

APR 10 2017

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: MILTON WEST,

Case No. 16-5483EC

Respondent.
_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Orlando and Tallahassee, Florida, on December 1, 2016, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Advocate: Melody A. Hadley, Esquire
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For Respondent: Mark Herron, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent, while serving as an appointed member of the Ocoee Planning and Zoning Commission, violated section 112.313(7)(a), Florida Statutes (2015)^{1/} by having a contractual relationship that conflicted with his official responsibilities; and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On August 3, 2016, the Florida Commission on Ethics (Commission) issued an Order Finding Probable Cause to believe that Milton West (Respondent), as a member of the City of Ocoee Planning and Zoning Commission (P & Z Commission), violated section 112.313(7)(a) by having a contractual relationship that created a continuing or frequently recurring conflict between his private interests and the performance of his public duties or that impeded the full and faithful discharge of his public duties. The matter was forwarded to the Division of Administrative Hearings (DOAH) on September 20, 2016.

During the final hearing, Advocate for the Commission (Advocate) offered the testimony of Michael Rumer, Joel Keller, and Respondent. Respondent testified on his own behalf and called no other witnesses. Advocate and Respondent stipulated to the testimony of John Grogan. Joint Exhibits 1 through 8 were admitted into evidence. Respondent's Exhibits 1 and 2 were admitted into evidence.

On November 23, 2016, Respondent filed a "Motion to Invalidate Agency or Limit Action Based on Unadopted Rule [Motion]." On November 29, 2016, Advocate responded with a "Motion to Strike or Dismiss Respondent's Motion to Invalidate Agency or Limit Action Based on [an Alleged] Unadopted Rule."

The undersigned reserved ruling on the Motion. By separate Order, Respondent's Motion was denied.

A Transcript of the final hearing was filed with DOAH on January 25, 2017. Respondent's Unopposed Motion to Extend Time Within Which to File Proposed Recommended Orders was granted, and on March 3, 2017, each party filed a Proposed Recommended Order.

FINDINGS OF FACT

1. At all times material to the complaint, Respondent served as an appointed member of the Ocoee P & Z Commission.

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 tenure on the P & Z Commission.

3. As a member of the P & Z Commission, Respondent is subject to the "Ocoee Florida Land Development Code, Section 3, Planning and Zoning Commission [Land Development Code]."

4. Section 3-2 of Land Development Code provides in part as follows:

A. Establishment and Membership

The Planning and Zoning Commission shall consist of nine (9) members appointed by the City Commission and one member appointed by the School Board of Orange County as a non-voting member. The member appointed by the School Board of Orange County shall attend those meetings at which the Planning and Zoning Commission considers comprehensive plan amendments and rezonings that would, if

approved, increase residential density on the property that is the subject of the application. No member shall be an employee of the City of Ocoee and all members, except the member appointed by the School Board of Orange County, shall be residents of the City of Ocoee. When selecting members to the Planning and Zoning Commission, the City Commission shall attempt to select persons from different geographical areas within the City so as to create geographical diversity and representation.

* * *

E. Compliance with Laws

The Planning and Zoning Commission, and its individual members, shall comply with all applicable laws relative to public bodies, including disclosure of interests and procedure[s] for refraining from participation [when] a conflict of interest exists.

* * *

G. Duties and Responsibilities

(1) To act as the Local Planning Agency (LPA) of the City of Ocoee, pursuant to Section 163.3174, Florida Statutes, and to prepare on its own initiative recommendations for amendments to the Comprehensive Plan of the City of Ocoee, including text and/or maps, and to forward such amendments to the City Commission for consideration. No such recommendation shall be made except after a public hearing held in accordance with State and local requirements.

(2) To review and make recommendations to the City Commission on applications for amendments to the Comprehensive Plan. No such recommendation shall be made except after a public hearing held in accordance with State and local requirements.

(3) To prepare on its own initiative recommendations for amendments to this Code, text and/or maps, and to forward such amendments to the City Commission for consideration. No such recommendation shall be made except after a public hearing held in accordance with State and local requirements.

(4) To review and make recommendations to the City Commission on applications for amendments to this Code, including applications for annexation or change of zoning. Pursuant to Section 163.3174(4)(c), Florida Statutes, the Planning and Zoning Commission shall also have the responsibility to review and make a finding as to the consistency of the proposed land development regulation with the adopted Comprehensive Plan and to report such finding to the City Commission. No such recommendation shall be made except after a public hearing held in accordance with State and local requirements.

