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City of North Miami Beach

Planning & Zoning Board Training

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CONDUCTING QUASI-JUDICIAL HEARINGS ON LAND USE MATTERS

Outline

- The Difference Between Legislative and Quasi-Judicial Hearings and Decisions
- Characteristics of Quasi-Judicial Decisions
  - Standards of Review and Burdens of Proof
  - Hearing Procedures and Parties
  - Substantial Competent Evidence
- Ex Parte Communications and Quasi-Judicial Bias
- Findings of Fact
- Best Practices

Setting Policy is LEGISLATIVE

- Adopting or amending the Comprehensive Plan
  - Includes large and small-scale plan amendments
- Adopting or amending Land Development Regulations (LDRs)
- All legislative (also known as quasi-legislative) decisions in land-use practice involve setting policy

Legislative Hearing Process

- Broad notice (i.e. posted agenda, newspaper publication)
- Wide-ranging public hearing, including consideration of pure preferences and opinions, conjecture and assumptions
- Presentation of evidence: anything relevant
- Substantial discretion: Commission/Board Members as policy-makers
- Can take a public or private position ahead of the hearing - *Izaak Walton League of America v. Monroe County*, 448 So.2d 1170 (Fla. 3rd DCA 1984).

Fairly Debatable Standard of Review

- Tolerant standard of rationality. There must be a reasonable basis to support the action
- The fairly debatable standard is a very deferential standard
- The Court:
  - may not second guess the wisdom of the local government's action; and
  - must affirm if there is any reasonable basis for the decision and that there are no constitutional violations

Fairly Debatable Standard of Review

- Legislative findings may be based on rational speculation unsupported by evidence or empirical data. Can legislate as an experiment, with no proof of efficacy.

- De Novo review. If the decision is challenged, the City has the opportunity to create additional evidence to support it – additional studies, expert testimony, etc. Heavy burden of proof on the challenger.

- ***Membreno v. City of Hialeah*, 188 So.3d 13** (Fla.3rd DCA 2016)
  - Essential to separation of powers, and highly deferential to the legislature's choice of means and ends.
  - Requires that it is at least debatable that a rational relationship exists between the regulation and a legitimate governmental purpose.
  - If we are intellectually honest, we will admit that most legislation easily passes this test.

QUASI JUDICIAL hearings are like criminal or civil trials - Applying law and policy to facts

- Application of the general policies and rules (the Code or the Plan) to specific properties
- Cannot create new policies to govern the decision without first going through a legislative process
- Site-specific application of Land Development Regulations
- Examples: Rezonings, Site Plans, Conditional Uses, Variances, Administrative Adjustments, Plats, Special Exceptions, Licenses, Permits

Quasi Judicial Hearing Process

Notice to owner and affected persons.

- Applicant and affected parties entitled to more than the 3 minute rule because their rights are uniquely affected.

- Two key elements:
  - the finding of facts regarding the specific proposal
  - the exercise of judgment and discretion in applying adopted policies to the specific situation
- Board acts as judges

Affected Parties - Objectors With Standing to Sue

Renard v. Dade County, 261 So. 2d 832 (Fla.1972)

- A person who has a **legally recognizable interest** which is or will be affected by the action of the zoning authority in question has standing.
- **May be shared in common with other members of the community** (an entire neighborhood), but, as a general rule, not every resident and property owner of a municipality can claim such an interest.
- **Must be a definite interest exceeding the general interest** in community good shared in common with all citizens.

Affected Parties - Objectors With Standing to Sue

- Relevant factors:
  - **proximity** of his property to the property to be zoned or rezoned,
  - the **character of the neighborhood**, including the existence of common restrictive covenants and set-back requirements
  - the **type of change proposed**
  - **entitlement to receive notice** under the zoning ordinance is a factor to be considered on the question of standing to challenge the proposed zoning action, but is **not controlling**. Persons having sufficient interest to challenge a zoning ordinance may, or may not, be entitled to receive notice of the proposed action under the zoning ordinances of the community.

Hearing Process Continued

- Where conflicting evidence is presented, the Board has the responsibility of deciding how much weight to accord each piece of evidence.
- Continued hearings: must be present for all, or must review the complete record of portions missed.
- Record-keeping is important: keeping all exhibits and materials handed up to the Clerk or shown to the Board.
- Review is based on the record: No ability to create additional evidence after decision is made.
- Board should give due consideration to the professional judgement of planning and zoning staff, considering their training and experience. But the question of what the Code means is a question of law for which the Board must base its own decision.

