

WEISS SEROTA HELFMAN
PASTORIZA COLE & BONSKE, P.L.

ATTORNEYS AT LAW

A PROFESSIONAL LIMITED LIABILITY COMPANY
INCLUDING PROFESSIONAL ASSOCIATIONS

BROWARD OFFICE

200 EAST BROWARD BOULEVARD
SUITE 1900
FORT LAUDERDALE, FLORIDA 33301

TELEPHONE 954-763-4242

FACSIMILE 954-764-7770

WWW.WSH-LAW.COM

MIAMI-DADE OFFICE

2525 PONCE DE LEON BOULEVARD • SUITE 700
CORAL GABLES, FLORIDA 33134
TELEPHONE 305-854-0800 • FACSIMILE 305-854-2323

*OF COUNSEL

February 1, 2010

MITCHELL BIERMAN, P.A.
NINA L. BONISKE, P.A.
MITCHELL J. BURNSTEIN, P.A.
JAMIE ALAN COLE, P.A.
STEPHEN J. HELFMAN, P.A.
GILBERTO PASTORIZA, P.A.
MICHAEL S. POPOK, P.A.
JOSEPH H. SEROTA, P.A.
SUSAN L. TREVARTHEN, P.A.
RICHARD JAY WEISS, P.A.
DAVID M. WOLPIN, P.A.

DANIEL L. ABBOTT
GARY L. BROWN
IGNACIO G. DEL VALLE
ALAN L. GABRIEL
DOUGLAS R. GONZALES
EDWARD G. GUEDES
MATTHEW H. MANDEL
ALEXANDER L. PALENZUELA-MAURI
SCOTT A. ROBIN
BRETT J. SCHNEIDER

LORI ADELSON*
LILLIAN M. ARANGO*
CARLA M. BARROW*

JOANNA G. DOERFEL
RAQUEL ELEJABARRIETA
CHAD S. FRIEDMAN
MACADAM J. GLINN
R. BRIAN JOHNSON
JOHN J. KENDRICK III
HARLENE SILVERN KENNEDY
KAREN LIEBERMAN*
JOHANNA M. LUNDGREN
KATHRYN M. MEHAFFEY
HARRIS S. NIZEL
MATTHEW PEARL
JOHN J. QUICK
ANTHONY L. RECIO
AMY J. SANTIAGO
DANIEL A. SEIGEL
GAIL D. SEROTA*
JONATHAN C. SHAMRES
ESTRELLITA S. SIBILA
ANTHONY C. SOROKA
EDUARDO M. SOTO
MICHAEL L. STINES
NANCY STUPARICH*
CHRISTOPHER J. VOLK
MICHELLE D. VOS
LAURA K. WENDELL*
JAMES E. WHITE
DEREK R. YOUNG

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
2345 Providence Boulevard
Deltona, FL 32725

RE: Legal Opinion Concerning the Activities of Deltona City Commissioner, Herbert S. Zischkau, III ("Commissioner Zischkau") as Pertaining to the City's Purchase of the Howland Crossings Property ("the Property")
Our File No.: 1760.002

Dear Ms. Miller:

As requested by you pursuant to the December 9, 2009, motion of the City Commission of the City of Deltona, Florida (the "City"), this letter shall serve to provide our legal opinion concerning Commissioner Zischkau's conduct and activities in reference to the Property transaction.

I. Question Presented.

The question addressed by this legal opinion is as follows:

Whether the conduct and activities of Commissioner Zischkau concerning the Property transaction violate the City Charter and/or applicable ethics provisions provided by Part III of Chapter 112, Florida Statutes (the "Ethics Code").

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 2 of 19

II. Opinion.

As explained below, it is our opinion that the activities and conduct of Commissioner Zischkau, including the filing of his pro se petition for formal administrative hearing with the St. John's River Water Management District (the "SJRWMD") and his pro se filing of an answer, affirmative defenses and counterclaims in the case of *Howland Crossings, LLC. vs. Herbert S. Zischkau, III*, pending in the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, Case Number 2009-15722-CIDL (the "Howland Crossings Litigation") do not violate the City Charter or the Ethics Code.

