

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

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

Plaintiffs,

vs.

CASE NO.: 2008 CA 11315
Division: B

TRAILER ESTATES PARK AND
RECREATION DISTRICT, an
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.

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANT JONES' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs, MARY LOU SMITH and SHARON DENSON, through their undersigned counsel, LEWIS, LONGMAN & WALKER, P.A., hereby submit their Memorandum in opposition to the Motion for Summary Judgment submitted by Defendant JANET JONES:

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper only when there is an absence of a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Galaxy Fireworks, Inc. v. Bush, 927 So.2d 995, 996 (Fla. 2d DCA 2006). "The facts presented to the trial court must be viewed in the light most favorable to the nonmoving party." Duncan v. Bay Realty of Englewood, Inc., 792 So.2d 548 (Fla. 2d DCA 2001) (citation

omitted). "All doubts and inferences shall be resolved in favor of the nonmoving party, and *the slightest doubt or conflict in the evidence will preclude summary judgment.*" Sawyer v. Southeastern Univ., 993 So.2d 141, 142 (Fla. 2d DCA 2008) (citing Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So.2d 261, 263 (Fla. 4th DCA 2007) (emphasis added). See also Nard, Inc., v. DeVito Contracting & Supply, Inc., 769 So.2d 1138, 1140 (Fla. 2d DCA 2000) ("[E]ach and every Florida district court of appeal has concurred with our holding that the merest possibility of the existence of a genuine issue of material fact precludes the entry of final summary judgment.").

If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issue, it should be submitted to the jury as a question of fact to be determined by it.

Bruckner v. City of Dania Beach, 823 So.2d 167, 170 (Fla. 4th DCA 2002) (citations omitted). See also Eads v. Traffic Control Devices, Inc., 19 So.3d 1142, 1143 (Fla. 1st DCA 2009) (where different inferences can be drawn from uncontroverted facts, summary judgment is unavailable). Moreover, when an issue of credibility is present a summary judgment should not be granted. Ham v. Heintzelman's Ford, Inc., 256 So.2d 264, 268 (Fla. 4th DCA 1972) (citations omitted).

APPLICABLE LAW

Article I, §24, of the Florida Constitution provides that

[a]ll meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public.

As explained by Florida's Attorney General, "[t]he Florida Constitution safeguards every Floridian's right of access to government meetings and records. . . . [D]isclosure is the

standard, unless the Legislature concludes that the public necessity compels an exemption from our strong open government laws.” Office of the Attorney General, Government-in-the-Sunshine Manual, Vol. 30 (2008), Page 1. Florida’s Government-in-the-Sunshine Law (hereinafter, the “Sunshine Law”) provides a right of access to governmental proceedings. Id. at 5 (citing §286.011, Fla. Stat.).

Section 286.011, Fla. Stat., known as Florida’s “Sunshine Law,” provides additional protection for Government in the Sunshine. This Section provides that

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.

Any interpretation of the Sunshine Law should be liberally construed in favor of the public and open government. Krause v. Reno, 366 So.2d 1244, 1250 (Fla. 3d DCA 1979) (emphasis supplied). See also Evergreen Tree Treasurers of Charlotte County v. Charlotte Co. Board of County Comm’rs, 810 So.2d 526 (Fla. 2d DCA 2002); & Wolfson v. State, 344 So.2d 611 (Fla. 2d DCA 1977). The breadth of the public’s right to require government in the sunshine “is virtually unfettered.” Pinellas County School Bd., 829 So.2d at 990 (citing Lorei v. Smith, 464 So.2d 1330, 1332 (Fla. 2d DCA 1985)). “Every meeting of any board, commission, agency or authority of a municipality should be a marketplace of ideas, so that the governmental agency may have sufficient input from the citizens who are going to be affected by the subsequent action of the municipality. . . . [O]pen meetings instill confidence in government.” Town of Palm Beach v. Gradison, 296 So.2d 473, 475 (Fla. 1974).

As explained by the Second District in Times Publishing Co. v. Williams, 222 So.2d 479, 473 (Fla. 2d DCA 1969), *disapproved on other grounds sub nom.*, Neu v. Miami Herald Publ'g Co., 462 So.2d 821 (Fla.1985), the "open meeting" requirement of the Sunshine Law goes far beyond meetings where formal action is taken by a local governing body.

Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire decision-making process that the legislature intended to affect by the enactment of the [Sunshine Law]. This act is a declaration of public policy, the frustration of which constitutes irreparable injury to the public interest. Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action. It follows that each such step constitutes an 'official act,' an indispensable requisite to 'formal action,' within the meaning of the act.

....

Thus, in the light . . . of the obvious purpose of the statute, the legislature could only have meant to include therein the acts of deliberation, discussion and deciding occurring prior and leading up to the affirmative 'formal action' which renders official the final decisions of the governing bodies.

It is our conclusion, therefore, that with one narrow exception [pertaining to the attorney-client privilege] . . ., the legislature intended the provisions of [the Sunshine Law] to be applicable to every assemblage of a board or commission governed by the act at which any discussion, deliberation, decision, or formal action is to be had, made or taken relating to, or within the scope of, the official duties or affairs of such body.

Id. at 473-474 (citations omitted).

The Sunshine Law was enacted to "protect the public from 'closed door' politics and, as such, the law must be broadly construed to effect its remedial and protective purpose." Wood v. Marston, 442 So.2d 934, 938 (Fla.1983) (citation omitted). Thus, its application includes the consideration and deliberative processes that precede decisions to be made by public bodies.

Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency, and relates to any matter on which foreseeable action will be taken.

The principle to be followed is very simple: ***When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State.***

Gradison at 477 (citation omitted) (emphasis supplied).

