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

**Complaint No. 20-120**

**In re: Randall Merritt,**

**Respondent.**

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# RESPONSE TO ADVOCATE'S RECOMMENDATION

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Randall Merritt, by and through undersigned counsel, submits this response to the Advocate's Recommendation, pursuant to Rule 34-5.006(3), Florida Administrative Code.

Mr. Merritt respectfully requests that the Commission reject the Advocate's Recommendation of probable cause and, instead, conclude there is no probable cause for the reasons set forth herein.

## Introduction

The Commission's Executive Director found the complaint legally sufficient to warrant investigation as to whether Mr. Merritt violated Sections 112.3143(3)(a), Florida Statutes, and Article II, Section 8, Florida Constitution, and Sections 112.3144, Florida Statutes. Following an investigation of the allegations which were

deemed legally sufficient,[1] the Advocate recommended that the Commission find:

> 1. There is probable cause to believe that Mr. Merritt 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 Mr. Merritt 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."

Each of the Advocate's Recommendations will be addressed in turn.

## **Allegation One**

Section 112.3143(3)(a), Florida Statutes, provides as follows:

> (3)(a) 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

[1] Other allegations in the complaint were deemed to be not legally sufficient to warrant investigation.

> 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.

For the purposes determining "special private gain or loss:"

> "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.

The Advocate has recommended that there is probable cause to believe that Mr. Merritt 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. (AR at pp. 2-6, 9)

The minutes of the October 3, 2016 Wakulla County Commission meeting confirm the Mr. Merritt participated in a unanimous vote of the Wakulla County Commission to approve the Final Plat for Phase II of The Gardens of Saralan. (ROI ¶ 4) The minutes further reflect County Attorney Heather Espinosa advised Commission members prior to the vote that all County Code and Florida statutory requirements had been met and the Final Plat should be approved by the County Commission. (ROI ¶ 4)

Approval of the plat by the County Commission was a ministerial act under the Wakulla County Code of Ordinances, as advised by County Attorney Heather Espinosa. Section 7-23, Wakulla Code of Ordinances, provides that '[t]he planning official shall promptly place the final plat, short form subdivision, replat, or family homestead subdivision on the county commission agenda for the next regular meeting. The county commission shall review all final plats, short form subdivisions, replats or family homestead subdivisions for compliance with this Code and, ***if found to be in compliance, the final plat, short form subdivision, replat or family homestead subdivision shall be approved.***" (Emphasis added.) *See Broward County v. Narco Realty, Inc.*, 359 So. 2d 509,

511 (Fla. 4th DCA 1978 (holding that where a landowner "has met all of the legal requirements for platting land, the county had no discretion to refuse this plat approval and the trial court was correct in issuing the Peremptory Writ of Mandamus.")

The Advocate refers to an informal opinion from then-General Counsel Chris Anderson to Mr. Merritt in support of her recommendation for probable cause with respect to Allegation One. (AR at p. 6) In his request, Mr. Merritt asks:

> For example, if I vote on a zoning change or final plat approval, some citizens have expressed concern due to the fact **that I may receive more engineering work** due to the increased devolvement that the land use change potentially could generate.
>
> Specifically, there is a vote scheduled on February 2, 2015 to consider final plat approval for an approximately 40 lot subdivision in Wakulla County, and I request a formal opinion as to whether or not it would be conflict of interest for me to vote on the issue.

(ROI Exhibit A at p. 2) (Emphasis added.)

The informal opinion concluded that, Mr. Merritt "will not be presented with a voting conflict:"

- "***provided*** that the plat approval applicant (subdivision owner/developer) is not a client of you or your firm (on any matter, whether related to the subdivision or not), is not your relative, and is not in any other relationship to you as listed in Section 112.3143(3)(a),

- "***provided*** that you have not submitted proposals to perform services regarding the subdivision,

- "***provided*** that you have not begun any negotiations or had any contact with the developer, applicant, owner, contractor, lot owners, or similar persons or entities with interests in the subdivision in regard to performing services regarding the subdivision, and

- ***provided*** that you or your firm did not prepare the plat for the subdivision or otherwise perform work regarding the subdivision."

(ROI Exhibit A at pp. 2-3)(Emphasis added.)

The Advocate emphasized Mr. Merritt's statement in the Report of Investigation that Pafford Properties & Construction has been a client of his business "currently and during all times relevant to this investigation," while downplaying what Mr. Merritt meant by that statement. "Mr. Merritt said he has no written contract with Pafford Properties & Construction and completes inspections for properties owned by the company when he is requested to do so through email contact with representatives of the company. (ROI ¶5; AR at pp. 4, 6) While he considered Pafford Properties & Construction as client, he was not employed by Pafford Properties & Construction at the time of the October 3, 2016 vote.

The Commission has "construe[d] the statute (Section 112.3143) as applying only 'in the present tense.' That is, a public officer must be employed by the public-measure-affected person or entity at the time of the vote; past relationships or possible future relationships do not satisfy the requirements of the statute." CEO 06-5.

Review of the information submitted to the Commission's investigator in the course of the investigation regarding billings for engineering services for properties owned by Pafford Properties & Construction reveals only one billing in October of 2016 (on October 31, 2016); the most immediate prior billing was on August 14, 2021. *See* Exhibit "A," attached.

**Allegation Two**

The Advocate's Recommendation that Mr. Merritt violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, by filing an inaccurate 2018 CE Form 6 was predicated on allegations that Mr. Merritt

> sold 28 acres of property located on Doctor Martin Luther King Jr Road, Crawfordville, in April 2018, to Mr. Mike Pafford for $540,000, but he listed only $197,085 as income from the sale of his property in "Part D- Income" on his 2018 CE Form 6 (appended as Exhibit B)."

(ROI ¶11) In addition, the complaint alleged that based on the date the disclosure form was submitted, the Mr. Merritt should have listed the income from this sale of property on his 2017 CE Form 6 (appended as Exhibit B)." (ROI ¶11)

In responding to the investigation, it was determined that income reported from the sale of the property on April 18, 2018 was incorrect and an amended 2018 Form 6X was filed to reflect the "gains from property dealings" as specified in the 2018 Form 6 instructions. (ROI ¶¶ 15-16) While Mr. Merritt concedes that he did not seek advice on how to list income from the sale of property, it is significant to note "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)

In his 2018 Form 6X filing, Mr. Merritt, on his own volition, also corrected the name of the purchaser of the property from "Mike Pafford" to "Pafford Properties & Construction, LLC." (ROI ¶ 15; ROI Exhibit D at p. 3) While listing "Mark Pafford" as the purchaser was not 100% accurate, this reporting error was "inconsequential."

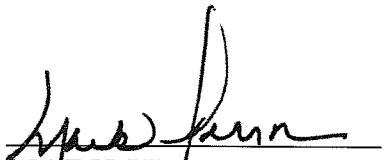
Section 112.3144(11)(c), Florida Statutes, provides that "an error or omission is immaterial, inconsequential, or de minimis if the original filing provided sufficient information for the public to identify potential conflicts of interest." Describing the purchaser as "Mark Pafford" provided sufficient information for the public to identify potential conflicts of interest.

Finally, regarding the contention that the property sale disclosure should have been on Mr. Merritt's 2017 Form 6 filing, the evidence reflects that the correct reporting year was 2018. (AR at p. 9)

## Conclusion

For the reasons set forth herein, Mr. Merritt respectfully requests that the Commission reject the Advocate's Recommendation of probable cause with respect to Allegation One and Allegation Two and, instead, conclude there is no probable cause and dismiss the complaint.

Respectfully submitted on this 20th day of August 2021, by:



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