



Office of the Town Attorney

Mitchell A. Bierman
Town Attorney

Chad S. Friedman
Town Attorney

MEMORANDUM

To: The Honorable Mayor and Town Council

From: Mitchell Bierman, Town Attorney

Date: January 10, 2017

Re: Ex-Parte Communications on Quasi-Judicial Land Use Matters

We have prepared the attached ordinance addressing disclosure of ex-parte communications regarding quasi-judicial proceedings and land use matters. An explanation follows.

I. QUASI-JUDICIAL BOARDS AND PROCEEDINGS FOR LAND USE MATTERS

The Town's Local Planning Agency ("LPA") and, in certain situations, the Town Council are considered to be quasi-judicial boards of the Town. This means that the LPA and the Town Council will be conducting quasi-judicial proceedings. As Councilmembers, you are most familiar with legislative decision making, in which you are asked to create a general rule or policy to govern the conduct of those within the Town. In contrast, a quasi-judicial proceeding is one that determines the rights of some individual person or business by applying that legislative rule of Town-wide application to the particular facts and circumstances of an individual case. In the area of land use, all comprehensive planning decisions are considered to be legislative. Most zoning decisions are considered to be quasi-judicial proceedings; a few, such as a Town-wide enactment of zoning, are likely to be considered legislative. Decisions on special permits, such as variances and building permits, are quasi-judicial.

Members of quasi-judicial boards are subject to certain restrictions when it comes to communications concerning matters under consideration. Such contacts are considered "ex-parte communications."¹ Since it is possible that applicants or other interested persons may seek to contact (or already have contacted) you to discuss the merits of development applications, the Council should address what, if any, communications will be allowed

¹ / "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.

between the Councilmembers and an applicant, as well as communications with the general public.

A. WHAT IS AN EX-PARTE COMMUNICATION?

An ex-parte communication is any communication, whether written or oral, between a Councilmember or other quasi-judicial board member and any person regarding the subject matter of any application that is, or foreseeably will be, heard in a quasi-judicial proceeding. Site visits and review of expert opinions are also considered ex-parte communications.

Currently, you must refrain from all ex-parte contacts with applicants or other interested persons regarding development applications, in order to avoid creating a legal presumption that your future decision on these applications is prejudiced by the contact.¹ However, as discussed below, the Town Council may remove this presumption of prejudice by adopting an ordinance or resolution establishing a process to allow ex-parte communications related to quasi-judicial proceedings.

i. JENNINGS V. METROPOLITAN DADE COUNTY

The leading case dealing with the issue of ex-parte communications and quasi-judicial boards is Jennings v. Metropolitan Dade County, 589 So. 2d 1337 (Fla. 3rd DCA 1991), rev. den., 598 So.2d 75 (Fla. 1992). In Jennings, the court disapproved of ex-parte communications and found them to be inherently improper because they violated the concept of fundamental due process, the cornerstone of quasi-judicial proceedings. The court further found that the existence of an ex-parte communication creates a presumption that the communication is prejudicial. As a result, any aggrieved party that objects to the ex-parte communication is entitled to an entirely new hearing unless it can be successfully proven that the communication was not, in fact, prejudicial.

While the types of matters which are subject to the rules put forth in the Jennings case are not clearly and consistently defined by the law, at a minimum the following matters are considered by courts to be quasi-judicial in nature:

site specific re-zonings, special exceptions, variances, site plan approvals, conditional uses, and code enforcement proceedings.²

¹ / The Town Charter provides for the continued applicability of Miami-Dade County ordinances until replaced or superceded by the Town's own ordinances. Miami-Dade County has not adopted any rules removing the presumption of prejudice and allowing ex-parte communications with members of quasi-judicial boards.

² / Board of County Commissioners of Brevard County v. Snyder; 627 So. 2d 469 (Fla. 1993); Irvine v. DuvalCounty Planning Commission, 495 So. 2d 167 (Fla. 1986); Park of Commerce Associates v. Town of Delray Beach, 636 So. 2d 12 (Fla. 1994); Chapter 162, Fla. Stat. (2000).

ii. **SECTION 286.0115(1), FLORIDA STATUTES: ACCESS TO LOCAL PUBLIC OFFICIALS LAW.**

Due in large part to the Jennings decision, in 1995 the Florida Legislature enacted Section 286.0115, Florida Statutes, titled "Access to Local Public Officials". This law allows a municipality to adopt an ordinance or resolution removing the presumption of prejudice from ex-parte communications with local public officials.

By definition, this statute covers all elected or appointed officials holding a municipal office who recommend or take quasi-judicial action as a member of a board or council. It allows any person to engage in ex-parte discussions regarding the merits of quasi-judicial matters with a Councilperson so long as the Councilperson discloses, on the record, the existence of the ex-parte communication. This disclosure must be made before or during the public meeting at which any final action is taken on the matter in order for the presumption of prejudice to be removed. The Councilperson must disclose the communication and the identity of the person, group, or entity with whom the communication took place. This procedure allows an applicant or an affected party with a differing opinion a reasonable opportunity to refute or respond to the substance of the ex-parte communication.

In order to allow any form of ex-parte communication or site visit without creating the presumption of prejudice, the Council is required to adopt an ordinance or resolution specifying what, if any, ex-parte communication is allowed.

iii. **ORDINANCE REGARDING EX-PARTE COMMUNICATIONS.**

Attached for your consideration is a proposed ordinance authorizing ex-parte communications so long as the communications are properly disclosed. Alternatively, the Council may elect to maintain the current practice followed by the County and prohibit all ex-parte communications in accordance with the court's ruling in the Jennings case.