Although the Defendants in this action have argued differently, Florida's courts have consistently agreed that under the Sunshine Law, a "meeting" is any assemblage of public officials at which "any discussion, deliberation, decision, or formal action is to be had, made or taken relating to, or within the scope of, the official duties or affairs of such body." Times Publishing, 222 So.2d at 473. *Accord*, Op. Att'y Gen. Fla. 08-07 (2007) (Sunshine Law extends to any gathering, whether formal or casual). The Sunshine Law also applies to meetings that do not occur in person and under some circumstances, even when no actual meeting occurs. *See e.g., Leach-Wells v. City of Bradenton*, 734 So.2d 1168 (Fla. 2d DCA 1999); Blackford v. School Bd. of Orange County, 375 So.2d 578 (Fla. 5th DCA 1979).

In interpreting §286.011, Fla. Stat., the Florida Attorney General and the courts have repeatedly found that

[T]he Sunshine Law applies to the entire decision-making process and not merely to the formal assemblage of a public body at which the final vote to ratify a decision is taken. . . . Thus, the law has been held to be applicable 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 that public board or commission. . . .

Op. Att'y Gen. Fla., 02-24 (2002) (footnotes & citations omitted).

As outlined in detail below, all meetings involving decision-making about a special district's business, whether in small groups, by electronic means, through the use of liaisons or via advisory committee, regardless of whether final action is taken as a result, require public notice, a reasonable opportunity to attend and recorded minutes. Additionally, the Sunshine Law has also been found to be applicable to advisory committees that have been appointed by a single public official. See e.g., Krause v. Reno, 366 So.2d 1244 (Fla. 3d DCA 1979).

Specifically, the Trailer Estates Park and Recreation District Bylaws (the "Bylaws") authorize the District's individual Trustees to appoint their own Trustee Committee to advise, inform, and assist the individual Trustee in performing his or her duties. Bylaws, Exhibit 2 to Third Amended Complaint. Therefore, a committee, appointed by a District Trustee, to assist the Trustee by advising, informing or performing his or her duties, would be subject to the Sunshine Law, as would any advisory committees appointed by the Board of Trustees as a whole. See Krause, supra.

There is no requirement of knowledge or intent with regard to a Sunshine Law violation. Even if Sunshine Law violations were inadvertently made or accidental, such ignorance or accident does not excuse the violation. See Leach-Wells v. City of Bradenton, 734 So.2d at 1171 (*citing Gradison, supra*).¹ As explained by the Fourth

¹ "It is also clear from the record that neither the committee nor the Council set out to evade the Sunshine Law. In fact, there is no indication in the record that the Council was even aware that the committee may have violated the Sunshine Law when the Council first entertained the presentations from the short-listed bidders. Of course, under the statute, no intent to violate is required." Leach-Wells at 1171.

DCA, “[t]he principle that a Sunshine Law violation renders void a resulting official action does not depend on a finding of intent to violate the law or resulting prejudice. Once the violation is established, prejudice is presumed.” Zorc v. City of Vero Beach, 722 So.2d 891, 902 (Fla. 4th DCA 1998) (citing Port Everglades Auth. v. International Longshoremen's Ass'n, Local 1922-1, 652 So.2d 1169, 1171 (Fla. 4th DCA 1995)).

RESPONSE TO “UNDISPUTED FACTS”

In Pages 2 through 8 of her Motion for Partial Summary Judgment, Defendant Jones lists what are characterized as “Undisputed Facts.” With very few exceptions, most of what she characterizes this way is in fact hotly disputed. Moreover, Defendant Jones includes legal conclusions as part and parcel of these “Undisputed Facts.” In lieu of identifying each of the disputed areas here, each is addressed below, along with the applicable legal standard under the Sunshine law.

ARGUMENT

A. The McNeil Fence Case (Complaint ¶137(aa)):

With regard to the McNeil Fence litigation, Plaintiffs and Defendant Jones agree that Trustee John Vander Molen authored two memoranda to the Board and there is no dispute as to the contents of these memoranda. It is undisputed that in the second memorandum, Mr. Vander Molen “strongly recommend[ed] that the Board of Trustees vote to accept this [mediated settlement] agreement.” Defendant Jones Trial Exhibit 63. That is where the consensus ends. The parties could not disagree more as to the inferences to be drawn from the statements contained in the memoranda and how the Sunshine Law applies.

Although public board members may use a written report concerning official business to inform other board members of a topic that would be discussed at a public meeting, there may not be any “interaction related to the report” prior to the meeting. Op. Att’y Gen. Fla. Inf. (June 8, 2007). In the event there is any interaction relating to the report or if the report is circulated between board members “for comments with such comments being provided to other board members,” the interaction constitutes a meeting subject to the Sunshine Law. Id.; accord Op. Att’y Gen. Fla. 07-35 (2007).

To date, the courts have not ruled on whether a board member’s circulation of a position paper to another board member directly violates the Sunshine Law. Although Florida’s Attorney General has taken the view that individual board members may prepare and circulate individual position statements to other board members, provided they do not engage in any “discussion or debate” about those statements outside of the Sunshine, because of the potential for Sunshine Law violations associated with written communications, position papers and memoranda are “strongly discouraged.” Op. Att’y Gen. Fla. 01-21.

While Attorney General Opinions offer helpful instruction on the interpretation of existing Sunshine Law cases, they are not binding. Further, as indicated in Opinion 2001-21, in the absence of controlling case law, any reliance thereon must be made cautiously. With regard to the memoranda issue, the Attorney General is drawing an artificial distinction that is not consistent with existing case law mandating a liberal interpretation of the Sunshine Law so as to avoid all evasive actions. See e.g., Gradison, supra.

