

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: IRVING ELLSWORTH,                    )     Case No. 04-0701EC  
  )     )  
          Respondent.                         )     )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on December 1, 2004, and January 18, 2005, in St. Petersburg, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Mark Herron, Esquire  
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STATEMENT OF THE ISSUES

Whether Respondent violated Subsection 112.3143(3)(a), Florida Statutes (2002),<sup>1</sup> and, if so, what penalty should be recommended.

PRELIMINARY STATEMENT

On July 29, 2003, the Florida Commission on Ethics (Commission on Ethics) entered an Order Finding Probable Cause to believe that Respondent, Irving Ellsworth (Ellsworth), as a

member of the Treasure Island City Commission, violated Subsection 112.3143(3)(a), Florida Statutes, by voting in his official capacity on Resolution No. 02-48 and the resulting ordinance. The matter was referred to the Division of Administrative Hearings on March 1, 2004, for assignment to an administrative law judge to conduct a final hearing.

The case was initially set for hearing on August 24, 2004. As a result of an unopposed motion for continuance, the final hearing was rescheduled for December 1, 2004. The parties were unable to complete the hearing on December 1, 2004, and the final hearing was reconvened on January 18, 2005.

The parties entered into a Joint Prehearing Stipulation and admitted to certain facts contained in Section E of the Joint Prehearing Stipulation, which are included in this Recommended Order to the extent they are relevant.

At the final hearing, the parties entered into evidence Joint Exhibits 1 through 33. The Advocate for the Commission on Ethics (Advocate) submitted Advocate's Exhibits 1 through 7, which were admitted in evidence. Respondent's Exhibits 1 and 2 were admitted in evidence. The following witnesses were called by the Advocate: Lynn Rosetti, Sidney A. Rice, Irving Ellsworth, Christopher Anderson, James Denhardt, and Tim Ferguson. Respondent testified on his behalf and called Charles Coward as a witness.

The Transcript of the portion of the final hearing held on January 18, 2005, was filed on May 3, 2005. A copy of the Transcript of the portion of the final hearing held on December 1, 2004, was filed by Petitioner on October 31, 2005. The court reporter filed the original of Transcript of the portion of the final hearing held on December 1, 2004, on November 14, 2005.

The parties agreed at the final hearing to file their proposed recommended orders on or before June 1, 2005. On May 10, 2005, the parties filed a Joint Motion for Extension of Enlargement of Time to Submit Proposed Recommended Orders. The motion was granted, and the time was extended to June 15, 2005. The parties timely filed their proposed recommended orders, which have been considered in rendering this Recommended Order.

#### FINDINGS OF FACT

1. Ellsworth served as a member of the Treasure Island City Commission from 1998 to 2004.
2. Ellsworth is subject to the requirements of Part III, Chapter 112, Florida Statutes, the Code of Ethics for Public Officers and Employees for his acts and omissions during his tenure as a city commissioner for the City of Treasure Island (City or Treasure Island).
3. Agnes Rice is presently one of the largest private land owners on Treasure Island. She owns property north of 127th

Avenue. The portion of her properties north of 127th Avenue and east of Gulf Boulevard is known as "Kingfish Point." Her property north of 127th Avenue and west of Gulf Boulevard is known as the Rock House property. Mrs. Rice has ownership interests in at least two corporations doing business at Kingfish Point: John's Pass Marina, Inc., and Gator's on the Pass, Inc. John's Pass Marina, Inc., also owns land on Kingfish Point.

4. Mrs. Rice hired an attorney, Tim Ferguson (Ferguson), who also had a master's degree in urban regional planning, to assist her in finding out the highest and best use for her properties on the north end of Treasure Island. Ferguson became a member of Mrs. Rice's advisory board, consisting of three attorneys, an accountant, and her son, Sid Rice. The advisory board had discussions with Mrs. Rice about assembling her properties on Kingfish Point.

