
Legislative and Case Law Updates Related to Land Planning

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OUTLINE OF PRESENTATION

- Florida Legislative Updates related to Land Planning
- The New Property Rights Comp. Plan Elements Requirement
- Covid Impacts on Administrative Proceedings and Court Hearings
- Land Use Litigation Updates
- Questions

FLORIDA LEGISLATIVE UPDATES

FOR LAND PLANNERS

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CHAPTER 2021-178, LAWS OF FLORIDA RENEWABLE ENERGY (SOLAR PREEMPTION)

- Section 163.3205, Florida Statutes (2021), effective July 1, 2021
- Solar facilities are a permitted use in local government comprehensive plan agricultural land use categories and agricultural zoning districts in unincorporated areas.
- Must comply with the setback and landscaped buffer area criteria for other similar uses in the agricultural district.
- A county may adopt ordinance specifying buffer and landscaping requirements for solar facilities that do not exceed the requirements for similar uses involving the construction of other facilities that are permitted uses in agricultural land use categories and zoning districts.
- Does not apply retroactively.

CHAPTER 2021-150, LAWS OF FLORIDA PREEMPTION OVER RESTRICTION OF UTILITY SERVICES

- Section 366.032, Florida Statutes, effective July 1, 2021
- Preempts regulation that restricts or prohibits types or fuel sources of energy production which may be used, delivered, converted, or supplied by various utility entities to serve customers that such entities are authorized to serve.
- Does not preempt government that owns or operates and directly controls electric or natural gas utility, from passing rules, regulations, or policies governing the utility.
- Prior regulation is void.

CHAPTER 2021-202, LAWS OF FLORIDA PREEMPTION OVER REGULATION OF HOME-BASED BUSINESS

- Section 559.955, Florida Statutes, effective July 1, 2021
- Allows home-based businesses to operate in any area zoned for residential use.
- Preempts local governments from licensing and regulating home-based businesses.
- Defines “home-based” business: operates from residential property; employees reside in the home or are related to a resident; parking meets the zoning requirements; business does not substantially increase traffic, noise, waste, or recycling; viewed from the street is consistent with surrounding residential area.
- Business must be secondary to the use as a residential dwelling.

CHAPTER 2021-211, LAWS OF FLORIDA “HOME SWEET HOME ACT” (COTTAGE FOOD OPERATIONS)

- Section 500.03, Florida Statutes, effective July 1, 2021
- Increases the annual gross sales limitation from \$50,000 to \$250,000 for exempting cottage food operations from food and building permitting requirements of s. 500.12.
- Preempts the regulation of cottage food operations to the state
- Prohibits local governments from prohibiting cottage food operations or regulating cottage food products by cottage food operations
- Requires cottage food operations to comply with s. 559.955 governing conditions for the operation of home-based businesses.

CHAPTER 2021-201, LAWS OF FLORIDA FLORIDA BUILDING CODE

- Allows a substantially affected person to petition the Florida Building Commission (FBC) for a nonbinding advisory opinion on whether a local government regulation is an improper amendment to the Building Code and establishes a process for such petitions.
- Prohibits a municipality, county, or special district from using preliminary maps issued by FEMA for any law, ordinance, rule, or other measure that has the effect of imposing land use changes or permits.
- Regulation of building design elements may not be applied to a single-family or two-family dwelling unless the dwelling is otherwise protected by certain laws concerning historical or wildlife preservation or is subject to jurisdiction of a design or architectural review board.
- Authorizes the FBC to issue an “errata to the code” to list demonstrated errors in the Building Code if the determination of errors and issuance of an errata code is approved by a 75 percent supermajority vote of the Commission.
- Prohibits local government from requiring contract between builder and owner as a condition of applying for or obtaining a building permit.