III. Discussion.

We shall set forth the pertinent factual background, followed by our discussion and application of the relevant City Charter and Ethics Code provisions.

a. Limitations and Factual background.

At the outset, please be advised that our description of the factual background is based upon the public records which you, as City Manager, have provided to us, and our discussion with you. Those public records include minutes of City Commission meetings, the September 3, 2008, Purchase and Sale Agreement (the "Land Purchase Contract") providing for the purchase of the Property, as well as other pertinent public records which have been provided to us. We have not made an independent investigation of the facts, because that is beyond the scope of our assignment. Our assignment is to provide a legal opinion based upon the facts provided to us, and by researching and applying the applicable law. We shall confine our recitation of the facts

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 3 of 19

to those facts that are essential to our examination of the legal issues presented and to the issuance of our legal opinion in this matter. Further, we must point out that only a court may make a binding determination on the application of the City Charter; and only the State Commission on Ethics or a court may make a binding decision on the Ethics Code.

By motion adopted at the August 18, 2008 City Commission meeting, the City Commission approved the Land Purchase Contract by which the City was to acquire the Property from Howland Crossings, LLC ("Howland Crossings"). Commissioner Zischkau was one of the members of the City Commission who dissented from the adopted motion approving the Land Purchase Contract. The motion was approved by a 4-3 vote.

The transcript of the August 18, 2008, City Commission meeting reflects a warning by Commissioner Zischkau that he intended to sue the City in an effort to hold up the consummation of the Property purchase transaction. This warning is reflected on lines 4 through 14 of page 138 of the condensed print version of the Commission meeting transcript, which reads, as follows:¹

I'm going to have to sue the City on behalf of the taxpayers of Deltona, so you're going to need to change the covenant in 6.2.7 that says there's no litigation threatened against purchaser which would hold this up. And the lawsuit that I am contemplating on behalf – to protect our taxpayers is for a declaratory judgment injunction to prevent this Commission majority from violating Florida Statute 166.045.

¹ That transcript is on file in the Howland Crossings Litigation, as an exhibit to the Complaint.

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 4 of 19

Commissioner Zischkau did not file said litigation. Instead, he subsequently filed a petition (the "Petition") for a formal administrative hearing with the SJRWMD on November 25, 2009. Commissioner Zischkau's Petition attempted to assert that there were problems with the surface water management plan for the Property and the corresponding SJRWMD permit. Under the Land Purchase Contract, the seller (Howland Crossings) was obligated to obtain the SJRWMD permit as a condition to the closing of the transaction. Following an order of dismissal of his Petition and a motion adopted by the City Commission requesting that he withdraw said Petition, Commissioner Zischkau did file a Voluntary Dismissal of the Petition on December 22, 2009.

In the Petition, Commissioner Zischkau had sought, in his personal capacity, to challenge the SJRWMD surface water permit for the Property, based upon an alleged concern for storm water management related to property owned by him, that he alleged was located within 200 yards of the surface water retention pond for the Property. However, Commissioner Zischkau further sought to bolster his Petition, by alleging, in Paragraph 5 of the Petition, that:

Besides his interest as an affected homeowner, petitioner also has a substantial interest in this Application and Permit as a Commissioner of District 2 of the City of Deltona. City Commissioners have a fiduciary or quasi-fiduciary duty to the residents and land owners of the City of Deltona, among other things, to protect the common good and protect homeowners from public nuisances, and in some instances, private nuisances caused by the use of real property.

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 5 of 19

In Paragraph 6 of the Petition, Commissioner Zischkau further alleged that:

Petitioner therefore also makes these objections for the benefit of the affected homeowners in District 2 of the City of Deltona, and specifically those who own properties along Voltaire Street and downhill of the Retention Pond.