Quasi-Judicial Hearing Standard of Review

- Decisions by the City in a quasi-judicial capacity are subject to narrow and limited review by **certiorari** on the record in Circuit Court:
  - Whether procedural due process was accorded;
  - Whether the essential requirements of the law have been observed; and
  - Whether the decision is supported by competent substantive evidence
  - Petitions for writ of certiorari must be filed **within 30 days** of rendition of the development order to be reviewed. Cannot be extended.
  - Rendition = filing of final, executed development order or denial with the Clerk. Denials must cite to the legal authority for the decision – see Section 166.033, Fla. Stat.

Burdens of Proof for Quasi-Judicial Approvals

Bd. of Cnty. Comm'rs of Brevard Co. v. Snyder, 627 So. 2d 469, 476 (Fla. 1993).

- The **burden is upon the landowner** who challenges the denial of a rezoning, special exception, conditional use permit, variance, site plan approval, etc. to demonstrate that the application **complies with the reasonable procedural requirements** of the applicable ordinance and that the use sought is **consistent with the applicable comprehensive plan.**
- The **burden then shifts to the government** to demonstrate that maintaining the existing zoning classification on the property **accomplishes a legitimate public purpose, and is not arbitrary, discriminatory, or unreasonable.**
- Quasi-judicial decisions generally are based on their facts and do not set precedents. Relevant: changed conditions, changed applications.

Competent, Substantial Evidence

- Whether the decision is supported by **competent, substantial evidence** = Evidence a reasonable mind would accept as adequate to support a conclusion
- Substantial Competent Evidence from lay witnesses/residents must be "fact based"
  - Subjective preferences ("love it"/"hate it") are not fact based and do not constitute competent, substantial evidence
  - Conjecture or assumptions are irrelevant to the issues

Competent, Substantial Evidence

- Example:
  - If you want to find that property values in the neighborhood will be harmed by a proposed project, you must base your conclusion on record evidence rather than your gut.
    - testimony from an appraiser about the impacts of a similar project
    - Is it truly similar? Does the record reflect that, or are you just relying on your knowledge of the area? Need to state/show what may be obvious to local citizens, so that a reviewing court can see that evidence supports your conclusion
    - presentation of facts that would allow a reasonable person to conclude property values would go down
    - property owners testifying in detail about personal knowledge of the appraisals or sales prices or cancelled sales contracts resulting from similar development or from the pending application
  - Relevant personal knowledge must be explained if it is to form the basis of your motion or vote

Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991)

- Proper procedures for quasi-judicial decisions
  - Notice
  - Presentation of evidence
  - Hearing before a neutral (un-biased) decision maker

Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991)

- Evidence
  - **All evidence** relied upon shall be admissible.
  - **Immaterial or unduly repetitious evidence** shall be excluded.
  - **Hearsay** evidence (a statement about the facts made by someone who is not present and available for cross- examination) can supplement or explain other evidence, but is not sufficient by itself to support a finding. Consider credibility and weight.
  - Statements by **counsel** are argument, not testimony.
  - **Opinion** evidence generally should be offered only by a properly qualified expert witness. Lay experts.

Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991)

- Sworn testimony – swear or affirm
  - Reminds witnesses of the seriousness of the matter and the necessity of presenting factual information, not opinions or speculation
  - All at once, or one at a time
  - A person who deliberately gives false testimony under oath could be subject to criminal charges for perjury
- Questioning of witnesses – can regulate abuse and length
- Parties (City, applicant, affected persons) have the right to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matter, and rebut evidence

Ex-Parte Communications

- An ex parte communication occurs when a party to an application, or someone involved with a party, talks or writes to or otherwise communicates directly with a Board Member about the issues involved with the application, **without the public present.**
  - Examples: the prosecutor meets with the judge about the case, without the public defender present. A Board Member meets with the applicant or an opponent without the public present.
- **Attributes of ex-parte communications on local quasi-judicial matters**:
  - Occurs outside the official hearing
  - Usually one-sided (opposition or support)
  - Does not allow the other side an opportunity to respond
  - Can be in any form – written, verbal, electronic, etc.

Ex-Parte Communications Continued

- *Jennings*: Opponents must have an opportunity to respond
- **Implications**
  - Prevents you from participating or voting

Statute creates local choice for ex-parte

- Section 286.0115, Florida Statutes “Access to local public officials; quasi-judicial proceedings on local government land use matters.”
- A “… municipality may 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 this subsection or by adopting an alternative process for such disclosure. . ..”
- When this procedure is followed, the presumption of prejudice is removed

Bias in Quasi-Judicial Hearings

- Bias (a **predetermined opinion that is not susceptible to change**), undisclosed ex parte communications, and close family or business ties can **disqualify Commissioners/Board Members from participating or voting** as a matter of due process – even if there is no statutory conflict of interest

- Those participating in quasi-judicial proceedings have a right to expect **impartial decision-making on the basis of the evidence presented**. Decision-makers should **not take a position** on a quasi-judicial application until each party (City, applicant, affected person) has made its presentation at the hearing. Doing so deprives a party of its constitutionally protected right to a fair hearing.

