



AGENDA MEMORANDUM

Planning Commission Meeting Date: April 8, 2025

To: Planning Commission
From: John Agnew, City Attorney
Date: April 2, 2025

SUBJECT: Direction and recommended hearing procedures for the appeal alleging an error in the decision or determination made by the floodplain administrator in the administration and enforcement of Sanibel Land Development Code (LDC) Chapter 94 - Floods.

BACKGROUND:

At the April 8, 2025 Planning Commission meeting, the Planning Commission is scheduled to hear an appeal made under LDC Section 94-92, which provides that an appeal can be made to the Planning Commission “when it is alleged there is an error in any requirement, decision, or determination made by the floodplain administrator in the administration and enforcement of this chapter.”

The appeal, filed by Arlene Dillon on behalf of herself and 44 other residents (the “Appellants”), alleges an error in the floodplain administrator’s determination of the boundaries of an open body of water on 1305 Seaspray Lane, in connection with building permit BLDR-2024-017801, for new construction of a single-family home at 1305 Seaspray Lane, STRAP tax parcel no. 19-46-22-T1-00300.0180 (the “Building Permit”). The Building Permit application was submitted by American Gallery of Homes of Sanibel, Inc., on behalf of the property owners, William & Sunyoung P Covalleski (“Owners”). The purpose of this memorandum is to provide direction relevant to the appeal process, as well as a recommended procedure for the appeal hearing.

SCOPE AND STANDARD OF REVIEW:

LDC Chapter 94, Division 7, relates to variances and appeals under Chapter 94. Within Chapter 94, Division 7, Section 94-92 sets forth the scope of review for the Planning Commission in this type of appeal and provides as follows:

The planning commission shall hear and decide appeals when it is alleged there is an error in any requirement, decision, or determination made by the floodplain administrator in the administration and enforcement of this chapter....

Sanibel is and shall remain a barrier island sanctuary

Unfortunately, there is no guidance within Chapter 94 as to the standard of review for such an appeal or what comprises the appellate record to be reviewed. Given the absence of such guidance, my recommendation is to hold a traditional hearing of limited duration, which allows the Planning Commission to take testimony and evidence regarding the Building Permit application and its approval. The Planning Commission will then base its decision on such testimony and evidence, along with the arguments of the parties to the appeal. As with all quasi-judicial hearings, only “competent, substantial evidence” should be relied upon in making a decision. Competent, substantial evidence is evidence that is sufficiently relevant and material that a reasonable mind would accept as adequate to support the conclusion reached. In summary, the Planning Commission is charged with determining whether the floodplain administrator erred in any requirement, decision, or determination made by the floodplain administrator in the administration and enforcement of LDC Chapter 94 – Floods, particularly as it relates to the issued Building Permit

HEARING PROCEDURE:

In terms of the appellate procedure at the Planning Commission meeting, I recommend the following:

1. Oaths should be administered to anyone wishing to provide testimony.
2. Each Planning Commissioner shall make disclosures pertaining to any site visit, *ex parte* communications, or voting conflicts. *Ex parte* communications, if any, shall be disclosed in accordance with City Council Resolution 23-012 (attached). Voting conflicts, if any, shall be disclosed in accordance with Form 8B (attached).
3. Arlene Dillon, or another representative of the Appellants, will proceed first and present arguments, testimony, and evidence in support of their position.
4. Next, City staff will have an opportunity to make an argument to the Planning Commission in support of Building Permit approval, followed by the Owners or their representatives, if they desire.
5. Thereafter, the Appellants will be provided an opportunity to briefly summarize their position and make any rebuttal arguments.
6. The Planning Commission will then deliberate and consider the testimony, evidence, and arguments presented, and the Planning Commission will render its decision on the appeal. No party will be permitted to make further argument to the Planning Commission unless it is in response to a question asked by a Planning Commission member.

I suggest that the Planning Commission establish maximum speaking times for each party, with the Appellants being allotted a total of 25 minutes, and City Staff and Appellees being allotted a combined total of 25 minutes to be allocated between them how they see fit. Thus, the order of speakers would be as follows:

Sanibel is and shall remain a barrier island sanctuary

1. Appellant argument by Ms. Dillon/Appellants
2. Staff argument
3. Owner argument, if any
4. *Summary/rebuttal by Ms. Dillon/Appellants (to the extent, if any, that some of the 25 minutes allotted has not been fully used).

If the Planning Commissioners question the parties during their arguments, the Planning Commission will have to use its discretion in determining how much additional time, if any, will be provided to a party in the event that a significant amount of time is spent answering questions. Alternatively, Planning Commission could elect to hold questions until the conclusion of all arguments.

FINAL DECISION:

Regarding the Planning Commission's final decision on a Chapter 94 appeal, the LDC provides no guidance as to the Planning Commission's authority; however, Section 82-98(e) of the Land Development Code provides as follows:

On any appeal, the City Council shall have authority to uphold, reverse or modify the Planning Commission's decision; or to remand the application to the Planning Commission for re-hearing, a new hearing, or for the consideration of additional evidence. In reversing or modifying the decision of the Planning Commission and approving an application, the City Council shall have the same authority as the Planning Commission to place conditions on such approval.

