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ADVISORY BOARD WORKSHOP

Government in the Sunshine Law

What is the Government in the Sunshine Law?

The Government in the Sunshine Law, as codified in section 286.011, Florida Statutes, provides a right of public access to governmental proceedings at the state and local levels.

The Sunshine Law applies to all governmental boards and bodies with decision-making authority and to all advisory boards that may provide recommendations to any board, body or individual with decision-making authority.

What are the basic requirements of the Sunshine Law?

As applied to municipal boards, the Sunshine Law has three basic requirements:

1. **All Meetings Must be Open to the Public**

- *Public meetings cannot be held at locations where the public and press are effectively excluded or where public access is limited in any way.*
- *A board **may** adopt reasonable rules, regulations and policies to ensure the orderly conduct and require orderly behavior on the part of those attending. These include: providing guidelines as to the amount of time an individual has to address the board; prescribing procedures for allowing representatives of groups to address the board; prescribing a procedure or forms for an individual to use in order to inform the board of a desire to be heard; and designating a specific period of time for public comment.*
- *Members of the public may record a meeting so long as they are not disruptive.*

- *Based on a recent statutory amendment, members of the public must be given an **opportunity** to be heard on any proposition before any municipal board or commission prior to the final decision.*
- *Board members may vote by written ballot so long as the votes are made openly at a public meeting, the name of the person voting is written on the ballot, and the ballots are maintained as public records.*
- *Roll call votes are not required.*

2. Public Must be Given Reasonable Notice of Such Meetings

- *No “bright line” test for what constitutes reasonable notice. Type of notice required depends on the particular facts and circumstances.*
- *Sunshine Law does not require that a board provide notice of each item to be discussed via a published agenda. Such a requirement would preclude access to meetings by members of the general public who wish to bring specific issues before a governmental body.*

3. Minutes of the Meeting Must be Taken

- *Minutes of public meeting, including workshop meetings, must be promptly recorded and open for public inspection.*
- *The use of the term “minutes” contemplates a brief summary or series of brief notes or memoranda reflecting the events of the meeting (also known as “action minutes”).*
- *No requirement that meetings be recorded; however, once recordings have been made, they are public records and subject to public records retention schedule established by the Department of State.*

When does the Sunshine Law apply?

The Sunshine Law applies to any gathering of two or more members of the same municipal board to discuss some matter which foreseeably **may** come before that board for action.

Any such gathering that is not open to the public, for which the public is not given reasonable notice, and for which minutes are not taken violates the Sunshine Law.

What are the practical applications of the Sunshine Law to members of municipal boards?

1. Two or more members of the **same board** cannot privately “discuss” any matter that will foreseeably come before the board for official action, regardless of when or where the discussions take place.

ALL CONVERSATIONS REGARDING BOARD BUSINESS MUST OCCUR DURING THE COURSE OF A PUBLIC MEETING.

- *This prohibition includes conversations at informal gatherings, all telephone conversations, and all exchanges of written communications, including e-mail and text messages.*
 - *The Sunshine Law is not violated if a communication by a board member to another board member is only “one way” and there is no response. For example, e-mail communication of factual background from one board member to another that does not result in exchange of comments or responses does not constitute a meeting under the Sunshine Law. While board members may distribute “position statements” to other members so long as they avoid any discussion or debate among themselves on those statements, this practice is strongly discouraged. If a member is unable to make a meeting and wishes to make a statement on a particular item, the member may request that Staff or the Chair read such statement into the record at the meeting.*
 - *Members of the same board may not have any private discussions or communications relating to issues before the board **during the board meeting** (including recesses) if such discussions are not audible to the public attending the meeting. Such discussions or communications violate the letter and spirit of the Sunshine Law. This prohibition specifically includes any “off-microphone” discussions between board members and the exchange of written notes, e-mails or text messages during the course of a meeting.*
 - *Members of the same board are not precluded from attending social or business functions together so long as board matters are not addressed at such functions.*
 - *Members of one board are not prohibited from attending meetings of another municipal board and commenting on agenda items that may subsequently come before their board for final action so long as the members do not discuss the items among themselves. For example, members of the Village Council may attend advisory board meetings and comment upon items. AGO 00-68,*
2. Board members **may** discuss board matters with the Village Manager, members of Village Staff, legal counsel or a member of a different board. However, the Village Manager (or any other non-board member) may **not** act as a liaison for board members by circulating information and the thoughts of the individual board

