

ORDINANCE NO. 2016-9

AN ORDINANCE OF THE MAYOR AND CITY COUNCIL OF THE CITY OF NORTH MIAMI BEACH, FLORIDA, AMENDING CITY OF NORTH MIAMI BEACH CITY CODE CHAPTER II ENTITLED "STRUCTURE OF CITY GOVERNMENT", SECTION 2-1 ENTITLED "CITY COUNCIL", SUBSECTION 2-1.1 ENTITLED "MEETINGS OF THE CITY COUNCIL" AT SUBSECTION (a) THEREOF TO ESTABLISH AN ETHICAL DUTY OF CITY COUNCILMEMBERS TO REMAIN AT CITY COUNCIL MEETINGS DURING THE ENTIRETY OF ANY SUCH COUNCIL MEETING AND PROVIDING FOR JURISDICTION OF MIAMI-DADE COUNTY COMMISSION ON ETHICS AND PUBLIC TRUST TO ENFORCE THIS SUBSECTION; PROVIDING FOR SEVERABILITY, REPEALER, CODIFICATION AND AN EFFECTIVE DATE.

WHEREAS, Florida Statute section 286.012 (Florida's "Government in the Sunshine" law) specifically provides that members of governmental bodies are required to perform their responsibilities by participating in decisions to be made by such bodies. Clearly, a member of a governmental body, such as the North Miami Beach City Council, is expected to attend and remain at meetings of the City Council, barring a situation in which that member's presence is unexpectedly required elsewhere;

WHEREAS, allowing without restriction a City Councilmember to leave Council meetings prior to its completion of business effectively grants to such Councilmember the means of frustrating official action by merely refusing to remain at a Council meeting, which actions the City Council deems to be inconsistent with a Councilmember's official duties and contrary to the Oath of Office as stated in Section 8 of the City Charter ("...to well and faithfully perform... their duties...");

WHEREAS, within the past several months, certain Councilmembers have left Council meetings before the Council's completion of agenda items, necessitating either the postponement and rescheduling of time-sensitive items for future Council meetings or the need for meeting adjournment pending the Council's ability to obtain a quorum, both situations serving to obstruct and impede good, responsive government in the City of North Miami Beach; and

WHEREAS, inasmuch as State and County laws permit the governing body of a

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municipality to impose upon its officers additional or more stringent standards of conduct than those specified in said laws, the City Commission hereby enacts the following to address the above concerns for the purposes of supplementing existing code of conduct regulations applicable to members of the City Council.

NOW, THEREFORE, BE IT ORDAINED by the Mayor and City Council of the City of North Miami Beach, Florida:

Section 1. The foregoing recitals are true and correct.

Section 2. That City of North Miami Beach Code, Chapter II “Structure of City Government”, Article I “The City Council”, section 2-1 “City Council”, subsection 2-1.1 “Meetings of the City Council” at subsection (a) thereof is hereby amended to read as follows:

CHAPTER II – STRUCTURE OF CITY GOVERNMENT,

ARTICLE I—THE CITY COUNCIL

2-1 CITY COUNCIL

2-1.1 Meetings of the City Council.

- a. Quorum Required/Ethical Duty to Remain at City Council Meetings. Before the City Council can transact any legal business, there must be not less than five (5) duly qualified Councilmembers present. Furthermore, in order to promote the integrity of Council meetings and to ensure the performance of public duties by the City’s elected officials, Councilmembers shall (subject to restroom or other temporary personal breaks, and subject to a Councilmember’s duty to leave Council chambers during that portion of a Council meeting in which the Councilmember has a voting conflict) remain at City Council meetings throughout the entirety of such meeting, barring an emergency or other matter beyond a Councilmember’s control which compels his/her presence elsewhere, in which event he/she shall state into the record the basis of such emergency/other matter prior to leaving the meeting. Failure of a Councilmember to truthfully state the basis of emergency/other matter prior to leaving the meeting shall constitute a violation of this Code subsection. The Miami-Dade County Commission on Ethics and Public Trust shall enforce the provisions of this subsection and may impose any penalty authorized by County Code pertaining to violations of municipal ethics laws. The validity of any action or determination of the City Council

shall not be affected by the failure of any Councilmember to comply with the provisions herein.