5. Mrs. Rice retained Ferguson to go before the City Commission and to meet with City officials to try to change the City's Land Development Regulations (LDRs) to gain more flexible land use for her properties. Thereafter, Ferguson actively lobbied his ideas for amendments to the LDRs on behalf of Mrs. Rice before City officials in public meetings, as well as individual meetings with City officials and City Commissioners. At the same time, Ferguson was lobbying for amendments to the

LDRs on behalf of 13 other clients. When Ferguson appeared before the City Commission concerning the amendments to the LDRs, he stated that he represented Agnes Rice as well as other property owners.

6. In January 24, 2000, Ferguson met with Lynn Rosetti (Rosetti) and City Manager Chuck Coward to discuss things that could be done with the Rice property at the north end of Treasure Island. On January 30, 2000, Ferguson and Sid Rice met with Rosetti and the City manager to discuss some kind of hotel or resort that included mixed uses such as a mix of commercial, residential, and hotel. Ferguson and Rice also inquired about the possibility of vacating a right of way and about a height variance.

7. Thereafter, Ferguson had meetings with Rosetti and the City manager on July 17, 2000; August 3, 2000; August 4, 2000; April 4, 2001; October 30, 2001; April 25, 2002; and May 7, 2002. Ferguson wanted amendments to the LDRs that allowed mixed-use development, height incentives, development agreements and planned community development. He provided input to the City officials on those issues. Some of Ferguson's suggestions were later incorporated into amendments to the LDRs.

8. In April 2002, City staff presented to the mayor, the City Commission, and the Treasure Island Planning and Zoning Board (Planning and Zoning Board) proposed amendments to the

LDRs in a report and draft ordinance, which included amendments that could be passed through the local ordinance process and amendments that would require comprehensive plan amendments before they could be implemented. Major components of the proposed amendments that could be passed by local ordinance without comprehensive plan amendments included the concepts of mixed uses in the Commercial General (GC), Resort Facilities (RFM-30), and the Resort Facilities High (RFH-50) zoning classifications; accessory uses; density/intensity averaging; grand-fathering existing hotel/motel density for redevelopment in CG, RFM-30, and RFH-50; a height redefinition, giving an additional five feet in height to all zoning categories; bulk standards-height bonuses (height increase incentive plan) in CG and RFH-50; and development agreements. The proposed amendments requiring amendments to the comprehensive plan included the concepts of density bonuses in RFH-50; floor area ratios in RFM-30 and RFH-50; increase in hotel/motel density in CG; and transfer of development rights.

9. On May 3, 2002, the City manager and the City planner prepared and submitted to the mayor and members of the City Commission a memorandum identifying those proposed changes to the LDRs that could be addressed by the local ordinance process and those that would require amendments to the comprehensive plan.

10. On May 21, 2002, a Commission Workshop Session was held during which a first draft ordinance was presented to the City Commission. The first draft ordinance deleted proposed changes to LDRs that would require changes to the City's Comprehensive Plan. Ellsworth voted in favor of passing proposed modifications to the City's LDRs.

11. The first draft ordinance was incorporated into Resolution 02-48 for the draft ordinance's second reading and consideration on May 28, 2002. At the meeting on May 28, 2002, Ellsworth voted in favor of referring Resolution No. 02-48 to the Planning and Zoning Board for review and recommendation. The City Commission's vote to pass Resolution 02-48 and refer the ordinance to the Planning and Zoning Board was not merely a ministerial act. Rather, it was a required step in the process of adopting the amendments to the LDRs.