members. AGO 74-47. Such discussions cannot act as a substitute for a public meeting. Within the context of the Sunshine Law, “polling” occurs when a non-member seeks to ascertain the members’ positions on an issue and takes official action based on such information.

3. Members of a municipal advisory board are not prohibited from conducting “inspection trips” to view properties or other matters that are the subject of board action, but members generally may not take such trips together or discuss such inspections prior to the public meeting. The group may only take such trips in the context of an advertised public meeting.
4. Although the Sunshine Law generally allows members to participate in meetings via telephone so long as a legal quorum is physically present in a public location, **attendance by telephone or any other electronic means violates Section 2-1(f)(8) of the Village Code.**
5. A member of a Village board who is present at a meeting of that body at which an official decision, ruling or other official act is to be taken or adopted **may not abstain from voting.** A vote shall be recorded or counted for each such member present, except when there is or appears to be a conflict of interest or voting conflict. Failure to vote, however, does not invalidate the proceeding.
 - *When a member of a local advisory board is required to abstain, the member is disqualified from voting and may not be counted for the purposes of determining a quorum. AGO 86-61.*

What are the consequences for a violation of the Sunshine Law?

1. *Criminal penalties:* A knowing violation of the Sunshine Law is a second degree misdemeanor and is punishable by up to 60 days in jail and/or a fine not exceeding \$500.00.
2. *Civil penalties:* Noncriminal violations of the Sunshine Law are punishable by a fine not exceeding \$500.00. The state attorney may pursue such actions on behalf of the state. AGO 91-38.
3. *Attorney’s fees:* Attorney’s fees may be assessed against both the board and the individual members when sued for a Sunshine Law violation (except that the individual board members are not liable for attorney’s fees where the board sought, and took, the advice of its attorney).
4. *Effect on board action:* Any action taken by a board in violation of the Sunshine Law is invalid and of no effect. A violation can be cured by independent final action (as opposed to mere ratification) in the sunshine.

5. *Civil action for declaratory or injunctive relief.* A civil action for declaration or injunctive relief can be pursued by any citizen of the state. The mere showing that the Sunshine Law has been violated constitutes “irreparable injury.”

Voting Conflicts

1. Under state law, a member of a Village advisory board is prohibited from voting in his or her official capacity:

upon any matter which would inure to **his or her special private gain or loss**; which he or she knows would inure to the **special private gain or loss of any principal by whom he or she is retained** or to the parent organization or subsidiary of a corporate principal by which he or she is retained . . . ; or which he or she knows would inure to the **special private gain or loss of a relative or business associate of the public officer.**

Note: For the purposes of this section, the term “relative” refers to a father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law or daughter-in-law.

2. If conflict known prior to meeting, a written memorandum setting forth the nature of the conflict should be filed (Ethics Commission Form 8B), which becomes part of the minutes. If conflict discovered at the meeting, nature of the conflict should be disclosed orally, and written memorandum setting forth the nature of the conflict should be filed (Ethics Commission Form 8B) within 15 days, which becomes part of the minutes.
3. A board member should not participate (defined as attempting to influence the decision orally or in writing) in any manner in which he or she has a voting conflict.
4. Under State law, the determination of whether the public officer receives a special private gain or loss is based upon the size of the class of persons affected by the vote at issue. In other words, where the class of persons affected by the vote is large, a special gain will result only if there are circumstances unique to the officer so that the officer stands to gain more than other members of the class. The Ethics Commission has typically concluded that no voting conflict exists where the interests of the public officer involve one percent or less of the class of persons affected by the vote. For example, the Commission concluded that a council member could vote on the alignment of a proposed road project where the council member was only one of 385 potentially affected property owners. The County has generally adopted this same formula while applying the County ethics code.
5. No voting conflict exists where there is uncertainty at the time of the vote as to whether there would be any special gain or loss to the public officer. For example, in CEO 88-31, the Commission determined that a city council member

was not prohibited from voting on the annexation of property which adjoined property in which she owned an interest because it was unclear what effect the proposed development of the property would have on the council member's property.

