

IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
STATE OF FLORIDA

COMMISSION ON ETHICS
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IRVING ELLSWORTH,

CASE NO.: 2D06-2358

Appellant,

L.T. No.: 02-108

vs.

STATE OF FLORIDA, COMMISSION
ON ETHICS,

Appellee.

ANSWER BRIEF OF APPELLEE,
STATE OF FLORIDA COMMISSION ON ETHICS

An Administrative Appeal from a
Final Order and Public Report of the
Florida Commission on Ethics

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PRELIMINARY STATEMENT

Appellant, Irving Ellsworth, will be referred to herein as “Appellant” or “Ellsworth.” Appellee, the Florida Commission on Ethics, will be referred to as “Appellee” or the “Commission.” Administrative Law Judge Susan B. Harrell who rendered the Recommended Order adopted by the Commission shall be referred to as the “ALJ.”

References to the nine volume record on appeal will be in parenthesis and contain the record’s abbreviated Volume (“Vol.”), Document (“Doc.”), page (“p.”), and any paragraph (“¶”) numbers, occasionally followed by a brief description in brackets. For transcript references, the surname of witnesses will be enclosed in brackets after the page number. Appellant’s Initial Brief will be referenced parenthetically as “Initial Brief.” References to the published opinions of the Commission on Ethics will be by “CEO” followed by the opinion number. The opinions are available on the Commission’s website at: **www.ethics.state.fl.us**. However, for the Court’s convenience, an appendix containing the cited opinions is submitted herewith.

STATEMENT OF THE CASE AND FACTS

Appellee agrees with Appellant's Statement of Facts to the extent that it reflects the Administrative Law Judge's Findings, which Appellee does not dispute. However, as Appellant omits a number of salient facts, Appellee supplements the facts stated in Appellant's Initial Brief as follows:

At all pertinent times Agnes Rice was one of the largest land owners on Treasure Island and had a number of business operations on her properties located in an area known as "Kingfish Point" on the very north end of Treasure Island north of 127th Avenue, including: Gator's Gift Shop; Gator's Café & Saloon owned by Gator's on the Pass, Inc. ("Gator's"); dockage, parking and ticket office for Majesty Cruise Lines; a couple of rental properties; a parasailing business; dry boat storage; and John's Pass Marina owned by John's Pass Marina, Inc. Her son, Sidney ("Sid") Rice, assisted her in running those operations. (Vol. III, Doc. 37 [map]; Vol. V, Doc. 63, p. 831 [detailed map]; Vol. VII, Doc. 79, pp. 38-39, 49-60 [Rice]; Vol. IX, Doc. 81, pp. 60-63 [Rice]) Mrs. Rice was the sole owner of Gator's and John's Pass Marina, Inc. (Vol. IX, Doc. 81, pp. 60-63, 99 [Rice])

At the time of the votes in question, in addition to his service on the Treasure Island City Commission, Appellant was general manager at John's Pass Marina and he performed various additional jobs at Gator's, such as maintenance

of the coin machine and ATM, and oversight of the docks at the restaurant. (Vol. IX, Doc. 81, p. 53, 60-61 [Rice])

Sid Rice supervised Appellant's duties at John's Pass Marina through recommendations received from his mother. As owner, Mrs. Rice had the power to hire, fire, and dictate Appellant's work responsibilities. (Vol. VI, Docs. 71, 72 & 73; Vol. IX, Doc. 81, pp. 60, 99 [Rice]) At Gator's, Appellant also worked for Mrs. Rice through Sid Rice. Mrs. Rice also gave direct instruction to Appellant to do things on a day-to-day basis, such as making sure a "cleat is not thrown," "take care of holes in the sea wall," "fix that dangling board," or "the red light is on in the change machine, correct it because no one can play pool." (Vol. IX, Doc. 81, pp. 75-76 [Rice])

Appellant was paid for his work at John's Pass Marina by John's Pass Marina, Inc. He was paid for his work at Gator's by John's Pass Marina, Inc., and also from an account named Kingfish Restaurant and Lounge, Inc. The corporation, Kingfish Restaurant and Lounge, Inc., was administratively dissolved in 1996. Sid Rice described Kingfish Restaurant and Lounge, Inc., as a "payroll account." (Vol. IV, Doc. 58; Vol., V, Doc. 62; Vol. VI, Doc. 74; Vol. IX, Doc. 81, pp. 61-66, 69, 74, 103-105 [Rice])

It was the understanding of all the parties at the time that Appellant worked for Agnes Rice at Gator's as well as John's Pass Marina because she owned the

corporations and controlled what went on at her properties. (Vol. IX, Doc. 81, pp. 60-63 [Rice]) Sid Rice described Gator's on the Pass restaurant as "an ongoing family matter." (Vol. VII, Doc. 79, p. 54 [Rice]) As Appellant put it, "Agnes Rice is the queen fish. She's the queen bee and it doesn't matter what piece of property or who owns what, the assumption is she's the head person." (Vol. VII, Doc. 79, p. 87 [Ellsworth])

Prior to the votes in question, Ellsworth had abstained from voting on matters involving "[a]ny piece of property that the [Rice] family owned." (Vol. III, Doc. 32, p. 420, ¶ 30; Vol. V, Doc. 65, p. 846; Vol. VII, Doc. 79, p. 87 [Ellsworth]; Vol. VIII, Doc. 80, pp. 156-157 [Ellsworth])

Approximately four years prior to the votes in question, the then-City Attorney for Treasure Island, James Denhardt (Vol. VII, Doc. 79, p. 78 [Ellsworth]), sought a staff opinion at Appellant's request from the Florida Commission on Ethics on the subject of Appellant's potential conflict of interest when voting on matters brought before the City Commission involving the Rice family. (Vol. IV, Doc. 54, pp. 708-709; Vol. VIII, Doc. 80, p. 224 [Denhardt]) In response, Commission staff counsel Chris Anderson provided a written opinion advising that Ellsworth should abstain from voting on matters that would inure to the benefit of his employer. (Vol. IV, Doc. 55, pp. 710-711) Mr. Denhardt, in turn, prepared a letter to Ellsworth dated October 21, 1998, enclosing the Ethics

Commission staff opinion. (Vol. IV, Doc. 56, pp. 712-713) Appellant reviewed both the Ethics Commission staff opinion and Mr. Denhardt's letter in 1998. (Vol. II, Doc. 23, p. 233, ¶ 3)

