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**PLANNING AND ZONING BOARD WORKSHOP**

**I. Government in the Sunshine Law**

**What is the Government in the Sunshine Law?**

The Government in the Sunshine Law, as codified in section 286.011, Florida Statutes, provides a right of public access to governmental proceedings at the state and local levels.

**When does the Sunshine Law apply?**

- A. The Sunshine Law applies to any gathering of two or more members of the same municipal board to discuss some matter which foreseeably **may** come before that board for action.
- B. The Sunshine Law is not limited to standing boards and councils and applies equally to advisory boards created by the Town Council, even when the recommendations of such boards are not binding on the Council.

**What are the basic requirements of the Sunshine Law?**

As applied to municipal boards, the Sunshine Law has three basic requirements:

A. All Meetings Must be Open to the Public

- (1) Public meeting cannot be held at any facility that discriminates on the basis of sex, age, race, creed, color, origin or economic status, or which operates in such a manner as to unreasonably restrict public access.
- (2) Public has right to record public meetings (video and audio) so long as such recording is not disruptive.

*This is generally not an issue for advisory boards.*

B. Public Must be Given Reasonable Notice of Such Meetings

- (1) No “bright line” test for what constitutes reasonable notice. Type of notice required depends on the particular facts and circumstances. In some instances, posting is sufficient. In others, publication in a newspaper may be necessary.
- (2) The Sunshine Law does not require that a public agency provide notice of each item to be discussed at a public meeting via a published agenda. Such a requirement would preclude access to meetings by members of the general public who wish to bring specific issues before a governmental body.

C. Minutes of the Meeting Must be Taken

- (1) Minutes of public meeting, including workshop meetings, must be promptly recorded and open for public inspection.
- (2) The use of the term “minutes” contemplates a brief summary or series of brief notes or memoranda reflecting the events of the meeting (also known as “action minutes”).
- (3) No requirement that meetings be recorded; however, once recordings have been made, they are public records and subject to public records retention schedule established by the Department of State.

**What are the practical applications of the Sunshine Law to members of municipal boards?**

- A. Two or more members of the **same board** cannot privately “discuss” any matter that will foreseeably come before the board for official action, regardless of when or where the discussions take place.

**ALL CONVERSATIONS REGARDING BOARD BUSINESS MUST OCCUR DURING THE COURSE OF A PUBLIC MEETING.**

- (1) This prohibition includes conversations at informal gatherings, all telephone conversations, and all exchanges of written communications, including e-mail.

*Note: The Sunshine Law is not violated if a communication by a board member to another board member is only “one way” and there is no response. See AGO 01-20 (e-mail communication of factual background from one city council member to another that does not result in exchange of comments or responses does not constitute a meeting under the Sunshine Law); AGO 01-21 (council members may distribute “position statements” to other council members so long as they avoid any discussion or debate among themselves on those statements).*

- (2) Members of the same board may not have any private discussions or communications relating to issues before the board before or after the board meeting. Additionally, such discussions are prohibited during the meeting (including recesses) if such discussions are not audible to the public attending the meeting. Such discussions or communications violate the letter and spirit of the Sunshine Law.

*Note: This prohibition specifically includes any “off-microphone” discussions between board members and the exchange of written notes, e-mails or text messages during the course of a meeting.*

- (3) Members of the same board are not precluded from attending social or business functions together so long as board matters are not addressed at such functions.

- (4) Members of one board are not prohibited from attending meetings of another municipal board and commenting on agenda items that may subsequently come before their board for final action so long as the members do not discuss the items among themselves. For example, members of the Town Council may attend advisory board meetings and comment upon items. AGO 00-68,

B. Board members may discuss board matters with the Town Manager, members of Town Staff, legal counsel or a member of a different board. However, the Town Manager (or any other non-board member) may not act as a liaison for board members by circulating information and the thoughts of the individual board members. AGO 74-47. Such discussions cannot act as a substitute for a public meeting. Within the context of the Sunshine Law, “polling” occurs when a non-member seeks to ascertain a member’s vote on a matter pending before the board.

C. Members of a municipal advisory board are not prohibited from conducting “inspection trips” to view properties or other matters that are the subject of board

action, but members may not take such trips together or discuss such inspections prior to the public meeting. **Such trips should be disclosed as ex parte communications.**

- D. The Sunshine Law generally allows members to participate in meetings via telephone so long as a legal quorum is physically present in a public location and the person on the telephone can hear all those present and the persons present can hear the member. See AGO 92-44.
- E. A member of a Town board who is present at a meeting of that body at which an official decision, ruling or other official act is to be taken or adopted may **not** abstain from voting. A vote shall be recorded or counted for each such member present, *except when there is or appears to be a conflict of interest or voting conflict.* § 286.012, Fla. Stat. Failure to vote, however, does not invalidate the proceeding. City of Hallandale v. Rayel Corporation, 313 So. 2d 113 (Fla. 4<sup>th</sup> DCA 1975).

*Note: When a member of a local advisory board is required to abstain, the member is disqualified from voting and may not be counted for the purposes of determining a quorum. AGO 86-61.*

**5. What are the consequences for a violation of the Sunshine Law?**

- A. *Criminal penalties:* A knowing violation of the Sunshine Law is a second-degree misdemeanor and is punishable by up to 60 days in jail and/or a fine not exceeding \$500.00.
- B. *Civil penalties:* Noncriminal violations of the Sunshine Law are punishable by a fine not exceeding \$500.00. The state attorney may pursue such actions on behalf of the state. AGO 91-38.
- C. *Attorney's fees:* Attorney's fees may be assessed against both the board and the individual members when sued for a Sunshine Law violation (except that the individual board members are not liable for attorney's fees where the board sought, and took, the advice of its attorney).
- D. *Effect on board action:* Any action taken by a board in violation of the Sunshine Law is invalid and of no effect. A violation can be cured by independent final action (as opposed to mere ratification) in the sunshine. Tolar v. School Board of Liberty County, 398 So. 2d 427 (Fla. 1981).
- E. *Civil action for declaratory or injunctive relief:* A civil action for declaration or injunctive relief can be pursued by any citizen of the state. The mere showing that the Sunshine Law has been violated constitutes "irreparable injury."

## **II. Ex parte communications.**

### **1. Disclosure.**

The Town's quasi-judicial procedures require that members of the Town Council and the Planning and Zoning Board disclose the substance of all ex parte communications at the beginning of any quasi-judicial proceeding.

*Note: Proceedings are quasi-judicial where the Board's decision is based on facts or alternatives presented at a hearing involving the application of existing policies or regulations to a limited number of persons. Examples of quasi-judicial proceedings include: site plan approvals, site specific rezoning requests, variances and PUD approvals.*

### **2. Types of Ex Parte Communications.**

A. An ex parte communication is any communication, written or oral, outside of the public meeting that relates to a matter under review by the Board.

B. Ex parte communications include site visits.

### **3. Presumption of Prejudice.**

A. Ex parte communications are presumed prejudicial until such presumption is removed through disclosure.

B. Because the Board's decision must be based on the evidence presented during the course of the hearing, affected parties must be given the opportunity to address any communications that may have occurred outside the public hearing to dispel any preconceived notions or conclusions.