Florida Association of County Attorneys
New Assistant County Attorney Orientation
September 15, 2016
Hutchinson Island Marriott, Egret Room
Martin County
(4 CLE Hours)

1:00 p.m.	**Opening Remarks and Welcome** Anne Brown, Levy County FACA President
1:00 p.m. to 1:50 p.m.	**County Government 101** Virginia “Ginger” Delegal General Counsel Florida Association of Counties
1:50 p.m. to 2:50 p.m.	**Public Records, Sunshine Law & Ethics** Herbert W. A. Thiele County Attorney Leon County
2:50 p.m. to 3:00 p.m.	**Refreshment Break**
3:00 p.m. to 4:00 p.m.	**Home Rule: Charter vs. Non-Charter** Robert L. Nabors Nabors, Giblin & Nickerson Tallahassee, Florida
4:00 p.m. to 5:00 p.m.	**Quasi-Judicial vs. Legislative** Herbert W. A. Thiele County Attorney Leon County
5:00 p.m.	**Closing Remarks** Anne Brown, Levy County Attorney FACA President

Florida County Government 101 – FACA New Assistant County Attorney Orientation

Virginia "Ginger" Delegal
General Counsel
Florida Association of Counties
September 2014
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Contributions by:
Rodney L. Clouser
University of Florida, IFAS Extension

Soap Box Speech Biases

- Card carrying member of the club of Home Rule.
- Believe that some taxation is necessary. It is what we must pay to live in a civilized society.
- Believe that local taxes should stay local.
- Believe that local government is the most accountable level of government in the U.S.

Today's County Civics Class

- What's the history of Florida's counties?
- What is a county?
- How is a county different than a city?
- What form of government is my county?
- Who are the other county officers?
- Are charter counties different?
- What function does my county have?

History Lesson

- First there was Escambia and St. Johns (1821)
- Provisional government established a county judicial system, appointed county judges, clerks and sheriffs
- Government was administered through the court system by five justices of the peace

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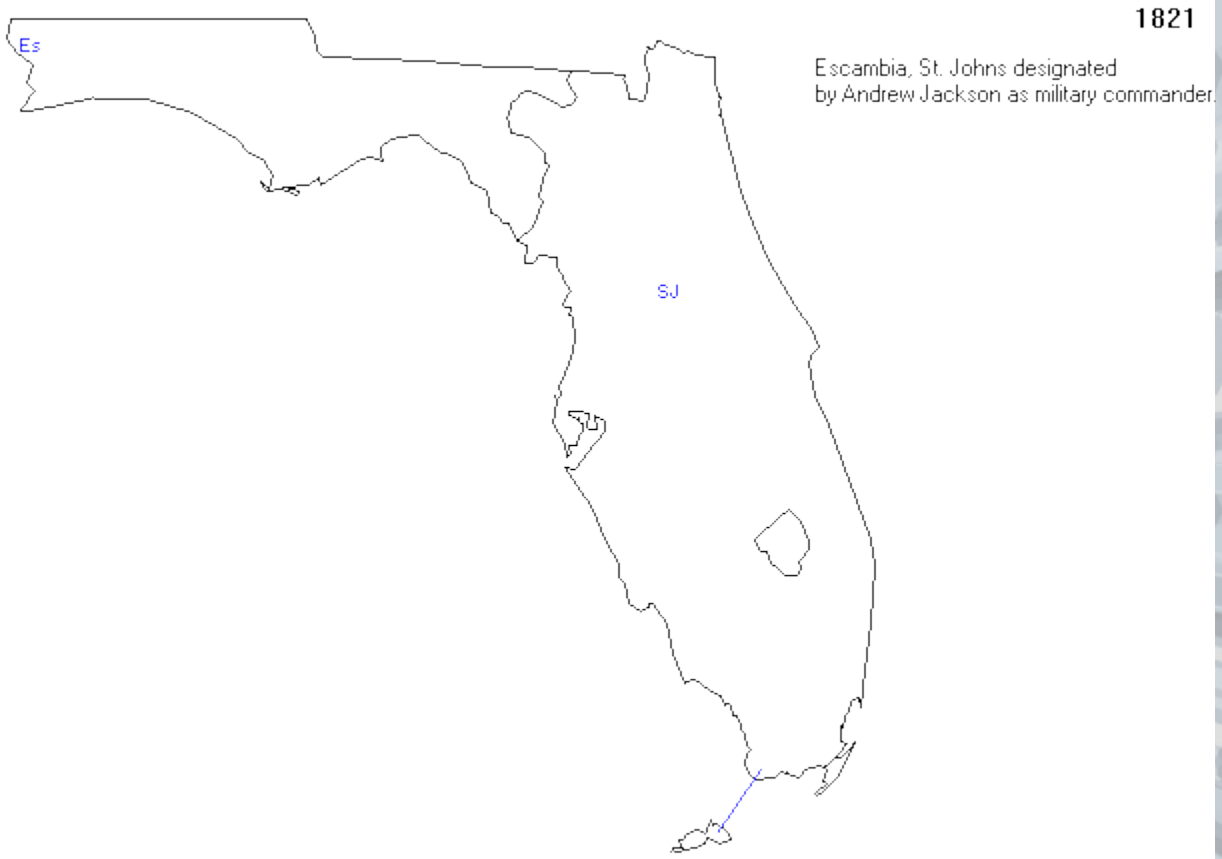
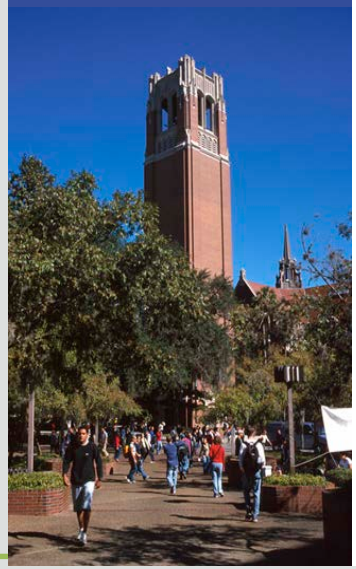
Florida Counties 1821…



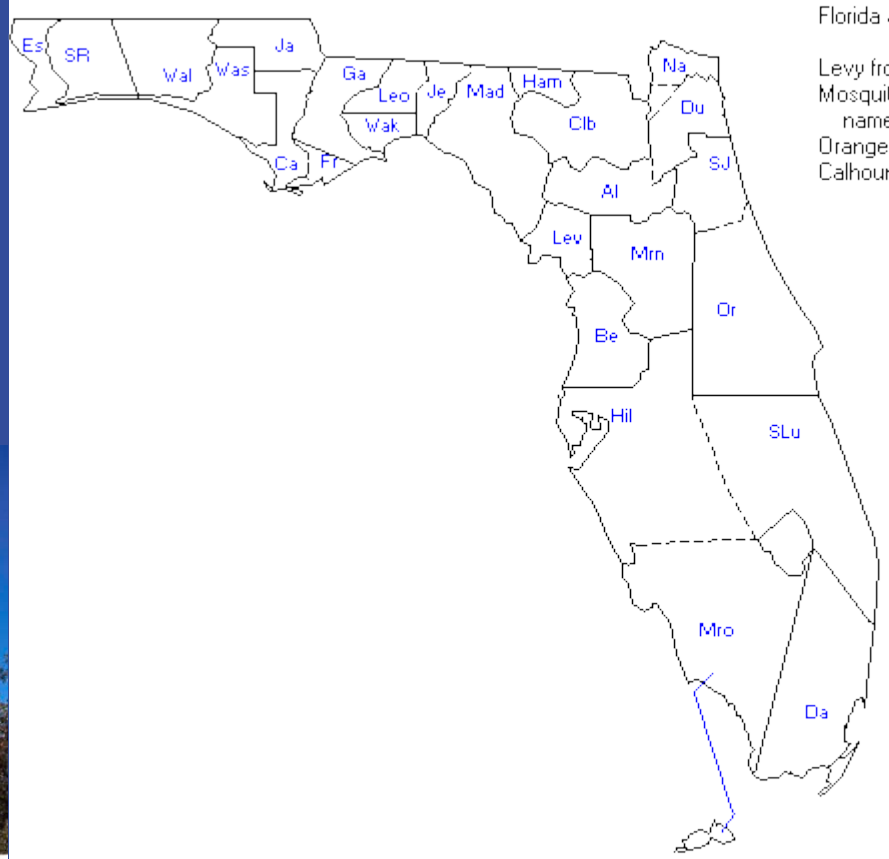


FAC FLORIDA ASSOCIATION OF COUNTIES All About Florida

History Lesson con't

- 1822: along came Jackson and Duval
- 1838: Florida enters the Union and adopted a state constitution
- 1861: first constitutional status given to counties
- 1885: counties and cities given separate constitutional article
- 1925: last county, Gilchrist, created

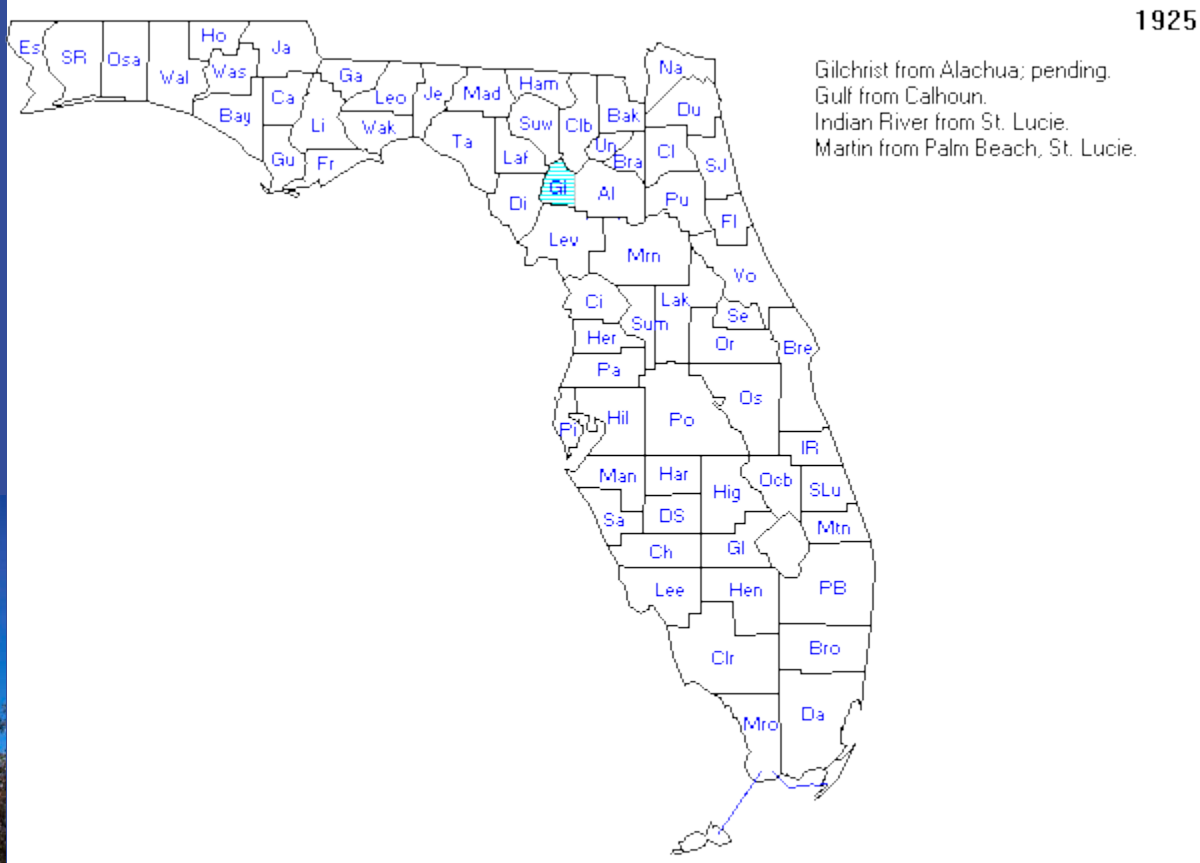
Florida Counties 1845…



Florida admitted as state. **1845**

Levy from Alachua.
Mosquito (Leigh Read)
name changed to Orange.
Orange gained from St. Lucie.
Calhoun gained from Jackson.

Florida Counties 1925…



History Lesson con't

- One county abolished: 1834, Fayette dissolved and incorporated into Jackson
- Name changes
  - New River became Baker and Bradford
  - Mosquito became Orange
  - Dade became Miami-Dade
- Attempted formations
  - Call: 1928
  - Bloxham: 1917
  - Kennedy: 1965
  - Hialeah: 1999, 2000

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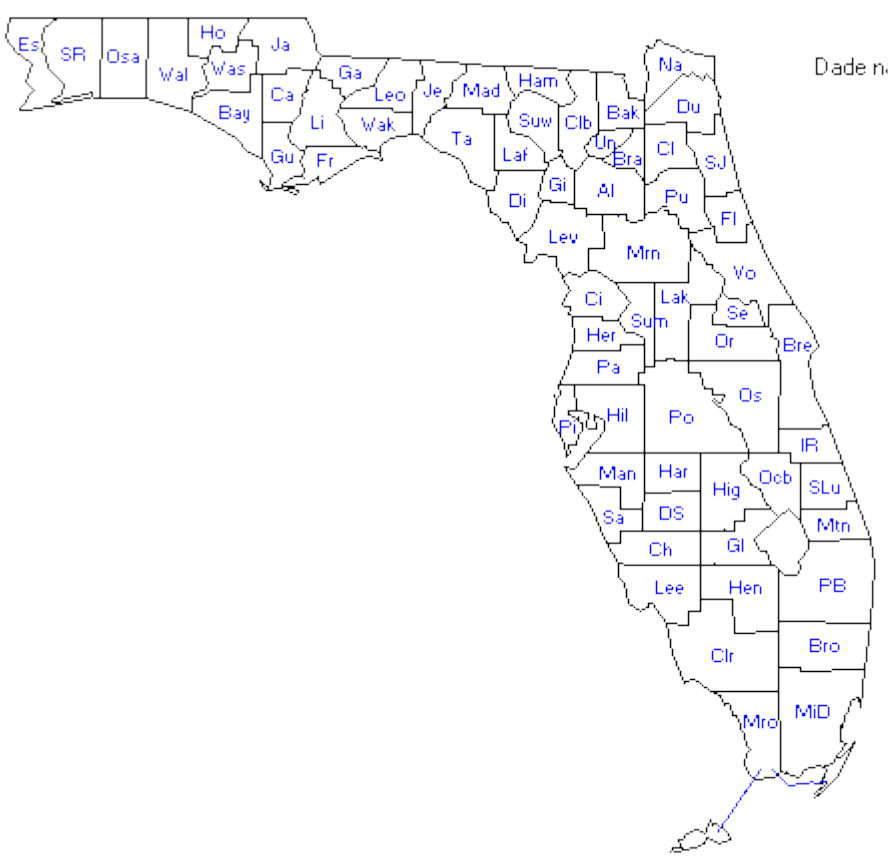
Florida Counties 1997…



Meet Florida's Counties

- 67 counties
  - 20 charter counties
- Diversity
  - Population
  - Geographic area
  - Landscape
  - Economic base
- Together: serve all Floridians

What is a county?

- A **county** is a political subdivision of the state, established by the state to execute state services and functions at the local level
- Contrast: a **municipality** is a local government that serves its citizens who created it by charter
- Florida counties: tension and overlapping functions with the municipalities, with the rise of home rule
- **Special district**: a local government, created by another level of government, for a specific purpose

What do counties do?

- Traditionally: state mandated duties
  - assessment of property
  - record keeping
  - maintain rural roads
  - administer elections
  - perform judicial functions
- Today: expansion of services
  - public health and welfare
  - consumer protection
  - economic development (growth management)
  - employment and training
  - planning and zoning
  - water quality
  - fire protection
  - emergency management
  - regulatory entity

County Functions Under State Law

- Florida Constitution, among others:
  - Article VII – Taxes
  - Article VIII – Local Government Powers
- Florida Statutes, among others:
  - Section 125.01(1), Fla. Stat.
  - Transportation systems
  - Solid waste disposal
  - Emergency management
  - COPCNs (ambulance)
- Other provisions of state law: program sharing (Medicaid, juvenile justice, court funding)

County Duties and Authority

- Florida Constitution
- Florida Statutes: General Laws
- Laws of Florida: Special Acts
- Florida Case Law
- County Charters
- County Ordinances
  - County Resolutions

Forms of County Government

- County commission form
- Commission-county administrator form
- Commission-elected chairman (executive) form

Other County Officers

- Property Appraiser
- Tax Collector
- Clerk of the Court
- Sheriff
- Supervisor of Elections

  – Article VIII, section 1(d), Florida Constitution

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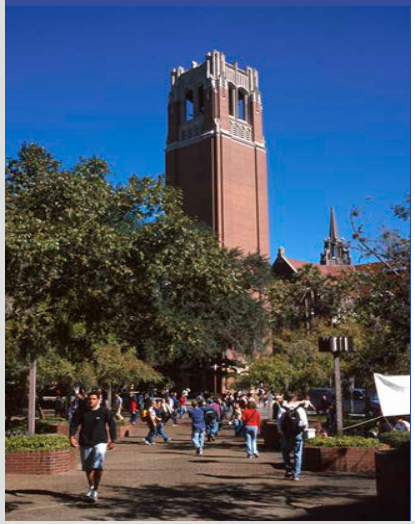
For Your Review…

Sheriff: Chief Law Enforcement Officer, CEO of the Judicial System: Civil Processes, Bailiffs and in Many Counties Operation of the Jail, Sheriff Can Appeal Budget Adopted By Board to Administration Commission Who Can Increase Funding Above Board Allotment

Property Appraiser: Responsible for Assessing Real and Personal Property, Responsible for Producing Tax Roll, Responsible for Administering Tax Exemptions, Budget Submitted Simultaneously To DOR and Board, DOR approves budget, Board or Appraiser Can Appeal

Tax Collector: In Most Counties A "Fee Officer" (Office Operating Costs for Property Taxes and Special Assessments Billed to Taxing Entities), Budget Submitted to DOR for Review and Approval, Board Can't Appeal.



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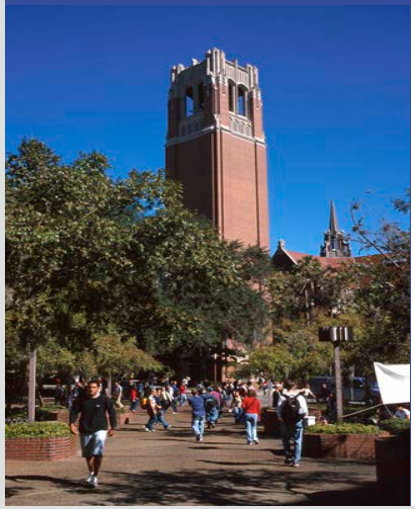
For Your Review…

Supervisor of Elections: Administers Local Elections, Maintains Voter Registration, Budget Is Under "Direct" Control of Board, No Appeal Mechanism

Clerk of Courts: Serves as Clerk of County and Circuit Courts, In Most Cases Also Serves As Clerk of Board, Serves as Treasurer and Comptroller and May Be Budget Officer, Ensures Expenditures Are Made According to County Budget Policy and State Law, May Be a "Budget" or "Fee" Office, In Role As Clerk to Board and County Always a Budget Office



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Charter Counties

1968 Constitutional Revision

Dillon's Rule

Post constitutional revision powers

Article VIII, section 1

(f): non-charter counties

(g): charter counties

Charter County Distinctions

- Choose form of government
- Power to tax in unincorporated area
- May alter functions of county officers
- Can have county ordinances prevail over municipal ordinances
- Special acts that limit power must be approved by voters
- Can increase citizen involvement

Intergovernmental Relations

- Opportunity for regional governance
  - Municipalities
  - Special districts
  - Service delivery

- Opportunity can be limited by status as a political subdivision

Wrap Up

- Unique history of counties in Florida (as contrasted with the state, a municipality and a special district)
- What is a county?
- What does a county do?
- How does a county do it?
- Where does its authority come from?
- Where does the county government fit with respect to other county officers (and their functions)?
- Are a charter county's form and function different from other counties in Florida?

Questions ??

PUBLIC RECORDS, SUNSHINE LAW & ETHICS

Public Records Law

"Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body…"

"It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency"

Unless there is a specific exemption to disclosure, "[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records"

Definition

- Documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency

- Any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type

BUT NOT:

- Handwritten notes
- Personal emails
- Personal telephone records

Exemptions

- All public records are open for public inspection unless the Legislature has specifically exempted them from disclosure or the records have been made confidential by law
- Records custodian redacts only the exempt portion of the record & produces the remainder of the record (unless the entire record is exempt)
- Records custodian states the basis for the exemption, including the statutory citation, and if requested, provides in writing and with particularity the reasons for concluding that the record is exempt from disclosure

Examples of Exemptions

- Home addresses, personal home telephone numbers, personal cell numbers, social security numbers, dates of birth, & photographs of active or former police officers, firefighters, judges, prosecutors, probation officers, code enforcement officers, animal control officers, and human resource directors
- Social security numbers
- Bank account and debit/charge/credit card numbers
- Attorney work product
- Trade secrets
- Building plans & security system plans
- Public library registration and circulation records

Responding to Requests

- Requests may be made orally or in writing & requestor does not have to provide his or her identity
- Respond timely, no unjustified delays
- Copying charges & “special service charges” can be required up front
- “Special service charge” can be required for “extensive” (more than 15 minutes) use of information technology resources & clerical/supervisory assistance
- “Labor cost” in computing the special service charge can include salary & benefits of the person(s) doing the work

Civil Actions

- Accelerated hearing process if litigation ensues over the refusal to provide records
- If court determines an agency unlawfully refused to permit the inspection of a record, the court shall assess and award reasonable costs and attorneys' fees, even if the agency mistakenly withheld the records
- Also, once litigation ensues, subsequently providing the records will not avoid the assessment of costs and fees

Consequences

- Noncriminal infraction & fine

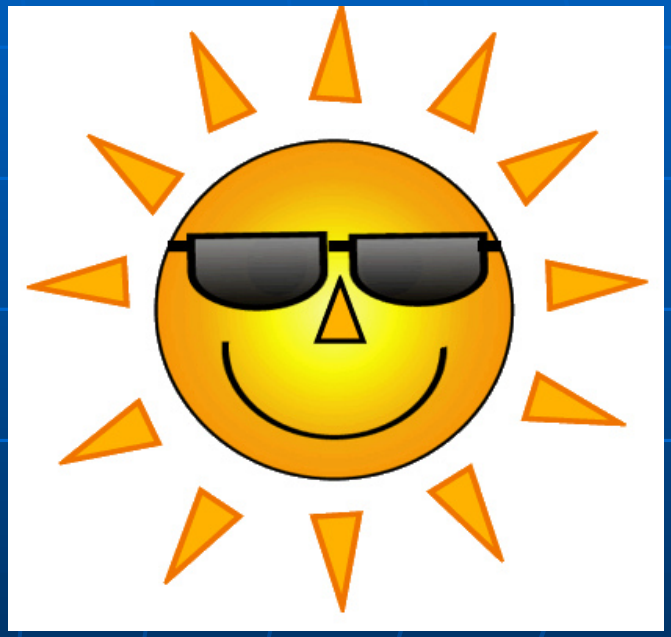
- Knowingly / willfully violating Chapter 119 may result in suspension or removal, first degree misdemeanor charge

Sunshine Law

Meetings of public boards or commissions must be open to the public

Reasonable notice of the meetings must be given

Minutes of the meetings must be taken, promptly recorded, & open to public inspection



Purpose of the Sunshine Law

Protects the public from “closed door” politics

Prevents at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance

Covers any gathering of some of the members of a public board where those members discuss some matters on which foreseeable action may be taken by the board

A meeting is either fully open or fully closed; there is no middle ground

Which Boards?

Local governing bodies and decision-making committees of local government agencies are subject to the Sunshine Law

Sunshine Law applies to boards or commissions created by law or by a public agency

Applies to board members and members-elect

Applies to advisory boards or committees, except for those that are merely “fact-finding”

Examples

NOT SUBJECT TO THE SUNSHINE LAW:

- Strictly advisory committees
- Strictly fact-finding, information gathering committees

ARE SUBJECT:

- Decision-making committees
- Committees that make recommendations
- Search and screen committees

Private Entities?

Certain private entities may be subject to the Sunshine Law if the entity is “standing in the shoes of the public agency”

An entity that has been delegated governmental or legislative functions is subject to the Sunshine Law

But not an entity that is merely under contract, such as a lease, with the agency

“Meetings”

Sunshine Law applies to any function where two members of the same board are present and there are discussions of board business

Applies to all assemblies or meetings, whether structured or casual, where there are discussions of matters which may foreseeably come before a board or commission for official action

Application

No actual meeting? Attorney General's Office has opined that circulating a memorandum between members of a commission, so that the members could write down whether they approved or disapproved an issue, was a violation of the Sunshine Law

A liaison? A party cannot act as a liaison between two members of same board or take an official poll

One member? Yes, if a single member has been delegated decision making authority to act on behalf of the board

Electronic Communication

Email, etc.? Discussions or exchanges between board members about board business via email, texts, blogs, or message boards would be prohibited

Facebook & Twitter? Board members are not prohibited from posting, but members must not engage in a discussion of matters which could foreseeably come before the board for official action

OH, MY….

- Restroom Conversation Between Lake Wales Officials Raises Sunshine Question

- LAKE WALES | Two city commissioners in Lake Wales may have tread over the line drawn by the Sunshine law by talking about a land purchase in a place not accessible to women - a men's restroom in Lake Wales City Hall. A reporter walked in on the discussion Tuesday night in the men's room after the monthly Community Redevelopment Agency board meeting. Mayor Mike Carter and City Commissioner John Paul Rogers were discussing a proposed purchase of property for a city gateway, including a sign announcing Lake Wales. [TheLedger.com]

Reasonable Notice

What is “reasonable” notice of a meeting? It depends…

- Three days’ notice of a meeting is reasonable
- But, providing notice one hour and thirty minutes in advance of a meeting is not

Access to Meetings

Public meetings must be accessible to physically handicapped persons

Section 286.011(6) prohibits holding public meetings at any facility or location which discriminates on the basis of sex, age, race, creed, color, origin or economic status, or which operates in such a manner as to unreasonably restrict public access

Participating in Meetings Electronically

Board members may participate in scheduled board meetings by telephone or electronic means, but…

Compliance with the Sunshine Law requires notice to the public and access by the public to hear the discussions

Also, a quorum of board members must be physically present at the meeting in order to conduct official business

Hear Ye!

During the 2013 Legislative Session, Senate Bill 50 was adopted and signed into law by the Governor to create Section 286.0114, Fla. Stat.

The statute requires a board to give the public a “reasonable opportunity to be heard on a proposition” that is before the board

Known as the “anti-shushing” bill

The opportunity to be heard does not have to occur at the same meeting when the board takes official action (just during the decision making process & within reasonable proximity in time before said meeting)

Exemptions: emergency situations, ministerial acts (i.e., approval of minutes, ceremonial proclamations), quasi-judicial proceedings

Boards can adopt rules & policies to maintain orderly conduct and proper decorum at the meeting

Exempt Meetings

Portions of meetings regarding evaluation of claims and offers of compromise regarding a risk management program of an agency

Portions of any public meeting that would reveal a security system plan

Attorney-client “shade” meetings

"This is highly confidential, so, yes, we built a little fort."

“Shade” Meetings

Local governing boards, commissions & agencies may meet privately with their attorneys to discuss pending litigation, but specific conditions must be met

Attorney must request the private meeting at a public meeting

Subject matter is confined to settlement negotiations or litigation strategy

Reasonable public notice of the meeting is required, including names of attendees

Meeting be must recorded by a certified court reporter

Session commences at an open meeting, is closed for the attorney/client meeting, then reopened afterwards

Statute is Strictly Construed

In AGO 2013-17, the Florida Attorney General's Office determined that, absent an identifiable lawsuit, the City of Gainesville could not hold a closed attorney-client meeting to discuss arbitration. City was in a dispute concerning a Purchase Agreement, and the Agreement required that any controversy, dispute or claim be settled by arbitration. However, mandatory and binding arbitration is not considered pending litigation, thus the City could not hold a closed attorney-client meeting.

In Anderson v. St. Pete Beach, court found that the City violated the Sunshine Law when the discussions of seven "shade" meetings covered a wide range of political and policy issues in addition to the settlement discussions.

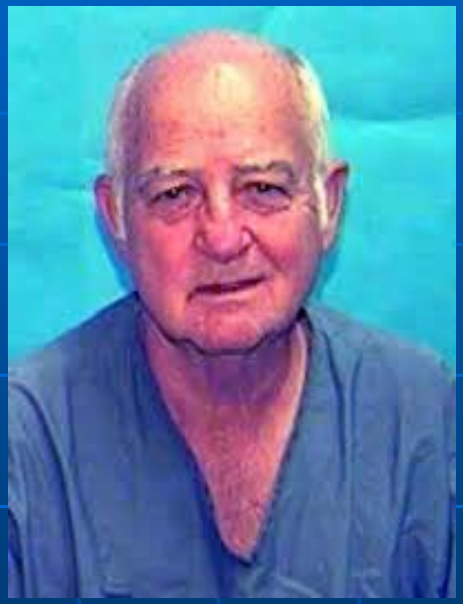
PENALTIES

Criminal. Any member of a public body subject to § 286.011 who *knowingly* violates the Sunshine Law is guilty of a misdemeanor of the second degree

Civil. Any public officer who violates any provision of this section is guilty of a non-criminal infraction, punishable by fine not exceeding $500

The court may also assess reasonable attorneys' fees

City of St. Pete Beach may have to pay up to $1 million in court-imposed attorney's fees and costs in the Anderson case



W.D. CHILDERS, former president of the Florida Senate and chairman of the Escambia County Commission…

Convicted by a jury in 2003 of Sunshine Law violations for discussing public business in private with other commissioners; served 49 days in jail

Also found guilty in 2006 of two charges of bribery and unlawful compensation & served 3-1/2 years in prison for that

According to Okaloosa County Judge T. Patterson Maney:

Childers' crimes were more serious because he ignored advice from the county attorney, played a leadership role, & had vast political experience…

www.TALLAHASSEE.com LOCAL/FLORIDA Tallahassee Democrat • Tuesday, May 13, 2003 3B

Childers gets jail for Sunshine violation

By Bill Kaczor
The Associated Press

PENSACOLA — Former Florida Senate President W.D. Childers received a maximum 60 days in jail Monday for one count of violating the state's open-government Sunshine Law. The suspended Escambia County commissioner could get a similar sentence for bribery later this week.

A second Sunshine Law count drew a $500 fine, also the maximum, and orders to pay $476 for court costs and $3,225.85 to cover investigation and prosecution expenses.

Childers looked grim but said nothing in court as Okaloosa County Judge T. Patterson Maney imposed sentence. As briefly, Childers flashed a smile and said, "No comment." Maney denied an appeal bond and ordered Childers to turn himself in at 8 a.m. CDT today to begin his sentence.

Childers

Outside, his defense lawyer blasted the bond denial.

"This is a good man who did not deserve, or get to talk on a strictly disputed issue of law as to whether or not his conduct was illegal or illegal," said defense lawyer Richard Lubin. "When you file an appeal it becomes meaningless if you have already served your time."

Former Escambia Commissioner Mike Bass also was convicted for the Sunshine Law offenses. He escaped jail but was ordered to pay $4,143.89 in jail costs. Maney also withheld adjudication, meaning Bass, who pleaded no contest, will have no criminal record.

Bass and Childers both Republicans were accused of discussing public business in private with other commissioners. The maximum penalty for both was 120 days in jail — 60 days per count.

Maney said Childers' crimes were more serious, because he ignored advice from the county attorney, played a leadership role, he was the board's chairman — and had vast political experience. Childers served in the Senate 10 years until 2000 when he was forced out by term limits and ran for county commissioner.

A Pensacola jury convicted Childers on one Sunshine Law count. It convicted him on two others and hung on a fourth. He later pleaded no contest to the last charge, while reserving the right to appeal it, and the conviction.

Childers also plans to appeal his felony conviction last month for bribery and unlawful compensation for official behavior. He could get up to 30 years in prison.

Jury on each charge — Friday in Crestview, where that trial was moved because of extensive news coverage.

Validity of Actions

No resolution, rule or formal action shall be considered binding except as taken or made at an open public meeting

Ordinance was invalidated in Town of Palm Beach v. Gradison case

Contract award was invalidated in Port Everglades Authority case

Cures

An initial violation of the Sunshine Law may be cured by independent final action taken at a public meeting

Action can be reinstated or cured if voted on again after full public discussion and participation in an open public meeting

But, a Sunshine Law defect cannot be cured by “perfunctory ratification” or “ceremonial acceptance” of the action

ETHICS

Ethics: “Of or relating to moral action, conduct, motive or character… [p]rofessionally right or befitting.”

“Ethics is knowing the difference between what you have the right to do and what is the right thing to do.”

Public Trust

Florida Constitution says:

“Public office is a public trust”

and

“People shall have the right to secure and sustain that trust against abuse”

Code of Ethics

Chapter 112, Part III, Florida Statutes is the “Code of Ethics for Public Officers and Employees”

Code establishes standards of conduct required of officers & employees of the state, county, city, & other political subdivisions, in the performance of their official duties

Code applies to any person elected or appointed to public office, including persons serving on an advisory board

Code of Ethics addresses financial disclosure, conflicts of interest, nepotism, gifts & honoraria, campaign finance, lobbying, and felony offenses such as embezzlement & bribery

Also unlawful for a person to pay or receive a commission, bonus, kickback, or rebate, or engage in any split-fee arrangement with a physician, surgeon, organization, or person, either directly or indirectly, for patients referred to a particular hospital

And unlawful for a health care provider or provider of health care services to offer, pay, solicit, or receive a kickback for referring or soliciting patients

These laws may come into play if a city or county runs a hospital or ambulance service

To Vote or Not to Vote

A vote must be recorded and counted for each board member who is present at a board meeting, unless a conflict of interest exists, or appears to exist

A county commissioner may abstain from voting on a measure to avoid creating an appearance of impropriety only where such impropriety amounts to a conflict of interest

Board member may abstain from voting if there is, or appears to be, a possible conflict of interest under a locally adopted code of ethics

Board member may abstain from voting in a quasi-judicial proceeding “if the abstention is to assure a fair proceeding free from potential bias or prejudice”

In the event of a conflict of interest, board member must publicly disclose the reasons for not voting & afterwards file a Memorandum of Voting Conflict (CE Form 8B) with the clerk within 15 days

What if a board member is in attendance at a board meeting, but happens to be out of chambers during the vote on an issue in which the board member has or appears to have a conflict of interest?

Florida Commission on Ethics Opinion (CEO) 88-3 says that a board member would be required to publicly announce the basis of a conflict of interest and file a memorandum of voting conflict even if the board member was in attendance but temporarily absent from that portion of the meeting when the board considered the matter of conflict

Statutory duty to vote may not be avoided by a “temporary” absence of a member during the vote on a matter which comes before the board during a meeting at which he is present (AG0 074-289)

GIFT LAW

No public officer, employee of an agency, local government attorney, or candidate for elected office shall "solicit or accept anything of value to the recipient" (gift, loan, reward, favor, service, promise of future employment) based upon any understanding that the vote, official action, or judgment of the officer or employee would be influenced by the thing of value

Prohibits public officers/employees (& their spouses & minor children) from accepting compensation, payment, or a "thing of value," when the officer knows, or should know, that it was given to influence a vote or official action

Also prohibits "reporting individuals" (persons required to file full or limited financial disclosure statements) & "procurement employees" (state officers & employees who participate in procuring services or commodities that exceed $10,000/year) from soliciting or accepting gifts

A “gift” would include: real property, the use of real property, tangible or intangible personal property or the use of same, preferential rates or terms on a debt/loan/goods/services, forgiveness of a debt, food or beverage, membership dues, tickets to events, floral arrangements, personal or professional services

But not: awards, plaques, certificates, & other similar items given in recognition for public service

Accepting a gift worth more than $100 from a lobbyist, vendor, or political committee is prohibited

Accepting a gift valued at not exceeding $100 from a lobbyist, vendor, or political committee is allowable, but any gifts valued at over $25 (but not exceeding $100) must be reported quarterly

Soliciting any gift from a lobbyist, vendor of the agency, or political committee is prohibited

Accepting gifts from relatives is allowable and not reported

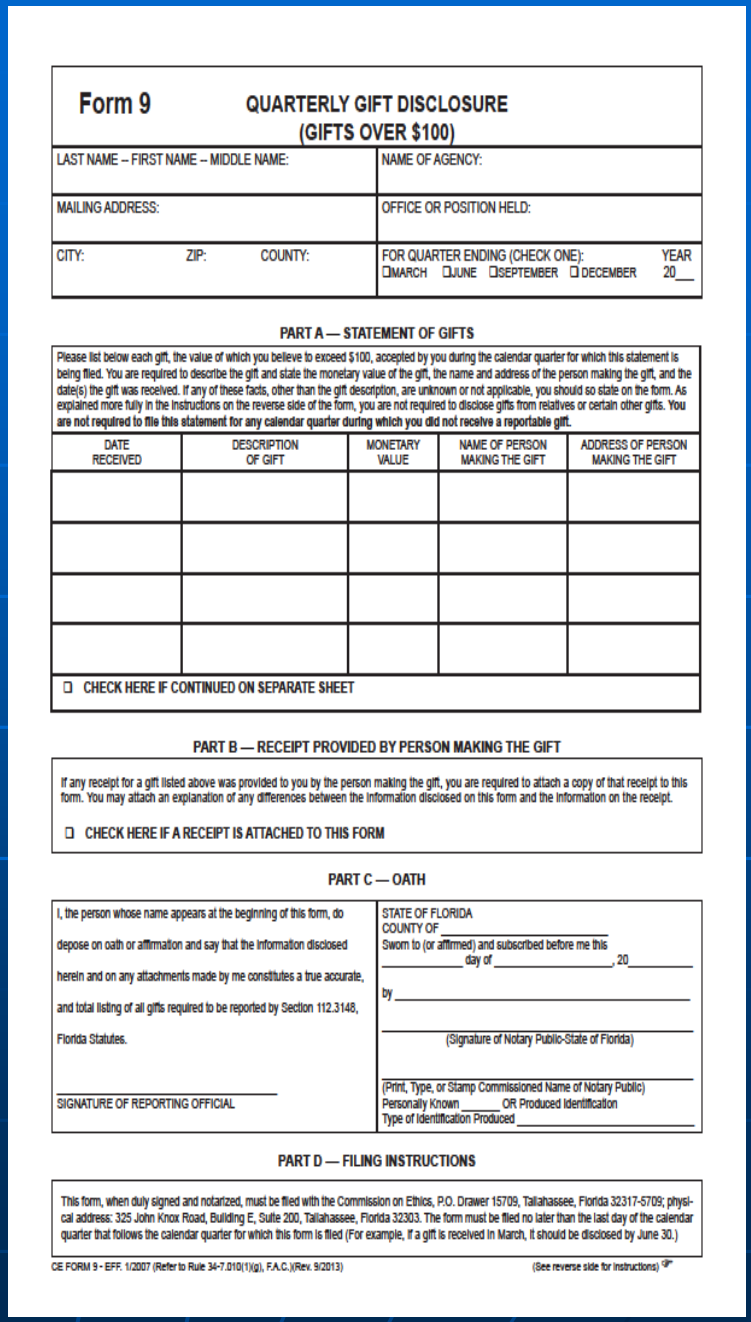
Accepting gifts worth more than $100 in value from certain governmental agencies for a public purpose is allowable but must be reported

All other gifts that are worth over $100 must be disclosed quarterly

FORM 9

QUARTERLY GIFT DISCLOSURE

(Gifts over $100)



Form 9 **QUARTERLY GIFT DISCLOSURE (GIFTS OVER $100)**

LAST NAME – FIRST NAME – MIDDLE NAME:	NAME OF AGENCY:
MAILING ADDRESS:	OFFICE OR POSITION HELD:
CITY: ZIP: COUNTY:	FOR QUARTER ENDING (CHECK ONE): YEAR ☐MARCH ☐JUNE ☐SEPTEMBER ☐ DECEMBER 20__

PART A — STATEMENT OF GIFTS

Please list below each gift, the value of which you believe to exceed $100, accepted by you during the calendar quarter for which this statement is being filed. You are required to describe the gift and state the monetary value of the gift, the name and address of the person making the gift, and the date(s) the gift was received. If any of these facts, other than the gift description, are unknown or not applicable, you should so state on the form. As explained more fully in the Instructions on the reverse side of the form, you are not required to disclose gifts from relatives or certain other gifts. **You are not required to file this statement for any calendar quarter during which you did not receive a reportable gift.**

DATE RECEIVED	DESCRIPTION OF GIFT	MONETARY VALUE	NAME OF PERSON MAKING THE GIFT	ADDRESS OF PERSON MAKING THE GIFT

☐ CHECK HERE IF CONTINUED ON SEPARATE SHEET

PART B — RECEIPT PROVIDED BY PERSON MAKING THE GIFT

If any receipt for a gift listed above was provided to you by the person making the gift, you are required to attach a copy of that receipt to this form. You may attach an explanation of any differences between the information disclosed on this form and the information on the receipt.

☐ CHECK HERE IF A RECEIPT IS ATTACHED TO THIS FORM

PART C — OATH

I, the person whose name appears at the beginning of this form, do depose on oath or affirmation and say that the information disclosed herein and on any attachments made by me constitutes a true accurate, and total listing of all gifts required to be reported by Section 112.3148, Florida Statutes.

_____
SIGNATURE OF REPORTING OFFICIAL

STATE OF FLORIDA
COUNTY OF _____
Sworn to (or affirmed) and subscribed before me this _____ day of _____, 20_____
by _____
_____
(Signature of Notary Public-State of Florida)
_____
(Print, Type, or Stamp Commissioned Name of Notary Public)
Personally Known ____ OR Produced Identification
Type of Identification Produced _____

PART D — FILING INSTRUCTIONS

This form, when duly signed and notarized, must be filed with the Commission on Ethics, P.O. Drawer 15709, Tallahassee, Florida 32317-5709; physical address: 325 John Knox Road, Building E, Suite 200, Tallahassee, Florida 32303. The form must be filed no later than the last day of the calendar quarter that follows the calendar quarter for which this form is filed (For example, if a gift is received in March, it should be disclosed by June 30.)