CHAPTER 2021-224, LAWS OF FLORIDA CONSTRUCTION PERMITS

- Sets timeframes for reviews of additional information requested by a county or municipality from a building permit applicant.
- Requires local government to post on its website each type of building permit application and all required attachments; procedures for processing, reviewing, approving applications; and the status of each application.
- Local governments must allow electronic submission of all applications, attachments and payments.
- If a local government fails to meet established deadlines for reviewing and issuing a building permit for a single-family residential dwelling, it must reduce the original permit fee by 10% for each day it is late.
- Requires the local government to provide notice of the reason(s) why the permit application fails to meet the FBC or the agency's laws and provide the applicant 10 business days to correct the application. If corrected and submitted within 10 business days, local government must approve or deny the application within 10 business days; if not, the local government must reduce the original permit fee by 20% for the first day, and 10% for each additional day late afterwards up to 5 business days.

OTHER IMPACTS OF NOTE

- Cap on Impact Fees (Chapter 2021-63, Laws of Florida)
- Agritourism Limitation of Liability (Chapter 2021-7, Laws of Florida)
- Preemption of Gas Station/EV Charging Regulation (Chapter 2021-111, Laws of Florida)
- Newspaper Website Legal Notices (Chapter 2021-17, Laws of Florida)

PROPERTY RIGHTS ELEMENT



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CHAPTER 2021-195, LAWS OF FLORIDA

- Requires local governments to establish a new Property Rights Element within the Comprehensive Plan
- There is a minimum statement of property rights requirement
- Must be done prior to the County adopting any other Comprehensive Plan Amendment after July 1, 2021

INTENT OF THE LEGISLATION

- To further support the legislative intent expressed in ss. 163.3161(10) and 187.101(3), Florida Statutes, that governmental entities respect judicially acknowledged and constitutionally protected private property rights.

THE MODEL STATEMENT OF PROPERTY RIGHTS

- The following rights shall be considered in local decision-making:
 1. The right of a property owner to physically possess and control his or her interests in the property, including easements, leases, or mineral rights.
 2. The right of a property owner to use, maintain, develop, and improve his or her property for personal use or for the use of any other person, subject to state law and local ordinances.
 3. The right of the property owner to privacy and to exclude others from the property to protect the owner's possessions and property.
 4. The right of a property owner to dispose of his or her property through sale or gift.

ISSUES WITH THE MODEL STATEMENT OF PROPERTY RIGHTS

- What is the definition of “property owner”?
- When is it applicable
- Separation of Powers Issues

WHAT IS THE DEFINITION OF “PROPERTY OWNER”?

- The new legislation cites that it is to further the legislative intent of 163.3161(10) and 187.101(3), Florida Statutes.
- 163.3161(10), Fla. Stat. references the definitions in 70.001(3)(f) (Bert J. Harris, Jr. Private Property Rights Protection Act), which defines “property owner” which “means the person who holds legal title to the real property that is the subject of the and directly impacted by the action of the governmental entity. The term does not include a governmental entity.”

APPLICABILITY

- Since the legislation is to further the protection of private property and references definitions in 70.001(3), Florida Statutes, looking at subsection (g) it defines “real property” and limits the term to only parcels that are the subject of and directly impacted by the action of the governmental entity.

SEPARATION OF POWERS

- The division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another.
- In Florida, determinations related to an individual or entities ownership interest in a property when in doubt is within the sole jurisdiction of the courts. See s. 26.012(g), Florida Statutes (2021), and Art.V, Sec. 20(c)(3), Fla. Const.

CHANGES TO THE STATEMENT OF PROPERTY RIGHTS

- If a local government adopts its own property rights element, the element may not conflict with the statement of rights provided in the Model Statement by the legislature.
- Must ensure that any changes do not conflict. The changes can clarify, but not conflict.

“THINGS TO KEEP IN MIND IN DRAFTING THE ADOPTING ORDINANCE”

- Who to establish the data relied upon to create the element. s. 163.3177, Fla. Stat.
 - Whereas Clauses.
- Be strategic in your timing of adoption.
 - Each local government must adopt a property rights element in its comprehensive plan by the earlier of the date of its adoption of its next proposed plan amendment that is initiated after July 1, 2021, or the date of the next scheduled evaluation and appraisal of its comprehensive plan pursuant to s. 163.3191.

