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BREVARD County
BOARD OF COUNTY COMMISSIONERS

FLORIDA'S SPACE COAST

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April 4, 2021

Memo Discussing Issue Coming before BoCC on Tuesday, April 6, 2021

This memorandum does not solicit feedback from any Commissioner and Commissioners are specifically asked not to respond to it (or discuss it amongst one another outside of a duly noticed BoCC meeting) as doing so could and likely would constitute a violation of one or more provisions of Chapters 119 and/or 286, Fla. Stat. So that it may be made available to the public, a copy of this memo is being provided to the Clerk to the Board so that it may be included in the minutes for the April 6, 2021 BoCC meeting. Please see the attached County Attorney's Office Inter-Office Memo dated December 12, 2016 which indicates that communications of this variety are authorized under applicable law.

Please be advised that this is a memo primarily pertaining to allocation of a portion of the anticipated American Rescue Plan Act of 2021 funds. The proposal contained herein apply identically throughout unincorporated Brevard County and do not favor any district.

Kindly note that discussion regarding my other proposals, contained within Item J.6, including small business grant funding and allocation of funds to fully fund the Emergency Operations Center are not included herein as these items appear too lengthy for inclusion in this document. It is still my intention to discuss these items during the April 6 meeting, including making a contemplated motion to set aside roughly $10M for small business funding countywide.

BoCC Meeting – 2021 April 06 - Item J.6

DISTRICT 2 COUNTY COMMISSIONER LOBER'S PROPOSED MOTION REGARDING ALLOCATION OF "AMERICAN RESCUE PLAN ACT OF 2021" FUNDS TO OFFSET PROPOSED FIRE ASSESSMENT COSTS

The Brevard County Board of County Commissioners (hereinafter "BoCC") makes the following findings:

(1) Brevard County Fire Rescue's (hereinafter "BCFR") fire operations reserve funding has been spent down from a high of over $14,000,000 in 2009 to roughly $1,000,000 at present. This has occurred largely due to reserve spending having been used to meet basic operational expenses because the fire assessment collected has been insufficient to meet such needs; and

(2) As the reserves have been almost completely depleted over the course of the past dozen years, reserve spending is no longer a sustainable means of covering ongoing fire operations costs; and

(3) Reserve spending has allowed artificially low fire rates to be collected over this period; and

(4) While the proposed fire assessment results in a large percentage increase in fire fees, this percentage increase is tremendously misleading as the fire fees collected have not reflected actual costs as they were and remain insufficient to maintain existing levels of service; and

(5) Had prior commissioners, instead of kicking the can down the road as was done, charged rates sufficient to meet operational needs, there would be no need for such a substantial percentage increase; and

(6) Since 2008, there has been only one increase exceeding CPI to the fire assessment; and

(7) That increase was a low single digit percentage increase over CPI; and

(8) Brevard County's rate consultant, at the time, recommended a far higher increase than what was implemented; and

(9) Nonetheless, rates were kept artificially low with continued reserve spending; and

(10) The fire assessment is but one of roughly two dozen items which appear on a resident's tax bill which, together, constitute the tax charged to property owners by Brevard County; and

(11) While a supermajority of the BoCC has publicly expressed support for the implementation of a fire assessment, not a single County Commissioner has expressed support for increasing the aggregate rollback rate charged to residents; and

(12) Nearly all constituents would likely agree that certain governmental functions are not only appropriate but necessary; and

(13) Among the core obligations any government has to the community is providing for public safety; and

(14) Increasing the proportion of collected tax funds dedicated toward maintaining or improving public safety while concurrently reducing the proportion of collected tax funds dedicated to less critical governmental obligations is a goal of the BoCC; and

(15) To simply maintain existing levels of service is problematic given a high attrition rate amongst firefighters who have been with BCFR for less than ten (10) years, with an

abnormally high attrition rate amongst those with the organization less than five (5) years; and

(16) This attrition rate is due, in large part, to uncompetitive salaries when compared to comparable departments; and

(17) While the BoCC is not looking at making BCFR the highest paying department in the area, it is seeking to better ensure that competitive salaries are offered to aid in recruiting and retaining a sufficient number of qualified and competent first responders; and

(18) With the proposed fire assessment, not only will existing salaries be rendered more competitive, helping to stem attrition, but BCFR will also seek to recruit dozens of additional firefighters to better ensure continued ability to timely and professionally respond to a growing population; and

(19) It is anticipated that the proposed increase will additionally allow for reserves to be slowly built back up to a reasonable level; and

(20) It is anticipated that approximately $118M will be disbursed, to the BoCC, through the American Rescue Plan Act of 2021 (hereinafter "ARPA"); and

(21) Present indications suggest that, of the $118M expected, from ARPA, a $59M initial disbursement will be provided to the BoCC in the immediate to near future; and

(22) The BoCC recognizes that the fire assessment could not come at a worse time for a number of residents who have been severely impacted by the ongoing COVID-19 pandemic.

