

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
SECOND DISTRICT

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

Appellants/Petitioners,

CASE NO. 2D11-315

v.

L.T. No: 2008 CA 011315

TRAILER ESTATES PARK AND
RECREATION DISTRICT,
an independent special taxing district,

Appellee/Respondent.

APPELLANTS' INITIAL BRIEF

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR MANATEE COUNTY, FLORIDA
Case No. 2008 CA 08 CA 11315

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PREFACE

Appellants, Mary Lou Smith and Sharon Denson are referred to as “Ms. Smith” and “Ms. Denson” respectively. Respondent, Trailer Estates Park and Recreation District are referred to as the “District.” Members of the District’s Board of Trustees are referred to as “Trustees” or “Board Members.”

The Record on Appeal from the Twelfth Judicial Circuit, are referenced as “(R.)” and any references to the records from that proceeding shall include the volume number, in Roman numeral format, followed by page numbers and line numbers. For example, reference to the record at volume forty-eight, page number 471 from lines 3 to 13, would appear as (R. XLVIII 471:3-13.)

References to exhibits from the record are referenced as “(R.)” followed by the volume number (in Roman numeral format) in which the exhibit can be found, followed by the party’s exhibit number. For example, a reference to Plaintiffs’ Exhibit 282 would appear as (R. LVI Pls. Ex. 282.)

All documents provided for in the Appendix are referenced as “(A.)” and include references to page numbers of the Appendix. All documents are in the record on appeal, and cross-references to the corresponding record volume and page are in the Index to Appendix.

STATEMENT OF THE CASE AND FACTS

I. THE PARTIES

Appellants Mary Lou Smith and Sharon Denson are sisters and residents of Trailer Estates, a community in Bradenton, Florida. (R. XLVI 210:9-11; 203:8-12; R. L 680:22-23, 679:5-7; A. 2). Each owns a home in Trailer Estates. (A. 2; R. XLVI 203:10-13; R. L 679:1-10). Appellee is an independent special district located in Manatee County, created by Special Act, Chapter 2002-361 of the Laws of Florida (the “Charter”). (A. 41). The Charter specifically identifies the District as a park and recreational district. (A. 41). Public property includes a recreation hall, shuffleboard courts, marina, playgrounds and walkways. (A. 45). The District provides services for its residents, including trash collection and cable service. (A. 47). Trailer Estates has 1285 private lots. (A. 2).

II. STRUCTURE OF THE DISTRICT

Pursuant to §189.429, Fla. Stat., the Charter codifies the governance of the District. (A. 41). The “business and affairs” of the District are conducted and administered by a board of nine trustees, Board of Trustees (“Board”). (A. 42-43, 45). The Trustees are “extremely active” in the daily operation of the District. (A. 2). The District is also subject to Deed Restrictions and Bylaws. (A. 62-68). The Board has also adopted policies, procedures, rules, and regulations. (A. 69-85).

Because of its recreational character the District's focus includes a variety of matters different from those of a typical local government. *See*, (A. 64). The District's official business includes District sponsored clubs, dinners, exercise classes, arts and crafts, dancing, billiards, "pickle ball," Bingo, chair volleyball, shuffleboard, woodshop, and card games. (A. 74-81). As these are all important District services, these matters regularly come before the Board. The District also regulates parking and issues temporary permits, ID's, and guest cards. (A. 69-70, 73). It supervises the use of District facilities and thereby controls the schedule of activities of District clubs. (A. 68, 71-73). District Rules and Regulations even incorporate specific rules for some of the games at its facilities. (A. 77). The District communicates with its residents by way of its newsletter, bulletin boards, website, and closed circuit televisions channel.¹ (A. 155; R. LVI Pls. Ex. 2).

Although Trailer Estates' resident composition, recreational facilities and activities are similar to those of many waterfront communities, it is operated by a local government, not a homeowner's association. (A. 2). Thus, the District is

1 The District utilizes the District Video Club to operate its closed-circuit television station, provide notices of public meetings, and broadcast those meetings. (R. LVI Pls. Ex. 2; R. LIII 1088:1-9).

subject to the Sunshine Law and the Public Records Act; a matter that is undisputed. (A. 3; R. LVIII 8498; R. X 1814; R. XI 1984).

The Board's responsibilities include the planning, implementation and supervision of all District activities. (A. 63-66). Specifically identified District functions include maintenance, public relations, continuing and seasonal recreational activities. (A. 64). The Bylaws further provide for the establishment of committees. (A. 64-66). Committees include the Administrative Committee (also known as the Executive Committee), which is responsible for making recommendations to the Board about the financial, legal, and employment needs of the District. (A. 4). The Executive Committee is comprised of three Trustees: the chairman, first and second vice-chairs. (A. 4; R. XLVIII 363:4-11; R. LII 850:11-13). From 2003 to 2006, Mary Lou McNulty served as Chairman of the Board and the Executive Committee. (R. XLVIII 362:2-8). As late as August 2009, the Bylaws attempted to exempt the Executive Committee from compliance with the Sunshine Law. (R. LIII 959:11-960:24; R. V 926; R. LVIII 8499).²

² During this litigation, the District was ordered to amend its bylaws to specifically address the fact that the Executive Committee is not exempt from the Sunshine Law. (R. V 926).

III. BACKGROUND OF THE LITIGATION AND COURSE OF THE PROCEEDINGS

In February 2006, Ms. Smith received an invoice at her home in Michigan that her District storage space fee had tripled from the prior year; her first notification of the increase. (R. XLVI 209:10-23). When she returned to the District in March 2006, Ms. Smith and her sister went to the District office to inquire about the rent increase. (R. XLVI 209:24-210:11). They met with the District's office manager, T.J. Miller, who could not explain the increase and told them to take the matter to the Board. (R. XLVI 210:12-20).

Ms. Smith attended a District Board meeting on March 20, 2006, and asked the Board what authority existed to increase storage fees without notice. (R. XLVI 215:2-14). She was told, "we've always done it this way." (R. XLVI 215:2-216:4). Not satisfied, Ms. Smith requested a meeting with a Trustee. (R. XLVI 216:5-14). Trustee Pam Cole met with her initially, but Ms. Cole asked another Trustee, Joseph Bigley, to join them. (R. XLVI 219:10-18; R. L 691:19-25; R. LIII 1097:5-1098:20). The Trustees and the District's office manager could not agree on the proper fee to charge Ms. Smith because they were confused by the District's three separate fee schedules, each having different rates. (R. XLVI 220:3-20; R. L 692:8-24; R. LIII 1098:13-25; R. XLVI 220:15-20; R. L 693:2-4; R. XLVI 221:6-13; R. L 693:5-8). Frustrated because of the conflicting information,

Appellants began investigating how the District operated. (R. XLVI 222:22-225:9; R. LVI Pls. Ex. 272).

Appellants soon learned of Florida's Sunshine and Public Records Laws. As found by the trial court, they:

observed conduct that raised their suspicions that some or all of the [T]rustees were running the District in disregard of open government. Their claims at the outset were met rudely. It was obvious that two or more trustees were meeting together, sometimes acting surreptitiously and other times ignorant of the laws applicable to them.

(A. 2). On November 26, 2008, Appellants filed suit against the District and four Trustees, seeking a declaratory judgment for violations of the Sunshine Law and the Public Records Act and mandamus and injunctive relief to address ongoing violations of those laws. (R. I 3).

On March 17, 2009, the parties stipulated to the entry of an order requiring the District to cease holding Executive Committee meetings unless properly noticed and produce the District database and 2006 Budget Hearing video. (A. 23). On May 29, 2009, an agreed order was entered, wherein the District would amend its Bylaws to remove the language attempting to exempt the Executive Committee from the requirements of the Sunshine Law. (A. 27). Subsequently, Appellants settled with the individually named Trustees, dismissed them from the case, and proceeded solely against the District. (R. XXXI 6097-6098).

