g., Gasparini v. Pordomingo, 972 So. 2d 1053, 1055 (Fla. 3d DCA 2008) ("The law is clear that the mere ownership of a corporation by a few shareholders, or even one shareholder, is an insufficient reason to pierce the corporate veil") and Lipsig

v. Ramlawi, 760 So. 2d 170, 187 (Fla. 3d DCA 2000) ("[E]ven if a corporation is merely an alter ego of its dominant shareholder or shareholders, the corporate veil cannot be pierced so long as the corporation's separate identity was lawfully maintained").

123. The Advocate counters that in CEO 80-25 (Fla. Comm'n on Ethics Apr. 17, 1980), the Commission found that a conflict of interest under section 112.313(7)(a) is created when a county commissioner is an officer or a stockholder of a corporation and a wholly owned subsidiary of that corporation does business with the county. The Commission explained its rationale as follows:

> The corporate entity may be disregarded when it is used as a cover for fraud or illegality, when it is used to work an injustice, when it is deemed necessary to achieve equity, or when failure to achieve equity would enable the corporate device to be used to circumvent a statute. See 18 Am. Jur.2d Corporations s. 15, and cases cited therein. We hasten to point out that we have seen no indication that the corporations involved here have been created in order to cover any fraud or injustice. However, in the context of conflict of interest laws, we also observe that it would appear to be no less of a conflict of interest for a public officer or employee to own an interest in and be an officer of a parent holding company than for him to own and be an officer of a wholly owned subsidiary. Thus, if we were to observe the strict, legal formalities of the corporate form, a public officer or employee could circumvent the Code of Ethics in order to own a corporation doing business with or subject to the regulation of his agency merely by adding a holding company to insulate him from the Code of Ethics. We

> have no reason to believe that the subject commissioner has intended to circumvent the Code of Ethics; however, as a matter of precedent, we cannot allow the corporate form to thwart the intent and effectiveness of the Code of Ethics. . . .
>
> We are not attempting here to "pierce the corporate veil" in order to impose personal financial liabilities upon shareholders, but rather to adjudge the ethical responsibilities of public officers and employees under a conflict-of-interest statute. The corporate form is a well-accepted form of economic life within this state. . . . We agree that this form has a legitimate function within the economic sphere, but we do believe that a public officer or employee should not be able to disregard his ethical responsibilities and the public's trust simply by changing the business form under which he operates or in which he invests.

124. The Advocate is correct that in CEO 80-25, the Commission asserted its authority to disregard the "strict, legal formalities of the corporate form" in the interest of maintaining the "intent and effectiveness of the Code of Ethics." However, since 1980, the Commission has receded from this position:

> Although there clearly is language in CEO 80-25 that indicates that we no longer would observe the corporate form or distinguish between parent and subsidiary entities in deciding what is a "business entity," a line of subsequent opinions rendered by us did not take this approach, but instead continued to distinguish interrelated corporations as separate business entities. For example, in CEO 80-89, we again distinguished between parent

> and subsidiary corporations in concluding that a county housing finance authority member was not prohibited from serving as a loan officer and a vice president of a bank that was a subsidiary of a second bank that also owned a third bank that had entered into a trust indenture with the authority. In CEO 82-78, we concluded that a mayor could be employed as a salesman for a corporation, where the owner of the corporation was a partner in a limited partnership that held the cable television franchise granted by the mayor's city. And in CEO 83-11, in response to concerns expressed by school board advisory committee members who were employed by large firms or corporations consisting of subsidiaries which might have been doing business with the school district, we again noted that we previously had treated each corporate subsidiary as a separate business entity in applying the Code of Ethics. In CEO 85-31, we referred to this line of opinions in concluding that a housing finance authority member was not prohibited from being a broker employed in the local office of a national brokerage firm which through an extensive succession of subsidiary corporations and partnerships, proposed to become a sixty percent general partner in a limited partnership that was seeking authority approval for bonds to finance a housing project. . . .

CEO 99-13 (Fla. Comm'n on Ethics Oct. 27, 1999).

125. The Commission reiterated this view in CEO 09-2 (Fla. Comm'n on Ethics Jan. 28, 2009) (footnote omitted):

> In many previous decisions, we have found that separate corporations constitute separate business entities for purposes of the statute, and therefore have found that one's employment or contractual relationship with a corporation does not mean that they also hold employment or a contractual

> relationship with other entities connected to the corporation with which they hold employment or a contractual relationship. See CEO 05-8, CEO 86-12, and opinions cited therein. These decisions are grounded in the definition of "business entity" codified in the Code of Ethics at section 112.312(5), Florida Statutes, which recognizes the separateness of corporations one from another. Our only "piercings of the corporate veil" in this regard have come in the context of parent companies whose only assets consisted of wholly-owned subsidiaries. See, for example, CEO 94-5.

126. The Advocate cites Ellsworth, see Conclusions of Law 105 and 106, supra, as a case in which the Commission pierced the corporate veil to find that Mr. Ellsworth worked for an individual hiding behind corporate formalities.

