City of North Miami Beach
Memorandum

CITY ATTORNEY'S OFFICE
Phone: (305) 948-2939
Fax: (305) 787-6004

TO: Councilwoman Phyllis Smith

CC: Honorable Mayor George Vallejo
Members of the City Council
Ana Garcia, City Manager
Pamela Latimore, City Clerk

FROM: Jose Smith, City Attorney

DATE: September 30, 2015

RE: Legal Opinion Regarding Recusals

During the City Council meeting of September 21, 2015, item 7.3 came up for a vote. The matter involved the appointment of Michael Joseph to the Code Enforcement Board. Mr. Joseph was one of the challengers in your race for a City Council seat and is currently contesting the results of the election in Circuit Court.

You recused yourself from the vote stating that there was "an appearance of a conflict of interest" since Mr. Joseph was suing you and the City. A copy of Form 8B you filed today with City Clerk is attached. Since we had not discussed the matter prior to the vote, I did not have an opportunity to research whether, under the circumstances, a recusal was appropriate.

Having now reviewed the applicable law, I must conclude that you should not have recused yourself. As the attached Attorney General and State Ethics opinions state, a city council member may not abstain from voting due to bias, prejudice or any other grounds, unless there is a personal financial interest involved. See also the language I highlighted in Form 8B To my knowledge, the vote would not have resulted in any personal financial gain or loss to you. Accordingly, under Florida Statue §286.012 you were required to vote.

Should this matter come up again, I recommend that you vote. Please feel free to discuss this matter with me at your convenience.

Respectfully submitted.

FORM 8B MEMORANDUM OF VOTING CONFLICT FOR COUNTY, MUNICIPAL, AND OTHER LOCAL PUBLIC OFFICERS

LAST NAME—FIRST NAME—MIDDLE NAME	NAME OF BOARD, COUNCIL, COMMISSION, AUTHORITY, OR COMMITTEE
SMITH PHYLLIS SUE	Councilwoman City of North Miami Beach
MAILING ADDRESS PO Box 0520	THE BOARD, COUNCIL, COMMISSION, AUTHORITY OR COMMITTEE ON WHICH I SERVE IS A UNIT OF: ☒ CITY ☐ COUNTY ☐ OTHER LOCAL AGENCY
CITY North Miami Beach COUNTY DADE	NAME OF POLITICAL SUBDIVISION:
DATE ON WHICH VOTE OCCURRED 9/21/15	MY POSITION IS: ☒ ELECTIVE ☐ APPOINTIVE

WHO MUST FILE FORM 8B

This form is for use by any person serving at the county, city, or other local level of government on an appointed or elected board, council, commission, authority, or committee. It applies equally to members of advisory and non-advisory bodies who are presented with a voting conflict of interest under Section 112.3143, Florida Statutes.

Your responsibilities under the law when faced with voting on a measure in which you have a conflict of interest will vary greatly depending on whether you hold an elective or appointive position. For this reason, please pay close attention to the instructions on this form before completing the reverse side and filing the form.

INSTRUCTIONS FOR COMPLIANCE WITH SECTION 112.3143, FLORIDA STATUTES

A person holding elective or appointive county, municipal, or other local public office MUST ABSTAIN from voting on a measure which inures to his or her special private gain or loss. Each elected or appointed local officer also is prohibited from knowingly voting on a measure which inures to the special gain or loss of a principal (other than a government agency) by whom he or she is retained (including the parent organization or subsidiary of a corporate principal by which he or she is retained); to the special private gain or loss of a relative; or to the special private gain or loss of a business associate. Commissioners of community redevelopment agencies under Sec. 163.356 or 163.357, F.S., and officers of independent special tax districts elected on a one-acre, one-vote basis are not prohibited from voting in that capacity.

For purposes of this law, a "relative" includes only the officer's father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, and daughter-in-law. A "business associate" means any person or entity engaged in or carrying on a business enterprise with the officer as a partner, joint venturer, coowner of property, or corporate shareholder (where the shares of the corporation are not listed on any national or regional stock exchange).

* * * * * * * * * * * * * * * * *

ELECTED OFFICERS:

In addition to abstaining from voting in the situations described above, you must disclose the conflict:

PRIOR TO THE VOTE BEING TAKEN by publicly stating to the assembly the nature of your interest in the measure on which you are abstaining from voting; *and*

WITHIN 15 DAYS AFTER THE VOTE OCCURS by completing and filing this form with the person responsible for recording the minutes of the meeting, who should incorporate the form in the minutes.

* * * * * * * * * * * * * * * * *

APPOINTED OFFICERS:

Although you must abstain from voting in the situations described above, you otherwise may participate in these matters. However, you must disclose the nature of the conflict before making any attempt to influence the decision, whether orally or in writing and whether made by you or at your direction.

IF YOU INTEND TO MAKE ANY ATTEMPT TO INFLUENCE THE DECISION PRIOR TO THE MEETING AT WHICH THE VOTE WILL BE TAKEN:

- You must complete and file this form (before making any attempt to influence the decision) with the person responsible for recording the minutes of the meeting, who will incorporate the form in the minutes. (Continued on other side)

APPOINTED OFFICERS (continued)

- A copy of the form must be provided immediately to the other members of the agency.
- The form must be read publicly at the next meeting after the form is filed.

IF YOU MAKE NO ATTEMPT TO INFLUENCE THE DECISION EXCEPT BY DISCUSSION AT THE MEETING:

- You must disclose orally the nature of your conflict in the measure before participating.
- You must complete the form and file it within 15 days after the vote occurs with the person responsible for recording the minutes of the meeting, who must incorporate the form in the minutes. A copy of the form must be provided immediately to the other members of the agency, and the form must be read publicly at the next meeting after the form is filed.

