IN THE SUPREME COURT OF FLORIDA

SARASOTA CITIZENS FOR RESPONSIBLE GOVERNMENT, INC., and CITIZENS FOR SUNSHINE, INC.,

Appellants,

v. CASE NO. SC10-1647

CITY OF SARASOTA, BOARD OF COUNTY COMMISSIONERS OF SARASOTA COUNTY, FLORIDA, SHANNON STAUB, NORA PATTERSON, and JOE BARBETTA,

Appellees.
_____/

APPELLANTS' BRIEF ON THE MERITS

THE LAW OFFICE OF ANDREA FLYNN MOGENSEN, P.A.

Andrea Flynn Mogensen, Esquire
Florida Bar No. 0549681
200 South Washington Boulevard, Suite 7
Sarasota FL 34236
Telephone: (941) 955-1066

THOMAS & LOCICERO, PL

Gregg D. Thomas
Florida Bar No.: 223913
Paul R. McAdoo
Florida Bar No. 0036219
400 North Ashley Drive, Suite 1100
Tampa, FL 33602
Telephone: (813) 984-3060

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PREFACE

Appellants Sarasota Citizens for Responsible Government, Inc., and Citizens for Sunshine, Inc., will be referred to as "Citizens."

Appellee Board of County Commissioners of Sarasota County, Florida, will be referred to as the "Board" or "County."

Appellee City of Sarasota, Florida, will be referred to as the "City."

Appellees Nora Patterson, Shannon Staub, and Joe Barbetta will be referred to as "Commissioner Patterson," "Commissioner Staub," and "Commissioner Barbetta," respectively.

References to the Appendix submitted by the Appellant with this Initial Brief, as required by Florida Rule of Appellate Procedure 9.110(i), will be to the exhibit and, where appropriate, the page number. For example, a reference to exhibit 1, page five of the Appendix will be denoted as follows: "Ex. 1 at 5."

INTRODUCTION

Citizens brought an action against the County and City alleging violations of the Sunshine Law by a joint negotiating team to which county commissioners had delegated authority to conduct negotiations with a private organization. The result of these negotiations was an agreement with the Baltimore Orioles ("Orioles") for the renovation of a spring-training baseball stadium. The complaint also alleged that e-mails between three individual county commissioners were used to conduct electronic meetings and discussions without the required notice to the public.

The County and City subsequently filed bond validation complaints. The cases were consolidated and, after a four-day trial, the lower court issued a final judgment validating the bonds. The lower court determined the county commissioners violated the Sunshine Law by engaging in substantive discussions via e-mail, but refused to invalidate the agreement with the Orioles because the conduct was unintentional and cured by subsequent meetings. The trial court rejected the remaining Sunshine Law claims.

STATEMENT OF THE CASE AND FACTS

A. Nature of the Case

This case is an appeal from a Final Judgment which validated bonds to be issued by both the County and City on July 8, 2010. (Ex. 1) The bonds

are to renovate a spring training stadium and are supported by collection of a Tourist Development Tax ("TDT") and half-cent sales tax revenue.

In July 2009, the County entered into a Memorandum of Understanding ("MOU") with the Orioles.[1] (Ex. 2) The heart of the MOU is $31.2 million of public financing and a 30-year lease, during which the Orioles would play their spring training games at the renovated stadium.

Citizens, however, contend that the agreement should be voided due to Sunshine Law violations in contravention of Article I, § 24(b) of the Florida Constitution, and § 286.011, Florida Statutes, which is referred to as Florida's Government-in-the-Sunshine Law (the "Sunshine Law").

B. Factual Background

1. Public Negotiations with Reds

In 2006, the County and City jointly conducted negotiations for an agreement with the Cincinnati Reds (the "Reds") to lease Ed Smith Stadium ("the stadium")—owned by the City at the time—in Sarasota. The meetings of the joint City and County negotiation team for the Reds were noticed to the public and minutes were kept. (Ex. 4; Ex. 6 at 165-166) Draft copies of a memorandum of understanding negotiated with the Reds were also

[1]An Interlocal Agreement ("Interlocal") transferred ownership of the stadium from the City and provided indemnity to the County and Orioles for remediation of environmental contamination at the site. (Ex. 3)

presented at those open meetings. (Ex. 4; Ex. 7 at 372) Members of the public were allowed to attend these meetings. (Ex. 7 at 373-374)

At a public referendum in November 2007, City voters rejected the use of ad valorem taxes to renovate the stadium. (Ex. 8 at 656) According to County Administrator James Ley ("County Administrator" or "Ley"), after negotiations with the Reds ended, "both the city and the county commission … decided to just let their administrators try to work out a deal" with the Boston Red Sox (the "Red Sox") to keep spring training in Sarasota, so they delegated the responsibility to their respective staffs. (Ex. 9 at 689)

2. Private Negotiations with Red Sox

What followed was starkly less transparent. For example, although the City and County designated a commissioner to act as the point person in the discussions with the Red Sox just as had occurred with the Reds, (Ex. 7 at 376), the meetings of the negotiating team were not noticed to the public and minutes were not kept. (Ex. 9 at 692)

In May 2008, Barbetta, designated as the Board's representative in the Red Sox discussions, unabashedly stated at a public meeting that publicizing notice of meetings would "hamper" the progress of those discussions. (Ex. 7 at 376-378) He referenced a newspaper article that had done some "damage" to ongoing negotiations. (*Id*.) Baseball teams do not want it known they are

negotiating with a specific city because it might harm their negotiating position with other municipalities. (*Id*. at 379; 381) Until a team is ready to say "yes" to a deal, they demand confidentiality. (*Id*. at 425-427)

In July 2008, the County quietly sought to purchase parcels of property to use as a potential new stadium site ("the Payne Park parcels"). (Ex. 9 at 696) John Dowd ("Dowd")— Barbetta's close friend, campaign treasurer, and accountant—was used as an intermediary to purchase the property. (Ex. 7 at 381-382; Ex. 9 at 696) On July 26, 2008—the same day Dowd offered to purchase the Payne Park parcels—Ley e-mailed Deputy County Administrator David Bullock ("Bullock"), stating:

> Talked to John H several times, John Ask. Dowd (guarantee me I get paid back), Nora (I am risk averse but I won't hold it against you) Shannon (Dowd called me and asked me if I would vot[e] - and I said yes). FUN

(Ex. 10)[2]

Ley acknowledged this e-mail reflected feedback received from two commissioners (Patterson and Staub) on how they would vote *prior to* Dowd exercising the option to purchase the Payne Park parcels. (Ex. 9 at 700-702) Dowd was concerned about a guarantee of repayment from the County. (*Id*. at 698) Although these detailed negotiations had already transpired behind

[2]"John H" was a reference to John Herrli, the County's property acquisition manager. John Ask was the real estate broker for the Payne Park transaction. (Ex. 9 at 697-698)

the scenes, the first time the Board considered the purchase in a public meeting was one month later when Ley recommended and the Board approved the assignment of the Dowd option and purchased the property for nearly $5 million. (*Id*. at 703-704; Ex. 11)

In October 2008, as the Red Sox deal was near collapse, Dowd e-mailed Barbetta, raising suspicions about the negotiations. (Ex. 7 at 385-386) Dowd stated he had met individually with other commissioners and that there was "no chance" Patterson and another commissioner would vote in favor of a Red Sox deal. (Ex. 7 at 386-387; Ex. 12) Dowd expressed fear that the administration was "clearing" the deal through Patterson and that it would be over before others had the opportunity to get to her. (*Id*.)

