



**Miami-Dade Commission on Ethics & Public Trust**  
**Report of Investigation**

**Investigators:** Sylvia Batista

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|---|--|----------------------------|------------------------|
| <b>Case:</b><br><b>K16-021</b><br><b>PI 16-35</b> | <b>Case Name:</b><br>Village of Palmetto Bay<br>Vice Mayor John Dubois<br>and April Burch    | <b><u>Date Opened:</u></b> |                        |
| <b>Complainant(s):</b>                            | <b>Subject(s):</b><br>Recusal from vote due to<br>conflict of interest and<br>other matters. | <b>05/05/16</b>            | <b>CASE<br/>CLOSED</b> |

Date: 6/26/17

Sometime in early April 2016, Palmetto Bay Village attorney, Dexter Lehtinen (Lehtinen), contacted the Executive Director of the Miami-Dade County Commission on Ethics and Public Trust, Joseph Centorino (Centorino), and advised Centorino that Village of Palmetto Bay Vice Mayor John DuBois (DuBois) would be calling to discuss a conflict of interest involving a development known as the Burger King property. Shortly thereafter, on or about **04/22/16**, Dubois contacted Centorino the first time and called a second time about three days later. Some of the details of these conversations are disputed between the two men.

According to Centorino, DuBois told him that he had a voting conflict of interest because he owns property in very close proximity to the proposed development. Centorino gave Dubois a written opinion based on the information provided advising him that this issue falls under Section 2-11.1(d) of the County Ethic Code and under Section 112.3143, Florida Statutes. Specifically, Centorino recommended that, pursuant to Section 112.3143, at the time of the vote, Dubois must publicly declare that he has a conflict of interest due to his personal interest in the outcome of the vote, and also that within 15 days of the vote, he must file Form 8B with the Clerk of the Board again disclosing the conflict.

DuBois was further advised that the County Code requires that he must remove himself from the Council Chambers during the discussion of the item and the vote, and may not participate in any way in the deliberations. This prohibition would also include that he not appear before the Council, even as an interested resident, to address it regarding the issue. Centorino's opinion

adds that the County Code requires that Dubois not make any attempt to influence the decision by oral or written communication, whether made by him, or at his request. DuBois was also advised to avoid appearing at any non-governmental workshops or meeting organized by interested parties to discuss the item in order to avoid any situation where his involvement may be interpreted as an attempt to use his elected position to influence the outcome.

## **Investigation:**

### **Meetings Reviewed:**

At the time that DuBois had the telephone conversations with Centorino, he had already recused himself from discussing and voting on the subject item at two separate, prior meetings.

#### **07/21/14 – Village Council meeting -**

The first time DuBois recused himself from participating in Council deliberations on the subject item was during a Village Council meeting held on **07/21/14**. At the time that the item came up for first reading, DuBois stated that he would be recusing himself “since *I cannot be objective* in this matter for the reason that I live very close. I’m not a direct neighbor, but I’m a couple of properties over *and don’t feel that I can be objective*, in addition to some conversations that have occurred between myself and the managers of the property.” After declaring his recusal and conflict of interest, DuBois left the dais and remained out of sight throughout the discussions, testimonies and subsequent vote. Although DuBois initially stated that he was going to speak as a witness against the item, he did not. After hearing the testimonies of several area residents, the applicant and City officials, the Council voted to defer the item to a future date. It should be noted that this meeting was a quasi-judicial hearing.

The item came up again for a first reading on **03/07/16**.

#### **03/07/16 – Village Council meeting –**

Resolution 11A was read into the record. The resolution involved the transfer of development rights (TDR) of 85 residential units from 17901 Old Cutler Rd. to 17777 Old Cutler Road. DuBois remained at the dais while the item was being read and witnesses were sworn in. DuBois then asked for a few minutes so that he could get a legal opinion from Village Attorney Dexter Lehtinen as to whether he needed to recuse himself from this issue. DuBois and Lehtinen conferred privately as they sat at the dais. Whereupon, both DuBois and Lehtinen left the dais. DuBois did not return to the dais until Items 11A, 12A and 12B were voted on.

All Council members and Lehtinen returned to the dais. Before proceeding any further, Lehtinen announced that the Vice-Mayor had previously recused himself from the discussion in this zoning matter and concurred that Dubois had a particularized interest as opposed to a general interest which made it appropriate for him to recuse himself on items 11, 12A and 12B.