Following the Attorney General's Opinion to its logical conclusion, one need only envision the following scenario:

1. A number of Trustees prepare position papers on a particular matter, which papers are circulated to the Board.
2. The Chairman reads each position paper and interprets the positions advocated as probably votes on that matter.
3. Without any further communication with the Trustees, the Chairman determines that given the positions advocated, that there is no reason to put the matter on the agenda for a public vote.

Under this set of facts, the entire consideration of a potentially significant District matter would have occurred outside the sunshine and the public would have had no opportunity to voice any opinion that may have led to a different outcome if the matter had been brought before the Board in a public meeting. This conduct, while technically permissible if the Attorney General's Opinion is followed, is actually more akin to the conduct prohibited by Blackford.²

Both the memoranda and Defendant Vander Molen's testimony demonstrate that Attorney Barnebey received a phone call from at least one Trustee concerning the settlement agreement. Defendant Jones' Trial Exhibit 63; Transcript – Vander Molen

² In Blackford, the Orange County School District was facing a redistricting problem that required the transfer of 6000 students. Id. at 579. As part of his attempts to assist with the resolution of that problem, the superintendent "devised a plan by which his board members would come visit his office in rapid-fire succession to discuss, exclusively, this major redistricting problem." Id. at 580. A total of six board members met with the superintendent this way. Id. None of the board members talked with each other, nor did the superintendent share their statements with them. Id. The Fifth DCA concluded that despite these elaborate steps to keep from having a meeting subject to the Sunshine Law, these machinations were intended to circumvent the Sunshine Law and therefore could not be allowed to stand. Id. at 580-81 (citing City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971)).

Deposition at 129:21-130:4. On its face, it is clear that Defendant Vander Molen's memorandum is in direct response to Attorney Barnebey's call and the other Trustee's concerns regarding the release of the settlement agreement. Defendant Jones' Trial Exhibit 63. The plain language of the Defendant Vander Molen's testimony and the memoranda he prepared contradict the "undisputed" facts presented by Defendant Jones and establishes there was interaction between the all of Trustees regarding the McNeil settlement – a matter clearly before the Board – and that interaction took place outside of the sunshine in violation of §286.011, Fla. Stat.

Additionally, Vander Molen's memorandum evidences discussions regarding Board business with the Attorney Barnebey. Id. It confirms that those discussions included the use of an intermediary – Attorney Barnebey – to relate information and communications from another Trustee to Vander Molen. Id. Vander Molen in turn relayed this information to the other Trustees. Id. The use of intermediaries to convey information between public officials in order to circumvent or evade the Sunshine Law is not permitted. Blackford v. School Bd. of Orange County, 375 So.2d 578, 580-81 (Fla. 5th DCA 1979) (citation omitted). See also e.g., Op. Atty. Gen., 89-23 (1989) & 81-42 (1981). Finally, Mr. Vander Molen's testimony confirms that he, with the assistance of the Trailer Estate's office manager, called each of the trustees regarding the settlement. Defendant Jones' Trial Exhibit 63; Transcript – Vander Molen Deposition at 132:4-16. When Defendant Vander Molen called the Trustees about the mediated settlement agreement, he also discussed his conversation with Attorney Barnebey. Vander Molen Deposition at 134:1-6. All of this conduct violates the Sunshine Law.

B. Manatee County Easement Encroachment Agreement (Complaint ¶137(rr)):

Article V of the District's Bylaws specifies that the Administrative Committee is responsible for representing the District in all legal matters and necessary contact with the County. Bylaws. The Administrative Committee is also known as the Executive Committee. There are no minutes from any public meeting wherein the Board or Executive Committee authorized Mr. Hamblen to execute the Agreement.

Again, there are multiple inferences that can be drawn from this set of undisputed facts. The most reasonable inference is that there were discussions between the Trustees about this agreement, the result of which was Mr. Hamblen executing it on behalf of the Board. While Defendant Jones denies any memory of this Agreement, it is possible that the Trustees remaining to be deposed³ may have a clearer recollection of this Agreement, how it came about and which of the Trustees were involved. Jones Deposition at 32:19-33:9. Until such time as these depositions and the related discovery are concluded, however, it is inappropriate to determine, for purposes of summary judgment, that Defendant Jones was uninvolved in this activity.

C. SAFE Committee (Complaint ¶137(aaa)):

A member of the Board, Trustee Bruce Smith, was responsible for public relations. B. Smith Deposition at 12:17-13:4. His duties included addressing the residents' safety concerns. Id. During his tenure on the Board, he and a group of residents met to discuss and develop a proposal to the Board for the appointment and organization of a Safe Committee. Id. at 13:5-22. During that meeting, Defendant

³ The following Trustees are scheduled to be deposed in this matter within the next five days, but their depositions will not be transcribed in time for the hearing on Defendant's Motion: Margo Cushman and Peg Durham. The parties have also identified additional witnesses with information regarding these matters, a number of whom will be deposed in the upcoming weeks.

Jones called Trustee Smith into her office, told him this was not his job and then informed him that there would not be a Safe Committee. Id. at 6:16-22.

After Defendant Jones' conversation with Trustee Smith, Smith followed her instructions and did not bring this before the Board. As he explained in his deposition, it would have been difficult to get this done without the approval of the chair. B. Smith Deposition at 21:16-17. But for Defendant Jones taking this upon herself and dictating that this committee would not be formed, the Board would have had an opportunity at a public meeting for discussion and action about this committee.

Defendant Jones' assertion that the Chairman has unfettered discretion to appoint committees is incorrect. The Bylaws permit the formation of committees by the Board, by its Chairman and the individual Trustees. Bylaws, Article V. Defendant Jones' unilateral determination that a Safe Committee would not be formed and her communications to that effect to another Trustee constitute a sunshine violation. Although no public meeting was ever held on this issue, one was required. The failure to have that meeting and give the Board an opportunity to debate this committee publically was a sunshine violation. See Leach-Wells, 734 So.2d at 1171 ("if a meeting was required and none was held, a Sunshine Law violation occurred").

