

CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
MEMORANDUM

TO: Victoria Méndez, City Attorney
FROM: George K. Wysong III, Asst. City Attorney
DATE: January 6, 2015
RE: The Jennings Rule and Ex Parte Communications

Several years ago this office provided guidance regarding ex-parte communications with quasi-judicial officers regarding matters which are quasi-judicial in nature as prohibited by *Jennings v. Dade County*, 589 So.2d 1337 (Fla. 3rd DCA 1991).¹ This informal memorandum is intended to serve as an update to that earlier memo.

The Jennings Rule

The so called “Jennings Rule” stands for the proposition that elected officials may not discuss zoning matters outside of the public hearing. The *Jennings* Rule resulted from an appeal to the Dade County Commission from a decision of the Dade County Zoning Appeals Board (“Zoning Board”). The applicant applied for a variance to permit him to operate a quick oil change business on his property adjacent to that of Mr. Jennings. The Zoning Board granted the applicant’s request and the County Commission upheld the Zoning Board’s decision. Following the decision, Jennings filed a lawsuit requesting declaratory and injunctive relief. In his complaint, Jennings alleged that a lobbyist for the applicant had engaged in *ex parte* communications with several Dade County Commissioners prior to the vote. Jennings argued that he was denied due process under the United States and Florida constitutions as well as section (A)(8) of the Dade County Citizens' Bill of Rights. The trial court dismissed Jennings’ claim and he thereafter appealed to the Third District Court of Appeal.

The Third District Court of Appeals declared the following, which has been subsequently referred to as the *Jennings* Rule:

Ex parte communications are inherently improper and are anathema to quasi-judicial proceedings. Quasi-judicial officers should avoid all such contacts 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 occurrence of

¹ See City of Miami Legal Opinion MIA 98-023

such a communication in a quasi-judicial proceeding does not mandate automatic reversal. Nevertheless, we hold that the allegation of prejudice resulting from *ex parte* contacts with the decision makers in a quasi-judicial proceeding states a cause of action. ... Upon the aggrieved party's proof that an *ex parte* contact occurred, its effect is presumed to be prejudicial unless the defendant proves the contrary by competent evidence.

Quasi-judicial or legislative

Land use hearings can be either quasi-judicial or legislative. Most hearings on land use applications are quasi-judicial in nature. Hearings for comprehensive plan amendments and large scale rezonings are generally considered to be legislative. Quasi-judicial processes are like court hearings in the presentation of the evidence to be considered. In a quasi-judicial process, the decision-maker applies existing law to the record evidence to determine the result. This is in contrast to decisions made in a legislative process where the decision-maker is making new policy or laws. "It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial" *Snyder v. Board of County Commissioners*, 627 So.2d 469 (Fla. 1993).

Quasi-judicial decisions that are generally subject to the Jennings Rule include:

- a. Variances
- b. Exceptions
- c. Special area plans
- d. Appeal decisions by the board, and
- e. Most re-zonings.

Legislative decisions that are not subject to the Jennings Rule include:

- a. Comprehensive plan amendments
- b. Text amendments to Miami 21
- c. Adoption of zoning ordinance covering the entire city

Quasi-judicial hearing requirements

If the land use hearing is quasi-judicial then it must be conducted almost as if it were being conducted in a court of law. All witnesses must testify under oath, the evidence they present must be based on facts that are personally known to them, and testimony is subject to cross-examination, among other things. Formal rules of evidence do not apply in quasi-judicial hearings, but the fundamentals of due process must be observed.

Burden of proof

In a quasi-judicial hearing, the initial burden is upon the landowner to demonstrate that his/her petition or application for use of privately owned lands, (rezoning, special exception, conditional use permit, variance, site plan approval, etc.) complies with the reasonable procedural requirements of the ordinance and that the use sought is consistent with the applicable comprehensive zoning plan. Then the burden shifts to those who are seeking to deny the application. The ultimate determination must be made based upon competent substantial evidence contained within the record of the proceedings.

***Ex parte* communications**

An *ex parte* communication occurs when a Planning, Zoning and Appeals Board member ("PZAB") or City Commissioner in a quasi-judicial proceeding communicates, directly or indirectly, with any person or party in connection with a matter before the board, absent of notice and opportunity for all parties to participate. *Ex parte* communications include written and oral communications.

How to cure an inadvertent *ex parte* communication

If an interested party communicates with a City Commissioner or PZAB members outside of the hearing then the following steps should be taken by the member to avoid giving rise to a legally-actionable claim:

1. Immediately end the communication. Explain to the individual that you cannot talk about matters currently before the commission/board outside of the public meeting.
2. Disclose and make part of the record at the public hearing the subject of the communication and the identity of the person, group, or entity with whom the communication took place.
3. Provide persons who have opinions contrary to those expressed in the disclosed *ex parte* communication with a reasonable opportunity to refute or respond to the communication.

Communications between Staff and City Commissioners/PZAB members

Staff is permitted to meet with City Commissioners and PZAB members to advise them of their professional opinions regarding quasi-judicial land use matters.

Site visits

The City Commissioners and PZAB members may drive by and physically inspect the property, but must state at the public hearing that they have done so. Communications with the owners or surrounding property owners should be avoided. City Commissioners and PZAB members must be careful to insure that their decision is based only on the testimony and evidence that is accepted into the record.

The City Attorney's Office remains available to answer any questions regarding the substance of this memorandum.