Using his private e-mail account, Barbetta authored "talking points" he knew would be shared with other commissioners. (Ex. 7 at 390-392) Barbetta asked Dowd to remove his name as the author, stating. "[p]lease do not recirculate with my name or e-mail on it. Just cut and paste." (Ex. 12)

Meanwhile, Patterson was asked in a one-on-one meeting[3] whether she would support allocating an entire penny of TDT revenue to fund a new

[3]In a one-on-one meeting, an individual commissioner meets with staff to discuss "complex" issues commissioners have questions about in advance of a public meeting. (Ex. 8 at 539-540) One of the purposes of such meetings is to shorten the public meeting. (*Id*. at 541)

stadium. (Ex. 8 at 546-547)[4] At a later public meeting, Barbetta claimed Patterson had placed "handcuffs" on the negotiators, stating:

> It's very upsetting that the public doesn't really know what happened and why we didn't get the Red Sox. We didn't get the Red Sox primarily because we didn't allow the full penny to go towards the stadium. End of story.

(Ex. 13 at 10-11) Patterson disputed that account, stating she had been asked if she was willing to subsidize Red Sox operating expenses. (*Id*. at 11-12). No vote was ever taken on any specific deal with the Red Sox. Instead, the team renewed its contract with another municipality shortly after Patterson's one-on-one meeting. (Ex. 7 at 395; Ex. 8 at 547)

3. Negotiations with the Orioles

a. Delegation to Negotiating Team

After two strikes at bringing baseball to Sarasota, the Board directed staff on November 4, 2008, to begin a third round of negotiations—this time with the Orioles. (Ex. 14) Ley designated Bullock to lead the negotiations. (Ex. 5 at 37) Over the next seven months, Bullock, Staub, Chief Financial Officer Jeffrey Seward ("Seward"), County Attorney Stephen DeMarsh ("DeMarsh"), Strategic Planning Coordinator Jenny Yarabek ("Yarabek"), consultants Dan Barrett ("Barrett") and Paul Jacobs ("Jacobs"), and others

[4]Patterson described this meeting as expressing her views "behind the scenes to the negotiators we were paying as well as to Dave Bullock." (Ex. 27 at 2)

(collectively, the "Negotiating Team")[5] negotiated with the Orioles, the City, and representatives from the Sarasota Chamber of Commerce (the "Chamber"), about the terms of a deal with Orioles. (Ex. 6 at 167-170)

b. Economic Development Agency

Bullock's staff responsibilities included economic development activities on behalf of the County. (Ex. 5 at 46) The County has a formal economic activity group that Bullock was a member of. (Ex. 17 at 55) Although the practice is informal, from time-to-time, County Administrator Ley designates Bullock as a member of the economic development agency for the county and it was expected that Bullock would act in that role during the Orioles' negotiations. (*Id*. at 55-56) During the course of the Negotiation Team's meetings with the Orioles, the provisions of § 288.075, Florida Statutes,[6] were invoked to prevent the release of details about the negotiations. (Ex. 6 at 161) The public records request came from two media

[5]Many of these individuals comprised the core of the County's negotiation team during the Red Sox negotiations.

[6]The text of the statutory exemption is set forth in § 288.075(2)(a), which provides that:

> [u]pon written request from a private corporation, partnership, or person, information held by an economic development agency concerning plans, intentions, or interests of such private corporation, partnership, or person to locate, relocate, or expand any of its business activities in this state is confidential and exempt from [the Public Records Act].

groups. (*Id*. at 155) The Orioles were "adamant" throughout the process that the public records exemption be honored. (*Id*. at 231)

Throughout the negotiations with the Orioles, Bullock "was acting in the economic development interest of the County." (Ex. 6 at 163-164). When Bullock conducted negotiations with the Orioles, members of the Negotiating Team were present. (*Id*. at 163-164) No minutes were taken and no notice was provided to the public of these meetings. (*Id*. at 164-165)

Bullock acknowledged that the exemption applied only to documents, not meetings. (*Id*. at 157-158) Bullock also acknowledged he exercised decision-making authority regarding the terms of the MOU. (*Id*. at 167) He received advice from members of the Negotiating Team on the terms of the MOU. (*Id*.) The winnowing process of what to include in the MOU that ultimately went to the Board for a vote was made by the Negotiation Team. (Ex. 18 at 16; 148)

In late 2008, the Negotiating Team held numerous meetings with the Orioles. (Ex. 19) None of these meetings were noticed to the public. (Ex. 6 at 267-286) The meetings included members of the Negotiating Team, Orioles' representatives, City and County financial advisors, Chamber representatives, and others. (Ex. 6 at 267-268; 287) Although staff had been

delegated responsibility to conduct negotiations, Staub sat in on several of the initial meetings. (Ex. 6 at 187; Ex. 7 at 316; Ex. 8 at 495)

As the City had done before with the Reds and Red Sox, it also participated in the activities of the Negotiating Team. Deputy City Manager Pete Schneider attended meetings, as did other City staff such as Pat Calhoon and Finance Director Chris Lyons. City Commissioner Lou Ann Palmer also attended meetings. (Ex. 6 at 274-275)[7] The City also considered its participation as furthering economic development. (Ex. 5 at 101)

Yarabek took extensive personal notes during these meetings. (Ex. 6 at 267) Her notes indicate that a host of substantive issues were being negotiated with the Orioles in these early meetings. (*Id*. at 268-269, 282) Yarabek's notes demonstrated that negotiations included evaluation of the economic impact the Orioles might bring to Sarasota. (Ex. 6 at 270-272)

Representatives from the Chamber also considered a deal with the Orioles as an economic development opportunity. (Ex. 8 at 597) The Chamber facilitated several of the meetings. For example, the initial all-day meeting with the Orioles on November 11, 2008, was held at the Chamber offices. (Ex. 7 at 316) Seward characterized the Chamber representatives as

[7]At one of the early meetings held at the Chamber, two City commissioners were present during a presentation by the Orioles. When one commissioner made remarks, the other left the room and vice-versa. (Ex. 7 at 320-322)

"liaisons" between the County and the Orioles. (Ex. 6 at 247) Cranor characterized his role as a "broker" in the negotiations. (Ex. 8 at 651-652)

During the November 12, 2008 meeting, representatives of the Orioles presented detailed financial information on a computer screen only. While the City requested a copy of the information displayed on the computer screen, the Orioles did not provide a copy. (Ex. 7 at 324-325)

These initial meetings did not result in an agreement as the Orioles rejected the County's offer in December 2008. Early in 2009, Chamber representatives approached Barbetta in an effort to renew negotiations. (Ex. 7 at 427-429) By that time, Barbetta had been designated by the Board as the point-person to continue discussions with the Orioles. (*Id*. at 433)

c. Renewed Negotiations

On April 3, 2009, a meeting was planned at the Chamber. (Ex. 7 at 332, 446; Ex. 8 at 509, 633) Initially, a commissioner from the City (Kirschner) and County (Barbetta) were to attend. (Ex. 7 at 332) However, after concerns were raised about the public nature of the meeting, it was cancelled. (Ex. 7 at 333-334) Cranor then sent an e-mail to Bullock stating that a private meeting "in a dark back room" would go forward with certain key members of the Negotiating Team. (Ex. 20; Ex. 6 at 185; Ex. 8 at 636)

Subsequently, on April 3, 2009, as the public arrived at the door for what had been noticed as a public meeting, they were told that the meeting had been cancelled. Staub stated "I think Friday's meeting was cancelled because it appeared to [be] turning in to a crowded public meeting." (Ex. 21) Instead of the open, public meeting that had been planned, several key members of the Negotiating Team met privately and discussed the status of the negotiations with the Orioles. (Ex. 7 at 334-335) Notes from that meeting indicated that the Orioles did not want to put anything in writing because it would "hurt their Lee County deal." (Ex. 6 at 246-247)

The next day, Cranor sent an e-mail to Barbetta requesting a meeting to update him on the dark back room meeting. (Ex. 22) The following day, Cranor and another Chamber representative met with Barbetta. (Ex. 8 at 639-641) The meeting was to discuss the Orioles and inform Barbetta of the events that occurred at the April 3rd private meeting. (*Id*. at 642)

