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January 27, 2023

Brunswick County District Attorney's Office Press Release

State Auditor's Report Concerning Ocean Isle Beach Mayor Debbie Smith

In January of 2022 my office received an investigative report from the Office of the State Auditor in reference to alleged misconduct by Debbie Sloan Smith, Mayor of Ocean Isle Beach. This report made two key findings. First, the report detailed that Smith, in her role as mayor, derived direct benefit by making and administering a contract for property she acquired from the Town of Ocean Isle Beach in violation of N.C. Gen. Stat. § 14-234. Second, the Auditor's report made a finding that Smith, in her role as mayor, acquired property from the Town of Ocean Isle Beach using nonpublic information in violation of N.C. Gen. Stat. § 14-234.1. The first time I was made aware of the State Auditor's report was the day that her office released the report to the public. I immediately read the allegations and investigative details disclosed within the report. Additionally, I made a request that the North Carolina State Bureau of Investigation perform an independent investigation into Mayor Smith to determine if any criminal statutes had been violated from the real estate acquisition from the Town of Ocean Isle Beach. Upon the SBI completing its investigation, I reviewed the findings and made a request to the North Carolina Conference of District Attorneys to review all the underlying facts and render an independent legal opinion as to whether criminal charges were warranted against Mayor Smith. I made this request to avoid even the appearance of impropriety by me or members of my office. The Conference agreed to perform an independent analysis and render a charging recommendation. Having received that opinion and recommendation from the Conference (Attached), I concur that there is insufficient evidence to warrant prosecution of Mayor Smith.

As stated in the letter from the Conference, "The focus of a prosecutor must always be to administer the criminal laws of North Carolina fairly and impartially regardless of the individuals involved. Without question, the acquisition of the Town property by Smith's real estate company could have been handled in a more professional manner. However, this fact alone does not merit the initiation of any additional criminal proceedings."

NORTH CAROLINA

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CASE REVIEW SUMMARY

Kimberly Overton Spahos
Executive Director

To: Executive Director Kimberly O. Spahos, NC Conference of District Attorneys

P.O. Box 3159
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CC: District Attorney Jonathan M. David, Prosecutorial District 15

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From: Chief Financial Crimes Prosecutor Jordan M. Ford, NC Conference of District Attorneys

Date: Tuesday, January 10th, 2023

Re: Debbie Sloane Smith (Prosecutorial District 15 | Case Review)

Director Spahos,

I have completed my review of the Debbie Sloane Smith (Smith) matter. The details of my review are contained below. Please let me know if I can be of further assistance or answer any additional questions.

SCOPE OF REVIEW

This case originated with a request for review from the Elected District Attorney for Prosecutorial District 15, Jonathan David. District Attorney David asked that our unit provide an independent review of the underlying facts to determine if criminal charges were warranted against Smith. Based on my review, no criminal charges should be pursued against Smith at this time.

I began my assessment of the Smith matter by evaluating a January 2022 Investigative Report from the North Carolina Office of the State Auditor (State Auditor) concerning the Town of Ocean Isle Beach (Auditor Report).¹ I have also reviewed a May 2022 Investigative Report from the North Carolina State Bureau of Investigation concerning the same matter (SBI Report).² The SBI Report was requested by District Attorney David after he reviewed the Auditor Report and contains interviews with two additional witnesses.³ Furthermore, my team conducted independent research in several areas relevant to the investigation.

As you know, evidence in a criminal case must satisfy the highest burden of proof in our judicial system: proof beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces another of the defendant's guilt.⁴ Without more in a criminal proceeding, a prosecutor would be remiss in his sworn duty to seek justice. Furthermore, a prosecutor holds several special responsibilities not imputed to other licensed attorneys in this state.⁵ Among those is the specific obligation to see that guilt is decided upon the basis of sufficient

1. See Exhibit 1: North Carolina Office of the State Auditor Investigator Report from January 2022 regarding the Town of Ocean Isle Beach.

2. See Exhibit 2: North Carolina State Bureau of Investigation Report from May 2022 published pursuant to a limited assistance request from District Attorney Jonathan M. David; note that the Auditor Report has been removed from Exhibit 2 and attached separately as Exhibit 1.

3. Following his review of the Auditor Report, District Attorney David determined that the Auditor had not thoroughly interviewed the two real estate appraisers, Jim McNeill and Mike Powell, who initially valued the subject Property. District Attorney David requested that the SBI conduct complete interviews of these two individuals. The SBI Report containing these additional interviews confirms that the appraisal of the Property performed by McNeill and Powell was free from any outside pressure or undue influence. Additionally, there is no evidence that any person attempted to influence any aspect of their appraisal.

4. *State v. Britt*, 270 N.C. 416, 419 (1967).

5. See Rule 3.8 – Special Responsibilities of a Prosecutor, N.C. Rules of Professional Conduct r.3.8 (2022).

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evidence.⁶ For the purposes of this review, it is important to note that the State Auditor is not bound by these same responsibilities when making its decisions and recommendations.

