



Miami-Dade Commission on Ethics & Public Trust

Preliminary Investigative Report

Investigator: Nilda Olmo

Case: PI 17-11	Case Name: Jose A. Bergouignan	Date Opened: 02/08/17	CASE CLOSED
Complainant(s): Orlando Lopez, Mayor, City of Sweetwater	Subject(s): Jose A. Bergouignan, Commission President, City of Sweetwater	Date: <u>4/10/17</u>	

Allegation(s):

Orlando Lopez (Lopez), Mayor for City of Sweetwater, contacted COE. Lopez alleged that on Monday, February 6th, 2017, during a Commission meeting, Jose A Bergouignan (Bergouignan), Commission President for City Of Sweetwater, engaged in settlement negotiations from the dais without Commission approval.

Relevant Law:

Miami-Dade County Conflict of Interest and Code of Ethics Ordinance, Sec. 2-11.1 (z), *Prohibition on participating in settlement negotiations*. Neither the Mayor, a County Commissioner nor any member of their staff shall participate in settlement negotiations of claims or lawsuits, including, but not limited to, contract scope or compensation adjustments involving the County without prior approval of the Board of County Commissioners.

Investigation:

COE staff viewed the pertinent portions of the 02/06/17 Commission meeting, in which an item had been presented for review by the City Commission. The Commission was to make a decision on an item that would be set for a special hearing in the weeks to follow. Below is a brief description and timeline pertaining to said item:

A lawsuit was filed by Lucy Castro against the City of Sweetwater and former Mayor Jose M. Diaz (Diaz), for code enforcement violations, pertaining to an unlawful structure in Diaz' backyard, which is adjacent to Castro's property.

- In 2010, Diaz submitted an application for variance to Building and Zoning and it was approved. Castro alleges that the structure was unlawful and it did not meet the City's setback requirement.
- In 2014, the City issued a Stop Work Order on the construction due to the expired variance, but Diaz continued to build. Diaz was Mayor of Sweetwater in 2014.
- On or about May of 2015, Diaz went before the Planning and Zoning Board seeking approval again for his variance. The vote was tied 2-2 and as a consequence, the application was denied. Diaz, then filed an appeal before the City Commission.
- On or about July 2015, the City Commission passed a Resolution (R-15-4054), approving Diaz' appeal. Diaz at that time was Commission President.
- On or about August of, 2015, a Petition for Writ of Certiorari was filed by Castro's attorney, Paul Savage (Savage). Castro alleges that the Commission went beyond the record below and improperly allowed testimony to be considered essentially giving Diaz a de novo review he was not entitled to.
- On or about June, 2016, the Court, in its appellate capacity, granted the petition, quashing the July 6, 2015 Sweetwater Commission Resolution 15-4054.

As advised by City Attorney Cuadra, the court's mandate, gives the Commission two options.

1. **Enforcement:** directing Administration to have Diaz remove the unauthorized structure; or
2. **Grant appellate remedy.** Have the Planning and Zoning appeal heard by the Commission making sure the Commission follows the proper and appropriate standard of review. The Commission will only look at what happened and at what was presented (evidence) at the Planning and Zoning board when the original application was filed and not conduct a new hearing on the matter. The Commission has to follow established procedures, addressing the currently unauthorized structure.

During the 02/06/2017 Commission meeting, there was a discussion that involved Diaz, Savage, Castro and the Commissioners. During that discussion, Bergouignan made the following statements that led to the alleged settlement negotiations allegations by Lopez.

Diaz addressed the Commission regarding his version of events regarding the process...

Bergouignan: *"I am going to do something unorthodox, and I don't even know if I can, but is there any way that, man...you guys are neighbors, this has gone on for years. Even if you win, you lose. You lose, you win, everyone in here has lost."*

Then, Cuadra interrupted and reminded the Commission that the City has to act, not at this meeting but at a special meeting that needs to be scheduled.

Octavio Guerrero (Guerrero), Castro's husband addressed the Commission regarding his position and asked the Commission to act on the Court's final order and vote to enforce the mandate to remove the unauthorized structure.

Bergouignan: *"This whole thing, from what I remember, it was over 2 inches. A part of one of the house, a little thing that was there forever."* He also stated that, *"maybe you guys can work it out"* and further stated, that a meeting will be set and they *"will take care of it soon."*

At that point, Cuadra intervened and reminded the Commission that they had to comply with Court's order, to which Bergouignan replied that they would schedule the meeting as soon as possible.

Savage then addressed the Commission and asked the Commission to take enforcement action against the illegal construction, *"like they would with any other property that had an invalid permit."*

Bergouignan, responding to Savage's argument, stated *"May I just ask you one question?, cause I've really, I've been accused of all kinds of things in this case because we know Mr. Diaz, ahh. Not being true. I am not doing anything just to help him out. What I've done is for everyone...."*

Savage then responded that throughout the litigation process and waiting for the ultimate decision from the Court, Diaz continued to build, even though he knew and was advised this decision was under challenge.

As of today, no date has been set for the special meeting, at which the Commission will decide the next course of action as mandated by the Court's Final Order.



Records Review:

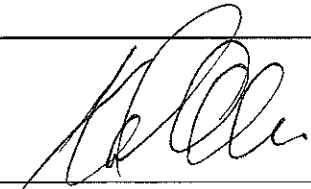
- Agenda-Sweetwater Commission meeting on 02/06/2017.
- Video: COE staff viewed pertinent portions of the 02/06/2017 Sweetwater Commission meeting.

Conclusion:

After discussion with the Ethics Commission Advocate it was determined that the statement by Bergouignan did not rise to the level of a settlement negotiation sufficient to sustain the filing of an ethics complaint. Moreover, even if his statements did rise to that level, they were made at a public meeting from the dais with the apparent consent of the Commission.

It should be noted however that pursuant to Florida Statute 286.012 entitled "Voting requirement at meetings of governmental bodies." Bergouignan should consider voluntarily recusing himself from further participation in the matter. That statute states, in pertinent part, "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 ... **if the official decision, ruling, or act occurs in the context of a quasi-judicial proceeding, a member may abstain from voting on such matter if the abstention is to assure a fair proceeding free from potential bias or prejudice.** (emphasis added)

Bergouignan's statements can be interpreted as a bias or prejudice which would justify recusal in the matter.



Nilda Olmo, COE Investigator

Approved by:

Michael Murawski

Michael Murawski, Advocate

Joseph Centorino

Joseph Centorino, Executive Director

Date: 4/10/17