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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

CASE NO. 2D16-3361

CITY OF ST. PETERSBURG,
Appellant/Defendant,

vs.

BRUCE WRIGHT,
Appellee/Cross-Appellant/Plaintiff.

On Appeal from the Circuit Court of the Sixth Judicial
Circuit in and for Pinellas County, Florida
L.T. No. 522013CA010801

APPELLEE/CROSS-APPELLANT'S ANSWER BRIEF/CROSS-INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS. i

TABLE OF CITATIONS. ii

STATEMENT OF THE CASE AND FACTS. 1

I. Statement of the Case.. 1

II. Statement of the Facts.. 2

A. The Context of the Federal Litigation.. 2

B. The City Council's October 13, 2011, Meeting.. 3

C. The City Council's November 3, 2011, Meeting.. 7

SUMMARY OF ARGUMENT.. 9

ARGUMENT.. 12

I. The City Failed to Hold Two Public Readings Prior to Amending Section 20-30 of the City Code as Required by Florida Statutes.. . . 12

II. The City Violated Florida's Sunshine Law When It Engaged in Deliberations to Amend a City Ordinance at a Closed Attorney-Client Session. 19

III. Conclusion. 29

CERTIFICATE OF SERVICE. 31

CERTIFICATE OF COMPLIANCE WITH TYPEFACE. 32

TABLE OF CITATIONS

CASES

Anderson v. City of St. Pete Beach,
161 So. 3d 548 (Fla. 2d DCA 2014). 10, 20, 27, 28

Bd. of Pub. Instruc. of Broward Cnty. v. Doran,
224 So. 2d 693 (Fla. 1969). 19, 22

Bigelow v. Howze,
291 So. 2d 645 (Fla. 2d DCA 1974) 17

Bruckner v. City of Dania Bch.,
823 So. 2d 167 (Fla. 4th DCA 2002). 12, 19

Catron v. City of St. Petersburg,
658 F.3d 1260 (11th Cir. 2001).. . . . . 3-5, 21, 26

City of Dunnellon v. Aran,
662 So. 2d 1026 (Fla. 5th DCA 1995). 20

City of Miami Bch. v. Berns,
245 So. 2d 38 (Fla. 1971). 13, 25, 26

City of St. Petersburg v. Austin,
355 So. 2d 486 (Fla. 2d DCA 1978). 14, 21

Coleman v. City of Key West,
807 So. 2d 84 (Fla. 3d DCA 2001). 17

Fla. Intergovernmental Risk Mgmt. Ass'n v. City of Greenacres,
804 So. 2d 448 (Fla. 4th DCA 2001). 19

Neu v. Miami Herald Pub. Co.,
462 So. 2d 821 (Fla. 1985). 15

Sch. Bd. of Duval Cnty. v. Fla. Pub. Co.,
670 So. 2d 99 (Fla. 1st DCA 1996).. 13

Times Pub. Co. v. Williams,
222 So. 2d 470 (Fla. 2d DCA 1969). 15, 27

Wood v. Marston,
442 So. 2d 934 (Fla. 1983). 13

Zorc v. City of Vero Beach,
722 So. 2d 891 (Fla. 4th DCA 1998). 18, 20, 26, 28

FLORIDA CONSTITUTION

Art. I, § 24, Fla. Const.. 13

FLORIDA ATTORNEY GENERAL OPINIONS

Fla. Atty. Gen. Op. 081-32, 1981 WL 140311. . . . . 14, 15

Fla. Atty. Gen. Op. 98-79, 1998 WL 883337. . . . . 14, 22

Fla. Att'y Gen. Op. 2000-68, 2000 WL 1729642. 21

OTHER AUTHORITIES

St. Petersburg City Charter, Sec. 3.05.. . . . . 16, 25

St. Petersburg City Code, Section 20-30.. . . . . *passim*

STATEMENT OF THE CASE AND FACTS

I. Statement of the Case.

On November 21, 2013, Appellee/Cross-Appellant Bruce Wright (Wright) filed a Complaint in the Sixth Judicial Circuit, in and for Pinellas County, Florida, against the Appellant/Cross-Appellee City of St. Petersburg, Florida (City). (R.11-24.) The Complaint sought injunctive and declaratory relief under Florida's Government in the Sunshine Law, § 286.011(1), Fla. Stat. (*Id.*) The City filed an Answer on December 16, 2013. (R.90-98).

On November 13, 2015, Wright moved for summary judgment. (R.99-157.) The City did not file a response to the motion. On June 8, 2016, a hearing on the motion for summary judgment was held before the Hon. Kathleen Hessinger. (R.159, 253-91.)

On June 24, 2016, the trial court entered Final Judgment for Wright, holding that the City violated the statutory requirements of § 286.011(1) and § 166.041(3)(a) when it amended Section 20-30 of the City Code without providing reasonable notice to the public. (R.160-65.) The trial court declared the amendments to the ordinance void ab initio and retained jurisdiction to award attorneys' fees and costs. (*Id.*) However, the trial court ruled adversely to Wright in concluding that the City did not exceed its statutory authority during the closed attorney-client session when it

discussed amending Section 20-30. (*Id.*)

On July 21, 2016, the City filed a Motion for Rehearing (R.187-89) and supplemented the record with five exhibits (R.190-222). On July 25, 2016, the trial court held a hearing (R.292-307) and denied the City's motion for lack of jurisdiction due to untimely filing. (R.236-37.)