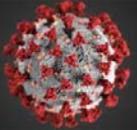
DEO OFFICIAL POSITION ON EFFECTIVE DATE

Any proposed comprehensive plan amendment package submitted [to DEO, Bureau of Community Planning and Growth] will be returned to the local government if the package does not include a property rights element or if the comprehensive plan does not already include the required property rights element

The Notice of Legislative Change Concerning Property Rights, issued July 20, 2021.

IMPLEMENTATION OF THE NEW COMPREHENSIVE PLAN ELEMENT

- The practical effect of the new comp. plan element will require it to be addressed in land planning decisions impacted by the Comprehensive Plan.
- For planners, both for the local government and private, will likely be required to address the components of the Property Rights Element in applications, staff reports, and evidence presented to Planning Commissions, Councils and Boards.



CORONAVIRUS EFFECTS ON LAND PLANNING PROCEEDINGS

MARTY, WHATEVER HAPPENS



DONT EVER GO TO 2020!

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THE INITIAL SITUATION

- When COVID-19 hit there were land planning applications in the middle of being processed by the government and there were several decisions that had to be made by the local land planning agencies as well as applicants for land planning decisions on how to proceed.
- There were important legal factors that had to be taken into consideration in setting the policy on how to move forward. Including whether procedural due process could be sufficiently given in any process; how to give the public an opportunity to be heard safely and accommodate those who were quarantining; whether it was legal to hold a local board meeting virtually instead of in-person.

MINIMUM DUE PROCESS FOR QUASI-JUDICIAL PROCEEDINGS

- Procedural due process rights are enhanced in quasi-judicial proceedings. *Ex-parte* contact is enforced and cannot delay for an unreasonable amount of time.
- Formal parties (not general public although they have right to be heard) are entitled to call witnesses, cross-examine witnesses, present evidence, demand that witnesses testify under oath, and demand a decision that is based on a correct application of the law and competent substantial evidence on the record.

MINIMUM REQUIREMENTS FOR QUASI-LEGISLATIVE PROCEEDINGS

(2) Members of the public shall be given a reasonable opportunity to be heard on a proposition before a board or commission. The opportunity to be heard need not occur at the same meeting at which the board or commission takes official action on the proposition if the opportunity occurs at a meeting that is during the decisionmaking process and is within reasonable proximity in time before the meeting at which the board or commission takes the official action. This section does not prohibit a board or commission from maintaining orderly conduct or proper decorum in a public meeting. The opportunity to be heard is subject to rules or policies adopted by the board or commission.

s. 286.0114 (2), Fla. Stat.

GOVERNOR'S WAIVER OF AN IN-PERSON QUORUM AND ITS REVOCATION

- Generally, the state agencies are the only agencies in the state that can conduct a meeting entirely through the use of electronic medical technology. AGOs 20-03 and 98-28. Local boards must have a quorum of the board physically present. AGO 20-03.
- Exception if the in-person requirement is waved by law or lawfully suspended during a state of emergency. *Id.* Cannot be the local government that waives it.
- March 20, 2020 – November 1, 2020, the Governor, while there was still a declared state of emergency, issued executive order (20-69) waiving the in-person quorum requirement for local boards. That was not renewed beyond November 1, 2020.
- If a quorum of a local board is physically present, “the participation of an absent member by telephone conference or other interactive electronic technology is permissible when such absence is due to extraordinary circumstances such as illness.” The local board must determine whether the absent members excuse is sufficient by a vote.

