



**City of Palm Coast**  
**Agenda**  
**PLANNING AND LAND**  
**DEVELOPMENT**  
**REGULATION BOARD**

City Hall  
160 Lake Avenue  
Palm Coast, FL 32164  
[www.palmcoastgov.com](http://www.palmcoastgov.com)

***Vice Chair Glenn Davis***  
***Board Member Robert J. DeMaria***  
***Board Member Sybil Dodson-Lucas***  
***Board Member Christopher Dolney***  
***Board Member Pete Lehnertz***  
***Board Member Jake Scully***  
***Board Member Clinton Smith***  
***School Board Rep David Freeman***

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**Wednesday, November 14, 2018**

**5:30 PM**

**COMMUNITY WING OF CITY HALL**

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**RULES OF CONDUCT:**

>Public comment will be allowed consistent with Senate Bill 50, codified at the laws of Florida, 2013 – 227, creating Section 286.0114, Fla. Stat. (with an effective date of October 1, 2013). The public will be given a reasonable opportunity to be heard on a proposition before the City's Planning & Land Development Regulation Board, subject to the exceptions provided in §286.0114(3), Fla. Stat.

>Public comment on issues on the agenda or public participation shall be limited to 3 minutes.

> All public comments shall be directed through the podium. All parties shall be respectful of other persons' ideas and opinions. Clapping, cheering, jeering, booing, catcalls, and other forms of disruptive behavior from the audience are not permitted.

>If any person decides to appeal a decision made by the Planning and Land Development Regulation Board with respect to any matter considered at such meeting or hearing, he/she may want a record of the proceedings, including all testimony and evidence upon which the appeal is to be based. To that end, such person will want to ensure that a verbatim record of the proceedings is made.

>If you wish to obtain more information regarding Planning and Land Development Regulation's Agenda, please contact the Community Development Department at 386-986-3736.

>In accordance with the Americans with Disabilities Act, persons needing assistance to participate in any of these proceedings should contact the City Clerk's Office at 386-986-3713 at least 48 hours prior to the meeting.

>The City of Palm Coast is not responsible for any mechanical failure of recording equipment

>All pagers and cell phones are to remain OFF while the Planning and Land Development Regulation Board is in session.

**Call to Order and Pledge of Allegiance**

**Roll Call and Determination of a Quorum**

**Approval of Meeting Minutes**

**1 MEETING MINUTES OF THE OCTOBER 17, 2018 PLANNING AND LAND DEVELOPMENT  
REGULATION BOARD MEETING**

**Public Hearings**

- 2 ELECTION OF CHAIR AND VICE CHAIR FOR THE PLANNING AND LAND DEVELOPMENT  
REGULATION BOARD**
- 3 SUNSHINE LAW TRAINING**
- 4 TRAINING ON COMPREHENSIVE PLAN AND APPLICATION PROCESS**

**Board Discussion and Staff Issues**

**Adjournment**

## City of Palm Coast, Florida Agenda Item

Agenda Date: 11/14/2018

<b>Department</b>	PLANNING	<b>Amount</b>
<b>Item Key</b>	4640	<b>Account</b>
		<b>#</b>
<b>Subject</b>	MEETING MINUTES OF THE OCTOBER 17, 2018 PLANNING AND LAND DEVELOPMENT REGULATION BOARD MEETING	
<b>Background :</b>		
<b>Recommended Action :</b>		
Approve as presented		



# **City of Palm Coast Minutes PLANNING AND LAND DEVELOPMENT REGULATION BOARD**

City Hall  
160 Lake Avenue  
Palm Coast, FL 32164  
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## **A Call to Order and Pledge of Allegiance**

*Acting Chair Davis called the October 17, 2018 Planning and Land Development Regulation Board (PLDRB) meeting to order @ 5:32PM.*

## **B Roll Call and Determination of a Quorum**

*Present and responding to roll call:  
Mr. Smith  
Mr. Dolney*

Mr. DeMaria  
Mr. Lenhertz  
Mr. Davis

Absent:  
Mr. Scully  
Mrs. Lucas  
Mr. Freeman

**C Approval of Meeting Minutes**

**1 MINUTES FOR OCTOBER 3, 2018 PLANNING AND LAND DEVELOPMENT REGULATIONS BOARD MEETING**

**Pass**

**Motion made to approve as presented made by Board Member Dolney and seconded by Board Member Smith**

**Approved - 5 - Vice Chair Glenn Davis, Board Member Christopher Dolney, Board Member Robert DeMaria, Board Member Pete Lehnertz, Board Member Clinton Smith**