B. GUIDANCE FOR COMPLYING WITH JENNINGS.

Until such time as the Town Council enacts its own rules governing ex-parte communications, the rule of law set forth in the Jennings decision applies. Any correspondence received by a Councilmember regarding a quasi-judicial application must be forwarded to the Town Clerk. In the event that someone attempts to contact you about a quasi-judicial matter outside of a public meeting, we recommend that you ask them to put their concerns in writing and forward their written documents to the Town Clerk. The Clerk will then make their correspondence part of the record on that application. Additionally, when the application is subsequently heard before the LPA or the Town Council, each Councilmember should state on the record the existence of the ex-parte communication, the nature of the communication, and the name of the person who contacted you. You should also state whether or not the ex-parte communication affects your ability to consider the evidence presented impartially.

Finally, even if the Town Council establishes a process to allow ex-parte communications on quasi-judicial matters, Councilmembers must comply with the Florida Government in the Sunshine Law. As is required on any issue that might come before the Council for consideration, Town Councilmembers may only discuss quasi-judicial matters with each other at a public meeting.

ORDINANCE NO. 07-08

AN ORDINANCE OF THE MAYOR AND TOWN COUNCIL OF THE TOWN OF CUTLER BAY, FLORIDA, IMPLEMENTING THE PROVISIONS OF SECTION 286.0115, FLORIDA STATUTES, TO ESTABLISH A PROCEDURE GOVERNING EX PARTE COMMUNICATIONS WITH LOCAL PUBLIC OFFICIALS CONCERNING QUASI-JUDICIAL MATTERS; PROVIDING FOR SEVERABILITY; PROVIDING FOR INCLUSION IN THE TOWN CODE; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Town of Cutler Bay, Florida (the "Town") desires to implement Section 286.0115(1) Fla. Stat., by establishing a process to disclose ex parte communications (communications made on behalf of one side only without the presence of the other side) with local public officials; and

WHEREAS, the Town Council finds that adoption of these regulations is in the best interest and welfare of the citizens of the Town.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND TOWN COUNCIL OF THE TOWN OF CUTLER BAY, FLORIDA, AS FOLLOWS:

Section 1. The above recitations are true and correct and are incorporated into this ordinance by this reference.

Section 2. Communications with The Town Council. Communications with local public officials [as defined in Sec. 286.0115(1)(b), Fla. Stat. (1997)], regarding quasi-judicial matters [as defined in Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993)], including the adjudication of the rights of persons and the application of a general rule or policy to a specific individual, property, interest or activity shall be governed by the following procedure:

A. Any person not otherwise prohibited by statute, charter provision, or ordinance may discuss with any local public official representing the Town the merits of any matter on which action may be taken by any board, council or commission on which the local public official is a member. Such communication shall not raise any presumption of prejudice provided that the following process of disclosure occurs:

1. The subject and substance of any ex parte communication with a local public official representing the Town which relates to quasi-judicial action pending or impending before the official, as well as the identity of the person, group or entity with whom the communication took place, is disclosed and made a part of the record before final action is taken on the matter.

2. A local public official representing the Town may read a written communication from any person; however, a written communication that relates to quasi-judicial action pending or impending before such official shall be made a part of the record before final action is taken on the matter.

3. A local public official representing the Town may conduct investigations, make site visits and receive expert opinions regarding quasi-judicial action pending or impending before him or her, provided that such activities and the existence of such investigations, site visits, or expert opinions is made a part of the record before final action is taken on the matter.

4. Disclosure made pursuant to paragraphs (1), (2) and (3) above 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.

Section 3. Severability. The provisions of this Ordinance are declared to be severable and if any section, sentence, clause or phrase of this Ordinance shall for any reason be held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining sections, sentences, clauses, and phrases of this Ordinance but they shall remain in effect, it being the legislative intent that this Ordinance shall stand notwithstanding the invalidity of any part.

Section 4. Inclusion in the Code. It is the intention of the Town Council, and it is hereby ordained that the provisions of this Ordinance shall become and made a part of the Town Code and that the sections of this Ordinance may be re-numbered or re-lettered to accomplish such intentions; and that the word "Ordinance" shall be changed to "Section" or other appropriate word.

Section 5. Effective Date. This Ordinance shall be effective immediately upon adoption on second reading.

PASSED on first reading this 21st day of February, 2007.

PASSED AND ADOPTED on second reading this 21st day of March, 2007.



PAUL S. VROOMAN, Mayor

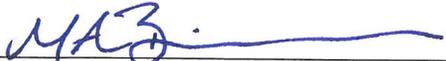
Attest:



ERIKA GONZALEZ-SANTAMARIA, CMC
Town Clerk



APPROVED AS TO FORM AND
LEGAL SUFFICIENCY FOR THE
SOLE USE OF THE TOWN OF CUTLER BAY:


WEISS SEROTA HELFMAN PASTORIZA
COLE & BONISKE, P.A.
Interim Town Attorney

Moved by: Councilmember Sochin
Seconded by: Vice Mayor MacDougall

FINAL VOTE AT ADOPTION:

Mayor Paul S. Vrooman	<u>NO</u>
Vice Mayor Edward P. MacDougall	<u>YES</u>
Councilmember Peggy R. Bell	<u>YES</u>
Councilmember Timothy J. Meerbott	<u>YES</u>
Councilmember Ernest N. Sochin	<u>YES</u>