12. The draft ordinance referred to the Planning and Zoning Board included the following proposed changes to the LDRs:

a. Various definitions applicable to LDRs, including definitions for density, density averaging, floor area ratio, and transfer of development rights.

b. Amendments to the Property Development Regulations applicable to GC, RFM-30 and RFH-50 permitting mixed uses under the following conditions: "Mixed uses shall not exceed, in

combination, the respective number of units per acre and floor area ratio permitted, when allocated in their respective proportion to the total lot area."

c. A new section relating to mixed uses, which authorized mixed-use developments within CG, RFM-30, and RFH-50; required site plan review for all proposed mixed-use projects; established rules for special exceptions for mixed-use projects; and provided for an unspecified percentage reduction in the parking requirements for a mixed-use project when it is determined that peak demand for parking of the various uses occurs at different times.

d. A new section permitting density/intensity averaging between RFH-50, RFM-30, and GC for either hotel/motel uses or a mixed-use development that has a hotel/motel as the predominate use; providing that the shifting of any density/intensity could be used either between the same land districts or from a lower density district to a higher density district; and requiring that any project using density/intensity averaging would require written evidence of such averaging in a development agreement to be recorded with the Clerk of the Circuit Court.

e. A new section establishing a height incentive increase plan, permitting an increase in the maximum allowable height for hotels/motels in the RFH-50 and GC land use districts.

f. A new section providing for development agreements subject to the following requirements:

(1) Any interested party may make a proposal for a development agreement at any time prior to the completion of discretionary approvals for the development of a project. Such a proposal shall be formulated with the applicant and the City manager.

(2) A proposed development agreement shall be adopted, amended, or resolved by following the procedures outlined in Chapter 163, Florida Statutes, for development agreements. At a minimum, the City Commission shall hold a public hearing following the notification procedures set forth in Section 70-12 of the City Code.

(3) Development agreement shall be adopted by ordinance and may be amended by mutual consent of the parties to the agreement or their successors in interest.

13. After completing its review of the proposed changes to the LDRs, the Planning and Zoning Board referred the proposed changes to the City Commission with recommendations for modifications. The recommendations were summarized as follows:

The most significant recommendation being made by the Planning and Zoning Board involves density averaging and the height incentive increase plan. The Board is recommending that both tools be placed under the umbrella of Development Agreements so that there can be more control over how and

when such tools are used. In addition, they are recommending that the height incentive increase plan can only be used north of 104th Avenue to John's Pass and shall apply only to parcels that are one (1) acre or more in size.

Finally these recommended changes include the requirement that any such development agreement would be reviewed and approved by the Planning and Zoning Board prior to the City Commission taking action on the development agreement. In that manner, a second set of checks and balances will occur prior to the density averaging and the height incentive increase plan being utilized.

14. The City planner was directed by the City Commission to work up a draft ordinance including the modifications recommended by the Planning and Zoning Board. The draft ordinance was designated Ordinance No. 02-06.

15. On October 8, 2002, the City Commission considered on first reading Ordinance No. 02-06, which reflected the proposed changes to the LDRs as proposed by City staff as modified by the recommendations of the Planning and Zoning Board. At the meeting, the City planner noted two problems with the proposed ordinance as it related to the provisions relating to the height incentive increase plan included as part of the development agreement provisions of the LDRs. First, there was an inconsistency between the first sentence of the proposed ordinance applicable to RFH-50 and CG with the provisions of subsection (4) applicable to RFH, RFM-30 and CG. The City

planner recommended that the height incentive increase plan be applied only in RFH-50. Second, the City planner recommended deletion of the restriction that the height incentive increase plan apply only north of the 104th Avenue, because City staff had advised that the City could not split a land use district for disparate treatment.

16. The City planner's suggested changes were accepted by the City Commission, and the proposed ordinance was passed forward to second reading. Ellsworth participated in the vote on October 8, 2002, voting in the affirmative on moving the proposed ordinance to second reading.

17. On October 22, 2002, the City Commission considered on second reading Ordinance No. 02-06, as modified by the City Commission on first reading on October 8, 2002. Ellsworth participated in the vote on October 22, 2002, voting with the majority to approve the ordinance. The votes taken by the City Commission on October 8, and 22, 2002, were steps that were necessary in the process to amend the LDRs.

18. Resolution No. 02-48 and Ordinance 02-06 (at its initial reading on October 8, 2002, and as finally passed on October 22, 2002) had modifications that were beneficial to landowners on Treasure Island.