The City filed its notice of appeal. (R. 227.)

The City filed a Motion for Stay (R.234-35) and Wright filed a Response (R.238-44.) There has been no ruling on the Motion to Stay.

On August 4, 2016, Wright filed his notice of Cross-Appeal to appeal the adverse portions of the trial court's order. (R.245-46.)

II. Statement of the Facts.

This controversy arises out of amendments made by the City Council in 2011 to § 20-30 of the City Code in response to federal litigation.

A. The Context of the Federal Litigation.

In May 2009, six homeless individuals filed an action against the City in the United States District Court for the Middle District of Florida challenging, *inter alia*, the constitutionality of City Code § 20-30 (authorization to issue trespass warning for public property)(§ 20-30) both on its face and as-applied. *Catron v. City of St. Petersburg*, Case No. 8:09-cv-00923 (M.D. Fla.) (R.12 ¶ 9; 91 ¶ 9.) Wright was not

a plaintiff in that action and those plaintiffs are not a part of the action here. (*Id.*)

On September 28, 2011, on appeal from an adverse final judgment, the Eleventh Circuit held that plaintiffs had stated a claim for relief that § 20-30 was unconstitutional on its face and as-applied in violation of the United States Constitution's Fourteenth Amendment and in violation of the Florida Constitution's right to intrastate travel. *Catron v. City of St. Petersburg*, 658 F.3d 1260 (11th Cir. 2001). (R.12-13 ¶ 10; 91 ¶ 10.)

On October 18, 2011, the City filed a Petition for Rehearing En Banc in the Eleventh Circuit, which was denied on November 29, 2011. The mandate issued on December 13, 2011, remanding the case to the District Court for further proceedings. (R.13 ¶ 11; 91 ¶ 11.)

On December 16, 2011, the City filed a Motion to Dismiss in the District Court asserting that plaintiffs' claims were moot because the City had amended § 20-30 while its Petition for Rehearing En Banc was pending. (R.13 ¶ 12; 91 ¶ 12.)

The City represented to the District Court that the amendment was passed into law after the approval by the City Council at two public hearings and mayoral approval. (R.13 ¶ 13; 91 ¶ 13.)

B. The City Council's October 13, 2011, Meeting.

The City voted to approve amendments to § 20-30 immediately after it

adjourned a closed attorney-client session held on October 13, 2011, to discuss *Catron v. City of St. Petersburg*. (R.14-15 ¶¶ 19-25; 92 ¶¶ 19-25; 36-45.) The "first reading" of § 20-30 that occurred on October 13, 2011, was not held on the first or third Thursday of the month during the City Council's generally scheduled business meetings. (R.124, Tr. 7:14-25; 126-129, Tr. 25:7-28:3; 137-38.) Instead, the City conducted the "first reading" of the ordinance at a "mini-meeting" of the City Council which is reserved for awards/proclamations and closed attorney-client sessions. (*Id.)* There is typically no business conducted at these meetings and no open forum for citizen comment. (R.124, Tr. 7:5-25; 137-38; 149-50.)

Consistent with these procedures, the agenda for the October 13, 2011, mini-meeting only lists awards/presentations and a closed attorney-client session. (R.27-30.) The mini-meeting agenda lists "adjournment" immediately after the closed attorney-client session. The City Council's October 13, 2011, meeting agenda does not list a first reading to amend § 20-30. (R.27-30; 13 ¶ 14; 91 ¶ 14.) This departed from the City's usual practices and procedures for providing the public with notice of a first reading of an ordinance on a section of the agenda titled "New Ordinances" and attaching a copy of the draft ordinance to the agenda. (R.147-49; 152-55, Tr. 6:13-9:23; 125, Tr. 11:2-25; 126-28, Tr. 25:7-27:10.)

The City closed its Council meeting to the public on October 13th to go into

the "attorney-client session." The Chair of the Council announced that "any or all of the following named persons will be attending this meeting: James Kennedy, Chair; Karl Nurse, Vice-Chair; Herbert E. Polson; Bill Dudley; Leslie Curran; Steve Cornell; Wengay Newton; Jeff Danner; Mayor Bill Foster; Attorneys for the City John Wolfe, Mark Winn, Joe Patner." He also stated the meeting would be recorded by a court reporter. These participants were the members of the City Council, the Mayor, and the City attorneys including Joe [Joseph] Patner who represented the City in the federal litigation of *Catron*. (R.14 ¶ 18; 92 ¶ 18; 33, Tr. 2:2-25; 37, Tr. 4:10-20.)

