STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: JIM VANDERGRIFFT,) Case No. 08-1438EC
)
Respondent.)
__________________________________)

RECOMMENDED ORDER

Pursuant to notice this matter came before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings to conduct a formal proceeding and hearing. The formal hearing was conducted in Daytona Beach, Florida on July 29, 2008. The appearances were as follows:

APPEARANCES

For Petitioner: Jennifer M. Erlinger, Esquire
James H. Peterson, III, Esquire
Advocate for the Commission on Ethics
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Respondent: Mark Herron, Esquire
Messer, Caparello & Self, P.A.
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STATEMENT OF THE ISSUE:

The issue to be resolved in this proceeding concerns whether Jim Vandergrifft, the Respondent, as mayor of the City of New Smyrna Beach, voted on a matter which inured to his special private gain in violation of Section 112.3143(3),

Florida Statutes, by voting to postpone a vote on Proposed City Ordinance 43-05. If enacted, the ordinance would have established an "historic architecture overlay district" by amendment to local land use regulations.

PRELIMINARY STATEMENT

This proceeding arose when a complaint was filed with the Florida Commission on Ethics (Commission) alleging that Jim Vandergrifft had violated the Code of Ethics for public officers and employees. The Complaint was filed March 26, 2006. A "Report of Investigation" was issued on January 25, 2007, with the recommendation that no probable cause was present to believe that Jim Vandergrifft had violated Section 112.3143(3)(a), Florida Statutes.

The Commission rejected the recommendation of the Advocate and found probable cause that Jim Vandergrifft, serving as Mayor of the City of New Smyrna Beach at the times pertinent to this Complaint, had violated the above statute by voting to postpone a vote on a proposed city ordinance, Ordinance No. 43-05. A public hearing was ordered to be held by the Commission in accordance with Section 112.324(3), Florida Statutes. The case was referred to the Division of Administrative Hearings and ultimately the undersigned Administrative Law Judge for conduct of a formal proceeding and hearing.

The cause came on for hearing, as noticed, on July 29, 2008. The parties entered into a Joint Pre-Hearing Stipulation which admitted certain facts which are depicted in that Pre-Hearing Stiuplation and are included in this Recommended Order, to the extent relevant. The Commission presented eight exhibits which were admitted into evidence at the hearing. It also presented the testimony of four witnesses: James L. Vandergrifft, Frank B. Gummey, III, Chad Thomas Lingenfelter, and Floyd Fulford. The Respondent presented three exhibits which were admitted into evidence. The parties also stipulated to the admission of an additional exhibit which was submitted subsequent to the hearing.

Section 50-12 of the New Smyrna Beach City Code Ordinances relating to historic building demolition was submitted as a Joint Exhibit.

Upon conclusion of the hearing, a transcript of the proceedings was ordered and the parties agreed to submit proposed recommended orders, which were timely submitted on or before September 19, 2008. The Proposed Recommended Orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. Jim Vandergrifft was the Mayor of New Smyrna Beach at times pertinent to this case. He had been mayor from 1995 through 2007, and prior to that time served as a city

commissioner from 1988 to 1995. He is subject to the requirements of Part III, Chapter 112, Florida Statutes, the Code of Ethics for Public Officers and Employees.

2. A proposed city ordinance came before the New Smyrna Beach City Commission for a vote, as proposed ordinance number 43-05. The vote was to be taken on February 14, 2006. The Respondent voted to postpone enactment of the ordinance which was designed to amend local land development regulations by establishing an historic architectural overlay district. It applied to a certain described territory within the City of New Smyrna Beach. The purpose of the ordinance was to ensure that new construction and renovations of current structures within that historic overlay district would adhere to strict building guidelines intended to maintain the historic character of the area, by following historic design standards of the City of New Smyrna Beach.

3. The guidelines concerning building and remodeling structures in the historic district of New Smyrna Beach were voluntary prior to the proposal of ordinance 43-05. The ordinance was never enacted, however, so the guidelines for building and remodeling in the subject territory in the City of New Smyrna Beach remained voluntary.