(5) To review and make recommendations to the City Commission on applications for various development approvals or permits as provided within this Code, including, but not limited to Planned Unit Developments (PUD), special exceptions, subdivisions, and any other application for which the City Commission requests a report and/or recommendation. Where a public hearing is required by the applicable procedural section, no such recommendation shall be made except after a public hearing held in accordance with State and local requirements.

(6) To act in an advisory capacity to the City Commission on land use and land development issues and to make such studies and to conduct such investigations as may be requested from time to time by the City Commission.

(7) To review zoning of newly annexed lands when it represents an increase in intensity of use or a conflict with the Comprehensive

Plan pursuant to requirements of State law and City ordinance.

5. In addition to serving on the P & Z Commission, Respondent buys and sells commercial real estate.

6. Respondent is a manager and shareholder in W.O.R.Y. INVESTORS, LLC (WORY), an entity that is also in the business of buying and selling commercial real estate.

7. Respondent, in his individual capacity, owned approximately four acres, which abutted six acres owned by WORY. Both properties have an address on West Road in Ocoee, Florida, and will be referred to collectively herein as the "West Road property."

A. The Contract

8. On or about November 11, 2015, Respondent, in his individual capacity, and as manager for WORY, executed an "Agreement of Sale" wherein the West Road property was to be purchased by Charter Schools Development Group, LLC (buyer), for \$1,890,540. According to the Agreement of Sale, the buyer wanted to "develop and construct on the Property a K-8 public charter school."

9. The Agreement of Sale contained a number of contingencies, referred to in the contract as "Buyer Required Approvals," that Respondent was required to satisfy prior to finalization of the sale of the West Road property. Paragraph

six of the Agreement to Sale sets forth a number of the pre-sale contingencies imposed on Respondent, and the same provides as follows:

6. Development

The Buyer intends to develop and construct on the Property a K-8 public charter school and adjacent commercial development acceptable to Buyer consisting of buildings and other improvements including, but not limited to recreation fields, related landscaping, open space, storm water, and appropriate parking (the "Project"). Buyer's obligation to complete the purchase of the Property from Seller in accordance with the terms of this Agreement is contingent upon the satisfaction of each of the following conditions with regard to the Property (each of which may be waived in whole or in part in writing by Buyer):

(a) Buyer has obtained final, unappealed and unappealable approvals from all necessary governmental authorities (including governmental agencies), for zoning, utilities and any other approvals (including necessary parking requirements) Buyer deems necessary, in its sole discretion, permitting the construction and use of the improvements comprising the Project, including but not limited to any required special exception.

(b) Buyer has obtained final, unappealed and unappealable approvals and/or permits required by any and all governmental authorities (including governmental agencies) so that the Property shall have immediate and adequate access to water, sewer and all other utilities in accordance with the final approved site development plan.

(c) Buyer has obtained final, unappealed and unappealable approvals and/or permits required by any and all governmental

authorities (including governmental agencies) for storm water management; including easements and agreements for constructing and maintaining storm water basins; all wetlands studies and approvals in such form that wetlands, if any, shall not preclude construction of roads, utilities, storm water management facilities, any other required improvements for erection of buildings on the Property.

(d) Buyer has obtained all permits and approvals, and all conditions thereof shall have been satisfied, so as to allow for recording of the final plan and issuance of building permits subject only to satisfaction of the following requirements by Buyer at or after Closing (i) submission of construction drawings in accordance with applicable law, (ii) execution by the Buyer of the necessary development agreements, (iii) execution and funding by Buyer of the necessary escrow agreements for municipal improvements, and sewer and water improvements, and (iv) payment by the Buyer of all municipal fees and charges associated therewith.

(e) Subject to Seller's obligation set forth in Section 6(f) below, Buyer has obtained any and all other easements, approvals and/or permits that may be necessary to construct and use the improvements comprising the Project.

(f) Buyer shall obtain, at no additional cost to Seller, all easements and roads that in Buyer's sole reasonable discretion are necessary for property access, utilities and signage to the Property in accordance with Buyer's final approved site development plan.