Following that meeting, Cranor called Bullock to "brief" him on the meeting with Barbetta. (Ex. 23) On April 11, 2009, Cranor sent an e-mail to Barbetta, Staub, Bullock, and others urging quick action as the Orioles had all but signed a deal with Lee County. (Ex. 24) On April 19, 2009, Cranor told the Orioles that conversations had been renewed with both the City and County and that "there is a deal to be had – from both sides." (Ex. 25)

In mid-May 2009, negotiations were bearing fruit. Bullock informed Barrett that his services might be needed again as the parties were close to a term sheet. (Ex. 26) Barrett was reengaged on June 1, 2009, (Ex. 6 at 188) as the parties had outlined very specific terms of the proposed deal. (Ex. 28)

In late June 2009, City Commissioner Kirschner sent an e-mail expressing his frustration about the secrecy surrounding negotiations with the Orioles. (Ex. 5 at 113-114)

d. E-mail Discussions

Almost immediately following the delegation to staff of responsibility for negotiating a deal with the Orioles, Patterson, Staub and Barbetta began a series of discussions via e-mail about numerous aspects of any potential deal, including, but not limited to, TDT, bonding, stadium costs, advertising, economic impact, stadium construction, and the location of a baseball youth academy. For example, on November 17, 2008, Barbetta unilaterally sent an e-mail to each of his fellow commissioners on the subject of economic impact and value of the Orioles' advertising network. The e-mail from Barbetta produced several replies, including a reply from Staub, Kirschner and Seward. Barbetta continued to reply to each response, including Staub, pointing out that the Board did not agree to use economic figures provided by the Florida Sports Foundation, but had an independent study conducted.

Eventually, Staub replied "[i]sn't it great that there is such public record discussion with the Orioles?" (Ex. 30)

Another example of e-mail discussions can be found in the e-mail response from Patterson to a constituent on November 29, 2008. In an eight-paragraph response, Patterson engaged in a lengthy policy discourse, concluding with the requirements of what it would take to garner her vote in support of a deal. (Ex. 31 at 3-4)

Barbetta replied directly to Patterson and copied other commissioners, and engaged in substantive discussions about rent, capital contributions from the Orioles and other issues. (Ex. 31 at 2)

Barbetta's reply did not go unanswered; 22 minutes later Patterson provided a substantive response. (*Id*. at 1-2) This discussion prompted Staub to seek specific information from staff on financial information that had been provided by an Orioles representative. (*Id*. at 1)

The next day, the same e-mail chain continued with Staub sending an e-mail directly to Barbetta asking him to be “patient” and telling him that "negotiations are in play." (Ex. 32) Barbetta responded by again raising the question of rent to be paid by the Orioles and that this was a “key” element of the negotiations that had occurred over the past several weeks. (*Id*.)

Another representative e-mail discussion occurred in early April 2009, during the time period when negotiations with the Orioles ran into difficulties and Cranor was acting as an intermediary. Staub attempted to rescue the situation by intervening and making direct contact with John Angelos, the Orioles' Executive Vice-President, on April 10, 2009. The next day, Staub sent key members of the Negotiating Team an e-mail, including Barbetta, in which she promised to provide an update the next day. (Ex. 33)

As promised, on April 12, 2009, Staub sent a lengthy e-mail outlining what she described as a new proposal she had discussed with Angelos and others, replete with detailed construction costs, comparison to other deals, TDT scenarios, and multiple reasons why "we" should want to make this happen. (Ex. 34) Staub sent the e-mail to each of the other commissioners.

A convoluted and lengthy e-mail discussion ensued with multiple threads to and from Staub, Patterson, Barbetta, Kirschner and others, discussing the pros and cons of Staub's e-mail and the Orioles negotiations. (Exs. 35 and 36) At one point during the discussion, Staub asked Barbetta, "Can we make this work?" (Ex. 36)

e. One-on-one meetings

In mid-June 2009 as negotiations reached their apex, Bullock and DeMarsh held a series of one-on-one meetings with each individual county

commissioner. During the course of those meetings Bullock informed the Orioles attorney that he had encouraged the County Commissioners not to discuss the issue at the public meeting, stating:

> Steve and I briefed 3 commissioners this afternoon. Have more to discuss tomorrow with one of them. Will also brief the remaining two in morning. *I have encouraged them not to discuss in any detail at bcc mtg*.

(Emphasis added). (Ex. 29)[8] Subsequent e-mails make plain that one-on-one meetings were continuing to take place in the lead-up to the July 22, 2009 County Commission meeting. Yarabek stated that it was the first time she had participated in such a meeting on a Sunday. (Ex. 6 at 294)

On July 18, 2009, Bullock sent an e-mail to Barrett entitled "Briefing my 2nd commish now" stating that his first meeting with the Board's chair went "Ok," but the commissioner would "vote against it anyway." (*Id*.)

(Ex. 37) Bullock On July 19, 2009, Bullock stated he had met with two commissioners individually and would finish meetings with the others that day. (Ex. 38) DeMarsh and Yarabek were also present in the one-on-one meetings. (*Id*.) In another e-mail that same date, Yarabek circulated call-in numbers and scheduling information for the one-on-one meetings with Staub, Barbetta, and Patterson with Bullock, DeMarsh, and herself. (Ex. 39)

[8]The reference to "bcc" is an acronym for Board of County Commissioners.

Immediately after Staub's one-on-one meeting, she sent an e-mail to Tom Tryon, editor of the *Sarasota Herald-Tribune*, acknowledging awareness that Bullock had meetings with Barbetta and Patterson after her session. Staub stated "Once I talk to [B]ullock tomorrow I will know if some calls need to be made. He had Joe and Nora after me." (Ex. 40)

The day before the July 22, 2009, County Commission meeting Bullock replied to an e-mail from Tryon. (Ex. 40) Tryon asked, "[b]est you can tell, indemnification going to work and 4 BCCers ok?" Bullock responded "I think so Tom. Looks good for your team."

f. The MOU

On July 22, 2009, the City approved the Interlocal and the County approved the MOU. The MOU was not released to the public until the day before the public meeting. (Ex. 6 at 232) The MOU and Interlocal obligated the public treasury as follows: $31.2 million in renovation costs, (ex. 2 at ¶ 2.1.1F), $5.6 million in capital repairs, (*id*. at ¶ 12.3)[9] the grant of two County-owned parcels adjacent to the stadium and Twin Lakes Park for the Orioles unrestricted private development use, (ex. 5 at 56-57), and responsibility for all environmental clean-up costs. (Ex. 3 at ¶ 4.9) The

[9]The Orioles' portion of capital repair expenses could be collected through a ticket surcharge over the lifetime of the MOU. (Ex. 5 at 51)

Orioles retain all proceeds from ticket sales, concession and parking operations, and naming rights. (Ex. 2 at ¶ 4.3) The County also surrendered approximately $8 million in rent it had been receiving for the lease of Twin Lakes Park where the Orioles conduct minor league operations. (Ex. 5 at 52) In return, the County receives $1 in rent for 30 years and some free tickets to spring training games each year. (Ex. 5 at 50)[10]

C. Disposition in the Lower Tribunal

After a four-day trial, the circuit court rendered a final judgment validating the bonds. Although the trial court found violations of the Sunshine Law relating to e-mail discussions, such as the ones previously outlined, it determined that the County commissioners had no intent to violate the law and that the violations were cured. (Ex. 1)

SUMMARY OF THE ARGUMENT

I. The activities of Bullock and the joint City-County Negotiating Team were in furtherance of the County's economic development interests and qualified as an economic development agency ("EDA"). The Negotiating Team asserted the exemption under § 288.075, Florida Statutes, for the public records of an EDA. There is no corresponding statutory

[10]The tickets are to be used by the County for "economic development purposes." (Ex. 2 at ¶ 10.3)

exemption for the meetings of an EDA. The Negotiating Team cannot apply both an exemption for records and hold closed meetings.