During the presentation and discussion of the items, the Mayor and the Village Manager explained that no new development was being proposed. This development had been in the works since 2004 or 2005, and the developer already had the right to build 400 units. The Village Manager further explained that this is about the developer's right to build on the first 22 acres of the property and not about approving additional units. The Mayor gave his opinion on the project. Lehtinen spoke regarding the currently allowed building height of 85 ft. which along with the number of units, did not change. The 22 acres being proposed for transfer had building rights for 85 units. These 85 units would be transferred to the Village Mixed Use (VMU), thus making the 22 acres undevelopable except for a possible fire station and park purposes.

The Council and Mayor passed a motion to defer item 11A and voted in favor of 12A and 12B on first reading. DuBois returned to the dais at this point.

#### **05/02/16 Village Council meeting –**

Village Attorney Dexter Lehtinen interrupted after the subject item was read and reminded the Council of Dubois' previous recusals from the vote of this item on first reading.

The Village Attorney then explained that Dubois provided him with an advisory opinion from the State of Florida Ethics Commission (FEC) indicating that he need not abstain from the vote. The Village Attorney indicated that Dubois' previous recusal due to his admitted conflict of interest raised serious questions about *whether he can be impartial at this time*. During disclosures made by the Mayor and Council, DuBois stated that he had extensive communication with the FEC which had advised him that this was not an issue that he had to worry about. DuBois did not disclose his communication with Centorino on the phone or in response to the ethics opinion that was provided to him by Centorino in April. Further, Dubois did not state for the record that he could now be objective or remain fair and impartial.

#### **06/06/16 Village Council meeting –**

Village Attorney Lehtinen read from the ethics opinion provided by Centorino wherein Dubois was advised that, due to his stated conflict of interest, DuBois must refrain from engaging in any activity on the subject item to attempt to influence the outcome. The COE learned that DuBois did participate in the vote on **05/02/16** and engaged in activity to influence the outcome of the vote contrary to what he had been advised to do by Centorino.

DuBois stated that in the conversation that he had with Joseph Centorino on the phone, he did not say that he had a conflict. (Note that at page 35, line 10 of Dubois' December 7, 2016 statement Dubois states, "I told him (Centorino) that because of my proximity that *I had a conflict and I recused myself.*"

DuBois went on to say at this meeting that he was advised by the FEC that he did not have a conflict under State law. DuBois continued to explain that three minutes before the item came up before the Council at the March meeting, he turned to the City Attorney and said, "I need to ask you if I have a conflict," and he and the City Attorney discussed it and the City Attorney said, "I think you do so you should recuse yourself." DuBois denied that he told Centorino that he had a conflict. He said that he "believed" he had a conflict because he was advised by the City Attorney that he did. DuBois said the following about his conversation with Centorino:

*"So in doing that he (Centorino) is now claiming that I have admitted that I have a conflict. Well that is not quite accurate. This is only his recollection of a phone conversation which is totally inaccurate. I did not say I had a conflict, I said I believed I had a conflict because I was advised so by the City Attorney. I went to the higher authority who has much greater expertise on the matter at the State level because the County law level that he is referring to that supersedes state only applies to a very narrow issue that has nothing to do with this issue, okay? It has nothing to do with my case. So the State Commission said with extensive research and case law reference that I absolutely do not have a conflict because there must be a financial interest in it and there clearly was none, okay? That is a requirement of conflict so even though I had said that I thought I had a conflict. That was my opinion at the time, it was not factual information. What is factual information is whether in fact I did have a conflict and under State law I was advised by the State Ethics Commission that I in fact did not have a conflict and because I did not have a legal conflict I am actually obligated by law to vote on the issue. So if I didn't vote on the issue the second time, I was led to believe that I would actually then be in an ethics violation so this convoluted information that you're hearing from the Director of the COE does not hold water. It is another political maneuver here and it's ridiculous to be perfectly honest. The State has already overruled that and the relevance of the difference between the County and the State is not relevant and because I didn't have a conflict I am not obligated to file a Form 8."*

Mayor Flinn reminded DuBois that he recused himself on two occasions—in 2014 and a second time during the vote on the first reading of the item (03/07/16). DuBois stated that this item was not voted on in 2014 and he did not vote on it in 2014. Flinn agreed that DuBois did not vote in 2014 because he recused himself. Flinn asked whether DuBois had filed a Form 8B for his failure to vote at that time. DuBois said that he did not vote on the issue in 2014 because "this issue didn't come up in 2014. You are incorrect and that is an irrelevant question."