The District moved for Summary Judgment on numerous allegations in the Complaint. (R. XX 3689-3717). Appellants' contest herein the Court's summary judgment ruling on allegation 37(s) of the Third Amended Complaint. The remaining allegations of the Third Amended Complaint were tried before Judge Janette Dunnigan in Manatee County Circuit Court October 4-12, 2010. On November 3, 2010, the trial court entered judgment wherein it found that "[i]t was obvious that two or more trustees were meeting together...in diametric contradiction of the concept that open meetings instill confidence in government." (A. 2). The trial court stated that the Executive Committee meetings were not noticed and were in violation of the Sunshine Law; however, it held that "subject matters discussed at the otherwise illegal meetings were addressed at subsequent public meetings where the public had the opportunity to discuss the recommendation, but no objection was had." (A. 4). Further, the trial court held that the meetings were cured by subsequent Board ratification, changes in Trustees, and amendment of Bylaws. (A. 4).

The trial court found that the Architectural Review Committee ("ARC") is a committee with its members appointed by the Board and empowered to issue building permits in accordance with the Deed Restrictions, and that the Board is authorized to enforce the Deed Restrictions. Nevertheless, it held that ARC's

authority “is not derived from or delegated to by the Board.” (A. 5). The trial court found that the Seasonal Recreation Committee (“SRC”) consisted of a Trustee and a group of volunteers, who meet to determine the mechanics of presenting the District’s recreational events, but could not determine whether SRC was formally appointed, and therefore, held that it was not subject to the Sunshine Law. (A. 5-6). The trial court found that the Referendum Committee’s purpose was to recommend to the Board a procedure for initiating a referendum, it had two Trustees participating in its meetings which were not open or noticed to the public, but held that the committee was not subject to the Sunshine Law. (A. 6).

The trial court held that the District’s omission of the name of a Trustee participating in a closed meeting, under Fla. Stat. § 286.011(8), was merely a technical breach and deemed the transcript of that Executive Session properly withheld. (A. 8). Additionally, the trial court found no violation in the District’s delay of over one year in producing the resident database. (A. 9). Although the trial court found that the delay in production of the 2006 Budget Hearing Video was excessive, it held that the District had not violated the Public Records Law. (A. 9). The trial court found that the District maintained its documents in an “unsophisticated manner,” that “some of the documents were not produced timely because they were misfiled, misplaced, [or] lost,” and that “the initial conduct of

some of the Trustees . . . was in violation of the Sunshine Law,” yet it entered judgment entirely in favor of the District. (A. 10).

IV. SUNSHINE LAW VIOLATIONS

The District’s Executive Committee met outside of public meetings. (R. XLVIII 363:12-14). The only attendees to those meetings were Trustees and those meetings took place in a private District office. (R. XLVIII 369:9-11, 370:9-20). Although there are no written notices or minutes, there are some written memoranda of some meetings. (R. XLVIII 365:13-22; R. LIV 1190:3-6; R. LVI Pls. Ex. 47). The written memoranda do not state who attended or other information typically contained in formal government minutes. (R. XLVIII 365:13-22; R. LIV 1190:3-6; R. LVI Pls. Ex. 47). The meetings were not advertised, shown on the District’s television channel, or posted on the District’s bulletin boards. (R. XLVIII 363:18-364:5). The trial court found that the Executive Committee meetings were not noticed and violated the Sunshine Law. (A. 4).

In May 2007, Ms. Smith and her legal counsel met with the District’s representative, John Vander Molen, and the District’s legal counsel. (R. XLVII 291:15-292:12). During that meeting, Ms. Smith raised issues regarding the Executive Committee meetings and the District’s failure to provide public records.

(R. XLVIII 294:2-10). Mr. Vander Molen responded that the District was “just old people doing the best we can.” (R. XLVIII 294:11-14).

On November 21, 2005 Chairman McNulty requested and subsequently held an Executive Committee meeting to discuss whether DeSears, a nearby retailer, could tap into the District’s water line. (R. XLVIII 415:14-416:4; 419:19-22). There are no minutes for this meeting. The Board allowed DeSears to tap into the District’s water line, but no substantive discussion was ever conducted by the Board. (R. XLVIII 420:7-12; R. LIV 1144:24 – 1145:4. 1143-45). The evidence presented on this matter was limited to the testimony of two Trustees, only one with firsthand knowledge: Ms. McNulty testified that “the situation was explained to the Board and the Board voted on it.” (R. XLVIII 471:3-13); and Ms. Brauer testified as to what she read in the District minutes. (R. LIV 1144:24-1145:6).

On June 13 and 16, 2006, the Executive Committee met to discuss the Trustee vacancy created by Robert Poor. (R. XLVIII 374:23-375:3; R. LVI Pls. Ex. 49, 50). Neither meeting was publically noticed. (R. LIV 1196:24-1197:2). At the second meeting, the Executive Committee interviewed two candidates, Michael Neal and Bruce Smith, behind closed doors, in a private District office with no members of the public present. (R. XLVIII 375:14-376:9; R. LII 919:17-19, 920:2-7, 922:2-4, 922:24-25). Brief written memoranda of these meetings exist.

(R. LVI Pls. Ex. 49, 50). There was never any public discussion concerning the merits of either candidate to fill the Board. (R. XLIX 525:4-7; R. LII 923:13-16; R. LVI Pls. Ex. 51). Prior to voting on the Executive Committee's recommendation, the written memoranda from the June 16, 2006, meeting was read; Ms. McNulty immediately moved to approve the recommendation; the motion was seconded and passed without discussion. (R. LVI Pls. Ex. 51).

On September 5, 2006, the Executive Committee met to fill another Trustee vacancy. (R. XLVIII 392: 10-16, R. LVI Pls. Ex. 55). Trustees McNulty, Hamblen and Cole held this meeting in the District's office. (R. XLVIII 395: 2-25; R. LVI Pls. Ex. 55; R. LIII 1102:22-1104:5). During that meeting, these Trustees discussed whether to appoint Tom Featheringill or Bruce Smith. (R. XLVIII 392:17-19; R. LII 921:9-16; R. LIII 1103:16-1104:5). Ms. McNulty did not want Mr. Smith, so it was agreed that Mr. Featheringill should be appointed. (R. LIII 1103:16-1104:5). The Executive Committee recommended Mr. Featheringill to fill the vacancy instead of Mr. Smith, because of concern over a letter that Mr. Smith's wife, Toni, had written supporting Appellants' concerns. (R. XLVIII 392:20-394:3; R. LVI Pls. Ex. 55). A memorandum of the Executive Committee meeting stated fears of "a conflict if any legal action were to take place in regards to the Mary Lou Smith case" (R. LVI Pls. Ex. 55). Immediately following the Executive

Committee meeting, the Board met. (R. LVI Pls. Ex. 56). The Board Meeting minutes state:

Mary Lou McNulty said there was a meeting of the Executive Committee to fill the position left vacated by Joe Fulmer[‘s] resignation. Three people had applied – Fred Hoch, Bruce Smith and Tom Featheringill. This position is to run until December 31, 2007. Mary Lou McNulty made a motion to appoint Tom Featheringill to this position. Seconded and passed 6-0.

(R. LVI Pls. Ex. 56). Neither the Board’s minutes nor the testimony at trial reflect any discussion at a public meeting of the concerns expressed in the Executive Committee regarding a potential conflict if Mr. Smith was appointed. (R. LVI Pls. Ex. 56; R. XLVIII 397:22-398:9).

Between October 19, 2006, and the evening of October 23, 2006, the District posted a notice on its bulletin board of a meeting the following day to interview a law firm for the position of District attorney. (R. LVI Pls. Ex. 301; R. XLVII 282:16-283:5). This was not a regularly scheduled Board meeting, had not been included in the prior District advertised notice, and did not comply with the requirements of §189.417, Fla. Stat. (R. XLVII 282:25-283:5; R. LIV 1174:7-12). The Trustees met with Attorney Mark Barnebey on October 24, 2006. (R. XLVII 282:16-24). Appellants were in the audience for this meeting. (R. XLVII 282:16 – 284:5; R. LI 743:3-11; R. LIV 1246-47). Neither Appellant saw anyone taking

minutes, videotaping or recording this meeting. (R. XLVII 284:6-14; R. LI 743:9-17). They made a public records request for the meeting minutes, but received nothing. (R. XLVII 284:15-20; R. LIV 1213:2-15). The District held a workshop on October 30, 2006, and discussed hiring an attorney. (R. XLII 7986-7988, 7991). The workshop was not advertised in a newspaper as required by §189.417(1), Fla. Stat. (R. LVI Pls. Ex. 794; R. XLII 7991). Nonetheless, the law firm was hired at the workshop and the decision to hire the firm was never discussed at another Board meeting. (R. XLII 7987-7988, 7991; R. XV 2855).