In keeping with the scope of authority under LDC Section 82-98, my opinion is that the Planning Commission may uphold, reverse, or modify the floodplain administrator's alleged erroneous requirement, decision, or determination; or remand the Building Permit application to the floodplain administrator for the consideration of additional evidence. At the conclusion of the hearing, a motion will be in order to approve one of these options—upholding, reversing, modifying, or remanding. The typical opportunity for public comment received between a motion and vote may be taken. Once a deciding motion carries, the decision of the Planning Commission will be memorialized by Resolution passed at either the current meeting or a subsequent meeting.

If you have any questions on these considerations or proposed procedures, I am available to discuss at your convenience.

Sanibel is and shall remain a barrier island sanctuary

**CITY OF SANIBEL
RESOLUTION 23-012**

RESOLUTION 23-012 OF THE CITY COUNCIL OF THE CITY OF SANIBEL, FLORIDA, RELATED TO QUASI-JUDICIAL PROCEEDINGS ON LOCAL LAND USE MATTERS; FORMALIZING A METHOD TO REMOVE THE PRESUMPTION OF PREJUDICE FROM EX PARTE COMMUNICATIONS; AND PROVIDING AN EFFECTIVE DATE

WHEREAS, the City Council of the City of Sanibel, the Sanibel Planning Commission, and certain of the City's other boards and commissions have the authority to conduct quasi-judicial proceedings on local land use matters; and

WHEREAS, ex parte communications (i.e., communications involving board members about a matter coming before the board which occur outside the noticed public hearing on the matter) are highly discouraged, because the quasi-judicial decision before the board should be based solely upon evidence in the record, known to all interested parties; and

WHEREAS, ex parte communications create a presumption of prejudice to the quasi-judicial proceeding; however, Section 286.0115, Florida Statutes, provides an avenue to formalize a method to remove the presumption of prejudice from ex parte communications related to local land use matters; and

WHEREAS, the City Council desires to formalize such method, consistent with its current, informal practices.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SANIBEL, FLORIDA:

SECTION 1. The recitals above are true and correct and made a part hereof.

SECTION 2. Consistent with Section 286.0115, Florida Statutes, the following procedures are hereby adopted for all quasi-judicial proceedings on local land use matters:

1. The substance of any ex parte communication with a local public official which relates to quasi-judicial action pending before the official is not presumed prejudicial to the action if the subject of the communication and the identity of the person, group, or entity with whom the communication took place is disclosed and made a part of the record before final action on the matter.

2. A local public official may read a written communication from any person. However, a written communication that relates to quasi-judicial action pending before a local public official shall not be presumed prejudicial to the action, and such written communication shall be made a part of the record before final action on the matter.

3. Local public officials may conduct investigations and site visits and may receive expert opinions regarding quasi-judicial action pending before them. Such activities shall not be presumed prejudicial to the action if the existence of the investigation, site visit, or expert opinion is made a part of the record before final action on the matter.

4. Disclosure made pursuant to subparagraphs 1., 2., and 3. must be made before or during the public meeting at which a vote is taken on such matters, so that persons who have opinions contrary to those expressed in the ex parte communication are given a reasonable opportunity to refute or respond to the communication. This subsection does not subject local public officials to Part III of Chapter 112, Florida Statutes, for not complying with this paragraph.

SECTION 3. This Resolution shall be effective immediately upon adoption.

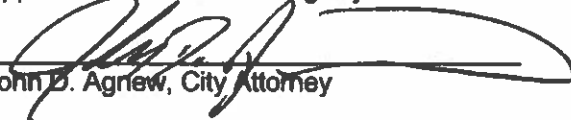
PASSED IN OPEN AND REGULAR SESSION OF THE CITY COUNCIL OF THE CITY OF SANIBEL, FLORIDA THIS 7TH DAY OF FEBRUARY 2023.

Attest:


Scotty Lynn Kelly, City Clerk


Holly D. Smith, Mayor

Approved as to form and legality:


John D. Agnew, City Attorney

Date filed with City Clerk: February 7, 2023

Vote of Council Members:

Smith	<u>Yea</u>
Johnson	<u>Yea</u>
Crater	<u>Yea</u>
Henshaw	<u>Yea</u>
Miller	<u>Yea</u>

REPORT OF EX-PARTE COMMUNICATION

Note: The completed form shall be attached to the adopted meeting minutes.