127. The facts of Ellsworth were set forth in the Recommended Order in Case No. 04-0701EC (Fla. DOAH Jan. 11, 2006; Fla. EC May 1, 2006). Mr. Ellsworth was a member of the Treasure Island City Commission. He was employed as the general manager of John's Pass Marina, Inc. and also worked for Gator's on the Pass, Inc. An individual named Agnes Rice, who was one of the largest private landowners on Treasure Island, was the sole owner of John's Pass Marina and had an interest in Gator's on the Pass. Amendments to the city's land development regulations were brought before the commission. These amendments affected properties owned by Ms. Rice individually and by her companies, including John's Pass Marina.

128. The ALJ expressly found that Mr. Ellsworth was employed by John's Pass Marina. The ALJ did not expressly find that Mr. Ellsworth was employed by Ms. Rice. The ALJ did find that "Ellsworth viewed himself, without regard to the corporation that was issuing his paycheck, as working for the Rice family and, in particular, Agnes Rice." Ellsworth Recommended Order at ¶ 30. The ALJ's conclusions of law were also couched in Mr. Ellsworth's subjective belief that he worked for Ms. Rice. Ellsworth Recommended Order at ¶ 41. Though she discussed Ms. Rice's personal interests in the matters before the city commission, the ALJ was careful to note that Mr. Ellsworth's employment by John's Pass Marina alone was sufficient to find him in violation of section 112.3143(3)(a) for his votes on the LDRs. Ellsworth Recommended Order at ¶¶ 42-44.

129. In adopting the Recommended Order, the Commission noted that Ms. Rice owned and controlled the corporate entities through which Mr. Ellsworth was paid and actively participated in assigning his responsibilities. Mr. Ellsworth referred to Ms. Rice as the "matriarch," and Ms. Rice's son testified, "On a day-to-day basis, my mom tells everybody what to do." Ellsworth at 7.

130. The Commission stated:

> The Respondent is correct that this Commission has generally recognized the separate identity of corporate entities from their owners or officers. However, we have also been quite clear that we would not "slavishly adhere" to that model, which evolved in the context of business and tort law, when it defeats the very aim of the voting conflicts statute: that a local public officer is not to vote on measures regarding which his objectivity is compromised or questioned due to his private, economic connections.... In In re James Gordon, 13 FALR 1864 (Ethics Commission 1990), affirmed in part, reversed in part on other grounds, 609 So. 2d 125 (Fla. 4th DCA 1992) we found that a City Council member had a prohibited contractual relationship under section 112.313(7), Florida Statutes, where his consulting company performed services for Waste Management while that entity was regulated by the City. Gordon argued that it was not he, but a separate corporate entity (his consulting company) which was doing business with Waste Management. We rejected the argument in part because the evidence showed that Waste Management sought Gordon's services specifically; Gordon simply directed that the payments for those services be made to his company. The fact that the payment mechanism called for the funds to go through a separate entity did not, in our view, exempt the relationship from section 112.313(7). Similarly, it is evident here that Agnes Rice was the Respondent's employer-- she just paid him through the mechanism of a corporate account. Thus, to the extent the Recommended Order can be read as finding that Ms. Rice was the Respondent's principal, such finding is not inaccurate.

Ellsworth at 7-8 (footnote omitted).

131. Respondent answers that the Commission distinguished and thereby limited Ellsworth in CEO 09-2:

> [T]he situation presented regarding the member is distinguishable from that present in In re IRVING ELLSWORTH, Commission on Ethics Complaint No. 02-108 (COE Final Order No. 06-024, rendered April 26, 2006). In ELLSWORTH, the respondent considered himself employed by a natural person (who was benefited by a vote/measure of the respondent's public board) who used corporations she wholly-owned or controlled as a mechanism to pay the respondent for his services, and who ran the corporations on a day-to-day basis. In the instant inquiry, there is no indication that the member considers himself employed by the construction corporation, the natural persons owning it, or the natural persons owning the hotel corporation; there is no indication that the hotel corporation is merely a payment mechanism for compensating the member; and there is no indication that any natural person who might be affected by votes affecting the construction corporation runs the day-to-day operations of the hotel corporation.

132. In the instant case, Respondent did not consider himself employed by Mr. Booth personally or by either of the Booth entities with interests in Centerville Farms. Mr. Booth did not run the LLCs on a day-to-day basis, nor was there evidence that he used the LLCs as a mechanism to pay Respondent for personal services to Mr. Booth. To the extent that in Ellsworth the Commission pierced the corporate veil in the interest of preserving the aim of the voting conflicts statute,

the facts of Ellsworth are inapposite to the situation presented by Respondent's votes.[22/]

133. It is concluded that the Commission's current view of how and when it will disregard the corporate form is consonant with the general view set forth by the Court in Dania Jai-alai.

134. For purposes of section 112.3143(3)(a) the Commission has construed "principal" to be synonymous with "employer." CEO 06-5 (Fla. Comm'n on Ethics Apr. 26, 2006). See also CEO 78-27 (Fla. Comm'n on Ethics May 18, 1978) ("While we recognize that the terms 'principal' and 'employer' or 'master' are not wholly synonymous, for the purpose of determining whether one has a voting conflict under section 112.3143, we fail to see any material distinction between the terms.")

135. Respondent was retained and paid by Boothco Hansford, Boothco Coastal, and Booth Holdings Booth Trust to provide services in Jefferson County, Franklin County, and Wakulla County. These three entities were indisputably Respondent's principals.

