

City of Belle Isle City Council Workshop

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ESTABLISHED 1935

ATTORNEYS AND COUNSELORS AT LAW

Sunshine Law

Section 286.011, Florida Statutes

- ▶ Council members are subject to the Government in the Sunshine Law.
- ▶ The law has been applied to any gathering between two or more members of the same board to discuss some matter which will foreseeably come before that board for action. There is no requirement for a quorum to be present for a meeting to be subject to Sunshine Law.
- ▶ There are three basic requirements of Sec. 286.011, Fla. Stat.:
 - ▶ Meetings of Board must be open to the public;
 - ▶ Reasonable notice of such meetings must be given; and
 - ▶ Minutes of the meetings must be taken.

Sunshine Law

- ▶ Discussions between two or more members of the same Board to discuss with, solicit opinions and comments from, or inform other members of a subject which will be or foreseeable will be discussed at a public meeting of the Council is a violation of the Sunshine Law.
- ▶ The key is for each member of the Council to not have any discussion with any other member of the Council concerning City business which will foreseeably come before the Council for a decision unless it is during a public meeting of the Council.
- ▶ Meeting with another Commissioner includes communications by:
 - ▶ In person meetings
 - ▶ E-mail, social media, internet blogs, etc.
 - ▶ Memos, mail, passing notes, letters, etc.
 - ▶ Telephone
 - ▶ Use of non-board member liaisons between members

Sunshine Law

- ▶ Even during the public meeting, refrain from passing notes or whispering comments between other Commissioners concerning matters pending or likely to come before the Council.
- ▶ When receiving emails from the City staff or members of the public directed to the two or more members of the Council regarding City business foreseeably to come before the Council, Do Not “Reply All” to the email, as it creates the potential for a Sunshine Law violation.
- ▶ If you have questions or comments about a City staff member’s email to the Commissioners, reply only to the City staff member or call the City staff member to discuss.

Sunshine Law

Penalties for Violations

- ▶ Any Commissioner who *knowingly* violates the Sunshine Law is guilty of a misdemeanor of the second degree, which is punishable by imprisonment up to 60 days and/or a fine of \$500.00.
- ▶ Suspension upon indictment and removal from office upon conviction.
- ▶ Non-criminal penalties for violations are punishable by a fine up to \$500.00 and reasonable attorney's fees assessed against the violating member.
- ▶ Commission actions taken in violation or tainted by a violation of the Sunshine Law may be void.

Public Records

- ▶ E-mail messages, text messages, social media posts, other written correspondence, recordings, pictures, videos, or other records generated or received by a Council member in connection with City business are public records and subject to disclosure in the absence of a statutory exemption from public inspection.
- ▶ Under Chapter 119, Florida Statutes (the Public Records Act), it is the nature of the record itself, not its physical location, which determines whether a record qualifies as a “public record.”
- ▶ Even texts or emails generated or received on private email account or privately owned cell phones can be a public record if it relates to City business.

Public Records

- ▶ Public records are subject to public inspection and proper retention.
- ▶ The City Clerk is the custodian of the City's records.
- ▶ If you generate or receive public records during your service on the Council for which the City Clerk or the City's computer server would not otherwise have the original or copy, for record keeping purposes, it is a good practice and highly recommended that you provide the City Clerk a copy of such record for preservation and maintenance.

Quasi-Judicial Proceedings

A quasi-judicial proceeding is a proceeding in which the Council is applying an existing ordinance, rule or policy to a small number of people or a particular piece of property.

Except for annexations and comprehensive plan amendments (legislative decisions), most of the land development decisions of the Council are quasi-judicial in nature, including:

- ▶ Rezoning, variances, special exceptions, and lot splits

In a quasi-judicial proceeding, certain elements of due process must be afforded the applicants and participants, such as:

- ▶ Reasonable notice of a hearing
- ▶ Right to be heard and submit evidence at the hearing
- ▶ Recommendations and decisions of board must be based on competent substantial evidence in the record.
- ▶ Conduct of proceedings must be in accordance with established rules and principles such that interested parties may meaningfully participate in the process

Refrain from taking a position for or against an application that involves a quasi-judicial decision until after hearing all the evidence presented at the public hearing.