After a 15 minute pause, the Council reconvened and Village Attorney Lehtinen addressed DuBois' comments by quoting DuBois from a transcript of the **July 21, 2014** meeting in which DuBois stated, "since the item has been called, I will be recusing myself since I cannot be objective in this matter for the reasons that I live very close; I'm not a direct neighbor, but I'm two properties over and I don't feel I can be objective."

Lehtinen added that Centorino is correct with respect to the legal issue of whether or not the Vice-Mayor is governed by the County Ethics Code which provides a stricter standard for voting conflicts and which supersedes the State requirements. The City Manager stated that he also indicated to DuBois that he would probably be bound by the opinion.

Lehtinen explained that in light of DuBois' stated recusals at the 2014 and March 2016 Village Council meetings together with the advice that he received from the COE, the Village of Palmetto Bay could not sustain a legal challenge under the *Jennings* standard when a council member *who was not impartial* voted. According to Lehtinen, the *Jennings* standard requires that if you're not reasonably impartial, you are not supposed to vote in a quasi-judicial matter. DuBois said that he is considering deferring the item adding that he is not 100% sure that he is impartial, and that he has sent communication out to some residents. DuBois moved to defer the item but no one seconded the motion.

During the Village Attorney Report (3:24), Lehtinen discussed the lawsuit filed by Bette April Burch against the Village of Palmetto Bay as follows:

**Lehtinen :**

Lehtinen stated that "Leary's use of the Vice Mayor's office is a subsidy to Mr. Leary."

"The question there simply is whether or not there is an undue entanglement that gives an appearance of difficulty when there are conflicting interests. An attorney can sometimes have a Chinese wall and sometimes cannot. Even though the attorney does not engage in any, there are some situations where the attorney cannot, and I'm certainly not giving advice to Mr. Leary, but it is incumbent on those who defend a lawsuit to ensure that the representation is not influenced by other, or outside payments or influences."

"It could be, and we would discuss this, it could be that he is using your office as a subsidy to Mr. Leary and I'm not saying that is a thing, but that is a matter that you and he may, or Ms. Burch. . ."

**DuBois:** "Leary has represented Ms. Burch outside of any scope of responsibility with me in the past. She is one of his clients."

**Lehtinen:** "The question is whether Ms. Burch pays him or whether somebody else pays him or whether Citizens to Protect Property Rights pays him, which is allegedly a not-for-profit group. I don't know those answers. I'm just saying those are the questions that arise under the circumstances."

**DuBois:** "I guess the question is what do we need to do to give the Mayor a level of confidence to disqualify the attorney or insulate and provide the fire wall you were talking about, right?"

**Lehtinen:** "Well, what I would really like is to have a credible representation that Mr. Leary does not get any funding that is either directly, indirectly or in any way tied to any official of Palmetto Bay, either Burch, or Ms. Burch's brother or somebody, but not a cross-subsidy and her lawyer not being subsidized by an official of Palmetto Bay."

No reply from DuBois.

**State of Florida Ethics Commission –**

**06/06/16 – E-mail from Susan Herendeen (Herendeen), Staff Attorney for Florida Commission on Ethics** in which she advises that her advisory opinion to DuBois speaks only to the Code of Ethics for Public Officers and Employees, and that she will send DuBois a note to that effect.

**Inquiry from DuBois to the State Ethics Commission –**

Herendeen provided the COE with a copy of DuBois' inquiry. The inquiry presents the question of whether a municipal councilmember whose primary residence is 3 to 4 lots (approximately 500 to 800 feet) away from a development site wherein a developer is seeking a zoning change and transfer of development rights has a legal conflict of interest requiring his recusal.

Under the facts, DuBois focuses on the increase of traffic congestion on a 2 to 3 mile stretch of Old Cutler Road located near his residence that would increase the extremely congested road during rush hour. DuBois states that there are approximately 300 residential homes which would be similarly affected to his own because they are either adjacent to or merge directly into the same stretch of Old Cutler Road.

