



**Miami-Dade Commission on Ethics & Public Trust**

**Investigative Report**

**Investigator:** Robert Steinback

<b>Case No.:</b> K14-089 (initially PI 14-042)	<b>Case Name:</b> Robert Yaffe	<b>Date Open:</b>	<b>CASE CLOSED</b>
<b>Complainant(s):</b> Teri D'Amico	<b>Subject(s):</b> Robert Yaffe	Aug. 11, 2014	Date: <u>12/23/14</u>

**Allegation(s):**

Subject Robert Yaffe (Yaffe), who is an attorney and also mayor of Bay Harbor Islands (BHI), is alleged to have improperly represented a client, a condominium association in Bay Harbor Islands (BHI), in two real estate transactions, an easement and a quit-claim deed, involving the town itself.

Yaffe is further alleged to have used his political influence to engineer a transaction involving the receipt and sale of transfer development rights (TDRs) that was uniquely favorable to his client.

**Relevant Ordinances:**

Subject is alleged to have violated Sec. 2-11.1(m)(2) of the Miami-Dade County Conflict of Interest and Code of Ethics Ordinance, which reads in relevant part: *No person [covered by this ordinance] shall . . . receive compensation, directly or indirectly or in any form, for services rendered to a third party, who has applied for or is seeking some benefit from the County board or agency on which such person serves, in connection with the particular benefit by the third party.*

Subject is also alleged to have violated the Miami-Dade County Conflict of Interest and Code of Ethics Ordinance 2-11.1 (g), which reads in relevant part: (g) Exploitation of official position prohibited. *No person [covered by this section] shall use or attempt to use his or her official position to secure special privileges or exemptions for himself or herself or others except as*



*may be specifically permitted by other ordinances and resolutions previously ordained or adopted or hereafter to be ordained or adopted by the Board of County Commissioners.*

Sec. 2-11.1 (a) extends the applicability of the above citations to the Town of Bay Harbor Islands. It reads in relevant part, *"This section shall be applicable to all County personnel as defined herein, and shall also constitute a minimum standard of ethical conduct and behavior for all municipal officials and officers [...] and employees of municipalities in the County insofar as the individual relationships with their own municipal governments are concerned. References in the section to County personnel shall therefor be applicable to municipal personnel who serve in comparable capacities to the County personnel referred to."*

## **Investigation:**

### ***Interviews***

**Teri D'Amico** (D'Amico), principal of D'amico Design Associates, August 15, 2014, in North Miami Beach, and subsequent conversations.

#### **Summary of interview**

D'Amico contacted the investigator to express concerns regarding a particular transaction under consideration by the BHI Town Council that would approve the transfer of two (2) Transfer Development Rights, or TDRs, from the property at 9300 W. Bay Harbor Drive, also known as 9300 W. Bay Harbor Drive Condominium, Inc. (the 9300 Condominium), to another at 9161 & 9201 E. Bay Harbor Drive, also known as Island Club Towers, LLC (Island Club).

TDRs allow property owners in a designated area (in this case, the East Island of Bay Harbor Islands) who have fewer dwelling units on the site than the maximum housing density allowed (in BHI, 34 per acre), to sell that unused density to another property owner in town who wishes to exceed the density cap. This keeps the overall density of the town fixed, while relieving pressure on certain owners to unwillingly redevelop in order to gain maximum value from their land. TDRs are saleable assets that are bound by deed restrictions recorded with the county property appraiser.

D'Amico is an interior designer who formerly served on the town's Design and Review Board. She is a long-time civic activist and preservationist who helped launch the movement to consider the Miami Modern, or MIMO, class of 1950s and '60s architecture worthy of historic preservation. The style, typified by two- to four-story apartment buildings with an open-air design and distinctive artistic accents, is prominent on BHI's East Island. Pressure for new development, however, poses a threat to preservation of these older structures.

