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PRESERVATION ADVOCACY: FIXIN' THE PROCESS AND WORKIN' THE PROGRAM

I. FUNDAMENTAL RULES IN QUASI-JUDICIAL HEARING

a. Distinction between Legislative and Quasi-Judicial Hearings.

i. Legislative:

(1) Example: The process by which the land development code or historic preservation ordinance is amended
(2) Policy Making
(3) Legislative Body has more discretion and is focused on connection or nexus between the proposed legislation (ordinance) and the problem or issue intended to be addressed or corrected
(4) Contact with Legislative Body: Acceptable since same is considered lobbying. Lobbying registration rules may apply.

ii. Quasi-Judicial:

(1) Example: Hearings held by an historic preservation commission on an application for certificate of appropriateness, variance review board on a petition for variance or city council on a rezoning petition.
(2) Implementing Policy Adopted by Legislative Body
(3) Less Discretion as the commission or board is required to apply adopted standards of review to the application
(4) Focus on testimony and documentary evidence as it relates to the applicable standard of review
(5) Contact with Board Members: May or may not be permitted

b. Sunshine Law:

i. All contact between board members on matters that may come for a vote must be in the "sunshine". Florida's Government in the Sunshine Law, Section 286.011 Fl. St., commonly referred to as the Sunshine Law, provides a right of access to governmental proceedings of public boards and commissions at both the state and local levels. The law is equally applicable to elected and appointed boards, and applies to any gathering of 2 or more members of the same board to discuss some matter which will foreseeably come before that board for action. Members-elect to such boards or commissions are also subject to the Sunshine Law, even though they have not yet taken office.

ii. There are 3 basic requirements of the Sunshine Law:

(1) Meetings of public board or commissions must be open to the public;
(2) Reasonable notice of such meetings must be given; and
(3) Minutes of the meetings must be taken and promptly recorded.

iii. A constitutional right of access to meetings of collegial public bodies is recognized in Art I, Section 24, Florida Constitution. So the Sunshine Law is both a constitutional and statutory mandate.

iv. Much has been written and opined on the applicability of the Sunshine Law to numerous situations in Florida. Suffice it to say, the Sunshine Law applies to historic preservation boards that are delegated and charged with carrying out and enforcing local historic preservation ordinances. This applies whether the board is responsible for determining which structures, properties or neighborhoods are appropriate for local historic designation or reviewing an application for demolition or is applying adopted design guidelines to the rehabilitation of a contributing structure.

v. Consequences for Failure to Comply with Sunshine Law:

(1) Criminal Penalties: a knowing violation is a misdemeanor of the 2nd degree subject to imprisonment not to exceed 60 days and/or fine up to $500.00.
(2) Removal from Office: When a method for removal from office is not otherwise provided by the FL Constitution or by law, the Governor may suspend an elected or appointed public officer who is indicted or informed against for any misdemeanor arising directly out of his or her official duties. If convicted, the officer may be removed from office by executive order of the Governor.

(3) Noncriminal Infractions: Punishable by a fine not exceeding $500.00.
(4) Attorney's fees: Reasonable attorney's fees will be assessed against a board or commission found to have violated the Sunshine Law.
(5) Validity of Action: Section 286.011 F. S., provides that no resolution, rule, regulation or formal action shall be considered binding except that taken or made at an open meeting. The courts have held that action taken in violation of the Sunshine Law is void ab initio. A full open hearing will cure the defect; a violation of the Sunshine Law will not be cured by a perfunctory ratification of the action taken outside of the sunshine.

c. Voting Requirement and Conflicts of Interest at Meetings of Governmental Bodies.

i. Financial Conflicts of Interest. Section 112.312(8) defines conflict or conflict of interest as a situation in which regard for a private interest tends to lead to disregard of a public duty or interest. Section 112.3143(2)(a) "a state public officer may not vote on any matter that the officer knows would inure to his or her special private gain or loss. This term is defined to mean "an economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, unless the measure affects a class that includes the officer, his or her relative, business associate, or principal", in which case, certain factors must be considered.

ii. SB 846 amends Section 286.012. A member of a state, county or municipal governmental board, commission or agency who is present at a meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may not abstain from voting in regard to any such decision, ruling or act; and a vote shall be recorded or counted for each such member present, unless with any such member, there is, or appears to be, a possible conflict of interest under 112.311, 112.313 or 112.3143, or additional or more stringent standards of conduct, if any, adopted pursuant to 112.326. If there is, or appears to be, a possible conflict under 112.311, 112.313 or 112.3143, the member shall comply with the disclosure requirements of 112.3143. If the official decision, ruling or act occurs in the context of a quasi-judicial proceeding, a member may abstain from voting on such matter if the abstention is to assure a fair proceeding free from potential bias or prejudice.