At the time of the subject votes, both Agnes and Sid Rice had an interest in seeing that Treasure Island was not overrun by condominiums. (Vol. IX, Doc. 81, p. 118 [Ferguson]) The properties owned by Mrs. Rice and her corporation, John's Pass Marina, Inc., on Kingfish Point are the only properties on the north end of Treasure Island facing John's Pass, (Vol. III, Doc. 37 [map]; Vol. VII, Doc. 79, pp. 38-39, 59-60 [Rice]; Vol. VIII, Doc. 80, p. 235 [Denhardt]) and are dependent on tourism. (Vol. IX, Doc. 81, pp. 7-10 [Rice]) In addition, Mrs. Rice had been approached by a major hotel chain regarding the possible sale of her property on the north end of Treasure Island. These discussions stirred Ms. Rice's interest in finding out what could be done with her Treasure Island properties (Vol. IX, Doc. 81, pp. 141-142 [Ferguson]) and she asked attorney Tim Ferguson, who has a degree in urban regional planning, to assist in finding their highest and best use. (Vol. III, Doc. 32, pp. 409, ¶ 4; Vol. IX, Doc. 81, p. 81 [Rice], 108, 110-115 [Ferguson])

Mr. Ferguson discussed with the Rices the need for revised land development regulations ("LDRs") that would provide more flexibility for development of the north end of Treasure Island. Thereafter, Mrs. Rice paid Mr.

Ferguson \$50,000 to represent her property and business interests in that regard. (Vol. IX, Doc. 81, pp. 37-38, 41-42, 44-46 [Rice], 120-123 [Ferguson])

Agnes Rice wanted LDRs in place that would give greater flexibility to her properties. She hired Mr. Ferguson to “start the ball rolling” for future LDR amendments and to go before the City Commission and meet with City officials to try to change Treasure Island’s LDRs. (Vol. IX, Doc. 81, pp. 120, 123-124, 127, 129 [Ferguson]) Thereafter, Mr. Ferguson actively lobbied his ideas for LDR amendments on behalf of Mrs. Rice before Treasure Island City officials in public meetings, as well as individual meetings with City officials and Commissioners, including Appellant. Appellant knew Mr. Ferguson represented the Rices, because Mr. Ferguson said so in an appearance before the City Commission while Ellsworth was present. (Vol. III, Doc. 32, pp. 409, ¶ 5; Vol. IX, Doc. 81, pp. 124-128, 130 [Ferguson]; Vol. IV, Doc. 61 [video of Commission Workshop held 5/7/2002])

Mr. Ferguson had individual meetings on behalf of Mrs. Rice with City Planner Lynn Rosetti and City Manager Charles Coward in which he promoted the ideas of height variances, height incentives and mixed uses, such as a mix of commercial, residential and hotel. (Vol. III, Doc. 37, 38 & 39; Vol. VI, Doc. 70, pp. 996-1022 [Rosetti]; Vol. III, Doc. 32, p. 410, ¶ 6; Vol. VI, Doc. 70, pp. 1003-1004, 1010-1012 [Rosetti]) Mr. Ferguson had input during public meetings as

well. (Vol. VII, Doc. 79, p. 110 [Ellsworth]; Vol. IX, Doc. 81, pp. 149-50 [Ferguson]; Vol. IV, Doc. 61 [video tapes from 5/7/02 & 5/21/02 workshops]; (Vol. VI, Doc. 70, p. 1051 [Rosetti])

Mr. Ferguson was an effective advocate and lobbyist in the LDR amendment process. (Vol. IX, Doc. 81, pp. 138-139, 146-149 [Ferguson]) Concepts he advocated which found their way into the LDR amendments included: height incentives, mixed uses, accessory uses, density averaging, density transfer and development agreements.¹ (Vol. III, Doc. 32, pp. 410, ¶ 7; Vol. III, Doc. 40, pp. 502-519; Vol. IX, Doc. 81, p. 34 [Rice], 145-149 [Ferguson]; Vol. VII, Doc. 79, pp. 108-109 [Ellsworth]) These concepts as incorporated into the LDR amendments 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 development of the affected properties. (Vol. VI, Doc. 70 [Rosetti], pp. 1042-1043 [mixed-uses], 1047-1047 [development agreements], 1048-1049 [height incentive increase], 1051-1055 [density averaging], 1056 [all would encourage

¹Tim Ferguson explained that inclusion of development amendments in the LDR amendments “was a part of what I could report to Mrs. Rice that could, at least, something that she could be proud of having on her site that might allow us to have the flexibility to do something later on down the line.” (Vol. IX, Doc. 81, pp. 148-149 [Ferguson])

redevelopment], 1101 [added to ability to develop]); Vol. III, Doc. 32, p. 427-428, ¶ 45; Vol. IX, Doc. 81, pp. 211-212 [Coward])

Except for an across-the-board redefinition of height, the amendments focused on property zoned Commercial General (“CG”), Resort Facilities High (“RFH-50”), and Resort Facilities Medium (“RFM-30”). Mrs. Rice, either individually or through her wholly-owned corporation, John’s Pass Marina, Inc., owned property in each of these categories on the north end of Treasure Island. In particular, John’s Pass Marina, Inc., owned 1.59 acres of property zoned CG.² (Initial Brief, pp. 3-5)

The May 28, 2002, vote in which Appellant participated³ resulted in a version of a draft ordinance being forwarded to the Planning and Zoning Board that included a new height definition for all zoning categories; the concepts of mixed-uses, density/intensity averaging, and grandfathering provisions for RFH-50, RFM-30, and CG zones; a height incentive increase plan that would apply only to RFH-50 and CG land use districts; and the concept of development agreements.

² At the final hearing, Sid Rice explained the fact the corporation ended up owning the land was an “unusual incident” because normally his mother bought property in her individual capacity, but that, in any case, she controls what is done with that property. (Vol. IX, Doc. 81, pp. 99-100 [Rice])

³ The vote was in favor of Resolution No. 02-48 which referred a draft ordinance, later to become Ordinance No. 02-06, with LDR amendments for review and recommendation. (Vol. II, Doc. 23, p. 233, ¶ 5; Vol. IV, Docs. 48, 60 [5/28/02 meeting minutes, pp. 1-3]; Vol. III, Doc. 32, p. 412, ¶ 11; Initial Brief, pp. 8-10)

(Vol. IV, Doc. 48, pp. 621, 626-629) This vote was a required step in the process of amending the LDRs. (Vol. VIII, Doc. 80, p. 231[Denhardt])

The complaint alleging that Appellant had a voting conflict, which led to the action by the Commission against Appellant in this case, was filed with the Commission on July 29, 2002. (Vol. 1, Doc. 3) The Commission's Order to investigate was entered September 25, 2002. (Vol. I, Doc. 4)

Prior to the final vote, then City Attorney James Denhardt told Appellant that the facts and circumstances could justify Appellant's abstention, and that Appellant would not be shirking his duties if he abstained from voting on the LDR amendments. (Vol. VIII, Doc. 80, pp. 141-142 [Ellsworth], 229-230 [Denhardt]; Vol. III, Doc. 32, p. 421, ¶ 31)

