IN THE CIRCUIT COURT THE NINTH JUDICIAL CIRCUIT
IN AND FOR OSCEOLA COUNTY, FLORIDA
CIVIL DIVISION

FRIENDS OF SPLIT OAK FOREST, INC.,
SPEAK UP WEKIVA, INC., and
VALERIE ANDERSON,
Plaintiffs,
v.

CASE NO.: 2018-CA-01528

OSCEOLA COUNTY, FLORIDA,
a Political subdivision,
Defendant,
_____/

DEFENDANT, OSCEOLA COUNTY'S MOTION TO DISMISS COUNTS I AND II OF PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendant, OSCEOLA COUNTY, FLORIDA, by and through its undersigned counsel, pursuant to Fla. R. Civ. P. 1.140, files this motion to dismiss Counts I and II of Plaintiffs', FRIENDS OF SPLIT OAK FOREST, INC., SPEAK UP WEKIVA, INC., and VALERIE ANDERSON, First Amended Complaint with prejudice, and in support thereof, states as follows:

SUMMARY OF GROUNDS FOR DISMISSAL

This is a cause of action for declaratory and injunctive relief based on an allegation that the Osceola County Board of County Commissioners (BOCC) should have allowed public comment at a public meeting before the BOCC chairperson sent two letters regarding the Central Florida Express Authority's Osceola Expressway project ("the CFX Expressway Project"). Plaintiffs' First Amended Complaint also alleges that the BOCC was required to take a vote, but did not.

Section 286.0114, Fla Stat., requires that a commission provide the public an opportunity to speak during the decision-making process and before official action is taken. The BOCC discussed the CFX Expressway Project, but there was no motion, and no vote. The subsequent writing of letters by the Chairperson does not constitute official action invoking §286.0114. Since

no official action was taken, and there was no decision-making process, the BOCC was not required to receive public comment. Furthermore, nothing required the BOCC to take a vote before the letters were sent. As such, Counts I and II of Plaintiffs' First Amended Complaint fail to state causes of action and should be dismissed with prejudice.

MEMORANDUM OF LAW

STANDARD FOR A MOTION TO DISMISS

In ruling on a motion to dismiss, a court should confine its consideration to the four corners of the complaint, accept all well-pleaded allegations as true, and view the allegations in the light most favorable to the plaintiff. *See Alvarez v. E & A Produce Corp.*, 708 So. 2d 997, 999 (Fla. 3d DCA 1998); *Bell v. Indian River Mem'l Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001). However, legal conclusions are not entitled to be accepted as true. *W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.,* 728 So. 2d 297 (Fla. 1st DCA 1999). Here, even taking all of Plaintiffs' factual allegations as true, Counts I and II of Plaintiffs' First Amended Complaint do not state causes of action and should be dismissed with prejudice.

ARGUMENT

Counts I and II of Plaintiffs' First Amended Complaint fail to state causes of action. The May 2, 2018, letters sent by the chairperson do not constitute official action under §286.0114(2), and therefore, no public comment was required. Furthermore, §286.012 does not require that the BOCC take a vote before the chairperson sends a letter. Therefore, Counts I and II of Plaintiffs' First Amended Complaint should be dismissed with prejudice.

I. COUNT I OF PLAINTIFFS' FIRST AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER FLA. STAT. §286.0114(2) AS PUBLIC COMMENT WAS NOT REQUIRED PRIOR TO WRITING THE MAY 2, 2018, LETTERS.

Count I of Plaintiffs' First Amended Complaint alleges a violation of §286.0114(2), which provides:

> (2) Members of the public shall be given a reasonable opportunity to be heard on a proposition before a board or commission. The opportunity to be heard need not occur at the same meeting at which the board or commission takes official action on the proposition if the opportunity occurs at a meeting that is during the decision making process and is within reasonable proximity in time before the meeting at which the board or commission takes the official action.....

Fla. Stat. §286.0114(2).

§286.0114(2) requires public comment be allowed during the decision-making process and prior to taking official action. If no decision-making process occurs and no official action taken, §286.0114 does not apply.

Here, the BOCC heard a presentation and the chairperson, in his individual capacity as a commissioner, then wrote two letters. (*See* Exhibit A to Appendix to Plaintiffs' First Amended Complaint). No motion was made and no vote adopting any action was taken by the BOCC. The BOCC chairperson's letters in response to Tavistock's letter did not constitute official action of the BOCC as there was no action taken by the BOCC. There was no decision-making process and no official action as contemplated by §286.0114, and therefore no requirement that public comment be allowed.

i. No Public Comment was Required Prior to the Chairperson Sending the May 2, 2018, Letters as there was No Motion, No Vote, and No Decision-Making Process and Therefore, No Official Action.