19. The total acreage of land in the City is 766.4885 acres. Of the total acreage, 40.4860 acres are zoned CG,

46.3162 acres are zoned RFM-30, and 46.3162 acres are zoned RFH-50.

20. At the time of Ellsworth's votes for Resolution 02-48 and Ordinance 02-06, he was employed as the general manager of John's Pass Marina, Inc., and also worked for Gator's on the Pass, Inc. Agnes Rice is the sole owner of John's Pass Marina, Inc., and has an ownership interest in Gator's on the Pass, Inc.

21. John's Pass Marina, Inc., owned 1.59 acres of property zoned CG at 12795 Gulf Boulevard/Kingfish Drive where John's Pass Marina is located. The property owned by John's Pass Marina, Inc., comprises slightly more than 3.9 percent of the property zoned CG in the City.

22. Agnes Rice individually owned several parcels of land in the City, at various locations, at the time that Ellsworth voted on Resolution 02-48 and Ordinance 02-06. Most of the properties owned in the Kingfish Point area are owned by Mrs. Rice, including the "Rock House" property, which is .91 acres located on the western side of Gulf Boulevard at 12714 Gulf Boulevard and is classified as RFH-50. Mrs. Rice also owns three other parcels on the western side of Gulf Boulevard which are classified as RFH-50: .14 acre at 12717 Sunshine Lane; .12 acre at 12721 Sunshine Lane; and .02 acre with an address listed as Coney Island. Mrs. Rice's total acreage classified as RFH-50 is 1.19 acres.

23. Agnes Rice also owns other properties in the Kingfish Point area, including properties upon which the following businesses are located: Gator's Café and Saloon, Gator's Gift Shop, Majesty Cruise Lines office, some rental properties, a parasailing business, and a high and dry boat storage. Of these properties owned by Agnes Rice, 3.92 acres are classified as CG: .6 acre at 12766 Gulf Boulevard; 1.89 acres at 12781 Kingfish Drive; .78 acre at 12783 Gulf Boulevard; and .65 acre at 12725 Gulf Boulevard. Less than one acre of the property owned by Agnes Rice in the Kingfish Point area was classified as residential: .19 acre lot, three .12 acre lots, one .11 acre lot and .08 acre lot at 12700 to 12714 Lagoon Drive and 110 127th Avenue.

24. The properties owned by John's Pass Marina, Inc., and Agnes Rice that were zoned CG were affected by the votes Ellsworth cast for Resolution 02-48 and Ordinance 02-06. There are properties owned by Agnes Rice on Treasure Island, other than property zoned CG, which were affected by the votes Ellsworth cast for Resolution 02-48 and Ordinance 02-06.

25. The 1.59 acres in the CG land use category owned by John's Pass Marina, Inc., at the time of the subject votes, constituted the following percentages of land on Treasure Island: approximately 3.92 percent of the total acreage of CG;

1.81 percent of the combined acreage in CG and RFH-50; and 1.18 percent of the combined acreage in CG, RFH-50, and RFM-30.

26. Considering the 1.59 acres in CG owned by John's Pass Marina, Inc., plus the 3.92 acres of CG owned by Mrs. Rice on Kingfish Point, the total acres in CG owned by Mrs. Rice and her corporation at the time of the subject votes constituted the following percentages of land on Treasure Island: 13.6 percent of the total CG; 6.26 percent of the combined acreage in CG and RFH-50; and 4.1 percent of the combined acreage in CG, RFH-50, and RFM-30.

27. Considering the 1.59 acres in CG owned by John's Pass Marina, Inc., plus the 3.92 acres of CG owned by Mrs. Rice on Kingfish Point plus the 1.19 acres of RFH-50 owned by Mrs. Rice north of 127th Avenue, the total 6.7 acres CG and RFH-50 owned by Mrs. Rice and her corporation at the time of the subject votes constituted the following percentages of land on Treasure Island: 7.6 percent of the combined acreage in CG and RFH-50 and 4.99 percent of the combined acreage in CG, RFH-50 and RFM-30.