The situation created by Defendant Jones' pronouncement to disallow the formation of this committee is akin that which occurred in Board of Pub. Instruction of Broward County v. Doran, 224 So.2d 693, 699 (Fla.1969). There, members of the Broward County School Board held a number of private, "informal conference session[s] at which no official acts were taken or to be taken." Id. at 695. In these meetings, "no official action was taken by way of resolution, rule, enactment of regulations or

otherwise.” Id. at 696. The Florida Supreme Court held that these meetings, even in the absence of formal action, violated the Sunshine Law.

The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with ‘hanky panky’ in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.

Id. 699.

D. Document Management System (Complaint ¶137(bbb))

Plaintiffs agree that this allegation is not directed to Defendant Jones.

E. Policy and Procedures Committee and Pool Rules (Complaint ¶137(bbbb))

All functions of covered boards and commissions that relate to the duties and affairs of the board or commission, whether formal or informal, are subject to the Sunshine Law and are not to be treated differently based upon their level of importance. Monroe County v. Pigeon Key Historical Park, Inc., 647 So.2d 857, 868 (Fla. 3d DCA 1994). Meetings such as executive work sessions, conciliation conferences, workshop meetings, conference sessions, discussion of pre-audit reports of special district boards, and organizational meetings are all subject to the Sunshine Law. See e.g., Op. Att’y Gen. Fla. 76-102 (1976), 74-358 (1974), 74-94 (1974), 74-62 (1974), & 73-08 (1973). Even “premeetings” of boards and informal discussions in offices and homes are subject to the Sunshine Law. Board of Public Instruction of Broward County v. Doran, 224 So.2d 693, 695-98 (Fla. 1969).

The undisputed facts cited by Defendant Jones regarding this allegation are misleading. As set forth in the Third Amended Complaint, Plaintiffs allege that “[o]n December 8, 2008, Jones and trustee-elect Brauer met and discussed PP41, PP40, PP13 and [the] Swimming Pool Rules outside of a properly noticed board meeting.” Nothing in this allegation relates to conduct that occurred prior to Brauer’s election to the Board of Trustees. At the time of this meeting, Defendant Jones was the Chairman of the Board of Trustees and Defendant Brauer was a Trustee-Elect.. Jones Deposition at 7:3-8; Brauer Deposition at 9:22-10:12.

Given Brauer’s position as a Trustee-Elect, Brauer was subject to the Sunshine Law. Hough v. Stembridge, 278 So.2d 288 (Fla. 3d DCA 1973). The matters discussed at the Policy and Procedures Committee Meeting are matters that regularly come before the Board and the Board adopts or relies on their recommendations in formulating Board action. Therefore, the Committee’s activities bring it within the confines of the Sunshine Law. Additionally, because both a Trustee and a Trustee-Elect were present and participating in the meetings, the Committee’s meetings rose to the level of board meetings. As such, the committee’s meetings were subject to all of the notice, openness and other requirements under the Sunshine Law. Times Publishing, 222 So.2d at 473. *Accord*, Op. Att’y Gen. Fla. 08-07 (2007) (Sunshine Law extends to any gathering, whether formal or casual).

The Sunshine Law requires “reasonable notice” be given of public meetings. Section 286.011(1), Fla. Stat. Where the governing body of a special district is concerned, “reasonable notice” is specifically defined by statute. The notice applicable for Trailer Estates’ Board Meetings, is set forth in §189.417, Fla. Stat.

The governing body of each special district shall file quarterly, semiannually, or annually a schedule of its regular meetings with the local governing authority or authorities. The schedule shall include the date, time, and location of each scheduled meeting. The schedule shall be published quarterly, semiannually, or annually in a newspaper of general paid circulation in the manner required in this subsection. *The governing body of an independent special district shall advertise the day, time, place, and purpose of any meeting other than a regular meeting or any recessed and reconvened meeting of the governing body, at least 7 days prior to such meeting, in a newspaper of general paid circulation in the county or counties in which the special district is located* The advertisement shall be placed in that portion of the newspaper where legal notices and classified advertisements appear. The advertisement shall appear in a newspaper that is published at least 5 days a week, unless the only newspaper in the county is published fewer than 5 days a week. The newspaper selected must be one of general interest and readership in the community and not one of limited subject matter, pursuant to chapter 50.

(Emphasis added). Further, counsel for the District had previously advised the Board that committee meetings where more than one Trustee is in attendance are to be noticed as Board meetings, “otherwise a sunshine violation may occur.” Plaintiffs’ Trial Exhibit 132.

In the facts argued by Defendant Jones, she states that she “posted a notice on the District’s notice board that the Policy and Procedures Committee would meet on December 5, 2008[,]” and that this meeting date was announced during a “Board of Trustees meeting that was broadcast throughout the District on access channel 95” Motion for Partial Summary Judgment, ¶13. No where in Defendant’s Motion, however, does she allege compliance with the statutory notice requirements under §189.417, Fla. Stat., nor is there any evidence whatsoever that proper notice was provided. By failing to provide proper notice or to direct the Board to provide such notice as required by this Section, Defendant Jones violated the Sunshine Law.

F. Decisions Regarding Free Internet Access (Complaint, ¶37(nnnn))

The District's Charter provides that the District has the power to "provide central television antenna signals and services for the benefit of all persons residing within the District" Plaintiffs' Third Amended Complaint, Exhibit 1. As stated in the Third Amended Complaint at ¶37(nnnn), Plaintiffs assert that Defendants Jones and Vander Molen met outside the sunshine to determine that the District should not provide free internet access to its residents.

