

City of Belle Isle P&Z Board Workshop

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ATTORNEYS AND COUNSELORS AT LAW

Sunshine Law

Section 286.011, Florida Statutes

- ▶ P & Z Board 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

- ▶ If the requirements for a meeting are not met, 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 foreseeably will be discussed at a public meeting of the Board is a violation of the Sunshine Law.
- ▶ The key is for each member of the Board to not have any discussion with any other member of the Board concerning Board business which will foreseeably come before the Board for a decision unless it is during a public meeting of the Board.
- ▶ Meeting or discussion with another Board member includes communications by:
 - ▶ In person meetings
 - ▶ E-mail, social media, internet blogs, etc.
 - ▶ Memos, mail, passing notes, letters, etc.
 - ▶ Telephone
 - ▶ Use of liaisons between members

Sunshine Law

- ▶ Even during the public meeting, refrain from passing notes or whispering comments between other Board members concerning matters pending or likely to come before the Board.
- ▶ When receiving emails from the City staff or members of the public directed to two or more members of the Board regarding City business foreseeably to come before the Board, 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 Board members, reply only to the City staff member or call the City staff member to discuss.

Sunshine Law

Penalties for Violations

- ▶ Any Board member 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.
- ▶ Violations of the Sunshine Law create the potential to void certain Board actions.

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 Board 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.

Public Records

- ▶ E-mail messages, text messages, social media posts, other written correspondence, recordings, pictures, videos, or other records generated or received by a Board 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.

Quasi-Judicial Proceedings

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

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

- ▶ Rezoning, variances, special exceptions, preliminary plats/site plans 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 Board 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.
- ▶ The Board'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 applicable 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 Board'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 Board member, it is necessary for the Board 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. Also, it is recommended that you disclose any site visits conducted by a Board member to a property subject to an application.
- ▶ 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.

Voting Conflicts

Section 286.012, Florida Statutes, provides that no Board member who is present at any Board 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 Board member, **there is, or appears to be, a possible conflict of interest** prescribed in Chapter 112, Florida Statutes; or
- ▶ in a quasi-judicial proceeding, the Board member abstains from voting to assure a fair proceeding free from potential bias or prejudice.

Voting Conflicts

Chapter 112, Florida Statutes

- ▶ No Board member shall vote upon any matter which:
 - ▶ would inure to the Board member's special private gain or loss;
 - ▶ the Board member 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 Board member 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 Board member'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 Board minutes.

Caution on Participation in Voting Conflict Situations

- ▶ Section 112.3143(4), Florida Statutes, requires appointed public officers to, prior to participation in any matter that would inure to the officer's special private gain or loss, disclose the nature of his or her interest in the matter with a written disclosure memorandum.
- ▶ The term "participate" means any attempt to influence the decision by oral or written communication, whether made by the officer or at the officer's direction. NOTE: This has been interpreted to include an attempt to influence the recommendations of the City staff to the Board.
- ▶ While the statute affords an opportunity to participate in the Board discussion without voting on a matter after the required written disclosure is made, it is best not to participate in the discussions for which you have a voting conflict.
Appearance/Avoid Complaints

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 92-37 a City Commissioner owned 5 hotel or apartment buildings in an area that might be added to a historic preservation district. The Commissioner either owned 5 of 60 eligible sites (8.3%) or 5 of 168 eligible sites (3.0%), depending upon how big the area of potential designation would be. Voting conflict of interest? Commission of Ethics says: Yes.

Key point: There is not a bright line rule but if you are more than 1% or 2% 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.

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/>

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 and P&Z Board members.
- ▶ 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 “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).

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