II. The delegation of authority to staff and others to conduct negotiations required compliance with the Sunshine Law. There is no delegation exception under the Sunshine Law, and the County cannot do indirectly that which it is forbidden to do directly. Even though the Negotiating Team could only recommend final approval, its activities in filtering, winnowing and crystallizing the terms of the MOU and Interlocal were critical in the decision-making process and required transparency.

III. The use of electronic communications in the modern era is a substantial threat to the integrity of the Sunshine Law. As this Court has noted for decades, all evasive devices must be frustrated to ensure that the constitutional right of access enjoyed by every citizen does not disappear into the electronic ether. The evidence shows that Commissioners used e-mail to subvert the constraints of the democratic process. The use of e-mail communications in combination with the one-on-one meetings and Chamber representatives acting as "brokers" in a location they described as a "dark back room[,]" frustrated the public's right-to-know.

IV. The violations of the Sunshine Law were not cured at any of the public meetings. In order to have affected a plausible cure, the County

should have illuminated the prior activities of the Negotiating Team and the commissioners that occurred outside the Sunshine. There is no evidence that the County took independent action in the Sunshine in order to conduct their decision-making process under public scrutiny. In contrast, the standard for cure that the trial court applied does not frustrate all evasive devices, such as e-mail discussions and secret, dark back-room meetings, but instead leads to a slippery slope of partial compliance. As a result, the County Commission's actions provide a completely articulated blueprint to any public agency in Florida seeking to avoid the State's pioneering and expansive Sunshine law.

The evasive devices employed here were to accommodate Major League Baseball's demand for secrecy. Baseball may be exempt from the antitrust laws, but it is not exempt from Florida's hallowed Sunshine Law.

STANDARD OF REVIEW

Review in a bond validation proceeding should: (1) determine if a public body has the authority to issue the subject bonds; (2) determine if the purpose of the obligation is legal; and (3) ensure that the authorization of the obligation complies with the requirements of law. *Strand v. Escambia County*, 992 So. 2d 150, 154 (Fla. 2008). Findings of fact are reviewed for substantial competent evidence and its conclusions of law *de novo*. *Id.*

The Sunshine Law was enacted "to protect the public from 'closed door' politics." *Pinellas County Sch. Bd. v. Suncam, Inc.*, 829 So. 2d 989, 990 (Fla. 2d DCA 2002). Consequently, "the law must be broadly construed to effect its remedial and protective purpose." *Id*. (citation and internal quotation marks omitted). This Court has explained that, "[t]he statute should be construed so as to frustrate all evasive devices." *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974).

ARGUMENT

I.

THE TRIAL COURT ERRED IN CONCLUDING THAT THE JOINT NEGOTIATING TEAM WAS NOT SUBJECT TO THE SUNSHINE LAW.

A. History and Scope of Florida's Sunshine Law

> "*The philosophical underpinnings of open meetings laws are rooted in the concepts of democracy; the citizenry must be well informed in order to effectively self-govern*."[11]

Florida's long tradition of transparency in government is widely recognized as the model for other states. The tradition started as early as 1892 when the legislature enacted §§ 1390 and 1391, Revised Statutes of 1892, the precursor to the Public Records Act, Chapter 119 of the Florida

[11]Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law then and now: A model for implementing new technologies consistent with Florida's position as a leader in open government,* 35 Fla. St. U. L. Rev. 245, 246 (2008).

Statutes. *See State v. McMillan*, 49 Fla. 243, 246, 38 So. 666, 667 (1905) (recognizing no limitations on a citizen's right to access public records).

More than 100 years ago, Florida enacted § 165.22, Florida Statutes (1905), requiring open meetings for city and town councils and boards of alderman. Florida's current open meetings law, § 286.011, Florida Statutes, was adopted in 1967. As this Court explained shortly after its enactment:

> Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with "hanky panky" in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. 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. Inst. of Broward Co. v. Doran, 224 So. 2d 693, 699 (Fla. 1969).

Florida's citizens elevated this statutory right to a constitutional level in 1992 by a resounding majority. Article I, § 24(b), worded more broadly than its statutory counterpart, provides:

> All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, *at which official acts are to be taken or at which public business of such body is to be transacted or discussed*, shall be open and noticed to the public . . . .

Art. I, § 24(b), Fla. Const. (emphasis added). As a result of the amendment, the right to attend public meetings is a fundamental right for all Floridians.

Additionally, § 286.011 provides a statutory right of access to governmental proceedings at the state and local levels, applying to any gathering of two or more members of the same board or commission to discuss some matter which will foreseeably come before that board for action. *E.g.*, *Times Publ'g Co. v. Williams*, 222 So. 2d 470, 473 (Fla. 2d DCA 1969). The key provision of § 286.011(1), provides that:

> [a]ll meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, 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.

Id. at 286.011(1).

In addition to the obvious agencies, the Sunshine Law applies to a wide variety of other formal and informal groups that are involved in the decision-making process. Advisory boards that make recommendations are subject to the Sunshine Law. *Gradison*, 296 So. 2d at 476 ("any committee established by the Town Council to act in any type of advisory capacity would be subject to the provisions of the government in the sunshine law"). The same is true for ad hoc committees. *Spillis Candela & Partners, Inc. v. Centrust Sav. Bank*, 535 So. 2d 694, 695 (Fla. 3d DCA 1988) (“The law is quite clear. An ad hoc advisory board, even if its power is limited to making

recommendations to a public agency and even if it possesses no authority to bind the agency in any way, is subject to the Sunshine Law."). In fact, it matters not that the decision-making resides in one designated person's hands, nor that this person is only receiving advice from others in the group. The meetings must still be open to the public. *Dascott v. Palm Beach County*, 877 So. 2d 8, 14 (Fla. 4th DCA 2004).

This Court has further expounded upon the breadth of the Sunshine Law when it explained that the frustration of all evasive devices:

> can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a government agency, and related to any matter on which foreseeable action will be taken.

Gradison, 296 So. 2d at 477. Thus, every stage of the decision-making process must be embraced in the Sunshine Law's dictates if attempts to frustrate it are to be evaded. Florida court's have zealously guarded the public's right to know under the Sunshine Law, stating that "'[t]he breadth of such right is virtually unfettered.'" *Suncam, Inc.*, 829 So. 2d at 990) (quoting *Lorei v. Smith*, 464 So.2d 1330, 1332 (Fla. 2d DCA 1985).

B. Economic Development Agency

The evidence presented to the trial court established that Bullock and other members of the Negotiating Team acted as an EDA within the

meaning of § 288.075(1)(a), Florida Statutes (2009), in the course of conducting negotiations with the Orioles.[12] Consequently, the Negotiating Team was subject to the Sunshine Law and the trial court erred in concluding otherwise.

The record is replete with evidence that the goal of luring a major league baseball team to Sarasota was in furtherance of economic development. For example, Bullock himself acknowledged that he "was acting in the economic development interest of the County" when conducting negotiations with the Orioles. (Ex. 6 at 163-164). Barbetta acknowledged that Major League Baseball is quite sensitive about publicly

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[12]Two of the six definitions of an EDA under § 288.075(1) are at issue here:

> (a) "Economic development agency" means:
>
> 1. [t]he public economic development agency of a county or municipality or, if the county or municipality does not have a public economic development agency, the county or municipal officers or employees assigned the duty to promote the general business interests or industrial interests of that county or municipality or the responsibilities related thereto.
>
> ….
>
> 6. Any private agency, ***person***, partnership, corporation, or business entity when authorized by the state, a municipality, or a county to promote the general business interests or industrial interests of the state or that municipality or county.