The conversations with D'Amico served primarily to inform the investigator about what TDRs are and how they are used in BHI. Although D'Amico had no direct evidence of wrongdoing on the part of any participant in the TDR transaction involving the 9300 Condominium, she expressed concern that appearances might indicate questionable actions.

D'Amico noted that among the eight (8) condominium owners at 9300 W. Bay Harbor Drive are former BHI Mayor Ileene Wallace and her husband Charles, a former Planning Board



member who has worked with developers in the town. The same condominium was the first to engineer a private sale of TDRs after the mechanism was created in 2006. At that time, the condominium sold eight (8) TDRs for \$560,000. This was the maximum amount of TDRs that could be sold from the 9300 Condominium property at that time.

The transaction that is the subject of this complaint involves an 11-foot strip of land on the street side of 9300 Condominium property that years earlier had been deeded to the town by the owner. This was done in accordance with town policy at the time to allow for construction of reserved parking spaces and sidewalks alongside the original town rights-of-way. Most properties on BHI's East Island deeded these strips to the town for this purpose. A subsequent legal opinion, however, concluded that the town could not create reserved parking spaces on what had become town land, and so the town adopted a new policy of requiring property owners to lease the parking spaces from the town. In addition, the town set in place a new strategy of gradually returning the dedicated 11-foot strips back to property owners when requested. Typically, this has been when a piece of property was being fully redeveloped.

In April 2014, by way of an easement and a quit-claim action, the town returned this 11-foot dedication back to 9300 West Bay Harbor Drive. This enabled the property to claim two (2) additional TDRs. The 9300 Condominium promptly sold those TDRs to Island Club Towers for \$80,000. The condominium had no plans to redevelop, however it was understood that the money would help fund the correction of code deficiencies on the property.

Yaffe has served as real estate counsel for the 9300 Condominium since at least 2006, when he also represented that client for its initial TDR transaction. D'Amico raised the possibility that the particular influence of Yaffe and the Wallaces might have created a favorable circumstance not generally available to other property owners.

D'Amico also expressed concern that a site survey, which is supposed to accompany all TDR requests, was not provided in the public documents that accompanied the TDR transfer application as it came before the Town Council on August 11, 2014. In addition, since the property sold its TDRs on two separate occasions, D'Amico expressed concern that the process of twice "rounding up" fractional TDR calculations to whole integers might have created an additional TDR that actual size of the property would not justify.



**Ronald J. Wasson** (Wasson), Town Manager Bay Harbor Islands, Sept. 17, 2014, 10 a.m., at Town offices, with **J.C. Jimenez** (Jimenez), BHI Assistant Town Manager, and **Marlene Marante** (Marante), BHI Town Clerk, in attendance.

### **Summary of interview**

This interview focused on a historical understanding of TDRs and how they are used in Bay Harbor Islands, and also the history of the 11-foot dedications of land by many BHI properties to the town years ago to facilitate the creation of reserved parking and sidewalks.

The city administrators stated that TDRs are based on an established maximum living unit density of eight and a half (8.5) units per lot [about a quarter acre], or 34 per acre.

Wasson stated that early in the town's history, road rights-of-way were too narrow to allow for on-street parking or sidewalks. Consequently, the town devised a practice under which properties would deed an 11-foot wide strip of land bordering the road rights of way to the town for the sole purpose of construction of on-street reserved parking and sidewalks. The deeds contained clauses stating that if the town ever decided not to use the dedicated land for the stated purposes, it would revert to the property owner. In most cases, the parking was constructed, though only in a handful of cases were sidewalks ever installed.

Marante said that a subsequent legal opinion stated that the town did not have the authority to construct private parking on what, after dedication, had become public land. The town came up with the idea to "lease" the land back to the property owner at a relatively nominal fee, which allowed for the private parking, but later adopted a strategy to gradually quit-claim the 11-foot strips throughout the town back to property owners. This was most evident when properties redeveloped. The town adopted a new policy for all new development to place all parking on site rather than on the street, and in return, the town would return the 11-foot strip to each property owner. Originally, each quit-claim had to be approved by a vote of the Town Council, but they became routine enough that the Council in August 2013 gave power to the Town Manager to approve such quit-claims without a Council vote, at the usual nominal charge of \$10.