* * *

Section 3. The provisions of this Ordinance are declared to be severable and if any section, sentence, clause or phrase of this Ordinance shall be held invalid by a court of competent jurisdiction, the remainder shall not be affected by such invalidity.

Section 4. All other City ordinances and resolutions or parts thereof in conflict with the provisions of this Ordinance are hereby superseded and repealed.

Section 5. It is the intention of the City Council of the City of North Miami Beach and it is hereby ordained that the provisions of this Ordinance shall become and be made a part of the Code of Ordinances of the City of North Miami Beach, Florida. The Sections of this Ordinance may be renumbered or re-lettered to accomplish this intention and the word "Ordinance" may be changed to "Section," "Article," or other word as the codifier may deem appropriate.

Section 6. This Ordinance shall be effective ten days after adoption on second reading.

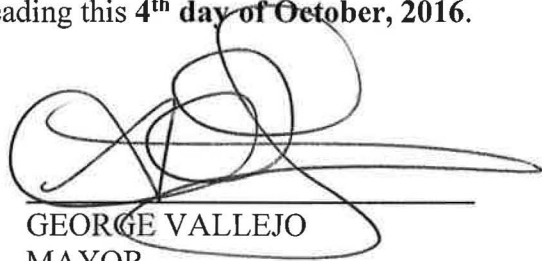
APPROVED on first reading this **6th day of September, 2016.**

APPROVED AND ADOPTED on second reading this **4th day of October, 2016.**

ATTEST:



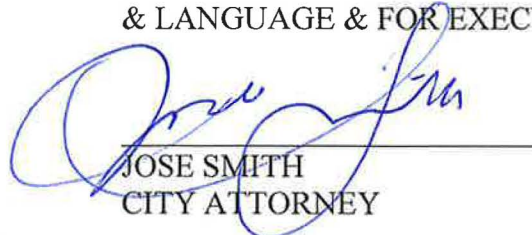
PAMELA L. LATIMORE
CITY CLERK



GEORGE VALLEJO
MAYOR

(CITY SEAL)

APPROVED AS TO FORM &
& LANGUAGE & FOR EXECUTION



JOSE SMITH
CITY ATTORNEY

Sponsored by: Councilmember Barbara Kramer.



City of North Miami Beach Memorandum

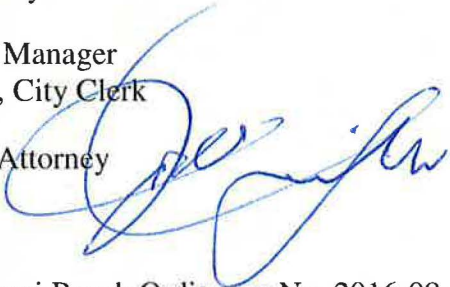
CITY ATTORNEY'S OFFICE

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TO: Honorable Mayor George Vallejo
Members of the City Council

CC: Ana Garcia, City Manager
Pamela Latimore, City Clerk

FROM: Jose Smith, City Attorney 

DATE: October 4, 2016

RE: City of North Miami Beach Ordinance No. 2016-09 re: "Ethical Duty to Remain at City Council Meetings": City Attorney Opinion confirming Constitutionality

I. Introduction

In voting against Ethics Ordinance 2016-09, on first reading, Councilwoman Beth Spiegel challenged the constitutionality of the proposed ordinance on First Amendment and Right to Privacy concerns. For the reasons explained below, Councilwoman Spiegel's constitutional challenges are without merit.

At the request of Councilwoman Barbara Kramer, I have prepared this Memorandum confirming that (1) Councilpersons have a statutory duty to vote (absent a legal conflict); (2) Councilpersons do not have a First Amendment right to walk out of a meeting in "protest" as a reaction to legislative action; and (3) requiring Councilpersons to state a reason for leaving a meeting does not violate their right to privacy.

During the September 6, 2016 public hearing on the Ordinance, the following comments were made:

Joseph Centorino, Executive Director of the Miami-Dade Commission on Ethics and Public Trust:

“I have been in public life a long time, but I have never really come across a situation where apparently **there may be members of this body who are not remaining at meetings and voting and carrying out their public responsibilities. I have a hard time understanding that, if that is the case.**

You know, I know how hard it is to get elected to public office and I try to respect every single elected official because I now **it is hard to be get elected. I know it is difficult and it is a great honor to be chosen by your constituents to represent them and do the things that they can’t do for themselves in terms of making public decisions.**

And I always try to impress in *people the sacredness of the public trust and it really means that when you walk in to this chambers you leave your personal agendas outside. You leave your personal grievances, your gripes...You are elected to make decisions that are the best for the public...*

There is a law that requires that you vote on matters unless you have a conflict of interest or some basis for not being able to be fair on a given matter.