In March 2007, while the Board had adjourned a budget meeting and before the meeting had resumed, Trustee Tom Featheringill heard two Trustees, Margaret Cushman and Joseph Bigley, discuss the budget vote. (R. LIII 1026:9-1027:5; R. LVI Pls. Ex. 79). Trustee Featheringill heard Trustee Cushman tell Trustee Bigley that the District needed a bigger budget and he should change his vote and support the larger budget. (R. LIII 1026:19-22). When the budget meeting resumed, Trustee Bigley changed his vote and the larger budget passed. (R. LIII 1027:2-5). At trial, the District presented the testimony of Ms. Brauer who found no mention of the discussion between Trustees Cushman and Bigley in the District's minutes. (R. LIV 1171:21-1172:3; R. LVI Pls. Ex. 79).

V. PUBLIC RECORDS VIOLATIONS

Appellants have made several requests for public records from the District. (A. 8). Initially, these requests were ridiculed by the District. (R. LI 781:8-11). Trial testimony revealed that Plaintiffs had to make multiple requests for the same documents because the District was unresponsive or provided only part of the documents. (R. XLVI 131:1-19; R. XLV 95:12-97-21; R. XLV 66:10-67:3, 68:2-24). Even simple requests for meeting minutes were often difficult to obtain. (R. XLV 49:11-21). Problems in obtaining public records included production of redacted versions or documents that weren't responsive. (R. XLV 66:10-67:3, 68:2-24).

District records are not organized, mis-numbered, could not be found, or were found accidentally while looking for other records. (R. XLV 68:10-70:12). "Documents were maintained in an unsophisticated manner that caused it to be extremely burdensome to respond to the Plaintiffs." (A. 9). The trial court found that "some documents were not produced timely because they were misfiled, misplaced, [or] lost." (A. 10). Evidence at trial demonstrated that: the District did not maintain the records in chronological order (R. XLV 95:15-96:3); the District allowed its Trustees and committee members to keep public records at their homes (R. XLV 96:25-97:3; R. LIII 977:2-4.); the District did not index or computerize its

records (R. XLV 97:4-11); and the District kept piles of records in large Rubbermaid totes, presenting these to the person requesting the records to sift through. (R. XLV 97:25-98:2; R. XLVI 159:6-14; R. LIII 982:19-25). Trustee Cole personally observed Appellants' difficulty obtaining records, and testified:

At the beginning when we were first new to the public records and getting things set up, *whenever Ms. Denson and Ms. Smith* or Beverly [Lew, another District resident] *ordered anything, Mary Lou McNulty would tell T.J. [Miller] to take her time*. At that time we didn't [sic] have specified that fifteen minutes or half hour. We didn't have any of those. It wasn't a procedure form. Sometimes it would be two or three days before they would get the information out.

(R. LIII 1121-22). Appellants both testified, records were produced after weeks or months of delay, or not at all. (R. XLVI 211:4-10; R. XLVII 262:1-6; R. L 688:24-689:10).

On April 17, 2006, Ms. Smith wrote requesting "clarification of the statutory authority of the Board to interfere with the use of the common areas of the [D]istrict by charging 'rents' which are exploitive of one segment of the population [of Trailer Estates Park for] . . . the stated . . . purpose of providing funds for the operation of the [D]istrict." (R. LVI Pls. Ex. 272). Ms. Smith expressly requested that her letter "be forwarded to the [District's] attorney for an answer to [her] question in a timely manner." (R. LVI Pls. Ex. 272). In response to Ms. Smith's letter, Trustee

McNulty contacted the District's then legal counsel, Ruden McClosky, to obtain a legal opinion concerning the District's authority to charge its fees. (R. XLV III 421:3-16). Trustee McNulty received a written legal opinion dated May 10, 2006, with a cover letter dated May 18, 2006, stating that it was "not clear whether or not Trailer Estates may properly charge rent for [the] use of a parking space and/or the marina." (R. LVI Pls. Ex. 525 (page 2); R. XLV III 421:19-422:10).

On or about May 19, 2006, Trustee McNulty wrote Ms. Smith, that "Trailer Estates [was] acting within its powers and authority in assessing fees for the use of the facilities [and the storage space]." (R. LVI Pls. Ex. 277). **Ruden McClosky's response to Ms. Smith's inquiry was not provided.** (R. XLVI 225:21-23). Ms. Smith responded, again asking for the District Attorney's opinion. (R. LVI, Pls. Ex. 278). She wrote back a third time on June 22, 2006, and specifically asked for "an itemization of the attorney time on this matter and [copies of] **all communications with the attorney concerning [her] request.**" (R. LVI Pls. Ex. 281). To avoid confusion, she also stated that this was an "official Florida Sunshine Law request." (R. XLVI 227:9-228:21; R. LVI Pls. Ex. 281). Ms. Smith never received from the District the Ruden McClosky opinion letter and memorandum in response to these requests; although the documents were discovered in the District's files in July 2007. (R. XLVI 229:2-16; R. XLVII 250-52).

On April 11, 2008, Ms. Denson wrote a letter to the Board seeking information from the District's resident database. (R. XLVIII 450:5-8, 451:16-19; R. LI 722:10-723:11; R. LVI Pls. Ex. 349). The database contains the names, addresses, and other pertinent information of District residents. (R. XLVI 181:4-19). A week later, having received no response to her request, Ms. Denson and another resident, John White, sent a second letter, asking for a copy of the database in Excel format. (R. LVI Pls. Ex. 350). Ms. Denson and Mr. White included a photocopy of a single database record previously obtained from the District and highlighted the information requested. (R. LVI Pls. Ex. 350). The District also did not respond to this second request. (R. LI 724:12-15).

At the Board meeting on April 21, 2008, Ms. Denson renewed her outstanding public records requests for the database, and in response Trustee Vander Molen stated that he was not sure the database was a public record. (R. L 667:23-668:13, 668:1-13; R. LVI Pls. Ex. 985). The Board advised Ms. Denson that the database was subject to the Privacy Act and included personal information they would not produce. (R. XLVIII 450:9-17; R. LI 725:2-11). Ms. Denson never withdrew her request for the database and ultimately, in November 2008, she filed suit to obtain it. (R. LI 724:25-725:5; R. LIII 1001-07).

Around May 8, 2008, District counsel responded to a resident who did not want the database produced. (R. LVI Pls. Ex. 354). Counsel advised that the database was a public record, the “District’s hands [were] tied,” and the database would be produced. (R. LVI Pls. Ex. 354). T.J. Miller was copied on this letter, acknowledged receiving a copy of it, and admitted knowing the database was a public record. (R. LIII 1004:9-10; 1004:24-1005:14). Nonetheless, she did not produce a copy of it to Appellants prior to suit being filed. (R. LIII 1006:5-1007:6).

On April 27, 2009, pursuant to a Court Order, and nearly one year after the first request, an electronic copy of the database on CD-ROM in Excel format was produced. (R. XLVI. 181:22-182:5; R. LVI Pls. Ex. 388). As testified at trial that copy had errors in it.³ (R. LI 785:1-17). At trial T.J. Miller testified that, although the District was not “unwilling to provide it,” she did not know how to produce the database in Excel. (R. LIII 1002:17-1003:2, 1006:5-14). After the lawsuit was filed she learned how to make a copy in Excel. (R. LIII 1002:17-1003:4).