DISCLOSURE OF LOCAL OFFICER'S INTEREST

I, _____, hereby disclose that on _____, 20 ____:

(a) A measure came or will come before my agency which (check one)

___ inured to my special private gain or loss;

___ inured to the special gain or loss of my business associate, _____;

___ inured to the special gain or loss of my relative, _____;

___ inured to the special gain or loss of _____, by whom I am retained; or

___ inured to the special gain or loss of _____, which is the parent organization or subsidiary of a principal which has retained me.

(b) The measure before my agency and the nature of my conflicting interest in the measure is as follows:

THE VOTE WAS TO APPROVE THE APPOINTMENT OF A PERSON THAT HAS A CURRENT CIVIL SUIT IN WHICH MYSELF AND THE COUNCILS THREE EMPLOYEES ARE NAMED DEFENDANTS.
I FELT THERE MAY BE AN APPEARANCE OF A CONFLICT; THEREFORE, I RECUSED MYSELF FROM THE VOTE AND REMOVED MYSELF FROM THE DIAS.

9/30/15
Date Filed

Phyllis A. Smith
Signature

NOTICE: UNDER PROVISIONS OF FLORIDA STATUTES §112.317, A FAILURE TO MAKE ANY REQUIRED DISCLOSURE CONSTITUTES GROUNDS FOR AND MAY BE PUNISHED BY ONE OR MORE OF THE FOLLOWING: IMPEACHMENT, REMOVAL OR SUSPENSION FROM OFFICE OR EMPLOYMENT, DEMOTION, REDUCTION IN SALARY, REPRIMAND, OR A CIVIL PENALTY NOT TO EXCEED $10,000.

15 SEP 30 PM 12:00

RECEIVED

Effectively, then, the power of the association to arbitrarily, capriciously, and unreasonably withhold its consent to transfer prevents the activation of the reverter clause and eliminates the accountability of the association to the unit owner. Therefore, we conclude that the power of the association to arbitrarily, capriciously, and unreasonably withhold its consent to transfer is not saved by the reverter clause from being declared an invalid and unenforceable restraint on alienation. Accordingly, the judgment of the trial court is

Reversed.

The IZAAK WALTON LEAGUE OF AMERICA, Appellant,

v.

MONROE COUNTY and Windley Key, Ltd., et al., Appellee.

No. 83-129.

District Court of Appeal of Florida, Third District.

April 17, 1984.

The Monroe County Circuit Court, M. Ignatius Lester, J., issued writ of prohibition against county commission precluding its consideration of appeal from resolution of county zoning board which rezoned certain property, and environmental organization appealed. The District Court of Appeal, Schwartz, C.J., held that: (1) county commissioners were not disqualified from consideration of appeal because they had made prior public pronouncements which were adverse to rezoning of the property, and (2) environmental organization lacked standing, under county code.

Affirmed and question certified.

1. **Counties** ⇐23
   Municipal Corporations ⇐63.1(1)

Members of county commission or any governing body of a political subdivision who act in that capacity do not do so as judges, subject to judicial canons and standards, but rather as politicians, and supposed errors in substance of their views or manner in which their opinions are expressed are therefore ordinarily subject only to relief at the polls, not in the courts.

2. **Constitutional Law** ⇐72

When there is no specific legislation to the contrary, basic doctrine of separation of governmental powers precludes judicial interference with the vote even of a commissioner with identifiable personal interest in particular issue.

3. **Municipal Corporations** ⇐94
   Zoning and Planning ⇐351

Political officeholders may not be prevented from performing duties they have been elected to discharge merely because they have previously expressed, publicly or otherwise, opinion on subject of their vote; same rule applies when official states his views on zoning questions or similar matters of community policy during his term of office.

4. **Zoning and Planning** ⇐351

County commissioners were not disqualified from consideration of appeal of resolution of county zoning board because they had made prior public pronouncements which were adverse to rezoning of the property.

5. **Zoning and Planning** ⇐571

Environmental organization lacked standing, under county code, to appeal to board of county commissioners from resolution of county zoning board which rezoned certain property.

Sireci, Allen, Kelly & Muldoon and Mark Kelly, Key West, for appellant.

Lucien C. Proby, Jr., Key West, Roger A. Bridges, Coral Gables, for appellees.

Before SCHWARTZ, C.J., and DANIEL S. PEARSON and JORGENSON, JJ.

SCHWARTZ, Chief Judge.

The Izaak Walton League of America, an environmental organization which is the present appellant, timely filed an appeal to the Monroe County Board of County Commissioners from a resolution of the Monroe County Zoning Board which rezoned property on Windley Key owned by the appellee, Windley Key, Ltd. The Monroe County Circuit Court, however, issued a writ of prohibition against the Commission precluding its consideration of the appeal on the grounds that (a) each member of the Commission had become disqualified because of prior public pronouncements, mostly at commission meetings, which were adverse to the rezoning of the property and (b) the League lacked standing to file the appeal under the pertinent provision of the Monroe County Code. We thoroughly disagree with the first reason but affirm the judgment under review on the basis of the second.

