

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: WILLIAM SPAUDE,

Case No. 21-2145EC

Respondent.

RECOMMENDED ORDER

On September 15 and 16, 2021, Administrative Law Judge Robert J. Telfer III, of the Florida Division of Administrative Hearings (DOAH), conducted an evidentiary hearing pursuant to section 120.57(1), Florida Statutes (2020), in Tallahassee, Florida, via Zoom web-conference.

APPEARANCES

For Advocate: Melody A. Hadley, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent, William Spaude, while serving as Mayor of the City of Bushnell, violated section 112.313(6), Florida Statutes, by corruptly using, or attempting to use, his official position or any property or resource which may have been within his trust, or performed his official duties, to secure a

special privilege, benefit, or exemption for himself or others; and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On December 9, 2020, the Florida Commission on Ethics (Commission) issued an Order Finding Probable Cause to believe that Mr. Spaude, while serving as the Mayor of the City of Bushnell, violated section 112.313(6). The Commission forwarded the case to DOAH on July 7, 2021.

On July 16, 2021, the undersigned noticed this matter for a live final hearing in Bushnell, for September 15 through 17, 2021. On August 31, 2021, after a telephonic status conference, the undersigned issued an amended notice of hearing, which moved the final hearing in this matter to the Zoom web-conference platform.

On September 8, 2021, Respondent filed a Motion for Official Recognition, which requested that the undersigned take official recognition of the Charter of the City of Bushnell, as well as Chapter 27 of the Code of Ordinances for the City of Bushnell. The undersigned entered an Order Granting Motion for Official Recognition on September 10, 2021. On September 13, 2021, Respondent filed a Motion in Limine, and on September 14, 2021, the Advocate filed an Objection to Respondent's Second Set of Interrogatories and Motion to Strike Respondent's Second Set of Interrogatories.

The undersigned conducted the final hearing on September 15 and 16, 2021, by Zoom web-conference. At the outset of the hearing, the undersigned heard argument on Respondent's Motion in Limine and the Advocate's Objection to Respondent's Second Set of Interrogatories and Motion to Strike Respondent's Second Set of Interrogatories, and denied both. The Commission presented the testimony of: Mr. Spaude; Jeffrey McDaniel, an

employee at the Wildwood location of Core & Main; Stephen Fussell, a retired City of Bushnell employee who previously worked in its water department; Shelley Ragan, the finance director for the City of Bushnell; Isaac Wietan, an employee of the City of Bushnell who served as a first-class lineman with its electric department; Ronda Cason, a retired former purchasing agent for the City of Bushnell; Lance Lowery, the owner of Lowery's True Value Hardware Store in Bushnell; James Dixon, a former electric line foreman with the City of Bushnell; Jody Young, the City Manager for the City of Bushnell; and Christopher Thrift, an employee of Ace Pole Company. The undersigned admitted Advocate's Exhibits 7, 8, 10 through 13, and 15. Respondent presented the testimony of Mr. Spaude and Jay Fuller, an electric lineman for the City of Bushnell. Respondent offered no additional exhibits into evidence.

The three-volume Transcript of the final hearing was filed with DOAH on October 19, 2021. The parties timely submitted Proposed Recommended Orders on October 29, 2021, which the undersigned has considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Mr. Spaude is the Mayor of the City of Bushnell. He first became Mayor in January 2011, was subsequently reelected, and served as Mayor until September 2018, when he resigned. He was elected again as Mayor and was sworn in in January 2019.

2. Mr. Spaude is retired, but remains active in various business and real estate ventures (which, according to the evidence presented, were operated under limited liability companies he either owns or co-owns with members of his family), as well as civic and community activities.

3. Mr. Spaude has family that also lives in Bushnell. His son, Tod Spaude, owns a go-kart business called TS Racing. His grandson, Bret Spaude, is an

owner of a racetrack in Bushnell called Bushnell Motorsports Park (BMP). Mr. Spaude, or a real estate venture in which Mr. Spaude has an interest, owns property adjacent to BMP.

4. Mr. Spaude helped found the Sumter County Youth Center, and serves on its board of directors. As will be discussed more fully below, Mr. Spaude operates a “corn maze” on the property adjacent to BMP, which is an annual fundraiser for the Sumter County Youth Center.