Following Mr. Centorino, resident Chuck Cook spoke about protesting the Vietnam War while serving in the Army.¹ He also compared councilpersons to the Ladies in White protesting in Communist Cuba and the recent mass protests in Venezuela:

Chuck Cook, North Miami Beach resident:

“I myself protested for Civil Rights and protested against the war in Vietnam while I was actually serving in the United States Army. This piece of legislation apparently was created as a response to a form of protest by some of the Councilmembers who walked out of a meeting as a statement of protest as to what they conceived as a measure of injustice...

¹ It would have been illegal for Mr. Cook to protest the Vietnam War while on active military duty. In the face of compelling government interests to promote efficiency in its armed services, the Supreme Court has held that an officer’s First Amendment interests do not outweigh the interest of the military. Lee v. United States, 32 Fed. Cl 530,542 (1995) (“even if there was any interference with protected expression in this case, it was merely incidental to the military’s need to ensure discipline in order to carry out its important mission”).

Is it an ethical violation to leave a meeting as a form of protest? Is it an ethical violation to leave the room because a piece of legislation is against your beliefs?

Be glad that the protests here do not come to the same risk as one of the Ladies in White protesting against a decade old repressive regime in Cuba, or the risk the citizens of Caracas, Venezuela took last week to protest the failed policies from an authoritarian ruler. Surely, you have it in you to respect the rights of your colleagues to protest and be glad they can do so without fear for their lives or their safety.”

During discussion on the Ordinance, Councilwoman Spiegel confirmed that she walked out of the July 19, 2016 City Council meeting “as a protest” to the Mayor’s new seating arrangements:

Beth Spiegel, Councilwoman:

“Yes, when I left, I left as a protest. I announced on the record, why I was leaving and what my protest was.”²

I do not claim to be a constitutional scholar but I believe this violates every councilmembers’ first amendment right to free speech. Free speech includes the right to protest. It includes the right to get up and leave when you are being disrespected and that is what I did and I don’t think that if there is a constitutional challenge and this will withstand it...If you really want to have a knee jerk reaction like this, let’s go back to the drawing board and let’s do something that doesn’t violate our...First Amendment Rights.”

² Councilwoman Spiegel was cautioned previously at the September 21, 2015 public meeting, and thereafter, in a formal legal opinion dated September 30, 2015 that she was **required** to vote and that she could **not** “abstain from voting.” Ignoring my legal advice, she refused to vote on the appointment of Michael Joseph to the Code Enforcement Board:

“Councilwoman Spiegel: I’d ask that you would please record my vote as abstaining. The only reason I’m not leaving the dais is that I don’t want to destroy quorum but I am not voting on this.

Mayor Vallejo: I don’t know, Mr. Attorney?

Councilwoman Spiegel: I’m not voting.

Mayor Vallejo: Ok.

Councilwoman Spiegel: First Amendment Right, Freedom of Speech. I am not voting.

City Attorney Mr. Smith: I would rather that you vote against it than abstain because there is no such thing as abstaining, you have to vote one way or the other.

Councilwoman Spiegel: I’ll walk off the dais then. I’m not voting on it.

Mayor Vallejo: We lost just quorum again.”

II. Legal Analysis

The first question raised by Councilwoman Spiegel is whether the First Amendment to the United States Constitution affords her the right to walk out in protest over some legislative action. The United States Supreme Court has held that the answer is NO. Nevada Commission on Ethics v Carrington, 564 US 117 (2011).

Additionally, as eloquently explained by Joe Centorino, and legal opinions I issued, Florida law requires elected officials to vote on all matters absent a conflict of interest. Fla. Statute §286.012³

Finally, as discussed below, requiring council members to announce why they leave a meeting does not violate their right to privacy. As elected officials, their right to privacy is significantly diminished under well-established legal authorities.

