Ex parte communication, municipal ordinance

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Subject:
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Mr. Mitchell A. Bierman
Attorney, Town of Cutler Bay
2525 Ponce De Leon Boulevard
Suite 700
Coral Gables, Florida 33134

Dear Mr. Bierman:

On behalf of the Town of Cutler Bay, you ask 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, and if not, when must the disclosure requirement begin.

In *Jennings v. Dade County*,[1] 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.

In 1995, the Florida Legislature adopted section 286.0115, Florida Statutes, to deal with the problems presented by the *Jennings* case for local elected public officials. In adopting the statute, the Legislature expressed its concern that

"local elected public officials have been obstructed or impeded from the fair and effective discharge of their sworn duties and responsibilities due to expansive interpretations of Jennings v. Dade County, a decision rendered by the Third District Court of Appeal[.]"[2]

Section 286.0115(1)(a) provides:

"A county or municipality may adopt an ordinance or resolution removing the presumption of prejudice from ex parte communications with local public officials [3] by establishing a process to disclose ex parte communications with such officials pursuant to this subsection or by adopting an alternative process for such disclosure. However, this subsection does not require a county or municipality to adopt any ordinance or resolution establishing a disclosure process."

Pursuant to section 286.0115(1)(c):

"Any person not otherwise prohibited by statute, charter provision, or ordinance may discuss with

any local public official the merits of any matter on which action may be taken by any board or commission on which the local public official is a member. If adopted by county or municipal ordinance or resolution, adherence to the following procedures shall remove the presumption of prejudice arising from ex parte communications with local public officials.
1. The substance of any ex parte communication with a local public official which relates to quasi-judicial action pending before the official is not presumed prejudicial to the action if the subject of the communication and 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 on the matter.
2. A local public official may read a written communication from any person. However, a written communication that relates to quasi-judicial action pending before a local public official shall not be presumed prejudicial to the action, and such written communication shall be made a part of the record before final action on the matter.
3. Local public officials may conduct investigations and site visits and may receive expert opinions regarding quasi-judicial action pending before them. Such activities shall not be presumed prejudicial to the action if the existence of the investigation, site visit, or expert opinion is made a part of the record before final action on the matter.
4. Disclosure made pursuant to subparagraphs 1., 2., and 3. 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. This subsection does not subject local public officials to part III of chapter 112 for not complying with this paragraph."

Subsection (2) of the statute provides for quasi-judicial proceedings on local government land use matter:

"(a) Notwithstanding the provisions of subsection (1), a county or municipality may adopt an ordinance or resolution establishing the procedures and provisions of this subsection for quasi-judicial proceedings on local government land use matters. The ordinance or resolution shall provide procedures and provisions identical to this subsection. However, this subsection does not require a county or municipality to adopt such an ordinance or resolution.
(b) In a quasi-judicial proceeding on local government land use matters, a person who appears before the decisionmaking body who is not a party or party-intervenor shall be allowed to testify before the decisionmaking body, subject to control by the decisionmaking body, and may be requested to respond to questions from the decisionmaking body, but need not be sworn as a witness, is not required to be subject to cross-examination, and is not required to be qualified as an expert witness. The decisionmaking body shall assign weight and credibility to such testimony as it deems appropriate. A party or party-intervenor in a quasi-judicial proceeding on local government land use matters, upon request by another party or party-intervenor, shall be sworn as a witness, shall be subject to cross-examination by other parties or party-intervenors, and shall be required to be qualified as an expert witness, as appropriate.
(c) In a quasi-judicial proceeding on local government land use matters, a person may not be precluded from communicating directly with a member of the decisionmaking body by application of ex parte communication prohibitions. Disclosure of such communications by a member of the decisionmaking body is not required, and such nondisclosure shall not be presumed prejudicial to the decision of the decisionmaking body. All 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."

The purpose of the statute is to require public officials to disclose ex-parte communications in order to assure an adverse party the opportunity to confront, respond, and rebut any such disclosures so as to prevent any appearance of impropriety.[4] While this office has no information regarding the provisions of local ordinances implementing this statute, I would note that under the Rules of Judicial Conduct, Canon 3(B) provides in pertinent part that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a *pending or impending* proceeding[.]"[5] (e.s.)

Since the purpose of the judicial canon and of the statute appear similar, it may be advisable to use the terms "pending or impending."[6] If the term "pending" is used alone, an individual seeking to avoid the provisions of the ordinance would only need to delay filing the application until he or she had the opportunity to discuss the issue with the local official.

I trust that the above informal comments may be of assistance to you in resolving this issue. Thank you for contacting the Florida Attorney General's Office.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/t

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[1] 589 So. 2d 1337 (Fla. 3rd DCA 1991).

[2] *See* Preamble to Chapter 95-352, Laws of Florida.

[3] *See* s. 286.0115(1)(b), Fla. Stat., defining the term "local public official" as used in the subsection to mean
"any elected or appointed public official holding a county or municipal office who recommends or takes quasi-judicial action as a member of a board or commission. The term does not include a member of the board or commission of any state agency or authority."

[4] *Cf. City of Hollywood v. Hakanson*, 866 So. 2d 106 (Fla. 4th DCA 2004).

[5] Certain exceptions are set forth in Canon 3(B)(7):

"(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:
(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a

result of the ex parte communication, and
(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.
(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.
(c) A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.
(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.
(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so."

[6] *See* Webster's Third New International Dictionary *Impending* p. 1132 (that is about to occur; imminent); and *Pending* p. 1669 (through the period of continuance or indeterminacy; until the completion of) (unabridged ed. 1981). *And see* Black's Law Dictionary *Pending* p. 1169 (awaiting decision) (8th ed. 2004).