FORM 8B MEMORANDUM OF VOTING CONFLICT FOR COUNTY, MUNICIPAL, AND OTHER LOCAL PUBLIC OFFICERS

LAST NAME—FIRST NAME—MIDDLE NAME	NAME OF BOARD, COUNCIL, COMMISSION, AUTHORITY, OR COMMITTEE
MAILING ADDRESS	THE BOARD, COUNCIL, COMMISSION, AUTHORITY OR COMMITTEE ON WHICH I SERVE IS A UNIT OF:
CITY COUNTY	<input type="checkbox"/> CITY <input type="checkbox"/> COUNTY <input type="checkbox"/> OTHER LOCAL AGENCY
DATE ON WHICH VOTE OCCURRED	NAME OF POLITICAL SUBDIVISION:
	MY POSITION IS: <input type="checkbox"/> ELECTIVE <input type="checkbox"/> APPOINTIVE

WHO MUST FILE FORM 8B

This form is for use by any person serving at the county, city, or other local level of government on an appointed or elected board, council, commission, authority, or committee. It applies to members of advisory and non-advisory bodies who are presented with a voting conflict of interest under Section 112.3143, Florida Statutes.

Your responsibilities under the law when faced with voting on a measure in which you have a conflict of interest will vary greatly depending on whether you hold an elective or appointive position. For this reason, please pay close attention to the instructions on this form before completing and filing the form.

INSTRUCTIONS FOR COMPLIANCE WITH SECTION 112.3143, FLORIDA STATUTES

A person holding elective or appointive county, municipal, or other local public office **MUST ABSTAIN** from voting on a measure which would inure to his or her special private gain or loss. Each elected or appointed local officer also **MUST ABSTAIN** from knowingly voting on a measure which would inure to the special gain or loss of a principal (other than a government agency) by whom he or she is retained (including the parent, subsidiary, or sibling organization of a principal by which he or she is retained); to the special private gain or loss of a relative; or to the special private gain or loss of a business associate. Commissioners of community redevelopment agencies (CRAs) under Sec. 163.356 or 163.357, F.S., and officers of independent special tax districts elected on a one-acre, one-vote basis are not prohibited from voting in that capacity.

For purposes of this law, a "relative" includes only the officer's father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, and daughter-in-law. A "business associate" means any person or entity engaged in or carrying on a business enterprise with the officer as a partner, joint venturer, coowner of property, or corporate shareholder (where the shares of the corporation are not listed on any national or regional stock exchange).

* * * * *

ELECTED OFFICERS:

In addition to abstaining from voting in the situations described above, you must disclose the conflict:

PRIOR TO THE VOTE BEING TAKEN by publicly stating to the assembly the nature of your interest in the measure on which you are abstaining from voting; *and*

WITHIN 15 DAYS AFTER THE VOTE OCCURS by completing and filing this form with the person responsible for recording the minutes of the meeting, who should incorporate the form in the minutes.

* * * * *

APPOINTED OFFICERS:

Although you must abstain from voting in the situations described above, you are not prohibited by Section 112.3143 from otherwise participating in these matters. However, you must disclose the nature of the conflict before making any attempt to influence the decision, whether orally or in writing and whether made by you or at your direction.

IF YOU INTEND TO MAKE ANY ATTEMPT TO INFLUENCE THE DECISION PRIOR TO THE MEETING AT WHICH THE VOTE WILL BE TAKEN:

- You must complete and file this form (before making any attempt to influence the decision) with the person responsible for recording the minutes of the meeting, who will incorporate the form in the minutes. (Continued on page 2)

APPOINTED OFFICERS (continued)

- A copy of the form must be provided immediately to the other members of the agency.
- The form must be read publicly at the next meeting after the form is filed.

IF YOU MAKE NO ATTEMPT TO INFLUENCE THE DECISION EXCEPT BY DISCUSSION AT THE MEETING:

- You must disclose orally the nature of your conflict in the measure before participating.
- You must complete the form and file it within 15 days after the vote occurs with the person responsible for recording the minutes of the meeting, who must incorporate the form in the minutes. A copy of the form must be provided immediately to the other members of the agency, and the form must be read publicly at the next meeting after the form is filed.

DISCLOSURE OF LOCAL OFFICER'S INTEREST

I, _____, hereby disclose that on _____, 20 ____ :

(a) A measure came or will come before my agency which (check one or more)

- ☐ inured to my special private gain or loss;
- ☐ inured to the special gain or loss of my business associate, _____ ;
- ☐ inured to the special gain or loss of my relative, _____ ;
- ☐ inured to the special gain or loss of _____ , by
whom I am retained; or
- ☐ inured to the special gain or loss of _____ , which
is the parent subsidiary, or sibling organization or subsidiary of a principal which has retained me.

(b) The measure before my agency and the nature of my conflicting interest in the measure is as follows:

If disclosure of specific information would violate confidentiality or privilege pursuant to law or rules governing attorneys, a public officer, who is also an attorney, may comply with the disclosure requirements of this section by disclosing the nature of the interest in such a way as to provide the public with notice of the conflict.

Date Filed

Signature

NOTICE: UNDER PROVISIONS OF FLORIDA STATUTES §112.317, A FAILURE TO MAKE ANY REQUIRED DISCLOSURE CONSTITUTES GROUNDS FOR AND MAY BE PUNISHED BY ONE OR MORE OF THE FOLLOWING: IMPEACHMENT, REMOVAL OR SUSPENSION FROM OFFICE OR EMPLOYMENT, DEMOTION, REDUCTION IN SALARY, REPRIMAND, OR A CIVIL PENALTY NOT TO EXCEED \$10,000.