28. When interviewed by an investigator for the Commission on Ethics in this case prior to Ellsworth's voting on Ordinance 02-06 on October 8 and 22, 2002, Ellsworth advised the investigator that he was employed by A.E. Rice, Inc. Ellsworth was not employed by A.E. Rice, Inc., at the time he told the

investigator that he was employed by A.E. Rice, Inc., and he has never been employed by A.E. Rice, Inc., which does not exist.

29. A few months after his interview with the investigator, Ellsworth advised the investigator that he was employed by Kingfish Restaurant and Lounge, Inc., and John's Pass Marina, Inc. Ellsworth also advised the investigator that he did not know whether either of those corporations owned property on Treasure Island.

30. It is clear that prior to his voting on October 8 and 22, 2002, Ellsworth viewed himself, without regard to the corporation that was issuing his paycheck, as working for the Rice family and, in particular, Agnes Rice. He described Mrs. Rice as the "matriarch." In the past, Ellsworth had abstained from voting on matters involving "[a]ny piece of property that the [Rice] family owned." He described his abstention as follows:

I have recused myself from voting on anything that has gone down here. . . . Any piece of property that the family owned. Even so minute as having a fund raiser for a fishing tournament, you know a fishing tournament fund raiser where all the money goes to charity. We've been involved with that for ten years. You know and I have to recuse myself from voting on that saying yes or no where they can have a tent up because there might be some type of monetary gain there. Because we do own a restaurant, there is a bar there, I say we do I'm doing that. The Rices own a bar and restaurant here and yes even if the money goes to

charity somebody could go in and buy cocktails and that would ultimately benefit my employer.

Ellsworth recused himself from voting on matters involving any piece of property owned by the Rice family based on an informal opinion obtained in 1998 by the City attorney from the Commission on Ethics concerning the propriety of Ellsworth voting on matters that were being presented to the City by the Rice family.

31. Prior to his votes in October 2002, Ellsworth had been advised by the City attorney that the facts and circumstances could justify Ellsworth abstaining on voting on the LDR amendments. In making his assessment and giving advice to Ellsworth, the City attorney was of the opinion that Ellsworth was directly or indirectly employed by some of the entities that were involved in the ownership of the property on the north end of Treasure Island. The City attorney never advised Ellsworth that Ellsworth had a conflict, but he felt that it was a close call and abstention would be supportable.

32. On or about September 25, 2002, Ellsworth spoke to Commission on Ethics staff counsel, Chris Anderson, by telephone. Ellsworth told Anderson that the City was considering some changes in the LDRs that would have an impact on some persons or companies that he worked for who were property owners or had an interest in the LDRs. Ellsworth told

Anderson that there was an active complaint currently before the Ethics Commission on the subject of the vote. Ellsworth advised Anderson that the amount of land owned by persons or companies that he worked for was "nine acres, seven commercial."

33. Anderson told Ellsworth that in view of the fact there was an active complaint on essentially the same activity, he should not vote on the changes to the LDRs when it came back to the City Commission for a vote. Anderson also had a "size-of-class" discussion with Ellsworth regarding the size of the land owned relative to the size of land affected. Ellsworth advised that his employer or the people he worked for was the biggest or one of the biggest landowners.

34. A few days after Anderson spoke with Ellsworth, Tim Ferguson, the same attorney who had been retained by Agnes Rice to lobby the City Commission concerning the changes to the LDRs, spoke with Anderson. Ferguson told Anderson that he was representing Ellsworth and asked essentially the same questions that Ellsworth had asked. Ferguson also wanted to know if the Commission on Ethics would issue an advisory opinion on Ellsworth's voting in the upcoming votes on changes to the LDRs. Anderson advised Ferguson that the practice of the Commission on Ethics under the circumstances was to defer to the active complaint and investigative facts rather than issue an advisory

opinion. Anderson emphasized to Ferguson that Ellsworth should not vote and that Ellsworth likely had a voting conflict.

