



Office of the Mayor and Town Council

Mary Ann Mixon
Council Member – Seat 1

MEMORANDUM

To: Honorable Members of the Town Council
From: Mary Ann Mixon, Council Member – Seat 1
Date: January 18, 2017
Re: Repealing Section 2-99 (Ex-parte communications with the Town Council)

REQUEST

AN ORDINANCE OF THE MAYOR AND TOWN COUNCIL OF THE TOWN OF CUTLER BAY, FLORIDA, REPEALING SECTION 2-99 OF THE TOWN CODE OF ORDINANCES RELATING TO EX- PARTE COMMUNICATIONS; PROVIDING FOR CONFLICTS; PROVIDING FOR SEVERABILITY; PROVIDING FOR CODIFICATION; AND PROVIDING FOR AN EFFECTIVE DATE.

BACKGROUND AND ANALYSIS

On March 21, 2007, the Town Council passed and adopted Ordinance #07-08 establishing a procedure governing ex-parte communications with local public officials concerning quasi-judicial matters. The adoption of this new ordinance established a procedure for disclosing ex-parte communications regarding quasi-judicial proceedings and land use matters. (*See Attachment “A”: Town Attorney Memo and Ordinance #07-08*).

Prior to adopting Ordinance #07-08, the Town Council complied with the rule of law set forth by the court case Jennings v. Metropolitan Dade County, 589 So. 2d 1337 (Fla. 3rd DCA 1991), rev. den., 598 So.2d 75 (Fla. 1992) (the “Jennings Rule”), prohibiting ex-parte communications relating to quasi-judicial proceedings. The “Jennings Rule” establishes that the existence of an ex-parte communication creates a presumption that the communication is prejudicial. The “Jennings Rule” is currently followed by the members of the Miami-Dade County Board of County Commissioners.

Ex-Parte is defined as “on one side only; by or for one party; done for, in behalf of or on the application of, one party only.” (Black’s Law Dictionary, 5th Edition). In other words, when the prosecutor talks to the judge in the absence of the defense attorney about the case against the accused, it is an ex-parte contact. In quasi-judicial actions, Council members are acting as *judges* rather than legislators; the Council is not making new laws, but rather applying existing laws to specific facts, at a public hearing. Just as a judge cannot speak to one party without the





other party or parties present, the Town Council, when acting as judges should refrain from all forms of communication (oral, written, electronic, and/or graphic) outside of the public hearing.

I believe that ex-parte communications are fundamentally improper to quasi-judicial proceedings, and are in direct contrast with our Sunshine laws. Section 2-99 of the Town's Municipal Code relating to ex-parte communications with the Town Council instructs Town Council members to disclose the following information if we meet with lobbyists in private:

- The subject and substance of any ex-parte communication
- The identity of the person, group or entity with whom the communication took place,
- Any written communication that relates to quasi-judicial action pending or impending,
- Any investigations conducted, site visits made, and any expert opinions received regarding quasi-judicial action pending or impending.

According to our ordinance, "all of these disclosures must be made before or during the public meeting at which a vote is taken on such matters, so that persons who have opinions contrary to those expressed in the ex-parte communication are given a reasonable opportunity to refute or respond to the communication." If the disclosure is made at the public meeting at which the voting is to take place, how does that give anyone a reasonable opportunity to refute or respond? It denies the opposing party due process due to lack of time to prepare a reasonable response or repudiation.

I feel that, in spite of our current ordinance, it is impossible to say that ex-parte communication with decision makers does not create a presumption of prejudice. Therefore, I feel any and all information brought forth to Council Members via ex-parte communication should be done so only at public meetings because it eliminates any appearance of impropriety and provides everyone an equal opportunity of due process.

Additionally, another reason to eliminate ex-parte communication is having to register lobbyists, keep track of who is registered, and respond to the numerous public requests about who is registered or not, and what ex-parte communication has taken place takes up an enormous amount of time in the Town Clerk's already busy schedule; time which could otherwise be better spent on more important Town matters.

RECOMMENDATION

It is recommended that the Town Council adopt the attached Ordinance repealing Section 2-99 of the Town's Municipal Code, relating to ex-parte communications with the Town Council.