DuBois states that the passage of the proposed resolution and companion ordinances would permit the development of 485 residential homes on the site, which would have a substantial impact on traffic on Old Cutler Road.

DuBois further states that he is unaware of any "special private gain or loss" which he may receive, or which may be received by a principal by whom he has been retained, or by any family member or business associate because of the vote on the proposed resolution and ordinances by the Village council.

DuBois adds that he has no direct or indirect controlling financial interest in the development company, 17777 Old Cutler Rd LLC.

DuBois concludes by stating in his inquiry that he is not in a different position from any other homeowner in the Village of Palmetto Bay who lives in close proximity to the development site. Significantly, however, it appears that DuBois did not mention to the State Ethics Commission the unique impact the proposed development would have on the view from his home.

**Interviews:**

**06/02/16 – Scott Silver, Developer of the Palmetto Bay Village Center –**

Scott Silver (Silver) came to the COE and met with Executive Director, Joe Centorino, Advocate, Michael Murawski and Investigator Sylvia Batista.

Silver said that he met DuBois through the Board of Deering Estates Foundation before DuBois was elected to the Village of Palmetto Bay council.<sup>1</sup> Around that time, they (Silver) had the approval to develop 400 units. DuBois came to the meeting and the City drafted a proposed ordinance to build 400 units. Silver said that they met with homeowner groups and people spoke in favor of the project and they got the 400 units approved.

In 2008 (before Dubois was an elected official), DuBois met with him and told him that he did not approve of the project, however, would not distribute information or take action against the project if Silver would sell him two of the planned units at cost. Silver said that he did not accept the offer. Silver said that the offer was made privately in his law office. However, Silver said that he discussed it with his law partner, Fred Garvett. Silver said that he told his partner as soon as it happened. He said something like "I can't believe what this guy just did. I'll deal with neighborhood groups, but will not give anybody money."

In his December 7, 2016 statement, Dubois recalls this meeting with Silver in a different way. Dubois said he did meet with Silver and were together on the roof of Dubois' house when Dubois told Silver "I really don't relish the thought of having a couple of condo buildings, the assisted living facilities, whatever, towering over my house, you know..." (Page 22, line 13 Dubois statement)

Dubois said Silver assured him that he would switch the condo towers from being on the North end of the property (closer to Dubois) to the South end of the property (further from Dubois).

As far as the alleged offer to buy two units from Silver, Dubois explained that originally he wanted to construct a guest house on his property however, doing so would require a variance. So, since Silver's property was relatively close by, Dubois offered to buy a lot where one of the townhomes would be built and do the construction himself and use it to house guests when needed.

Silver advised that a resident of the Village, David Singer, just received a \$500,000 mortgage from DuBois. David Singer just filed to run against Councilman Schaffer at the next election.

Silver explained that DuBois' residence is a very tall structure situated one lot away from the development site. There are no buildings in between DuBois' house and the new project, only green space with a horse farm with a small stable. DuBois always told him inside and outside of council meetings that he would never vote for or against his project because he had a conflict.

Silver showed this investigator an aerial view of DuBois' property in relation to the project site wherein he indicated a unique effect on DuBois' property for the reason that DuBois' residence is the only residence from which the development site is visible. Silver advised the proposed transfer of development rights would, if approved, impact the view to the South of DuBois' property.

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<sup>1</sup> Vice Mayor John DuBois was sworn in as a council member of the Village of Palmetto Bay on December 3, 2012.

**06/16/16 – Dexter Lehtinen, City Attorney for Village of Palmetto Bay –**

Dexter Lehtinen (Lehtinen) met with COE Advocate Michael Murawski and COE Investigator Sylvia Batista at a private residence. During the interview, Lehtinen provided background information regarding Dubois' counsel's representation of April Burch in a lawsuit against the Village on the issue at hand

Lehtinen said that he knows attorney Jeff Leary (Leary) through Village Vice-Mayor John DuBois. Leary's office has the same address as DuBois' organization on Indigo Street. This is the address of Miami-Dade Citizens for Property Rights, a not-for-profit created by DuBois. Leary is the registered agent of Miami-Dade Citizens for Property Rights. That is where Leary took Eugene Flinn's, (the Mayor) deposition in a dispute that DuBois has with Miami-Dade County. DuBois claims that Eugene Flinn turned him in regarding his (DuBois') removal of the mangroves behind his property.