§ 288.075(1)(a), Fla. Stat. (emphasis added).

revealing any information about its business practices, including efforts to relocate to another community. (Ex. 7 at 379; 381) Team owners invoked the economic development exemption. (*Id.* at 426) Staub, who sat in on the initial meetings with the Orioles, testified that she was aware of reliance on the exemption. (Ex. 8 at 519) At one of the initial Negotiating Team meetings with the Orioles in November 2008, the City Manager stated that the Orioles' representatives would only show financial information on a computer screen.[13] (Ex. 7 at 324-325) Yarabek's notes make detailed references to economic impact information. (Ex. 6 at 270-272) Likewise, the Chamber—that played a critical role in the negotiations—considered the Orioles an "economic development opportunity." (Ex. 8 at 597)

Significantly, it is undisputed that the Orioles invoked, and that Bullock relied on, the provisions of § 288.075 to prevent the disclosure to the media of records relating to the Orioles' negotiations. (Ex. 16) Notwithstanding this express reliance on the exemption that necessarily described the activities of Bullock's Negotiating Team as an EDA for

[13]This practice was recently held to violate Florida's Public Records Act in another case. *See Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1207 (Fla. 1st DCA 2009), *review denied*, 37 So. 3d 848 (Fla. 2010) (receipt of a public record "refers not only to a situation in which a public agent takes physical delivery of a document, but also to one in which a public agent examines a document residing on a remote computer. If that were not the case, a party could easily circumvent the public records laws.").

purposes of avoiding a public records request, the trial court rejected the notion that it was subject to the Sunshine Law, stating that entitlement to the records exemption did not "convert [Bullock] into a one man collegial body." (Ex. 1 at 3) The trial court erred in this conclusion for three reasons.

First, Bullock did not work alone. He relied on the advice and recommendations from Negotiating Team members during the course of negotiations. Consistent with the evidence, the trial court made numerous findings that:

> the people and entities Bullock met with [Bullock's Negotiating Team], albeit in frequent and *unpublicized* meetings, operated in the roles of advisor, consultant and facilitator, to assist him in the performance of his duty to negotiate with the Orioles.

(Ex. 1 at 4) (emphasis added). That Bullock "retained and exercised the ultimate authority to negotiate the terms of the MOU that would be submitted to the [Board] for consideration" does not immunize the prior activities and numerous meetings of the Negotiating Team from the Sunshine Law. (Ex. 1 at 4) For one thing, Bullock did not act alone when he met with representatives of the Orioles during those meetings. Neither was he alone when he met with commissioners in the one-on-one meetings, including the final ones just prior to the public meeting in July 2009. (Ex. 6 at 287, 293)

Second, as the trial court itself noted, "[w]hether they were a negotiating team is not the determinative issue." (Ex. 1 at 4) It is the substance of the group's activities that determines whether the Sunshine Law applies. *E.g.*, *Wood v. Marston*, 442 So. 2d 934, 939 (Fla. 1983) (explaining that proper focus of Sunshine Law inquiry is "on the *nature* of the act performed, not the make-up of the committee or the proximity of the act to the final decision" (emphasis in original)); *Krause v. Reno*, 366 So. 2d 1244, 1251 (Fla. 3d DCA 1979) ("In construing the Sunshine Law, the Florida courts have consistently looked at the substance of a meeting, rather than its form, in determining its nature."). If a committee has a role in the decision-making function "then the Sunshine Law would apply even if all members of the group were city staff." *Dascott*, 877 So. 2d at 12.

Thus, just because the Negotiating Team includes some members of the County staff does not mean that the group is immune from the Sunshine Law. It is the nature of the acts performed by the Negotiating Team as a whole that subjects it to the Sunshine Law. Here, the evidence establishes that the negotiations were for the express purpose of economic development.

Third, whether Bullock was "a one man collegial body" or whether the Negotiating Team itself was formally designated as an EDA matters not under § 288.075(1)(a), Florida Statutes. § 288.075(1)(a)4 expressly provides

that if there is no publicly created EDA, the definition still applies to "the county or municipal officers or employees assigned the duty to promote the general business interests or industrial interests of that county or municipality or the responsibilities related thereto."[14] Bullock clearly stated that one of his duties for the County was to promote economic development and that he was acting in that capacity at the time of the negotiations with the Orioles. (Ex. 3 at 46; Ex. 4 at 163-164) The City Manager also testified that economic development was a purpose behind the role his staff played in conducting negotiations with the Orioles on the Interlocal. (Ex. 5 at 101)

More important, although it is clear Bullock did not act alone in his meetings, even if he had, the statutory definition of an EDA under § 288.075(1)(a)6 would still require the meetings to be held open to the public. § 288.075(1)(a)6 provides that an EDA includes:

> Any private agency, ***person***, partnership, corporation, or business entity when authorized by the state, a municipality, or a county to promote the general business interests or industrial interests of the state or that municipality or county.

[14]At trial, Bullock stated that the County had not created a public EDA. (Ex. 6 at 229-230) During his deposition, Bullock testified that the County had a formal "economic development activity group" that he was a member of and that he acted in that role with regard to the negotiations with the Orioles. Bullock further stated that he is occasionally designated as a member of the "economic development agency for the county." (Ex. 17 at 55-56)

(Emphasis added). Thus, Bullock alone was an EDA given his unequivocal testimony that he was promoting the county's business interests in negotiating with the Orioles and that this was a duty he performed from time-to-time. The County cannot apply the statute when it suits its purpose, and then abandon it when it no longer fulfills that purpose.

The trial court's determination that Bullock's reliance on an exemption to prevent inspection does not transform him alone into a collegial body is not only contrary to the statutory definition of what constitutes an EDA, but turns the statute on its head. The statute cannot be used as a shield to prevent the inspection of public records and, at the same time, a sword to prevent the public from attending meetings.

The trial court's decision also ignores several Florida Attorney General Opinions that are squarely on point. While Citizens do not dispute that the County was able to properly assert the exemption under the Public Records Act, Florida law expressly recognizes that such exemptions do not create exemptions from the Sunshine Law for its meetings. *See* § 119.07(7), Fla. Stat. ("An exemption from this section does not imply an exemption from s. 286.011. The exemption from s. 286.011 must be expressly provided."). Although § 288.075 expressly requires that certain information submitted by parties negotiating with an EDA be exempt from the Florida

Public Records Act, as the Florida Attorney General has on three different occasions opined, the meetings of an EDA must be noticed and open to the public as required by Florida's broad Sunshine Law.

In 2004 then-Attorney General Charlie Crist opined that "the exemption expressed in § 288.075(2), Florida Statutes, applies only to records and does not constitute an exemption from the provisions of the Government-in-the-Sunshine Law." Op. Att'y Gen. Fla., 2004-19 (2004). *See also* Op. Att'y Gen. Fla., 2001-26 (2001) (same).

In an earlier opinion, the Florida Attorney General was asked "[s]hould the media be notified of all meetings of the Santa Rosa County Industrial Development Authority, and if so, can those portions of the meetings dealing with specific clients be closed?" Op. Att'y Gen. Fla. 080-78 (1980). "[T]he Legislature has provided such a statutory exception to the public records disclosure requirements in s. 119.07(1), F.S. (but not to the open meetings requirements in s. 286.011, F.S.)." *Id.* The reason for this difference between the applicability of § 288.075 to the public records law and not the open meetings law is simple: § 288.075 "fails to mention s. 286.011 in any respect." *Id.* In addition, "[i]t is fundamental under rules of statutory construction that the express inclusion of one thing in a statute implies the exclusion of other such things which are not expressly

mentioned." *Id.* (citing *Thayer v. State*, 335 So. 2d 815 (Fla. 1976); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341 (Fla. 1952)). Thus, § 288.075's limited exemption for public records "in no way affects or constitutes an exception to the open meeting requirements in s. 286.011." *Id.*

By its own declaration, Bullock's Negotiation Team operated as an EDA and, as a result, it was able to assert the exemption for drafts of the MOU. Bullock, along with other members of the County staff, and with the assistance of highly paid private consultants, acted in the County's economic or business interest while negotiating the MOU with the Orioles, which it would later take to the Board. In so doing, this group was acting as the County's EDA. While the records submitted to the EDA by the Orioles were covered by the exemption under § 288.075(2), the meetings between the EDA and the Orioles were required to comply with Florida's Sunshine Law. Because those meetings were not conducted in the Sunshine, the MOU, which was a result of those numerous private meetings, is void.