The District possessed record logs which identified records by number, date and description. (R. XLVI 140). On November 24, 2008, Ms. Denson requested a

3 Those errors related to residents birth dates. (R. LI 785:2 -4). As a 55+ park, the birth dates of residents must be kept by the District. *See*, (A. 52). The database produced in Excel showed “people not having been born yet.” (R. LI 785:1-17).

copy of Item 76 from the February 22, 2007, public records log, which related to purported threats made at a February 2007 District Meeting. (R. LI 717:7-720:10). In response, Ms. Miller provided Ms. Denson with a large general correspondence book, which did not reference the individual log numbers. (R. LI 719:13-19). A review of the book revealed the document was not there. (R. LI 719:9-12). Upon further inquiry, she was told that Trustee Jones might have it at her home. (R. LI 719:20-23). Ms. Denson never received the document from the District. (R. LI 720:5-10). On January 12, 2009, counsel for Ms. Denson sought inspection of the District's public records logs. (R. XLVI 140:13-141:23). As directed by the District's attorney, Appellants' counsel then identified and requested, by number and description, copies of specific logged items. (R. XLVI 141:11-14; R. LVI Pls. Ex. 373). In response, Ms. Miller told Appellants' counsel that the documents were no longer kept pursuant to the District's logs. (R. XLVI 141:13-17). Ms. Miller pointed out numerous binders and piles of documents in her office as a possible location for the requested documents. (R. XLVI 141:17-23). None of the documents were numbered or made any reference to the prior logs. (R. LI 719:13-16). There was no way to determine that a logged document had been produced for inspection and the District made no effort to identify logged documents. (R. XLVI 142:11-24). Appellants' counsel specifically looked for

Item 76, but nothing identified as Item 76 was found, and no public record was produced that met its description. (R. XLVI 142:25-143: 23; R. LI 718:20-719:19). Trustee Brauer admitted the District could not find Item 76. (R. LIV 1182:23-1183:2).

On December 12, 2008, Appellants submitted a public records request for emails between Trustees, blogs or other electronic medium where two or more Trustees have communicated, from January 1, 2006, to present. (R. LVI, Pls. Ex. 366). The District representative testified that in January 2009, they were still working on the response to the December 2008 public records request. (R. LIV 1185:6-1186:7). As justification for the delay, the District asserted that there was confusion on the District's part as to what documents were included in the request. (R. LIV 1185:6-1186:7). The District did not maintain Trustee emails in its offices and had requested that Trustees bring in their emails. (R. LIV 1236:15-25). A month after the request, the District's attorneys provided a *partial* response consisting of fewer than 200 pages of documents. (R. LIV 1274:13-20, 1275:1-5). The District neither claimed that any of the requested records were exempt nor did it provide a written explanation for the delay. (R. XLVI 134:14-135:4). Counsel for Appellants subsequently wrote the District's lawyers, identifying several gaps in the documents produced. (R. LIV 1279:23-1280:21). In June 2009, after the

Appellants notified the District's counsel of to the obvious missing documents and after the trial court's hearing on Appellants' Motion for Temporary Injunction, the District finally produced two voluminous supplements, consisting of an additional 800 documents. (R. XLVI 135:16-23; R. LIV 1187:12-1188:18; 1280:4-10).

The District's meetings are videotaped by the Video Club and broadcast on the District's closed circuit television channel. (R. LII 939:18-23, R. LIII 1088:6-11). The video tapes are public records. (R. LIV 1246:18-22, 1257:21-1258:4). In August 2006, Ms. Smith requested a copy of the videotape transcription or copy of the video tape for the budget hearing held on March 20, 2006. (R. 254:23-255:14; R. LVI Pls. Ex. 287). Ms. Smith had attended the budget hearing, knew it was videotaped, and wanted to review the behavior by Trustees that she felt was inappropriate. (R. XLVII 256:1-258:5). Chairman McNulty responded:

The volunteers from the Video Club on an unofficial basis tape the meetings and budget hearings. You can contact the president – Rich Musgrave when he gets back in the fall.

(R. LVI Pls. Ex. 290). Ms. Smith wrote the District again on August 27, 2006, and renewed her request that the District produce the video stating:

the taping is an official park function (the meetings are rebroadcast on the [park] TV station), and the equipment belongs to the park. I presume that there is somebody in the park that can get the requested

videos and make copies. They are public records. Waiting until October is not acceptable.

(R. LVI Pls. Ex. 292). The District did not respond to Ms. Smith's second letter. (R. LVII 263:16-23). On April 24, 2009, after suit was filed and in response to a Court Order, the District provided Ms. Smith with a 2006 Budget Hearing video that it had recently "discovered within the District's office." (A. 23; R. LVI Pls. Ex. 388). In contrast to Appellants' experience, other District residents did not have problems getting copies of videotaped Board meetings. (R. LIII 1121:8-11). Trustee Cole testified that when she requested videos from the District's records custodian they would be provided to her without any problem. (R. LIII 1121:1-14).

On January 5, 2009, the Board held an executive session and before starting that session, Trustee Brauer read off the names of the Trustees attending the shade meeting. (R. XLVI 138:20-139:2). Although Trustee Vander Molen attended the executive session, it is undisputed that his name was omitted from the list read by Trustee Brauer. (R. XLVI 138:20-25).

STANDARD OF REVIEW

Appellants appeal from decisions of the trial court both on Summary Judgment and from the Final Judgment issued after a non-jury trial. While decisions of a trial court normally carry with them a presumption of correctness, in

the context of an appeal of a summary judgment that presumption is diminished because the appellate court must look to the record and draw every possible inference in favor of the party against whom summary judgment was entered. *Wills v. Sears & Roebuck*, 351 So. 2d 29, 32 (Fla. 1977). Further, both the Summary Judgment and the Final Judgment contain conclusions of law concerning the interpretation and application of the Sunshine and Public Records Laws, therefore, this Court is entitled to determine if issues of law were correctly determined and is not required to defer to the determination of the trial court. This court is entitled to pursue a de novo review of the decisions being appealed. *S. Baptist Hosp. v. Welker*, 908 So. 2d 317, 319 (Fla. 2005).

Specifically as to the Court's application of the Sunshine Law to the actions of Appellee's Executive Committee, Appellant challenges the trial court's legal determination that three Trustees may meet out of the sunshine as a "fact finding committee;" that objections to Sunshine Law violations at a public meeting is a pre-condition to the imposition of liability for the violation; and that Board ratification of actions violating the Sunshine Law together with changes in the Board's composition and By-laws, subsequent to the filing of a lawsuit, can cure violations. Appellants also challenge the trial court's determination that the ARC, SRC, and Referendum Committee need not comply with the Sunshine Law.

Appellant further challenges several determinations of the trial court concerning interpretation of the Public Records Law; specifically determinations that place the burden on the party seeking a public record to disprove that the record has been lost or destroyed as the explanation for the government's failure to produce a public record; that the poor or inadequate record keeping of a government excuses public record law violations; and that production of public records after suit has been filed serves to avoid liability for Public Records Law violations including imposition of fees and costs.

SUMMARY OF ARGUMENT

Appellants take issue with the general manner in which the Appellee operates in violation of the Sunshine and Public Records Laws. These violations continue based on a belief among Appellee's elected officials and employees that Appellee should not be held to the requirements of Florida's open government laws due to its size, the age of its residents, and that its public officials are not paid. The trial court erred in not finding numerous violations of the Sunshine Law and Public Records Laws and in determining that violations were cured or excused. Specifically, the trial court erred in failing to hold that a conversation between two Trustees concerning an upcoming vote on a District budget violated the Sunshine Law and in determining that District committees could operate outside of the Sunshine. The

Executive Committee, as a subset of the Board, cannot operate outside of the sunshine as a fact finding committee. *Wood v. Marston*, 442 So. 2d 934, 939 (Fla. 1983); *Bigelow v. Howze*, 291 So. 2d 645, 647 (Fla. 2d DCA 1974). Similarly, the Referendum Committee, which included multiple trustees, could not meet and act outside the sunshine. The trial court erred in determining that ARC could operate outside of the sunshine where ARC's members were appointed by the Board and the Board was ultimately responsible for enforcing the community's deed restrictions. Finally, it erred in determining that the SRC could operate outside of the sunshine. It is irrelevant under the Sunshine Law whether committee members were appointed by a single Trustee or appointed formally or informally. *Krause v. Reno*, 366 So. 2d 1244, 1248 (Fla. 3d DCA 1979).