Avoid making statements in advance of Council deliberations that would subject you or the Council to scrutiny for having your mind made up or being prejudicially biased for or against an application and/or interested party/person.

Decision Based on Criteria

- ▶ Quasi-judicial decisions should be based on the applicable criteria for the approval or matter being sought.
- ▶ Each type of development application has a set of criteria set forth in the City's Code.
- ▶ The Council's duty is to determine whether based on competent, substantial evidence in the record made at the hearing, the application meets or fails to meet the criteria. If the criteria is met, the application is to be approved.

Competent Substantial Evidence

- ▶ Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred.
- ▶ For the “substantial” evidence to also constitute “competent” evidence, the evidence relied upon should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support for the conclusion reached.
- ▶ Some of the items that can be relied upon as competent substantial evidence are:
 - ❖ City staff reports and testimony
 - ❖ Fact based applicant and citizen testimony
 - ❖ Comprehensive plan and zoning maps and ordinances
 - ❖ Expert testimony and reports.

Ex parte Communications

- ▶ Communications with persons or parties to quasi-judicial proceedings outside of the public hearing, may constitute a presumptive prejudice of the other party's due process rights and be a basis for challenging the Council's decision.
- ▶ Parties to a quasi-judicial proceeding include the applicant, persons speaking for or against the application, and city staff.
- ▶ Pursuant to section 286.0115(1), Florida Statutes, if ex parte communications are sent or received by a Council member, it is necessary for the member to disclose during the public hearing and before final action the subject of the ex parte communications and the identity of the person, group, or entity with whom the communications took place.
- ▶ The recommended time for such ex parte disclosures is prior to the applicant or members of the public speaking on the matter so that they are aware of such disclosures before they are afforded an opportunity to speak.

Suggested Order of Quasi-Judicial Proceeding

- (1) Announce agenda item.
- (2) Disclosure of *ex parte* communications by City Council members;
- (3) Introduction or presentation of application or proposal by City staff (Council may ask questions);
- (2) Applicant's presentation in chief (Council may ask questions);
- (3) Supporters/objectors/and other public comments (Council may ask questions)
- (4) Applicant's rebuttal to any public comments (Council may ask questions)
- (5) Close Public Comments
- (6) Deliberations and questions among the City Council
- (7) Action by City Council. Motion, Second, Discussion on Motion and Call the Vote.

Denial of Development Permits

- ▶ Section 166.033, Florida Statutes states that when a municipality denies an application for a development permit, the municipality shall give written notice to the applicant and the notice must include a citation to authority for denial of the permit.
- ▶ If the Council denies an application, written notice of the denial must be given to the applicant and must contain the legal basis for such denial.
- ▶ Therefore, in order to assist the City staff in their preparation of the required notice, the Commissioner making the motion for denial (and others supporting the motion) of a development permit application should announce all of the code provisions/criterion with which the application does not comply.

Ethics Training Statutory Requirement

Section 112.3142, Florida Statutes

Ethics training for specified constitutional officers and elected municipal officers.—All elected municipal officers must complete 4 hours of ethics training **each calendar year** which addresses, at a minimum, s. 8, Art. II of the State Constitution, the Code of Ethics for Public Officers and Employees, and the public records and public meetings laws of this state.

Portions of Art. II, Sec. 8, Florida Constitution:

- ▶ A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:
 - ▶ All public officers...shall file full and public disclosure of their financial interests;
 - ▶ All elected public officers and candidates for such offices shall report and file full and public disclosure of their campaign finances;
 - ▶ Any public officer or employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the state for all financial benefits obtained by such actions. The manner of recovery and additional damages may be provided by law;
 - ▶ Any public officer or employee who is convicted of a felony involving breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law;
 - ▶ There shall be an independent commission to conduct investigations and make public reports on all complaints concerning breach of public trust;
 - ▶ These provisions are not construed so as to limit disclosures and prohibitions that may be established by law to preserve the public trust and conflicts of interest.

Who Decides if there was a Voting Conflict or an Ethics Code Violation?