At the closed attorney-client session, Assistant City Attorney Patner discussed the status of the *Catron* litigation. He stated that in light of the Eleventh Circuit's decision that there was no appeal process to challenge trespass warnings issued under § 20-30 of the City Code, he drafted a revised version of the ordinance "which does provide for the appeal process." (R.16 ¶ 31; 93 ¶ 31; 38, Tr. 7:20-9:4.) He passed out a copy of the draft amendment to § 20-30 and explained that the purpose of adopting the revision was so that he could argue to the District Court that the case was moot so that plaintiffs would not be prevailing parties and, thus, not entitled to attorneys' fees. (R.16 ¶ 32; 93 ¶ 32; 38-39, Tr. 9:3-11:11.)

City Attorney Wolfe explained that the closed attorney-client session was related to "litigation expenditures" as opposed to "settlement" because the Council

was discussing how to avoid paying attorneys' fees to plaintiffs' counsel. (R.16 ¶ 33; 93 ¶ 33; 39, Tr. 11:12-18.) He suggested to the Council that it approve the ordinance on the first reading because otherwise it would take away one of the "tools to help reduce the attorneys' fees." (R.16 ¶ 34; 93 ¶ 34; 40, Tr. 17:16-20.)

Council member Dudley moved to approve the ordinance. Council member member Kennedy stated that the Council could not approve the ordinance "in this session." Attorney Wolfe agreed and then stated that the Council could approve the ordinance once the Council came out of the session. (R.16 ¶ 35; 93 ¶ 35; 40-41, Tr. 17:22-18:1.)

The Council proceeded to discussed the substance of the ordinance and the design of the appeal process for trespass warnings. (R.16 ¶ 36; 93 ¶ 36; 41-42, Tr. 18:25-24:14.) Member Polson asked whether Council members could be deposed as to their intent in amending the ordinance, and he was assured by City Attorney Wolfe that they would not. (R.17 ¶ 37; 94 ¶ 37; 42-43, Tr. 25:4-27:3.) The Council then discussed general enforcement concerns regarding the issuance of trespass warnings under § 20-30. (R.17 ¶ 38; 94 ¶ 38; 43-44, Tr. 27:5-30:20.)

Member Newton questioned what would occur if the amended version of the ordinance was not passed. Attorney Patner responded that unless the City corrected the constitutional "defect" with the ordinance that the City would have to fight about

it in the District Court and could be liable for attorneys' fees if it lost. (R.17 ¶ 39; 94 ¶ 39; 44, Tr. 31:2-16.) Mayor Foster stated that he thought the amended ordinance "should be passed." (R.17 ¶ 40; 94 ¶ 40; 44, Tr. 33:24-25.) Attorney Wolfe stated that he recommended that once the Council came out of the closed session, the Council should "pass it on the first reading, the title could be read, and just set it for public hearing." (R.17 ¶ 41; 94 ¶ 41; 45, Tr. 34:5-8.) The Council subsequently terminated the closed session. (R.17 ¶ 42; 94 ¶ 42; 45, Tr. 34:18-20.)

Upon exiting the closed session, the Council unanimously approved the amendment to § 20-30 without any discussion, including not repeating their deliberations on the record about the ordinance that had occurred during the closed session. (R.17 ¶ 43; 94 ¶ 43; 45, Tr. 34:21-36:6.)

C. The City Council's November 3, 2011, Meeting.

The November 3, 2011, City Council meeting agenda lists as Item No. F (Public Hearings): "Ordinance 2-H creating a new Section 20-30(i); providing for appeals to the issuance of trespass warnings in certain situations; providing for hearing masters and procedures for appeals; clarifying and formalizing the process for an appeal of a trespass warning; and amending Section 20-30(e) to provide that trespass warnings shall identify the right to an appeal of a trespass warning." (R.49; 17-18 ¶ 44; 94 ¶ 44.)

At this meeting, Assistant City Attorney Winn stated that several of the City's ordinances had been challenged in court and that the City had prevailed on everything but that the Eleventh Circuit noted that there were concerns that the City did not have an appeals procedure when trespass warnings were issued. He said "[w]e don't necessarily agree with that... But just to ensure that there is a clearly written procedure that formally lays out a process, we have established this trespass appeal warning process so that anybody that's issued an appeal or a trespass warning will know what the process is." (R.18 ¶ 45; 94 ¶ 45; 64-65, Tr. 2:14-3:9.)

The Council began to vote on the ordinance without discussion when the Clerk told them there was a person who wishes to make a public comment. (R.18 ¶ 46; 94 ¶ 46; 65, Tr. 3:10-14.) A member of the public questioned the projected amount of fees associated with hiring hearing masters to conduct the trespass warning appeals. (R.65-67, Tr. 3:16-5:7.) Member Newton then asked the attorneys about the costs of the appeal process and how hearing masters are retained. (R.67-70, Tr. 5:10-8:5; 18 ¶ 47; 95 ¶ 47.) There was no other discussion on the record about the ordinance. (R.18 ¶ 48; 95 ¶ 48; 65-71.) The Council unanimously passed the amendment to § 20-30. (R.18 ¶ 49; 95 ¶ 49; 70-71, Tr. 8:8-9:3.) The Mayor, who has veto power over the ordinances, did not veto, and the effective date of the ordinance was November 10, 2011, at 5:00 p.m. (R.18 ¶ 50; 95 ¶ 50; 75; 146.)

