

Sunshine Law--Mediation

Number: INFORMAL

Date: February 18, 2002

Subject:
Sunshine Law--Mediation

Mr. Mark McQuagge
Cape Canaveral Assistant City Attorney
Post Office Box 1807
Cocoa, Florida 32923-1807

RE: LOCAL GOVERNMENT--FLORIDA GOVERNMENTAL CONFLICT RESOLUTION ACT--PUBLIC MEETINGS--MEDIATION--GOVERNMENT IN THE SUNSHINE--whether members of local governmental entity involved in mediation under Ch. 164, Fla. Stat., may meet privately to discuss course of mediation. Ch. 164, Fla. Stat.

Dear Mr. McQuagge:

You have asked for assistance in determining whether under the governmental conflict resolution procedures of Chapter 164, Florida Statutes, representatives of a local governmental entity who have the authority to negotiate on behalf of that governmental entity are authorized to meet together privately during the course of mediation of a conflict to discuss mediation strategy in situations where no litigation is on-going.

Attorney General Butterworth has asked me to respond to your letter. The following informal comments are offered in an effort to assist you in resolving this matter.

The Florida Governmental Conflict Resolution Act, sections 164.101-164.1061, Florida Statutes,[1] was adopted by the Florida Legislature in 1999.[2] As stated in section 164.102, Florida Statutes, the purpose and intent of the act is

"to promote, protect, and improve the public health, safety, and welfare and to enhance intergovernmental coordination efforts by the creation of a governmental conflict resolution procedure that can provide an equitable, expeditious, effective, and inexpensive method for resolution of conflicts between and among local and regional governmental entities. It is the intent of the Legislature that conflicts between governmental entities be resolved to the greatest extent possible without litigation."

The act imposes a duty on governmental entities to negotiate prior to prosecuting a legal action.[3] The act provides in part that

"[i]f a governmental entity files suit against another governmental entity, court proceedings on the suit shall be abated, by order of the court, until the procedural options of this act have been exhausted. The governing body of a governmental entity initiating conflict resolution procedures

pursuant to this act shall, by motion, request the court to issue an order abating the case pursuant to this section. All governmental entities are encouraged to use the procedures in this act to resolve conflicts that may occur at any time between governmental entities, but shall use these procedures before court proceedings, consistent with the provisions of this section." [4]

Thus, the provisions of the act are intended to apply before a legal action is filed or, in a case where legal action has been initiated, the judicial action shall be abated until the conflict resolution procedure has been completed.

The act applies to governmental conflicts that may arise from a number of issues or processes, including, but not limited to: local comprehensive plans or plan amendments; [5] municipal annexation; [6] service provision areas; [7] allocation of resources such as water, land, or other natural resources; [8] siting of hazardous waste facilities, landfills, garbage collection facilities, silt disposal sites, or other locally unwanted land uses; [9] governmental entity permitting processes; [10] siting of elementary and secondary schools. [11] The provisions of the act do not apply to administrative proceedings under Chapter 120, Florida Statutes; any appeal from an administrative or trial court judgment or decision; or cases in eminent domain, foreclosure, or other court proceedings where, as a function of the nature of the suit, other governmental entities are necessary parties, if there are no materially disputed issues regarding joinder. [12]

To initiate the conflict resolution procedures provided in the act, the governing body of a governmental entity must pass a resolution. [13] The resolution shall relate the intention of the governing body to begin the conflict resolution procedures of the act prior to initiating court proceedings or prosecuting action on a previously filed court proceeding. The resolution must specify the issues of conflict and the governmental entity or entities with which there is a conflict. Following passage of the resolution a letter and a certified copy of the resolution must be provided to the governmental entity with which the conflict exists. The letter must set forth the conflict, other governmental entities who may be involved, the justification for initiating the conflict resolution process, the proposed date and location for a conflict assessment meeting and suggestions as to personnel who should be present at such meeting. [14]

Following initiation of the conflict resolution procedure, the statute calls for a conflict assessment meeting. Section 164.1053(1), Florida Statutes requires that this meeting must occur within 30 days of the receipt of the letter initiating the conflict resolution procedure. Public notice of this meeting must be given and the conflict assessment meeting must be scheduled to allow the attendance of the appropriate governmental personnel or their designees. During this meeting the representatives of the governmental entities are required to discuss the issues relating to the conflict and to assess the conflict from the perspective of each governmental entity involved. If no resolution is achieved by this meeting, any primary conflicting governmental entity may request mediation.

Mediation under the Florida Governmental Conflict Resolution Act is controlled by section 164.1055, Florida Statutes. This statute requires that failure to resolve a conflict after following the specific procedures of the act requires the scheduling of "a joint public meeting" between the representatives of the primary conflicting governmental entities. At this meeting the parties involved shall:

- "(a) Consider the statement of issues prepared in the conflict assessment phase.
- (b) Seek an agreement.
- (c) Schedule additional meetings of the entities in conflict, or of their designees, to continue to seek resolution of the conflict." [15]

If no agreement is reached following the joint public meeting both conflicting governmental entities shall participate in mediation. [16]

Your question deals with the procedures for conducting the mediation phase of this process and nothing in Chapter 164, Florida Statutes, generally, or in section 164.1055, Florida Statutes, particularly, addresses whether the representatives of conflicting governmental entities may meet privately to discuss the terms of the on-going mediation.