A. DUTY TO VOTE

Except where there is a conflict of interest, elected officials are required to vote on all matters before them. George v. City of Cocoa, Fla., 78 F.3d 494 (11th Cir. 1996). F.S. Section § 286.012, Florida Statutes, provides:

*A member of a state, county, or municipal governmental board, commission, or agency who is present at a meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted **may not abstain from voting** in regard to any such decision, ruling, or act; and a vote shall be recorded or counted for each such member present, **unless, with respect to any such member, there is, or appears to be, a possible conflict of interest** under s. 112.311, s.112.313, s. 112.3143. (emphasis added).*

For there to be legal conflict there must exist a special pecuniary interest—i.e. a financial gain or loss to the legislator, a client, relative or business associate. See Fla. Stat. §112.3143(3)(a) (“No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer...”).

The Florida Attorney General has rendered numerous opinions interpreting Section 286.012. Under the provisions of the Code of Ethics, a public official is required to have a personal financial interest in a matter in order to abstain from voting. AGO 072-229 (a public official must

³ See also, e.g. FL. AGO 79-14, 72-229, 74-31; George v. City of Cocoa, Fla., 78 F.3d 494 (11th Cir. 1996) (Under Florida law, elected officials are required to vote on all matters before them, and abstaining from a vote is prohibited unless there is a conflict of interest.

cast his vote unless he has a personal interest in the matter); AGO 073-236 (a city councilman is not allowed to abstain on a request for a zoning change made by a business customer unless such vote results in a benefit to the councilman's business); and AGO 074-31 (a county commissioner may not abstain on matters relating to mental health board of which he is a director as he would not profit personally). Furthermore, when adopting the Code of Ethics, the Legislature was concerned primarily with the effect of a public official's economic interests and relationships upon the performance of public duties, rather than the effect on personal preferences or animosities. See Fla. Stat. 112.311(5).

Accordingly, absent a legal conflict of interest, a Councilmember's refusal to vote during a Council meeting constitutes a per se violation of Florida and County ethics laws, and also violates the Councilmember's oath to "well and faithfully perform" his or her duties as an elected official of the City, as mandated by Section 8 of the City Charter.

B. VOTING IS NOT PROTECTED SPEECH UNDER THE FIRST AMENDMENT

The First Amendment protects freedom of expression, ideas and points of view, Stanford v. State of Tex., 379 U.S. 476 (1965), However, the Amendment does not apply when the restriction is not protected speech. Nevada Com'n on Ethics v. Carrington, 564 US 117, 121 (2011).

The U.S. Supreme Court has noted that "[r]estrictions on legislators' voting are not restrictions on legislators' protected speech...Even if the mere vote itself could express depth of belief (which it cannot), **this Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message.**" The Court further explained that "*the legislator casts his vote 'as trustee for his constituents, not as a prerogative of personal power.'* In this respect, voting by a legislator is different from voting by a citizen. While 'a voter's franchise is a personal right,' *the procedures for voting in legislative assemblies...pertain to legislators not as individuals but as political representatives executing the legislative process.*" (emphasis added)

The argument that walking out of a meeting as a "protest" is tantamount to "symbolic speech," was rejected by the Supreme Court in Carrington:

There are, to be sure, instances where action conveys a symbolic meaning—such as the burning of a flag to convey disagreement with a country's policies, see Texas v. Johnson, 491 U.S. 397...But the act of voting symbolizes nothing. It discloses, to be sure, that the legislator wishes (for whatever reason) that the proposition on the floor be adopted...Moreover, the fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like it to convey his deeply held personal belief—does not transform action into First Amendment speech.

Further, the Supreme Court admonished that “a legislator has no right to use official powers for expressive purposes. “It is one thing to say that an inherently expressive act remains so despite its having governmental effect, but it is altogether another thing to say that a governmental act becomes expressive simply because the governmental actor wishes it to be so.” And the Court and emphasized that “[w]e have never said the latter is true.” 564 US at 128.

B. RIGHT TO PRIVACY

Just as City employees are required to disclose reasons for their absence from City employment⁴, requiring a Councilmember to disclose reasons for his/her departure from a Council meeting serves the public good and furthers transparency. Requiring such disclosure advances a legitimate interest of the City in preventing Councilmembers from frustrating official action by refusing to remain at a Council meeting, forcing the postponement and rescheduling of time-sensitive items for future Council meetings or adjournment pending the Council’s ability to obtain a quorum.