- ▶ Answer: The Florida Commission on Ethics
- ▶ The Commission on Ethics has a staff that investigates and prosecutes ethics violations when a complaint is filed.
- ▶ The Commission on Ethics also issues opinions with regard to what would or would not constitute an ethics code violation.
- ▶ <http://www.ethics.state.fl.us/>

Voting Conflicts

Section 286.012, Florida Statutes, provides that no Commissioner who is present at any Council meeting at which a official decision, ruling, or other official act is to be taken or adopted may abstain from voting, except

- ▶ when, with respect to any such Commissioner, there is, or appears to be, a possible conflict of interest prescribed in Chapter 112, Florida Statutes; or
- ▶ in a quasi-judicial proceeding, the Commissioner abstains from voting to assure a fair proceeding free from potential bias or prejudice.

Voting Conflicts

Chapter 112, Florida Statutes

- ▶ No Commissioner shall vote upon any matter which:
 - ▶ would inure to the Commissioner's special private gain or loss;
 - ▶ the Commissioner knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained;
 - ▶ He or she knows would inure to the special private gain or loss or a relative or business associate of the member.

Voting Conflicts

Chapter 112, Florida Statutes

- ▶ A Commissioner with a voting conflict shall:
 - ▶ Abstain from voting on the conflicting matter.
- ▶ Prior to the vote being taken, publicly state to the assembly the nature of the Commissioner's interest in the matter from which he or she is abstaining from voting. Recommend that the disclosure occur after the item is first called.
- ▶ 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 recording the Council minutes.

Participation in Matter Where Voting Conflicts Exist

State law allows members of elected governing bodies to participate in the discussion, but a member who does so should be careful to avoid misuse of position (Section 112.313(6), Fla. Stat.).

Also consider the appearance of impropriety.

To avoid complaints it is better to keep quiet on matters for which you are abstaining from voting for a conflict of interest.

Voting Conflicts of Interest

Section 112.3143(1)(d), Fla. Stat.

“Special private gain or loss” = economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, unless the measure affects a class of persons, in which case there are statutory factors to consider. How to measure if officer is part of a class affected by the vote or action?

Minimum factors to be considered:

- ▶ size of the class;
- ▶ nature of the interests involved;
- ▶ degree to which all class members are affected;
- ▶ benefit or burden received by official compared to others in class; and
- ▶ The degree of uncertainty as to economic benefit or harm and, if it is uncertain, the nature or degree of the economic benefit or harm must also be considered.

Size of Class Test:

Size of Class Examined on a Case-by-Case Basis:

Example: In CEO 90-17, a Town of Melbourne Beach Commissioner lived in a subdivision with 83 lots, and owned 1.2% of the lots. Could he vote to impose a special assessment on all 83 lots to dredge canals for drainage of the subdivision? Because his interest was so small in comparison to the size of the class, no voting conflict of interest.

Example: In CEO 96-12, a county commissioner was found to have no voting conflict related to a proposed convention center project where the commissioner owned four out of 605 parcels that would be affected by the project (about 0.70%)

Example: In CEO 23-3 a City Council member owned 1 of 88 residences (1.1%) that would benefit from a septic to sewer conversion program with city funding, and in a tier of 18 homes that would receive more funding than the other 70 homes in the program. Commission on Ethics says that the Council member must abstain from voting.

Key point: There is not a bright line rule but if you are more than 1% of the class affected by the vote, you likely have a voting conflict of interest based on Commission on Ethics' opinions.

An Alternative Test: the Remote & Speculative Test

- ▶ If the interest of the voting official or that of his principal, business associate, or relative is remote and speculative enough, then a voting conflict of interest will not be found to exist.
- ▶ However, remember that you may abstain if there appears to be a possible conflict of interest.

Gift and Financial Disclosures for Public Officers

Section 112.3148, Fla. Stat.

- ▶ There are gift restrictions for all reporting individuals who must file financial disclosures, including City Commissioners.
- ▶ If the gift is under \$100, no reporting required (However, PAC/lobbyist/vendors doing business with the City must report between gifts valued between \$25 and \$100).
- ▶ If the gift is over \$100 and not from a PAC/lobbyist/vendor doing business with the City, you can accept and but must report it. You must report every gift received exceeding \$100 in value using the forms provided by the Commission on Ethics. However, there is no reporting required if gift is from a relative as defined by Section 112.312(12), Fla. Stat.
 - ▶ Relative for gift purposes means an individual who is related to a public officer or employee as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, grandparent, great grandparent, grandchild, great grandchild, step grandparent, step great grandparent, step grandchild, step great grandchild, person who is engaged to be married to the public officer or employee or who otherwise holds himself or herself out as or is generally known as the person whom the public officer or employee intends to marry or with whom the public officer or employee intends to form a household, or any other natural person having the same legal residence as the public officer or employee.
- ▶ If the gift is over \$100 and from a PAC/lobbyist/vendor doing business with the City, you cannot accept.
- ▶ Cannot solicit a gift of any value from a PAC/lobbyist/vendor for personal benefit or that of a parent, spouse, child or sibling or for the personal benefit of another person required to report gifts under the law.