The trial court's decision, if affirmed, would permit every economic development activity by Florida municipalities to shield its activities from the public. One or more staff members, delegated authority to conduct substantial public business, winnow options, and consult with board members individually, could make decisions to a point just short of

ceremonial acceptance. Only when the final vote occurs would the public learn of the substantial expenditure of public funds and resources. This is not what the citizens of Florida deserve and certainly not what the constitutional amendment they approved permits. Such an arrangement provides no benefits to the public and a windfall to the private entity. A board cannot avoid the scrutiny mandated by the statute and constitution by saying that one staff member will make all the decisions except for the final one. The trial court's decision below eviscerates the spirit and letter of the law.

II.

THE DELEGATION OF AUTHORITY TO THE NEGOTIATING TEAM REQUIRED ITS MEETINGS TO COMPLY WITH THE SUNSHINE LAW.

As set forth above, during the Orioles' negotiations, the Board delegated the responsibility to negotiate to the County staff. County Administrator Ley subsequently delegated that assignment to Mr. Bullock who worked with a variety of staff members, the County Attorney, professional facilitators, and representatives from the Chamber. Although Bullock was the lead on the project, he received advice, recommendations, and other assistance throughout the process from Yarabek, Seward, Cranor, Jacobs, DeMarsh, and Barrett, among others. This Negotiating Team worked together, outside the Sunshine, to bring the MOU and related documents to

the Board for its consideration on July 22, 2009. As set forth below, there is no delegation exception to the Sunshine Law. By closing meetings that were an integral part of the decision-making process, the Negotiating Team violated the Sunshine Law.

In 1994, the City of Miami asked the Attorney General:

> Are the meetings of a negotiating team created by resolution of the city commission which reports the results of negotiations to the city commission for final approval subject to the Sunshine law?

Op. Att'y Gen. Fla. 94-21 (1994). At the time, Miami was negotiating with the NBA's Miami Heat (the "Heat") to keep the team in town. *Id.* The city commission delegated authority to negotiate to a negotiating team that was comprised of "the mayor, a person designated by the city manager, and a person designated by the Miami Sports and Exhibition Authority." *Id.* Although the city commission did not provide specific parameters for its negotiating team, the city commission retained the right to approve the deal struck with the Heat by the negotiating team. *Id.* The Attorney General held that Miami's negotiating team was subject to the Sunshine law. *Id.*

"The Florida courts have clearly stated that governmental entities may not carry out decision-making functions outside of the Sunshine law by delegating such authority." *Id.* The opinion discussed the distinction between advisory committees with the authority to make recommendations to the

public body with final authority to bind the agency and fact-finding committees charged only with information gathering and reporting. *Id.* The former is subject to the Sunshine law whereas the latter are not. *Id.* The Miami negotiating team was an advisory committee subject to the Sunshine Law because it was "charged with more than conducting mere fact-finding but rather during negotiations will be participating in the decision-making process by accepting some options while rejecting others for presentment of the final negotiations to the city commission." *Id.*

In support of this decision, the Florida Attorney General relied upon two analogous cases, *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983) and *News-Press Publishing Co. v. Carlson*, 410 So. 2d 546 (Fla. 2d DCA 1982). In *Carlson*, a public hospital in Lee County delegated the responsibility to prepare the proposed budget to the president of the hospital and his staff. 410 So. 2d at 547. This delegation resulted in the creation of "an ad hoc committee known as the internal budget committee." *Id.* The committee met during a period of several months and created the proposed budget, which was comprised of 4,700 line items which totaled about $35 million. *Id.* The hospital board's finance committee "accepted the budget with very little discussion." *Id.* The Second District Court of Appeal rejected the hospital's argument that the committee was not subject to the Sunshine Law, stating:

> When public officials delegate de facto authority to act on their behalf in the formulation, preparation, and promulgation of plans on which foreseeable action will be taken by those public officials, those delegated that authority stand in the shoes of such public officials insofar as the application of the Government in the Sunshine Law is concerned.

Id. at 547-48 (citation omitted). The court also rejected a claim that a committee of staff members was not subject to the Sunshine Law. Instead of looking at who was on the committee, the court looked to its purpose.

> [W]hen a member of the staff ceases to function in his capacity as a member of the staff and is appointed to a committee which is delegated authority normally within the governing body, he loses his identify as staff while operating on that committee and is accordingly included within the Sunshine Law.

Id. at 548. "In this case, the staff became the public body." *Id.*

This Court reached the same conclusion in *Wood* in regards to a search-and-screen committee at a law school. 442 So. 2d at 936-37. The committee was made up of seven members of the law school's faculty, a prominent attorney, and two non-voting members of the law school's student body. *Id.* at 937. "The purpose of the committee was to solicit and screen applications for the deanship and to submit for faculty approval a list of the best qualified applicants before forwarding the list of [the university's president] for the final selection." *Id.* This Court explained that "the evaluation process was to take place 'out of the sunshine.'" *Id.* Local media

entities filed suit arguing that the committee meetings should be open to the public. *Id.* This Court rejected the university's position of secrecy.

Although the committee in *Wood* clearly had a fact-gathering purpose, "[i]t had an equally undisputed decision-making function in screening the applicants." *Id.* at 938. It did not matter that the law school's faculty and the university's president retained the right to reject the committee's recommendations. *Id.* at 939. "Review is a second-hand retrospective reflection upon the decision-making process, not the first-hand observation to which the public is entitled." *Id.*

Like *Carlson*, the *Wood* Court rejected the notion that the Sunshine Law did not apply because the committee included staff. It was the purpose of the committee rather than its makeup, which affected the analysis. *Id.* The Court also rejected a "remoteness from the decision-making process" argument. *Id.* at 940-41. "No official act which is in and of itself decision-making can be 'remote' from the decision-making process, regardless of how many decision-making steps go into the ultimate decision." *Id.* at 941. As a result, the committee was subject to the Sunshine Law.

The instant case falls clearly within the construct discussed in *Wood*, *Carlson*, and Florida Attorney General Opinion 94-21. The Board delegated the Orioles' negotiations to staff. In so doing, those members of the staff

became subject to the Sunshine Law. The delegation occurred at the November 4, 2008 Board meeting when staff was told to work on a conceptual plan with the Orioles. (Ex. 14) Bullock was the point-person for this effort and he worked, along with Staub, with other members of the County staff in addition to staff from the City and members of the Chamber, often referring to themselves collectively as the Negotiating Team. The negotiations produced a draft MOU, which later became the blueprint for additional negotiations. Because the Negotiating Team was delegated the responsibility to negotiate a deal with the Orioles for the Board to consider and vote upon, its meetings related to the negotiations with the Orioles were subject to the Sunshine Law and should have been open to the public.