I

[1, 2] It is fundamental to our system that the members of a county commission or any governing body of a political subdivision who act in that capacity do not do so as judges—subject to judicial canons and standards—but rather, using the term in its Aristotelian sense, as politicians. Any supposed errors in the substance of their views or the manner in which their opinions are expressed are therefore ordinarily subject only to relief at the polls, not in the courts. See generally, *Davis v. Keen*, 140 Fla. 764, 192 So. 200 (1939); *Osban v. Cooper*, 63 Fla. 542, 58 So. 50 (1912); *Broward County Rubbish Assn. v. Broward County*, 112 So.2d 898 (Fla. 2d DCA 1959); *Senior Citizens Protective League, Inc. v. McNayr*, 132 So.2d 237 (Fla. 3d DCA 1961); 2 McQuillin, Municipal Corporations § 10.-33 (3rd ed. 1979); 12 Fla.Jur.2d Counties and Municipal Corporations § 145 (1979). Indeed, when there is no specific legislation to the contrary,[1] the basic doctrine of the separation of governmental powers precludes judicial interference with the vote even of a commissioner with an identifiable personal interest in the particular issue. *City of Miami Beach v. Schauer*, 104 So.2d 129 (Fla. 3d DCA 1958), cert. discharged, 112 So.2d 838 (Fla.1959); compare *Fossey v. Dade County*, 123 So.2d 755 (Fla. 3d DCA 1960) (disqualifying county commissioner under specific terms of county charter).

[3] As an aspect of this rule, the law is clear that political officeholders may not be prevented from performing the duties they have been elected to discharge [2] merely because, as occurred in this instance,[3] they have previously expressed, publicly or otherwise, an opinion on the subject of their vote. This court has specifically so held in the virtually all-fours case of *City of Opa Locka v. State ex rel. Tepper*, 257 So.2d 100 (Fla. 3d DCA 1972). There, the Opa Locka City Commission had unanimously requested city manager Tepper's resignation at an open meeting. After the manager's motion to dismiss the charges was denied by a three-man commission majority, he sought and was granted prohibition against the three commissioners on the grounds of bias and prejudice. On appeal, we reversed on the ground that the trial court had erroneously determined that the three commissioners' predetermination to vote for the resolution removing the city manager either required or justified their recusal. Judge Hendry, writing for the court, stated that the resolution was a legislative act, and, citing *City of Miami Beach v. Schauer*, supra, concluded:

1. There is none involved here. See notes 6–8, infra, and accompanying text.

2. It is significant—and wholly unacceptable—that under the ruling below, the citizens of Monroe County would be entirely deprived (putting the standing issue aside), of any review, as required in the code, by its elected County Commission of the Zoning Board decision in this important case.

3. Under our holding, which assumes that the comments of the commissioners did indicate a predisposition against the appellee, their precise contents are irrelevant and are consequently not detailed in this opinion.

> Whenever an act of the Legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act.

257 So.2d at 104.[4]

[4] Although *Opa Locka* would be alone sufficient to establish the incorrectness of the ruling below on this point, we think that the present situation even more obviously requires that holding. While *Opa Locka* involved what was at least arguably a quasi-judicial question, that of determining the validity of charges against a city employee, this case concerns the supremely legislative function of zoning, *Florida Land Company v. City of Winter Springs*, 427 So.2d 170, 174 (Fla.1983).[5]

Accordingly, the cases have almost unanimously declined even to consider disqualification of a responsible official merely because he has expressed, or even committed, himself publicly on a zoning issue before a formal vote has taken place. This is true both when the acts complained of are committed prior to the time the official takes office, *Furtney v. Simsbury Zoning Commission*, 159 Conn. 585, 271 A.2d 319 (1970) (commissioner who, three years earlier, had expressed opinion supporting suitability of residential tract for shopping mall was not disqualified from hearing application to rezone property); *Pearce v. Lorson*, 393 S.W.2d 851 (Mo.App.1965) (fact that member of board which had revoked permit authorizing commercial use of residence had, before taking office, drafted and signed petition for change in zoning law precluding such use held insufficient to constitute grounds of bias or prejudice); and when his preconceived notions are aired during a political campaign. Thus, in *City of Farmers Branch v. Hawnco, Inc.*, 435 S.W.2d 288 (Tex.Civ.App.1968), the court responded to the contention that the mayor and two councilmen who ran on a political platform opposing high density construction were disqualified from participating in the vote on an amendatory ordinance authorizing it by stating:

> We do not agree. Campaign promises made in political races do not disqualify the successful candidates from exercising the duties of their offices after the election. To so hold would mean that very few successful candidates for political office would be able to qualify for their office or to perform their official duties. Under our theory of government the voters desire and even demand to be informed as to how candidates stand on the issues of the campaign... In any event public officials are not legally required to keep their campaign promises and whether they do or do not they are answerable to the voters at the next election, not to a particular private property owner.

435 S.W. at 292. Accord, *Wollen v. Borough of Fort Lee*, 27 N.J. 408, 142 A.2d 881 (1958) (councilmen who campaigned and were elected on promises to implement zoning changes qualified to vote on ordinance in manner consistent with prior positions).

The same rule applies when, as here, the official states his views on zoning questions or similar matters of community policy during his term of office. *Binford v.*

4. In response to Tepper's argument that, under due process principles, he was nevertheless entitled to demand recusal of the three commissioners under Section 120.09, Fla.Stat. (currently Section 120.71, Fla.Stat. (1981) (Administrative Procedure Act), the court stated that the terms of that section are "particularly inapplicable to city commissions and should not be applied or construed to govern the legislative deliberations of city commissions." 257 So.2d at 104. Accord, e.g., *Board of County Commissioners of Monroe County v. Marks*, 429 So.2d 793, 794, n. 1 (Fla. 3d DCA 1983) ("The Administrative Procedure Act does not apply because Monroe County has not been defined as an 'administrative agency' by general or special law or judicial decision.")

   It is all the more obvious that the judicial recusal statute, Sec. 38.10, Fla.Stat. (1981), does not apply.

5. In *Winter Springs*, the Supreme Court approved the submission of a zoning change to a popular vote. Just as a voter in Winter Springs could obviously not be deprived of his franchise because of a publicly expressed opinion before the election, so a Monroe County Commissioner charged under the Code with the same responsibility, may not be disqualified for that reason.