d. Financial Disclosure: Section 112.3144 F. S., requires all public officials, including appointed board members, to file a full and public disclosure of his or her financial interests by July 1 for the previous calendar year. The Legislature just amended this section (SB 846) to allow the Ethics Commission to initiate an investigation and conduct a public hearing without receipt of a complaint to determine whether the person's failure to file was willful. If the commission determines that the person willfully failed to file the public disclosure, the commission shall enter an order recommending that the officer be removed from his or her public office.

II. **DUE PROCESS RULES:** A quasi-judicial hearing generally meets basic due process requirements if the parties are provided with notice of the hearing and an opportunity to be heard. In quasi-judicial proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts. [*Jennings v Dade County, 589 So.2d 1337 (Fla 3rd DCA 1991].*

a. <u>What Kind of Notice of the Meeting must be Given:</u>

i. A vital element of the Sunshine Law is the requirement that boards subject to the law provide "reasonable notice" of all meetings. The Sunshine Law does not define the term "reasonable notice". Therefore, the type of notice is variable and depends upon the facts of the situation and the board involved. In each case, the agency must give notice at such time and in such manner as to enable the media and the general public to attend the meeting. Notice should be guided by the principle so as to give each party a fair opportunity to prepare and respond.

ii. While the Attorney General cannot specify the type of notice which must be given in all cases, the following notice guidelines are suggested:

1. The notice should contain the time and place of the meeting and, if available, an agenda, or if no agenda is available, a statement of the general subject matter to be considered.
2. The notice should be prominently displayed in the area in the agency's offices set aside for that purpose, ie. city hall, agency's website, etc.
3. Except in the case of emergency or special meetings, notice should be provided at least 7 days prior to the meeting.
4. Special meeting should have no less than 24 and preferably at least 72 hours reasonable notice to the public.
5. The use of press releases, faxes, emails, and/or phone calls to the local news is highly effective in providing notice of upcoming meetings.

iii. Section 286.0105, F.S., requires each board, commission or agency of this state or of any political subdivision thereof to include in the notice of each meeting or hearing, conspicuously on such notice, the advice that, if a person decides to appeal any decision made by the board, agency or commission with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

iv. The Sunshine Law does not mandate that an agency provide notice of each item to be discussed via public agenda although the AGO has recommended the publication of an agenda, if available.

b. <u>Present Evidence</u>

i. The order of presenters is not set in statute and is generally addressed within the board's or commission's rules of procedure. Generally, the board staff will make an initial presentation, followed by the applicant and then members of the public who wish to speak on the case. Rebuttal time should be afforded to the applicant particularly after public commentary and the opponents have had a chance to speak.

ii. How much time is afforded each party can vary immensely and is another subjective call. It can range from 15 minutes per side, to 30 minutes to the applicant and 3 minutes for each member of the public, to 2 hours depending on the hearing and the board's or commission's adopted rules of procedure.

iii. The public has a right to speak, but as with any other hearing, the board or commission can impose reasonable restrictions to limit the debate. Section 286.0115(2)(b) provides that "In a quasi-judicial proceeding on local government land use matters, a person who appears before the decision-making body who is not a party or party-intervenor shall be allowed to testify before the decision-making body, subject to control by the decision-making body and may be requested to respond to questions from the decision-making 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".

c. <u>Cross-Examine.</u> The right to cross examine witnesses is reserved for parties only and is not a right that has been bestowed on all participants, especially

members of the public. [*Carillon Community Residential v Seminole County, 45 So.3d 7 (Fla. 5th DCA 2010]*

d. <u>Impartial Judge.</u> Each board member is charged with making a decision by applying the applicable standard of review in the historic preservation ordinance or code to the evidence presented during the hearing without bias to either the applicant or anyone who testified in support or in opposition to the application. This goes beyond the financial voting conflicts of interest we discussed earlier and I believe was the Legislature's intent in SB 846 when it amended Section 286.012.