Accordingly, it is hereby directed that BoCC staff work with County Finance to create a new cost center (or fund) in which to set aside $8.7M of the initial $59M (from ARPA) and that the $8.7M set aside be restricted in use for the explicit purpose of offsetting any increase, exceeding CPI, which would otherwise be required of those who face increased costs as a result of implementation of the proposed fire assessment. It is contemplated that this $8.7M initial allocation would roughly cancel out any increase faced by residents during the first year in which the fire assessment would be implemented.

If direct payment, to the tax collector, of the difference between what would otherwise be charged were the assessment not to pass (namely existing rates plus CPI) and whatever would be charged following approval of the proposed fire assessment would be incompatible with the requirements of ARPA (including any Dept. of Treasury guidance), staff shall timely advise the BoCC of recommended options to allow for the intent of this motion to be realized. Such options may include reimbursement of eligible public safety payroll expenses budgeted to be paid out of the general fund, freeing those general fund dollars to be used to achieve the intent of this motion absent ARPA restrictions.

Individuals or entities involved in litigation against the BoCC and individuals or entities with outstanding code enforcement fines, unpaid public record request fees, and/or any other outstanding monetary obligation to the BoCC, shall not be entitled to benefit, in any way, from this motion. Staff shall not remit payment, to the tax collector, for the increased costs faced by anyone in any of the aforementioned categories.

Absent future direction to the contrary, by a majority of the BoCC, staff shall set aside an additional $8.7M from the second $59M of ARPA funding upon its arrival and this set aside shall be placed in the same account as the initial $8.7M set aside with the intent of allowing for its use to offset any increase faced, by residents, in the second year of implementation of the proposed fire assessment.

Staff is directed to make reasonable efforts to publicize the passage and implementation of this motion prior to tax bills being sent.

It is not presently anticipated that there will be additional stimulus funding allocated for the purposes of this motion. As such, fire assessment payers are advised that in the third year following adoption of the proposed fire assessment, it is highly unlikely that the increased charges will be offset by the use of such funds.

In the unlikely event that the fire assessment should fail to gain BoCC approval, staff shall seek direction from the BoCC on the use of any funds set aside in accordance with this motion.

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BOARD OF COUNTY COMMISSIONERS

Inter-Office Memo

TO: Scott Knox

FROM: Alex Esseesse

SUBJECT: Ability for commissioner to send out a memorandum or position statement to the other commissioners on an issue that will go before the Board

DATE: 12/8/16

Issue: A commissioner wants to prepare and circulate a written memorandum to the other members of the Board of County Commissioners that discusses an issue that will go before the Board. This memorandum will include the commissioner's stance/position on the matter and will likely recommend that a certain course of action be taken by the Board.

Question: Can a commissioner prepare and circulate a memorandum/position statement to other commissioners on an issue that will go before the Board without violating the Government in the Sunshine Law, Chapter 286, Florida Statutes?

Short Answer: Yes, but with caution. No discussions of the information/positions outlined in the memorandum can be discussed outside of a public meeting; the memorandum cannot solicit feedback from the other Board members; there cannot be any responses to the memorandum prior to the public meeting; and, because the memorandum is a public record, a copy must be made available to the public. Furthermore, the memorandum/statement cannot be used as a substitute for action at a public meeting and cannot be used to enable staff to act as an intermediary among the commissioners.[1]

Analysis

The Government in the Sunshine Law was adopted, at least in part, to prohibit public business from being conducted in private. Put another way, "[o]ne purpose of the [G]overnment in the [S]unshine [L]aw was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance."[2] In order to accomplish this goal, Florida law provides that

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[1] *See*, Op. Att'y Gen. Fla. 01-21 (2001).
[2] Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla. 1974).

> [a]ll meetings of any board or commission . . . of any agency or authority of any county, . . . except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, 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.[3]

Courts have found that, "[i]n order for there to be a violation of [Fla. Stat. § 286.011], a meeting between two or more public officials *must take place* which is violative of the statute's spirit, intent, and purpose."[4] However, despite this assertion, it has been established that "the physical presence of two or more members is *not necessary* in order to find the Sunshine Law applicable."[5] In practice, this means that Fla. Stat. § 286.011 "should be construed so as to frustrate all evasive devices" used to circumvent the statute's purposes of transparency and openness.[6]

Florida Attorney General Interpretations

The Florida Attorney General has issued a number of opinions on when and how official subject to the Government in the Sunshine Law can use memoranda to discuss their stances and/or suggest certain positions be taken on issues requiring official action before their respective boards. For example, in **AGO 2007-35**, the Florida Attorney General was tasked with determining whether city commissioners could exchange documents on issues that would come before the commission for official action. As mentioned above, "the courts and this office have found that there are instances where the physical presence of two or more members is not necessary in order to find the Sunshine Law applicable."[7] The Attorney General found that "a commissioner may send informational material to the other commissioners outside of a public meeting provided that there is no interaction between or response from the other commissioners."[8] Importantly,

> [w]hile it is not a direct violation of the Sunshine Law for members to circulate their own written position statements to other council members so long as the council members avoid any discussion or debate among themselves on these statements, the members' discussions and deliberations on matters coming before the commission must occur at a duly noticed [meeting] and . . . must not be used to circumvent the requirements of [Fla. Stat. § 286.011].