4. At the time of the vote on February 14, 2006, the Respondent had a pending contract for the purchase of property

located at 115 Washington Street, New Smyrna Beach, Florida. The property was located in the area to be affected by the above-referenced proposed ordinance. At the time of the vote on February 14, 2006, the property was under contract and was not actually in the title ownership of the Respondent. He closed his purchase of the property and completed it on February 15, 2006. At the time of the purchase a dilapidated 15-room hotel was located on the property. The hotel was in very bad condition. The roof was in the process of collapse and it was dangerous to walk on the second floor for risk of falling through. The wiring was antiquated and in poor condition, and the building had no central heating system.

5. At the time of the vote on February 14, 2006, the Respondent owned his personal residence, also located in the area affected by the ordinance. Because his residence was new it would not have affected by the subject architectural standards ordinance. Mr. Vandergrifft disclosed that he lived in his residence and owned other property in the district, encompassed by ordinance 43-05, at the city commission meeting of February 14, 2006. The Respondent did not abstain from voting on that date, but publicly disclosed that he lived downtown and owned other properties in the affected area.

6. The Respondent had sought advice from the city attorney prior to the vote on February 14, 2006, concerning whether he

would have a voting conflict if he voted on the ordinance. He told the city attorney that he lived in and had other property in the district to which the ordinance would apply if enacted. He did not actually inform the city attorney of his impending purchase of the property located at 115 Washington Street (the hotel site). The city attorney advised him that as an elected official he had an obligation to vote on the ordinance.

7. According to the city attorney's testimony the Respondent indicated that he lived downtown and had other property in the area of the ordinance's applicability and inquired whether he could vote on the ordinance. Based on his understanding of the district covered by the ordinance, the city attorney advised Mr. Vandergrifft that he could vote on the matter. The city attorney reasoned that under existing law, Mr. Vandergrifft's ownership interest was less than one percent of the properties being affected by the vote, therefore Mr. Vandergrifft could vote on the ordinance. According to the city attorney's testimony: ". . . practically every land use vote that a member of the governing body makes could affect that person's property one way or the other. But, they're . . . required to live in the city to qualify for office . . . so obviously their votes affect their property. The question is whether it is a special private gain."

8. The proposed ordinance 43-05 would have affected 522 parcels of property within its territorial area. If the Respondent had an ownership interest in two properties, his residence and the property at 115 Washington Street (the hotel) his interest would only constitute .37 percent of the total parcels affected by the ordinance, obviously less than one percent of the total parcels affected. In fact, as of the date the postponement vote on the ordinance was taken, he did not actually own the hotel property. It was under contract to be sold to the Respondent but the closing and final performance of the contract did not occur until the day after the city commission meeting at which the postponement was voted. In any event, Mr. Vandergrifft's ownership in the territorial area of the proposed ordinance amounted to less than one percent, at most, of the total affected parcels. Therefore, in the opinion of the city attorney a voting conflict did not exist.

9. Although the Respondent did not inform the city attorney of the impending purchase of that specific piece of property, he did inform him that he owned his residence and "other property" in the area affected by the proposed ordinance. The city attorney would not have changed his legal advice as to whether the Respondent could vote on the ordinance if he had known of the specific impending purchase of the property at 115 Washington Street.

10. The Respondent purchased the property at 115 Washington Street with the intention of renovating it. After having architects examine it, however, including a renovation architect, and having it inspected by members of the city staff, it was determined by all concerned, including the city building inspector, that the property should be demolished. It was deemed beyond repair and a liability. The renovation architect believed that there was no feasible way to renovate the building and so the Respondent requested approval to demolish the structure.