Marante said that when the town's overall TDR allotment was calculated leading up to 2005, the town's consultant town planner, Michael J. Miller, wasn't aware of the 11-foot strip dedications, and calculated public and private TDRs presuming that the strips belonged to each property. However, when transactions were actually arranged, the dedication of the strip had to be taken into account, and so any property that had made such a dedication lost the TDR "value" of the strip (even though Miller's original accounting DID include it) unless the town deeded it back to them.

Accordingly, Marante said that the quit-claiming of these parcels back to their original owners does not change the number of TDRs originally allocated to the town or to the private property owners. Rather, it merely enables the original property owner to legally sell TDRs they could not sell as long as the strips were deeded to the Town.

Wasson said that despite the added TDR value returning the 11-foot strips to the property owner would create, many property owners were in no hurry to reclaim the strips since that



would increase each property's tax liability. Wasson said that returning the strips was "not high on the [Town's] priority list, and generally would only be initiated when a property owners expressed an interest in reclaiming them. Marante said, "The Town decided to wait until people ask for the return of 'their' property."

Marante stated that other BHI properties besides the 9300 Condominium have sought quit-claim returns of the 11-foot strip absent plans to redevelop the entire lot. Marante cited three examples: 9350 W. Bay Harbor Drive, 9655 E. Bay Harbor Drive, and 9655 East Bay Harbor Drive.

Marante said that properties donating (selling) TDRs are inspected for code violations, and for 40-year recertification, if applicable. Proceeds from the TDR sales are required to be placed in escrow and not fully released until code violations are corrected and the 40-year certification obtained. The 9300 Condominium has seawall and pool deck violations that must be corrected, Marante said.

**Frank Simone**, Town Attorney for Bay Harbor Islands, October 2, 2014, by telephone.

#### **Summary of Interview:**

Simone called the investigator after the latter had contacted Yaffe. Simone stated that "the issue came up a couple of [Town Council] meetings ago."

Simone said the Town used dedication of the 11-foot strips to allow multifamily properties to have exclusive parking. Subsequently, special counsel Stan Price, a land-use attorney, told the town it could not use what had become town land to provide reserved parking for particular properties. This led to a new town policy to gradually return the 11-foot strips to property owners. This allows a property to claim its full TDR allotment, Simone said.

Simone said the town used quit-claim deeds to return strips to property owners who desired it, with Town Council approval. The town eventually decided to allow the quit claim deeds to be approved administratively.

Simone said about 21 quit-claim deeds had been processed with about 79 remaining to do.

Simone volunteered an explanation of Yaffe's participation in the preparation of two documents for the 9300 Condominium even though he is the town's attorney and not Yaffe's. Simone said he "wasn't sure how this could be a violation" because preparing the two documents was a "perfunctory" action. "All he [Yaffe] did was prepare a quit-claim-deed transmittal to the town. There's nothing that the mayor receives as a benefit."

**Robert Yaffe**, attorney and Mayor of Bay Harbor Islands, October 15, 2014, at the COE office. BHI Town Attorney **Frank Simone** and COE Advocate Michael Murawski in attendance.

#### **Summary of interview**

Simone stated that the primary reason BHI created the TDR program was for "community enhancement purposes," primarily to give owners of aging properties a way to finance



upgrades and meet code requirements. He said the purpose was not to promote historic preservation, although other municipalities have used them for this purpose.

Simone said money from TDR transaction revenues are held in escrow until code repairs are made. For private TDR transactions, the escrow requirement is the only role the town plays in the deal.

For transactions involving town-owned TDRs, recipients of the TDRs have one year to get the building permits, or else the developer loses the TDR back to the town.