Western Electric Co., 219 Ga. 404, 133 S.E.2d 361 (1963) (claim that commissioners passing upon application to rezone property had declared publicly that they favored such application in advance of proceedings held insufficient to void their action); *Kramer v. Board of Adjustment*, 45 N.J. 268, 212 A.2d 153 (1965) (no inference of bias or prejudice drawn from fact that member of board which granted variance for hotel construction had endorsed political candidates adopting positions favorable to hotel's developer); *City of Fairfield v. Superior Court of Solano County*, 14 Cal.3d 768, 122 Cal.Rptr. 543, 537 P.2d 375, 382 (1975) ("A councilman has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance.") (disapproving *Saks & Co. v. City of Beverly Hills*, 107 Cal.App.2d 260, 237 P.2d 32 (1951)); compare and contrast *Barbara Realty Co. v. Zoning Board of Review of Cranston*, 85 R.I. 152, 128 A.2d 342 (1957).

Since there is no provision in the Monroe County Code,[6] the special act which governs Monroe County Zoning Board appeals[7] or the applicable Florida statute,[8] which requires or, indeed, *permits*[9] disqualification of a county commissioner on the predisposition ground, we conclude that the lower court erroneously usurped the legislative function in effecting that result.

II

[5] The order granting the writ is affirmed, however, on the alternative basis relied on below: the lack of standing of the present appellant to pursue the appeal. Section 19–77(b) of the Monroe County Code provides:

> such body at which an official decision, ruling, or other official act is to be taken or adopted may 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, except when, with respect to any such member, there is, or appears to be, a possible conflict of interest under the provisions of s. 112.311, s. 112.313, or s. 112.3143. In such cases said member shall comply with the disclosure requirements of s. 112.3143.

As was noted by the Florida Commission on Ethics, "none of [the aforementioned sections] relate to bias or prejudice on the part of a public officer based on other than private economic interests or relationships." Op. Comm. Ethics, 79–14, March 22, 1979. Consequently,

> [a] city council member may not abstain from voting on grounds of bias or prejudice against an individual when matters concerning that individual or the business he represents come before the council. It is present policy of this state that a public officer may vote upon any matter, so long as he files a memorandum of voting conflict. He also may abstain as provided by § 286.012, which has been interpreted by the attorney general to require that a voting officer have a personal financial interest in a matter in order to abstain. Therefore, in the absence of any applicable provision of law which would override policy established by § 112.3143, a public officer may abstain from voting only if there is or appears to be a conflict or interest under §§ 112.311, 112.313, or 112.3143....

Ibid.

6. Section 19–77(a), Monroe County Code (1979):

> It shall be the duty of the board of county commissioners to hear and decide appeals where it is alleged there is error in any order, requirement, decision, determination or action of the zoning board or board of adjustment in the enforcement of this chapter.

7. Chapter 61–2503, Laws of Florida § 8(2) (1961):

> The Zoning Board shall have the authority and duty to consider and act upon application for District Boundary changes, after a public hearing as prescribed in Section 5. All decisions of the Zoning Board covering District Boundaries shall be by resolution concurred in by three (3) members of the Zoning Board, and shall become final after twenty-one (21) days from the date of said decision, unless appealed to the Board of County Commissioners. All appeals from decisions of the Zoning Board shall be filed with the County Zoning Director on forms prescribed by the County Commission, accompanied by a reasonable fee set by the County Commission, within twenty-one (21) days and not thereafter. An appeal from a decision of the Zoning Board may be taken by an applicant or his agent, or an aggrieved party whose name appears in the record of the Zoning Board. The Board of County Commissioners, after considering said appeal, shall by resolution either confirm, modify or reverse the decision of the Zoning Board.

8. Section 286.012, Fla.Stat. (1981) provides:

> No member of any state, county, or municipal governmental board, commission, or agency who is present at any meeting of any

9. *Ibid.*

> Any person or persons claiming to be aggrieved on account of any ruling of the zoning board or board of adjustment which enforces this chapter may appeal in writing to the board of county commissioners. Any such appeal must be filed within thirty (30) days after the act or decision upon which any appeal is made and must specify the grounds thereof.

In *Chabau v. Dade County*, 385 So.2d 129 (Fla. 3d DCA 1980), another panel of this court squarely held that a representative association like the Izaak Walton League was not "aggrieved" by an adverse zoning decision under a Dade County ordinance indistinguishable from this one and thus could not maintain an appeal from the Dade County Zoning Appeals Board to the county commission.[10] We are unable to distinguish that decision on any principled basis. Since, under the present circumstances, we are bound to follow it, *In re Rule 9.331, Determination of Causes by a District Court of Appeal, En Banc*, 416 So.2d 1127 (Fla.1982); see also, *State v. Whitehead*, 443 So.2d 196 (Fla. 3d DCA 1983) (Schwartz, C.J., specially concurring), the judgment below is affirmed solely on the authority of *Chabau*.

Because of the obvious significance of the issue, however, we certify to the Supreme Court of Florida that this decision passes upon the following question of great public importance:

> Whether a representative group has standing as an "aggrieved" person or party to maintain an appeal of a zoning decision of a lower tribunal to the governing board of a county or municipality? [11]

Affirmed, question certified.

GRANITE STATE INSURANCE COMPANY, Appellant,

v.

Calvin LANE, Sr., as Personal Representative of the Estate of Calvin Lane, Jr., deceased, Appellee.

Nos. 83–755, 83–1194.

District Court of Appeal of Florida, Third District.

April 17, 1984.

Rehearing Denied May 16, 1984.

Personal representative filed suit seeking declaration that excess liability insurer

10. As in *Chabau*, none of the exceptions to the lack of standing rule of *Renard v. Dade County*, 261 So.2d 832 (Fla.1972) apply since only the wisdom of the zoning board was challenged by the League. See *Citizens Growth Management Coalition of West Palm Beach, Inc. v. City of West Palm Beach*, 450 So.2d 204 (Fla.1984); compare *City of Miami v. Save Brickell Ave. Inc.*, 426 So.2d 1100 (Fla. 3d DCA 1983) and cases cited.