CE FORM 9 - EFF. 1/2007 (Refer to Rule 34-7.010(1)(g), F.A.C.)(Rev. 9/2013) (See reverse side for instructions)

Violations

Florida Atlantic University administrator Paulo Brida: Found by the Ethics Commission to have received $9500 personal loan from a vendor; fined $2500

Chattahoochie City Manager Elmon Lee Garner: Did not report gift of two football tickets & dinner; fined $1652

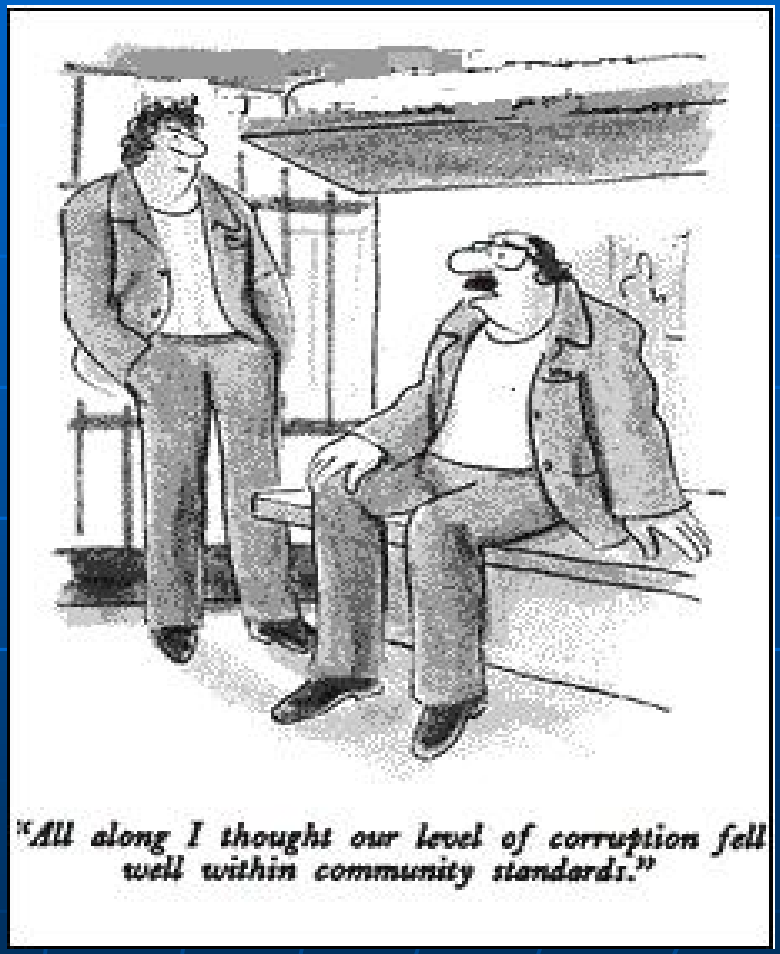
Former Flagler County Sheriff Donald Fleming: Failed to disclose honorary membership at a resort; fined $500 & repaid the resort $3800

Federal Public Corruption Convictions from 2003-2013

Texas: 870

California: 678

Florida: 622



Honest Services Act

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of mail, wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both (18 U.S.C. §§ 1341 & 1343)

"Scheme or artifice to defraud" was defined by Congress in 1988 as "a scheme or artifice to deprive another of the intangible right of *honest services*" (18 U.S.C. § 1346)

Then Came Skilling

Jeffrey K. Skilling, former Enron CEO…

Enron was worth over $60 billion and its stock sold at $90 per share, but fraud and faulty accounting led to the 6th largest bankruptcy in U.S. history

Skilling was convicted of one count of conspiracy (premised on honest services fraud), 12 counts of securities fraud, 5 counts of making false representations to Enron's auditors, & 1 count of insider trading

He appealed his convictions, arguing that the honest services law was unconstitutionally vague…

Supreme Court Decision

In Skilling v. United States, 130 S. Ct. 2896 (2010), the U.S. Supreme Court held that § 1346 (mail fraud statute) criminalizes ***only*** those schemes that involve bribes or kickbacks

Court found that non-disclosure of a conflict of interest is ***not*** a violation of the honest services fraud statute

Therefore, honest services fraud statute is ***not*** unconstitutionally vague when properly confined to bribery and kickback schemes

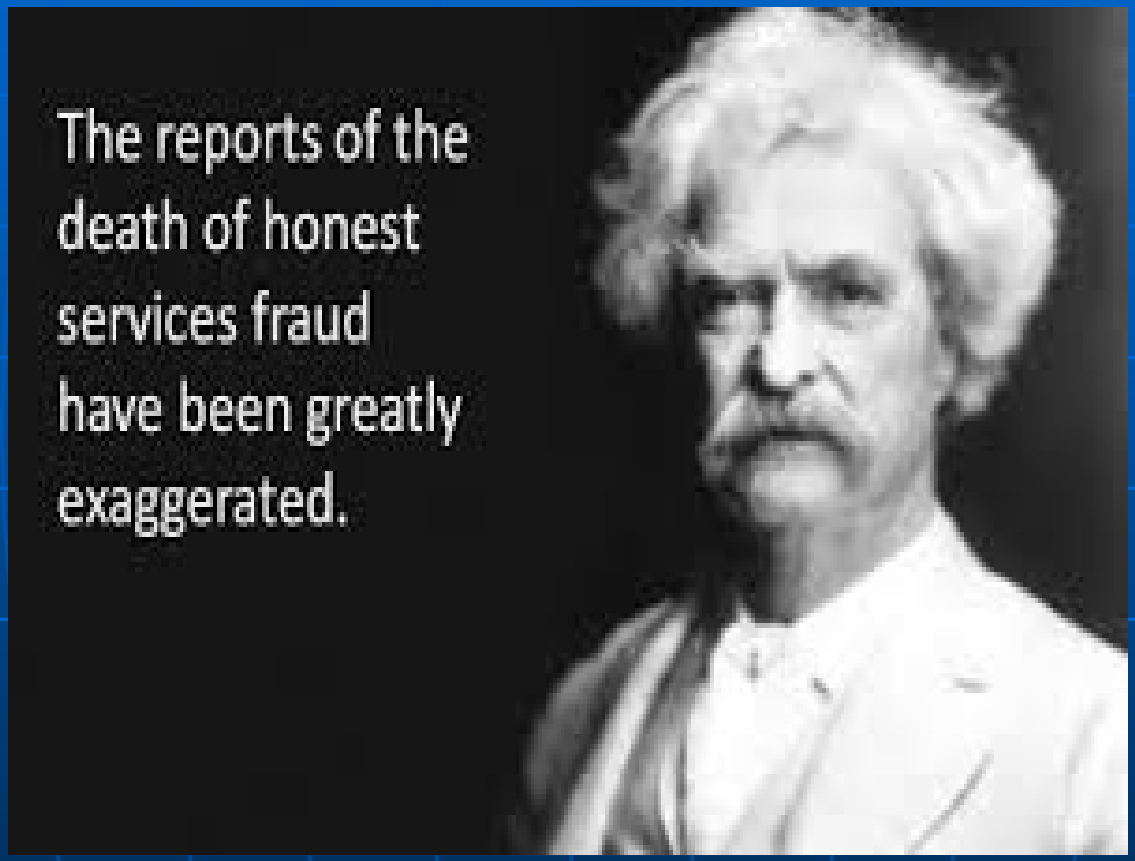
Skilling Epilogue

Jeffrey Skilling has been in jail since 2006, and after years of legal wrangling, a deal was reached

Skilling's sentence was reduced from 24 years to 14 years

More than $40 million of his fortune (which had been frozen since 2006) will be distributed to victims of Enron's collapse

It had been speculated that the Skilling case would significantly curtail honest services fraud convictions, but…


The reports of the death of honest services fraud have been greatly exaggerated.

On September 4, 2014, former Virginia Governor Robert F. (Bob) McDonnell and his wife, Maureen G. McDonnell, were found guilty of several counts of public corruption

Allegedly participated in a scheme to use his official position to obtain over $170,000 in loans & gifts, including cash, golf outings & equipment, Rolex watch, designer clothes, trips, etc., from a businessman in exchange for promoting diet supplements

He was sentenced to 2 years; she was sentenced to one year and a day

BUT, the former Governor appealed to the U.S. Supreme Court

Court rejected arguments that the Honest Services and Hobbs Act are unconstitutionally vague

However, the Court did vacate the Governor's convictions due to incorrect jury instructions concerning the term "official act"

"Official act" is more than just setting up a meeting, calling another public official or hosting an event to discuss a particular issue

Florida Cases

Congresswoman Corrine Brown of Jacksonville & her Chief of Staff were charged with a 24-count indictment in early July

Charges include: mail & wire fraud, conspiracy to commit mail & wire fraud, concealing material facts on financial disclosure forms, theft of government property, obstruction of the due administration of internal revenue laws, filing false tax returns

Allegedly solicited & received donations to One Door for Education, a supposedly charitable organization, but diverted the funds for personal & professional use, including personal expenses, plane tickets, personal automobile repairs, vacations, receptions, & luxury boxes at a Beyoncé concert & NFL game

President of One Door for Education recently pleaded guilty for her role in the scheme


Congresswoman
Representing the 5th District of Florida


HOME
ABOUT US
SERVICES
CONTACT US
One Door for Education
The Amy Anderson Scholarship Fund
Providing scholarships and opportunities to students pursuing a degree in Education as well as opening doors in the community.
One Door For Education – The Amy Anderson Scholarship Fund

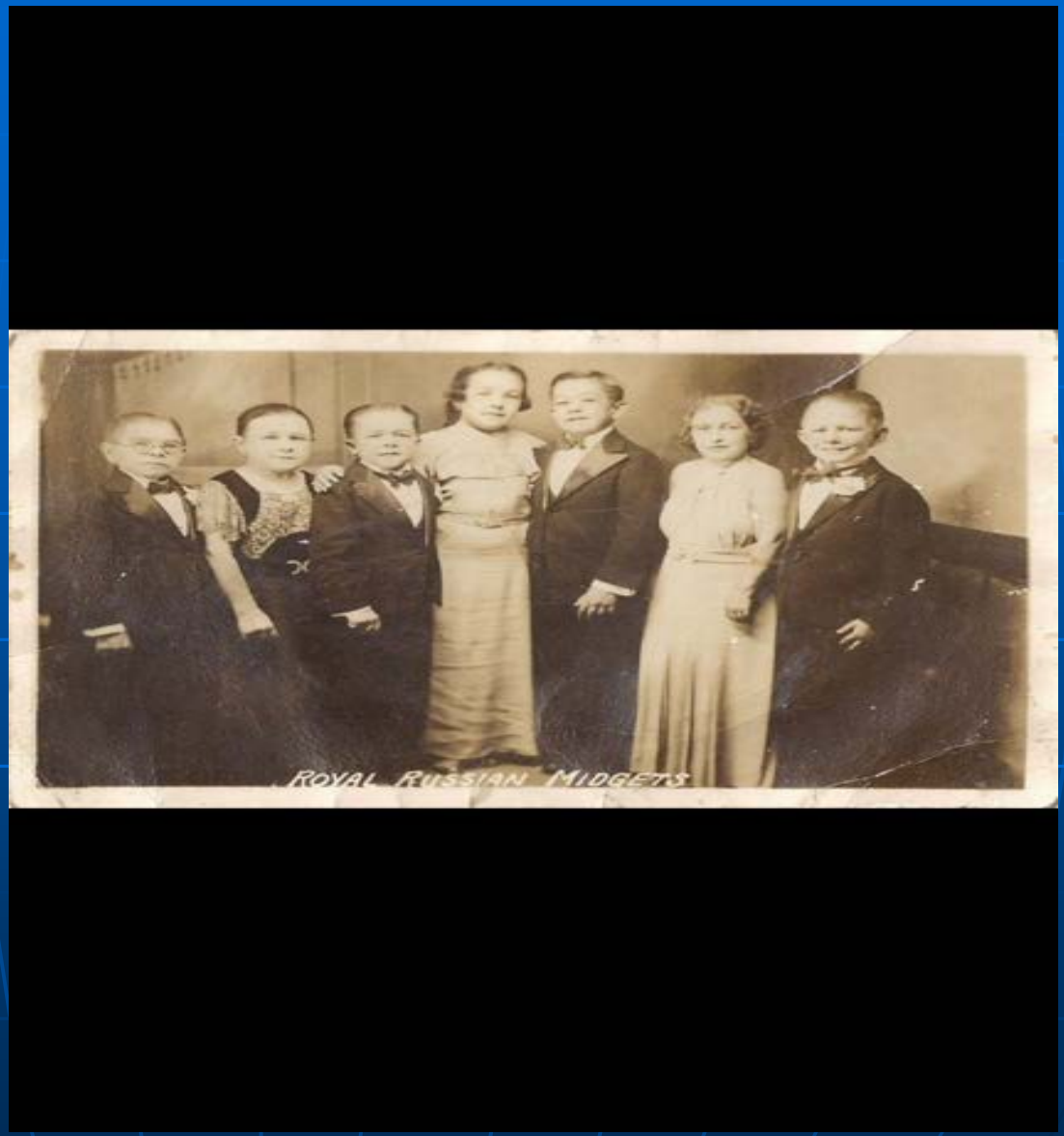
In late 2013, Mayor Manuel Maroño of Sweetwater pleaded guilty to one count of conspiracy to commit honest services wire fraud

Mayor admitted he agreed to help a company obtain federal grant funds to prepare an economic development study for Sweetwater, in exchange for kickback of $30,000

The company was an undercover FBI entity

Received a 40-month prison sentence

Sweetwater



Tony Devaughn Nelson, former chairman of the Jacksonville Port Authority, was found guilty of 36 corruption-related charges, including honest services mail fraud, bribery, money laundering, and lying to the FBI

Reportedly solicited & received $140,000 in bribes from a dredging company that had ongoing business with the JPA

Sentenced to 40 months in federal prison

Appealed, but was unsuccessful

Operation Dirty Water

13 arrested on bribery & racketeering charges, most entered plea deals

Engineering contractors gave gifts to public utility employees in exchange for water & sewer contracts

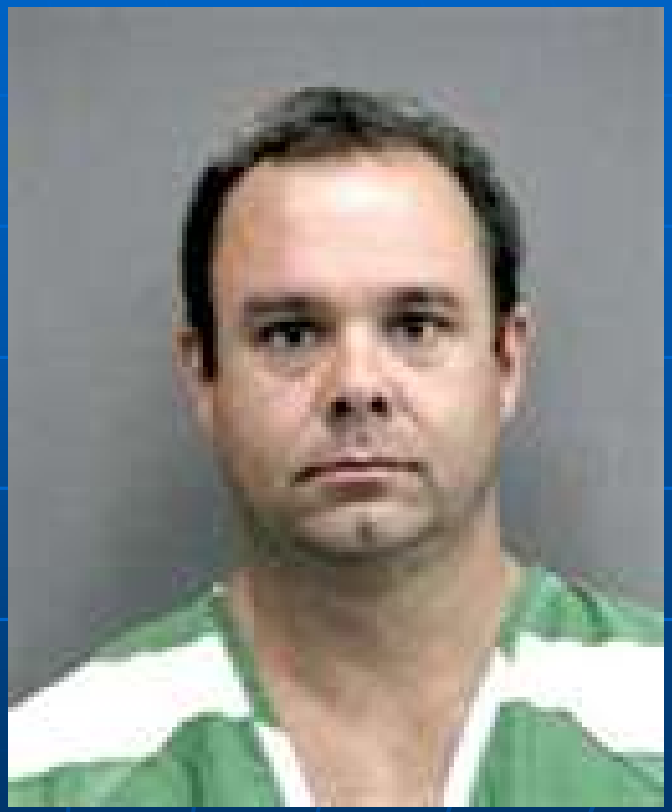
Included current / former employees of Wellington, Port St. Lucie, Boynton Beach, West Palm Beach, Delray Beach, Sarasota County & Palm Beach County

Former Dixie County Attorney JOSEPH T. (JOEY) LANDER…

Convicted of six felony counts of mail fraud & 11 felony counts of money laundering, for requiring developers to pay him personally for performance bonds… also used his position to entice others to invest in his start-up vitamin business

He was sentenced to 87 months in federal prison & ordered to pay $50,000 fine, $1,600 in court costs, & forfeit co-ownership in local newspaper

Successfully appealed 12 of the convictions, but not the mail fraud conviction for the vitamin company scheme



Operation Flat Screen

Former Broward County Commissioner Josephus Eggelletion pled guilty to conspiring to launder money & filing a false tax return, sentenced to 30 months in prison

Former Broward County School Board member Beverly Gallagher pled guilty to bribery, sentenced to 37 months in prison

Former Miramar City Commissioner Fitzroy Salesman convicted of two counts of bribery, two counts of extortion, but acquitted of honest services fraud, sentenced to 51 months in prison

FORMER PALM BEACH COUNTY COMMISSIONERS

- Anthony R. Masilotti
- Warren H. Newell
- Mary B. McCarty

HOBBS ACT

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both

Extortion means “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right”

This law was primarily enacted to combat racketeering but it is also used in public corruption cases

Conviction under Hobbs Act will be sustained based upon proof that a public official obtained payment in cash and/or property and *generally* intended to use his or her influence to benefit the payor as opportunities arose

No. 14-361

In the

Supreme Court of the United States

SAMUEL OCASIO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

Supreme Court affirmed convictions of Baltimore police officer for extortion and conspiracy to commit extortion

Officer participated in a scheme to get car owners who were involved in accidents to take their vehicles to the Majestic Body Shop in exchange for a $150 - $300 referral fee

Body shop owners were extorted, yet were also part of the scheme

Supreme Court found that to be convicted under the Hobbs Act it was not necessary to extort money or property from persons who were not part of the conspiracy

Recent Case

Former Opa-locka City Manager David Chiverton & Public Works Director Gregory Harris

Both were charged for their roles in a bribery and extortion scheme

Allegedly conspired to solicit, demand, and obtain thousands of dollars in exchange for taking official actions to assist and benefit businesses

Could face 5 years in prison

The End

PUBLIC RECORDS, SUNSHINE LAW & ETHICS

Herbert W.A. Thiele
County Attorney
Leon County, Florida

I. PUBLIC RECORDS LAW

A. State Policy

Article I, Section 24(a) of the Florida Constitution provides that "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Also, Section 119.01(1), Florida Statutes provides that "[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person," and "[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records."

B. Definition

In Section 119.011(11), Florida Statutes, "public records" means "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." In Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 So. 2d 633, 640 (Fla. 1980), the court construed the statutory definition of a "public record" to be "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type."

There are some records that do not meet the definition of "public records," such as:

1. *Handwritten notes.* In Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 So. 2d 633 (Fla. 1980), one of the specific findings was that a consultant's handwritten notes were not public records. The court contrasted the definition of public records with those materials that were prepared as drafts or notes, which are mere precursors of governmental records, and not, in of themselves, intended as final evidence of the knowledge to be recorded.

2. *Personal e-mail.* In Times Publishing Company v. City of Clearwater, 830 So.2d 844 (Fla. 2d DCA 2002), the court held that the personal e-mail of city employees did not qualify as public records subject to disclosure under the public records statute. The court determined that, because personal e-mails were not created or received in

connection with the official business of the city, or in connection with the transaction of the city's official business, the e-mails did not qualify as "public records" subject to disclosure. The Florida Supreme Court approved the decision and further held that personal e-mails did not fall within the definition of public records by virtue of their placement on a government-owned computer system. State v. City of Clearwater, 863 So. 2d 149 (Fla. 2003).

3. *Private or personal telephone records.*

(i) In the case of Media General Operation, Inc. v. Feeney, 849 So. 2d 3 (Fla. 1st Dist. App. 2003), rev. den. 857 So. 2d 196 (Fla. 2003), the First District Court of Appeal held that the private or personal cellular telephone calls of five staff employees of the House of Representatives, which calls were contained in billing records, were not public records subject to disclosure and therefore could be redacted. However, the actual telephone numbers called in connection with official state business were public records that should be disclosed, even though disclosure of the numbers might result in unreasonable consequences to the persons called.

(ii) However, in Fla. Atty. Gen. Op. 99-74 (1999), the Attorney General's Office opined that the telephone numbers in a school district's record of calls made on school district telephones were public records, even if the calls were personal and the employee reimbursed the school district for the calls.

(iii) In the case of Rea v. Sansbury, 504 So. 2d 1315 (Fla. 4th Dist. App. 1987), rev. den. 513 So.2d 1063 (Fla. 1987), the court held that an unlisted telephone number which was provided to staff members in order that they could, by telephone, listen to the proceedings of the county commission and other county boards, was not subject to disclosure under Chapter 119, Fla. Stat. The court determined that the telephone number, which had limited availability for access because of the capacity of the machinery, was not a public record. This was despite allegations in the petition for writ of mandamus that certain persons in the private sector had been selectively given the telephone number for their private use and access.

C. Exemptions

In general, all public records are open for public inspection and copying, unless the Legislature has specifically exempted them from disclosure or the records have been made confidential by law. See Wait v. Florida Power and Light Company, 372 So.2d 420 (Fla. 1979). Section 119.07(1)(d), Florida Statutes provides that the records custodian shall redact only that portion of the record for which an exemption has been asserted and validly applies, and shall produce the remainder of the record. Further, the records custodian shall state the basis for the exemption, including the statutory citation,

and if requested, shall provide in writing and with particularity the reasons for concluding that the record is exempt. Fla. Stat. §§ 119.07(1)(e); 119.07(1)(f).

The exemptions listed below are illustrative and not exhaustive.

1. *Personnel information.* Unless specifically exempted, the Florida courts have consistently held that information contained in government employee personnel files are public records subject to disclosure. See Tribune Co. v. Cannella, 458 So. 2d 1075 (Fla. 1984). However, certain personal information (home addresses, personal home telephone numbers, personal cellular telephone numbers, social security numbers, dates of birth, photographs, etc.) concerning active or former police officers, firefighters, judges, prosecutors, probation officers, code enforcement officers, animal control officers, and human resource directors and managers are exempt from disclosure. Fla. Stat. § 119.071(4)(d). In addition, medical records, medical claims records, medical reports, medical information, and employee assistance program information are exempt from disclosure. See Fla. Stat. §§ 119.071(4)(b), 112.08(7), 125.585, 440.125, 760.50(5).

2. *Social security numbers* are confidential and exempt from disclosure. Fla. Stat. §§ 119.071(4)(a); 119.071(5)(a).

3. *Bank account numbers and debit, charge, and credit card numbers* are exempt. Fla. Stat. § 119.071(5)(b).

4. *Attorney work-product.* A public record prepared by an agency attorney (or prepared at the attorney's express direction) which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or agency, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of same, is exempt until the conclusion of the litigation or adversarial administrative proceedings. Fla. Stat. § 119.071(1)(d).

5. *Data processing software.* There is an exemption for certain data processing software, including sensitive agency-produced software, as well as software obtained under a licensing agreement which prohibits disclosure and which is a trade secret. Fla. Stat. § 119.071(1)(f).

6. *Building plans.* Building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary and final formats, which depict the internal layout and structural elements of a building, arena, stadium, water treatment facility, or other structure owned or operated by an agency are exempt from disclosure. Fla. Stat. § 119.071(3)(b). In addition, the building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary and final formats, which depict the internal layout or structural elements of a recreation facility, entertainment complex,

industrial complex, or retail/office/hotel/motel developments are exempt. Fla. Stat. § 119.071(3)(c).

7. *Security system plans* held by an agency are confidential and exempt from disclosure. Fla. Stat. § 119.071(3)(a).

8. *Acquisition of property.* When a county seeks to acquire real property for a public purpose, the appraisals, offers, and counteroffers are exempt for a limited time. Fla. Stat. § 125.355.

9. *Bids.* Sealed bids or proposals received by a government agency are exempt from disclosure for a limited period of time. Fla. Stat. § 119.071(1)(b). Also, financial statements which an agency requires a prospective bidder to submit in order to prequalify to bid, or respond to a proposal, for a road or other public works project is exempt from disclosure. Fla. Stat. § 119.071(1)(c).

10. *Active criminal intelligence information and active criminal investigative information* are exempt. Fla. Stat. § 119.071(2)(c).

11. *Certain information regarding crime victims* is exempt. See, e.g., Fla. Stat. §§ 119.071(2)(h); 119.071(2)(i); 119.071(2)(j); Fla. Stat. § 119.105.

12. *Records of emergency calls* which contain patient examination or treatment information are confidential and exempt, and may not be disclosed without the consent of the person to whom the records pertain. However, limited disclosure may be made to the parent of a minor, guardian, next of kin (if the patient is deceased), hospital personnel (for use in treating the patient), or via subpoena. Fla. Stat. § 401.30(4).

13. *Public library registration and circulation records*, with the exception of statistical reports, are exempt. Fla. Stat. § 257.261(1).

14. *Children participating in recreation programs or camps*. Section 119.071(5)(c) exempts certain identifying information of children who participate in government-sponsored recreation programs or camps, including the names, home addresses, telephone numbers, social security numbers, and photographs of the children, the names and locations of schools attended by such children, and the names, home addresses, and social security numbers of the parents or guardians of the children.

D. Responding to Requests

A public records request may be made either in writing or orally. There is no requirement that a public records request must be in writing. See Dade Aviation Consultants v. Knight Ridder, Inc., 800 So. 2d 302, 305 n.1 (Fla. 3d DCA 2001). In addition, there is no requirement that the name of

the requestor be revealed, or the identity of any other person on whose behalf the requestor is acting, unless the custodian is required by law to obtain this information. See Fla. Atty. Gen. Op. 92-38 (1992).

The public records request must also be responded to in a timely fashion. In the case of Barfield v. Town of Eatonville, 675 So. 2d 223, 225 (Fla. 5th DCA 1996), the court found that an unjustified delay in complying with a public records request, whether by intentional wrongdoing or by ineptitude, amounted to an "unlawful refusal" to produce the records.

If copies of the records are requested, the provision of same can be conditioned upon the payment of the fee permitted by law, or, if a fee is not prescribed by law, for duplicated copies of not more than 14 inches by 8-1/2 inches, upon payment of not more than 15 cents per one-sided copy, or upon the payment of the actual cost of duplication. An additional five cents may be charged for each two-sided copy. Fla. Stat. § 119.07(4).

The statutes also provide for a reasonable "special service charge" if the nature or volume of the public records requested requires extensive use of information technology resources, extensive clerical or supervisory assistance, or both. Fla. Stat. §119.07(4)(d). In Florida Institutional Legal Services, Inc. v. Florida Dept. of Corrections, 579 So. 2d 267 (Fla. 1st DCA 1991), rev. den. 592 So. 2d 680 (Fla. 1991), the First District Court upheld a rule of the Department of Corrections which defined "extensive" as any request which required personnel more than 15 minutes to locate, review for confidential information, copy, and refile the requested records. In Board of County Commissioners of Highlands County v. Colby, 976 So. 2d 31 (Fla. 2d DCA 2008), the Second District Court found that the "labor cost" assessed as the basis for the "special service charge" may include both the salary and benefits of the employee performing the request. Also, the Court affirmed the circuit court's approval of the County's policy which required an advance deposit before beginning work on the extensive public records request.

E. Civil Actions

Section 119.11(1), Florida Statutes provides for an accelerated hearing process if litigation ensues over refusal to provide a requested document, and gives the case priority over other pending cases on the docket. The Fourth District Court of Appeal of Florida found that this statutory rule did not directly conflict with the Rules of Civil Procedure, and was thus valid (and requires a good faith effort by the Court to give priority). Salvador v. Fennelly, 593 So. 2d 1091 (Fla. 4th Dist. App. 1992).

Pursuant to Section 119.12, if the court determines that an agency unlawfully refused to permit a public record to be inspected or copied, then the court shall assess and award the reasonable costs of enforcement, including reasonable attorneys' fees. In News and Sun-Sentinel Co. v. Palm Beach County, 517 So. 2d 743 (Fla. 4th Dist. App. 1987), the court held that attorneys' fees were recoverable in an action to obtain access to public records, even where the access was denied based upon the good faith but mistaken belief that the documents involved were exempt from disclosure. See also Times Publishing Co., Inc. v. St. Petersburg, 558 So. 2d 487, 495 (Fla. 2d Dist. App. 1990)

(intent of the statute is to reimburse a party who incurs legal expenses when seeking permission to view records wrongfully withheld, even if access is denied based on a good faith but mistaken belief that the documents are exempt). Also, once litigation has commenced to enforce compliance with Chapter 119, subsequently providing the records sought will not avoid the assessment of costs and fees. See Wisner v. City of Tampa Police Department, 601 So. 2d 296 (Fla. 2d Dist. App. 1992).

F. Consequences

Section 119.10(1)(a) states that any public officer who violates any provision of Chapter 119 is guilty of a noncriminal infraction, punishable by a fine not exceeding $500. And, under Section 119.10(1)(b), any public officer who knowingly violates the provisions of Fla. Stat. § 119.07(1), is subject to suspension and removal or impeachment, and is guilty of a misdemeanor of the first degree punishable as provided in Chapter 775, Florida Statutes.

Further, Section 119.10(2)(a) provides that any person who willfully and knowingly violates any of the provisions of Chapter 119 is guilty of a misdemeanor of the first degree, punishable as provided for in Chapter 775, Florida Statutes. And, pursuant to Section 119.10(2)(b), any person who willfully and knowingly violates Section 119.105 (which provides for the protection of victims of crimes or accidents) commits a felony of the third degree, punishable as provided in Chapter 775, Florida Statutes.

In the case of State v. Webb, 786 So.2d 602 (Fla. 1st Dist. App. 2001), rev. den. 807 So.2d 656 (Fla. 2002), the court concluded that the dilatory responses of a school board member to the public records requests of a parent did not comport with the requirement for the "reasonable" access to public records. In this case, the board member responded to the initial public records request one and one-half months later, but did not schedule a time for the parent to review the documents until four months had passed. At that time, the parent was only allowed one hour to review a large stack of documents, and then allowed only two additional one-hour review sessions some five weeks later. The board member terminated the parent's review of the records after the third session. The board member did not provide all of the public records requested until after she received a request from the grand jury, nearly seven months after the initial request. The jury subsequently convicted the board member of a first-degree misdemeanor charge. After being found guilty, the school board member filed a motion to arrest judgment and vacate the conviction, which was granted by the county court. However, on appeal, the First DCA reversed the county court's decision.

II. SUNSHINE LAW

A. State Policy

Under Florida law, all meetings of any agency or authority of a county, municipal corporation or political subdivision (including meetings with or attended by any person elected to such board or commission but who has not yet taken office) at which official acts are to be taken, or at which public business is to be transacted or discussed, are required to be open and noticed to the public. Art. I, § 24(b), Fla. Const.; § 286.011(1), Fla. Stat. (2015). This law is commonly referred to as the

Government in the Sunshine Law, or the Sunshine Law. In fact, resolutions, rules, and formal actions of a public board or commission are considered binding *only* if taken or made at an open, public meeting. § 286.011(1), Fla. Stat. (2015). Providing reasonable notice to the public of all such meetings is required, and minutes of the meetings must be taken. §§ 286.011(1) & (2), Fla. Stat. (2015).

B. Purpose and Intent

It has been said that the Sunshine Law was enacted to protect the public from "closed door" politics, to prevent the "crystallization of secret decisions to a point just short of ceremonial acceptance." Deerfield Beach Publishing, Inc. v. Robb, 530 So. 2d 510, 511 (Fla. 4th DCA 1988); Town of Palm Beach v. Gradison, 296 So. 2d 473, 477 (Fla. 1974). Governmental meetings should be a "marketplace of ideas," enabling input from those citizens who will be affected by the board's actions. Zorc v. City of Vero Beach, 722 So. 2d 891, 902 (Fla. 4th DCA 1998), rev. den. 735 So.2d 1284 (Fla. 1999).

The intent of the Sunshine Law is "to cover any gathering of some of the members of a public board where those members discuss some matters on which foreseeable action may be taken by the board." Hough v. Steinbridge, 278 So. 2d 288, 289 (Fla. 3d Dist. App. 1973). Under the Sunshine Law, a meeting is either fully open or fully closed; there are no intermediate categories. Zorc, 722 So. 2d 891.

C. Boards and Committees Subject to the Sunshine Law

Local governing bodies and decision-making committees of local government agencies are subject to the Sunshine Law. This includes public boards or commissions created by law or by a public agency. Lyon v. Lake County, 765 So. 2d 785 (Fla. 5th Dist. App. 2000), rev. den. 790 So. 2d 1105 (Fla. 2001). The Sunshine Law applies to the members and members-elect of such public boards and commissions.

Moreover, the Sunshine Law applies to advisory boards or committees, including committees of staff members, other than those which are mere fact-finders. The Sunshine Law "equally binds all members of governmental bodies, be they advisory committee members or elected officials." Monroe County v. Pigeon Key Historical Park, Inc., 647 So. 2d 857, 869 (Fla. 3d Dist. App. 1994).

However, when a committee has been established strictly in an advisory capacity, and conducts only fact-finding activities, such as information gathering and reporting, then those activities are not subject to the Sunshine Law. For example, in Cape Publications v. City of Palm Bay, 473 So. 2d 222 (Fla. 5th Dist. App. 1985), the court held that staff members did not constitute a "board" where the staff was merely asking questions of applicants for chief of police in front of the city manager. In Molina v. The City of Miami, 837 So. 2d 462 (Fla. 3d Dist. App. 2002), the Third DCA found that investigations by a committee were not subject to the open meeting requirements of the Sunshine Law, because the committee was nothing more than a meeting of staff members who served in a fact-finding, advisory capacity to the chief of police.

Also, in Knox v. District School Board of Brevard County, 821 So. 2d 311 (Fla. 5th Dist. App. 2002), the court held that a team of staff members who interviewed and evaluated candidates for school principal, resulting in recommendations to the school superintendent, was not subject to the Sunshine Law, because all of the applications were forwarded to the superintendent, and it was the superintendent who then determined which applicants to interview and recommend to the school board. Although the team of staff members made recommendations, all of the applications for the school principal position were sent to the superintendent, who then decided which applicants to interview and nominate to the school board.

On the other hand, in Krause v. Reno, 366 So. 2d 1244 (Fla. 3d Dist. App. 1979), the Florida Supreme Court held that once a city manager utilized a citizens advisory group to assist him in screening applications and making recommendations for the position of chief of police, he created a "board" within contemplation of the Sunshine Law. Also, in the case of Wood v. Marston, 442 So. 2d 934 (Fla. 1983), the Florida Supreme Court found that the meetings of a search and screen committee, consisting of faculty members who had a decision-making function in the screening of applicants for a new dean, were improperly closed to the public.

Although meetings of a technical review committee created by county ordinance were subject to the provisions of the Sunshine Law, the informal, informational meetings of the pre-technical review committee were not. Lyon v. Lake County, 765 So. 2d 785 (Fla. 5th Dist. App. 2000), rev. den. 790 So. 2d 1105 (Fla. 2001).

Certain private entities may also be subject to the Sunshine Law. The test to determine whether a private entity is subject to the Sunshine Law is whether the private entity is merely providing services to the public agency, or "is standing in the shoes of the public agency." See Fla. Atty. Gen. Op. 98-21 (1998). For example, if a county commission dissolves its cultural affairs council and designates a nonprofit organization to fulfill that role for the county, then the nonprofit organization would be subject to the Sunshine Law. See Fla. Atty. Gen. Op. 98-49 (1998). Similarly, the activities of a non-profit golf and country club, which was specifically created to contract with a county for the operation of a public golf course on county property acquired by public funds, was subject to the Sunshine Law. Fla. Atty. Gen. Op. 02-53 (2002).

However, a private corporation that performs services for a public agency and receives compensation for such services under a contract or otherwise, is not by virtue of that relationship alone necessarily subject to the Sunshine Law, unless the public agency's governmental or legislative functions have been delegated to the corporation. See McCoy Restaurants, Inc. v. City of Orlando, 392 So. 2d 252 (Fla. 1980) (airlines are not, by virtue of their lease with the aviation authority, public representatives subject to the Sunshine Law).

D. What Constitutes a "Meeting"?

The Sunshine Law applies to all assemblies or meetings, whether structured or casual, where there are two members of the same board present and discussions of matters which may foreseeably come

before the board for official action. See Board of Public Instruction of Broward County v. Doran, 224 So. 2d 693 (Fla. 1969). See also Fla. Atty. Gen. Op. 86-23 (1986) (election campaign function attended by two or more members of the city council and where matters were discussed that may come before the board for action was subject to Sunshine Law). However, board members may attend various types of other meetings and express their views so long as they do not discuss or debate the issues amongst themselves. See Fla. Atty. Gen. Op. 98-79 (1998); Fla. Atty. Gen. Op. 00-68 (2000).

In addition, the Sunshine Law may apply even if there is no actual meeting. In an informal opinion dated June 29, 1973, the Attorney General's Office reviewed a procedure utilized by a city commission whereby a memorandum was circulated by one commissioner and other commissioners could write their concurrence or disapproval of the position, with the act becoming formally approved when all concurred. This procedure, even though none of the commissioners actually met formally or informally, was construed to be a violation of the Sunshine Law. Similarly, a person cannot act as a liaison between two members of same board or take an official poll of board members. See Blackford v. School Bd. of Orange County, 375 So. 2d 578, 580 (Fla. 5th Dist. App. 1978).

The Sunshine Law even applies if a single member has been delegated decision making authority to act on behalf of his or her board. See Fla. Atty. Gen. Op. 74-294 (1974); Fla. Atty. Gen. Op. 86-23 (1986); Fla. Atty. Gen. Op. 87-34 (1987); Rowe v. Pinellas Sports Authority, 461 So. 2d 72 (Fla. 1984).

The Attorney General's Office has also determined that private discussions via e-mail between board members about board business are prohibited under the Sunshine Law. See Fla. Atty. Gen. Op. 89-39 (1989). The same would be true of board members texting each other about board business. The use of a website blog or message board to solicit comments from other members of the board by their responses on issues that would come before the board would trigger the requirements of the Sunshine Law. See Fla. Atty. Gen. Op. 08-07 (2008). Also, while there is nothing prohibiting a board member from posting comments on the local government's Facebook page, members must not engage in any discussions of matters that could foreseeably come before the board for official action. See Fla. Atty. Gen. Op. 2009-19 (2009).

Oh, my…. A few years ago the rather embarrassing headline "Restroom Conversation Between Lake Wales Officials Raises Sunshine Question" was posted on The Ledger.com. Apparently, a mayor and a city commissioner were discussing city business in the men's room when a reporter walked in. Because the item of discussion had already been decided by the commission, the city attorney did not consider the restroom discussion to be a Sunshine Law violation, but did acknowledge that it only took the appearance of impropriety for someone to assert a violation.

E. Notice

The Sunshine Law requires that reasonable notice of a public meeting be given. However, although notice of a board meeting is mandatory, there is no need to notice each item on the board's agenda.

See Law and Information Services, Inc. v. City of Riviera Beach, 670 So. 2d 1014 (Fla. 4th Dist. App. 1996), rev. den. 678 So. 2d 1287 (Fla. 1996). Further, a board may take action on a matter which has not been placed on the agenda. See Hough vs. Stembridge, 278 So. 2d 288 (Fla. 3d Dist. App. 1973).

Public notices of some meetings are required by statute to be advertised in a local newspaper. See e.g., Fla. Stat. § 125.66 (public hearing for adoption of county ordinances); Fla. Stat. § 166.041 (public hearing for adoption of municipal ordinances); Fla. Stat. § 164.1053, *et seq.* (conflict assessment meetings); Fla. Stat. § 163.3225 (consideration of a development agreement); Fla. Stat. § 286.011(8) (closed attorney-client meetings to discuss pending litigation).

Absent a statutory requirement for a specific type of public notice, the notice would vary depending on the facts of the situation and the board involved. In Yarbrough v. Young, 462 So. 2d 515 (Fla. 1st Dist. App. 1985), the court determined that three days' notice of a meeting constituted reasonable notice. Conversely, in Rhea v. City of Gainesville, 574 So. 2d 221 (Fla. 1st Dist. App. 1991), the court held that notice of approximately one hour and thirty minutes in advance of a special meeting was insufficient. As suggested by the Florida Attorney General's Office, "[i]f the purpose for notice is kept in mind, together with the character of the event about which notice is to be given and the nature of the rights to be affected, the essential requirements for notice in that situation will suggest themselves." Fla. Atty. Gen. Op. 73-170 (1973).

F. Access

Section 286.26, Florida Statutes, requires that public meetings be accessible to physically handicapped persons. Section 286.011(6) prohibits holding public meetings at any facility or location which discriminates on the basis of sex, age, race, creed, color, origin or economic status, or which operates in such a manner as to unreasonably restrict public access. For example, in Rhea v. School Bd. of Alachua County, 636 So. 2d 1383 (Fla. 1st DCA 1994), the court held that a board workshop held more than 100 miles from the board's headquarters violated the Sunshine Law.

In Fla. Atty. Gen. Op. 02-32 (2002), the Attorney General's Office determined that the use of an electronic bulletin board by board members of a water management district to discuss matters that may be addressed by the board violated the Sunshine Law, since the public was not permitted to participate in the online discussions. However, in Fla. Atty. Gen. Op. 02-66 (2002), it was opined that members of an airport authority could conduct informal discussions over the internet if proper notice was given and interactive access afforded to the public. The authority should provide public access via the internet, and designate locations where computers with internet access would be available.

The Sunshine Law does not prohibit public boards or commissions from conducting business by telephone or electronic means. For example, a board may agree to allow a board member, who is out of town or suffering from health problems, to participate in the meeting via speaker phone or electronic means, so long as the discussions can be heard by all of the other board members and the public, and provided the meeting is otherwise open to the public. See Fla. Atty. Gen. Op. 94-55. See

also Fla. Atty. Gen. Op. 92-44 (ill county commissioner may participate and vote in commission meetings through use of interactive video and telephone system that permitted the commissioner to see and hear the other members of the board and audience.)