After speaking with Mr. Denhardt, Appellant spoke to Commission on Ethics staff counsel Chris Anderson by telephone on or about September 25, 2002. Appellant explained to Mr. Anderson that the matter involved some persons or companies that he worked for, who were property owners or had an interest that would be impacted by the changes or potential changes in LDRs that were being considered by the City Commission. Mr. Anderson advised him emphatically not to vote. (Vol. VIII, Doc. 80, pp. 169-172 [Anderson]; Vol. V, Doc. 68; Vol. III, Doc. 32, p. 421, ¶ 32)

Several days later, Tim Ferguson called Mr. Anderson and advised that he was representing Appellant.⁴ Mr. Ferguson asked essentially the same question, and whether the Commission on Ethics would issue an advisory opinion on the upcoming votes. Mr. Anderson advised Mr. Ferguson of the practice of the Ethics Commission to defer to the active complaint and investigative facts instead of issuing an advisory opinion under the circumstances. However, Mr. Anderson emphasized to Mr. Ferguson that Appellant likely had a voting conflict and should not vote. (Vol. VIII, Doc. 80, p. 177-180 [Anderson]; Vol. III, Doc. 32, p. 421, ¶ 34)

When voting on the LDR amendments, Appellant was also aware that the public perceived that he had a conflict because of his employment by the Rice family and their corporations. (Vol. VII, Doc. 79, p. 135 [Ellsworth]; Vol. IX, Doc. 81, pp. 78-82 [Rice]) During the LDR amendment process and prior to the final votes, someone placed bumper stickers with the phrase “SID’S BOY BUTCH,” on stop signs, speed signs and other signs on Isle of Palms and Kingfish Drive on the Isle of Capri on Treasure Island. Appellant recalled that, even before the placement of those stickers, he had been referred to as “Sid’s Boy Butch.”

⁴ Tim Ferguson began representing Appellant in this Ethics case prior to the October 22, 2002, final vote on Ordinance No. 02-06, while Mr. Ferguson was also actively lobbying for the LDR amendments. (Vol. VII, Doc. 79, p. 131 [Ellsworth])

(Vol. VIII, Doc. 80, pp. 136-137 [Ellsworth]) At the final hearing in this case, Sid Rice observed:

The Public assumed, Public, single word, that Butch Ellsworth worked for the Rices, that he was for the Rices. And that was stated by different people at public meetings.

(Vol. IX, Doc. 81, p. 79 [Rice])

On October 1, 2002, after receiving draft Ordinance No. 02-06 back from Planning and Zoning, the City Commission held a public workshop and agreed by consensus to amend the draft ordinance so that “the height incentive increase plan can only be used north of 104th Avenue to Johns Pass and shall apply only to parcels that are (1) acre or more in size.” (Vol. IV, Doc. 49, p. 632; Doc. 51, pp. 672-673 [see especially p. 673, item (e) 4]; Doc. 24[10/1/02 workshop minutes])

On October 8, 2002, at the first reading of Ordinance No. 02-06, the City Commission voted to change the ordinance so that the height incentive increase plan applied only to RFH-50, excluding CG and RFM-30 from the height incentive increase plan altogether. (Vol. IV, Doc. 60 [10/8/02 minutes]; Doc. 61 [10/8/02 video]; Doc. 51, pp. 672-673; Doc. 52, p. 690; Vol. II, Doc. 23, p. 233, ¶ 6) This was a loss for CG property because, after the change, only RFH-50 could take advantage of the height incentive increase plan. (Vol. VI, Doc. 60, pp. A-1, pp. 1082-1083)

On October 22, 2002, draft Ordinance No. 02-06 with the incorporated changes was presented to the City Commission for its second and final reading and was passed and adopted by the City Commission. (Vol. IV, Doc. 60 [minutes from 10/8/02 & 10/22/02 meetings], Doc. 51[draft considered on 10/8/02], Doc. 17[signed ordinance]; Vol. II, 23, p. 233, ¶ 6)

Apart from LDR amendments, the effective date of Ordinance No. 02-06 was at issue because of a citizen's referendum that was coming up for a vote on November 5, 2002, that would have restricted the City Commission's power to adopt development regulations without a majority vote of the citizens. (Vol. IV, Doc. 60 [10/8/02 minutes; 10/22/02 minutes]; Vol. VII, Doc. 79 [Ellsworth]) Tim Ferguson and Sid Rice both wanted the LDR amendments passed prior to any such referendum. (Vol. IV, Doc. 60 [minutes from 10/22/02 meeting]; Vol. IX, Doc. 81, pp. 164, 169 [Ferguson])

Despite warnings, Appellant participated in the votes for the LDR amendments on October 8 and October 22, 2002, and against measures considered during those meetings to postpone the effective date of the amendments, resulting in the approval of Ordinance No. 02-06 with LDR amendments prior to the citizen's referendum. (Vol. IX, Doc. 81, p. 169 [Ferguson]; (Vol. IV, Doc. 60 [minutes from 10/8/02 & 10/22/02 meetings])

While height incentives were not available for CG zoned property under Ordinance No. 02-06 as passed, Ordinance No. 02-06 included the concepts of mixed-uses, density/intensity averaging, and grandfathering provisions for properties in RFH-50, RFM-30, and CG zoning categories; and included the concept of development agreements. (Vol. IV, Doc. 53) This was considered a victory by Mrs. Rice's attorney. (Vol. IV, Doc. 59; Vol. IX, Doc. 81, p. 195 [Ferguson])

While the LDR amendments that ultimately passed did not reflect all of the changes that Mr. Ferguson was seeking for Agnes Rice's properties, the LDR amendments voted on by Appellant contained provisions that would provide more flexible use for the land she owned, including the land owned by her corporation, John's Pass Marina, Inc. Throughout the process, 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,⁵ as well as increased height, mixed uses, and other enhancements that would increase flexibility for future developments of the affected property." (Vol. III, Doc. 32, pp. 427-428, ¶ 45; Vol. VI, Doc. 70, pp. 1041-1042, 1046-1056, 1101 [Rosetti])

⁵Appellant understood and the evidence showed that density from John's Pass Marina's CG property could be shifted to Agnes Rice's RFH-50 zoned property on the west side. (Vol. VII, Doc. 79, pp. 106-107 [Ellsworth]; Vol. VI, Doc. 70, pp. 1052-1056, 1063-1065 [Rosetti])

STANDARD OF REVIEW

The applicable standard of review for this appeal is found in Section 120.68(7)(b) and (d), Florida Statutes, which provides that the court shall remand or set aside the agency action when it finds that:

(b) The agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57; however the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact;

[or]

(d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action.⁶

§ 120.68(7)(b) and (d), Fla. Stat. (2005).