**D Public Hearings**

**2 STORQUEST SPECIAL EXCEPTION FOR MINI-WAREHOUSES, OFFICE STORAGE AND SELF-STORAGE IN THE COM-2 ZONING DISTRICT AT 3895 OLD KINGS ROAD NORTH, APPLCATION NO. 3782**

*Mr. Ray Tyner, Planning Manager, gave information regarding the requirements for a special exception. He then introduced Mr. Bill Hoover, Senior Planner, who gave a presentation which is attached to these minutes.*

*Mr. Kendall Jones representing the applicant, The William Warren Group, addressed the PLDRB members and gave a presentation which is attached to these minutes.*

*Acting Chair Davis opened this item to public comment @ 5:57PM, seeing no one approach the podium, he then closed this item to public comment @ 5:58PM.*

**Pass**

**Motion made to approve as presented with staff recommendations made by Board Member Smith and seconded by Board Member DeMaria**

**Approved - 5 - Vice Chair Glenn Davis, Board Member Christopher Dolney, Board Member Robert DeMaria, Board Member Pete Lehnertz, Board Member Clinton Smith**

**3 A SPECIAL EXCEPTION TO PERMIT A SANDWICH SHOP IN LIGHT AND WAREHOUSE INDUSTRIAL (IND- 1) ZONING AT 4490 US HIGHWAY 1 SUITE 101.**

*Mr. Ray Tyner introduced this item by giving some history on the property including its history of being annexed into the City from the County. Ms. Ida Meehan, Senior Planner, gave a presentation which is attached to these minutes.*

*Mr. Jason Sultan, applicant, addressed the PLDRB members.*

*Chair Davis opened this item to public comment at 6:07PM.*

*Mrs. Sultan, wife of applicant, spoke in favor of this agenda item and gave some background to their families' previous business experience.*

*Chair Davis closed this item to public comment at 6:09PM.*

**Pass**

**Motion made to approve as presented made by Board Member DeMaria and seconded by Board Member Smith**

**Approved - 5 - Vice Chair Glenn Davis, Board Member Christopher Dolney, Board Member Robert DeMaria, Board Member Pete Lehnertz, Board Member Clinton Smith**

**4 A SPECIAL EXCEPTION REQUEST FOR AUTOMOTIVE PARTS IN GENERAL COMMERCIAL (COM-2) ZONING AT 4835 PALM COAST PARKWAY NW.**

*Mr. Tyner introduced Ms. Ida Meehan, Senior Planner, who gave a presentation which is attached to these minutes.*

*Josh Lathan, representing the applicant, addressed the PLDRB members.*

*Mr. Lathan questioned the impact of condition #4 under the conditions for approving this application and Mr. Ray Tyner clarified that this condition is required due to the fact that 20% of trips would result in a traffic conflict at the intersection which will cause a serious safety concern.*

*Discussion ensued with PLDRB members regarding other options other than the left in and left out as well as how the lot split will impact on future developments in the area.*

*Acting Chair Davis opened this item to public comment 6:40PM, seeing no one approach the podium he closed this item to public comment at 6:41PM.*

**Pass**

**Motion made to approve as amended approval is depended on City of Palm Coast Traffic Engineer or its consultant approval addressing the site ingress/egress location for the project during the site plan review process and returning to the Planning and Land Development Regulation Board for their final site plan recommendation made by Board Member Dolney and seconded by Board Member Lehnertz**

**Approved - 5 - Vice Chair Glenn Davis, Board Member Christopher Dolney, Board Member Robert DeMaria, Board Member Pete Lehnertz, Board Member Clinton Smith**

**5 REQUEST FOR TIER 2 TECHNICAL SITE PLAN APPROVAL FOR THE PALMS AT TOWNCENTER MULTIFAMILY PROJECT, APPLICATION 3726.**

*Ms. Ida Meehan, Senior Planner, gave a presentation which is attached to these minutes.*

*Mr. Jake Zummon, lead developer for the Housing Trust Group Palms, LLC, representing the applicant, addressed the PLDRB members.*

*Acting Chair Davis opened this item for public comment @ 6:49PM and seeing no one approach the podium he closed this item to public comment at 6:50PM.*

*Ms. Reischmann pointed out to staff and the PLDRB members that attachment A is mislabeled in the agenda packet and should more accurately read Staff comments second submittal.*