The rules of statutory construction provide that to define a term in a statute, one must first look to the language of the statute itself, reading related statutory provisions together to achieve a consistent whole. *Raymond James Financial Services v. Phillips*, 126 So. 3d 186 (2013). Only if the statute is ambiguous, may courts employ extrinsic aids such as dictionaries to discern legislative intent. *Herrin v. City of Deltona*, 121 So. 3d 1094 (Fla. 5th DCA 2013).

Here, the language of §286.0114 is not ambiguous. Fla. Stat. §286.0114 provides:

> (2) Members of the public shall be given a reasonable opportunity to be heard on a proposition before a board or commission. The opportunity to be heard need not occur at the same meeting at which the **board or commission** takes **official action** on the proposition if the opportunity occurs at a meeting that is during the **decision making process** and is within reasonable proximity in time before the meeting at which the board or commission takes the **official action**.....
>
> (3) The requirements in subsection (2) do not apply to:
> ...
>
> (b) An **official act** involving no more than a **ministerial** act, including, but not limited to, approval of minutes and ceremonial proclamations;

Fla. Stat. §286.0114 (emphasis added).

Although §286.0114 does not define "official action," or "decision-making process," when reading the entire section as a whole, the meaning of the statute is clear - public comment is required only during the decision-making process if the BOCC takes official action on a proposition. Here, there was no motion, no vote, no decision-making process, and no official action.

The CFX Expressway Project is not a County project, but rather a project of the Central Florida Expressway Authority. There was nothing before the BOCC to vote or make a decision

on. (*See* Exhibit Q to Plaintiffs' Appendix of Exhibits, page 20). The BOCC simply reviewed and discussed Tavistock's letter and the CFX Expressway Project, and then the Chairperson decided to write the May 2, 2018, letters. The chairperson concluded the BOCC's discussion of this item by stating:

> "County Manager, I think you and I can draft a letter letting Tavistock know how this went".

(*See* page 13 of Exhibit F to Plaintiffs' Appendix of Exhibits.)

Additionally, one of the May 2, 2018, letters from the BOCC chairperson summarizes what transpired at the BOCC meeting:

> I received your letter (dated April 13, 2018) and reviewed it during our Osceola Board of County Commissioners meeting on April 16, 2018. **What followed was a shared discussion with the other board members, community, and Charles Lee from Audubon Florida.**

(*See* Exhibit A in Plaintiffs' Appendix of Exhibits.)

A discussion of a governing board does not equate to "official action" or a "decision-making" process. The conclusion of the BOCC's discussion was that the chairperson and the county manager drafted letters relaying how the discussion went. No motion was made, no official action taken by the BOCC, and thus, no decision-making process. Accordingly, the BOCC was not required to take public comments under §286.0114, Fla. Stat. Count I should be dismissed with prejudice.

ii. The May 2, 2018, Letters were an Act of the Individual Chairperson, not the BOCC, and therefore, did not Require Public Comment.

The letters were an act of the chairperson individually. It is well-established that the individual acts of an elected official are not official acts triggering the Sunshine Law. See *National Council on Compensation Insurance v. Fee,* 219 So. 3d 172, 178-9 (Fla. 1st DCA 2017)

(the Sunshine Law is designed to apply to a group of people, not a single individual; it does not ordinarily apply to an individual member of a commission). See also, *Rowe v. Pinellas Sports Authority,* 461 So. 2d 72 (Fla. 1984).

Both the courts and Attorney General have found that when an elected official acts as an individual, she is not subject to the Sunshine Law. These cases and attorney general opinions were decided under §286.011, under which the requirements for a public meeting are triggered in part by "official acts" of the elected body. Thus, for example, when an elected official sends a memorandum to the remaining members of her commission, that action does not invoke the Sunshine Law. *See e.g.* Op. Att'y Gen. Fla. 89-23 (1989).

The courts also have established that when an individual elected official or even a committee are performing fact-finding functions, the individual or committee are not part of the decision-making process. When an act is not "decision-making" in nature, it is not an official act with the meaning of the Sunshine Law under §286.011. See *Wood v. Marston,* 442 So. 2d 934, 940 (Fla. 1983) (certain exchanges of information are not "decision-making" in nature, and are thus not official acts within the meaning of the Sunshine Law); *Bennett v. Warden,* 333 So.2d 97 (Fla. 2nd DCA 1976) (meetings of college president and committee of employees not subject to the Sunshine Law because no decision-making).