On December 18, 2009, Howland Crossings, as plaintiff, filed the Howland Crossings Litigation as a civil action for damages against Commissioner Zischkau in his personal capacity, based upon actions alleged to have been taken by him either personally and/or in an official capacity concerning his attempt to derail the Property transaction. Plaintiff's Complaint included counts for tortious interference with contract, slander of title, and abuse of process. On December 28, 2009, Commissioner Zischkau (as an attorney representing himself) filed an answer, affirmative defenses and counterclaims (collectively, the "Answer") in the Howland Crossings Litigation. Commissioner Zischkau's Answer seeks to recover costs and attorneys fees incurred by him in defending the Howland Crossings Litigation from Howland Crossings, and although his Answer does not directly sue or attack the City, he does seek to invalidate the Land Purchase Contract and to enjoin the Property transaction. The Howland Crossings litigation remains pending as of the date of this opinion.

At a special meeting held on December 30, 2009, the City Commission adopted a motion to enable the Property transaction to proceed to an escrow closing by approving certain closing proceeds to be held in escrow pending completion of certain punch list items. That motion was approved by a 4-3 vote, with Commissioner Zischkau fully participating and voting "no" on the adopted motion.

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 6 of 19

An escrow closing was held on the Property transaction later that day on December 30, 2009, before the December 31, 2009, deadline established by the Land Purchase Contract. It is our understanding that Howland Crossings is working to complete the remaining punch list items for the release of the escrowed funds, and it is expected that they will be successfully completed. The Property purchase will enable the City to build a fire station upon parcel number 2, and will enable the City to acquire and have land available in the future for a potential public safety and governmental complex on parcel number 7. Parcel number 2 is to be provided to the City in "pad ready" condition, so that the much-needed Fire Station may be built by the City in an expedited fashion.

We have omitted from this factual statement a description of the facts concerning the sufficiency of the Property appraisals that were furnished to the City and the alleged disparity, if any, between those Property appraisals, as furnished by two professional appraisers. We have also avoided any lengthy recitation of the arguments made by Commissioner Zischkau concerning the substance of the appraisals, both at the Commission meeting of August 18, 2008, and in the Howland Crossings Litigation. Those disputes and arguments relate to the matter of whether or not the City Commission motion approving the Land Purchase Contract was subject to the extraordinary vote required by Section 166.045, Florida Statutes, which, when applicable, provides for a majority plus one vote when a purchase price exceeds the average amount of two appraisals of value. We have omitted a detailed recitation of the appraisal controversy raised by Commissioner Zischkau, in his effort to support his argument (that a 5-2 vote was needed and

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 7 of 19

that the 4-3 vote of the City Commission was not sufficient), because those factual disputes are not material to our opinion.

However, it should be noted that the appraisal and extraordinary vote requirements of Section 166.045, Florida Statutes, are **not** generally applicable to routine municipal land purchase transactions. Instead, the statute is only applicable where the public records exemptions provided by the statute are *invoked*. Those public records exemptions enable a municipality to protect appraisals, offers and counter-offers from public inspection during the process of entering into a potential property purchase transaction. The public record provided to us in this matter suggests that Section 166.045, Florida Statutes, likely was **not** applicable, because it appears that the public records exemption was **not** invoked (although it may have been assumed by some participants that the extraordinary vote requirement of the statute would have applied if the purchase price was greater than the average of the two appraisals). The transcript of the August 18, 2008, City Commission meeting suggests at page 90, lines 2-5, that a public record exemption was **not** invoked, because the city attorney explained that:

When I questioned it, that's when they asked can I see the other appraisal. Absolutely. *Public record. There's no reason not to distribute those things.* (emphasis added)

The above quoted provision of the transcript appears to indicate that Section 166.045, Florida Statutes, does not apply, and accordingly that discussions, debate and arguments as to the alleged disparity and/or sufficiency of appraisals and the alleged need for a 5-2 vote of the Commission for the approval of the Land Purchase Contract are misplaced and irrelevant. In any event, the

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 8 of 19

dispute over the applicability of Section 166.045, Florida Statutes, is not determinative of our opinion as to the legal propriety of Commissioner Zischkau's actions. The lack of merit of Commissioner Zischkau's claims under Sec. 166.045, Florida Statutes, may impact the ultimate judicial decision in the Howland Crossings Litigation, but is not determinative of whether or not his conduct violated the Charter and Ethics Code.