SUMMARY OF ARGUMENT

This Court should affirm the trial court's decision that the City of St. Petersburg violated Florida law when it failed to provide reasonable notice of the first reading of a proposed City ordinance (amending Section 20-30) on October 3, 2011. The City voted to approve the ordinance at the first reading immediately after it adjourned a closed attorney-client session held pursuant to § 286.011(8), Fla. Stat. The City conducted this reading at a "mini-meeting" of the City Commission which is reserved for awards/proclamations and closed attorney-client sessions. No official business is usually transacted at these meetings and there is no public forum at these meetings. The agenda for the meeting did not provide any notice that there would be any official business transacted at the "mini-meeting." Likewise, the City failed to notify the public that there would be a first reading of an ordinance, a departure from the City's usual practice of providing notice on the agenda and a copy to the public in advance of the first reading. By voting on the amendment immediately after a meeting that was closed to the public, the trial court was correct to conclude that the City failed to provide reasonable notice of the first reading of the ordinance.

The City's argument that it was not required to provide notice of a first reading should be rejected. Florida's Government in the Sunshine Law clearly requires that all meetings be open to the public and the public must be provided reasonable notice

so that it has the opportunity to attend and be heard on official business. Two public readings are required by law prior to adoption of a city ordinance, which is an official legislative act that is required to be taken at a public meeting. Both readings are mandatory requirements of law and the failure to have a first reading at a meeting that was open to the public is a violation of Fla. Stat. §§ 166.041 and 286.011.

Wright cross-appeals the portion of the trial court's order that found that the City did not exceed its statutory authority when it engaged in substantive deliberations about the proposed ordinance during the closed attorney-client session on October 3, 2011, pursuant to the limited exemption to the Sunshine Law provided in § 286.011(8), Fla. Stat. All deliberations and discussions by the City Commission about the ordinance must be conducted in the Sunshine to allow the public the opportunity to be informed contemporaneously of the City's decision-making process. Every step in the decision-making process is open to the public, not merely the final votes. The transcript of the closed session clearly demonstrates that the City exceeded its legislative authority when it discussed how to amend an ordinance that was previously held unconstitutional by the U.S. Eleventh Circuit Court of Appeal as a litigation strategy to moot out pending litigation. This Court should follow its same reasoning in *Anderson v. City of St. Pete Beach*, 161 So. 3d 548, 553 (Fla. 2d DCA 2014), where it held that St. Pete Beach exceeded its statutory authority for

discussions held at closed attorney-client sessions on how to amend a comprehensive plan that had been invalidated by the court.

The Court should affirm the trial court's order declaring a violation of the statutory notice requirements in connection with the first reading of the ordinance held on October 3, 2011, and voiding ab initio of the 2011 amendments to Section 20-30. This Court should reverse the portion of the trial court's order related to the secret deliberations on the ordinance during the closed attorney-client session and declare that the City violated the Sunshine Law.

This Court should also find that Wright is entitled to reasonable attorneys' fees and costs.

ARGUMENT

I. The City Failed to Hold Two Public Readings Prior to Amending Section 20-30 of the City Code as Required by Florida Statutes.

The trial court granted summary judgment in favor of Wright, holding that the City violated Florida's Government in the Sunshine Law by violating the notice provisions of § 286.011(1) and §166.041(3)(a) of the Florida Statutes. (R.160-65.) The trial court's decision is subject to de novo review and should be affirmed because there were no genuine issues of material fact and summary judgment was appropriate as a matter of law. *Bruckner v. City of Dania Bch.*, 823 So. 2d 167, 171 (Fla. 4th DCA 2002).

The trial court's decision holding that the City violated notice requirements for enacting ordinances under Florida law was compelled by well-established legal precedent. Florida's Sunshine Law requires, in relevant part:

> All meetings of any board or commission of any state agency or authority of any agency or authority of any county, municipal corporation, or political subdivision, 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. The board or commission must provide reasonable notice of all such meetings.

§ 286.011(1), Fla. Stat. (2016). This statute is rooted in state constitutional guarantees. Art. I, § 24(b), Fla. Const.

Florida's Sunshine Law governs conduct of city councils and other municipal agencies. *City of Miami Bch. v. Berns*, 245 So. 2d 38, 40 (Fla. 1971). The purpose of the Sunshine Law is "the protection of the public's right to be present and to be heard during all phases of enactments by governmental boards and commissions." *Sch. Bd. of Duval Cnty. v. Fla. Pub. Co.*, 670 So. 2d 99, 101 (Fla. 1st DCA 1996). The Sunshine Law should be construed liberally "to give effect to the public purpose and to frustrate evasive devices." *Id.; see also Wood v. Marston,* 442 So. 2d 934, 938 (Fla. 1983) ("Sunshine Law was enacted in the public interest to protect the public from 'closed door' politics and, as such, the law must be broadly construed to effect its remedial and protective purpose").