11. In resolving this question as an original matter, the high court must decide whether, as we held in *Chabau*, the rules relating to court access, which deny standing, *Citizens Growth Management Coalition of West Palm Beach, Inc. v. City of West Palm Beach*, supra, apply; or whether, because of the judicial-legislative dichotomy which we have discussed supra, a broader range of interests may be heard by the commission, as indicated by the out-of-state cases we declined to follow in *Chabau* and reflected in the more relaxed standards now applicable in administrative proceedings. *Douglaston Civic Ass'n, Inc. v. Galvin*, 36 N.Y.2d 1, 364 N.Y.S.2d 830, 324 N.E.2d 317 (1974); *East Camelback Homeowners Ass'n v. Arizona Foundation for Neurology and Psychiatry*, 19 Ariz.App. 118, 505 P.2d 286 (1973); *Florida Home Builders Ass'n v. Dep't of Labor and Employment Security*, 412 So.2d 351 (Fla.1982); *Florida Medical Ass'n, Inc. v. Dep't of Professional Regulation*, 426 So.2d 1112 (Fla. 1st DCA 1983); *Farmworker Rights Organization, Inc. v. Dep't of Health and Rehabilitative Services*, 417 So.2d 753 (Fla. 1st DCA 1982); *Caloosa Property Owners Ass'n, Inc. v. Palm Beach County Board of County Commissioners*, 429 So.2d 1260 (Fla. 1st DCA 1983), rev. denied, 438 So.2d 831 (Fla.1983); Belmont, Public Interest Access to Agencies: The Environmental Problem for the 1980's, 11 S.L.R. 454, 473–4, n. 93 (1982) ("After the supreme court reversal in *Florida Home Builders*, standing appears to be once again readily available to environmental groups. *See, e.g., Booker Creek [v. Dep't of Environmental Regulation]*, 415 So.2d 781 (Fla. 1st DCA 1982) (reversing agency denial of standing, but affirming agency ruling on substantive claims)").

Select Year: 2015 Go

The 2015 Florida Statutes

Title XIX Chapter 286 View Entire Chapter
PUBLIC BUSINESS PUBLIC BUSINESS: MISCELLANEOUS PROVISIONS

286.012 Voting requirement at meetings of governmental bodies.—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 respect to any such member, there is, or appears to be, a possible conflict of interest under s. 112.311, s. 112.313, s. 112.3143, or additional or more stringent standards of conduct, if any, adopted pursuant to s. 112.326. If there is, or appears to be, a possible conflict under s. 112.311, s. 112.313, or s. 112.3143, the member shall comply with the disclosure requirements of s. 112.3143. If the only conflict or possible conflict is one arising from the additional or more stringent standards adopted pursuant to s. 112.326, the member shall comply with any disclosure requirements adopted pursuant to s. 112.326. 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.

History.—s. 1, ch. 72-311; s. 9, ch. 75-208; s. 2, ch. 84-357; s. 13, ch. 94-277; s. 19, ch. 2013-36; s. 7, ch. 2014-183.

CEO 79-14 -- March 22, 1979

VOTING CONFLICT OF INTEREST

ABSTENTION FROM VOTING BY CITY COUNCIL MEMBER

To: Michael E. Watkins, City Attorney, Homestead

Prepared by: Phil Claypool

SUMMARY:

A city council member may not abstain from voting on grounds of bias or prejudice against an individual when matters concerning that individual or the business he represents come before the council. It is present policy of this state that a public officer may vote upon any matter, so long as he files a memorandum of voting conflict. See s. 112.3143, F. S. 1977. He also may abstain as provided by s. 286.012, which has been interpreted by the Attorney General to require that a voting officer have a personal financial interest in a matter in order to abstain. Therefore, in the absence of any applicable provision of law which would override policy established by s. 112.3143, a public officer may abstain from voting only if there is or appears to be a conflict of interest under s. 112.311, s. 112.313, or s. 112.3143, none of which relate to bias or prejudice on the part of a public officer based on other than private economic interests or relationships.

QUESTION:

May a city council member abstain from voting on grounds of bias or prejudice against an individual when matters concerning that individual, or the business he represents, come before the council?

Your question is answered in the negative.

In your letter of inquiry you advise that the subject city council member in the past was involved in an altercation with another person which began with words and ended with blows. You also advise that this other person is the president and majority stockholder of a national bank located within the city and that, from time to time, matters come before the city council concerning this bank. In addition, you advise that the subject city council member believes that any items upon which he might vote involving this individual or his bank, depending on his vote, would present the appearance of impropriety on his part, based upon personal bias or dislike for the individual. Finally, you write that it is entirely possible for some bias or prejudice to exist, either conscious or unconscious, in the mind of the city council member, who wishes to avoid any impropriety and any appearance of impropriety.

Historically, in the absence of a statutory provision regarding conflicts of interest, abstention from voting, or disqualification of public officials, the Florida courts have adhered to the following rule:

> The motives of a governing body of a municipality in adopting an ordinance of legislative character are not usually subject to judicial inquiry, while actions of judicial tribunals or bodies acting quasi-judicially can be reviewed. [City of Opa Locka v. State ex rel. Tepper, 257 So.2d 100, 104 (3 D.C.A. Fla., 1972).]

See also Schauer v. City of Miami Beach, So.2d 838 (Fla. 1959). However, even when a public body exercised a legislative function, the courts could determine whether that body's action involved fraud or overreaching. City of Coral Gables v. Coral Gables, Inc., 160 So. 476 (Fla. 1935).