In *Fee*, it was alleged that a rate proposal prepared by an individual was the act of the rate determination committee and therefore was subject to the Sunshine Law, specifically, Fla. Stat. §627.091(6), which provides an official act of the collegial public body or a board or commission requires a public meeting. *Id.* at 178. The court rejected this argument, explaining that it ignores the plain language of the statute. The court found the express provisions of the Sunshine Law are clear that there must be some "official act" of the "collegial public body" or a "board or

commission" to require a public meeting. The unilateral act of an individual official does not satisfy this threshold requirement. *Id.* at 178-79.

Similar to §286.011, the public comment requirement under §286.0114(2) is triggered by the "decision-making" process and "official action." The courts and the Attorney General have made clear that these terms as used in §286.011 are not invoked by the act of an individual commission member. Similar to the language of §286.011, Section 286.0114(2) requires public comment before the "**commission** takes official action on the proposition." Fla. Stat. §286.0114(2)(emphasis added). The collective action of the commission is distinguishable from the unilateral acts of a single commission member. If writing a memorandum to the other commissioners is not part of the decision-making process, nor an official act requiring a Sunshine Law meeting under §286.011, how is the Chairperson's writing a letter, without the input of other commissioners, to non-members of the Commission an official act under §286.0114? The answer is clear, the act of a single member of a commission, such as the BOCC chairperson, rather than the collegial act of the commission, does not suffice to invoke the public meeting requirement of §286.011 or the public comment requirement of §286.0114. As the Supreme Court said in *Wood*, exchanges of information are not decision-making, and are thus not official acts within the meaning of the Sunshine Law.

Accordingly, no public comment was required here. Count I should be dismissed with prejudice.

iii. Plaintiffs urge the court to defer to extrinsic sources for the definitions of "proposition," "official act", "decision", etc. However, the rules of statutory construction call for a court to resort to extrinsic aids only when the statute is ambiguous. These rules also instruct the court not to read a statute so it is inconsistent. Use of the extrinsic aids relied on by the Plaintiffs are inappropriate because §286.0114 is not ambiguous and using Plaintiffs' definitions lead to inconsistences.

Without making any argument that §286.0114 is ambiguous, the Plaintiffs tout the use of various dictionaries' definitions of terms used in §286.0114. There is no need to revert to these dictionaries' definitions because the statute is not ambiguous. (*See infra.*at 3-4.) Only when a statute is ambiguous, may a court defer to extrinsic aids. *Raymond James.*

Moreover, in the context of §286.0114, use of the Plaintiffs' sponsored definitions would render the statute intentionally inconsistent. For example, using the Plaintiffs' definitions, a "ministerial act" would be one in which the BOCC had a duty to undertake. Yet §286.0114 declares the adoption of minutes and a proclamation as ministerial. There is nothing that requires the BOCC to adopt minutes or proclamations. The BOCC has discretion with regard to the approval, format, and content of both. Furthermore, adopting the Plaintiffs' definitions of "official," "act," and "official act," would mean that an act of an individual commissioner is official action, because it is something done voluntarily by an officer doing his duties. (See First Amended Complaint, para. 33.) Yet, the court and the Attorney General have made it clear that §286.011, which requires a public meeting when official action is taken, does not ordinarily apply to an individual commissioner. *Fee.*

Accordingly, the court should not use the Plaintiffs' extrinsic definitions to interpret §286.0114. If Plaintiffs' supported definitions are employed, then §286.0114 would be internally inconsistent, and inconsistent with the long-standing judicial interpretation of the Sunshine Law.

iv. Section 286.0114(3) exempts ministerial acts from the public comment requirement. Accordingly, even if the court finds that the May 2, 2018, Letters Constitute Official Action of the BOCC, they are Ministerial Acts and Therefore Exempt from the Public Comment Requirement under Fla. Stat. §286.0114(3).

Even if the court finds the BOCC chairperson's letters were an "official act" of the BOCC, public comment was not required because they were merely ministerial acts.

Section 286.0114 provides examples of "official" acts that do **not** require public comment:

> (3) The requirements in subsection (2) do not apply to:
> ...
> (b) An **official act** involving no more than a ministerial act, including, but not limited to, approval of minutes and ceremonial proclamations;

Fla. Stat. §286.0114(3). (Emphasis added.)

Both the approval of minutes and ceremonial proclamations involve the exercise of discretion and personal judgment. There is no duty that the BOCC approve minutes or proclamations. The BOCC has discretion as to whether to approve both and as to the content and form of both. Similarly, the decision to write the two letters in response to the Tavistock letter rested with the discretion and personal judgment of the BOCC chairperson. Therefore, even if the May 2, 2018, letters constitute official action, they were ministerial acts and exempt from the public comment requirement under §286.0114(3), Fla. Stat.

v. The BOCC was not Required to Give Notice of or List its Discussion of the CFX Expressway Project on the Agenda.

