



Planning and Land Use Law Update

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Two Topics

- *Update on Pacetta, LLC et al v. Town of Ponce Inlet (U.S. Supreme Court)*
- *Cruz, et. al v. City of Miami (Fla. 3d DCA)*

Ponce Inlet

Background

- 2003- Comprehensive plan creates a riverfront commercial land use category – limiting height and square footage of commercial buildings and prohibiting construction and expansion of marinas. Then it enacted a zoning overlay district to implement the plan and which further limited boat storage facilities.
- 2004- Pacetta company began buying riverfront parcels, and with some encouragement from the town staff and individual council members decided to create a mixed use planned waterfront development. Then over two years it purchased 10 parcels (16 acres) Two parcels had existing businesses. No application made for small scale plan amendment.

Ponce Inlet

Background

- 2008 - Town begins to consider necessary comprehensive plan amendments, sends to DCA for ORC report. In the fall, a citizen referendum amends town charter to incorporate land use restrictions on riverfront development. Town council elected with majority opposed to the development. Second reading and adoption of comprehensive plan amendments fails. Suit ensues.

Ponce Inlet

- 2011 – Pacetta I (5th DCA). Referendum invalidated based on statute prohibiting CP restriction on 5 parcels or less. Sixteen acres are one parcel.
- 2012 – Trial court finds regulatory taking on 4 parcels, and equal protection/due process violations on remaining 6 parcels, and Harris Act violation.
- 2013 – Pacetta II (5th DCA). No vested right in Comprehensive Plan amendment and therefore no Harris Act claim. Remand to trial court.

Ponce Inlet

- 2014 – Jury trial on takings damages. Award, with interest: \$30,775,248.29.
- 2017 – *Pacetta III* (5th DCA). Reversed “total taking” liability finding, remanding for issues of ripeness, futility and partial taking. Federal claims for equal protection and due process dismissed.
- April 2018 – New trial judge dismisses the takings claim as not ripe, as Pacetta never submitted a meaningful application for development approval (i.e. small scale comprehensive plan amendment; vested right application). Rejected Pacetta claim that such a submission would be futile because of council hostility on lack of proof. Pacetta has the same development rights it had when it purchased the property. No damages, no attorneys fees.

Ponce Inlet

- June 2018 – Pacetta petitions the U.S. Supreme Court for a writ of certiorari to review *Pacetta III*.
 - “To what length must a property owner go to obtain a final decision from a government to ripen its takings claim?”
 - “Six years of attempting to appease the Town”
 - District court is too rigid in instructions that trial court must determine if applications were “meaningful” and whether government would have rejected “any other development” of the property (ripeness and futility)
 - “Does the government effect a taking when it intentionally devalues property with the intent of later acquiring it at a discount?”
 - “Original trial court finding”

Ponce Inlet

- October 1, 2018. U.S. Supreme Court denies certiorari
- The case is over
- October 6, 2018, Justice Kavanaugh is confirmed as associate Justice



Take Away

- The Town's persistence was remarkable in this case; expensive to litigate and terrible result on the constitutional issues at the trial court. Not many town attorneys would survive, or town councils would survive this legal odyssey.
- For planners, the importance of continuing to advise the developer when the decision is not the staff's, but the elected board – and advise the elected board that it speaks as a body, not individuals
- The importance of the whole parcel principle
- Will the new Supreme Court (since Kavanaugh's appointment) want to revisit ripeness and futility doctrines?
- Will the Court want to revisit Penn Central and give more weight to the character of the governmental action ("ulterior motives")?

Elvis Cruz v. City of Miami

Background

- City grants rezoning of vacant parcel within Palm Grove Neighborhood Historic District (residential area), adjacent on north and west to other single family residential zoning. Rezoning allows general commercial uses. Owner proffers and city accepts restrictive covenant limiting height to 35 feet and requiring part of the development to contain residential use. Owner plans a furniture store with rooftop event space.
- At same time, City grants comprehensive plan amendment to allow commercial uses on the site.
- Neighbors bring comprehensive plan consistency challenge under Section 163.3215, Fla. Stat.

Elvis Cruz v. City of Miami

Issues

- Claim: rezoning is inconsistent with certain goals and policies of the plan, i.e.
 - Policy HO-1.1.8 "...protect and enhance existing viable neighborhoods...."
 - Goal LU-1(1): "Maintain a land use pattern that protects and enhances the quality of life in the city's residential neighborhoods..."
 - Policy HO-1.1.7: "...control, through restrictions in the City's land development regulations, large scale and/or intensive commercial and industrial land development which may negatively impact any residential neighborhood...."
- City moved for summary judgment, arguing that the statutory inconsistency challenge is limited to enforcing only the comprehensive plan policies that govern "use, density or intensity" and so the above "compatibility" goals and policies could not be enforced by way of a consistency challenge