5. Neither BMP nor the Sumter County Youth Center are owned or affiliated in any way with the City of Bushnell.

6. The City of Bushnell’s Charter provides that it is a “Council-Manager” form of government. Section 2.04(b) of the City Charter provides the duties for the Mayor, and states:

The Mayor shall preside at meetings of the Council and shall be recognized as head of the city government for service of process, execution of contracts, deeds, and other documents. The Mayor shall have no administrative duties other than those necessary to accomplish these duties.

7. According to the City Charter, the Mayor is one of five members of the City Council. Section 2.06 of the City Charter also states:

Neither the City Council nor any of its members shall in any manner dictate the appointment of any City employee excepting that Council shall be responsible for the appointment of the City Manager, City Attorney and of the respective Department heads. Neither Council nor any of its members shall give directives to any employee. Council, and its members, shall deal in all respects through the City Manager.

8. The City Manager prepares the annual budget, oversees all operational aspects of the City government, and has the ultimate say on City employees and personnel issues.

9. Under this “Council-Manager” form of government, the City Manager has no direct supervisor, but reports directly to the City Council. The City Council may remove the City Manager upon an affirmative vote of four of its five members.

10. As Mayor, Mr. Spaude is a “public officer” as that term is defined in section 112.313(1).

11. Mr. Spaude is subject to the requirements of part III, chapter 112, of the Code of Ethics for public officers and employees.

12. Mr. Spaude has attended annual municipal officer’s ethics training, as required under section 112.3142(b).

13. Ms. Young has been the City Manager since 2018. In early 2018, the prior City Manager, Bruce Hickie, passed away unexpectedly, and Ms. Young took over the position, first as an interim City Manager, until the City Council appointed her as City Manager in a 4-1 vote, with Mr. Spaude casting the lone dissenting vote.

14. Ms. Young testified that there was some “friction” between her and Mr. Spaude. The testimony provided at the final hearing suggested at least two possible causes of this “friction”:

(a) Mr. Spaude (who supported Ms. Young’s appointment as interim City Manager), objected to Ms. Young’s salary as City Manager; and

(b) Mr. Spaude proposed, in 2018, reducing or eliminating a contract between the City of Bushnell and the Sumter County Sheriff’s Office, under which the City paid the Sheriff’s Office to provide law enforcement in Bushnell. Ms. Young worked closely with the Sheriff’s Office liaison, Lieutenant Mike Cassidy, and testified that she was told that the Sumter County Sheriff would not support a reduction in that contract. Ms. Young did not share that information with the City Council prior to its vote. Ultimately, the City Council voted to renew the contract between the City of Bushnell and the Sumter County Sheriff’s Office without a reduction in 2018.

Mr. Spaude expressed his disapproval at a City Council meeting.

15. After Ms. Young became City Manager, she implemented some changes from the previous regime of Mr. Hickle. For example, Mr. Spaude regularly attended staff meetings under the previous regime; when Ms. Young became City Manager, she sent him an email requesting that he no longer attend such meetings. Ms. Young testified that she felt his presence at staff meetings “was overreaching his position as the mayor,” and that, under the City Charter, “[t]here’s nothing in there about him attending staff meetings or providing input to staff[.]”

16. Mr. Spaude resigned as Mayor in September 2018, shortly after Ms. Young became the City Manager. However, Mr. Spaude had already declared that he was seeking reelection to his position as Mayor, and was unopposed. Ms. Young testified that she had consulted with the City Attorney about whether Mr. Spaude was eligible for reelection after his resignation.

17. Ms. Young testified that around the time of Mr. Spaude’s opposition to her becoming the permanent City Manager, she learned of various allegations concerning Mr. Spaude from a former city employee.

18. Ms. Young, thereafter, began talking to others about various allegations she had heard about Mr. Spaude. Around this same time, she mentioned her investigation to Lt. Cassidy, who, she testified, then told his superior at the Sumter County Sheriff’s Office. The Sheriff’s Office then set up a meeting with Ms. Young and agents with the Florida Department of Law Enforcement (FDLE), and thereafter, the FDLE conducted an investigation of Mr. Spaude.

19. Ultimately, the FDLE conducted an investigation into Mr. Spaude, and referred this matter to the Commission.

20. At the final hearing, the Commission contended that Mr. Spaude misused his position as Mayor of the City of Bushnell in four separate ways (and as presented in the Joint Stipulation)¹:

(a) Mr. Spaude used the services of City employees to negotiate the sale and delivery of wooden utility poles for his personal use. Also, he used City employees, on City time, to deliver the wooden poles using City equipment for his personal use. Due to using the City's resources, Mr. Spaude did not pay sales tax on the purchase;

(b) Mr. Spaude used the services of City employees, on City time, to provide and install two wooden utility poles at a business in which he has an interest;

(c) Mr. Spaude requested and received plumbing supplies—PVC pipe and tapping saddles—for free from the City's Public Utilities Department warehouse for his personal use; and

(d) Mr. Spaude charged personal purchases to the City's tax-exempt charge account with Core & Main, a City vendor.