Bette April Burch sued the Village and the owner of 17777 Old Cutler Rd LLC. The basis of the lawsuit is to challenge quasi-judicial action by the Village Council. Leary filed a Petition for Writ of Certiorari on behalf of Burch as his client. According to Lehtinen, this is basically an appeal and the Court takes it and says there is a lack of confidence to make the decision. Lehtinen said that the Court will say that Burch never appeared at the meetings or wrote about the council's decision therefore, she lacks standing. The Courts have said that you have to participate in order to have standing. Burch's lawsuit might get thrown out on that basis. There is then another lawsuit alleging inconsistency with the Comprehensive Plan. According to Lehtinen Leary has not properly sued the Village—the summons is not properly done. It is significant that Burch did not appear at the council meetings on the issues, but DuBois went out "plaintiff shopping." Leary is probably being paid by DuBois or by his not-for-profit, Citizens for Property Rights, Lehtinen said.

Lehtinen recounted that at the June 2016 Council meeting, DuBois said that Joe (Centorino) is wrong—that Centorino did not tell him that he has a conflict. At the meeting, DuBois made a motion to defer but it didn't get seconded. During the comments section of the meeting, Dubois brought the issue up again.

At the March 2016 Council meeting, DuBois asked to talk to Lehtinen and said "my property is adversely affected...I can see and I'm the only guy that can see the development." According to Lehtinen, DuBois has a deck on top of his roof which he uses to entertain. From the deck you can see the development site. Dubois said "my property is adversely affected and I can see these buildings and nobody else can." The buildings can be built to 85 feet high and the Burger King building was built to 82 feet. DuBois has no visual barrier from his property because of the height of his residence. The Village said that there can be no more traffic than what was permitted. The transfer of development rights decreases traffic because the old plan had more traffic than the new one. The 85 units were already there as interim zoning. To the East of Old Cutler the zoning allows 10 units to an acre and on the West across Old Cutler Road they have 1-2 units to an acre. They got rid of the hotel. The 85 acres are not new. The 85 units existed but were not recognized by number. Approval of the 400 units existed already. The transfer of development rights is done to preserve endangered lands.



DuBois told him "I'm adversely affected," and he told him to call the COE and whatever they tell you, you'll be bound by it. Also, he told him that Miami-Dade has a broader rule than the State if you are particularly impacted. Then, DuBois asked him whether he had to stay recused. Lehtinen said, "if you made a factual error, technically you could."

Lehtinen said that when you recuse yourself you have to file a form with the Clerk no later than 15 days after recusal. DuBois never filed the form.

Lehtinen added that at the June meeting, DuBois intended to rescind what was done at the May meeting where the items passed at second reading. The Comprehensive Plan and Zoning plan has been amended. The items have passed and it is law since the May meeting when it was approved by a 3 to 2 vote. The developers donated 22 + additional acres to the Village. The transfer of development rights preserves open space.

DuBois has a fiduciary duty to the Village. He cannot sue the Village. DuBois filed the law suit before the agenda item. According to Lehtinen, specific information regarding who is paying for Burch's lawsuit is not attorney-client privilege.

**06/28/16 – Fred Garvett –**

Fred Garvett (Garvett) is Scott Silver's law partner. Garvett was asked about his knowledge of DuBois' attempt to induce Silver to sell him two of the planned residential units at cost in return for abstaining from any effort to scratch the project. Garvett said that he was sitting in his office on the day that Silver met with DuBois. They met in Silver's office which is located next to his own. Garvett said that he saw DuBois leave and, shortly thereafter, Silver walked over and told him of DuBois' offer. Garvett said that he did not hear DuBois make the offer, but Silver would not have told him had it not been true.

**10/11/16 – Bette April Burch –**

Transcript of Ms. Burch's statement is enclosed in the investigative file.

**12/07/16 – John Dubois –**

Transcript of DuBois' statement is enclosed in the investigative file.

## **Conclusion:**

There were two issues to be determined by this investigation. The first issue was: Whether or not Vice-Mayor Dubois should be charged with an ethics violation for voting and participating in an issue on May 2, 2016, when Dubois had a written opinion from Joe Centorino advising him not to vote on the issue and what actions to take as a consequence, and also had an opinion from the State Ethics Commission advising him that he had no conflict on the issue.