**Pass**

**Motion made to approve as presented made by Board Member Dolney and seconded by Board Member Lehnertz**

**Approved - 5 - Vice Chair Glenn Davis, Board Member Christopher Dolney, Board Member Robert DeMaria, Board Member Pete Lehnertz, Board Member Clinton Smith**

**6 SUNSHINE LAW PRESENTATION**

**Motion made to withdraw item made by Ms. Reischmann**

*Mr. Tyner requested that this item be rescheduled to the November 14, 2018 meeting due to the absence of Mrs. Lucas and Mr. Scully. Ms. Katie Reischmann withdrew this item.*

**E Board Discussion and Staff Issues**

**F        Adjournment**

*Motion made that the meeting be adjourned by Mr.Dolney and the motion was seconded by Mr. DeMaria.*

*The meeting was adjourned at 6:54PM.*

*Respectfully Submitted by:  
Irene Schaefer, Recording Secretary*



## City of Palm Coast, Florida Agenda Item

Agenda Date: 11/14/2018

<b>Department</b>	PLANNING	<b>Amount</b>
<b>Item Key</b>	4693	<b>Account</b>
		<b>#</b>
<b>Subject</b>	ELECTION OF CHAIR AND VICE CHAIR FOR THE PLANNING AND LAND DEVELOPMENT REGULATION BOARD	
<b>Background :</b>		
<b>Recommended Action :</b>		
Elect a Chair and Vice Chair to the Planning and Land Development Regulations Board.		

## City of Palm Coast, Florida Agenda Item

Agenda Date: 11/14/2018

<b>Department</b>	PLANNING	<b>Amount</b>
<b>Item Key</b>	4495	<b>Account</b>
		<b>#</b>
<b>Subject</b>	SUNSHINE LAW TRAINING	
<b>Background :</b>	City of Palm Coast legal counsel, Katie Reischmann will give a refresher to the Planning and Land Development Regulation Board members regarding the State of Florida’s Sunshine Law and its requirements.	
<b>Recommended Action :</b>	Presentation only	

# Government in the Sunshine Issues

Catherine Reischmann

# Open Meetings Law

## A. What does the law say?

It applies to any gathering of two (2) or more members of the same board, committee, commission or council to discuss some matter which will foreseeably come before that board, committee, commission or council for action. The Government-in-the-Sunshine Law applies to all discussions or deliberations as well as the formal action by a board, committee or commission. The law, in essence, is applicable to any gathering, whether formal or casual, of two (2) or more members of the same board, committee or commission to discuss some matter on which foreseeable action will be taken by the public board or commission. There is no requirement that a quorum be present for a meeting to be covered under the law. Communications between board, commission or committee members can occur in many ways: orally in person, orally over a telephone, by writings, through e-mails, through conduit individuals, or by any other means. The Law provides that debates or discussions on issues should occur at open meetings noticed as required by law, not in letters, etc. – to whoever directed or at non-noticed meetings.



In essence, the “Open Meetings Law” (or “Government-in-the-Sunshine Law”) of the State of Florida requires that:

- 1) meetings of boards or commissions must be open to the public;
- 2) reasonable notice of such meetings must be given, and
- 3) minutes of the meeting must be taken.

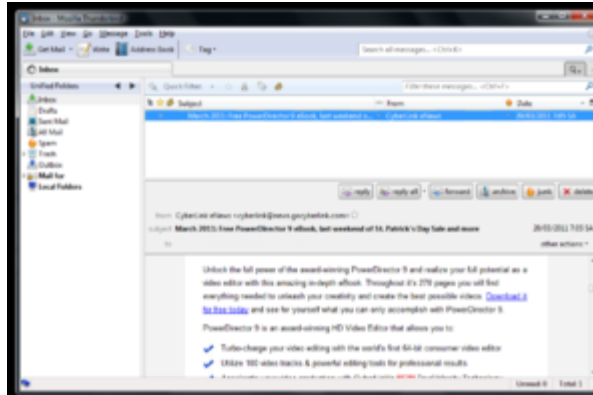


# Interpretation of Statute

## 1. Inconsistent with Plain wording

- a. The word “meetings” does not necessarily mean there has to be a meeting.
- b. There really does not have to be a board or commission for the law to apply.
- c. The words “at which official acts are to be taken” does not really mean that any action has to be taken in order for a violation of the Sunshine Law to exist.