It is of interest to note that two months subsequent to the August 18, 2008, Commission meeting, the Commission adopted City Code Sec.2-201, which provided for a land purchase procedure that is similar to Sec. 166.045, F.S. That new City Code provision is not applicable to the previously approved Property transaction.

b. Applicable Charter and Ethics Code Provisions.

In this portion of our opinion, we discuss those Charter and Ethics Code provisions which we found to be relevant.

(1) Charter Provisions.

The City Charter provision which we found to be relevant to our opinion is paragraph (11), "Noninterference by City Commission", of Section 5 of the City Charter, which reads, as follows:

(11) NONINTERFERENCE BY CITY COMMISSION. Except for the purpose of inquiry and information, the Commission and its members, including committees thereof, are expressly prohibited from **interfering with the performance of the duties of any city employee who is under the direct or indirect supervision of the**

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 9 of 19

City Manager or City Attorney. Such action shall be malfeasance within the meaning of Florida Statutes. (emphasis added)²

Additionally, we have examined and considered the provisions of paragraph (4) “Standards of Conduct” of Section 11 of the City Charter, which reads as follows:

(4) *STANDARDS OF CONDUCT.* All elected officials and employees of the City shall be subject to the standards of conduct for public officers and employees set by general law. In addition, the City Commission may, by ordinance, establish a code of ethics for officials and employees of the City which may be supplemental to general law, but in no case may such an ordinance diminish the provisions of general law.

City Charter Section 5(11) is clearly intended to apply to those situations where a Commissioner attempts to stop a City employee from performing his or her duties by, for example, ordering an employee who works under the jurisdiction of the City Manager to either do or not do something. One example of the application of that Charter provision would be if a Commissioner would attempt to order the City public works director not to pave that portion of a public street that abutted the property of a political opponent of the Commissioner. Charter Section 5(11) would also bar a Commissioner from standing in front of and blocking a City employee who was attempting to mow an overgrown lot or repair a swing at a City park, while threatening to “get even” with that employee if he or she persisted in performing his or her duties.

² The term “malfeasance” means intentional wrongdoing or misconduct by a public official. See Black’s Law Dictionary, 968 (7th Ed.1999).

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 10 of 19

We find nothing in the City Charter's noninterference provision that would apply to the activities and conduct of Commissioner Zischkau in reference to the Property. The activities and conduct of Commissioner Zischkau in reference to the Property primarily consisted of his comments, questions and votes at City Commission meetings and his activities in filing the administrative claims set forth in the Petition and in responding and counterclaiming in the Howland Crossings Litigation. As to the matters contested in the Petition, Commissioner Zischkau's actions in filing the petition, amount at most, to a disagreement with the City's staff and consultants as to the sufficiency of the SJRWMD surface water permits for the Property. Based upon the public record presented, he did not actively and directly interfere with the performance or actions of the City's staff or the City's consultants. By way of his Petition and Answer, he jousted with the SJRWMD and Howland Crossings, respectively, not with the City.

The matter of a violation of the non-interference provisions of Charter Section 5(11) is a serious one, because a violation, if any, of that prohibition is, pursuant to the last sentence of paragraph (11), categorized as "malfeasance within the meaning of Florida Statutes." Pursuant to Florida Statute Section 112.51(1) the Governor of the State of Florida may suspend any elected municipal official from office for "malfeasance." However, based upon the public records provided to us, we are not able to find any direct interference by Commissioner Zischkau with the performance of the City Manager's employees, in reference to his efforts to delay or obstruct the closing of the Property purchase transaction via the Petition and/or his Answer in the Howland Crossings Litigation or otherwise.