e. <u>Record Based Decision Making</u>

i. Any testimony may be submitted. However, the body should be careful so as to avoid giving lay testimony weight over staff recommendations or evidence introduced by those qualified as experts. Section 286.0115(2)(b) "the decision-making body shall assign weight and credibility to such testimony as it deems appropriate".

ii. Too many documents and not enough time. Rarely do you have a board making decision in which they elect to postpone their ruling until the next meeting. It is presumed that all the documentation has been read in advance or at least reviewed. Particularly when reviewing voluminous staff reports or transcripts of earlier proceedings, this becomes an impossible task.

iii. Site Visits. City of Tampa has helped organize site visits. Other jurisdictions are concerned that site visits could result in a board member testifying as a witness, in the board member no longer being an impartial judge or in the board member not making a decision based upon evidence introduced during the noticed public hearing.

f. <u>Ex Parte Contact</u>

i. Jennings v Dade County held that: Ex parte communications are inherently improper in quasi-judicial proceedings. Quasi-judicial officers should avoid all such contact where they are identifiable. However, we recognize the reality that commissioners are elected officials in which capacity they may unavoidably be the recipients of unsolicited ex parte communications regarding quasi judicial matters they are to decide.

The court must first determine "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."

ii. Considerations by Jennings decision which may be relevant to void a board's actions if unduly influenced by ex-parte communications:

(1) The gravity of the ex parte communication;
(2) Whether the contacts may have influenced the agency's ultimate decision;
(3) Whether the party making the improper contacts benefited from the agency's ultimate decision;
(4) Whether the contents of the communications were unknown to opposing parties who therefore had no opportunity to respond; and,
(5) Whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

iii. Can ex-parte communications really be cured under Section 286.0115(2) F.S.?

(1) Subparagraph (c) provides that: 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 decision making body by application of ex parte communications prohibitions. Disclosure of such communications by a member of the decision-making body is not required, and such nondisclosure shall not be presumed prejudicial to the decision of the decision making body. All decisions of the decision making body in 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.
(2) However, pursuant to Subsection (1) the county or municipality must first "adopt an ordinance or resolution establishing the procedures and provisions of this subsection for quasi-judicial proceedings on local government land use matters" in order to allow for this cure.

g. <u>Substantial Competent Evidence</u>

i. Competent/Substantial Evidence is defined as "Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion…We are of the

view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent'. *[De Groot v Sheffield, 95 So2d 912, 915 (Fla 1957)]*

ii. The evidence, whether testimony or documentary evidence, must relate to the standards, criteria or design requirements adopted in the historic preservation code. Otherwise, it is not relevant and should not be relied upon by the board members in making a decision.

(1) Citizen Testimony – fact based
(2) Role of Consultant/Land Use Planner/Architect
(3) Documentary Evidence
Staff Reports
Studies
Maps: may be considered as competent substantial evidence
Photographs

iii. Competent substantial evidence is NOT persuasive to the board if:

(1) Your witness is an engineer that announces that he is not an expert witness. "Where technical expertise is required lay opinion testimony is not valid evidence upon which a special exception determination may be made in whole or in part.
(2) Your witness testifies that "he wished to preserve the residential character of his neighborhood". Being a good neighbor does not make you a credible or even an expert witness on the character of the neighborhood.
(3) You submit numerous letters of protest or approval. The petitions gathered may look impressive to a legislative body, but in the quasi-judicial realm, the appellate courts have held that the "letters are not evidence".

iv. Discuss 2 cases:

(1) *City of Apopka v Orange County, 299 So.2d 675 (4th DCA 1974*): Layman's opinions not corroborated by competent facts does not constitute competent substantial evidence
(2) *Metropolitan Dade County v Blumenthal, 675 So.2d 598 (3rd DCA 1995):* Citizen testimony that was fact based constituted competent substantial evidence.

III. HELPFUL HINTS

a. Reach out to staff, city attorney, opposing side
Helpful in preparing for hearing
Can point out flaws or gaps in argument

b. Coordinate presentation between folks

c. Know when to retain a lawyer, consultant, etc.

d. Petition – role of petition (belt and suspenders approach)
Don't rely exclusively on petition
If not fact based, it's not competent substantial evidence

e. When to compromise – is it possible to negotiate a resolution with the applicant?
Off-site improvements?
Limited hours of operation?
Enhanced buffer or landscaping?

f. Association – if represent Assn as opposed, Assn must have met and taken affirmative action. On person cannot independently speak on behalf of the Assn

g. Know your Board

h. Be involved – don't rely on your neighbors to do it all