BACKGROUND

Smith is the Mayor of the Town of Ocean Isle Beach (Town). The Town is located in Brunswick County, North Carolina. The Town provides general government services including law enforcement and public works services to approximately 640 year-round residents. Smith is also one of the owners of Sloane Realty, a real estate company operating primarily in the Brunswick County, NC area. The key findings detailed in the Auditor Report stem from the acquisition of the Town police department building and land (Property) by Smith's real estate company.⁷ The Auditor Report states that it referred two of the four key findings from its investigation to District Attorney David. These two key findings were referred to determine whether sufficient evidence exists to pursue criminal charges against Smith.

ANALYSIS

• Key Finding 1

The first key finding states that Smith, in her role as Mayor of the Town, derived a direct benefit by making and administering a contract for property she acquired from the Town. The Auditor Report indicates that because of these actions, Smith violated N.C. Gen. Stat. § 14-234.⁸ Section 14-234(a)(1) prohibits public officers from making or administering a contract on behalf of a public agency where they would derive a direct benefit from the contract. Section 14-234(d1) contains four provisions that, when satisfied, provide an exception to subdivision(a)(1) for small jurisdictions. Section 14-234(d1)(1) specifically exempts "contracts . . . where the amount does not exceed twenty thousand dollars (\$20,000) for medically related services and forty thousand dollars (\$40,000) for other goods or services within a 12-month period."

The Auditor Report states that section 14-234(d1) did not apply to the Smith transaction because the contract amount exceeded \$40,000.⁹ In support of its position, the Auditor Report cites a singular blog post from the University of North Carolina School of Government that notes the statute does not indicate the exception can be used for contracts involving real property transactions.¹⁰ The Auditor Report omits language from the same blog post which indicates the exception may apply under those same circumstances. The Auditor Report also acknowledges that Smith acted on the advice of counsel from Town Attorney Mike Isenberg (Isenberg). The Auditor Report recommended the Town ensure Isenberg remains knowledgeable in legal matters relating to local government, including conflicts of interest. Unlike its guidance related to Smith, the Auditor Report did not provide any additional recommendations related to Isenberg nor did it request District Attorney David to evaluate Isenberg's conduct for potential criminal activity.

A plain reading of section 14-234(d1) would expressly permit the Smith transaction as an exception to section 14-234(a)(1). However, my research has provided no definitive answer to the question of whether this exception would or should apply to the Smith transaction. Additionally, the Auditor Report indicates that Isenberg should enhance his knowledge base in the areas of local government and conflicts of interest. Given that Smith relied on Isenberg's counsel, it would be improper to pursue a criminal action based on her subsequent conduct related to Isenberg's guidance. Given the unclear nature of how section 14-234 may be applied, the use of a reasonable

6. *Id.*

7. Sloane Realty, a real estate company in which Smith holds a 50% ownership interest, purchased the Ocean Isle Beach Police Department building and land, located at 2 West Third Street, Ocean Isle Beach, NC, on November 5, 2020, for \$460,670.

8. See Exhibit 3: N.C. Gen. Stat. § 14-234 (2022).

9. Citing N.C. Gen. Stat. §14-234(d1)(1).

10. See Exhibit 4: Frayda S. Bluestein, *The North Carolina Criminal Self-Dealing Statute (G.S. 14-234): Five Things You Should Know*, COATES' CANONS: NC LOCAL GOV'T LAW (Jun. 26th, 2015), <http://canons.sog.unc.edu/2015/06/the-north-carolina-criminal-self-dealing-statute-g-s-14-234-five-things-you-should-know/>.

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interpretation of the law by Isenberg, and the reliance Smith placed upon the advice of Isenberg, I cannot recommend any criminal prosecution for Smith's actions. Moreover, even if the law allowed criminal prosecution under these circumstances, I am confident the State would be unable to prove its case beyond a reasonable doubt. Therefore, I recommend that no criminal charges be pursued against Smith related to the first key finding in the Auditor Report.

- **Key Finding 2**

The second key finding states that Smith, in her role as Mayor of the Town, acquired Town property using nonpublic information. The Auditor Report indicates that because of these actions, Smith violated N.C. Gen. Stat. § 14-234.1.¹¹ Section 14-234.1(a) prohibits any officer or employee of the State or any of its political subdivisions from using confidential information gained in their official capacity to acquire a financial interest in property.¹²

The Auditor Report acknowledges that the Town appropriately and timely disclosed at least six pieces of information to the public before Smith acquired any pecuniary interest in the Property.¹³ However, the Auditor Report states that Smith had access to two other pieces of privileged information not available to the public: (1) the intended sale price for the Property; and (2) the intended time frame for selling the Property. The Auditor Report states that Smith obtained this information during closed-session meetings of the Town's Board of Commissioners (Board). Furthermore, the Auditor Report states that Smith used these pieces of information in structuring her real estate company's offer to purchase and contract and was therefore the first and lowest bidder on the Property.