The items referred to in subsections 6(a) through 6(f) hereof shall hereafter be referred to as the "Buyer Required Approvals." After the end of the Inspection Period, Buyer shall diligently proceed with the filing of all applications necessary for

obtaining the Buyer Required Approvals. Seller agrees, at no expense to Seller, to cooperate with buyer in connection with the Buyer Required Approvals to the extent of signing all applications necessary for obtaining the buyer Required Approvals and appearing and testifying at the various hearings. Seller's cooperation as aforesaid shall not entitle Seller to any additional compensation. All permit fees, studies, deposit and investigation costs incurred in connection with the Buyer Required Approvals shall be the sole responsibility of buyer and buyer agrees to affirmatively use its good faith efforts to obtain all of the Buyer Required Approvals without delay and as expeditiously as reasonably possible. Seller hereby grants to Buyer a power of attorney to file, on Seller's behalf, all applications related to the Buyer Required Approvals; provided, however, that the Land shall not be rezoned prior to the expiration of the Inspection Period. Seller acknowledges that buyer will likely contact, meet with and/or obtain consents for the Project from neighboring property owners during the Inspection Period and in the process of obtaining the Buyer Required Approvals. (emphasis added).

10. None of the provisions of paragraph six of the Agreement of Sale were waived by either party.

11. Paragraph 15(b) of the Agreement of Sale provides as follows:

(b) If Seller shall violate or fail (in breach of its obligations hereunder) to fulfill or perform any of the terms, conditions or undertaking set forth in this Agreement within ten (10) days written notice from Buyer or (five (5) days written notice in the event of a monetary default), Buyer shall be entitled to: (i) terminate this Agreement and receive the return of the

Deposit and reimbursement of Buyer's documented out-of-pocket due diligence expenses up to \$15,000.00, and, thereupon, the parties hereto will be released and relieved from all provisions of this Agreement, or (ii) pursue specific performance.

12. Paragraph 17 of the Agreement of Sale states that "[b]uyer and Seller agree to cooperate with each other and to take such further actions as may be requested by the other in order to facilitate the timely purchase and sale of the Property."

13. Paragraphs 6, 15(b) and 17 of the Agreement of Sale obligated Respondent to take all steps necessary, including "appearing and testifying at the various hearings," for ensuring that the "Buyer Required Approvals" were satisfied, which in turn would allow Respondent to receive his share of the purchase price for the West Road property.

14. Section 112.311(1), provides in part that "[i]t is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for private gain other than the remuneration provided by law."

B. Rezoning and Respondent's Role

15. In order for a charter school to be built on the West Road property, it was necessary to rezone the existing planned unit development land use plan covering the property. Ocoee City Planner Michael Rumer testified that there are two types of rezoning. There is a straight rezoning to a zoning category listed in the land development code and there is rezoning to a planned unit development (PUD). Both types of zoning use the following process: an application is filed; then there is a review process by a development review committee, which is a staff level review; that review is forwarded to the P & Z Commission for a recommendation; and then it goes to the Ocoee City Commission for two readings of an ordinance for rezoning if the rezoning is approved. This is the process that was followed for the West Road property PUD.

16. On February 9, 2016, the issue of whether to recommend rezoning of the West Road property to allow for the charter school referenced in the Agreement of Sale came before the P & Z Commission. Respondent was present for the meeting.

17. During the meeting, Respondent spoke in favor of the rezoning request for the West Road property. When a fellow commissioner made a request for more time to review the rezoning issue, Respondent opposed the delay by stating "[i]f you don't

give them a go now, you basically kill the deal because it's a time sensitive thing that they want the kids in there in August."

18. During the meeting, the commissioners struggled with whether to recommend denial of the West Road property zoning request, recommend approval of the request without conditions, or recommend approval of the request with conditions. After two previous motions regarding the zoning request died for lack of a "second," a third motion was made wherein approval was recommended "with the condition that we're all going to look at the traffic movement with the final site plan design." When it appeared as though this motion was also likely to fail for lack of a "second," Respondent encouraged the chairman of the P & Z Commission to voice a "second" for the motion since Respondent was unable to do so.^{2/}

19. Respondent's actions during the meeting of February 9, 2016, were consistent with his obligations under the Agreement of Sale to assist the buyer of the West Road property with securing the "Buyer Required Approvals."

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the subject matter of and the parties to this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

21. Section 112.322 and Florida Administrative Code Rule 34-5.0015 authorize the Commission to conduct investigations and to

make public reports on complaints concerning alleged violations of the Code of Ethics for Public Officers and Employees.

22. The Commission seeks to penalize Respondent for his alleged violations of the Code of Ethics for Public Officers and Employees. Consequently, the Commission has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Dep't of Agric. & Consumer Servs., 550 So. 2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So. 2d 398 (Fla. 1994).