However, there must be a quorum of members physically present at the meeting. See Fla. Atty. Gen. Op. 02-82 (physically disabled members of a board may participate and vote on board matters by electronic means if they are unable to attend a public meeting, so long as a quorum of the members is physically present at the meeting site); Fla. Atty. Gen. Op. 03-41 (participation by telephone by an absent member in a public meeting should be permitted only in extraordinary circumstances and when a quorum of the board members is physically present at the meeting).

Under Section 286.0114, Florida Statutes, which was created in 2013, a "board of commission" (defined to include a board or commission of any agency or authority of a county, municipal corporation or political subdivision) is required to give the public a "reasonable opportunity to be heard on a proposition" that is before the commission. The opportunity to be heard need not occur at the same meeting when the commission takes official action, just at some meeting "during the decision making process" and "within reasonable proximity in time" before the actual meeting when the commission does take official action.

However, Section 286.0114 does not prohibit a board or commission from maintaining orderly conduct and proper decorum at a meeting. In addition, there are exceptions to the opportunity to be heard requirement, including emergency situations, the performance of ministerial acts (such as approving minutes and ceremonial proclamations), and quasi-judicial hearings. Finally, the board or commission may adopt rules or policies that govern the opportunity to be heard, including: (a) limiting the amount of time an individual has to speak; (b) prescribing procedures for a representative of a group to speak, rather than all members of the group; (c) requiring speakers to fill out speaker forms; and (d) designating a specific period of time during a meeting for public comment.

G. Exemptions

Article I, Section 24(c), Florida Constitution, provides that an exemption from the Sunshine Law "shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the statutory purposes of the law." Below are examples of meetings that are exempt from the Sunshine Law. (The listing is illustrative and not exhaustive.)

1. Pursuant to Section 395.3036, Florida Statutes, meetings of the governing board of a private corporation that leases a public hospital or other public health care facilities are exempt when the public lessor and private lessee meet certain criteria.

2. Certain discussions related to investigations of fraudulent insurance claims and crimes regarding fires are exempt from the provisions of Fla. Stat. § 286.011. See Fla. Stat. § 633.175(5). See also Kirscher v. D'Amato, 674 So. 2d 909 (Fla. 4th Dist. App. 1996).

3. Fla. Stat. § 447.605(1) exempts discussions between the chief executive officer of the public employer or representative, and the legislative body of the public employer with regard to collective bargaining.

4. Pursuant to Section 768.28(16)(c), portions of meetings and proceedings conducted pursuant to a risk management program administered by the state, its agencies, or subdivisions, are exempt from the Sunshine Law. This specifically applies to matters which relate solely to the evaluation of claims, or offers of compromise of claims, filed with the risk management program.

5. Portions of county meetings regarding competitive solicitation negotiations, such as when a vendor makes an oral presentation or answers questions as part of the competitive solicitation process, are exempt from the Sunshine Law. § 286.0113(2), Fla. Stat. (2015).

6. Portions of any public meeting which would reveal a security system plan are exempt from the provisions of the Sunshine Law. See Fla. Stat. § 281.301.

7. Attorney-client meetings.

   a. Section 286.011(8), Florida Statutes specifically provides that government boards, commissions, and agencies are authorized to meet privately with their attorney(s) to discuss pending litigation. The following conditions have to be met: (a) the attorney shall advise the governmental entity at a public meeting that advice concerning ongoing litigation is desired; (b) the subject matter of the meeting must be confined to settlement negotiations or strategy; (c) the meeting must be recorded by a certified court reporter, who must fully transcribe the notes and file the transcript with the entity's clerk within a reasonable time after the meeting; (d) the entity shall give reasonable public notice of the date and time of the meeting and the names of persons who will be attending; and (e) when the litigation has been concluded the transcript will then become a public record.

   b. This statutory exemption is strictly construed. For example, in City of Dunnellon v. Aran, 662 So. 2d 1026 (Fla. 5th Dist. App. 1995), the City failed to state at the onset of the meeting the actual names of the attorneys who were attending the meeting. The City believed that indicating that their attorneys would be in attendance, without stating the actual names of the attorneys, was sufficient. However, the Fifth DCA rejected this position and held that a Sunshine Law violation had occurred.

   c. In School Bd. of Duval County v. Florida Publishing Co., 670 So. 2d 99 (Fla. 1st Dist. App. 1996), the court held that only those people identified in the

statute may attend the closed attorney-client meeting. Therefore, while attorneys (including special counsel) could attend a closed meeting, staff and consultants could not.

d. In Fla. Atty. Gen. Op. 01-10 (2001), the Attorney General opined that the clerk of court was not entitled to attend attorney-client meetings of the board of county commissioners. See also Zorc v. City of Vero Beach, 722 So. 2d 891 (Fla. 4th Dist. App. 1998), rev. den. 735 So. 2d 1284 (Fla. 1999) (attendance of city clerk and deputy city clerk at closed attorney-client meetings was improper and violated Sunshine Law).

e. In Fla. Atty. Gen. Op. 13-17 (2013), the Florida Attorney General's Office determined that, absent an identifiable lawsuit, the City of Gainesville could not hold a closed attorney-client meeting to discuss arbitration. The City was in a dispute concerning a Purchase Agreement, and the Agreement required that any controversy, dispute or claim be settled by arbitration. However, mandatory and binding arbitration is not considered pending litigation, thus the City could not hold a closed attorney-client meeting.

f. In the case of Anderson v. City of St. Pete Beach, 161 So. 3d 548 (Fla. 2d DCA 2014), the Second DCA found that the plaintiff was entitled to a declaration that the City had violated the Sunshine Law during a series of seven attorney-client "shade" meetings. The Court found that although some of the discussions during the shade meetings did involve settlement of the pending litigation, the discussions covered a wide range of political and policy issues not connected to the litigation.

H. Penalties

Section 286.011(3)(b), Florida Statutes, provides that any member of a public body subject to § 286.011 who knowingly violates the Sunshine Law is guilty of a misdemeanor of the second degree. Criminal prosecution for a violation thus requires proof of knowledge and intent. See Board of Public Instruction of Broward County v. Doran, 224 So. 2d 693, 699 (Fla. 1969) (construing the statute to impliedly require a charge and proof of scienter).

Jail time can and has happened. Former Florida Senate president W. D. Childers was the first public official to serve actual jail time for violating the Sunshine Law. Childers, who was serving as Chairman of the Escambia County Commission at the time, was convicted by a jury in 2003 of Sunshine Law violations for discussing public business in private with other commissioners. Childers was sentenced to 60 days in jail and ordered to pay a $500 fine, plus $3,603.85 in court costs and investigation and prosecution expenses.

Under Section 286.011(3)(a), Florida Statutes, any public officer who violates any provision of this section is guilty of a non-criminal infraction, punishable by fine not exceeding $500. For example,

during 2014 two former members of the Orlando Orange County Expressway Authority (which handles the operation of toll roads) received fines for Sunshine Law violations. One board member pleaded guilty to violating the Sunshine Law and was fined $500, and another board member pleaded no contest and received fines totaling $9,808.

Section 286.011(4) also provides that whenever a Sunshine Law action has been filed against a board or commission or its members, the court may assess reasonable attorney's fees against the agency if the members are found to have acted in violation of this section. However, the court may also assess a reasonable attorney's fee against the individual filing such an action if the court finds the action was filed in bad faith or was frivolous.

Section 286.011(5) also provides for reasonable attorney's fees for the appeal of court decisions involving the Sunshine Law. However, even though the wording of the statute states that the court shall assess a reasonable attorney's fee, the fee is not automatically awarded. For example, in School Bd. of Alachua County v. Rhea, 661 So. 2d 331 (Fla. 1st Dist. App. 1995), rev. den. 670 So. 2d 939, the court held that a party does not automatically receive appellate attorney's fees in a Sunshine Law case, but must make a timely motion for same.

In the case of Anderson v. City of St. Pete Beach, 161 So. 3d 548 (Fla. 2d DCA 2014), a Sunshine Law case which the City lost, the City could face having to pay more than $1 million in court-imposed attorney's fees and court costs. The City has pondered filing a legal malpractice lawsuit against its former outside counsel for the legal advice the City received in this matter.

I. Validity of Actions

Section 286.011(1), Florida Statutes provides that no resolution, rule or formal action shall be considered binding except as taken or made at an open meeting. The general public has standing to challenge alleged noncompliance. McCoy Restaurants, Inc. v. City of Orlando, 465 So. 2d 546 (Fla. 5th Dist. App. 1985).

In Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974), a zoning ordinance was declared invalid by the Florida Supreme Court because of Sunshine Law violations by a citizens planning committee. The citizens planning committee had held meetings outside of the "sunshine" with a professional planner, and made recommendations to the town planning commission. The planning commission then held hearings and made subsequent recommendations to the town council. The town council subsequently held public hearings and adopted an ordinance based upon these recommendations. The court invalidated the ordinance despite the subsequent ratifications and public hearings, holding that an action taken in violation of the Sunshine Law was void ab initio (void from the beginning).

In the case of Port Everglades Authority v. International Longshoremen's Association, 652 So. 2d 1169 (Fla. 4th Dist. App. 1995), the Fourth DCA held that a violation of the Sunshine Law occurred when a selection and negotiation committee excluded bidders from hearing the presentations of the other competing bidders. The committee ranked the bidders, and then the very next day the Port

Authority approved the committee's rankings, resulting in the award of a contract. However, the Fourth DCA held that the Sunshine Law violation invalidated the contract award.

J. Cures

An initial violation of the Sunshine Law may be cured by independent final action taken at a public meeting. See Zorc v. City of Vero Beach, 722 So. 2d 891 (Fla. 4th Dist. App. 1998), rev. den. 735 So. 2d 1284 (Fla. 1999). However, a defect arising from a Sunshine Law violation will not be cured by a "perfunctory ratification" of the action taken outside of the sunshine. See id. See also Anderson v. City of St. Pete Beach, 161 So. 3d 548, 553 (Fla. 2d DCA 2014) (the doctrine of a "cure" was inapplicable because the later action amounted to a "perfunctory ratification" or "ceremonial acceptance" of the void act). A board action that would otherwise be void because of a Sunshine Law violation can be reinstated or cured if voted on again after full public discussion and participation in an open public meeting. See Tolar v. School Bd. of Liberty County, 398 So. 2d 427, 428-29 (Fla. 1981).

III. ETHICS

A. Overview

Ethics is defined as "[o]f or relating to moral action, conduct, motive or character… [p]rofessionally right or befitting." *Black's Law Dictionary* 553 (6th ed., West 1990). As former Supreme Court Justice Potter Stewart once said, "Ethics is knowing the difference between what you have the right to do and what is the right thing to do."

It is Florida law and policy that "[a] public office is a public trust. The people shall have the right to secure and sustain that trust against abuse." Art. II, § 8, Fla. Const. Furthermore,

> It is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for private gain other than the remuneration provided by law. The public interest, therefore, requires that the law protect against any conflict of interest and establish standards for the conduct of elected officials and government employees in situations where conflicts may exist.

§ 112.311(1), Fla. Stat. (2015).

The state "Code of Ethics," Chapter 112, Part III of the Florida Statutes, contains standards of conduct and disclosures applicable to public officers, employees, candidates, lobbyists, and others in state and local government, with the exception of judges. The Code of Ethics applies to any person elected or appointed to public office, including persons serving on certain advisory boards. § 112.313(1), Fla. Stat. (2015). The ethics laws address financial disclosure, conflicts of interest, nepotism, gifts and honoraria, campaign finance, lobbying, and, of course, felony offenses such as embezzlement and bribery.

Also, pursuant to Section 395.0185, Florida Statutes, it is unlawful for any person to pay or receive a commission, bonus, kickback, or rebate, or engage in any split-fee arrangement with a physician, surgeon, organization, or person, either directly or indirectly, for patients referred to a particular hospital. In addition, it is unlawful for a health care provider or provider of health care services to offer, pay, solicit, or receive a kickback for referring or soliciting patients. These laws may come into play if a city or county runs a hospital or ambulance service.

B. Voting Conflicts

Section 286.012, Florida Statutes, requires a vote to be recorded and counted for each county or municipal government board member who is present at a board meeting, unless a conflict of interest exists, or appears to exist under Sections 112.311, 112.313, or 112.3143, Florida Statutes. In the event of a conflict of interest, the board member must not vote, and must also comply with the disclosure requirements of Section 112.3143.

During the 2014 Legislative Session, Section 286.012 was amended to provide that a board member may also abstain from voting on a matter before the board if there is, or appears to be, a possible conflict of interest under a locally adopted code of ethics. If the conflict arises under the local code of ethics, then the board member would follow the disclosure requirements specified in the local code of ethics. In addition, Section 286.012 now allows a board member to abstain from voting on a matter in a quasi-judicial proceeding "if the abstention is to assure a fair proceeding free from potential bias or prejudice."

For county, municipal and other local government officers, the disclosure requirements are set forth in Section 112.3143(3)(a), Florida Statutes, which states that prior to the vote by the board, the officer should publicly state his or her reasons for abstaining from voting on the matter, and then afterwards file a Memorandum of Voting Conflict (Commission on Ethics Form 8B) with the clerk of the board within 15 days.

In George v. City of Cocoa, 78 F.3d 494 (11th Cir. 1996), the court held that a city councilman's possible run for a seat based on a redistricting plan did not require him to abstain from voting on the redistricting plan. In fact, the court said that under Florida law, elected officials have an affirmative duty to vote on all matters before them, and that abstaining from a vote is prohibited unless there is or appears to be a conflict of interest. Id. at 496. See also Fla. Atty. Gen. Op. 87-17 (1987) (county commissioner may abstain from voting on a measure to avoid creating an appearance of impropriety only where such impropriety amounts to a conflict of interest).

Query: *What if a board member is in attendance at a board meeting, but happens to be out of chambers during the vote on an issue in which the board member has or appears to have a conflict of interest?*

In Florida Commission on Ethics Opinion (CEO) 88-3, the Ethics Commission concluded that a board member would be required to publicly announce the basis of a conflict of interest and file a

memorandum of voting conflict even if the board member was in attendance but temporarily absent from that portion of the meeting when the board considered the matter of conflict. See also Fla. Atty. Gen. Op. 074-289 (statutory duty to vote "may not be avoided by the 'temporary' absence of a member during the vote on a particular matter which comes before the body of which he is a member during a meeting at which he is present").

Recently, the Commission on Ethics found that a county commissioner had failed to disclose two conflicts of interest when voting on the purchase of a building. Although the commissioner did not benefit financially from the purchase, a business associate apparently did. The commissioner was assessed a $2,500 civil penalty.

C. Gift Law

Section 112.313(2), Florida Statutes says that no public officer, employee of an agency, local government attorney, or candidate for elected office "shall solicit or accept anything of value to the recipient" (such as a gift, loan, reward, favor, service, or promise of future employment) "based upon any understanding that the vote, official action, or judgment" of the officer or employee would be influenced by the thing of value. Section 112.313(4) prohibits public officers and employees, as well as their spouses and minor children, from accepting "any compensation, payment or thing of value," when the officer knows, or should know, that it was given to influence a vote or official action. Section 112.3148 also prohibits "reporting individuals" (persons required to file full or limited financial disclosure statements) and "procurement employees" (state officers and employees who participate in procuring services or commodities that exceed $10,000/year) from soliciting or accepting gifts.

For purposes of the Code of Ethics, a "gift" would include: real property or the use of real property; tangible or intangible personal property or the use of same; preferential rates or terms on a debt, loan, goods, or services; forgiveness of a debt; food or beverage; membership dues; tickets to events; floral arrangements; and personal or professional services which would ordinarily require payment. § 112.312(12), Fla. Stat. (2015). On the other hand, awards, plaques, certificates, and other similar items given in recognition for public service are not considered "gifts."

Specifics of the gift law include, but are not limited to, the following:

1. Accepting a gift worth more than $100 from a lobbyist, vendor of the agency, or political committee is prohibited.
2. Accepting a gift valued at not exceeding $100 from a lobbyist, vendor, or political committee is allowable, but any gifts valued at over $25 but not exceeding $100 must be reported quarterly (on Form 30) to the Commission on Ethics.
3. Soliciting any gift from a lobbyist, vendor of the agency, or political committee is prohibited.
4. Accepting gifts from relatives is allowable and does not have to be reported.

5. Accepting gifts worth more than $100 in value, for which there is a public purpose and which are given by certain governmental agencies, is allowable but must be reported annually (on Form 10).
6. All other gifts that are worth over $100 in value must be disclosed on a quarterly gift disclosure form (Form 9) which is filed with the Commission on Ethics.
7. If no reportable gifts were received, then no forms must be filed.

§ 112.3148, Fla. Stat. (2015).

The value of a gift is the actual cost of the gift, less taxes and gratuities. For personal services provided, the value of the gift would be the reasonable and customary charge for same. Gifts are usually valued on a per occurrence basis, but there are some exceptions. For example, lodging provided on consecutive days is considered a single gift, and membership dues paid to the same organization during any 12-month period is considered a single gift. § 112.3148(7), Fla. Stat. (2015).

The following are some examples of violations of the gifts law:

1. In June of 2013, Florida Atlantic University administrator Paulo Brida was found by the Commission on Ethics to have solicited and received a personal loan in the amount of $9500 from a vendor doing business with FAU. Brida, who had been suspended without pay and demoted at FAU, was fined $2500.

2. In August of 2012, the Commission on Ethics found that Chattahoochie City Manager Elmon Lee Garner failed to report the gift of two football tickets, as well as the gift of dinner for his wife and himself at the Florida League of Cities annual conference. He was fined $1652.80.

3. In January 2013, former Flagler County Sheriff Donald Fleming was found by the Commission on Ethics to have violated the gift law when he failed to disclose an honorary membership at an exclusive beach resort that gave him meals at a discount. He was fined $500. He also repaid the resort $3800 for the meals and cancelled his membership.

D. Honest Services

On a very regular basis we hear of public officials (and employees) getting into trouble for various ethics violations, and there are numerous examples of public officials (and employees) who are presently serving time in prison for these transgressions. According to a recent investigation by Integrity Florida, a nonpartisan, nonprofit research institute based in Tallahassee, the states of Texas, California and Florida are leading the nation in federal public corruption convictions. From the time period of 2003 through 2013, Texas had 870 public corruption convictions, followed by California with 678 and Florida with 622.

The federal mail fraud statutes have actually been around since the 1870's. The mail fraud statute, 18 U.S.C. § 1341, as well as the companion wire, radio or television fraud statute, 18 U.S.C. § 1343, together provide that, "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted" by means of mail, wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined or imprisoned for not more than 20 years, or both. Under 18 U.S.C. § 1346, the phrase "scheme or artifice to defraud" is defined as a scheme or artifice to deprive another of the intangible right of "honest services."

The term "honest services" is not defined in the federal statutes but has withstood numerous court challenges. Notably, in 2010, the U.S. Supreme Court issued its landmark decision in the case of Skilling v. United States, 130 S. Ct. 2896 (2010), which involved former Enron CEO Jeffrey K. Skilling. At its height, Enron was the seventh largest revenue producing company in America and its stock sold at $90 per share. However, fraud and faulty accounting sunk the company and triggered the sixth largest bankruptcy in U.S. history. In May of 2006 a jury convicted Mr. Skilling of one count of conspiracy, twelve counts of securities fraud, five counts of making false representations to auditors, and one count of insider trading. Part of the conspiracy conviction was premised on honest services fraud. He subsequently appealed his convictions all the way to the U.S. Supreme Court.

On appeal the U.S. Supreme Court upheld the honest services statute, finding that it was not unconstitutionally vague when properly confined to bribery and kickback schemes. However, the Court did narrow the scope of honest services fraud by finding that the nondisclosure of a conflict of interest (or undisclosed self-dealing/self-enrichment) was not a violation of the statute if there was no underlying bribe or kickback from a third party.

For Jeffrey Skilling, this ruling meant that his alleged misconduct did not fall within the proscription of honest services fraud, because prosecutors did not allege or show that he engaged in a bribery or kickback scheme. In other words, federal prosecutors did not allege or show that Mr. Skilling solicited or accepted side payments from a third party in exchange for misrepresenting Enron's financial position. Nevertheless, the U.S. Supreme Court did not reverse any of Mr. Skilling's convictions, but remanded the case to the Fifth Circuit Court of Appeals to determine whether the instructions to the jury about honest services amounted to harmless error. Ultimately, the Court of Appeals affirmed Mr. Skilling's convictions on all counts. He was sentenced to 24 years in prison, and after years of legal wrangling, an agreement was reached which reduced his sentence to 14 years, in exchange for his forfeiture of certain property and the payment of over $41 million in restitution to the Enron Fair Fund to help the victims of Enron's collapse.

It had been widely speculated that the Skilling decision would significantly reduce the number of honest services fraud prosecutions. However, as stated in an article published online in *The National Law Journal,*

> [It] appears that rumors of the death of honest services fraud cases were greatly exaggerated. Prosecutors continue to prosecute these cases, and appellate courts continue to readily uphold these prosecutions.

Laurie L. Levenson, *Criminal fraud cases survive Skilling decision*, The National Law Journal (Jan. 3, 2011), http://www.nlj.com. The article concluded that,

> *Skilling* did not give a green light to politicians or executives to be dishonest and courts are not eager to allow such defendants to walk away unscathed. Even after *Skilling*, the greediest of defendants are still being held accountable for their actions.

Id.

Nevertheless, the constitutionality of the honest services statute has once again been in the news this year in the case involving former Virginia Governor Robert F. (Bob) McDonnell. On September 4, 2014, the former Governor and his wife, Maureen G. McDonnell, were found guilty of several counts of public corruption by a federal jury in Virginia. Mr. McDonnell was convicted of 11 of 13 counts, including three counts of honest services wire fraud, six counts of obtaining property under color of official right, one count of conspiracy to commit honest services wire fraud, and one count of conspiracy to obtain property under color of official right. Mrs. McDonnell was convicted of 9 of 13 counts, including two counts of honest services wire fraud, four counts of obtaining property under color of official right, one count of conspiracy to commit honest services wire fraud, one count of conspiracy to obtain property under color of official right, and one count of obstruction of an official proceeding.

It was alleged that the McDonnell's participated in a scheme to use the Governor's official position to enrich themselves by soliciting and obtaining $175,000 in loans and gifts from the former CEO of a company that sold dietary supplements. In exchange for cash, loans, golf outings, golf equipment, luxury goods, designer clothes, trips, and private plane rides, the former Governor allegedly performed official actions to help legitimize, promote, and obtain research studies for the dietary supplements. During the trial one of the more curious assertions made by the defense was that the McDonnell's marriage was in such shambles that they barely spoke to one another, much less conspired with each other to accept bribes. The former Governor was sentenced to two years in prison, and his wife sentenced to one year and one day.

However, the former Governor appealed his convictions all the way to the U.S. Supreme Court, and on June 27, 2016, the Supreme Court made its ruling. Although the Court once again rejected arguments that the Honest Services and Hobbs Acts are unconstitutionally vague, the Court did vacate the Governor's convictions and remanded the case back to the lower court, finding that the instructions to the jury concerning the meaning of the term "official act" were incorrect, which may have led the jury to convict the Governor for conduct that was not unlawful. The Supreme Court adopted a more limited interpretation of an "official act," finding that it was not enough to merely set up a meeting, call another public official, or host an event to discuss a particular issue. Rather, in

order to convict Governor McDonnell, the jury had to find that the Governor took action, or agreed to take action, on the issue, such as exerting pressure on other public officials to initiate research studies on the dietary supplements. The Supreme Court thus concluded its opinion as follows:

> There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute. A more limited interpretation of the term "official act" leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.

McDonnell v. United States, 136 S.Ct. 2355, 2374 (2016).

On July 6, 2016, U.S. Congresswoman Corrine Brown of Jacksonville, and her Chief of Staff, Elias "Ronnie" Simmons, were charged with a 24-count indictment for mail and wire fraud, conspiracy to commit mail and wire fraud, concealing material facts on financial disclosure forms, theft of government property, obstruction of the due administration of internal revenue laws, and filing false tax returns. The indictment alleges that Brown and Simmons solicited and received donations to One Door for Education, a supposedly charitable organization established by Simmons to buy computers for schools and provide scholarship assistance, but diverted the funds for their own personal and professional enrichment. One Door for Education, which was never registered as a 501(c)(3) tax exempt charitable organization, received some $800,000 in contributions, of which only $1,200 was spent on actual scholarships. Rather, thousands of dollars from One Door, as well as various funds from Brown's campaign and PAC, were allegedly used for personal expenses, plane tickets, personal automobile repairs, vacations, receptions, and luxury boxes at a Beyoncé concert and NFL game, among other things. The President of One Door for Education, Carla Wiley, recently pleaded guilty for her involvement in the scheme.

On November 13, 2013, Manuel "Manny" Maroño, the former mayor of the City of Sweetwater, pleaded guilty to one count of conspiracy to commit honest services wire fraud. Mr. Maroño admitted that, beginning in November 2011, he agreed to help a company obtain federal grant funds to prepare an economic development study for Sweetwater, in exchange for cash kickbacks totaling $30,000. It turned out that the company he was helping was actually an undercover FBI entity. He was sentenced to 40 months in prison. Lobbyist friend Jorge Forte also pleaded guilty for his role in the conspiracy and was sentenced to 1-1/2 years in prison.

Tony Devaughn Nelson, the former chairman of the Jacksonville Port Authority, was found guilty in 2011 of 36 corruption-related charges, including honest services mail fraud, bribery, money laundering, and lying to the FBI, for reportedly soliciting and receiving approximately $140,000 in bribes from a dredging company that had ongoing business with the Authority. He was sentenced to 40 months in federal prison, ordered to forfeit the $140,000, and received a $3,600 fine. He appealed his convictions, but was unsuccessful. His co-conspirator, the owner of the dredging company, pleaded guilty to his charges, received a 20-month prison sentence and was ordered to pay a $100,000 fine.

"Operation Dirty Water" was a sting orchestrated by the Palm Beach County State Attorney's Office that netted the arrest of 13 persons on bribery and racketeering charges. Investigators discovered that a contractor had given $90,000 in gifts (loans, cruises, gift cards, sporting event tickets and jewelry) to public employees in exchange for water and sewer contracts with his firm. Those arrested included employees from Wellington, Port St. Lucie, Boynton Beach, West Palm Beach, Delray Beach, Sarasota County, Palm Beach, and Palm Beach County. Most of the public employees entered plea deals, including Steven White, a former construction manager for Palm Beach, who received a 42-month prison sentence. The contractor who gave the gifts to the officials was also convicted and received a nine-month prison sentence.

On October 9, 2009, former Dixie County Attorney Joseph T. (Joey) Lander was convicted of six felony counts of mail fraud and 11 felony counts of money laundering, for fraudulently requiring real estate developers to pay him personally for performance bonds for the developments, plus using his position to entice others to invest in his start-up vitamin business. It was estimated that he pocketed over $1 million during a period of 18 months. He was sentenced to 87 months in federal prison plus probation, ordered to pay a $50,000 fine and $1,600 in court costs, and had to forfeit his co-ownership in a local weekly newspaper.

However, Landers was successful in appealing 12 of his convictions, as on February 2, 2012, the Eleventh Circuit Court of Appeals reversed the convictions pertaining to the land development scheme. The Court concluded that there was a material variance between the proof offered by the Government at trial and the allegations contained in the superseding indictment, which substantially prejudiced Lander. The Court did affirm the mail fraud convictions pertaining to the vitamin scheme, but vacated the sentences for same and remanded for resentencing.

"Operation Flat Screen" was a federal sting that resulted in the arrest of three Broward County public officials, including former Broward County Commissioner Josephus ("Joe") Eggelletion, who was charged with conspiring to launder money, filing a false tax return, and unlawful compensation. It was alleged that he accepted payments from land developers in exchange for supporting their developments, and laundered more than $900,000 through a Bahamas bank account. He pleaded guilty and was sentenced to 30 months in a Georgia prison.

In June 2007 the former chairman of the Palm Beach County Commission, Anthony R. Masilotti, pleaded guilty for his involvement in a public corruption conspiracy stemming from the unlawful use of his elected position to promote and conceal significant financial ventures, including land deals which netted him millions of dollars. He also accepted significant travel gratuities, including free airfare valued at approximately $100,000, from a developer in return for voting favorably on measures for the developer. He was convicted of a single count of honest services fraud and sentenced to prison for five years. He was also ordered to forfeit two parcels of real estate worth approximately $9 million, as well as $175,000 in cash.

Following the U.S. Supreme Court's ruling in the Skilling case, Mr. Masilotti challenged his honest services fraud conviction in the U.S. District Court for the Southern District of Florida, but was

unsuccessful. The U.S. Magistrate Judge entered a Report and Recommendation, which recommended the denial of Masilotti's petition for habeas relief, as Masilotti's crimes involved bribes and kickbacks. On March 8, 2011, the U.S. District Court for the Southern District Court entered an Order affirming the Report and Recommendation in its entirety, and the case was closed. Mr. Masilotti served 37 months of his 5-year sentence.

Mr. Masilotti's ex-wife also had to forfeit $400,000 in cash, which she had received in a divorce settlement, as the money came from one of the tainted land deals brokered by Masilotti. In addition, William Boose, a former land use attorney and lobbyist from Palm Beach, pleaded guilty for his involvement in the land deals, and served 15 months in federal prison. Rather than being disbarred, Mr. Boose was suspended from the practice of law for three years.

In 2008, another former Palm Beach County commissioner, Warren H. Newell, was sentenced to five years in prison, for conspiracy to commit honest services fraud. Newell concealed his financial interest in a "success fee contract" relating to the sale of certain property for a regional water storage project. The "success fee contract" netted him approximately $366,000. In addition, on another project that came before the county commission involving the purchase of a waterfront preservation easement for a yacht center, Mr. Newell concealed that he had docked his boat at the yacht center for free. He also concealed his financial interest in another land deal which came before the commission. Newell's sentence was subsequently reduced by two years for providing evidence against former Palm Beach County Commissioner Mary McCarty. Mr. Newell attempted to get his felony convictions overturned but was unsuccessful.

On January 8, 2009, Palm Beach County Commissioner Mary B. McCarty resigned her post, stating that she had failed to disclose free and discounted hotel rooms provided to her by a company doing business with the county, and also had failed to recuse herself on county bond issues that benefited companies that employed her husband. The benefits to the McCarty's were reported to total $300,000. Mrs. McCarty pleaded guilty to depriving the public of her honest services, and was sentenced to a prison term of 42 months, followed by three years of supervised release, and fined $100,000. Her husband was sentenced to a prison term of eight months. The McCarty's also had to forfeit $272,000 to the U.S. government.

E. Hobbs Act

The federal "Hobbs Act" was enacted in 1946 and named for U.S. Representative Samuel Francis Hobbs of Alabama, who introduced the Act. The Hobbs Act provides in pertinent part that:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). In the Hobbs Act, extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

Although this law was primarily enacted to combat racketeering in labor-management disputes, it is also used in public corruption cases. An example of a Hobbs Act violation would be the acceptance by a public official of cash and/or property from a land developer, if the public official generally or explicitly intended to use his or her influence to perform an official act on behalf of the land developer. In other words, a conviction under the Hobbs Act violation will be sustained based on proof that the public official obtained a payment in cash and/or property and *generally* intended to use his or her public influence to benefit the payor as opportunities arose. See United States v. Abbey, 560 F.3d 513 (6th Circ. 2009), cert. den. 130 S. Ct. 739 (2009).

Earlier this year the U.S. Supreme Court made a significant ruling in a Hobbs Act case, Ocasio v. United States, 136 S.Ct. 1423 (2016). In this case, the Supreme Court affirmed the convictions of Samuel Ocasio, a former police officer from Baltimore, Maryland, for extortion and conspiracy to commit extortion, for his participation in a scheme with other police officers to get car owners who had been involved in auto accidents to take their cars to a particular auto repair shop for repairs. The auto repair shop's business and profits increased significantly from the scheme, and the police officers were paid $150 to $300 per referral. This case was interesting because although the police officers extorted money from the auto repair shop owners, the auto repair shop owners were also co-conspirators in the scheme (in other words, the repair shop owners were "victims" of extortion as well as co-conspirators). Nevertheless, the Supreme Court upheld the convictions, and further found that in order to be convicted under the Hobbs Act it was not necessary to extort money or property from individuals who were not a part of the conspiracy.

Recently, former Opa-locka City Manager David Chiverton and former Assistant Public Works Director Gregory Harris were charged for their roles in a bribery and extortion scheme for allegedly conspiring with others, including elected officials, to solicit, demand, and obtain thousands of dollars in illegal cash payments from individuals and businesses, in exchange for taking official actions to assist and benefit those businesses in their dealings with the City. If convicted, each man will face a maximum sentence of five years in prison, $250,000 in fines, and three years of supervised release. The City of Opa-locka has also been in the news lately because of financial turmoil and mismanagement.

HOME RULE AND ALLOCATION OF TAXING POWER

A Presentation to:

Florida Association of County Attorneys
New Assistant County Attorney Orientation

by

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HOME RULE AND EXERCISE OF TAXING POWER

To determine the home rule power of a county or municipality to legislate by ordinance, the search is not for specific legislative authorization. The search is for a general or special law that is inconsistent with the subject matter of the proposed ordinance. Absent an inconsistent law, a county or municipality has the complete power to legislate by ordinance for any public purpose. As to charter counties, any special act that diminishes its home rule powers is required to be elector-approved and the search includes a determination that there exists no charter limitation that is not inconsistent with general law.

These materials focus on the Florida constitutional and statutory powers of Florida counties and municipalities and the authority of special districts within their current statutory classification scheme. The home rule analysis is completed with an outline of the legal requirements for a valid fee or special assessment imposed by ordinance. Any home rule analysis also requires a general discussion of the taxing preemption to the State embodied in the 1968 constitutional revision.

I. COUNTY HOME RULE CONCEPTS

A. County Power Before the 1968 Florida Constitution

No provisions relating to the general power of counties comparable to Article VIII, sections 1(f) and 1(g), Florida Constitution (1968), existed in the 1885 Florida Constitution. Article VIII, section 1, Florida Constitution (1885), merely provided that "[t]he State shall be divided into political divisions to be called counties." Additionally, Article IX, section 1, Florida Constitution (1885), provided, "The Legislature shall provide for a uniform and equal rate of taxation. . . ."

This brief mention of counties in Article VIII, section 1, Florida Constitution (1885), and the posture of implementing general legislation placed counties, before the 1968 Florida Constitution, in an area of limited power. All county power had to be found in an express grant from the Legislature and no implied power could be inferred that would result in the exercise of any power not expressly conferred by the State. See Amos v. Mathews, 126 So. 308 (Fla. 1930); and Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936). The primary source of county power was a special act.[1]

[1]Examples of the time demand on the Legislature to focus on issues of local authority are: (1) the number of local bills introduced in the 1965 Legislative Session was 2,107 and (2) the number of population acts enacted had grown to 2,100 by 1970 with over 1,300 having been enacted since the effective date of the 1960 census. Sparkman, The History and Status of Local Government Powers in Florida, 25 U. Fla. L. Rev. 271, 286 (1973).

B. County Power of Local Self-Government Under the 1968 Constitutional Revision

Except for the constitutional reservation to the Legislature of the power to preempt county authority by general law, the home rule power of counties, whether charter or non-charter, is expansive. Upon approval of its charter by a vote of the electors, a charter county derives the home rule power embodied in its charter directly from the Florida Constitution. In contrast, a non-charter county has "such power of self-government as is provided by general or special law."

Compare the two constitutional authorizations:

> (f) NON-CHARTER GOVERNMENT. Counties not operating under county charters shall have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.

Art. VIII, § 1(f), Fla. Const.

> (g) CHARTER GOVERNMENT. Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

Art. VIII, § 1(g), Fla. Const. Thus, the constitutional contemplation of home rule power for non-charter counties required authorization by general law or special act.

Section 125.01, Florida Statutes, by design and intent, is a general law grant of expansive home rule authority to all Florida counties. While subsection (1) of section 125.01, Florida Statutes, enumerates certain specific powers, subsection (3) clarifies that such enumeration is not intended to be exclusive or restrictive, rather the legislative purpose is to be liberally construed to grant to all counties the broad exercise of home rule powers authorized in the State Constitution. A broad construction of section 125.01 has been approved by the Florida Supreme Court on numerous occasions. See, e.g., State v. Orange County, 281 So. 2d 310 (Fla. 1973); Speer v. Olson, 367 So. 2d 207 (Fla. 1978); and Taylor v. Lee County, 498 So. 2d 424 (Fla. 1986).

Except for the potential preemption of municipal authority in its county charter, the scope of home rule power in a charter and a non-charter county is essentially the same. That this constitutional consequence was clearly contemplated is supported by the following from the Commentary to Florida Statutes Annotated, Article VIII, section 1(g), Florida Constitution:

> Counties operating under a charter are presumptively considered to have the broad power of self-government (with the exception of precedence over municipal ordinances which must be provided in the charter) unless provided otherwise by general law or by the special law adopting the charter. Thus, charter counties and non-charter counties apparently start from different poles in their relationships with legislative enactments. Both could, conceivably, be the same depending on the legislation adopted.

T. D'Alemberte, Commentary, Art. VIII, § 1(g), 26A Fla. Stat. Ann. 271 (West 1970).

In fact, a charter county may have less home rule power if its charter has restrictions not inconsistent with general law or special law approved by the voters. For example, in State v. Sarasota County, 549 So. 2d 659 (Fla. 1989), a charter provision required elector approval of bonds not required in non-charter counties.

Under the constitutional design as legislatively implemented, neither a charter nor non-charter county needs specific authority to enact ordinances or to deliver services. All counties have the home rule authority to enact ordinances for any public purpose. The search is for a preemption by the Legislature or, in the case of charter counties, a charter limitation that is not inconsistent with general law. Absent such preemption, all counties have the home rule power to legislate by ordinance for any county purpose.

C. Constitutional and Statutory Distinctions Between Charter and Non-Charter Counties

In addition to receiving a direct constitutional grant of the power of local self-government upon charter approval, a charter county has more expansive home rule authority than a non-charter county in several fundamental ways.[2]

[2] A county charter can also change the method by which a county office is chosen or abolish any county office where all duties of the office as provided by general law are transferred to another office. Such county office change can be achieved in a non-charter county only by special act approved by vote of the electors. See Art. VIII, § 1(a), Fla. Const.

First, the Legislature cannot, by special act, diminish the power of local self-government constitutionally granted to a charter county unless the special act is approved by the electors.

Second, the county charter may grant to the county the power to regulate an activity countywide and provide that such regulation prevails over a conflicting municipal ordinance. Such municipal preemption can be implemented by a charter amendment approved by the electors in a single countywide vote. Provided, however, any attempt to transfer municipal services to the county by charter amendment requires dual approval by both the municipal and county electors as a consequence of judicial construction of the transfer of power limitations contained in Article VIII, section 4, Florida Constitution. See Broward County v. City of Ft. Lauderdale, 480 So. 2d 631 (Fla. 1985).[3]

Third, as discussed in more detail subsequently, a charter county is vested with the authority to levy any tax within its jurisdiction that is authorized by general law for a municipality unless the tax authorization precludes county imposition. See McLeod v. Orange County, 645 So. 2d 411 (Fla. 1994) (extending the municipal taxing power of charter counties to the public service tax authorized under section 166.231, Florida Statutes).

1. municipal taxing powers of charter counties

One of the essential distinctions between a charter county and a non-charter county is the constitutional vesting of municipal taxing powers in charter counties by the 1968 constitutional revision.[4] This constitutional vesting of municipal powers provides a charter county with the authority to levy any form of tax within the unincorporated areas that municipalities are provided

[3]Under the cases applying Article VIII, section 4, an interlocal agreement may provide for a transfer of services between local governments when the ultimate responsibility for supervising or controlling those services is not transferred. See City of Palm Beach Gardens v. Barnes, 390 So. 2d 1188 (Fla. 1980).

[4]Other distinctions between charter counties and those not operating under a charter, in addition to their sources of power, are that ordinances of non-charter counties cannot be inconsistent with special law as well as general law and are not effective within a municipality in the event of a conflict. In contrast, the power of self-government of a charter county is limited by an inconsistent special act only if the special act has been approved by vote of the electors. Additionally, the charter provides which ordinance prevails in the event of a conflict with a municipal ordinance.

by general law.[5] The genesis of a charter county's municipal taxing power is judicial in nature, not statutory.

The initial case explaining the municipal taxing power of a charter county is State v. Dade County, 127 So. 2d 881 (Fla. 1961), which constructed the constitutional home rule charter of Dade County as authorized under the 1885 Florida Constitution. In State v. Dade County, the Florida Supreme Court held that general laws granting municipalities the authority to issue revenue bonds applied to Dade County because its charter also authorized the county to exercise all powers and privileges granted to municipalities. Id. at 882.

Faced with clear precedents and a constitution provision concerning the municipal powers of Dade County under its constitutional charter, the Florida Supreme Court decided the case of State ex rel. Volusia County v. Dickinson, 269 So. 2d 9 (Fla. 1972).[6] The fundamental distinction was that Volusia County adopted its charter under the authority of Article VIII, section 1(g), Florida Constitution, and did not share the unique Dade County constitutional authority.[7]

In Volusia County v. Dickinson, Volusia County levied, by ordinance, a cigarette sales tax in the unincorporated areas under the statutory taxing authority granted to a municipality by section

[5]An exception to this constitutional principle would arise if the general law authorizing a tax for a municipality expressly provided that the tax was not available to charter counties since the power of self-government of a charter county cannot be inconsistent with general law.

[6]See State ex rel. Dade County v. Brautigam, 224 So. 2d 688 (Fla. 1969). The Supreme Court approved Dade County's imposition of an excise tax on cigarette sales in the unincorporated areas pursuant to a cigarette tax option granted to municipalities in section 210.03, Florida Statutes (1968). Any doubt as to the municipal taxing authority of Dade County was eliminated by the adoption of Article VIII, section 6(f), Florida Constitution, in the 1968 constitutional revision. Consistently, in Bearden v. Metropolitan Dade County, 258 So. 2d 344 (Fla. 3d DCA 1972), cert. denied, 263 So. 2d 234 (Fla. 1972), the Court approved the levy by Dade County of the public service tax pursuant to section 167.431, Florida Statutes (1971). The Court, in Bearden v. Metropolitan Dade County, upheld Dade County's levy of the public service tax by recognizing that, pursuant to its charter, Dade County had the same power to levy and collect taxes as the municipalities. 258 So. 2d at 346.