The trial court correctly found that the closed door meetings of Trustees as an Executive Committee violated the Sunshine Law, but erred in finding those violations cured or excused due to Board ratification of the decisions combined with subsequent changes in the By-laws and membership of the Board. A Sunshine Law violation can only be cured when the process is restarted, all matters previously considered are brought by independent action into the "sunshine," and the government entity performs a full reexamination of the issues, at a full, open public hearing for the purpose of allowing the public to express its views and participate in

the decision-making process. *Zorc v. City of Vero Beach*, 722 So. 2d 891, 903 (Fla. 4th DCA 1998). Here, the District's actions were, at best, perfunctory ratifications of prior decisions made outside of the sunshine with little or no public input or discussion and in no way equated to a restarting of the process or reexamination of the issues at a proper public meeting.

The trial court erred in granting Summary Judgment to the District regarding allegation 37(s), the interviewing and hiring of District legal counsel, holding that any Sunshine Law violation was cured. Evidence was before the court that the meetings were held in violation of statutory notice requirements and that after these meetings the Board never revisited any issue regarding the appropriateness of hiring the District Attorney. Instead the trial court incorrectly determined that the violation could be cured by the ratification of payment of invoices for legal fees.

The District failed to comply with the requirements of § 286.011(8), Fla. Stat., requiring the identification of all persons participating in a closed door litigation session by name. Therefore, the meeting violated the Sunshine Law and the transcript was a public record required to be produced in response to Appellants' public record requests.

Finally, the trial court erred in finding that the District's excessive delays in responding to Appellants' public record requests and failure to provide public

records requested were excused by the District's primitive filing system or the limitations of its staff. The public records law is designed to thwart all devices which serve to frustrate the production of public records and the ineptitude of staff will not excuse a violation or imposition of sanctions. *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984); *Office of the State Att'y for the Thirteenth Jud. Cir. v. Gonzalez*, 953 So. 2d 759, 765 (Fla. 2d DCA 2007).

ARGUMENT

- I. THE TRIAL COURT ERRED IN FINDING THAT THE DISTRICT DID NOT VIOLATE THE SUNSHINE LAW, WHEN IT HAD TWO OR MORE TRUSTEES PRESENT AT MEETINGS THAT WERE NOT NOTICED AND OPEN TO THE PUBLIC AND PROPER MINUTES WERE NOT TAKEN.

The Florida Constitution imposes an express obligation on all local governments, to conduct business in the open. Art. I, § 24, Fla. Const. Florida's Government-in-the-Sunshine Law, § 286.011, Fla. Stat. (hereinafter, the "Sunshine Law"), implements this constitutional right. The Sunshine Law is to be liberally construed in favor of the public and open government. *Krause* 366 So. 2d at 1250; *See also, Evergreen Tree Treasurers of Charlotte County v. Charlotte County Bd. of County Comm'rs*, 810 So. 2d 526, 531(Fla. 2d DCA 2002). The intent of the Sunshine Law is to "cover any gathering of some or all of the members of a public board at which such members discuss any matters on which [f]oreseeable action

may be taken by the board; and it is the entire [d]ecision-making process that the legislature intended to affect by the enactment of the statute. *Wolfson v. State*, 344 So. 2d 611, 614 (Fla. 2d DCA 1977).

The purpose of the Sunshine Law is to “prevent at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance.” *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974). The public has an interest as to the how and why of public officials’ the decisions, not just merely the final decision; it is access to the entire decision-making process of public officials that the legislature intended to affect by enacting the Sunshine Law. *Times Publ’g Co. v. Williams*, 222 So. 2d 470, 473 (Fla. 2d DCA 1969) *overruled in part*, *Neu v. Miami Herald Publ’g Co.*, 462 So. 2d 821, 824 (Fla.1985). The spirit, intent and purpose of the Sunshine Law require “a liberal judicial construction in favor of the public which frustrates all evasive devices.” *Fla. Parole & Prob. Comm’n v. Thomas*, 364 Fla. 480, 481 (Fla. 1st DCA 1978). The breadth of the public’s right to require government in the sunshine “is virtually unfettered.” *Pinellas County Sch. Bd. v. Suncam*, 829 So. 2d 989, 990 (Fla. 2d DCA 2002) (citing *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985)).

Entities subject to the Sunshine Law must satisfy three requirements: 1) All meetings must be open to the public; 2) the public must be given reasonable notice

of the meeting; and 3) minutes of the meetings must be recorded and open for public inspection. § 286.011, Fla. Stat. (2010). 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 Publ’g*, 222 So. 2d at 473. Even informal conferences “where no official acts were to be taken or were taken” are meetings under § 286.011, Fla. Stat., and must be held in the “sunshine.” *Bd. of Pub. Instruction of Broward County v. Doran*, 224 So. 2d 693, 698 (Fla. 1969). All functions of covered boards that relate to the duties and affairs of the board 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, workshops, 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); Op. Att’y Gen. Fla. 74-358 (1974); Op. Att’y Gen. Fla. 74-94 (1974); Op. Att’y Gen. Fla. 74-62 (1974); Op. Att’y Gen. Fla. 73-08 (1973). Even “pre-meetings” of boards and informal discussions in offices and homes are subject to the Sunshine Law. *Doran*, 224 So. 2d at 695-98.

An advisory board created to screen applications and make recommendations to a board for a vacant position is subject to the Sunshine Law. *Wood*, 442 So. 2d at 941. When a committee is screening and rejecting applicants, the committee is performing a decision-making function delegated to it by the board and is therefore, subject to the Sunshine Law. *See also, Leach-Wells v. City of Bradenton*, 734 So. 2d 1168, 1172 (Fla. 2d DCA 1999). Although there is a narrow exception to the applicability of the Sunshine Law for fact-finding committees, that exception does not apply when the committee is comprised of more than one member of the ultimate decision-making governmental body. *Wood*, 442 So. 2d 941; *Finch v. Seminole County*, 995 So. 2d 1068, 1073 (Fla. 5th DCA 2008). *See also, Lyon v. Lake County*, 765 So. 2d 785, 790 (Fla. 5th DCA 2000); and *Warden v. Bennett*, 333 So. 2d 97, 99 (Fla. 2d DCA 1976). “[T]he decision[-]making process of a duly appointed committee of a public body comprised of more than one member of that body must be held in public” *Bigelow*, 291 So. 2d at 647. In so holding, the Second DCA took:

judicial notice of the fact that committee recommendations are often accepted by public bodies at face value and with little discussion. Therefore, unless the decision[-]making process of a committee composed of two or more members of the public body appointing the committee is made public, the salutary [sic] objectives of the Sunshine Law will indeed have become clouded.

Id. at 647.

A. *THE TRIAL COURT ERRED IN HOLD THAT THE EXECUTIVE COMMITTEE, WAS A FACT-FINDING COMMITTEE, NOT SUBJECT TO THE SUNSHINE LAW, WHEN AT LEAST TWO TRUSTEES WERE MEMBER OF THE COMMITTEE AND PRESENT AT EACH OF THE MEETINGS.*

The Executive Committee meetings were neither open to the public nor properly noticed and each of these meetings was to discuss matters which would specifically come before the Board. (R. XLVIII 363:18-364:5; R. LIV 1144:24-1125:4, 1246:25-1247:11; R. XLVIII 396:14-397:15; R. XLVII 284:21-285:2). Despite finding that these were “closed door interviews,” the trial court erred in holding that these interviews were merely fact finding because the “final decision making authority rests with the board.” (A. 4). In these meetings Trustees not only interviewed but also evaluated, rejected, and ultimately recommended a candidate to fill a Board vacancy and in doing so behind closed doors violated the Sunshine Law. See, *Wood*, 442 So. 2d at 940; *Leach-Wells*, 734 So. 2d at 1172; *Bigelow*, 291 So. 2d at 647; *Port Everglades Auth. v. Int’l Longshoremen’s Ass’n Local 1922-1*, 652 So. 2d 1169, 1170 (Fla. 4th DCA 1995).

B. THE TRIAL COURT ERRED IN FINDING THAT THE INFORMAL DISCUSSION BETWEEN TRUSTEES CUSHMAN AND BIGLEY REGARDING THEIR UPCOMING VOTES ON THE BUDGET WERE NOT IN VIOLATION OF THE SUNSHINE LAW.

The discussion between Trustees Cushman and Bigley in March of 2007, regarding the District's budget and how they would vote on that budget was a clear Sunshine Law violation. Despite the unrefuted testimony at trial of a former Trustee regarding discussions he witnessed between Trustees Cushman and Bigley, the trial court failed to mention this violation in the Final Judgment. (A. 1-12). Ultimately, in the Order of Clarification, the trial court stated that any paragraph not specifically discussed in the final order is deemed to have been insufficiently proven. (A. 9, 21). The trial court erred in failing to find a Sunshine Law violation given the evidence presented at trial.

