

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: SAMUEL G. S. BENNETT,) Case No. 02-2924EC
)
Respondent.)
)
)
_____)

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearing, on October 11, 2002, in Deland, Florida.

APPEARANCES

For Advocate: James H. Peterson, III, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Respondent: Ty Harris, Esquire
Allen Watts, Esquire
Cobb, Cole, & Bell
150 Magnolia Avenue
Daytona Beach, Florida 32115

STATEMENT OF THE ISSUE

The issue is whether Respondent violated Section 112.313(6), Florida Statutes, by misusing his position as Chairman of the Town Council to obtain a personal benefit by attempting to change zoning classifications.

PRELIMINARY STATEMENT

A complaint was filed against Respondent Samuel G.S. Bennett (Mr. Bennett) with the Florida Commission on Ethics

(Commission) on August 3, 2000. An investigation followed and an Advocate's Recommendation was filed on April 2, 2002. The Advocate recommended a finding of no probable cause. Nevertheless, the Commission found probable cause. This was noted in an Order Finding Probable Cause filed June 11, 2002.

The matter was forwarded to the Division of Administrative Hearings and filed July 22, 2002. The case was set for hearing on September 26, 2002, in DeLand, Florida. Subsequent to a motion to set the case on October 11, 2002, the matter was re-scheduled for hearing on that date and heard as scheduled.

At the hearing, the Advocate presented the testimony of Robert Allen Keeth, Mary Frances Stoughton, Deborah LeBlanc, David Gray Leonhard, and Mr. Bennett. The Advocate offered 24 pre-marked exhibits which were admitted into evidence and also had admitted Advocate's Exhibits 26, 27, 28, and 29. The Advocate also offered into evidence two large maps which were received into evidence as Advocate's Exhibits 2B and 2C, which were also admitted into evidence. The Advocate had admitted a printout of the "official town map" as it currently exists. Additionally, by agreement of the parties, the testimony of Robert Keeth taken during the hearing in the case of In re. Bonnie Jones, Case Number 02-2826EC, is admitted as evidence in this case.

Respondent presented the testimony of Mary Frances Stoughton and had nine exhibits accepted into evidence.

A Transcript was filed on November 21, 2002. A Joint Stipulation and Motion for an Extension of Time to File Proposed Recommended Orders was filed on November 22, 2002. The Motion was granted and the time to submit Proposed Recommended Orders was advanced to December 13, 2002. Advocate and Respondent timely filed Proposed Recommended Orders which were considered by the Administrative Law Judge in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Pursuant to Article II, Section 8, Florida Constitution, and Section 112.320, Florida Statutes, the Commission is empowered to serve as the guardian of the standards of conduct for the officers and employees of the state. Pursuant to Sections 112.324 and 112.317, Florida Statutes, the Commission is empowered to conduct investigations and to issue a Final Order and Public Report recommending penalties for violations of the Code of Ethics for Public Officers and Employees (Code of Ethics).

2. Mr. Bennett is subject to the Code of Ethics. Mr. Bennett, at the time of the hearing, had served as a town councilman of the Town of Pierson, Florida, for approximately 17

years. During all times pertinent he was the Chairman of the Town Council of Pierson, Florida.

3. Pierson, Florida, is a town of about 3400 people. It is known for the production of ornamental ferns.

4. The Pierson Town Council has the power, through the adoption of ordinances, to change the zoning classifications of parcels of land within the Town of Pierson. Prior to 1992, this was accomplished by maintaining a file of city ordinances affecting zoning. There was no zoning map.

5. In 1994, a zoning map, printed on a vellum-like medium, was produced. This map, which will hereinafter be referred to as the "official zoning map," actually consisted of three separate sheets. It was precise and accurate in its depiction of the location of individual parcels and roads and streets. However, the lines denoting zoning were crudely drawn with a grease pencil. In 1999, it was believed it lacked completeness in that some changes made by ordinance had not been entered upon it.

6. The "official zoning map" of the Town of Pierson was maintained by the Town Clerk. The Town Clerk's duties included maintaining personal control of the map. The Town Clerk, as a matter of policy, would not permit the map to leave the clerk's office unless accompanied by the Town Clerk. The map was locked in a safe in the clerk's office except when it was being viewed

by someone in the presence of the clerk. This policy was in effect to deter the possibility that someone might surreptitiously alter the map.

7. Robert Allen Keeth (Mr. Keeth), is employed as a planner for the Volusia County Metropolitan Planning Organization (MPO). The Town of Pierson contributes to the cost of the operation of the MPO, and receives services from it.

8. As a planner for the MPO, Mr. Keeth works with the Town of Pierson and he has done so since at least the early 1990's. In accomplishing these duties, he works with the Town Council; the town attorney, Noah McKinnon; the Planning Commission; and other citizens of Pierson. Mr. Keeth has known Mr. Bennett since at least 1990.