11. Ultimately approval was granted by the city and the old hotel structure has now been demolished, as of October 2007, approximately one and one-half years after the property was purchased by the Respondent. The demolition of the hotel building was accomplished in accordance with the "Historic Building Demolition Ordinance." Pursuant to that ordinance the hotel was a "contributing structure" in the National Register Historic District. If the subject proposed ordinance had been enacted, demolition of the hotel building would have still have been possible. There were no differences in the actual approval process of the Historic Preservation Commission with respect to the proposed demolition either with or without enactment of the proposed ordinance at issue.

12. Several conditions were attached to approval of the demolition of the hotel building, as allowed for by the "Historic Building Demolition Ordinance." The Respondent agreed to these conditions, one of which was that a site plan for reconstruction be completed and approved, based upon historic overlays. The procedures voluntarily followed by the Respondent in demolition of the hotel, and obtaining the site plan approval by the Historic Preservation Board and the City Building Department, although pursuant to non-mandatory guidelines, were essentially the same as they would have been if the mandatory standards of the proposed ordinance had been enacted.

13. A Real Estate Broker, Mr. Floyd Fulford, established that, based on Multiple Listing Service Reports, four properties in the district covered by the proposed ordinance, were sold during February of 2006. However, property sold by owners without the use of a realtor are typically not shown in the multiple listing service, a service to which realtors have access. According to the Volusia County Property Appraiser's data base, as described by Mr. Fulford, 166 properties were sold in the entire 32168 zip code area, which is the mainland side of the City of New Smyrna Beach. There may have been other sales in February 2006 occurring in the beachside area of New Smyrna Beach. Mr. Fulford was not aware of whether or not these

properties were located in the Historic Overlay District at issue.

CONCLUSIONS OF LAW

14. 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. (2008).

15. The Commission is authorized to conduct investigations and to make public reports on complaints concerning violations of Part III, Chapter 112, Florida Statutes, which is the Code of Ethics for public officers and employees. This activity is authorized by Section 112.322, Florida Statutes, as well as Florida Administrative Code Rule 34-5.0015.

16. The Ethics Commission is asserting through its advocate the affirmative of the issue involving the Respondent's purported violation of Section 112.3143(3)(a), Florida Statutes. The party having the affirmative of the issue in a proceeding bears the burden of proof, according to the opinions in Department of Transportation v. J.W.C. Co. Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). The Commission must establish by clear and convincing evidence the elements of the violation it alleges. See § 120.57(1)(j), Fla. Stat., and Latham v. Commission on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997), in which the First District Court of Appeal

cited Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996), and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1997).

17. The Florida Supreme Court has described the standard of clear convincing evidence in the following fashion:

> [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 testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegation sought to be established.

In Re: Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1993). See also Evans Packing Company v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 115 n.5 (Fla. 1st DCA 1989).

18. It is alleged that the Respondent violated Section 112.3143(3)(a), Florida Statutes, by voting to postpone an official vote by the city commission of New Smyrna Beach regarding the question of enactment of proposed city ordinance 43-05. Section 112.3143(3)(a), provides in pertinent part as follows:

> No county, municipal, or other 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 or 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.

19. In order to establish a violation of Section 112.3143(3)(a), Florida Statutes, the following elements must be established by clear and convincing evidence:

> (1) Respondent must have been a county, municipal, or other local public officer.
>
> (2) The Respondent must have:
> (a) Voted on a measure that inured to his special private gain or loss; or
> (b) Knowingly voted on a measure that inured to the special private gain or loss of any principal by whom he was retained, or to the parent organization or subsidiary of a corporate principal by whom he is retained, other than an agency defined in Section 112.312(2), Florida Statutes; or
> (c) Knowingly voted on a measure that inured to the special private gain of a relative or business associate . . .

20. There is no question that the Respondent was a public officer and the first element described above has thus been proven, regarding the allegations concerning Section 112.3143(3)(a), Florida Statutes. The Commission must therefore prove that the Respondent's vote to postpone proposed ordinance 43-05 inured to his special private gain or loss. The Commission has not established by clear and convincing evidence that the Respondent's vote actually inured to his special private gain or loss.