The Board announced in February 2018 that it had received an inquiry about purchasing the Property. Thereafter, the Board voted unanimously to obtain an appraisal of the Property. The evidence shows that the appraisal was obtained for the express purpose of selling the Property. Consequently, the public was made aware that the Town intended to entertain offers on the Property and sell the Property in February 2018. The appraisal was completed and received by the Town in March 2018. Once received, the appraisal was made a public record and available for inspection and copying by the public. In September 2018, the agenda packet for an upcoming Board meeting was made public. The agenda packet contained a copy of the appraisal and Sloane Realty's offer to purchase the Property. The public provided comments during the September 2018 Open Forum and the Public Comment Section of the September 2018 Board meeting. Smith acquired a pecuniary interest in the property in October 2018 when the Board voted to accept Sloane Realty's offer. The Board was continuously advised by Isenberg that it had the right to reject all offers at any time, including the offer from Sloane Realty.

The evidence does not indicate the Town ever developed a specific sale price for the Property before receiving the initial offer to purchase from Sloane Realty. Additionally, there is no evidence that Smith had access to any price for the Property outside of the amount listed in the March 2018 appraisal. The offer from Sloane Realty and subsequent purchase of the Property was for approximately the same amount as the original appraisal. While there may be a dispute about the effectiveness of the Board's method of advertisement, the substantive information regarding the sale price for the Property was made available to the public as required.

There is also no evidence to indicate that the Town ever set forth a specific timeline for the sale of the Property. Instead, the evidence indicates the Town was willing to begin accepting offers in February 2018 and did not have a time certain within which it would stop accepting offers to sell the Property. Once Sloane Realty provided its offer on the property, the Town properly executed the advertisement and upset bid process in accordance with the appropriate North Carolina laws.¹⁴

Finally, the evidence does not support the Auditor Report's claim that Smith obtained non-public information during two closed-session meetings of the Board.¹⁵ Instead, the evidence shows that the intended purpose of each

11. See Exhibit 5: N.C. Gen. Stat. § 14-234.1 (2022).

12. *Id.*

13. (1) The Town's interest in entertaining offers on this property to the point the Board unanimously voted to obtain an appraisal; (2) The fact that an appraisal was obtained; (3) The offer made by the Mayor's real estate company; (4) The Mayor's affiliation with her real estate company; (5) That both the offer and the appraisal were available for public inspection; and (6) That the public had a right to submit offers to purchase the property.

14. It is important to note that the Auditor Report does not dispute that the Town followed the appropriate course of action for the advertisement and upset bid process.

15. The two Board meetings in contention occurred on May 8, 2018, and June 12, 2018.

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meeting was appropriate and the proper topics were discussed during each of those closed-session meetings. The Town admits that the sale of the Property came up briefly at the conclusion of both meetings. However, the evidence shows that the sale price and time frame for selling the Property were not discussed. In the first meeting, the Board directed an offer be made to a member of the public who had expressed an interest in purchasing the Property. In the second meeting, the Board was informed that the member of the public who had previously expressed an interest in purchasing the Property had not responded to the Town and therefore no action was taken.

It is worth noting that the Auditor Report states that this “member of the public” was asked if he ever received an offer to sell the Property from the Town and he responded “No.” The “member of the public” was later identified during our investigation as an individual named Bo Tate (Tate). In an email dated December 13, 2021, Tate disputes the findings of the Auditor Report and states that he never told any investigator that he was not contacted by the Town about the sale of the Property.¹⁶

I have found no evidence that proves, beyond a reasonable doubt, that Smith utilized her role as Mayor of the Town to acquire Town property using nonpublic information. As such, the State lacks the necessary evidence to proceed with criminal prosecution under N.C. Gen. Stat. § 14-234.1. Therefore, I recommend that no criminal charges be pursued against Smith related to the second key finding in the Auditor Report.

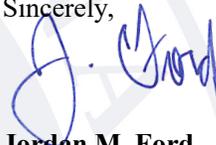
RECOMMENDATION

I have spoken with numerous individuals associated with this case and reviewed the file independently on several occasions. I have also obtained input from other prosecutors on my team and within our office. I understand the analysis contained in the Auditor Report and respect its findings and recommendations. However, the burden of proof in the criminal justice system is much higher than that applied by the State Auditor, and for good reason.

The focus of a prosecutor must always be to administer the criminal laws of North Carolina fairly and impartially regardless of the individuals involved. Without question, the acquisition of the Town Property by Smith’s real estate company could have been handled in a more professional manner. However, this fact alone does not merit the initiation of any additional criminal proceedings.

The totality of the evidence I have reviewed in this case, while concerning, is legally insufficient to proceed with criminal charges. Based on the information available for my review, no criminal charges should be pursued against Smith at this time. As such, I recommend that we decline prosecution in this matter and take no further action.

Sincerely,



Jordan M. Ford

Chief Financial Crimes Prosecutor
NC Conference of District Attorneys

16. See Exhibit 6: Email dated December 13, 2021, from Bo Tate to Isenberg.