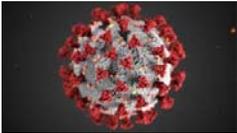
SOLUTIONS FOR THE PRESENT

- In person approach with accommodations
- Hybrid approach

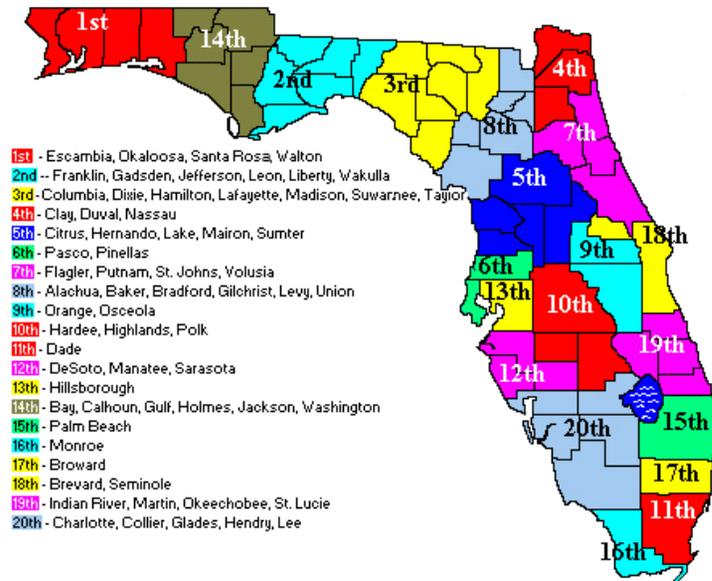
WHAT PLANNERS SHOULD KNOW TO PREPARE FOR A LOCAL LAND PLANNING MEETING

- Know what the procedures will be for the meeting – with COVID-19 continuously evolving, it may vary from meeting to meeting.
 - Be prepared for:
 - Virtual meetings – practice with clients
 - Submittal of documentation ahead of time.

COVID-19 IMPACTS TO COURT PROCEEDINGS



COVID-19 IMPACTS TO COURT HEARINGS



- **Florida Supreme Court orders**
 - **April case management**
 - **June health and safety protocols**
- **Every circuit has its own guidelines**
- **Map depicts judicial circuits**
- **1st and 14th apply to you**

1ST JUDICIAL CIRCUIT COVID-19 PROTOCOLS (ESCAMBIA, SANTA ROSA, WALTON, AND OKALOOSA)

- Administrative Orders 2021-17 and 2021-22 have the most current health and safety protocols for all courts within the 1st circuit
- Face masks **NOT** required

The First Judicial Circuit consists of the following four counties:
Escambia, Santa Rosa, Okaloosa, Walton



14TH JUDICIAL CIRCUIT COVID-19 PROTOCOLS (BAY, CALHOUN, GULF, HOLMES, JACKSON, AND WASHINGTON)



- Administrative Order 2021-00-09
- Updates COVID-19 health and safety protocols as of the beginning of August
- Face masks and social distancing **required** during in-person proceedings, recommended elsewhere
- Health screening upon entrance

EFFECT OF COVID-19 ON TIMING OF COURT PROCEEDINGS



- Extreme backlog of cases
- Expect delays!
- Courts are attempting to address the backlog

BEST PRACTICES FOR APPEARING AS A WITNESS IN A REMOTE PROCEEDING



- Attire—wear pants
- Device
- MUTE
- Background
- Test it out
- Have a method of communication

VIRTUAL HEARINGS/DUE PROCESS

Remote Hearings—Placing Witness Under Oath

- Oath cannot be administered telephonically by Hearing Officer where witness was not known by Hearing Officer personally, and voice cannot be identified. Dorofy v. State of Florida 28 Fla. L. Weekly Supp. 570b (Fla. Cir. Ct. Aug. 24, 2020).
- HB 121 (2021) (creating section 117.231, Florida Statutes)
 - Allows for remote administration of oaths using audio-video technology
 - Applies to notary public taking oath of individual testifying in court proceeding, deposition, arbitration or public hearing