These contentions are addressed below.

Sale and Delivery of Wooden Poles

21. In 2015, Mr. Spaude was assisting his grandson, Bret, in the building of the BMP racetrack, and needed utility poles for lighting the racetrack.

22. Mr. Spaude approached Mr. Hickle, who was the City Manager and the City's director of utilities at this time, and asked him where the City purchased its utility poles.

23. Ms. Cason testified that Mr. Hickle thereafter asked her to obtain a quote for the poles that Mr. Spaude requested, and to also obtain an additional quote for the City to order poles, "to get a full truckload."

¹ In the Joint Stipulation, the Commission identified two other matters that it believed constituted misuse of position. At the final hearing, the Commission declined to present evidence or otherwise proceed on those two matters.

24. At that time, the City had a contract through its membership in the Florida Municipal Power Association (FMPA) to purchase wooden utility poles from Ace Pole Company (Ace), located in Blackshear, Georgia.

25. Ms. Cason contacted Mr. Thrift, who testified that he was responsible for 98 percent of Ace's domestic sales of wooden utility poles, which included sales to cities, co-ops, and utility companies throughout the southeastern United States, including the City, to obtain quotes for both Mr. Spaude and the City.

26. Mr. Thrift explained the significance of ordering a full load of poles:

When we ship a load of poles ... out to our customers, the freight is the same for everybody. It's based on the mileage amount and if you have one pole on that truck and say going to Bushnell, which was I think a little over 200 miles, the freight charges on that load, on that truck going down there, is about \$800.

If you buy one pole, say one pole that's before freight is \$150, when you take the freight of 800 and add it to the 150, you paid 950 for that pole. But if you ordered a truckload of them because the freight is spread out over all the poles on the trailer the price comes down.

27. In an email dated March 10, 2015, from Ms. Cason to Mr. Hickle, she wrote:

Ace Pole Company can ship us a load with [Mr. Spaude's] poles mixed in. However, he will pay an extra delivery charge, and he will have to pre-pay for his poles. They no longer extend credit to any customer other than the municipalities. ... If [Mr. Spaude] can live with these conditions, I will ask them for an official quote. I will order our poles at the same time, thus saving some of the shipping costs for both parties.

28. Ms. Cason thereafter obtained pricing information from Ace for wooden utility poles requested by Mr. Spaude, and for the City. Ace provided

the quotes in two separate documents. Together, the proposed order would constitute a full load.

29. The quote for Mr. Spaude (which appears to be for a limited liability company that he has an interest in) from Ace provides for the delivery of seven poles. In a subsection entitled “Delivery” it states, “FOB: Bushnell Fl. VIA Boom Truck.” It quotes a price of \$3,045.00, and states, “[t]his price is valid if ordered with the city of Bushnell Fl. Order.” The price quote does not reference Florida sales tax.

30. Mr. Thrift confirmed that the “extra delivery charge” for Mr. Spaude was added into the overall charge contained in the quote. He further testified about the delivery via boom truck:

Poles are big and heavy. Most places you deliver to don't have any way to unload them. A boom truck, right behind that cab is a big hydraulic arm with a claw on the end that picks the poles up off our truck and puts them in the racks or wherever our customers want them.

Q. And that's included in the service charge that you offload them by way of a boom truck?

A. Yes, sir, every – every charge related to the delivery is all figured in that price each.

31. Mr. Spaude provided Ms. Cason with a credit card to use for the purchase of his share of the poles contained in the quote. Based on the evidence presented, it does not appear that Mr. Spaude paid sales tax for this transaction. Mr. Spaude also stated that, based on the email from Ms. Cason and the quote from Ace, he believed he was paying an extra delivery charge to have the poles delivered to him.

32. Mr. Spaude's quote was \$3,045.00 for seven 55-foot wooden poles. The City's quote was \$3,245.00 for nine 30-foot poles, eight 35-foot poles, and seven 40-foot poles.

33. The Commission has suggested that the City did not need any additional poles when it made this order; that it instead normally waits until closer to the summer hurricane season to make any additional orders.