When a board acts in a quasi-judicial capacity, a member of the board might be disqualified to act in a particular case by reason of personal interest or prejudice. State Board of Funeral Directors and Embalmers v. Cooksey, 4 So.2d 258 (Fla. 1941), and Board of Public Instruction of Broward County v. State ex rel. Allen, 219 So.2d 430 (Fla. 1969).

However, when a statute or charter provision is applicable, it will control over the above rules. Fossey v. Dade County, 123 So.2d 755 (3 D.C.A. Fla., 1960), holding that under a county charter provision, a county commissioner was required to abstain from voting on a matter in which he had a special financial interest. Under s. 475.44, F. S., a member of the Florida Real Estate Commission may be disqualified in a particular matter on the same grounds as circuit judges, which include bias, prejudice, or interest. State ex rel. Cannon v. Churchwell, 195 So.2d 599 (4 D.C.A. Fla., 1967).

Similarly, a longstanding provision of the Administrative Procedure Act, s. 120.09, F. S., allowed the disqualification of a member of an administrative body for bias, prejudice, interest, or other causes. However, this provision was held not to apply to city commissions in City of Opa Locka v. State ex rel. Tepper, supra. Section 120.09 has been amended and presently exists as s. 120.71, F. S. It appears that the present section also would have no application to a city councilman, as Ch. 120 does not apply to municipal agencies. Section 120.52(1)(c), F. S.

In 1972, s. 286.012, F. S., was enacted. This statute, with only minor amendments, presently provides:

> No member of any state, county, or municipal governmental board, commission, or agency who is present at any meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may 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, except when, with respect to any such member, there is, or appears to be, a possible conflict of interest under the provisions of s. 112.311, s. 112.313, or s. 112.3143. In such cases said member shall comply with the disclosure requirements of s. 112.3143. [Section 286.012, F. S. 1977.]

The Attorney General has rendered numerous opinions interpreting this provision. Those most relevant to the question presented in this opinion include AGO 072-229 (a public official must cast his vote unless he has a personal interest in the matter); AGO 073-236 (a city councilman is not required to abstain on a request for zoning change made by a regular business customer unless such vote results in substantial benefit to the councilman's business); and AGO 074-31 (a county commissioner may not abstain on matters relating to a mental health board of which he is a director as he would not profit personally). Thus, it appears that under the Attorney General's interpretation of s. 286.012 and the provisions of the Code of Ethics referenced in that section, a public official was required to have a personal financial interest in a matter in order to abstain from voting on that matter.

The Attorney General has advised also that s. 286.012 should be regarded as mandating abstention in cases when it applies. See AGO's 073-121 and 073-215. However, in 1974 the Legislature enacted s. 112.3141, F. S., which appears now as s. 112.3143, F. S. 1977:

> No public officer shall be prohibited from voting in his official capacity on any matter. However, any public officer voting in his official capacity upon any measure in which he has a personal, private, or professional interest and which inures to his special private gain or the special gain of any principal by whom he is retained shall, within 15 days after the vote occurs, disclose the nature of his interest as a public record in a memorandum filed with the person

responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. (Emphasis supplied.)

Thus, it is the present policy of this state that a public officer may vote upon any matter, so long as he files a memorandum of voting conflict when required by the above-quoted section. He also may abstain as provided by s. 286.012, F. S.

Therefore, in the absence of any applicable provision of law which would override policy established by s. 112.3143 (for example, see s. 120.71, F. S. [1978 Supp.]), it appears that a public officer may abstain only if there is, or appears to be, a possible conflict of interest under s. 112.311, s. 112.313, or s. 112.3143, F. S. However, in our view, none of these three sections applies to the circumstances you have outlined.

Section 112.3143, quoted above, requires the filing of a memorandum of voting conflict when a public officer votes upon a measure "in which he has a personal, private, or professional interest and which inures to his special private gain or the special gain of any principal by whom he is retained . . . ." Here, there is no principal relationship between the parties involved, nor does it appear that matters coming before the city council regarding the bank or its president would inure to the gain of the subject councilman. Therefore, s. 112.3143 does not apply.

Section 112.313 contains numerous standards of conduct for public officers, none of which, however, would apply or even appear to apply here, as they relate primarily to conflicts of interest based upon the private economic interests of a public official.

Section 112.311 expresses the legislative intent behind the substantive provisions of the Code of Ethics. As a general statement of intent, this section provides broader grounds for one's abstention from voting than does s. 112.3143 or s. 112.313. See s. 112.311(1), regarding the independence and impartiality of public officials. Nevertheless, it is clear that, when adopting the Code of Ethics, the Legislature was concerned primarily with the effect of a public official's economic interests and relationships upon the performance of his public duties, rather than the effect of his personal preferences or animosities. See s. 112.311(5), F. S.

In short, the sections of the Code of Ethics referenced in s. 286.012 simply do not relate to bias or prejudice on the part of a public officer under the circumstances presented here. Moreover, it appears that, had the Legislature intended to allow abstention by, or disqualification of, a municipal official on grounds of bias or prejudice, it would have done so explicitly, as it has done in ss. 120.71 and 475.44, F. S., for other classes of public officers.

Accordingly, it is our opinion that a city council member may not abstain from voting on grounds of bias or prejudice against an individual when matters concerning that individual, or the business he represents, come before the council.

Florida Attorney General
Advisory Legal Opinion

Number: AGO 87-17
Date: March 10, 1987
Subject: Voting abstinence to avoid appearance of impropriety

---

Mr. Daniel S. McIntyre
County Attorney
St. Lucie County
2300 Virginia Avenue
Fort Pierce, Florida 33482-5652

RE: COUNTIES--COUNTY COMMISSIONERS--Abstention from voting by county commissioner to avoid appearance of conflict of interest, authorized

Dear Mr. McIntyre:

This is in response to your request for an opinion of this office on substantially the following question:

May a member of a board of county commissioners who is present at a meeting of the board abstain from voting on a measure to avoid creating an appearance of impropriety?