## 2. Arguably the statute could be rephrased to state:

Any communication between two members of the same board on any matter which may reasonably or foreseeably come in front of the board must take place at a time and place of which the public has reasonable notice and location where the public has reasonable access.



# Mandatory Voting Exceptions:



a. An exception to the voting requirement exists only when the member has a possible conflict of interest.

b. Another exception was recently adopted and applies to quasi-judicial proceedings where the member must abstain “to assure a fair proceeding free from potential bias or prejudice.” Fla. Stat. 286.012.





May restrictions be placed on the presence of recording devices? No, unless the devices are unreasonably disruptive. The Courts have reasoned that cameras and no disruptive recording devices aid in making an accurate report to the members of the public who could not be present.

Meetings of the staff of commissions, boards or committees are not ordinarily subject to the Sunshine Laws. However, a staff member loses his identity as staff while serving on a commission, board or committee which has been delegated authority normally held by the governing body.



# Government in the Sunshine

- Board members may call upon staff members for factual information and advice without being subject to the Sunshine Law. However, the staff cannot be used as a liaison between committee members to conduct a de facto meeting of the committee. For example, Mr. Tyner could meet with individual Board members, but cannot circulate information and thoughts of the individual Board members to other members.

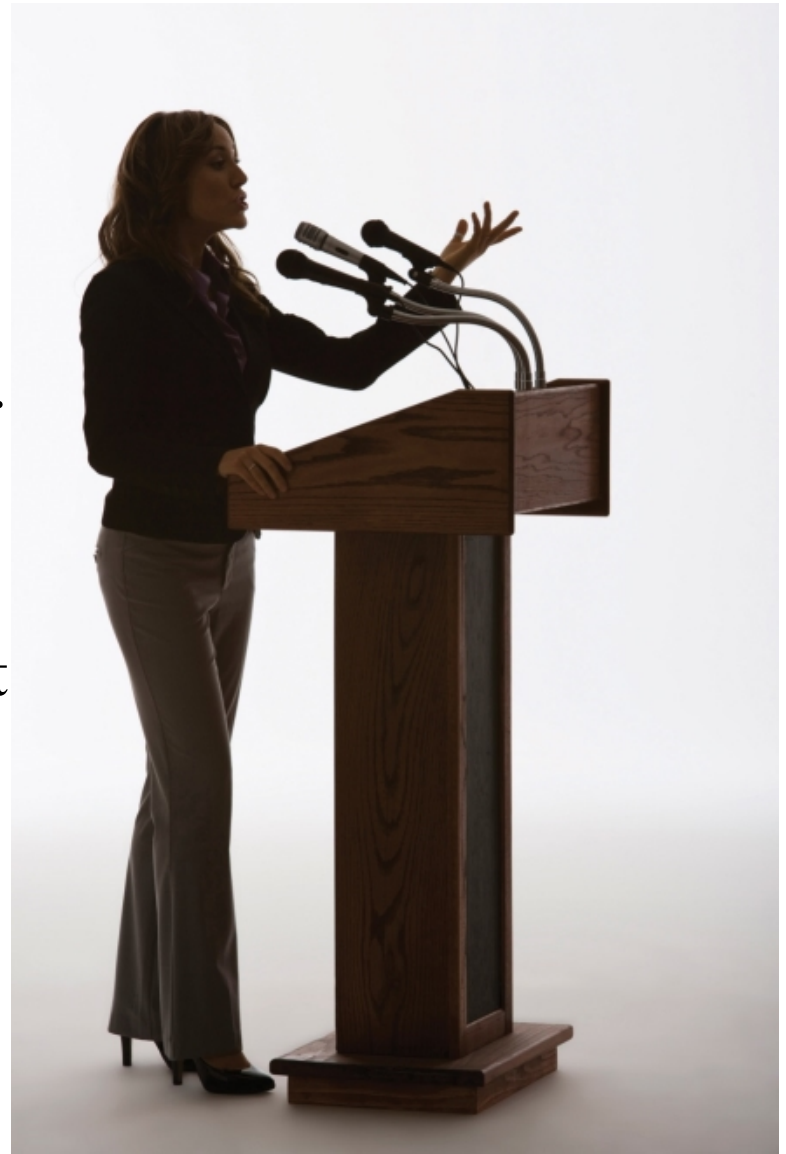
Does the Sunshine Law require an item be agendaed in order to take action?

No, but sometimes procedural rules do.



Can a board limit public participation?