By virtue of seeking and holding public office, public officers inherently lack the degree of privacy possessed by other citizens. *Florida Commission on Ethics v. Plante*, 369 So.2d 332 (Fla. 1979). Regardless of whether a public official is elected or appointed to office, his or her legitimate expectation of privacy is substantially diminished. *Duplantier v. U.S.*, 606 F.2d 654, 671 (5th Cir. 1979). The Ordinance is a reasonable regulation on elected officials requiring that prior to leaving a Council meeting on an emergency matter they: “...shall state into the record the basis of such emergency/other matter prior to leaving the meeting. Failure of a Councilmember to truthfully state the basis of emergency/other matter prior to leaving the meeting shall constitute a violation of this Code subsection”. City Code, 2-1.1(a). There is no provision in the Ordinance requiring the disclosure of private or confidential information, nor does the Ordinance’s legislative intent reveal that the City Commission intended Councilmembers to disclose such confidential information.

In *Goldtrap v. Askew*, 334 So.2d 20 (Fla.1976), the Supreme Court determined that a right of privacy did not warrant overturning the State’s ethics law requiring elected officials to disclose their personal finances⁵: **“The State of Florida has a compelling interest in protecting its citizens from abuse of the trust placed in their elected officials, and no court has yet declared**

⁴ See City of North Miami Beach Personnel Policy and Procedure, Number 20 dated December 8, 2014.

⁵ See, also, *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), in which the court held that Florida’s “Sunshine Amendment,” which required extensive financial disclosure by all elected state officials, including judges, did not illegally interfere with familial privacy. Plaintiffs contended that financial disclosure was a matter of “great family concern,” and could bring “mischief, even kidnappers or other criminal attention to an office holder.” 575 F.2d at 1128. The Court concluded, however, that “(f)inancial privacy is not within the autonomy branch of the right to privacy.” *Id.* at 1132.

Similarly, it would be laughable for a public official to claim a right to privacy when confronted with a public records request under Chapter 119 of the Florida Statutes.

that a federal right of privacy overrides a reasonable effort by the state to implement a policy of ethics in government. In this state, in particular, the interest in preventing conflicts of interest rests on the broadest possible base.” Citing to the State’s ethics laws and the legislative intent for such laws⁶, the Court held that the disclosure of personal finances advances the legitimate interest of the state in preventing the wrongful diversion of governmental authority to private financial gain. The Legislature could reasonably conclude that a holder of public office is most apt to act for the public's good only when any member of the public can see any possible conflicts of interest. Similarly, it is not unreasonable that the City of North Miami Beach Council has determined that a member of the City Council is more apt to fulfill his/her public duties to the residents of the City when its residents are provided with the reasons for a Councilmember’s departure from a Council meeting. Further, in *Garner v. Florida Com'n on Ethics*, 415 So.2d 67, 69 (Fla. 1DCA 1982), a Commissioner challenged the Ethics Commission’s disclosure of information after a probable cause hearing on complaints alleging sexual harassment, with the Commissioner claiming such disclosure violated his right to privacy. The Florida Supreme Court held that individual privacy rights did not outweigh the public's right to see such reports, citing *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So.2d 633 (Fla.1980).

III. Conclusion

The City of North Miami Beach has a compelling interest in deterring any abuse of trust placed in their elected officials, such as occurs when a Councilmember unjustifiably leaves a Council meeting prior to its completion of official business. The Ordinance does not place unreasonable burdens on City Council members who for emergency reasons leave Council meetings prior to its adjournment—disclosure of the reason for leaving a meeting is required but no requirement exists that confidential or private information be disclosed. The Ordinance comports with constitutional principles and does not unlawfully impair elected officials’ free speech or privacy rights.

⁶ Fla. Stat. sec. 112.311(6): “It is declared to be the policy of the state that public officers and employees, state and local, are agents of the people and hold their positions for the benefit of the public. They are bound to uphold the Constitution of the United States and the State Constitution and to perform efficiently and faithfully their duties under the laws of the federal, state, and local governments. Such officers and employees are bound to observe, in their official acts, the highest standards of ethics consistent with this code and the advisory opinions rendered with respect hereto regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern”.