- Commissioners/Board Members should **not** actively involve themselves in efforts to support proponents or opponents of a quasi- judicial land development action. To do so could subject the City and the individual Commissioner/Board Member to a lawsuit.

Quasi-Judicial Bias Litigation

- "Disquieting in our search was the revelation that a Commissioner **telegraphed his decision before considering the information upon which the decision was to be made.** We think that was a questionable departure from the fundamental fairness which should prevail when any governing body considers a citizen's request." ***Huntley's Jiffy Stores, Inc. v. Brevard County***, Case No. 90-12261-AP (18th Cir. Ct. 1991) (denial of rezoning based on resident opposition)
- ***Edelstein v. City of Miami Beach***, 3 Fla. L.Weekly Supp. 89 (Fla. 11th Cir. Ct. April 7, 1995) (**campaign promises to support a downzoning** in advance of the hearing)

Public Records Law

- "[a]t the Board hearing **before any evidence was received, [the district] County Commissioner** ... **moved for denial** of the Petitioner's rezoning request which would give some cause to question the Commissioner's impartiality on the issue before the Board." ***ABC Ventures, Inc. v. Board of County Commissioners of Brevard County***, Case No. 95-8041-AP (Fla. 18th Cir. Ct. January 1996) (members of church across the street opposed rezoning for site of liquor store)

- Strip club occupational license revocation hearing – **mayor campaigned against use and accused it of illegal activities prior to the hearing**, and City Manager acted as prosecutor – denial of adequate cross exam and other irregularities in how Mayor conducted the hearing, so injunction granted. ***Seminole Entertainment, Inc. v. City of Casselberry***, 811 So.2d 693 (Fla. 5th DCA 2001)

- There must be an **orderly and fair** procedure. Technical legal rules of evidence and procedure may be disregarded, but **no essential element of a fair trial can be dispensed with unless waived**. . . .The presiding official should **be judicial in attitude and demeanor and free from prejudgment and from zeal for or against** the licensee or permittee. . ." citing 9 McQuillin, Municipal Corporations §26.89 (3rd ed.)."

Findings of Fact

- The Fla. Supreme Court in Snyder ruled that the local government “will NOT be required to make findings of fact” to support its decision on an application for rezoning.
- However, written findings of fact are a good idea in case of appeal to support the local government’s quasi-judicial decisions because they:
  - Are essential to effective strict judicial scrutiny of quasi-judicial decisions.
  - Greatly reduce the possibility of arbitrary or politically-motivated rezoning decisions, thereby providing protection for property rights.
  - Ensure mindfulness of consistency with Comp Plan requirement; if local government makes written findings of fact to support their consistency determinations, local government officials will focus more closely on the relationship between proposed rezoning and goals, objectives and policies of the Comp Plan.

Best Practices for Quasi-Judicial Decisions

- **BE AN OBJECTIVE DECISION-MAKER**
  - Do not prejudge the application and avoid making up your mind beforehand.
  - Provide objective decisions based on all the facts in evidence presented.
  - Follow the City's plan and the local zoning codes, and local land development codes
  - Base decision on the information available to you at the meeting, including the staff report, the site visit, relevant information presented at the meeting, and public comment.
- **MAKE THE BEST DECISION POSSIBLE BASED ON ALL OF THE INFORMATION PRESENTED TO YOU**

More Best Practices

- **BE AN EFFECTIVE BOARD MEMBER**
  - Prepare well for the meetings
  - Keep the meeting tempo the same throughout the meeting
  - Seek to understand each other's positions and opinions
  - Be civil to each other so the public will be civil to you
  - Have a basis for action
  - Explain your rationale, but don't lecture
  - Make your final action clear to the public

More Best Practices

- **MAKE SOUND DECISIONS & DEFENSIBLE MOTIONS**
  - Ask applicant if he/she agrees. If not, why not? Verify understanding and assumptions before voting. Allow rebuttal as needed.
  - Restate and discuss criteria to support the motion
  - Follow competent substantial evidence, not the Roar of the Crowd
  - Repeat the “gift wrapped” motion provided by staff if you agree
  - Motions different than staff-recommended motion
  - Develop defensible public record based on evidence in the record
    - May not be arbitrary
    - Denials must provide a reason, in writing, to the applicant