Yes . However, under the **Right to Speak Act**, Fla. Stat. 286.0114, the public now has a right to be heard on all “propositions” before the Board. The right to speak must be provided during the decision making process and within “reasonable proximity in time” before final action is taken.



# 2005 Attorney General List of Don'ts



Do not talk about matters during recesses.

Do not talk about matters before meetings.

Do not talk about matters after meetings.

Do not talk about matters between meetings  
(even at City Hall).

# 2005 Attorney General List of Don'ts



Do not whisper to another member or pass notes to another member during a meeting.

Do not talk about public business at social settings.

Do not talk about votes, hearings, actions AFTER the public meetings as these matters may come back in different contexts.

# Government in the Sunshine

- Boards may not take action on nor engage in private discussion of board business via written correspondence, emails, text messages, or other electronic communications (Facebook).
- Email communication of information from one board member to another may not violate the Sunshine Law if there is no interaction related to the report, but circulating “position statements” is highly discouraged and may pose other procedural due process concerns.



# Sanctions for Violation of Sunshine Law

## 1. Criminal

- a. Any public officer who knowingly violates the Sunshine Law is guilty of a misdemeanor of the second degree, punishable as provided in Section 775.082, Section 775.083 or Section 775.084, Fla. Stat. (jail, fines, surcharges, etc.).



## 2. Civil

- a. Any public officer who violates any provision of this section is guilty of a non-criminal infraction, punishable by fine not exceeding \$500.00.
- b. Local governments may also be required to pay attorney's fees on behalf of those who enforce the Sunshine Laws.



### 3. Validity of Actions Taken in Violation of Sunshine Law.

- a. The violation makes the action **void ab initio**. No resolution, rule or formal action shall be considered binding except as taken or made at an open meeting. For example, a zoning ordinance was declared invalid because of Sunshine Law violations by a citizen's planning committee. Also, a contract for the purchase of real estate was held non-binding.
- b. The violation can be cured by reconsidering the matter at a later public meeting, however the meeting must include a **full debate** and a public hearing. The Board must take "independent final action", not just perfunctory action.

# Example of Violation

**August 2011:** A member of the Florida Keys Mosquito Control District pleaded guilty to a non-criminal violation of the Open Meetings Law. Joan Lord-Papy, a five term commissioner, must pay \$250 fine along with \$270 in court costs.

Lord-Papy was charged after responding to an email from a fellow commissioner discussing interview dates for district director applicants. The original email, sent by Commissioner Jack Bridges, included a warning that other commissioners should not reply to avoid violating the Open Meetings Law.

# Violations



- For example, the circulation of written memoranda seeking the concurrence of other members is violation.
- Additionally, the Laws are applicable where a single member of a committee or board has been delegated authority to negotiate on behalf of the commission, committee or board and does so without holding a public meeting.
- Sunshine Law is not violated by attendance of all members at a “candidates' night” as long as the board members don’t speak among themselves about government issues.
- Remember sometimes just being seen speaking together can give rise to suspicion, so use caution.



# Public Records

1. **Definition.** Section 119.011 defines public records as all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.
2. **Includes:**
  - a. Anything in writing.
  - b. Tapes and recordings.
  - c. Photographs and film.
  - d. Emails and texts and computer data storage (including citizens' email addresses).

# What are the procedures for production?

- a. Public has the right to inspect records for free. Public also has a right to copy the records, but agency can charge for that.
- b. The requestor can remain anonymous by sending an email request. The request can be oral. Anyone can make a request, even if the purpose is monetary gain or partisan politics.
- c. The documents must be produced “within a reasonable time”, to allow time to review for exempt or confidential information. Many governments have been penalized for delay.

# What are the procedures for production?

- d. There's no objection for an "overbroad" request. Requests can be made throughout litigation and can tie up staff.
- e. Government must state the legal basis for refusing to provide a document or a part of a document.

# Email/Text Receipt and Retention

Emails and texts made or received in connection with official business are public records and subject to disclosure in the absence of a specific statutory exemption. Emails and texts are also subject to the statutory restrictions on the destruction of public records requiring records be retained for a certain period of time. Email addresses of constituents are also public records, necessitating a disclosure statement on City emails. Any City related email or text received on personal computers should be forwarded to the City Clerk or to Commissioners' City email address for proper retention.





# Doubts

When in doubt about whether a document is public record, give or forward the document to the City Clerk or Irene.



