FLORIDA
COMMISSION ON ETHICS
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BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re: Randall Merritt,

Respondent. **Complaint No. 20-120**

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ADVOCATE'S RECOMMENDATION

The undersigned Advocate, after reviewing the Complaint and Report of Investigation filed in this matter, submits this Recommendation in accordance with Rule 34-5.006(3), F.A.C.

RESPONDENT/COMPLAINANT

Respondent, Randall Merritt, serves a member of the Wakulla County Commission for District 2. Complainant is Meaghan Allen of Crawfordville, Florida.

JURISDICTION

The Executive Director of the Commission on Ethics determined that the Complaint was legally sufficient and ordered a preliminary investigation for a probable cause determination as to whether Respondent violated Section 112.3143(3)(a), Florida Statutes and Article II, Section 8, Florida Constitution and 112.3144, Florida Statutes. The Commission on Ethics has jurisdiction over this matter pursuant to Section 112.322, Florida Statutes.

The Report of Investigation was released on June 10, 2021.

ALLEGATION ONE

Respondent is alleged to have violated Section 112.3143(3)(a), Florida Statutes, by voting on an October 3, 2016 measure that he knew would have inured to the special private gain or loss of a principal by whom he was retained.

APPLICABLE LAW

Section 112.3143(3)(a), Florida Statutes, 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 s. 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.

Section 112.3143(1)(d), Florida Statutes, defines special private gain or loss as follows:

> "Special private gain or loss" means an economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, unless the measure affects a class that includes the officer, his or her relative, business associate, or principal, in which case, at least the following factors must be considered when determining whether a special private gain or loss exists:
>
> 1. The size of the class affected by the vote.
>
> 2. The nature of the interests involved.
>
> 3. The degree to which the interests of all members of the class are affected by the vote.

4. The degree to which the officer, his or her relative, business associate, or principal receives a greater benefit or harm when compared to other members of the class.

The degree to which there is uncertainty at the time of the vote as to whether there would be any economic benefit or harm to the public officer, his or her relative, business associate, or principal and, if so, the nature or degree of the economic benefit or harm must also be considered.

In order to establish a violation of Section 112.3143(3)(a), Florida Statutes, the following elements must be proved:

1. Respondent must have been a county, municipal or other local public officer serving on a collegial body.

2(A). Respondent must have:

1) voted in his or her official capacity on a measure which would have inured to the Respondent's own special private gain or loss,

or

2) voted in his or her official capacity on a measure which the Respondent knew would have inured to the special private gain or loss of a principal by whom the Respondent was retained or to the parent organization or subsidiary of a corporate principal by which the Respondent was retained,

or

3) voted in his or her official capacity on a measure which the Respondent knew would have inured to the special private gain or loss of a relative or business associate of the Respondent.

OR

(B). When abstaining from a vote because of a conflict, the Respondent, prior to the vote being taken, must have failed to publicly state to the assembly the nature of his or her interest in the measure described in paragraph 2(A), above.

OR

(C). After abstaining from a vote because of a conflict, the Respondent failed to disclose the nature of his or her interest in the measure described in paragraph 2(A), above, as a public record in a memorandum filed within 15 days after the vote occurred with the person responsible for recording the minutes of the meeting at which the vote occurred.

ANALYSIS

Respondent has served as a member of Wakulla County Commission since 2010. (ROI 5) He is self-employed as a civil engineer and his primary business completes engineering inspections and documentation required prior to the issuance of a building permit for new construction single-family homes. (ROI 5)

Pafford Properties & Construction, LLC, owned by Michael E. Pafford, is currently and during all times relevant to the investigation, has been a client of Respondent's business. (ROI 5, 9) They have no written contract, but Respondent completes inspections for properties owned by the company when he is requested to do so. (ROI 5)

On October 3, 2016, the Wakulla County Commission, including Respondent, voted to approve the Final Plat for Phase II of The Gardens of Saralan. (ROI 4) County Attorney Heather Espinosa had advised Commission members prior to the vote that all County code and Florida Statute requirements had been met and the Final Plat should be approved by the County Commission. (ROI 4)

Pafford Properties & Construction owned all of the lots located in Phase II of The Gardens of Saralan. (ROI 5) Respondent advised that he bills the company a flat fee of approximately $200 to $230 per residence inspected. (ROI 5) Between 2015 and 2018, Respondent completed the engineering for 101 homes in The Gardens of Saralan, with 43 of the engineering jobs involving homes located in Phase II of the subdivision. (ROI 5) He estimated he completed approximately 40-50 inspections for Pafford Properties & Construction during 2016. (ROI 5)

On January 6, 2015, Respondent e-mailed the Commission on Ethics requesting a formal opinion on whether he would have a voting conflict when voting on land use changes, specifically mentioning that his inquiry involved Final Plat approvals and an upcoming vote concerning a Final Plat approval. (ROI 7, Exhibit A2) Because of time constraints, then-General Counsel Chris Anderson provided an informal written opinion on January 14, 2015. (ROI 7, Exhibit A3-A4) Anderson stated in the analysis that it appeared Respondent would not have a voting conflict as long as the subdivision owner/developer was not a client of his and he had not submitted proposals to perform services regarding the subdivision. (ROI 7, Exhibit A3-A4) There are two follow up e-mails relative to a telephone conversation that Anderson had with Respondent. (ROI 7) In the first e-mail, Anderson advised Respondent that clients are persons or entities who have a relationship with you or your firm at the time of the vote on a measure and that past clients or possible future clients, do not trigger the voting conflict law. (ROI 7, Exhibit A5) In the second e-mail, Anderson advised Respondent that if the upcoming subdivision vote is such that, if approved, would likely result in business for Respondent's company based upon his work history with the owner/developer of the subdivision, then he should consider the vote as presenting him with a voting conflict, even if no negotiation for services has occurred. (ROI 7, Exhibit A6)