23. Section 112.313(7)(a) provides as follows:

(7) CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.—

(a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

Respondent is charged with violating the portion of section 112.313(7)(a) which prohibits a public officer from having a contractual relationship that impedes the full and faithful discharge of the official's public duties.

24. A determination of a violation of section 112.313(7)(a) "requires an examination of the nature and extent of the public officer's duties together with a review of his private employment to determine whether the two are compatible, separate and distinct, or whether they coincide to create a situation which 'tempts dishonor.'" Zerweck v. State Comm'n on Ethics, 409 So. 2d 57, 61 (Fla. 4th DCA 1982).

25. Making recommendations to the Ocoee City Commission regarding rezoning issues, like those related to the West Road property, is an essential part of Respondent's responsibilities as a member of the P & Z Commission. Section 112.311(1) requires that Respondent act with independence and impartiality when performing his public duties.

26. Respondent's contractual relationship with the buyer, both in his individual capacity and as manager/shareholder in WORY, encroaches on his public duties of independence and impartiality because the contract imposes on Respondent an obligation to take all steps necessary, including "appearing and testifying at the various hearings," to assist buyer in securing the "Buyer Required Approvals." Further encroachment is

evidenced by the fact that if Respondent defaulted on his contractual obligation to assist buyer in securing the "Buyer Required Approvals," then not only would Respondent lose the benefit of the bargain with respect to the West Road property but he would be obligated to reimburse buyer's documented out-of-pocket expenses up to \$15,000. Simply stated, Respondent's contract with buyer created a situation which could reasonably tempt Respondent to act with dishonor.

27. Finally, it is undisputed that Respondent complied with section 112.3143 by abstaining from the February 9, 2016, rezoning vote because it inured to his special private gain (and probably a business associate's). Respondent argues that his ability to participate in the February 9th discussion under section 112.3143(4) absolves or exempts him from a violation of section 112.313(7)(a).

28. Sections 112.3143 and 112.313(7) are independent laws. Neither statute refers to the other. The statutes require proof of different elements in order to establish a violation. Compliance with one statute does not equate to compliance with the other law. In Commission on Ethics advisory opinion 94-5, the Commission opined that, "[n]othing in section 112.313(7)(a) indicates that compliance with section 112.3143 creates an exemption from its application; in contrast, other specific

exemptions are provided in section 112.313(12).” Respondent’s argument in this regard is rejected.

29. The clear and convincing evidence establishes that Respondent violated section 112.313(7) (a).

PENALTY

30. The penalties available for a public officer who violates the Code of Ethics include: impeachment; removal from office; suspension from office; public censure and reprimand; forfeiture of no more than one-third of his or her salary per month for no more than 12 months; a civil penalty not to exceed \$10,000; and restitution of any pecuniary benefit received because of the violation committed. § 112.317(1) (a), Fla. Stat.

31. A primary purpose of civil penalties is to deter misconduct by securing obedience to the law. Tull v. United States, 481 U.S. 412 (1987); see also Hudson v. United States, 522 U.S. 93 (1997) (“all civil penalties have some deterrent effect”). Thus, an imposition of a penalty is important to deter future ethical misconduct, and critical to ensure the public’s trust and confidence in the system.

32. The West Road property sold for \$1,890,540. While Respondent was not the sole recipient of the sale proceeds, his share of the same was based on the fact that individually he owned four acres and had a shared interest in the remaining six acres. A civil penalty should be something more than what is

tantamount to "the cost of doing business." See, e.g., In Re: Joseph G. Spicola v. Comm'n on Ethics, Case No. 91-6730EC (Fla. DOAH Apr. 9, 1992; Fla. COE Jun. 5, 1992).

33. In its Proposed Recommended Order, Advocate proposed a civil penalty in the amount of \$10,000 and that Respondent also receive a public censure and reprimand. These are reasonable recommendations given the facts of this case.

RECOMMENDATION

Based on the Findings of Facts and Conclusions of Law, it is RECOMMENDED that a civil penalty of \$10,000.00 be imposed against Respondent due to his violation of section 112.313(7)(a) and that Respondent also be publicly censured and reprimanded.

DONE AND ENTERED this 10th day of April, 2017, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of April, 2017.

ENDNOTES

^{1/} All subsequent references to Florida Statutes will be to 2015, unless otherwise indicated.

^{2/} On August 3, 2016, the Commission on Ethics, in its Order Finding Probable Cause, determined that because Respondent followed the necessary disclosure and filing requirements, probable cause does not exist to believe that Respondent violated section 112.3143(3)(a) and (4).

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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.