

IN THE TWELFTH JUDICIAL CIRCUIT COURT  
IN AND FOR MANATEE COUNTY, FLORIDA

MARY LOU SMITH, et al.,

Plaintiffs,

v.

Case No. 2008-CA-11315

TRAILER ESTATES PARK AND  
RECREATION DISTRICT, et al.,

Defendants.

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**DEFENDANT JANET JONES' MEMORANDUM IN SUPPORT  
OF HER ALTERNATIVE MOTION TO DISMISS AND STRIKE**

Defendant Janet Jones files this memorandum of support of her Alternative Motion to Dismiss and Strike directed at Plaintiffs' Third Amended Complaint. In that complaint, Plaintiffs allege that Ms. Jones violated section 286.011, Florida Statutes, popularly known as Florida's Government in the Sunshine Act. Plaintiffs have *not* alleged that Ms. Jones violated Florida's Public Records law.

*Memorandum Applicable to Motion to Dismiss*

**Count 1**

Plaintiffs alleged multiple instances of purported Sunshine Law violations against Ms. Jones in Count 1. Plaintiffs continue to maintain that these are separate violations even though they have lumped approximately 100 separate distinct allegations into Count 1. Thus, each separate violation can be individually attacked. Ms. Jones' memorandum addresses those specific allegations.

Section 286.011(1) provides in pertinent part:

All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

Importantly, the Court should note that the Sunshine Law does *not* prohibit all private discussions between trustees.

The scope of the Sunshine Law is “to cover any gathering of some of the members of a public board where those members discuss some matters on which *foreseeable* official action will be taken by the board.” Canney v. Board of Public Instruction of Alachua County, 278 So. 2d 260, 263 (Fla. 1973) (emphasis added). The purpose of the Sunshine Law “is to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance.” News-Press Pub. Co. v. Carlson, 410 So. 2d 546, 548 (Fla. 2d DCA 1982) (citing Town of Palm Beach v. Gradison, 296 So. 2d 473, 477 (Fla. 1974)).

The Sunshine Law applies to meetings of two or more members of the same board, not to an individual meeting with a private citizen. See City of Miami Beach v. Berns, 245 So. 2d 38, 40 (Fla. 1971); see also Op. Att’y Gen. Fla. 81-42, 1981 WL 140321 (May 29, 1981) (citing Berns, explaining that “[t]he Sunshine Law applies only when two or more members of a public board deal with some matter on which foreseeable official action will be taken”). For that reason, Plaintiffs’ allegation in 37(x), that Ms. Jones **acted on her own** in determining that public comments as meeting will be 3 minutes, cannot be a violation for that very reason.

By its express terms, the Sunshine Law does not preclude all contact between members of the same board outside a noticed, public meeting. The statute prohibits communications about matters that “*are to be taken*” by the board. See § 286.011(1), Fla. Stat. Thus, there is no statutory prohibition for there to be discussions concerning matters *that have already have decided* by the board. For that reason, Plaintiffs’ allegation in paragraph 37(g), that members of the Executive Committee met with Ms. Jones between September and December 2006 to discuss their reasons for having appointed Tom Featheringill to the board, involves a matter that had already been decided on September 5, 2006.

The Sunshine Law applies to “meetings . . . at which official acts are to be taken,” and it further provides that “no resolution, rule, or formal action” is binding where the decision is made outside a noticed, public meeting. See § 286.011(1), Fla. Stat. As explained above, the statute precludes policy decisions from being made outside a notice, public meeting. Thus, a conversation outside a noticed, public meeting involving a matter where there is no discretion – and hence, no policy prerogative of the board – does not violate either the express text of the statute or its intent.

Plaintiffs, in several allegations, allege that Ms. Jones’ violated the Sunshine Law by having a discussion outside a noticed, public meeting to come to various legal determinations. For instance, in paragraph 37(y), Plaintiffs allege that the trustees secretly determined whether OSHA laws applied. In paragraph 37(ss), Plaintiffs allege that the trustees secretly determined whether section 849.01, Florida Statutes (a gambling statute), applied. In paragraph 37(zz), Plaintiffs allege that the trustees secretly determined whether certain videos were public records. Each of those matters, however, involved no discretion on the part of the board. There is nothing

the Board could do to affect whether those items applied. These laws either applied or they did not. Accordingly, each of those discussions cannot, as a matter of law, violate the Sunshine Law.