136. The record indicates that each of these companies was lawfully organized and is currently active. Each company does business and owns property in its own name. There is no evidence that any of these companies was created to mislead creditors or engage in fraud of any kind.

137. Any gain or loss resulting from the votes on Centerville Farms inured to CCG and CCG II. These companies were lawfully organized and do business and own property in their own names. There is no evidence that either company was created to mislead creditors or engage in fraud of any kind.

138. Respondent was never retained by CCG or CCG II. The record credibly establishes that Respondent did not work for these companies in Leon County or elsewhere. Respondent performed no work in relation to Centerville Farms. When Respondent worked as an employee of SCG, it did not represent CCG or CCG II. For these reasons, CCG and/or CCG II were not Respondent's principals.

139. Neither Boothco Hansford, nor Boothco Coastal, nor Booth Holdings Booth Trust owns shares of CCG or CCG II. Neither CCG nor CCG II owns shares of Boothco Hansford, Boothco Coastal, or Booth Holdings Booth Trust. There is no parent-subsidiary relationship between any of these companies.

140. Despite the lack of formal relationships among these companies, the Advocate points to the fact that during the times relevant to this proceeding, there were roughly 100 companies operating under the Booth auspices. All of the companies were under common management and for the most part used a common bank account, though the Booth companies' accounting and bookkeeping system attributed payments to the proper ownership entity. For

the 2007 tax year, Respondent received 1099s from the following entities: Booth Holdings Booth Trust in the amount of $3000; Boothco Coastal in the amount of $900; and Boothco Hansford in the amount of $8100. The evidence indicated that the payments actually came from the account of Booth Holdings Booth Trust, then were attributed to the other entities for accounting purposes.

141. Mr. Booth was the ultimate decision-maker for all of the Booth companies, though Mr. Williams oversaw the day-to-day activities and Mr. Calabro had some discretion as to accounting issues and payables. Respondent was a personal friend of Mr. Booth, who made the decision to hire Respondent as a lobbyist.

142. The Advocate argues that, despite the existence of many individual LLCs, the "Booth companies" are run as a single large enterprise. One person, Mr. Booth, makes the major decisions. One person, Mr. Williams, was the CEO of all the companies. The bookkeeping practices did not strictly delineate each LLC but mingled their accounts as a single enterprise. All the financial rewards flowed back to Mr. Booth or to a trust controlled by him.

143. Respondent replies that there is nothing unlawful about the fact that Mr. Booth, or a trust of which he is a trustee, has an ownership interest in all of the Booth

companies. Mr. Booth's interests do not strip away the lawful corporate identities of the companies. Under black letter rules of corporate law, neither Mr. Booth nor an entity called "Booth companies" can be considered Respondent's principal.

144. Mr. Booth's direct involvement with Respondent was minimal. Respondent did not meet with or take direction from Mr. Booth in performing his consulting services. Respondent did not perceive that he was being retained by Mr. Booth individually. Respondent did no work related to CCG or CCG II or Centerville Farms and did not believe he was obliged to do such work. Respondent and Mr. Booth denied ever discussing the Centerville Farms project with each other.

145. The Advocate points to Respondent's recusal from the November 14, 2006 vote on the proposed reduction of the deposit for the repaving of Pisgah Church Road as an indication that Respondent knew he was working for the "Booth companies" and an admission of sorts that he should not have voted on any of the other matters concerning Centerville Farms. Mr. Williams also recalled a conversation in which Respondent stated that he would have to recuse himself from anything "we" had before the LCC.

146. Respondent's explanation of his recusal from the November 14, 2006 vote was jumbled. His recollection was that his primary concern was a perceived benefit to himself, though the objective evidence of the Form 8B indicates that the reason

for recusal was that his vote would inure to the special gain or loss of "Booth Properties," by whom he was retained as a consultant. The minutes of the November 14, 2006, meeting state that Respondent was recusing himself because he did consulting work for "Booth Company."

147. Respondent's recusal on November 14, 2006, does not constitute a binding admission of wrongdoing as to his other votes, and does not establish that he was, in fact, employed by an entity called "Booth Properties" or "Booth Company." Respondent's perception of a conflict on November 14, 2006, does not necessitate a conclusion in this tribunal that there was an actual conflict as to that or any other vote.

148. In conclusion, principles of corporate law recognized by the judiciary and by the Commission dictate that the corporate form is to be respected "unless it is shown that the corporation was organized or employed to mislead creditors or to work a fraud upon them." Dania Jai-alai, 450 So. 2d at 1120. In the absence of such misuse of the corporate form, the corporate veil may not be pierced.

149. In the instant case, the only way in which any gain inuring from Respondent's votes on Centerville Farms can be attributed to Respondent's principals is to pierce the corporate veil and conclude that all of the "Booth companies" operate as alter egos of Mr. Booth. The evidence produced at the hearing

does not support such a conclusion. It is concluded that the Advocate has failed to establish by clear and convincing evidence that Respondent's votes inured to the special private gain or loss to a principal by whom Respondent was retained or to the special private gain or loss of the parent organization or subsidiary of a corporate principal by which Respondent was retained.