Elvis Cruz v. City of Miami

- November, 2017: Court agrees with City, and grants summary judgment for the City (decided as a matter of law, no evidentiary trial)
 - Accepts City argument that *Heine v. Lee County* (Fla. 2d DCA 2017) is correct in holding same limitation applies to consistency challenges
 - Finds that the covenant renders the project “compatible” with the neighborhood and therefore consistent with the Plan
- Cruz files appeal in the Florida Third District Court of Appeal
 - The *Heine* case is wrongly decided and not in accordance with the statute and settled Florida law, and was incorrectly applied here
 - Court failed to apply the “strict scrutiny” standard of review applicable to consistency challenges
 - “Compatibility” is a factual dispute that cannot be decided on summary judgment

Elvis Cruz v. City of Miami

- ❑ APA and APA-Florida file amicus brief to argue that consistency challenges under the statute and settled case law are not limited only to whether the zoning action is consistent with the “use, density and intensity” restrictions of the Comprehensive Plan.
- ❑ **Relevant statutes:**
 - § 163.3161(1), Fla. Stat. (2017): (One intent of the Community Planning Act is) “that no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act.”

Elvis Cruz v. City of Miami

- § 163.3194(1)(a): “[a]fter a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted.”
- § 163.3194(3)(a): “[a] development order or land development regulation shall be **consistent** with the comprehensive plan if the **land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan** and if it meets all other criteria enumerated by the local government.”

Elvis Cruz v. City of Miami

This is the statutory language that creates the consistency challenge.

- § 163.3215(3): “Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to **challenge any decision of such local government granting or denying an application for**, or to prevent such local government from taking any action on, **a development order, as defined in s. 163.3164, which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan adopted under this part.**”

Elvis Cruz v. City of Miami

This section creates the cause of action, do not limit the extent of how the challenged decision must be consistent with the Comprehensive Plan

- The challenged development order must “**materially alter the use or density or intensity of use on a particular piece of property**”
- *O’Neil v. Walton County* (Fla. 1st DCA 2014) PUD approval plan did not materially alter a previously approved site plan for the property, was not challengeable under the statute

Elvis Cruz v. City of Miami

Once a challenge is brought to a qualified development order, the court must apply strict scrutiny to determine if it is consistent with the Comprehensive Plan – all goals, objectives and policies.

- Consistency is defined by the statute (163.3194) to include land uses, densities or intensities, and “other aspects of development” which must be “compatible with and further the **objectives, policies**, land uses, and densities or intensities in the comprehensive plan.”
- Legislative intent of 1985 Growth Management Act was to create citizen standing to enforce the consistency mandate
- The Comprehensive Plan is required to address more than land uses, densities and intensities of development

Elvis Cruz v. City of Miami

Strict scrutiny:

- *Board of County Commissioners of Brevard County v. Snyder* (Fla. S. Ct. 1993) (rezoning consistency with the comprehensive plan).
 - “Upon consideration, we hold that a landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance... the review is subject to strict scrutiny.”

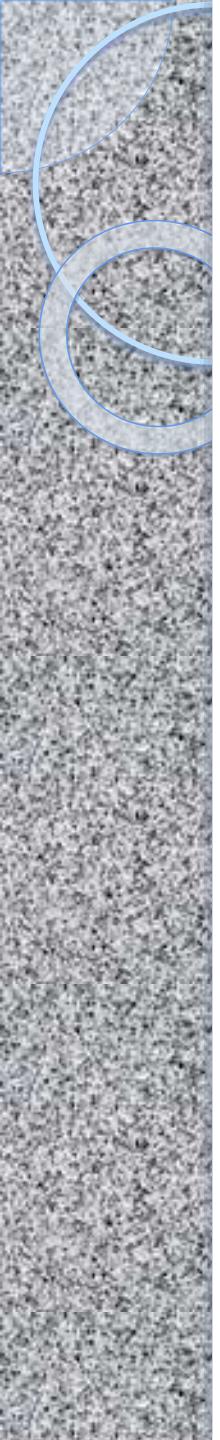
Elvis Cruz v. City of Miami

Strict scrutiny:

- *Machado v. Musgrove* (Fla. 3d DCA 1993):
 - “The term strict scrutiny arises from the necessity of strict compliance with the comprehensive plan, and the standard is a process whereby a court makes a detailed examination of a(n)...order of a tribunal for exact compliance with, or adherence to, a standard or norm.”
 - “The test ... is whether...a proposed development conforms to **each element and the objectives** of the land use plan...”
 - “Because the applicants were unable to show that their commercial project was consistent with **each element of the land use plan and furthered its objectives**, the circuit court was eminently correct in voiding the rezoning.”

Elvis Cruz v. City of Miami

- Oral Argument before the Third District Court of Appeal on September 11, 2018
- November 7, 2018 Third DCA issues a “Per Curium Affirmed” Order with no opinion
 - The appellate decision does not set Precedent



Take Away

- Judges must be educated on the comprehensive planning statute and its mandates
- The Florida system of judicial challenges to land use decisions is complicated!
 - Zoning decisions can challenged in a writ of certiorari action based on failure to follow procedural or substantive requirements of the land development regulations
 - But consistency challenges are de novo and are the exclusive remedy for challenging consistency with the comprehensive plan
 - But don't forget federal and state constitutional challenges (due process, takings etc) – de novo proceedings.