However, Ms. Cason, when asked about this on cross-examination, stated:

Q. So, in March of 2015, did the city have a need for poles at that time?

A. I wouldn't be able to answer that question unless I could see what the inventory was for the poles at that time to know whether we were low or not. Normally we did not order poles at that time and I know that at that time we weren't doing a lot of line work or additional poles. We were just changing out poles.

The undersigned finds that Ms. Cason's testimony was precise and lacking in confusion as to many of the facts concerning this transaction, but with respect to whether the City did not need additional poles in March 2015—as the Commission contends—her memory was not as clear. Additionally, Mr. Dixon testified that at the time of the order, the City “still had a few [poles] in stock” and “could wait a while longer.”

34. Mr. Spaude testified that he had requested that Ace deliver his poles to the BMP racetrack property, which at that point was vacant, undeveloped land. Mr. Spaude stated he never asked the City for additional assistance in delivering the poles, and believed that he was paying Ace an extra delivery charge for delivery of the poles to the BMP property with a boom truck.

35. Mr. Dixon testified that when Ace delivered the poles to the City, he, and as many as two other City employees, with a City truck, and during work hours, then assisted in delivering the poles that Mr. Spaude had ordered to the then-vacant BMP racetrack property. He could not recall whether Mr. Spaude was present when he and the other City employees delivered the poles.

36. Ms. Cason testified that she was not aware if any City employees participated in delivering the poles to the BMP racetrack property.

37. Mr. Spaude testified that he was not present when the poles were delivered, never asked anyone from the City to assist with the delivery of the poles, and, because he believed he had paid an extra delivery charge to Ace for delivery with a boom truck, was not aware why Ace would have needed any assistance in delivering the poles to the BMP racetrack property.

38. The undersigned finds that Mr. Spaude benefitted from having the City assist him in “bundling” his order of poles with that of the City’s, which had an existing contractual relationship with Ace through the City’s membership in FMPA. However, as the email and actual quotes reveal, it appears that Mr. Spaude paid more for his seven poles (\$3,045.00) than the City’s 24 poles (\$3,245.00), which casts doubt on whether Mr. Spaude derived any monetary benefit from this purchase. Further, Mr. Spaude’s belief that he paid to have Ace—and not the City—deliver his poles to the BMP racetrack property was reasonable and credible.

Installation of Two Wooden Utility Poles

39. The Commission also presented evidence concerning the City’s installation of two wooden utility poles at the BMP racetrack. To be clear, this allegation is separate and distinct from the allegations concerning the ordering and delivery of the seven wooden utility poles from Ace discussed above.

40. Mr. Spaude testified that he purchased an electrical or electrician business—Strickland Electric—out of foreclosure. He further testified that, among other things from this foreclosure sale, he “inherited” three unused concrete utility poles.

41. Mr. Spaude testified that he approached Mr. Hickle, and the two orally agreed to “trade” Mr. Spaude’s three concrete poles to the City, and in return, the City would provide and install two wooden poles at the BMP

racetrack. Mr. Spaude explained that the purpose of these two wooden poles would be to post time lapse cameras on them, so that his family would have a history of the construction of the BMP racetrack.

42. The agreement between Mr. Spaude and Mr. Hickle was not reduced to writing, and as previously mentioned, Mr. Hickle passed away suddenly in 2018. No other witnesses testified as to the existence of this oral agreement.

43. Mr. Spaude believed this to be a “fair trade” with the City, because the price of concrete poles is much higher than that of wooden poles, and because he agreed to provide the City with three concrete poles, in exchange for the City providing and installing two wooden poles.

44. Mr. Dixon testified about the two wooden poles at the BMP racetrack property. He testified that “I’m almost sure we set the poles. We had the other guys there. It’s been so long I can’t recall.” He further testified that he recalled putting cameras on the poles, but when again asked about installing the poles, he stated, “I can’t answer that. Like I said before, I’m not really sure.” Mr. Dixon had no recollection of picking up concrete poles from Mr. Spaude.

45. Mr. Dixon testified that city employees installed cameras on the poles. Mr. Spaude testified that no city employees installed cameras on the poles.

46. Mr. Fuller testified that, when he worked for the City, he recalled picking up concrete poles from Strickland Electric and delivering them to the City. He did not recall how many poles he picked up, or when he did this. He could not recall what the City did with the concrete poles.

47. Ms. Young testified that the city manager would “potentially” have the ability to approve this alleged “trade” arrangement, stating, “I don’t know that there’s anything that would prohibit me from doing that, that I’m aware of.” Ms. Young also stated that she would not have authorized this trade, because it would interfere with the City’s annual financial audit, and because “I don’t think it would be a good practice for the City.”