150. It is alleged that Respondent committed two violations of article II, section 8 of the Florida Constitution. article II, section 8 provides, in relevant part:

> Ethics in government.-- A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:
>
> (a) All elected constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file full and public disclosure of their financial interests.
>
> * * *
>
> (i) Schedule-- On the effective date of this amendment and until changed by law:
>
> (1) Full and public disclosure of financial interests shall mean filing with the custodian of state records by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of $1,000 and its value together with one of the following:
>
> a. A copy of the person's most recent federal income tax return; or

> b. A sworn statement which identifies each separate source and amount of income which exceeds $1,000. The forms for such source disclosure and the rules under which they are to be filed shall be prescribed by the [Commission on Ethics], and such rules shall include disclosure of secondary sources of income.

151. Section 112.3144(5) directs the Commission to create forms for compliance with the full and public disclosure requirement of article II, section 8. In Florida Administrative Code Rule 34-7.010(1)(c), the Commission has adopted Form 6, Full and Public Disclosure of Financial Interests.

152. The 2007 Form 6 provided detailed instructions for completing the form. Under "Primary Sources of Income," the instructions provided that the reporting individual list the name of each source of income that provided him with more than $1,000 of income during 2007. "Income" included "gains from property dealings." The instructions also included a section titled "Secondary Sources of Income" that provided, in relevant part:

> This part is intended to require the disclosure of major customers, clients, and other sources of income to businesses in which you own an interest. You will not have anything to report unless:
>
> (1) You owned (either directly or indirectly in the form of an equitable or beneficial interest) during the disclosure period more than five percent (5%) of the total assets or capital stock of a business

> entity (a corporation, partnership, limited partnership, proprietorship, joint venture, trust, firm, etc., doing business in Florida); and
>
> (2) You received more than $1,000 in gross income from that business entity during the period.
>
> If your ownership and gross income exceeded the two thresholds above, then for that business entity you must list every source of income to the business entity which exceeded ten percent (10%) of the business entity's gross income (computed on the basis of the business entity's most recently completed fiscal year, the source's address, the source's principal business activity, and the name of the business entity in which you owned an interest. You do not have to list the amount of income the business derived from that major source of income....

153. Respondent admitted that on his 2007 CE Form 6 he failed to report the gain of $55,000 he realized in 2007 from his sale of Lot P2 as a primary source of income.

154. At the hearing, the Advocate attempted to introduce evidence that Respondent had failed to report primary sources of income beyond the Booth Holdings Booth Trust checks discussed at Findings of Fact 46 and 47, supra. Specifically, the Advocate attempted to introduce evidence purporting to show that Respondent failed to report income he received that was attributable to his recently deceased wife, and that Respondent underreported his salary as a County Commissioner. Neither the Order of Probable Cause nor the Supplemental Order Finding

Probable Cause made allegations regarding these alleged sources of income. The Advocate took the position that because it was alleged that Respondent had violated article II, section 8 by failing to disclose sources of income, any facts supporting that general allegation could be asserted to support a finding of a violation, regardless of whether those facts were pled at the outset of the hearing.

155. The mere reference to the charging statute, without supporting factual allegations, was not sufficient to place Respondent on notice of the charges against him. Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005). See also Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996) ("Predicating disciplinary action against a licensee on conduct never alleged in an administrative complaint or some comparable pleading violates the Administrative Procedure Act. To countenance such a procedure would render nugatory the right to a formal administrative proceeding to contest the allegations of an administrative complaint."). Based on these principles, the undersigned ruled at the hearing that the Advocate would not be permitted to raise issues not alleged in the Order Finding Probable Cause or the supplemental order thereto. That ruling is confirmed by this Recommended Order.

156. As to secondary sources of income, Respondent's original 2007 income tax return reflected gross income of

$64,000 to Respondent's sole proprietorship lobbying business. The 2007 1099 from Boothco Hansford totaled $8,100, well in excess of the ten percent threshold that would make Boothco Hansford a major source of income for purposes of the Form 6 reporting requirement.

157. However, the evidence established that $3,000 of the $8,100 attributable to Boothco Hansford was actually signed over to and became the property of Respondent's employer SCG. The evidence further established that $6,000 of the $12,000 total for 2007 was actually the income of SCG and should not have been included by Respondent as income on his 2007 income tax return. Thus, the 2007 total gross income for Respondent's sole proprietorship was $58,000. The $5,100 from Boothco Hansford was less than 10 percent of $58,000 and was not required to be reported on Respondent's 2007 Form 6.[23/]

158. To recapitulate, this case presented eight issues. The recommended disposition of each issue is set forth below.

a. Whether Respondent violated section 112.3143(3)(a), Florida Statutes, regarding a July 11, 2006, vote/measure which affected a real estate development in which Respondent had an interest.

159. The July 11, 2006, vote to approve the plat for Phase 1 was undertaken prior to completion of the staff reviews for reasons of convenience to the developer and therefore cannot be considered a ministerial vote. The vote on this consent agenda

item did not inure to the special private gain or loss of Respondent because any gain realized by Respondent as to the value of his lot was no different in kind from the gains realized by other members of the class of persons affected, a class of which Respondent constituted slightly more than one percent. The Advocate failed to prove by clear and convincing evidence that Respondent violated section 112.3143(3)(a) by his vote on July 11, 2006.

b. Whether Respondent violated section 112.3143(3)(a), Florida Statutes, regarding an August 22, 2006 vote/measure which affected a real estate development in which Respondent had an interest.