The second issue (which arose during the course of the investigation on the first issue) was: Whether or not Dubois is in violation of the County's Ethics Code due to his relationship with attorney Jeffrey Leary and the non-profit organization known as Miami-Dade Citizens for Property Rights (MDCPR), as that relationship relates to Leary's/ MDCPR representation of April Burch in her lawsuit against the Village of Palmetto Bay.

### **Issue Number One:**

Dubois initially recused himself from voting on the Burger King property development issue on July 21, 2014. According to his sworn testimony, Dubois did not request an opinion from either the State Ethics Commission or the Miami-Dade County Ethics Commission prior to announcing his recusal. He claims he did consult with the Village Attorney at the time who advised him that it would probably be best for him to recuse himself. Dubois based his decision to recuse himself at that time on his own assumption that he had a "conflict" due to the proximity of his property to the development. However, when Dubois announced his recusal at the 2014 meeting his reason was that he didn't feel that he could be "objective." Hence, it is not clear whether Dubois based his recusal on his inability to be objective due to the proximity of his property or whether the proximity of his property in and of itself raised a conflict under Florida Statute 112.3143 (i.e. the "special private gain or loss" standard.)

The July 21, 2014 vote took place in the context of a quasi-judicial proceeding. It is important to keep in mind that because this matter took place during a quasi-judicial setting, there are slightly different standards involved. One is a conflict of interest issue under Florida Statute 112.31343 (2) (a) and Section 2-11.1(d) of the Miami-Dade County Conflict of Interest and Code of Ethics Ordinance and the other is under Florida Statute 286.012.

Florida Statute 286.012 states:

286.012 Voting requirement at meetings of governmental bodies.—A member of a state, county, or municipal governmental board, commission, or agency who is present at a meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may not abstain from voting in regard to any such decision, ruling, or act; and a vote shall be recorded or counted for each such member present, unless, with respect to any such member, there is, or appears to be, a possible conflict of interest under s. 112.311, s. 112.313, s. 112.3143, or additional or more stringent standards of conduct, if any, adopted pursuant to s. 112.326. If there is, or appears to be, a possible conflict under s. 112.311, s. 112.313, or s. 112.3143, the member shall comply with the disclosure requirements of s. 112.3143. If the only conflict or possible conflict is one arising from the additional or more stringent standards adopted pursuant to s. 112.326, the member shall comply with any disclosure requirements

adopted pursuant to s. 112.326. **If the official decision, ruling, or act occurs in the context of a quasi-judicial proceeding, a member may abstain from voting on such matter if the abstention is to assure a fair proceeding free from potential bias or prejudice.** (emphasis added)

As a result of this investigation, it is quite clear that, at the very least, there was misunderstanding and a lack of clarity by Dubois and others about precisely what “conflict” Dubois meant when he said he had a conflict or believed he had a conflict. Was it a conflict because Dubois could not be objective in a quasi-judicial setting or was it a conflict because he owned property in close proximity to the development that resulted in his “special private gain or loss” or because he “would or might, directly or indirectly, profit or be enhanced” by the action of his Council? Clearly, Dubois did have a basis on which to assert a conflict under F.S. §286.012 once he declared that he could not be “objective.”

In fact, at the May 2, 2016 hearing on the Burger King property issue (the meeting where Dubois announced that he had an opinion from the State Ethics Commission), the Village Attorney brought up his concern about whether Dubois *can be impartial*, which appears to have more to do with a concern over a F. S. §286.012 potential bias or prejudice conflict rather than a conflict because of the location of Dubois’ property.

On April 22, 2016, Dubois had a telephone conversation with Joseph Centorino. As indicated above, both men have different recollections of what transpired during that phone call. It was subsequently learned that Dubois’ father passed away that day and by Dubois’ own admission he was preoccupied and “thinking of other things” that day which may partially excuse his lack of memory about what was said. Moreover, although Centorino’s e-mail to Dubois confirming their telephone conversation did state that Dubois had a conflict, the e-mail does not relate any facts reflecting any conversation about the proximity of Dubois’ property to the “Burger King” property or the basis for the “conflict.” So again, it is unclear whether Dubois meant a “conflict” because he could not be objective or he meant a conflict under the Florida Statute 112.3143 standard

(special private gain or loss) or under the Section 2-11.1(d) of the Ethics Code standard (would or might, directly or indirectly profit or be enhanced.) As a non-attorney, it is possible that Dubois did not understand the differences among the conflict standards.