# Penalties for failure to comply


- a. If a requestor files suit, and a court determines that the agency unlawfully refused to provide records or a timely basis, then the plaintiff is entitled to attorney's fees.
- b. Attorney's fees are also awarded where access is denied in good faith but it turns out the documents are not exempt from disclosure. In a recent case, a county quickly responded to a request by stating the county would provide the records, but then delayed complying with the plaintiff was entitled to attorney's fees.
- c. An agency that misplaced the request was also dinged with attorney's fees.
- d. In addition to attorney's fees, a public officer who knowingly violates the statutes is subject to suspension and removal or impeachment and is guilty of a misdemeanor of the first degree. A violation of Chapter 119 is a noncriminal infraction, punishable by a fine not exceeding \$500.

# Code of Ethics (Chpt. 112, F.S.)

- Cannot solicit or accept anything of value, such as a gift, loan, favor, or service given for the purpose of influencing votes or actions.
- Cannot do business with one's own agency – to and from
- Cannot use position to secure a special privilege or benefit
- Cannot hold conflicting employment or contractual relationship
- Cannot misuse privileged information
- Cannot appoint, employ, promote, or advance relatives
- Cannot vote on any measure which would inure to the special private gain
- Must disclose personal interests, financial interest, clients represented, contributions and honoraria
- Penalties include removal from office, censure, restitution and civil penalty up to \$10,000


# Voting Conflicts (Sec. 112.3143, F.S.)

- No municipal or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss OR to the special private gain or loss of:
  - A principal by whom the officer is retained (e.g., employer or clients)
  - To the parent organization or subsidiary of a corporate principal by which the officer is retained.
  - A relative or business associate of the officer (father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, daughter-in-law; but may extend broader to other relatives such as brother-in-law if the benefit would impact a relative such as sister). (Note that measure affecting relative's employer may also create a conflict)
- Special private gain or loss – economic benefit or harm
- Before the vote is taken, officer shall publicly state to the Board the nature of the interest in the matter from which he or she is abstaining and within 15 days after the vote occurs, disclose the nature of the interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum into the minutes
- No appointed officer shall PARTICIPATE in any manner that would inure to the special private gain or loss of any of the persons or entities listed above without first disclosing the nature of the interest.
  - If interest is not given to person responsible for recording minutes BEFORE the meeting, disclosure must be made orally at the meeting when it becomes known that a conflict exists. Memorandum must be filed 15 days after.



# QUASI-JUDICIAL PROCEEDINGS

Developing Good Habits



## I. Overview of Functions of Elected Officials

- Administrative
- Legislative
- Quasi-Judicial



# A. Administrative Examples

- Contracts
- Some resolutions (see F.S. 166.041(b) – administrative resolutions)
- Grants



## B. Legislative Examples

- Ordinances, including small and large scale amendments comprehensive plan (exception: parcel specific rezonings)
- Some resolutions (see F.S. 166.041(b) – expressions of temporary character)
- Proclamations



# C. Quasi-Judicial

## 1. What are quasi judicial proceedings?

- “Quasi”: “nearly”; “almost but not quite” “sorta”
- “Justice”: “dealing with someone reasonably by applying the law”; judges

# Quasi-Judicial (cont'd)

2. What are characteristics of quasi-judicial proceedings?
  - An applicant (individual/entity)
  - Asks the Town for something which the Code regulates and allows if (s)he meets certain criteria (applying the law)

# Quasi-Judicial (cont'd)

## 3. What boards are quasi-judicial?

- PLDRB
  - Variances and appeals from Administrative official decisions
  - Code Enforcement Board
  - Lot specific rezonings
  - Subdivisions – major and minor
  - Street vacations
  - Sign permits
  - Special exceptions
- City Council

# Quasi-Judicial (cont'd)

- 4. What does “quasi” judicial NOT mean?
  - Majority of formal rules of evidence and rules of procedure do not apply
  - Boards, committees, and Council are not the “judiciary” under Fla. Constitution, and therefore have no power to declare an ordinance voidable, illegal, unfair, or unenforceable.

# Quasi-Judicial (cont'd)

## 5. What does quasi judicial mean?

- Due process (i.e., fair procedures) – constitutional mandate
  - Proper notice
  - Opportunity to be heard
  - Parties must be able to:
    - present evidence
    - cross examine witnesses (done differently than in judicial proceedings, per City's rules of procedure)
    - know why board/committee/council decided the way it did (based on what facts?)