160. The August 22, 2006, vote to accept the Phase 1 conservation easement was a ministerial vote in light of the earlier passage of Ordinance No. 04-31 and completion of the Type B site review. The vote on this consent agenda item did not inure to the special private gain or loss of Respondent because any gain realized by Respondent as to the value of his lot was no different in kind from the gains realized by other members of the class of persons affected, a class of which Respondent constituted slightly more than one percent. The Advocate failed to prove by clear and convincing evidence that Respondent violated section 112.3143(3)(a) by his vote on August 22, 2006.

c. Whether Respondent violated section 112.3143(3)(a), Florida Statutes, regarding a January 9, 2007 vote/measure which affected a real estate development in which Respondent had an interest.

161. The January 9, 2007, vote to accept the conservation easements for Phases 2-4 was a ministerial vote in light of the earlier passage of Ordinance No. 04-31 and completion of the Type B site review. The vote on this consent agenda item did not inure to the special private gain or loss of Respondent because any gain realized by Respondent as to the value of his lot was no different in kind from the gains realized by other members of the class of persons affected, a class of which Respondent constituted slightly less than one percent. The Advocate failed to prove by clear and convincing evidence that Respondent violated Section 112.3143(3)(a) by his vote on January 9, 2007, as regards the allegation that his vote inured to his own special private gain or loss.

d. Whether Respondent violated section 112.3143(3)(a), Florida Statutes, regarding a March 13, 2007 vote/measure which affected a real estate development in which Respondent had an interest.

162. The March 13, 2007, vote, insofar as it dealt with reducing the repaving deposit for Pisgah Church Road, was a discretionary action by the LCC that cannot be called ministerial. The remainder of the issues on this consent agenda item constituted a ministerial vote in light of the

earlier passage of Ordinance 04-31 and completion of the Type B site review. The vote on this consent agenda item did not inure to the special private gain or loss of Respondent because any gain realized by Respondent as to the value of his lot was no different in kind from the gains realized by other members of the class of persons affected, a class of which Respondent constituted slightly less than one percent. The Advocate failed to prove by clear and convincing evidence that Respondent violated section 112.3143(3)(a) by his vote on March 13, 2007, as regards the allegation that his vote inured to his own private gain or loss.

e. Whether Respondent violated article II, section 8 of the Florida Constitution by failing to disclose income received in 2007 on his 2007 CE Form 6, Full and Public Disclosure of Financial Interests.

163. Respondent admitted that on his 2007 CE Form 6 he failed to report the gain of $55,000 he realized in 2007 from his sale of Lot P2 as a primary source of income.

164. Section 112.317(1)(d) provides:

> In the case of a former public officer or employee who has violated a provision applicable to former officers or employees or whose violation occurred before the officer's or employee's leaving public office or employment:
>
> 1. Public censure and reprimand.
>
> 2. A civil penalty not to exceed $10,000.

> 3. Restitution of any pecuniary benefits received because of the violation committed. The commission may recommend that the restitution penalty be paid to the agency of the public officer or employee or to the General Revenue Fund.

165. Based on all of the circumstances and the gravity of the violation, it is recommended that the Commission impose a civil penalty of $1,000 on Respondent for his failure to disclose income received from the sale of his lot in Centerville Farms.

> f. Whether Respondent violated section 112.3143(3)(a), Florida Statutes, regarding a January 9, 2007 vote/measure which would inure to the special private gain or loss of a principal by whom Respondent was retained or to the special private gain or loss of the parent organization or subsidiary of a corporate principal by which Respondent was retained.

166. The January 9, 2007, vote to accept the conservation easements for Phases 2-4 was a ministerial vote in light of the earlier passage of Ordinance No. 04-31 and completion of the Type B site review. Respondent's principals at the time of the January 9, 2007, vote were Boothco Hansford, Boothco Coastal, and Booth Holdings Booth Trust, none of which was involved in Centerville Farms. Any special private gain or loss from the votes on Centerville Farms would have inured to CCG and/or CCG II, the owners of the project. The only way in which any special private gain or loss could be attributed

to Respondent's principals would be to pierce the corporate veil and conclude that all of the named companies were alter egos of Mr. Booth, Respondent's actual sub rosa principal. The facts of the case and principles of law at issue do not permit such a conclusion. The Advocate failed to prove by clear and convincing evidence that Respondent violated section 112.3143(3)(a) by his vote on this consent agenda item on January 9, 2007, as regards the allegation that his vote inured to the special private gain or loss of a principal by whom Respondent was retained or to the special private gain or loss of the parent corporation or subsidiary of a corporate principal by which Respondent was retained.

g. Whether Respondent violated section 112.3143(3)(a), Florida Statutes, regarding a March 13, 2007 vote/measure which would inure to the special private gain or loss of a principal by whom Respondent was retained or to the special private gain or loss of the parent organization or subsidiary of a corporate principal by which Respondent was retained.