Gift and Financial Disclosures for Public Officers & Employees

Section 112.3148, Fla. Stat.

- ▶ Applies to elected officials, members of planning and zoning boards, community redevelopment area boards and boards of adjustments
- ▶ Does not apply to citizen advisory boards or technical coordinating committees
- ▶ Applies to manager or administrator, attorney, finance director, chief building code inspector, water resources coordinator, pollution or environmental control director, police/fire chief, clerk, and purchasing agent of municipality or county

What is a “Lobbyist” Under State Law?

A “lobbyist” is any person who, for compensation, seeks, or has sought during the preceding 12 months, to influence the governmental decision-making of a reporting individual or procurement employee or his or her agency.

What is a “Gift” Under State Law?

Anything accepted by a person or on that person's behalf . . . for which an equal or greater consideration is not given within 90 days of the receipt of the gift.
Sec. 112.312(12)(a), Fla. Stat.

Included in a “Gift”

- ▶ real property or the use thereof;
- ▶ tangible or intangible personal property or the use thereof;
- ▶ a preferential rate or terms on a transaction not available to others similarly situated;
- ▶ forgiveness of a debt;
- ▶ transportation (unless provided by an agency in relation to officially approved governmental business), lodging, or parking;
- ▶ food or beverage;
- ▶ dues, fees, and tickets;
- ▶ plants and flowers;
- ▶ personal services for which a fee is normally charged by the provider; and
- ▶ any other thing or service having an attributable value.

See §112.312(12)(a), Fla. Stat.

Excluded from a “Gift”

- ▶ salary, benefits, services, fees, gifts, commissions, or expenses associated primarily with one's employment, business, or service as an officer or director of a corporation or organization;
- ▶ campaign contributions or expenditures pursuant to the election laws;
- ▶ an honorarium or honorarium expense; an award, plaque, certificate, etc., given in recognition of public, civic, charitable, or professional service;
- ▶ honorary membership in a service or fraternal organization;
- ▶ the use of a public facility or public property made available by a governmental agency for a public purpose; and
- ▶ transportation provided by an agency in relation to officially approved governmental business. See §112.312(12)(b), Fla. Stat.; Rule 34-13.214, Fla. Admin. Code.

Gifts Seeking To Influence Public Official

Section 112.313(4), Fla. Stat.

- ▶ May not accept anything of value when you know, or should know with the exercise of reasonable care, that it is being given to influence a vote or other official action
- ▶ Applies to the official, the official's spouse and minor children.

Misuse of Public Position by Public Official/Employee/Attorney

Section 112.313(6), Fla. Stat.

- ▶ May not “corruptly” use or attempt to use position to obtain a special privilege for self or for another
- ▶ “Corruptly” means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties. §112.312(9), Fla. Stat.
- ▶ To make a corrupt use of one’s position, one must act “with reasonable notice that conduct was inconsistent with the proper performance of [one’s] . . . public duties and would be a violation of the law or the code of ethics.” *Blackburn v. Commission on Ethics*, 589 So. 2d 431 (Fla. 1st DCA 1991).

Examples:

Corrupt Use of Position

Use of agency business cards. CEO 02-13: an elected official who distributes a City business card with the intent of promoting himself or herself for personal profit or gain is engaging in a “corrupt use” of one’s position.

- ▶ City business cards have a nominal cost to the governmental agency. Elected officials regularly distribute the cards to identify themselves to constituents and others to promote the community that elected them.
- ▶ Do not use a city business card as a means of introducing yourself when engaged in personal business matters, but you can use your city business card when there is a valid public purpose for doing so.
- ▶ Law is not violated in situations where there is a valid public purpose for the use, notwithstanding that the use provides an *incidental* private benefit to the official.