21. "A 'special private gain' described by the voting conflicts statute usually involves a financial interest of the public official that is directly enhanced by the vote in question." George v. City of Cocoa, Florida, 78 F.3d 494, 496 (11th Cir. 1996). No clear evidence establishes that the Respondent's financial interests would have gained or suffered a loss because of the vote to postpone the vote on the ordinance.

22. The Commission, in its Final Order in the matter styled In Re: Ervin Ellsworth, Complaint No. 02-108 (COE Final Order No. 06-024 (April 26, 2006)) noted that it had used a "size of the class" test in determining whether a gain is "special." Ibid. pp. 8-9. The "size of the class test" involves:

> An analysis in which the determination as to whether a particular vote would inure to the 'special private gain' of a public officer

> is made by examining the 'size of the class' of persons who stand to benefit to gain 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 stands to gain more than 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 conflict law. CEO 00-13.

23. No "special private gain" exists when the official's interest or that of his principal constitutes less than one percent of the size of the class affected. For example, the Commission has advised that a town commissioner was not prohibited from voting on issues relating to a project that would benefit his neighborhood and that would be assessed against property owners in the neighborhood, when the commissioner owned 1.2 percent of the lots that would be affected. See CEO 90-71.

24. In the instant situation the Respondent owned one parcel of property and was under a contract or agreement to purchase the other parcel at 115 Washington Street, both within the historic overlay district. This is the district that would have been affected if the ordinance in question had been enacted. A total of 522 parcels of property were in that

historic overlay district. Even if the Respondent was deemed to own both parcels, his interest would still be only .37 percent of the total parcels to be affected by the ordinance. Consequently, if there was a gain or loss to Mr. Vandergrifft as a result of the vote to postpone the vote on the ordinance, it was not a "special gain" under the "size of the class test."

25. The Advocate appears to contend that the "size of the class" should be re-defined to constitute "properties under contract at the time of the vote" or the "number of properties sold" at some point temporally connected to the vote on February 14, 2006. Neither of those proposed standards for determining the class to place the Respondent in is consistent with the test explicated by the Commission on multiple occasions, which focuses on the number of persons affected by the measure under consideration.

26. There was no evidence presented which would establish how many properties within the historic overlay district, were actually under contract at the time of the vote on February 14, 2006. It would not be likely that anyone, including the Respondent, could know how many properties were actually under contract at any given time in a certain geographical area. Further, there was no evidence or testimony to show that the public, including the Respondent, would have had access to information regarding the number of properties sold during any

designated time period in the Historic Overlay District of New Smyrna Beach. The MLS service does not contain all properties for sale or sold.

27. The Advocate presented testimony which indicated that at least four properties were sold in the District at issue during the month of February 2006. For purposes of determining the Respondent's interest under these facts, however, the class size cannot be made up of properties sold in the month of February 2006. The MLS, used by the Advocate's witness to determine the number of properties sold, is not accessible to the general public, including the Respondent, and is not reliable in that other properties could have sold during that time period which are not listed in the Multiple Listing Service System. Moreover, it can also be said that at the time of the vote the Respondent was not in a class of persons who had purchased property anyway. The Respondent was merely under contract to purchase the subject property. Moreover, technically speaking the contract was not even a contract since the sellers had never executed it. It was at most a memorandum of agreement or executory contract because the sellers had never signed the contract document.

28. A determination that the appropriate class would be made up of properties sold within a certain time period would be speculative and would provide no meaningful standard for

determining whether, at the time of the vote, a public officer was faced with a voting conflict. Some or all of the contracts which closed in February 2006, could have been entered into subsequent to the vote on February 14, 2006. Similarly, property can be contracted for and sold simultaneously, alleviating any time period during which the property is merely effectively under contract, but not yet sold.

29. Even if information regarding pending contracts for sale was available to the public and to the Respondent at the time the vote on the ordinance was scheduled, it is more than likely that such contracts were scheduled to close at different times and even in different months. The contracts could have closed in February but almost certainly there were contracts in place at the time of the vote on the ordinance which did not close in February. It is also likely that there were contracts pending at the time of the vote which never closed at all because the agreements "fell through."