167. The March 13, 2007, vote, insofar as it dealt with reducing the repaving deposit for Pisgah Church Road, was a discretionary action by the LCC that cannot be called ministerial. The remainder of the issues on this consent agenda item constituted a ministerial vote in light of the earlier passage of Ordinance 04-31 and completion of the Type B site review. Respondent's principals at the time of the

March 13, 2007 vote were Boothco Hansford, Boothco Coastal, and Booth Holdings Booth Trust, none of which were involved in Centerville Farms. Any special private gain or loss from the votes on Centerville Farms would have inured to CCG and/or CCG II, the owners of the project. The only way in which any special private gain or loss could be attributed to Respondent's principals would be to pierce the corporate veil and conclude that all of the named companies were alter egos of Mr. Booth, Respondent's actual sub rosa principal. The facts of the case and principles of law at issue do not permit such a conclusion. The Advocate failed to prove by clear and convincing evidence that Respondent violated section 112.3143(3)(a) by his vote on this consent agenda item March 13, 2007, as regards the allegation that his vote inured to the special private gain or loss of a principal by whom Respondent was retained or to the special private gain or loss of the parent corporation or subsidiary of a corporate principal by which Respondent was retained.

> h. Whether Respondent violated article II, section 8 of the Florida Constitution, by failing to disclose a secondary source of income received in 2007 on his 2007 CE Form 6, Full and Public Disclosure of Financial Interests.

168. The Advocate failed to prove by clear and convincing evidence that Respondent failed to disclose a secondary source

of income that exceeded ten percent of the gross income of Respondent's sole proprietorship lobbying business.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Commission issue a public report finding:

1. That the evidence presented at the public hearing in this case was insufficient to establish clearly and convincingly that Respondent's votes on July 11, 2006, November 14, 2006, January 9, 2007, and March 13, 2007, inured to his special private gain or loss in violation of section 112.3143(3)(a);

2. That the evidence presented at the public hearing in this case was insufficient to establish clearly and convincingly that Respondent's votes on January 9, 2007, and March 13, 2007, inured to the special private gain or loss of a principal by whom Respondent was retained or to the special private gain or loss of the parent corporation or subsidiary of a corporate principal by which Respondent was retained in violation of section 112.3143(3)(a);

3. That the evidence presented at the public hearing in this case was insufficient to establish clearly and convincingly that Respondent violated article II, section 8 of the Florida Constitution by failing to disclose a secondary source of income

received in 2007 on his 2007 CE Form 6, Full and Public Disclosure of Financial Interests; and

4. That the evidence presented at the public hearing in this case established clearly and convincingly that Respondent violated article II, section 8 of the Florida Constitution by failing to disclose income received in 2007 on his 2007 CE Form 6, Full and Public Disclosure of Financial Interests, and that such violation merits a civil penalty of $1,000.

DONE AND ENTERED this 11th day of August, 2011, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of August, 2011.

ENDNOTES

[1/] "Booth companies" is not a formal corporate entity. It is the informal name used at the hearing to describe the corporations, partnerships and other business entities in which Hurley Booth, Jr. or trusts established by Mr. Booth have an interest as a shareholder, member, partner or trustee.

[2/] The record evidence did not indicate whether Respondent participated in the drafting or completion of this agreement. Because the agreement was entered into after Respondent purchased his first lot in Centerville Farms, the undersigned presumes that the Advocate would have offered evidence of Respondent's participation in the agreement if there were any.

[3/] The parties have stipulated that the actual number of lots in Phase 1 was 91.

[4/] Section 10-7.410(1) of the Leon County Code provides, in relevant part: "A final plat, when required, must be recorded before a developer may transfer title to lots within a subdivision."

[5/] Section 10-7.604 of the Leon County Code provides:

> When a plat has been submitted to the Board of County Commissioners, and conforms with an approved site and development plan and the provisions of this Code, the board shall consider and take action on the plat. Approval by the board shall not be shown on the plat until all requirements of this chapter have been met and the county engineer has certified that:
>
> 1. All improvements and installations in the development required for its approval under this Code have been completed in accordance with all appropriate specifications; or,
>
> 2. A surety device has been provided by the applicant for the improvements which have not been constructed. The surety device shall:
> (a) Be acceptable to and approved by the county engineer and the county attorney; and,
> (b) Cover 110 percent of the cost of any uncompleted road, storm water management conveyance improvements, or other required infrastructure as estimated by the engineer

of record and approved by the county engineer; and,
(c) Be conditioned upon completion of construction of dedicated roads and storm water management conveyances as shown on the approved construction plans within 12 months, or as extended by the county engineer; and,
(d) Be payable solely to and for the indemnification of Leon County.

3. A surety device in the amount of ten percent of the total cost of all required improvements as approved in the site and development plan to cover defects in materials and/or workmanship for two years shall also be posted as a condition of acceptance of responsibility for maintenance of any public improvements by the county.

[6/] Section 10-1.101 of the Leon County Code provides:

> Conservation easement shall mean a recorded legal right or interest in real property, as described in F.S. § 704.06, which is granted to the state or to the county for the benefit of the public interest of its citizens, which shall be perpetual in nature unless specifically released by the holder of the easement. Pursuant to such an easement, the possessor of the land from which the easement issues is prohibited from altering the topography or vegetative cover of the area subject to the easement, except as may be particularly specified in the conservation easement and any related, valid permit. The purpose of such an easement is to ensure that the owner of the servient land, and his agents, assigns, and successors in interest, maintain the area subject to the easement predominantly in a natural, scenic, open, or wooded condition or state, and may include restrictions and conditions as to alteration.