Dascott further illustrates why the Negotiating Team is subject to the Sunshine Law. In *Dascott*, the plaintiff claimed that closure of a pre-termination conference panel's deliberations violated the Sunshine Law. 877 So. 2d at 9. According to the county code, the county administrator had "the sole power to suspend or terminate employees of the county." *Id.* at 10. The code provided for a pre-termination conference, which was to "be conducted by the Department Head or designee, with the Personnel Director and the Director [of the] Office of Equal Opportunity or their representatives present." *Id.* at 11. However, despite the three-person panel, the decision on

whether to affirm a recommended dismissal of an employee was made by the Department Head alone, not by a vote of the panel. *Id.* The question for the court, then, was whether the pre-termination conference panel was a "board" or "commission" under the Sunshine Law. *Id.*

Factually, the defendant sought to cast the participation of the other two members of the panel as being "consultation and advice." *Id.* at 13. This attempt at hair-splitting to distinguish the other panelist's activities from "recommendations" was rejected. *Id.* ("We see little distinction between 'advice' and 'recommendations' in the context of this pre-termination panel."). After discussing prior precedent related to the issue, the court held:

> we conclude that the pre-termination panel constituted a “board” or “commission” because it exercised decision-making authority. While in this case the County Administrator had the sole authority to discipline or terminate county employees, he delegated that authority to each department head. The department head in charge of appellant's pre-termination conference chose to share this authority with the other members of the panel.

Id. at 12-13. The court also said, "[i]t appears to us that the conference panel assists in determining whether to terminate an employee. Therefore, they participated in the decision-making authority delegated to the department head, and their meeting was subject to the Sunshine Law." *Id.* at 13.

However, Bullock did not act alone - far from it. Staub was personally involved in negotiations with the Orioles. Barbetta was also personally

involved at times. Additionally, DeMarsh, Seward and Yarabek all played a significant part in the process as well and their participation was *not* limited to "fact-finding." Members of the Sarasota Chamber of Commerce, such as Mr. Cranor, a self-proclaimed “broker” between the County and the Orioles, participated in negotiations with the Orioles. The County hired professional baseball experts, Jacobs and Barrett, who were also at the table at various times and assisted in drafting portions of the MOU.

But the public was not involved in these preliminary discussions which are the foundation of the Orioles’ deal. The fact that this group was informal, and that its membership was fluid, does not alter the fact that this involved the collective inquiry and discussion stages of the process. "[A] subordinate group or committee selected by the governmental authority should not feel free to meet in private." *Gradison*, 296 So. 2d at 476. To allow otherwise would be to eviscerate the Sunshine Law and provide a template for agencies to use to keep discussion and decision-making secret and away from the public - the very people who the Sunshine Law is meant to protect. It is every step in the decisional process that is covered by the Sunshine Law, not just the final ceremonial meeting and vote.

To be sure, it would be an evasive device if a board could simply delegate authority to one senior staff member to conduct secret negotiations

through a committee under the guise that only one member of the committee has the power to filter those recommendations back to the board—all outside the Sunshine Law except the final ceremonial act of entering into the negotiated contract. If such a construction were to prevail, it would effectively sound the death knell for the Sunshine Law. Governmental units across the state would soon abandon the entire deliberative public process in favor of a "delegation to staff" exception. As noted in *Wood*:

> Review is a second-hand retrospective reflection upon the decision-making process, not the first-hand observation to which the public is entitled. Where a body merely reviews decisions delegated to another entity, the potential for rubber-stamping always exists. To allow a review procedure to insulate the decision itself from public scrutiny invites circumvention of the Sunshine Law.

Wood, 442 So. 2d at 939-940. It is the *function* of the committee and not its composition that determines whether the Sunshine Law applies. Here, Bullock's Negotiating Team played a significant role in the decision-making process which the public was entitled to observe firsthand.

III.

THE TRIAL COURT ERRED IN DETERMINING THAT INTENT TO VIOLATE THE SUNSHINE LAW WAS A REQUIREMENT UNDER § 286.011, FLORIDA STATUTES.

The County also violated the Sunshine Law when the Commissioners had e-mail discussions with each other regarding Orioles-related matters

rather than hold such discussions before the Board in public meetings. As previously discussed, the Sunshine Law must be interpreted to frustrate all evasive devices. *City of Miami Beach v. Berns*, 245 So. 2d 38, 41 (Fla. 1971). As a result, e-mail discussions between two or more members about matters that may come before them violate the Sunshine Law.

Commentators have made note of the threat technology poses to Florida's open government laws. Cheryl Cooper, *Sending the Wrong Message: Technology, Sunshine Law, and the Public Record in Florida*, 39 Stetson L. Rev. 411 (2010). In 2009, the Commission on Open Government Reform, established by Governor Crist, evaluated the impact of technology on open government laws.[15] One of the conclusions drawn in that Final Report was that "technology … has changed the nature of communication but it has not diminished the value of Florida's open government laws or the need for public officials to consistently follow the law." Final Report at 29.

In this case, numerous e-mail strings among commissioners regarding Orioles-related issues violated the Sunshine Law.[16] These e-mail discussions violated the Sunshine Law because they contained more than a singular

[15]The Commission on Open Government Reform, *Reforming Florida's Open Government Laws in the 21st Century*, (Jan. 2009) ("Final Report").

[16]For a more thorough factual discussion of the e-mails, *see* pp. 12-14, *supra*. The trial court reviewed dozens of e-mail chains among commissioners. Duplication of all discussions would be impractical here.

statement by a commissioner. The e-mail chains constituted back-and-forth substantive discussions between commissioners on matters then pending before the Board. This is a clear violation of the Sunshine Law, and the trial court's order found as much. (Ex. 1 at 6-9) The trial court concluded, however, that despite the violations, the commissioners were acting in good faith, "believing that they were in compliance with the law." (*Id*. at 8-9) As a result of that distinction, the court excused the violations, stating:

> There was clearly no attempt to subvert the law by avoiding public debate. In short, if in fact violations occurred, the violations were not egregious or intentional.

(*Id*. at 9)

The trial court's position loses sight of a basic principle of the Sunshine Law, namely that intent is irrelevant under the Sunshine Law. As the Fourth District Court of Appeal held:

> The principle that a Sunshine Law violation renders void a resulting official action does not depend on a finding of intent to violate the law or resulting prejudice. Once the violation is established, prejudice is presumed.

Zorc v. City of Vero Beach, 722 So.2d 891, 902 (Fla. 4th DCA 1998). The *Zorc* decision relied on *Gradison*, which unequivocally stated that: [a]lthough a criminal prosecution requires proof of scienter an unintended violation of the government in the sunshine law will negate any action taken by the Town Council. *Gradison*, 296 So.2d at 477-78.

Clearly, the noted e-mails were a part of a bigger process—the nine-month negotiation with the Orioles. But as the Second District Court of Appeals explained in *Williams*, the Sunshine Law requires openness throughout the entire decision-making process, not merely at the final stages. In this case, there was secrecy up to the final ceremonial act. Not content with the public records exemption that cut off access to information, Bullock encouraged commissioners "not to discuss in any detail" the Orioles' negotiations at public meetings. (Ex. 29) There is no valid explanation for Bullock's e-mail other than the desire to keep the public in the dark. The triple-play of unnoticed meetings by the Negotiating Team, one-on-one meetings, and e-mail discussions exacerbated the Sunshine Law violations. *See also Zorc*, 722 So. 2d at 902 ("Rarely could there be any purpose to a non-public pre-meeting except to conduct some part of the decisional process behind closed doors.").

IV.

THE SUNSHINE LAW VIOLATIONS WERE NOT CURED BECAUSE THE COUNTY DID NOT INDEPENDENTLY REVIEW THE ACTIVITIES OF THE NEGOTIATING TEAM.

The trial court found that the County had cured any violations of the Sunshine Law because of the aggregate of public meetings that occurred prior to July 22, 2009, in which the issue of baseball was discussed. (Ex. 1

at 9-10) The trial court's reasoning amounts to a partial compliance viewpoint of the Sunshine Law that is inconsistent with the mandate that every step in the decision-making process be open to the public.