Florida's Government in the Sunshine Law, section 286.011, Florida Statutes, provides a right of access to government proceedings at both the state and local levels. This right is also recognized by the Florida Constitution. Article I, section 24, Florida Constitution, provides access to public records and meetings and requires that the Florida Legislature provide certain evidence of the necessity for any exemption of meetings from the Government in the Sunshine Law. [17] As a statute enacted in the public interest to protect the public from "closed door" politics, the Sunshine Law must be broadly construed to effect its remedial and protective purpose. [18]

A fundamental requirement of the Sunshine Law is that meetings of entities covered by the Sunshine Law be "open to the public." The term "open to the public" as used in section 286.011, Florida Statutes, means open to all persons who choose to attend. [19] In addition, the courts of this state have held that the Sunshine Law extends to discussions and deliberations as well as formal actions taken by a public board or commission. [20]

In the case of *News-Press Publishing Company, Inc. v. Lee County*, [21] the appellate court considered whether access under the Government in the Sunshine Law was required for mediation proceedings involving the county and a city in a dispute over the location of a proposed bridge. During the course of litigation, the trial judge in the case had ordered mediation and directed that the parties have present a representative with full authority to bind them. Subsequently a reporter who sought access to the proceedings was advised by the mediator that the mediation proceeding would be closed to the public. The newspaper then filed suit. In denying access to the mediation proceedings, the trial judge amended the original order to narrow the scope of the mediation and to allow the parties to send representatives who had no authority to settle the issues raised. The District Court, in reviewing the trial court orders, determined that "the narrow scope of the mediation proceedings in this case does not give rise to a substantial delegation affecting the decision-making function of any board, commission, agency or authority sufficient to require that this mediation proceeding be open to the public." [22]

Unlike the Lee County case, which predates the adoption of the "Florida Governmental Conflict Resolution Act," mediation meetings conducted under Chapter 164, Florida Statutes, require participation by governmental officials or their representatives who meet to discuss the resolution of intergovernmental conflicts. If designees attend such meetings they must possess full authority to negotiate on behalf of the governmental entity and to recommend settlement to the decision-making body of the governmental entity. [23] Any resolution of the issues must be

officially adopted by the governing bodies of the entities involved. Thus, mediation meetings conducted pursuant to Chapter 164, Florida Statutes, which involve officials or representatives of local governmental entities would come within the scope of Florida's Government in the Sunshine Law.[24]

Therefore, in the absence of any expression of legislative intent that officials attending mediation sessions pursuant to section 164.1055, Florida Statutes, are authorized to privately discuss among themselves the matters being considered at such a meeting, it would appear that any such meetings must be conducted openly and in accordance with the provisions of section 286.011, Florida Statutes.

This informal opinion was prepared by the Department of Legal Affairs in an effort to be of assistance to you. The conclusions expressed herein are those of the author and should not be considered a formal opinion of the Attorney General.

Sincerely,

Gerry Hammond
Assistant Attorney General

GH/tgk

[1] See s. 164.101, Fla. Stat., for the short title for the act.

[2] See Ch. 99-279, Laws of Fla.

[3] Section 164.1031(3), Fla. Stat., defines "[g]overnmental entity" to include local and regional governmental entities, and s. 164.1031(1) and (2), Fla. Stat., define "[l]ocal governmental entities" and "[r]egional governmental entities" respectively.

[4] Section 164.1041(1), Fla. Stat.

[5] Section 164.1051(1), Fla. Stat.

[6] Section 164.1051(2), Fla. Stat.

[7] Section 164.1051(3), Fla. Stat.

[8] Section 164.1051(4), Fla. Stat.

[9] Section 164.1051(5), Fla. Stat.

[10] Section 164.1051(6), Fla. Stat.

[11] Section 164.1051(7), Fla. Stat.

[12] Section 164.1041(1), Fla. Stat.

[13] Section 164.1052(1), Fla. Stat.

[14] *Id.*

[15] Section 164.1055(1)(a)-(c), Fla. Stat.

[16] Section 164.1055(2), Fla. Stat.

[17] See Art. I, s. 24(c), Fla. Const. And see *Frankenmuth Mutual Insurance Company v. Magaha*, 769 So. 2d 1012, 1021 (Fla. 2000), noting that the Sunshine Law "is of both constitutional and statutory dimension."

[18] See *Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983); *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973); *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969).

[19] See, e.g., Ops. Att'y Gen. Fla. 01-66 (2001) and 99-53 (1999).

[20] See *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973) (Sunshine Law applies to any gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter on which foreseeable action will be taken by the board or commission).

[21] 570 So. 2d 1325 (Fla. 2d DCA 1990).

[22] *Id.* at 1327.

[23] See s. 164.1031(6), Fla. Stat., defining a "[d]esignee" as a representative with full authority to negotiate.

[24] The Government in the Sunshine Law applies to any gathering of two or more members of the same board or commission to discuss some matter on which foreseeable action will be taken by the public board or commission. See *Hough v. Stembridge*, *id.* And see *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969). And see, e.g., Ops. Att'y Gen. Fla. 95-06 (1995) (if designee is authorized to exercise any decision-making authority on behalf of council, that person would be acting on behalf of the council or the board and meeting is subject to s. 286.011, Fla. Stat.); 90-17 (1990) (if city council member had been delegated authority on behalf of entire city council to negotiate with private garbage contractor, meetings would be subject to Government-in-the-Sunshine Law).