The trial court correctly found that the City failed to provide the public reasonable notice that it would hold a first reading of proposed amendments to City Code § 20-30. (R.5.) The City argues that the trial court erred because "there was no requirement that the first reading on October 13, 2011 be noticed in advance." (Initial Br., at 7.) The City does not dispute that it failed to provide notice to the public of the first reading of the ordinance. The City simply asserts that there is no legal requirement that it do so, without any citation to legal authority to support its novel

position.[1]

The enactment of an ordinance is a formal legislative action which must take place at a properly noticed public meeting. Fla. Atty. Gen. Op. 98-79, 1998 WL 883337, at *2 ("The adoption of the ordinance is a responsibility resting with the city commission, and the city commission's discussions and deliberations on the proposed ordinance must occur at a duly noticed city commission meeting."). Florida law requires that the City, prior to adoption of an ordinance, hold public readings on at least two separate days. § 166.041(3)(a), Fla. Stat. (2016). This statute establishes a uniform procedure for the adoption of municipal ordinances and cannot be lessened or reduced by any municipality in the state. Fla. Atty. Gen. Op. 081-32, 1981 WL 140311, at *2. As this Court previously held, in interpreting this statute, it is "obvious that the legislature mandated that this reading be done on no less than two occasions prior to its passage." *City of St. Petersburg v. Austin*, 355 So. 2d 486, 488 (Fla. 2d DCA 1978) ("legislature intended such reading to be aloud as to be heard by the public in order that the public might be informed of the measures under consideration by the City").

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[1] The City instead relies three times to a statement by the trial court at the hearing on the motion for rehearing (R.292-306), which the trial court held it did not have jurisdiction to consider. (Initial Br., at 5, 8 & 9.) Clearly, this cannot bolster the City's argument and is not pertinent to the legal discussions on appeal.

The City argues that the first reading is not "binding" (and therefore not required to be noticed in advance) because a second reading was required after which the ordinance was officially adopted. (Initial Br., at 7.) This is incorrect as a matter of law. Because Florida law requires that the ordinance be read aloud on at least two occasions, a first reading at a meeting open to the public was necessary for the valid adoption of the ordinance.[2] Fla. Atty. Gen. Op. 081-32, 1981 WL 140311, at *2 ("reading requirements contained in § 166.041(3)(a), F.S., are the minimum, mandatory requirements necessary for the valid adoption of an ordinance by a municipality"). The entire decision-making process must be open to the public, not merely meetings at which a final vote is taken. *Times Pub. Co. v. Williams*, 222 So. 2d 470, 473 (Fla. 2d DCA 1969), *overruled in part on other grounds, Neu v. Miami Herald Pub. Co.*, 462 So. 2d 821 (Fla. 1985) ("Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action. It follows that each step constitutes an 'official act,' an indispensable requisite to 'formal action,' within the meaning of the act.").

The trial court correctly found that the City failed to provide reasonable notice to the public prior to the required first reading. The City's usual practice and

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[2] This argument also is not credible because the November 2011 version of the ordinance recites the dates of the "first reading" (October 13, 2011) and states that it was adopted on the "second and final reading" (November 3, 2011). (R.75.)

procedures for providing the public with notice of a first reading of an ordinance on a section of the agenda titled "New Ordinances" and a copy of the draft ordinance is attached to the agenda.[3] (R.147-49; 152-55, Tr. 6:13-9:23; 125, Tr. 11:2-25; 126-28, Tr. 25:7-27:10.) The undisputed evidence in the record demonstrated that, contrary to the City's typical practice and procedures, there was no advance notice provided to the public on the October 13, 2011, agenda that a first reading was to occur. (R.27-28.) Nor was the public provided notice that any official business was to be transacted at that meeting, as the only things listed on the agenda are awards/presentations and a closed attorney-client session. (*Id.*) The official City Commission meetings are held on the first and third Thursdays of the month. Meetings not held on those dates (such as the one on October 13, 2011, held on the second Thursday of the month) are considered mini-meetings for awards/presentations and closed attorney-client sessions. (R.124, Tr. 7:14-25; 126, Tr. 25:7-28:3; 137-38.) There is typically no voting on official business at those meetings and no open forum for citizen comment. (R.124, Tr. 7:5-25; 29; 137-38; 149-50.) There was therefore no reasonable notice that a public meeting was to be

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[3] The City Charter mandates that the City Council establish procedures for making copies of ordinances available to the public for inspection. City Charter, Sec. 3.05, *available at* https://www.municode.com/library/fl/st._petersburg/codes/code_of_ordinances?nodeId=PTICH_ARTIIIELAPPO_S3.05PR.

held or that official business would be transacted immediately after the closed attorney-client session. *See Bigelow v. Howze*, 291 So. 2d 645, 647-48 (Fla. 2d DCA 1974) (for a meeting to be public for purposes of the Sunshine Law, the public must be provided advance notice and a reasonable opportunity to attend).

The City voted to approve the ordinance at the October 13, 2011, meeting immediately after its closed attorney-client session. (R.45.) The agenda for that meeting lists "adjournment" to occur immediately after the closed session. (R.28.) Under these facts, the trial court was correct to conclude that the public was deprived of an opportunity to be informed in advance that a first reading of an ordinance (or any public business whatsoever) was to be discussed and voted on at this mini-meeting and that conducting the first reading immediately after the closed session deprived the public of an opportunity to participate in the process. *See Coleman v. City of Key West*, 807 So. 2d 84, 85 (Fla. 3d DCA 2001) (notice provisions are "mandated in order to protect interested persons, who are thus given the opportunity to learn of proposed ordinances; given the time to study the proposals for any negative or positive effects they might have if enacted; and given notice so that they can attend the hearings and speak out to inform the city commissioners prior to ordinance enactment"). The public did not have reasonable notice that there would be a public meeting immediately after the closed attorney-client session at which

official business was to be transacted.