[7]Prior to the decision in Volusia County v. Dickinson, the Dade County distinction was thought to be significant because of the unique provisions of Article VIII, section 6(f), Florida Constitution, which expressly conferred on Dade County all powers provided to municipalities by general law.

210.03, Florida Statutes (1971).[8] The Court noted that the issue in Volusia County v. Dickinson was "quite analogous in principle" to the one considered by the Court in the Dade County v. Brautigam case. See 269 So. 2d at 11. In upholding the authority of Volusia County to impose a tax option granted to a municipality by general law, the Court held as follows:

> When Section 1(g), Article VIII and Section 9(a), Article VII are read together, it will be noted that charter counties and municipalities are placed in the same category for all practical purposes. That upon a county becoming a charter county it automatically becomes a metropolitan entity for self-government purposes. This is so because Section 1(g) of Article VIII provides a charter county "shall have all powers of local self-government not inconsistent with general law. . . . The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law." This all inclusive language unquestionably vests in a charter county the authority to levy any tax not inconsistent with general or special law as is permitted municipalities.
>
> Read together, Sections 9(a), Article VII and 1(g), Article VIII, clearly connote the principle that unless precluded by general or special law, a charter county may without more under authority of existing general law impose by ordinance any tax in the area of its tax jurisdiction a municipality may impose.

269 So. 2d at 10-11 (emphasis in original).[9]

In McLeod v. Orange County, 645 So. 2d 411 (Fla. 1994), the Florida Supreme Court extended the municipal taxing power of charter counties to the public service tax authorized under section 166.231, Florida Statutes. The Supreme Court adopted the "logic employed" in Volusia County v. Dickinson:

[8]The municipal tax on the sale of cigarettes was subsequently repealed as a local option and imposed statewide. Ch. 72-360, Laws of Fla.

[9]See also State v. Broward County, 468 So. 2d 965 (Fla. 1985), rev'd on other grounds, 515 So. 2d 1273 (Fla. 1987) (favorably discussed the municipal taxing power of a charter county under Article VIII, section 1, Florida Constitution).

> The crux of the Volusia holding is that "unless precluded by general or special law, a charter county may without more under authority of existing general law impose by ordinance any tax in the area of its tax jurisdiction a municipality may impose." 269 So. 2d at 11. This conclusion was dictated by our reading of articles VII and VIII of the Florida Constitution.
>
> * * *
>
> Read together, the articles give charter counties the authority to levy any tax that a municipality may impose, if it is within the county's taxing jurisdiction.

645 So. 2d at 413 (footnote omitted).

On a collateral issue, the Florida Supreme Court held that no geographic limitation existed on the expenditure of the public service tax proceeds which were levied solely in the unincorporated areas. The Court stated, "However, even if all of the projects are located within municipalities and confer no benefit to the unincorporated areas, this Court cannot create a constitutional prohibition when none exists." 645 So. 2d at 414. The intervenor had argued that the public service tax was illegal unless the use of the tax proceeds provided a real and substantial benefit to the unincorporated area attempting to draw an analogy to the dual taxation prohibition in Article VIII, section 1(h), Florida Constitution.[10]

II. MUNICIPAL HOME RULE CONCEPTS

A. Municipal Power Prior to the 1968 Florida Constitution

Under the 1885 Florida Constitution, all municipal powers were dependent on a specific delegation of authority by the Legislature in a general law or special act.

> The Legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their

[10]The court also emphasized the county power construction of the constitutional concept by holding that the implemented ordinance was correctly adopted pursuant to the ordinance enactment provisions for counties in section 125.66(1), Florida Statutes, rather than the ordinance enactment provisions in section 166.041, relating to municipalities.

> jurisdiction and powers, and to alter or amend the same at any time.

Art. VIII, § 8, Fla. Const. (1885).

This requirement of an express legislative grant was a reflection of the prevailing nineteenth century local government theory known as "Dillon's Rule."[11] Under this approach to municipal power, "[t]he authority of local governments in all matters, including those purely local, was limited to that expressly granted by the legislature, or that which could be necessarily implied from an express grant." Sparkman, The History and Status of Local Government Powers in Florida, 25 U. of Fla. L.R. 271, 282 (1973). To find a municipal power to legislate, the search was for an express delegation of authority from the Legislature in a general law or special act. The quantum and source of power was essentially the same for both municipal and county governments.

B. Municipal Power of Local Self-Government Under the 1968 Constitutional Revision

The 1968 revision to the Florida Constitution abolished and buried Dillon's Rule and fostered a Florida revolution in municipal home rule power. Article VIII, section 2(b), Florida Constitution, provides as follows:

> (b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. . . .

Art. VIII, § 2(b), Fla. Const. (emphasis added). The constitutional revision signaled a dramatic reversal of the source of municipal legislative power from Tallahassee to the city hall.

Section 166.021, Florida Statutes, the Municipal Home Rule Powers Act, completed the constitutional design of the novel municipal home rule concept. As recognized by the Florida Supreme Court, section 166.021 was:

> a broad grant of power to municipalities in recognition and implementation of the provisions of Art. VIII, § 2(b), Fla. Const. It

[11]The term "Dillon's Rule" is named after a treatise on municipal corporations by J. Dillon. See Malone v. City of Quincy, 62 So. 922 (Fla. 1913) (a typical application of Dillon's Rule by the Florida Supreme Court).

> should be so construed as to effectuate that purpose where possible. It provides, in new F.S. § 166.021(1), that municipalities shall have the governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services; it further enables them to exercise any power for municipal services, except when expressly prohibited by law.[12]

City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764, 766 (Fla. 1974) (Dekle, J., concurring) (footnote omitted).[13]

To affirm and emphasize the broad constitutional deferral of municipal legislative power, section 166.021(4), Florida Statutes, further provides:

> The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the

[12]Under section 166.021(3), Florida Statutes, this broad grant of home rule power to legislate by ordinance on any subject matter upon which the state Legislature may act is denied to: (1) subjects of annexation, merger, and exercise of extraterritorial power of municipalities which require general or special law pursuant to Article VIII, section 2(c), Florida Constitution, (2) any subject expressly prohibited by the Florida Constitution, (3) any subject expressly preempted to state or county government by the Florida Constitution or by general law, and (4) any subject preempted to a county pursuant to a county charter.

[13]In Forte Towers, the Court apparently agreed that the Municipal Home Rule Powers Act empowered a municipality to enact a rent control ordinance, though it split on whether the ordinance was properly imposed.

> exercise of home rule powers other than those so expressly prohibited.[14]

Id. (emphasis added). As Justice Dekle recognized, the empowering provision allowing municipalities to legislate by ordinance is

> the provision of new F.S. § 166.021(1) which expressly empowers municipalities to "exercise any power for municipal purposes, except when expressly prohibited by law." . . . [T]he intent of this chapter was largely to eliminate the "local bill evil" by implementing the provisions of Art. VIII, § 2, Fla. Const.

Forte Towers, Inc., 305 So. 2d at 766. This liberal construction of municipal home rule has been consistently followed by the Florida Supreme Court:

> Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid "municipal purpose." It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority.

State v. City of Sunrise, 354 So. 2d 1206, 1209 (Fla. 1978). A comparison of municipal power under the 1885 and 1968 Florida Constitution was made by the Supreme Court in Lake Worth Utilities v. City of Lake Worth, 468 So. 2d 215 (Fla. 1985). The Court stated:

> Thus, [under the 1885 Florida Constitution] the municipalities were inherently powerless, absent a specific grant of power from the legislature. The noblest municipal ordinance, enacted to serve the

[14]Section 166.021, Florida Statutes, was enacted by Chapter 73-129, Laws of Florida, in response to the narrow municipal home rule interpretation in City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972). The Court in Forte Towers, Inc. stated that it had to consider whether Chapter 73-129 necessitated a change in the Fleetwood Hotel decision and stated, "I believe that it does, and that municipalities now are empowered to enact such ordinances by virtue of new Ch. 73-129." 305 So. 2d at 766, Dekle, J., concurring.

> most compelling municipal purpose, was void, absent authorization found in some general or special law.
>
> The clear purpose of the 1968 revision embodied in article VIII, section 2 was to give the municipalities inherent power to meet municipal needs.

Id. at 217.

To determine the home rule power of a municipality to legislate by ordinance, the search today is not for specific legislative authorization. The search is for a general or special law that is inconsistent with the subject matter of the proposed ordinance. Absent an inconsistent law, a municipality has the complete power to legislate by ordinance for any municipal purpose.

C. Summary of County and Municipal Home Rule Power

The following is a summary of the constitutional and statutory home rule power of counties and municipalities, the power of the Legislature to restrict or diminish such home rule power and the expanded home rule power possessed by charter counties.

- The constitutional home rule powers of all counties and municipalities cannot be inconsistent with general law.

- The power of local self-government of charter counties is derived directly from the Florida Constitution and can be diminished by special act only if the special act is approved by a vote of the electors.

- The power of local self-government provided by general law for municipalities and non-charter counties can be preempted by special act.

- A county charter can contain limitations on county power not inconsistent with general law that apply only to that charter county.

- The ordinance of a non-charter county that is in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.

- A county charter can provide which shall prevail in the event of a conflict between a county and a municipal ordinance. A county charter provision providing for countywide regulatory authority that preempts inconsistent municipal action requires elector approval only in a single countywide vote. A county charter that attempts to transfer municipal services to a county requires dual approval by electors countywide and within each municipality under

judicial construction of the transfer of power provisions of Article VIII, section 4, Florida Constitution.

- A charter county is vested with the authority to levy any tax within its jurisdiction that the Legislature authorizes for a municipality unless a contrary legislative intent is provided in the tax authorization.

D. Transfer of Powers

Article VIII, section 4, Florida Constitution, sets forth the authority for local governments to transfer powers under specified circumstances, as follows:

> By law or by resolution of the governing bodies of each of the governments affected, any function or power of a county, municipality or special district may be transferred to or contracted to be performed by another county, municipality or special district, after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee, or as otherwise provided by law.

This section authorizes counties, municipalities, and special districts to transfer specific powers or functions of one entity to another such entity, so long as the transfer is approved by the electors of both entities, or provided by general or special law.

Although it authorizes the transfer of powers, Article VIII, section 4, Florida Constitution, mandates specific procedural requirements. First, this section specifies two avenues under which a transfer can be initiated: by a resolution of each governing body or by general or special act of the Legislature. Second, the transfer may only occur after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee (a dual referenda), or as otherwise provided by law.

The Florida Supreme Court has established a rule on when the dual referenda requirements are triggered:

> We hold that section 1(g) permits *regulatory* preemption by counties, while section 4 requires dual referenda to transfer functions or powers relating to *services*. A charter county may preempt a municipal regulatory power in such areas as handgun sales when county-wide uniformity will best further the ends of government. § 125.86(7), Fla. Stat. (1983). Dual referenda are

> necessary when the preemption goes beyond regulation and intrudes upon a municipality's provision of services.

Broward County v. City of Ft. Lauderdale 480 So. 2d 631, 635 (Fla. 1985) (emphasis in original).

This rule, in the reasoning of the Court, draws a line between what was perceived as the overlapping power of Article VIII, section 4, Florida Constitution, and the constitutional authority in Article VIII, section 1(g) for a county charter to provide which shall prevail in the event of a conflict between a county and a municipal ordinance.

The situation where actual control is not transferred is distinguishable. In the case of Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So. 2d 981 (Fla. 1981), opponents to a tourist development tax plan challenged a provision that would allocate funds raised by Dade County to renovate the city-owned Orange Bowl stadium. The Court found that because the plan did not require the city to transfer any jurisdiction over the stadium to Dade County, but rather only offered a grant of funds to be used for a particular purpose, it was not an unconstitutional transfer of powers. Similarly, in City of Palm Beach Gardens v. Barnes, 390 So. 2d 1188 (Fla. 1980), the issue was the implementation of a contract between the city and the sheriff of Palm Beach County for the performance of law enforcement services for the city at a stated price. Opponents to the contract argued that pursuant to Article VIII, section 4, Florida Constitution, a separate vote of both the city and the county electors was required. Finding that section 4 was inapplicable, the Court stated, "In our opinion, the framers of section 4 had no intention of applying its provisions to a sheriff as a county official, and his contracting for services with a municipality is clearly different from a municipality transferring or contracting away the authority to supervise and control its police powers to the county government." Id. at 1189. Provision of services may be transferred without section 4 implications if the ultimate responsibility for supervising or controlling those services is not transferred.

Thus, case law provides two inquiries in determining whether a transfer of powers implicates Article VIII, section 4, Florida Constitution, and its requisite dual referenda: (1) whether the transfer from one unit of government to another involves the provision of services or the preemption of regulatory authority, and (2) whether the transfer from one unit of government to another involves total relinquishment of power and control over the service at issue. When the transfer involves the complete relinquishment of control over services, the local government unit must comply with the requisite procedures of Article VIII, section 4, Florida Constitution.

Notwithstanding the above analysis, the rule of construction forged in Broward County v. City of Ft. Lauderdale is trumped by a transfer of powers "otherwise provided by law." Thus, in addition to the referenda process initiated by resolution of the governing bodies, Article VIII, section 4, Florida Constitution, provides that local government powers and functions may be transferred between units of local government "as otherwise provided by law." Legislative efforts

to transfer powers between units of local government will preempt local government ordinances in non-charter counties and municipalities by general or special law, and in charter counties by general law or special act adopted by a referendum of the electors of the county. See Art. VIII, §§ 1 and 2, Fla. Const.

E. County Preemption of Municipal Power

A county ordinance adopted by a non-charter county in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict under the provisions of Article VIII, section 1(f), Florida Constitution. As to charter counties, Article VIII, section 1(g), Florida Constitution, provides that the charter will provide which ordinance prevails in a conflict between county and municipal ordinances.

Thus, as to a charter county, the charter is constitutionally an instrument for a county to preempt municipal authority.[15] Such municipal authority preemption by a county charter can be diminished by a special act only with elector approval. Recall, Article VIII, section 1(g), provides that charter counties have such power of local self-government not inconsistent with general law "or with special law approved by vote of the electors."

Additionally, section 166.021, Florida Statutes, the Municipal Home Rule Powers Act, provides in subsections (3)(c) and (a) that municipal power does not exist for (1) any subject expressly preempted to the state or county government by the Constitution or by general law or (2) any subject preempted to a county pursuant to a county charter.

F. Municipal Purpose Exception to Municipal Home Rule

The constitutional principle that a county ordinance is not effective within a municipality that enacted an inconsistent ordinance is also limited by the requirement that all municipal ordinances must serve a municipal purpose.

For example, in City of Ormond Beach v. County of Volusia, 535 So. 2d 302 (Fla. 5th DCA 1988), the county transportation impact fee ordinance stated that its purpose was to regulate county land use and land development and to implement the comprehensive plan by imposing an impact fee for county road expansion attributable to new growth and development. Volusia County imposed such transportation impact fee countywide and several municipalities enacted ordinances to opt out of the application of the county impact fee ordinance within their boundaries. The court held that the municipal ordinances were invalid because, although

[15] If the area of municipal preemption is a transfer of services as opposed to a regulatory preemption, the dual referenda requirement of Article VIII, section 4, Florida Constitution, is implicated. Broward County v. City of Ft. Lauderdale, 480 So. 2d 631 (Fla. 1985).

municipalities have broad powers under the Florida Constitution to act for municipal purposes, these ordinances had no reasonable relationship to the morals, health, welfare, and safety of the people. The court further stated that preventing or hindering a county in its task of building and maintaining county roads was not in the best interest of a municipality.[16]

The Ormond Beach court stated:

> Most cases dealing with whether a city's ordinances or other municipal activities are for a "municipal purpose" concern some positive action undertaken by the city, considered to be needed for the health, morals, safety, protection or welfare of the city. . . . If an ordinance has no reasonable relationship to the morals, health, welfare and safety of the people of a municipality, it is beyond the authorized exercise of the police power of the municipality.
>
> In this case, the cities' ordinances have no apparent police power or municipal governmental function. . . . They simply recite their sole purpose or intent is to opt the respective city out of the county's ordinance, relying upon the primacy of city ordinances in the case of "conflict."
>
> However, there is no real conflict in this case. The cities in essence are attempting to veto an otherwise legitimate effort on the part of the county to raise funds to pay for the county road system, which traverses the municipalities as well as the unincorporated areas. Preventing or hindering the county from its task of maintaining, building and planning the arterial or collective

[16]The court applied the Ormond Beach reasoning in Seminole County v. City of Casselberry, 541 So. 2d 666 (Fla. 5th DCA 1989), which was factually similar, yet Seminole County was then a non-charter county and Volusia County was a charter county. (Seminole County is currently a charter county.) The Florida Constitution provides that a county's charter will state which ordinance shall prevail when a county ordinance and a municipal ordinance are in conflict. Art. VIII, § 1(g), Fla. Const. (1968). The Volusia County charter, however, provided that a county ordinance in conflict with a municipal ordinance is not effective within the municipalities to the extent of the conflict except in specific areas not relevant to the decision. The 1968 Florida Constitution states that when a non-charter county ordinance conflicts with a municipal ordinance then the county ordinance shall not be in effect within that municipality to the extent of the conflict. Art. VIII, § 1(f), Fla. Const. The court held that the same rule of law applied in Seminole County that had applied in Ormond Beach.

> streets throughout the county does not appear to be in any city's best interest or welfare.

535 So. 2d at 304-05 (citations, footnote omitted).

The general rule of both Ormond Beach and Seminole County is that both charter and non-charter counties have the power to impose impact fees countywide to fund capital facilities provided on a countywide uniform basis. In other words, the constitutional principle that county ordinances are not effective within municipalities with conflicting ordinances is also constitutionally limited by the requirement that all municipal ordinances serve a municipal purpose. Absent a municipal purpose, a municipality cannot, by adopting an inconsistent ordinance, preempt the county from providing or funding a countywide program or facility.

Assume that a county establishes a countywide emergency medical services program and imposes an impact fee to fund the growth portion of the needed capital facilities and equipment. Can a single municipality "opt-out" of such countywide program and interfere with the county funding plan? The Polk County Emergency Medical Services Impact Fee was upheld by the trial court over an inconsistent municipal ordinance which attempted to remove municipal areas paying the countywide impact fee when the municipality itself did not provide emergency medical services. The trial court opinion was not appealed.

III. SPECIAL DISTRICT POWER AND CLASSIFICATION

A. Special District Power

Special districts are a limited form of local government created to perform a specialized function. Special districts have no home rule power. This specialized form of local government has only the powers expressly provided, or which can be reasonably implied, from the authority provided legislatively in its charter. See State ex rel. City of Gainesville v. St. Johns River Water Management District, 408 So. 2d 1067 (Fla. 1st DCA 1982).[17]

The Florida Supreme Court, in explaining the specialized nature of special districts in Gallant v. Stephens, 358 So. 2d 536 (Fla. 1978), recognized a special district as a distinct form of local government:

[17]The only constitutional references to a special district are the potential authorization of ad valorem taxing power and the millage limitations of Article VII, section 9, Florida Constitution, and the scheduling provisions of prior authorized special district tax millage in Article XII, section 2, Florida Constitution.

> Wholly independent of this county taxing power is the authority provided for "special districts" to meet the need for special purpose services in any geographical area which may (but need not) be within one county. . . .

Id. at 540. The definition of special districts in section 189.403(1), Florida Statutes, supports the Supreme Court's explanation in Gallant of a special district and provides:

> (1) "Special district" means a local unit of special-purpose, as opposed to general-purpose, government within a limited boundary, created by general law, special act, local ordinance, or by rule of the Governor and Cabinet. The special purpose or purposes of special districts are implemented by specialized functions and related prescribed powers. The term does not include a school district, a community college district, a special improvement district created pursuant to s. 285.17, a municipal service taxing or benefit unit as specified in s. 125.01, or a board which provides electrical service and which is a political subdivision of a municipality or is part of a municipality.

Id.

B. Statutory Classifications

Special districts are defined by statute as independent or dependent. Such statutory classification controls the available formation options and dictates the application of statutory millage limitations.

Section 189.403(2), Florida Statutes, defines a special district as "dependent" if it meets one of the following criteria:

- Its governing body is identical to that of a single county or municipality,
- All members of the governing body are appointed by a single county or municipality,
- The members of the governing body can be removed during their unexpired term by a single county or municipality, or
- Its budget requires approval of or can be vetoed by a single county or municipality.

An "independent" special district is defined in section 189.403(3), Florida Statutes, as a special district that is not defined as "dependent" under the criteria of section 189.403(2), Florida Statutes, or any district that includes more than one county unless the district lies wholly within the boundaries of a single municipality (i.e., Town of Longboat Key).

Section 189.404, Florida Statutes, adopted under the provisions of Article III, section 11(a)(21), Florida Constitution, prohibits the creation of independent special districts by special acts or general laws of local application unless they conform to the stated statutory criteria and minimum requirements. Section 189.4041, Florida Statutes, provides that the charter for the creation of a dependent special district shall be adopted only by "ordinance of a county or municipal governing body having jurisdiction over the area affected."

IV. PREEMPTION OF LOCAL GOVERNMENT POWER

The design of the 1968 constitutional revision incorporates a legislative mechanism to prohibit special legislation that is inconsistent or in conflict with general law. Article III, section 11(a)(21), Florida Constitution (1968), provides:

> SECTION 11. Prohibited special laws.--
>
> (a) There shall be no special law or general law of local application pertaining to:
>
> * * *
>
> (21) any subject when prohibited by general law passed by a three-fifths vote of the membership of each house. Such law may be amended or repealed by like vote.

When the Florida Legislature exercises this power to prohibit special acts, it does so in clear and certain terms, citing the constitutional provision as its basis. See, e.g., § 236.014, Fla. Stat. (prohibiting special acts pertaining to taxation for school purposes and the Florida Education Finance Program); see also Art. III, § 11, n. 1, Fla. Const. (detailing each of the 10 statutes passed by a supermajority of the Legislature under its Art. III, § 11(a)(21) power).[18]

[18]Historically, the Florida House of Representatives and the Florida Senate have differed on the interpretation of this constitutional provision. The House position is that a special act passed by a "like vote" of three-fifths repeals a general law prohibition. The Senate position is that the general law prohibition must be repealed by a three-fifths vote before considering the inconsistent special act.

The concept of state preemption of local government power is not limited to circumstances in which an express and direct state legislative statement or declaration of preemption has been made. Local government power can also be preempted by legislative decisions of the state if the local government action: (1) conflicts with state law, (2) is inconsistent with a pervasive regulatory scheme legislated by the state, or (3) attempts to exercise control over an area in which the state has assigned contrary discretion and responsibility.

A. Local Government Action in Conflict with State Law

The doctrine that local government action is preempted if it is in conflict with state law is most clearly stated in Rinzler v. Carson, 262 So. 2d 661 (Fla. 1972). In Rinzler, the Supreme Court considered a City of Jacksonville ordinance that prohibited the possession of any machine gun, submachine gun, or similar firearm within the municipal boundaries of the city. The ordinance was more restrictive than allowed under state law. The Supreme Court, in determining that the ordinance was invalid, stated:

> Municipal ordinances are inferior in stature and subordinate to the laws of the state. Accordingly, an ordinance must not conflict with any controlling provision of a state statute, and if any doubt exists as to the extent of a power attempted to be exercised which may affect the operation of a state statute, the doubt is to be resolved against the ordinance and in favor of the statute. A municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden.

Id. at 668.

In the later case of City of Miami Beach v. Rocio, 404 So. 2d 1066 (Fla. 3d DCA 1981), rev. den'd, 408 So. 2d 1092 (Fla. 1981), the Court balanced this conflict doctrine with the provisions of the Municipal Home Rule Powers Act contained in section 166.021, Florida Statutes. The municipal ordinance at issue delayed conversion of apartments into condominiums by extending leases and creating a 90-day moratorium on their conversion. The Court held that the subject matter of the municipal ordinance was not "expressly preempted to the state" within the "expressly preempted" language of section 166.021(3)(c), Florida Statutes. However, the Court recognized that express preemption is not required and that municipal authority can be otherwise restricted by general law. The Court, relying extensively on Rinzler v. Carson, held that the ordinance was invalid under the conflict doctrine with the following statement, "Municipal ordinances are inferior to state law and must fail when conflict arises." See 404 So. 2d at 1069.

The city had argued in City of Miami Beach v. Rocio that the conflict doctrine articulated in Rinzler v. Carson had been superseded by the passage of the Municipal Home Rule Powers Act. The Court rejected this argument and noted:

> Although the legislature has extended municipal powers in the Municipal Home Rule Powers Act, the issue of conflict with state law has not been addressed. . . . The principle that a municipal ordinance is inferior to state law remains undisturbed. Although legislation may be concurrent, enacted by both state and local governments in areas not preempted by the state, concurrent legislation enacted by municipalities may not conflict with state law. If conflict arises, state law prevails.

Rocio, 404 So. 2d at 1070.

B. Local Government Action Inconsistent With a Pervasive Regulatory Scheme

Not only is local government action prohibited when it is in conflict with the provision of a specific state statute, local government action is also preempted when it is deemed to be inconsistent with a pervasive regulatory scheme of the state. In Tribune Co. v. Cannella, 458 So. 2d 1075 (Fla. 1984), the Florida Supreme Court addressed the effect of a local government action within the area of public records disclosure. The area of public records had been the subject of comprehensive regulation by the state. At issue was not an ordinance but rather a municipal policy that delayed the public release of personnel files for seven days. The Supreme Court struck the municipal policy, holding that the state public records law did not allow a delay in the disclosure of nonexempt public records for any reason. The basis of the Supreme Court's decision was the comprehensive nature of the public records law and it stated the following language with approval:

> Under [the preemption] doctrine a subject is preempted by a senior legislative body from the action by a junior legislative body if the senior legislative body's scheme of regulation of the subject is pervasive and if further regulation of the subject by the junior legislative body would present a danger of conflict with that pervasive regulatory scheme. . . .

Id. at 1077.

The general rule that an ordinance cannot be in conflict with a pervasive regulatory scheme of the state is softened by the principle that a municipal or county ordinance providing more

stringent regulation is not in conflict if the state regulatory scheme by its language and scope does not preempt local action or advance a policy that the Legislature intended to be uniform.

In Jordan Chapel Freewill Baptist Church v. Dade County, 334 So. 2d 661 (Fla. 1976), the Court was determining whether an ordinance providing additional regulation of bingo was in conflict with the state statute. The Court stated the general rule that legislative provisions are inconsistent if, to comply with one provision, a violation of the other is required. The Court further held as follows:

> Courts are therefore concerned with whether compliance with a County ordinance requires a violation of a state statute or renders compliance with a state statute impossible.

334 So. 2d at 664.

Similarly, in F.Y.I. Adventures v. City of Ocala, 698 So. 2d 583 (Fla. 5th DCA 1997), the Court upheld an ordinance providing additional regulations to those enacted by the state on the conduct of bingo games. The Court held that, under its review of the statute, it perceived no intent by the Legislature to preempt appeal of bingo regulation or that the Legislature intended that bingo regulation be uniform across the state. As a consequence, the Court in FYI Adventures v. City of Ocala held as follows:

> The question is, does compliance with the ordinance violate the state law, or make compliance with state law impossible? It is not a conflict if the ordinance is more stringent than the statute.

698 So. 2d at 584.

In Phantom of Clearwater v. Pinellas County, 894 So. 2d 1011, 1016 (Fla. 2d DCA 2005), the Court was faced with a state law regulating the sale of fireworks that had a section that stated:

> This chapter shall be applied uniformly throughout the state.

In upholding the ordinance, the Court reasoned that implied preemption is actually a decision by the courts to create preemption in the absence of an explicit legislative directive and that such judicial decisions are made reluctantly since they preclude an elected local governing body from exercising its local powers. The Court concluded as follows:

> [I]f the legislature can easily create express preemption by including clear language in a statute, there is little justification for the courts to insert such words into a statute. In the absence of express

> preemption, normally a determination based upon any direct conflict between the statute and a local law, . . . is adequate to solve a power struggle between existing statutes and newly created ordinances.

894 So. 2d at 1019.

Therefore, the courts imply preemption only when the legislative scheme is so pervasive that it evidences an intent to preempt the particular area under a uniform legislative scheme.

The Court in City of Kissimmee v. Florida Retail Federation, 915 So. 2d 205 (Fla. 5th DCA 2005), recognized that in resolving conflict between the state and local regulation, the Court should exercise judicial deference. Recognizing the principle that a local ordinance cannot conflict with a state statute, the Court held that conflict does not exist simply because the ordinance is more stringent than the state law or regulates an area not covered by the state law. The Court held as follows:

> Where there is no direct conflict between the two, appellate courts should indulge every reasonable presumption in favor of an ordinance's constitutionality.

915 So. 2d at 209.

In Thomas v. State, 614 So. 2d 468 (Fla. 1993), the Court held a penalty in a municipal ordinance invalid since it has exceeded the penalty imposed by the state. However, the Court recognized the concurrent regulatory jurisdiction of both the municipality and the state as follows:

> Although municipalities and the state may legislate concurrently in areas that are not expressly preempted by the state, a municipality's concurrent legislation must not conflict with state law.

614 So. 2d at 470.

C. Local Government Action Contrary to State Assignment of Discretion and Responsibility

The final area of local government preemption exists when the proposed governmental action is contrary to or in conflict with the assignment of governmental responsibility by the Legislature. For example, in Department of Transportation v. Lopez-Torres, 526 So. 2d 674 (Fla. 1988), the Florida Supreme Court recognized the preemption of local government action because the Legislature had assigned specific responsibility to a governmental entity. The Supreme Court

found that such preemption existed without reliance on the conflict doctrine developed in Rinzler v. Carson and City of Miami Beach v. Rocio and without reliance on the pervasive regulatory scheme doctrine asserted in Tribune Company v. Cannella. Furthermore, in Department of Transportation v. Lopez-Torres, a municipality attempted to exercise control of the replacement of a bridge on the state highway system by directing its new location through the local comprehensive plan. The Florida Department of Transportation sought to construct a replacement bridge at an alternative location which was 100 feet north of the existing bridge. The Town of Ocean Ridge and certain of its residents filed suit maintaining that the town's comprehensive plan prevented construction of a bridge at the location selected by the Department.

At issue was the relationship between the specific assignments of responsibility contained within the Florida Transportation Code and the efforts of the municipality to legislate within those areas.[19] The stated purpose of the Florida Transportation Code as contained in section 334.035, Florida Statutes, is as follows:

> The purpose of the Florida Transportation Code is to establish the responsibilities of the state, the counties, and the municipalities in the planning and development of the transportation systems serving the people of the state and to assure the development of an integrated, balanced statewide transportation system.

Under the provisions of the Florida Transportation Code, the state and each local government is granted the authority over specific roads within its jurisdiction. The roads within the state's responsibility are defined by section 334.01(25), Florida Statutes. Those that are the responsibility of counties and each municipality are defined by sections 334.03(8) and 334.03(3), Florida Statutes, respectively. No express preemption language is contained within the Florida Transportation Code. The Florida Supreme Court in Department of Transportation v. Lopez-Torres found that authority over state roads was preempted to the Florida Department of Transportation and that municipalities had no authority to interfere in the exercise of that authority, even when it conflicted with legitimate municipal goals. The Supreme Court stated:

> By virtue of its preemptive authority, the DOT may route a state road bridge through or into a municipality by way of a corridor that conflicts with the municipality's comprehensive growth plan.

Id. at 676. Thus, the Court concluded that "the legislature preempted municipalities from exercising any control over the establishment of state roads and bridges[.]" Id. at 674.

[19]Chapters 334 through 339, Florida Statutes, along with certain other chapters, as designated by section 334.01, Florida Statutes, constitute the Florida Transportation Code.

V. INTERGOVERNMENTAL SERVICE DELIVERY OPTIONS

Chapter 163, Part I, Florida Statutes, provides for intergovernmental cooperation and the exercise of joint powers by a city and a county through the execution of an interlocal agreement. Section 163.01(5), Florida Statutes, enumerates the terms and conditions of the interlocal agreement and specifically provides that such an agreement may provide for the creation of a separate legal entity. Section 163.01(7)(a), Florida Statutes, also specifically provides that the interlocal agreement may create "a separate legal or administrative entity to administer" the agreement. However, section 163.01(7)(c), Florida Statutes, limits the power of any separate legal or administrative entity by providing that such entity shall not possess the power to levy any tax or to issue any type of bond in its own name. However, section 163.01(7)(g)1., Florida Statutes, specifically authorizes the issuance of bonds for financing public facilities, including, but not limited to, water, wastewater, alternative water supply facilities and water reuse facilities.

Often the regional nature of county government is ignored or overlooked. The issue under the constitutional authority of a municipality to adopt an inconsistent ordinance and "opt-out" of a countywide program where municipal action is not preempted, is not whether the municipality has consented to the county ordinance. The issue is whether the municipality has the authority to object to the subject matter of the ordinance and, if so, whether it legislatively opted-out by the adoption of an inconsistent municipal ordinance. If the municipality takes no inconsistent legislative action, a countywide program which serves a county purpose is implemented. An interlocal agreement is a viable option to eliminate doubt and secure municipal consent for such countywide programs.

VI. CONSTITUTIONAL PREEMPTION OF FORMS OF TAXATION TO THE STATE

To place the taxing power of local government in proper perspective, one must focus on the difference in the taxation provisions of the 1885 and the 1968 Florida Constitutions.

Article IX, section 3, Florida Constitution (1885), provided, "No tax shall be levied except in pursuance of law," and Article IX, section 5, Florida Constitution, provided:

> Section 5. The Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for State taxation.

In contrast, Article VII, section 1(a), Florida Constitution (1968), provides:

> No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.

Article VII, section 9(a), Florida Constitution (1968), provides:

> Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes. . . .

Under the 1885 Florida Constitution, if a special act did not change the method of assessment or collection, a county or a municipality could be authorized by special act to levy a tax.[20] In contrast, under the 1968 Florida Constitution, all taxes, other than ad valorem taxes, are preempted to the State. The 1968 Florida Constitution expressly authorized counties to levy ad valorem taxes but preserved state-wide legislative discretion as to the levy of all other taxes by constitutionally requiring a general law authorization.

Article VII of the 1968 Florida Constitution is not a source of local government taxing power. Other than the mandatory authorization to levy ad valorem taxes within the stated millage limits, Article VII grants no taxing power to local governments. Rather, it is a limitation on the power to tax, whether imposed by ordinance or special act. All taxes other than ad valorem taxes are preempted to the state except as authorized by general law.

Not all local government revenue sources are taxes requiring general law authorization under Article VII, section 1, Florida Constitution. The judicial inquiry, when a county or municipal revenue source is imposed by ordinance, is whether the charge meets the legal sufficiency test for a valid fee or assessment. If not, the charge is a tax and general law authorization is required under the tax preemption provisions of Article VII, section 1. As discussed subsequently, if not a

[20]Article III, section 20, Florida Constitution (1885), like Article III, section 11(a)(2), Florida Constitution (1968), prohibits special acts relating to the assessment and collection of taxes. See also Alachua County v. Adams, 702 So. 2d 1253 (Fla. 1997) (holding that the use of the infrastructure surtax cannot be changed by special act).

tax under Florida case law, the imposition of the fee or assessment by ordinance is within the constitutional and statutory home rule power of municipalities and counties.[21]

A. The Benefit Requirement for Use of Ad Valorem Taxes

The general rule is that the questions of benefits and of unlawful burdens do not arise when the tax is uniform, for a public purpose, and within the power of the Florida Legislature to prescribe. See Hunter v. Owens, 86 So. 839 (Fla. 1920); Jinkins v. Entzminger, 135 So. 785 (Fla. 1931); Dressel v. Dade County, 219 So. 2d 716 (Fla. 3d DCA 1969), cert. denied, 226 So. 2d 402 (Fla. 1969); and Tucker v. Underdown, 356 So. 2d 251 (Fla. 1978).

VII. HOME RULE NON-TAX REVENUE SOURCES

Whether a fee, assessment or charge authorized by a local government ordinance and not a general law is constitutionally permissible depends on the Florida case law requirements established for its validity. The difficulty in this analysis results from the various requirements that exist for the different types of constitutionally valid fees and charges.

In the constitutional analysis of the validity of a home rule fee, judicial reliance is often placed on the type of governmental power being exercised. For example, special assessments, like taxes, are imposed under sovereign powers, as an enforced contribution from the property owner. In contrast, regulatory fees are imposed pursuant to the police power as regulation of an activity or property. In further contrast, user fees, franchise fees or rental fees are imposed pursuant to the exercise of the proprietary right of government.

Although fees are imposed through the exercise of differing governmental powers, judicial analysis has created limitations on home rule fees to ensure that they are not taxes. For example, restrictions on the amount of the fee are ingrained in Florida case law to ensure that special assessments do not exceed the special benefit provided to assessed property, that regulatory fees do not exceed the cost of regulation, and that fees imposed under the proprietary right of government are not unreasonable. Use restrictions are also imposed on special assessments and regulatory fees to ensure that the proceeds are used for the purpose for which they were imposed. No use restrictions apply to fees imposed under the proprietary capacity of government as long as the amount of the fee is reasonable.

[21] See City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992) (held that Chapter 170, Florida Statutes, was supplemental authority to the power of self-government of a municipality to levy special assessments authorized in section 166.021, Florida Statutes).

VIII. FEES OR SERVICE CHARGES

Generally, fees fall into two categories: (1) regulatory fees imposed under the police power in the exercise of a sovereign function of the local government; and (2) fees imposed in the assertion of the proprietary power of local government. Each category of fee has its own special rules developed by Florida case law that distinguishes a valid fee from a tax.

Examples of regulatory fees imposed under the sovereign power are building permit fees, inspection fees, impact fees, and stormwater fees. Such regulatory fees cannot exceed the cost of the regulatory activity and are generally required to be applied solely to pay the cost of the regulatory activity for which they are imposed. As an example, as explained subsequently, the fee imposed on development to regulate its impact on the need for future capital facilities must meet the "dual rational nexus test." In other words, the impact fee cannot exceed the cost of the capital facilities required as a consequence of the development regulation and must be used and expended for such regulatory purpose. Similarly, building permit fees cannot exceed the cost of the governmental activity established to regulate the building permit issuance and ensuing inspection activity.

Examples of fees imposed by local government in its proprietary capacity are admission fees, utility fees, franchise fees and traditional user fees. Such fees are governed by the principle that the feepayer receives a special benefit or that the fee imposed is reasonable in relation to the privilege or service provided. For example, a franchise fee is reasonable since it is assumed to be bargained for the property right that is relinquished by the local government. Similarly, a local government utility can generate a profit if the amount of the profit is reasonable. As an illustration, the First District Court of Appeal in Jacksonville Port Authority v. Alamo Rent-a-Car, 600 So. 2d 1159 (Fla. 1st DCA 1992), recognized that the fee charged Alamo for its use of airport facilities was not imposed by the Jacksonville Port Authority (the "JPA") "to regulate its airport system under the auspices of the general police power, but rather to do so as a function of its proprietary status." Id. at 1164. The Court's rationale was that

> [t]he fee [in this case] is not a general revenue source in support of a sovereign government, instead, it is governed by entirely different principles based upon Alamo's receipt of a special benefit from the JPA--the generation of its customers.

Id. at 1164.

Similarly, as discussed subsequently, the Florida Supreme Court in State v. City of Port Orange, 650 So. 2d 1 (Fla. 1995), in setting forth its two-prong test for a valid user fee recognized the sovereign function versus proprietary activity distinction as follows:

> Funding for the maintenance and improvement of a municipal road system even when limited to capital projects as the circuit court did here, is revenue for the exercise of a sovereign function contemplated within the definition of a tax.
>
> User fees are charged based upon the proprietary right of the governing body permitting the use of the instrumentality involved.

Id. at 3 (emphasis supplied).

Each fee imposed under the home rule power of a local government must be analyzed in the context of judicial rules applicable to its validity. The threshold analysis requires a consideration of whether the fee is imposed under the police power or as a function of a proprietary activity. The following more specific analysis focuses on the Florida case law rules for specific fees.

IX. IMPACT FEES

Impact fees are charges imposed against new development to provide for the cost of capital facilities made necessary by that growth. The purpose of the charge is to impose upon the newcomers, rather than the general public, the cost of new facilities necessitated by their arrival. For example, in City of Dunedin v. Contractors and Builders Assoc. of Pinellas County, 312 So. 2d 763 (Fla. 2d DCA 1975), the court stated, "Where a city's water and sewer facilities would be adequate to serve its present inhabitants were it not for drastic growth, it seems unfair to make the existing inhabitants pay for new systems when they have already been paying for the old ones." Id. at 766. See also Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th DCA 1983), rev. denied, 440 So. 2d 352 (Fla. 1983).

Impact fees are unique products of local government's home rule powers and are imposed in conjunction with their power to regulate land use and their statutory responsibility to adopt and enforce comprehensive planning. The development of impact fees has occurred in Florida by home rule ordinance rather than direct statutory authorization or mandate. The characteristics and limitations of impact fees in Florida are found in Florida case law, not statute.

Section 163.31801, Florida Statutes, designated as the "Florida Impact Fee Act" places certain limitations on the imposition and enforcement of impact fees. This Act recognizes the important role of impact fees in providing essential infrastructure and provides certain minimum requirements for an impact fee including: (a) requiring that the data utilized for the calculation of an impact fee must be "based on the most recent and localized data"; (b) requiring the accounting and reporting of impact fee collections; (c) limiting administrative costs for collection of impact

fees to "actual costs"; (d) requiring notice of impact fee adoption to be provided not less than 90 days prior to the effective date of the imposition of a new or amended impact fee; and (e) requiring that the audits performed pursuant to section 218.39, Florida Statutes, certify local government compliance with the Act.

Additionally, a new subsection (5) was added during the 2009 Legislation Session changing the burden of proof and the judicial review standard to be applied in a challenge to the validity of impact fees. The new subsection (5) of section 163.31801, Florida Statutes, provides:

> In any action challenging an impact fee, the government has the burden of proving by a preponderance of the evidence that the imposition or amount of the fee meets the requirements of state legal precedent or this section. The court may not use a deferential standard.