In November 2007, Trustee Smith provided Trustee Pam Cole, District Treasurer, with the specifications for a wireless router to be purchased by the District. Plaintiffs' Trial Exhibit 359. In January 2008, Defendant Jones and Trustee Smith, both members of the Board, communicated about the District's router and its location to provide internet service. Plaintiffs' Trial Exhibit 150.

In April 2008, Defendant Jones and Trustee Vander Molen removed the router from the District's office and provided it to a computer service company. Curiously, Defendant McNulty was the first to speak at the April 21, 2008, Board meeting as to why the router was removed by Defendant Jones and Defendant Vander Molen. Board Minutes dated April 21, 2008. Defendant McNulty was not present when the router was removed. Since this was ostensibly the first time this issue was discussed in detail in a public meeting, Defendant McNulty's comments prove that there were discussions about the removal of the router outside the sunshine. In the same Board meeting and discussion, Trustee John Vander Molen acknowledged that the provision of internet service to residents was a decision to be made by the Board. Id. The statements at the April 21, 2008, Board Meeting, kept as a part of the District's public records, paint a

sharply different picture from what is claimed to be undisputed by Defendant Jones. This evidence demonstrates that no fewer than five Trustees - Defendants Jones, Vander Molen and McNulty, along with Bruce Smith and Pam Cole – had discussions relating to internet service within the Park outside the sunshine. Such conduct violates the Sunshine Law. Town of Palm Beach v. Gradison, *supra*; Times Publishing Co. v. Williams, Times Publishing Co. v. Williams, *supra*.

G. Compliance with Applicable State and Federal Law.

As set forth in Paragraphs 37(y), (ss) and (zz) of the Third Amended Complaint, Defendant Jones and one or more other Trustees had private discussions outside of properly noticed and public meetings regarding the District's obligations to comply with state and federal law. These discussions and corresponding decisions regarding compliance with OSHA, whether the District is subject to the gambling restrictions of §849.01, Fla. Stat., and what constitutes a public record are all matters that should have been made in the sunshine.

Without citing any case law, Defendant Jones asserts that as there is no discretion involved here – e.g., the laws either apply or not – the Sunshine Law is therefore inapplicable. This argument ignores decades of case law. See e.g., Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260, 263 -264 (Fla. 1973) (a board's "quasi-judicial" acts and interpretation of the law do not exempt it from the Sunshine Law).

"Various boards and agencies have obviously attempted to read exceptions into the Government in the Sunshine Law which do not exist. Even though their intentions may be sincere, such boards and agencies should not be allowed to circumvent the

plain provisions of the statute.” Canney at 264. “[T]he legislature intended the provisions of [the Sunshine Law] to be applicable to every assemblage of a board or commission governed by the act at which any discussion, deliberation, decision, or formal action is to be had, made or taken relating to, or within the scope of, the official duties or affairs of such body.” Times Publishing Co. v. Williams, 222 So.2d at 473 (emphasis supplied).

It appears that Defendant Jones is arguing that the discussions regarding the applicability of state and federal laws are exempt from the Sunshine Law’s reach. Again, the case law shows otherwise. “While courts must liberally construe [the Sunshine Law] to give effect to its public purpose, its exemptions must be narrowly construed.” Bruckner v. City of Dania Beach, 823 So.2d 167, 170 (Fla. 4th DCA 2002) (citation omitted).

Without question, matters concerning the District’s compliance with applicable law are matters falling within the scope of “the official duties or affairs” of the District. Accordingly, the District’s Trustees determinations as to whether a law applies – a quasi-judicial determination – and how compliance with such laws is to be had fall squarely under the purview of the Sunshine Law.

The undisputed facts show that in December 2007, there were multiple communications outside of properly noticed, open public meetings between several board members, including Defendant Jones and Trustees Bruce Smith and John Vander Molen, regarding their concerns about the District’s compliance with OSHA. Plaintiff’s Trial Exhibits 80 & 403. Defendant Jones admitted in deposition that questions and concerns regarding OSHA compliance and possible violations fall within

the responsibilities of both the Chairman of the Board of Trustees and the Maintenance Trustee, that being herself and John Vander Molen respectively. Jones Deposition at 75:9-24. Similarly, Defendant Jones and Trustee Tom Featheringill met outside a properly noticed public meeting to discuss whether the District's operation of bingo games was precluded by §849.01, Fla. Stat. Plaintiffs' Trial Exhibit 359. These discussions regarding how Florida and federal law apply to the District were not theoretical debates with without impact on the District's functions. Rather, these discussions were held for the purpose of determining how the Board and consequently the District were to act in the future, whether the District would seek the advice of legal counsel, and what they needed to do in order to comply with the law. These discussions held outside the sunshine directly impacted the Board's actions regarding appropriate insurance, how it would deal with its employees, visitors and residence and its maintenance of public records, and whether it would continue to operate bingo and games of chance – all of which were subject to the Sunshine Law.

H. Resignation of Vander Molen (Complaint ¶137(eee))

In April 2007, Trustee John Vander Molen tendered his resignation from the Architectural Review Committee ("ARC") to all of the Trustees, including Defendant Jones. Plaintiffs' Trial Exhibits 323 & 406. Defendant Vander Molen's resignation was out of appropriate concern of future Sunshine Law violations due to the fact of his appointment to the Board of Trustees. After learning of Defendant Vander Molen's resignation and outside the confines of a public meeting, Defendants Jones and Vander Molen discussed the timing of his resignation. Id. While arguably a discussion concerning Defendant Vander Molen's resignation was not subject to the Sunshine Law

because it was self-effectuating. There is no evidence that Defendant Jones or the Board treated Defendant Vander Molen's resignation as such. In fact, the evidence is that his resignation was conditional. Further, the discussions concerning his "reappointment" to the ARC constituted Board business subject to the Sunshine Law.