⁶While the statement in the Initial Brief that "courts are free to disagree with an agency on a point of law" is generally accurate, the statement is not explained or supported by the case cited by Appellant, Eight Hundred v. Dep't of Revenue, 837 So. 2d 574 (Fla. 1st DCA 2003), which was a petition to review a non-final administrative action pursuant to § 120.68(1), Fla. Stat. In contrast, the instant appeal is from the Commission's final order adopting the ALJ's Recommended Order entered after a formal evidentiary hearing. Appellant's statement is explained in Gaudet v. Fla. Bd. of Prof'l Eng'rs, 900 So. 2d 574 (Fla. 4th DCA 2002), wherein the Fourth District Court of Appeal stated:

Appellate courts are free to disagree with an agency on a point of law. [citation omitted] Although courts should give great weight to an agency's construction of a statute that it is charged with enforcing and interpreting, [footnote omitted] *section 120.68(7)(d)* provides in material part that the court may "set aside agency action" when it finds that the agency has "erroneously interpreted a provision of law and [that] a correct interpretation compels a particular action." 120.68(7)(d), Fla. Stat. (2002); [citations omitted].
Gaudet, 900 So. 2d at 576-577.

SUMMARY OF ARGUMENT

The finding that Appellant had a voting conflict in violation of the Code of Ethics, Section 112.3143(3)(a), Florida Statutes, was a question of fact decided by the ALJ and supported by competent, substantial evidence. The special private gain to one or more of Appellant's principals was demonstrated by evidence that Agnes Rice and her corporation, John's Pass Marina, Inc., owned relatively large tracts of property on the north end of Treasure Island within the targeted zoning districts affected by Appellant's votes for land development regulation ("LDR") changes. Evidence showed that, before the LDR changes, Mrs. Rice hired attorney and land planner Tim Ferguson and paid him \$50,000 to lobby for LDR changes that would increase the flexibility for the use of properties that she and her corporation owned. Evidence also showed that a number of the LDR changes voted on by Appellant were lobbied by Mr. Ferguson and did increase the use flexibility for the properties.

The argument that the ALJ should have found that any gain by the votes was "remote and speculative" was never properly raised before the Commission. Even if it had been, the Commission could not have reversed the ALJ's ruling as to this factual finding because competent, substantial evidence supports the finding that gain to Mrs. Rice and her corporation was not speculative, but rather was exactly

what Agnes Rice hired Tim Ferguson to accomplish: to “start the ball rolling” and obtain LDR amendments which increased flexibility in the use of the properties.

In addition to the fact that John’s Pass Marina, Inc., was a principal which employed Appellant, competent, substantial evidence showing that Agnes Rice exerted control over Appellant while he was working at her businesses on the north end of Treasure Island demonstrated that she, also, was one of Appellant’s principals. Appellant always considered Agnes Rice to be the person in charge and he was paid for some of his work for her from an old account of one of her dissolved corporations.

While Appellant argues that Mrs. Rice and her corporations had separate legal identities, the conclusion that Agnes Rice was one of Appellant’s principals is consistent with the legislative intent of the voting conflict provisions of the Code of Ethics, which were designed “to address the reality of a public officer’s economic connections interfering with his or her objectivity in voting, and that in doing so it was not the Legislature’s desire to slavishly adhere to ‘entity distinctions’ created and recognized in other contexts for other purposes.” CEO 03-13.

Finally, as to Appellant’s argument that the May 28, 2002, vote was merely “preliminary and procedural,” former City Attorney James Denhardt testified that the May 28, 2002, vote was not ministerial, but a required step in the process. In

Chavez v. City of Tampa, 560 So. 2d 1214 (Fla. 2d DCA 1990), this Court said that in Section 112.3143(3), the legislature made no distinction whether the conflicting vote occurs at the beginning, in the middle, or at the end of a procedure. Chavez, supra, at 1216, n.4. As a measure necessary to keep the matter alive, the vote could not be deemed preliminary or procedural.

Therefore, under both the facts and the law, the findings of the ALJ and the Final Order and Public Report of the Commission on Ethics should be affirmed.

ARGUMENT

I. THE ADMINISTRATIVE LAW JUDGE AND THE COMMISSION CORRECTLY CONCLUDED THAT APPELLANT VIOLATED SECTION 112.3143(3)(a), FLORIDA STATUTES [Restated]

Appellant's suggestion that the finding that he violated Section 112.3143(3)(a), Florida Statutes,⁷ is a matter of law is not accurate. Whether the facts as found in a recommended order constitute a violation of a rule or statute is a question of ultimate fact which the agency may not reject if supported by competent, substantial evidence. Goin v. Comm'n on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995); see also Gross v. Department of Health, 819 So. 2d 997, 1003 (Fla. 5th DCA 2002) ("Florida courts have consistently held that the issue of whether an individual violated a statute or deviated from a standard of conduct is generally an issue of fact to be determined by the administrative law judge based on the evidence and testimony"); Bush v. Brogan, 725 So. 2d 1237 (Fla. 2d DCA 1999)(whether teacher engaged in acts of gross immorality in violation of a statute is an issue of fact and should not be rejected by the agency if supported by competent, substantial evidence). Here, the determination that Appellant violated Section 112.3143(3)(a), Florida Statutes, is supported by the law and the facts.

⁷ Cites to Florida Statutes herein are to the versions found in the 2005 Official Florida Statutes. Referenced Sections in Chapters 112 and 607, Florida Statutes, have identical language as applicable in 2002. No substantive changes in Section 112.3143(3)(a) have been made since 1994. See 1994 Fla. Laws ch. 94-277, § 3.

A. **The ALJ Did Not Err in Finding that John's Pass Marina, Inc., and Agnes Rice Received a Special Private Gain and/or Loss as a Result of Appellant's Votes [Restated]**

Section 112.3143(3)(a), Florida Statutes, does not prohibit public officials from voting on all matters in which they have an interest or may recognize a benefit. Rather, it prohibits votes only in those cases where there a "special private" gain or loss to themselves, their principal(s), or to one of the other entities identified in the statute. § 112.3143(3)(a), Fla. Stat.

Appellant does not dispute that Mrs. Rice and John's Pass Marina, Inc., benefited as a result of measures on which he voted. His arguments (although not presented in this order) are that (a) only John's Pass Marina, Inc., was Appellant's "principal" and only the impact of the votes on that entity should be considered, and (b) that the gain or loss to John's Pass Marina was too small to be considered a "special private" gain. As Appellant has addressed the latter issue first, the Commission will follow suit. It is the Commission's position that both Mrs. Rice and John's Pass Marina, Inc., were Appellant's principals, but that even if only the benefit to John's Pass Marina, Inc., is considered, it is still sufficient to constitute a "special private" gain or loss.