More Best Practices

- **Adding Conditions of Approval?**
  - Make sure they do not overlap or conflict with the staff-recommended conditions
  - Related to the criteria for approval
  - Rational nexus
  - Rough proportionality

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LEGAL/ETHICS STANDARDS FOR PLANNING AND ZONING BOARD MEMBERS

OVERVIEW

- All board members are bound by state ethics law and the Miami-Dade County ethics ordinance
- In addition, board members must comply with Sunshine Law and Public Records Law
- The fact that decisions are considered advisory and not final does not relieve members of their duty to adhere to applicable laws.
- Both the Florida Commission on Ethics and Miami-Dade Ethics Commission have authority to investigate actions of city advisory boards and State Attorney can investigate alleged violations of Sunshine Law/Public Records Law.

SUNSHINE LAW
FS 286.011(1)

- Applicability – All city board or committee meetings at which official acts are to be taken; covers boards that are part of the decision-making process even if authority is limited to making recommendations
- Board business – The test under the Sunshine Law to determine whether a discussion between two board members is permissible depends on the status of an item. If it is on the board's agenda or could foreseeably come before the board, then two or more board members may not discuss the item unless they do so at a public meeting

- Unrelated discussions – The Sunshine Law does not apply to communications between board members which are unrelated to board business and/or involve personal/private matters.
- Single member – If one board member meets with staff or a member of another city board, the rules of a public meeting will not apply. Using staff to circumvent the Sunshine Law is prohibited. Also, one board member meeting with one member of the City Commission is not a problem, either

- Basic requirements – In order to comply with the Sunshine Law, three important components: meetings must be open to public; reasonable notice must be given; minutes must be taken
- Open to the public (absent a state of emergency)– should hold meetings at City Hall or other City buildings; generally can't hold meetings out of town or in a private place (hotel/restaurant); meeting room must accommodate turnout; public also has the right to participate (most meetings); can adopt time limits for speakers; don't have to permit speakers who are disruptive; can limit those who speak if repetitive to what others have said on same subject

- Notice – depends on the board; notice requirements differ for the governing board than for lesser boards; no definition of reasonable notice for regular meetings (if board has regular meetings schedule and it follows the schedule -- that would comply); emergency or special meetings are permitted, but public must be given at least 24 hours notice
- Minutes – verbatim account of everything that has been said is not necessary; summarize discussion and if vote taken – identify how each member voted; if meeting recorded or televised, must be made available to public if requested

- Voting – required to vote unless board member has a real or perceived conflict of interest – law does not permit abstentions. New law permit quasi-judicial board members to abstain if they have a bias.
- Voting procedures -- depending on item may require roll call, voice vote. Paper ballots may be used in some cases provided ballots state the name of member and his/her vote. Ballots have to be kept by the city.
- Sanctions – civil and criminal penalties can be imposed; actions taken in violation of Sunshine Law are void.

PUBLIC RECORDS
FS 119.07

- Intent of the law is make all records available to the public to inspect and copy with certain exceptions
- Public Records law gives the public the right to inspect and get copies of public records without unreasonable delays.
- City should evaluate each request for public records because there could be reasons why the records requested are exempt
- All public records regardless of their form are public records

- Cannot force a person to put a public records request in writing
- Requester has no right to specify the format for the records
- Any determination that a record is exempt from disclosure must be spelled out in specificity
- No right to question a person's motives in making public records requests and no authority of government to limit the number of requests made by a "chronic" requester.

- Public records must be made available to the public within a reasonable timeframe; no definition of the term “reasonable” and depends on the nature of the requests. The request to see an agenda or minutes from a meeting should take less time to produce than the request to view all of the records related to a project the City is undertaking
- Board members who send or receive materials on their own related to their positions as board members are in possession of public records and are considered to be custodians of their public records

- Permissible to charge the public for documents that have to be copied and possibly staff time required to assemble documents
- Can let requester know up-front what costs will be
- If requester prefers to inspect the records before they are photocopied, may have to set aside staff time to monitor inspection
- Records retained by board members even if on their personal computers or cellphones or other devices are subject to disclosure if these records are in connection with board business

- Government can designate a person/office to serve as custodian of city's public records. Board members not required to keep agendas or other documents forwarded to them by the City
- If board member receives a Public Records request should advise the Clerk's Office to coordinate the response.

