# Why Village Council is Limiting Communications Surrounding Palmer Trinity Zoning Issue

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The village council, acting in its capacity as the Planning & Zoning arm of the Village of Palmetto Bay has certain responsibilities and restrictions placed upon them under state law. There are three main restraints on the council:

- Government in the Sunshine;
- Public Records laws; and
- Jennings

Often all three restrictions, particularly in zoning matters, may be applied as a restriction upon the council.

**Government in the Sunshine**

As elected officials, whether dealing with zoning or any other official action of village, are to comply with Article I, Section 24 of the Florida Constitution and Section 286.011(1), Florida Statutes, which is known as the "open meeting law" or "Florida in the Sunshine. These provisions requires that all meetings of any board or council of any municipal corporation, except as otherwise provided by the Constitution, at which official acts are to be taken are declared public meetings open to the public at all times, and no resolution, rule or formal action shall be considered binding except as taken or made at such meeting. The meetings must be open to public, set upon reasonable prior notice, and minutes must be taken. These provisions apply to the village council and any advisory boards.

The state has recognized a limited exception for fact-finding and reporting only boards. The provisions apply to any subject that is or foreseeably will

come before the board or council for action, and includes but is not limited to informal discussions, workshops, and town hall meetings. In essence, any meeting of two or more members of the same board would be required to comply with "Florida in the Sunshine."

If there is a violation of "Florida in the Sunshine" the penalties are that the action taken by the board or council are voided, $500.00 fine, a second degree misdemeanor for "willful violations," and an attorney's fee award provision to the person that succeeds in proving a violation.

**Public Records Laws**

All village officials, elected or appointed, and all village staff members are subject to Chapter 119, Florida Statutes, which statute is know as the "Public Records Law." It is the policy of this state that all state, county and municipal records shall at all times be open for personal inspection by any person. The Florida Supreme Court in 1980, held in the Shevin v. Byron case that any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge is a public record. A public record includes:

- Inter-office memoranda, etc. which supply knowledge obtained i/c/w transaction of official business;
- Computer and cell phone records;
- Personnel records [applications, background and credit checks, grievance records, salary information, travel vouchers];
- Claim settlement agreements;
- Hand written notes, emails, letters, etc.

A violation of the Act can result in a first degree misdemeanor ($1,000/1 year); and impeachment or removal from office of the official.

**Jennings Rule**

The village officials are also subject to guidelines relating specifically to quasi-judicial proceedings. So, not only do the officials have to comply with the foregoing, they must also, in a zoning matter, adhere to additional rules, often referred to as the "Jennings Rule" or simply "Jennings," which is a

1991 ruling by the Florida Supreme Court Jennings sued on a zoning hearing item regarding a due process argument (right to be heard – process for notice, obtaining evidence, ability to cross examine witnesses and ability to have impartial decision maker) based upon the effect of an ex parte communication upon a decision emanating from a quasi-judicial proceeding of the Miami-Dade County Commission.

An ex parte communication is a communication with a decision maker (village council member) who is to rule on a quasi-judicial proceeding (zoning hearing item) that is held outside the presence of the applicant – which means outside of the public hearing on the zoning request. The Florida Supreme Court held that "upon proof that a quasi-judicial officer received an ex parte contact, a presumption arises … that the contact was prejudicial. The aggrieved party will be entitled to a new and complete hearing before the commission unless the defendant proves that the communication was not, in fact, prejudicial." As a result, due to the ex parte communications with Dade County, the zoning hearing was overturned and a new hearing was required. The Court also held, in very strong language that:

Ex parte communications are inherently improper and are anathema to quasi-judicial proceedings. Quasi-judicial officers should avoid all such contacts where they are identifiable.

An allegation of prejudice resulting from ex parte contacts with the decision makers in a quasi-judicial proceeding states a cause of action. Upon the aggrieved party's proof that an ex parte contact occurred, its effect is presumed to be prejudicial unless the defendant proves the contrary by competent evidence. Because knowledge and evidence of the contact's impact are peculiarly in the hands of the quasi-judicial officer, such a burden is appropriate.

In determining the prejudicial effect of an ex parte communication, the trial court should consider the following criteria:

- Whether, as a result of improper ex parte communications, the agency's decision making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either as to an innocent party or to the public interest that the agency was obliged to protect. In making this determination, a number of considerations may be relevant: the gravity of the ex parte communications; whether the contacts may have influenced the agency's ultimate decision;
- Whether the party making the improper contacts benefited from the agency's ultimate decision;
- Whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and
- Whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

Since the principal concerns of the court are the integrity of the process and the fairness of the result, mechanical rules have little place in a judicial decision whether to vacate a voidable agency proceeding. Instead, any such decision must of necessity be an exercise of equitable discretion.

The allegation of a prejudicial ex parte communication in a quasi-judicial proceeding before the [quasi-judicial body] will enable a party to maintain an original equitable cause of action to establish its claim. Once established, the offending party will be required to prove an absence of prejudice.

This Supreme Court decision remains good law. As many municipalities and counties were concerned with how broad the Jennings decision was they lobbied the state legislature in an attempt to provide a “cure process” for such ex parte communications and sought a way to narrow the holding of Jennings. As a result, the state legislature created 286.0115, Florida Statutes entitled: “Access to local public officials; quasi-judicial proceedings on local government land use matters.” The statutes allows a local government, the village, to adopt an ordinance or resolution that would “remove” the presumption of prejudice from ex parte communications with local public officials by establishing a process to disclose ex parte communications with such officials by adhering to a process outlined in the statute relating to providing for disclosures of any ex parte communications. The statute has

not been successfully challenged, but there are groups that believe that a Constitutional challenge could strike the law down. Nevertheless, in an abundance of caution, the village has enacted such an ordinance, so as to cure an ex parte communications from the community during public comments, incidental comments at the grocery store, emails sent to the council, etc.

The ordinance requires that the village council disclose any communications by third persons, whether by residents, or an applicant at the beginning of the public hearing. Pursuant to Florida law, zoning quasi-judicial hearings are exempted from lobbying processes.

**In other words…**

In other words, neither the applicant nor the community is supposed to lobby the council outside of the public hearing on the zoning application. If all the communications are not properly disclosed, the decision of the council as to the zoning application can be unraveled. A court could find that improper ex parte communications were had and the decision could be overturned. The council cannot control third persons contacting them for unsolicited advice or concerns. Although such communications should be discouraged, they often do occur.

The Supreme Court advised that the proper forum for voicing concerns or opinions regarding an application is during the public hearing. By having the public hearing and the voicing of all opinions during the public hearing ensures due process of law to all parties. It provides the applicant with the opportunity to cross-examine those testifying and also provides the applicant with the opportunity to rebut any statements. It additionally provides the council, as the finder of fact with the same opportunity. Thus, after proper notice, the hearing provides all persons adequate opportunity to express their concerns.

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