The ARC is a standing committee appointed by the Board. Bylaws, Article V; Brauer Deposition 124:8-11. As stated in Article V, "[n]ominations to the Standing Committees may be made by any Trustee, *subject to approval by the Board.*" Id. (emphasis added). Thus, Defendant Jones' negotiations with Defendant Vander Molen about the timing of his resignation should have occurred at a public meeting and their failure to present his subsequent letter, attempting to rescind this resignation, and her acceptance of his rescinded resignation, are violations of the Sunshine Law.

I. Cure of Violations of the Sunshine Law.

Finally, Defendant Jones claims that even if the alleged Sunshine violations occurred, those violations are no longer at issue because they were "cured." Such conclusion flies in the face of the following undisputed facts:

1. There are no minutes or other records that document what occurred in the numerous meetings and communications that occurred outside the sunshine as identified in Paragraph 37 of the Third Amended Complaint; and
2. Defendants have never acknowledged that their conduct outside of public meetings violated the Sunshine Law.

In light of these undisputed facts, Plaintiffs question how any meaningful cure could occur for these violations.

The mere showing that the Sunshine Law has been violated constitutes "an irreparable public injury" which renders the action taken in furtherance thereof void *ab initio*. Port Everglades Auth. v. Int'l Longshoremen's Ass'n, Local 1922-1, 652 So.2d

1169, 1170-71 (Fla. 4th DCA 1995) (citing Gradison, supra, & Spillis Candela & Partners, Inc. v. Centrust Savings Bank, 535 So.2d 694 (Fla. 3d DCA 1988)).

[T]he principle that a Sunshine Law violation renders void a resulting official action does not depend on a finding of intent to violate the law or resulting prejudice. Once the violation is established, prejudice is presumed.

Id. at 1171 (citing Gradison).

“[I]t must be emphasized that only a *full*, open hearing will cure a defect arising from a Sunshine Law violation. Such violation will not be cured by a perfunctory ratification of the action taken outside the sunshine. . . .” Zorc v. City of Vero Beach, 722 So.2d 891, 903 (Fla. 4th DCA 1998) (citations omitted) (emphasis in original). In order to cure a violation, there must be a full re-examination of the issues during a full, open public hearing convened for the purpose of enabling the public to express its views and participate in the decision-making process. Zorc at 903. The steps necessary to effect a cure for a Sunshine Law violation are extensive. Tolar v. School Bd. of Liberty Cty., 398 So.2d 427 (Fla. 1981).

The county commission in Monroe County v. Pigeon Key Historical Park, 647 So.2d 857 (Fla. 3d 1994), recognizing that its advisory committee had held meetings in violation of the Sunshine Law, went to great lengths to cure those violations. In so doing, the advisory committee and the commission:

1. Held a properly noticed public meeting after the Sunshine Law violation;
2. Held a public hearing where members of the community were permitted to make comment;
3. Tabled a vote on the issue and encouraging the foundation and community members to meet and negotiate a joint plan;

4. Had the county attorney meet with the attorney for the foundation to make changes to the proposed plan;
5. Reconvened for a second public hearing, at which time the minutes of the unnoticed meetings were read into the record;
6. Permitted the public another opportunity to make comment at the second public hearing; and
7. Conducted open discussion and debate at the second public hearing before voting on the revised plan.

Id. at 859-60.

In B.M.Z. Corp. v. City of Oakland Park, 415 So.2d 735 (Fla. 4th 1982), there was considerable discussion within the community about an ordinance being considered by the City Council. There was testimony that the members of the city council and the mayor discussed this ordinance outside of public meetings over the course of a year, although the testimony was general and no specifics were put into evidence. Id. at 737. In concluding that there was no unremedied Sunshine Law violation, the Court outlined in detail all of the public actions taken by the city council with regard to that ordinance. Id. at 738. Those steps included the following:

1. Three separate public meetings during which the ordinance was considered;
2. Participation in at least one of the meetings by the appellant, through his counsel;
3. Public comments invited at all of the meetings; and
4. The issue was finally submitted by the council to the electorate who made the final decision about the subject.

Id. at 738. "This last event should put to rest any question of a Sunshine Law violation."

Id.

While Defendant Jones argues that the issue of cure is one which can be determined on summary judgment, the case law suggests otherwise. See e.g., Monroe County, 647 So.2d at 865 (Cope, J., dissenting) (trial court conducted a full evidentiary hearing before ruling on whether a cure had been effected). Summary judgment is only appropriate to determine whether a cure has occurred where the facts are truly undisputed. See Zorc (undisputed public records reflected the attendance of unauthorized individuals at pending litigation/settlement conference which defeated exemption under §286.011(8), Fla. Stat.). Where, as here, the credibility of the witnesses is at issue and where there is a substantial disagreement as to the facts and circumstances under which both the violation and the alleged cure occurred, such matters are not properly decided by summary judgment. Sawyer v. Southeastern Univ., *supra* (the smallest conflict in the evidence precludes summary judgment).

1. Third Amended Complaint ¶37(s) – Interviewing and Hiring Legal Counsel

The undisputed evidence shows that the Board interviewed legal counsel through a least one meeting outside the sunshine.⁴ Plaintiffs' Trial Exhibits 336 & 337. There was no notice for this meeting, no minutes were taken, and no video or audio tapes have been provided. Id. The subsequent workshop where the attorney was hired was not a full and open public meeting as the Board simply ratified what had been agreed to at the earlier. Further the subsequent workshop was not properly noticed. Plaintiffs' Trial Exhibit 407. This "perfunctory ratification," which occurred in a workshop rather than a properly noticed Board meeting, failed to cure this sunshine violation. Spillis Candela, *supra*.