48. Ms. Young calculated the cost to the City in providing and installing the two wooden poles to be \$1,390.00.

49. The undersigned finds that the evidence presented on this issue lacked sufficient weight to establish the existence of the “trade,” or whether the “trade” was unlawful or improper, or resulted in a special privilege or benefit to Mr. Spaude. The undersigned finds that the only evidence of the “trade” is through Mr. Spaude’s testimony that this was an oral agreement; additionally, neither Mr. Dixon nor Mr. Fuller distinctly remembered the facts surrounding this issue—namely, the installation of the wooden poles, or what happened to the concrete poles. Further, Ms. Young testified that she, as city manager, would not be prohibited from approving such a transaction.

Plumbing Supplies from the City

50. Mr. Spaude hosted an annual “corn maze” on property he owned near the BMP racetrack, in which members of the public could participate. He testified that all of the proceeds received from the corn maze went to the Sumter County Youth Center.

51. Mr. Fussell testified that when he worked in the City’s Utilities Department, if a citizen needed some type of material that the City had in its possession, the City would sell it to that citizen at cost.

52. Mr. Spaude testified that he decided to extend the corn maze to additional adjoining property south of the original corn maze, and stated:

I was not sure whether we was going to have to run more pipe in order to do that so I went to the city and asked if I could borrow two lengths of four-inch pipe and saddle taps in case that I needed them and if I didn’t need them I would return them and if I did need them I would replace and pay for them.

53. Mr. Spaude went to the City's Utilities Department and requested two four-inch PVC pipes, and two tapping saddles.²

54. Mr. Wietan testified that he used the City's bucket truck to deliver a piece of PVC pipe to the BMP racetrack for the corn maze. He further testified that he never delivered PVC pipes to other City residents.

55. Mr. Fussell testified that the City kept an inventory of its supplies. For this particular transaction, he stated that he did not "charge out" the supplies, but wrote a description of the supplies on a piece of paper and gave it to another employee, Joey Chandler.

56. Mr. Fussell testified that after some time, he called Mr. Spaude and asked him to return the supplies because of unspecified small city gossip and rumors.

57. Mr. Spaude testified that he did not use the pieces of PVC pipe or tapping saddles, "and I entirely forgot to return them in a timely manner." He confirmed that Mr. Fussell called him and asked him to either return them or to let the City know so it could bill Mr. Spaude.

58. Mr. Spaude testified that he immediately returned the PVC pipe and tapping saddles unused, with a note that thanked the City for the materials. Mr. Fussell confirmed that the City received these supplies, and that they had not been used.

59. Mr. Spaude stated that he never received a bill or charge from the City for these plumbing supplies, and that no one from the City ever told him that he owed the City any money for these plumbing supplies.

60. Ms. Young calculated the cost to the City for these plumbing supplies and delivery to be \$205.00 (\$130.00 for supplies, \$75.00 for delivery).

61. The undersigned finds that Mr. Spaude derived a benefit from possessing the plumbing supplies, and having the City deliver the PVC pipes, which he originally intended to use for the corn maze, even if he did not use

² A tapping saddle allows tapping into a water line while it is under pressure, allowing the addition of another water line.

and ultimately returned them. He knew, or should have known, that obtaining and possessing City property, without first paying for the property, was unlawful and improper.

Personal Charges for Plumbing Supplies on City Account

62. Core & Main is a commercial waterworks company that distributes waterworks materials. It sells these materials directly to contractors, as well as municipalities, counties, and states. It has over 300 locations.

63. Mr. McDaniel, a longtime employee of Core & Main at its Wildwood store, testified that the public generally does not come to its store, because “[w]e don’t sell things that consumers would generally use at their home. Usually professionals are installing this type of material.”

64. However, Mr. McDaniel stated that if a member of the public came to his Core & Main store in Wildwood, he would sell them these materials, as long as they made the minimum purchase (\$50.00) and paid with a credit card, or possibly a company check.

65. The City of Bushnell is approximately a 30-minute drive from the Core & Main store in Wildwood. The City has an account with Core & Main; for purchases, Mr. McDaniel explained that an employee of the City would normally call or come in to pick up materials and charge the City’s account, and Core & Main would then provide the City with a monthly statement that listed the charges for the items sold.