Therefore, the trial court correctly held as follows:

> By conducting the first reading and voting for approval directly after the closed attorney-client session, without having it on the Council agenda and without providing prior notice for the inspection of the amendment to the ordinance and prior notice of the reading and Council vote, the public did not have an opportunity to review the amendment, appear at the hearing and make comment before the vote thereon.

(R.251.) The trial court declared that the City violated Florida's Government in the Sunshine law for violations of the notice provisions of § 286.011(1) and § 166.041(3)(A), Fla. Stat. and voided ab initio the amendments to the ordinance.

The trial court acted consistently with its legal authority because the Sunshine Law states that no formal action is binding unless it is taken at a public meeting. § 286.011(1), Fla. Stat. (2016). The mere showing that the Sunshine Law is violated constitutes irreparable harm such that action taken in violation of the Sunshine Law is void ab initio. *Zorc v. City of Vero Beach*, 722 So. 2d 891, 902 (Fla. 4th DCA 1998). This Court should affirm the trial court's order declaring that the City violated Florida's Government in the Sunshine Law and voiding ab initio the 2011 amendments to Section 20-30 of the City Code.

Wright also is entitled to reasonable attorneys' fees pursuant to § 286.011(4),

Fla. Stat. (2016), for this violation. *See Fla. Intergovernmental Risk Mgmt. Ass'n v. City of Greenacres*, 804 So. 2d 448, 451 (Fla. 4th DCA 2001) ("Section 286.011(4), Florida Statutes, requires the assessment of reasonable attorneys' fees against the public entity and in favor of the person filing an action to enforce the open meetings provision of the statutory section or invalidation of an action taken in violation of the section, when the person bringing the action prevails.").

II. The City Violated Florida's Sunshine Law When It Engaged in Deliberations to Amend a City Ordinance at a Closed Attorney-Client Session.

The trial court erred in concluding that the City did not violate Florida's Government in the Sunshine Law when it engaged in discussions about amending City Code § 20-30 during a closed attorney-client session. (R.230-31.) Wright cross-appeals this portion of the trial court's order. The trial court's decision is subject to de novo review and the ruling on the closed attorney-client session should be reversed because there were no genuine issues of material fact and summary judgment was appropriate as a matter of law. *See Bruckner*, 823 So. 2d at 171.

The Sunshine Law was enacted for the public benefit and must be construed broadly and interpreted most favorably to the public. *Bd. of Pub. Instruc. of Broward Cnty. v. Doran*, 224 So. 2d 693, 699 (Fla. 1969). The trial court erred in concluding that the City did not exceed its statutory authority under § 286.011(8), Fla. Stat. This

subsection of Florida's Sunshine provides a limited exception to the requirement in § 286.011(1) that all government meetings be open to the public. The section provides in relevant part that any "commission ... may meet in private with the entity's attorney to discuss pending litigation." § 286.011(8), Fla. Stat. (2016). A number of statutory conditions must be met for the commission to comply with the requirements of this exemption. *Zorc*, 722 So. 2d at 899. The exemption is to be construed narrowly and a strict construction applies. *City of Dunnellon v. Aran*, 662 So. 2d 1026, 1027 (Fla. 5th DCA 1995). "Substantial compliance" with the exemption is not enough. *Id.*

When it engaged in substantive deliberations and discussions about amending a city ordinance during the closed attorney-client session, the City failed to confine the subject matter of the meeting "to settlement negotiations or strategy sessions related to litigation expenditures" as required by law. § 286.011(8)(b), Fla. Stat. (2016). The transcript of the attorney-client session demonstrates that the decision-making process by the City Commission to amend Section 20-30 were not made in the Sunshine, but in the "shade."[4] (R.36-45.) As shown by the undisputed facts, all substantive discussions and deliberations about the amendments to the ordinance

[4] "Shade" is the term used to by courts describe the attorney-client exemption to Fla. Stat. § 286.011(8). *See, e.g., Anderson,* 161 So. 2d at 551 n.2.

were made during the closed session.

During the closed meeting, the City attorney stated that the purpose of the meeting was related to litigation expenditures because the ordinance was being proposed as a strategy to moot out the claims in the pending litigation by adding an appeal process to Section 20-30 of the City Code to comply with the Eleventh Circuit's *Catron* ruling that the City's ordinance failed to provide due process. (R.38-40.) This strategy was proposed as way to avoid paying attorneys' fees to the plaintiffs in that case as the prevailing party. (*Id.*)

Regardless of the legislative purpose for enacting an ordinance, there is no question that adoption of an ordinance is an official act that must be taken at no less than two meetings open to the public. *Austin*, 355 So. 2d at 488. All of the City's deliberations about the ordinance must occur in public. *Id.*; *see also* Fla. Att'y Gen. Op. 2000-68, 2000 WL 1729642, at *1 ("Application of the statute is not limited to meetings at which final, formal actions are taken. It applies to any gathering of members where members deal with some matter on which foreseeable action will be taken by the board. Florida courts have recognized that it is the entire decision-making process that is covered by the Government in the Sunshine Law, not merely meetings at which a final vote is taken."). The Florida Supreme Court explained the importance of an open process:

> The right of the public to be present and to be heard during *all phases of enactments* by boards and commissions is a source of strength in our country... Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at *all deliberations* wherein decisions affecting the public are being made.