# Quasi-Judicial (cont'd)

## 6. What statutes recognize quasi judicial proceedings?

- Local governments get their power generally from the Fla. Constitution and F.S. 166.021 (home rule powers)
  - F.S. 286.0115: limited rules re: land use decisions and swearing in witnesses
  - F.S. 166.033: Town must provide written notice to applicant when application is denied in land use decisions and to cite the applicable ordinance as basis for denial.
- Rules regarding quasi-judicial proceedings have been developed over time by court decisions.

# Quasi-Judicial (cont'd)

7. What is so different legally between quasi-judicial and legislative/administrative proceedings?
- Since individual constitutional rights are not at stake in quasi-judicial proceedings, if a decision is judicially challenged, courts scrutinize them closer than legislative or administrative decisions.
  - It is important to know, though, that courts still generally only review quasi-judicial decisions to a limited extent, with exceptions.

# Quasi-Judicial (cont'd)

8. Judicial “test” when a legislative or administrative decision is challenged:

- Was the decision by the City “fairly debatable”?
  - It is always wise to state reasons (i.e., “whereas” clauses) in ordinances or have a record when awarding major contracts since courts pay great deference to City’s legislative decisions. (NOTE: The “fairly debatable” test does not apply when a decision is challenged on other grounds, such as a violation of state or federal law or the constitution.)



# Quasi-Judicial (cont'd)

## 9. Judicial “test” when a quasi-judicial decision is challenged

- Was due process afforded?
- Was there competent substantial evidence to support the decision?
- Were the essential requirements of the law followed?

(NOTE: This judicial test does not apply when a decision is challenged on other grounds, such as a violation of state or federal law or the constitution. In such cases, there will be a trial before the court.)

# Quasi-Judicial (cont'd)

## a. What is “due process”?

- Proper notice
- Opportunity to be heard
- Parties must be able to:
  - Present evidence
  - Cross examine witnesses (done differently than in judicial proceedings per the City’s rules of procedure)
  - Know why board/committee/council decided the way it did (based on what facts?)

# Quasi-Judicial (cont'd)

## b. What is competent substantial evidence?

The applicant has the burden to prove the competent substantial evidence that (s)he meets the criteria of the Code. If the applicant meets the criteria by competent evidence, with the exception of variances, the burden shifts to the City to prove the granting the application/permit would be detrimental to the public interest. (NOTE: In code enforcement proceedings, City has the burden of proving that there has been a violation of the Code.)

Competent substantial evidence is evidence that a reasonable mind would accept as adequate to support the decision.



## What is competent substantial evidence? (cont'd)

- Swearing in witnesses gives the proceeding more credibility in the eyes of a court. F.S. 286.0115 requires a witness be sworn when a party so requests in a land use case.
- Boards have a fair amount of discretion to determine what is competent substantial evidence because they can judge the credibility of the witnesses by their demeanor, voice intonations, facial expressions, and conduct during the hearing.
- Even if there is MORE competent substantial evidence to support an opposite decision, a court will uphold the decision!
- Appellate courts have developed rules of what constitutes LEGAL competent evidence.

# Quasi-Judicial (cont'd)

## c. What is LEGAL competent evidence?

- Reports and testimony of planners, engineers, fire chiefs, police, code inspectors, and other staff are competent and often are considered experts in technical matters.
- Ultimate conclusions are not competent evidence; there must be facts presented to support the conclusion (i.e., “the special exception will generate undue traffic congestion”).

## C. What is LEGAL competent evidence?

- Affidavits have a low threshold of competency as evidence and do not allow the opposing party to “cross examine.”
- Opinions without facts are not competent.
- Simply a decision of a lower board, without more, is not considered competent substantial evidence.
- “Popularity Polls” are not competent evidence. (Conetta v City of Sarasota, 400 So.2d 1051 (Fla. 2d DCA 1981))
- Although hearsay is allowed, hearsay by itself is not competent substantial evidence AND the opposing party cannot “cross examine.”



## C. What is LEGAL competent evidence? (cont'd)

- “Testimony” of attorneys representing applicants is not considered competent substantial evidence; it should not be a basis for a decision.
- Neighbors are competent to give facts about which they have first-hand knowledge in areas such as aesthetics, recreational needs, compatibility with the neighborhood.
- Neighbors’ testimony regarding traffic is sometimes not considered competent since they are not experts.
- Neighbors’ testimony regarding real estate values is not considered competent since they are not experts.