The determination of whether there was been a "special private" gain or loss was a question of fact for the ALJ because, while the Commission has developed a

number of tests to aid in the determination,⁸ application of those tests requires no special expertise, and the determination can be made by ordinary methods of proof.⁹ Cf., Cape Development Co. v. Cocoa Beach, 192 So. 2d 766, 773 (Fla. 1966) (noting that “it is a question of fact as to whether there is a special benefit to be derived from local improvements,” and finding that it was established as a fact that properties affected would receive more benefits than the assessments), quoting Atlantic Coast Line Railroad Co. v. City of Lakeland, 94 Fla. 347, 115 So. 669 (1927) (“question of whether property abutting upon a street is in fact specially benefited by the paving of the street . . . is a question of fact to be ascertained and established as any other fact”). Apparently, this much is conceded by Appellant, since although he makes reference to the Commission’s ruling that the issue is one of fact (Initial Brief, p. 22), he makes no argument to the contrary.

The Commission was bound to adopt the ALJ’s findings of fact unless on review of the entire record it could find no competent, substantial evidence in support of the finding. See § 120.57(1)(l), Fla. Stat.; cf. § 120.68(7)(b), Fla. Stat. (similar restraints on reviewing courts).

⁸ See discussion on pages 22-30 and 36, *infra*.

⁹ See, e.g., Bush, 725 So. 2d at 1239-40 (where issues were not “infused with policy considerations” and were “determinable by ordinary methods of proof through the weighing of evidence and the judging of the credibility of witnesses [they were] therefore solely the prerogative of the hearing officer as finder of fact’[citations omitted]”).

In her Recommended Order that was adopted by the Commission the ALJ observed:

It is clear that Agnes Rice was seeking amendments to the LDRs that would provide flexible use for the land she owned, including the land owned by her corporation, John's Pass Marina, Inc.

(Vol. III, Doc. 32, p. 427, ¶ 45) The ALJ further found:

[T]he 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.

Id. These findings are supported by competent, substantial evidence. (Vol. III, Doc. 32, pp. 409, ¶ 5; Vol. IX, Doc. 81, pp. 124-128 [Ferguson]; Vol. VI, Doc. 70, pp. 1003-1004, 1010-1012 [Rosetti]) In fact, Appellant has stipulated that the LDR amendments he voted for on October 8 and 22, 2002, were beneficial to landowners on Treasure Island. (Vol. II, Doc. 23, p. 233, ¶ 7) In addition, it is undisputed that, other than the across-the-board redefinition of height, the LDR amendments were to be applied to just three zoning categories: CG, RFH-50, and RFM-30.

It is also evident that amendments for height incentives, mixed uses, accessory uses, density averaging, density transfer and development agreements at one time or another during the voting process from May 28 through October 22, 2002, specifically applied to CG, RFH-50, and RFM-30 zoning categories, and

when they did apply, were an advantage or a benefit to the particular zoning category. (Vol. VI, Doc. 70 [Rosetti], pp. 1042-1043 [mixed-uses], 1047-1047 [development agreements], 1048-1049 [height incentive increase], 1051-1055 [density averaging], 1056 [all would encourage redevelopment], 1101 [added to ability to develop])

Given the relatively large percentage of property ownership held within these targeted zoning districts by John's Pass Marina, Inc., and Agnes Rice, it stands to reason under both the facts and the law that votes on the LDR amendments had a greater impact on them than the general public. Specifically, the 1.59 acres in CG owned by John's Pass Marina, Inc., at the time of the subject votes constituted approximately 3.92% of the total acreage in CG; 1.81% of the combined acreage in CG and RFH-50 zoning categories; and 1.18% of the combined acreage in CG, RFH-50, and RFH-30 zoning categories on Treasure Island.¹⁰

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

¹⁰ The arithmetic for these percentages and percentage calculations for combinations of properties owned by Agnes Rice on the north end of Treasure Island is set forth ¶s 62 through 64 and accompanying footnotes of the Advocate's Proposed Recommended Order. (Vol. II, Doc. 30, pp. 303-305, ¶s 62-64, footnotes 9-16)

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. (Vol. III, Doc. 32, p. 14, ¶ 26; see also Initial Brief, pp. 3-4)

The finding that the impact on Appellant's principals was a special private gain or loss is consistent with prior opinions of the Commission on Ethics. In attempting to articulate what makes a gain or loss a “special private” one, the Commission on Ethics has developed various tests. See generally Lawrence A. Gonzalez & Philip C. Claypool, Voting Conflicts of Interest Under Florida's Code of Ethics for Public Officers and Employees, 15 Stetson L. Rev. 675, 691-700 (1986).

The first of these¹¹ is referred to as the “size of the class” test. This test is no more than a recognition that in the absence of any other factors making the benefit unique, when the class of persons benefiting from the vote is very large it is unlikely that the official's gain from it could be called “special.” See CEO 77-129. In a situation where the official, his principal (or other entity specified in the statute) would be the only one to benefit from a vote, the conflict is easy to identify. Similarly, where the measure benefits equally every member of an

¹¹ The “gain or loss” test referred to in the Initial Brief at page 19 is no longer relevant because the statute itself now refers to measures inuring to the “special private gain or loss.” See 1994 Fla. Laws ch. 94-277, § 3.

extremely large group, it is easy to say there is no voting conflict. CEO 00-13 references a number of examples at either end of this scale. The difficulty arises where the voting official has a significant, though perhaps not especially large, interest at stake in the matter.

A determination of “special private” gain or loss demands a thorough review of all the facts and circumstances surrounding a vote, and consequently does not lend itself to rulemaking. Accordingly, all the guidance from the Commission has been on a case-by-case basis through either complaints or requests for opinions, each of which speak only to the particulars of the case at hand and is not binding on other persons. See, § 112.322(3)(b), Fla. Stat. (opinions binding on the officer, employee, or candidate seeking the opinion).

In attempting to ascertain an official's proportional benefit as compared to the overall benefit conferred by a measure, the Commission has often found it convenient to use a numerical analysis, taking the number of the constituent members of the class, be it persons, families, acres, businesses, etc., and measuring it against the official's interest. So, for example, in CEO 00-13, a vote by a city councilman who belonged to a retirement system to ratify an agreement which increased the pensions paid all retirees was found not to inure to his "special private gain" where he was but one of 88 members who would benefit and there were no other circumstances suggesting he would be affected to a greater degree

than the other members. While the councilman's actual percentage of the affected class was slightly greater than one percent (actually 1.14%), that opinion also observed that the Commission has typically found no conflict where the voting official's interest constituted less than one percent of the class affected.