Section 10-7.204(f) sets forth the easement requirements for the reserve acreage in conservation subdivisions.

[7/] Respondent testified that he believed he was buying lots in a "very unique subdivision," the first conservation community that he knew of, where "a vast amount of the land... was going to be in its natural form forever." There seems little question that the conservation easements were a selling point of Centerville Farms and added to the value of the lots. Respondent mounted a persuasive attack on the merits of Mr. Boutin's expert opinion, but the undersigned is not persuaded that an expert opinion is necessary to establish, at the very least, that the developer and the purchasers of lots believed that the conservation easements enhanced the value of the lots.

[8/] Mr. Williams wrote the formal agreement to retain Respondent as a consultant. This agreement was not produced at the hearing.

[9/] Mr. Williams described the Booth company offices as very busy and hectic. Respondent had to "corner" Mr. Williams in order to report on his discussions with local officials in Jefferson and Franklin counties.

[10/] The record evidence does not explain why Respondent received a 1099 from Booth Holdings Booth Trust when his work was for the other two named Booth companies.

[11/] Mr. Thiele confirmed that he had a discussion with Respondent prior to the November 14, 2006 Commission meeting regarding a potential conflict due to Respondent's work for the Booth companies. Mr. Thiele added that he had no such conversations with Respondent as to any of the other votes in question.

[12/] Respondent's testimony on this point was not clear. He was definite that his foremost concern was that he should not appear to be voting to improve the value of his own lots. He stated that he approached Mr. Thiele about this concern. Mr. Thiele recalled having a conversation with Respondent about the November 14, 2006, vote, but did not testify as to the details of the conversation. From the contents of the Form 8B prepared by Mr. Thiele, it may reasonably be inferred that his conversation with Respondent involved Respondent's representation of Booth companies. When shown the Form 8B during cross-examination, Respondent stated:

> Now, Mr. Thiele prepared this for me, and obviously I signed it, and I agreed at that time and I agree at this time that the conflict could have been Booth properties because of two reasons, because I represented them outside of Leon County, or because it was a place that I had lots in Leon County that I owned, or was trying to own.

The minutes of the November 14, 2006, LCC meeting state: "Commissioner DePuy recused himself from the discussion and pointed out that he does consulting for Booth Company, although not on the subject property." The minutes do not mention Respondent's ownership of a lot in Centerville Farms.

[13/] Respondent acknowledged it would have been better practice to return the checks to Booth Holdings Booth Trust and ask that new ones be issued in the name of SCG. By merely signing the checks over to SCG, Respondent ensured that the 2007 1099s from the Booth companies would show that the $6,000 from these two checks was paid to Respondent rather than SCG. As a result, Respondent mistakenly reported the $6,000 from these two checks as income on his own 2007 tax return, which showed that he made $64,000 in gross income from his sole proprietor lobbying activities. The mistake became apparent to Respondent's accountant during the discovery process in this case. Respondent amended his 2007 tax return in February 2011.

[14/] Respondent stopped working for SCG in early May 2007, due to the controversy surrounding him in relation to the issues raised in this proceeding.

[15/] This amount was the difference between Respondent's purchase price and the price for which he sold the lot to Mr. Kise. Respondent testified that he did not actually clear $55,000 from the sale.

[16/] The Commission's reference is to dicta contained in a footnote of Chavez, which is a case involving an award of attorney's fees to a city official who had successfully defended against ethics charges brought before the Commission. The court stated as follows:

The hearing officer concluded that only a vote on the ordinance itself would constitute violation of section 112.3143(3). Thus, the tie-breaking vote on the motion to refer the appellant's petition to the legal department was merely a preliminary or procedural vote not proscribed by the statute. While we do not have the commission's report before us for direct review, suffice it to say we do not agree with such a construction of the statute. Under the hearing officer's construction, the official votes taken by the council are severable. Some-- conflicts of interest occurring at a procedural step-- are permitted. Others-- conflicts occurring at a substantive step-- are not. In a case like the one before us, that seems to be a distinction without a difference. The result for the appellant is the same. The failure to obtain a majority vote at any step along the path from the filing of the petition to final passage as an ordinance effectively killed it. In fact, it was the death of her petition by the tie vote, and the resulting detrimental financial consequences to the appellant, that, at least in part, caused her to change her mind. But for her tie-breaking vote on November 21, 1985, no zoning change would have occurred. Her decision to break the impasse was intended and calculated to expedite movement of the matter toward its ultimate successful conclusion. The appellant was faced with an ethical dilemma in deciding whether to break the tie vote. We feel sure it is this very type of dilemma that the legislature addressed when it established the unequivocal standard of behavior expected of public officials when faced with voting in these circumstances. In the words of section 112.3143(3), "no... local public officer shall vote in his official capacity upon any measure which inures to his special private gain . . . ."

> The legislature makes no distinction whether the conflicting vote occurs at the beginning, in the middle, or at the end of the zoning change procedure.
>
> For all that, while we do not agree with the conclusion of the commission on this point, we do not have the commission's report before us for review. Rather, we have for review and disposition the order of the trial court which awarded the appellant reimbursement for her attorney's fees and costs under section 111.07 as a "prevailing respondent" before the commission.