⁴ The interviewing or hiring of an attorney does not qualify for the exemption under §286.011(8) of the Sunshine Law. See also Wolfson v. State, 344 So.2d 611 (Fla. 2d DCA 1977).

Defendant Jones urges that the Board's subsequent approval of payment for its attorney's invoices constitutes a cure. The logic of this argument is wholly lacking. Authorizing payment is completely unrelated to the process of interviewing and hiring counsel. How does paying an attorney equate to a determination as to an attorney's qualifications or his/her ability to perform the functions required?

2. Third Amended Complaint ¶37(x)

Although Plaintiffs maintain that Defendant Jones violated the Sunshine Law with respect to the decisions she made setting limitations on public comment as expressed in the memorandum, a copy of which was made part of the District's records, Plaintiffs agree that this issue was adequately cured by the extensive and open Board discussion at the properly noticed and broadcast Board meeting on February 19, 2007.

3. Third Amended Complaint ¶37(aa) – McNeil Mediated Settlement Agreement

Here, Defendant Jones maintains that the approval of the McNeil Settlement during a properly noticed Board meeting cures the Sunshine Law violations related to the memoranda and the other communications. Again, this argument fails in that there was no full disclosure in an open and public meeting as to what had occurred with respect to the memoranda and the communications with the other Trustees. While the settlement agreement may have been approved, its ratification was nothing more than a rubber stamp. Lacking a full re-examination of the issues during a full, open public hearing as required by Gradison, Tolar and Zorc, *supra*, there was no cure for this violation.

4. Third Amended Complaint ¶37(eee)/Addendum 44(ii) – Budget Questionnaire

At the Board Meeting on December 8, 2008, Martha Brauer, then a Trustee-Elect, stated that Defendant Jones had approached her about formulating a budget questionnaire and Defendant Salerno had provided revisions to that questionnaire. Videotaped Board Meeting December 8, 2008; Plaintiffs' Trial Exhibit 382. Although the fact of those communications occurred outside the sunshine was acknowledged, the substance of those discussions was not. Unlike Monroe County v. Pigeon Key Historical Park, *supra*, there are no minutes disclosing the details of these Sunshine Law violation conversations. Because the actions taken were again simply ratified without beginning anew, these violations were not cured. In order to properly effectuate a cure, again there must be a full and open hearing before the committee's recommendations may be ratified. Port Everglades Auth. v. Int'l Longshoremen's Ass'n, 652 So.2d at 1171 (citations omitted).

5. Third Amended Complaint ¶37(sss) – Trailer Estates Disaster Plan

In May 2007, four Trustees attended and participated in a Disaster Committee meeting to discuss a disaster plan for the residents. Defendant Jones Trial Exhibit 32; McNulty Deposition at 90:1-91:23. As with the Policy and Procedures Meeting discussed above (Third Amended Complaint ¶37bbbb), this Disaster Committee Meeting was subject to all of the notice requirements of §189.417, Fla. Stat. See also Plaintiffs' Trial Exhibit 132 (communications from counsel to the District, instructing the Board that committee meetings at which more than one Trustee is in attendance must be noticed as a Board Meeting).

As stated in Tolar, Spillis Candela and their progeny, a cure to a Sunshine Law violation such as the one that occurred in this instance requires a full, open meeting and a reconsideration of all of the matters discussed and considered outside the sunshine. This did not occur here. The District's own records confirm that despite Defendant Jones' allegations to the contrary, the Sunshine Law violations associated with this improperly noticed committee meeting were not cured at the Board Meetings on March 24, 2008, or April 7, 2008. Defendant Jones Trial Exhibit 32. These Meetings addressed a disaster plan for the District Office facilities only, and nothing to do with the disaster plan for the Park residents. Id.

6. Third Amended Complaint ¶37(yyy) & Addenda ¶6 – Disaster Plan (Salerno) & Budget Questionnaire

The allegations contained in this Paragraph are not directed to Defendant Jones.

7. Third Amended Complaint ¶37(bbbb) – Practices and Procedure and Swimming Pool Rules

See Section E, *infra*, regarding the Sunshine Law violations alleged in ¶37(bbbb).

These violations were not cured with the subsequent discussions at the meetings in December 2008 and January 2009. Monroe County, *supra*. Moreover, even if such violations were addressed after Plaintiffs filed suit, made the violations known to the public and specifically brought them to Defendants' attention, such "cure" does not alleviate the implication and consequences of the violations, nor Plaintiffs' right to obtain recovery for the violations as provided by §286.011, Fla. Stat.

Defendant Jones' citation to Bruckner v. City of Dania Beach, *supra*, is misleading and misplaced. Bruckner does not stand for the proposition that reconsidering and readopting the same ordinance section after litigation had been filed

“cured” a Sunshine Law violation and therefore supported the entry of summary judgment in the City’s favor.⁵ Rather, the case was affirmed because there was no Sunshine Law violation resulting from a litigation “shade meeting” between the City’s attorney and the City Commission. *Id.* at 171-73. On the basis of the undisputed record and transcript of the shade meeting, the Court found that the subject matter of the litigation meeting with counsel was “confined to settlement negotiations or strategy sessions related to litigation” and that the discussion with the City’s attorneys “did not exceed those parameters as outlined by city law.” *Id.* at 171. As cited by the 4th DCA,

There is simply nothing in the transcript which would reveal [the challenged action] to be *anything but an attorney client session to discuss settlement strategy with regard to the [pending] federal lawsuit*. Rather it is clear that the members discussed putting forth what was discussed at a formal meeting. Therefore, the closed session . . . fell within the exemption of Section 286.011(8), and there was no Sunshine Law violation.