As developed under Florida case law, impact fees must meet the "dual rational nexus" test. First, impact fees are valid when a reasonable connection, or rational nexus, exists between the anticipated need for additional capital facilities and the growth in population. Second, impact fees are valid when a reasonable connection, or rational nexus, exists between the expenditure of the impact fee proceeds and the benefits accruing to the growth from those proceeds. Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611-12 (Fla. 4th DCA 1983). See also St. Johns County v. N.E. Fla. Builders Assoc., 583 So. 2d 635, 637 (Fla. 1991).

Applying this two prong test, the Florida courts have upheld impact fees imposed by local governments for a variety of capital projects. See Baywood Construction, Inc. v. City of Cape Coral, 507 So. 2d 768 (Fla. 2d DCA 1987), rev. denied, 513 So. 2d 1060 (Fla. 1987) (water and sewer capital expansion fee); City of Dunedin v. Contractors and Builders Assoc. of Pinellas County, 358 So. 2d 846 (Fla. 2d DCA 1978) (water and sewer impact fee); St. Johns Co. v. N.E. Florida Builders Assoc., Inc., 583 So. 2d 635 (Fla. 1991) (countywide school facilities impact fee); Ormond Beach v. County of Volusia, 535 So. 2d 302 (Fla. 5th DCA 1988) (county road impact fee); Hollywood, Inc. v. Broward Co., 431 So. 2d 606 (Fla. 4th DCA 1983) (park expansion impact fee); Home Builders and Contractors Assoc. of Palm Beach Co., Inc. v. Palm Beach Co., 446 So. 2d 140 (Fla. 4th DCA 1983), rev. denied, 451 So. 2d 140 (Fla. 1984) (county road impact fees).

Under the first prong of the dual rational nexus test, needs are sufficiently attributable to new development when the need for additional capital facilities is rationally related to the growth generated by new development. Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. 4th DCA 1983). For example, in Hollywood, Inc., Broward County adopted an ordinance which required developers to dedicate land or pay a fee as a condition of plat approval. The county intended to use the fee or land in expanding the county's park system to accommodate the residents of the new development. The court upheld the ordinance against developer attack.

Broward County showed that the county's park program had a standard of three acres of developed parkland per one thousand residents. The county met this standard for current residents through various methods but new growth required the county to acquire and develop new land to maintain its standard of three acres per one thousand residents. The court stated:

> Thus, Broward County demonstrated a reasonable connection between the need for additional park facilities and the growth in population that will be generated by the subdivision and, in addition, that the fees were an equitable pro rata share of the cost of reasonable capital expansion required because of new development.

Hollywood, Inc., 431 So. 2d at 612.

Additionally, under the second prong of the dual rational nexus test, valid impact fees must exhibit a reasonable connection or rational nexus between the expenditure of the fees collected and the benefits accruing to the new development. See Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. 4th DCA 1983). However, the benefits accruing from impact fee expenditures need not be exclusively or overwhelmingly for the fee payers only. The court in Home Builders and Contractors Assoc. of Palm Beach County, Inc. v. Palm Beach County, 446 So. 2d 140 (Fla. 4th DCA 1983), noted that exclusivity is not the proper test for valid impact fees because, "It is difficult to envision any capital improvement for parks, sewers, drainage, roads, or whatever, which would not in some measure benefit members of the community who do not reside in or utilize the new development." Id. at 143.

The second prong of the dual rational nexus test is met when ordinances or resolutions specifically earmark the fees collected to benefit the new residents by the construction of capital facilities. Hollywood, Inc. at 612; see also City of Dunedin v. Contractors and Builders Association of Pinellas County, 312 So. 2d 763, 766 (Fla. 2d DCA 1975). Furthermore, under the second prong of the dual rational nexus test, local governments may not expend impact fee proceeds for operation and maintenance expenses; the fees must be expended for capital projects needed or consumed by new development. Finally, the second prong of the dual rational nexus test requires local governments to expend the impact fee proceeds within a reasonable time of their collection. See Home Builders and Contractors Assoc. of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140, 142 (Fla. 4th DCA 1983) (ordinance requiring expenditure or refund of impact fees within six years was upheld).

Impact fees are sufficiently "earmarked" when the ordinances or resolutions relating to their imposition, collection and administration expressly limit the use of the fee revenue to meeting the costs of the reasonably required improvements or is limited to the consumption of existing capacity by the new development. See Contractors and Builders Assoc. of Pinellas County

v. City of Dunedin, 329 So. 2d 314 (Fla. 1976). In Dunedin, the Florida Supreme Court invalidated the impact fee ordinance which the city adopted to fund expansion of its water and sewer utility system. The Supreme Court articulated its grounds for invalidation with the following:

> The failure to include necessary restrictions on the use of the [impact fee] fund is bound to result in confusion, at best. City personnel may come and go before the fund is exhausted, yet there is nothing in writing to guide their use of these moneys, although certain uses, even within the water and sewer systems, would undercut the legal basis for the fund's existence. . . . [T]he ordinance is defective for failure to spell out necessary restrictions to be collected.

329 So. 2d at 321. However, the Supreme Court went on to say:

> Nothing we decide, . . ., prevents Dunedin from adopting another sewer connection charge ordinance, incorporating appropriate restrictions on use of the revenues it produces. Dunedin is at liberty, moreover, to adopt an ordinance restricting the use of moneys already collected.

Id. at 322 (emphasis added). Based on this language, the City of Dunedin adopted two ordinances which expressly restricted the impact fee revenue for the water and sewer system expansion and which established trust funds for that purpose. For example, one of the two subsequent ordinances which the City of Dunedin adopted provided that "the use of any funds previously collected . . . is restricted to extension or construction of new additions to the treatment and systems so as to meet the increased demand which additional connections to the system create." City of Dunedin v. Contractors and Builders Assoc. of Pinellas County, 358 So. 2d 846, 847 (Fla. 2d DCA 1978).

X. FRANCHISE FEES

A franchise fee is a charge imposed upon a utility for the grant of a franchise and for the privilege of using the local government's rights-of-way to conduct the utility business. A franchise fee is fair rent for the use of such rights-of-way and consideration for the local government agreeing not to provide competing utility services during the franchise term. See City of Plant City v. Mayo, 337 So. 2d 966 (Fla. 1976); Santa Rosa County v. Gulf Power Co., 635 So. 2d 96 (Fla. 1st DCA 1994), rev. denied, 645 So. 2d 452 (Fla. 1994); and City of Hialeah Gardens v. Dade County, 348 So. 2d 1174 (Fla. 3d DCA 1977).

By definition, a franchise ordinance grants a special privilege that is not available to the general public. The Florida Supreme Court explained in Leonard v. Baylen Street Wharf Co., 52 So. 718 (Fla. 1910), that "[a] franchise is a special privilege conferred upon individuals or corporations by governmental authority to do something that cannot be done of common right." Id. at 718. However, "[f]ranchises [are] not . . . the absolute property of any one, but their use may be granted or permitted by proper governmental authority, subject to supervision and regulation, and upon such terms as may be lawfully imposed." Id. Franchises are used for "the good of the public, usually for the purpose of rendering an adequate service without unjust discrimination, and for a reasonable compensation." Id. Finally, "[p]rivate rights in franchises are confined to a proper use of them for the general welfare, subject to lawful governmental regulation." Id.

In addition to compensation for the relinquishment of property rights, when counties and municipalities have the authority to own, operate, and maintain utilities themselves any permission granted to another entity to perform those services is additional justification for the fee. See Alpert v. Boise Water Corp., 795 P. 2d 298 (Idaho 1990). In Alpert, each franchise provided that the utility would pay to the cities a three percent (3%) franchise fee from all sales within the corporate limits as "consideration for the franchise contract." Id. at 300. The Idaho Supreme Court stated, "[C]ities have the right to own and operate utilities and provide those services to their residents[.] [T]he surrender of this right is valid consideration for the franchise fee charged to the utilities." Id. at 306.

The home rule authority of a county or municipality to enter into a franchise agreement with a utility and to impose a fee that is bargained for in exchange for the government property rights relinquished is settled. An evolving issue is the extent of the power of a county or municipality to unilaterally impose a fee for a privileged use of its right-of-way whether such charge is characterized as a rental fee, a regulatory fee or both.

Customarily, a franchise fee is calculated as a percentage of the gross revenues received by a utility from a defined geographic area. A franchise fee imposed by a municipality is based upon the gross revenues received by the utility from the municipal areas and a franchise fee imposed by a county is generally based upon the gross revenues received by the utility from the unincorporated areas (whether a franchise fee imposed by a county could be based on gross receipts received by the utility countywide has not been addressed.)

In Alachua County v. State, because the electric utilities would not consent to a franchise agreement, Alachua County unilaterally imposed a fee for the privileged use of its rights-of-way. The fee imposed was three percent (3%) of the gross revenues generated by the electric utilities and the utilities were allowed to separately state the fee on the electric bill. The record in the validation proceedings did not, in the words of the Court, establish any "nexus between its alleged 'reasonable rental charge' . . . and the rental value of the rights-of-way." Id. at 1067-68. As a

consequence, the Court held that the unilaterally imposed privilege fee was a tax not authorized by general law.

The Alachua County case was distinguished by the Court in Florida Power Corp. v. City of Winter Park, 887 So. 2d 1237 (Fla. 2004). There, the electric utility refused to renegotiate a franchise agreement which had previously provided for the payment of a franchise fee of six percent (6%) of the gross revenues received from the sale of electricity within the City of Winter Park. The Court likened the electric utility to a holdover tenant in the public rights-of-way and held that the electric utility would be subject to the six percent fee until the parties reached a new agreement or the City exercised its rights to acquire granted under the franchise agreement. The Court distinguished its prior holding in Alachua County as follows:

> Moreover, we reiterate that Alachua validates fees that are reasonably related to the government's cost of regulation or the rental value of the occupied land, as well as those that are the result of a bargained-for exchange. [cit. omitted] In the instant case, the trial court specifically found that the City had "offer[ed] sufficient evidence that the six percent fee was reasonably related" to the costs of regulation, and had "also presented strong evidence that the six percent fee is a fair 'market rate' for such use, occupation, or rental."

887 So. 2d at 1241.

In summary, a bargained for reasonable fee in a franchise agreement is not a tax. The fact that the franchise agreement has expired does not render the charge a tax and it remains a valid fee until a new agreement is reached or any contractually granted acquisition rights are exercised. Additionally, a unilaterally imposed fee reasonably related to the cost of regulation and constituting a reasonable rental charge for the use of public property is a valid fee.

XI. UTILITY AVAILABILITY CHARGE

In Pinellas County v. State, 776 So. 2d 262 (Fla. 2001), the Florida Supreme Court held that a utility availability or "readiness to serve" charge (the "Utility Availability Charge") imposed by the county and calculated to pay portions of the capital cost of reclaimed water distribution lines and service stubs was a valid fee imposed against property with access to such reclaimed water service regardless of actual connection.

The Utility Availability Charge was pledged as partial security for the payment of revenue bonds issued to construct reclaimed water distribution lines and service stubs in certain portions of

the utility service area of the county. Reclaimed water service, although highly treated, is not potable and must be delivered through specific collection transmission lines. The transmission lines to carry the reclaimed water from the treatment facilities to the general service areas were not included in the Utility Availability Charge calculation but were apportioned to all system users.

Not all property within the county utility service area had reclaimed water service available. The monthly Utility Availability Charge was charged only to property that had reclaimed water service available through the construction of the reclaimed collection system. Property that elected to use the reclaimed water would be subject to a connection charge and a monthly fee based upon usage.

The Court held that the Utility Availability Charge was a valid fee and not an impermissible tax. First, under the State v. City of Port Orange, 650 So. 2d 1 (Fla. 1995), test for a valid user fee, the Court reasoned that the property paying the Utility Availability Charge had access to reclaimed water services and thus received a benefit from the cost of the capital construction of the reclaimed water collection system which was not shared by persons not required to pay the charge. The Court recognized that some customers carrying the burden of the Utility Availability Charge may elect not to connect and use the reclaimed water service but held that such individual decision not to connect did not undermine the validity of the fee. In upholding the validity of the charge, the Court recognized a long line of cases where local ordinances imposing mandatory fees were upheld regardless of whether individual customers actually used or desired the service.

XII. SPECIAL ASSESSMENTS

Increasingly, counties and municipalities have utilized special assessments as a home rule revenue source to fund certain services and to construct and maintain capital facilities.

As established by case law, two requirements exist for the imposition of a valid special assessment: (1) the property assessed must derive a special benefit from the improvement or service provided; and (2) the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit. See City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992).

The test to be applied in evaluating whether a special benefit is conferred on property by the provision of a service is

> whether there is a "logical relationship" between the services provided and the benefit to real property. Whisnant v. Stringfellow, 50 So. 2d 885 (Fla. 1951).

Lake County v. Water Oak Management Corp., 695 So. 2d 667, 669 (Fla. 1997). This logical relationship to property test defines the line between those services that can be funded by special assessments and those failing to satisfy the special benefit test. Governmental functions such as indigent health care, general law enforcement activities and the general provision of government fail to bear a logical relationship to property and thus are required to be funded by taxes. Examples of services that possess a logical relationship to property and thus can be funded wholly or partially by special assessments are: solid waste collection and disposal, stormwater management, and fire rescue, including first response medical aid. Once an identified service or capital facility satisfies the special benefit test, the assessed amount is required to be fairly apportioned among the benefited property in a manner consistent with the logical relationship embodied in the special benefit requirement.

Generally, a special assessment, whether imposed for capital projects or services, is collected on the annual ad valorem tax bill pursuant to the provisions of section 197.3632, Florida Statutes (the "Uniform Collection Method"). Under such Uniform Collection Method, the special assessment is characterized as a "non-ad valorem assessment." See § 197.3632(1)(d), Fla. Stat.

A. Special Benefit Requirement

The benefit required for a valid special assessment consists of more than simply an increase in market value, and includes both potential increases in value and the added use and enjoyment of the property. See Meyer v. City of Oakland Park, 219 So. 2d 417 (Fla. 1969). In Meyer, the Florida Supreme Court upheld a sewer assessment on both improved and unimproved property, stating that the benefit need not be direct nor immediate but must be substantial, certain and capable of being realized within a reasonable time. Furthermore, the benefit need not be determined in relation to the existing use of the property. See City of Hallandale v. Meekins, 237 So. 2d 318 (Fla. 4th DCA 1970), aff'd, 245 So. 2d 253 (Fla. 1971).

Although the benefit derived need not be direct and immediate, the benefit must be special and peculiar to the property assessed and not a general benefit to the entire community. Thus, services which are provided by a government may be essential to the public welfare but fail to provide the special benefit necessary for the imposition of a valid assessment. For example, the Court in Crowder v. Phillips, 1 So. 2d 629 (Fla. 1941), held that a special assessment for the establishment and maintenance of a hospital did not provide a special or peculiar benefit to the real property assessed. The Court reasoned that the hospital provided benefits to the entire community because of its availability to any person but that no logical relationship existed between the construction and maintenance of the hospital and the assessed property. Additionally, in Whisnant v. Stringfellow, 50 So. 2d 885 (Fla. 1951), an assessment for the county health unit was also held to be invalid in that it benefited everyone in the county, regardless of their status as property owners.

Significantly, in Sarasota County v. Sarasota Church of Christ, 667 So. 2d 180 (Fla. 1995), the Florida Supreme Court recognized and declared that assessed properties may be specially benefited by a special assessment program for services even when the assessment is imposed throughout an entire community. In this case, the Supreme Court found that stormwater management services confer a special benefit to property and additionally clarified that courts will presume that local government legislative findings on special benefit are correct, unless a challenger can prove that they are "palpably arbitrary or grossly unequal and confiscatory." 667 So. 2d at 184 (quoting South Trail Fire Control District, Sarasota County v. State, 273 So. 2d 380, 383 (Fla. 1973)). See also Harris v. Wilson, 693 So. 2d 945 (Fla. 1997) (upholding solid waste special assessment imposed throughout unincorporated area of Clay County and confirming the holdings in the Sarasota Church of Christ case).

Following this case law, the Florida Supreme Court ratified these prior decisions in Lake County v. Water Oak Management, 695 So. 2d 667 (Fla. 1997). The Lake County Court concluded that the county's fire rescue special assessment program provided a special benefit to property and, in so doing, articulated the appropriate test for special benefit. The Court rejected the assertion that for a valid special benefit to exist, a special assessment program must provide a "unique" benefit to the assessed properties, and instead found that a special benefit will exist so long as there is a "logical relationship" between the services provided and the benefit to real property." 695 So. 2d at 669; see also North Lauderdale v. SMM Properties, 825 So. 2d 243 (Fla. 2002) (incorporating restrictions on fire rescue services).

B. Fair and Reasonable Apportionment Requirement

An improvement or service which specially benefits the assessed properties must also be "fairly and reasonably apportioned among the benefited properties." City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992); Parrish v. Hillsborough County, 123 So. 830 (Fla. 1929). For example, in South Trail Fire Control District, Sarasota County v. State, 273 So. 2d 380 (Fla. 1973), the Florida Supreme Court upheld the apportionment scheme which assessed business and commercial property on an area basis while other property was assessed on a flat rate basis. The Court held that the manner of the assessment's apportionment is immaterial and may vary provided that the amount of the assessment for each property does not exceed the proportional benefits it receives as compared to other properties.

However, improper apportionment will defeat a special assessment when a special benefit is otherwise available. In City of Ft. Lauderdale v. Carter, 71 So. 2d 260 (Fla. 1954), a special assessment for garbage, waste and trash collection was apportioned based upon the value of the property. The Florida Supreme Court held this assessment to be invalid in that apportioning on the basis of value did not bear any reasonable relationship to the services provided. See also St. Lucie County-Fort Pierce Fire Prevention and Control District v. Higgs, 141 So. 2d 744 (Fla. 1962) (Court

struck fire assessments imposed against property based on the ratio of the assessed value of each property to the total value of all property in the district).

In comparison, the Florida Supreme Court in City of Naples v. Moon, 269 So. 2d 355 (Fla. 1972), found that the levying of a special assessment for improved parking facilities was valid because the city established specific guidelines to measure the benefits accruing to the assessed property. The guidelines were value of the property benefited, relative floor space of each improved property, its kind, susceptibility to improvement, and the maximum annual benefits to be conferred thereon. City of Naples, 269 So. 2d at 358. Other methods of apportionment which have been upheld are sewer improvements on a square foot basis (Meyer v. City of Oakland Park, supra) and street improvements on a lineal front foot basis (Bodner v. City of Coral Gables, 245 So. 2d 250 (Fla. 1971)).

Finally, in determining the reasonableness of the apportionment, courts generally give deference to the legislative determination of a local government. In Rosche v. City of Hollywood, 55 So. 2d 909 (Fla. 1952), the Florida Supreme Court stated:

> The apportionment of assessments is a legislative function and if reasonable men may differ as to whether land assessed was benefited by the local improvement the determination as to such benefits of the city officials must be sustained.

Id. at 913; see also Key Colony No. 1 Condominium Assoc., Inc. v. Village of Key Biscayne, 651 So. 2d 779 (Fla. 3d DCA 1995).

As discussed previously, the concept of judicial deference to legislative findings has been strengthened and expanded by the Florida Supreme Court in its recent decisions in Sarasota County v. Sarasota Church of Christ and Harris v. Wilson.

Many assessed services and improvements have been upheld as providing the requisite special benefit. Such services and improvements include:

- **Garbage Disposal**: Harris v. Wilson, 693 So. 2d 945 (Fla. 1997) and Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977);

- **Sewer Improvements**: City of Hallandale v. Meekins, 237 So. 2d 318 (Fla. 4th DCA 1970) and Meyer v. City of Oakland Park, 219 So. 2d 417 (Fla. 1969);

- **Fire Protection**: South Trail Fire Control Dist., Sarasota County v. State, 273 So. 2d 380 (Fla. 1973) and Fire Dist. No. 1 of Polk County v. Jenkins, 221 So. 2d 740 (Fla. 1969);

- **Fire and Rescue Services**: Sarasota County v. Sarasota Church of Christ, 641 So. 2d 900 (Fla. 2d DCA 1994), rev'd on other grounds, 667 So. 2d 180 (Fla. 1995) and Lake County v. Water Oak Management Corp., 695 So. 2d 667 (Fla. 1997)

  The scope of fire rescue services held to provide a logical relationship to the use and enjoyment of property was restricted in City of North Lauderdale v. SMM Properties, 825 So. 2d 243 (Fla. 2002). The Court held that the "emergency medical services" portion of the combined fire and rescue services program failed to provide any special benefit to property;

- **Street Improvements**: Atlantic Coast Line R. Co. v. City of Gainesville, 91 So. 118 (Fla. 1922) and Bodner v. City of Coral Gables, 245 So. 2d 250 (Fla. 1971);

- **Parking Facilities**: City of Naples v. Moon, 269 So. 2d 355 (Fla. 1972);

- **Downtown Redevelopment**: City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992);

- **Stormwater Management Services**: Sarasota County v. Sarasota Church of Christ, 667 So. 2d 180 (Fla. 1995);

- **Water and Sewer Line Extensions**: Murphy v. City of Port St. Lucie, 666 So. 2d 879 (Fla. 1995); and

- **Neighborhood Amenities**: City of Winter Springs v. State, 776 So. 2d 255 (Fla. 2001).

A few services and facilities have been deemed to not provide the requisite special benefit. These include a county hospital, Crowder v. Phillips, 1 So. 2d 629 (Fla. 1941), a county health unit, Whisnant v. Stringfellow, 50 So. 2d 885 (Fla. 1951), and emergency medical services, City of North Lauderdale v. SMM Properties, 825 So. 2d 343 (Fla. 2002).

XIII. HOME RULE TAX INCREMENT

On September 18, 2008, the Florida Supreme Court reversed its revised opinion rendered on September 28, 2007, in Strand v. Escambia County, 992 So. 2d 150 (Fla. 2008), and substituted a new opinion.[22] This September 18, 2008, substituted opinion reinstates the constitutional analysis first provided by the Court in State v. Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla.

[22]The Court had previously revised its original opinion of September 6, 2007, to remove from its scope any questions on the constitutionality of lease purchase and certificates of participation financings.

1980). Such reversal by the Court represents a landmark decision in support of the use of a tax exempt financing authorized by law or home rule ordinance.

The substituted opinion in Strand v. Escambia County reaffirmed the prior constitutional analysis by the Court in Miami Beach Redevelopment Agency on the basis of the doctrine of stare decisis.

In Miami Beach Redevelopment Agency, the Florida Supreme Court held that funds placed in the statutory community redevelopment trust fund created under the general law scheme in Chapter 163, Part II, Florida Statutes, lost their character as ad valorem taxes for purposes of constitutional elector approval requirements in Article VII, section 12, Florida Constitution. The Court's reasoning was that bonds secured by available trust fund revenues were not payable from ad valorem taxes since no bondholder had the power to compel the levy of ad valorem taxes or interfere with the budgetary discretion of a local governing board in the levy of ad valorem taxes. Under the reasoning of the Court, the statutory duty to make an annual contribution to the community redevelopment trust fund did not make the bonds payable from ad valorem taxes in the constitutional sense of that term. Thus, voter approval is not required for the pledge of trust fund revenues generated from an annual deposit in a trust fund of a defined tax increment.

The principles articulated in the State v. Miami Beach Redevelopment Agency decision were subsequently followed in precedent establishing the constitutional limits of when elector approval is required in the appropriation of ad valorem taxes. A pledge of ad valorem taxes in violation of Article VII, section 12, Florida Constitution, occurs when a bondholder or outside party can compel the exercise of the taxing authority or interfere with the budgetary discretion of the governing board or, where the ad valorem taxing power is indirectly pledged under a financing structure in a manner which will invariably lead to an increase in ad valorem taxation. See State v. Brevard County, 539 So. 2d 461 (Fla. 1989). For example, in County of Volusia v. State, 417 So. 2d 968 (Fla. 1982), the pledge of all non-ad valorem taxes coupled with a promise to maintain all programs generating the various revenues was held to have more than an incidental affect on the exercise of the taxing power.

Of equal significance is the fact that the Court in Strand v. Escambia County upheld a tax increment financing that was implemented by county ordinance to finance infrastructure improvements within a tax increment district consisting of a four-lane road widening project required to improve economic development within the area and to relieve traffic congestion. The creation of a tax increment trust fund by ordinance is not restricted to the general law formula contained in section 163.387(2)(a), Florida Statutes, for redevelopment projects. As an example, the ordinance could provide that the increment is measured only by a percentage of the prior year taxable value generated by new construction. As a further example, the ordinance can provide that the annual tax increment is calculated on an increase in the countywide taxable value or the increase in taxable value within a designated geographic area described in the ordinance.

As a consequence of a recent legislative change in the definition of "rolled-back" rate, the creation of a home rule tax increment does not diminish the ad valorem tax capacity otherwise available to a local government.

Amendments to section 200.001, Florida Statutes, added a new definition of "dedicated increment value" to be included in the rolled-back rate calculation provided in section 200.065, Florida Statutes. This new term "dedicated increment value" is defined in section 200.001(8)(h) as "the proportion of the cumulative increase in taxable value within a defined geographic area used to determine a tax increment amount to be paid to a redevelopment trust fund pursuant to s. 163.387(2)(a) or to be paid or applied pursuant to an ordinance, resolution, or agreement to fund a project or to finance essential infrastructure." Id. (emphasis added).

The portion of the cumulative increase in taxable value represented by a dedicated increment value is excluded from the calculation of the rolled-back rate which rate sets the base maximum ad valorem millage rates mandated in section 200.065, Florida Statutes.[23] Thus, the agreement to pay or apply a portion of the cumulative increase in taxable value within a defined geographic area by local government ordinance, agreement, or resolution does not reduce available ad valorem funds under the statutory ad valorem millage limitations set for local governments.

XIV. AD VALOREM TAXATION PRINCIPLES

This section is limited to discussing the authorization and limitations on the use of ad valorem taxes to provide local governmental services and does not include constitutional limitations and statutory provisions relating to the pledge of ad valorem taxes for the payment of debt or constitutional and statutory provisions relating to assessment principles and practices.

A. Constitutional and Statutory Provisions

Article VII, section 9(b), Florida Constitution, provides as follows:

[23]Generally, section 200.065(5), Florida Statutes, sets as the maximum millage rate for counties and municipalities that can be levied by a majority vote at the rolled-back rate established pursuant to section 200.065(1), Florida Statutes, as adjusted for growth in per capita Florida personal income. Such maximum millage rate can be exceeded by extraordinary vote or by referendum approved by the electors. The increase in the rolled-back rate by the portion of the cumulative increase in taxable value represented by a dedicated increment yields additional funds within the maximum millage rate imposed by a majority vote.

> Ad valorem taxes, exclusive of taxes levied for the payment of bonds and taxes levied for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation, shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: for all county purposes, ten mills; for all municipal purposes, ten mills; for all school purposes, ten mills; . . . and for all other special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation. A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

These constitutional millage limitations can be summarized as follows:

- Ten mills for municipal purposes.
- Ten mills for county purposes.
- To the extent authorized by law, a county furnishing municipal services may levy additional taxes within the limits fixed for municipal purposes. (See section entitled "Function of the Municipal Service Taxing and Benefit Unit Concept" for the criteria and functions of a municipal service taxing unit.)
- Special districts may levy a millage: (1) authorized by law, and (2) approved by voters.
- The ten mills for county purposes and municipal purposes may be exceeded if approved by electors: (1) for two years for general governmental purposes, and (2) for payment of bonds.

Article XII, section 2, Florida Constitution, provides:

> SECTION 2. Property taxes; millages.--Tax millages authorized in counties, municipalities and special districts, on the date this revision becomes effective, may be continued until reduced by law.

Article XII, section 15, Florida Constitution, provides:

> SECTION 15. Special district taxes.--Ad valorem taxing power vested by law in special districts existing when this revision

> becomes effective shall not be abrogated by Section 9(b) of Article VII herein, but such powers, except to the extent necessary to pay outstanding debts, may be restricted or withdrawn by law.

B. Function of the Municipal Service Taxing and Benefit Unit Concept

Section 125.01(1)(q), Florida Statutes, includes as an enumerated county power, the power to

> [e]stablish, and subsequently merge or abolish those created hereunder, municipal service taxing or benefit units for any part or all of the unincorporated area of the county, within which may be provided fire protection, law enforcement, beach erosion control, recreation service and facilities, water, streets, side-walks, street lighting, garbage and trash collection and disposal, waste and sewage collection and disposal, drainage, transportation, indigent health care services, mental health care services, and other essential facilities and municipal services from funds derived from service charges, special assessments, or taxes within such unit only. Subject to the consent by ordinance of the governing body of the affected municipality given either annually or for a term of years, the boundaries of a municipal service taxing or benefit unit may include all or part of the boundaries of a municipality in additional to all or part of the unincorporated areas. If ad valorem taxes are levied to provide essential facilities and municipal services within the unit, the millage levied on any parcel of property for municipal purposes by all municipal service taxing units and the municipality may not exceed 10 mills. <u>This paragraph authorizes all counties to levy additional taxes, within the limits fixed for municipal purposes, within such municipal service taxing units under the authority of the second sentence of s. 9(b), Art. VII of the State Constitution</u>.

<u>Id.</u> (emphasis added).

Section 125.01(1)(r), Florida Statutes, further enumerates the power to

> [l]evy and collect taxes, both for county purposes and for the providing of municipal services within any municipal service taxing unit, and special assessments; borrow and expend money; and issue bonds, revenue certificates, and other obligations of indebtedness, which power shall be exercised in such manner, and subject to such

> limitations, as may be provided by general law. There shall be no referendum required for the levy by a county of ad valorem taxes, both for county purposes and for the providing of municipal services within any municipal service taxing unit.

Id. (emphasis added).

A municipal service taxing unit is not constitutionally nor functionally a special district.[24] It is purely a mechanism by which a county can fund a particular service from a levy of ad valorem taxes, not countywide, but within all or a portion of the unincorporated areas. It is a tax equity tool available to a board of county commissioners within its legislative discretion to place the burden of ad valorem taxes upon a geographic area less than countywide to fund a particular service. In terms of function and accountability, it is no different than any other revenue source appropriated and budgeted by a county. In the county budget, the municipal service taxing unit is used to segregate the ad valorem taxes levied within the taxing unit to ensure that funds derived from such levy are used to provide the contemplated services. A better municipal service taxing unit analogy is the transportation trust fund created under section 336.022, Florida Statutes, which is used under section 129.02(2), Florida Statutes, in the county budget to account for transportation-related revenues and expenditures.

The distinction between a municipal service taxing unit and municipal service benefit unit is that "benefit unit" is the correct terminology when the mechanism used to fund the county service is a service charge or a special assessment rather than a tax. Again, both units are similar in that a municipal service benefit unit is a mechanism available to a board of county commissioners to identify a precise geographic area in the unincorporated area in which to impose such service charges and special assessments and is not a special district in function or in status. The municipal service benefit unit is used within the county budget to account for such special assessments and service charges to ensure that such funds are used to provide the county services for which they were imposed.

C. The Benefit Requirement for Use of Ad Valorem Taxes

As summarized previously, the general rule is that the questions of benefits and of unlawful burdens do not arise when the tax is uniform, for a public purpose, and within the power of the Florida Legislature to prescribe. Hunter v. Owens, 86 So. 839 (Fla. 1920); Jinkins v. Entzminger, 135

[24]For a constitutional comparison, see the statement of legislative intent provided in section 125.01(5)(c), Florida Statutes, relating to millage levy by a special district created by ordinance.

So. 785 (Fla. 1931); Dressel v. Dade County, 219 So. 2d 716 (Fla. 3d DCA 1969), cert. denied, 226 So. 2d 402 (Fla. 1969); and Tucker v. Underdown, 356 So. 2d 251 (Fla. 1978).

1. dual taxation concept

Article VIII, section 1(h), Florida Constitution, provides:

> (h) TAXES; LIMITATION. Property situate within municipalities shall not be subject to taxation for services rendered by the county exclusively for the benefit of the property or residents in unincorporated areas.

The Florida Supreme Court interpreted this "dual taxation" provision to prohibit the taxation of city-located property by a county where no "real and substantial" benefit accrues to municipal residents and property from the county service. Conversely, this provision permits such taxation where the service provides a real and substantial benefit to municipal property and residents. City of St. Petersburg v. Briley, Wild & Associates, Inc., 239 So. 2d 817 (Fla. 1970).

The benefit required to be received by municipal areas or residents, is not a "direct benefit" occurring within municipal areas, but may consist entirely of "indirect benefits." See Town of Palm Beach v. Palm Beach County, 460 So. 2d 879 (Fla. 1984). The dual taxation provision limits only the taxing of property within municipalities for services exclusively for the benefit of unincorporated areas; there is no comparable constitutional provision that limits the taxing of property within the unincorporated area for the benefit of the municipal area. See McLeod v. Orange County, 645 So. 2d 411 (Fla. 1994).

The dual taxation provisions of Article VIII, section 1(h), Florida Constitution, only limit the power of counties to expend ad valorem taxes not other county revenues. See Manatee County v. Town of Longboat Key, 365 So. 2d 143 (Fla. 1978). In response to the holding in Manatee County v. Town of Longboat Key, the Legislature adopted section 125.01(7), Florida Statutes, to include by statute all non-ad valorem county revenues in the "real and substantial" benefit expenditure limitation as follows:

> No county revenues, except those derived specifically from or on behalf of a municipal service taxing unit, special district, unincorporated area, service area, or program area, shall be used to fund any service or project provided by the county when no real and substantial benefit accrues to the property or residents within a municipality or municipalities.

Under this statutory provision, county revenues derived from or on behalf of the unincorporated areas are excluded. For example, section 218.64(1), Florida Statutes, provides:

> The proportion of the local government half-cent sales tax received by a county government based on two-thirds of the incorporated area population shall be deemed countywide revenues and shall be expended only for countywide tax relief or countywide programs. The remaining county government portion shall be deemed county revenues derived on behalf of the unincorporated area but may be expended on a countywide basis.

Other examples of unincorporated revenues are fees and charges imposed in the unincorporated area only and taxes such as the public service tax imposed only in the unincorporated area. See McLeod v. Orange County, 645 So. 2d 411 (Fla. 1994).

XV. STATUTORY AD VALOREM REVENUE LIMITATIONS

Notwithstanding the direction in Article VII, section 9(a), Florida Constitution, that, "Counties, school districts, and municipalities shall . . . be authorized by law to levy ad valorem taxes" within stated millage limitations, the Legislature adopted statutory maximum millage rates in section 200.065(5), Florida Statutes. Such millage limitations apply to the aggregate ad valorem revenues of local government, including dependent special districts and municipal service taxing units. This aggregation provision allows a local government to adjust district or MSTU millages to accommodate the revenue needs of the local government general fund.

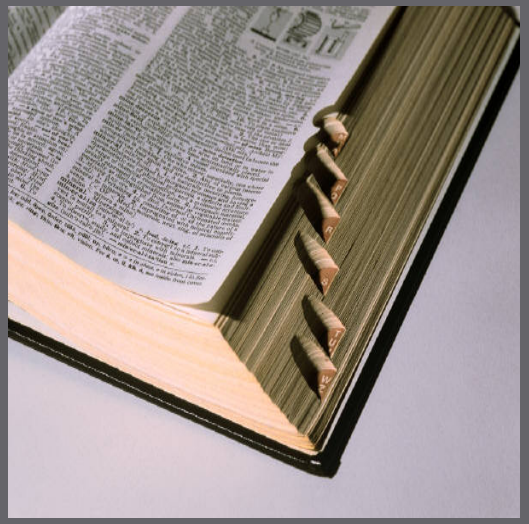
Generally, the maximum millage rate that may be levied shall be the rolled-back rate calculated pursuant to section 200.065(1), Florida Statutes, adjusted by the change in per capita Florida personal income. Such maximum millage rate may be exceeded by extraordinary vote or by referendum of the voters. Specific reference should be made to the statutory provisions in section 200.065(5), Florida Statutes, for the circumstances under which the maximum millage rate can be exceeded and for unique provisions relating to the calculation of taxable value within each jurisdiction.

September 2016

QUASI-JUDICIAL VS. LEGISLATIVE

Herbert W.A. Thiele, Esq.
Leon County Attorney

QUASI-JUDICIAL DEFINED



The action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.

Black's Law Dictionary 1245 (6th ed., West 1990).

HISTORICAL PATH TO *SNYDER*

General rule was that zoning and rezoning decisions by local governing boards were legislative acts, subject to the highly deferential "fairly debatable" standard of judicial review.

"Fairly debatable" rule is a "rule of reasonableness; it answers the question of whether, upon the evidence presented to the municipal body, the municipality's action is reasonably based." This required a reviewing court to sustain local government action as long as the action was determined to be reasonable as applied to the facts.

As a result, local zoning systems tended to develop in a "markedly inconsistent manner."

However, this general rule was not destined to last…

Fourth DCA, in following the Fifth DCA's lead in *Snyder*, found that the processing of site plans reviewed by local governments had been completely modified to be quasi-judicial. *Park of Commerce Associates and Land Resources Investment Company v. City of Delray Beach, et .al.*

Although the Second DCA adopted the functional analysis of *Snyder*, it disagreed that local governments had to show "clear and convincing" evidence. Only "substantial competent evidence" was required to show that an existing zoning classification was enacted in furtherance of some legitimate public purpose, and that the public interest was legitimately served by continuing the existing zoning classification. *See Lee County v. Sunbelt Equities, II, Ltd. Partnership*

On the other hand, First DCA specifically rejected *Snyder*, and instead reaffirmed that rezoning decisions were legislative in nature. *Board of County Commissioners of Leon County v. Monticello Drug Company*, 619 So. 2d 361 (Fla. 1st DCA 1993), et al.

These differing opinions caused much confusion… to resolve the conflicts and establish consistency, the Florida Supreme Court reviewed *Snyder.*

Florida Supreme Court held that a rezoning which entails application of a general rule or policy to specific individuals, interests or activities, is quasi-judicial in nature and subject to strict scrutiny on certiorari review. Snyder, 627 So. 2d 469.

"Root" case was a case in Oregon, *Fasano v. Board of County Commissioners*, 264 Or. 574, 506 P.2d 23 (Or. 1973).

SCOPE OF REVIEW

Quasi-judicial land use proceedings are properly reviewable by petition for certiorari

Scope of review for circuit court consists of 3 elements:

(1) Whether procedural due process was afforded;
(2) Whether the essential requirements of the law were observed; and
(3) Whether the administrative findings and judgment were supported by competent substantial evidence.

Circuit court performs a review, but does not sit as a trial court to consider new evidence or make additional findings

In its review of the circuit court's judgment, the District Court applies a two-pronged standard of review:

(1) whether procedural due process was accorded; and
(2) whether the correct law was applied.

District Court "may *not* review the record to determine whether the agency decision is supported by competent substantial evidence. "

Second-tier review is "extraordinarily limited" and not a second appeal.

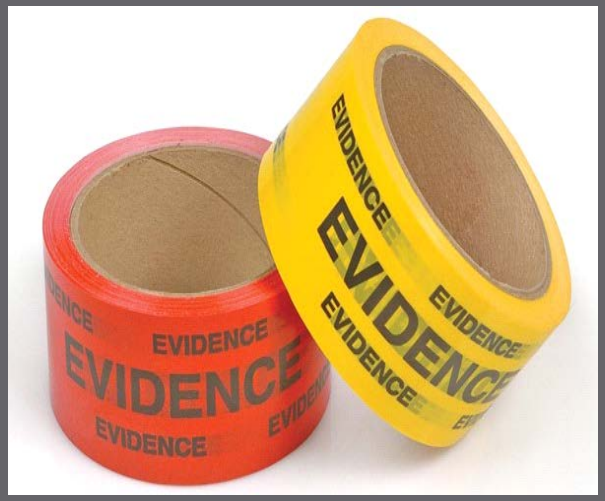
See Florida Power & Light Co. v. City of Dania, 761 So.2d 1089 (Fla. 2000)

COMPETENT SUBSTANTIAL EVIDENCE

That which is “sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached”

Not surmise, conjecture, speculation, or generalized statements that merely support or oppose a project

Expert testimony, comments & opinions of professional staff, are considered competent substantial evidence, & fact-based testimony of neighbors & lay persons is permissible



LEGISLATIVE VS. QUASI-JUDICIAL

Legislative acts generally broad-ranging and apply to larger segments of society

"It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. Generally speaking, legislative action results in the *formulation* of a general rule of policy, whereas judicial action results in the *application* of a general rule of policy."

Snyder, 627 So. 2d at 474 (citations omitted; emphasis in text)

COMP PLAN AMENDMENTS

Fourth DCA certified this question: "Can a rezoning decision which has limited impact under *Snyder*, but does require an amendment to the comprehensive land use plan, still be a quasi-judicial decision subject to strict scrutiny review?"

Florida Supreme Court said no: "We expressly conclude that amendments to comprehensive land use plans are legislative decisions. This conclusion is not affected by the fact that the amendments to comprehensive plans are being sought as part of a rezoning application in respect to one piece of property."

Martin County v. Yusem, 690 So. 2d 1288, 1293 (Fla. 1997).

Board of County Commissioners of Sarasota County v. Karp, 662 So. 2d 718 (Fla. 2d DCA 1995):

Second DCA held that a "corridor plan" adopted for a 5.5-mile parkway extension was a legislative act. The corridor plan, which affected 179 acres (including 48 separate parcels), was the formulation of general policy rather than the application of a previously determined policy. Also, the number of parcels affected was "fairly substantial."

SMALL SCALE AMENDMENTS

Small scale development amendments to a comprehensive plan are also legislative decisions subject to the fairly debatable standard of review. *Coastal Development of North Florida, Inc. v. City of Jacksonville Beach*, 788 So. 2d 204 (Fla. 2001).

(1) The original adoption of the comprehensive plan was a legislative act, thus it would follow that a proposed modification to the comprehensive plan was likewise a legislative act.

(2) The integrated review process by several levels of government indicated that the action was a policy decision.

EXECUTIVE VERSUS QUASI-JUDICIAL

Second DCA held that a city official's issuance of a building permit was an executive decision, not quasi-judicial. A local government decision is quasi-judicial, as distinguished from executive, "when notice and hearing are required and the judgment of the administrative agency is contingent on the showing made at the hearing."