Simone said the town wants to cede the 11-foot strips back to property owners because “the town is violating the law every day,” He called such transactions “a benefit to the town, not a benefit from the town. The town is seeking this out.” In the manner Simone argued that Yaffe or his client should not be viewed as “benefiting” from the transaction.

Simone continued, saying, “We interpreted [the ordinance] as, ‘you can’t pay to play. You can’t hire us to gain favor with the town staff.’”

Simone stated that the easement and quit-claim transactions are “perfunctory approvals.” Simone said the property owners were “only getting back that which the city should never have taken.”

Yaffe stated that he had already given his client a credit in the amount of \$250 to offset his charge for preparing the easement and quit-claim.

#### **Document/Audio/Video Review:**

Complainant D’Amico provided a number of items, as follows.

- A copy of portions of the Town Charter.
- A copy of the Town of Bay Harbor Islands Community Development Memorandum, dated July 28, 2014, prepared by Michael Miller Planning Associates Inc., with attachments.
- Newspaper clippings and other documents circa 2006 about the first TDR sale by the 9300 Condominium.
- A copy of a memo from Town Clerk Marlene Marante, dated Sept. 5, 2014, addressing “11-foot dedications – quit claim deeds,” a history of TDRs in BHI.
- A packet of documents from the town administration related to various town TDR transactions.
- A property breakdown map of the town.
- An original copy of the July 13, 2014 Miami Herald, featuring a front cover story entitled “Endangered MIMO.”
- Copies of documents of title records, town meeting minutes and other historical information related to earlier TDR ordinances and transactions, including Town of BHI 2013 Annual report on Density Monitoring Systems and TDRs.



Received from BHI Town Clerk Marante:

- A copy of the Town of Bay Harbor Islands' "TDR Bank" as of Aug. 14, 2014, It lists as the starting number of units: 330; Sold to date, 201, and Balance left in TDR banks: 129.
- Documentation of the town's most recent five (5) transactions involving TDRs from the town's TDR bank.
- Documents related to three (3) TDR transactions for properties that were not involved in redevelopment activity: 10180 West Bay Harbor Drive (Montego Club Condominium Association), resulting in the subsequent transfer of three (3) TDRs; 9665 Bay Harbor Terrace (Seascape Club Condominium Association), resulting in the subsequent transfer of six (6) TDRs; and 9350 Condominium Association, 9350 W. Bay Harbor Drive, resulting in the subsequent transfer of eight (8) TDRs via two transactions.

Received from BHI Mayor Robert Yaffe:

- A redacted copy of an invoice to 9300 W. Bay Harbor Drive Condominium, Inc. showing a \$250 credit extended as a refund credit for preparing the easement and quit claim deed for the client.

Received from BHI Town Attorney Frank Simone:

- Copy of minutes from the August 12, 2013, Town Council meeting at which the Council voted to give power to approve future quit-claims of 11-foot right-of-way strips to the town manager without need of Town Council approval.
- Copy of January 4, 2006, memorandum from Marante to the Mayor and Town Council identifying that 9300 West bay Harbor Drive Condominium would have qualified for ten (10) TDRs except for the 11-foot dedication, which reduced its available TDR stock to eight (8).

## Analysis

Complainant D'Amico met with the COE investigator to express concerns regarding a recent TDR transaction involving Mayor Yaffe and one of his law clients, the 9300 W. Bay Harbor Drive Condominium Inc., among whose residents is former BHI Mayor Wallace.

The 9300 Condominium sits on two lots, about 22,500 square feet, or slightly more than a half-acre. According to Miller, the consulting town planner, conjoined lots of that size would qualify for 18 living units. The condominium has only eight units on the two lots, leaving 10 available as marketable TDRs. When the 9300 Condominium sought to make a private TDR sale in 2006, the property only qualified for eight (8) due to the prior dedication of the 11-foot strip to the town. But contemporaneous documentation provided does show that the property would have qualified for two (2) more TDRs, but for the prior dedication of the 11-foot strip.