The crux of the County's cure argument is that the July 22, 2009 meeting fully complied with the Sunshine Law because it lasted many hours, involved public attendance and comments, and extensive discussion of the Project Documents by the Board. The County also pointed to other public meetings at which baseball issues were discussed between November 2008 and July 2009 as curing the Sunshine violations. However, the length of discussion, allowance of public comment and discussion of some issues among the members of the Board do not sufficiently cure the County's Sunshine Act violations. "[O]nly a *full*, open hearing will cure a defect arising from a Sunshine Law violation." *Zorc*, 722 So. 2d at 903 (emphasis in original). In *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857 (Fla. 3d DCA 1994), the court discussed four steps that the public body took which made the cure sufficient. *Id.* at 860-61.

In *Pigeon Key*, an advisory committee was formed to negotiate a lease for Pigeon Key with the party who had submitted the chosen request for proposal. *Id.* at 859. The advisory committee held two meetings without public notice, but took detailed minutes of those meetings, which described

recommendations for the lease and for a master plan for use of the island. *Id.* A final meeting of the advisory committee was later held with proper public notice. *Id.* The county commission then held a public hearing at which the lease negotiated by the advisory committee was discussed. *Id.* Because of a problem with the lease, the county commission did not vote on the lease at the initial meeting. *Id.* The county attorney then worked with the vendor's attorney on changes to the lease. *Id.* The county commission then held a second public hearing during which minutes of the improperly noticed advisory committee meetings were read into the record. *Id.* The county commission then heard public comment on the lease and "recommended and approved additional changes to the lease." *Id.* One of the key issues was whether the cure meetings were sufficient.

The *Pigeon Key* Court outlined four reasons the cure was effective. Only one of those four reasons is present in this case. The first reason was that the public body held subsequent public hearings. *Id.* at 860. Although, the County in this case did hold subsequent public meetings, that is the only similarity to the cure meeting in the *Pigeon Key* case.

Second, the public body made an effort "to make available to the public the minutes of the unnoticed meetings." *Id.* This effort included reading the minutes to the unnoticed meetings into the record at one of the

subsequent public hearings. *Id.* at 860-61. In this case, not only were no minutes of the numerous closed meetings provided to the public, they were not even kept. This important public access, which helped remediate the Sunshine violation in *Pigeon Key*, is completely missing here. *See also Zorc*, 722 So. 2d at 902 (holding attempted cure was ineffective and noting that public body failed to provide public access to transcript of closed meeting).

Third, the lease approved in *Pigeon Key* "was markedly different from that recommended by the Advisory Committee." 647 So. 2d at 861. Here, the Board did not make a single change to the MOU presented to them.

Finally, the *Pigeon Key* Court found it relevant that much of the work on the lease was done after the noncompliant meetings were held. In this case, negotiations between members of the Negotiating Team with the Orioles continued right up to the eve of the July 22, 2009 meeting. Thus, the fourth reason from *Pigeon Key* is also absent in this case.

Two other cases provide insight into what is and what is not sufficient cure of a Sunshine violation. In the first case, *Finch v. Seminole County School Board*, 995 So. 2d 1068 (Fla. 5th DCA 2008), the Seminole County School Board was engaged in deciding rezoning issues. *Id.* at 1070. Three initial rezoning plans were developed at public meetings by a "Core Committee" which was delegated the task by the School Board. *Id.* After

receiving the rezoning proposals, the School Board members, along with two members of the media, and others toured the neighborhoods that might be affected. *Id.* To avoid discussion among the School Board members about issues that might come before them for a vote, they purposefully separated themselves on the bus. *Id.* Despite these good faith efforts, the court found that the bus-trip was a Sunshine violation. *Id.* at 1071-72.

A subsequent meeting, however, was found to have been a sufficient cure. *Id.* at 1073. That meeting lasted five hours with more than 800 members of the public attending. *Id.* at 1070. Importantly, the other plans which were considered by the School Board were not only published in advance of the meeting for the public to peruse, but "the various plans, including the one recommended by the superintendant, were vigorously debated." *Id.* at 1073. It was also noted that the violation was "certainly not willful" and was "inadvertent." *Id.*

A description of a sufficient cure is also set forth in *Blackford v. School Board of Orange County*, 375 So. 2d 578 (Fla. 5th DCA 1979). In *Blackford*, like this case, a series of one-on-one meetings were held between the superintendant and the individual board members right before a vote on redistricting issues. *Id.* at 580. The court found that Sunshine violations had occurred related to the redistricting decision. *Id*. Although the superintendant

was "adamant that he did not act as a go-between during their discussions and denied that he told any one board member the opinions of any of the others," the court found that Sunshine violations had occurred related to the school board's redistricting decision. *Id*. No cure had been attempted. *Id.* at 581. The appellate court did describe what would be a sufficient cure:

> we recognize the possibility that the board, upon reconsideration, may decide on the same course of action as before. However, what we Do [sic] require is that the entire redistricting problem, and all the supporting data and input leading up to the resolutions which are the subject matter of this cause, be re-examined and re-discussed in open public meetings. The brief eleven days previously allowed for the aggrieved parties to air their objections were totally insufficient to render the error of twelve weeks of secret negotiations, harmless.

Id. at 581. The County did not meet this criteria, just like it did not meet the standards for successful cure in *Finch* and *Pigeon Key*.

The County's decision to conduct negotiations through the Bullock-led Negotiating Team outside of the public eye was a purposeful choice. Negotiations with the Reds were in the open, but the County chose not to conduct negotiations with both the Red Sox and the Orioles in that manner. Thus, unlike *Finch*, the violations here lack the same good faith aspect.

Cure meetings must be more than "a ceremonial acceptance of secret actions and not merely a perfunctory ratification of secret decisions." *Tolar v. Sch. Bd. of Liberty County*, 398 So. 2d 427, 429 (Fla. 1981). The prior

public meetings provide no substitute for the lengthy meetings of the Negotiating Team. It is significant that none of the prior meetings disclosed *any* aspect of the in-depth meetings held by the Negotiating Team. The key aspect of a cure meeting is whether a full and open discussion of all the underlying data, input and prior discussions takes place. For these reasons, the prior meetings did not cure the preceding Sunshine Law violations.

CONCLUSION

Florida courts have been unwilling to restrict the breadth of the Sunshine Law because of the important goals it serves. Florida's citizens amended their constitution to ensure that its government remains of the people, by the people, and for the people. The trial court's order fails to serve these principles and must be reversed.

Respectfully submitted,

Andrea Flynn Mogensen, Esquire
Florida Bar No. 0549681
200 South Washington Blvd., Ste. 7
Sarasota FL 34236
Telephone: (941) 955-1066

Gregg D. Thomas
Florida Bar No.: 223913
Paul R. McAdoo
Florida Bar No. 0036219
400 N. Ashley Drive, Ste. 1100
Tampa, FL 33602
Telephone: (813) 984-3060

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished by U.S. Mail and e-mail on September 9, 2010, to: FREDERICK ELBRECHT, 1616 Ringling Blvd., Sarasota, FL 34236; ROBERT FOURNIER, 1 S. School Ave., Sarasota, FL 34237; SUSAN CHURUTI, One Tampa City Center Ste. 2700, Tampa, FL 33602; EDWARD W. VOGEL, III, Esq. and MICHAEL L. WIENER, Esq., Holland & Knight LLP, 2115 Harden Boulevard, Lakeland, FL 33803; and DENNIS J. NALES, Esq., Chief Assistant, State Attorney's Office, 2071 Ringling Boulevard, Sarasota, FL 34237.

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ANDREA FLYNN MOGENSEN, Esquire

CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the font requirements set forth in Rule 9.210(a)(2), Fla. R. App. P., and AO04-84.

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ANDREA FLYNN MOGENSEN, Esquire