Here, the city official made an executive decision; no hearing was conducted and there was no record to review. The circuit court departed from essential requirements of law when it relied on documents supplied by a neighboring property owner in an attempt to construct a record. *City of St. Pete Beach v. Sowa*, 4 So. 3d 1245 (Fla. 2d DCA 2009).

JUDICIAL VERSUS QUASI-JUDICIAL

Quasi-judicial hearings are said to be “akin to informal trials.” However, “quasi-judicial” does not imply that a quasi-judicial board possesses judicial power.

It is simply a characterization of the action itself – one that imposes certain obligations on the [quasi-judicial board] and that allows judicial review by way of certiorari proceedings in circuit court.

A quasi-judicial board is not empowered to rule on the validity of an existing ordinance. A city council or county commission may enact, amend, and repeal ordinances in its legislative function. But, “quasi-judicial boards do not have the power to ignore, invalidate or declare unenforceable the legislated criteria they utilize in making their quasi-judicial determinations.”

RECENT QUASI-JUDICIAL CASES

Alvey v. City of North Miami Beach

- Proposal to build hotel/office complex on 4.2 acres south of Greynolds Park
- Developers requested rezoning the parcel to permit building heights of up to 15 stories
- Planning and Zoning Board voted against the rezoning application
- City voted in favor of the rezoning application, citing economic benefits, job creation, increased tax base
- However, the City did not consider its zoning code, which required finding that the proposed rezoning would be consistent with and in scale with the established neighborhood land use pattern
- Circuit Court agreed w/ City but Third DCA quashed, finding that the Circuit Court failed to apply the correct law--the City's zoning code--resulting in miscarriage of justice


NE 183rd St
Oleta Dr
NE 25th Pl
Biscayne Blvd
NE 182nd St
NE 22nd Ave
NE 181st St
NE 21st Ave
NE 180th St
NE 179th St
Greynolds Park
BOATHOUSE
CHARLES BARON'S CONDOMINIUM
W Dixie Hwy
Aventura Plaza
Greynolds Park Golf Course
Greynolds Park
Point E Dr
West Lake
NE 174th Terrace
NE 174th St
PROPOSED DEVELOPMENT
© 2013 Google

Waterview Towers Condo. Assn., Inc. v. City of West Palm Beach

- City approved development orders to construct a 8-story hotel on a sub-parcel of land located along intracoastal waterway
- Petitioners were co-lessees of a sub-parcel but were not allowed to intervene and participate as a party to the project's application and approval process
- Petitioners were only allowed to be "participants" (which limited speaking to three minutes), rather than be a "party" (which would have provided the opportunity and time to present opposition and cross examine staff and witnesses)
- Circuit Court found that the petitioners, as co-lessees, were denied procedural due process
- Development orders were quashed

Harbor Marina Hotel
alm Beach, Florida

EAST ELEVATION

Bencivenga v. Osceola County

- County alleged that Bencivenga violated ordinances & Florida Building Code by failing to obtain building permits for four structures
- Petitioner asserted that the structures were nonresidential farm buildings that did not require building permits
- Code Enforcement Board found in favor of the County, circuit court affirmed
- Bencivenga petitioned Fifth DCA, but Fifth DCA denied his petition
- Court said that, although it "may be sympathetic to some of Bencivenga's arguments," it could not "second-guess" the circuit court's determination that the Board's decision was supported by competent, substantial evidence

Taxi USA of Palm Beach, LLC v. City of Boca Raton, Florida

- Taxi co. submitted application to the City to operate 30 new taxicabs in Boca Raton & there was a hearing on the application before a hearing officer
- Other taxi companies argued against the application, but hearing officer granted the application; taxi companies appealed to the City Council
- City Council considered additional evidence & voted to reverse the hearing officer's decision
- Applicant petitioned the circuit court, circuit court denied, applicant petitioned the Fourth DCA

- Applicant's main argument was that the City Council had allowed new evidence to be introduced at the hearing
- City Code / rules specifically allow new evidence
- Code does not require City Council to confine its deliberations to the record which was before the hearing officer
- Applicant did not cite any clearly established law that would prohibit this procedure
- Fourth DCA determined that the City Council was not precluded from considering new evidence, and that the applicant was not deprived of due process

Village of Palmetto Bay v. Palmer Trinity Private School, Inc.,
128 So. 3d 19 (Fla. 3d DCA 2012)

This dispute began back in 2006, with the school's plans to increase enrollment and expand its campus into a quiet residential neighborhood

School's application for rezoning was originally denied by the Village, but subsequently reversed in 2010 by the Third District Court of Appeal

In its application for a special exception, the School agreed to expand enrollment gradually from 600 to 1150 students, and Village staff recommended approval of this plan. However, Village Council changed the student cap to 900. Circuit Court mandated the cap be changed back. Village decided it was then free to deny the special exception altogether.

Third DCA stated that the Village's skewed interpretation of the circuit court's ruling "amounted to wishful thinking at best, and more likely a willful disobedience" of the court's instructions

Village Council finally approved the rezoning & allowed the student enrollment to increase to 1150 students; Village also accepted a settlement agreement with the School, including paying the School $200,000 for legal fees & giving $600,000 in credits for future building permit & inspection fees

On Sept. 26, 2014, Village Council approved the School's site plan

PAST QUASI-JUDICIAL CASES OF INTEREST

Dusseau v. Metro. Dade County Board of County Commissioners, 794 So. 2d 1270 (Fla. 2001).

Florida Supreme Court agreed with the DCA that the circuit court departed from the essential requirements of law when it reweighed evidence and substituted its own judgment.

Instead of reviewing the Commission's decision to determine whether it was *supported* by competent substantial evidence, the circuit court apparently reviewed the decision to see if it was *opposed* by competent substantial evidence.

DCA also erred when it reviewed the evidence. Second-tier certiorari review precludes the district court from assessing the record evidence.

"We reiterate that the 'competent substantial evidence' standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of the local agency. Rather, this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters. The issue before the court is not whether the agency's decision is the 'best' decision or the 'right' decision or even a 'wise' decision, for these are technical and policy-based determinations properly within the purview of the agency." *Dusseau*, 794 So. 2d at 1276.

As long as the record contains competent substantial evidence to support the agency's decision, the agency's decision is presumed lawful and the circuit court's job is over.

Seminole Entertainment, Inc. v. City of Casselberry, 811 So. 2d 693 (Fla. 5th DCA 2001).

Involved a municipal hearing by the City in which the business license of an adult entertainment establishment was revoked. Fifth DCA reversed the circuit court's decision; found that the license revocation hearing (which was a quasi-judicial hearing) by the City violated the due process rights of the adult entertainment establishment.

Fifth DCA determined that the business was denied the right to challenge the principal witness against it through cross-examination; also, the evidentiary rulings of the mayor presiding over the hearing reflected a bias so pervasive that it violated basic fairness.

Carillon Community Residential v. Seminole County, 45 So.3d 7 (Fla. 5th DCA 2010). Case was initiated after County approved a major amendment to a PUD, which allowed for a 7-story, 600 bed UCF student housing complex (NorthView) to be built on property adjacent to petitioners.

Circuit court upheld the approval, and residential association petitioned the Fifth DCA. DCA denied the petition, concluding that the circuit court afforded procedural due process and did not depart from essential requirements of law.

In the context of a quasi-judicial hearing, "it is important to distinguish between parties and participants." Although a *party* to a quasi-judicial hearing must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts, the same degree of due process does not apply to all *participants* in the proceedings.

Petitioners were able to present their witnesses, and Commission allowed the petitioners to pose questions to the Commission, which in turn would pose questions to the appropriate individuals.

QUASI-JUDICIAL POLICIES & PROCEDURES

Quasi-judicial proceedings are not controlled by strict rules of evidence and procedure. Nonetheless, certain standards of basic fairness must be adhered to in order to afford due process. Consequently, a quasi-judicial decision based upon the record is not conclusive if minimal standards of due process are denied. A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts.

Jennings v. Dade County, 589 So. 2d 1337, 1340 (Fla. 3rd DCA 1991), *rev. den.* 598 So. 2d 75 (Fla. 1992).

Practical considerations for preparing policies and procedures for conducting quasi-judicial hearings:

A. Notices
B. Standing / Citizen Participation
C. Staff Reports
D. Obtaining Additional Information
E. Conduct of Hearing
F. Evidence
G. The Record
H. Final Order
I. Maintaining Files

EX PARTE COMMUNICATION

Quasi-judicial proceedings do not require the same quality of due process as would a true court proceeding, though certain minimum standards of due process are required.

A quasi-judicial hearing will meet the basic due process requirements if: the parties are provided notice of the hearing, provided an opportunity to be heard, allowed to present evidence, allowed to cross-examine witnesses, and are *"informed of all of the facts upon which the commission acts*."

Jennings v. Dade County, 589 So.2d 1337, 1340 (Fla. 3d DCA 1991), *rev. den.* 598 So. 2d 75 (Fla. 1992) (emphasis supplied).

Fla. Stat. § 286.0115, in part, provides:

(1)(a) A county or municipality may adopt an ordinance or resolution removing the presumption of prejudice from ex parte communications with local public officials by establishing a process to disclose ex parte communications with such officials pursuant to this section or by adopting an alternative process for such disclosure. However, this section does not require a county or municipality to adopt any ordinance or resolution establishing a disclosure process.

* * *

(c) Any person not otherwise prohibited by statute, charter provision, or ordinance may discuss with any local public official the merits of any matter on which action may be taken by any board or commission on which the local public official is a member. If adopted by county or municipal ordinance or resolution, adherence to the following procedures shall remove the presumption of prejudice arising from ex parte communications with local public officials.

1. The substance of any ex parte communication with a local public official which relates to quasi-judicial action pending before the official is not presumed prejudicial to the action if the subject of the communication and the identity of the person, group, or entity with whom the communication took place is disclosed and made a part of the record before final action on the matter.

2. A local public official may read a written communication from any person. However, a written communication that relates to quasi-judicial action pending before a local public official shall not be presumed prejudicial to the action, and such written communication shall be made a part of the record before final action on the matter.

3. Local public officials may conduct investigations and site visits and may receive expert opinions regarding quasi-judicial action pending before them. Such activities shall not be presumed prejudicial to the action if the existence of the investigation, site visit, or expert opinion is made a part of the record before final action on the matter.

4. Disclosure made pursuant to subparagraphs 1., 2., and 3. must be made before or during the public meeting at which a vote is taken on such matters, so that persons who have opinions contrary to those expressed in the ex parte communication are given a reasonable opportunity to refute or respond to the communication. This section does not subject local public officials to part III of chapter 112 for not complying with this subsection.

CONSEQUENCES OF EX PARTE COMMUNICATION

If it is determined, either before a hearing or thereafter, that off-the-record communication, either verbal or written, has been made with board members, can this matter be cured in advance or re-reviewed by the same board?

If such a matter is presented for the first time during a court challenge, what is the consequence of the ex parte communication?

CONSEQUENCES OF EX PARTE COMMUNICATION

In *Jennings*, the Court stated:

"[U]pon remand [the applicant] shall be afforded an opportunity to amend his complaint. Upon such an amendment [the applicant] shall be provided an evidentiary hearing to present his prima facie case that ex parte contacts occurred. Upon such proof, prejudice shall be presumed. The burden will then switch to the respondents to rebut the presumption that prejudice occurred to the claimant. Should the respondents produce enough evidence to dispel the presumption, then it will become the duty of the trial judge to determine the claim in light of all of the evidence in the case."

ADVISING QUASI-JUDICIAL BOARDS

Fla. Atty. Gen. Op. 72-64. Attorney General advised that, in order to maintain fundamental fairness in administrative hearings, there should be a delegation of duties such that one attorney acts as a prosecutor while another serves as legal advisor to the board.

Cherry Communications, Inc. v. Deason, 652 So.2d 803 (Fla. 1995). Florida Supreme Court addressed the question of whether the same attorney who prosecutes a case on behalf of an agency may also serve to advise that agency in its deliberations:

"It is sufficient for us to point out that it would be in closer accord with traditional notions of justice and fair play for a quasi-judicial administrative board to designate one person to act as it legal adviser and a different person to act as its prosecutor."

A similar situation occurred more recently in *McAlpin v. Criminal Justice Standards and Training Commission,* 120 So. 3d 1260 (Fla. 1st DCA 2013).

At the hearing, there were two different attorneys for the agency, an advisory attorney for the commission as well as a prosecutorial attorney. During the hearing, however, the prosecutorial attorney offered both procedural advice and legal advice to the Commission, even though the Commission's advisory attorney was there.

Documents in the record also indicated that the prosecutorial attorney was operating in dual roles.

The Court said it was clear that the prosecution was given enhanced access to the decision-making body and that such “enhanced access undermined the Commission’s function as an unbiased, critical reviewer of the facts.”

Court did emphasize that there “was nothing inherently inappropriate with consolidating the investigative, prosecutorial and adjudicative authority in a single entity or agency,” but that the Court’s decision was predicated upon the facts of this particular case.

The Court concluded: “All future cases of this stripe must, correspondingly, be adjudicated on their unique circumstances; there is no bright line rule that can accurately address the full spectrum of potential factual scenarios.”

SPECIAL MASTERS

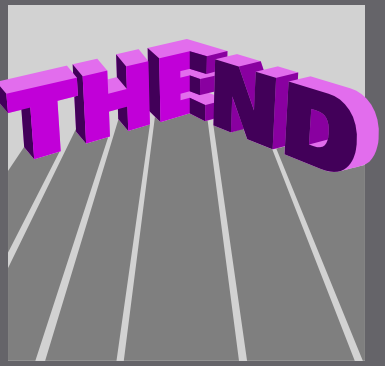
In 2002, the Florida Legislature adopted CS/SB's 1906 & 550, which forged a number of changes to Chapter 163.

Authorizes a local government to establish a "special master process" to address quasi-judicial proceedings associated with development order challenges. Special master or quasi-judicial process would afford more deference to the local government's decision if the decision is challenged.

SPECIAL MASTERS

If the special master process is implemented, the sole appeal method for the developer/applicant, or affected third party, is by certiorari review, which is limited to a review of the record created during the special master process to determine whether the local government's decision is supported by competent, substantial evidence.

If the special master process is not adopted, then both the developer/applicant and affected third party may challenge the local government's decision in a de novo hearing in circuit court.


THE END

QUASI-JUDICIAL VS. LEGISLATIVE

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I. INTRODUCTION

It has been over 20 years since the Florida Supreme Court rendered its landmark decision in the case of Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993), which changed how local governments are to review and process land development applications, particularly those regarding site specific rezonings and site and development plan approvals. The Florida Supreme Court determined that the old rule, that these decisions were legislative in nature, was inconsistent with the requirements set out in Florida's Growth Management Act as enacted in 1985. Pursuant to the Florida Supreme Court's decision in Snyder, the process for considering site specific rezoning applications and site and development plan approvals requires quasi-judicial proceedings, to be supported by the "competent substantial evidence" standard of review.

II. HISTORICAL PATH TO *SNYDER*

Historically, the general rule was that zoning and rezoning decisions by local governing boards were legislative acts, subject to the highly deferential "fairly debatable" standard of judicial review. For example, in the landmark zoning case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926), the U.S. Supreme Court held that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." See, Snyder, 627 So. 2d at 472. Moreover, the Florida Supreme Court had also expressly adopted the fairly debatable principle of judicial review for local zoning decisions. Id., citing City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (Fla. 1941).

The "fairly debatable" rule is a "rule of reasonableness; it answers the question of whether, upon the evidence presented to the municipal body, the municipality's action is reasonably based." Lee County v. Sunbelt Equities, II, Ltd. Partnership, 619 So. 2d 996, 1002 (Fla. 2d DCA 1993). This standard required a reviewing court to sustain the local government action as long as the action was determined to be reasonable as applied to the facts. See City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364, 366 (Fla. 1941). As a result, however, local zoning systems tended to develop in a "markedly inconsistent manner." See, Snyder, 627 So. 2d at 472.

This general rule was not destined to last, and its demise did come with some forewarning. There were several cases just prior to the Snyder decision that were indicative of how the courts in Florida were changing their views.

For example, in ABG Real Estate Development Company of Florida, Inc. v. St. Johns County, Florida, 608 So. 2d 59 (Fla. 5th DCA 1992), the Fifth District Court of Appeal set forth the position that the zoning authority must produce clear and convincing evidence of some public necessity in order to defeat a landowner's prima facie showing of entitlement to a particular use of his land. A short time later, the Fifth DCA reiterated this same position in the case of Snyder v. Board of County Commissioners of Brevard County, 545 So. 2d 65 (Fla. 5th DCA 1991).

The Fourth District Court of Appeal also followed the lead of the Fifth District, holding that the processing of site plans reviewed by local governments had been completely modified to be quasi-judicial. See Park of Commerce Associates and Land Resources Investment Company v. City of Delray Beach, et .al., 606 So. 2d 633 (Fla. 4th DCA 1992), aff'd, 636 So. 2d 12 (1994). The Fourth DCA, in receding from its prior decision in City of Boynton Beach v. VSH Realty, Inc., 443 So. 2d 452 (Fla. 4th DCA 1984), found that the procedure for site plan approval was administrative, quasi-judicial in nature, and subject to certiorari review.

Even though the Second District Court of Appeal adopted the functional analysis of the Snyder decision of the Fifth DCA, the Second District Court disagreed that local governments had to show "clear and convincing" evidence. Rather, only "substantial competent evidence" was required to show that an existing zoning classification was enacted in furtherance of some legitimate public purpose, and that the public interest was legitimately served by continuing the existing zoning classification. See Lee County v. Sunbelt Equities, II, Ltd. Partnership, 619 So. 2d 996, 1007 (Fla. 2d DCA 1993).

Then, in the case of Board of County Commissioners of Leon County v. Monticello Drug Company, 619 So. 2d 361 (Fla. 1st DCA 1993), the First District Court of Appeal specifically rejected the Snyder decision of the Fifth District, and instead reaffirmed that rezoning decisions were legislative in nature. See also Florida Land Co. v. City of Winter Springs, 427 So. 2d 170 (Fla. 1983); Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla. 1959); City of Jacksonville Beach v. Grubbs, 461 So. 2d 160 (Fla. 1st DCA 1984), rev. den. 469 So. 2d 749 (Fla. 1985).

These differing opinions by the district courts caused much confusion. In order to resolve the conflicts and establish consistency in the courts, the Florida Supreme Court reviewed Snyder. The Florida Supreme Court held that a rezoning which entails application of a general rule or policy to specific individuals, interests or activities, is quasi-judicial in nature and subject to strict scrutiny on certiorari review. Snyder, 627 So. 2d 469. The "root" case involved in expounding this stricter view was a case decided in Oregon, Fasano v. Board of County Commissioners, 264 Or. 574, 507 P.2d 23 (Or. 1973).

III. SCOPE OF REVIEW

As set forth by the Florida Supreme Court in Snyder, quasi-judicial land use proceedings are properly reviewable by petition for certiorari. 627 So. 2d at 474-475. The circuit court's certiorari review of a local government's quasi-judicial action is the first tier of judicial review, and the scope of review is akin to a direct appeal. See City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982). The Florida Supreme Court has explained that the scope of review for the circuit court, when reviewing the decision of a quasi-judicial body, consists of three elements, or prongs, as follows:

(1) whether procedural due process was accorded;
(2) whether the essential requirements of the law were observed; and
(3) whether the administrative findings and judgment were supported by competent substantial evidence.

Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089, 1092 (Fla. 2000), citing City of Deerfield Beach v. Vaillant, 419 So. 2d at 626. See also, Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995). The circuit court performs a review, but does not sit as a trial court to consider new evidence or make additional findings. Vichich v. Dept. of Highway Safety and Motor Vehicles, 799 So. 2d 1069, 1073 (Fla. 2d DCA 2001).

In addition, the review is subject to "strict scrutiny." Snyder, 627 So.2d at 475. For purposes of land use decisions, the Court explained that "[t]he term 'strict scrutiny' arises from the necessity of strict compliance with [the] comprehensive plan." Id. This is not the same "strict scrutiny" that is used for constitutional cases. Id.

Procedural due process, which is the first prong of certiorari review, requires reasonable notice of the quasi-judicial hearing and a fair and meaningful opportunity to be heard at same. Notice is adequate for due process concerns if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Little v. D'Aloia, 759 So. 2d 17, 19 (Fla. 2d DCA 2000) (citations omitted). It is not required that the affected person *receive* notice, only that the government *give* notice. See, Miami-Dade County v. Wilson, 44 So. 3d 1266, 1270 (Fla. 3d DCA 2010). As explained in Jennings v. Dade County, "[a] quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts." 589 So. 2d 1337, 1340 (Fla. 3rd DCA 1991), rev. den. 598 So. 2d 75 (Fla. 1992) (citations omitted).

The second prong of the court's certiorari analysis is to determine whether or not the essential requirements of the law were observed or applied. A ruling constitutes a departure from the essential requirements of law when it amounts to a "violation of a clearly established principle of law resulting in a miscarriage of justice." Miami-Dade Cnty. v. Omnipoint Holdings, Inc., 863 So. 2d 195, 199

(Fla. 2003). Clearly established law can be derived from a variety of legal sources, such as recent controlling case law, rules of court, ordinances, statutes, and constitutional law. City of Tampa v. City National Bank of Florida, 974 So. 2d 408, 410 (Fla. 2d DCA 2007), rev. den., 973 So. 2d 1120 (Fla. 2007). In quasi-judicial hearings it typically involves the interpretation and application of local ordinances. See Colonial Apartments, LP v. City of Deland, 577 So. 2d 593, 598 (Fla. 5th DCA 1991), rev. den. 584 So. 2d 997 (Fla. 1991) (the correct law applicable in the case was to give the zoning ordinance its plain and obvious meaning).

For the third prong of first-tier certiorari review, the circuit court should not re-weigh the evidence or substitute its judgment for that of the local governing authority. Dusseau v. Metro. Dade County Board of County Commissioners, 794 So. 2d 1270, 1275-76 (Fla. 2001). Further, the circuit court may not re-weigh the "pros and cons" of conflicting evidence. Id. at 1276. Lastly, the circuit court is limited to a review of the record that was made at the hearing before the local governing authority. Battaglia Fruit Co. v. City of Maitland, 530 So. 2d 940, 943 (Fla. 5th DCA 1988).

The second tier of judicial review occurs when the district court reviews the circuit court's decision. The district court of appeal applies a two-pronged standard of review, as follows: (1) whether procedural due process was accorded; and (2) whether the correct law was applied. Florida Power & Light Co. v. City of Dania, 761 So. 2d at 1092. As summarized by the First District Court of Appeal:

> The standard of review in certiorari proceedings in a district court of appeal when it reviews the circuit court's order under Florida Rule of Appellate Procedure 9.030(b)(2)(B) ... has only two discreet components. The inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law.

City of Jacksonville Beach v. Marisol Land Dev. Corp., 706 So. 2d 354, 355 (Fla. 1st DCA 1998) (citations omitted).

The district court "may *not* review the record to determine whether the agency decision is supported by competent substantial evidence." Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089, 1093 (Fla. 2000) (emphasis in text). Rather, second-tier review is "extraordinarily limited." Id. at 1092. Further, "second-tier certiorari review is not a second appeal." Miller v. Hernando County, 931 So. 2d 172, 173 (Fla. 5th DCA 2006).

IV. COMPETENT SUBSTANTIAL EVIDENCE

Pursuant to the Florida Supreme Court's decision in the Snyder case, the more difficult "competent substantial evidence" standard now applies to quasi-judicial actions. Competent substantial evidence is that which is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). On the other hand, however, "[s]urmise, conjecture or speculation have been held not to

be substantial evidence." Fla. Rate Conference v. Fla. R.R. and Pub. Utils. Comm'n, 108 So. 2d 601, 607 (Fla. 1959).

By way of example, the "competent substantial evidence" standard of review would place the initial burden upon the landowners/applicants to demonstrate to the decision-making body that their land use proposal complies with the requirements of the particular zoning code, and that the use sought is consistent with the local comprehensive plan. Such a showing gives the landowners/applicants a prima facie case that they are entitled to use the property in the manner they seek. The burden then shifts to the opposition (which may be the local governing board or a third party), which must present testimony and evidence to prove by "competent substantial evidence" that the applicant's request does not meet the required standards and is in fact adverse to the public interest. If the opposition carries its burden, the application should be denied. See Snyder, 627 So. 2d at 476. See also, Jesus Fellowship, Inc. v. Miami-Dade County, 752 So. 2d 708 (Fla. 3d DCA 2000) (explaining the principles applicable to special exceptions and unusual uses).

As a general rule, comments and opinions of professional staff, as well as expert testimony from non-staff professionals, would constitute competent substantial evidence upon which a local governing board may base a decision, provided there are facts in the record to support the comments and opinions. However, "[g]eneralized statements in opposition to a land use proposal, even those from an expert, should be disregarded." City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc., 857 So. 2d 202, 204 (Fla. 3d DCA 2003). And, "no weight may be accorded an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning." Div. of Admin. State Dep't of Transp. v. Samter, 393 So. 2d 1142, 1145 (Fla. 3d DCA 1981).

The testimony of neighboring land owners "is perfectly permissible and constitutes substantial competent evidence," so long as the testimony is fact-based. Miami-Dade County v. Walberg, 739 So. 2d 115, 117 (Fla. 3d DCA 1999), rev. dismissed, 763 So. 2d 1046 (Fla. 2000), citing Metropolitan Dade County v. Blumenthal, 675 So. 2d 598, 607 (Fla. 3d DCA 1995), rev. dismissed, 680 So. 2d 421 (Fla. 1996). See also Marion County v. Priest, 786 So. 2d 623 (Fla. 5th DCA 2001), rev. den. 807 So. 2d 655 (Fla. 2002) (fact-based testimony of property owners who opposed special use permit was admissible and could be considered substantial competent evidence).

However, generalized statements by neighbors and lay persons that merely support or oppose a project would not constitute substantial competent evidence. See Walberg, 739 So. 2d at 117. See also, Colonial Apts., L.P. v. City of Deland, 577 So. 2d 593, 596 (Fla. 5th DCA 1991) ("opinions of neighbors by themselves are insufficient to support denial of a proposed development"). Further, where technical expertise is required, lay opinion testimony is not considered to be valid evidence. Jesus Fellowship, Inc., 708 So. 2d at 710. As explained by the First DCA in Katherine's Bay, LLC v. Fagan,

> Lay witnesses may offer their view in land use cases about matters not requiring expert testimony. For example, lay witnesses may testify about the

> natural beauty of an area because this is not an issue requiring expertise. Lay witnesses' speculation about potential "traffic problems, light and noise pollution," and general unfavorable impacts of a proposed land use are not, however, considered competent, substantial evidence. Similarly, lay witnesses' opinions that a proposed land use will devalue homes in the area are insufficient to support a finding that such devaluation will occur. There must be evidence other than the lay witnesses' opinions to support such claims.

52 So. 3d 19, 30 (Fla. 1st DCA 2010). (Citations omitted.)

Also, arguments of attorneys who represent the parties in a quasi-judicial hearing would not constitute evidence, as "it is black letter law that argument of counsel does not constitute evidence." Romeo v. Romeo, 907 So.2d 1279, 1284 (Fla. 2d DCA 2005). However, it is conceivable that attorneys with other types of professional degrees and employment experiences could provide comments or opinions that would be considered as evidence.

V. LEGISLATIVE VS. QUASI-JUDICIAL

The Eleventh Circuit Court of Appeals has explained that legislative acts "generally apply to larger segments of – if not all of – society; laws and broad-ranging executive regulations are the most common examples." McKinney v. Pate, 20 F. 3d 1550, 1557, n. 9 (11th Cir. 1994). As explained by the Florida Supreme Court in Snyder:

> It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. Generally speaking, legislative action results in the *formulation* of a general rule of policy, whereas judicial action results in the *application* of a general rule of policy.

Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d at 474 (citations omitted; emphasis in text).

Thus, a rezoning / land use decision is quasi-judicial in nature when it impacts a limited number of persons of identifiable parties and interests, and when the decision can be viewed as policy application, rather than policy setting. In other words, decisions that implement an adopted policy will be considered quasi-judicial in nature. Examples of quasi-judicial functions include small scale rezoning actions, conditional use permits, reviews of variances, and decisions of local governments on building permits, site plans, and other development orders.

There are still some land use decisions which remain legislative rather than quasi-judicial. As stated previously, legislative acts typically apply to large segments of society. In the land use area this would include: comprehensive plan amendments; small scale development comprehensive plan amendments; enactments of original zoning ordinances; comprehensive rezonings that affect a large

portion of the public; adoption of land development regulations; decisions on developer agreements; issuance of debt instruments; and decisions on proportionate fair share agreements. See Snyder, 627 So. 2d at 474; See also Gary K. Hunter, Jr. and Douglas M. Smith, *ABCs of Local Land Use and Zoning Decisions*, 84 Fla. B.J. 20, n.3 (2010).

A. Comprehensive Plan Amendments.

1. In the case of Section 28 Partnership, Ltd. v. Martin County, 642 So. 2d 609 (Fla. 4th DCA 1994), rev. den., 654 So. 2d 920 (Fla. 1995), referred to as *Partnership I*, Martin County had refused to approve an application to amend its Comprehensive Growth Management Plan and Future Land Use Map, which would have enabled the developer to develop a parcel of land as a Planned Unit Development (PUD). The developer then sought certiorari relief in the circuit court, which was denied. The Fourth District Court of Appeal also denied the developer's petition for writ of certiorari, concluding that the county's decision to deny the Comprehensive Plan amendment was a legislative or policy making decision under Snyder, rather than quasi-judicial, and that the trial court did not err in concluding that certiorari relief was not available.

The subject parcel consisted of 638 acres (approximately one square mile), was zoned rural/agricultural, and was bordered on two sides by a state park and river preserve area. The District Court determined that, considering the pristine nature of the land in the park and around the river, the size of the park, and the use of the area by the public, the changes sought by the developer involved matters of policy and were thus subject to review under the "fairly debatable" standard. Id. at 612.

The same parties came before the Fourth District Court again in the case styled Martin County v. Section 28 Partnership, Ltd., 676 So. 2d 532 (Fla. 4th DCA 1996), rev. den. 686 So. 2d 581 (Fla. 1996), cert. den. 117 S. Ct. 1553 (1997), referred to as *Partnership II*. This time the trial court found that Martin County's denial of the Partnership's development request involved the application of adopted policy, which led the court to view the county's decision as a quasi-judicial action. The trial court also found that the county's refusal to grant the applications for development approval was arbitrary and capricious, and granted the developer injunctive relief and awarded damages in a total amount of $200,000. The Fourth District Court of Appeal reversed and remanded, holding that the trial court committed reversible error because it was obliged to review the county's denial of the application for an amendment to the comprehensive plan and future land use map under the "fairly debatable standard," which was applicable to a review of legislative action.

On remand, the circuit court held that the county's refusal to grant the developer's requested comprehensive plan amendments denied the developer substantive due process, and awarded the developer $4,750,000 in damages. However, the Fourth District Court of Appeal again reversed, and remanded for judgment to be entered in favor of Martin County. Martin County v. Section 28 Partnership, Ltd., 772 So. 2d 616 (Fla. 4th DCA 2000), rev. den. 794 So. 2d 606 (Fla. 2001), cert. den. 122 S. Ct. 922 (2002). The Fourth District Court of Appeal concluded that the case involved a legislative planning decision by the county to "maintain the status quo" in its comprehensive plan, and that there was abundant evidence supporting the county's decision, which was based upon a

legitimate interest in maintaining low densities in an environmentally sensitive area and accomplishing growth management goals for the subject property and the county as a whole. Further, as there was evidence in support of both sides of a comprehensive plan amendment, it was difficult to determine that the county's decision was anything but "fairly debatable." Id. at 621. Further review of this decision was denied by both the Florida Supreme Court and United States Supreme Court, and after nearly a decade of litigation, the matter was finally concluded.

2. In City Environmental Services Landfill, Inc. of Florida v. Holmes County, 677 So. 2d 1327 (Fla. 1st DCA 1996), the First District Court upheld the trial court's decision that most comprehensive plan amendments were legislative decisions. Petitioner was seeking to add a new element to the county's comprehensive plan to allow for landfills. The amendment was to have created an entirely new land use category that would have a county wide environmental impact, and was not site specific. The Court found that the county's decision to reject the comprehensive plan amendment was legislative and should be evaluated under the fairly debatable standard.

3. The 5th DCA in Younger v. City of Palm Bay, 697 So. 2d 589 (Fla. 5th DCA 1997), upheld the position that decisions not to amend the comprehensive plan were legislative and not quasi-judicial. Thus, certiorari was unavailable to review such decisions. The appropriate procedural device would be an action for declaratory judgment or injunction.

4. Also, early in 1995 the Fourth District Court found that the City of Delray Beach was performing a legislative, rather than quasi-judicial, function when it established a 2,000 acre redevelopment area in JFR Investment v. Delray Beach Community Redevelopment Agency, 652 So. 2d 1261 (Fla. 4th DCA 1995).

5. In Martin County v. Yusem, 664 So. 2d 976, 982 (Fla. 4th DCA 1995), the District Court certified this question to the Supreme Court: "Can a rezoning decision which has limited impact under Snyder, but does require an amendment to the comprehensive land use plan, still be a quasi-judicial decision subject to strict scrutiny review?" The Fourth DCA felt that this case was distinguishable, because amending the future land use map to increase the density on the 54 acre parcel would have a limited impact on the public. Thus, the Fourth DCA determined that the action taken by the county in regard to the comprehensive plan amendment was quasi-judicial.

However, the Florida Supreme Court reversed in part and answered the certified question in the negative, finding that amendments to a comprehensive plan adopted pursuant to Chapter 163 were legislative decisions subject to the "fairly debatable" standard of review. The Florida Supreme Court stated that:

> we expressly conclude that amendments to comprehensive land use plans are legislative decisions. This conclusion is not affected by the fact that the amendments to comprehensive plans are being sought as part of a rezoning application in respect to one piece of property.

Martin County v. Yusem, 690 So. 2d 1288, 1293 (Fla. 1997) (footnote omitted).

6. In the case of Board of County Commissioners of Sarasota County v. Karp, 662 So. 2d 718 (Fla. 2d DCA 1995), the Second District Court of Appeal, in quashing the circuit court's decision, held that a "corridor plan" adopted by Sarasota County for a 5.5-mile parkway extension was a legislative act. The Second DCA found that the corridor plan, which affected 179 acres (including 48 separate parcels), was the formulation of a general policy rather than the application of a previously determined policy. Further, the number of parcels affected was "fairly substantial." Id. at 720.

B. Small Scale Amendments.

1. In the case of Fleeman v. City of St. Augustine Beach, 728 So. 2d 1178 (Fla. 5th DCA 1998), the Fifth DCA held that an action by a town on an application for a small parcel comprehensive plan amendment was a "legislative function." Similarly, in the case of City of Jacksonville Beach v. Coastal Development of North Florida, Inc., 730 So. 2d 792 (Fla. 1st DCA 1999), the City's denial of a developer's application for a small-scale development amendment to the City's comprehensive plan was held to be legislative rather than quasi-judicial in nature. The First DCA went further, certifying the question to the Florida Supreme Court of whether small-scale development amendments were legislative in nature. 730 So. 2d at 795. See also Palm Springs General Hospital, Inc. v. City of Hialeah Gardens, 740 So. 2d 596 (Fla. 3d DCA 1999).

The Florida Supreme Court answered the certified question, holding that small scale development amendments to the comprehensive plan were legislative decisions which are subject to the fairly debatable standard of review. Coastal Development of North Florida, Inc. v. City of Jacksonville Beach, 788 So. 2d 204 (Fla. 2001). The Florida Supreme Court further concluded that the reasoning set forth in Yusem also applied to small scale development amendments, in part because (1) the original adoption of the comprehensive plan was a legislative act, thus it would follow that a proposed modification to the comprehensive plan was likewise a legislative act, and (2) the integrated review process by several levels of government indicated that the action was a policy decision. 788 So. 2d at 208.

2. Around the same time that the Florida Supreme Court rendered its decision in the Coastal Development case, the Court also made a ruling in Minnaugh v. County Commission of Broward County, 783 So. 2d 1054 (Fla. 2001). In Minnaugh, the Florida Supreme Court affirmed the decision of the Fourth District Court of Appeal, holding that small scale development amendment decisions were legislative in nature and subject to the fairly debatable standard of review. In this case, the petitioners owned a 4.3 acre parcel of land and applied to the Broward County Commission for a small-scale amendment that would change the use of their property from "agricultural" to "employment center." The Broward County Commission denied the petitioners' application for the small-scale amendment, and the petitioners filed a complaint in circuit court for a writ of common law certiorari, a writ of mandamus, and in the alternative, declaratory and injunctive relief. The circuit court dismissed the certiorari and mandamus complaints. On appeal, the Fourth

District Court agreed with the circuit court, holding that decisions on small-scale amendments to local comprehensive land use plans were legislative in nature and thus not subject to certiorari review. The Appeals Court reiterated that small-scale amendment decisions were reviewable by a de novo action seeking declaratory or injunctive relief under the fairly debatable standard of review.

3. The case of Island, Inc. v. City of Bradenton Beach, 884 So. 2d 107 (Fla. 2d DCA 2004), involved the denial by the city commission of a petition to amend the comprehensive plan to permit construction of a duplex on each of two lots. The landowners sought to change the designation of their property on the future land use map from preservation, a classification which permits no development, to medium/high residential/tourist. The circuit court affirmed the city commission's decision, but the District Court of Appeal reversed, holding that the landowners were entitled to a small scale amendment to change the designation of their property. The Second DCA determined that the trial court erred in finding that the city's denial of the petition was fairly debatable. Rather, the evidence before the city commission included expert testimony, including the city's own land planner, showing that the designation of the property as preservation was erroneous because the property did not meet the definition of preservation. In addition, evidence was presented that the county had taxed the property as residential property, and the mayor's son had been issued a license to operate a sailboard rental business on the property, which was not allowed on preservation property.

4. In the case of D.R. Horton, Inc.--Jacksonville v. Peyton, 959 So. 2d 390 (Fla. 1st DCA 2007), a developer petitioned the circuit court for a writ of quo warranto, asserting that the mayor of the City of Jacksonville exceeded his authority when he vetoed a resolution of the city council which approved a fair share assessment contract. The fair share assessment contract provided that the developer would pay for the cost of roadway improvements to accommodate the developer's proposed development. The city council approved the resolution by a vote of 11 to 8, but the mayor timely vetoed it, explaining, among other things, that the proposed roadway improvements would be inadequate to address the traffic impacts to the other affected roadway links. The city council reconsidered the matter, but failed to override the mayor's veto by a vote of 2 to 16. The circuit court subsequently granted summary judgment in favor of the mayor, and on appeal the First District Court of Appeal affirmed, holding that the city council's resolution which approved the fair share assessment contract was legislative in nature and thus subject to the mayor's veto power.

The City of Jacksonville has a "strong mayor" form of government, and the city's charter allows the mayor to veto any ordinance or resolution adopted by the city council, except for those relating to, among other things, quasi-judicial decisions made by the city council. Therefore, the question became whether or not the council's decision to approve the developer's fair share contract was legislative in nature and thus subject to the mayor's veto power. The First District Court concluded that the matter was a legislative function, because consideration of the fair share assessment contract required the city council, and later the mayor, to evaluate the likely impact of the contract on the provision of local services, on its planned capital expenditures, and on its overall plan for the managed growth and future development of the surrounding area. The Court found that determining whether to approve the contract "involved considerations well beyond" the actual

development. Id. at 400. Further, under the express terms of the fair share assessment contract, the necessary roadway additions would have required amendments to the city's Comp Plan.

VI. EXECUTIVE VERSUS QUASI-JUDICIAL

The Eleventh Circuit Court has explained that:

> Executive acts characteristically apply to a limited number of persons (and often to only one person); executive acts typically arise from the ministerial or administrative activities of members of the executive branch.

McKinney v. Pate, 20 F. 3d 1550, 1557, n. 9 (11th Cir. 1994). "A duty or act is defined as ministerial when there is no room for the exercise of discretion, and the performance being required is directed by law." *See Town of Manalapan v. Rechler*, 674 So. 2d 789, 790 (Fla. 4th DCA 1996).

When an executive, such as the county manager, has been delegated the sole authority to make a decision, and makes said decision without conducting a hearing, then "there is nothing for the circuit court to review." Lee County v. Harsh, 44 So. 3d 239, 242 (Fla. 2d DCA 2010). On the other hand, when notice and a hearing are required, and the judgment of an official is contingent on the showing made at the hearing, then the judgment becomes quasi-judicial, as distinguished from purely executive. Id.

For example, a contract award is the exercise of an executive function, rather than a quasi-judicial act subject to certiorari review. MRO Software, Inc. v. Miami-Dade County, 895 So. 2d 1086 (Fla. 3d DCA 2004). See also Charles M. Schayer & Co. v. Board of County Commissioners of Dade County, 188 So. 2d 871 (Fla. 3d DCA 1966) (port authority's act of leasing store space was not judicial or quasi-judicial).

In another case, City of St. Pete Beach v. Sowa, 4 So. 3d 1245 (Fla. 2d DCA 2009), the Second District Court of Appeal held that a city official's issuance of a building permit for the repair of an apartment building was an executive decision, not a quasi-judicial decision; therefore, the circuit court lacked certiorari jurisdiction to review the matter and quash the building permit. The District Court explained that a local government decision is judicial or quasi-judicial, as distinguished from executive, "when notice and hearing are required and the judgment of the administrative agency is contingent on the showing made at the hearing." 4 So. 3d at 1247. (Citation omitted.) Here, a single city official made an executive decision to grant the building permit, and no hearing was conducted. Therefore, the circuit court had no record to review. When the circuit court relied on documents supplied by a neighboring property owner in an attempt to construct a record, the court departed from the essential requirements of law.