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[3]Fla. Stat. § 286.011(1).
[4]Hough v. Stembridge, 278 So.2d 288, 289 (Fla. 3rd DCA 1973) (*emphasis added*).
[5]Op. Att'y Gen. Fla. 96-35 (1996) (*emphasis added*).
[6]Gradison, 296 So.2d at 477; Op. Att'y Gen. Fla. 96-35 (1996).
[7]Op. Att'y Gen. Fla. 2007-35 (2007).
[8]*Id.*

Ultimately, the Attorney General found that a commissioner may send documents to other members of the commission on matters going before the commission for official action, "provided that there is no response from, or interaction related to such documents among, the commissioners prior to the public meeting."[9]

In **AGO 01-21**, the Florida Attorney General was asked whether board members could prepare individual position statements on the same subject and exchange these memoranda to the other board members. In the situation outlined in AGO 01-21, board members "prepare[d] and circulate[d] statements meant to communicate a particular council member's position on issues coming before the board," but these statements did not solicit responses from the other members and were made available to the public.[10] The Florida Attorney General's Office found that "[w]hile [it] would strongly discourage such activity, it would appear that council members . . . may prepare and distribute their own position statements to other council members without violating the Government in the Sunshine Law so long as the council members avoid any discussion or debate among themselves on these statements."[11] More specifically, the Florida Attorney General noted that such a practice would become "problematic" if and when "any such communication [was] a response to another commissioner's statement" because it opened the door for board members to respond to one another outside of a duly noticed meeting, causing the requirements of Fla. Stat. § 286.011 to be circumvented.[12] Despite reaching such a conclusion, the preparation and distribution of such memoranda/statements amongst the commissioners would not be a "direct violation of the Government in the Sunshine Law."[13]

The Florida Attorney General issued an opinion (**AGO 96-35**) that addressed the issue of whether a school board member could circulate a memorandum "expressing that member's position on a matter that [would] come before the school board for action and urging the other board members to give the author's position very serious consideration."[14] Importantly, "[t]he memorandum [did] not request other board members to respond prior to the meeting at which the topic will be brought up for action or discussion."[15] The Attorney General made it a point of identifying circumstances where the use of a memorandum would not be permitted. For example, a memorandum cannot request board members to respond with comments and/or to request the board members to "indicate his or her approval or disapproval" for certain views.[16] Based on such a position, the Attorney General came to the conclusion that

> if a school board member writes a memorandum to provide information to make a recommendation to other school board members on a particular subject, there is

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[9] *Id.*
[10] Op. Att'y Gen. Fla. 01-21 (2001).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Op. Att'y Gen. Fla. 96-35 (1996).
[15] *Id.*
[16] *See, Id.*

> no violation of [Fla. Stat. § 286.011]. However, the use of a memorandum to solicit comment from other members of the board or commission or the circulation of responsive memoranda by other board members would violate the statute. Such action would be equivalent to private meetings discussing the public business through the use of memoranda without allowing an opportunity for public input.[17]

Another Florida Attorney General opinion (**AGO 89-23**) found that "[t]he use of a written report by one [city] commissioner to inform other commissioners of a subject which will be discussed at a public meeting does not violate Florida's Government in the Sunshine Law if prior to the public meeting, there is no interaction related to the report among the commissioners."[18] Again, in that situation, the other commissioners were not requested to and did not provide any comments on the report prior to the public meeting. The Attorney General determined that the memorandum would be allowed as long as "[t]he circumstances . . . do not . . . involve the use of a report as a substitute for action at a public meeting, inasmuch as there is no interaction among the commissioners prior to the public meeting." Furthermore, the memorandum cannot be used by other city officials, such as a city manager, "to act as intermediary among the commissioners" to ask "each commissioner to state his or her position on a specific matter which will foreseeably be considered by the commission at a public meeting in order to provide information to the members of the commission."[19]

Conclusion

A County commissioner is permitted to prepare and circulate a memorandum on an issue to go before the Board. However, no discussions of the information/positions outlined in the memorandum can be discussed outside of a public meeting; the memorandum cannot solicit feedback from the other Board members; there cannot be any responses to the memorandum prior to the public meeting; and, because the memorandum is a public record, a copy must be made available to the public. Additionally, the memorandum/statement cannot be used as a substitute for action at a public meeting and cannot be used to enable staff to act as an intermediary among the commissioners.

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[17]Op. Att'y Gen. Fla. 96-35.
[18]Op. Att'y Gen. Fla. 89-23 (1989).
[19]*Id.*