66. Under Florida law, the City is exempt from sales tax purchases, including purchases from Core & Main.

67. In September 2017, in the immediate aftermath of Hurricane Irma, Mr. Spaude went to Core & Main to purchase fittings for some four-inch PVC pipe and other materials that he needed for the corn maze, which, as previously mentioned, Mr. Spaude hosted on his property to benefit the Sumter County Youth Center. He stated that he went to Core & Main, after

looking elsewhere, because he was “looking for someplace that had the right type of stuff.”

68. When he arrived at Core & Main, its power had not yet been restored from the hurricane. However, the store was open, and Mr. McDaniel met Mr. Spaude and assisted him. Mr. McDaniel was able to find the items Mr. Spaude needed.

69. Because the store had no power, Mr. McDaniel was unable to charge Mr. Spaude’s credit card. Mr. McDaniel said that Mr. Spaude told him that he was the Mayor of the City of Bushnell, and that he believed that Mr. Spaude told him that the materials were for a corn maze for the City.

70. Because he could not use a credit card at checkout, Mr. Spaude asked Mr. McDaniel if the City had a charge account. When Mr. McDaniel said yes, Mr. Spaude testified,

I’m assuming that I said, well, I’m the mayor. If you want to bill it to them [the City], I’ll go by and tell them that I charged it here and whenever they get the invoice they’ll let me know and I’ll immediately pay it and that’s what happened.

71. Mr. McDaniel confirmed this. He testified,

He was the mayor of Bushnell, it was right after a hurricane, and I thought nothing of someone from the city coming in and picking up materials that would be used for a repair. It was line repair material.

* * *

[I]t was obviously material that was used, being used for repairing a four-inch line. So like I said, if they were trying to get a corn maze up and running for the city, this is repair material, I didn’t question it. Nor did my boss.

72. Mr. Spaude was able to charge the items he wanted to the City’s account, and took them with him that day.

73. Mr. McDaniel created a handwritten invoice for the items purchased that included the job name "Corn Maze." It also included "City of Bushnell," and contained Mr. Spaude's printed name and signature. This handwritten invoice reflects the items Mr. Spaude purchased that day, but did not reflect the amounts charged or whether Core & Main charged sales tax.

74. After Core & Main's power was restored, Mr. McDaniel inputted the items Mr. Spaude purchased into its computer and generated an invoice, dated September 19, 2017, that reflects the City as the customer and the job name as "CORN MAZE." This invoice reflects a total price for the items purchased of \$334.97, and does not reflect any sales tax charged.

75. Mr. Spaude testified that after he left Core & Main that day, he promptly went to City Hall and told the staff about his purchase on the City account, and "when the bill came in to call me and tell me what it was and I would bring them a check and that's exactly what happened."

76. Ms. Ragan confirmed that Mr. Spaude informed the City of the purchase. She stated that she believed that Mr. Spaude paid Core & Main directly for the purchase, and that no City funds were expended on this transaction.

77. Ms. Ragan further testified that she informed the City's auditors of Mr. Spaude's purchase, in which he used the City's charge account at Core & Main, and which appeared in a list of charges from Core & Main, because she felt it was fraudulent and not authorized under the City's procurement policy, which provides that:

Departmental purchases fall under the general authority and responsibility of the department heads and within the general guidelines and constraints of the city budget. Purchases are dictated by standard reoccurring needs and planned budget acquisitions.

It is the department heads responsibility to direct the purchasing process within his/her department in accordance with the requirements of this policy

and the general budget. It is also the City Managers [sic] responsibility to exercise general supervision over the respective departments to assure that all requirements of this policy are faithfully executed.

78. The Commission also presented the testimony of Mr. Lowery, who owns a hardware store in Bushnell. He testified that his store could order the items that Mr. Spaude purchased at Core & Main, although his store does not keep those items in stock.

79. The undersigned finds that Mr. Spaude derived a special benefit for himself by using the City's charge account at Core & Main to purchase items for his private use. Further, by using the City's sales tax-exempt charge account, he did not pay sales tax on this purchase. The Commission presented credible evidence that the City's procurement policy did not permit the Mayor, or members of the City Council, to purchase items using the City's accounts.

Ultimate Findings of Fact

80. Based on the foregoing, the undersigned finds, as a matter of ultimate fact, that the Commission did not prove, by clear and convincing evidence, that Mr. Spaude's purchase of wooden utility poles in conjunction with the City's purchase of wooden utility poles from the same vendor, or that the City's installation of two other wooden utility poles at private property at a separate time, constituted violations of section 112.313(6).