9. With substantial input from Mr. Keeth, the Town of Pierson adopted a comprehensive land use plan, entitled the Unified Land Development Regulations (ULDR). The Town Council adopted the ULDR on February 22, 1994. Subsequent to its adoption, the ULDR provides a regulatory scheme for storm water management, resource protection, signs, and zoning, among other things.

10. The ULDR provides a method for amending the zoning scheme. Section 10.6.1 provides for the application process; Section 10.6.2 provides for Planning Commission review and for a public hearing; Section 10.6.3 provides for a Town Council

review and a public hearing; and Section 10.6.4 provides that amendments to zoning must be made consistent with the comprehensive plan by amending the plan if necessary to achieve that goal. The fee for amending the zoning classification of a parcel of land, was set at \$150.

11. By 1995, digitalized mapping became commonplace and Mr. Keeth suggested to the Town Council, during 1995, that the "official zoning map" of Pierson be replaced with a digital map. The council agreed that a digital map should be prepared and adopted. The council did not immediately act on this decision.

12. It was probable that there would be some changes in connection with the adoption of the digitalized map. This is because the "official town map" then in use was crudely drawn and might not be completely accurate in some respects and because ordinances had been passed affecting zoning and these changes were not reflected on the official town zoning map. Moreover, when one changes an original map to a digital map it is unlikely to scale correctly or align correctly.

13. The process of preparing a digitalized map is not designed to bypass the processes set forth in Sections 10.6.1 through 10.6.4 of the ULDR. The creation of a new map through digitalization was described by Mr. Keeth as, "replacing a map."

14. "Replacing a map" is a form of administrative rezoning. Administrative rezoning occurs when, after notice and

hearing, an authorized governmental body changes the zoning of a parcel of property without receipt of an application from the owner. Section 166.041, Florida Statutes, addresses administrative rezoning.

15. It was Mr. Keeth's understanding that the Town Council desired that Mr. Bennett, would work with him in preparing the new map. Mr. Keeth and Mr. Bennett had discussions with regard to the process involved with producing an accurate digitalized map. Mr. Keeth told Mr. Bennett, and other members of the Town Council, that they could make suggested changes which might be reflected in the new, digitalized map. In other words, it was possible that zoning changes might be effected which were not supported by any ordinance. This would not occur, in Mr. Keeth's opinion, until after public workshops and hearings.

16. On November 2, 1999, at approximately 9:00 A.M., Mr. Bennett entered the Town Clerk's office. The Town Clerk at that time was Deborah LeBlanc (Ms. LeBlanc). Mr. Bennett demanded that Ms. LeBlanc turn over the "official zoning map" to him so that he could take it out of the Town Hall.

17. Ms. LeBlanc had never permitted the "official zoning map" to be removed from the Town Hall. Ms. LeBlanc resisted Mr. Bennett's demand that she relinquish possession of the map because it was against policy for the map to leave the Town Hall

without being in her possession. By using the force of his authority, Mr. Bennett was able to make Ms. LeBlanc yield the map.

18. Mr. Keeth on this occasion had a discussion with regard to the map at Mr. Bennett's house and in his car. Either Mr. Keeth at Mr. Bennett's directions, or Mr. Bennett, made suggestions for changes in zoning on the "official zoning map" by marking it with a pencil. Mr. Bennett had an interest in each of the properties marked.

19. Mr. Bennett returned to the Town Hall at lunch time, accompanied by Mr. Keeth. Mr. Bennett returned the "official zoning map." Later that afternoon, Ms. LeBlanc noticed that pencil markings had been entered upon the map.

20. The following changes were found by Ms. LeBlanc:

a. A parcel south of West Palmetto Avenue had B-2 written in pencil. This may be found in the upper left, or northwest corner, of the section of the "official zoning map" which also depicts the town park.

b. A parcel adjacent to West Palmetto Avenue west of County Road 3, but east of the parcel mentioned in "a" above, had MH-1 written in pencil.

c. A parcel between West Second Avenue and Short Street near the Seaboard Coast Line Railroad track had B-1 entered in pencil. This area is below the center of the

section of the "official zoning map" which also depicts the town park.

d. A parcel on the corner of Hagstrom Road and County Road 3 had B-2 entered in pencil. This area is the upper center of the section of the "official zoning map" which also depicts Lake Botts.

21. A designation as B-1 means property may be used for general retail commercial development. A designation as B-2 means property may be used for heavy commercial and industrial development. A designation as MH-1 means property may be used for medium density mobile home development. Except for the Short Street parcel, the parcels were zoned A-1, agriculture. The Short Street parcel was zoned R-3, medium density single family residential development.