Finally, Plaintiffs fail to state a cause of action against Ms. Jones in paragraph 44 because as alleged, fails to state a cause of action against Ms. Jones and it fails to meet minimum notice requirements. At a minimum, the Court should require a more definite statement.

### **Count 3**

Plaintiffs in Count 3 seek mandamus but impermissibly lumps together differing theories – Public Records and Sunshine. Those are separate and distinct theories and must be pled separately. See Pratus v. City of Naples, 807 So. 2d 795, 796-97 (Fla. 2d DCA 2002) (requiring separate counts where plaintiffs had separate theories or causes of action). There can be no doubt that Plaintiffs have impermissibly mingled theories here. For instance, in paragraph 78, Plaintiffs incorporated paragraphs 62, 64, and 65, which contain a litany of Public Record allegations from Count 2, which Ms. Jones is not a target. Yet, paragraph 78 makes this confusing and unclear. For that reason alone, this count must be dismissed – or more appropriate, an order to show cause should not issue.

While mandamus is proper in a Public Records case, mandamus is not proper here. Mandamus is a common law remedy to compel a person in an official capacity to perform an indisputable ministerial duty required by law. See Smith v. State, 696 So. 2d 814, 815-16 (Fla. 2d DCA 1997). Plaintiffs fail to identify any ministerial duty that Ms. Jones is required to perform. For instance, Plaintiffs seek in Wherefore Clause B to require Ms. Jones to attend a public record and Sunshine workshop. Yet, Plaintiffs failed to identify any legal basis to require

this discretionary decision. In Wherefore Clause D, Plaintiffs seek an attorney fee award pursuant to section 286.011, which statute is *within the Court's discretion*. Finally, in Wherefore Clause C, Plaintiffs essentially seek an injunction to comply with the Sunshine Law but Plaintiffs fail to identify any action that Ms. Jones is to perform by way of mandamus. Thus, this cannot be the basis for a mandamus action.

#### Count 4

Plaintiffs in Count 4 again impermissibly mix Public Record and Sunshine allegations. Plaintiffs should, at a minimum, be required to separate out and not mix causes of action. See Pratus, 807 So. 2d at 796-97.

#### *Memorandum applicable to motion to strike*

On two previous occasions, the Court directed Plaintiffs to provide more definite statements so that Defendants could have notice of the allegations against them. The Court during the hearing on September 3 ordered that Plaintiffs “must state with specificity when the alleged violations occurred, who was present, and the subject matter of the alleged violation.” Exhibit 1, p.2.

While Plaintiffs complied as to some allegations, Plaintiffs failed to comply as to others. There are numerous allegations within which Ms. Jones is left to guess whether she alleged to have committed the violation or not, when it occurred, or what the subject matter is of the violation. This is simply unfair and violation of Ms. Jones' due process rights. Modern pleading requirements serve to notify the opposing party of the claims alleged and prevent unfair surprise. See First Protective Ins. Co. v. Featherston, 978 So. 2d 881, 882 (Fla. 2d DCA 2008) (en banc).

As just one example of Plaintiffs' continued failure to give adequate notice of their allegations against Ms. Jones, paragraph 37(q) provides:

**During November 2005 through 2009, Board members attended ARC meetings wherein they discussed the denial of permits and these meetings were not advertised as board meeting.**

As noted in Ms. Jones' motion, there are at least 26 separate allegations where Ms. Jones does not know if it is directed at her, when the conduct occurred, or the subject matter of such conduct. This is improper and fails to give the minimum constitutional notice. "Florida law clearly holds that a trial court lacks jurisdiction to hear and to determine matters which are not the subject of proper pleading and notice." Pro-Art Dental Lab, Inc. v. V-Strategic Group, Inc., 986 So. 2d 1244, 1252 (Fla. 2008). There is no doubt that this violations Defendants' due process rights. See id. ("To allow a court to rule on a matter without proper pleadings and notice is violative of a party's due process rights.").

Accordingly, the Court should strike those paragraphs from the Third Amended Complaint or have the Court order that such paragraphs are not directed at Ms. Jones.

WHEREFORE, Ms. Jones requests that the Court grant her Motion in all respects.