The e-mail also states that “Your [Dubois’] question *was directed* (emphasis added) to what limitations there are on your participation... both inside and outside of the Council chamber.” This seems to support Dubois’ recollection that the majority of his conversation with Centorino centered on what restrictions there were, if any, on Dubois because of his recusal.

However, Centorino’s opinion that Dubois has a conflict under Section 2-11.1(d) of the ethics code has some merit. Although mere proximity of Dubois’ property to the Burger King property by itself might not constitute a conflict under 2-11.1 (d), the totality of circumstances in this case could amount to a conflict. As pointed out in RQO 15-04, “many voting conflicts are inherently ambiguous.” Section 2-11.1(d) provides that a voting conflict may be created where the voting official “*might*, directly or indirectly, profit or be enhanced

by the action of the board.”

The Ethics Commission has utilized a standard similar to that applied by the State of Florida Ethics Commission in analyzing whether a board member is uniquely or directly affected by a vote depending on the size of the affected class. For instance, in RQO 10-20, a Key Biscayne Councilperson was allowed to vote on a rezoning resolution because he was one of 1,500 property owners affected, representing only 0.06% of all residents affected. The threshold of the 1-2% of the size of the class, generally finding conflicts where the individual's interest exceeds that amount, is used as a guideline in analyzing conflict issues involving individuals with property interests within an affected class and is offered here by analogy. In Dubois' case, his home is one of only two homes directly adjacent to the north of the Burger King property. Moreover, Dubois' home is the only home two properties removed from the Burger King property whose sight line would be affected by the proposed development. His own statements in 2014, to the effect that he had a conflict due to the proximity of his home to the development and “conversations” he had with the developer confirm that he understood these factors as possibly creating a conflict.

No one has filed a complaint against Dubois stemming from his May 2, 2016 vote. After careful review of the facts and circumstances surrounding Dubois' vote, the evidence does not rise to a level of probable cause necessary to justify the filing of an ethics complaint against him in this instance for a violation of 2-11.1(d) of the County's Conflict of Interest and Code of Ethics ordinance. It should be noted however, that much of the controversy that arose from Dubois' actions were caused by Dubois himself and could have been avoided early on had he sought an ethics opinion well in advance of the July 2014 meeting where the “Burger King” property issue first came up. Dubois compounded his mistakes by his seeming lack of understanding and acceptance of the fact that the Ethics Code of Miami-Dade County can be stricter than the State Ethics laws. It was duplicitous and disingenuous of Dubois to attempt to “go to a higher authority” by requesting an ethics opinion from the State after Centorino had advised him that he had a conflict and shouldn't participate in the issue. It should be noted that Dubois is not an attorney and may not have understood that the County Code can be more restrictive than State law. Hopefully, having been put on notice, Mr. Dubois will not make that mistake again and will govern himself accordingly.

#### **Issue Number Two:**

On September 30, 2013, approximately one year after Dubois became an elected official in the Village, he created a non-profit organization called Miami-Dade Citizens for Property Rights (MDCPR). Dubois is listed as the “President” of MDCPR in incorporation documents listed with the Florida Department of State Division of Corporations. The stated specific purpose of MDCPR is to “Educate citizens of Miami-Dade County on their property rights and how to stop the government on (sic) infringing on such rights.”

The principal place of business of MDCPR is 9726 E, Indigo Street, Palmetto Bay, Florida 33157. 9726 E. Indigo street is a building partly owned by Dubois. Attorney Jeffrey Leary (Leary) is the sole employee of MDCPR. MDCPR is entirely funded by Dubois. Dubois pays Leary's salary.

Although Leary's "LinkedIn" profile lists him as the "In-House Counsel" for another Dubois company- Eyecast- according to Dubois, Leary claims not to be an employee of Eyecast but does occasional pro bono work for Eyecast. Leary is also the registered agent for three of Dubois' limited liability corporations: J&S 8360 Mortgage LLC, Redinn Mtg, LLC, and Indigo Street, LLC. Leary also represents Dubois in an action against him by the Miami-Dade County Regulatory and Economic Resources Department (RER). Leary has also represented April Burch, a Palmetto Bay resident, neighbor of Dubois and a County employee, in an action against her brought by RER. In addition, Leary represents Dubois in a lawsuit against the Miami-Dade Commission on Ethics and Public Trust.<sup>2</sup> Leary has also represented April Burch in this investigation by the Ethics Commission. Leary/MDCPR was purportedly retained by Burch in a lawsuit against the Village which seeks essentially to overturn the quasi-judicial action taken by the Village Council wherein it approved the zoning application of the developer of the "Burger King" property.