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 11 of 19

The provisions of paragraph (4) of Section 11 of the Charter, which enable supplemental ethics standards to be adopted, are discussed below within Section III (c) of this opinion. The City Commission has not adopted said supplemental ethics standards.

(2) Ethics Code Provisions.

An Ethics Code provision that is pertinent to our opinion is set forth in Paragraph (6) of Section 112.313, Florida Statutes, which reads, as follows:

(6) MISUSE OF PUBLIC POSITION. No public officer, employee of an agency, or local government attorney shall *corruptly use* or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with Section 104.31. (emphasis added)

We find that Commissioner Zischkau's activities and conduct fall short of clearly demonstrating a violation of Section 112.313(6), Florida Statutes, in that the element of "corruptly use" is absent from the public record concerning his activities and conduct. As noted in *Garner vs. State of Florida Commission on Ethics*, 439 So. 2d 894 (Fla.2d DCA1983):

Section 112.313(7) defines "corruptly" as "done with a wrongful intent and for the purpose of obtaining...any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his public duties."

The Ethics Code has been construed to target and condemn improper personal **financial** interests, not political interests. *See George v. City of Cocoa*, 78 F.3d 494 (11th Cir. 1996). The public record offers no evidence that Commissioner Zischkau sought any improper financial

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 12 of 19

benefit for himself in attacking the Property transaction. Instead, the public record reflects that he believed (perhaps stubbornly) that he knew best when it came to the matter of the wisdom of the purchase of the Property and the correct appraised value of such Property. Accordingly, we find that Commissioner Zischkau's activities and conduct concerning the Property do not contravene the misuse of public position prohibition of the Ethics Code as set forth in Sec. 112.313(6), Florida Statutes.

Although the Ethics Code is comprehensive, the limited reach of the existing Ethics Code may be understood by looking at an example from a similar situation that arose in another city. That other situation involves a different Ethics Code provision, but included a similar effort to bolster a private claim through allegations of an official status. In the Florida Commission on Ethics Final Order and Public Report In Re Joanne Fanizza, Final Order No. 05-086, February 1, 2005, the Ethics Commission found that a city council member, who sued her own city (the City of Wilton Manors) on behalf of herself and her clients who resided in the neighborhood of a property that had received a zoning special exception from that city, violated Sec.112.313(7), Florida Statutes. In that matter, Councilmember Fanizza had voted against the zoning special exception. As an attorney, she subsequently sued to overturn the city council action and, in including herself as a named plaintiff along with other neighbors in that suit, alleged that she sued "as City Council member who dissented from the City Council's action and as a property owner living in the same zoning district." That allegation was similar to Commissioner Zischkau's allegation in the Petition. See page 4, above. The Ethics Code provision at issue in

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 13 of 19

Fanizza (Section 112.313(7), Florida Statutes) bars a public official from having a contractual relationship that causes a conflict between his or her public duties and private interests. The contractual relationship involved in *Fanizza* consisted of that council member's representation of her clients who sued as plaintiffs. However, on appeal of that Ethics Commission ruling in *Fanizza v. Commission on Ethics*, 927 So.2d 23 (Fla. 4th DCA 2006), the Fourth District Court of Appeal **overturned** the order of the Ethics Commission and found that there was **no violation** of the Ethics Code by the appellant, council member. The Court found that her involvement in the litigation did not create a "continuing or frequently recurring conflict" between public duties and private interests and that it did not "impede the full and faithful discharge" of her public duties. However, in perhaps a tacit recognition that the situation did not look proper, the Court did admonish the attorney/council member that "as a lawyer, appellant should have known better."

