Status of Miami River Commission

Number: INFORMAL

Date: November 03, 1999

Mr. Robert L. Parks
Chair, Miami River Commission
First Floor, 330 Alhambra Circle
Coral Gables, Florida 33134

Dear Mr. Parks:

On behalf of the Miami River Commission, you ask several questions regarding the status of the commission and the notice required for meetings of the commission and its members. Attorney General Butterworth has asked me to respond to your letter.

The Miami River Commission (MRC) was created by Chapter 98-402, Laws of Florida, as

"the official coordinating clearinghouse for all public policy and projects related to the Miami River to unite all governmental agencies, businesses, and residents in the area to speak with one voice on river issues; to develop coordinated plans, priorities, programs, projects, and budgets that might substantially improve the river area; and to act as the principal advocate and watchdog to ensure that river projects are funded and implemented in a proper and timely manner."[1]

The MRC consists of a managing director who is authorized to implement all commission policies, plans and programs, a working group composed of all governmental agencies that have jurisdiction in the Miami River area, as well as business and civic association representatives, and a policy committee.[2] The policy committee is responsible for, among other things, consolidating existing programs into a coordinated strategic plan for the improvement of the Miami River and preparing an integrated financial plan. Section 163.061(1), Florida Statutes (1998 Supplement), however, provides:

"No item, motion, directive, or policy position that would impact or in any way diminish levels of currently permitted commercial activity on the Miami River or riverfront properties shall be adopted by the Miami River Commission unless passed by a majority vote of the appointed members of the commission then in office."[3]

Clearly the MRC, as an entity created by state statute, is subject to section 286.011, Florida Statutes. As such, it is subject to the requirement that reasonable notice be given of commission meetings, including meetings between two or more members of the commission to discuss some matter on which the commission will foreseeably take action.[4]

The purpose of such notice is to apprise the public of the pendency of matters that might affect their rights, afford them the opportunity to appear and present their views, and provide them a reasonable time to make an appearance if they wish.[5] This office has recognized that the

notice should contain the time and place of the meeting and, if available, an agenda. It should be prominently displayed in an area of the agency's offices set aside for that purpose. In addition, this office has recognized that the use of press releases or phone calls to the media can be highly effective, although on matters of critical public concern, advertising in local newspapers of general circulation would be appropriate.[6]

Thus, for purposes of section 286.011, Florida Statutes, posting notice of meetings on the door of the MRC office, sending copies of the notice to the local media and to those on a mailing list may be sufficient for some MRC meetings. In cases where the commission is considering issues of critical public concern, it would be advisable to publish notice in a local newspaper.[7]

You ask, however, whether the MRC is an agency for purposes of Chapter 120, Florida Statutes, the Florida Administrative Procedures Act (APA), and thus subject to the notice requirements of that chapter.[8] Section 120.52(1), Florida Statutes, defines "agency" for purposes of the APA to include:

"(a) The Governor in the exercise of all executive powers other than those derived from the constitution.

(b) Each state officer and state department, departmental unit described in s. 20.04, commission, regional planning agency, board, multicounty special district with a majority of its governing board comprised of nonelected persons, and authority, including, but not limited to, the Commission on Ethics and the Game and Fresh Water Fish Commission when acting pursuant to statutory authority derived from the Legislature, educational units, and *those entities described in chapters 163*, 298, 373, 380, and 582 and s. 186.504, except any legal entity or agency created in whole or in part pursuant to chapter 361, part II, an expressway authority pursuant to chapter 348, or any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection.

(c) Each other unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions." (e.s.)

The courts of this state have favored an approach that examines the territorial jurisdiction of the public body in determining the applicability of the APA. In *Booker Creek Preservation, Inc. v. Pinellas Planning Council,*[9] the court held that a planning commission, operating wholly within Pinellas County with no authority outside that county, was "not comparable in jurisdiction to a statewide agency or even a regional, intercounty agency" and, thus, not subject to the APA. More recently, the Fifth District Court of Appeal in *Orlando-Orange County Expressway Authority v. Hubbard*,[10] examined the geographic scope of powers of the expressway authority to operate outside the limits of one county, and to plan and build integral parts of the statewide transportation highway system that affected many counties in central Florida in determining that the authority was an agency for purposes of Chapter 120, Florida Statutes.

This office has been advised that the geographic scope of the MRC is limited to one county. Thus, under the territorial standard established in the above cases, the MRC would not appear

to constitute an agency for purposes of Chapter 120, Florida Statutes.

Section 120.52, Florida Statutes, however, in defining "agency," also includes those entities described in Chapter 163, Florida Statutes, regardless of their territorial jurisdiction. The provisions relating to the MRC have been assigned to Chapter 163 as sections 163.06 and 163.061, Florida Statutes (1998 Supplement). Chapter 98-402, Laws of Florida, in creating the MRC, did not assign the MRC to a particular chapter; rather, the Division of Statutory Revision assigned the MRC to Chapter 163.