6. There clearly is no "bright line" test to determine whether a voting conflict exists and each circumstance must be evaluated on the specific set of facts presented. This office will assist any board member in determining whether a conflict or apparent conflict exists.
7. As you will hear during your required Ethics Training, the Palm Beach County Ethics Code is more restrictive when it comes to voting conflicts and hinges upon a determination of "special financial benefit" to the Board member and the member's relatives, outside employer (or spouse or domestic partner's outside employer), clients and debtors. It also applies to: civic groups; unions; social, charitable or religious organizations; and other not-for-profit organizations of which the board member (or the member's spouse or domestic partner) is an officer or director.

Conflicting Employment or Contractual Relationship

While there are statutory restrictions governing conflict employment and contractual relationships, these statutory provisions are addressed within Section 2-1(f) of the Village Code:

1. Section 2-1(f)(3) provides that a member of a Village board "shall not hold any employment or office in Village government or any contractual relationship with the Village" (unless required by statute or ordinance);
2. Section 2-1(f)(5) provides that a member of a Village board "shall not appear before the board or committee on which they serve or the Village Council as an agent or attorney on behalf of any person or entity;" and
3. Section 2-1(f)(6) provides that a member of a Village board "shall not have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between their private interests and the performance of their public duties or that would impede the full and faithful discharge of their public duties."

Other Village Code Requirements

All Village board and committees are governed by Section 2-1 of the Village Code. The provisions not already addressed above include:

1. Each board or committee shall maintain attendance records and voting records of each member shall forward such information to the Village Clerk. The records shall include the reason given by the member for any absence.
2. All board or committee members serve at the pleasure of the Village Council and may be removed with or without cause by vote of the Village Council.
3. Members shall serve on only one (1) village board or committee where membership on two (2) boards or committees would violate the constitutional dual office-holding provision.
4. Members shall not initiate any grievance or complaint against any person appearing before the board or committee on which they serve without the approval of the Village Manager.
5. At the beginning of the meeting, the chair must publicly announce whether the first alternate and/or the second alternate will be voting.
6. All boards and committees shall elect a chair, vice chair and any other officers deemed necessary during the month of May. The vice chair presides in the absence of the chair. In the absence of both, the board or committee selects a chair pro tempore to assume such duties.
7. While boards and committees may adopt their own rules, each board or committee must adhere to the basic rules of parliamentary procedure, which require:
 - A. All items of business and motions before the board or committee are fully and freely discussed;
 - B. Only one motion or issue should be considered at a time;
 - C. All members should direct their remarks to the chair and wait to be recognized;
 - D. While majority rules, the rights of the minority are protected by assuring them the ability to speak and vote; and
 - E. Members shall refrain from making personal remarks or otherwise attacking the motives of the other members.
8. Special meetings require forty-eight (48) hours' notice to the Village Clerk and to other members.
9. Members shall notify the chair if they are unable to attend so that the meeting can be canceled if a quorum will not be present.

10. Unless otherwise provided by law or ordinance, three members constitute a quorum. An affirmative vote of a majority of those present is necessary for official action. If a motion fails to achieve the affirmative vote of a majority of members, the petition or other matter is denied.
11. Unless waived by the Village Council, any member of a board or committee who no longer resides in the Village during his or her term shall automatically cease to be a member.
12. If any member of a board or committee is absent from three (3) consecutive regular meetings or twenty-five percent (25%) of the regular meetings within any twelve-month period, the chair shall notify the Village Council of such absences in writing. Upon consideration of the circumstances pertaining to the member's absence, the Village Council may retain the member or declare the member's office vacant and promptly fill such vacancy for the unexpired term of office.