II. THE TRIAL COURT ERRED IN NOT FINDING SUNSHINE LAW VIOLATIONS WHERE DISTRICT COMMITTEES HELD MEETINGS THAT WERE NOT OPEN AND NOTICED TO THE PUBLIC.

The trial court erred in finding that the ARC, the Referendum Committee and the SRC were not subject to the Sunshine Law. When public officials delegate authority to act on their behalf in the formulation, preparation, and promulgation of plans on which foreseeable action will be taken by those public officials, then those delegated that authority stand in the shoes of such public officials with respect to the Sunshine Law. *News-Press Pub. Co., Inc. v. Carlson*, 410 So. 2d 546, 547 (Fla. 2d

DCA 1982); *Dascott v. Palm Beach County*, 877 So. 2d 8, 11 (Fla. 4th DCA 2004). “Stated another way, where a board or committee, regardless of its make-up, is delegated decision[-]making authority by a public official, its meetings and deliberations are subject to the Sunshine Law.” The Sunshine Law is applicable to advisory committees that have been appointed by an entire public board or a single public official. *See e.g., Krause*, 366 So. 2d at 1251. Further, the narrow exception to the applicability of the Sunshine Law for fact-finding committees does not apply when the committee is comprised of more than one member of the ultimate decision-making governmental body. *Wood*, 442 So. 2d at 940; *Finch*, 995 So. 2d at 1072. *See also, Lyon*, 765 So. 2d at 790; *Warden*, 333 So. 2d at, 99; *Bigelow*, 291 So. 2d at 647.

A. THE TRIAL COURT ERRED IN FINDING THAT ARC’S AUTHORITY DOES NOT DERIVE FROM OR IS NOT DELEGATED BY THE BOARD.

The trial court correctly found that ARC is a committee, with its members appointed by the Board, and that the Board is authorized to enforce the Deed Restrictions that apply to Trailer Estates. Given those facts, the Court had no legal basis to hold that ARC’s authority “is not derived from or delegated to [it] by the Board.” (A. 5). If the Board failed to appoint ARC members, the Board would

have to take over the responsibilities of ARC to insure deed restrictions were enforced.

B. THE TRIAL COURT ERRED IN HOLDING THAT THE REFERENDUM COMMITTEE WAS NOT SUBJECT TO THE SUNSHINE LAW.

The Referendum Committee's purpose was to develop procedures for initiating referendums and presents its recommendation to the Board for consideration. (A. 6). In fulfilling its charge, the Referendum Committee held meetings, which were neither open nor noticed to the public, and had two Trustees as participating members. (A. 6). Because of its purpose, closed meetings, and multiple Trustee members, the lower erred in finding that the Committee was not subject to the Sunshine Law. *See, Finch*, 995 So. 2d at 1072; *Bigelow*, 291 So. 2d at 647.

C. THE TRIAL COURT ERRED IN ASSUMING THAT INFORMAL APPOINTMENT OF THE SEASONAL RECREATION COMMITTEE COULD AVOID APPLICATION OF THE SUNSHINE LAW.

The trial court acknowledged that the SRC consisted of a Trustee and a group of volunteers, who met to determine the mechanics of presenting the District's recreational events, but it ruled that there was no Sunshine Law violation as it was unproven whether the SRC was formally appointed. (A. 5-6). The trial court erred in this ruling, as the Sunshine Law recognizes both formal and informal gatherings,

where the group of people assist in the formulation, preparation, and promulgation of plans on which foreseeable action will be taken by those public officials. *Bigelow*, 291 So. 2d at 647.

III. THE TRIAL COURT ERRED IN FINDING CURE WHERE THE DISTRICT'S ACTIONS, SUBSEQUENT TO EACH SUNSHINE LAW VIOLATION, FAILED TO START ANEW THE DELIBERATION PROCESS AT A FULL, OPEN HEARING REGARDING THE SAME OFFICIAL MATTERS THAT WERE ACTED UPON "OUTSIDE" OF THE SUNSHINE.

The trial court erred in finding that Sunshine Law violations that occurred in meetings of the Executive Committee or the full Board were cured. Sunshine Law violations may only be cured provided the board conducts a full, open public hearing on the same official matters which were considered or acted upon out of the sunshine. *Monroe County*, 647 So. 2d at 860. Provided the governmental entity takes steps to conduct independent, final action "in the sunshine," affording the public the right to participate in the process, and so long as the agency's action is "not merely a ceremonial acceptance of secret actions" or "merely a perfunctory ratification of secret decisions," then a prior Sunshine Law violation may be cured. *Tolar v. Sch. Bd. of Liberty County*, 398 So. 2d 427, 429 (Fla. 1981). A committee's violation of the Sunshine Law cannot be cured by a board's perfunctory ratification of a committee's report; only a full, open public hearing by the board can

cure a Sunshine Law violation. *Spillis Candela & Partners, Inc. v. Centrust Sav. Bank*, 535 So. 2d 694, 695 (Fla. 3d DCA 1988).

The Fourth DCA considered what constituted a full, open hearing capable of curing a Sunshine Law violation in *Zorc*. *Zorc*, 722 So. 2d at 897. In *Zorc*, Vero Beach held that three “shade” meetings violated the provisions of § 286.011(8), Fla. Stat. *Id.* After a lawsuit was filed, the City held a public meeting attempting to cure the violation. *Id.* at 901. The Court found that the City’s actions taken after the lawsuit was filed did not satisfy the threshold necessary for a cure, stating:

It is evident from the record that the meeting was not a full reexamination of the issues, but rather, was merely the perfunctory acceptance of the City’s prior decision. This was not a full, open public hearing convened for the purpose of enabling the public to express its views and participate in the decision-making process. Instead, this was merely a Council meeting which was then opened to the public for comment at the City’s request. There was no significant discussion of the issues or a discourse as to the language sought to be included. The City Councilmen were provided with transcripts of the hearings, but none reviewed the language previously approved, and the Council subsequently voted to deny reconsideration of the wording. Under *Tolar* and its progeny, it is clear that the City did not effectively cure its violation of the Sunshine Law emanating from the May 9 meeting.

Id. at 903-04; *See also, Blackford v. Sch. Bd. of Orange County*, 375 So. 2d 578, 581 (Fla. 5th DCA 1979) (violations of Sunshine Law not cured by discussions at subsequent public meeting). This Court should follow prior determinations on cure

and hold that a violation can only be cured when the process that violated § 286.011, Fla. Stat., is begun anew and all matters previously considered are brought by independent action into the “sunshine.” *Port Everglades*, 652 So. 2d at 1171.

While the actions necessary to remedy a Sunshine Law violation may depend on the extent of the violation, the public body that violates the statute must always make a genuine, thorough, and public effort to effectuate a proper cure of the violation. *See, Finch* 995 So. 2d at 1073; *See also, B.M.Z Corp. v. City of Oakland Park*, 415 So. 2d 735, 738 (Fla. 4th DCA 1982), *Bert Fish Found. v. Se. Volusia Hosp. Dist., et al.*, No. 10-20801 (Fla. 7th Cir. Ct. Feb. 24, 2011); *Monroe County*, 647 So. 2d at 860. The Sunshine Law violations which occurred at the Executive Committee meetings were not cured when they came before the Board, as the Board’s actions were merely perfunctory ratification of prior decisions.

As evidenced by the minutes from the Board meetings on June 19, 2006, and September 5, 2006, which followed the Executive Committee meetings of June 13 and 16, 2006 and September 5, 2006, Executive Committee decisions regarding filling Board vacancies were simply presented to the Board by motion and then approved without discussion. (R. LVI Pls. Ex. 51, 56). Similarly, the former District Chairman McNulty testified that the DeSears “situation was explained to the Board and the Board voted on it.” (R. XLVIII 471:3-13). There was neither

acknowledgement of Sunshine Law violations, nor any meaningful, open discussion by the Board for the appointments or DeSears approval. (R. XLIX 524:13-525:7). The interviews and discussions were held entirely behind closed doors. (R. LII 920:2-7, 922:2-4, 922:24-25). There was no re-examination or re-discussion of these appointments or approvals in an open, properly noticed public meeting as required by *Monroe County, Finch* and *B.M.Z. Corp.* Rather, the District's continued attitude that Executive Committee meetings were exempt from Sunshine Law requirements extended well into this litigation, as only after court order did the District finally amend its Bylaws to eliminate the "Executive Committee exception" from the Sunshine Law. (A. 23).