81. The undersigned further finds, as a matter of ultimate fact, that the Commission proved, by clear and convincing evidence, that Mr. Spaude's efforts in having the City deliver two PVC pipes, and his obtaining two tapping saddles, from the City's Utilities Department, for use in the corn maze, constituted an improper use of his position as Mayor that was not

consistent with the performance of his public duties, and thus constituted a violation of section 112.313(6).

82. The undersigned additionally finds, as a matter of ultimate fact, that the Commission proved, by clear and convincing evidence, that Mr. Spaude's use of the City's charge account at Core & Main, to obtain plumbing supplies for the corn maze, and for which he repaid Core & Main directly after it charged the City, constituted an improper use of his position as Mayor that was not consistent with the performance of his public duties, and thus constituted a violation of section 112.313(6).

CONCLUSIONS OF LAW

83. DOAH has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569 and 120.57(1).

84. 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 violations of part III, chapter 112, of the Code of Ethics for Public Officers and Employees.

85. The burden of proof, absent a statutory directive to the contrary, is on the Commission, the party asserting the affirmative of the issue of these proceedings. *Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778 (Fla. 1st DCA 1981); *Balino v. Dep't of Health & Rehab. Servs.*, 348 So. 2d 349 (Fla. 1st DCA 1977). In this proceeding, it is the Commission, through its Advocate, that is asserting the affirmative: that Mr. Spaude violated section 112.313(6). Commission proceedings which seek recommended penalties against a public officer or employee require proof of the alleged violation(s) by clear and convincing evidence. *See Latham v. Fla. Comm'n on Ethics*, 694 So. 2d 83 (Fla. 1st DCA 1997). Therefore, the Commission has the burden of establishing, by clear and convincing evidence, the elements of Mr. Spaude's violations.

86. Clear and convincing evidence “requires more proof than a ‘preponderance of the evidence’ but less than ‘beyond and to the exclusion of a reasonable doubt.’” *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997). The Florida Supreme Court further held:

This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. Clear 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 lacking in confusion as to the facts in issue. The evidence must be of such a 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 allegations 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 1983)).

87. Section 112.313(6), provides:

MISUSE OF PUBLIC POSITION.—No public officer, employee of an agency, or local governmental 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.

88. Section 112.312(9) defines “corruptly” as follows:

“Corruptly” means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

89. Courts have provided further direction on what constitutes acting “corruptly” under section 112.313(6). In *Blackburn v. Commission on Ethics*, the First District held that to satisfy the “corruptly” statutory element, the Commission must prove that a respondent acted “with reasonable notice that her conduct was inconsistent with the proper performance of her public duties and would be a violation of the law or code of ethics in part III of chapter 112.” 589 So. 2d 431, 434 (Fla. 1st DCA 1991); *see also Siplin v. Comm’n on Ethics*, 59 So. 3d 150, 151-52 (5th DCA 2011).

90. To establish a violation of section 112.313(6), the Commission must prove, by clear and convincing evidence, that:

- a. Mr. Spaude is or was a public officer or employee;
- b. Mr. Spaude: (i) used or attempted to use his official position or any property or resources within his trust; or (ii) performed his official duties;
- c. Mr. Spaude’s actions must have been taken to secure a special privilege, benefit, or exemption for himself or others; and
- d. Mr. Spaude must have acted corruptly, that is, with wrongful intent and for the purpose of obtaining any benefit which is inconsistent with the proper performance of his public duties.

91. The evidence established that Mr. Spaude, who served as Mayor of the City of Bushnell, was, at all relevant times, a public employee subject to the requirements of part III, chapter 112, at the time of the alleged violations.

92. The evidence also established that Mr. Spaude, as Mayor of the City of Bushnell, had access to certain employees and resources of the City of Bushnell.

Sale and Delivery of Wooden Poles

93. The undersigned concludes that the evidence failed to establish, by clear and convincing evidence, that Mr. Spaude’s ordering and purchase of wooden utility poles in conjunction with the City’s purchase of wooden utility

poles from the same vendor, was done to secure a special privilege or benefit for Mr. Spaude, or that Mr. Spaude acted corruptly.

94. The evidence presented showed that Mr. Spaude asked Mr. Hinkle about obtaining wooden poles, and received a quote from Ace in which the poles he wished to purchase, and have Ace deliver, were “bundled” with poles that the City ordered, which provided both Mr. Spaude and the City a lower cost.