Similarly, in CEO 90-71, a town commissioner and his wife jointly owned one of 83 residential parcels being considered for a dredging and improvement project. The Commission noted that the property would be benefited by the project, but ultimately concluded that votes on issues surrounding the project would not inure to the town commissioner's special private gain even though his interest was slightly more than 1% of the total affected class (1.2%), because his interest was still quite small and, under the circumstances, did not amount to a significantly greater proportion of the total assessment than the other properties.

Appellant argues that through these two opinions the Commission has established a "1.14% to 1.2% range" within which no special gain or loss can be found. (Initial Brief, pp. 20-21) Using this logic he asserts that John's Pass Marina, Inc., did not enjoy a "special private" gain because it constituted only 1.18% of the affected class.¹² Such a representation distorts and mischaracterizes the analysis, and trivializes the efforts of the Commission to apply the statute in a

¹² Even under his own analysis, Appellant does not, and cannot, argue that Mrs. Rice received no special private gain.

meaningful and fair way. The “size of the class” test is a tool developed by the Commission to aid in the analysis of whether a special private gain exists; it is not an arbitrary boundary separating legal behavior from illegal on the basis of a tenth of a percentage point.

Furthermore, Appellant overlooks a significant difference between the circumstances here and those presented in CEO's 90-71 and 00-13. In those opinions, the votes affected all the members of the class equally. There were no circumstances suggesting the voting member or his principal had a special interest in the measure. That is not the case here. Here, assuming for purposes of argument that John's Pass Marina, Inc., was Appellant's only principal, it was not on equal footing with all other property in the City, or even all other similarly zoned property.

For instance, all of Appellant's votes were on measures with proposed changes which would allow “density averaging.” This was more meaningful to John's Pass Marina, Inc., than other properties because Mrs. Rice owned other property across the street which could have been used to take advantage of that provision by shifting building density from John's Pass Marina, Inc.'s, CG property to her property zoned RFH-50 on the west side.¹³ Similarly, as the height incentive plan included in the vote on May 28, 2002, was only to be applied to

¹³ See footnote 5, supra.

RFH-50 and CG (Vol. IV, Doc. 48, pp. 621, 626-629), taking just the 1.59 acres in CG owned by John's Pass Marina, Inc., and dividing it by the total 87.9176 acres in those two zoning categories results in a dividend of slightly more than 1.8% of those properties.

The October 8, 2002, vote also affected John's Pass Marina disproportionately. That vote removed CG properties from a height incentive increase plan. John's Pass Marina was zoned CG and constituted just over 3.9% of the CG zoned property in the City. To that extent, it suffered a loss as a result of the vote.¹⁴

Finally, in addition to the fact that Appellant had been warned not to vote, circumstances present here which did not exist in the opinions relied on by Appellant include the fact that Agnes Rice, who was the one ultimately responsible for Appellant's continued employment, wanted the changes enough to pay an attorney \$50,000 to advocate for them.

¹⁴Although the vote inured to the detriment of this property, the overall effect on the Rice properties was still a gain to Mrs. Rice, because the height incentive then applied only to property classified RFH-50, and Mrs. Rice owned 2.5% of the RFH-50 property in the City (1.19 acres ÷ 47.4496 acres = .02507).

B. The ALJ Did Not Err in Failing to Find that the Gain to Appellant's Principal was "Remote" or "Speculative"¹⁵

In his exception 8 to the Recommended Order, Appellant argued that "[t]he ALJ in this case made no conclusion, as she should have, that any 'gain' to Mr. Ellsworth's employer resulting from any vote on the LDRs was too remote and speculative to form the basis for a violation of the voting restrictions in Section 112.3143(3)(a), Fla. Stat." The Commission denied the exception, stating "[t]he exception does not identify any disputed portion of the recommended order by page number or paragraph, and therefore we are not required to rule on it. Section 120.57(1)(k), Florida Statutes." (Vol. III, Doc. 36, p. 495)

Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

An agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

As Appellant makes no argument to the contrary, he apparently concedes that this issue was never properly raised below. Moreover, the ALJ made a specific finding that "[t]he gain to John's Pass Marina, Inc., and to Agnes Rice was not

¹⁵Appellant labels this point in his argument as "The ALJ Failed to Conclude that Ellsworth's Employer Received any "Special Private Gain." (Initial Brief, p. 23) Appellant's label, however, is inconsistent with his statement on page 18 of his Initial Brief that "The ALJ concluded, as a matter of law, that properties owned by either John's Pass Marina, Inc., or Agnes Rice received a 'special private gain.'"

speculative.” (Vol. III, Doc. 32, p. 427, ¶ 45) Appellant here is simply asking for a different finding of fact.¹⁶ The Commission was precluded from accommodating him. As explained by the First District Court of Appeal in Heifetz v. Department of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985):

If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.

Id. at 1281. Similarly, this court is constrained from altering findings of fact in this appeal. See § 120.68(7)(b), Fla. Stat. (the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact).

Finally, consideration of the “remote and speculative” test developed by the Commission in view of the facts and circumstances of this case demonstrates that the “gain to John’s Pass Marina, Inc., and to Agnes Rice,” as concluded by the ALJ, “was not speculative.” (Vol. III, Doc. 32, p. 427, ¶ 45) The test recognizes when any gain is tentative and provisional at best, a voting conflict will not be found. Again, the analysis is necessarily fact-driven. In CEO 03-6, cited by

¹⁶ This is true for Appellant’s “preliminary and procedural” argument under Issue III, infra, as well.

Appellant, the question came from a county housing finance authority member who was also a real estate broker. The vote involved recommending the issuance of tax-exempt bonds, the proceeds of which would subsidize low-interest loans to be used for purchasing homes. The member/broker had represented and presumably would in the future represent persons buying homes through this process. The Commission recognized that the vote would conceivably benefit the broker, because the funds might result in more home sales in which case she might represent more buyers and thus earn more commissions. But it found that since a buyer could choose any real estate agent, any benefit to this particular broker was remote and speculative.

Similarly, in CEO 91-7, the question concerned a school board member who owned a construction business which had subcontracted with builders working on school district projects. At issue was a vote on whether the district should engage in a building or remodeling project. The Commission said the member could vote on that issue, noting, “the determination of whether to build or remodel cannot be said to inure to anyone's special gain.” (emphasis added) But the Commission further advised that once the project reached the point where a general contractor would be selected, the board member would have to abstain from voting if his corporation might submit a bid to subcontract on the project.

