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**M E M O R A N D U M**

TO: Members of the Accessibility Advisory Council  
and the Florida Building Commission

FROM: Kathy Butler, Assistant General Counsel  
Suzanne Schmith, Staff Attorney

SUBJECT: Ex Parte Communications

DATE: Oct. 7, 1999

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The subject of possible ex parte communications between members of the Accessibility Advisory Council (Council), waiver applicants, and advocacy groups arose at the August Council meeting. At that meeting, Suzanne Schmith passed out a copy of an e-mail she sent to Larry Schneider on the subject (attached), and agreed to research the matter further as a result of concern on the part of Council members. Additional research supported Suzanne's e-mail opinion that such ex parte communication should not continue.

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Summary:

Common law and public policy prohibit ex parte communication between a decision-making body and affected parties about the merits of a matter while that matter is pending before the decision-making body. In other words, it is improper for Council members and Florida Building Commissioners (Commissioners) to discuss the merits of an individual application with either the applicant or members of advocacy groups while the application is pending. We realize that this is a difficult situation, as Council members are prevented from

discussing applications with their own constituents, who they represent on the Council and from whom they may want input. However, this does not prohibit Council members and Commissioners from discussing *general policy issues* with these interested parties. Applicants may discuss a pending application with DCA staff members or with a member of an advocacy group who does not serve on the Council or Commission. As always, Council members and Commissioners may discuss individual applications among themselves or with each other at publicly noticed meetings.

In the event that prohibited ex parte communications have previously occurred, or if they occur by accident in the future, please follow the "cure" outlined in Suzanne's attached e-mail: any Council member or Commissioner who has contacted or been contacted by an applicant should disclose at the next regularly-scheduled meeting that the communication occurred, when it occurred, and the nature of the communication.

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#### Long Version:

The prohibition against ex parte communication, communication between a judge and one party to a lawsuit without the other party's knowledge, is a well-established common law doctrine intended to protect the unbiased nature of the court system and to provide each party the opportunity for rebuttal or cross-examination. The Florida Supreme Court has strongly stated that a judge should not engage in any conversation about the merits of a pending case with only one of the parties to the case because it gives the appearance of impropriety and places the judge in the position of possibly receiving inaccurate information or being unduly swayed. *See* *Rose v. State*, 601 So. 2d 1181 (Fla. 1992). The Florida Bar Code of Judicial Conduct and the Rules Regulating The Florida Bar instruct

judges and attorneys to avoid ex parte communications except as authorized by law. *See* Fla. Bar Code of Judicial Conduct, Canon 3A(4); Rules Regulating The Florida Bar, R. 4-3.5(b). Judges may be disqualified from cases for engaging in ex parte communications. *See* *Robbins v. Robbins*, 1999 WL 651634 (2d DCA 1999); *Klapper-Barrett v. Nurell*, 1999 WL 754733 (5th DCA 1999).

This prohibition also applies to administrative hearings. *See* *Twins D& D, Inc. v. Department of Bus. & Prof'l Regulation*, 722 So. 2d 234 (2d DCA 1998) (reversing hearing officer's revocation of license and remanding for new hearing before different hearing officer). Further, in proceedings in which substantial interests of a party are determined by an agency, rule 120.66 prohibits ex parte communications relative to the merits of a case between the agency head and any party after the agency head has received a recommended order. *See* r. 120.66(1), Fla. Admin. Code (1998). The agency head must enter any such communications into the record, and if he or she does not, may be subject to a fine or disciplinary action. *See id.* at 120.66(3).

Legislators and agencies have apparently strongly felt that the prohibition against ex parte communication should be extended to situations other than court cases. Section 350.042 forbids Florida Public Service Commissioners from participating in ex parte communications concerning the merits in certain proceedings. *See* § 350.042(1), Fla. Stat. (1997). If such a communication occurs, the commissioner must place it on the record; if a commissioner knowingly fails to do so, he or she is subject to removal and may be assessed a civil penalty of up to \$5,000. *See id.* at § 350.042(4) & (6). The Public Service Commission's rules prohibit Commission employees from directly or indirectly relaying to a Commissioner any communication from a party or interested person which would be prohibited under section 350.042. *See* r. 25-22.033, Fla. Admin. Code (1998). Other agencies that have prohibited ex parte communication between commissioners and

parties regarding the merits of pending matters are the Florida Commission on Ethics (34-5.0171, 34-9.0121, 34-11.0171, & 34-15.0171) and the Florida Commission on Human Relations (60Y-4.002).

Ex parte proceedings are statutorily permitted only in the most extreme cases: in domestic violence cases when there is an immediate and present danger (§ 741.30(5)), in an action to abate an imminent hazard caused by a hazardous substance (§ 403.726(3)), in the examination and commitment of people under the Baker Act in certain cases (§ 394.462(1)(a)), in actions to enjoin the manufacture or sale of counterfeit goods (§ 506.09(2)), and when defendants do not timely respond after initial pleadings are filed in an action for eviction (§ 66.061).

There are some additional exceptions to the prohibition. Section 286.0115 permits local governments to adopt procedures for disclosure of ex parte communications with local public officials, which would allow a citizen to discuss with an official the merits of a matter on which action may be taken by the local board or commission without a presumption of prejudice arising from the communication. *See* § 286.0115(1), Fla. Stat. (1997). However, the statute explicitly excludes members of boards or commissions of state agencies. *See id.* at § 286.0115(1)(b). This statute also allows local governments to adopt similar procedures as applicable to quasi-judicial proceedings on land use matters, with no requirement of disclosure. *See id.* at § 286.0115(2).

As you can see, there is a strong public policy against ex parte communication. Where does this leave the Council? While neither statute nor rules specifically prohibit Council members from engaging in ex parte communication, and the Council is not a neutral judge ruling on a dispute between two parties, the Council does perform a judge-like function when it considers applications for waiver and decides whether to recommend that the Florida Building Commission (Commission) grant or deny waivers. In Florida, the granting of variances and special exceptions or permits are "quasi-judicial" actions. *See Jennings v. Dade County*, 589 So. 2d 1337, 1343 (3d DCA 1991) (Barkdull, J., concurring). Ex parte communications are considered inherently improper and have been described as "anathema to quasi-judicial proceedings . . ." *See id.* at 1341. Although the majority of the court in *Jennings* advised that the occurrence of such a communication in a quasi-judicial proceeding does not mandate automatic reversal as it could in a judicial proceeding, the court held that the allegation of an ex parte communication states a cause of action and cautioned that "[q]uasi-judicial officers should avoid all such contacts . . ." *See id.* The Council's proceedings are analogous to these quasi-judicial proceedings.

In conclusion, it is improper for Council members and Commissioners to discuss the merits of an individual application with either the applicant or members of advocacy groups while the application is pending. However, this does not prohibit Council members and Commissioners from discussing *general policy issues* with these interested parties. Also, applicants may discuss a pending application with DCA staff members or with a member of an advocacy group who does not serve on the Council or Commission. As always, Council members and Commissioners may discuss individual applications among themselves or with each other at publicly noticed meetings.