In the case of Fisher Island Holdings, LLC v. Miami-Dade County Commission on Ethics and Public Trust, 748 So. 2d 381 (Fla. 3d DCA 2000); the Third District Court of Appeal held that a decision by the Miami-Dade County Commission on Ethics (which was created by Miami-Dade

County to enforce the various county and municipal ethics ordinances) that a complaint was legally insufficient, was a non-reviewable, quasi-executive decision. The Third DCA agreed with the circuit court's reasoning that the Commission's decision was akin to a prosecutor's determination not to file an information or to seek an indictment in a criminal action, which is a decision long been held to be completely discretionary and not subject to judicial interference. 748 So. 2d at 382. See also Sirgany International, Inc. v. Miami-Dade County, 845 So. 2d 1017, 1018 (Fla. 3d DCA 2003) (Miami-Dade's Inspector General does not exercise any judicial or quasi-judicial functions, but only makes recommendations to various boards). See also, Gershman v. Florida Elections Commission, 127 So. 3d 686 (Fla. 4th DCA 2013) (Florida Elections Commission's dismissal of alleged elections violation complaint as legally insufficient was a non-reviewable, quasi-executive action).

VII. JUDICIAL VERSUS QUASI-JUDICIAL

Pursuant to Article V, Section 1 of the Florida Constitution, "Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices."

Quasi-judicial hearings are said to be "akin to informal trials." Hunter, Jr. and Smith, 84 Fla. B.J. 21. However, as explained by the Second District Court of Appeal in the case of Verizon Wireless Personal Communications, L.P. v. Sanctuary at Wulfert Point Community Association, Inc., 916 So. 2d 850 (Fla. 2d DCA 2005), the term "quasi-judicial" does not imply that a quasi-judicial board possesses judicial power. Rather, "it is simply a characterization of the action itself – one that imposes certain obligations on the [quasi-judicial board] and that allows judicial review by way of certiorari proceedings in circuit court." Id. at 855.

A quasi-judicial adjudicatory act is one in which a rule or policy is applied to a specific set of existing facts. Kucharczyk v. Regents of the University of California, 946 F. Supp. 1419, 1436 (N.D. Cal. 1996). Types of quasi-judicial decisions that apply policy to a specific property development application include: site-specific rezonings, site plan approvals, variances, special exceptions, and voluntary annexations. Hunter, Jr. and Smith, 84 Fla. B.J. 21 and n. 7.

A quasi-judicial board is not empowered to rule on the validity of an existing ordinance. To be sure, a city council or county commission may enact, amend, and repeal ordinances in its legislative function. Verizon Wireless, 916 So. 2d at 855. But, as enunciated by the court in Miami-Date County v. Omnipoint Holdings, Inc., 863 So. 2d 375, 377 (Fla. 3d DCA 2003), "quasi-judicial boards do not have the power to ignore, invalidate or declare unenforceable the legislated criteria they utilize in making their quasi-judicial determinations."

VIII. RECENT QUASI-JUDICIAL CASES

1. Alvey v. City of North Miami Beach, ___ So.3d ___, 2015 WL 8937617 (Fla. 3d DCA, Dec. 16, 2015). This case involved a proposal to build two 10-story hotel buildings, plus a six-story office building and four-story parking garage on 4.2 acres immediately south of Greynolds

Park, a 249-acre park. The parcel had previously housed a one and two-story nursing home, but had been vacant and overgrown for years. The parcel is located in two zoning districts, and the zoning districts have a three-story height restriction. The areas around the proposed development consist of residential, parks, limited business (two-story height restriction), and open space. The developers requested the City to rezone the subject parcel to a broader business designation which would permit building heights of up to fifteen stories. The City's Planning and Zoning Board voted against the proposed rezoning application, which then proceeded to the City Council.

At the first meeting the City voted in favor of the rezoning application. At the second meeting, nearby residents appeared and spoke in opposition to the rezoning application. The developer made no presentation at either of the first two meetings, and the City voted to table the application. However, at the third and final meeting on the rezoning application, the developer did present two experts. Numerous neighbors objected to the rezoning in person and in writing, but the City unanimously approved the rezoning, citing economic benefits such as job creation and an increased tax base. However, the City did not consider its zoning code, which required that the City find that the proposed rezoning would be consistent with and in scale with the established neighborhood land use pattern. The objecting neighbors sought first-tier certiorari review of the City's rezoning decision, but the Circuit Court affirmed the City's decision. However, upon second-tier certiorari review, the Third DCA quashed, finding that the Circuit Court failed to apply the correct law-the City's zoning code-which resulted in a miscarriage of justice.

2. Waterview Towers Condominium Association, Inc. v. City of West Palm Beach, Case No. 2014CA0011943 (15th Judicial Circuit, Palm Beach County, Oct. 9, 2015). This case involved the approval by the City of development orders to construct an 8-story hotel on a sub-parcel of land located along the intracoastal waterway. The City owns the entire parcel of land, but has leased the land since 1968. As a result of various lease amendments and official acts by the City, the developer, one other party, and petitioners are "co-lessees" of the entire parcel. The developer and another party lease two commercial sub-parcels, and the petitioners lease a sub-parcel that contains a 22-story condominium building. It is the commercial sub-parcel leased by the developer that is the subject of litigation.

The developer's plans, including applicable rezoning, were approved by the City's Planning Board and the matter was set for a meeting and vote of the City Commission. The petitioners sent the City a petition seeking to intervene and participate as a party to the project's application and approval process. However, this was denied. As a result, at the two Commission meetings on the matter, the petitioners could only speak as "participants" (thus limiting their speaking to three minutes), rather than as a "party" (which would have afforded the opportunity and time to present opposition and cross examine staff and witnesses). The City subsequently approved the project, and the petitioners sought the certiorari review of the Circuit Court. The Circuit Court found that the petitioners were denied procedural due process, because the petitioners, as "co-lessees," should have been afforded party status to participate in the zoning proceeding. Accordingly, the development orders were quashed.

3. Bencivenga v. Osceola County, 140 So. 3d 1035 (Fla. 5th DCA 2014). This case involved a code enforcement board issue. The County alleged that Bencivenga violated the County's ordinances, as well as the Florida Building Code, by failing to obtain building permits for four structures on his property. Bencivenga asserted that the buildings were nonresidential farm buildings that did not require building permits. The Code Enforcement Board found in favor of the County, and Bencivenga appealed to the circuit court. The circuit court affirmed the Code Enforcement Board's order, holding that Bencivenga was afforded procedural due process, that the Board's findings and conclusion did not depart from the essential requirements of law, and that the findings and conclusion were based on competent, substantial evidence. Bencivenga then petitioned the Fifth DCA, but the Fifth DCA denied his petition. The Court stated that, although it "may be sympathetic to some of Bencivenga's arguments," the Court could not "second-guess" the circuit court's determination concerning whether or not the Code Enforcement Board's decision was supported by competent, substantial evidence. 140 So. 3d at 1036.

4. Taxi USA of Palm Beach, LLC v. City of Boca Raton, Florida, 162 So. 3d 119 (Fla. 4th DCA 2014). This case involved a request by a taxi company for a certificate to operate 30 new taxicabs in Boca Raton. After the taxi company submitted its application to the City, the matter was set for a hearing before a hearing officer. At the hearing, other taxi companies argued against the application; however, the hearing officer found in favor of the applicant and granted its application. The other taxi companies then appealed the hearing officer's decision to the City Council. After considering additional evidence and arguments, the City Council voted to reverse the hearing officer's decision. The applicant petitioned the circuit court, but the circuit court denied the petition, and the applicant petitioned the Fourth DCA.

The applicant's main argument was that the City Council had allowed new evidence to be introduced at the hearing before the City Council. The City Code and its rules specifically allow new evidence, and the City further asserted that there was nothing in the Code that required the City Council to confine its deliberations to the record which was before the hearing officer. Further, the applicant did not cite any clearly established law that would prohibit this procedure. The Fourth DCA determined that the City Council was not precluded from considering new and different evidence, and that the applicant was not deprived of due process. Accordingly, the Court denied the applicant's petition.

5. Village of Palmetto Bay v. Palmer Trinity Private School, Inc., 128 So. 3d 19 (Fla. 3d DCA 2012). At the heart of this dispute, which first began in 2006, was the school's plans to increase its student enrollment and expand its campus onto 32 acres located in a quiet residential neighborhood. The project required an application for rezoning (that was originally denied by the Village but subsequently reversed in 2010 by the Third District Court of Appeal), as well as a request for a special exception and non-use variance. In its effort to acquire approval of the special exception application, the school agreed to expand its enrollment gradually from 600 students to 1150 students over a period of years, rather than expanding to 1400 students as originally planned.

Staff for the Village recommended approval of the school's request to increase the student enrollment from 600 to 1150 students. However, although the Village Council decided to approve the request for a special exception, the Council also decided to cap the enrollment at 900 students, rather than 1150 students, even though the 900 figure had never been posed before. The school filed a petition with the circuit court, arguing that the 900 student cap was not supported by competent substantial evidence and constituted a departure from the essential requirements of law. The circuit court agreed with the school and ordered the removal of the 900 student cap. The Village then claimed that although it would comply with the court's ruling and drop the 900 student cap, the Village was also free to deny the special exception request altogether, and the Village Council subsequently did just that.

More trips to court ensued, resulting in a court order for the Village to follow the circuit court's mandate. The Village petitioned the Third District Court of Appeal, but the Third DCA denied the petition, holding that the circuit court did not depart from the essential requirements of law when it ordered the Village to comply with its previous mandate. Further, the Third DCA stated that the Village's skewed interpretation of the circuit court's ruling "amounted to wishful thinking at best, and more likely a willful disobedience of that court's instructions." Id. at 29.

After losing the appeals, the Village Council finally approved the school's rezoning request and allowed the student enrollment to increase to 1,150 students. On September 9, 2013, the Village Council also voted 3-2 to accept a settlement agreement with the school. The terms of the settlement included $200,000 to be paid by the Village to the school for legal expenses, $600,000 in credit to be given to the school for future building permit and inspection fees, and waiver of the site plan fees. In addition, the school was allowed to have a 50-foot landscape buffer (rather than 75-foot), plus allowed to have lights installed at all athletic fields, which must be turned off at 8:30 p.m. The school agreed to commission a traffic study once the enrollment reached 900 students plus pay for any needed traffic improvements as a result of the study.

The latest on this matter is that on September 26, 2014, the Village Council approved the school's site plan.

IX. PAST QUASI-JUDICIAL CASES OF INTEREST

1. By applying the law rendered in the Florida Power & Light Co. v. City of Dania decision, the First District Court of Appeal in City of Jacksonville Beach v. Car Spa, Inc., 772 So. 2d 630 (Fla. 1st DCA 2000), concluded that the circuit court incorrectly reweighed evidence and substituted its judgment for that of the Planning Commission. In this case, Car Spa filed an application for a conditional use permit, but after the public hearing and presentation of evidence, the Planning Commission denied the permit. The circuit court subsequently quashed the decision of the Planning Commission. However, upon appeal the First District reversed, and instructed on remand that "the circuit court shall determine whether the record before it contains competent substantial evidence supporting the Planning Commission's decision to deny the conditional use, without reweighing the evidence, or substituting its judgment for that of the Planning Commission."

2. In the case of Dusseau v. Metro. Dade County Board of County Commissioners, 794 So. 2d 1270 (Fla. 2001), the Florida Supreme Court again explained the tiers of certiorari review as outlined in Florida Power & Light Co. v. City of Dania. First, the Florida Supreme Court agreed with the District Court of Appeal that the circuit court departed from the essential requirements of law when it reweighed evidence and substituted its own judgment. (In fact, instead of reviewing the Commission's decision to determine whether it was *supported* by competent substantial evidence, the circuit court apparently reviewed the decision to see if it was *opposed* by competent substantial evidence. 794 So. 2d at 1275). The Florida Supreme Court further noted that the District Court also erred when it reviewed the evidence, as the second-tier certiorari review precludes the district court from assessing the record evidence. In other words, the "competent substantial evidence" component is part of the first tier of review, but not the second tier of review. In rendering its opinion, the Florida Supreme Court stated as follows:

> We reiterate that the "competent substantial evidence" standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of the local agency. Rather, this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters. The issue before the court is not whether the agency's decision is the "best" decision or the "right" decision or even a "wise" decision, for these are technical and policy-based determinations properly within the purview of the agency.

794 So. 2d at 1276. Thus, as long as the record contains competent substantial evidence to support the agency's decision, the agency's decision is presumed lawful and the circuit court's job is over.

3. In the case of City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc., 857 So. 2d 202 (Fla. 3d DCA 2003), the Third DCA quashed the decision of the circuit court, finding that the circuit court had substituted its judgment as to the weight of the evidence for that of the City Council. The DCA stated that the "issue before the [circuit] court is not whether the agency's decision is the 'best' decision or the 'right' decision or even a 'wise' decision, for these are technical and policy-based determinations properly within the purview of the agency." 857 So. 2d at 206. Rather, the "sole issue before the court on first-tier certiorari review is whether the agency's decision is lawful." Id.

4. In another case, Miami-Dade County v. Omnipoint Holdings, Inc., 863 So. 2d 195 (Fla. 2003), the Florida Supreme Court quashed the decision of the Third District Court of Appeal, and held that the District Court exceeded the proper scope of second-tier review when it, sua sponte, found that portions of the county code were facially unconstitutional. The background of this case involved an application by Omnipoint for an "unusual use" exception to the Miami-Dade County zoning ordinances in order to erect a 148-foot (fourteen-story) telecommunications monopole. Although county staff recommended that the zoning board approve the request, the zoning board

denied the application, finding as follows:

> [T]he requested modification, … unusual use, … and non-use variance of zoning regulations … would not be compatible with the area and its development and would not be in harmony with the general purpose and intent of the regulations and would not conform with the requirements and intent of the Zoning Procedure Ordinance and the requested unusual use … would have an adverse impact upon the public interest and should be denied without prejudice.

863 So. 2d at 197, 198.

On certiorari review, the circuit court quashed the zoning board's decision, holding that the board's decision was unsupported by competent, substantial evidence, and further, constituted unlawful discrimination under the Federal Communications Act. On second-level certiorari review, the Third DCA found no error in the circuit court's opinion. However, the Florida Supreme Court subsequently found that the Third DCA exceeded the proper scope of review when it, sua sponte, declared the ordinances in question unconstitutional, and the case was remanded.

Upon remand, the Third District Court of Appeal held that the trial court could not consider the Federal Telecommunications Act when considering the petition for certiorari, and that the District Court of Appeal could not review the sufficiency of the evidence to support the zoning board's decision, but rather could only review whether the trial court applied the correct law to the information offered to the zoning board as evidence. Thus, the County's petition for writ of certiorari was denied. Miami-Dade County v. Omnipoint Holdings, Inc., 863 So. 2d 195 (Fla. 2003).

5. The case of Verizon Wireless Personal Communications, L.P. v. Sanctuary at Wulfert Point Community Association, Inc., 916 So. 2d 850 (Fla. 2d DCA 2005), involved a dispute over the City of Sanibel's approval of an application to place a telecommunications tower on City-owned property. The tower was to be located on property that already housed a wastewater treatment facility. The City approved the application based on its 1999 telecommunications ordinance, which encouraged the placement of towers in "telecommunications tolerant areas," which included the subject property. A neighboring homeowners' association opposed the application and filed a petition for certiorari in circuit court. The homeowners' association argued that a prior settlement agreement between the City and the developer, and the resulting planned unit development (PUD) ordinance, governed the development of the parcel. The association also argued that using the property for a telecommunications tower was contrary to the plat's existing use designation as a wastewater treatment plant. The circuit court agreed on all points, and further held that the City was equitably estopped from approving Verizon's application.

A petition for writ of certiorari was then filed by Verizon. The Second District Court of Appeal granted the petition and quashed the circuit court's order, holding as follows: (1) that the City

Council was obligated to apply its telecommunications ordinance when deciding whether to grant the application; (2) that the dedication of the property for wastewater treatment did not preclude the city from allowing the tower; and (3) that the circuit court's application of equitable estoppel was a departure from the essential requirements of law.

6. In another case, Clay County v. Kendale Land Development, Inc., 969 So. 2d 1177, (Fla. 1st DCA 2007), the First District Court of Appeal granted the county's writ of certiorari, finding that the trial court departed from the essential requirements of law when it conducted an independent review of the administrative record. In this case, the land developer had obtained a Concurrency Reservation Certificate (CRC) which, in essence, "reserved" approval for the development. However, because the developer did not obtain approval of the preliminary plat within six months of issuance of the CRC, the CRC expired. After the expiration of the CRC there was an email exchange between the developer and Chief Planner wherein the Chief Planner stated that concurrency was okay. The Chief Planner made this comment on the assumption that the final plat acceptance was the only condition that had not already been met, when in actuality the developer had not submitted the preliminary plat, much less the final plat. In any event, the CRC expired and when the developer reapplied, the application was denied because of a lack of available concurrency. The county also told the developer that it could obtain a new CRC if it paid a "fair share assessment" for transportation concurrency in the amount of $625,203.

The developer subsequently sought an administrative appeal, contending that the county was estopped from denying the validity of the CRC, or, alternatively, estopped from requiring payment of the fair share assessment for the new CRC. The hearing officer rejected the developer's arguments and found that the CRC expired solely as the result of negligence on the part of the developer.

The developer then filed a petition for writ of certiorari in the circuit court, and the circuit court concluded that competent substantial evidence supported a conclusion that even though the CRC had in fact expired, the hearing officer had erroneously concluded that the developer had failed to establish equitable estoppel. The trial court affirmed the County's denial of concurrency upon the condition that Kendale be allowed to pay a fair share in the amount of $190,414. The county then sought certiorari relief with the District Court of Appeal, which found that the circuit court had only two options, either deny the petition or grant it. However, the trial court entered judgment on the merits, fashioning what it believed to be an equitable remedy; thus, the District Court quashed the trial court's order and remanded the matter for further proceedings applying the correct law.

7. In the case of Buck Lake Alliance, Inc., et al. v. Board of County Commissioners of Leon County, Florida, et al. (Circuit Court Case No. 97-4892), the Circuit Court, Second Judicial Circuit, entered a Final Summary Judgment in favor of Leon County. This action was one of four filed by the Plaintiffs to prevent construction and development activities on a project in Leon County known as Marsh Landing. In this case, the Planning Commission found that the project complied with the Comprehensive Plan and Leon County Ordinances regarding stormwater impacts, water quality, protection of the environment, etc. The County Commission also subsequently approved of the project's preliminary site / development plan. The Circuit Court found as follows:

> Thus, it appearing that all of the issues raised in the Complaint are either barred by the application of collateral estoppel or not properly justiciable or triable in this action based upon the county's approval of a preliminary site plan, it appears that the material facts are not in dispute and the Defendants are entitled to judgment as a matter of law.

Circuit Court Case No. 97-4892 at 11. However, upon appeal, the First District Court of Appeal reversed the decision of the Circuit Court. Buck Lake Alliance, Inc. v. Board of County Commissioners of Leon County, 765 So. 2d 124 (Fla. 1st DCA 2000). The First District Court found that a development order's compliance with the comprehensive plan was to be determined by references to the "objectives, policies, land uses, and densities and intensities in the comprehensive plan," rather than by references to ordinances that were adopted to implement the plan. 765 So. 2d at 127. Thus, the District Court determined that the Planning Commission and Leon County Commission never ruled on the claims regarding inconsistencies between the development order and the comprehensive plan. Id.

8. In the case of Miami-Dade County v. Walberg, 739 So. 2d 115 (Fla. 3d DCA 1999), rev. dismissed, 763 So. 2d 1046 (Fla. 2000), the Third DCA granted the County's Petition for Writ of Certiorari, quashed the circuit's court order under review, and remanded with directions to affirm the Dade County Board of County Commissioners' decision finding that landowners were not entitled to a rezoning of their property. The Third DCA noted that even if the rezoning was consistent with the comprehensive plan, the landowners were not presumptively entitled to the use; further, the property owners were not entitled to the use by proving consistency alone if the Board action was also consistent with the comprehensive zoning plan. Based on the testimony of neighbors and an expert, plus review of a site map, the Board denied the application for rezoning because the change was incompatible with the neighborhood and would conflict with the principles and intent of the plan for development in Dade County. The Third DCA determined that the Board's decision was thus based upon competent substantial evidence.

9. The case of Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191 (Fla. 4th DCA 2001), rev. den. 821 So. 2d 300 (Fla. 2002) raised an issue that had been unprecedented in the State of Florida: does a trial court have the authority to order the complete demolition and removal of buildings because of inconsistency with the comprehensive plan? The Fourth District of Appeal concluded that the court was so empowered, and in affirming the decision of the circuit court, found that the complete demolition and removal of apartment buildings in Martin County was an appropriate remedy.

The background of this case went back some twenty years, when a developer set out to develop a 500-acre parcel of land in ten phases. Phases One through Nine were developed as single-family homes on individual lots in very low densities. Phase Ten, the subject of the litigation, involved a 21-acre strip of land abutting a major arterial highway that was designated by the

Comprehensive Plan as "medium density residential" with a maximum of eight units per acre. Over a seven year period of time the developer sought the approval of three different site plans for Phase Ten. The County Commission finally approved the last site plan and issued a development order allowing the development of 136 two-story apartment units on the site. Neighboring residents and homeowners associations sued, and when the circuit court found that the development order was consistent with the Comprehensive Plan, the petitioners appealed. Meanwhile, the developer kept building more apartments.

Upon appeal, the Fourth District Court of Appeal in the case styled Poulos v. Martin County, 700 So. 2d 163 (Fla. 4th DCA 1997), concluded that Fla. Stat. § 163.3215, required de novo consideration in the trial court on the consistency issue, and remanded the case to the circuit court to determine whether the Phase Ten development was consistent with the Comprehensive Plan. On remand the circuit court found that the apartment buildings in Phase Ten were not compatible or comparable to the types of single family, single level dwelling units of Phase One, nor were they of comparable density. Consequently, the circuit court determined that the development order for Phase Ten was inconsistent with the comprehensive plan. The court then settled on a remedy, which was an injunction to permanently enjoin further development of the project, plus the removal of the existing apartment buildings. The Fourth District Court of Appeal affirmed the decision and stated that "[t]he statutory rule is that if you build it, and in court it later proves inconsistent, it will have to come down." 795 So. 2d at 209. The Florida Supreme Court declined to review the decision, 821 So. 2d 300 (Fla. 2002), and the $3.3 million complex was completely demolished in September of 2002.

10. In the case of Evergreen the Tree Treasurers of Charlotte County, Inc. v. Charlotte County Board of County Commissioners, 810 So. 2d 526 (Fla. 2d DCA 2002), the Second DCA denied the petition for writ of certiorari, as the issues raised by the petitioners were moot. However, the petition was nevertheless reviewed by the District Court because of due process errors on the part of the circuit court. This case involved a challenge by a citizens group of the Development Review Committee's (DRC) approval of an apartment development project. On appeal, the Second DCA found that the circuit court exceeded its scope of certiorari review and applied the incorrect law.

First, the Second DCA determined that the circuit court applied the incorrect scope of review by considering sworn and unsworn testimony at the evidentiary hearing and making factual findings. In its appellate capacity the circuit court's certiorari review should be limited to the administrative record and the items attached to the petition. Second, the circuit court applied incorrect law in its due process analysis. Rather than concluding that due process requirements had been satisfied based on public participation at the hearing on the development proposal, the court should have determined whether the specific quasi-judicial decision under review was derived from a proceeding which itself afforded procedural due process. Third, the Second DCA determined that the circuit court applied the incorrect rule of law when it decided that the DRC meeting was not a proceeding subject to Florida's Sunshine Law. Rather, the Second DCA concluded that the county's staff members serving on the DRC were delegated by ordinance to serve as public officials, thus, any DRC meeting at which quasi-judicial action was taken was subject to the Sunshine Law. See also Lyon v. Lake

County, 765 So. 2d 785 (Fla. 5th DCA 2000), rev. den. 790 So. 2d 1105 (Fla. 2001) (meetings of Technical Review Committee created by county ordinance are subject to the provisions of the sunshine law, but informal, informational meetings of Pre-technical Review Committee are not).

11. The case of Seminole Entertainment, Inc. v. City of Casselberry, 811 So. 2d 693 (Fla. 5th DCA 2001), involved a municipal hearing by the City in which the business license of an adult entertainment establishment was revoked. In reversing the circuit court's decision, the Fifth District Court of Appeal found that the license revocation hearing by the City (which was a quasi-judicial hearing) violated the due process rights of the adult entertainment establishment. Namely, the Fifth DCA determined that the establishment was denied the right to challenge the principal witness against it through cross-examination, plus the evidentiary rulings of the mayor presiding over the hearing reflected a bias so pervasive that it violated basic fairness. Quoting McQuillin's Municipal Corporations, the Fifth DCA stated as follows:

> A hearing or trial in an administrative proceeding to revoke a license or permit must be fair. While the tribunal may not be a court or the proceeding strictly judicial, there must be an orderly and fair procedure. Technical legal rules of evidence and procedure may be disregarded, but no essential element of a fair trial can be dispensed with unless waived. The licensee must be fully apprised of the claims against him or her and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. The presiding official should be judicial in attitude and demeanor and free from prejudgment and from zeal for or against the licensee or permittee... (footnotes omitted).

811 So. 2d at 696, citing 9 McQuillin, Municipal Corporations, § 26.89 (3rd ed.).

12. In the case of Barber v. Leon County, 838 So. 2d 1148 (Fla. 1st DCA 2003), the First District Court of Appeal affirmed the trial court's decision, therein approving the siting of a solid waste transfer facility in Leon County. By way of background, the lawsuit was filed on October 12, 2000, and was amended several times as a result of dismissals, until the final Sixth Amended Petition was filed by the Complainants. Count I was a procedural due process claim, while Count II was premised on Fla. Stat. § 163.3215, challenging the site plan approval of the solid waste transfer facility site as violative and contrary to the Tallahassee-Leon County Comprehensive Plan. Following a two-day trial held on January 23-24, 2002, the trial court dismissed both Counts I and II of the Sixth Amended Petition for lack of subject matter jurisdiction. The trial court concluded that it lacked jurisdiction on both Counts I and II, based on procedural deficiencies. In addition, after reaching its decision that the Petition should be dismissed for lack of jurisdiction, the trial court also made several critical findings of fact, the most important of which concluded that the proposed solid waste transfer facility was consistent with the Tallahassee-Leon County 2010 Comprehensive Plan.

13. Robert and Lauren Egan, LLC v. Hendry County, Case No. 08-41-CA, Circuit Court of the Twentieth Judicial Circuit in and for Hendry County, Florida. This case concerned the denial of an application for a special exception use for a proposed vegetative recycling center to be located in an agricultural zoning district, which was near residences, schools, and a church-based campground. Hendry County staff first reviewed the application and recommended approval, finding that the proposed special exception use was consistent with the comp plan and compatible with the zoning district. However, at a public hearing before the local planning agency, the application was unanimously denied. A subsequent public hearing was held by the Board of County Commissioners of Hendry County (BCC) to address the planning agency's recommendation to deny the application. Witnesses were heard and public input received, but the hearing was continued, and at that time the County Attorney also reminded the Commissioners of Hendry County's ordinance governing ex parte communications.

At the continued public hearing seven weeks later, the County Attorney requested, and each Commissioner made, disclosures of any ex parte communications and site visits concerning the matter. Staff made findings of fact, public comments were received, and ultimately the BCC unanimously voted to deny the application based on the project's incompatibility with the surrounding area with regard to use and aesthetics. Egan then filed a petition for writ of certiorari with the circuit court, asserting that the public comments considered by the BCC "amounted to nothing more than a lay person who testified in opposition based solely on speculation, assumption or uncorroborated hearsay." However, the circuit court found that "citizen testimony regarding the neighborhood surrounding a proposed project may constitute substantial competent evidence," as the public input "was specific to the locale and went beyond mere generalizations." Egan also claimed that procedural due process was thwarted by the ex parte communications. However, the circuit court noted that the BCC disclosed their ex parte communications and visits to the site. Finally, the circuit court found that the decision to deny the application was supported by competent substantial evidence, as the BCC found that the project was incompatible in terms of use and aesthetics with the surrounding neighborhood.

14. Carillon Community Residential v. Seminole County, 45 So.3d 7 (Fla. 5th DCA 2010), rev. den. 60 So.3d 386 (Fla. 2011). This case was initiated by a residential association, in response to Seminole County's approval of a major amendment to a planned unit development, which allowed for a 7-story, 600 bed UCF student housing complex to be built on property adjacent to the petitioners. When the circuit court upheld the approval, the residential association petitioned the Fifth District Court of Appeal. However, the Court of Appeal denied the petition, concluding that the circuit court afforded the petitioners procedural due process and did not depart from the essential requirements of law.

The petitioners specifically asserted that the circuit court had departed from the essential requirements of law when the court determined that the petitioners did not have a due process right to cross-examine adverse witnesses during the quasi-judicial hearing. However, the Fifth District Court of Appeals noted that when applying due process principles to the context of a quasi-judicial hearing, "it is important to distinguish between parties and participants." 45 So.3d at 10. Although a

party to a quasi-judicial hearing must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts, the same degree of due process does not apply to all *participants* in the proceedings. Rather, Florida law does not require that all participants be allowed to cross-examine witnesses. Id. The parties to the proceedings were the applicant and the government agency. On the other hand, the residential association, as an adjoining landowner, was a participant in the proceedings, not a party, and thus not entitled to the same degree of due process.

Further, the circuit court noted that the petitioners were able to present their witnesses. In fact, 25 community members spoke at the hearing. In addition, the County Commission allowed the petitioners to pose questions to the Commission, which in turn would pose questions to the appropriate individuals. Therefore, finding that the circuit court afforded the parties procedural due process and applied the correct law, the Fifth District Court of Appeals denied the petition for writ of certiorari.

15. Highwoods DLF EOLA, LLC v. Condo Developer, LLC, 51 So. 3d 570 (Fla. 5th DCA 2010). In this case, the Fifth District Court of Appeal found that the lower court failed to recognize a party to the case. When the City of Orlando approved Highwoods' request for a master plan amendment so that it could build a 42-story mixed-use, high rise building, the neighboring owner of a multi-family high-rise building challenged the City's decision in circuit court. However, Highwoods was not named as a party to the challenge. When Highlands filed a motion to dismiss for failure to include it as an indispensable party, the circuit court denied the request. Highwoods then filed a motion to intervene, which the circuit court also denied. Upon appeal, the Fifth District Court of Appeals reversed the circuit court's order and remanded with directions that Highwoods be allowed to fully participate in the certiorari proceedings as a respondent.

16. City of Key West, Tree Commission v. Havlicek, 57 So. 3d 900 (Fla. 3d DCA 2011). In this case, the respondent was found by the City's Tree Commission to have committed 35 irreparable violations under the City's tree protection ordinance. The respondent declined to enter into a compliance settlement agreement, thus the Commission forwarded the case to a special magistrate. Seven months later, the respondent had subpoenas issued to take the depositions of three members of the Tree Commission. The Tree Commission filed a Motion for Protective Order, but the trial court allowed the depositions. The Tree Commission then filed a petition for writ of certiorari with the Third District Court of Appeal.

The Third District Court of Appeal granted the petition and found that the trial court had departed from the essential requirements of the law when it found that the respondent could take the depositions of the commissioners. The District Court found that the commissioners were authorized to conduct investigations and site visits, and were not, as a result of the site visits, fact witnesses who were subject to discovery depositions in proceedings before the special magistrate. The Court cited Section 286.0115(1)(c)(3), Florida Statutes, which provides that "[l]ocal public officials may conduct investigations and site visits and may receive expert opinions regarding quasi-judicial action pending before them," and "[s]uch activities shall not be presumed prejudicial to the action if the

existence of the investigation, site visit, or expert opinion is made a part of the record before final action on the matter."

17. 1000 Friends of Florida, Inc. v. Palm Beach County, 69 So.3d 1123 (Fla. 4th DCA 2011). In this case, the Palm Beach County Commission issued a development order to a mining company, granting the company the right to mine within the Everglades Agricultural Area in western Palm Beach County. 1000 Friends of Florida and the Sierra Club challenged the development order, claiming that the order was inconsistent with the comprehensive plan, which states that mining and excavation activities may be permitted "only to support" public roadways, agricultural activities, or water management projects. The Circuit Court awarded summary judgment to the County, therein approving the development order, and the plaintiffs appealed. On appeal, the District Court of Appeal, Fourth District, reversed.

The key to the Fourth District Court's decision was the plain and ordinary meaning of the term "only" in the comprehensive plan. The parties had previously admitted that the material to be mined from the property "could be used for purposes other" than the purposes specifically delineated in the comprehensive plan. The Court of Appeal found that the development order was inconsistent with the comprehensive plan, because the term "only" meant "solely" and "nothing else," thus confining mining activities on the property to three specific activities, to the exclusion of anything else.

18. Bush v. City of Mexico Beach, 71 So.3d 147 (Fla. 1st DCA 2011). In this case, the petitioners filed a lot split application with the City of Mexico Beach, which the Planning and Zoning Board voted unanimously to deny. The application was then scheduled for a public hearing before the City Council, but was tabled by the Council. The petitioners were unable to obtain a public hearing for another six months. After the petitioners filed a mandamus action, a public hearing was scheduled, but the City Council once again tabled discussion on the item, plus adopted a new land development ordinance on the same day. The next month the City Council voted unanimously and without discussion to deny the lot split application, finding that the application failed to comply with the newly-enacted ordinance as well as two policies in the City's comprehensive plan.

The petitioners then sought certiorari review in the circuit court, complaining of several due process violations and also asserting that they did not receive a quasi-judicial hearing before the City Council. The circuit court dismissed the petition, agreeing with the City's argument that the petitioners had failed to file an action under Section 163.3215, Florida Statutes, to challenge the determination that the lot split application was inconsistent with the comprehensive plan. However, upon petitioning the First District Court of Appeal, the Court of Appeal found that the petitioners had raised numerous due process violations that preceded the entry of the final order by the City Council, and were thus entitled to certiorari review.

19. Miami-Dade County v. Torbert, 69 So.3d 970 (Fla. 3d DCA 2011). In this case, property owners requested a determination from the Planning Department as to whether they could

develop one-acre residences on a 65-acre parcel that was being used to grow crops. The parcel was zoned in a district that required a minimum lot size of five acres per home site, but the parcel had been platted and recorded back in 1926 as a subdivision of a larger plat where each home site was 1/8 of an acre. However, the Planning Department determined that the 1926 plat was invalid, thus the property could only be developed in accordance with the current zoning regulations. The property owners appealed the determination to the County Commission, which subsequently agreed with the Planning Department's determination. However, the property owners appealed this decision to the Circuit Court, which reversed the County Commission's decision, concluding that the Board had applied incorrect law and did not base its decision on competent substantial evidence. The County then appealed to the Third District Court of Appeal.

On appeal, the Third District Court of Appeal disagreed with the Circuit Court and quashed its opinion, finding that the Circuit Court had applied incorrect principles of law to the facts and departed from the essential requirements of law, resulting in a miscarriage of justice. Namely, the District Court found that the evidence presented to the Board (which consisted of a County Attorney opinion, a memo from the Public Works Department, testimony from the Director of Planning, plus the Planning Department's recommendation) was substantial and competent to support the Board's decision.

20. City of Sunny Isles Beach v. Publix Super Markets, Inc., 88 So.3d 224 (Fla. 3d DCA, 2011). This was the third installment of a dispute that made its way to the Third District Court of Appeal. At the heart of the dispute was a site plan application submitted by Publix in 2006 to develop an existing Publix site into a new Publix, condos, a marina and roadway. The City deemed the plan application null and void due to fraud allegedly perpetrated by Publix. The alleged fraud was based on evasiveness concerning the nature of the development plans and property holdings (which kept changing), and the purchase of 14 acres of submerged lands in an apparent attempt to satisfy the City's density requirements.

In the first installment of the dispute, City of Sunny Isles Beach v. Publix, 996 So. 2d 238 (Fla. 3d DCA 2008), Publix filed a declaratory judgment action in the circuit court, seeking review of a city attorney's opinion on whether submerged lands could be included for purposes of determining density and intensity of land use, relating to a grocery and residential venture proposed by Publix. At the time of filing the declaratory judgment action, the city council had not acted on the city attorney's opinion. Thus, the city sought a writ of prohibition in the district court to prevent or stay the improper exercise of jurisdiction by the circuit court. The District Court granted the city's petition, stating as follows:

> Setting aside the more interesting question whether an opinion of a city attorney is a "decision" subject to certiorari review, *see Bloomfield v. Mayo*, 119 So. 2d 417, 421 (Fla. 1st DCA 1960) (stating that "certiorari is limited only to review of judicial or quasi-judicial orders of administrative boards, bodies or officers"), Publix had not exhausted its administrative remedies before filing its declaratory judgment action.

996 So. 2d at 239.

In the third installment of the case, City of Sunny Isles Beach v. Publix, 88 So.3d 224 (Fla. 3d DCA, 2011), the Third District Court of Appeal granted the City's petition for writ of certiorari, after the Circuit Court quashed the City Commission's decision. The Circuit Court had found that the Commission denied Publix due process, that the Commission's decision departed from the essential requirements of law, and that the decision was not supported by substantial, competent evidence. However, the District Court of Appeal disagreed, holding as follows:

(1) The City Commission did not violate the applicant's due process rights when, at a duly noticed hearing, the City addressed the underlying issues concerning that site plan application's validity, when Publix wanted to address only certain issues. Moreover, the City's notice was not narrow.

(2) The fact that the City Attorney acted as both advocate for the City and legal advisor to the City Commission did not violate the applicant's due process rights. The Court noted that "due process does not bar agencies from embracing dual roles in administrative proceedings."

(3) The Circuit Court violated clearly established principles of law when it reweighed the evidence, making its own determination that Publix's conduct did not rise to the level of fraud.

(4) The Circuit Court violated clearly established principles of law by concluding that the City Commission lacked substantial competent evident to establish fraud.

21. Brodeur v. Miami-Dade County, 81 So. 3d 491 (Fla. 3d DCA 2012), rev. den. 103 So. 3d 140, (Fla. 2012). This case is unusual in that it was brought by a member of the county's zoning and appeals board. What happened is that when the zoning and appeals board voted on a developer's site plan application (to increase an existing apartment building from four stories to eight stories), the result was a 3-3 tie vote, with board member Brodeur voting against the application. County staff and the assistant county attorney advised that the result of the tie vote was that the matter would be carried over to the next meeting of the board, in accordance with the county code. Ms. Brodeur subsequently left the meeting, as she was feeling ill. After she left the meeting, however, the zoning and appeals board continued to discuss the site plan application, including amendments thereto. The chairman then asked county staff and the assistant county attorney if the amended site plan application could be voted on, staff said yes, and the site plan application was approved by a 3-2 vote. Ms. Brodeur brought a declaratory judgment action against the county and the developer, but the circuit court dismissed her complaint with prejudice for lack of subject matter jurisdiction, and she appealed.

The Third District Court of Appeal stated that, although the general rule is that a public official lacks standing to challenge the rules and procedures applicable to his or her official acts, an exception exists when the official is willing to perform his or her duties "but is prevented from doing so by others." 81 So. 3d at 493 (citing Graham v. Swift, 480 So. 2d 124, 125 (Fla. 3d DCA 1985)). Thus, while it was true that Ms. Brodeur did not have a property interest in the site plan application, it was also true that she was entitled to seek review of the actions that nullified her duly-exercised vote. The Third DCA thus reversed and remanded the circuit court's order, finding that Ms. Brodeur had standing to bring her challenge.

Miami-Dade County subsequently filed a petition with the Florida Supreme Court for discretionary review of the Third DCA's ruling, but the Florida Supreme Court declined to accept jurisdiction.

22. Town of Longboat Key v. Islandside Property Owners Coalition, LLC, 95 So. 3d 1037 (Fla. 2d DCA 2012). This case involved a $400 million redevelopment plan to renovate and expand a resort. The Town approved the plan, but this was challenged in the circuit court and quashed. The Town and others then challenged the circuit court's ruling, asserting that the circuit court departed from the essential requirements of law by deferring too much to statements made by staff who disapproved the project. However, the District Court disagreed with this argument, finding that the circuit court "focused with precision on the specific words in the code and their definitions, only mentioning [staff's] testimony to summarize the arguments before making its own decision utilizing statutory interpretation." 95 So. 3d at 1040.

The petitioners then argued that the circuit court departed from the essential requirements of the law by not applying the Town's own interpretation of its code. The District Court disagreed with this argument as well, finding that the circuit court limited its analysis to the wording of the code, and when a term in the code lacked a definition, the court utilized the proper rules of statutory construction by turning to a dictionary. Thus, by using the code's wording, aided by a dictionary, the circuit court discerned the meaning of the code, rather than adhering to the Town's "self-serving" and "erroneous" interpretation of the code. Id. at 1042. Accordingly, the District Court denied the Town's petition for certiorari.

X. QUASI-JUDICIAL POLICIES & PROCEDURES

As explained in the case of Jennings v. Dade County, 589 So. 2d 1337, 1340 (Fla. 3rd DCA 1991), rev. den. 598 So. 2d 75 (Fla. 1992):

> Quasi-judicial proceedings are not controlled by strict rules of evidence and procedure. Nonetheless, certain standards of basic fairness must be adhered to in order to afford due process. Consequently, a quasi-judicial decision based upon the record is not conclusive if minimal standards of due process are denied. A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an

> opportunity to be heard. In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts.

(Citations omitted.) Thus, there are practical questions which need to be addressed by the local government attorney in preparing policies and procedures for his or her board to conduct quasi-judicial hearings. Issues such as notices, citizen participation, evidence, findings, and the record are addressed below. Ex parte communications will be addressed in the Section X which follows.

A. <u>Notices</u>.

How are notices to the applicant, surrounding landowners, "affected parties," and others to be provided or published? What would the content of those notices be concerning the recipient's ability to participate? Should those notices also provide a warning with regard to ex parte communication?

Miami-Dade County, which in its own Special Laws determined that quasi-judicial procedures apply, has addressed the notice issue in Sec. 33-310 of its Code of Laws, in part as follows:

> (c) No action on any application shall be taken by the Community Zoning Appeals Board or the Board of County Commissioners on any appeal, until a public hearing has been held upon notice of the time, place, and purpose of such hearing, the cost of said notice to be borne by the applicant. Notice shall be provided as follows:
>
> (1) Said notice shall be published twice in newspapers of general circulation in Miami-Dade County as follows: (A) a full legal notice, to be published no later than twenty (20) days and no earlier than thirty (30) days prior to the public hearing, to contain the date, time and place of the hearing, the property's location (and street address, if available) and legal description, and nature of the application, including all specific variances and other requests; and (B) a layman's notice, to be published in the newspaper of largest circulation in Miami-Dade County, no later than twenty-five (25) days and no earlier than thirty five (35) days prior to the public hearing, to contain the same information as the above described full legal notice except that the property's legal description may be omitted and the nature of the application and requests contained therein may be summarized in a more concise, abbreviated fashion. The layman's notice may be published in a section or a supplement of the newspaper distributed only in the locality where the property subject to the application lies. In the event that any time periods specified in this subsection shall

conflict with any applicable provision of the Florida Statutes, the provision of the Florida Statute shall govern.