You state in your inquiry that the measure would not inure to the member's special private gain or inure to the special private gain of any principal by whom he is retained. Accordingly, your question does not involve a prohibition on voting. *See* s. 112.3143(3), F.S. (1986 Supp.) ("[n]o county . . . officer shall vote in his official capacity upon any measure which inures to his special private gain or shall knowingly vote in his official capacity upon any measure which inures to the special gain of any principal . . . by whom he is retained"), and s. 112.3143(2)(a), F.S. (1986 Supp.) ("[e]xcept as provided in subsection [3], no public officer is prohibited from voting in his official capacity on any matter"); AGO's 85-40 and 86-61 (s. 112.3143[3] creates a voting disqualification when its terms apply). Rather, your inquiry is specifically directed at s. 286.012, F.S., which provides as follows:

"No member of any state, *county*, or municipal governmental board, commission, or agency who is present at any meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may 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, *except when, with respect to any such member, there is,*

or appears to be, a possible conflict of interest under the provisions of s. 112.311, s. 112.313, or s. 112.3143. In such cases, said member shall comply with the disclosure requirements of s. 112.3143." (e.s.)

See s. 112.3143(3), F.S. (1986 Supp.), providing in pertinent part that a county officer shall, prior to the vote being taken, publicly state to the assembly the nature of his interest in the matter from which he is abstaining from voting and, within 15 days of the vote, disclose the nature of his interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. *See also* s. 112.3143(4), F.S. (1986 Supp.) (number and nature of such memoranda shall be considered whenever public officer or former officer is being considered for appointment or reappointment to public office).

Thus, s. 286.012, F.S., operates to permit a member of a board of county commissioners to abstain only "when, with respect to any such member, there is, *or appears to be,* a possible conflict of interest under the provisions of" s. 112.311, F.S., or under ss. 112.313 or 112.3143, F.S. (1986 Supp.). (e.s.) *See* Biddle v. State Beverage Department, 187 So.2d 65 (4 D.C.A. Fla., 1966); and State Road Department v. Levato, 192 So.2d 35 (4 D.C.A. Fla., 1966), *cert. discharged,* 199 So.2d 714 (Fla.1967) (express exceptions in statute provide strong inference that no other exception were intended). The phrase "conflict of interest" as used in s. 112.311, F.S., and ss. 112.313 and 112.3143, F.S. (1986 Supp.), means "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest." Section 112.312(6), F.S. Any question as to what constitutes a "conflict of interest" under this statutory definition must be submitted to the Florida Commission on Ethics. *See* s. 112.322(3), F.S.; AGO's 85-40 and 86-61. However, your attention is directed to Op. Comm. Ethics, 79-14, March 22, 1979, stating in pertinent part as follows:

"The Attorney General has rendered numerous opinions interpreting [s. 286.012] . . . . Thus, it appears that under the Attorney General's interpretation of s. 286.012 and the provisions of the Code of Ethics referenced in that section, a public official was required to have a personal financial interest in a matter in order to abstain from voting on that matter."

That opinion continued by noting that, pursuant to then existent statutory language, "a public officer may vote upon any matter, so long as he files a memorandum of voting conflict when required . . . . [*But see* Ch. 84-357, Laws of Florida, enacting the prohibitory language now codified at s. 112.3143(3), F.S. (1986 Supp.), discussed *supra*.] He may also abstain as provided by s. 286.012, F.S." The opinion thus concluded "that a public officer may abstain only if there is, or appears to be, a possible conflict of interest under s. 112.311, s. 112.313, or s. 112.3143, F.S." Finding no conflict of interest based on bias or prejudice of a city council member in the particular fact situation

presented, the opinion states in pertinent part that "it is clear that, when adopting the Code of Ethics [containing, *inter alia*, s. 112.311, F.S., and ss. 112.313 and 112.3143, F.S. (1986 Supp.)], the Legislature was concerned primarily with the effect of a public official's *economic interests and relationships* upon the performance of his public duties . . . ." (e.s.) *See also* Izaak Walton League of America v. Monroe County, 448 So.2d 1170 (3 D.C.A. Fla., 1984) (s. 286.012 did not permit disqualification from voting of a county commissioner on the ground of predisposition amounting to bias and prejudice, citing to Op. Comm. Ethics, 79-14, *supra*).

Accordingly, s. 286.012, F.S., operates to permit a member of a board of county commissioners to abstain from voting when there is, *or appears to be*, a possible conflict of interest under the provisions of s. 112.311, F.S., or under ss. 112.313 or 112.3143, F.S. (1986 Supp.), subject to the requirement that such abstaining member shall, prior to the vote being taken, publicly state to the assembly the nature of his interest in the matter and, within 15 days of the vote, disclose the nature of his interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting to be incorporated in the minutes. I am therefore of the view that a member of a board of county commissioners who is present at a meeting of the board may abstain from voting on a measure to avoid creating an appearance of impropriety only where such impropriety amounts to a conflict of interest pursuant to the foregoing provisions of Part III, Ch. 112, F.S., as amended, and where the required oral and written disclosure is made.

