Planning & Zoning Board, ex parte communications

Number: INFORMAL

Date: September 26, 2007

Subject:
Planning & Zoning Board, ex parte communications

Mr. Bo Raulerson
482 Washington Court
Bartow, Florida 33830

Dear Mr. Raulerson:

As a member of the Bartow Planning and Zoning Commission, you ask whether a member of the commission, sitting in a quasi-judicial capacity on a land use matter, may have ex parte communications with residents of the area prior to the hearing. If so, must the member disclose such communications prior to voting on the matter?

It is the policy of this office to respond to questions involving the authority or actions of a board or commission at the request of a majority of its members. While this office will not provide a formal opinion in this instance, the following general comments are provided to provide some guidance.

In an informal opinion dated March 12, 2007, this office was asked whether a municipal ordinance which requires disclosure of ex parte communications that occur as to pending applications that have been filed is adequate to eliminate the presumption of prejudice pursuant to section 286.0115, Florida Statutes.

Section 286.0115(1), Florida Statutes, authorizes a county or municipality to adopt an ordinance or resolution removing the presumption of prejudice from ex parte communications with local public officials, by establishing a process to disclose ex parte communications with such officials pursuant to the subsection. The statute recognizes that counties or municipalities are not required to adopt such an ordinance. Subsection (2) of the statute allows for an ordinance or resolution to establish procedures for quasi-judicial proceedings on local government land use matters. However, an ordinance or resolution affecting ex parte communications in quasi-judicial matters "shall provide procedures and provisions identical to this subsection."[1] Thus the provisions in section 286.0115, Florida Statutes, operate to remove the presumption of prejudice for ex parte communications, should a local government adopt the appropriate procedures. It would appear that absent the adoption of such procedures, the presumption of prejudice for ex parte communications would remain intact. You do not indicate whether the City of Bartow has adopted a resolution or ordinance for quasi-judicial proceedings.

In *Jennings v. Dade County*,[2] the Third District Court of Appeal concluded that proof of an ex parte communication by a quasi-judicial officer creates a rebuttable presumption of prejudice unless proven otherwise by competent evidence by the officer. The person affected adversely by

the decision, therefore, is entitled to a new and complete hearing, unless the party defending against a new hearing can show that the communication was not, in fact, prejudicial.

Section 286.0115, Florida Statutes, was enacted to address the problems presented by the *Jennings* case. Absent the adoption of the appropriate procedures either pursuant to section 286.0115, Florida Statutes, or by an alternative process, problems such as in *Jennings* would arise when ex parte communications occur with an officer sitting in a quasi-judicial capacity. I would note, that section 286.0115(2)(c), Florida Statutes, acknowledges that disclosure of an ex parte communication between an individual and a member of the decisionmaking body is not required and such nondisclosure "shall not be presumed prejudicial to the decision of the decisionmaking body." The subsection further states that "[a]ll decisions of the decisionmaking body in a quasi-judicial proceeding on local government land use matters must be supported by substantial, competent evidence in the record pertinent to the proceeding, irrespective of such communications." However, as noted above, the application of these provisions is dependent upon the municipality's adoption of the procedures identical to the ones set forth in section 286.0115(2), Florida Statutes.

I trust that these informal comments will be of assistance to you.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] Section 286.0115(2)(a), Fla. Stat.

[2] 589 So. 2d 1337 (Fla. 3rd DCA 1991).