Another Ethics Code provision that we have examined is Section 112.3143(3)(a), Florida Statutes, which provides, as follows:

(3)(a) **No** county, **municipal**, or other local public **officer** shall vote in an official capacity upon any measure which would **inure to his or her special private gain or loss**;...Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. (emphasis added)

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 14 of 19

At the time of the December 30, 2009, City Commission meeting there may have existed the potential for a concern as to the appearance of the existence of a special private gain or loss to Commissioner Zischkau, if the action taken by the City Commission on the Property closing would impact the Howland Crossing Litigation that was already pending against him (and in which he had already filed an Answer), in a manner that would inure to his special private gain or loss. However, our opinion is that it appears to be speculative and remote that **approval** of an escrow closing by the City Commission would necessarily serve to provide a special private gain or loss to Commissioner Zischkau in defending against the claims of Howland Crossings by avoiding or limiting the damages, if any, recoverable from him or by advancing or impeding his counterclaim against Howland Crossings. Howland Crossings alleged that damages had already been inflicted upon it. Likewise, it appears to be speculative and remote that **rejection** of an escrow closing by the City Commission would have defeated the claims of Howland Crossings or limited or expanded the damages, if any, recoverable from him or advanced or impeded Commissioner Zischkau's counterclaim against Howland Crossings. In Commission on Ethics Opinion CEO 76-24 (1976), it was explained that the test for a special private gain or loss does not turn on the nature of the official's vote—whether it is for or against the measure—but rather on whether the official will stand to gain or lose as a “direct result of the outcome of the board's decision.” The Commission on Ethics has steadfastly held that a special gain or loss will not be found where any such gain or loss is speculative or remote. See CEO 05-3 (2005) (“where the impact of a vote on the public officer's interests is uncertain at the time of the vote, the impact of

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 15 of 19

the vote would be remote and speculative and, thus, not a voting conflict”). The outcome of litigation often is, by its very nature, speculative and uncertain. The Howland Crossings Litigation is no exception to that common experience.

Accordingly, we are not able to conclude that under Section 112.3143, Florida Statutes, Commissioner Zischkau was precluded from voting on the Property escrow matter at the December 30, 2009, special Commission meeting. It suffices to say that it may have been a better practice for him to abstain from voting on the matter. Interestingly, Section 10(G) of Resolution 2008-6, (the “Commission Rules of Procedure”), which provides the Commission’s procedural rules, takes a more limited view of permissible abstention than Section 286.012 Florida Statutes. This is evident by comparing Section 286.012 Florida Statutes, which provides as follows:

286.012 Voting requirement at meetings of governmental bodies.—No member of any state, county, or municipal governmental board, commission, or agency who is present at any meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may 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, except when, with respect to any such member, *there is, or appears to be, a possible conflict of interest* under the provisions of s. 112.311, s. 112.313, or s. 112.3143. In such cases, said member shall comply with the disclosure requirements of s. 112.3143. (emphasis added);

with Section 10(G) of the Commission Rules of Procedure, which provides, as follows:

G. Abstaining from voting: No member of the City Commission shall abstain from voting except as provided in the Florida State Statutes, Chapter 112.3143, if the issue **would inure** to the person’s private gain. Accordingly, he or she must publicly state the nature of his or her interest in the issue at the time the item is to

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 16 of 19

be considered, and within fifteen (15) days after the abstention, he or she must file a "Memorandum of Voting Conflict", with the City Clerk. The proper form is available in the City Clerk's office. The Memorandum(s) will be attached to the minutes of that meeting and made a part thereof. (emphasis added)

Section 286.012, Florida Statutes, recognizes that abstention may be appropriate, not only when there is an actual conflict, but also when there **appears** to be a **possible** conflict.

c. Potential Remedial Action.

(1) Ideal Functioning of a Collegial Body.