LAND USE LITIGATION UPDATE



EXAMPLES OF POTENTIAL JUDICIAL REVIEW

- (1) Petition for Writ of Certiorari (Quasi-Judicial decisions)
- (2) Consistency Challenge under s. 163.3215, Florida Statutes
- (3) Constitutional challenges, such as Equal Protection
- (4) Inverse Condemnation “Taking”
- (5) Bert Harris Act
- (6) Declaratory/Injunctive Relief

PETITION FOR WRIT OF CERTIORARI CHALLENGING QUASI-JUDICIAL DECISION

- A landowner can challenge quasi-judicial decisions through a petition for writ of cert
- Limited to the record before the governmental authority; limited standard of review
- If the Petition is denied at the circuit court level, the landowner can petition for “second-tier” review to the appropriate district court of appeal.

2019 AMENDMENT TO SECTION 163.3215, FLORIDA STATUTES

- 163.3215 is the statute allowing a person to challenge a development order for lack of consistency with the jurisdiction's comprehensive plan
- 2019 amendment added subsection (8):
 - (8)(a): In any proceeding under subsection (3), either party is entitled to the summary procedure provided in s. 51.011, and the court shall advance the cause on the calendar, subject to paragraph (b).
 - (b) Upon a showing by either party by clear and convincing evidence that summary procedure is inappropriate, the court may determine that summary procedure does not apply.
 - (c) The prevailing party in a challenge to a development order filed under subsection (3) is entitled to recover reasonable attorney fees and costs incurred in challenging or defending the order, including reasonable appellate attorney fees and costs

ZONING CODE

Construction:

Persaud Props. FL Investments LLC v. Town of Fort Myers Beach, 310 So. 3d 493 (Fla. 2d DCA 2020).

- Courts will strictly construe Town's ordinance in favor of property owner
- In the case of nonconforming use of restaurant and bar serving alcohol within Environmentally Critical Zone, determined that abandonment of a nonconforming use requires voluntary cessation of the nonconforming use with the intent that the cessation of such use be permanent

ZONING CODE

Enforcement:

Haver v. City of West Palm Beach, Inc., 298 So. 3d 647 (Fla. 4th DCA 2020)

- Plaintiffs sued City for failure to enforce zoning codes based on neighboring property owner operating adult family-care home in single family zoning classification
- Lower court ruled in favor of City, who argued that courts cannot interfere with municipality's discretionary function to enforce its zoning codes.
- Fourth District disagreed, and determined that if Plaintiffs could show special damages—injury different in kind from those in community—can pursue injunctive relief against the City
- Fourth District certified conflict with two other decisions, and Florida Supreme Court accepted jurisdiction.

BERT HARRIS ACT, SECTION 70.001, FLORIDA STATUTES

- Created in 1995
- Separate cause of action from inverse condemnation/takings
- **Property Owner** must prove: (1) **a specific governmental action** has (2) **inordinately burdened** (3) an **existing use or vested right** to a specific use of the property
- Statutory pre-suit process:
 - Claimant notice of claim with supporting appraisal
 - Government settlement offer/statement of allowable uses

BERT HARRIS ACT: PROPERTY OWNER

Can a property owner sell the property during lawsuit, and seek recovery?

Dean Wish, LLC v. Lee County (Fla. 2d DCA April 7, 2021): Court ruled no

- Plaintiff owned the Property when legal action was commenced but sold the property prior to trial.
- Determined not entitled to recovery under Bert Harris Act

BUT SEE Legislature's change to definition in 2021:

- Provides that a property owner entitled to relief retains entitlement to pursue the claim even if the property owner relinquishes title to the subject property before the claim reaches a final resolution

BERT HARRIS ACT: SPECIFIC GOVERNMENTAL ACTION

Can a Plaintiff state a claim where government has failed to act?