22. It is the opinion of Mr. Keeth that all of the proposed changes made with regard to Mr. Bennett's properties were "up-zoning" in that they would reflect an increase in the value of the property. Moreover, Mr. Bennett testified under oath that if the suggested changes had been made they would have been to his benefit.

23. It is found as a fact that either Mr. Bennett made these changes, or that they were made by Mr. Keeth at Mr. Bennett's direction, during the time the "official zoning map" was out of the presence of Ms. LeBlanc.

24. Ms. LeBlanc believed that misconduct was occurring, and beginning December 1, 1999, recorded activities concerning the map and the map replacement process in a log or on "while you were out" pads. She also called Mr. Keeth and asked him how the changes could occur without supporting ordinances. Mr. Keeth told her that Mr. Bennett had told him that there were ordinances supporting the four proposed changes written in pencil by or at the direction of Mr. Bennett.

25. As a result of Ms. LeBlanc's conversation with Mr. Keeth, concerning the changes made in pencil, Ms. LeBlanc, and Mr. Keeth spent an entire day attempting to locate ordinances which would support the marks made on the "official zoning map" by Mr. Bennett or at his direction. They also attempted to find a supporting ordinance for Councilwoman Jones who had also made pencil changes on the "official zoning map." No supporting ordinances for any of these changes could be found. This search occurred in November or December of 1999.

26. The only other person to make pencil marks on the map was Ms. Jones, who was also a town councilperson.

27. Mr. Keeth considered these marks to be "suggestions" rather than changes. Mr. Keeth knew of no formal process, nor was the council aware of any formal process, for converting the official zoning map to a digital map. However, it is clear that Mr. Keeth believed that there would be public workshops as part

of the process and he believed that the Town Council would have to approve the final draft by ordinance. That he was correct in that belief is evidenced by the process which eventually resulted in the adoption of a final map on September 12, 2000.

28. On or about December 1, 1999, a draft map dated November 1999, was delivered to Town Hall with an accompanying memorandum to Mr. Bennett dated November 29, 1999. The memorandum notes that the draft reflected the changes Mr. Bennett had suggested. It also noted that if the changes were approved by Mr. Bennett the draft should be forwarded to Ms. LeBlanc for the purpose of scheduling a public hearing.

29. There were several draft maps produced during the period November 1999 through the winter and spring of 2000, but the drafts were not numbered or dated. As many as six draft maps were produced and some never left Mr. Keeth's office. The maps were stored in the hard drive of his computer. On some drafts the words "Ordinance number ##____, Jan ##____, 2000" appeared. On the maps entered into evidence, some of the suggestions made by Mr. Bennett were incorporated.

30. Changing a zoning classification does not automatically mean that the market value of the property is enhanced. However, because people do not ordinarily act contrary to their economic interest, it is found that the zoning

suggestion made by Mr. Bennett, would have represented value to him had the change been made.

31. During various times in the Spring of 2000, Ms. LeBlanc had several conversations with citizens who had concerns with regard to the map situation. During a discussion on April 14, 2000, Mr. Keeth told Ms. LeBlanc that Councilperson Jones had asked that the suggestion that she made be discarded. He further stated that Mr. Bennett had not made such a request.

32. The Town Mayor visited Ms. LeBlanc on April 17, 2000, and informed her that he was going to ask a respected citizen, Mr. Greenland, to talk with Mr. Bennett about the changes he made to the "official zoning map" and to convince Mr. Bennett that what he had done should be undone.

33. On April 25, 2000, Mr. Keeth called Ms. LeBlanc and told her that Respondent had called and asked him to put the map back to its original state.

34. In time, more and more citizens of Pierson learned of the penciled changes, and as a result, rumor and innuendo with regard to the changes coursed through the community. As late as the July 11, 2000, Town Council meeting, the Bennett suggestions were still displayed on the draft.

35. In early July, Mr. Keeth concluded that the matter was getting out of hand. On July 10, 2000, in a memorandum to the

Town Council, he noted that there was a perception that the map was being amended without full disclosure and review.

36. Amendments were made on the draft maps as the result of other citizens making suggestions to Mr. Keeth. These amendments affected the Community Christian Assembly, Lois Taylor, Wilsey Bennett, and Shane Crosby. These suggestions were discussed at the July 11, 2000, Town Council meeting.

37. In the case of Wilsey Bennett, the changes were made to conform to an existing use. In the case of the Community Christian Assembly, the property was subject to a special exception. Neither the Town Council, nor the unhappy and vocal citizens present at the council meeting of July 11, 2002, indicated that there was any question about the propriety of these changes.

38. There is no evidence in the record as to the circumstances of the amendments in the case of Taylor or Crosby. It cannot be determined if these amendments resulted in substantial changes or whether they were made to reflect existing uses or to indicate prior changes which should have been previously placed on the "official zoning map." By whatever process used, the changes were not made by merely penciling in the change and neither the Town Council, nor the unhappy and vocal citizens attending the council meeting of

July 11, 2002, indicated that there was any question about the propriety of these changes.