- Notes taken by board members at a public meeting could be public records – depends on content and whether it is to perpetuate knowledge or assist in making decision
- A crime to destroy a public record, but not all public records have to be kept for the same length of time – State of Florida has a records retention schedule

ETHICS STANDARDS – STATE AND LOCAL

- Gifts (State): Officials not permitted to solicit or accept anything of value based upon any understanding that the action taken would be influenced thereby; the threshold for reporting gifts is $100, but there is no cap in most cases. Not all local board members are Reporting Individuals – board members enforcing local code provisions, planning and zoning board members are; prohibited from accepting a gift from a vendor doing business with the reporting individual's agency in excess of $100; also applies to a principal of a lobbyist and a lobbyist.
- Gifts (Miami-Dade) – Any item of value where no consideration has been given is a gift. Board members not permitted to solicit gifts in the their official capacity unless official business of the City; may not take action based on a quid pro quo; required to report gifts received if greater than $100; exceptions include gifts from relatives and household, awards for professional or civic achievement

VOTING CONFLICTS

- VOTING CONFLICTS (State): Must abstain from voting if the item will result in a special private financial/economic gain to board member, employer, relative or business associate; and nay abstain from voting if an appearance of a conflict would be created by voting. A disclosure should be made writing before the meeting or orally at the meeting. If written disclosure prior to the meeting, the memorandum will be incorporated into the minutes. If an oral disclosure, must follow with a written memorandum within 15 days and will be incorporated into the minutes of the meeting.

VOTING CONFLICTS

- Voting conflicts (Local) : Board members are prohibited from voting on any matter if board member will be directly affected by the board's action **and** has a special relationship with a party or entity appearing before the board.

MISUSE OF POSITION

- Misuse of public position: May not corruptly use position for personal gain or to secure special privileges for others
- Exploitation of official position – Prohibited from using or attempting to use official position to secure special privileges or benefits for oneself. Does not require wrongful or corrupt intent.

DOING BUSINESS WITH CITY

- Doing Business with One's Agency: Can't do business with your board nor a business that spouse or child is officer, director.
- Transacting Business with the City – Individuals who sit on City boards are not permitted to enter into contracts with the City if the contract is with a department subject to regulation, oversight, management, policy-setting or quasi-judicial authority of the individual's board. This prohibition also applies to board member's immediate family and any company that board member or immediate family member has a controlling financial interest.

FINANCIAL DISCLOSURE

- Financial disclosure – All board members must file a financial disclosure form annually with the Clerk by July 1st for the prior year's activities. Source of income statement is the least intrusive and does not require board members to disclosure the value of assets or liabilities

MISCELLANEOUS ETHICS PROVISIONS

- Prohibited investments – Board members must not have personal investments individually or through an immediate family member that will create a substantial conflict between private interests and board duties
- Financial interests – Board members barred from participating in any official action in which member or immediate family has a financial interest, nor can board member acquire a financial interest while serving on a city board that would be directly affected by the actions of his/her board.
- Unauthorized compensation – Not permitted to accept any compensation from a person or entity that was given to influence the official's action. Applies to anything of value given to spouse or minor child

- Use of confidential information – To the extent a board member learns of information as a board member that is not public, he/she prohibited from disclosing this information to a third party or using it for personal gain.
- Conflicting employment – Board members may not accept employment that would impair the member's independence of judgment in the performance of board duties. If such employment is accepted, board member would have to resign.

- Appearance before own board – Board members prohibited from appearing before their own board directly or through an associate for compensation. Board member has same right as other residents to access city services and assert his/her rights even if it requires interaction with his/her board.
- Recommending professional services – Board members not permitted to recommend professional services to a third party if such transaction were to involve the City of North Miami Beach.

ENFORCEMENT OF ETHICS STANDARDS

- Three agencies have authority to enforce ethics standards
- Violations of Chapter 112 are enforced by Florida Commission on Ethics
- Miami-Dade Commission on Ethics enforces County Code of Ethics and City's Ethics Ordinance (to take effect December 31, 2020)
- State Attorney can prosecute individuals who violate the County Ethics Ordinance
- Complaints can be filed with both state and local ethics commissions operating out of the same set of facts
- Both ethics commissions issue advisory opinions but limited to laws under its jurisdiction – generally operate as a safe harbor against prosecution

- Miami-Dade Ethics Commission can self-initiate complaints, the Florida Commission cannot
- Processes are supposed to be confidential until complaint dismissed or probable cause found
- If probable cause found, alleged violator entitled to a public hearing
- Most cases settle prior to the public hearing
- Penalties include fines, reprimands, letters of instruction, adverse personnel action (state), civil penalties, restitution