35. A few days before Ellsworth spoke with Anderson, Anderson had a conversation with the City attorney concerning Ellsworth voting on the changes to the LDRs. Anderson told the City attorney that Ellsworth was "going to step on a snake twice; it's a no-brainer; don't vote on it again when it comes back."

#### CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2004).

37. The Commission, through its Advocate, is asserting that Ellsworth violated Subsection 112.3143(3)(a), Florida Statutes. The Commission has the burden to establish the violation by clear and convincing evidence. Latham v. Commission on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

38. Subsection 112.3143(3)(a), Florida Statutes, provides:

No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would

inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

39. In order to establish a violation of Subsection 112.3143(3)(a), Florida Statutes, the following elements must be proven:

1. Respondent must have been a county, municipal or other public officer serving on a collegial body.
2. Respondent must have:
  - a. voted in his official capacity on a measure which would have inured to Respondent's own special private gain or loss,
  - or
  - b. voted in his official capacity on a measure which Respondent knew would have inured to the special private gain or loss of a principal by whom Respondent was retained or to the parent organization or subsidiary of a corporate principal by which Respondent was retained,
  - or
  - c. voted in his official capacity on a measure which Respondent knew would have inured to the special private gain or loss of a relative or business associate of Respondent.

40. Ellsworth was a city commissioner serving on the City Commission at the time of the votes. He voted in his official

capacity as a city commissioner when he voted on Resolution 02-48 and Ordinance 02-06.

41. At the time of his voting, Ellsworth knew that the amendments to the LDRs would affect Agnes Rice and John's Pass Marina, Inc. Technically, he received a salary from John's Pass Marina, Inc., and Gator's on the Pass, Inc. However, the evidence is clear and convincing that Ellsworth considered himself to be employed by the Rice family, and, in particular, Agnes Rice at the time of this voting. His statements to the investigator for the Commission on Ethics, his conversation with the staff attorney for the Florida Commission on Ethics in September 2002, and his past practice of abstaining on voting on matters involving land owned by the Rice family support this conclusion.

42. It is clear that, without considering his relationship with Agnes Rice, Ellsworth was employed by John's Pass Marina, Inc., and, therefore, John's Pass Marina, Inc., was a "principal" by whom Ellsworth was retained. In CEO 84-108, the Florida Commission on Ethics stated:

Section 112.3143, Florida Statutes, as amended by Chapter 84-357, Laws of Florida, prohibits a municipal public officer from voting upon a measure which inures to his special private gain, and from knowingly voting on a measure which inures to the special gain of a principal by whom he is retained. In previous opinions interpreting the identical language in the former law, we

have advised that a public official's employer is a "principal by whom he is retained." See CEO 78-27, CEO 79-76, CEO 81-52 and CEO 82-53. As the Legislature chose to use the same language when designating the situations in which a public official must now abstain from voting, we are of the opinion that our prior interpretations remain valid. Accordingly, we find that the subject Town Council member would be prohibited from voting on a measure which inures to the special gain of the corporation which employs him.

43. In determining whether there was a special gain to the principal by whom Ellsworth was retained, an examination must be made "in part on the number of persons who would be affected (size of class) and in part on whether the gain would be remote or speculative." CEO 92-37. In cases where the Commission on Ethics has examined the size of class of those who stand to benefit from a measure voted on, the Commission on Ethics has typically found a voting conflict where the affected interest is more than one percent of the total. See CEO 92-37 (two percent and eight percent of property affected is sufficient for conflict); CEO 90-64 (1.8 percent or 2.7 percent of property to be affected is sufficient, stating: "We have concluded that no voting conflict was presented in other situations where the interests of the public official involved one percent or less of the affected class.").

44. In the most conservative scenario--taking only that property owned by John's Pass Marina, Inc., 1.59 acres, and dividing it by the total acreage in CG, RFH-50, and RFM-30, 134.2518 acres--the resulting percentage of property owned by one of the principals who retained Ellsworth is 1.18 percent of the affected class. When the property owned individually by Agnes Rice in land categories CG and RFH-50 is added to the mix, the total property owned by Ellsworth's principals is 6.7 acres, which is 4.99 percent of the combined CG, RFH-50, and RFM-30.