39. At a Town Council meeting on July 13, 2000, it was decided that Mr. Keeth would work with the Town Clerk to prepare another zoning map which represented the current state of zoning. This was to be done by looking at town records and the "official zoning map," without reference to the pencil marks entered with regard to Ms. Jones' or Mr. Bennett's property, and without reference to any other suggestions for change.

40. At a Town Council meeting on September 12, 2000, it was affirmatively decided that the digitalized zoning map would be accepted which reflected only changes supported by properly prepared ordinances. A final draft was approved by Ordinance Number 00-03.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes.

42. Section 112.322, Florida Statutes, and Rule 34-5.0015, Florida Administrative Code, authorize the Commission to conduct investigations and to issue final orders and public reports concerning violations of the Code of Ethics.

43. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the

issue of the proceedings. Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Therefore, the Commission, through its Advocate, has the burden of proof.

44. Because of the penalties provided by Section 112.317, Florida Statutes, the Commission, through its Advocate, must prove its case by clear and convincing evidence. Latham v. Florida Com'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

45. Section 112.313(6), Florida Statutes, provides as follows:

112.313 Standards of conduct for public officers, employees of agencies, and local government attorneys.--

* * *

(6) MISUSE OF PUBLIC POSITION.-- No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31.

46. Section 104.31, Florida Statutes, addresses elections and is not applicable to this case.

47. At the time the zoning suggestion was made, Mr. Bennett was a public officer.

48. Section 112.312(9), Florida Statutes, defines "corruptly" as "done with a wrongful intent and for the purpose of obtaining . . . any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his public duties."

49. It is clear Mr. Bennett penciled in suggestions on the zoning map with a wrongful intent and for the purpose of obtaining a benefit. Moreover, his actions in this regard were inconsistent with the proper performance of his public duties.

50. An analysis of the evidence of record reveals that Mr. Keeth to some extent misled Mr. Bennett when he informed him that he could make zoning changes by penciling in suggestions.

51. Mr. Bennett's intent was to secure a benefit that was not available to the other citizens of Pierson. This is why the action was wrongful. Notice to the citizens of Pierson inviting them to pencil suggestions on the "official zoning map" was not provided. Indeed, the only other suggestions penciled on the map were made by Ms. Jones. Perhaps when the matter was discussed at Town Council meetings, or workshops addressing the matter, other citizens could at that time make suggested changes. But as Mr. Keeth pointed out, a suggestion already appearing on the digitalized map, such as Mr. Bennett's, could slip through.

52. The motivation for this change was to obtain a zoning change for his parcels without having to pay a \$150 fee per parcel and without having to participate in the process set forth in Sections 10.6.1 through 10.6.4 of the ULDR. The probability of the change actually being made cannot be measured but it is clear that it was at least theoretically possible and therefore no further inquiry need be made.

53. The actions of Mr. Bennett were inconsistent with the proper performance of his public duties. As Chairman of the Town Council it was his job to ensure the fair and equal treatment of all citizens and in this he failed.

54. Mr. Bennett's testimony at the hearing lacked credibility. He dissembled with regard to whether he participated in the making of the pencil marks on the parcels. He was evasive as to which properties he owned. His testimony demonstrated that he knew that his actions in this matter were ethically unacceptable.

55. The Advocate has proven by clear and convincing evidence that Mr. Bennett violated Section 112.313(6), Florida Statutes.

56. Section 112.317, Florida Statutes, provides as follows:

112.317 Penalties

(1) Violation of any provision of this part, including, but not limited to, any failure to file any disclosures required by this part or violation of any standard of conduct imposed by this part, or violation of any provision of [s. 8, Art. II of the State Constitution](#), in addition to any criminal penalty or other civil penalty involved, shall, pursuant to applicable constitutional and statutory procedures, constitute grounds for, and may be punished by, one or more of the following:

- (a) In the case of a public officer:
1. Impeachment
 2. Removal from office.
 3. Suspension from office.
 4. Public censure and reprimand.
 5. Forfeiture of no more than one-third salary per month for no more than 12 months.
 6. A civil penalty not to exceed \$10,000.
 7. Restitution of any pecuniary benefits received because of the violation committed.

RECOMMENDATION

Based upon the findings of fact and conclusions of law, it is

RECOMMENDED: That a final order and public report be entered finding that Respondent, Samuel G.S. Bennett, violated Subsection 112.313(6), Florida Statutes. It is further recommended that the Commission recommend that he be publicly censured and reprimanded and that he be assessed a fine in the amount of \$4,000.

DONE AND ENTERED this 7th day of January, 2003, in
Tallahassee, Leon County, Florida.

HARRY L. HOOPER
Administrative Law Judge
Division of Administrative Hearings
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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.