The trial court erred in finding that failure to object to the Sunshine Law violations at a public meeting coupled with ratification of recommendations, offending Trustees terms expiring, and amendment of the Bylaws constituted cure. As the District failed to properly cure each of these Sunshine Law violations, the Board appointment of these Trustees and approval of the DeSears waterline tap in are *void ab initio*. *Gradison*, 296 So. 2d at 475.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO ALLEGATION 37(S) REGARDING THE IMPROPER NOTICE FOR THE OCTOBER 2006 BOARD MEETINGS.

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, 550 (Fla. 2d DCA 2001). “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. Se. Univ.*, 993 So. 2d 141, 142 (Fla. 2d DCA 2008) (emphasis supplied). “[T]he merest possibility of the existence of a genuine issue of material fact precludes the entry of final summary judgment.” *Nard, Inc., v. DeVito Contracting & Supply, Inc.*, 769 So. 2d 1138, 1140 (Fla. 2d DCA 2000).

The District moved for partial summary judgment on a number of allegations, including allegation 37(s) of the Third Amended Complaint (improper notice of meetings where the District interviewed and then hired legal counsel) (R. XX 3713). In support of its position as to allegation 37(s), the District provided the trial court with copies of minutes from February 19, 2007, March 16, 2009, and December 21, 2009. (R. XIX 3611-3613, 3579-3584, 3660-3664). Additionally, Trustee Jones,

in support of an earlier, similar Motion for Summary Judgment, requested that the trial court take judicial notice of the Board' minutes for the following dates: February 19, 2007; January 7, 2008; April 21, 2008; January 19, 2009; February 16, 2009; and March 16, 2009. (R. XII 2266-2268, 2288-2292, 2307-2313, 2363-2368, 2370-2377, 2390-2395).

The trial court made no finding as to whether the District had given the notice required by §189.417, Fla. Stat., but simply determined on the basis of these minutes that District legal counsel's bills had come before the Board such that there was:

ample opportunity for protest in subsequent meetings regarding the hiring of legal counsel in October 2006; the subsequent meetings were not perfunctory. The Court finds that any potential taint in the hiring process has been cured

(R. XXX 5814-5815). Section 286.011(1), Fla. Stat. requires that the public receive "reasonable notice" of all meetings. This notice requirement for special districts is further defined by § 189.417(1), Fla. Stat., which adds the following provisions:

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...

Id. The District posted notice for the meeting of October 24, 2006, on a bulletin park board one to five days before the meeting. (R. LVI Pls. Ex. 301; R. XLVII 282:25-283:5). It neglected to publish the notice for the meeting “at least 7 days prior to such meeting” in a newspaper as required by § 189.417, Fla. Stat. As a matter of law, this defect in notice violates the Sunshine Law.

The notice for the second meeting was similarly defective. Since the Trustees decided October 24, 2006, that they would hold a workshop six days later on October 30, 2006, to consider hiring counsel, there was simply no way they could publish the required notice “at least 7 days prior to such meeting.” Because neither meeting was noticed as statutorily required, the public did not receive “reasonable notice” as required by § 286.011, Fla. Stat., therefore, both District meetings violated the Sunshine Law.

The District’s argument, accepted by the trial court was simple: its legal counsel’s bills were brought before the Board publically, authorized for payment, and that was enough to cure any violations regarding notice. (R. XLII 7992). While attendance of attorneys at District meetings and approval of legal bills for payment shows the public that the District has counsel, it is insufficient conduct to cure prior violations. In order to establish cure, the District must show that it conducted a “full, open hearing” and “full reexamination of the issues” at a public

meeting “*convened for the purpose of enabling the public to express its views and participate in the decision-making process.*” *Zorc*, 722 So. 2d at 903 (emphasis added). Here, the District never held a properly noticed public meeting concerning the **hiring** of its legal counsel, Kirk Pinkerton. The District failed to introduce any evidence that after the violations had occurred there was any reconsideration of this decision, any public opportunity to express views on the firm’s hiring, or participate in the hiring process.

The Board meeting minutes discussing its legal bills are remarkable in their lack of discussion. See, (R. XII 2266). The discussion between Trustees appears to concern only the payment of a particular invoice. (R. XII 2308). Nowhere in any of the minutes offered in support of the Motion is there any evidence that the Board raised any issue concerning hiring Kirk Pinkerton. Given the evidence before the trial court, the District failed to prove that there was no genuine issue of material fact as to the cure of its Sunshine Law violations regarding the hiring of Kirk Pinkerton. At a minimum, these minutes “permit different reasonable inferences” as to whether the District cured these clear notice violations. *Bruckner v. City of Dania Beach*, 823 So. 2d 167, 170 (Fla. 4th DCA 2002). Therefore, this issue should have been preserved for trial.

V. THE DISTRICT VIOLATED THE SUNSHINE LAW BY FAILING TO STRICTLY COMPLY WITH EACH OF THE REQUIREMENTS OF § 286.011(8), FLA. STAT.

In the absence of a legislative exemption, discussions between a public body and its counsel are subject to the Sunshine Law. *Zorc*, 722 So. 2d at 901. Section 286.011(8), Fla. Stat., provides for a narrow exception for a “shade meeting” where a board or agency actively involved in litigation may meet in private with its attorney. The strict requirements of this exemption specifically includes that:

The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting shall be reopened, and the person chairing the meeting shall announce the termination of the session.

Id. “While courts must liberally construe the statute to give effect to its public purpose, its exemptions must be narrowly construed.” *Bruckner*, 823 So. 2d at 170.

In *City of Dunnellon v. Aran*, 662 So. 2d 1026, 1027 (Fla. 5th DCA 1995), the mayor failed to identify by name each of the individuals attending the closed attorney-client session called pursuant to § 286.011(8), Fla. Stat. He announced only that “the attorneys hired by the City would attend the session[.]” *Id.* Though the City argued that it substantially complied with the requirements under § 286.011(8), Fla. Stat., and therefore was entitled to claim the meeting with its counsel exempt from the Sunshine Law, the 5th DCA disagreed, emphasizing that

“[t]he clear requirements of the statute are neither onerous nor difficult to satisfy.” *Id.* Further, in *Sch. Bd. of Duval County v. Florida Pub. Co.*, 670 So. 2d 99, 101 (Fla. 1st DCA 1996), the Court held that the attendance of anyone other than those statutorily permitted individuals at a “shade” meeting violated the Sunshine Law. Hence, the inclusion of anyone beyond those properly identified and permitted by statute would remove a meeting from the exemption and subject the entire meeting to the Sunshine Law. *Id.*; *Zorc*, 722 So. 2d at 897.

Although Trustee Vander Molen attended the executive session on January 9, 2009, when Trustee Brauer read off the list of executive session attendees at the Board meeting, she failed to identify him as an attendee. (R. XLVI 138:20-139:14). Regardless of the reason for this omission, the failure to name Trustee Vander Molen, as a person attending the executive session, constitutes a Sunshine Law violation and which removes the transcript from the protections of the exemption provide for in §286.011(8), Fla. Stat. *See e.g., Aran*, 662 So. 2d at 1027; *Zorc*, 722 So. 2d at 901.

VI. PUBLIC RECORDS VIOLATIONS

Article I, Subsection 24(a), of the Florida Constitution establishes a constitutional right of every person to access any public record made or received in

connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records specifically exempted or made confidential under the Constitution. “[O]ur Constitution requires that public officials must conduct public business in the open and that public records must be made available to all members of the public.” *State ex rel. Clayton v. Bd. of Regents*, 635 So. 2d 937, 938 (Fla. 1994). Chapter 119, Fla. Stat., provides a detailed mandate governing the disclosure of public records. As held by this Court:

The legislative objective underlying the creation of chapter 119 was to insure to the people of Florida the right freely to gain access to governmental records. The purpose for such inquiry is immaterial. . . . The breadth of such right is virtually unfettered, save for the statutory exemptions designed to achieve a balance between an informed public and the ability of government to maintain secrecy in the public interest.