Disclosure/Use of Information By Public Official

Section 112.313(8), Fla. Stat.

- ▶ A current or former public officer, employee of an agency, or local government attorney may not disclose or use information not available to members of the general public and gained by reason of his or her official position, except for information relating exclusively to governmental practices, for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity.

Prohibition of Public Official Doing Business with City

Section 112.313(3), Fla. Stat.

- ▶ While acting in official capacity, may not purchase, rent or lease any realty, goods or services for the City from a business entity in which the official owns a material interest (more than 5%), or is an officer/director/partner.
- ▶ While acting in private capacity, may not sell, rent or lease any realty, goods or services to the City.
- ▶ There are a few exemptions. Consult with City Attorney if questions.

Conflicting Employment for Public Officer

Section 112.313(7), Fla. Stat.

- ▶ May not have employment or contract with an entity doing business with or regulated by the City.
- ▶ May not have employment or contractual relationship that will pose a continuing or frequently recurring conflict between private interest and public duty, or which will impede the full and faithful discharge of public duties (See *Zerweck* case on next slide).
- ▶ There are a few exemptions. Also, this shall not be construed to prevent employment if it doesn't interfere with faithful discharge of duties. See Section 112.316, Fla. Stat.

Penalties for Public Officers Under State Code of Ethics

Section 112.317(1)(a)-(b)

- ▶ Impeachment, suspension or removal from office and public censure and reprimand for officers
- ▶ Dismissal, suspension, demotion, or salary reduction for employees
- ▶ Forfeiture of part of public salary or compensation
- ▶ Civil penalty not to exceed \$10,000
- ▶ Restitution of pecuniary benefit received

Charter Prohibitions

► Sec. 3.10. Prohibitions.

- (A) *Holding other office.* No former commissioner or mayor for the city shall be employed, volunteer for, hold any compensated appointive city office of employment, or be retained as a consultant with the city until two years after the expiration of the term for which he/she was elected.
- (B) *Appointments and removals.* Except to the extent provided otherwise in this charter, neither the mayor nor any commissioners shall in any manner dictate the appointment or removal of any city employee, the city manager or any other office outlined in this charter. The city manager or any of his subordinates at his direction are empowered to appoint, but the council may express its views and fully and freely discuss with the city manager anything pertaining to appointment and removal of such officers and employees.
- (C) *Interference with administration.* No commissioner or mayor may direct, order, or command any city officers and employees who are subject to the direction and supervision of the city manager, or substantially interfere with an employee in the performance of their duties. Commissioners and the mayor shall direct all requests and inquiry to the city staff and city clerk to the city manager. No commissioner or mayor shall order any officer or employee to attend any meeting, hearing or event, either publicly or privately, without the approval of the city manager. Nothing in the foregoing is to be construed to prohibit individual members of the council from closely scrutinizing by questions and personal observation, all aspects of city government operations so as to obtain independent information to assist the members in the formulation of sound policies to be considered by the council. It is the express intent of this charter, however, that recommendations for improvement in city government operations by individual commissioners be made to and through the city manager, so that the city manager may coordinate efforts of all city departments to achieve the greatest possible savings through the most efficient and sound means available.

Section 3.07 (B) of Charter - forfeiture of office

- ▶ (B) Forfeiture of office: A commissioner or mayor shall be deemed to have forfeited the office if the commissioner or mayor:
 - ▶ (1) Lacks at any time during the term of office any qualification for the office prescribed by this charter or by law.
 - ▶ (2) Violates any standard of conduct or code of ethics established by law or this Charter or is convicted of a misdemeanor of the second degree or a felony of any degree.
 - ▶ (3) Misses four (4) regularly scheduled council meetings in a twelve-month period from first Tuesday of April of each year, without being excused as specifically approved by the council for each absence.
 - ▶ (4) Failure to maintain and keep a bona-fide residence in the city district as elected for the term in [section 3.05](#), above, or be a bona-fide resident of the city. A residence shall be considered a bona-fide residence if subject to a valid homestead exemption in the records of the Orange County Property Appraiser.
 - ▶ (5) Fails to comply with the code of conduct as specified in [section 3.10](#) (D) or violates any other provision of [section 3.10](#).