## d. What is “essential requirements of the law”?

- When there is a departure from a clearly established principle of law which results in miscarriage of justice.
  - Examples: When a board makes a decision based on a criteria not set forth in the code or when the board applies the wrong code provision.



## 10. Ex parte communications

- a. Definition: involving one side only; made on behalf of, or by, only one of the parties involved in a case outside of the noticed hearing.
- b. Due process problems
  - No notice to the other party
  - No opportunity to “cross examine”
  - When the board finally makes a decision in the noticed hearing, parties are to be informed of the facts upon which the board made its decision.
  - Prejudicial (quasi judicial officer may pre-judge)

## 10. Ex parte communications (cont'd)

- “Ex parte communications are inherently improper and are anathema to quasi-judicial proceedings” (Jennings v. Dade Co., 589 So.2d 1337, 1341 Fla. 4<sup>th</sup> DCA 1991))
- When ex parte communication is established, there is a presumption of prejudice; the offending party will be required to prove an absence of prejudice – a heavy burden.
- 1996: F.A. 286.0115 passed to remove the heavy presumption of prejudice so long as (1) local government passes a resolution setting forth procedures of the statute; and (2) the communication is disclosed before voting. City has passed.

## 10. Ex parte communications (cont'd)

- Disclosure
  - Subject of communication;
  - Who
  - Did the communication prejudice you in any way from fairly making a decision based only on evidence presented here today?
- If you can, disclose early in the proceedings to give any opponents reasonable to respond/refute.

## 10. Ex parte communications (cont'd)

- “Ex parte communications are inherently improper and are anathema to quasi-judicial proceedings” (Jennings v. Dade Co., 589 So.2d 1337, 1341 Fla. 4<sup>th</sup> DCA 1991))
- When ex parte communication is established, there is a presumption of prejudice; the offending party will be required to prove an absence of prejudice – a heavy burden.
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## 10. Ex parte communications (cont'd)

- A quasi-judicial officer should not “testify” about what (s)he read, saw, or heard except during disclosure because (s)he is then becoming a witness (i.e., “During my site visit, I saw...”)
- Ex parte rules do not apply to communications between staff and public. These communications are encouraged.
- If you receive written communication, this must be made part of the record of the hearing.
- Ex parte rules do not apply to communication between board members and City attorney on legal questions.

## 10. Ex parte communications (cont'd)

- Ex parte communications should be discouraged, and the ability to disclose ex parte communication should not be treated as a license for unmitigated ex parte communication. If you are approached by someone prior to a hearing, tell him/her to come to the hearing and be heard by all at that time. Tell him/her that you should not be receiving the information outside of the hearing.
- How would you feel if you were a party to a court case, and the judge was talking to your opponent?

## 11. Closing.

- Common sense consideration: Many applicants feel the “deck is stacked” against them because the Board is part of the City , as are staff; both seem to be on the same side, and the Board is not perceived as being partial. In hearings, staff members and Board members should be courteously business-like toward each other without being overly buddy-buddy.
- “...some Boards take unbridled and arbitrary actions, and may well deserve Jones’ characterization of them as “kangaroo courts.”” (Justice Winifred Sharp in Jones v. Seminole County, 670 So.2d 95 (Fla. 5<sup>th</sup> DCA 1996))
- How would you feel if you were a party to a court case, and the judge was talking to your opponent?

## II. Outline

Administrative

Legislative

Quasi-Judicial

1. What are Q-J proceedings?
2. What are characteristics of quasi-judicial proceedings?
3. What boards are quasi-judicial?
4. What quasi-judicial does NOT mean?
5. What quasi-judicial does mean?





## II. Outline (cont'd)

6. What statutes recognize quasi-judicial proceedings?
7. What is so different legally between quasi-judicial and legislative/administrative?
8. Judicial test when a legislative/administrative decision is challenged?

## II. Outline (cont'd)

9. Judicial test when a quasi-judicial decision is challenged.

- a. Due process
- b. Competent substantial evidence
- c. Leal competent evidence
- d. Essential requirements of the law

10. Ex parte communications

## City of Palm Coast, Florida Agenda Item

Agenda Date: 11/14/2018

<b>Department</b>	PLANNING	<b>Amount</b>
<b>Item Key</b>	4694	<b>Account</b>
		<b>#</b>
<b>Subject</b>	TRAINING ON COMPREHENSIVE PLAN AND APPLICATION PROCESS	
<b>Background :</b>		
<b>Recommended Action :</b>	Presentation only	