Therefore, unless and until legislatively or judicially determined otherwise, and where the prohibitory terms of s. 112.3143(3), F.S. (1986 Supp.), do not apply, it is my opinion that a member of a board of county commissioners who is present at a meeting of the board may abstain from voting on a measure to avoid creating an appearance of impropriety only where such impropriety amounts to a conflict of interest pursuant to s. 112.311, F.S., or ss. 112.313 or 112.3143, F.S. (1986 Supp.), subject to the requirement of s. 112.3143(3), F.S. (1986 Supp.), that such member shall, prior to the vote being taken, publicly state the nature of his interest and, within 15 days of the vote, disclose the nature of his interest as a public record in a memorandum to be filed for incorporation in the minutes of the meeting. Any question as to the existence of a conflict of interest in any particular factual situation must be submitted to the Florida Commission on Ethics.

Sincerely,

Robert A. Butterworth
Attorney General

Prepared by:

Kent L. Weissinger
Assistant Attorney General

Florida Attorney General
Advisory Legal Opinion

Number: INFORMAL
Date: June 9, 2011
Subject: Abstension from voting

Mr. Edward Rodgers
Chairman, Palm Beach County
Commission on Ethics
2633 Vista Parkway
West Palm Beach, Florida 33411

Dear Mr. Rodgers:

On behalf of a majority of members of the Palm Beach County Commission on Ethics, you have requested our assistance in determining whether a member of a local commission on ethics who is present at a meeting of the board may abstain from voting on a measure to avoid creating an appearance of impropriety. Attorney General Bondi has asked me to respond to your letter.

Initially, I must advise you that this office is limited by section 16.01(3), Florida Statutes, to providing legal opinions on questions of state law. Thus, the discussion herein is based on an examination of statutes and case law involving section 286.012, Florida Statutes. This office has no authority to comment on the procedures established by local ordinance for the conduct of meetings or hearings of the Palm Beach County Commission on Ethics. You may wish to discuss your concerns with the county attorney who can more fully explore any procedures established in the ordinance or charter provision creating the commission and describing its procedures.

Section 286.012, Florida Statutes, provides:

"Voting requirement at meetings of governmental bodies.—No member of any state, county, or municipal governmental board, commission, or agency who is present at any meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may 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, except when, with respect to any such member, there is, or appears to be, a possible conflict of interest under the provisions of s. 112.311, s. 112.313, or s. 112.3143. In such cases, said member shall comply with the disclosure requirements of s. 112.3143."

Thus, the Legislature has determined that a member of a county board or commission may only abstain from voting "when, with respect to any such member there is, or appears to be, a possible conflict of interest under the provisions of" sections 112.311, 112.313, or 112.3143, Florida Statutes. It is a rule of statutory construction that express exceptions in a statute provide a strong inference that no other exceptions were intended.[1] The phrase "conflict of interest" as used in sections 112.311, 112.313, and 112.3143, Florida Statutes, means "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest."[2] However, as this office has advised on a number of occasions, any question as to what fact situations may constitute a "conflict of interest" under this statutory definition must be directed to the Florida Commission on Ethics.[3]

An opinion of the Ethics Commission, citing opinions of this office, stated that "it is clear that, when adopting the Code of Ethics (which contains the statutes referenced in section 286.012), the Legislature was concerned primarily with the effect of a public official's economic interests and relationships upon the performance of his public duties. . . . "[4] This opinion was cited by the court in *Izaak Walton League of America v. Monroe County*,[5] in its holding that section 286.012, Florida Statutes, did not permit disqualification from voting of a county commissioner on the grounds of predisposition amounting to bias and prejudice.

I would note that other boards and commissions, including quasi-judicial administrative bodies, conduct quasi-judicial proceedings under section 286.012, Florida Statutes. In Attorney General Opinion 88-62, this office was asked to consider under what circumstances a member of a municipal code enforcement board could recuse himself. Once created, the board was required to adopt rules relating to the conduct of meetings, but the opinion points out that any such rules adopted by the board would be required to conform to section 286.012, Florida Statutes. The opinion reviewed the provisions of Chapter 162, Florida Statutes, for the creation of these quasi-judicial administrative boards and noted that nothing in that chapter provided for the disqualification of a member or members of the code enforcement board from consideration of matters coming before the board. Thus, the opinion concludes that a member of the code enforcement board may not disqualify himself from considering a matter before the board and that, as provided in section 286.012, Florida Statutes, a member who is present at a meeting must vote unless a conflict of interest exists or appears to exist.

While the Commission on Ethics has no jurisdiction to administer section 286.012, Florida Statutes, it has interpreted the "appears to be a possible conflict" language of that statute. As the Commission advised in its letter to Mr. Farach of June 2, 2011, "non-economic bias or prejudice on the part of a public officer toward someone affected by a measure would not constitute a basis for a valid abstention pursuant to Section

286.012."[6] This office would concur in the Commission's analysis and conclusion.

Thank you for considering the Florida Attorney General's Office as a source for assistance in this matter. I trust that these informal comments will be helpful to you. This informal advisory opinion is provided in an effort to be of assistance. The comments expressed herein are those of the writer and do not constitute a formal Opinion of the Florida Attorney General.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

GH/tsh

---

[1] *See Biddle v. State Beverage Department*, 187 So. 2d 65 (Fla. 4th DCA 1966); and *State Road Department v. Levato*, 192 So. 2d 35 (Fla. 4th DCA 1966), *cert. discharged*, 199 So. 2d 714 (Fla. 1967).

[2] Section 112.312(8), Fla. Stat.

[3] *See e.g.*, Op. Att'y Gen. Fla. 87-17 (1987), 86- 61 (1986), and 85-40 (1985); *and see* s. 112.322(3), Fla. Stat., providing that public officers seeking interpretations of the Code of Ethics or the applicability of these statutes may request an advisory opinion of the Commission on Ethics.

[4] *See* CEO 79-14, dated March 22, 1979.

[5] 448 So. 2d 1170 (Fla. 3d DCA 1984).

[6] Letter to Manual Farach from Virlindia Doss, Florida Commission on Ethics, dated June 2, 2011.