95. Mr. Spaude’s credible testimony, when considered in conjunction with the written quote from Ace, established that he believed he was paying more than the City for the poles, and for Ace to deliver the poles with a boom truck. The evidence further established that Mr. Spaude paid more for his seven poles than the City paid for its 24 poles.³ Mr. Spaude further credibly testified that he had no reason to believe that Ace required any additional assistance with the delivery of the seven wooden poles to his property, and it was unclear why the City assisted in the delivery of these wooden poles.

Installation of Two Wooden Utility Poles

96. The undersigned concludes that the evidence failed to establish, by clear and convincing evidence, that the City’s installation of two wooden poles on private property, and as Mr. Spaude requested, was done to secure a special privilege or benefit for Mr. Spaude, or that Mr. Spaude acted corruptly.

³ Although the Commission also contends that Mr. Spaude enjoyed an additional benefit of not paying Florida sales tax on this transaction, it is unclear whether Ace, a Georgia company, would impose sales tax on its sales to Mr. Spaude. As Mr. Spaude points out in his Proposed Recommended Order, states like Florida could not compel out-of-state companies to collect or remit tax on sales to state residents unless the company had a physical presence in the state. *See Quill Corp. v. N. Dakota*, 504 U.S. 298 (1992). The Supreme Court subsequently overruled *Quill Corporation*. *See S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). However, the Florida Legislature did not act on the *Wayfair* decision until the most recent legislative session. *See* Ch. 2021-002, Laws of Fla. Mr. Spaude’s purchase of the wooden poles occurred in 2015, well before *Wayfair* or the Florida Legislature’s recently-enacted legislation.

97. As found, the evidence presented on this issue lacked sufficient weight to establish whether, as Mr. Spaude testified, he and Mr. Hickie agreed to a trade of three concrete poles to the City, in exchange for the City providing and installing two wooden poles at the private property. The other individuals who testified concerning this matter could not distinctly remember the facts, though then recalled picking up concrete poles and delivering them to the City, and Ms. Young testified that a city manager would not be prohibited from approving such a transaction.

Plumbing Supplies from the City

98. The undersigned concludes that the evidence established, by clear and convincing evidence, that Mr. Spaude's having the City provide him with two PVC pipes and two tapping saddles, and delivering the two PVC pipes to his private property, which he intended to use for the corn maze, constituted an improper use of his position that provided him a special benefit, even if he ultimately, upon request, returned these plumbing supplies to the City unused. The undersigned concludes that Mr. Spaude acted corruptly, because he knew, or should have known, that obtaining and possessing City property, without paying for the property, was unlawful and improper.

Personal Charges for Plumbing Supplies on City Account

99. The undersigned concludes that the evidence established, by clear and convincing evidence, that Mr. Spaude's decision to use the City's charge account at Core & Main to purchase plumbing supplies for his private use (the corn maze), constituted an improper use of his position that provided him a special benefit. Although Mr. Spaude credibly testified that he repaid this charge, he did so without paying applicable Florida sales tax, and the Commission presented credible evidence that such a purchase was not authorized under the City's procurement policy. The undersigned concludes that Mr. Spaude acted corruptly because he knew, or should have known,

that only those city employees designated under its procurement policy could purchase items on behalf of the City, and that his doing so was unlawful and improper.

Recommended Penalty

100. The penalties available for a former public employee who violated the Code of Ethics include, pursuant to section 112.317(1)(d): (a) public censure and reprimand; (b) a civil penalty not to exceed \$10,000.00; and (c) restitution of any pecuniary benefits received because of the violation committed.

101. Neither the Code of Ethics, or chapter 34-5, recognize any mitigating or aggravating factors to consider when determining the appropriate penalty.

102. The Commission argues, in its Proposed Recommended Order, for a significant penalty: a public censure and reprimand, and the maximum civil penalty of \$10,000.00. The Commission contends that Mr. Spaude “is still refusing to acknowledge facts before him that reflect his many requests for special treatment from the City, his agency. Without a substantial deterrent, Respondent is bound to continue with the same behavior.”

103. The undersigned has reviewed the previous Commission cases involving violations of section 112.313(6) and the punishment imposed. The undersigned recommends the imposition of a fine of \$5,000.00, as well as a public censure and reprimand, as the appropriate penalty for Mr. Spaude’s violation of section 112.313(6).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby RECOMMENDS that the Commission enter a final order finding that Respondent, William Spaude, violated section 112.313(6), and that Respondent be subject to a \$5,000.00 fine, as well as a public censure and reprimand.

DONE AND ENTERED this 17th day of November, 2021, in Tallahassee,
Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
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Filed with the Clerk of the
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this 17th day of November, 2021.

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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.