Since the MRC was placed in Chapter 163, Florida Statutes, by the division rather than by the Legislature, this office cannot presume a legislative intent to subject the MRC to the APA. On the other hand, this office has no authority to question the division's designation of the MRC as a Chapter 163 entity. As an entity described in Chapter 163, Florida Statutes, the MRC would appear to fall within the APA's definition of agency. The fact that the Division of Statutory Revision, rather than the Legislature, placed the provisions relating to the MRC in Chapter 163, however, raises a question as to whether the Legislature intended to subject the MRC to the notice requirements of the APA.

This office, therefore, would suggest that the Legislature may wish to clarify this matter. Until such time, it is clear that discussions between two or more MRC members on issues before the commission would be subject to the Sunshine Law and reasonable notice as discussed above would have to provided. For commission meetings, hearings or workshops, however, it may be advisable to also comply with the APA notice requirements until this matter is clarified by the Legislature.

You also ask about the responsibilities of several MRC members who serve on the board of directors of a group that wishes to discuss and take policy positions concerning the activities of the MRC.

This office has recognized that the Sunshine Law does not prohibit two members of a public commission from serving together on another board such as the board of trustees of a nonprofit corporation.[11] Thus, when any two or more members of the committee are attending or participating in meetings or other functions unconnected with the MRC, they should refrain from discussing matters on which foreseeable action may be taken by the commission but are not otherwise restricted in their actions. The courts of Florida have stated that in the event a board member is unable to determine whether a meeting is subject to the Sunshine Law, he or she should either leave the meeting or ensure that the meeting complies with the law.[12]

I trust that the above informal advisory comments may be of assistance to you in resolving these matters.

Sincerely,

Joslyn Wilson
Assistant Attorney General
Director, Opinions Division

JW/tzg

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[1] Section 163.06(1)(a), Fla. Stat. (1998 Supp.). *And see* Final Bill Research & Economic Impact Statement on CS/HB 4027 (codified as Ch. 98-402, Laws of Florida), Florida House of Representatives, Committee on Water & Resource Management, dated May 18, 1998, stating that at least 36 different agencies in four different levels of government (federal, state, county and municipal) have some jurisdiction over the Miami River.

[2] The voting members of the policy committee are comprised of various state and local officials, as well as representatives of various business, neighborhood and other organizations. Nonvoting members include a member of the United States Congressional delegation and the Captain of the Port of Miami as a representative of the United States Coast Guard.

[3] *And see* s. 163.061(2), Fla. Stat. (1998 Supp.). The MRC is authorized to develop plans, programs and projects that might substantially improve the river area, and the managing director has the responsibility to implement MRC plans and programs. *See* s. 163.06(1)(a) and (2)(b), Fla. Stat. (1998 Supp.). While the act does not affect or supersede the regulatory authority of any governmental agency relating to the Miami River, the MRC may accept any specifically defined coordinating authority or functions delegated to the commission by a governmental entity. *See* s. 163.06(1)(b), Fla. Stat. (1998 Supp.); *and see* 163.061, Fla. Stat. (1998 Supp.), stating that no directive or policy position that would impact or diminish levels of commercial activity on the river shall be adopted except by unanimous vote.

[4] *See, e.g., Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973). *And see, Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969); *City of Miami Beach v. Berns,* 245 So. 2d 38 (Fla. 1971).

[5] *See* Ops. Att'y. Gen. Fla. 80-78 (1980) and 73-170 (1973).

[6] *See* Inf. Op. W.W. Caldwell, Jr., February 10, 1975.

[7] *See Nocera v. School Board of Lee County, Florida*, No. 91-1828 CA-WCM (Fla. 20th Cir. Ct. Nov. 25, 1991), in which the circuit court held that reasonable notice for school rezonings, a matter of critical public concern, mandated that such meetings be noticed in a newspaper of general circulation. While notice of the meetings of an attendance zone advisory committee responsible for making recommendations regarding redistricting and desegregation had included posting a notice outside the meeting room, sending letters home with the affected elementary school children advising parents of the meetings, and advertising in the local newspaper of general circulation, only the notice given by advertising in the local paper was considered by the court to be sufficient on such a matter of critical public concern.

[8] *See, e.g.,* s. 120.525(1), Fla. Stat., providing that except in cases of emergency meetings, each agency shall give notice of public meetings, hearings, and workshops by publication in the Florida Administrative Weekly not less than 7 days before the event.

[9] 433 So. 2d 1306 (Fla. 2d DCA 1983). *And see Rubinstein v. Sarasota County Public Hospital Board,* 498 So. 2d 1012 (Fla. 2d DCA 1986), holding that a hospital board whose jurisdiction did not extend beyond one county was not a state agency.

[10] 682 So. 2d 566 (Fla. 5th DCA 1996).

[11] *See, e.g.,* Op. Att'y Gen. Fla. 92-79 (1992) and 83-70 (1983).

[12] *See, e.g., City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974) ("[t]he principle to be followed is very simple: When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State.").