- Boca Center at Military, LLC v. City of Boca Raton, 312 So. 3d 920 (Fla. 4th DCA 2021): Answer is no.
 - 2010 Comprehensive Plan amendment assigning area to Planned Mobility which “may incorporate a range of uses such as commercial, office, financial institutions, health care, residential, hotel, recreational, educational, community and cultural facilities.”
 - Plaintiff argued that amendment created an expectation that properties would be zoned residential
 - Court ruled Act protects against governmental action rather than inaction, and does not provide a remedy for refusal to enact new laws.
 - Permissive language did not make it reasonably foreseeable that properties would be zoned by a specific date for residential use

BERT HARRIS ACT: EXISTING USE

Existing Use:

- An actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use
- Activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property

BERT HARRIS ACT: EXISTING USE

Is a proposed use of vacant land permitted under zoning code, but not financially viable, an “existing use” of the property?

Ocean Concrete, Inc. v. Indian River County, 241 So. 3d 181 (Fla. 4th DCA 2018): Answer is yes.

- Owner sought to develop undeveloped property as concrete batch plant on property zoned Light Industrial, allowing for such use. Zoning Code later amended while site plan pending, to remove use.
- Circuit court determined it was not an existing use because it was not financially viable, and therefore was not non-speculative use
- Fourth District disagreed, and determined existing use relates to whether the actual land use is a reasonably foreseeable, nonspeculative use without concern to economics.
- Where the use is expressly provided for by zoning, no need for speculation analysis
- Also determined that the use was per se compatible with adjacent land uses, though adjacent property zoned residential.

BERT HARRIS ACT: EXISTING USE

Is the actual unauthorized use of the property in violation of the Comprehensive Plan an “existing use”?

Mojito Splash, LLC v. City of Holmes Beach 46 Fla. L. Weekly D 1725 (Fla. 2d DCA July 30, 2021): Answer is no.

- 2009: Ordinance adopted which allowed vacation rentals in Medium Density Residential zoning, but restricted occupancy
- 2013: Plaintiff purchased property to use as vacation rental property which would exceed residency restrictions, and the property was used for this purpose, generating significant weekly rental income
- 2015: Ordinance passed updating LDC to conform
- 2016: Ordinance passed with enforcement mechanism for residency restrictions
- Appellate court ruled no “existing use” because Plaintiff never had a right to use the property as a vacation rental for an unregulated number of guests

BERT HARRIS ACT: COMPENSATION

- The award of compensation shall be determined by calculating the difference in the fair market value of the real property, as it existed at the time of the governmental action at issue, as though the owner had the ability to attain the reasonable investment-backed expectation or was not left with uses that are unreasonable, whichever the case may be, and the fair market value of the real property, as it existed at the time of the governmental action at issue, as inordinately burdened, considering the settlement offer together with the statement of allowable uses, of the governmental entity or entities.

BERT HARRIS ACT: COMPENSATION

Can recovery be limited if there is a highest and best use of the property which exceeds the value of the use sought by the property owner?

Indian River County v. Ocean Concrete Inc., 308 So. 3d 1010 (Fla. 4th DCA 2020): Answer is no.

- County argued that the concrete batch plant was not economically feasible and was not the highest and best use of the property either before or after the change in the land development regulation.
- Appellate court ruled that valuation is focused on the investment backed expectation itself, rather than a potentially higher value use
- Also determined that an owner can testify as to his or her own knowledge of value of the property.

BERT HARRIS ACT: 2021 AMENDMENT

- Changes property owner definition to allow for relinquishment of title to property before final resolution of claim
- Changes definition of real property to add surface, subsurface or mineral estates and “other relevant interests” in the real property
- Broadens statute by modifying “action of a governmental entity” to include specific action adopting or enforcing any ordinance, resolution, regulation, rule, or policy
- Shortens notice and settlement period to 90 days
- Settlement offers are presumed to protect the public interest
- Allows for property owner to forego a jury and elect to have a court determine award of compensation
- Attorney’s fees and costs can be recovered by property owner from the date of presentation of claim (as opposed to filing lawsuit)
- Authorizes a process for a property owner to notify the government that he or she deems a law or regulation’s impact on real property to be clear and unequivocal.



QUESTIONS?

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