Respectfully submitted,

MATTHEWS, EASTMOORE, HARDY,  
CRAUWELS & GARCIA, P.A.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail and First Class U.S. Mail this 17th day of September, 2009, to:

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\_\_\_\_\_  
/s/ Hunter W. Carroll

IN THE TWELFTH JUDICIAL CIRCUIT  
IN AND FOR MANATEE COUNTY, FLORIDA

MARY LOU SMITH, an individual,  
and SHARON DENSON, an individual,

Plaintiffs,

v.

CASE NO. 08 CA 11315

TRAILER ESTATES PARK AND  
RECREATION DISTRICT,  
an independent special taxing district,  
JANET JONES, an individual,  
JOHN VANDER MOLEN, an individual,  
JOSEPH SALERNO, an individual, and  
MARY LOU McNULTY, an individual,

Defendants.

FILED FOR RECORD  
R.B. SHORE  
2009 SEP 11 PM 1:45  
CLERK CIRCUIT COURT  
MANATEE CO. FLORIDA

**ORDER ON MATTERS HEARD SEPTEMBER 3, 2009**

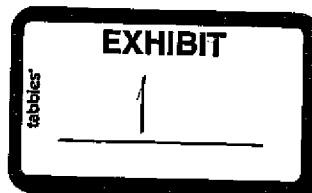
THIS CAUSE having come before the Court on September 3, 2009, on the matters set forth below, the Court having conducted a hearing concerning such matters and being otherwise fully advised in the premises, it is hereby ORDERED:

**I. Order on Motions to Strike or Dismiss Plaintiffs' Second Amended Complaint for Failure to Comply with Order Permitting Amendment**

The Court finds that the Plaintiffs did not raise new issues in the Second Amended Complaint and attempted to comply with the Court's Order dated, August 14, 2009. The Court finds that the Second Amended Complaint meets the pleading requirements. Accordingly, the Motions to Strike or Dismiss Plaintiffs' Second Amended Complaint are denied.

**II. Order on Motions to Dismiss or for More Definite Statement regarding Second Amended Complaint**

The Court finds that a Motion for More Definite Statement is appropriate Accordingly,



Plaintiffs shall file and deliver to the Defendants not later than 10:00 a.m. September 9, 2009, a Third Amended Complaint which provides a more definite statement concerning the allegations made in paragraphs 37, 62, 64, and 69. The Third Amended Complaint must state with specificity when the alleged violations occurred, who was present, and the subject matter of the alleged violation. Plaintiffs will be limited at trial to the matters alleged in the Third Amended Complaint. Accordingly, the Defendants' Motion for More Definite Statement regarding the Second Amended Complaint is granted, however, the Motion to Dismiss is denied. Defendants shall file and deliver to the other parties an Answer and Affirmative Defenses to the Third Amended Complaint by 10:00 a.m. September 10, 2009. Further, any Motions to Strike Affirmative Defenses will be heard prior to trial.

### **III. Order on Motions to Continue**

The District and other Defendants have moved to continue this matter arguing that it is not at issue and cannot be set for trial under the provisions of Fla. R. Civ. P. 1.440. The Defendants also argue that setting this matter for trial on allegations to be made in the Third Amended Complaint will result in prejudice to them by not allowing sufficient time to prepare for trial and defend the allegations of the Third Amended Complaint. The Court finds that there is no prejudice in allowing this case to remain on the Court's calendar. The Court finds that once the parties have complied with the actions stated in this order, the case can be set for trial to commence on September 14, 2009 at 9:00 a.m. Accordingly, the Motion to Continue is denied.

### **IV. Order on Procedural Matters.**


The Court orders that counsels for the parties meet to exchange lists and copies of exhibits that the parties intend to introduce during the trial in this matter. The parties shall submit the lists of exhibits to the Court with indication for each exhibit whether the parties stipulate that the exhibit is

admissible or briefly state any objections to the exhibit. The parties will meet on Friday, September 11, 2009, at the Manatee County Judicial Center to have exhibits pre-marked by the clerk prior to trial.

**V. Order on Motion to Severe or Bifurcate the Public Records Law and Sunshine Law Matters.**

Defendant Salerno's counsel made a motion ore tenus to severe the public records and sunshine law issues. The Motion is denied.

DONE and ORDERED this 10 day of September, 2009.

  
The Hon. Janette Dunnigan  
Circuit Court Judge

cc: Thomas D. Shults, Esquire  
Kevin S. Hennessy, Esquire  
Robert E. Turffs, Esquire  
Daniel E. Scott, Esquire  
James D. Dye, Esquire  
Hunter W. Carroll, Esquire