Bd. of Pub. Instruc. of Broward Cnty., 224 So. 2d at 699 (emphasis added).

The City clearly violated the public's right to be present and heard at all deliberations when it engaged in lengthy substantive discussions at the shade meeting regarding the proposed ordinance. *See* Fla. Att'y Gen. Op. 98-79, 1998 WL 883337, at *2 ("The adoption of the ordinance is a responsibility resting with city commission, and the city commission's discussions and deliberations on the proposed ordinance must occur at a duly noticed city commission meeting."). A draft of the proposed ordinance was provided to the commissioners at the beginning of the Shade meeting. (R.38.) The City attorney recommended that the commissioners approve the ordinance on the "first reading" otherwise it would take away the attorney's ability to "help reduce attorneys' fees." (R.40, Tr. 17:16-20.) Commissioner Dudley moved to approve the ordinance. (R.40, Tr. 17:22.) When he was told by the City attorney and another commissioner that they could not approve the ordinance in a closed session, the commissioners proceeded to have substantive deliberations and

discussions about specific language in the ordinance:

- **Council Member Danner** had a back and forth exchange with the assistant city attorney about the trespass warning appeal process; the decision to disconnect the appeal process from the process for resolving related charges in the criminal system; and the adoption of the "clear and convincing" standard for the trespass warning appeal. (R.41, Tr. 18:25-21:22.)
- In response to Danner's comments, **Council Member Polson** also questioned the decision to disconnect the trespass warning appeal process from the criminal court proceeding and asked and received reasoning from the City attorneys' office as to why they did not draft the ordinance so that the trespass warning automatically is lifted if criminal charges are dismissed. (R.42, Tr. 22:8-24:14.)[5]
- **Council Member Kornell** discussed concerns about the importance of the trespass warning policy and issues with enforcement of the policy and then was told by the City attorney it was outside the scope of what he was allowed to discuss at the meeting. (R.43, Tr. 27:5-28:8.)
- **Council Member Danner** questioned whether a trespass warning issued for

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[5] Polson also questioned whether the commissioners could be asked as to their reasons for passing the ordinance and whether the commissioners made the decision because of the Court's ruling. (R.42-43, Tr. 25:4-27:3.)

a certain park meant that you could not ride the bus and the assistant city attorney explained specific language in the ordinance meant that trespass warnings could not be issued for right-of-ways or bus stops on the right-of-ways. The city attorney also explained there had been enforcement issues related to the prior version of the ordinance and that he met with police to address those issues. (R.44, Tr. 30:3-20.)

- **Council Member Newton** questioned what would happen if they did not pass the amendments to the ordinance. The assistant City attorney responded that they would not be able to enforce the current version of Section 20-30 and that there would still be a facial constitutional defect in the ordinance which could expose them to greater liability for attorneys' fees. (R. 44, Tr. 30:22-31:16.)
- **Council Member Kennedy** questioned why the City did not have an appeal process initially and if there were other places in their ordinances that would need to be amended to address similar issues. (R.44, Tr. 31:19-33:7.)
- **Mayor Foster** recommended the ordinance should be passed. (R.44, Tr. 33:24-25.)

After Mayor Foster's comments, Council Member Kennedy reopened the meeting by stating "I declare the city counsel meeting reopened and announce the termination of the closed session." (R.45, Tr. 34:18-20.) The City attorney asked if

there were any motions. Council Member Curran stated "I move for approval." Council Member Newton stated "Second." This motion to approve the ordinance was made prior to announcing what they were voting on, prior to providing the city clerk with a copy of the ordinance and prior to reading the title of the ordinance publicly. The clerk then read the title, and the commission took a roll call vote. Council Members Curran, Kornell, Newton, Danner, Kennedy, and Dudley all voted to approve the ordinance without any further discussion. (R.45, Tr. 34:23-36:6.)