Lorei, 464 So. 2d at 1332. Governmental entities, including special districts, may not implement devices which impede, hamper or frustrate the production of public records. *See e.g.*, §119.07, Fla. Stat.; *Lorei*, 464 So. 2d at 1332.

Information stored on a computer is as much a public record as written documents in official files. *Times Publ’g Co. v. City of Clearwater*, 830 So. 2d 844, 847 (Fla. 2d DCA 2002). Similarly, since the term “public records” includes records “regardless of their physical form, characteristics, or means of transmission,” video and tape recordings are also public records subject to the Public

Records Act. § 119.011(12), Fla. Stat. Whether a document is a “public record” depends on “the nature of the record, not its physical location.” *State v. City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003). Documents stored offsite, maintained by private entities or kept at a public official’s home are still public records subject to the production requirements of the Florida Constitution and §119.011, Fla. Stat. (hereinafter the “Public Records Law”). *See e.g., Booksmart Ent., Inc. v. Barnes & Noble College Bookstores, Inc.*, 718 So. 2d 227, 228 (Fla. 3d DCA 1998).

Section 119.07(1)(a), Fla. Stat., provides that “[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.” Neither a local government nor its records custodian may impose any rules or conditions of inspection which operate to restrict or circumvent an individual’s right of access to the public records. *See, Tribune Co.*, 458 So. 2d at 1077. Here, “reasonable conditions,” “refers not to conditions which must be fulfilled before review is permitted but to reasonable regulations that would permit the custodian of records to protect them from alteration, damage, or destruction and also to ensure that the person reviewing the records is not subjected to physical constraints designed to preclude review.” *Wait v. Fla. Power & Light Co.*, 372 So. 2d 420, 425 (Fla. 1979).

A records custodian must not do anything that would directly or indirectly frustrate a person's right to inspect and copy public records. *Tribune*, 458 So. 2d at 1078; *Times Publ'g Co. v. City of St. Petersburg*, 558 So. 2d 487, 492 (Fla. 2d DCA 1990) (A City purposely avoiding taking possession of its public records is an improper delegation of record keeping and a violation of the Public Records Act.); *see also*, *Wooten v. Cook*, 590 So. 2d 1039, 1040 (Fla. 1st DCA 1991).

While the Public Records Law does not provide a specific time limit for an agency to comply with a public records request, the Florida Supreme Court has stated that the only permissible delay in producing public records, is to provide the agency with "the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt." *Tribune*, 458 So. 2d at 1078. An agency's unreasonable and excessive delays in producing public records will constitute an unlawful refusal to provide access to the public records. *Town of Manalapan v. Rechler*, 674 So. 2d 789, 790 (Fla. 4th DCA 1996); *See also*, *Gonzalez* 953 So. 2d at 765 (Misplaced records by inept personnel does not excuse violation of Sunshine Law or imposition of sanctions); *Barfield v. Town of Eatonville*, 675 So. 2d 223, 225 (Fla. 5th DCA 1996) (Delay in producing records due to "either the intentional wrongdoing or ineptitude of its Town clerk" is neither an excuse nor valid basis to deny an award of fees & costs).

Similarly, an agency's failure to produce records because of its good faith, but mistaken, belief that records requested were exempt from disclosure still constitutes an unlawful refusal under §119.12, Fla. Stat. *News & Sun-Sentinel Co. v. Palm Beach County*, 517 So. 2d 743, 744 (Fla. 4th DCA 1987). Further, "[i]f there is any doubt about the application of the [public records] law in a particular case, the doubt is resolved in favor of disclosing the documents. *Nat'l Colligate Athletics Assoc. v. Assoc. Press*, 18 So. 2d 1201, 1207 (Fla. 1st DCA 2009).

A. ON MULTIPLE OCCASIONS, THE DISTRICT UNREASONABLY DELAYED IN PRODUCING RECORDS WITHIN ITS POSSESSION, AND THE TRIAL COURT ERRED IN FINDING THAT THE DELAYS WERE JUSTIFIED.

Appellants have made numerous requests for public records within the District's possession, which were met with numerous instances of delays. The most egregious delay was in producing the requested correspondence with the District's former counsel, Ruden McClosky (delay of fifteen months), and the District's resident database (delay of over one year) with production only after the issuance of a court order. (R. XLVI 181:20-182:5, 195:14-20). The trial court erroneously found that the District has provided the database in the format it was stored in by the District, but the record does not support this finding. The record in this matter supports that the District only provided the database, after suit was filed

and an order entered requiring production, and then it was produced in the requested Excel format. Some records requested in December 2008, were produced more than a month after the initial request, but a complete response consisting of an additional 800 pages of documents, were only produced several months later and after an order of the trial court. (R. XLVI 135:5-23; R. LIV 1274:21-1275:8, 1278:7-9,1278:20-1279:4, 1279:11-14, 1279:23-1280:21).

B. THE TRIAL COURT ERRED IN FAILING TO FIND A PUBLIC RECORDS LAW VIOLATION WHEN THE DISTRICT'S METHOD OF MAINTAINING ITS PUBLIC RECORDS WAS SO INEPT AND DEFECTIVE THAT IT COULD NOT LOCATE RECORDS IT HAD PREVIOUSLY LOGGED.

The uncontested evidence presented at trial established that the District's method of maintaining public records invited incomplete responses and delay. (R. XLV 95:12-96:16, 96:7-20; R. LIII 977:2-3, 977:14-17, 982:19-25). As a justification for the District's problems with its business practices and recordkeeping, Trustee Vander Molen explained that the Trustees were "just old people doing the best we can." (R. XLVII 294:11-14). However, lack of skill or ineptitude of personnel is no excuse for failing to comply with the Public Records Law. *Gonzalez*, 953 So. 2d at 765.

The District's own records custodian confirmed that at one point, it had a system for logging in public records. (R. LIII 1009:8-11). When Item 76 was

requested, the District could not produce it. (R. XLVI 143:5-23). Because of the District's poor recordkeeping, it cannot explain what has happened to the record. (R. LIV 1182:23-1183:2). The trial court erred in finding that the Plaintiffs failed to carry their burden of proof, when there was testimony by the District's representative and records custodian that the District was unable to provide the record because it could not find it. (R. LIII 1011:8-13). By failing to maintain these records, the District breached the duties imposed by the Public Records Act and it should be sanctioned.

CONCLUSION

In conclusion Appellants request, for all the above stated reasons, that this Court reverse the Summary Judgment and Final Judgment of the trial court and remand with directions for the trial court to enter Judgment for the Appellants holding that the District has violated the Sunshine and the Public Records Laws by: holding meetings of Trustees as an Executive Committee in private without public notice or proper minutes; allowing Trustees to discuss votes in private outside of a public meeting; failing to adequately cure Sunshine Law violations; allowing District committees, specifically ARC, Seasonal Recreation, and Referendum to meet outside of properly noticed public meetings where proper minutes are taken and made available; allowing unreasonable delays in the production of public

records; and failing to strictly comply with the requirements of § 286.011(8), Fla. Stat. Further, directing the trial court to hold appropriate further proceedings as necessary to determine whether a Sunshine Law violation occurred in the hiring of Appellee's law firm; the appropriate mandamus and injunctive relief that should issue to address outstanding violations and the potential for future violations; and an award of reasonable fees and costs to the Appellants for the previous trial, this appeal and further proceedings ordered by this Court.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of this Initial Brief has been furnished to **Kurt E. Lee**, Kirk Pinkerton, P.A., 50 Central Avenue, Suite 700, Sarasota, FL 34236, by *U.S. First Class Mail*, this 25th day of May, 2011.

_____/s/_____
KEVIN S. HENNESSY, ESQ.

CERTIFICATE OF COMPLIANCE

Counsel for Appellants, Mary Lou Smith and Sharon Denson, certifies that this brief has been prepared in Times New Roman, 14-point font, in compliance with the requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2). An electronic copy of the brief has been provided in accordance with A.O. 2006-1.

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