Respondent advised that he was confident he did not have a voting conflict when voting on the Final Plat approval in question because these types of votes are procedural and are never controversial. (ROI 6) He believed the vote was not a conflict because his company's profit from the engineering work performed is only a small percentage of the overall cost of the building a residence, and he "does not have enough skin in the game" for it to be a voting conflict. (ROI 6) He advised that if he abstained from the vote in question, he would be required to abstain from

voting on every Final Plat approval in the County because every residential construction contractor in the County utilizes his services. (ROI 6)

An argument can be made that the Final Plat approval, which is basis of the October 3, 2016 vote, is ministerial in that the County Commission had no other option but to approve; however, prior to his October 3, 2016 vote, Respondent received an informal opinion from the Commission on Ethics. While not a formal decision, it was written direction from the General Counsel of the Commission that addressed Respondent's initial concern with voting on Final Plat approval. Anderson also addressed the concern of the "present tense" of Respondent's working relationship with a business entity seeking Final Plat approval in that Respondent was informed that he should still abstain if he anticipates receiving business from the Final Plat approval's development which he in fact did with 43 of the homes located in Phase II of The Gardens of Saralan subdivision. In addition, Respondent acknowledged that Pafford is an ongoing client. As such, giving great consideration to Anderson's informal opinion, Respondent violated the relevant statute by failing to abstain, announce a conflict, and/or file a memorandum of conflict.

Therefore, based on the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Section 112.3143(3)(a), Florida Statutes.

ALLEGATION TWO

Respondent is alleged to have violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, by filing an inaccurate 2019 CE Form 6, "Full and Public Disclosure of Financial Interests."

APPLICABLE LAW

Article II, Section 8, Florida Constitution provides:

(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 secretary of state 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 independent commission established in subsection (f), and such rules shall include disclosure of secondary sources of income.

* * *

Section 112.3144(1), Florida Statutes, provides as follows

(1) An officer who is required by s. 8, Art. II of the State Constitution to file a full and public disclosure of his or her financial interests for any calendar or fiscal year shall file that disclosure with the Florida Commission on Ethics.

ANALYSIS

On July 1, 2019, Respondent filed his 2018 CE Form 6, "Full and Public Disclosure of Financial Interests." (ROI 11, Exhibit B) On the 2018 form, Respondent disclosed "Sale of Land" to "Mike Pafford" at "285 Tiger Hammock Road, 32327" for $197,085 under "Part D – Income." (ROI 13, Exhibit B3)

Complainant alleges Respondent sold 28 acres of property located on Dr. Martin Luther King, Jr. Road in Crawfordville to Mike Pafford for $540,000 but, as reflected above, only listed

$197,085 as income from the sale on his property in "Part D – Income," on his 2018 CE Form 6. (ROI 11, Exhibit B) Wakulla County records reflect Respondent sold 28.36 acres of timberland property on Dr. Martin Luther King, Jr. Road to Pafford Properties & Construction, LLC on April 18, 2018 for $540,000. (ROI 12) In addition, Complainant contends the disclosure should have been listed on Respondent's 2017 CE Form 6 based on the date of sale. (ROI 11, Exhibit C)

The form's instructions provide, in part:

> List the name of each source of income that provided you with more than $1,000 of income during 2018, the address of that source, and the amount of income received from that source.
>
> "Income" means the same as "gross income" for federal income tax purposes, even if the income is not taxable...[e]xamples of income include:...gains from property dealings.
>
> If more than $1,000 of income was gained from the sale of property, then you should list as a source on income the name of the purchaser, the purchaser's address, and the amount of gain from the sale.

(ROI 16)

Respondent advised that he listed income of only $197,085 because this is the amount of capital gains income his accountant calculated for income tax purposes relative to the sale of the property. (ROI 14) Respondent acknowledged the income he reported for the sale of the property in question was incorrect because he failed to include income from an Internal Revenue Code "1031 exchange" when he purchased property on Lonnie Raker Lane in Crawfordville on April 19, 2018 with the proceeds from the sale of the property in question. (ROI 15) He maintains this was an oversight on his part and filed a CE Form 6X, "Amendment to Full and Public Disclosure of Financial Interests," on March 3, 2021. (ROI 15, Exhibit D) The amended disclosure form changed the amount of income earned from the sale of the property from $197,085 to $317,085 which Respondent claims was his "gain" from the sale. (ROI 15, Exhibit D3) In addition,

Respondent changed the name of the purchaser from "Mike Pafford" to "Pafford Properties & Construction, LLC." (ROI 15, Exhibit D3)

While Respondent has filed an amended form, the original filing was inaccurate. Regarding Complainant's contention that the property sale disclosure should have been on Respondent's 2017 form, the evidence reflects that the correct reporting year is 2018.

Therefore, based on the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes.

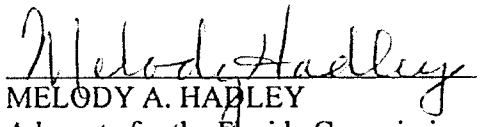
RECOMMENDATION

It is my recommendation that:

1. There is probable cause to believe that Respondent violated Section 112.3143(3)(a), Florida Statutes, by voting on an October 3, 2016 measure that he knew would have inured to the special private gain or loss of a principal by whom he was retained.

2. There is probable cause to believe that Respondent violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, by filing an inaccurate 2019 CE Form 6, "Full and Public Disclosure of Financial Interests."

Respectfully submitted this 9th day of August, 2021.



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