Section 2-11.1 (l) of the Miami-Dade County Conflict of Interest and Code of Ethics entitled, "Prohibited investments" states that: " No person included in the terms defined in Subsections (b)(1) through (6) and (b) (13) shall have personal investments in any enterprise, either himself, herself or through a member of his or her immediate family, which will create a substantial conflict between his or her private interests and the public interest."

It is undisputed that Dubois opposes the development on the "Burger King" property; indeed, he voted against it on May 2, 2016. Moreover, in July 2016, Dubois introduced legislation designed to effectively repeal what the Village Council had passed in May regarding the development of the "Burger King" property, in essence to achieve the same goal as the Burch lawsuit.

There is no question that Dubois has a personal investment in MDCPR- he funds it in its entirety. Leary is Dubois' employee.

As part of the investigation into this matter Leary provided Burch's legal billing records, ostensibly to prove that Dubois was not directly paying for Burch's legal representation.

Those records reveal that Burch has actually paid only about \$760.00 towards her legal bill which presently totals about \$27,391.00.

The evidence strongly suggests that while Dubois may not be completely funding Burch's legal representation, other facts as outlined above clearly establish that he is, at least indirectly, subsidizing the lawsuit against his Village. If Dubois is subsidizing Burch's lawsuit, even indirectly, through MDCPR, even if Dubois is not a party to the lawsuit, his personal stake in the outcome creates a conflict between his private interests and his public duties, in violation of Section 2-11.1(l) of the Miami-Dade County Conflict of Interest and Code of Ethics entitled

<sup>2</sup> Case law is clear that disqualification (of a judge) is required if counsel for one of the parties is representing or has recently represented the judge. See Ballard v. Campbell, 127 So. 3<sup>rd</sup> 693 (4th DCA 2013); City of Fort Lauderdale v. Palazo Las Olas Group, LLC 882 So.2<sup>nd</sup> 1102 (4<sup>th</sup> DCA 2004)

This same logic would demand Dubois recuse himself in any situation where Dubois may be sitting in a quasi-judicial matter, where an attorney for one of the parties (Leary) "is or has recently represented" Dubois.

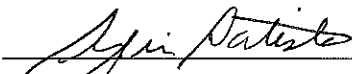
**“ Prohibited investments.”**

The relationship between Dubois and Leary/MDCPR/Burch creates a conflict for Dubois under the Miami-Dade County Conflict of Interest and Code of Ethics and precludes Dubois from any further involvement in or with the Burch lawsuit and the “Burger King” property.

The voting conflict section of the Ethics Code, Section 2-11.1(d) states, in pertinent part, that: “ No person included in the term defined in Subsection (b)(1) shall vote on or participate in any matter presented to the [Village Council] if said person [Dubois] has any of the following relationships with any of the persons of entities which would be *or might be* directly or indirectly affected by any action of the [Village Council] ...employee.

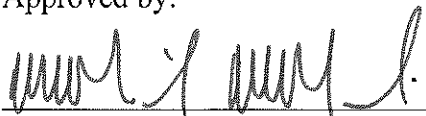
Moreover, as the founder/owner and financial benefactor of MDCPR Dubois has a personal investment in an enterprise (MDCPR) whose sole employee (Leary) has his salary paid by Dubois. Leary’s (Dubois employee) representation of Burch in a lawsuit against the Village creates a conflict between Dubois’ private interest and the public’s interest.

Finally, Ms. April Burch, as a County employee, should be aware of the gift provisions of Section 2-11.1 (e) of the Miami-Dade County Conflict of Interest and Code of Ethics If Ms. Burch’s “debt” to Leary is forgiven, she may be required to report that forgiveness of debt as a gift.

  
Sylvia Batista, Investigator

June 22, 2017  
Date

Approved by:

  
Michael P. Murawski, Advocate

6/26/2017  
Date