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Daniel D. Eckert, Esq.
County of Volusia
123 W. Indiana Avenue
DeLand, FL 32720-4613

Re: Sunshine Law Issues in Echo Water Access Acquisition Program

Dear Dan:

On behalf of the First Amendment Foundation, Inc., I write to express the Foundation's deep concern that the Sunshine Law has been violated during the process of ranking properties for acquisition under this program. The Foundation requests that the Council cure this violation and then continue with this program in compliance with the Sunshine Law.

I understand that the legal department already has said that it does not agree that this process violates the Sunshine Law, and I recognize that the staff and Council have not intended to violate or evade the law. Nevertheless, during the period following the Council's workshop on March 22, 2012, through the Council meeting on April 5, 2012, the process veered out of the Sunshine, and an integral part of the Council's decision making process improperly was conducted outside the purview of the Sunshine Law.

Summary of the Relevant Facts

The Council is engaged in ranking and selecting properties to be acquired in its water access program. Previously, the Council adopted a set of 12 or more criteria and invited applications for acquisition. At the workshop on March 22, 2012, the staff presented reports on about 50 properties from which the Council wanted to select up to seven properties. The discussion was complicated because the seven Council members had to refine the 50 properties by 12 or more criteria and distribute their choices around different areas of the County. The members made little progress toward consensus during that workshop. Several suggestions were offered by members and staff.

The criteria and their relative importance seem to have been thoroughly discussed and readily agreed. The difficulty lay in reaching agreement on the selection of properties to be short listed.

The Manager observed that there were different views among the members. He suggested that the staff meet with each member individually to prioritize each member's top seven properties. At the next meeting, staff would then present "all seven of the prioritized lists" from which the Council then could select its consensus list of seven properties.

At the Council meeting on April 5, however, the staff presented only one list of properties. A staff member reported that staff had one-on-one meetings with each Council member to refine a single list of seven properties plus one "secondary" selection. The staff said the Council members were not unanimous. "In order to get on this list at least four council members had to acknowledge that that this was an important piece for us to consider."

The Council accepted the list as presented with little discussion or debate of the list itself. Mr. Kelly said that he "heard a couple of other locations. Are we honing in on X number of locations? No, we're not, not specifically. We did privately. We were fine privately." Mr. Persis thanked the staff for "helping us work through all this" and said, "I certainly support the final list if that's what represents what most Council members wanted."

The Council expressed consensus approval of the list without taking a vote during the meeting. It was left to the staff to refine the list and analyze financial issues. Although the significance of the list was not clearly stated, it is clearly a short list, the creation of which is an integral step in the decision making process of the water acquisition program.

The Meetings Were de facto *Meetings of the Council.*

The obvious purpose and effect of the one-on-one meetings was privately to refine the views of individual members into a short list representing the views of a majority and to address members' concerns and views in private. The meetings did not produce seven lists reflecting legitimate staff consultations with each individual member. Instead, the staff and members used the private meetings to refine the preferences of a majority of the Council. The public never heard the discussion that would have taken place if the members had discussed their preferences in public. Even after the public meeting on April 5, 2012, the public still does not know how each member voted in the private meetings. In fact, the members apparently do not know how each other voted during the private meetings.

Such one-on-one meetings to discuss and refine the Council's consensus on a matter of Council business constitute *de facto* meetings of the Council in violation of the Sunshine Law. See, generally, Sunshine Manual at 21-22.

In *Blackford v. Orange County School Board*, 375 So.2d 578 (Fla. 5th DCA 1979), the court found that a series of one-on-one meetings between board members and the superintendent

to discuss a controversial plan for closing a school constituted *de facto* meetings of the board in violation of the Sunshine Law. This was true even though the superintendent "was adamant that he did not act as a go-between . . . and denies that he told any one board member the opinions of any other member." *Id.* at 580. Nevertheless, the court concluded that "the scheduling of six sessions of secret discussions, repetitive in content, in rapid-fire seriatim and of such obvious official portent" constituted six *de facto* meetings in violation of the Sunshine Law. *Id.*

In 1992, the Osceola School Board held a series of one-on-one meetings with the superintendent regarding an administrative reorganization. There was no evidence that the superintendent relayed board members' views from member to member, but the Circuit Court ruled that the meetings violated the Sunshine Law because "the purpose of the meetings was to present and consider staff recommendations concerning the administrative structure of the school system and to privately address any objections or concerns the board members may have. [T]he meetings were intended to refine and define the board's position on matters covered by the Sunshine Law. As such they were an integral part of the decision making process and not properly conducted behind closed doors." *Sentinel Communications Company v. School Board of Osceola County et al*, Case No: City 92-0045 (Fla 9th Judicial Circuit, April 6, 1992).[1] The court enjoined the board from holding "a series of such meetings which concern a specific agenda." *Id.*

In *Citizens for a Better Royal Palm Beach, Inc. v. Village of Royal Palm Beach*, No. CL 9114417 (Fla. 15th Cir. Ct. May 14, 1992),[2] the Circuit Court applied the rule of *Blackford* and held that a sale of property by the city was void ab initio where the city manager had arranged for the sale in question based on individual consultations with the council members after a sale approved by the council had fallen through. The court held that the individual meetings resulted in *de facto* meetings at which official action to approve the substituted sale was approved. The court invalidated the transaction after holding that an effort to cure the violation was not successful.

It is true that members of a collegial body may consult with staff "for factual information and advice without being subject to the Sunshine Law's requirements." *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So.3d 755, 784 (Fla. 2010). However, the present meetings go far beyond such consultation. Like the meetings disapproved by the cited cases, these meetings defined the Council's position on a matter that could only be defined in a public meeting.

[1] The slip opinion is published on the Attorney General's website at http://www.myfloridalegal.com/sun.nsf/cases

[2] The slip opinion is published on the Attorney General's website at http://www.myfloridalegal.com/sun.nsf/cases.

Accordingly, we request that the Council hold such public deliberations as are necessary to cure the violation and that it refrain from conducting such meetings in the further.

Sincerely,

Jon

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JDK:rk
Cc: Council Members
County Manager