Chavez, 560 So. 2d at 1216, n.4. Even if these dicta constituted binding authority in the instant case, it is inapplicable to the factual situation presented. In the instant case, "final passage as an ordinance" had already occurred before Respondent took his seat on the LCC in November 2004. There was no impasse to be broken; nothing remained to be "killed."

[17/] In CEO 84-1 (Fla. Comm. on Ethics Jan. 26, 1984), the Commission on Ethics stated:

> We do not understand the Narco Realty decision to mean that the Commission's responsibility in approving plats is purely ministerial. The Fourth District Court of Appeal subsequently has acknowledged that consideration of a plat involves the exercise of discretion. City of Coconut Creek v. Broward County Board of County Commissioners, 430 So.2d 959 (Fla. 4th DCA 1983), and Broward County v. Coral Ridge Properties, Inc., 408 So.2d 625 (Fla. 4th DCA 1981).

The cases cited by CEO 84-1 distinguish Narco Realty but do not at all undermine its essential holding "that where 'the property owner has done all the law required of him to entitle his plat to be recorded' then mandamus was an appropriate remedy because nothing remained to be done which would permit or require an exercise of discretion." Coral Ridge Properties, 408

So. 2d at 626. In the instant case, there is no dispute that all legal conditions precedent to the approval of the plats had been met. See also Park of Commerce Associates v. City of Delray Beach, 606 So. 2d 633, 635 (Fla. 4th DCA 1992), in which the en banc court reaffirmed the principle of Narco Realty that "where all of the legal requirements for platting land have been met there is no residual discretion to refuse plat approval and mandamus will lie," and extended that rationale to approval of site plans.

[18/] The basis of the Advocate's argument appears to be that a legislative body always has the discretion not to adopt a given piece of legislation, and therefore that any vote on a matter implicating the official's special private gain or loss is prohibited. However, it is well to recall that while the term "discretion" means "freedom of judgment or choice," it also carries the connotation of "prudence" derived from its root word "discreet." A vote undertaken with the sure knowledge that it would result in a writ of mandamus against the County would not be an exercise of "discretion" as that term is used in the controlling case law.

[19/] See, e.g., CEO 11-01 ("[O]ur prior decisions have tended to find no 'special' gain or loss when the covered person constituted less than one percent of the affected class."); CEO 01-08 ("We also typically have concluded that no voting conflict was presented in situations where the interests of the public official involved one percent or less of the class."); and CEO 95-04 ("Generally, we have found no voting conflict when the interests involved one percent or less of the class.").

[20/] Both parties have cited examples of advisory opinions in which the one percent factor was not found determinative in light of all the facts presented. In CEO 00-13, a city commissioner was to vote on ratifying a collective bargaining agreement that would affect the city's firefighter retirement system. The commissioner was one of 88 members of the retirement system who would immediately and directly benefit from an affirmative vote, out of a total of 206 members in the retirement system. The Commission found that, although the city commissioner was 1.14% of the class of members benefited by the vote, the class was sufficiently large that any gain or loss attendant to the city's ratification of the collective bargaining agreement would not be "special." Conversely, in CEO 90-20, the Commission found that a city council member was prohibited from voting on matters pertaining to a lawsuit filed

against the city by a citizens' group of which the councilman was a member. The lawsuit challenged a special assessment levied for street paving and repair that included an assessment on the councilman's property. The affected class constituted 300 property owners, meaning that the councilman was far less than one percent of the affected class. The Commission held that the councilman was nonetheless required to abstain from voting on matters regarding the lawsuit, "[g]iven the direct, personal financial effect striking the assessment would have on your interests, and the clearly defined class of persons who would be benefited. . . ."

[21/] To cite an extreme example, suppose a single purchaser swept in the day before a Commission vote and bought every lot except the two on which Respondent held contracts. With no change in his actual financial interest in the development, Respondent would suddenly constitute 50% of the class of persons holding contracts on lots in the development on the day of the vote.

[22/] CEO 03-13 (Fla. Comm. on Ethics Sept. 9, 2003) is similarly inapposite because it dealt with a ladder of wholly owned corporations that subjected the city council member in question to the strictures of the "parent organization or subsidiary of a corporate principal" language of section 112.3143(3)(a), a situation not present in the instant case.

It might be objected that this distinction is the sort of "hyper-technical, legalistic" interpretation of corporate law against which CEO 03-13 warns in the context of ethics issues. However, the cited cases and advisory opinions do not yield a clear rule as to when the Commission will disregard the corporate fiction and pierce the corporate veil, absent the recognized exceptions for fraud, in pursuit of the higher purposes of the Code of Ethics. If the Commission itself finds it difficult to draw a bright line on piercing the corporate veil in the absence of the judicially established criteria for doing so, its Advocate has a herculean task in establishing that a public official knew or should have known that his otherwise lawful actions ran afoul of the Commission's ad hoc "slavish adherence" rule. Dania Jai-alai has the virtue of clarity and reliance on a long line of well established case law.

[23/] The Advocate urges that the total of $6,000 received from the Booth companies is the correct figure. Such aggregation of the amounts received from the Booth entities could only be

achieved by a piercing of the corporate veil that is not supported by the facts of this case.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.