The Plaintiffs rely on allegations that the BOCC's discussion of the CFX Expressway Project was not on the agenda in support of its claims. These allegations provide no support for Plaintiffs' argument that the BOCC was required to take public comment.

Florida case law is clear that there is no requirement that an item be on an agenda before it can be considered by a governmental body. Fla. Stat. §286.011; *Hough v. Stembridge*, 278 So. 2d

288 (Fla. 3d DCA 1973). "[W]hile Florida courts have recognized that notice of public meetings is a mandatory requirement of the Government in the Sunshine Law, the preparation of an agenda that reflects every issue that may come before the governmental entity at a noticed meeting is not." Op. Att'y Gen. Fla. 2003–53 (2003). If the meeting itself is properly noticed, chapter 286 does not require the governmental entity to "give notice of potential deviation from a previously announced agenda." *Grapski v. City of Alachua*, 31 So. 3d 193, 199 (Fla. 1st DCA 2010) (citing *Law & Info. Servs., Inc. v. City of Riviera Beach,* 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996)).

Therefore, Plaintiffs' allegations that the BOCC failed to include Mr. Charles Lee's presentation on the CFX Expressway Project on the meeting agenda, is of no assistance in Plaintiffs' efforts to cobble together an argument that §286.0114 required the BOCC to take public comment.

In conclusion, accepting all of the Plaintiffs' factual allegations as true, Count I of Plaintiffs' First Amended Complaint fails to establish a violation of §286.0114. The BOCC chairperson simply sent two letters following a workshop discussion. These letters do not constitute an "official act" and there was no decision-making process, no motion made, and no vote or official action taken by the BOCC. Therefore, no public comment was required under §286.0114 and Count I of Plaintiffs' First Amended Complaint should be dismissed with prejudice.

II. COUNT II ASSERTS A CLAIM THAT THE BOCC VIOLATED §286.012 BECAUSE NO VOTE WAS NOTED IN THE MINUTES OF THE BOCC MEETING. SECTION 286.012 REQUIRES THAT MINUTES REFLECT A VOTE FOR EACH COMMISSIONER WHEN A VOTE IS TAKEN. SINCE NO VOTE WAS TAKEN BY THE BOCC, THE MINUTES COMPLY WITH §286.012

Recognizing the weakness of Count I because no vote was taken, in Count II Plaintiffs argue that the BOCC was required to take a vote under Fla. Stat. §286.012. This section has never been interpreted to require a vote on any matter. The Plaintiffs do not cite to any authority finding

otherwise. Section 286.012 merely requires that elected officials not abstain from voting unless they have a conflict and requires minutes to reflect the vote of all present, if a vote is taken. Section 286.012 provides:

> **286.012 Voting requirement at meetings of governmental bodies.**—A member of a state, county, or municipal governmental board, commission, or agency who is present at a meeting of any such body **at which an official decision, ruling, or other official act is to be taken or adopted may not abstain from voting in regard to any such decision, ruling, or act**; and a vote shall be recorded or counted for each such member present, unless, with respect to any such member, there is, or appears to be, a possible conflict of interest under s. 112.311, s. 112.313, s. 112.3143, or additional or more stringent standards of conduct, if any, adopted pursuant to s. 112.326.

(Emphasis added.)

The pre-condition of the statute is that an "official decision, ruling or other official act" is taken. Thus, the intent of the statute is to mandate that all members present at a BOCC meeting cast a vote on all matters on which a vote is taken and the minutes reflect the vote of each member. *See* Government-in-the-Sunshine Manual, 2018 Edition, Volume 40, page 46. Section 286.012, Fla. Stat., clearly does not demand that a vote be taken on any specific matter, let alone when the chairperson decides to send a letter.

Therefore, Plaintiffs' First Amended Complaint does not allege a violation of §286.012. Accordingly, Count II of Plaintiffs' First Amended Complaint fails to state a cause of action and should be dismissed with prejudice.

Conclusion

Counts I and II of Plaintiffs' First Amended Complaint fails to state a cause action upon which relief can be granted as public comment was not required prior to sending out the May 2, 2018, letters and the BOCC was not required to vote under §286.012 prior to sending out the

chairperson's May 2, 2018, letters. Since Plaintiffs will not be able to state causes of action in Count I and II, Counts I and II of Plaintiffs' First Amended Complaint should by dismissed with prejudice.

WHEREFORE, Defendant, OSCEOLA COUNTY, FLORIDA, respectfully requests this Honorable Court dismiss Counts I and II of Plaintiffs' First Amended Complaint with prejudice and grant any other relief this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that on January 30, 2019, a copy hereof has been filed electronically with the Clerk of Court via the Florida E-Filing Portal, which will provide an electronic copy to:

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