Appellant argues that because additional steps would be required between the change to the LDRs and the Rices' ability to make a profit from that change the gain to his principal remote and speculative, and points to CEO 05-15 in support of this proposition. CEO 05-15 spoke to a situation where a city commissioner, who was an attorney in his private life, was faced with a vote which would amend the city's existing affordable housing ordinance to allow developers to charge higher prices for the sale or rental of affordable housing. This would presumably spur developers to seek permits to build more affordable housing. One of the commissioner's clients was a developer of housing in the city.

The Commission found in CEO 05-15 that any benefit to the commissioner's client as a result of changes to an affordable housing ordinance would be remote and speculative because there were innumerable obstacles separating the commissioner's clients from any potential gain.¹⁷ In contrast, Appellant was well aware that he should not vote and the gain here was, at the very least, exactly what the property owner wanted: to "start the ball rolling" in the LDR amendment

¹⁷ The obstacles found by the Commission in CEO 05-15 included: if changes were approved by the city, the changes also would need Department of Community Affairs (DCA) approval; all development regulations and permits would also need DCA approval; any specific permit application required review and approval by the city's development review committee, planning board, and depending on project size, the city commission; and finally, factors not determinable at the time of the votes, included whether suitable property could be acquired, availability of financing, and whether proposals would meet regulations and qualify for local and state regulatory body approvals.

process and to obtain LDR amendments that would increase the flexibility in the use of the properties. That, according to Mr. Ferguson, is why he was hired; that is what he accomplished. (Vol. IX, Doc. 81, pp. 153-154, 173-174 [Ferguson])

II. CONSIDERATION OF AGNES RICE'S INTERESTS IN THE MATTERS VOTED ON, WHILE UNNECESSARY TO SHOW A VOTING CONFLICT, WAS APPROPRIATE UNDER BOTH THE FACTS AND LAW [Restated]

As noted above, even without consideration of Agnes Rice's ownership of properties on the north end of Treasure Island, John's Pass Marina, Inc.'s, ownership of 1.59 acres of CG, alone, was sufficient to trigger the voting conflict provisions against Ellsworth's participation in votes on the LDR amendments. Nevertheless, it was appropriate to consider, and would have been naïve to ignore, facts and circumstances demonstrating that Agnes Rice was also one of Appellant's principals in this case who stood to realize special gain or loss from Appellant's votes.

A. The Finding that Agnes Rice was One of Appellant's Employers and Principals is Supported by Competent, Substantial Evidence [Restated]

The language of Section 112.3143(3)(a) prohibits an official from knowingly voting on a measure which inures to the special private gain or loss of a "principal" by whom he or she is retained. The term "principal" is not defined in the statute. From its inception, the Commission has "follow[ed] a broad view of

the terms 'principal' and 'retained' which encompasses not only the principal-agent relationship but also the relationships of employer-employees and (to some extent) contractor-independent contractor.” Lawrence A. Gonzalez & Philip C. Claypool, Voting Conflicts of Interest Under Florida's Code of Ethics for Public Officers and Employees, 15 Stetson L. Rev. 675, 701 (1986) (footnotes omitted).

As noted by the Supreme Court of Florida: “The existence of an agency relationship is normally one for the trier of fact to decide.” Villazon v. Prudential Health Care Plan, Inc., 843 So. 2d 842, 853 (Fla. 2003).¹⁸ Likewise, “[i]t is well established that the question of an employer/employee relationship is generally a question of fact, and therefore a question for the trier of fact.” [citations omitted]” Harper v. Toler, 884 So. 2d 1124, 1129 (Fla. 2d DCA 2002). “Essential to the existence of an actual agency relationship is (1) acknowledgment by the principal that the agent will act for him, (2) the agent’s acceptance of the undertaking, and (3) control by the principal over the actions of the agent. *Restatement (Second) of Agency § 1 (1957)*.” Villazon, 843 So. 2d at 853. “When one considers an action based on actual agency, it is the right to control, rather than actual control that may be determinative.” Id.

¹⁸While the case involved the issue of employee vs. independent contractor, as opposed to who is one’s principal, the case is a recent source citing the *Restatement (Second) of Agency*, applicable in the case-at-bar.

There is no doubt that Agnes Rice controlled matters that went on at her properties at Kingfish Point, that she had the right, and did in fact exert control over Appellant during his employ at the marina, as well as while he was performing duties at Gator's on the Pass restaurant, and that she paid him in part from a dissolved corporate account. It is also clear that Appellant took orders from Agnes Rice and considered her as the "head person," and that no one tried to differentiate between the Rices and the corporations as Appellant's employers and/or principals until sometime after the institution of this case. (Vol. III, Doc. 32, p. 420, ¶ 30; Vol. V, Doc. 65, p. 846; Vol. VII, Doc. 79, p. 87 [Ellsworth]; Vol. VIII, Doc. 80, pp. 156-157 [Ellsworth]; Vol. IV, Doc. 21) Appellant's attempt to make those technical distinctions in this proceeding ignores the reality of the private, economic connections that compromised his integrity as a public officer.

B. It was Not Error to Conclude that Agnes Rice was One of Appellant's Employers and Principals [Restated]

Appellant is correct in saying that for the most part, the Commission has recognized the separation of legal identities of corporations from their officers, owners, or parents. The Commission has specifically rejected this approach, however, in contexts where required by the facts.

In CEO 03-13, the Commission found a voting conflict of interest would be created were a city council member to vote on measures concerning expansion of a

medical center owned by a corporation that was owned by another corporation which owned yet another corporation which owned still another corporation which employed the member. Specifically interpreting the part of the statute which prohibits voting on measures inuring to the benefit of the parent organization of a corporate principal, the Commission said:

For purposes of business, contracts, torts/lawsuits, and similar matters the paramount tenet is that each corporation is a separate business entity, separate from other corporations or natural persons who own it, irrespective of any “wholly owned” status, whose distinct legal identity will not be ignored or “pierced” absent fraud, disregard of the corporate form in operations, and/or similar factors, in order to promote passive investment/lack of personal liability and the growth of industry and commerce. In our view, the ethical context is markedly different. In the instant situation, for example, the member's “bread is buttered,” via her nurse's pay, by and through a business organization or structure which is headed by a company/corporation/organization that will be affected by the expansion of the medical facility and the City Council votes necessary to the expansion. In reality, this parent organization owns the member's employer, which, as is common to all employers, holds great sway over the views, actions, and decisions of its employees in a variety of contexts.

We are not ignorant of potential criticism based upon assertions that we have ignored the meaning and requirements of corporate law in reaching our finding herein. However, a “hyper-technical, legalistic” interpretation of the term “parent organization” in the ethics context of the voting conflicts law, in disregard of a purpose of the voting conflicts law, would unduly insert the “fictions” and lack of personal responsibility ostensibly indispensable to corporate operations and the growth of money and commerce into the context of ethics and the personal responsibility of public officers.