The transaction that is the subject of this investigation was the town's April 30, 2014, quit-



claim of the 11-foot strip years earlier that had been deeded to the city by the property owner to facilitate the construction of reserved on-street parking spaces and sidewalks. By deeding the strip back to the 9300 Condominium, the property acquired legal authority for two (2) TDRs, which it then immediately sold to Island Club Towers for a price of \$80,000.

D'Amico's concern was that this series of transactions was unprecedented and may have represented favorable treatment of the 9300 Condominium by Yaffe, who is both mayor and the attorney for the condominium.

D'Amico stated that these two (2) TDRs appeared to have materialized from thin air. Her suspicion was that town administrators had somehow engineered a transfer of two (2) TDRs from the town's bank of TDRs to Yaffe's client. Subsequent investigation does not support this view. As stated above, the original property lots qualified it for ten (10) TDRs, but only eight (8) could be sold prior to the August 2014 quit-claim of the 11-foot strip.

D'Amico also expressed concern that the town had not previously quit-claimed these dedicated strips back to property owners except in cases of an entire redevelopment of the site, for which all parking would be included on-site rather than on the street. D'Amico believed this was the first case of a property being given the strip for the sole purpose of acquiring TDRs to sell, with no anticipated changes to street parking. D'Amico pointed out that in 2006 the same condominium – with Yaffe as its attorney – had become the first property in the Town to arrange a private sale of eight (8) TDRs, which resulted in a \$560,000 windfall at the time. Subsequent investigation suggests that while transactions of this sort have not been common, they are in line with the town's ultimate intentions, and so more such transactions may follow.

In any TDR transaction, fractional TDRs above .50 are routinely rounded up to the next whole integer. D'Amico expressed suspicion that the property's two separate TDR sales may have each involved "rounding up," such that it may have actually been able to sell ten (10) TDRs total when the combined lot size, taken as a whole, may have only justified nine (9) TDRs, resulting in an unwarranted gain to the property. D'Amico's suspicions in this regard were fueled by the absence of certain site-plan documents normally required for the Town to process a TDR transaction in the meeting package circulated before the April council meeting.

Documents subsequently received by COE, as well as a careful site survey calculation by complainant D'Amico, supports the notion that the property did correctly qualify for a total of 10 TDRs.

Documents obtained as part of the investigation showed Yaffe as the attorney who prepared an easement and a quit-claim deed for the 9300 Condominium. Yaffe does not dispute that he performed this role for his client, although he (and town attorney Simone) describes his role in this regard as "perfunctory," involving nothing more than the routine preparation of two short documents. Yaffe acknowledged being paid for this service, stating that his fee for this function was \$250. Since meeting with COE, Yaffe offered, and apparently has followed through on extending, a \$250 credit to his client against other services rendered.

The Town Council did not have to vote on approval of the easement and quit-claim, as the



Town had given authority to process such transactions to the Town Manager at a Town Council meeting on August 12, 2013. Yaffe recused himself from the Town Council vote approving the sale of the resulting two (2) TDRs from the 9300 Condominium to Island Club Towers.

The investigator turned up no evidence suggesting that Yaffe in some way engineered a transaction that uniquely favored or worked to the special benefit of him or his client.

While it is true that most quit-claims of the 11-foot strips throughout BHI have gone to owners intending to redevelop their properties and move parking from on-street to on-site, Town Clerk Marante identified three other properties for which the quit-claim process was initiated which were not in the process of redeveloping. Town officials stated that while it is now the policy of the Town to return these dedications to their original owners, the Town thus far has been content to wait until the property owners request their return. Town Attorney Simone said that quit-claiming of the strips should be viewed as "a benefit to the town," as it is in the town's advantage to return the strips (through higher tax receipts and diminished liability), as opposed to a special benefit going to the property owner. It might be more appropriate to view such transactions as mutually beneficial since there is clearly a benefit to the property owner as well.

**Conclusion(s):**

Turned over to Advocate for filing decision.