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Reply to: Venice

## MEMORANDUM

TO: City Council

FROM: Kelly M. Fernandez, Esq., City Attorney

DATE: November 6, 2018

RE: Quasi-Judicial Procedures

Earlier this year, the City Council directed the City Attorney's Office to review the City's existing quasi-judicial procedures and provide suggestions as to how the procedures could be modified to shorten and streamline hearings. After reviewing a number of other local governments' quasi-judicial procedures, below are options for your consideration. While I am not necessarily recommending all of them, I thought it would be beneficial for you to see and consider all of the approaches that can be taken. The City's existing procedures are also attached for reference.

While reviewing these options, please keep in mind that the goal of quasi-judicial procedures should be to facilitate a well-run hearing that results in a final decision that will withstand appeal. Three factors are considered during an appeal to the circuit court: 1) was procedural due process afforded? 2) were the essential requirements of law observed? and 3) were the findings supported by competent and substantial evidence? Quasi-judicial procedures primarily impact whether procedural due process was afforded. At its most basic level, procedural due process is afforded when the parties were provided notice of the hearing, an opportunity to be heard, were allowed to present evidence, were allowed to cross-examine witnesses, and were informed of all facts upon which the governing body acted. Inclusion of any of the below options into the City's procedures will continue to afford parties their procedural due process rights.

Lakewood Ranch  
6853 Energy Court  
Lakewood Ranch, Florida 34240

Venice  
236 Pedro Street  
Venice, Florida 34285

## Options:

1. Eliminate or restrict rebuttal. Currently, City Code provides each party with 15 minutes for rebuttal, with the applicant afforded additional time if there are multiple affected parties. Rebuttal provides another opportunity for a party to present evidence, but it must relate to evidence or testimony provided by another party during their initial presentation. It cannot be wholly unrelated. The granting of additional time to an applicant if there are multiple affected parties is not required, nor is the provision of rebuttal time to any party required. If rebuttal were to be eliminated, a defined time for closing statements (which would *not* be an opportunity to present additional evidence) would need to be provided in its place. Other jurisdictions provide as little as 5 minutes for closing statements, with no rebuttal.
2. Cross-examinations. As a general rule, questions during cross-examination can only relate to testimony that was elicited during direct examination. Time restrictions on cross-examination can be adopted. A prohibition on re-direct (where the party whose witness it is has an additional opportunity to ask questions) or re-cross can also be adopted.
3. Attorney as fact witness. Procedures have become disrupted in the past when an attorney for a party has also acted as a fact witness. Generally an attorney is not to act as an advocate in a proceeding in which the attorney is likely to be a necessary witness on behalf of the client. Since an attorney wearing two hats in one proceeding is disfavored, the Code should provide that attorney statements will be treated strictly as argument and not fact unless the attorney does the following: 1) indicates at the start of the proceeding that he/she will be a fact witness; 2) is sworn in; and 3) testifies only on direct knowledge. When an attorney acts as a fact witness, he/she will be subject to cross-examination the same as any other witness.
4. Affected party status. Those seeking affected party status can be required to make their intent known to the City Clerk a set number of days in advance of the hearing. Council also may wish to implement an application process, whereby the individual or group would have to provide their grounds for affected party status in writing. This could expedite the review of the request.
5. Objections. The appellate review of any decision rendered by City Council will be based solely on the record created during the hearing before Council. Therefore, it is important that all parties are able to object and have those objections preserved in the record. The Rules of Evidence are relaxed in quasi-judicial proceedings. For instance, hearsay evidence may be used for the purposes of supplementing or explaining other evidence, but it cannot generally, by itself, support a finding. Also, evidence of a type commonly relied upon by reasonably prudent persons can be received whether or not it would be admissible in a court of law. For many objections, Council can simply allow the objection to be made for the record without taking any further action. To the extent an objection requires a decision (e.g. cross-examination exceeds the scope of direct examination) the Mayor or the City Attorney can rule.

6. Designated representatives. Some jurisdictions allow a group of individuals to designate a representative to speak on their behalf. The designated representative must identify whom they represent and can then accumulate, to a degree, the speaking time of the represented individuals during the public comment period. This is *not* the same as seeking affected party status and, therefore, provides no additional procedural rights.

7. Evidence provided in advance. Parties can be required to submit a list of witnesses (experts and fact), exhibits, and/or a summary of their argument a set number of days in advance of the hearing. The thought behind this requirement is that it allows the deciding body to be fully informed prior to the start of the hearing, reducing the amount of time required for the hearing, eliminating any evidentiary surprises, and allowing each party a better opportunity to prepare and streamline their presentations.

Copies of quasi-judicial procedures from the following municipalities are attached:

City of Hollywood

City of Ft. Pierce

City of Delray Beach