Id. (footnotes omitted).

All the facts here demonstrate that Ellsworth worked for Agnes Rice: that he was paid from accounts bearing the names John's Pass Marina, Inc., and Kingfish Restaurant and Lounge, Inc., did not change this reality. In fact, Kingfish Restaurant and Lounge, Inc., did not even exist, having been dissolved years before. (Vol. IX, Doc. 81, p. 69 [Rice])¹⁹ The account, according to Sid Rice, was merely one “we transfer funds into that is paid and Mr. Ellsworth receives his check from that.” (Vol. IX, Doc. 81, p. 69 [Rice]) Nothing in the Commission's opinions has ever suggested that the logistical arrangements by which payment is made controls over the facts of direction and control which define employment or agency relationships.

Considering Appellant's understanding at the time of the subject votes, Agnes Rice's right and actual control of Appellant, as well as Appellant's receipt of payment from one of Agnes Rice's dissolved corporation's for duties performed at Agnes Rice's direction and control, the clear and convincing evidence showed that Agnes Rice was also a principal by whom Appellant was retained.

¹⁹Cf., § 607.1421(3), Fla. Stat. (administratively dissolved corporations may not carry on any business except winding up affairs); § 607.1405, Fla. Stat. (use of corporate account for another entity's payroll is not included on list of winding up activities).

III. **THE FINDING THAT THE VOTE OF MAY 28, 2002, WAS NOT PRELIMINARY OR PROCEDURAL IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND THE COMMISSION'S ADOPTION OF THAT FINDING IS NOT CLEARLY ERRONEOUS**

The last test developed by the Commission to aid in determining whether a gain or loss is a “special private one,” is referred to as the “preliminary or procedural” test. It recognizes that certain matters, while they may be associated with a measure which would give rise to a special private gain or loss, actually do not themselves inure to any such gain or loss. See Lawrence A. Gonzalez & Philip C. Claypool, Voting Conflicts of Interest Under Florida's Code of Ethics for Public Officers and Employees, 15 Stetson L. Rev. 675, 699-700 (1986).

Initially it must be noted that Appellant’s argument that the vote of May 28, 2002, was preliminary or procedural does not include the votes cast by Appellant in favor of LDR amendments on October 8, 2002, and October 22, 2002. Therefore, Appellant apparently concedes the point that those two latter votes were not preliminary or procedural.

Next, the competent, substantial evidence established that the LDRs amendments voted on in the May 28, 2002, vote was a necessary step in the LDR amendment process. Specifically, Treasure Island's former City Attorney testified that the May 28, 2002, vote to send the matter to the Planning and Zoning Board

was not ministerial, but a required step in the process. (Vol. VIII, Doc. 80, p. 231 [Denhardt])

Appellant is correct in stating that the Commission has taken the position that procedural and preliminary votes do not violate Section 112.3143(3)(a). He substantially inflates that position, though, when he asserts in order to violate Section 112.3143(3)(a), a vote must be one in which the substance of an issue is brought before the public body for action. For this proposition Appellant cites no authority, because there is none.

To the contrary, the only support for the proposition was repudiated by this Court in Chavez v. City of Tampa, 560 So. 2d 1214 (Fla. 2d DCA 1990). Chavez dealt with an award of attorney's fees for a city council member who had successfully defended against an allegation of voting conflict before the Commission on Ethics. The facts underlying that proceeding were that Chavez had petitioned the city council on which she served for an alcoholic beverage zoning classification. A necessary first step in obtaining the classification was a vote by the council to refer her petition to the legal department to draft an ordinance. Chavez abstained, but the motion died on a tie vote, meaning the petition was denied and could not be resubmitted for 12 months. At that point Chavez decided to vote to break the tie and send the petition to the legal department. The Ethics Commission ruled that no violation had occurred, finding that the vote to refer the

matter to the legal department was merely preliminary or procedural. This Court said:

While we do not have the commission's report before us for direct review, suffice it to say we do not agree with such a construction of the statute. 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 Appellant is the same. The failure to obtain a majority vote at any step along the path from the filing of the petition to final passage as an ordinance effectively killed it.

* * *

We feel sure it is this very type of dilemma that the legislature addressed when it established the unequivocal standard of behavior expected of public officials when faced with voting in these circumstances. In the words of section 112.3143(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, in the middle, or at the end of the zoning change procedure.

Chavez, *supra*, at 1216, n.4.

While it may have been dicta, the Court's reasoning in Chavez was sound, and has been embraced by the Commission. In CEO 93-10, the Commission found that a member of a town council involved in a real property ownership dispute between the town and private property owners (including herself) was prohibited by Section 112.3143(3)(a), from voting on whether to procure a survey for use in the property dispute resolution, because dispute resolution measures to come before the town council would be effectively killed absent a survey. In CEO 94-

10, a county commissioner asked generally whether he could vote on matters affecting two persons with whom he owned an office building. The Commission said that if the measure inured to the special private gain of either person the county commissioner should abstain, declare a conflict, and file a memorandum of voting conflict. The Commission advised that some measures may be merely preliminary and procedural and would therefore not trigger a voting conflict, but cautioned “also be advised that any measure that is essential to keeping a project or matter alive is not merely preliminary or procedural.” (emphasis supplied.)

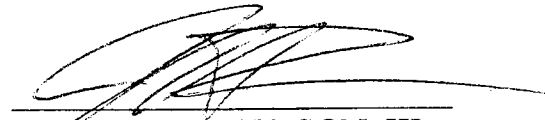
The fact that the vote of May 28, 2002, was not ministerial but rather a required step in the process cannot be ignored. To do as Appellant asks would be to engage in the very practice this Court criticized in Chavez.

CONCLUSION

Based upon the above-cited argument and legal authority, Appellee urges this Honorable Court to affirm the Final Order of the Florida Commission on Ethics.

Respectfully submitted,

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CERTIFICATE OF SERVICE

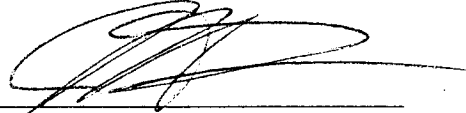
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Mark Herron, Esq., Caparello & Self, P.A., P.O. Box 1876, Tallahassee, FL 32302-1876, by U.S. Mail this 25th day of August, 2006.



James H. Peterson, III

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using Times New Roman 14 point font.



James H. Peterson, III
Assistant Attorney General

**IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
STATE OF FLORIDA**

IRVING ELLSWORTH,

CASE NO.: 2D06-2358

Appellant,

L.T. No.: 02-108

vs.

STATE OF FLORIDA, COMMISSION
ON ETHICS,

Appellee.

_____ /

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