Although Commissioner Zischkau's conduct concerning the Property may not have contravened the existing Charter or Ethics Code, his conduct may be viewed as contrary to the ideal behavior of a member of a collegial body. A collegial body, such as the City Commission, is characterized by the vesting of equal authority in each of its members. *See, e.g.*, Sec.112.3135(1)(b), Florida Statutes. That statute, which concerns nepotism in public employment or service, defines a "collegial body" as a "governmental entity marked by power or authority vested equally in each of a number of colleagues." This simply means that a governing body, such as the City Commission, functions best when the members respect each other as colleagues and share a common goal of advancing the best interests of the City. Vigorous debate may be engaged in by the members at the formal assembly of the body. However, once debate is complete and action taken, the conduct of each member should be supportive of or at least respectful of the will of the majority of the members. Further, it should be recognized that other than doing their respective homework in preparation for a Commission meeting, the essential

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 17 of 19

power and duty of a member of the Commission in a Commission-Manager form of government, as is provided by City Charter Section 3, is generally exercised only when the Commission body is duly assembled. When one member purports to act as a member outside of the assembly and takes action that is contrary to the action of the majority as taken at a meeting, the proper function of the collegial body may be impaired and disrupted. The City Commission has the authority to create additional ethics restrictions so as to avoid such disruption, and in order to advance the ethical and collegial function of the Commission.

City Charter Section 11(4) clearly preserves the authority of the City Commission to, by ordinance, create additional ethics code provisions. That City Charter provision is likewise supported by Section 112.326, Florida Statutes, which states that:

Nothing in this act shall prohibit the governing body of any political subdivision, by ordinance...from imposing upon its own officers and employees additional or more stringent standards of conduct and disclosure requirements than those specified in this part, provided that those standards of conduct and disclosure requirements do not otherwise conflict with the provisions of this part.

The above cited statutory provision, coupled with City Charter Section 11(4), authorize the City Commission to create additional standards of conduct. Although no such additional standards of conduct have yet been adopted, they may be adopted by the Commission.

Accordingly, the City Commission may elect to develop, adopt, and require the implementation of additional standards of conduct and ethics provisions that may, in the future, prevent some of the types of activities engaged in by Commissioner Zischkau concerning the Property.

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 18 of 19

(2) Examples of Potential Ethics Standards.

A few examples of a potential ethics provisions that may, after discussion and refinement, be considered for adoption via ordinance, are the following:

a. In the absence of consent by motion or resolution of the City Commission, no member of the City Commission shall file any pleading, petition or claim in any administrative or judicial proceeding by which he or she asserts or attempts to assert a claim, counterclaim or basis for relief predicated upon his or her status as a member of the City Commission, for the purpose of attempting to bolster, advance or support his or her private cause of action or private claims. This provision shall not preclude the assertion of a Commission member's official capacity when necessary to demonstrate an immunity defense as authorized by law.

b. No member of the City Commission shall vote on or participate in any way in any matter presented to the City Commission if said Commission member would or might, directly or indirectly, profit or be enhanced by the action of the Commission and said member shall absent himself or herself from the Commission meeting during the discussion of the subject item.

c. No member of the City Commission shall vote on any matter where the decision will directly affect him or her in a manner, financially or otherwise, distinct from the manner in which the vote will impact a substantial portion of City residents, businesses or property owners, or where the Commission member knows that the decision will have a similar direct effect on any principal by whom he or she is retained, or the parent organization or subsidiary of a corporate principal by which he or she is retained, or his relative or business associate.

IV. Conclusion.

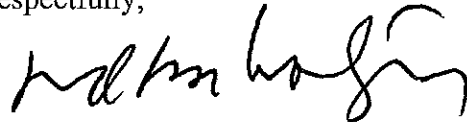
For the reasons indicated above, it is our opinion that Commissioner Zischkau has not violated the City Charter or Ethics Code concerning the Property transaction. Further, the

Faith G. Miller, MPA, MMC, City Manager
City of Deltona
February 1, 2010
Page 19 of 19

Commission has the authority, by ordinance, to adopt additional ethics standards governing City Commission members.

Please distribute this opinion to all Commission members as provided by the Commission's motion of December 9, 2009. We appreciate the opportunity to be of service to the City. Please advise us if there are any questions or if we may be of further assistance on this or any other matter.

Respectfully,

A handwritten signature in black ink, appearing to read "David M. Wolpin". The signature is fluid and cursive, with a large, stylized initial "D".

DAVID M. WOLPIN