(2) Mailed notice containing general information, including, but not limited to, the date, time and place of the hearing, the property's location (and street address, if available), and nature of the application shall be sent as provided by Subsection 33-310(d) no later than thirty (30) days prior to the hearing.

(3) The property shall be posted no later than twenty (20) days prior to the hearing in a manner conspicuous to the public, by a sign or signs containing information including but not limited to the applied for zoning action and the time and place of the public hearing.

* * * *

(e) The person or persons responsible for providing the notices provided in subsection (c) above shall attach to the application file a sworn affidavit or affidavits setting forth that they have complied with said subsection. Failure to provide the newspaper notices as provided, or failure to mail the written notices as provided, or failure to post the property as provide renders voidable any hearing held on the application.

(f) The Director shall have the discretion to expand any of the notice provisions contained in this section to provide more information if deemed appropriate.

B. <u>Standing / Citizen Participation</u>.

Questions to be addressed include: (1) who would have standing to appear before the Board/Council/Commission at the time of the hearing, and (2) who would have standing subsequent to a decision to "appeal" the matter?

For example, in Section 14.00.06(H) of the Lake County Land Development Regulations, the following definition of standing applies:

> *Standing.* No person shall participate in the case as a party unless that person can demonstrate that they will suffer an adverse effect to an interest that exceeds in degree the adverse effect to the interest of the public in general. All persons who received a notice of hearing or filed a notice of appearance shall be presumed to have standing unless challenged by another party. Decisions regarding standing shall be

made by the chairman, subject to review by the board upon motion and second being made.

Lake County has observed the following procedures regarding citizen participation at hearings:

> *Notice of Appearance.*
>
> a. Anyone other than the applicant and the staff who wishes to participate as a party in the case or cross examine other witnesses, must file a notice of appearance no later than five (5) days prior to the hearing. The notice of appearance should include the name and address of the person seeking to appear. A notice of appearance shall give a person the right to appear either in person as a party to the case or to be represented by an agent at the hearing.
>
> b. Those filing a notice of appearance shall be considered parties to the hearing, subject to a determination of standing if challenged.
>
> c. The chairman of the board may allow participation in the hearing by persons filing a notice of appearance after the five (5)-day deadline, upon a showing of excusable neglect by that person, but if a late appearance is permitted, the applicant shall have the right to continue the case, at their option, without additional cost. Persons who do not demonstrate excusable neglect are not entitled to seek any delay in the proceedings.

Lake County Land Development Regulations, Sec. 14.00.06(C)(2).

C. <u>Staff Reports</u>.

Should a staff report be prepared in written form in a narrative or in the nature of a pretrial statement? Should only oral presentations at the hearing be permitted by staff? If a staff report is prepared, how far in advance must it be submitted and copies be provided to the applicant? Should the applicant be permitted to provide something in the nature of a response on rebuttal brief? Here is an example:

> *Staff report.* The staff report shall be available to the general public at least five (5) days prior to the hearing on the case. If the staff report cannot be completed within the five (5) days due to failure on the part of the applicant to supply requested information, staff shall have the right to postpone the hearing on the case. Otherwise, failure to complete the staff report within five (5) days shall give the applicant the option of either postponing the hearing or continuing with the scheduled hearing date. However, in the event the

> applicant chooses to continue to the hearing without the staff report, staff shall have the option of recommending denial.

Lake County Land Development Regulations, Sec. 14.00.06(C)(1).

D. Obtaining Additional Information.

May board members obtain information on their own? Pursuant to Fla. Stat. § 286.0115(c)3., if adopted by an ordinance or resolution, a local public official may conduct investigations and site visits, and may receive expert opinions on a pending quasi-judicial matter if same is made a part of the record. For example, Lake County and Broward County allow board members to conduct site visits and investigations and to receive expert opinions, provided same is disclosed and made a part of the record. Lake County Land Development Regulations, Sec 14.00.06(E) and 14.00.07(C)(3); Broward County Code of Laws, Sec. 1-327(c)(3).

What about the personal knowledge a board or commission member may have with regard to the site? Wakulla County has addressed that as follows:

> *Personal knowledge.* Board and commission members may use their own personal knowledge in deciding a specific case before the board or commission. However, such personal knowledge should be recited in and made part of the record in a timely manner which provides an opportunity for refutation by interested parties.

Wakulla County Code of Laws, Sec. 24.001(d)(2).

E. Conduct of Hearing.

Walton County utilizes the following basic procedures in conducting a quasi-judicial hearing:

1. The applicant shall present evidence in support of the particular application under review. The County shall thereafter present evidence relating to the application under review.

2. The applicant's evidence may be presented by an attorney or by any other representative chosen and retained by the applicant. The County's evidence shall be presented by an attorney representing the County or by a member of the administrative staff of the County.

3. The applicant and the County may each call witnesses, who shall be sworn. All testimony shall be under oath and recorded.

4. Fundamental due process shall be observed and shall govern the proceedings.

5. Both parties may cross examine witnesses and present rebuttal evidence.

6. The Board and its attorney may call and may question any witness(es).

7. The Board may, at any hearing, order the reappearance of any witness at a future (or continued) hearing as to the particular case.

8. After all evidence has been submitted, the chair shall close presentation of evidence in the particular matter.

Walton County Land Development Code, Sec. 10.02.03(E).

With regard to the cross examination of witnesses or participants in the hearing, Broward County utilizes the following procedures:

(a) Only the applicant, staff and the board shall be entitled to conduct cross-examination when sworn testimony is given or documents are made a part of the record. Only the board shall be entitled to conduct cross-examination of participants providing unsworn testimony. The board shall not assign unsworn testimony the same weight or credibility as sworn testimony in its deliberations.

(b) The applicant, staff and all witnesses providing sworn testimony are subject to cross-examination during the hearing.

(c) Participants, who choose not to be sworn as witnesses, shall not be subject to cross-examination, except from the board as stated in subsection (a) above.

(d) A participant or a witness may not question any person. However, a participant or a witness may request that the board ask questions of a witness. The board may or may not choose to ask the witness any questions requested by a participant.

(e) The scope of the cross-examination shall be limited to the facts alleged by the applicant, staff or witnesses in relation to the application.

(f) The Mayor may direct the party conducting the cross-examination to stop a particular line of questioning that merely harasses, intimidates or embarrasses the individual being cross-examined.

(g) The Mayor may direct the party conducting the cross-examination to stop a particular line of questioning that is not relevant and that is beyond the scope of the facts alleged by the individual being cross-examined.

(h) If the party conducting the cross-examination continuously violates directions from the chair to end a line of questioning deemed irrelevant and merely designed to harass, intimidate or embarrass the individual, the Mayor may terminate the cross-examination.

Broward County Code of Laws, Sec. 1-331.

The City of Vero Beach uses the following Order of Proceedings:

I. PRELIMINARY MATTERS.

A. The Mayor shall read the case title.
B. Disclosure by City Council members of ex parte communications, if any.
C. Swearing in of applicant/appellant, staff and all witnesses collectively by City Clerk.
D. Charge as to custody of exhibits by City Clerk: "All exhibits, diagrams, photographs and similar physical evidence referred to during the testimony or which you would like the Council to consider must be marked for identification and kept by the Clerk for 30 days until the time for appeal has expired."

II. STAFF'S PRESENTATION.

A. Staff's opening statement.
B. Calling of witnesses and presentation of evidence by staff.
C. Cross examination after each witness, if so elected.

III. APPLICANT'S /APPELLANT'S PRESENTATION.

A. Applicant's / Appellant's opening statement.
B. Calling of witnesses and presentation of evidence by applicant/appellant.
C. Cross examination after each witness, if so elected.

IV. Testimony and presentation of evidence by the public with alternating speakers in support of and in opposition to the application and cross examination after each witness, if so elected.

V. Closing argument by applicant/appellant.

VI. Closing argument by staff.

VII. Rebuttal argument by applicant/appellant, if so elected.

VIII. Discussion by City Council of the evidence presented as it applies to the requirements of the City of Vero Beach Code of Ordinances and applicable law.

IX. After deliberation, a motion should be made which would presumably either:

[APPLICATION]

GRANT THE APPLICATION:

" I move that the City Council find that the following facts presented and reviewed here are competent substantial evidence to grant the application: (list factors)."

OR

DENY THE APPLICATION:

"I move that the City Council find that the following facts presented and reviewed here are competent substantial evidence to deny the application: (list factors)."

[APPEAL]

AFFIRM THE BOARD'S ACTION:

" I move that the City Council find that the following facts presented and reviewed here are competent substantial evidence to affirm the Board's action: (list factors)."

OR

REVERSE THE BOARD'S ACTION:

"I move that the City Council find that the following facts presented and reviewed here are competent substantial evidence to reverse the Board's action: (list factors)."

Denying a petitioner the right to challenge a principal witness against it through cross examination would be a denial of due process. See Seminole Entertainment, Inc. v. City of Casselberry, 811 So. 2d 693 (Fla. 5th DCA 2001). However, although *parties* to a quasi-judicial hearing must be able to present evidence and cross-examine witnesses, Florida law does not require that *participants* must be allowed to cross-examine witnesses. Carillon Community Residential v. Seminole County, 45 So. 3d 7, 10 (Fla. 5th DCA 2010).

It is also necessary for a petitioner to file a proper objection before a quasi-judicial board. In the case of Clear Channel Communications, Inc. v. City of North Bay Village, 911 So. 2d 188 (Fla. 3d DCA 2005), the District Court of Appeal agreed with the circuit court's opinion, holding that the petitioners failed to preserve their legal challenges for appellate review by not filing proper objections before the city commission during a quasi-judicial hearing. The petitioners contended that just questioning a witness during a quasi-judicial hearing was sufficient to preserve an issue for

appellate review, but the courts disagreed, finding that a sufficiently specific objection would be required. Id. at 189, 190.

F. Evidence.

Certain legal or technical arguments, or objections, may be lodged regarding admissibility of "evidence" at these hearings. Consideration should be given as to whether or not a basic training course in the Rules of Civil Procedure, and the conduct of hearings, should be presented in seminar fashion to the Board of County Commissioners or City Commissioners and their staff. How would rulings on evidence submission be determined? By a majority vote of those present and voting, or by the designated chair of that particular meeting? If it is delegated to the chair, are the chair's rulings final, or subject to an appeal to the remaining Board members? May procedures such as voir dire be permitted of witnesses?

Broward County has addressed the issue of evidence as follows:

(a) The board shall not be bound by the strict rules of evidence, or limited to consideration of evidence which would be admissible in a court of law.

(b) The board may exclude evidence or testimony which is not relevant, material, or competent, or testimony which is unduly repetitious or defamatory.

(c) The board will determine the relevancy of evidence.

(d) Matters relating to an application's consistency with the Broward County Land Use Plan, a Certified Land Use Plan or the Broward County Land Development Code will be presumed to be relevant and material.

(e) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient by itself to support a finding unless it would be admissible over objection in a court.

(f) Documentary evidence may be presented in the form of a copy or the original, if available. Upon request, the applicant and staff shall be given an opportunity to compare the copy with the original.

(g) The office of the county attorney shall represent the board and advise the board as to the procedures to be followed and the propriety and admissibility of evidence presented at the proceeding.

Broward County Code, Sec. 1-330.

G. The Record.

As has been noted by the Second District Court of Appeal, "[i]n the quasi-judicial context, certiorari review works best when the lower tribunal creates and maintains case-specific evidentiary records." Vichich v. Dept. of Highway Safety and Motor Vehicles, 799 So. 2d 1069, 1074 (Fla. 2d DCA 2001). In Broward County, the record is created and preserved as follows:

> (a) Quasi-judicial proceedings shall be preserved by tape recording or other device. The official record of the proceeding shall be the minutes as approved by the board and the evidence received, unless a verbatim transcript is made. If the proceeding is transcribed, the transcript shall become the official record of the proceeding. Any person may request that all or part of the transcript of the proceeding be transcribed into verbatim form. In such case, the person requesting the transcript shall be responsible for the cost of production of the transcript.
>
> (b) All evidence admitted at the hearing shall be maintained by the Broward County Records, Taxes, and Treasury Division or shall be placed in the official file as directed by the board. The official file shall be kept in the custody of the appropriate staff at all times during the pendency of the application. The official file and the record of the proceeding will be made available to the public for inspection upon request at any time during normal business hours.

Broward County Code of Laws, Sec. 1-335.1.

Treating a rezoning as a quasi-judicial proceeding before a local government legislative body may involve a re-examination of all of the local procedures to assure a complete record is kept (since the court would not permit additional documents, witnesses, or independent experts to testify on behalf of the local government at any subsequent "trial"). Instead, the circuit court will only review the record made before the local legislative body. This may mean that local governments will need to make sure that they have on staff, or retain, expert witnesses (such as planners or engineers) to make this record before the Board or Commission in favor of the staff's position.

In the case of Dragomirecky v. Town of Ponce Inlet, Board of Adjustments, 917 So. 2d 410 (Fla. 5th DCA 2006), a property owner filed a *pro se* petition with the circuit court, seeking certiorari review of a demolition order. The circuit court subsequently ordered the petitioner to file an appendix with transcripts and copies of exhibits. After obtaining counsel, the petitioner moved for two extensions of time to comply, and after granting the second request, the court warned the petitioner that failure to comply with the order would subject the petition to dismissal. Before the deadline, a corrected appendix and a corrected record were filed, but were found to be confusing and conflicting. On a motion to dismiss by the Town, the circuit court subsequently dismissed the petition, saying that the record was "incomplete, confusing and contradictory." On petition to the

Fifth District Court of Appeal, the Fifth DCA held that dismissal was too severe a sanction for failure to comply with appellate procedure rules. The court commented as follows:

> It is often very difficult to prepare a proper record in an appellate proceeding such as this. Municipal boards are not set up well for creating and organizing a record for appellate review … It is not uncommon to see confusion and contradiction, but based on our review, it does not appear that the record was so "incomplete, confusing and contradictory" that the appeal could not proceed. It is the petitioner who has the right to select the issues for review and who has the burden of providing a record adequate to demonstrate error. If petitioner's record is incomplete, he will not be able to demonstrate error and he will fail on the merits.

917 So. 2d at 412.

H. Final Order.

Should a motion be made at the time of the conclusion of the final hearing by any of the Board or Commission members to give finality to the hearing, or should there be only a preliminary motion to provide guidance to staff (county or city attorney or the planning director) to draft an appropriate final order? Should draft final orders be prepared during the course of the hearing, or should the draft be presented at some future date? Should both parties be permitted to submit proposed final orders from which the Board or Commission may choose all or a portion?

Final orders should be approved by a majority vote of the Board, and contain specific findings of fact and conclusions of law indicating the factual and legal basis for the motion which should then be made a part of the record as well. However, should "dissenting" or "concurring" opinions be included by Board or Commission members who vote in the minority?

Walton County utilizes the following procedure in rendering a written final order:

> *Findings and Order*. Unless the parties and the applicable Board agree to an extension the applicable Board shall, within 15 working days of the hearing, or within 15 working days of receipt of a transcript of the hearing if one is requested by the applicable Board, whichever is longer, prepare a written order which shall include:
>
> 1. A statement identifying the applicable criteria and standards against which the proposal or request was tested;
>
> 2. Findings of fact, based on evidence of record, which ultimately establish compliance or noncompliance with the applicable criteria and standards of this Code, directly or by reasonable inference;

3. The Board's conclusion (supported by its findings of fact and the applicable law, rules and regulations) to either approve, conditionally approve, or deny the proposal or request.

Issuance of the findings of fact and order shall be by motion approved by a majority of those members of the reviewing Board present and voting. A copy of the Board's order shall be mailed to the applicant(s) by certified mail, return receipt requested, within three working days of rendition of the written order.

Walton County Land Development Code, Sec. 10.02.03(F).

In June of 2001, the Florida Supreme Court released its decision in the case of Broward County v. G.B.V. International, Ltd., 787 So. 2d 838 (Fla. 2001), regarding the standard of review and process of appealing a local government's land use decision. Perhaps the more interesting aspect of this case was whether the Florida Supreme Court should implement a rule requiring a local government to prepare a written final decision when acting in its quasi-judicial capacity in a zoning hearing. In its opinion, the Florida Supreme Court noted that the County Commission had done little to facilitate judicial review, nor had it bolstered its own decision, as the Commission had made no findings, stated no formal reason for its decision, and issued no written order. Although the Court stated that such written findings of fact were not presently required, the Court did refer the issue for study to the Rules of Judicial Administration Committee of the Florida Bar. However, the Judicial Administration Rules Subcommittee recommended against a new rule to require written decisions.

In the case of Alachua Land Investors, LLC v. City of Gainesville, 15 So. 3d 782 (Fla. 1st DCA 2009), the Gainesville City Commission denied a plat application, but did not state its reason for the denial with written factual findings, and the petitioner appealed to the circuit court. The circuit court upheld the City's decision after noting competent substantial evidence that could have supported the denial of the plat application. Upon appeal of the circuit court's decision to the First District Court of Appeal, the District Court found that a circuit court may uphold a quasi-judicial decision "even in the absence of supportive factual findings, so long as the court can locate competent substantial evidence consistent with the decision (and, of course, conclude the local government applied the correct law and did not deprive the petitioner of due process)." Id.

I. Maintaining Files.

All files and materials submitted at the quasi-judicial hearing should be maintained as if it were a court file for purposes of establishing a potential appellate record. Who should be the custodian of these records? The City Clerk or Clerk of Circuit Court (where the subject appeal would subsequently be lodged), the Planning staff, or some other entity? Whatever is decided, it might be wise to keep a copy with the "official record keeper" of the county or city, whoever that may be. May members of the public examine the file during the pendency of the matter? May

members of the Board or Commission examine the file during the pendency of the matter; and if so, how would this be disclosed to the applicant or staff?

Lake County provides the following:

> *Files to be maintained.* All evidence admitted at the hearing, and a copy of the document setting forth the decision of the board shall be maintained in a separate file constituting the record of the case. Upon approval thereof by the board, the minutes of that portion of the meeting concerning the case shall be placed in the record. The record shall be kept in the custody of the clerk of the board at all times during the pendency of the case, and where there are multiple hearings on a single case, custody o f the record should not be given to any board member, party or member of the public, until the case is fully concluded, except that any member of the public may examine the file in the office of the clerk of the board at all reasonable times.

Lake County Land Development Regulations, Sec. 14.00.06(I).

XI. EX PARTE COMMUNICATION

Quasi-judicial proceedings do not require the same quality of due process as would a true court proceeding, though certain minimum standards of due process are required. A quasi-judicial hearing will meet the basic due process requirements if the parties are provided notice of the hearing, provided an opportunity to be heard, allowed to present evidence, allowed to cross-examine witnesses, and are "*informed of all of the facts upon which the commission acts*." Jennings v. Dade County, 589 So.2d 1337, 1340 (Fla. 3d DCA 1991), rev. den. 598 So. 2d 75 (Fla. 1992) (emphasis supplied). Thus, to meet the minimum requirements of due process under the Federal and Florida Constitutions, all parties must be aware of, and able to rebut, all facts upon which a commission bases its decision.

Ex parte communication -- one party providing off-the-record information to a decision maker without notice to, or contestation by, the adverse party -- is inherently dangerous to the legitimacy of quasi-judicial proceedings. In the Jennings case the Third DCA stated, "Ex parte communications are inherently improper and are anathema to quasi-judicial proceedings. Quasi-judicial officers should avoid all such contacts where they are identifiable." 589 So. 2d at 1341. Courts have ruled that *any* ex parte communications are presumed to be prejudicial to the proceedings until the local government proves otherwise. Upon the determination that ex parte contacts took place, courts will require the parties that engaged in the communications to present evidence to prove that the communications were not prejudicial. The Court in Jennings justifies this onerous burden by noting that the knowledge and the evidence of the contact's impact are in the hands of a decision making body, and that a party challenging the contact should not have to extricate such evidence from the offending parties in order to maintain his or her constitutional rights. Id. Disclosure of ex parte contacts on the record does enable the parties to be aware of all of

the facts and to rebut those facts. Such disclosure is still questionable, however, because the party may not have an opportunity to cross examine those parties that provided the evidence to the board members.

A. Fla. Stat. § 286.0115.

The Jennings case may prohibit, or at least limit, in quasi-judicial proceedings, any contact with the decision-makers prior to the rezoning hearing on the site plan review taking place. This would seem to include, but not be limited to, interested citizens, homeowner's association representatives, environmental groups, business groups, the applicant, the applicant's consultants, and perhaps even the Board/Commission's own planning and engineering staffs.

This decision was felt by some local government officials to be an impediment to constituents' access to these elected officials. In 1995 the Florida Legislature enacted Fla. Stat. § 286.0115, in an effort to allow local governments to override the Jennings and Snyder decisions.

Fla. Stat. § 286.0115, in part provides:

286.0115 Access to local public officials.

(1)(a) A county or municipality may adopt an ordinance or resolution removing the presumption of prejudice from ex parte communications with local public officials by establishing a process to disclose ex parte communications with such officials pursuant to this section or by adopting an alternative process for such disclosure. However, this section does not require a county or municipality to adopt any ordinance or resolution establishing a disclosure process.

(b) As used in this section, the term "local public official" means any elected or appointed public official holding a county or municipal office who recommends or takes quasi-judicial action as a member of a board or commission. The term does not include a member of the board or commission of any state agency or authority.

(c) Any person not otherwise prohibited by statute, charter provision, or ordinance may discuss with any local public official the merits of any matter on which action may be taken by any board or commission on which the local public official is a member. If adopted by county or municipal ordinance or resolution, adherence to the following procedures shall remove the presumption of prejudice arising from ex parte communications with local public officials.

1. The substance of any ex parte communication with a local public official which relates to quasi-judicial action pending before the official is not presumed prejudicial to the action if the subject of the communication and the identity of the person, group, or entity with

whom the communication took place is disclosed and made a part of the record before final action on the matter.

2. A local public official may read a written communication from any person. However, a written communication that relates to quasi-judicial action pending before a local public official shall not be presumed prejudicial to the action, and such written communication shall be made a part of the record before final action on the matter.

3. Local public officials may conduct investigations and site visits and may receive expert opinions regarding quasi-judicial action pending before them. Such activities shall not be presumed prejudicial to the action if the existence of the investigation, site visit, or expert opinion is made a part of the record before final action on the matter.

4. Disclosure made pursuant to subparagraphs 1., 2., and 3. must be made before or during the public meeting at which a vote is taken on such matters, so that persons who have opinions contrary to those expressed in the ex parte communication are given a reasonable opportunity to refute or respond to the communication. This section does not subject local public officials to part III of chapter 112 for not complying with this subsection.

* * * *

(3) This section does not restrict the authority of any board or commission to establish rules or procedures governing public hearings or contacts with local public officials.

In the case of City of Hollywood v. Hakanson, 866 So. 2d 106 (Fla. 4th DCA 2004), the District Court of Appeal reversed the decision by the circuit court (which was in favor of a former city employee) and held that comments made regarding the former employee at a public meeting did not constitute ex parte communications. The alleged ex parte communication involved statements made during a public meeting of the city commission, which was attended by both Hakanson, a former risk manager for the city, and the president of the civil service board, who was to subsequently participate in a hearing related to Hakanson's employment appeal.. The particular statement in question was made by the assistant city manager, who commented at the commission meeting that the former risk manager (Hakanson) had failed to perform a task regarding the city's options for self-insurance plans. The Third DCA deemed that this statement did not constitute an offending ex parte communication simply because a civil service board member was in the audience. In addition, the Court noted that even if the incident was deemed an ex parte communication, Section 286.0115 requires that disclosure of the offending communication must be made by the

public official either before or during the meeting at which final action is taken. Here, final action was not taken at the board meeting. 866 So. 2d at 107.

In an Informal Advisory Legal Opinion rendered to Mitchell A. Bierman on behalf of the Town of Cutler Bay (March 12, 2007), the Office of the Attorney General addressed a question posed by Cutler Bay as to when the requirement for disclosure of ex parte communications should begin. A municipal ordinance on the subject required disclosure of communications as to "pending" applications that had been filed. The Office of the Attorney General recommended using the terms "pending or impending" applications, because the term "pending" would allow a person to delay filing an application until *after* he or she had discussed the issue with the local official. Including the term "impending" would cover applications which have not yet been filed but which are imminent, about to the filed.

B. Constitutionality issues.

Based on the legislative history of Fla. Stat. § 286.0115, the primary intent of the Legislature was to remove the presumption of prejudice in any ex parte communication on a land use matter. However, it appears that the Florida Legislature may have attempted to circumvent the constitutional basis for the discouragement of ex parte communication: the basic requirement of due process that parties to quasi-judicial proceedings be informed of all of the facts upon which the commission acts.

In researching this matter, our office requested information from other county attorneys regarding their interpretation of this statute and the practices of other Boards. The response from other county attorneys was consistently in accord with Leon County's interpretation that the Florida Legislature has overstepped the bounds of constitutionality. This legislation notwithstanding, the policies of the responsive counties fell into two categories: those counties whose commissioners did not engage in ex parte communications, and those counties whose commissioners disclosed communications on the record of the proceeding. None of the responsive county attorneys agreed that this legislation did or could allow unmitigated ex parte communication, and it appears that, generally, those commissioners have acted accordingly.

C. Policies.

Policies should be adopted dealing with the issue of communication "off the record" between the public and staff and the Board/Council/Commission, especially in the context of a quasi-judicial proceeding. As mentioned previously, § 286.0115, Fla. Stat. allows local governments to establish a process by which ex parte communications may be made public in order to remove the presumption of prejudice.

The issue of ex parte communications has been addressed by Lake County in Section 14.00.07 of the Lake County Land Development Regulations, as follows:

A. *Application*. This subsection shall apply to all quasi-judicial proceedings in which public hearings are required or proceedings in which a property right is at issue. However, this subsection shall specifically exclude any proceedings or hearings in relation to the Comprehensive Plan Evaluation and Appraisal Report or amendments to the Comprehensive Plan.

B. *Communications between staff and public*. Oral and written communications between staff and members of the public shall be permitted and encouraged.

C. *Communication between the Board of County Commissioners and the public*. Members of the Board of County Commissioners shall be permitted to receive and participate in oral or written ex-parte communications regarding quasi-judicial matters before the Board, and any presumption of prejudice arising out of such ex-parte communications is hereby removed and declared non-existent, if all requirements of this section are followed as to any ex-parte communication:

1. Any oral ex-parte communication with a Board member relating to pending quasi-judicial action shall not be presumed prejudicial to the outcome of the matter if the subject matter of the communication and the identity of the person, group or entity with whom the communication took place is disclosed and made a part of the record in the quasi-judicial proceeding before final action on the matter.

2. Any written communication to a Board member from any source, regarding a pending quasi-judicial matter, shall not be deemed prejudicial to the outcome of the matter, if the written communication is made part of the record in the quasi-judicial proceeding before final action on the matter.

3. Board members may conduct site visits and may receive expert opinions regarding quasi-judicial matters pending before them, and such activities shall not be presumed prejudicial to the outcome of the matter if the existence of the investigation, site visit or expert opinion is disclosed and made a part of the record in the quasi-judicial proceeding before final action on the matter.

4. All disclosures required by this section must be made before or during the public meeting at which a vote is taken on the quasi-judicial matter so that persons having opinions contrary to those expressed in the ex-parte communication are given a reasonable opportunity to refute or respond to the communication.

D. *Communication between all other Board members and the public.* All communications concerning the case between any member of the general public,

including the applicant and any board member, with the exception of the Board of County Commissioners, shall be prohibited unless made at the hearing on the case.

E. *Communication between Board members and staff.* Written and oral communications between the board and staff shall be limited to the facts of the application or case. Discussions of the positions or arguments of the applicant or members of the opposition shall be prohibited. Attorneys for the Board may render legal opinions when requested by the Board members, but shall not engage in factual determinations or advocate one party's position over another, except to the extent necessary to respond fully to a purely legal question.

Lake County also provides for the following:

Written communications. All written communications received by board members concerning an application or pending case shall be immediately turned over to the County Manager or designee. The County Manager or designee shall include the written communication in the file for public inspection. All such written communications shall be offered into evidence and received by the board into evidence subject to any objections by participants at the hearing.

Lake County Land Development Regulations, Sec. 14.00.06(D).

D. <u>Consequences of Ex Parte Communication</u>.

If it is determined, either before a hearing or thereafter, that off-the-record communication, either verbal or written, has been made with board members, can this matter be cured in advance or re-reviewed by the same board? If such a matter is presented for the first time during a court challenge, what is the consequence of the ex parte communication? In the <u>Jennings</u> case, the Court stated that:

upon remand [the applicant] shall be afforded an opportunity to amend his complaint. Upon such an amendment [the applicant] shall be provided an evidentiary hearing to present his prima facie case that ex parte contacts occurred. Upon such proof, prejudice shall be presumed. The burden will then switch to the respondents to rebut the presumption that prejudice occurred to the claimant. Should the respondents produce enough evidence to dispel the presumption, then it will become the duty of the trial judge to determine the claim in light of all of the evidence in the case.

<u>Jennings v. Dade County</u>, 589 So. 2d 1337, 1342 (Fla. 3d DCA 1991), <u>rev</u>. <u>den</u>. 598 So. 2d 75 (Fla. 1992) (footnotes omitted).

What the Jennings case did not address was the possibility that the respondents may not be able to rebut the presumption of ex parte contacts. In that instance, what becomes of the case? Are Board or Commission members now prejudiced and thus precluded forever to make a decision on the subject application? In that instance, who makes the decision, or is the request in the application automatically now granted where the Board had previously denied the request? What if the application really is inconsistent with the local comprehensive plan?

E. Additional Questions.

Should the general rules regarding voting conflicts be applicable to such decision-making? Should general knowledge of the community or specific knowledge of the subject project or property be sufficient to create a conflict?

Can the applicant "voir dire" the Commissioners, like selecting a jury, about what they **do** know? If such conflicts are present, would that subject one or more of the Board members to recusal upon request of either the staff or the applicant? If recusals based on prejudice or outside knowledge create a lack of a quorum, what would be the procedures that would then be followed? Would the Governor appoint a substitute to serve in the matter from which the individual is disqualified in the event a quorum no longer remains, as with the provisions set forth in Fla. Stat. § 120.71?

XII. ADVISING QUASI-JUDICIAL BOARDS

In Fla. Atty. Gen. Op. 72-64, the Attorney General advised an agency that in order to maintain fundamental fairness in administrative hearings, there should be a delegation of duties such that one attorney acts as a prosecutor while another serves as legal advisor to the board. In the case of Cherry Communications, Inc. v. Deason, 652 So.2d 803 (Fla. 1995), the Florida Supreme Court addressed the question of whether the same attorney who prosecutes a case on behalf of an agency may also serve to advise that agency in its deliberations. In this case, the Florida Supreme Court recognized the holding in Ford v. Bay County School Board, 246 So. 2d 119, 121-122 (Fla. 1st DCA 1970), which agreed with the wording of the opinion in Metropolitan Dade County v. Florida Processing Company, 218 So. 2d 495, 497 (Fla. 3d DCA 1969), wherein it was said:

> It is sufficient for us to point out that it would be in closer accord with traditional notions of justice and fair play for a quasi-judicial administrative board to designate one person to act as its legal adviser and a different person to act as its prosecutor.

In the Ford case, the school board attorney acted as a prosecutor in a hearing, but did not proffer legal advice to the board during the hearing and was not present at the meeting at which the school board rendered its final judgment. Therefore, the court found that this scenario was not harmful to the petitioner and that the proceedings were conducted in a fair and impartial manner.

In the Deason case, however, while the functions of legal prosecutor and legal advisor were initially separated, the prosecutor was later invited into the commission's deliberations and submitted memoranda to the commission. The commission subsequently adopted the prosecutor's memoranda in its final order. The Florida Supreme Court held that the petitioner's due process rights were violated when the commission allowed the prosecutor to also serve as posthearing legal advisor.

Relying on the authority of Deason, the First District Court of Appeal also held that a litigant was not afforded procedural due process at a quasi-judicial proceeding before the county's grievance committee, because the county's legal counsel acted as both an advocate and proferred legal advice during the hearing. Brown v. Walton County, 667 So. 2d 376 (Fla. 1st DCA 1995).

A similar situation occurred more recently in McAlpin v. Criminal Justice Standards and Training Commission, 120 So. 3d 1260 (Fla. 1st DCA 2013). At the hearing before the Commission, there were two different attorneys for the agency, an advisory attorney for the commission as well as a prosecutorial attorney. During the hearing, however, the prosecutorial attorney offered procedural and legal advice to the Commission, even though the Commission's advisory attorney was there. The Court also found documents in the record which indicated that the prosecutorial attorney was operating in dual roles. In her role as staff counsel she offered advice and recommendations to the Commission, and in her role as agency prosecutor, she advocated the case against McAlpin. The Court found that it was "clear from the record that the prosecution was given enhanced access to the decision-making body" and that such "enhanced access undermined the Commission's function as an unbiased, critical reviewer of the facts." McAlpin, 120 So. 3d at 1263. The Court did emphasize that there "was nothing inherently inappropriate with consolidating the investigative, prosecutorial and adjudicative authority in a single entity or agency," but that its decision was predicated upon the facts of this particular case. Id. The Court concluded its opinion by stating: "All future cases of this stripe must, correspondingly, be adjudicated on their unique circumstances; there is no bright line rule that can accurately address the full spectrum of potential factual scenarios." Id.

In the case of City of Sunny Isles Beach v. Publix, 88 So.3d 224 (Fla. 3d DCA, 2011), the Third District Court of Appeal determined that the fact that the City Attorney acted as both advocate for the City and legal advisor to the City Commission did not violate the applicant's due process rights. The Court noted that "due process does not bar agencies from embracing dual roles in administrative proceedings."

In the case of State of Florida, Department of Highway Safety and Motor Vehicles v. Tidey, 946 So. 2d 1223 (Fla. 4th DCA 2007), Tidey, after refusing to take a breath test upon being arrested for DUI, sent a letter to the department, requesting a formal review hearing. He also requested recusal of all department employees from presiding as the hearing officer in his case. Tidey's request was denied by the department. He then filed a petition in the circuit court for a writ of prohibition, seeking disqualification of all department non-lawyer hearing officers and requesting that the department be required to retain "neutral detached magistrates." Id. at 1225. During the evidentiary hearing, Tidey presented testimony of three attorneys who stated that in their respective cases, the hearing officers of the department actually stopped their hearings to consult with the department's

legal counsel about the admissibility of evidence. The trial court thus determined that the department allowed or encouraged its hearing officers to confer with staff attorneys on issues of law, a practice which the court "recognized as exposing the hearing officers to ex parte influence and conflict of interest." Id. at 1226. The Circuit Court granted the writ of prohibition, and further ordered that all driving privileges be reinstated.

Upon appeal, the Fourth DCA reversed the Circuit Court's judgment, and remanded for entry of an order denying the petition without prejudice. The Fourth DCA first noted that Tidey's petition sought to prevent the conduct of a hearing officer before one had been assigned. The Court also deemed it "significant" that the petition was not predicated on any events which had occurred at Tidey's hearing, because there had been no hearing. Id. The Court then found that Tidey's letter requesting recusal was not legally sufficient to support prohibition, in that the letter was not filed with the hearing officer before whom the case was pending; further, the letter sought relief of all department employees, which was beyond the scope of the recusal rule provided in the Florida Administrative Code. As to the various due process issues raised regarding the possibility that Tidey's rights might have been violated had the hearing taken place, the Fourth DCA found that such claims should be raised by a petition for writ of certiorari once the facts were known and presented on the record. As to the Circuit Court's judgment prohibiting the department from allowing communications between its hearing officers and department staff attorneys, the Fourth DCA found that the trial court could not *sua sponte* grant injunctive relief for which none was prayed. Finally, the DCA concluded that the trial court went beyond the scope of procedure when it reinstated the driving privileges of the appellee.

XIII. HEARING OFFICERS

In order to deal with the judicial nature of quasi-judicial proceedings, some jurisdictions have either adopted or are contemplating creating a position for a Hearing Officer. Such a Hearing Officer, trained in trial practice, conducts the hearing, then makes a recommended decision which the legislative body reviews without further de novo "judicial" proceedings. Lafayette County, for example, has used this methodology:

> OFFICE OF THE COUNTY HEARING OFFICER.
>
> > *Position*. The Board of County Commissioners hereby creates the Office of the county hearing officer. The hearing officer shall have those powers an duties enumerated in the Lafayette County Land Development Code and other applicable county ordinances.
> >
> > The hearing officer shall be hired on a part-time basis by the Lafayette County Board of County Commissioners, and shall serve at the pleasure of the Board. Any hearing officer may be removed at any time, with or without cause, by an absolute majority of the Board of County commissioners.

> Because of the judicial nature of the position, the hearing officer shall report directly to the Board. The hearing officer will not represent clients in any action before the Board of County Commissioners nor accept any client or business which might cause an actual or perceived conflict of interest.
>
> *Qualifications*. The hearing officer shall possess sufficient experience and expertise to carry out the duties of the position. The hearing officer shall exhibit demonstrated ability in the areas of local land use law and zoning, comprehensive planning, judicial and administrative procedure and knowledge of the rules of evidence. The hearing officer shall be licensed to practice law in the State of Florida and shall hold a law degree from an ABA accredited law school.

Lafayette County Code, Sec. 23.5.

Historically, local governments have considered delegating the rezoning and site plans consideration function to established boards or independent hearing officers. This is mostly done for quasi-judicial functions, such as the granting of variances by boards of adjustment. This is a traditionally accepted "judicial" process and forum.

However, when such matters were considered to be legislative, this procedure was struck down on the basis that legislative decision making may not be delegated. Hillsborough County utilized such a procedure in the early 1980's until a trial court found it to be improper.

Since rezonings on site plan review may now be deemed quasi-judicial, perhaps delegation to a separate board hearing officer, whether their decisions are binding or advisory, may be appropriate to overcome legal or procedural obstacles and to provide technical expertise. A major negative is whether such a delegation would deprive the citizens of access to and use of their duly elected representatives.

While considering whether to install a hearing officer procedure, one must also consider whether or not, and under what circumstances, the hearing officer's decision might be binding. Would those hearing officers' decisions, even if binding, be "appealable" to the Board or Commission? If they are advisory only, does the Board or Commission conduct another full de novo trial, or should the matter be considered to be "on appeal" with its attendant appellate rules to the Board or Commission? At what juncture during this process would the ex parte rule come into play?

XIV. SPECIAL MASTERS

In 2002 the Florida Legislature forged a number of changes to Part II of Chapter 163, Florida Statutes (the Local Government Comprehensive Planning and Land Development Act of 1985). Notably, the legislation authorized a local government to establish a "special master process" to address quasi-judicial proceedings associated with development order challenges. If adopted by a

local government, this optional special master or quasi-judicial process would afford more deference to the local government's decision if that decision is challenged.

The new law provides a unique process with specific criteria by which local governments may process applications for development orders. The process requires the following procedures:

(1) Uniform notice by either mail or publication of each application for permit or other development approval within 10 days of application;
(2) Notice of appeal rights in publication or mail notice and posting at the job site;
(3) A notice of intent of the local government's decision prior to finalizing the decision, this triggers the opportunity to request the quasi-judicial hearing before a special master;
(4) Discovery prior to the special master hearing, including disclosure of witness lists and exhibits and an opportunity to depose witnesses;
(5) Public testimony allowed at the formal hearing;
(6) Formal hearing before a special master, who is an attorney with 5 years experience, who renders a recommended order; and
(7) Prohibition of ex parte communications.

If the special master process is implemented by a local government, the sole appeal method for either the developer/applicant or an affected third party, is by certiorari review, which is limited to a review of the record created during the special master process to determine whether the local government's decision is supported by competent, substantial evidence. If the special master process is not adopted, then both the developer/applicant and an affected third party, may challenge the local government's decision in a de novo hearing in circuit court. (A de novo action is a full evidentiary hearing wherein the local government's action is not afforded any deference, but the issue is heard as if for the first time. Prior to these revisions in the law, the remedy for the developer/applicant was by certiorari review, while the remedy for an affected third party was a de novo hearing.)

Should a local government adopt the optional special master process, it would benefit from the greater deference afforded its development order decisions when challenged by either the developer/applicant or an affected third party. Applicants and the public would benefit from a standardized process and a clear point of entry into the local government decision, rather than waiting until the decision is final and challenging that decision in a circuit court proceeding.

Another advantage to implementing the optional quasi-judicial process would be to avoid protracted circuit court litigation by providing the special master process in the first place. Under the new law, a party who is dissatisfied with the local government's decision expressed in its notice of intent, is afforded an opportunity to change the local government's decision in a less formal, less expensive and quicker proceeding than a de novo hearing would provide. Further, it is important to note that no development application would be required to undergo the special master process, only those which are contemplating challenge of the local government's decision as expressed in its notice of intent.

It is also important to note that under the new legislation, a local government may choose whether to offer the special master process as an option for all or only certain types of development orders, and may revisit that decision to add or delete the types of development orders to which it applies. For example, in 2003 Leon County adopted an ordinance providing for the special master process for "Type B" site and development plan applications.

Disadvantages of implementing the special master process could include lengthening the process for a local government to get to a final decision on the development application, as well as increased costs if many special master hearings are requested. For example, the quasi-judicial proceeding may take more time since formal discovery is conducted prior to the hearing. In addition, although no party is required to be represented by an attorney in the special master process, the formality of the hearings may lead to increased time and costs.

XV. CONCLUSION

In conclusion, the Florida Supreme Court's ruling in the Snyder case changed the way local governments review and process site specific rezonings and site and land development plan applications. The process now requires quasi-judicial proceedings to be supported by the "competent substantial evidence" standard of review.

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