45. The gain to John's Pass Marina, Inc., and to Agnes Rice was not speculative. It is clear that Agnes Rice was seeking amendments to the LDRs that would provide more flexible use for the land she owned, including the land owned by her corporation, John's Pass Marina, Inc. In CEO 92-37, the Florida Commission on Ethics opined that although a vote to include certain property in a historic district designation would not affect zoning of the property, "the ability to increase the number of dwelling units in a structure is certainly gain of a tangible nature, as is freedom from an additional or onerous step or process in order to demolish a structure to allow a more profitable use of the property." Id. at 3. Similarly, the LDR amendments voted on by Ellsworth contained provisions that would allow an increase in the number of units in certain buildings by density averaging, as well as increased height, mixed uses, and

other enhancements that would increase flexibility for future developments of the affected property.

46. The vote taken on May 28, 2002, and October 8 and 22, 2002, were required steps in the LDR process. In CEO-93-10, the Commission on Ethics opined that "a vote to refer a zoning petition to a city's zoning department prior to a vote on the proposed zoning change itself, where a vote not to refer the petition would have effectively killed the petition . . . is not merely preliminary or procedural." Id. at 3, citing, Chavez v. City of Tampa, 560 So. 2d 1214 (Fla. 2d DCA 1990).

47. In Chavez v. City of Tampa, the court disagreed with the hearing officer's construction of Subsection 112.3143(3), Florida Statutes, and stated:

Under the hearing officer's construction, the official votes taken by the council are severable. Some--conflicts of interest occurring at a procedural step--are permitted. Others--conflicts occurring at a substantive step--are not. In a case like the one before us, that seems to be a distinction without a difference. The result for the appellant is the same. The failure to obtain a majority vote at any step along the path from the filing of the petition to the final passage as an ordinance effectively killed it. . . . In the words of section 112.4143(3), "no . . . local public officer shall vote in his official capacity upon any measure which inures to his special private gain." . . . The legislature makes no distinction whether

the conflicting vote occurs at the beginning, the middle, or the end of the zoning change procedure.

560 So. 2d at 1216, n. 4.

48. The evidence is not clear whether the vote taken on May 21, 2002, was a preliminary vote or whether it was a necessary part of the process to amend the LDRs. Accordingly, the Advocate has not established by clear and convincing evidence that Ellsworth violated Subsection 112.3143(3)(a), Florida Statutes, when he voted on May 21, 2002. The Advocate has established by clear and convincing evidence that Ellsworth violated Subsection 112.3143(3)(a), Florida Statutes, when he voted on Resolution 02-48 on May 28, 2002, and when he voted on Ordinance 02-06 on October 8, and 22, 2002.

49. Subsection 112.317(1)(d), Florida Statutes, provides for penalties for a violation of a provision of Part III of Chapter 112, Florida Statutes, which includes a violation of Subsection 112.3143(3)(a), Florida Statutes. For penalties for former public officers, Subsection 112.317(1)(d), Florida Statutes, provides:

(d) In the case of a former public officer or employee who has violated a provision applicable to former officers or employees or whose violation occurred prior to such officer's or employee's leaving public office or employment:

1. Public censure and reprimand.
2. A civil penalty not to exceed \$10,000.

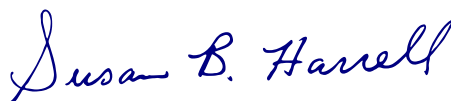
3. Restitution of any pecuniary benefits received because of the violation committed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered finding that Irving Ellsworth violated Subsection 112.3143(3)(a), Florida Statutes, and recommending the imposition of public censure and reprimand, and a civil penalty of \$5,000.

DONE AND ENTERED this 11th day of January, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
Division of Administrative Hearings  
this 11th day of January, 2006.

ENDNOTE

1/ Unless otherwise provided, references to the Florida Statutes are to the 2002 version.

COPIES FURNISHED:

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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.