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.

32. In the present case the Respondent owned two of the 522 parcels affected by the proposed ordinance. His personal interest in the measure upon which he voted was thus less than one percent of the interest of the class of persons affected by

the measure. This is true whether he is deemed to have owned both properties or only one property and was under contract for the other one, etc. If he owned both he still would only own .37 percent of the properties in the District. He did not thus vote on a measure which inured to his special private gain.

33. In asserting its version of the proper definition of the class to which Mr. Vandergrifft purportedly belonged the Commission argues that he stood to gain more than other members of the class of 522 affected properties. However, no evidence, and certainly no clear and convincing evidence of any unique circumstances or characteristics resulting in a financial gain unique to the Respondent was adduced at hearing. "To constitute a prohibited voting conflict . . . the possibility of gain must be direct and immediate, not remote and speculative." 78 F.3d at 498.

34. Moreover, the Respondent merely voted to postpone the vote on the ordinance based upon outcry by other members of the public who had expressed opposition to the ordinance. There is no evidence to refute that such was his intent in voting to postpone the ordinance. This is borne out by the fact that the contract, memorandum of agreement or executory contract, if one wishes to so call it, was entered into on June 13, 2005. The first closing date apparently agreed to by the parties to the contract, according to Mr. Vandergrifft's testimony and the

dates depicted on the face of the contractual document, was June 15, 2005. Thereafter, several more dates were arrived at on which the property sale was supposed to have closed, but had to be postponed. There was no evidence that they were postponed due to any set of facts concerning the proposed ordinance. Rather, Mr. Vandergrifft's testimony is unrefuted in showing that the postponements of the closing date of the sale were due to the fact that the sellers were dilatory in getting all their property moved from those premises so that Mr. Vandergrifft could close the sale and take possession of the property.

35. The last date agreed to upon which the sale could be closed happened to be the date immediately after the day the vote to postpone the ordinance was taken. There is no evidence to refute Mr. Vandergrifft's testimony that, in essence, the date was coincidental in terms of its relationship to the date the postponement vote was taken. There was no showing, moreover, that at the time the last date to close the sale of the property was agreed upon that the agenda for the city commission meeting for February 14, 2006, at which the vote on the ordinance was taken, had already been prepared. Thus it was not proven that, in setting that date, the Respondent would have known that the ordinance was coming up for a vote before his sale closure date. There is simply no evidence that the facts occurred that way.

36. The fact that the sale closure date was set a number of times and had to be postponed during the seven or so months prior to the postponement vote on the subject ordinance, renders it unlikely that the sale closure was intentionally scheduled by Mr. Vandergrifft and the sellers to occur immediately after the postponement vote. It was not established that Mr. Vandergrifft had any certainty that the vote on the ordinance would result in a postponement. There is simply no clear and convincing evidence to show that Mr. Vandergrifft intended to vote to postpone enactment of the ordinance for any special private gain, financial or otherwise.

37. The evidence shows no direct financial benefit or indirect benefit that actually inured to the Respondent as a result of the vote. In fact the evidence shows that, although the ordinance was never enacted, that Mr. Vandergrifft proceeded with the demolition and site plans for reconstruction under the same terms and conditions as if the ordinance had been in place.

38. In summary, the evidence shows that there was no "special private gain or loss" which inured to the benefit of Jim Vandergrifft. The ownership interest of Mr. Vandergrifft comprised at most no more than .37 percent of the property impacted by the ordinance in the subject Historic Overlay District. Consequently, it is concluded that there was no "special gain or loss" which inured to Mr. Vandergrifft as a

result of his vote to postpone the enactment or consideration of city ordinance 43-05 of the City of New Smyrna Beach.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and the arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Florida Commission on Ethics finding that the Respondent, Jim Vandergrifft, did not violate Section 112.3143(3)(a), Florida Statutes.

DONE AND ENTERED this 17th day of November, 2008, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of November, 2008.

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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.