By using the Shade meeting to engage in deliberations about amending a city ordinance, the City engaged in exactly the type of conduct the Sunshine Law is designed to prohibit: the "crystallization of secret decisions to a point just short of ceremonial acceptance." *Berns*, 245 So. 2d at 41. Council Members Dudley and Mayor Foster[6] affirmatively stated that they had decided the ordinance should be passed during the shade meeting. Council Members Curran and Newton motioned for approval of the ordinance immediately after the Shade meeting, prior to any public announcement that they were to be voting on an ordinance that day. The remaining Council Members (Kennedy, Danner, Kornell, and Polson) voted for approval of the

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[6] The Council adopts the ordinance, and the Mayor has the power to veto an ordinance. (R.145-46.) *See also* City Charter, Sec. 3.05. The Mayor did not veto the 2011 amendments to Section 20-30 (R.75), consistent with his view expressed privately to commissioners at the Shade meeting that he believed the ordinance should be passed. (R.44, Tr. 33:24-25.)

ordinance without any discussion on the record, but all four of them exchanged their views and questions about the ordinance during the shade meeting. None of these deliberations ever occurred openly or publicly as required by the law. *See id.*

The second hearing on the ordinance likewise involved minimal discussion. (R.63-73.) The only Council Member who ever spoke publicly regarding the ordinance was Council Member Newton who responded to a new concern raised by a member of the public about the cost of adding the appeal process. None of the Council members who spoke during the shade meeting about their deliberations (Danner, Polson, Kornell, Newton, Kennedy, and Foster) ever repeated the substance of those discussions at a public meeting, depriving the public of their "inalienable right" to contemporaneously participate in the decision-making process. *Zorc*, 722 So. 2d at 902.

The Council Members were deliberating over how to comply with the due process clause of the U.S. Constitution,[7] and contemplated serious concerns that impact liberty interests of its citizens. For example, the Council Members discussed

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[7] In *Catron*, the Eleventh Circuit held that issuance of a trespass warning banning an individual from a city park or other public place is a deprivation of a constitutionally protected liberty interest that requires due process. The Court found the City's pre-2011 version of Section 20-30 violated due process for failure to provide opportunity for a hearing to challenge the basis or scope of trespass warnings. 658 F.3d at 1266-67.

important issues such as burden of proof in the appeal hearings and a policy choice to keep trespass warnings in place instead of lifting them automatically (and require a hearing separate from the criminal process) even if related criminal charges are dropped. The public never had any knowledge of any of these deliberations at any point during the adoption process. These secret discussions violate the very purpose of the Sunshine Law, which is premised on the idea that the entire decision-making process should be open to the public because "[e]very thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern..." *Williams*, 222 So. 2d at 473.

This Court should find the City violated the Sunshine Law for the same reasons this Court previously found the City of St. Pete Beach exceeded the scope of the exemptions for the shade meeting when "discussing a way to readopt the comprehensive plan amendment that had been invalidated by the court and to avoid future litigation regarding the adopted amendment." *Anderson*, 161 So. 3d at 553. Just as in *Anderson*, the City here used the shade meeting to have secret deliberations over amending Section 20-30 to gain advantage in litigation and moot out the pending lawsuit by adding an appeal process to remedy the due process deficiencies identified by the Eleventh Circuit. *See id.* at 552-53.

The City exceeded the permissible scope of the exemption because, as the

legislative history states, "the Shade Exemption merely provides a governmental entity's attorney an opportunity to receive necessary direction and information from the government entity." *Id.* (quoting legislative history). The Exemption was instead impermissibly used here for government "to meet behind closed doors to accomplish goals out of the sunshine." *Id.* (quoting legislative history). As this Court held in *Anderson*, "to the extent the board discussed and took actions on the [ordinance] in public, its actions amounted to nothing more than a 'perfunctory ratification' of what had clearly been decided in the shade meetings." *Id.* at 553.

For these reasons, Wright is entitled to a declaration that the City violated the Sunshine Law. *See id.* at 554. Mere showing that the Sunshine Law is violated constitutes irreparable harm such that action taken in violation of the Sunshine Law is void ab initio. *Zorc*, 722 So. 2d at 902. There is no requirement that this Court find an intent to violate the law or resulting prejudice. Once the violation is established, prejudice is presumed. *Id.* This Court should declare that the City violated the Sunshine Law and find Section 20-30, as amended in November 2011, void ab initio.

Wright also is entitled to reasonable attorneys' fees pursuant to § 286.011(4), Fla. Stat. (2016), for this violation.

III. Conclusion.

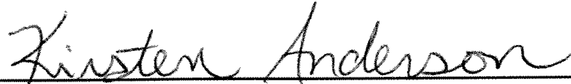
Wright respectfully requests that this Court affirm the trial court's Final Summary Judgment declaring that the City violated §§ 286.011(1) and 166.041(3)(a), Fla. Stat. (2016), and voiding ab initio the 2011 amendments to Section 20-30 of the City Code.

Wright also seeks an order reversing the trial court's conclusion that the Shade meeting did not violate the Sunshine Law. The undisputed evidence demonstrates that the City engaged in substantive discussions regarding the amendments to the ordinance that are required to be held at a public meeting. To the extent the City discussed the ordinance and voted in public, these actions were nothing more than a "perfunctory ratification" of what had clearly been decided in the shade meeting. The City exceeded the scope of its legal authority under § 286.011(8), Fla. Stat. (2016). Wright seeks a declaration that the City violated Florida's Sunshine Law.

Finally, Wright seeks an order that he is entitled to an award of attorneys' fees and costs under § 286.011(4), Fla. Stat.

Dated: January 13, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing was furnished via email this __13th__ day of January, 2017, to the following:

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE

I certify compliance with Fla. R. App. P. 9.210(a)(2) and that the font and size of this brief is Times New Roman 14.

/s/ *Kirsten Anderson*
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