Id. at 172-73 (emphasis added).

8. Third Amended Complaint ¶37(iiii) – Appointment of McNulty as Second Chair

In the published agenda for the May 21, 2007, meeting, it states that Trustee Peg Durham will move to appoint Defendant McNulty as the Second Vice Chair of the Board. Plaintiffs’ Trial Exhibit 408. As evidenced by the Minutes of the meeting, Durham in fact made that Motion and McNulty was appointed to that position without discussion. Defendant Jones Trial Exhibit 32. There is nothing in the Minutes cited by Defendant Jones which in any way reveals that the Board’s action was not a “ceremonial

⁵ Defendant Jones’ reliance on this case law appears to be based on a West headnote. Headnotes, however, not being a part of the Court’s ruling, are not law and do not serve as precedent.

acceptance of secret actions” and “a perfunctory ratification of secret decisions” made outside the sunshine. Tolar at 429. Accordingly, there was no cure.

9. Third Amended Complaint ¶37(nnnn) – Internet Service

See Section F, *infra*, regarding the nature of the Sunshine Law violations alleged in ¶37(nnnn). In order for there to be a true cure, what occurs outside the sunshine must be disclosed to the public in a properly noticed, open meeting so that there can be full debate and an independent re-examination of the issues. Monroe, supra. Nothing in the Minutes cited by Defendant Jones shows exactly what was discussed, when the discussions occurred, etc. There can be no cure without this full disclosure. Id. See also Spillis, supra.

10. Third Amended Complaint ¶37(qqqq) – Content of Information Contained in Minutes Published

As alleged in the Third Amended Complaint, Trustees met outside the sunshine to determine the “content of [the] information published in the District’s minutes.” Although the parties agree that the Board has maintained minutes subsequent to this meeting, this is not the basis for this Sunshine Law violation. The violation – which has not been cured – is that the minutes were changed without public discussion and that the minutes do not comply with the Sunshine Law in that they fail to accurately describe what occurred at the meeting. Section 286.011(2).

11. Addenda ¶7 (44)(iv) – Public Records Policy

In November 2007, Martha Brauer emailed Defendant Vander Molen, then a Trustee, about whether Board meetings should be videotaped and about the public records concerns surrounding those videotapes. Plaintiffs’ Trial Exhibit 73. In that email, Brauer related Jones’ concerns regarding the same matters.

As set forth above, the use of liaisons to circumvent the Sunshine Law – either intentionally or unintentionally – is not permitted. Blackford v. School Bd. of Orange County *supra*; Op. Atty. Gen., 89-23 (1989) & 81-42 (1981). Therefore, this communication was a Sunshine Law violation.

The minutes relied upon by Defendant Jones do not reflect any full or complete public discussion about these prior private discussions. Monroe. Like the other violations described above, this Sunshine Law violation has not been cured either.

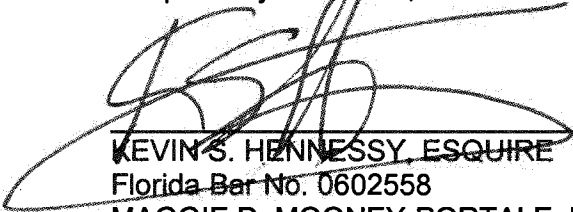
CONCLUSION

As demonstrated above, the majority of the “undisputed” facts are, in fact, the subject of much dispute and disagreement between the parties. The arguments presented by both sides confirm that that there are multiple inferences to be drawn from the evidence before the Court. Applying the law pursuant to Rule 1.510, the Court must view those facts and corresponding inferences in Plaintiffs’ favor. Considering the facts in the light most favorable to Plaintiffs, it is clear that Defendant Jones cannot meet the heavy burden she must carry in order to prevail on summary judgment.

With the exception of ¶37(bb) and (yyy) of the Third Amended Complaint and Addenda ¶6, which allegations and not directed to Defendant Jones, and ¶37(x), which allegation is hereby withdrawn as to Defendant Jones, this Court should deny Defendant’s Motion for Partial Summary Judgment.

WHEREFORE, Plaintiffs respectfully request that this Court deny Defendant Jones' Motion for Partial Summary Judgment and allow this matter to proceed to trial.

Respectfully submitted,



KEVIN S. HENNESSY, ESQUIRE
Florida Bar No. 0602558
MAGGIE D. MOONEY-PORTALE, ESQUIRE
Florida Bar No. 0555924
JENNIFER R. COWAN
Florida Bar No. 0038081
Lewis, Longman & Walker, P.A.
1001 3rd Avenue West, Suite 670
Bradenton, Florida 34205
Telephone: (941) 708-4040
Facsimile: (941) 708-4024
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Hunter Carroll, Esquire**, Matthews, Eastmoore, Hardy, Crauwels & Garcia, P.A., 1777 Main Street, Suite 500, Sarasota, FL 34236, **James D. Dye, Esquire**, Dye, Deitrich, Petruff, & St. Paul, 1111 Third Ave. West, Suite 300, Bradenton, FL 34205, **Robert E. Turffs, Esquire**, 1444 First Street, Suite B, Sarasota, FL 34236, **Daniel E. Scott, Esquire**, Daniel E. Scott, P.A., 2033 Main Street, Suite 408, Sarasota, FL 34237, **Thomas D. Shults, Esquire**, Kirk Pinkerton, P.A., 50 Central Avenue, Suite 700, Sarasota, FL 34236, by U.S. Mail, this 18TH day of December, 2009.



Kevin S. Hennessy, Esquire